

No. 294161

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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JILL AND DAVID DAMIANO,  
Plaintiffs/Appellants,

v.

JON AND SUELLEN LIND,  
Defendants/Respondents.

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

This case involves the disappearance of a domestic cat. The Appellants' (hereinafter, the "Damianos") cat is still missing and they have no evidence of the cat's present whereabouts or condition. The Damianos believe that their long-time neighbors, Respondents Lind (hereinafter, the "Linds"), are responsible for the cat's disappearance.

Undisputed evidence demonstrates that the Linds *legally* placed a live-trap on their property in an effort to capture skunks that were believed to be causing damage to their property/garden. On the night of July 23/24, 2009, an unidentified free-roaming domestic cat entered the live-trap. Very early on July 24, 2009, Mr. Lind immediately and safely released this cat back to its original, fugitive state. It is undisputed that at the time of its safe release, Mr. Lind did not know the identity of the cat or who it belonged to, if anyone.

The trial court properly granted summary judgment as to all claims because they are neither supported by Washington law, nor is there a genuine issue of material fact in dispute that could preclude dismissal. This is a frivolous appeal and the trial court should be affirmed.

## II. STATEMENT OF ISSUES

Was summary judgment properly granted when there is no legal duty owed, and there is no material fact in dispute relative to any claim arising from the disappearance of a still-missing domestic cat?

## III. STATEMENT OF THE CASE

The Damianos allege that they owned a cat named “Boo,” and that this cat disappeared on or about July 24, 2009. The whereabouts of the cat and its present condition are not known. The Damianos and the Linds are neighbors in Chewelah, Washington, living adjacent to natural areas and open fields.

**A. It is undisputed that there is no evidence of the Linds causing any injury to any cat.**

The Damianos filed suit against the Linds, asserting a laundry-list of allegations relating to the cat’s disappearance. There is no basis for any of their claims and summary judgment, as the means to avoid a useless trial, was properly granted. The following facts are *undisputed*:

- The Damianos admit that they never observed their cat on the Lind property on July 23-24, 2009. **CP 28**, *Deposition Transcript of Jill Damiano* p. 11; **CP 34**, *Deposition Transcript of David Damiano* p. 8.
- There is no evidence that any other person observed their cat on the Lind property on July 24, 2009. **CP 28**, *Dep. J.*

*Damiano* p. 11; **CP 33**, *Dep. D. Damiano* p. 7.

- The Damianos admit that they do not know the present whereabouts of their cat. **CP 29**, *Dep. J. Damiano* p. 12; **CP 34**, *Dep. D. Damiano* p. 8.
- The Damianos have no evidence of any injury to their cat. **CP 29**, *Dep. J. Damiano* p. 12; **CP 34**, *Dep. D. Damiano* p. 8).
- The Damianos do not know whether their cat is dead or alive. **CP 29**, *Dep. J. Damiano* p. 12; **CP 34**, *Dep. D. Damiano* p. 8).
- The Damianos never observed the Linds harm, injure or kill their cat, or any other cat. **CP 28**, *Dep. J. Damiano* p. 11.
- No other person observed the Linds harm, injure or kill the Damianos' cat, nor did another person observe the Linds harm, injure or kill any other cat or domestic animal. **CP 29**, *Dep. J. Damiano* p. 12.

The Damianos have spilled a lot of ink trying to demonize Mr. Lind and conjure up a case against him in order to explain the disappearance of their cat. The Damianos desperation has led them to rely on hyperbole, speculation, rumor and neighborhood gossip, rather than admissible evidence. There is no evidence that Mr. Lind caused harm to any domestic cat, the Damianos' cat included. **CP 110**, *Deposition Transcript of Jon Lind* p. 132.

Regarding interactions with domestic cats, the undisputed admissible evidence demonstrates that Mr. Lind ensured the safety of any domestic cat

he came in contact with; for example, Mr. Lind on one occasion inadvertently trapped a cat belonging to some other neighbors and immediately released it unharmed. **CP 86**, *Answer to Plaintiffs' Interrogatory No. 20*. On another occasion, Mr. Lind sought out, and found, a safe home for a stray cat and its litter of kittens found in a community building.

**B. The Linds have never claimed to know, especially at the time of release, the identity of the cat that was immediately returned to its original, fugitive state.**

Mr. Lind's statements are entirely consistent and do not create any dispute about a genuine issue of material fact. The Damianos attempt to conjure something out of nothing, and they totally ignore the sequential detail and context of each noted statement.

