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 REPLY BRIEF

ADAM P. KARP, ESQ.
Attorney for Plaintiffs-Appellants
114 W. Magnolia St., Ste. 425
Bellingham, WA 98225
(888) 430-0001
WSBA No. 28622

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Plaintiff **ROBERT REPIN**, through attorney **ADAM P. KARP**, strictly replies to Defendants' response, as follows:

A. <u>Properly Framing What Mr. Repin Seeks</u>.

Mr. Repin does not seek damages for Kaisa's pain and suffering, as erroneously stated by Defendants at 9, nor for Kaisa's wrongful death, as asserted at 14. Rather, he claims his own noneconomic damages arising under contract and tort principles. While Benthamite philosophy undoubtedly speaks to the moral justification of mercy killing and, indeed, the very existence of the procedure that came to be known as euthanasia by injection (and most commonly performed by veterinarians when in the presence of the owner), Mr. Repin does not seek damages for Kaisa's own torment. Instead, he asks this court to reinstate those common law doctrines that properly permit the recovery of his tremendous anxiety, fear, terror, guilt, anger, and other psychic insults arising from Defendants' irreversible acts and omissions.

Nor does this case concern the destruction of the human-animal bond, for Mr. Repin perseverated over whether to authorize the merciful act of humanely ending Kaisa's life, weighed against the painful realization that doing so would permanently sever such connection with her. While the depth of their relationship assuredly motivated this deliberative process and ultimate decision to put Kaisa to sleep, and though Defendants' thwarting of this single opportunity polluted the final minutes he had to share with her, the gravamen of this appeal arises from the very personal, and utterly nonpecuniary, harm visited upon Mr. Repin when making the choice to kill his beloved, and completely dependent, dog, and to fulfill that pledge

while bearing immediate witness to her last breaths. None disputes that a properly performed euthanasia would, by veterinary standards of care both ethical and substantive, result in no pain, suffering, or undue distress to both Kaisa and Mr. Repin. It is this slim aspect of tort and contract law that cries out for this court to align the common law with modern values.

B. <u>The Common Law is No Impotent Steed Fenced by History</u>.

Whittier Law School Professor Thomas G. Kelch aptly stated:

> [T]he common law is not an impotent steed fenced by history; it has the liberty and, in fact, the duty to migrate to higher ground when facts and moral awareness dictate. Although some have argued that the common law is not a ripe mechanism for change as it relates to the protection of the interests of animals, a fresh judicial view of the status of animals is, perhaps, the best means presently available to change the legal view of animals as property, given that legislative efforts to protect interests of animals have been largely ineffective.

Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L.J. 531, 532 (1998). Yet, in Washington, at least, Prof. Kelch need not wonder if the judiciary should take a firm grasp of the reins of common law as it pertains to animals and those who, like Mr. Repin, make the highly conflicted decision to euthanize them. Our legislature has mandated that the courts have the duty to declare the common law in conformity with evolving mores so that they parallel the "institutions and condition of society in this state":

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

RCW 4.04.010. As Division I explained:

> Society changes and the common law must be reevaluated and retested from time to time by the judiciary to determine if the law on a particular subject has kept pace with conditions. The common law must be rational and compatible with present society if it is to be respected and upheld.

Roth v. Bell, 24 Wash.App. 92, 100 (1979). Furthermore, the common law serves to fill the interstices that legislative enactments fail to address.

> Early in our state's history, this court construed RCW 4.04.010 to mean that,
>
> > in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but will not blindly follow the decisions of the English courts as to what is the common law without inquiry as to their reasoning and application to circumstances.
>
> *Bernot v. Morrison,* 81 Wash. 538, 544, 143 P. 104 (1914) (citing *Sayward v. Carlson,* 1 Wash. 29, 23 P. 830 (1890)).

In re Parentage of L.B., 155 Wn.2d 679, 689 (2005). When a rule of law originates in common law and is a creature of the courts, the courts may change or modify such rule. *Irwin v. Coluccio,* 32 Wash.App. 510, 512 (I, 1982). Washington's institutions honor and commit themselves to the preservation of companion animals' familial status, whether by funding and provisioning a well-ranked veterinary medical school with publicly-accessible teaching hospital; by establishing rigid licensing requirements as governed by the Veterinary Board of Governors and regulated by the Department of Health; by strictly regulating (through the Board of Pharmacy and DEA) those controlled substances used to sedate and euthanize by injection; or by the profession's unabashed awareness and

solicitation of, and resultant profiting from, the human-animal bond. Millions of Washington families who reside with companion animals and seek veterinary care for their loved ones further informs the contours of 21st Century common law as it relates to the veterinarian-client-patient relationship.

