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COURT OF APPEALS

STATE OF NEW YORK

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STRAY FROM THE HEART, INC.,

Appellant,

-against-

No. 158

NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE,

Respondents.

-----

20 Eagle Street  
Albany, New York 12207  
November 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 158, Matter of Stray  
2 from the Heart.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. ST. JOHN: Yes, please. Two minutes.

6 CHIEF JUDGE LIPPMAN: Okay, counselor. Go  
7 ahead.

8 MS. ST. JOHN: Stray from the Heart  
9 commenced this proceeding in order to vindicate the  
10 interests of the people of New York and its homeless  
11 animals, and in order to hold the department  
12 accountable - - -

13 CHIEF JUDGE LIPPMAN: Why are you a  
14 beneficiary of this statute?

15 MS. ST. JOHN: Well, for two reasons, Your  
16 Honor. One is that the - - -

17 CHIEF JUDGE LIPPMAN: And not just an  
18 incidental beneficiary of the statute?

19 MS. ST. JOHN: Sure. For one thing, the  
20 statute, as we argued in our brief, is intended to  
21 lessen the amount of homeless animals on the street.  
22 That's exactly what Stray from the Heart's purpose  
23 is, to adopt animals and to get - - -

24 JUDGE CIPARICK: How does that give you  
25 organizational standing?

1 MS. ST. JOHN: How does that give it  
2 organizational standing? There was a drain to Stray  
3 from the Heart's resources. They could have gone and  
4 adopted more animals, different animals, if it wasn't  
5 for the fact that the department was not providing  
6 the shelters that it was mandatorily required.

7 JUDGE SMITH: Do you have to show economic  
8 injury or is it enough that this - - - your purpose  
9 is to help the animals and the law was enacted to  
10 help the animals, therefore, you have standing?

11 MS. ST. JOHN: I think that we do show  
12 economic injury. Whether just - - -

13 JUDGE SMITH: My question is do you have  
14 to.

15 MS. ST. JOHN: Your Honor, I'm not sure;  
16 I'm not sure if an injury just to our societal - - -  
17 to the purpose of the organization would be  
18 sufficient, and I don't think that that is what we're  
19 claiming - - -

20 CHIEF JUDGE LIPPMAN: But assuming you have  
21 standing, assuming that the act promoted animal  
22 welfare and that fits - - - gives you standing, why -  
23 - - where do we have damages that have to be  
24 compensated here? Where - - - don't you have to have  
25 - - - don't you have to be a beneficiary of this

1 statute in order to get damages?

2 MS. ST. JOHN: Sure. And I think  
3 incidental damages are important here because that's  
4 how the department will be held accountable for the  
5 fact that it hasn't provided these services but - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but on what  
7 basis - - - don't you have to benefit under the  
8 statute? Doesn't - - -

9 MS. ST. JOHN: Sure. Well - - -

10 CHIEF JUDGE LIPPMAN: Doesn't your recovery  
11 have to be consistent with the legislative scheme,  
12 and what is it that - - - if the statute doesn't  
13 provide for a particular benefit for you, why isn't  
14 that the end of this case, why you can't get damages?  
15 The statute's been amended now, right? Where do you  
16 get - - - how do get damages? That's what's  
17 troubling me.

18 MS. ST. JOHN: Okay. Besides the fact that  
19 we are benefitting when there are less stray animals  
20 on the street, I think we also stand on behalf of the  
21 animals. They're benefitting from the statute, but  
22 an animal can't come here and say the city has not  
23 done what we've asked it - - - what the city council  
24 - - -

25 CHIEF JUDGE LIPPMAN: Well, the purpose of

1 the statute was the animals can come in and get the  
2 damages and you're representing them? Is that your  
3 theory of this case?

4 MS. ST. JOHN: No. The purpose of the  
5 statute - - - well, there's a public health purpose,  
6 but there's also the purpose to - - - the welfare of  
7 animals that are on the street, the stray animals.

