

Recovery of “Intrinsic Value” Damages in Case of Negligently Killed Pet Dog

BY CALLEY GERBER AND WILLIAM REPPY JR.

The North Carolina Court of Appeals, in a case where negligent killing of a pet dog with no market value was admitted, has denied recovery of “intrinsic” damages (also called “actual” damages). *Shera v. NC State University Veterinary Teaching Hospital*, 723 S.E.2d 352 (N.C. App. 2012). Because the holding is narrow



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and the type of damages denied are not the same as emotional damages, a close look at the decision is warranted.

The Veterinary Hospital Admits Negligence; Minimal Damages are Awarded

Laci, a Jack Russell Terrier owned by Mr. and Mrs. Shera, began to be treated for liver cancer at the defendant state veterinary hospital in 2003. After treatment, the cancer was in remission, but Laci had quarterly checkups at the hospital. In 2007 Laci began experiencing problems with poor appetite, vomiting, and difficulty with urination, and Plaintiffs

returned the dog to the hospital for treatment. She was admitted on March 31.

Following days of tests, Defendant determined that Laci should have an intranasal feeding tube, which on April 5 was inserted by the hospital staff. Laci was transferred to the intensive care unit. Unknown to anyone at the time, the feeding tube was placed into Laci's lungs rather than her stomach, and she began drowning due to the material forced into her lungs. The next day her heart stopped beating,

and she could not be resuscitated. Not knowing the cause of their pet's death, Plaintiffs paid the hospital's veterinary bill in full. Three days later, Defendant advised them that the misplaced feeding tube had caused Laci's death.

In 2009, Plaintiffs filed a veterinary malpractice action against the hospital with the North Carolina Industrial Commission pursuant to the state's Tort Claims Act, seeking damages based on the “intrinsic” value of Laci to them and citing the 1988 decision in

*Freeman, Inc. v. Alderman Photo Co.*¹ Defendant's answer admitted negligence and requested a hearing on the issue of damages. The initial hearing officer awarded Plaintiffs only \$2,755.72, the amount the pet owners had paid the hospital for treatment billed from March 31 through April 6, 2007. Reviewing this award, the full commission increased the damages by \$350, which it found to be the cost of replacing Laci with another Jack Russell. The commission employed the replacement value measure of damages upon finding that the aged Laci had no fair market value. The commission noted that North Carolina courts have recognized intrinsic value as a category of damages that is appropriate in some circumstances, but declined to expand applicability of that measure of damages to cases involving injury to or death of companion animals.

The Court of Appeals Affirms Based on Insufficient Evidence

The court of appeals affirmed, initially holding that replacement value is properly employed to assess damages where damaged property had no market value (citing cases involving a damaged power pole and transformer and a stolen pay telephone). The court did note that in the *Freeman* case—where the defendant's negligence resulted in the destruction of “hundreds of architectural drawings, work papers, and surveys”² that had no market value—recovery of damages based on intrinsic or actual value to the plaintiff of the lost property was approved.³ In *Freeman* the jury had been instructed that one factor to consider in determining intrinsic or actual value was “the uniqueness of that [destroyed] property.”⁴ The evidence in *Freeman* established that some, although not many, of the lost drawings—which were unique—could be reused if recreated. On the other hand, examination of the evidence in the *Shera* case led the court of appeals to conclude, in essence, that Laci was not a unique pet. In sum, the plaintiffs could not get the benefit of *Freeman* because of a failure of proof.

The inadequate evidence included testimony that Laci “brought so much joy” to the Shera home and “brought so much comfort” to Mr. Shera, who suffered from a heart condition; and that Laci “was just very helpful in stressful situations.”⁵ The court of appeals acknowledged that Mrs. Shera testified that “Laci was unique. She had her own personality.”⁶ But apparently this was viewed as too

conclusory to support an award of damages based on intrinsic value. Said the court: “The testimony reveals no absolute unique tasks or functions that Laci performed for plaintiffs, aside from her calming presence....”⁷

Plaintiffs also argued that the large sums of money they had spent treating Laci for cancer proved that Laci had an intrinsic value or actual value to them in excess of replacement value.

The court of appeals rejected the argument, stating: “[P]laintiffs fail to adequately explain how amounts spent on the dog's care prior to 31 March 2007, when Laci was admitted to defendant's care and negligently killed, were proximately related in any way to defendant's negligent act on 6 April 2007 and plaintiffs' resulting injury.”⁸ While this statement does not address the point made by Plaintiffs, it would seem to establish that, for some reason, amounts spent on health care for a pet are not relevant when intrinsic damages are sought.

