№ 39767-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JULIE HENDRICKSON,

Plaintiff-Petitioner,

v.

TENDER CARE ANIMAL HOSPITAL CORPORATION, et al.,

Defendants-Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Tender Care Animal Hospital Corporation, *dba* Ridgetop Animal Hospital[1] ("Ridgetop") prays the Court sustain the Trial Court's properly applying the independent tort duty doctrine and rejectnew, broad measures of damages in pet injury litigation.

In two landmark decisions, *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380,241 P.3d 1256 (2010) and *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.,* 170 Wn.2d 442, 243 P.3d 521 (2010), the Court replaced the economic loss doctrine, a principle that attempted to differentiate the line between damages in tort and contract, with the independent tort duty doctrine that similarly sought to identify the line of demarcation between damages in tort and contract. In so doing, the Court did not overrule the many prior decisions of the Court and lower courts applying the old economic loss doctrine.

This case offers the Court an opportunity to apply the new independent tort duty doctrine and to offer an appropriate application of the rule that differentiates damages in tort from damages arising out of a breach of a professional services contract involving a veterinarian. Not every breach of contract should subject a defendant to damages in tort merely because a party pleads ordinary breach of contract as a tort.

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[1] Tender Care Animal Hospital Corporation *d/b/a* Ridgetop Animal Hospital. CP 1.

This case also presents the opportunity to uphold longstanding Washington law regarding the proper measure of damages for loss of property, including dogs or other domestic animals.

In addition, by asking this court to usurp the Legislature and allow emotional distress damages for loss of an animal, Petitioner seeks to set aside the ancient wisdom of the common law. The Legislature has already refused to make that change and this court should not intrude in to the Legislature's constitutional prerogative.

Ridgetop is a veterinary clinic. Ridgetop entered into a contract with Julie Hendrickson to provide specific professional services. CP 152. The independent tort duty doctrine does not afford Ms. Hendrickson a remedy in tort where the contract: articulated in detail the commercial expectations, allocated the risks regarding the surgical procedure to be performed on her dog, and the claim against Ridgetop involves only commercial losses arising out of Ridgetop's performance of its contractually-based professional services. *Berschauer/Phillips Const. Co. v. Seattle School District No. 1,* 124 Wn.2d 816, 881 P.2d 986 (1994), *review denied,* 135 Wn.2d 1010 (1998). Additionally, in this case, Ms. Hendrickson seeks to recover not the fair market value or replacement value of her dog, but, instead,:

...

B. For economic damages, representing the intrinsic value of Bear, subject to proof and modification at trial;

C. In addition to and separate from the intrinsic value of Bear and loss of his use, for the intrinsic value of the unique human-animal bond between Bear and Hendrickson, borne from the time, labor, attention, and care given to Bear by Hendrickson, subject to proof and modification at trial;

D. For special and general damages relating to loss of Bear's utility;

E. For noneconomic damages, including emotional distress and loss of enjoyment of life, subject to proof and modification at trial;

... CP 9.

McCurdy v. Union Pac. R. Co., 68 Wash.2d 457, 413 P.2d 617 (1966), established the test to assess the measure of damages for the loss of personal property. If, as here, the property is a total loss the measure of damages is the value of the property destroyed or damaged. If it has a market value. If the property does not have a market value, then if a total loss, the measure of damages is the cost to replace or reproduce the article. If it cannot be reproduced or replaced, then its "value to the owner" may be considered in fixing damages. *Id.* at 467.

The measure of damages for the loss of a domestic animal is, "the actual or intrinsic value of lost property but not for sentimental value." *Pickford v. Masion*, 124 Wash.App. 257, 98 P.3d 1232 (2004) at 263, 98

P.3d 1232 (citing *Mieske v. Bartell Drug Co.*,). *McCurdy v. Union Pac. R. Co.*, 68 Wash.2d 457, 413 P.2d 617 (1966).

II. RESPONDENTS' POSITION ON ASSIGNMENTS OF ERROR

1. Did the trial court err by dismissing all tort claims based on the economic loss rule? NO.
2. Did the trial court err by dismissing the negligence and negligent misrepresentation by omission (lack of informed consent) claims? NO.
3. Did the trial court err by dismissing Ms. Hendrickson's reckless breach of bailment contract claim and attendant emotional distress damages? NO.

ISSUES PRESENTED

1. Are a plaintiff's tort claims against a veterinarian barred under the rule adopted in *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) where:
    - The claims arise from a professional services contract,
    - The parties' contract contained an allocation of rights and responsibilities, articulating in detail the commercial expectations and allocation of risk regarding the surgical procedure to be performed,

- Only commercial losses arising out of the veterinarian's performance of her contractually-based professional services are at issue, and
- There was no catastrophic property damage that created an unreasonable risk of harm to a human being? YES.

2. Should Washington courts create new, broad emotion-based damages that would be available in all types of litigation involving injuries to pets? NO.