On July 24, 2009, Mr. Lind spoke with Ms. Damiano as she confronted and accused him – packing zucchinis, no less – while he was working in his front yard. She asked about a cat in his garage, but the cat that he had released was never confined in his garage; rather, it had been back by his sun deck, and it had been set free much earlier. Thus, there was no logical connection between Ms. Damianos unfounded accusation and the previous safe release of the other unidentified cat.

Days later, on July 27, 2009, following commencement of a criminal

investigation prompted by the Damianos, Mr. Lind made a written statement and an alleged oral statement to an Officer Brandon Molett. In both the written statement and the alleged oral statement, Mr. Lind did not state that he knew the identity of the cat, or any owner, *at the time of its release*. CP 78; CP 74-75. It was only after the accusations of Ms. Damiano and the commencement of a criminal investigation that the record contains any alleged concession by Mr. Lind that it *possibly* could have been the Damianos' cat. In fact, the written statement of July 27, 2009, states explicitly that Mr. Lind did "not know the ownership of the cat[.]" CP 78. Upon thoughtful inspection, there is no inconsistency in these statements.

The Linds *Answer* and responses to written discovery are also consistent. Appellants' *Complaint* alleges that:

Jill Damiano then left the Linds' residence by vehicle to run errands. Minutes later, as she was traveling eastbound on Main Street, *she saw* Lind heading westbound on the same street, returning to the Linds' home.

CP 5, *Complaint* at 3, paragraph 15, emphasis added.

The Linds answered the *Complaint* with:

In answer to paragraphs 9, 10, 11, 12, 13, 14, 15, and 16 of Plaintiffs' *Complaint*, these answering Defendants have insufficient information or knowledge to form a belief of the truth of the allegations contained therein and therefore deny the same.

CP – , *Answer* at 2, paragraph 8. The Linds could not know, thus could not admit, to what Ms. Damiano “saw,” and that is what paragraph 15 of the *Complaint* alleged. Any later statement about what he saw has nothing to do with what Ms. Damiano saw, and despite the Damianos’ vigorous attempt to claim otherwise, there is no inconsistency here.

Regarding answers to written discovery, these too are consistent. Mr. Lind has never deviated from his statement that the legally-set live trap on or about July 23, 2009, was near his sun deck in his backyard. CP 87-88, *Answer to Pls’ Int. No. 35*. Any other stated trapping location only referenced other historic live-trap locations on his property in the 15 years prior. CP 81-82, *Answer to Plaintiffs’ Int. No. 7*. Any alleged inconsistency in Mr. Lind’s statements is a fiction.

Similarly, the Damianos allege that Mr. Lind had a “high-likelihood” of capturing a domestic cat in his legally-set live trap on the night of July 23/24, 2009. *Appellants’ Brief* at 13. It is alleged that Mr. Lind caught three (3) cats in three (3) years. This would translate to a capture rate of one (1) cat per three-hundred sixty-five (365) days; put another way, it would be a .27% chance that a domestic cat would be captured on the night in question. This is an extremely *low*-likelihood based on any statistical conception.

#### IV. ARGUMENT

**A. The summary judgment standard, when properly applied to admissible evidence, requires that the trial court be affirmed.**

As the Court knows well, a motion for summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hubbard v. Spokane County*, 146 Wn.2d 669, 707-08, 50 P.3d 602 (2002). To merely call an issue “genuine,” or a fact “material” does not make it so. When only one reasonable inference can be drawn, summary judgment is proper. *Bird v. Walton*, 69 Wn.App. 366, 368, 848 P.2d 1298, 1299-1300 (1993). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Bakay v. Yarnes*, 431 F.Supp.2d 1103, 1110 (W.D.Wash., 2006), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”).

The Damianos may not rest on conclusory allegations or speculation in an attempt to create a genuine issue of material fact. Rather, they must present admissible evidence that establishes the existence of a genuine dispute about each separate element of their various claims. *Matsushita*, 475

U.S. at 585-86, 106 S.Ct. 1348; *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (“The nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations.”); *Walker v. King County Metro*, 126 Wn.App. 904, 912, 109 P.3d 836 (2005) (“To survive a motion for summary judgment, a party must respond to the motion with more than conclusory allegations, speculative statements or argumentative assertions of the existence of unresolved factual issues.”).