In this regard, over twenty years ago Texas Court of Appeals Judge Andell explained:

> The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the only family members they have. … Even an heirloom of great sentimental value, if lost, does not constitute a loss comparable to that of a living being. This distinction applies even though the deceased living being is a nonhuman.

Bueckner v. Hamel, 886 S.W.2d 368, 376-78 (Tex. App. 1994) (Andell, J., concurring). Indeed, this very Division took to heart the self-evident institutional and societal state of Washington society when seeking to judicially resolve the cognitive dissonance generated by the legal problem presented by the poorly-fitting tort of outrage as applied to the abduction and setting afire of a tomcat named Max.

In honoring its mandate under RCW 4.04.010, this court did not just extend the common law, but creating an entirely new cause of action. *See Womack v. von Rardon,* 133 Wash.App. 254 (III, 2006)(acknowledging strong emotional connection between people and animals, thereby establishing tort of malicious injury to a pet). The questions of whether to permit recovery of general damages for breach of contract and negligence; as well as the cognizability of the torts of lack of informed consent, negligent misrepresentation, and conversion/trespass to

chattels all excite inquiry into matters strictly sounding in common law, which this court is statutorily bound to proclaim and revise over time.

Defendants do not, and cannot, dispute that every claim raised by Mr. Repin emerged from the swing of a gavel, not the tally of votes. To shunt such questions to the legislative branch abdicates the crucial common law-making function inhering within the judicial branch. The court should not shy away from these tasks, but face them squarely, with wisdom and sensitivity.

C. ***Gaglidari* and the *Restatements*.**

Defendants appear to argue that Washington does not follow *Restatement of Contracts* § 341 and *Restatement (2nd) Contracts* § 353, citing *Gaglidari v. Denny's Restaurants, Inc.,* 117 Wn.2d 426 (1991), and *Hendrickson v. Tender Care Animal Hosp.,* 176 Wash.App. 757, 767 (II, 2013). Such a position misapprehends their true holdings, particularly as they pertain to *Thomas v. French,* 30 Wash.App. 811, 817 (III, 1981), *rev. o.g.,* 99 Wn.2d 95 (1983), and *Cooperstein v. Van Natter,* 26 Wash.App. 91, 99 (I, 1980), *rev. den'd,* 94 Wn.2d 1013 (1980).[1] Instead of unambiguously asserting that Washington honors neither *Restatement* section, it held that the *Thomas* and *Cooperstein* courts adopted a standard that:

> **goes beyond the *Restatement*** by allowing emotional distress damages **regardless of the type of contract** involved whenever the breach was wanton or reckless and emotional distress was foreseeable from the outset.

Id., at 445. The sentence immediately prior assures the vitality of the *Restatement* by saying:

[1] See also *Schwarzmann v. Association of Apartment Owners of Bridgehaven,* 33 Wash.App. 397, 404 (I, 1982)(citing *Cooperstein* and *Restatement* approvingly).

> Emotional damages **<u>are available under the original *Restatement* only when the type or character of the contract</u>** renders emotional suffering for reasons other than pecuniary loss foreseeable from the outset.

Id. Further, what *Gaglidari* "specifically disapproved" was not the *Restatement* itsef but awarding damages for emotional distress "on an ordinary breach of contract action." *Id.,* at 445. Though it refused to apply *Restatement* remedies to breach of a particular type of contract – viz., employment, it did not disavow the *Restatement* categorically.[2] Were there such intention, it would not have needed to allude to the *Restatements* in explaining the refusal to expand the common law to the employment termination context:

> 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.

Id., at 448. To be clear, Mr. Repin does not ask this court to overreach as did *Thomas* or *Cooperstein.* Rather, he seeks damages based on a contract and breach that are hardly ordinary.