III. STATEMENT OF THE CASE

This case is here on discretionary review. CP 277. A trial on the merits has not been had. CP 279. Petitioner, Julie Hendrickson, seeks to overturn the Trial Court's rulings on Defendant's motion for summary judgment. *Id.*

In the absence of a trial record, the following statement of the case is based largely on the allegations in the pleadings:

On March 16, 2007, Plaintiff brought her Golden Retriever (named "Bear") to Ridgetop to be neutered. CP 5, ¶15; 12, §2.3. The transaction was governed by an express contract. CP 152. Ridgetop employees handled the dog's intake, pre-surgical diagnostics, and surgical procedure. CP 5, ¶16; 12, §2.4. The neutering procedure was uneventful. Postoperative recovery was characterized by vomiting treated with an injection of the anti-nausea medication *Reglan*. CP 5, ¶17; 13, §2.5. Just prior to discharge that evening, the dog's stomach appeared distended.

Kristen Cage, DVM, examined the animal and ordered X-rays his abdomen. CP 41, 42. Dr. Cage reviewed and interpreted the x-ray. *Id.;* CP 198. The interpretation of x-rays is a "complex judgment" that is "rife with error." CP 157. The error rate for interpretation of the sort of x-ray taken in this matter is around 30% for board certified radiologists; it is likely greater for primary care practitioners. CP 157 – 158. It was Dr. Cage's professional judgment that the dog was safe for discharge. The dog was released to Ms. Hendrickson, a Registered Nurse with the U.S. Navy, with instructions to:

- Obtain and administer Simethicone (Gas-X) to reduce stomach gas;
- Take the animal on short walks once home; and
- Take him to an emergency clinic if his condition worsened.

CP 115.

Several hours after leaving Ridgetop, Ms. Hendrickson took her dog to an emergency clinic where he died. CP 6, ¶25. The likely cause of death was gastric dilatation volvulous (GDV). CP 19. GDV is a life-threatening condition, which is the result of accumulation of gas, fluid, or a

combination of the two in the stomach, with fatality rates ranging from 10% to 60%.[2]

PROCEDURAL HISTORY

Ms Hendrickson brought suit in Kitsap County Superior Court on August 7, 2008, for an unspecified amount in damages alleging numerous theories of liability including: 1) Respondeat Superior, Agency, Concerted Action, Captain of Ship Doctrine; 2) Breach of (Bailment) Contract; 3) Professional Negligence; 4) Negligent Misrepresentation and Lack of Informed Consent. CP 1-10. Defendants filed a motion for summary judgment on March 19, 2009, requesting the Trial Court dismiss all of plaintiff's claims sounding in tort because they are barred by Washington's economic loss rule, and to limit Plaintiff's damages to the market or replacement value of the animal. CP 18-25. The Trial Court partially granted and partially denied Defendants' motion for summary judgment. CP 272-273. Specifically, the Trial Court dismissed all claims sounding in tort, claims for emotional distress and the claim for reckless breach of bailment. *Id.* The Trial Court denied Defendants' motion for summary judgment to dismiss all claims sounding in contract, as well as Defendants' motion to limit damages to market or replacement value. *Id.*

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[2] Brockman DJ, Holt DE: 2000. *Management Protocol for Acute Gastric Dilatation-Volvulus Syndrome in Dogs.* Compendium 22: 1025-1034.

Plaintiff sought reconsideration, which was denied May 22, 2009. CP 274. Plaintiff then voluntarily dismissed her remaining claims sounding in contract, CP 275, and filed this appeal. CP 277.

IV. SUMMARY OF ARGUMENT

This case first brings into question the scope of the independent tort duty concept created in *Eastwood* and *Affiliated.*

Washington law, both decisional and statutory, recognizes a difference between the measure of damages in tort and contract. Early decisions addressing the former economic loss doctrine, like *Berschauer/ Phillips,* applied the risk of harm analysis to determine whether commercial loss damages may be sought in negligence. The Court should reaffirm the principle that risks implicating the safety of persons or catastrophic damage to other property are within the ambit of negligence, while those risks that implicate no more than commercial expectations are within the ambit of the law of contracts.

This case also brings into question whether a plaintiff can avoid traditional means of redressing their property loss damages with causes of action for professional malpractice and breach of contract simply by

pleading magic words like "reckless"[3] — all to get a bite at the general damages apple.

Precedent aside, sound policy also dictates the outcome. General damages provide no benefit to the injured animal; rather they benefit only individual owners. If general damages are allowed, they would essentially constitute punitive damages, which Washington law clearly disfavors.

V. ARGUMENT

a. Standard of Review

The Court reviews summary judgments *de novo*, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper only when there is no genuine issue about any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

b. Washington Law Has Correctly Recognized That Contract and Tort Serve Distinct Roles

The Washington Supreme Court ("The Court") has reaffirmed the wisdom of the common law: contract and tort serve distinct roles in ordering relationships and the claims they spawn, The Court has consistently declared that the boundary between them should be preserved.

