THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appeal No. 2023-000631
Opinion No. 2023-UP-020 (S.C. Ct. App. filed Jan. 18, 2023)

Bridgett Fowler,……Petitioner,

v.

FedEx Ground Package System, Inc. and
James K. Ard d/b/a JMK Logistics
Corporation,……..Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents FedEx Ground Package System, Inc. and James K. Ard d/b/a/ JMK Logistics Corporation hereby oppose Petitioner Bridgett Fowler's Petition for Writ of Certiorari ("Petition") for review of the Court of Appeals' Opinion No. 2023-UP-020, filed January 18, 2023. Petitioner acknowledges that the Court of Appeals' Opinion is not in conflict with any decisions of this Court. In fact, she is transparent that her aspiration is to "create new law" by asking this Court to recognize, for the first time, a cause of action for negligent infliction of emotional distress for the loss of a pet. Contrary to Petitioner's arguments, neither the South Carolina statutes on which she relies nor case law from other jurisdictions, which she incorrectly

characterizes as establishing a "new trend," support recognizing such a cause of action. In fact, were this Court to adopt Petitioner's position, South Carolina would be an outlier among the States. Consequently, and for other reasons stated herein, this Court should deny the Petition.

STATEMENT OF THE CASE

Petitioner filed her Second Amended Complaint on March 4, 2018, naming FedEx Ground Package System, Inc. ("FXG") and James K. Ard d/b/a JMK Logistics Corporation ("JMK") as defendants. Petitioner alleges that, on March 22, 2018, a JMK driver, who was acting as an independent contractor to FXG, was delivering packages to homes in Horry County for FXG. (R. pp. 8-9 ¶¶ 9, 14). As JMK's truck proceeded down Petitioner's driveway, her pet dog, Honey Bunny, ran toward the approaching truck. (R. p. 9 ¶ 16). Petitioner claims that she witnessed the truck strike the dog in the driveway. Unfortunately, Honey Bunny did not survive. (R. p. 9 ¶¶ 17-19). In her negligence cause of action, Petitioner sought damages for the loss of her pet dog, as well as for mental anguish, emotional distress, and anxiety, among other actual and consequential damages. (R. p. 11 ¶ 27).

On August 1, 2019, Respondents filed a Motion for Summary Judgment and a Memorandum in Support, seeking judgment as a matter of law as to Petitioner's demand for damages for mental anguish, emotional distress, and anxiety stemming from the death of her dog. (R. pp. 24-36; *see also* p. 45, lines 13-15). Respondents argued that, because pet dogs are considered personal property in South Carolina, Petitioner's damages were limited to the pet's market value. (R. p. 28). Petitioner filed a memorandum in opposition to Respondents' motion on August 29, 2019. (R. pp. 37-42).

The Circuit Court held a hearing on Respondents' Motion for Summary Judgment on September 11, 2019. (R. pp. 43 – 58). After hearing oral argument from both sides, the Circuit

Court granted Respondents' partial Motion for Summary Judgment, holding that, as a matter of law, pets are considered personal property and a plaintiff may not recover non-economic damages for injury to property. (R. p. 56, lines 19-25). The Circuit Court entered a written Order on September 23, 2019 outlining its conclusions of law and Granting Respondents' Motion for Summary Judgment. (R. pp. 1 – 4). In particular, the Circuit Court noted that, since 1899, it has been established in South Carolina that pets are deemed to be personal property, and "a plaintiff's right to recover damages for personal property is limited to the market value of the property," relying on *State v. Langford*, 55 S.C. 322, 33 S.E. 370 (1899), and South Carolina Damages § II.4.B. While recognizing that the unpublished decision in *Bales v. Judelsohn*, 2005 S.C. App. Unpub. LEXIS 527 (Ct. App. Aug. 30, 2005), "does not have precedential value," the Circuit Court found it instructive in that it concluded under similar facts that "South Carolina law does not support a cause of action for emotional distress for injury to one's pet." Finally, the Circuit Court pointed out that both parties agreed that there was no "statutory provision … that allows for recovery of non-economic damages for the death or injury of a pet." (R. pp. 3-4).