Contracts generally protect pecuniary interests, and although pecuniary losses may cause emotional distress, this alone is insufficient to make emotional distress compensable. *Gagliardi* recognized, however, that courts can award emotional distress damages for breach of a "*contract[ ] uniquely intended to protect some personal interest or security* [that is] incapable of compensation by reference

[2] Nor did *Gaglidari* state that "contracts of a personal nature" are "specifically disallowed," as Defendants maintain at 22. Rather, the court distinguishes holdings from other States that *do* allow recovery in such instances and reasons that stating that losing a job is fundamentally pecuniary, not personal. *Id.,* at 440-41, 446-47.

to the terms of the contract." It also noted that both the first and second *Restatement of Contracts* would permit recovery of emotional distress damages for breaches of some types of contracts. Neither *Gagliardi* nor any other Washington authority has articulated how to determine when a contract protects a "personal interest or security" such that its breach gives rise to emotional damages. Yet, in this case, the owner-present contract for euthanasia itself demonstrates that it protects personal, not merely pecuniary, concerns. A violation of such personal interests will certainly lead to a non-pecuniary loss, and veterinarians know, anticipate, and teach this. Such contract, by its terms, protects emotional interests that pecuniary damages will not compensate.

Mr. Repin and Defendants entered into the type of personal contract on all fours with the *Restatements,* and fully distinguishable from the employment termination context considered in *Gaglidari.* Nor did the euthanasia contract at all resemble the contract to neuter a dog as discussed in *Hendrickson.* Clearly, the owner's choice to sterilize a dog is a far cry from the often gut-wrenching, soul-searching, tense expectation and profound emotional upheaval inherent in the entirely private decision to end the life of a dog. The distinction becomes even more apparent when examining the context in which the euthanasia takes place, with the owner caressing and holding the animal dearly, sometimes with prayer or meditation, as her spirit ebbs. The common law cannot be so out-of-touch with our institutions and society to deny such intimacy – certainly not when book and film has captured the emotive power in such classics as *Old Yeller,* authored by Fred Gipson in 1956 and made into a movie the next year.

D. *Negligence.*

Sustaining the anachronistic urge to tie and bind the common law to an outmoded standard, Defendants say that cases like *Barrios v. Safeway Ins. Co.,* 97 So.3d 1019 (La.App.2012) are "aberrations," all while citing a New York federal district court decision that predated *Barrios* by nearly twenty years. Then, in an effort to appear cutting-edge, they cite to the *Restatement (3rd) Torts* § 47, cmt. m, though it has never been adopted by any Washington appellate court. Nor have the policy arguments raised by these commentators been vetted and, in fact, are disproven by the insurance industry's own statistics:

> Surprisingly, though, the assertion that veterinary costs and prices will dramatically rise as a result of increased compensation is commonly made and accepted without any mathematical verification. Even academic advocates of higher civil damages for animal loss often feel obliged to concede that the potential for ancillary increases in veterinarians' liability exposure is the Achilles heel of their argument.[FN15] In actuality, the exact opposite may be true: The near total absence of veterinary negligence deterrents under current law may turn out to be the strongest economic reason for draining the baby's bath water as soon as politically possible.

Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals,* 10 Animal L. 163, 168 (2004). Mr. Green undertakes the mathematical analysis, using the insurance industry's own figures. *Id*., at 218-21.

Additionally, Defendants' position is unabashedly hypocritical, given that veterinarians openly exploit and seek to profit from the human-animal bond in the examination room, yet price the dog as obsolete and depreciated like an old Buick in the courtroom. Finally, their mantra to let the legislature resolve this issue ignores completely that personalty valuation and recovery of emotional damages for breach of contract were always common law issues, never made in consideration of a

legislative prerogative. The same applies to the common law doctrines of NIED, outrage, negligent misrepresentation, and conversion.

