NO. 94389-3

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT REPIN,

Petitioner,

v.

STATE OF WASHINGTON, et al.,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

JASON D. BROWN
Assistant Attorney General
WSBA #39366
Torts Division, OID: 91106
Office of the Attorney General
1116 W. Riverside Ave., Suite 100
Spokane, WA 99201
(509) 456-3123

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Secondary Sources

I. INTRODUCTION

"Current law that requires dismissal should not be judicially changed." *Repin v. State*, 198 Wn. App. 243, 286, 392 P.3d 1174 (2017) (Lawrence-Berrey, J., concurring). Washington law is clear that, notwithstanding the unquestioned emotional connection many people feel with their pets, for purposes of tort and contract law, pets are personal property. Accordingly, in Washington, there is no cause of action for wrongful death of a dog, or for recovery of emotional distress damages based on the negligent death or injury to a pet or breach of a contract for veterinary services. Despite clear Washington law to the contrary, Mr. Repin seeks recovery for his dog Kaisa's pre-death pain and suffering and his own emotional distress damages. While he couches his claims in terms of professional negligence and breach of contract, the gravamen of his complaint is one for the wrongful death of Kaisa. Wrongful death is a statutory cause of action that does not reach companion animals. Whether to expand Washington law to allow this type of claim is a public policy question more appropriately addressed by the Legislature. This Court should deny review.

II. COUNTERSTATEMENT OF ISSUES

1. Whether a plaintiff can recover emotional distress damages for breach of a euthanasia contract?

2. Whether a plaintiff can recover emotional distress damages for negligent injury to a pet?

3. Whether an animal suffering unintended pain, during euthanasia by a veterinarian, is atrocious and utterly intolerable in a civilized society?

4. Whether dismissal of Mr. Repin's conversion claim was proper?

5. Whether dismissal of Mr. Repin's lack of informed consent claim was proper?

III. COUNTERSTATEMENT OF THE CASE

A. Substantive Facts

Robert Repin acquired his dog, Kaisa, in February 2001. Clerk's Papers (CP) at 2, 45. In September 2012, Kaisa was diagnosed with cancer. CP at 47. On September 26, 2012, Kaisa's local veterinarian referred her to the Veterinary Teaching Hospital (VTH) at Washington State University. CP at 48-49. Upon arrival at the VTH, Kaisa was checked into the hospital by veterinary students Jasmine Feist and Jessica Miller. CP at 50-51, 78. At the time, Ms. Feist was a fourth year veterinary student doing an ICU rotation. CP at 77. Dr. Margaret Cohn-Urbach was an intern at the VTH and Ms. Feist's ICU supervisor. CP at 77, 95. During check in, Ms. Feist placed a catheter in Kaisa's left front leg. CP at 51. Radiographs were taken, indicating Kaisa was suffering from cancer. CP at 53, 101. Kaisa's prognosis was grave and euthanasia was recommended. CP at 53-54. Upon consideration, Mr. Repin authorized euthanasia. CP at 55, 79, 109.

After he signed a Consent for Euthanasia form, Dr. Cohn-Urbach explained to Mr. Repin what he might expect to see during the euthanasia procedure. CP at 59, 126. Based on this conversation, Mr. Repin expected any adverse reaction to include a "slight leg twitch, possibly a deep breath." CP at 60. Dr. Cohn-Urbach testified she has a "very standard discussion" that she uses to explain the euthanasia procedure:

> I just want to warn you that sometimes animals have adverse effects to the drugs, sometimes they'll have deep gasps, tremors, other adverse effects, however, it doesn't mean they are in pain, it doesn't mean they are suffering, it's just a side effect of the drug and it can happen. It's not expected, but it can happen.

CP at 96. Dr. Cohn-Urbach is confident she had this standard discussion with Mr. Repin. CP at 96.