Courts “may not consider inadmissible evidence when ruling on a motion for summary judgment.” *King County Fire Protection Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994). Appellate courts must presume that the trial judge, knowing the rules of evidence, did not consider matters which were inadmissible when ruling on a motion for summary judgment. *Davis v. Sill*, 55 Wn.2d 477, 480, 348 P.2d 215, 217 (1960).

The Damianos continue to rely on inadmissible evidence on appeal; namely, hearsay, with no applicable exception, and irrelevant evidence. ER 801 through 805; ER 401 and 402. Hearsay cannot be used to create an issue of material fact. *Turgren v. King County*, 33 Wn.App. 78, 84 n.3, 649 P.2d

153 (1982); see also *Barrie v. Hosts of America*, 94 Wn.2d 640, 618 P.2d 96 (1980); *Gams v. Oberholtzer*, 50 Wn.2d 174, 310 P.2d 240 (1957). Also, Rule of Evidence 404 provides that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]” ER 404(a), emphasis added. The only possible exception related to the “character of the accused,” is not applicable here; thus, character or trait of character evidence is not admissible. See ER 404(a)(1).

Rule of Evidence 608(a) and (b) provide that credibility may only be attacked by evidence that “refer[s] only to character for truthfulness or untruthfulness,” and that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility . . . may not be proved by extrinsic evidence.” ER 608; *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 785-88, 6 P.3d 583, 588-89 (2000).

Alleged credibility issues cannot be used to create a dispute about a material issue of fact. The party opposing summary judgment must “refute the proof of the moving party in some material portion . . . the opposing party may not merely recite ‘credibility’ and have a trial on the hope that a jury may disbelieve factually non-contested proof.” *Howell v. Spokane & Inland*

*Empire Blood Bank*, 117 Wn.2d 619, 626-627, 818 P.2d 1056 (1991) (showing witness as generally untrustworthy is not sufficient to avoid summary judgment).

The following portions of the record, though not exclusive, are inadmissible and cannot provide any basis for reversal:

**CP 73**, *Second Declaration of Brandon R. Molett*;

**CP 84**, *Plaintiffs' Interrogatory No. 19 and Answer*;

**CP 96-101**, hearsay and irrelevant evidence throughout;

**CP 122**, *Declaration of David Damiano*, irrelevant and hearsay;

**CP 124-125**, *Declaration of Katy Hoskins*, irrelevant statements and hearsay throughout; and

**CP 127-128**, *Statement of Fran Jenne*.

The Damianos have presented only conclusory allegations, speculative statements and argumentative assertions in an attempt to avoid the reality that their claims cannot survive summary judgment. They have presented no *genuine* issue of *material* fact in dispute that could prevent the dismissal of their myriad claims as a matter of law.

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**B. Bailment – The Linds cannot be liable for any breach of bailment because there was neither a consensual transaction between the Damianos and the Linds, nor was there any delivery by the Damianos to the Linds.**

The Damianos fail to present law or fact sufficient to avoid dismissal of their breach of bailment claim. The most fundamental aspect of a bailment contract requires delivery of the property by one person to another for some particular purpose with an express or implied agreement to redeliver when the purpose is fulfilled. *Freeman v. Metro-Transmission, Inc.*, 12 Wn.App. 930, 932, 533 P.2d 130 (1975). A bailment, and the associated duty of care, requires an actual delivery of the property by the bailor to the bailee. *Theobald v. Satterthwaite*, 30 Wn.2d 92, 190 P.2d 714 (1948). A bailment is essentially a consensual transaction. *Collins v. Boeing Co.*, 4 Wn.App. 705, 710-11, 483 P.2d 1282 (1971). A bailment “must be predicated upon a lawful transaction voluntarily entered into by *both* parties[,]” and also requires “delivery.” *Zuppa v. Hertz Corporation*, 111 N.J.Super. 419, 423, 268 A.2d 364, 366 (1970), citing 8 Am.Jur.2d, Bailments, s 48, at 954 (1963), and 8 C.J.S. Bailments, s 17, at 367 (1962), emphasis added.

No such transaction ever took place between the Damianos and the Linds. Even assuming the Damianos claim a gratuitous bailment had been

created, their claim fails because there is no evidence that any benefit was received. *O'brien v. Woldson*, 149 Wn. 192, 195-96, 270 P. 304 (1928).