Negligent infliction of emotional distress is a species of common law negligence, not a stand-alone cause of action. *Stanfield v. Douglas Cy.*, 107 Wash.App. 1, 14 (2001), in speaking of the tort, charts its origin with *Hunsley v. Giard,* 87 Wn.2d 424, 434 (1976). *Hunsley* outlines its elements. They are, predictably, duty, breach, proximate cause and damages (i.e., the identical elements for the tort of negligence). That there exists a common law duty to avoid causing emotional distress to another does not compel the conclusion that a new tort is born but, instead, that case law has articulated a specific duty to be examined as one of the elements in a typical negligence claim. *See Hunsley,* at 434 ("Thus we test the plaintiff's negligence claim against the established concepts of duty, breach, proximate cause and damage or injury.") and 435 ("the defendant has a duty to avoid the negligent infliction of mental distress.") and ("The very concept of negligence provides the primary boundaries [of defendant's liability].") Mr. Repin did not need to specify NIED in the *Complaint.* Negligence, coupled with the prayer for noneconomic damages, more than sufficed.[3]

That the Supreme Court broadened the common law beyond the proximity requirement of the "direct threat" or "zone of danger" test does not mean that a plaintiff could no longer prove a negligent infliction claim based on the such more

[3] Further, Defendants never raised this argument below. See CP 357-358 (discussing three reasons why claim should be dismissed, yet failure to plead is not one of them).

restrictive standard. Defendants have failed to cite to any case that clearly declares the death of the zone of danger test.

As to the assertion that *Murphy v. City of Tacoma,* 60 Wn.2d 603 (1962), should be ignored because it was a nuisance case, the Supreme Court explained that its holding did not turn on proof of nuisance at all but contemplated negligence:

> A reading of the cases cited by both appellants and respondent indicates to us that, generally, in cases which do not involve malice or intent to do harm, there must be **621* either an immediate physical invasion of the plaintiff's person or security, or ***988* a direct possibility of such an invasion in order that recovery may be had for mental anguish or distress of mind. **This holds true regardless of whether or not a nuisance is involved. …**
>
> We regard these cases as exceptions, wherein the usual rule was not applied because recovery for personal inconvenience was warranted under more general principles of tort law. **In these cases, the damages for personal annoyance and inconvenience were within the scope of the risk regarding which the defendants were negligent**. **In other words, the requirement of due care in those cases is imposed at least partially in order to avoid the annoyance, inconvenience, and emotional disturbance which are the natural, foreseeable, and probable consequences of a lack of due care in such situations.**

Id., 621-22.

Wilson v. Key Tronic Corp., 40 Wash.App. 802 (III, 1985), involved a claim of negligence, as well as nuisance. *Id.*, at 805. This Court, in discussing *Hunsley* and NIED, nonetheless believed that the zone of danger test remained viable, for the court states that in applying that standard, "the landowners here would recover." *Id*., at 810. It goes on to say that the modern test "provides a broader basis for

recovery."[4] *Id*. Accordingly, *Hunsley* signaled an expansion, not a contraction, of tort law. Any other reading would improperly resist the flow of precedent and contravene RCW 4.04.010.

E. <u>Outrage</u>.

Dr. Cohn-Urbach knew that injecting Euthasol into a broken catheter would, with substantial certainty, cause Kaisa to suffer extreme pain, jolt of unconsciousness, and endanger both Mr. Repin, but herself and her student, and, further, that such a reaction would cause emotional distress to Mr. Repin, who had shown marked sensitivity to any handling of Kaisa and demanded to be present with her at times and in locations that were not common to other patients and clients. While the facts construed in the light most favorable to Mr. Repin warrant a finding of intentional infliction, the alternative standard of recklessness assuredly applies given the deliberate indifference to the great risk of the foregoing events and sequelae. See WPI 14.03.03(3), stating that a person recklessly causes emotional distress if the person "is aware that there is a high degree of probability that his conduct will cause emotional distress and proceeds in deliberate disregard of it." The cumulative issues described in the opening brief and herein conceivably would cause a reasonable jury to find that she intentionally or recklessly exposed Mr. Repin to foreseeable emotional harm.[5]

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[4] Objective symptomatology emerged with *Hunsley* as a way to authenticate emotional distress claims by those not facing any imminent threat of invasion to their personal security. Hence, Mr. Repin need not have furnished medical evidence of his quite natural anguish over the risk of severe personal injury when Kaisa was in a state of tremendous agitation from the perivascular scalding.

