

## **McMahon v Craig**

7/31

Emotional Distress Claim; Property Damage; "Peculiar Value"

Plaintiff McMahon is an owner, breeder, and handler of Maltese show dogs. One of the dogs plaintiff owned was "Tootsie," a purebred Maltese. When Tootsie was two years old, she developed respiratory distress. The condition deteriorated, and at age 5, plaintiff met with defendant Craig, a doctor of veterinary medicine. He recommended corrective surgery. Plaintiff told Craig she would do whatever she could, regardless of cost, to help the animal.

Defendant advised plaintiff that aspiration pneumonia posed the biggest post-surgical risk. Defendant said the dog could not eat food for 24 hours. After surgery, the dog aspirated a mix of water and baby food, given to her by the staff despite Craig telling plaintiff no food would be provided. Defendant told plaintiff Tootsie would be closely monitored, but to the contrary, the dog was left in cage unattended. The dog died that night, and defendant had plaintiff's credit card charged for all unpaid services without plaintiff's consent.

When plaintiff learned of these facts, a suit for veterinary malpractice, intentional infliction of emotional distress, and other claims was filed and served. The trial court sustained defendant's demurrer on the intentional infliction cause of action. The court also granted without leave to amend, defendant's motion to strike plaintiff's damage claim for loss of companionship and emotional distress. Determining the trial court's rulings had impaired the value of her case, plaintiff stipulated to a judgment against her to expedite this appeal.

The Fourth DCA explained that the negligent causing of emotional distress is not an independent tort, but the tort of negligence. [The law in California imposes a duty to avoid causing emotional distress in two general instances. The first involves "bystander" situations in which a plaintiff seeks to recover damages as a percipient witness to the injury of another. \(\*Christensen v Superior Court\*\(1991\) 54 Cal.3d 868\)](#)

[In the absence of physical injury or impact to the plaintiff personally, damages for emotional distress should be recoverable only if the plaintiff: \(1\) is closely related to the injury victim, \(2\) is present at the scene of the injury causing event at the time it occurs and is aware it is causing injury to the victim and \(3\) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness. \(\*Burgess v Superior Court\* \(1992\) 2 Cal.4<sup>th</sup> 1064\)](#) Since McMahon was not present when the dog was injured, she does not fall under this category.

The second source of duty is where the plaintiff is a “direct victim” in that emotional distress damages result from a duty owed the plaintiff that is assumed by the defendant or imposed as a matter of law, or that arises out of a relationship between the two.

Plaintiff claims a special relationship here, akin to a doctor-patient relationship. The Appellate Court noted that although a veterinarian is hired by the owner of a pet, the medical care is directed only to the pet. The malpractice does not directly harm the owner in a manner creating liability for emotional distress.

In the *Burgess* case, the California Supreme Court found a special relationship between an obstetrician and the plaintiff, a mother who was giving birth to a child. The mother’s well being and the health of the child are inextricably intertwined. This is not true for the father, who must meet the bystander liability criteria set forth in *Thing v LaChusa* (1989) 48 Cal.3d 644. If the Supreme Court would not extend “direct victim” status to the father of a child under a doctor’s care, it would not extend it to an owner whose pet is under a veterinarian’s care.

The Fourth DCA stated there is no basis in policy or in reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of an animal being treated, while not imposing such a duty on a doctor to the parents of a child receiving treatment. Additionally, extending emotional distress damages to owners of companion pets based on veterinary malpractice would have unknown consequences on both the cost and availability of veterinary care. The trial court properly struck the allegations seeking emotional distress damages for negligence.

Plaintiff also asserted on appeal that defendant’s conduct of giving food to the dog shortly after surgery, and failing to provide adequate post-operative care, in light of his knowledge of plaintiff’s close attachment to the dog, illustrates a case of extreme and outrageous conduct to support a cause of action for intentional infliction of emotional distress. That tort is comprised of three elements: (1) extreme and outrageous conduct with the intention of causing emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff’s injuries were proximately caused by the defendant’s outrageous conduct.

The conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. Defendant’s knowledge that the plaintiff had a special susceptibility to emotional distress is a factor which may be considered. (*Cochran v Cochran* (1998) 65 Cal.App.4<sup>th</sup> 488) The conduct must not only be intentional and outrageous, it must be directed at the plaintiff. Since here the conduct by defendant was neither directed at plaintiff, nor was she present, defendant’s acts do not support a claim for intentional infliction. The trial court did not err in sustaining the demurrer to this claim without leave to amend.

Finally, plaintiff sought damages under Civil Code section 3355, alleging her property had a “peculiar value” to her and the defendant was aware before incurring liability to her for the loss. Peculiar value refers to a property’s unique economic value, not its sentimental or emotional value under section 3355. [The Restatement Second of Torts, section 911](#), explains that even where the subject matter has its chief value in its value for use by the injured person, if it is replaceable, the damages for the loss are limited to replacement value, less an amount for depreciation. Damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of such things.

The Justices conclude with the recognition of the strong bond between an owner and a dog. But given California law does not allow parents to recover for the loss of companionship of their children, it cannot allow a pet owner to recover for loss of companionship of a pet. The trial court did not err in striking plaintiff’s loss of companionship allegations.

The judgment is affirmed. Defendants are entitled to costs of appeal.

