Washington State Court of Appeals
Division III

Docket No. 340490

Kittitas Cy. Sup. Ct. Cause No. 142002176

ROBERT REPIN,

Plaintiff-Appellant,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

APPELLANT'S APPEAL BRIEF

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2. Refusing to permit Mr. Repin to recover noneconomic damages arising from the traditional negligent infliction of emotional distress rule involving zone of danger.

3. Dismissing Mr. Repin's claim for outrage.

4. Dismissing Mr. Repin's claim for conversion/trespass to chattels.

5. Dismissing Mr. Repin's claim for lack of informed consent/negligent misrepresentation by omission.

Issues Pertaining to Assignments of Error

A. Did the trial court err in excluding recovery of noneconomic damages for breach of contract?

B. Did the trial court err denying recovery of noneconomic damages for negligence?

C. Did the trial court err dismissing the claim for outrage?

D. Did the trial court err dismissing the claim for conversion/trespass to chattels?

E. Did the trial court err dismissing the claim for lack of informed consent/negligent misrepresentation by omission?

II. OVERVIEW

This lawsuit rests on the disturbing premise that Defendant Dr. Cohn-Urbach, a WSU/CVM resident, took numerous wrongful and completely unnecessary gambles with the manner of hastening the death of Mr. Repin's beloved dog, Kaisa. At about 1:30 a.m. on Sept. 27, 2012, the contract he signed for euthanasia was mateirally breached and the opposite (dysthanasia) transpired. **CP 337-38 ¶ 4**. As she was supposed to be drawing her last breaths, Kaisa's

whole body jerked violently and she screamed in agony, knowing she was being killed. For the next several minutes of hell, Kaisa struggled in desperation, staring deeply into Mr. Repin's face, her eyes begging that he explain why he was ending her life so torturously while at the same time showing panic and agitation that could have resulted in severe personal injury to Mr. Repin, the veterinary student present in the room, and Dr. Cohn-Urbach had he not restrained her with all his might. Because of her unpreparedness and refusal to place a new, working catheter prior to administering the Acepromazine and first injection of Euthasol, Dr. Cohn-Urbach had to leave Kaisa and Mr. Repin to retrieve another 15 mL of Euthasol and return to attempt uncatheterized intravenous administration in a now struggling, painfully conscious, and terrified patient.

In the crucible of the attempted euthanasia, Dr. Cohn-Urbach singlehandedly destroyed a lifetime of trust between Mr. Repin and Kaisa. Those who choose to be present during the euthanasia of their animal companions present acute medical concerns of foreseeable adverse psychological reactions. Dr. Cohn-Urbach knew or should have known the peril involved when allowing a veterinary student to administer caustic euthanizing solution (without Mr. Repin's consent) through a damaged catheter (the end of which having been chewed off), using a contraindicated premedicating tranquilizer (in insufficient dose), and failing to sufficiently warn Mr. Repin of such risks taken not only with Kaisa, but

also Mr. Repin, who hired WSU/CVM to provide a "world class" service. Instead, both suffered ignominious disservice.[1]

III. STATEMENT OF THE CASE

Then three weeks of age, orphaned by a lactating mother struck on a rural highway, the pup should have died. Rescued by Mr. Repin's niece, who nursed her to vigorous health, she instead was delivered to her uncle, her path then bound to memorably cross with that of who he called his "millennium baby." To the best of their calculations, she was probably born January 1, 2001 – the first day of the new millennium. "[I]t was something that was, by my way of thinking again, meant to be." **CP 181 (6:19—7:25); CP 337 ¶ 2.** This Alaskan Malamute began her life just as Mr. Repin entered middle age. Today, at age 58, Mr. Repin is a regular Dick Proenneke (of *Alone in the Wilderness* fame). Single and with no biological children, he lives alone in a small cabin built by hand on the Blewett Pass Highway. Mr. Repin thrived independently and by his own wits and skill as a gold prospector digging tunnels into the earth to find that elusive symbol of freedom – with Kaisa by his side for nearly twelve years. **CP 337 ¶ 2.**

As adventurous as she was independent, the two spirits bonded and aided one another through life's vicissitudes. Kaisa put her exclusive trust in Mr. Repin

[1] Importantly, WSU showcases "A gentle goodbye," complete with a touching, 2012-posted, 3-minute video clip narrated by Kathy Ruby, Director of the Pet Loss Hotline. Ms. Ruby invites the public to learn more about the CVM and the pet loss/euthanasia services. https://www.youtube.com/watch?v=vYwTrBaBFRw (accessed Dec. 27, 2015); *see www.youtube.com/watch?v=Y_PMOGKtdnE* for longer version (accessed Dec. 27, 2015). **CP 177-78.** She acknowledges that animals like Kaisa are "family members," adding that WSU/CVM trains students to deal with grieving people not only because of the short age span of most nonhuman patients, who die earlier than human beings, and for whom euthanasia is an option, but also recognizing that veterinarians are "facing death with their clients up to five times more often than human doctors do." She adds how imperative it is for them deal with animals and their guardians in a different way.

– a rare honor bestowed by an alpha female who would not tolerate strangers or allow them to approach, much less touch her, without Mr. Repin's assurance. Only an exceptional few could hold their faces near hers, a closeness founded on unconditional trust. Mr. Repin cherished it, throughout Kaisa's entire life. When veterinarians prodded, Kaisa acquiesced because Mr. Repin held her, stating, "It's OK, baby, I'm here." From the day she entered his life to the moment she died, Mr. Repin vowed to never betray her trust in him. **CP 337 ¶ 3.**

Speaking Kaisan,[2] Mr. Repin knew that when her health began to falter, and the time came to give her peace, she deserved no less than euthanasia under the most respectful and humane circumstances possible. On Sept. 26, 2012, at his regular veterinarian's recommendation, Mr. Repin traveled 200 miles to Pullman to have Kaisa seen by Dr. Cohn-Urbach and staff at the WSU/CVM-Veterinary Teaching Hospital, to determine whether the time to let her go had come and, if so, to do so without disruption, fear, or suffering. Believing she only had a few weeks to live and that Kaisa would suffer, "rather than a few weeks of continual agony," Mr. Repin signed a *Consent for Euthanasia* agreement and decided that it was the most humane thing he could do for her, at "the place where they are the best of the best at what they do." **CP 186 (25:1-7).** Alerting her to the deeply

[2] Kaisa was his everything. Over that time, he learned how to read her mannerisms and vocalizations the way a foreign language student figuratively thrown in the deep end of a linguistic pool learns the native tongue of her his new home after swimming there for over a decade. Kaisa did not make it difficult to develop a canine vocabulary, for she was quite vocal. Mr. Repin became keenly aware of when she was painful or suffering. **CP 182 (9:1—10:5)** (she learned to say "I want out"; he would know when she "was crying as if her gut or something hurt" and he knew she was in pain). In the day or two before her death, she had a rough night and was in terrible pain with many vocalizations. **CP 183 (17:25—18:10)** (describing his staying up with her that night, getting very little sleep, rolled up in a blanket with her when"[s]he would squeal, as if she was in pain for 30 seconds, maybe a minute").

emotional and delicate nature of the procedure to be performed, Mr. Repin cautioned Defendant Dr. Cohn-Urbach,[3] however, that "if there are any papers that I need to sign, I want to do it now ahead of time." He "would not be able to afterwards." **CP 185 (24:20-23)**.