The Damianos did not deliver their cat to Mr. Lind. Mr. Lind did not accept delivery of *their* cat. If a party does not know the identity, and owner of, a fugitive cat prior to its immediate and safe release back to its original, fugitive state, that person cannot become a bailee. There is no authority whatsoever supporting the Damianos concocted theory of a bailment existing between a person and a “foreseeable class of bailors.” *Apps' Brief* at 20.

**1. There is no legal duty to seek out the unknown owner of a stray cat prior to immediate, safe release of that cat back to its original, fugitive state.**

The Damianos cite only two Washington cases relating, just barely, to any recognition of a bailment theory applying to animals as personal property. The first is *Hatley v. West*, 74 Wn.2d 409, 445 P.2d 208 (1968), and Appellants cast this case as standing for the principle that “agistment of horse is kind of bailment.” *Apps' Brief* at p. 17. The agistment discussed in *Hatley* involved an “agister’s lien,” and was founded on a statute – RCW 60.56.040 – which expressly provided for a “particular kind of bailment under which a person, *for consideration*, takes in animals for care and pasturing on his land. 74 Wn.2d at 410, 445 P.2d at 209. The present case,

involving a fugitive domestic cat, bears no similarity in fact or law to the *Hatley* case or the legal analysis therein.

Appellants also cite the Illinois case of *Anzalone v. Kragness*, 356 Ill.App.3d 365, 826 N.E.2d 472 (2005), for the proposition that bailments are recognized in a veterinary medical malpractice action involving a domestic feline that was killed by a Rottweiler. The cat's owner had paid to board the cat with the defendant animal hospital. After nearly two-weeks at the animal hospital, "a hospital employee let [the cat] out of her cage and took her to a room for exercise[,] and failed to securely close the room door. *Anzalone*, 356 Ill.App.3d at 366, 826 N.E.2d at 474. At about the same time, a Rottweiler was taken to a nearby room and was able to run into [the cat's] room, attack the cat and kill it. *Id.* The *Anzalone* court recognized a bailment only because the "boarding [of] a pet at a kennel constitutes bailment for mutual benefit." *Id.* at 370, 826 N.E.2d at 476.

*Anzalone*, aside from not being controlling authority, is clearly not applicable here. There was no such boarding of a cat for consideration by a known owner in the present case, and there is no evidence that the Damianos' cat is actually dead. Here, a fugitive domestic cat – of an unknown identity – trespassed onto the Linds' property and became confined in a live-trap. The

unidentified cat was safely returned to its original, fugitive state, and there is not a scintilla of evidence on the record to the contrary.

**2. There can be no “presumption of negligence” because there was not a consensual exchange of property, accompanied by consideration, between the Damianos and the Linds.**

The “presumption of negligence” theory that Appellant proposes is also inapposite to the present case. The Damionos cite *Chaloupka v. Cyr*, 63 Wn.2d 463, 387 P.2d 740 (1964), for the theory that a presumption of negligence arises when the bailor shows “non-return, loss, damage or destruction to bailed property.” *Id.* at 466, 387 P.2d at 742. *Chaloupka* involved a car that was damaged in a fire while at the defendant auto-repairman’s shop. The plaintiff delivered the car to the defendant auto-repairman to have repairs made. The fire was from an unknown cause, and plaintiff could not prove otherwise; thus, the plaintiff’s claims were dismissed. *Id.*

*Chaloupka* does not preserve the Damianos’ claims here for a number of reasons. First, the “presumption of negligence” in a bailment case only arises when the bailment is accompanied by a *consensual exchange* between the bailee and the bailor. *Chaloupka*, 63 Wn.2d at 466-67, 387 P.2d at 742-43. The purported exchange was not consensual here. The alleged bailee

(the Linds) did not receive any property from the Damianos, the espoused bailors. There is no bailor here because the fugitive animal was not “delivered” in any sense. Mr. Lind did not know the identity of the cat *at the time he released it* unharmed and back to its original, fugitive state.

Second, even if there was some conceivable delivery of property, their was no *quid pro quo* – a prerequisite of the presumption the Lind’s assert. There is no evidence of any consideration exchanged between the Damianos and the Linds.