The euthanasia was performed in a room called the quiet room. CP at 79. Dr. Cohn-Urbach asked Ms. Feist if she would like to perform the euthanasia and Ms. Feist agreed to do so. CP at 80. Because VTH is a teaching hospital, Dr. Cohn-Urbach wanted Ms. Feist to learn from the experience. CP at 111. Dr. Cohn-Urbach told Mr. Repin they would give Kaisa a mild sedative, followed by the euthanasia solution. CP at 61. Mr. Repin and Kaisa got comfortable on the floor of the quiet room and Mr. Repin told Dr. Cohn-Urbach to proceed. CP at 62.

Mr. Repin testified he heard Ms. Feist say to Dr. Cohn-Urbach that Kaisa had chewed the end of the catheter. CP at 62. However, Mr. Repin did not observe the catheter during the euthanasia procedure nor did he observe Kaisa chewing on the catheter at any time. CP at 63. Ms. Feist was concerned that when she tested the catheter, she did not get any "flashback" of blood into the syringe. CP at 84, 103. After informing Dr. Cohn-Urbach, they tested the catheter by flushing a large amount of saline through the catheter to ensure it was patent.[1] CP at 82, 84. Neither Ms. Feist nor Dr. Cohn-Urbach had any concerns that the catheter looked damaged or chewed. CP at 83, 85, 114. Dr. Cohn-Urbach testified the catheter looked "perfect." CP at 111. Ms. Feist and Dr. Cohn-Urbach were confident the catheter was patent prior to the euthanasia. CP at 93, 115. Even though the steps they took may not have been visible to Mr. Repin, Dr. Cohn-Urbach and Ms. Feist took steps to make sure the catheter was patent. CP at 83, 85, 93, 111, 114, 115.

Prior to any of the drugs being administered, Kaisa was asleep. CP at 66. As Kaisa was sleeping, the Acepromazine was administered by Ms. Feist. CP at 65, 103. After the administration of the Acepromazine, they waited between five and ten minutes. CP at 65, 104. During this time, Kaisa

[1] The term "patent" refers to something that is "open, unobstructed, or not closed." *Dorland's Illustrated Medical Dictionary* 976 (26th ed. 1981).

continued to sleep. CP at 66. After waiting five to ten minutes, Ms. Feist administered the Euthasol. CP at 66, 81, 97, 104.

The accounts of what transpired after the administration of the Euthasol differ.[2] According to Mr. Repin, within ten to twenty seconds, Kaisa was awake and "screaming in agony." CP at 67. Mr. Repin indicated he had to wrestle Kaisa back to the floor. CP at 67. According to Ms. Feist, toward the end of the Euthasol injection, Kaisa lifted her front end and vocalized. CP at 82. Ms. Feist characterized the vocalization as at least one loud howl. CP at 86. Ms. Feist would not characterize Kaisa's vocalization as screaming in agony. CP at 92. According to Dr. Cohn-Urbach, Kaisa made three noises and looked at her left leg which Ms. Feist was handling and injecting. CP at 104. Dr. Cohn-Urbach testified Kaisa was not acting violently or thrashing. CP at 107, 112-13.

Dr. Cohn-Urbach decided that she wanted to accomplish the euthanasia as quickly as possible. CP at 104-05. So, she left the quiet room to get more Euthasol. CP at 105. Mr. Repin said Dr. Cohn-Urbach was gone from five to seven minutes. CP at 68. Ms. Feist estimates Dr. Cohn-Urbach was gone "a minute or two." CP at 88. Dr. Cohn-Urbach estimates she was

---

[2] Although there are significant factual differences in the parties' accounts of the euthanasia procedure, and the law requires all inferences be made in favor of the non-moving party, the factual differences between (and among) the accounts do not alter the legal conclusion under Washington law. Even if all of Repin's assertions are accepted as true, he has no claim for damages beyond economic damages.

gone two minutes. CP at 107.

When Dr. Cohn-Urbach returned to the quiet room, she told Mr. Repin she was going to inject again in Kaisa's right leg. CP at 69, 82. As Dr. Cohn-Urbach was administering the second dose of Euthasol, Kaisa made another noise similar to the noise she made during the first injection. CP at 105. After the second injection, Kaisa died. CP at 70.