Dr. Cohn-Urbach admits that once or twice, before attempted euthanasia, Mr. Repin expressed that Kaisa did not like being handled without him present. **CP 207 (104:16-25).** Indeed, when she first met Kaisa, Mr. Repin was in the back of the hospital with Kaisa, in an area where clients are not typically allowed – because he insisted on being with her and did not want to leave her side. **CP 208 (105:1-10).** Dr. Cohn-Urbach acknowledges that Mr. Repin spent a great deal of time reflecting on how best to proceed. ***Id.*, 105:15-17**. She admits he was invested in Kaisa's well-being, involved in making decisions for her care, and paying attention to what he was being told about prognosis and treatment options. ***Id.*, 106:1-10.**

[3] Dr. Cohn-Urbach began her one-year internship at WSU/VTH in June 2012. In June 2013, she began a three-year residence at Oregon State University's Veterinary College. Dr. Cohn-Urbach left the country in March 2015, having been terminated prematurely as a three-year resident at Oregon State University's Veterinary School for reasons related to her supervisors' perception that she was overconfident and arrogant. **CP 197 (62:12—63:10; 63:24—64:14).** Mr. Repin notes her arrogance as well. **CP 185 (22:8—23:1, 23:6-25), CP 188 (33:11-12, 33:17-19, 33:22—34:7)**(rolling of eyes, acting extremely confident and dismissive of others, and exemplified by her telling Ms. Feist that she would make a chewed-on catheter work). On the date Kaisa died, Dr. Cohn-Urbach was 25 years old. She obtained her Bachelor's of Veterinary Science in Australia in 2009, at the age of 22. **CP 197 (64:24—65:9).** Dr. Cohn-Urbach admitted that the 4th year veterinary student, Jasmin Feist, also age 25, had to go through three more years of college education to obtain her DVM, what she contends is the equivalent veterinary degree to her BVSc. **CP 198 (65:10—66:3).** Dr. Cohn-Urbach describes the four-year American undergraduate degree as "irrelevant." **CP 198 (67:5-11).** On Sept. 27, 2012, Ms. Feist had more years of education in an academic setting than Dr. Cohn-Urbach, yet the State permitted Dr. Cohn-Urbach to supervise her. **CP 198-99 (67:15-23; 70:13-14).** Dr. Cohn-Urbach reasoned that she had "a lot more veterinary experience" than Ms. Feist, having been "out in practice for two-and-a-half years." ***Id.*** Prior to Kaisa, Dr. Cohn-Urbach had performed 25-35 euthanasias. **CP 208-09 (108:24—109:12).**

Before Mr. Repin walked Kaisa from the ICU to what they call the "quiet room" for the euthanasia procedure, Mr. Repin signed a *Consent to Euthanasia* form. **CP 126, 187 (30:25—31:2)** (walking Kaisa from ICU). He did not grant permission for WSU/VTH to perform a necropsy or use Kaisa for educational purposes. ***Id.*** Neither Dr. Cohn-Urbach nor fourth-year veterinary student Jasmine Feist nor any other person brought Mr. Repin's attention to the part of the *Consent* that stated, "I hereby release the Washington State University Veterinary Teaching Hospital, their agents, and representatives, from any and all liability for said animal." **CP 338 ¶ 5**. Further, Dr. Cohn-Urbach did not refer to the procedure as "humane destruction," but always as "euthanasia." She stated that she would first:

> administer a mild sedative, that would help relax Kaisa, and then it would take a little while for that to take effect, and then when they – the second shot would be the euthanasia solution. And that if Kaisa gave a little muscle twitch, a little leg twitch, to not be concerned because it's only nerves and she would be passed away by that time if there was any sort of leg twitching is what she said to me.

CP 187 (29:22—30:6). She added that Kaisa might also have "possibly a deep breath." ***Id.,* 30:8-10.** Finally, she explained that the Euthasol would, "in very short order, stop her heart and she will pass away peacefully." ***Id.,* 32:11-15.** Dr. Cohn-Urbach's testimony does not vary significantly. She admits that she told him about deep gasps and tremors but did not enumerate any other types of adverse effects, such as convulsions or fighting to get away, noting that "the most horrifying thing for an owner to see in an owner-present euthanasia setting is agonal gasping, tremors, and convulsions." **CP 208 (106:11—107:20).**

Despite being an Arctic breed predisposed to vocalization, Dr. Cohn-Urbach failed to sufficiently apprise Mr. Repin of the risk of vocalization during euthanasia. **CP 240 ¶ 13(d).**

After settling into the quiet room and getting into position, hyperaware to what was being said in the "very tiny" room, and listening acutely for Kaisa's last heartbeat (**CP 188 (35:14-22)**), Mr. Repin recalls Ms. Feist exclaiming that Kaisa had "chewed off the end of her catheter[.]" He explains:

> A. Jasmine and Margaret Cohn-Urbach were on one side, Kaisa and I got comfortable on the floor, she laid down and closed her eyes and was relaxing. Urbach described what was going to transpire, and she said any time you're ready, Mr. Repin, we'll go ahead and proceed. So I said, Okay, I'm ready. Jasmine I heard say, oh, look, Kaisa has chewed off the end of her catheter, should I go get another one? That's what was said. Margaret responded no. I will show you how to still make this one work.
> **Q. Okay. So did you look at the catheter?**
> A. I'm not a doctor. I'm not a vet. I barely knew what a catheter was. I looked up, Margaret was on her knees with what was explained to me as the first shot was going to be the Acepromazine. She had just said to Jasmine, no, I -- being the key word -- will show you how to still make this one work. And she was starting the injection. I looked up and her wrist was towards me, the needle was in her hand, and she was injecting into the catheter. I wouldn't know what's good or bad on the catheter. She was absolutely confident, and I thought to myself, she's been totally confident all night and it may be going against my grain a little bit, she seems a little too cocky but she seems to know what she's doing. And she proceeded to inject the Acepromazine.

CP 188 (33:4—34:1). Mr. Repin disputes that they flushed the catheter to check for patency, noting:

> It was explained to me that the first injection was going to be the Acepromazine. I suspect if they were going to flush the catheter first, they would have said, hey, Mr. Repin, don't worry, don't worry, this isn't the stuff. We're just cleaning out the catheter.

> They would have told me. I would have been concerned, as any owner would have been, seeing a needle go to the catheter thinking, oh, my God, this is it. They never told me that they were going to flush it. I don't think they ever did. I think Margaret Cohn-Urbach was so confident in her skills, and she flat out told me the first injection was going to be the sedative, the Acepromazine. That's what she told me. That's what they did.

***Id.*, 35:23—36:12.** It should be noted that at the end of her graveyard shift, Dr. Cohn-Urbach met with the then-Director of WSU/VTH, Dr. Harmon Rogers, just as he was coming in to start his day. He instructed her to create an addendum to the record describing the problems encountered during the attempted euthanasia. **CP 230 (94:4—95:1).** In this addendum, Dr. Cohn-Urbach describes Kaisa "reacting" to the Euthasol from the first injection through the second injection. **CP 212-13.** Dr. Rogers's 4:27 p.m. email of Sept. 27, 2012 to Bryan Slinker, William Dernell, and Charlie Powell states that "the process was not smooth possibly because of a poorly placed catheter." His email at 5:00 p.m. asserts, "At the time of euthanasia the IV catheter looked questionable… It is possible that the euthanasia solution was perivascular." **CP 130-31**.[4]

There is no dispute that one should not use a catheter for euthanasia if it has been damaged, such as chewed on. **CP 200 (73:9-11).** Plaintiff's expert Victoria Peterson, DVM, JD confirms that one should never use a damaged or suspect catheter during an owner-present euthanasia. **CP 240 ¶ 13(e).** She adds that the standard of care in performing small animal euthanasia with the owner present is to administer a premedication with anxiolytic, analgesic, somnolent and

[4] Dr. Cohn-Urbach opined that Kaisa was *not* having a secondary excitatory response to the Euthasol – further proof that it went perivascular and her reaction was one of extreme pain. **CP 209 (109:13-21).**

sedative properties. **CP 236-38 ¶ 13(a).** Given Kaisa's charted history as not being friendly to strangers and growling, and Mr. Repin's own statements to Dr. Cohn-Urbach about Kaisa being scared and defensive around veterinary personnel, it was more imperative that proper premedication be given. ***Id.*** Dr. Peterson explains that Acepromazine is not a sedative, anesthetic, anxiolytic, or analgesic and could even make an animal more excited, unpredictable, and dangerous by acting as a stimulant. ***Id.*** Furthermore, Acepromazine, if given with drugs like Euthasol (i.e., containing phenytoin), may decrease metabolism and diminish the Euthasol's effectiveness at slowing the heart. ***Id.;*** **and see CP 263-69.** A prudent veterinarian should never administer Acepromazine alone as a premedication for any euthanasia solution, like Euthasol.