**3. Even assuming a “presumption of negligence,” with regard to any bailment claim, Defendants have rebutted that presumption with undisputed testimony that the cat was returned unharmed to its original, fugitive state.**

Even if for the sake of argument negligence could be presumed here, this presumption is thoroughly rebutted by the undisputed fact that Mr. Lind immediately released the cat, unharmed back into its original, fugitive state. Mr. Lind’s act of setting the cat free was no different from the Damianos’ act of setting their cat free the night of July 23, 2009, when he was let outdoors to roam at will. Moreover, the Damianos did not lose or misplace their cat; rather, *they* intentionally, and voluntarily, released him to roam freely around the area (including nearby fields and natural areas) on July 23, 2009.

The Louisiana case cited by Plaintiffs, *Lincecum v. Smith*, 287 So.2d

625 (La.App. 1974), is factually inapposite to the present case. Mr. Lind did not take the cat that was in his live-trap anywhere, he immediately released it unharmed into its original, fugitive state. Moreover, Mr. Lind did not *find* any cat, the cat found him.

There is no evidence whatsoever that any damage was done to any cat by the Linds. As noted in *Chaloupka*, in the absence of admissible evidence of causation, a defendant does not have to prove the negative – that any alleged damage was not caused by his negligence. 63 Wn.2d at 471-72, 387 P.2d at 745. Rather, a plaintiff still must prove that any alleged damage was caused by the defendant. *Id.* This is a burden that the Damianos have not carried on summary judgment.

“[I]f there is nothing more substantial to proceed upon than two or more conjectural theories . . . a jury will not be permitted to conjecture how the accident occurred.” *Chaloupka*, 63 Wn.2d at 471-72, 387 P.2d at 745, quoting *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947). The purpose of summary judgment is to avoid useless trials. *Burris v. General Ins. Co. of America*, 16 Wn.App. 73, 75, 553 P.2d 125, 127 (1976). Any trial in the present case would be useless because the Damianos have not, and cannot, raise any triable issue of fact related to any damage to their property.

**4. A so-called “involuntary,” or constructive bailment does not arise in the present case because there is no evidence of any “delivery” or knowledge of any bailor/owner on the part of the Linds.**

The Damianos rely on the New Jersey case of *Zuppa v. Hertz Corporation*, 111 N.J.Super. 419, 423, 268 A.2d 364, 366 (1970), which was a case of an alleged bailment involving a rental car that was rented by fraudulent means and not returned. The driver of the vehicle, also a co-defendant, was held not to be a bailee because there was not a *mutually consensual delivery* of the car. *Id.*

A fugitive, free-roaming animal cannot be construed to be the same as an inanimate object that can be “lost or misplaced” in the sense that those terms have been used in the common law to describe “finders” and “losers.” An animal that is set free to be a fugitive-being, moving freely about a neighborhood is not “lost.” Rather, it is purposefully released, which is more akin to abandonment. During the night, and the crepuscular periods at dusk and dawn, the Damianos’ cat was not constrained, under the watch of, or in any way in the custody of the Damianos. In essence a feral cat, the Damianos’ cat was free-roaming; a fugitive feline that could hunt and kill small song-birds, rodents, search out and consume refuse, etc.

“A person who abandons property loses any ownership interest in the

property[.]” *State v. Kealey*, 80 Wn.App. 162, 172, 907 P.2d 319, 325 (1996).

The Damianos quote *Kealey* for the principle that a finder of “lost goods” is a bailee of them for the true owner, but this principle is applied in the context of a customer leaving an *inanimate* object in a store or shop – not the context of a fugitive cat. Just like the distinction made in *Graham, infra*, regarding RCW 63.21 and its inapplicability, so too are the common law principles – which apply to things like purses, wallets or toolboxes – inapplicable in a case involving a fugitive animal.

Even if, for the sake of argument, there was a constructive bailment here, there is no evidence of bad faith or gross negligence. There is no evidence contravening the undisputed fact that Mr. Lind released a cat (which may or may not have been the Damianos, and which Mr. Lind did not know the owner of at the time of release) safely back to its original, fugitive state. There is no conceivable basis to call such actions grossly negligent or construe this as evidence of bad faith. *Id.*; See also *Apps’ Brief* at p. 23.

Only one reasonable inference is available from the undisputed fact that Mr. Lind safely released the unidentified cat back to its original, fugitive state; that is, Mr. Lind could not have breached any duty of care that he may have owed to an unknown owner of the cat.