8 CHIEF JUDGE LIPPMAN: Assume that's all  
9 true; how do you get damages?

10 MS. ST. JOHN: Well, the test is are you a  
11 primary beneficiary, which we just discussed - - -

12 CHIEF JUDGE LIPPMAN: Are you?

13 MS. ST. JOHN: I think that we are, as an  
14 organization, because we benefit from the statute,  
15 and I also think we stand in the shoes of the  
16 animals.

17 JUDGE GRAFFEO: Is that true of anyone? I  
18 mean, someone could come in and say I have twenty  
19 stray cats that I collect in order to give those  
20 animals a better life. Could that person also come  
21 in and make the same argument?

22 MS. ST. JOHN: To the extent that they can  
23 show that they're not accepting those animals for  
24 personal reasons but because the city shelters were  
25 closed and people brought them those animals because

1           they could not.

2                   JUDGE SMITH: Well, they're accepting them  
3 out of the goodness of their heart. So are you.

4                   MS. ST. JOHN: That is what Stray from the  
5 Heart does as an organization; however, the dogs that  
6 are discussed in our brief are actually brought to us  
7 because they could not be brought to the shelters.

8                   JUDGE GRAFFEO: Well, do you have to show  
9 that there's a private right of action under the  
10 statute?

11                   MS. ST. JOHN: For incidental damages?  
12 Yes, and I think there is. So we just - - -

13                   JUDGE GRAFFEO: Where do you find that in  
14 the statute?

15                   MS. ST. JOHN: Well, it's implied in the  
16 statute. So the test is primary beneficiary, which  
17 we discussed, is it consistent with the legislative  
18 purpose. As I said, I think the purpose of the  
19 statute, one of the purposes, is to benefit stray  
20 animals.

21                   JUDGE GRAFFEO: There's quite a bit of  
22 legislative history here, and they don't - - - the  
23 legislature didn't seem to comment on organizations -  
24 - - shelters or organizations that care for abandoned  
25 animals. I guess what I'm saying is where do you - -

1 - what do you find in the legislative history that  
2 indicates they wanted you to be able to recover  
3 monetary damages?

4 MS. ST. JOHN: Well, the legislative  
5 history indicates that they wanted certain services  
6 provided to animals, and Stray from the Heart  
7 provided those services because someone had to step  
8 in when the department was refusing to provide them.

9 CHIEF JUDGE LIPPMAN: Is there a special  
10 duty here? Is there a special duty on the part of -  
11 - -

12 MS. ST. JOHN: No, I don't think so, Your  
13 Honor. I think the duty is pretty clear; it's the  
14 duty that they needed to provide full-service  
15 shelters. It was a duty to all of the city - - -

16 CHIEF JUDGE LIPPMAN: And if they don't,  
17 you get damages?

18 MS. ST. JOHN: Because we provided those -  
19 - - the mandatory duty that they had which they  
20 decided not - - -

21 JUDGE CIPARICK: You did that as a  
22 volunteer. I mean, nobody was compelling you to do  
23 it. You did it as a volunteer. The association went  
24 out and collected - - -

25 MS. ST. JOHN: Yes, that's correct --

1 JUDGE CIPARICK: - - - strays - - -

2 MS. ST. JOHN: - - - but in the case law -

3 - -

4 JUDGE CIPARICK: - - - took care of them.

5 MS. ST. JOHN: - - - in a case like Mixon

6 or in a case like Grant v. Cuomo, you have a

7 nonprofit organization that comes in and provides

8 those services. And the fact that it's voluntary - -

9 -

10 JUDGE CIPARICK: That puts you within the  
11 zone of interest of the statute?

12 MS. ST. JOHN: Correct.

13 JUDGE CIPARICK: And gives you standing?

14 MS. ST. JOHN: Correct.

15 JUDGE GRAFFEO: And that would put anyone  
16 who does something privately similar within the zone  
17 of the statute?