Defendants admit that Euthasol has a pH of at least 12, is quite alkaline and caustic, and very painful if injected perivascularly. **CP 216, 219**. It is also very viscous and thick. **CP 204 (89:17-19).** For an aged dog like Kaisa, purportedly suffering from metastatic cancer, less than 9 mL of Euthasol would have sufficed to render her quickly unconscious, nonreactive, and unable to stand. **CP 241-42 ¶ 13(g), 13(h), 13(i).** Mr. Repin describes the events upon Ms. Feist injecting the undiluted Euthasol solution (**CP 204 (89:20—90:1)**(Cohn confirming undiluted)):

Q. Okay. So then walk me through what happened with the first injection of Euthasol.
A. As I was listening to Kaisa's breathing and her heart beat and waiting to hear her last heartbeat, since I did not watch that injection, my head was buried in Kaisa's fur on her neck, holding her, listening to her breathe and her heart beat. When Margaret says, Okay, Mr. Repin, we're ready for the second injection, are you ready? I said, Yes. I don't

know how many seconds it took to actually start the injection but -- so I don't know exactly when the injection started, but 10 to a maximum of 20 seconds later my dog woke up screaming. She was on her feet panicking, screaming in agony. I said, What the fuck is going on here? I said, This can't fucking be happening. I had to wrestle her back to the floor. I had to hold her down and listen to her scream. Margaret and Jasmine had backed up against the wall. They didn't know what the fuck to do. Jasmine said, My God, it's not working. What should we do, she says? My dog didn't know what the fuck was going on. She would have tore those girls apart if I let go of her. All she knew was she was in fucking pain and she wanted to get out of there and I had to hold her down. She looked at me, like, dad, what are you doing? What are you doing to me? Jasmine said somewhere, What do we do? Should I go get another catheter? Margaret says, I'm out of medication. I said, This can't be fucking happening. They stood there for, I don't know, not very long but seemed for an eternity, Margaret says, I got to go get some more.

CP 189 (38:3—39:4). After this first injection, Dr. Cohn-Urbach left the room for about five to seven minutes. ***Id.,* 39:5-10.** Kaisa was struggling the entire time. ***Id.,* 39:14-15**. Mr. Repin did not let Kaisa get to all four of her feet. ***Id.,* 39:16-19**. Neither Dr. Cohn-Urbach nor Ms. Feist tried to help restrain Kaisa, so Mr. Repin held a screaming Kaisa in his firm grip. There was no pause in her agony. **CP 189-90 (39:22—41:1).** If he lost his hold of Kaisa, she would have "chewed the shit out of [Dr. Cohn-Urbach and Ms. Feist], and maybe me." ***Id.,* 42:1-13.** Mr. Repin was placed in imminent danger and fear that Kaisa might turn on him and cause grievous physical injury. Her jaws were close enough to his neck and other appendages that in her panic she could have easily bitten him. Ms. Feist was so petrified that she had her back to one of the walls of the quiet room. She was visibly terrified. **CP 338-39 ¶ 7.**

Dr. Cohn-Urbach and Ms. Feist both agree that Kaisa "reacted" to the

Euthasol. After administration of what Defendants contend was 19 mLs (enough to kill a 190-pound dog), Dr. Cohn-Urbach admits that Kaisa "was conscious" and "awake." **CP 202 (84:14-17).** Specifically, she asserts that by the time 19 mL Euthasol was injected, Kaisa looked "really awake" with her eyes "open" at the time. **CP 204 (91:21—92:12).** Further, she admits that while conscious, Kaisa vocalized three times (as if barking or howling) and was looking at her left, catheterized leg. ***Id.*, 90:24—91:6; CP 207 (102:19—103:2)** (admitting that Kaisa was looking at the left and right leg while being handled). She admits that Kaisa was also "looking at her right leg while [Dr. Cohn-Urbach] was injecting the euthasol in the right forelimb[.]" **CP 203 (85:8-12).**

Indeed, Dr. Cohn-Urbach's second report, which she understood to have legal significance, which would be part of Kaisa's permanent record, and which was authored the same morning of Sept. 27, 2012, stated that Kaisa was *still reacting* to the Euthasol at the time she injected the right forelimb. A reasonable inference from this statement is that Kaisa had no reprieve from excruciating pain of having the highly caustic solution go perivascular and into her surrounding tissues. **CP 205-06 (96:15—98:22), 211-13**. Ms. Feist testified that "towards the end of the [first injection of euthanasia] solution, Kaisa lifted her front end up and vocalized as I was finishing the medication." **CP 224, 226 (57:17-19; 65:13-24)** (recalling Kaisa making one loud cry, like a howl as she propped herself up on her front legs).

After Kaisa died, in a sadly characteristic (for Dr. Cohn-Urbach), cold, dismissive, and unprofessional manner, Dr. Cohn-Urbach offered Mr. Repin a

green, extra heavy duty Hefty trash bag in which to place her, even though she was laying on her own personal blanket from home the entire time.

A. I don't remember for certain who went to get the gurney. It might have been Jasmine, come to think of it. Because Margaret Urbach, when it was all done, she was pronounced dead, she got to her feet, I got to my feet, I think Jasmine was off going to get the gurney, and Margaret reaches over onto a shelf or into a little cubbyhole in a closet or something or on the floor, I don't even know where she got it, but she hands me an extra heavy duty Hefty trash bag, green, fully expecting I was going to throw my dog in the fucking garbage bag. And I think that's about the time Jasmine rolled in with the gurney, and I struggled, because the whole time Kaisa was on her own personal blanket from home this whole entire time. On the gurney when we first got there in the ICU and during the euthanasia procedure, she was on her own blanket so that she had some semblance of a familiar smell other than me. And I was fully prepared to wrap her up in her own blanket and take her home. And Margaret hands me a Hefty trash bag. That's incredibly insensitive for anybody. Which is probably the other thing that really set me off when I said, get the fuck away from my dog. Somebody during that time, and I honestly can't remember who, removed the catheter.

CP 190 (43:7—44:2). Dr. Peterson opines that such conduct is neither polite nor an appropriate gesture in an owner-present euthanasia, especially since Kaisa already had her own blanket. In fact, this action brings into question Dr. Cohn-Urbach's poor judgment altogether. **CP 243 ¶ 13(k).**

It is not as though Defendants had no advanced notice of Mr. Repin's emotional sensitivity. Prior to executing the *Consent for Euthanasia* form, Mr. Repin cautioned Dr. Cohn-Urbach that "if there are any papers that I need to sign, I want to do it now ahead of time." He "would not be able to afterwards." **CP 185 (24:20-23)**. Dr. Cohn-Urbach admits that once or twice, before attempted euthanasia, Mr. Repin expressed that Kaisa did not like being handled without

him present. **CP 207 (104:16-25).** Indeed, when she first met Kaisa, Mr. Repin was in the back of the hospital with Kaisa, in an area where clients are not typically allowed – because he insisted on being with her and did not want to leave her side. **CP 208 (105:1-10).** Dr. Cohn-Urbach acknowledges that Mr. Repin spent a great deal of time reflecting on how best to proceed. **CP 208 (105:15-17).**

Following Kaisa's death, Mr. Repin had Kaisa exhumed by Carl Wigren, MD and Victoria Peterson, DVM, JD. As described in their reports, Kaisa's limbs and heart blood were sent to Bruce Goldberger, Ph.D. at the University of Florida for testing of the concentration of pentobarbital and phenytoin in Kaisa at various locations. Dr. Goldberger opined, and Dr. Peterson joins in this opinion, that the Euthasol injected into the catheter went perivascular (i.e., outside the vein). **CP 240-41 ¶ 13(f).**

On the issue of whether the *Consent for Euthanasia* was breached, Dr. Peterson draws from RCW 16.52.011(2)(e), which defines "euthanasia" as:

> the humane destruction of an animal accomplished by a method that involves instantaneous unconsciousness and immediate death, or by a method that causes painless loss of consciousness, and death during the loss of consciousness.