[5] Mr. Repin need not prove that Defendants intentionally or recklessly caused *severe* emotional distress. See WPI 14.03.01 ("This test from Washington's case law generally parallels the elements stated in Restatement (Second) of Torts, § 46, except for one word in the pattern instruction's third

As to outrageousness, *Jackson v. Peoples Federal Credit Union*, 25 Wash.App. 81, 89 (II, 1979) cites approvingly to *Restatement (2nd) Torts* § 46 cmt f, which provides that an actor's conduct may be deemed outrageous because he is aware of the other person's susceptibility to emotional distress due to a physical or mental condition. From his statements made at the time of signing the contract, to his insistence on being with Kaisa whenever possible, Defendants knew of Mr. Repin's vulnerable nature and, amidst other argument and facts raised in the opening brief, such detail factors strongly in favor of reinstating this claim.

Lastly, medical evidence is not required to prove the last element of severe emotional distress. "We have never applied the objective symptomatology requirement to intentional infliction of emotional distress. *Kloepfel v. Bokor*, 149 Wash.2d 192, 199, 66 P.3d 630 (2003)[.]" *Segaline v. State Dept. of L&I,* 182 P.3d 480, 488 (II, 2008).

F. <u>Conversion</u>.

The flaw in Defendant's argument is that they fail to deconstruct the legal and factual significance of the words "euthanasia" and "humane destruction." To state that Mr. Repin authorized the euthanasia or humane destruction of Kaisa assuredly does not mean that he gave authorization to the Defendants to touch Kaisa and interfere with her body and mind in such a fashion as to torment her by causing a violent, protracted, perilous, torturous, and anxiety-producing death. While a

element (intentionally or recklessly causing emotional distress). The Restatement requires that the defendant intentionally or recklessly caused *severe* emotional distress, see Restatement (Second) of Torts § 46 and comment i, whereas Washington's case law, without discussion, has removed the word "severe" from this element.")

botched euthanasia may make for an unconventional factual presentation, its legal application remains straightforward based on the traditional understanding of trespass (i.e., a harmful physical touching or intermeddling with chattel) and, for those more substantial interferences, conversion.

Here, Defendants did more than merely kill Kaisa: they brought about her demise by a means causing undue suffering, as explicitly criminalized by RCW 16.52.207, and as evidenced by post-mortem Euthasol concentrations revealing perivascular damage to the tissues surrounding the catheterized vein. If one must split hairs, the leaching of the euthanizing solution outside the vein constituted a trespass into those parts of Kaisa's body that Mr. Repin never did or would have permitted. The injection of 19 mL's of Euthasol outside the vein ripened into a conversion when the unauthorized route of administration of that substance into tissues that should never have been touched by the drug caused Kaisa to suffer a bad death. In so doing, Defendants exceeded the physical, psychological, and personal scope of any authorization given, seriously violating Mr. Repin's right to control (or protect) Kaisa's sensibilities in her last moments alive. As such exceeded authorization cause damage, and as Defendants admit intent, it was error to dismiss the conversion/trespass claims.

G. <u>Lack of Informed Consent</u>

Defendants in essence argue that where B adopts A; and B does not apply to them; then A does not apply to them. The logic fails A does not in any way depend on B to function. Moreover, the reason given for why B does not apply to Defendants has nothing to do with a conscious decision by the Legislature to excuse

them from the duty to obtain informed consent. *Sherman v. Kissinger,* 146 Wash.App. 855, 865-66 (I, 2008), makes clear that Ch. 7.70 RCW arose "in response to a perceived crisis in the cost of malpractice insurance for doctors and a corresponding rise in health care costs[.]" That veterinarians were not covered by Ch. 7.70 RCW demonstrates that the Legislature recognized no similar need for tort reform in the nonhuman health care fields. Furthermore, alleviating veterinarians of the burden of obtaining informed consent would be far more consistent with legislative efforts to protect them from a similar crisis (though, evidently, none existed), not with codifying such a doctrine, and certainly not by granting veterinarians a special immunity not enjoyed by their human health care counterparts. In short, that the legislature codified common law for human health care providers does not at all mean that it abrogated it for nonhuman health care providers. And while pets cannot themselves give informed consent, nor can children of tender years, those with dementia, the insane or incapacitated, for whom surrogate consent is obtained. As discussed in the original brief, the AVMA has recognized the doctrine and Defendant WSU/CVM has not produced any evidence that it refuses to teach veterinary students to obtain informed consent.