“The sentimental bond between a human and his or her pet companion,” the Shera court concluded, “can neither be quantified in monetary terms or compensated for under our current law.... [H]ow to value the loss of the human-animal bond between a pet owner and his or her companion animal...is more appropriately addressed to our legislature.”⁹

Unfortunate Dictum for Pro-Animal Advocates

While the narrow holding of *Shera* is that the plaintiffs failed to prove any intrinsic value to them of their dog, apparent dictum in the case renders *Freeman* (the architectural drawings case) and its intrinsic value theory of damages essentially worthless in future litigation concerning death of or injury to a pet. *Shera* read *Freeman* as employing the intrinsic value measure of damages “rather than the property's replacement value,” which it inferred would be greater.¹⁰ “Thus, the ‘actual value’ instruction in *Freeman* was applied to limit, rather than enhance, the plaintiff's recovery....”¹¹ Intrinsic value “damage awards,” said the *Shera* court,

have proven to be the rare exception and have never been applied to either enhance a damages award or to the recovery of damages for the loss of companion animals. This is surely due in part to the fact that a multitude of companion animals are available in society, and...replacement of the type of property—a companion animal—

currently is possible under our law.¹² This seems to tell pet owners as future litigants that they should just prove replacement value in the absence of market value, as the *Freeman* case and its theory of intrinsic value will not entitle them to recover anything more. A highly trained service dog will have intrinsic value, but will also have a market value, a fact that will preclude resort to the intrinsic value theory of damages.

The Shera Decision has No Effect on Future Claims for Emotional Damages

The actual holding in *Shera* leaves wide open the question whether in North Carolina emotional damages may be recovered for the tortiously-caused injury or death of a pet that was treated by its owners as a member of the family. That is so because the plaintiffs in *Shera* rested their claim to intrinsic value damages on the *Freeman* case where the property damaged—architectural drawings—was non-sentient personal property, and where the court specifically held that intrinsic value damages did not include “purely emotional value” that the property may have had.¹³

The court of appeal in *Shera* stated: “The current law in North Carolina is clear that the market value measure of damages applies in cases involving the negligent destruction of personal property, *whether sentient or not.*”¹⁴ Since the plaintiffs in *Shera* had not argued that a special rule of damages—that permitted recovery of emotional damages—applied where the property negligently destroyed was a sentient pet, the quoted statement is at best dictum. It is also wrong. It cannot be “clear” that North Carolina law bars recovery of emotional damages where a pet has been negligently killed (or injured) because the issue has not been before the courts of the state in a reported decision. On the other hand, as discussed previously in this journal,¹⁵ a 1913 decision of the North Carolina Supreme Court can readily be construed as establishing the right by a plaintiff-owner to recover emotional damages for the willful killing of a pet dog in the plaintiff's presence.¹⁶ This older decision could lead North Carolina courts to follow the precedents of Florida, where emotional damages are recoverable for the willful or grossly negligent killing or injury of a pet, but not if the level of fault by the tortfeasor is ordinary negligence.¹⁷ In other states there is a trend to allowing emotional damages to be awarded where a pet has been injured or killed willfully.¹⁸ Such decisions recognize pets as a

special type of personal property subject to unique rules concerning recovery of damages.

The Hospital had Grounds to Appeal the Award of Economic Damages

Because the veterinary hospital in *Shera* did not appeal, the decision there is not precedent supporting the amount of economic damages awarded to the pet owners by the commission panel. The \$350 replacement value surely was based on the cost of buying a young Jack Russell Terrier, but Laci was a sickly 12 3/4-year-old dog.¹⁹ Should not her age and health status have guided the determination of replacement value?

In addition, the veterinary hospital could have objected on appeal to being ordered by the commission to refund all of the veterinary bills paid by a pet owner after the hospital conceded there had been veterinary malpractice. Much of the \$2,755.72 that the pet owners had paid the hospital related to veterinary care during the period March 31 through April 4, which involved no malpractice. Should the improper placement of the feeding tube on April 5 have tainted the non-objectionable veterinary services rendered prior to that negligent act?²⁰

Must a Non-Veterinarian Tortfeasor Who Injures a Pet Reimburse for Reasonable Veterinary Bills that Exceed the Market or Replacement Value of the Animal?

Even if North Carolina courts establish a precedent that a veterinarian guilty of malpractice that injures or kills a pet cannot retain sums paid by the pet's owners for treatment, such a development would not necessarily dictate how the state's judiciary will answer the question whether a non-veterinarian tortfeasor who injures a pet is liable to reimburse the pet owner for veterinary expenses reasonably incurred to save (or attempt to) the life of the animal when those expenses exceed the fair market value or, if there is no market value, the replacement value of the animal. Where an item of inanimate personality has been tortiously damaged, North Carolina measures recoverable damages as "the difference between its fair market value immediately before and immediately after the injury."²¹ Where the damaged item of inanimate personal property has no market value, the cost of repair is the measure of damages.²²

Other states with similar rules applied where damaged personality is inanimate per-

mit recovery of veterinary expenses far in excess of replacement value of an injured pet that had no market value (for example, because it was an older mixed-breed dog). In a 2011 California decision,²³ after defendant shot Plaintiff's cat, Plaintiff spent \$36,000 to save the cat's life and treat it for paralysis. Reversing the trial court, the appellate court's holding was that if the veterinary expenses were reasonable the defendant was liable for them. Suppose, however, the cat was a young and attractive pure-bred Persian, and the trier of fact was convinced it had market value of \$25. That such a finding should bar Plaintiff's claim for recovery of all but \$25 of the veterinary bills is grossly unfair, yet the California court stressed the absence of market value for the cat in question.