Kaisa did not experience compliance with this definitional standard. ***Id.*** Nor would the experience she and Mr. Repin suffered amount to "humane destruction" as understood in the veterinary community and by the AVMA, Humane Society of the United States, and World Society for Protection of Animals. ***Id.*** Dr. Cohn-Urbach did not exercise prudent professional judgment in a euthanasia setting but, her actions and omissions, taken as a whole, amount to

gross negligence and recklessness. **CP 243 ¶ 13(l).**

Moreover, Kaisa suffered "the worst possible way." **CP 191 (54:9).** As a result, Mr. Repin endured exquisite and long-lasting mental anguish. He describes the impact extensively in deposition, including the change from being a nice, happy guy with a perfect life and no complaint in the world to a depressed, alcohol-dependent insomniac who lost his girlfriend and friends and suffered from years of headaches and inappetence. He describes the impact extensively:

A. Well, I'm asking you, what do you mean by that? My emotional damage includes a host of problems, issues, but they're not physically broken bones, if that's what you mean.
Q. Okay. So what are these issues that you're referring to?
A. I don't sleep.
Q. Okay. Anything else?
A. I have no patience with people. I've completely lost my patience with people, I suppose. I get angry very quickly. I used to be a nice guy. I used to have the perfect life. I have not a problem in the world. I'm a gold miner. I work my myself, for myself when I want. My life is perfect. I don't have a complaint in the world. I was a happy guy. And now I'm not. That's a big issue with me.
Q. I understand that. Anything else?
A. I drink every fucking night just to go to sleep. Used to be fun. Maybe on a weekend when the guys were over. If that's the kind of thing you're trying to get at. Sometimes if I've managed to get my mind off of this and I ignore Kaisa's photographs on my wall and I get my mind occupied on some other things, I can go to sleep. I can sleep a whole night. I'm usually -- I drink quite a bit. I need at least a few drinks before I can lay down and be able to go to sleep. And I never used to be like that.
Q. Okay. Anything else?
A. I have lost friends over this. Lost a girlfriend. She got tired of hanging around. Sent me an e-mail here a few months ago said I hope you find your happy again. I'm not a happy guy. Whether you want to call that depression, I don't know what the clinical signs of depression are. I don't know that definition. But I don't look forward to the next day like I used to. I don't really -- I don't really recognize me

anymore. It's not the same guy. I'm incredibly angry over this. My girl did not deserve to go out this way. She was saved when she was a tiny baby. She was saved for me. And I feel incredible guilt. I thought I was told the best thing possible for her. I purposely don't take these pictures of her off the wall. I can't. This story is not done yet. I don't know why this happened to me. As you saw in this photograph, no matter where she is in the room, she watches every fucking move I make. In my world she is waiting. That's an impossible photograph. That kind of stuff don't happen. She is waiting for me to somehow make this right. She didn't deserve to die that way. No dog deserves to die that way. I will get through this at some point. I will have taken this as far as I possibly can and I can look at her and say, Baby, I tried. This should not ever happen to anybody. That's probably my main focus on pursuing this impossible case. …

Mr. Repin continues:

Q. And then when you were talking about trouble sleeping as sort of a consequence of the emotional distress, were there any other types of physical symptoms, such as stomach problems, headaches, not wanting to eat, eating a lot, anything else, or just the insomnia?
A. It's been three years, this whole process so far. The first two years I had massive headaches all the time. Eating, not significantly. There were days when I wouldn't eat very much, but I'm one of those people that I have to force myself to eat sometimes because I get, I don't know, high -- I don't do well without food. So if I eat, it's because I force myself to.

CP 191-93 (56:13—58:14, 61:18—62:4). In addition to the significant noneconomic damages, Mr. Repin sought reimbursement for the cost of the attempted "euthanasia," mileage to and from WSU/VTH, and prejudgment interest on the liquidated sums of the invoice and mileage.

On Jan. 8, 2016, Kittitas County Superior Court Judge Frances Chmelewski heard Defendants' motion for summary judgment dismissal. While she allowed a few claims to survive, she dismissed several causes of action and

categorically eliminated the basis to recover any noneconomic damages. **CP 390-93.** The parties stipulated to discretionary review of the order, and the Court so certified. **CP 394-96.** On March 8, 2016, Commissioner Wasson granted discretionary review under RAP 2.3(b)(4) on all issues.

IV. ARGUMENT

The court erred barring multiple theories of liability, including those purportedly giving rise to general damages, substantially altering the status quo and ability of Mr. Repin to proceed with his case.[5] Several issues pose questions of first impression pertaining to nonhuman animal health care providers, with broad-scale impact for the state's thousands of veterinarians and veterinary technicians and millions of Washington companion animal guardians, as well as any other person or entity entering into animal-related contracts (e.g., groomers, trainers, boarders). On summary judgment, this court reviews the trial court *de novo*. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15 (1976).

A. Breach of Contract – General Damage Recovery.

The very title of the contract uses the word "euthanasia." Indeed, that was the term infusing all conversations. Regardless, Dr. Peterson has testified that euthanasia and humane destruction assuredly did not occur. As stated herein, Dr. Cohn-Urbach utterly failed in several respects to honor either contractual term. A material breach goes to the root or essence of the contract. Facts construed in the light most favorable to Mr. Repin strongly endorse the view that Dr. Cohn-Urbach

[5] After the dust settled, the court only permitted Mr. Repin to recover economic damages, which would amount to at most a few hundred dollars.

deprived him of the expected benefit (i.e., euthanasia/humane death); for which he could not be adequately compensated simply by refunding the modest sum for the injectables and procedure.

A material breach is one sufficient to allow rescission of a contract when it "substantially defeats the purpose of the contract." *Mitchell v. Straith,* 40 Wash.App. 405, 410 (1985); WPI 18-302.03 *Material Breach.* Breach of a substantial part of an entire contract gives the injured party an election to abandon the contract, or to perform and recover damages. *Campbell v. Hauser Lumber Co.,* 147 Wash. 140 (1928). In determining whether a breach of some, but not all, of the contract terms is substantial, rather than trivial or inconsequential, the jury may properly consider the question of fact as to whether the injured party would have been less willing to enter the contract without those terms. *Id.* Factors to consider in determining materiality are found in *Restatement (2nd) of Contracts* § 241 and *Bailie Comm., Ltd. v. Trend Business Systems,* 53 Wash.App. 77 (1988):

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of a benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeitures;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failures, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

A material breach goes to the root or essence of the contract. Facts construed in the light most favorable to Mr. Repin strongly endorse the view that Dr. Cohn-Urbach deprived him of the expected benefit (i.e., euthanasia/humane death); for which he could not be adequately compensated simply by refunding the modest sum for the injectables and procedure. No forfeiture, as traditionally understood by the maxim that courts are loathe to permit, would occur with a finding of material breach. The infliction of severe pain to Kaisa during what were to be her final moments could not be cured by leaving the room and trying again. The procedure as contracted for did not envision a hasty retry in order to put an animal out of the misery that the veterinarian inflicted moments before. Indeed, even according to Dr. Cohn-Urbach's charted note, there is no evidence that Kaisa stopped reacting prior to the second injection. The duty of good faith and fair dealing mirrors the fiduciary obligations described herein – both were violated.