**5. The Damianos' reliance on Chapter 63.21 RCW is misplaced because it does not apply to cases involving lost pets.**

This Court has already specifically rejected application of Chapter 63.21 RCW to cases involving lost pets. See *Graham v. Notti*, 147 Wn.App. 629, 638, 196 P.3d 1070, 1074 (Div. III, 2008). In cases involving lost pets, an appellate court “cannot determine whether a material issue of fact exists to merit reversal of summary judgment by resorting to the “finder” statute [Chapter 63.21 RCW][.]” *Id.* at 639, 196 P.3d at 1074, emphasis added. Thus, Chapter 63.21 RCW has no influence on the review of the present case and the Damianos reliance on it to “inform” the bailment analysis is misplaced.

Moreover, even if applicable, Chapter 63.21 RCW does not provide a basis to reverse summary judgment because the Linds had no intention, and made no attempt, to *claim* the “found property” in the present case. There is no evidence that Defendants intended to claim, as that term is contemplated under RCW 63.21, any cat.

The Damianos' reliance on the Vermont case of *Morgan v. Kroupa*, 167 Vt. 99, 702 A.2d 630 (1997), is misplaced. Not only is that case not controlling, but it is also distinguishable on the facts – in *Morgan*, in part,

there was an identified animal and owner. The policy presented in that case, of “*encourag[ing]* [finders of stray dogs] to make every reasonable effort to find the animal’s owner[,]” applied only in the context of a finder making a claim of permanent ownership to a stray dog, and challenging the original owners attempt to regain possession. 167 Vt. at 103-105, 702 A.2d at 633, emphasis added. *Encouraging* a finder that desires to claim a stray pet as their own, as against its original owner, to attempt to contact that owner is only an equitable consideration in that specific context. It is very different from *mandating* an affirmative legal duty on the part of an inadvertent finder, that has no intention whatsoever to claim title to the animal and immediately returns it to its original, fugitive state, to undertake the efforts outlined in *Morgan*. As that court conceded “[c]ircumstances will vary,” relative to applying any such policy. And the facts of the present case cannot warrant application.

The duty advanced by the *Damianos* does not exist in Washington, and even if the Court was willing to give birth to it here, it would not apply to the facts in this case. The *Damianos* cite no authority for an involuntary or constructive bailment in a situation involving an unknown owner and an essentially feral cat being released unharmed. Unlike the present case, the

animal cases cited by the Damianos also have actual evidence of damage to the personal property, *i.e.*, a dead cat or dog as evidence. And, unlike the animal cases cited by the Damianos, wherein the alleged bailees knew the owners of the property at the time they took possession, Mr. Lind did not know the identity of the cat or its owner at the time of its immediate and safe release back to its original, fugitive state.

**C. Negligence – The Linds cannot be held liable for negligence, as a matter of law, because they owed no duty, there is no evidence of any breach, and there is no evidence of causation.**

The Damianos are straining to convince the Court to concoct a new duty in Washington that is without basis in existing law. A negligence theory in this case is redundant in light of the bailment claim. In any event, even if the Damianos can allege negligence, they cannot carry their burden on all the necessary elements – in particular, duty, breach or causation – to avoid summary dismissal. The Damianos are obligated to prove both a duty and a causal connection to the Linds' acts and their injury to avoid summary judgment. *Seven Gables Corp. V. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Plaintiffs have the burden of establishing the existence of a duty. *Bakay*, 431 F.Supp.2d 1103, 1110 (W.D.Wash., 2006).

Neither a duty nor a causal connection exists here. And there is no

evidence of breach or damage. Instead, the Damianos are asserting that because their cat did not return home after July 24, 2009, the Linds must be responsible for their loss because of the Damianos' mere hyperbolic beliefs and conjecture.

A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts.

*Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

Negligence cannot be inferred. A plaintiff cannot state a claim by simply offering a theory as to how they suffered injury. *Id.*

The Damianos are obligated to prove each essential element of negligence. Their deposition testimony provides no evidence that the Linds harmed, injured or killed their cat in any way. The Damianos have totally unsupported *beliefs* that Mr. Lind was somehow involved in the disappearance of their cat, and such speculation cannot preserve their claim.

The Damianos admit that they do not know whether their cat was even injured, let alone what might have caused any speculated injury. They do not know whether their cat is alive or dead, or its whereabouts. There is no evidence that Mr. Lind harmed, injured or killed their cat. And there is no

question that there may be a number of *speculative* explanations, just like the Damianos' speculation, for their cat's disappearance. Because there is absolutely no evidence that the Linds harmed, injured or killed their cat, summary judgment was proper as to the Damianos' negligence claims.