North Carolina should follow the lead of New Jersey, which holds that a tortfeasor who has injured a pet—whether negligently or through willful misconduct—is liable for reasonable veterinary costs incurred to save or attempt to save the animal's life even though the animal had a market value far less than the total of the bills for veterinary care. In 1998 New Jersey's intermediate appellate court affirmed a judgment awarding reimbursement of the full amount of \$2,500 in veterinary bills paid to save the life of a tortiously injured pet dog despite a finding that the dog's replacement value was \$500, holding: "[A] household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness." The New Jersey Supreme Court subsequently approved this decision on the ground "that pets are a special variety of personal property."²⁵

Market or Replacement Value Should Not Be a Cap on Intrinsic Value Damages

New Jersey's approach should also be applied to cases where the pet owner seeks damages based on intrinsic value of the tortiously injured or killed pet and proves that the pet had—before the injury—provided special services but could no longer do so. For example, in a 1980 case from New York, a finding that a negligently killed pet dog had no market value as a mixed breed entitled the owner to recover \$550 in damages on proof that "plaintiff relied heavily on this well-trained watchdog and never went out into the streets alone at night without the dog's protection."²⁶ The law should not let the negligent

defendant escape paying such damages by convincing the trier of fact that because of its training as a watchdog, the mutt had a market value of \$25. ■

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Endnotes

1. 365 S.E.2d 183 (N.C. App. 1988).
2. *Shera*, 732 S.E.2d at 355.
3. The intrinsic value damages recovered in *Freeman* totaled \$73,600. 365 S.E.2d at 184.
4. *Id.* at 186.
5. *Shera*, 732 S.E.2d at 355.
6. *Id.* at 356. Plaintiffs also placed in evidence this statement found on the defendant hospital's website:
The bond formed between humans and animals is unique....They become members of our family and can provide a sense of constant support through various life changes in our lives....This special human-animal relationship is what makes the death of a pet one of the most significant losses we experience in our lives.
Trial Transcript Exhs pp 687, 24.
7. 732 S.E.2d at 356.
8. *Id.* at 357.
9. *Id.*
10. *Id.* at 355.
11. *Id.*
12. *Id.* at 357.
13. *Shera*, 723 S.E.2d at 355, quoting *Freeman*, 365 S.E.2d at 186.
14. *Shera*, 723 S.E.2d at 357 (emphasis added).
15. William A. Reppy Jr., *A New Specialty: Animal Law*, NC State Bar Journal, spring 2002, at pp. 12-13.
16. *Beasley v. Bynum*, 163 N.C. 3, 79 S.E. 270. The cause of action asserted there was apparently trespass both to the home where the slaying occurred and to a chattel, the pet dog. The court held that damages could be based on evidence that "the alarm and shock caused by defendant's conduct had caused her [Plaintiff] great suffering." *Id.* at 4, 79 S.E. at 271. The opinion would not have focused on the killing of the dog, in addition to the entry into the home, if the pet's death had not been pertinent to the assessment of damages.
17. Compare *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (willful tort) and *Knowles Animal Hospital, Inc. v. Wills*, 360 So.2d 37 (Fla. App. 1978) (gross negligence), with *Kennedy v. Byas*, 867 So.2d 1195 (Fla. App. 2004) (ordinary negligence).
18. See, e.g., *Plotnik v. Meibaus*, 2012 W.L. 3764874 (Cal. App., Aug. 31) (recovery of over \$50,000 for clubbing of pet dog); *Womack v. Von Rardon*, 135 P.3d 542 (Wash. App. 2006).
19. Although the defendant in *Shera* admitted negligence, that should not have resulted in the imposing on it the burden of proving that there was no market in mature

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Animal Damages (cont.)

- Jack Russells in which a replacement for Laci could have been bought for less than \$350.
20. Consider, too, whether ordering the refunding of veterinary charges paid by the Sheras was a remedy sounding in breach of contract that was not available in their suit against state veterinary hospital under the North Carolina Tort Claims Act.
 21. *Heath v. Mosley*, 286 N.C. 197, 199, 209 S.E.2d 740, 742 (1974). Costs of repairs are some evidence of the decrease in value.
 22. *Givens v. Sellars*, 273 N.C. 44, 51, 159 S.E.2d 530, 536 (1968).
 23. *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581 (App. 1911). See also *Burgess v. Shampooch Pet Industries*, 131 P.3d 1248 (Kan. App. 2006) (full amount of veterinary bills recoverable, although plainly in excess of replacement value, where 13-year-old dog had no market value).
 24. *Hyland v. Borass*, 719 A.2d 662, 664 (NJ App. Div. 1998). *Accord, Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. 2008).
 25. *McDougall v. Lamm*, 48 A.3d 312, 324 (NJ 2012).
 26. *Brousseau v. Rosenthal*, 443 N.Y.S. 2d 285, 286 (Civ. Ct NY Cnty, 1980).