The self-titled *Consent for Euthanasia* **(CP 126)** plainly promises to bring about the humane and swift death of the animal. Ordinarily, a veterinary medical malpractice action accuses the veterinarian of wrongly hastening or proximately causing the death of the animal; an action for a botched euthanasia, on the other hand, accuses the veterinarian of failing to bring about a good death. Although Kaisa did eventually succumb to the Euthasol, that fact does not end the legal inquiry, for Mr. Repin contracted with the Defendants as to the *time, place, and manner* of her passing (i.e., in his presence, early that morning, employing prudent and accept veterinary protocols and without torture).

In name, spirit, and letter, the euthanasia contract focused exclusively on, and explicitly contemplated, bringing about Kaisa's death without pain and suffering. While animals are indeed property under the law, this contract was *sui generis,* taking an undeniable Benthamite tack ("The question is not, Can they reason? Nor, Can they talk? But, Can they suffer?"), and concerning itself fundamentally with Kaisa's sensory and Mr. Repin's emotional experience. If denied them due to material breach, whether or not reckless in nature, emotional damages assuredly follow.

While *Pickford v. Masion,* 124 Wash.App. 257, 260-61 (II, 2004) barred emotional distress damages in the death of an animal, it did so only with respect to *negligence*. *Womack v. von Rardon,* 133 Wash.App. 254, 253 (III, 2006) expressly permitted it for *malice.* And the *Sherman* court expressly permitted it for *intentional* torts like conversion. *Sherman v. Kissinger,* 146 Wash.App. 855, 873 fn. 8 (2008). Mr. Repin claims emotional damages for breach of a euthanasia contract in two respects: (1) material breach of this type of contract *per se*; and (2) reckless breach of this type of contract. *Restatement (2nd) of Contracts* § 353 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.

Note the disjunctive in the phrase "contract or the breach." In comment *a* to this section, the commentators give "common examples" to include "contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." *Id.* The brutalization of a beloved family member

who, instead of being "put to sleep," faces pre-death terror, excruciating pain, and disorientation, hews more closely to the thanatic theme of the *Restatement.* If contracts breached by carriers, innkeepers, conveyers of corpses, and death messengers are "particularly likely to cause serious emotional disturbance," and fall within the Rule, then it seems plain that contracts breached by veterinarians to peacefully end the life of their client's beloved animal companion, especially where they profit directly from the human-animal bond[6] and are trained to anticipate the complex and foreseeable emotions that attend the presence of an owner at the laying to rest of his devoted dog, also are particularly likely to create such emotional disturbance.

Gaglidari v. Denny's Restaurants, 117 Wn.2d 426, 443 (1991) embraced this section. Importantly, § 353 broadened the doctrine from its 48-year-old predecessor in three important respects: (1) to permit recovery regardless of bodily harm; (2) to permit recovery even absent recklessness or willfulness by instead focusing on the foreseeability of serious emotional disturbance; and (3) by allowing recovery where the contract or breach is of a kind that would result in substantial mental anguish.

In other words, if the contract is not of the type that when breached would cause such psychological suffering, the recklessness or willfulness of the breach itself would justify recovery. Whether a contract for euthanasia of an animal companion is of the type contemplated by the *Restatement* is a matter of first

[6] Todd W. Lue, Debbie P. Pantenburg et al., *Impact of the owner-pet and client-veterinarian bond on the care that pets receive*, Journal of the American Veterinary Medical Association, Vol. 232:4, Feb. 15, 2008; Katie Burns, *Human-Animal Bond Boosts Spending on Veterinary Care, J*ournal of the American Veterinary Medical Association, Vol. 232:1, Jan. 1, 2008; *What are your Clients Willing to Pay?,* Veterinary Economics (August 2007), pp. 100, 104.

impression, as well whether its breach permits recovery of emotional damages. The foreseeability of an emotional upheaval arising from breach of such a contract is undeniable. WSU's "A gentle goodbye" video **(CP 178[7])** and several Washington/Ninth Circuit appellate case pronouncements all acknowledge, expressly or tacitly, that emotional suffering is foreseeable and expected when companion animals are injured or killed, or put to death inhumanely, given the nature of the "more than mere property" relationship.[8]

Hendrickson v. Tender Care Animal Hosp., 176 Wash.App. 757 (II, 2013), an out-of-division decision, declined to apply *Restatement (2nd) Contracts* § 353 and *Restatement (1st) Contracts* § 341 to a veterinary bailment contract for neuter of a dog, a procedure utterly unlike the facts at bar. Ms. Hendrickson anticipated that the dog would be released to her very much alive; the contract at issue here explicitly sought to ensure a dog's painless death without undue suffering – an accord of a completely different order, especially given the owner's presence. The question for this court is whether the contract for euthanasia for a sentient, animate being who occupies a status analogous to a child and is not maintained or

[7] See, supra, fn. 1 for active hyperlinks to videos.

[8] *See San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir.,2005)("The emotional attachment to a family's dog is not comparable to a possessory interest in furniture."); *Pickford* ("Pickford, with good reason, maintains that Buddy is much more than a piece of property; we agree." 124 Wash.App. at 263), *Womack* ("The damages are consistent with actual and intrinsic value concepts as found in *Pickford* because, depending upon the particular case facts, harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property." 133 Wash.App. at 263-64); and *Sherman* (146 Wash.App. 855, 873 fn. 8); as well as *Mansour v. King Cy.*, 131 Wash.App. 255, 265, 267 (citing *Pickford;* recognizing "emotional importance of pets to their families; acknowledging pets regarded as family) (I, 2006); *Rhoades v. City of Battle Ground*, 115 Wash.App. 752, 766 ("pets are not fungible" and "private interest at stake is great") (II, 2002)*; Downey v. Pierce Cy.*, 165 Wash.App. 152, 165 (2011)(accord with *Rhoades*, more than mere economic interest in pets).

cared for in the hope of realizing any commercial gain (i.e., through employment, breeding, show or competition) is the type of contract for which emotional distress damages are recoverable under *Gaglidari*. Kaisa was family, not even a source of financial stability. The type of loss related to this breach of contract has nothing to do with pecuniary loss and all to do with the animal's "personal" interests. Breach of such contract provides the perfect illustration of interference with noneconomic values.

Louisiana's Court of Appeals provides a suitable persuasive precedent. *Smith v. University Animal Clinic, Inc*., 30 So.3d 1154 (La.App.2010), *cert. denied*, 36 So.3d 247 (2010), ruled in favor of awarding emotional damages for breach of a cat boarding contract by a veterinary hospital. *Barrios v. Safeway Ins. Co*., 97 So.3d 1019 (La.App.2012), a negligence case, cited *Smith* in affirming the award of $10,000 in emotional distress for the motor vehicle death of Yellow, the Barrioses' dog, adding, at 1023-24:

> Although a pet is considered corporeal movable property in Louisiana, clearly, pets are not inanimate objects. This Court takes judicial notice of the emotional bond that exists between some pets and ***1024*** their owners and the "family" status awarded some pets by their owners. In the present matter, the trial judge based her award of $5,000.00 each to the Barrioses on her finding that they had a close family-like relationship with Yellow; that the dog was a part of their lives for approximately twelve years and that his loss caused them psychic trauma.

Other courts to extend emotional damages in property-based contract breaches include *Grather v. Tipery Studios, Inc.*, 334 So.2d 758 (1976, La.App.)(allowing noneconomic damages related to unprofessionally photographed wedding pictures *when professional hired); Mitchell* v. *Shreveport Laundries, Inc.*, 61 So.2d 539

(La.App.1952)(allowing noneconomic damages related to laundry agent failing to deliver groom's only clean and fitting suit in time for wedding); and *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich.App. 689 (1998)(allowing noneconomic damages to mother in breach of contract by day care involving care of 18-month-old). The trial court erred denying contract-based general damages.