Petitioner filed a timely Notice of Appeal to the Court of Appeals. (R. pp. 59-66). The Court of Appeals decided this matter based on the Briefs and Record, without oral argument. The Court of Appeals determined that the Circuit Court properly examined case law, including *Langford* and *Bales*, as well as other South Carolina cases dealing with the measure of damages for loss of personal property. The Court of Appeals also rejected Petitioner's "national trends and public policy" arguments, ruling that "the circuit court's decision is in line with national trends considering damages awarded in cases involving the death of a pet and that public policy considerations do not warrant intervention by this court in the absence of legislative action." *Fowler*, No. 2023-UP-020 (S.C. Ct. App. Jan. 18, 2023) (unpublished).

STANDARD OF REVIEW

Review by this Court is not a matter of right but is, instead, a matter "of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. While not an exhaustive list, this Court typically grants review where a case presents a novel issue of law, or where the Court of Appeals' opinion includes a dissent, or where the decision of the Court of Appeals is in conflict with a prior decision of this Court, or "[w]here substantial constitutional issues are directly involved," or, finally, in cases involving a federal question. *Id.* Despite Petitioner's attempts to argue otherwise, none of these reasons are presented in the instant case, which does not warrant or require this Court's review.

LEGAL ARGUMENT

A. The Court of Appeals' Opinion does not present a novel issue of law but, instead, the finding that a pet is considered personal property is well settled under South Carolina law.

South Carolina has long recognized the well-settled principle that pets are considered personal property. In *State v. Langford*, this Court was confronted with the question of whether pet dogs could be the subject of larceny. 55 S.C. 322, 324, 33 S.E. 370, 371 (1899). As explained in *Langford*, under the old common law, "larceny could not be committed of a dog" because a tame dog was considered to have "no intrinsic value." *Id.* *Langford* explicitly rejected this archaic notion, explaining that dogs are bought and sold as other property and are taxed as personal property and, therefore, should be regarded by the law as personal property. 55 S.C. at 324, 33 S.E. at 371. Although Petitioner attacks the Court of Appeals' reliance on *Langford* because that case analyzed a criminal statute (larceny), as opposed to civil liability, the result in *Langford* was based, in part, on *Salley v. Manchester & Augusta R.R. Co.*, 54 S.C. 481, 32 S.E. 526 (1899), decided a few months before *Langford*. In *Salley*, which involved the negligent

running over and killing of a dog by a train, this Court held that "[t]here is no doubt that by the common law one may have such property in a dog as the law will protect by a civil action." 54 S.C. at 482, 32 S.E. at 526.

Moreover, a mere five days after issuing the *Langford* decision, this Court held in *Richardson v. Florida Cent. & Peninsula R.R. Co.*, 55 S.C. 334, 33 S.E. 466 (1899), another train versus dog case, that "[t]here is no longer any room to doubt that a dog is personal property in this State." 55 S.C. at 335, 33 S.E. at 466. Thus, over a century ago, this Court definitively established, in both the civil and criminal context, that pet dogs are considered personal property in South Carolina. This binding precedent has remained the law in this State for over a century.

The law in South Carolina is clear that the calculus for determining the amount of recovery for damage to personal property is based exclusively on the property's fair market value. "There are two kinds of property which may be destroyed or injured, personal and real …" *Hall v. Seaboard A.L.R. Co.*, 126 S.C. 330, 333, 119 S.E. 910, 912 (1923). "When the thing destroyed is personal property … the measure of damages is the market value at the time and place of its destruction." *Id.* at 334, 119 S.E. at 912. South Carolina courts have consistently applied these principles for decades. *See Coleman v. Levkoff*, 128 S.C. 487, 490, 122 S.E. 875, 876 (1924) ("The general rule is that the owner of personal property, injured by the negligence of another, is entitled to recover the difference between the market value of the property immediately before the injury and its market value immediately after the injury"); *see also Duke Power Co. v. Thornton*, 303 S.C. 454, 401 S.E.2d 195, 196 (Ct. App. 1991) ("As a general rule, the measure of damages for injury to personal property is the difference between the market value of the property immediately before and its value immediately after the injury"). Damages

to compensate a plaintiff for their emotional attachment to personal property simply are not—and should not be—recoverable in South Carolina.