Mr. Repin lifted Kaisa onto a gurney and rolled her out to his car. CP at 71. Dr. Cohn-Urbach and Ms. Feist both walked Mr. Repin to his car. CP at 71. Mr. Repin repeatedly told Dr. Cohn-Urbach, "You fucked this up." CP at 71, 108. Dr. Cohn-Urbach told Mr. Repin, "I know that this is a very difficult time for you, but I hope that at some point in the future you will realize that I just meant the best for Kaisa." CP at 108. Ms. Feist helped Mr. Repin get Kaisa into his car. CP at 72. Mr. Repin then drove home to Cle Elum and buried Kaisa. CP at 73.

B. Procedural Facts

The trial court granted Dr. Cohn-Urbach's motion for summary judgment in part, dismissing the reckless breach of contract, outrage, conversion, and lack of informed consent claims, and holding that damages for the remaining negligence and breach of contract claims were limited to economic loss. CP at 390-93. After accepting review, the Court of Appeals affirmed the rulings of the trial court in an opinion authored by Chief Judge

George Fearing. *Repin*, 198 Wn. App. at 248-79. However, Chief Judge Fearing also concurred with his own opinion in order to "advocate for a change in the law," at the same time recognizing that he was bound by Washington precedent to affirm denial of Mr. Repin's emotional distress damages. *Id.* at 279-86 (Fearing, C.J., concurring). Judge Robert Lawrence-Berrey, in a separate concurrence joined by Judge Kevin Korsmo, recognized the law as it stands should not be changed by the courts. *Id.* at 286-87 (Lawrence-Berrey, J., concurring). Instead, Judge Lawrence-Berrey, in accord with Washington precedent, recognized that any expansion of the law should come from the Legislature. *Id.*

IV. ARGUMENT

This Court grants discretionary review only when at least one of four issues are present:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, Mr. Repin argues the Court of Appeals' decision is in conflict with decisions of this Court and published decisions by the Court of Appeals. *See* Petition for Review (Pet. Review) at 5-10. He also argues his petition involves an issue of substantial public interest. *See* Pet. Review

at 10-20. Mr. Repin is wrong on both assertions.

A. The Court Should Deny Mr. Repin's Petition for Review Where He Fails to Demonstrate Actual Conflict Between Division III's Decision Regarding the Availability Of Emotional Distress Damages and Prior Appellate Court Decisions

While Washington recognizes the importance of the human-animal bond, Washington also uniformly recognizes that for purposes of tort and contract law, pets are personal property. *See Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006); *Sherman v. Kissinger*, 146 Wn. App. 855, 870, 195 P.3d 539 (2008); *Hendrickson v. Tender Care Animal Hosp.*, 176 Wn. App. 757, 767, 312 P.3d 52 (2013). In Washington, a pet owner has no right to emotional distress damages for loss of the human-animal bond based on the negligent death or injury to a pet or for breach of a contract for veterinary services. *Hendrickson*, 176 Wn. App. at 762, 767; *Sherman*, 146 Wn. App. at 873. There is also no cause of action for negligent infliction of emotional distress or emotional distress suffered due to injury to a pet. *Pickford v. Masion,* 124 Wn. App. 257, 260, 98 P.3d 1232 (2004). *See also Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006).

Mr. Repin mistakenly takes a comment out of context from *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 635 P.2d 441 (1981), in claiming that the opinion below creates a conflict between courts. Pet.

Review at 5. *Barr* involved a question of whether to apply the law of Florida or the law of Washington to the plaintiff's claim for punitive damages. *Id.* at 696. In holding that Washington law applied, *Barr* quotes *Spokane Truck & Dray Co. v. Hoefer*, 2 Wn. 45, 25 P. 1072 (1891), for the propositions cited by Mr. Repin. *Barr*, 96 Wn.2d at 700 (quoting *Hoefer*, 2 Wn. at 52-53). The *Hoefer* court rejected the plaintiff's claim for punitive damages, objecting to adding the criminal element of punishment into the civil system. *Hoefer*, 2 Wn. at 51-52. *Barr* does not deal with emotional distress damages. It does not address available remedies for the death of a pet. It does not conflict with Division III's decision.