18 MS. ST. JOHN: I'm not - - -

19 JUDGE GRAFFEO: I mean, we read all the  
20 time in newspapers about people that have twenty,  
21 thirty, fifty, a hundred cats in their house.

22 MS. ST. JOHN: Sure. I think that there's  
23 a difference between someone who takes in a lot of  
24 animals and a nonprofit organization that is devoted  
25 to the rescue and rehabilitation of stray animals.

1                   CHIEF JUDGE LIPPMAN: Can we assume that  
2 the city is obligated to perform the services that  
3 you voluntarily do? Is that what we have to do to  
4 get your damages in?

5                   MS. ST. JOHN: I don't think that there's  
6 any question that the city was obligated to provide  
7 full-service shelters. And we stepped in and  
8 provided services that were not being provided. And  
9 that's actually not on appeal. The city -- the  
10 department admits that those services were not  
11 provided.

12                   JUDGE CIPARICK: Well, the fact that a  
13 statute's been appeal - - - been amended, how does  
14 that impact?

15                   MS. ST. JOHN: Well, we were - - -

16                   JUDGE CIPARICK: Does it make your original  
17 request moot?

18                   MS. ST. JOHN: It does make the request for  
19 equitable relief moot, but the incidental damages  
20 still remains viable, and I think it's important to  
21 hold the department accountable so that they don't  
22 just get off without any cost to the fact that they -  
23 - -

24                   JUDGE CIPARICK: Could it have been a  
25 recognition by the city that this isn't going to

1 work, we don't have the resources to fund such a  
2 comprehensive program so we have to cut back?

3 MS. ST. JOHN: I don't know why they  
4 changed it. I think that it's possible that it was  
5 out of frustration by the fact that the executive was  
6 clearly not going to do what it was mandatorily  
7 required to do.

8 JUDGE GRAFFEO: Is this - - - are these  
9 ongoing damages that you're seeking? Are you still -  
10 - -

11 MS. ST. JOHN: No.

12 JUDGE GRAFFEO: - - - accepting animals?

13 MS. ST. JOHN: Still accepting animals, but  
14 the fact that the law has been amended, the city is  
15 no longer - - - the department is no longer required  
16 to provide the services that we were discussing.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.  
18 Anything else?

19 MS. ST. JOHN: No.

20 CHIEF JUDGE LIPPMAN: Thank you.

21 Counselor.

22 MR. YOTAM: May it please the Court,  
23 Avshalom Yotam for the City's Department of Health  
24 and Mental Hygiene.

25 We think that the simplest way to decide

1           this case is to dismiss the proceeding because all  
2           that's possibly theoretically left here is this claim  
3           for incidental damages, and the damages are not based  
4           on any cognizable right - - -

5                    JUDGE SMITH:  Do we have to address the  
6           standing question in your view or can we skip  
7           standing and say, look, whether there's standing or  
8           not there's no damages claim?

9                    MR. YOTAM:  Yeah, that's our argument.  I  
10          mean, I don't think the court is prevented from  
11          addressing standing, but it doesn't need to; it can  
12          assume standing without deciding it.

13                   JUDGE GRAFFEO:  Why aren't they a  
14          beneficial recipient of the intention of the  
15          legislature to provide for the care of these animals?

16                   MR. YOTAM:  Well, I mean, for one thing,  
17          there's no mention in the statute of these  
18          organizations.  Really, there's not much that's done  
19          in this law.  All that's done is the city is  
20          instructed by the city council to make sure that  
21          there are five different shelters.  There's no idea  
22          that there's any kind of particular benefit given to  
23          organizations - - - volunteer organizations - - -

24                   CHIEF JUDGE LIPPMAN:  So even if the  
25          statute is designed - - - it's a public health issue

1           that you don't want these animals roaming the  
2           streets, it's not a good thing, and even if they're  
3           forced to do what you didn't do to protect public  
4           health, they still can't get damages?