To summarize, the analysis of this issue is straightforward and simple. This Court has established that pet dogs are considered personal property in the State of South Carolina. *Salley*, 54 S.C. at 482, 32 S.E. at 526; *Langford*, 55 S.C. at 324, 33 S.E. at 371; *Richardson*, 55 S.C. at 335, 33 S.E. at 466. The measure of damages for injury to personal property is "the market value" of the property. *Hall*, 126 S.C. at 333, 119 S.E. at 912. Damages for mental anguish, emotional distress, and anxiety are simply not recoverable for negligent injury to personal property, and never have been in this State. These longstanding principles alone should end the inquiry, and the Petition should be denied.

B. The Circuit Court's consideration of *Bales* as instructive was not improper.

The Circuit Court properly considered *Bales*, an unpublished opinion, in granting Respondents' Motion for Summary Judgment. In *Bales*, the Court of Appeals was presented with the precise issue in this case, *i.e.*, whether a dog owner could recover emotional damages allegedly arising from an injury to the plaintiffs' dog. 2005 S.C. App. Unpub. LEXIS 527 *1. There, the plaintiffs' dog was involved in a fight with the defendant's dog, and suffered various injuries that required $1,258.10 in veterinary care. The trial court submitted issues of emotional damages and lost wages to the jury, and the jury returned a verdict in favor of the plaintiffs in the amount of $5,000, well above the veterinary expenses of $1,258.10. *Id*. On appeal, the defendant argued, as do Respondents here, that emotional damages are not recoverable due to injuries to a dog. *Id*. at *2. The Court of Appeals began its analysis by noting that it "ha[d] not found any jurisprudence in South Carolina that addresses damages resulting from an injury to a

pet." *Id.*[1] However, the court went on to recognize that, in other jurisdictions, "[t]ypically, the courts have limited the award of damages to the dog's market value in view of the general recognition of dogs as personal property." *Id.* (citing 4 Am. Jur. 2d Animals §§ 6 and 165 (1995)), and *Langford*. After considering the various views other courts have taken, the court held "that South Carolina law does not support a cause of action for emotional distress for injury to one's pet." *Id.* at *3.

The Circuit Court recognized that the *Bales* opinion, while directly on point, was not binding precedent. *See* (R. p. 56, lines 19-20 (Circuit Court stating "I agree *B*[*a*]*les v. Judelsohn* [] doesn't have any precedential value . . ."); *see also* R. p. 3 (stating "[t]he Court recognizes that this unpublished decision [*Bales*] does not have precedential value" but finding it "instructive to the case at hand")). The Court of Appeals referenced "more recent but unpublished caselaw," but did not directly reference *Bales*. Citing *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 555-556, 813 S.E.2d 292, 298-299 (Ct. App. 2018), the Court of Appeals properly noted that reference to and reliance on an unpublished opinion is not error where the lower court also relies on other, published opinions. Petitioner takes issue with the fact that the only other case the Circuit Court relied on was *Langford*; however, there is no requirement that there be multiple other published cases, despite the use of the plural in *Hodge*, 422 S.C. at 555-556, 813 S.E.2d at 298-299. Additionally, the Circuit Court also cited South Carolina Damages § II.4.B.

More importantly, as noted above, Petitioner's complaint that *Langford* dealt with criminal larceny, not civil liability, is irrelevant in light of *Salley* and *Richardson*, both civil

[1] It appears that the Court of Appeals may have been unaware of *Salley* and *Richardson* when deciding *Bales*.

cases holding that pet dogs are considered personal property. Thus, as noted in *Hodge*, even if it was error to rely solely on *Bales* and *Langford*, which Respondents do not concede, "an error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." 422 S.C. at 555, 813 S.E.2d at 298-299.[2] Because the Circuit Court explicitly recognized that *Bales* opinion was not binding precedent, it did not commit reversible error in considering its reasoning as instructive, particularly in light of the similarity of the facts between it and this case. Correspondingly, the Court of Appeals did not err in affirming the Circuit Court.