Both concurring opinions recognize the law is well-settled. Judge Lawrence-Berrey states that "[c]urrent law that requires dismissal should not be judicially changed." *Repin*, 198 Wn. App. at 286 (Lawrence-Berrey, J., concurring). Likewise, Judge Fearing acknowledged that he is "bound by earlier Washington Supreme Court and Court of Appeals decisions to affirm denial to Robert Repin of emotional distress damages." *Id.* at 279-80 (Fearing, C.J., concurring). While Judge Fearing felt compelled to "advocate for a change in the law," *Id.*, his opinion offers no basis for this Court to accept review under RAP 13.4(b)(1) or (2) because it agreed that the law is well-settled and did not identify any conflict. And as shown

below, Mr. Repin's attempts to identify conflicts are fatally flawed. This Court should deny review on this ground.

B. The Court Should Deny Mr. Repin's Petition for Review Where His Emotional Distress Claim Fails to Present an Issue of Substantial Public Interest

There is no recognized cause of action in Washington for wrongful death of a dog. *Sherman*, 146 Wn. App. at 860 n.1. Although Mr. Repin does not couch his claim in terms of the wrongful death of Kaisa, he does seek emotional distress damages for damage to that relationship. *See* Pet. Review at 16-20. Chief Judge Fearing also couched his criticism of the law in terms of the human-animal bond:

> I criticize current Washington law in that state law may impose a strict prohibition on a pet owner recovering emotional distress damages for loss of a human-animal bond based on the negligent death or injury to a pet.

Repin, 198 Wn. App. at 286 (Fearing, C.J., concurring). Mr. Repin's claims are no more than wrongful death claims repurposed as breach of contract or negligence claims.

"[C]ourts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law." *Philippides v. Bernard*, 151 Wn.2d 376, 390, 88 P.3d 939 (2004). Indeed, since the Legislature has created a comprehensive scheme governing who may recover for wrongful death and

survival, there is no room for this Court to act in that area. *See Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 36, 323 P.2d 241 (1958) ("A legislative enactment, intended to be comprehensive upon a subject, pre-empts that field").

The Legislature has made various, difficult policy decisions regarding who may recover for wrongful death, allowing spouses, domestic partners, children, and parents of minor children to sue for wrongful death. RCW 4.24.010, RCW 4.20.020. But it has also decided that there is no cause of action for other relationships, such as parents of adult children and siblings (except when financially dependent), grandparents, and dear friends. *See* RCW 4.20.020. Similarly, the Legislature did not create a cause of action to recover for the wrongful death of a companion animal. *See id.*

Importantly, in 2008, the Legislature considered, and failed to adopt, a cause of action for "wrongful injury or death of a companion animal." *See* H.B. 2945, 60th Leg., Reg. Sess. (Wash. 2008). Chief Judge Fearing and Mr. Repin both invite this Court to accept review, because "the judiciary, without input from the Legislature, created the rule denying emotional distress damages for breach of veterinarian contracts." *Repin*, 198 Wn. App. at 285. *See also* Pet. Review at 19-20. Chief Judge Fearing and Mr. Repin are mistaken. The Legislature has decreed who may recover for wrongful death. There is no gap for this Court to step in and fill.

"[T]he Legislature is the fundamental source for the definition of this state's public policy and [the courts] must avoid stepping into the role of the Legislature by actively creating the public policy of Washington." *Sedlacek v. Hills*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). If there is to be a change in the public policy of this State to establish a cause of action for wrongful death of a dog, or to allow emotional distress damages for either negligent injury to a pet or breach of a bailment contract for veterinary services, it is a question for the Legislature. *See Sherman*, 146 Wn. App. at 860 n.1; *Hendrickson*, 176 Wn. App. at 767; *Pickford*, 124 Wn. App. at 263. "An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature." *Sedlacek*, 145 Wn.2d at 390. Judge Lawrence-Berrey recognized that the courts should defer to the Legislature to weigh the benefits and costs of public policy. *Repin*, 198 Wn. App. at 287 (Lawrence-Berrey, J., concurring). This Court should also recognize the questions presented for review are within the Legislature's purview and decline to accept review.[3]