B. <u>Negligence – General Damage Recovery.</u>

Dr. Peterson sets forth at least twelve reasons why Dr. Cohn-Urbach committed malpractice – including but not limited to: having a veterinary student with hardly any small animal, owner-present euthanasia experience take command; flushing with such a high volume of fluid (if flushing occurred at all) so as to risk venal rupture; administering Acepromazine alone when contraindicated for use with Euthasol; administering an insufficient dose to have any appreciable effect except to cause hypotension and increase the risk that the Euthasol would fail or cause a complication; pushing the Euthasol too quickly through an aged and potentially compromised vein; failing to dilute the very thick and viscous euthanizing solution; and allowing the highly caustic substance to exit the vein and make direct, extremely painful contact with Kaisa's tissues – all depriving Kaisa and Mr. Repin of a good death. **CP 232-69, *passim***. With reasonable medical certainty, she opines that the standard of care for performing owner-present small animal euthanasia was breached.

Curtis v. MRI Imaging Services II, 327 Or. 9, 15-16 (1998), held that medical professionals operate under a general duty to avoid any emotional harm that foreseeably might result from their conduct. Where the standard of care in a

particular medical profession recognizes the possibility of adverse psychological reactions or consequences as a medical concern, the law will not insulate persons in that profession if they fail in those duties, thereby causing the contemplated harm. Though an out of state case, the logic applies here.

Defendants owed Mr. Repin a duty, arising from the veterinary standard of care in owner-present euthanasia, to protect him from mental anguish associated with failure to prudently perform the procedure. The same logic was voiced in *Murphy v. City of Tacoma*, 60 Wn.2d 603, 621, 622 (1962), finding that emotional distress damages are permitted where there is "either an immediate physical invasion of the plaintiff's person or security, or a direct possibility of such an invasion" for "[i]n these cases, the damages for personal annoyance and inconvenience [are] within the scope of the risk regarding which the defendants were negligent." Applied here, the straightforward facts are that Defendants' negligence exposed Mr. Repin to the highly anxiety-producing experience of not only watching his beloved dog suffer tremendously in close proximity (i.e., invasion of his person), but also exposing him to the risk of sustaining grievous bodily harm from Kaisa. It is this "zone of danger" facet of the traumatic experience that gives rise to general damages based on negligence principles.

The holding of *Murphy* was recognized in *Wilson v. Key Tronic Corp*., 40 Wash.App. 802, 809-10 (III, 1985) as still viable, along with the modern negligent infliction of emotional distress ("NIED") test of *Hunsley v. Giard*, 87 Wn.2d 424 (1976) and progeny. "When the mental distress results from less than intentional or malicious conduct, under the former 'zone of danger' test, a

showing of actual or possible direct physical invasion was generally necessary." *Wilson*, at 809-10 (*quoting Murphy v. Tacoma*, at 620-21 and providing that non-impact, "physical invasion," negligent acts permit recovery of emotional distress damages). This original NIED rule remains good law. *See also McRae v. Bolstad*, 32 Wash.App. 173, 178 (1982), aff*'d o.g.*, 101 Wn.2d 161 (1984)(mere threat to personal health and safety, without physical impact, sufficed for emotional distress damages). In this case, Mr. Repin suffered a direct threat (nearly being attacked by Kaisa). Objective symptomatology is not required under *Murphy/Key Tronic*.

That the *Hunsley* court reexamined and relaxed the contours of NIED does not mean that it eliminated the stricter impact and zone of danger standards. Rather, it expanded the scope of NIED to situations beyond the physical proximity limitations of *Murphy*, *Frazee v. Western Dairy Prods*.,182 Wash. 578 (1935), and *O'Meara v. Russell*, 90 Wash. 557 (1916), so that a plaintiff could recover emotional distress damages even if miles away from the scene of the tortious event provided that objective symptomatology exists. Both the *Murphy* and *Hunsley* rules can be reconciled – where impact/direct threat exists, as here, objective symptoms need not be adduced; where no impact/direct threat exists, objective symptoms are required. *Key Tronic*, both a negligence and a nuisance case (*see page* 805), made this observation plainly at 810:

> The modern test set forth in Hunsley v. Giard, 87 Wash.2d 424, 553 P.2d 1096 (1976), provides a broader basis for recovery. Under the Hunsley test, where actual invasion of a plaintiff's person or security or a direct possibility thereof could not be made out, recovery was nevertheless warranted if the plaintiff's mental

distress was the reaction of a reasonable person and manifested by objective symptoms.

The trial court erred denying negligence-based general damages.

C. Outrage.

It should first be noted that Defendants' anticipated citation to *Womack v. von Rardon,* 133 Wash.App. 254 (III, 2006), a case handled by Mr. Karp, did not hold that setting a cat on fire was not outrageous. Rather, it affirmed dismissal of the outrage claim because the Plaintiff could not prove that the defendants torched Max in order to cause her severe emotional distress and because of insufficient evidence of severe emotional distress. Furthermore, Ms. Womack was not present when the young men doused Max in gasoline, yet this was not a basis for the court denying the claim. *Womack* is further distinguishable given the existence of a veterinarian-client-patient relationship, fiduciary relationship, contract, and evidence that Mr. Repin was emotionally distraught and firmly invested in ensuring Kaisa's alleviation of pain.

The tort of outrage or intentional/reckless infliction of emotional distress ("IIED") requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Reid v. Pierce Cy.,* 136 Wn.2d 195, 202 (1998) (*citing Dicomes v. State,* 113 Wn.2d 612, 630 (1989)). The elements were adopted from the *Restatement (2nd) of Torts § 46* (1965) in *Grimsby v. Samson,* 85 Wn.2d 52, 59-60 (1975). As to the first prong, Dr. Cohn-Urbach's manner of killing Kaisa, in defiance of contractual promises to the contrary, is the type of "outrageous" conduct that "shocks the conscience." Reasonable minds would

certainly disagree with Defendants' contention that Defendant Cohn-Urbach's conduct was not outrageous, if only based on RCW 16.52.205-.207, Washington's animal cruelty code, guarding against unnecessary and unjustifiable infliction of pain and suffering to an animal. Outrageousness is traditionally a question of fact. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 64 (2002).

As to the second prong, Dr. Cohn-Urbach acted in reckless disregard of probable, severely emotionally unsettling consequences to Mr. Repin and Kaisa, whom she knew were in a guardian-companion relationship. Any veterinarian paying attention would know that a committed and evidently emotional client observing the death of his animal would react with foreseeable and extreme mental anguish should euthanasia not occur. Indeed, the AVMA spilled a fair amount of ink guiding veterinarians to be mindful of such considerations.

As to the third prong, the conduct complained of self-proves distress.

> (I) The one who seeks damages must prove that he did suffer severe emotional distress. Although emotional distress is subjective there are many situations in which the genuineness of the claim that it was suffered is supported by the objective facts concerning the actor's conduct. The mere recitation of the conduct (example illustration omitted) … goes far to prove the truthfulness of the claim and the complainant did suffer intense grief. Knowledge of human nature tells one that intense grief is a normal emotional response to such a stimulus, and lack of such grief, an abnormal response.

Browning v. Slenderella, 54 Wn.2d 440, 448 (1959)(favorably quoting *Restatement (First) of Torts §46* (1934)) (emphasis added), *reversed on other grounds*, *Nord v. Shoreline Savings Ass'n*, 116 Wn.2d 477, 485 (1991) ("severity" requirement for intentional torts other than outrage is not required to prove emotional distress damages); *see also Brower v. Ackerly*, 88 Wn.App. 87, 102

(1997) ("extremity of the [tortious] conduct is in itself important evidence of the severity of the distress experienced by the target" where jury finds that conduct was extreme and outrageous). As copiously documented in the depositions of all present at the scene, Mr. Repin experienced tremendous mental anxiety. As he has deposed and declared, it continues to this day. The trial court erred dismissing this claim.