Next, Petitioner criticizes the Circuit Court's consideration of *Bales*, asserting (incorrectly) that it "was based on the law established in 'a limited number of cases decided throughout the United States' as of 2005," and repeating her litany of foreign case law that she alleges (again, incorrectly) supports her theory of a "current nationwide trend" recognizing a pet owner's ability to recover emotional damages in connection with the loss of a pet. (Pet. pp. 4-5). This argument is wholly misplaced and unsupported. Not only do Petitioner's cited cases fail to show any "*current* nationwide trend," she cites to only one opinion issued during the past decade, *Moreno v. Hughes*, 157 F. Supp. 3d 687 (E.D. Mich. 2016), the rest having been published between 1964 and 2006. In any event, *Moreno*, a 42 U.S.C. § 1983, Fourth Amendment case, considered whether noneconomic losses in the form of emotional damages, allegedly caused by police officers shooting the plaintiff's dog, were recoverable. The district court first noted specifically that *Michigan state law* precludes such damages and, like South Carolina, limits damages for harm to personal property in the form of pets to the difference in value of the pet prior to and following the incident. Consequently, the district court applied

[2] "Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

federal common law in order to find that "emotional distress damages from Defendant's unlawful seizure of Plaintiff's dog" could be awarded. 157 F. Supp. 3d at 690. Thus, *Moreno* and Michigan common law support the Circuit Court and Court of Appeals opinions, but not Petitioner's claim, which is not grounded in Section 1983 or federal common law.

None of the other cases cited by Petitioner support her nationwide trend argument. A number of cases relied on by Petitioner awarded emotional distress damages where the injury to the pet was *malicious*, as opposed to merely negligent. *See La Porte v. Assoc. Indep., Inc.*, 163 So.2d 267, 268 (Fla. 1964) (finding emotional damages appropriate where injury to pet was malicious); *Womack v. Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006) (recognizing that "harm may be caused to a person's emotional well-being by *malicious* injury to that person's pet as personal property," distinguishing the case before it, where the defendants maliciously used gasoline to set the plaintiff's cat on fire, from negligence cases involving simple negligence that caused harm to a pet) (emphasis added); *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001) (allowing emotional distress and/or punitive damages for *intentional* infliction of emotional distress and outrage in the intentional death of the plaintiff's pet horses). There is no evidence or allegation in this case that the injury to Honey Bunny was intentional or malicious.

Petitioner's reliance on the concurrence in *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex. Ct. App. 1994), is misplaced. The majority opinion first noted that, as is the case in South Carolina, "Texas law recognizes a dog as personal property." 886 S.W.2d at 370. The Texas Court of Appeals then considered the potential economic value of unborn puppies in its affirmation of "the trial court's finding of actual damages." *Id.* at 372. A statement by a concurring justice as to what he believes the law *should* provide is a far cry from stating what the law actually provides.

Plaintiff's reliance on *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981), is equally misguided. There, the Hawaiian Supreme Court upheld emotional damages for the death of a family pet—who died of heat exhaustion while in the State Animal Quarantine Station's custody—based on a prior case, *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970), that awarded damages "for mental distress due to the State's negligence in causing damages to plaintiffs' house," *i.e.*, the plaintiff's personal property. 632 P.2d at 1069. However, it appears that the Hawaiian legislature later overturned this holding. *See* Haw. Rev. Stat. 663-8.9(a) ("No party shall be liable for the negligent infliction of serious emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects"). Thus, Plaintiff would no longer be able to recover even under Hawaiian law.

In reality, the *vast majority* of jurisdictions in this country that have considered this very issue have *expressly* declined to expand the law to allow pet owners to recover non-economic damages arising from the negligent injury to or death of a pet. *See* Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 Stan. J. Animal L. & Pol'y 30, 34 (2013) (noting that "[c]ourts in every state have long held that pets are characterized as property under civil and criminal law, while recognizing the special, emotional bonds that owners have with their pets"); *see also* Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 236-237 (2006) (listing states and providing citations of cases that have reinforced the notion that pet owners cannot recover for emotional distress based upon an alleged negligent or malicious destruction of a dog to include Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New

Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, West Virginia, and Wisconsin); *see also McDougall v. Lamm*, 48 A.3d 312, 321-322 (N.J. 2012) (stating that "[t]he majority of jurisdictions that have considered whether pet owners should be permitted to recover for emotional distress arising from the death of the pet have declined to authorize the cause of action") (citing cases); *Kaufman v. Langhofer*, 222 P.3d 272, 274 (Ariz. Ct. App. 2009) ("The majority of states also limit recovery for negligent injury to or death of a pet to the animal's fair market value and bar a plaintiff pet owner from recovering emotional distress damages"); *and* 4 Am. Jur. 2d Animals § 115 (2019) ("Most jurisdictions deny recovery of damages for emotional distress arising from injury or death of animals caused by ordinary negligence").[3] Thus, Petitioner's claimed "current nationwide trend" or "collective shift" in jurisdictions allowing for recovery of emotional damages for negligent injury to a pet is nothing more than a mirage, with no support in fact or case law, and in direct contradiction to the weight of authority considering this issue. Accordingly, Petitioner's argument that the Circuit Court should not have considered *Bales*' reasoning as persuasive on this account is without any merit.

C. Petitioner's public policy arguments do not warrant this Court's review.

Petitioner appears to take issue with this Court's directive that "[d]eterminations of public policy … are chiefly within the province of the legislature, whose authority on these matters we must respect," *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 271, 802 S.E.2d 794, 797

[3] Indeed, the two jurisdictions that have passed legislation providing for emotion-based damages in lawsuits involving pets strictly limit the availability of such damages. The Illinois statute, 510 Ill. Comp. Stat. 70/16/3 allows emotional damages only in cases of aggravated cruelty, torture, or where the tortfeasor acts in bad faith. The Tennessee statute, Tenn. Code Ann. § 44-17-403, limits recovery for noneconomic damages to $5,000, and is available *only* if the injury to the pet is fatal and occurs on the owner's property or while under the control of the owner or caretaker. The fact that the two jurisdictions that allow such noneconomic damages have done so through legislation argues against Petitioner's position that this Court should "create" such a right, as is discussed in more detail below.

(2017), and that the "primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 395, 387 (2015) (noting courts "exercise restraint when undertaking the amorphous inquiry of what constitutes public policy"). Clearly, while this Court can make pronouncements of public policy, and can alter the common law, there is no reason for the Court to do so here. This Court consistently has "emphasized its preference for exercising restraint when undertaking the amorphous inquiry of what constitutes public policy based upon [its] understanding that the *General Assembly* is the principal source of public policy declarations." *Donze v. GM, LLC*, 420 S.C. 8, 23, 800 S.E.2d 479, 487 (2017) (internal quotation marks omitted) (emphasis added).

As explained above, South Carolina is in line with the vast majority of jurisdictions in denying noneconomic damages for the negligent injury to or death of a pet. Indeed, the only jurisdiction that allows noneconomic damages for the negligent death of a pet is Tennessee, and that is pursuant to a legislative enactment. *See* Tenn. Code Ann. § 44-17-403. The fact that South Carolina has recognized pets as personal property for over a century, consistent with nearly every other jurisdiction, argues strongly against this Court accepting certiorari review in order to enter or engage in the alleged "public policy" debate over this issue. Petitioner is free to apply to the General Assembly for a statutorily provided solution, should she so choose.

Petitioner's reliance on the definition of "emotional support animals" in S.C. Code Ann. § 47-3-920(6), purportedly as a legislative recognition that pets provide companionship, reassurance, and emotional support to their owners, is entirely misplaced. At the outset, it is important to recognize that the statutory provisions invoked below by Petitioner—Layla's Law (S.C. Code Ann. §§ 47-3-910 to -990)—are criminal statutes designed to protect guide dogs and

service animals from criminal acts causing injury, disability, or death to the guide dog or service animal. S.C. Code Ann. §§ 47-3-930 through -970.[4] Petitioner makes no attempt to show how these provisions have any bearing on the issues of damages available to a plaintiff in a civil case, frankly, because she cannot. Furthermore, the statute specifically states that "[t]his article does *not* affect civil remedies available for conduct punishable under this article." S.C. Code Ann. § 47-3-970(c) (emphasis added). On their face, these statutory provisions have absolutely no applicability to the issue before this Court, and Petitioner's reference to them is a blatant red herring.