[3] Mr. Repin also claims review is proper because the Court of Appeals misread the record regarding his "zone of danger" claim and adopted the majority view of other states. The State disputes Mr. Repin's claim that the record supports a "zone of danger" claim, but in any event he shows no conflict with precedent, nor an issue of substantial public interest. Pet. Review at 7-8, 11. This Court should deny review.

C. The Court Should Deny Mr. Repin's Petition for Review Where He Fails to Demonstrate Actual Conflict Between Division III's Decision and Prior Appellate Court Decisions Regarding Application of Restatement (Second) of Contracts § 353

In general, a plaintiff cannot recover emotional distress damages for breach of contract. *Restatement (Second) of Contracts* § 353; *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 440-48, 815 P.2d 1362 (1991). The Restatement states:

> Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

Restatement (Second) of Contracts § 353. In *Gaglidari*, the plaintiff brought a claim for breach of an employment contract for discharging her without complying with the terms of her employment handbook. *Gaglidari*, 117 Wn.2d at 430. The plaintiff sought emotional distress damages for the breach of the contract. *Id.* at 431. The court held it was error for the trial court to have awarded emotional distress damages based on breach of contract, stating: "We do not believe a change is warranted either on the basis of common law, the Restatement of Contracts, Washington precedent, or public policy." *Id.* at 440. Indeed, *Gaglidari* held that emotional distress damages are not recoverable for breach of an employment contract, stating:

> The quantum leap which the plaintiff urges us to take in explicating the common law is justified neither by the cases of other jurisdictions, the Restatement, Washington law, nor

> public policy in dealing with employment contracts. It was error for the trial court to allow plaintiff to seek emotional distress damages in this case.

Id. at 448.

The purpose of torts is "to protect citizens and their property by imposing a duty of reasonable care on others," while the purpose of contracts is "to enforce expectations created by agreement." *Berschauer/ Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). *Gaglidari* was concerned about the effect of § 353 on this distinction between tort and contract:

> The impact of allowing emotional distress damages for breach of contract would indeed be enormous. It is easily predictable there would be a jury issue on emotional distress in nearly every employee discharge case and in fact nearly every breach of contract case. The contractual consensus of the parties will become secondary to an action in tort. This will represent a profound change in the law, the implication of which can be explained only by adverting to the "Law of Unintended Consequences." If there is to be a change of the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring.

Gaglidari, 117 Wn.2d at 448. This concern was echoed in *Hendrickson*:

> Thus, recognizing for the first time the existence of emotional distress damages for reckless breach of a bailment contract for veterinary services would constitute a significant change in the law.

Hendrickson, 176 Wn. App. at 767. Mr. Repin does not draw this Court's attention to any Washington case that actually applies § 353 to create a

claim for emotional distress damages arising out of a contract action because there is no case that has done so.

Instead, Mr. Repin argues this Court should accept review because he claims that *Hendrickson* conflicts with *Thomas v. French*, 30 Wn. App. 811, 638 P.2d 613 (1981), and *Cooperstein v. Van Natter*, 26 Wn. App. 91, 611 P.2d 1332 (1980). *Thomas* and *Cooperstein* held that emotional distress damages were available when the breach of contract was intentional or reckless and the defendant had reason to know when the contract was made that a breach would cause mental suffering. *Thomas*, 30 Wn. App. at 817; *Cooperstein*, 26 Wn. App. at 99. However, *Gaglidari* held that *Thomas* and *Cooperstein* had interpreted the *Restatement* too broadly, stating:

> [W]hile Washington case law has recognized that a breach of contract may also lead to a related tort claim, we have yet to erase the traditional distinction between tort and contract damages in order to award damages for emotional distress on an ordinary breach of contract action. Anything to the contrary in *Thomas* or *Cooperstein* is specifically disapproved.