D. Conversion/Trespass.

The unauthorized intermeddling with the property rights of Mr. Repin in Kaisa in a manner inconsistent with his express (and contracted) instructions amounts to an intentional tort somewhere along the trespass-conversion spectrum. Indeed, the act of using a damaged catheter and pompously admonishing Ms. Feist that she would "make it work" was an intentional act that proximately caused perivascular administration, tremendous pain, and deprived both Kaisa and Mr. Repin of the expected results of euthanasia. Dispossession is not the only means of proving conversion as the Defendants insinuate. Other manners include destroying or altering a chattel (*Restatement (2nd) Torts* § 226), misusing a chattel in a manner that seriously violates the right of another to control its use (*Id.,* § 227; applies to use of chattel by person, including bailee, servant, or finder); and one who uses chattel in a manner exceeding authorization and seriously violates the other's right of control (*Id.,* § 228).

The fundamental nature of this transaction was not just "to destroy the property in question," but to do so according to Mr. Repin's express authorization to do so in a manner that was *humane* and without undue pain and suffering

according to sound veterinary principles. In other words, in failing to euthanize or humanely destroy, Dr. Cohn-Urbach caused tremendous psychological damage and physical injury to Kaisa; mishandled Kaisa in a way that violated Mr. Repin's right to control the manner of her death; and exceeded the authorization he had given to her. Conversion and trespass lie. Emotional damages follow as a matter of law per *Sherman,* at fn. 8 (conversion of animal allows for general damages); "A hundred-year succession of Washington cases supports damages for emotional distress arising from intentional torts such as trespass generally. Emotional distress damages may be recovered for intentional interference with property interests specifically." *Birchler v. Castello Land Co., Inc.,* 133 Wn.2d 106, 117 (1997). The trial court erred dismissing this claim.

E. <u>Lack of Informed Consent/Negligent Misrepresentation by Omission.</u>

At issue is whether Mr. Repin would have authorized the methods employed by Defendants (i.e., veterinary student injects, using Acepromazine alone and in insufficient dose, failing to flush, using damaged catheter, administering perivascularly, failing to have backup dose in room for quick administration) without the opportunity to delay the procedure for placement of proper catheter, administration of appropriate premedications, and other prophylactic steps to ensure a good death. Lack of informed consent is a specie of negligence and arises from common law

That it was codified in Ch. 7.70 RCW, a chapter that applies to *nonveterinary* health care providers (per *Sherman*), does not bastardize the doctrine's humble origins as applied in the veterinary context, given several

judicial pronouncements holding veterinarians to the same standards of physicians. Rather, Ch. 7.70 RCW served as a tort reform overhaul imposing numerous procedural, evidentiary, and substantive modifications to *human* medical malpractice common law. Had the legislature abrogated the doctrine, it might bear some relevance here; that it instead codified the doctrine acknowledges its vitality.

While it is true that the statutory lack of informed consent claim under RCW 7.70.030(3) and RCW 7.70.050(failure to secure informed consent) does not apply to veterinarians, per *Sherman* at 869, this does not mean that the common law doctrine of lack of informed consent is inapplicable here. *Bundrick v. Stewart,* 128 Wash.App. 11, 17 (I, 2005)(quoting *Miller v. Kennedy,* 11 Wash.App. 272, 281-82 (1974)). Other jurisdictions have applied the doctrine in the veterinary context. Defendants have cited none that has refused to do so.

Consider, for instance, *Lawrence v. Big Creek Vet Hosp., LLC,* 2007 WL 2579436, *3-*4 (Ohio Dist.11) ("The informed consent doctrine is not codified in Ohio. However, such practice is clearly indicative of the veterinarian's duty of care. This is an evidentiary issue that goes directly to the standard of care in a malpractice case... Informed consent is part of and necessary to a veterinarian's duty of care.")[9] Also examine *Henry v. Zurich Amer. Ins. Co.*, 107 So.3d 874, 882 (La.App.3 2013)(applying lack of informed consent doctrine to veterinary malpractice case involving equine surgery). In 2013, the Texas Court of Appeals reversed summary judgment dismissal on a lack of informed consent claim in a

[9] Citable per Ohio Supreme Court Rules for Reporting of Opinions, Rule 3.4 and Wash.GR 14.1(b).

veterinary context. *Gonzalez v. South Texas Veterinary Assoc., Inc.,* 2013 WL 6729873 *4-*5 (Tex.App.-Corpus-Christi-Edinburg, 2013)(citable under TRAP 47.7(b) (memorandum opinion)). Finally, see *Loman v. Freeman,* 375 Ill.App.3d 445, 452-53 (2006), discussing malpractice at length in equine surgical case and quoting law review article discussing informed consent:

> Traditionally, at common law, the term "malpractice" applied to physicians and attorneys but not to veterinarians. *Southall v. Gabel*, 28 Ohio App.2d 295, 298, 277 N.E.2d 230, 232 (1971); J. Young, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 Hastings Women's L.J. 201, 209 (2005); Black's Law Dictionary 978 (8th ed.2004) (definition of "malpractice"). "Through judicial rule and the adoption of legislation over the last [50] years or more, there has been an expansion of the concept of malpractice to include veterinarians." 16 Hastings Women's L.J. at 209. Our legislature's use of the word "malpractice," in the Veterinary Practice Act, presupposes a set of professional standards applicable to all veterinarians. "Malpractice" is "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary 978 (8th ed.2004). A "professional" is a member of "a learned profession." Black's Law Dictionary 1246 (8th ed.2004). A learned profession ***453*** implies the existence of a body of learning relevant to that profession as a whole—the "standard of care" to which the veterinary examining committee referred in *Massa*. Presumably, this body of learning is what the faculty teaches at the College of Veterinary Medicine. When deciding whether the case at hand fits into "a general class of cases of which the court has jurisdiction," we "accept as true all well[-]pleaded facts and reasonable inferences drawn therefrom." *Skinner v. Mahomet Seymour School District No. 3*, 90 Ill.App.3d 655, 656–57, 46 Ill.Dec. 67, 413 N.E.2d 507, 508 (1980). According to the amended complaint, one of the tenets of veterinary medicine is that before performing a nonemergency surgery on an animal, the veterinarian must obtain the owner's consent to that surgery. We accept that allegation as true. See M. Nunalee & G. Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non–Human Animals Will Change Veterinary Medicine*, Animal L. 125, 150 (2004) (article cowritten by a lawyer and a veterinarian, stating that "[v]eterinarians must always remain mindful of client communication. Effective client

> communication includes securing informed consent from the client before performing a procedure").

Though no Washington appellate court has yet to rule on the application of this doctrine in the veterinary context, there is no reason to expect a different outcome based on decisions from Division III and the Ninth Circuit that further the analogy between the learned professions. *Baechler v. Beaunaux,* 167 Wash.App. 128, 133-34 (2012)(veterinarians are professionals, who "like other professionals," require extensive scientific training, clinical experience, and a license; imposing requirement of expert testimony in veterinary malpractice cases); *see also Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th Cir.2004)(veterinarians deemed "physicians and other practitioners of medical science" for purposes of Fair Labor Standards Act).

Veterinarians, like doctors, are bound by the same Uniform Disciplinary Act. *See Sherman,* at 868-69. Two of the grounds for discipline of veterinarians (and human health care providers) include "incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed" and "misrepresentation or fraud in any aspect of the conduct of the business or profession." RCW 18.130.180(4, 13). Industry custom endorses the standard of informed consent in veterinary medicine, as well. The American Veterinary Medical Association ("AVMA"), a national professional organization for veterinarians akin to the American Medical Association ("AMA"), has set forth a policy on *Owner Consent in Veterinary Medicine,* stating:

> The public is best served when veterinarians provide sufficient information in a form and manner that enables owners or their authorized agents to make appropriate decisions when choosing the veterinary care provided.
>
> To the best of their ability and in a manner that would be understood by a reasonable person, veterinarians should inform animal owners or their authorized agents of the diagnostic and treatment options available. They should also provide an assessment of the risks and benefits of such choices, a prognosis, and a documented estimate of the fees expected for the provision of services. The owners or authorized agents should indicate that their questions have been answered to their satisfaction, the information received by them has been understood, and that they are consenting to the recommended treatments or procedures.
>
> The consent of owners or authorized agents should be provided in a verbal or written form and should be documented in the medical record by veterinarians or their staff members.