5                       MR. YOTAM:  Yes, that's exactly what I  
6           mean.  It is a kind of a fact of life that sometimes  
7           government falls short in providing services.  In  
8           this case, we concede we were out of compliance with  
9           statute.  Now, I don't think it's true at all that we  
10          were not providing the services we needed to.  All  
11          that happened was that there were fewer shelters than  
12          were required.

13                      JUDGE PIGOTT:  Well, the argument seems to  
14          be, among other things, let's assume one of these  
15          dogs was rabid and it bit somebody and the Stray from  
16          the Heart people, in addition to grabbing the dog,  
17          took the person who was bit to the hospital so they  
18          could be properly treated.  Now they sue you because  
19          you should have gotten that dog a week ago and you  
20          didn't and now they're out about 2,700 bucks because  
21          they had to take whatever action they took to get  
22          that person to the hospital, et cetera.  Wouldn't  
23          that be incidental damages for which they would be  
24          entitled to be compensated because you didn't do your  
25          job?

1                   MR. YOTAM: No. I mean, again, on the  
2 question of right of action, it's a very simple  
3 question. Does an organization that does admittedly  
4 very good things voluntarily - - -

5                   JUDGE PIGOTT: Well, no, we were talking  
6 about - - - the question was do we have to get to  
7 standing if we find no incidental damages, and I'm  
8 suggesting that there are ways that there would be -  
9 - - and that's why they're called incidental - - -  
10 damages in Article 78 proceedings such as this; by  
11 the way, we were damaged; we're out X number of  
12 dollars because we did what they were supposed to do.

13                   MR. YOTAM: Right. So I mean - - - so is  
14 your question about standing?

15                   JUDGE PIGOTT: Well, no. I was - - - you  
16 were saying there are no incidental damages, and I  
17 can conceive of ways that there could be. Now,  
18 whether any of these particular ones that are  
19 elicited are or not is another question. But the  
20 point is it seems like every time somebody brings one  
21 of these, they say, well, you know, the damages  
22 aren't that big a deal. Well, that's - - - they're  
23 not supposed to be that big a deal; that's why  
24 they're incidental. Otherwise, you got to bring a  
25 plenary action but - - -

1 MR. YOTAM: Right. Well, I mean, at least  
2 the way I think of incidental damages, it's not just  
3 that some of the damages can't be an independent  
4 claim; they have to somehow flow from the violation -  
5 - -

6 JUDGE PIGOTT: That's why I used rabies. I  
7 figured just helping a dog may not do it, but if you  
8 were helping someone who was injured by a dog and you  
9 had to spend money to get medical care for that  
10 person, that would be a cognizable claim. Wouldn't  
11 you agree?

12 MR. YOTAM: So it could be - - - then those  
13 would be incidental damages. I'm still not sure that  
14 they would be recoverable.

15 JUDGE SMITH: Are you saying that there is  
16 no damages recoverable against the city under this  
17 statute of any kind, ever?

18 MR. YOTAM: Right, right. I mean, it's  
19 just - - - the question about finding an implied  
20 right of action.

21 CHIEF JUDGE LIPPMAN: Why, because there's  
22 no private right of action, period?

23 MR. YOTAM: Right. The question is of  
24 legislative intent. Did the city council intend to  
25 imply - - -

1 JUDGE CIPARICK: So this statute could  
2 never be enforced. Obviously, the dog can't come in  
3 here to enforce it, and what about the person - - -  
4 just going with Judge Pigott's analogy, what about  
5 the person who got bit by the dog, by the rabid dog?  
6 Could that person come in - - -

7 MR. YOTAM: Right. Well - - -

8 JUDGE CIPARICK: - - - bring an action?

9 MR. YOTAM: - - - on standing perhaps, for  
10 standing purposes perhaps, meaning that person might  
11 have brought the mandamus petition. I'm talking  
12 about the collecting damages, right, sending a bill  
13 to the city. That, I think, is a different question.  
14 And that's the problem here.