Gaglidari, 117 Wn.2d at 445. Under *Gaglidari*, emotional distress damages may be available on a breach of contract claim where the type of contract renders emotional suffering foreseeable from the outset. *Id.* However, there is no Washington case (including *Thomas* and *Cooperstein*) that allows emotional distress damages for breach of the type of contract at issue here. Mr. Repin repeats the arguments disapproved of in *Gaglidari*, asking this

Court to overreach in urging acceptance of review based on a nonexistent conflict between *Hendrickson* and *Thomas/Cooperstein*. The consideration of whether to erase the distinction between tort and contract damages and allow emotional distress damages for breach of contract is a matter for the Legislature to consider. Review should be denied.

D. The Court Should Deny Mr. Repin's Petition for Review Where He Fails to Demonstrate Actual Conflict with Prior Appellate Decisions Regarding His Outrage Claim

To prevail on a claim of outrage, Mr. Repin must prove: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe emotional distress on the part of the plaintiff. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002). *See also Womack*, 133 Wn. App. at 260-61. "The first element requires proof that the conduct was '*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*'" *Robel*, 148 Wn.2d at 51 (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)) (emphasis in original). The level of outrageousness required is high and is not easy to meet. *Christian v. Tohmeh*, 191 Wn. App. 709, 736, 366 P.3d 16 (2015).

Although the three elements present fact questions for the jury, the first element only goes to the jury after the court "determine[s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result

in liability." *Robel*, 148 Wn.2d at 51 (quoting *Dicomes*, 113 Wn.2d at 630). The Court of Appeals acknowledged this distinction, stating that the elements of outrage are generally questions of fact, but that a trial court must make an initial determination as to whether the conduct is sufficiently outrageous to be decided by a jury. *Repin*, 198 Wn. App. at 266. Thus, the Court of Appeals opinion does not conflict with the statement in *Robel* that the elements of outrage are traditionally a question of fact, as suggested by Mr. Repin. *See* Pet. Review at 5. Mr. Repin also claims that the opinions relied on by the Court of Appeals are distinguishable from the present case. Pet. Review at 6-7. Even if true, the use of analogous, but distinguishable, cases does not create a conflict. Mr. Repin fails to show how the Court of Appeals' decision regarding his outrage claim meets the RAP 13.4(b) criteria. Review should be denied.

E. The Court Should Deny Mr. Repin's Petition for Review Where He Fails to Demonstrate Actual Conflict with Prior Appellate Decisions Regarding His Conversion Claim

Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession. *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005). An essential element of conversion is the taking of possession, actual or constructive, of the chattel. *Martin v. Sikes*, 38 Wn.2d 274, 287, 229 P.2d 546 (1951). "One who would otherwise be liable for conversion . . . is not

liable to the extent the other has effectively consented to the interference with his rights." *Michel v. Melgren*, 70 Wn. App. 373, 378, 853 P.2d 940 (1993). Here, the Court of Appeals emphasized: (1) Mr. Repin lay next to or held Kaisa during the euthanasia; (2) Dr. Cohn-Urbach never sought title of possession of Kaisa; (3) Mr. Repin never relinquished possession of Kaisa; and (4) Mr. Repin agreed to some care being given. *Repin*, 198 Wn. App. at 271. On these bases, the Court of Appeals held Mr. Repin could not make a prima facie case for conversion. *Id.*

Nevertheless, Mr. Repin urges this Court accept review based on a perceived conflict with *Burr v. Lane*, 10 Wn. App. 661, 517 P.2d 988 (1974). *See* Pet. Review at 10. In *Burr*, the defendant rented a car, did not return the car within the timeframe specified in the rental agreement, was involved in a motor vehicle accident while driving the car, and ditched the car in the lot of another location of the car rental company. *Id.* at 662-63. Under these facts, *Burr* agreed with the trial court that the defendant had converted the car. *Id.* at 667. *Burr* is distinguishable from this case. Dr. Cohn-Urbach did not use Kaisa in a way similar to the defendant in *Burr*. Instead, she performed a service that Mr. Repin contracted for her to perform. Whether the performance met the expectation of the contract is a different matter from whether Dr. Cohn-Urbach converted Kaisa to her use. As such, any perceived conflict between *Burr* and the decision below is

insufficient to serve as a basis for review under RAP 13.4(b)(2).[4]