Nevertheless, even if this Court is inclined to consider these criminal statutes as having some bearing on this appeal, Petitioner's passing mention of a handpicked, definitional provision of these statutes completely misses the mark. If anything, these provisions reveal the South Carolina General Assembly's intention to *not allow* ordinary pet owners to recover non-economic damages for the injury or death of their pet. Indeed, looking to the provisions allowing for criminal restitution for the criminal injury or killing of a guide dog or service animal, we find that a victim may be entitled to:

> (1) the value of the replacement of an incapacitated or deceased guide dog or service animal, the training of a replacement guide dog or service animal, or retraining of the affected guide dog or service animal and related veterinary and care expenses; and

[4] There is nothing in the record indicating that Honey Bunny was a guide dog or service animal. As defined by statute, a "guide dog" means "a dog that is trained for the purpose of guiding blind persons or a dog trained for the purpose of assisting hearing impaired persons," and a "service animal" means "an animal that is trained … to do work or perform tasks for an individual with a disability. *A service animal is not a pet* …" S.C. Code Ann. § 47-3-920(1) & (4) (emphasis added).

> (2) medical expenses of the guide dog or service animal user, training of the guide dog or service animal user, and compensation for wages or earned income lost by the guide dog or service animal user.

S.C. Code Ann. § 47-3-970(B)(1) & (2). Thus, even for criminal acts injuring or killing guide dogs or service animals, the South Carolina General Assembly has *explicitly* declined to allow for a victim to recover any non-economic damages from the offender. Quite simply, Petitioner has not provided any analysis of the substance of these provisions, and only references an isolated definitional provision in passing. In fact, the legislative history of this provision indicates that the definition of "emotional support animal" was intended to separate out such animals, which do not receive any special treatment under the statute, from "service animals" and "guide dogs" which do. 2019 Act No. 44, preamble.[5]

Furthermore, another statutory provision, Section 20-4-60, which is part of the domestic abuse statute, provides that, after hearing, a court may in its order of protection "provide for temporary possession of the *personal property, including pet animals*, of the parties …" S.C. Code Ann. § 20-4-60(C)(5) (emphasis added). This cuts against Petitioner's argument that the Legislature views pets as more than personal property.

Petitioner's amorphous arguments that recognizing noneconomic damages will encourage and incentivize "entities and individuals to exercise reasonable care around others' animals," is

[5] That preamble provides, in pertinent part, that "Whereas, the term 'service animal' has a distinct meaning in the law …. Under the law, the provision of emotional support, well-being, comfort, or companionship does not constitute the work or tasks of a service animal," and that "[p]eople sometimes erroneously think that a therapy animal, an emotional support animal, or any animal wearing a vest or having any other type of marking is a service animal as defined by law," which confusion some people "exploit" by attempting "to bring an animal into a place that it would otherwise not be allowed to enter by passing off the pet, therapy animal, or emotional support animal as a service animal." 2019 Act No. 44, preamble.

unsupported by any South Carolina case or statutory provision. Even if this Court is inclined to consider the public policy implications raised in the Petition, there is no doubt that public policy strongly favors the current law in limiting the damages a pet owner may recover for the loss of their pet to the fair market value of the pet. Other courts across the country have consistently found that the public policy of their states supports disallowing a plaintiff to recover non-economic damages for the injury or death of their pet. The same considerations outlined in those cases also largely apply here.[6]

For example, the Supreme Court of New Jersey considered this exact issue in *McDougall*. There, the Court was "asked to consider whether a pet owner should be permitted to recover for emotional distress caused by observing the traumatic death of that pet." 48 A.3d at 314. After reviewing other states' public policy considerations, the court recognized that there are "concerns that our enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human would make it impossible to define the boundaries of the cause of action." *Id*. at 322. Additionally, the court explained that other states had also identified the potential effects of allowing emotional distress claims in favor of pet owners including

> (1) opening the door to claims for non-economic damages for the loss of other types of personal property and thus burdening the courts with increased caseloads; (2) the difficulties of determining who would be entitled to recover, the category of companion animals for which recovery would be available, and evaluating

[6] *See* Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values, and Animal Welfare*, 6 Stan. J. Animal L. & Pol'y 30, 34 (2013); Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 236-237 (2006).

> damages that are so subjective that they are beyond the capacity of the legal process; and (3) the impact on the practice of veterinary medicine.