**D. Malicious Injury to a Pet – The Linds cannot be held liable for malicious injury to a pet as a matter of law because it is not a stand-alone cause of action, and the Damianos are not entitled to damages under any theory.**

A cause of action for “malicious injury to a pet” is not materially different from a cause of action for tortious injury to personal property – the Damianos' raise redundant causes of action by alleging “malicious injury to a pet” and tortious injury to personal property (“Gross Negligence, Willful and/or Reckless Property Damage/Destruction”). The Damianos cite no authority for a stand-alone cause of action for “malicious injury to a pet.”

“Malicious injury to a pet” is only related to a “measure of damages” in cases where, and after, it is proven that a defendant intentionally and maliciously injured someone's pet. *Womack v. Von Rardon*, 133 Wn.App. 254, 262-63, 135 P.3d 542, 546 (2006). A malicious injury to a pet can only “support a claim for, and be considered a factor in measuring a person's emotional distress *damages*.” *Id.*, emphasis added. Thus, this “cause of action,” as the Damianos have alleged it, is not legally distinguishable from

an alleged tortious injury to personal property, and only goes to an element of damages.

The Damianos' various claims of tortious injury to their personal property were properly dismissed as a matter of law, as described herein; thus, by incident, their claim for damages relating to any alleged malicious injury to a pet must also fail.

Even if this is somehow construed as an independent cause of action, the Damianos cannot prove any injury to their cat. They do not know whether their cat was injured, harmed or killed. They do not know if their cat is presently dead or alive. Their criminal complaint was even referred to the Prosecutor's office by the Chewelah Police Department for an independent analysis. The Prosecutor did not file charges. **CP 143, Dep. J. Damiano** p. 19. Plaintiffs rely on inadmissible evidence, gossip, and rumor to try and create a factual dispute. There is no evidence of any injury to any pet.

**E. Trespass to Chattels and Conversion – The Linds cannot be held liable, as a matter of law, for trespass to chattels or conversion because there is no evidence that they unjustifiably and intentionally deprived the Damianos of their personal property.**

The Damianos are obligated to prove the Linds unjustifiably and willfully interfered with *their* property to establish conversion, or alternatively, unjustifiably and intentionally interfered with their property to

establish trespass to chattels, and that Mr. Lind deprived them of their right to possession. *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005); Restatement (Second) of Torts sec. 217 (1965).

Precedent regarding trespass to chattels, generally, is scarce in Washington. Based on thorough research, there are no Washington cases applying trespass to chattels or conversion to a case involving a fugitive domestic animal or still-missing pet. The Linds are also not aware of any applicable authority outside of Washington applying these theories to any case like the present one.

Regarding the justification for setting a live-trap, it was completely lawful for the Linds to set the live-trap on their property. There is no permit required for setting live-traps, and people can trap skunks on their own property. *See* RCW 77.36.030; *see also* RCW 77.15.192; RCW 77.15.194; WAC 232-12-007; and WAC 232-12-142.

There is no evidence here of any intentional act directed at the Damianos' personal property. There is no admissible evidence that the Linds intentionally deprived the Damianos of any personal property. The Damianos' cat was fugitive, and voluntarily cast out by the Damianos. **CP 142-143**, *Dep. J. Damiano* pp. 14-21. The Damianos did not have possession

of their cat prior to any of the alleged activities, so they could not be deprived of something they did not have – they voluntarily dispossessed themselves when they released the cat to roam freely. Their cat was essentially abandoned to confront the world, and all attendant dangers (fox, coyote, owl, etc.), free of their custody or control. By the time Ms. Damiano made any attempt to re-possess her cat, the cat that was in Mr. Lind’s live-trap, if it was even hers, had already been released safely to its original, fugitive state – the very same condition, if it was their cat, that the Damianos themselves had placed it in. The live-trap was lawfully set, and the Linds did absolutely nothing unreasonable under any analysis. *See, e.g.*, RCW 7.48.230 (allowing for self-help abatement of a public nuisance).

**F. Outrage – The Linds cannot be liable for outrage as a matter of law because they did not intentionally or recklessly cause any injury or damage to the Damianos or their personal property.**

The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Ried v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). A claim for outrage must be based on behavior “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be

regarded as atrocious, and utterly intolerable in a civilized community.”  
*Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975), quoting  
Restatement (Second) of Torts sec. 46, comment d.