F. The Court Should Deny Mr. Repin's Petition for Review Where He Fails to Demonstrate Actual Conflict with Prior Appellate Decisions Regarding His Lack of Informed Consent Claim

Under the medical malpractice act, Chapter 7.70 RCW, in order to meet a prima facie case for lack of informed consent, a plaintiff must prove:

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1). In adopting RCW 7.70.050, the Legislature codified the common law doctrine of informed consent. *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 125, 170 P.3d 1151 (2007). The medical malpractice act, including the lack of informed consent claim, does not apply to veterinary care. *Sherman*, 146 Wn. App. at 865-69. The policy behind the lack of informed consent doctrine supports Dr. Cohn-Urbach's argument that this cause of action is inapplicable:

---

[4] Mr. Repin pleads an alternative claim for trespass to chattels. However, he presents no basis for review of the dismissal of this cause of action. "[A]ssignments of error unsupported by citation of authority or legal argument will not be considered." *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 795, 523 P.2d 193 (1974).

> The phrase 'informed consent' refers generally to legal theories of recovery in medical tort cases that depend, not on the appropriateness or inappropriateness of the doctor's diagnosis and treatment of the patient's condition, *but on the patient's right to know the conditions of his body and to make a decision regarding his medical care.*

Keogan v. Holy Family Hosp., 95 Wn.2d 306, 313, 622 P.2d 1246 (1980) (emphasis added). As lack of informed consent stems from the individual's right to control what happens to his own body, not the body of his pet, logic dictates that the doctrine only be applied to human patients. *See Ladnier v. Norwood*, 781 F.2d 490, 494 n.8 (5th Cir. 1986). Indeed, the panel recognized that "the principle rationale of patient sovereignty behind informed consent clumsily fits in the context of animal care." *Repin*, 198 Wn. App. at 276. If the lack of informed consent is to be expanded to apply in the veterinary context, this is a policy consideration for the Legislature. *Sedlacek*, 145 Wn.2d at 390. This Court should decline review.[5]

V. CONCLUSION

The human-animal bond, while undeniable, is also uncompensable under Washington law. If Washington law is to be expanded, it is for the Legislature to do so. Review should be denied.

---

[5] Mr. Repin claims the Court of Appeals erred in disregarding unpublished decisions from Ohio and Texas. Pet. Review at 14. However, the unpublished decisions of foreign jurisdictions are insufficient to create a conflict among Washington decisions. Mr. Repin also pleads an alternative cause of action for "negligent misrepresentation by omission." However, he presents no basis for review of the dismissal of this cause of action. "[A]ssignments of error unsupported by citation of authority or legal argument will not be considered." *Hamilton*, 83 Wn.2d at 795.

RESPECTFULLY SUBMITTED this 5th day of June, 2017.

ROBERT W. FERGUSON
Attorney General

Jason D. Brown, WSBA #39366
Assistant Attorney General
Torts Division, OID: 91106
Office of the Attorney General
1116 W. Riverside Avenue, Suite 100
Spokane, WA 99201
(509) 456-3123
JasonB@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Respondent and Appendix by US Mail Postage Prepaid to the following address:

Adam P. Karp
Animal Law Offices
114 West Magnolia Street, Suite 425
Bellingham, WA 98225

Sent via electronic mail to:

adam@animal-lawyer.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of June, 2016, at Spokane, Washington.

Sidnie Bernhardt

SIDNIE BERNHARDT
Legal Assistant III
Torts Division, OID: 91106
1116 West Riverside Avenue, Suite 100
Spokane, WA 99201-1106
(509) 458-3536