H. <u>Negligent Misrepresentation by Omission.</u>

Defendants ignore the clear holding of *Crisman v. Crisman,* 85 Wash.App. 15, 22 (1997) that where a duty to disclose exists, omission of a material fact is an affirmative misrepresentation. They also fail to address the five alternative cases where, outside a fiduciary relationship, the court will find such a duty to disclose.

See Favors v. Matzke, 53 Wash.App. 789, 796 (1989). For the reasons originally stated, the trial court erred dismissing this claim.

I. <u>Appendix</u>.

Mr. Repin points out the misstatements made by the Defendants in their *Appendix.*

- Alaska: *Mitchell v. Heinrichs*, 27 P.3d 309, 311-12 (Ak.2001) reiterates that it *permits* IIED relative to the intentional or reckless killing of a pet animal

- Arizona: *Kaufman v. Langhofer*, 223 Ariz. 249, 254 and 256 fn.13 (2009) explicitly does not decide whether the pet owner may recover sentimental value, but does acknowledge that "Several states allow damages for the intentional infliction of emotional distress when a pet is injured or killed through intentional, willful, malicious, or reckless conduct," and adds that Arizona law may allow recovery of such damages "when [plaintiff] sustains an economic loss involving fraud, intentional conduct, or a willful fiduciary breach";

- California: *McMahon v. Craig*, 176 Cal.App.4th 1502, 1515-16 (2009) does not categorically eliminate the cognizability of an IIED claim against a veterinarian, and *Plotnik* allows emotional damages for IIED and trespass to chattels; Defendants do not reveal *Plotnik v. Meihaus*, 146 Cal.Rptr.3d 585, 598-99 (Cal.App.4, 2012), distinguishing *McMahon* by rejecting the argument of Meihaus, responsible for hitting the Plotniks' Min-Pin with a baseball bat, that California "[has] rejected the concept that an animal owner may recover emotional distress damages due to injuries his animal received at the hands of a[nother]…."

Id., at 599. In upholding the general damages award based on a trespass to chattels theory, the court quoted *Johnson v. McConnell*, 80 Cal. 545, 549, where it noted:

> While it has been said that [dogs] have nearly always been held "to be entitled to less regard and protection than more harmless domestic animals," it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.

Id., at 600. The court justified this position by citing to a case involving damage to inanimate property, *Gonzalez v. Personal Storage, Inc*., 56 Cal.App.4th 464, 477 (1997), chronicling decisions providing for pain, suffering, and emotional distress related to breach of contract, fraud, conversion, and nuisance. *Id*. Indeed, Plotnik cited to Washington's *Womack* decision. *Id*. Additionally, *Plotnik* acknowledged the vitality of IIED, distinguishing *McMahon* since, "Here, the evidence supported a conclusion Meihaus went to his garage, retrieved a bat, and used it to intentionally strike Romeo." *Id*., at 603. As discussed above, IIED has a variant – reckless infliction. *Strong v. Terrell*, 147 Wash.App. 376, 385 (II, 2008).

- Florida: *Kennedy v. Byas*, 867 So.2d 1195 (Fla.App.2004) only precludes *negligence*-based noneconomic damages;
- Idaho: *Gill v. Brown*, 107 Idaho 1137 (1985) actually reversed and reinstated the claim of IIED in the shooting death of a donkey and, further, recognized the viability of NIED were the plaintiffs to have alleged physical injury;
- Illinois: *Jankoski v. Preiser Animal Hosp., Ltd.*, 157 Ill.App.3d 818 (1987) states that "The concept of actual value to the owner may include some element of sentimental value …," in accord with *Mieske*, but it did not address noneconomic damages as plaintiffs were not seeking them (see 820);

- Indiana: *Lachenman v. Stice*, 838 N.E.2d 451 (Ind.App.2005) only rejected NIED as a matter of law, but not IIED;

- Iowa: *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996) only rejected NIED and did not close the door to malicious injury;

- Kentucky: *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky.App.2002) states, "Simply because a claim involves an animal does not preclude a claim for intentional infliction of emotional distress";

- Louisiana: *Kling v. U.S. Fire Ins. Co.,* 146 So.2d 635 (La.App.1962) does not speak to noneconomic damages whatsoever;

- Massachusetts: *Krasnecky v. Meffen*, 56 Mass.App.Ct. 418 (2002) only rejected NIED;