Even a cat taken from a plaintiff’s front porch, purposefully set on fire  
and later euthanized because of the severity of its burns, was not factually  
sufficient to avoid dismissal of an outrage claim. *Womack v. Von Rardon*,  
133 Wn.App. 254, 260-61, 135 P.3d 542, 545 (2006). There is no evidence  
that establishes negligence of any kind on the part of the Linds, let alone the  
level of shocking and extreme conduct required to support an outrage claim.

**G. Tortious Injury to Personal Property – The Linds cannot be liable  
for tortious injury to personal property because there is no evidence of  
any damage to the Damianos personal property recklessly or willfully  
caused by the Linds.**

Gross negligence involves the additional element of intent or  
willfulness. Gross negligence is defined to be the intentional failure to  
perform a duty in reckless disregard of the consequences as affecting the life  
or property of another. *Boyce v. West*, 71 Wn.App. 657, 665, 862 P.2d 592  
(1993); citing to *Nist v. Tudor*, 67 Wn.2d 322, 332, 407 P.2d 798 (1965).  
The Damianos have not provided any evidence supporting a claim for simple  
negligence, let alone gross negligence. Nothing in the record supports a  
claim of gross negligence. There is no evidence of willful or reckless damage

or destruction to the Damianos' personal property by the Linds. The Damianos' allegations, unsupported by any fact, are insufficient to avoid summary judgment.

**H. Fraud – The Linds cannot be held liable for fraud because the Damianos cannot establish all NINE elements of the claim.**

The Damianos must show, by clear, cogent and convincing evidence all elements to prove fraud: “(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon it; and (9) damages suffered by the plaintiff.” *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996).

The Damianos are unable to create a genuine issue of material fact as to all nine (9) elements of fraud. Mr. Lind did not see or trap a cat in his garage the morning of July 24, 2009, and did not relocate or kill any cat. The Linds made no representation to the Damianos. The Damianos, according to their own testimony, were not ignorant of the material facts, nor did they actually rely on any statement made by the Linds. The Damianos also had no right to rely on any purported statement because they claim they knew their cat was missing.

There can be no claim for fraud based on the “concealment of wrongdoing,” as the Damianos assert. They rely on a California case that does not even involve a claim of fraud. *Katsaris v. Cook*, 180 Cal.App.3d 256 (1986). *Katsaris* is also distinguishable because you actually had admissible evidence of wrongdoing and the body of a dead dog that had been shot by the defendant. Here, there is no evidence of wrongdoing.

The Damianos also have no evidence of damages arising out of any alleged representation made by either Defendant. This claim fails as a matter of law for many, many reasons.

**I. Fees and Costs on Appeal – The Linds are entitled to fees and costs on appeal for having to incur unnecessary expense responding to this frivolous appeal.**

Under Title 14 Rules on Appeal, including RAP 14.1 and 14.2, RAP 18.1, and 18.9, the Linds request an award of costs and fees associated with responding to the Damianos’ frivolous appeal. There is neither law nor admissible evidence supporting any reversal of the summary judgment granted in the present case. The Damianos have failed to consider this; instead they have unjustifiably continued, along with counsel, on their crusade, unmoored from law and fact. This has caused the Linds to incur unnecessary expense, and justice calls for an award of fees and costs.

## V. CONCLUSION

The *status quo* prior to any cat being in the trap on the night of July 23, 2009, was that the cat was fugitive and free to move about various portions of private property throughout the night – including yards, streets and fields. Whatever cat was actually in the live-trap was returned to the *status quo*, unharmed, and there is no evidence whatsoever to the contrary. The owner of the released cat, if it had one, was not known to Mr. Lind at the time he returned it to its original, fugitive state.

There is no admissible evidence demonstrating any injury, “abandonment,” or “secreting” of the Damianos’ cat.

Based on the foregoing, the Linds respectfully request that the trial court’s summary judgment be affirmed on all issues, and that fees and costs be awarded because this appeal is frivolous.

**Respectfully submitted** this 10<sup>th</sup> day of January, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of January, 2011, I caused to be served a true and correct copy of the preceding document to the following attorneys of record as follows:

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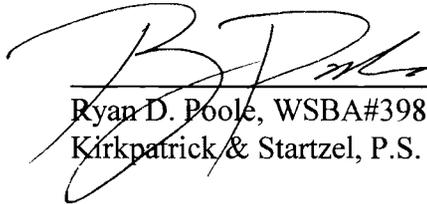
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