Id. at 326. In concluding that a pet owner who witnesses the death of their pet cannot recover non-economic damages, the court outlined five reasons of its own, concluding: 1) allowing a plaintiff to recover for observing the death of a pet would be nonsensical because the law of the state would not permit recovery for observing the death of most humans; 2) expanding the law to permit recovery of emotional distress based upon the death of a pet would be inconsistent with the state's existing statutes; 3) the state's precedent established that pets are property, and the measure of recovery for the loss of a pet was clearly established to be the replacement cost of the pet; 4) there was no way to easily identify which pet owners would be entitled to such non-economic damages, and which would not; and, 5) allowing recovery of non-economic damages for the death of a pet raises the potential that the door would be opened to consider claims that attachments to inanimate forms of property should likewise be honored. *See id*. at 326-27.

Numerous factors weigh heavily against accepting Petitioner's invitation to overturn the status quo. First, like most states, South Carolina's wrongful death statute limits the categories of people who can bring such a claim to close family members, such as a wife, husband, child, illegitimate child, or parent. S.C. Code Ann. §§ 15-51-20 to -30. In addition, in South Carolina, while a bystander may be entitled to recover for negligent infliction of emotional harm, that relief is available *only* where the injured party is a close relation, such as a child. *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582-583, 336 S.E.2d 465, 467 (1985). There can be no question that a pet, regardless of how well-loved or cherished, is not a close family relation. It would be incongruous for this Court to adopt Petitioner's flawed public policy argument and grant greater recovery to a pet owner for the loss of an animal than it does to a plaintiff who

witnesses the death or serious injury of a close personal friend or a co-worker, or any other number of emotionally close but non-familial relationships.

Second, it would be inconsistent to allow a plaintiff to recover non-economic damages from witnessing the death of their *pet* when South Carolina's current statutes protecting *guide dogs and service animals* do not allow recovery for such damages. *See* S.C. Code Ann. § 47-3-970. Third, because South Carolina has explicitly characterized dogs as personal property for over a century, it would go directly against established precedent to now allow for recovery of non-economic damages for witnessing injury to personal property. Fourth, if South Carolina courts were to allow pet owners to recover non-economic damages for witnessing injury to their pet, there would be no feasible way to qualify or quantify which pet owners would be entitled to damages,[7] and how much such owners would be entitled to—nor, in a practical sense, would any defendant be able to fairly defend against these issues. Finally, by allowing pet owners to recover non-economic damages for injury to their personal property in South Carolina, the door would swing wide-open for claims based on attachments to other, inanimate forms of property. Indeed, there are countless circumstances where individuals in this State have strong personal and emotional attachments to inanimate forms of personal property, such as family heirlooms or other sentimental items. Allowing recovery for non-economic damages for damage to personal property in this case would open the door to a whole host of claims that are, in principle, on similar footing.

In sum, the determination of the public policy of this State on this issue is properly left to the legislature. *See Fullbright*, 420 S.C. at 271, 802 S.E.2d at 797. Even were the Court inclined

[7] While, conceivably, it may be relatively straightforward to determine how much a pet was loved, on one end of the continuum, or neglected, on the other end, many cases that fall somewhere between the extremes would be nebulous and result in protracted, expensive litigation with inevitably inconsistent results.

to consider public policy, however, public policy favors the current law in South Carolina, which limits a plaintiff's available damages from witnessing the death of a pet to the fair market value of the pet.

CONCLUSION

The Circuit Court correctly held that a plaintiff in a civil action may not recover damages for emotional distress, mental anguish, or anxiety stemming from the negligent death of a pet. The law is clear that pets have been classified as personal property in this State consistently for over a century, a position that is in line with the vast majority of other jurisdictions. Consequently, the damages Petitioner may recover for negligent injury to her personal property is, and has always been, the market value at the time and place of the injury. Petitioner has presented no issues that warrant or require this Court's review and, accordingly, Respondents respectfully request this Court to deny her Petition.

Respectfully submitted,
MCANGUS, GOUDELOCK & COURIE, LLC

s/Dominic A. Starr

Dominic A. Starr, S.C. Bar No. 66231
2411 North Oak Street, Suite 401
Myrtle Beach, South Carolina 29578
dominic.starr@mgclaw.com
Telephone: (843) 848-6000
Facsimile: (843) 449-2306

Attorneys for Respondents FedEx Ground Package System, Inc. and James K. Ard d/b/a/ JMK Logistics Corporation

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