15 CHIEF JUDGE LIPPMAN: Okay. Anything else,  
16 counselor?

17 MR. YOTAM: That's it. Thanks very much.

18 CHIEF JUDGE LIPPMAN: Thank you.

19 Counselor, rebuttal?

20 MS. ST. JOHN: Just two things, Your Honor.  
21 First I just wanted to say that I do think this court  
22 should reach the standing issue. I think that the  
23 Appellate Division made a mistake. I think it was an  
24 erroneous narrowing of the - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but if you have

1 standing and you can't recover, what - - - but to  
2 what end?

3 MS. ST. JOHN: Well, I do think it's  
4 important for this court to correct an error in the  
5 standing law. And besides that, I do think, though,  
6 we - - -

7 JUDGE SMITH: Because this might not be the  
8 last lawsuit your organization ever brings?

9 MS. ST. JOHN: And maybe other  
10 organizations that are animal welfare organizations  
11 or that want to be within a broader - - - it's a zone  
12 - - -

13 JUDGE SMITH: You're actually, in a sense,  
14 asking us, if you should - - - I'm not saying - - -  
15 but if you should lose on the damages point, we would  
16 be giving you an advisory opinion on standing.

17 MS. ST. JOHN: I don't think that's the  
18 case. I - - -

19 CHIEF JUDGE LIPPMAN: Well, isn't it the  
20 case when you have a statute that's been markedly  
21 changed at this point? Wouldn't it be - - - isn't it  
22 an academic question whether you have standing?

23 MS. ST. JOHN: Well, it is true - - -

24 CHIEF JUDGE LIPPMAN: If - - - assuming  
25 that you still have damages.

1 MS. ST. JOHN: Right. It is true that the  
2 statute's been markedly changed. I don't think that,  
3 if it turns out the department is not in compliance  
4 in some other way, if they scale back what they have  
5 now, perhaps we would bring another lawsuit and then  
6 it wouldn't be - - - we would be - - - we would rely  
7 on that to show that we have standing.

8 And also to come back to the incidental  
9 damages point, I do think that we reach the test to  
10 imply a private right of action within the act, and I  
11 think it's really the only way to enforce the act.  
12 It's consistent with the legislative scheme. There  
13 is no other way to enforce it through the department.

14 CHIEF JUDGE LIPPMAN: Yeah, but maybe the  
15 statutory scheme or the legislative intent was not to  
16 have it enforced. Your adversary says that it can't  
17 be that a private organization such as yours could -  
18 - - that that wasn't within the - - - contemplated by  
19 the statute.

20 MS. ST. JOHN: It seems to me that when a  
21 statute is passed, it is not - - - there must be some  
22 sense that this will take place, this will be  
23 enforced.

24 CHIEF JUDGE LIPPMAN: Do you have to imply  
25 a private right of action then in almost any statute

1           like this one?

2                       MS. ST. JOHN:  No.  There are some statutes  
3           that actually within the statute itself provides an  
4           enforcement means.

5                       CHIEF JUDGE LIPPMAN:  Yeah, but let's say  
6           it doesn't; it cert -- and doesn't, at least on its  
7           face, create any private right of action, how do we  
8           know that in this case they intended to have one?

9                       MS. ST. JOHN:  Well, I think that that's  
10          why it's implied and that's why you apply this three-  
11          part test, the primary, beneficiary, the statutory  
12          purpose and the statutory scheme.

13                      CHIEF JUDGE LIPPMAN:  Okay.  Thanks,  
14          counselor.

15                      Thank you both.

16                      (Court is adjourned)

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C E R T I F I C A T I O N

I, David R. Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Stray from the Heart, Inc. v. New York City Department of Health and Mental Hygiene, No. 158 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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