- Michigan: *Koester v. VCA Animal Hosp*., 244 Mich.App. 173, 177 (2000) only involved NIED;

- Nebraska: *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb.1999) only rejected NIED;

- New Jersey: *Harabes v. The Barkery*, 791 A.2d 1142 (N.J.Super.2001) only involved negligence, and the court noted that "in this case plaintiffs do not allege, and there is no evidence to suggest, that plaintiffs' dog died as a result of intentional, willful, malicious or reckless conduct by the defendants" (at 1144);

- New Mexico: *Wilcox v. Butt's Drug Stores, Inc.,* 38 N.M. 502 (1934) said nothing about noneconomic damages, but applied a *per se* intrinsic value rule to death of an animal;

- New York: *DeJoy v. Niagara Mohawk Power Corp*., 786 N.Y.S.2d 873 (N.Y.A.D.2004), a ten-line opinion, merely rejected the claim for loss of companionship, but said nothing about noneconomic damages arising from beyond-negligent conduct;

- North Carolina: *Shera v. N.C. State Univ. Teaching Hosp*., 723 S.E.2d 352 (N.C.App.2012) involved stipulated negligence only (see 353);

- Ohio: *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121 (Ohio App.2003) noted that "the allegations refer only to negligence and breach of contract, not misconduct" (at 750);

- Oregon: *Lockett v. Hill*, 182 Or.App. 377 (Or.App.2002) only rejected NIED but left open the question of recovering noneconomic damages for public nuisance (at 383 and fn.1);

- Pennsylvania: *Daughen v. Fox,* 539 A.2d 858 (Pa.Super.1988), only rejected IIED but never spoke to the theory raised by Mr. Repin;

- Rhode Island: *Rowbotham v. Maher*, 658 A.2d 912 (R.I. 1995) rejected noneconomic damages under a Rhode Island statute and NIED;

- Texas: *Strickland v. Medlen,* 397 S.W.3d 184, 191-92 (Tex.2013) only examined the value of a deceased animal, not the ability to recover noneconomic damages;

- Vermont: *Scheele v. Dustin,* 188 Vt. 36 (2010), only considered the tort of intentional infliction of emotional distress; further, it cited *Womack* and rejected it (proving that common law of Vermont is less progressive than that of Washington and should not be consulted);

- Virginia: *Kondaurov v. Kerdasha*, 271 Va. 646 (2006) only restricted plaintiffs from recovering noneconomic damages from "ordinary negligence";

- West Virginia: *Carbasho v. Musulin*, 217 W.Va. 359 (2005) exclusively dealt with emotional distress "as an element to be considered in determining her property damage," adding that her causes of action for NIED and IIED were resolved by settlement (at 361 fn. 2);

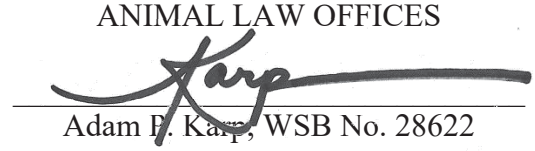
- Wisconsin: *Rabideau v. City of Racine*, 627 N.W.3d 795 (Wis.2001) affirmed summary judgment to defendants on NIED per se but on IIED only on evidentiary grounds.

J. Conclusion.

Commissioner Wasson granted review because the issue Mr. Repin presents as to emotional distress damages for breach of euthanasia contract, notwithstanding the holding of *Hendrickson,* "may be one of first impression, not only in Washington, but throughout the United States." Mindful examination of this thesis, as well as the other issues presented by his appeal, should bring further clarity and consistency to the progressive and erudite common law of this State.

Dated this August 12, 2016

ANIMAL LAW OFFICES

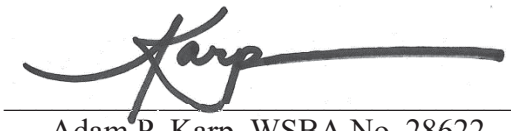


Adam P. Karp, WSB No. 28622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2016, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[X] Email (stipulated)
Jason Brown
Attorney General of Washington
Torts Division
1116 W. Riverside, Ste. 100
Spokane, WA 99201
(509) 456-3123
jasonb@atg.wa.gov
sidnieb@atg.wa.gov
boba@atg.wa.gov



Adam P. Karp, WSBA No. 28622