See https://www.avma.org/KB/Policies/Pages/Owner-Consent-in-Veterinary-Medicine.aspx.

Alternatively, the claim may be stated as negligent misrepresentation by omission. Ordinarily, "[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." *Ross v. Kirner*, 162 Wash.2d 493, 499 (2007). Yet, the common law is equally clear that "[w]hen a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation." *Crisman v. Crisman*, 85 Wash.App. 15, 22 (1997). The *Restatement (Second) of Torts* sets the governing standard for claims of negligent misrepresentation. *See Haberman v. WPPSS*, 109 Wn.2d 107, 161-62 (1987). The *Restatement* discusses failure to disclose as a basis for negligent misrepresentation based on the duty-bound nature

of a trust relationship and asymmetry of knowledge and skill in a commercial transaction. *Restatement (2nd) of Torts* § 551(1) (1977).

"Ordinarily, the duty to disclose a material fact exists only where there is a fiduciary relationship." *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wash.App. 456, 463–64 (1982) (*citing Oates v. Taylor*, 31 Wash.2d 898, 903 (1948)). A duty to disclose, within or without a fiduciary context, gives rise to a claim of negligent misrepresentation. *Colonial Import, Inc. v. Carlton Northwest,* 121 Wn.2d 726, 731-33 (1993). Outside of a fiduciary relationship, the court will find a duty to disclose in one of five cases, that is:

> where the court can conclude there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose.

Favors v. Matzke, 53 Wash.App. 789, 796 (1989) (citations omitted). Mr. Repin contends that such (quasi-)fiduciary and special relationship existed. He was not a veterinarian and trusted Defendants, the "best of the best." **CP 62:14-15** ("I'm not a doctor. I'm not a vet. I barely knew what a catheter was.")

A physician has a fiduciary duty to the patient to obtain consent. *Miller v. Kennedy,* 11 Wash.App. 272, 286, 522 P.2d 852 (1974), *aff'd and adopted,* 85 Wn.2d 151 (1975). Not having obtained such informed consent to kill Kaisa in the manner performed, the Defendants breached their fiduciary duty to Mr. Repin. Over time, the creation of different types of fiduciaries has expanded to include

bailments as well as health care providers,[10] so the concept is not static. T. Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795 (1983) charting evolution over the centuries of various types of fiduciaries, beginning with "trustees, administrators, and bailee**"** and recently extending to "physicians and psychiatrists")(quoted by *Konover Development Corp. v. Zeller*, 228 Conn. 206, 223 (1994)).

Indeed, the Department of Health has recognized the existence of the veterinarian as fiduciary by regulatory language echoing traditional fiduciary duties. Veterinarians are held to the "highest plane of honesty, integrity and fair dealing with clients in time and services rendered, and in the amount charged." WAC 246-933-080.The California Court of Appeals has agreed that in "tak[ing] his clients' animals, pets often as deeply revered as members of the family," the veterinarian puts himself "in a position of a bailee for hire and a fiduciary as far as the care and protection of the personalty is concerned." *Thorpe v. Board of Examiners*, 104 Cal.App.3d 111, 117 (1980); see also *Hume & Liechty Veterinary Assoc. v. Hodes*, 259 Ill.App.3d 367 (1994) (discussing claim of fiduciary duty against veterinarians). Further, veterinary medicine is a regulated profession subject to discipline for unprofessional conduct.[11]

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[10] A physician must engage in utmost good faith in dealing with his or her patient, which is predicated on a proposition that she has special knowledge and skill in diagnosing and treating diseases and injuries and that the patient sought the physician's services because of this expertise. 70 C.J.S. *Physicians and Surgeons* § 58, at 449 (1987); 61 Am.Jur.2d *Physicians, Surgeons and Other Healers* § 167, at 298-99 (1981). This relationship of mutual trust and confidence also requires the physician to fully inform the patient of his or her condition, to avoid patient abandonment, to refer to specialists as necessary, and to obtain informed consent. 61 Am.Jur.2d § 167, at 299; 70 C.J.S. § 58, at 448-49.

[11] RCW 18.130.180(4)(incompetence, negligence, or malpractice); RCW 18.92.046 (incorporating Ch. 18.130 RCW by reference). Indeed, those violating Ch. 18.92 RCW may be held to have committed a criminal misdemeanor. RCW 18.92.240.

Dr. Peterson has testified that veterinarians act in a special, quasi-fiduciary or fiduciary capacity of trust and confidence. Clients rely upon them as having superior, specialized knowledge and experience to guide them in making the best choices for their animal. **CP 233-34 ¶ 8**. Mr. Repin explains that if he were informed of the risks of proceeding with a damaged catheter, using Acepromazine alone and at an inappropriate dosage; using Acepromazine as a premedication for Euthasol (which contains phenytoin); allowing a 4th year veterinary student to inject the Euthasol; that Kaisa could respond in a very distressing and potentially dangerous way; what steps may be taken to minimize or eliminate such response; and not diluting the Euthasol, he would:

> never have consented to the procedure as performed but, instead, [would have] demanded that the catheter be changed, that proper premedications be used, that only a licensed veterinarian would inject (note: [he] believe[s] that Dr. Cohn-Urbach injected the Acepromazine and Euthasol, but she and Ms. Feist dispute this), and that the Euthasol be diluted. In short, had [he] been so informed, [he] would have demanded that every precaution be undertaken to ensure that Kaisa would not have suffered any fear or pain but would drift off peaceably as [he] held her. The Defendants deprived [him] of this information and caused an outcome that continues to create extreme anguish even to this day, over three years later.

CP 339 ¶ 8. The trial court erred dismissing this claim.

V. CONCLUSION

Consider for a moment the nature and profundity of Mr. Repin's relationship with his Millennium Girl. Almost primeval, their bond speaks to the rich history of human's co-evolution with the canine. It explains why this tragedy of prolonged pre-death terror leaves such a scar, and basis for significant noneconomic damages. Some regard euthanasia as a blessing while at the same

time begrudging human beings like relief. Much has been written about the claimed differences between humans and nonhumans, opining that animals cannot anticipate and understand death. But recent research from authoritative sources like Dr. Temple Grandin suggests the contrary.

For instance, in *Animals in Translation* (2005), Dr. Grandin contends that the single worst thing a person can do to an animal is make it feel afraid. As described herein in greater detail, Dr. Cohn-Urbach did far worse – by transferring the source of that fear to Mr. Repin (in whom Kaisa trusted for her entire life) and by flooding Kaisa with the greatest degree of fear possible at a time when her self-preservation instinct was strongest. In short, she made Kaisa's final moments of existence inexplicable torture and, thus, inhumane, precisely because Kaisa did not understand she was being killed or why. Further, she left Mr. Repin with irreversible, residual, and lasting despair and guilt and exposed him to grievous bodily harm.

Many animals hide when they are about to die. Some rumor it is because they feel pain, from which they seek refuge. Not knowing from where it comes, they claw and dig into the darkness, to enclosed spaces, to pass away alone and without fear. Mr. Repin tried to give Kaisa that same peace by having her sedated and then humanely killed in a "quiet room." Lucky individuals loved by human caretakers may pass in the presence of their master, the one whose voice, scent, and touch make the experience manageable and the good-bye "gentle."

Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 700 (1981), states clearly that "nothing [is] stinted" in the "exceedingly liberal" rule of compensation,

allowing recovery of "every actual loss, and some which frequently border on the imaginary." While the State may want to belittle Mr. Repin's experience and depreciate his damages by some nonexistent rule of legal insensitivity, the Washington Supreme Court has taken a decidedly different view. Accordingly, Mr. Repin asks that the court reverse the summary judgment order.

Dated this April 29, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2016, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

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