[3] Petitioner goes to great length in her brief to characterize this conduct as somehow more than professional negligence at its worst; at one point going so far as to suggest it was a criminal act. It must be noted that there has been no jury finding of such and the facts simply do not support it.

The Court noted the distinction between tort and contract damages most recently in *Elcon Constr., Inc. v. Eastern Washington University*, _ Wn.2d _, 273 P.3d 965 (2012), referring to the independent duty doctrine as "an analytic tool used by the court to maintain the boundary between torts and contract." *Id* at 969.[4]

(i) Decisions of The Court

In a long line of cases, beginning with *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), the Court has maintained the distinction between contract and tort. There, the Court refused to recognize a cause of action for negligent construction against a builder. *Id.* at 417-21. Instead, the Court held that warranty liability governs claims for construction defect. The Court explained that injuries including physical harm invoke "the safety-insurance policy of tort law" which is distinguished from "the expectation-bargain protection policy of warranty law." *Id.* at 421. The Court reaffirmed that principle and the need for a differentiation between damages in tort and contract in *Atherton Condominium Apartment-Owners Assn. Bd. of Directors* v. *Blume Development Co.*, 115 Wn.2d 506, 526-27, 799 P.2d 250 (1990).

The Court in *Berschauer/Phillips* recognized the distinction

[4] The Court there determined that the independent tort duty analysis did not apply to a fraud in the inducement claim. Both the majority and the concurring opinions agreed the plaintiff failed to establish the elements of fraud or the tort of intentional interference with a contractual relationship.

between the law of contract and tort law as well. There, the general contractor brought an action for negligent misrepresentation against the architect and structural engineer, claiming that their inaccurate and incomplete engineering plans caused the general contractor to spend more money and time to complete the construction project than originally believed. The Court employed a risk of harm analysis in concluding that the economic loss doctrine was necessary to "ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract." 124 Wn.2d at 826. The Court determined to preserve the

> fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. *Id.*

In more recent economic loss doctrine cases, the ancient distinction between contract and tort damages remains. In *Alejandre v. Bull,* 159 Wn.2d 674, 153 P.3d 864 (2007), the purchasers of a home discovered that their house had a defective septic system. They sued the seller of the home claiming that the seller had engaged in fraud and negligent misrepresentation in selling the home with the defective septic system. The Court applied the economic loss doctrine, barring the purchaser's

negligence claim because the purchaser's damage was "more properly remediable only in contract." *Id.* at 681.[5] The Court noted that the fundamental boundaries of tort and contract were important to ensure the allocation of risk of future liability was based on what the parties bargained for; otherwise, certainty and predictability in allocating risk would decrease and impede future business activity. *Id.* at 682. The Court articulated the economic loss rule as follows:

> The key inquiry is the nature of the loss and the manner in which it occurs, *i.e.*, are the losses economic losses, with economic losses distinguished from personal injury or injury to *other* property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies.
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> *Id.* at 684.[6] (emphasis added)

The Court's adoption of the independent tort duty analysis in *Eastwood* and *Affiliated* was also intended to maintain a line of demarcation between contract and tort damages. In *Affiliated,* the Seattle Monorail caught fire and its operator suffered extensive lost revenues. That company sued the engineering firm that provided maintenance

[5] The Court also ruled that plaintiff's fraudulent concealment claim was not precluded by the economic loss rule. *Id.* at 689.

[6] The Court defined economic loss as an injury in a contractual relationship "where the parties could or should have allocated the risk of loss, or had the opportunity to do so." *Id.* at 687. Economic loss occurs when the defendant's action causes the plaintiff to lose money, or something of purely economic value, as opposed to suffering personal injury or injury to other property. *Id.* at 684.

services for the Monorail for negligently causing the fire. In *Eastwood,* the lessor of a ranch brought an action against the lessee for breach of the lease, waste, and negligence in breaching a duty not to cause damage to the leasehold. The Court in both cases held that the tort-based claims were not barred.

In *Eastwood,* the Court held that plaintiff may bring a tort claim where the tort duty is independent of the contract, abandoning the term "economic loss rule" and renamed this rule the "independent duty doctrine." 170 Wn.2d at 393, 402. The Court further explained that "[t]he term 'economic loss rule' has proven to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort." *Id.* at 388-89. The *Eastwood* court determined the economic loss rule does not bar a plaintiff from bringing a tort claim simply because the injury is an economic loss and the parties have a contractual relationship. *Id.* The Court explained that in the past, when it has held that the economic loss rule applies, "what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal conclusion that the defendant did not owe a duty." *Id.* at 389. As the Court explained, "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Id.*

Notwithstanding this transition to the independent tort duty analysis, the Court reiterated its commitment to a line of demarcation between tort and contract recoveries, *Affiliated,* 170 Wn.2d at 451-54, and it expressly did not overrule any of its prior decisions on the economic loss doctrine. *Affiliated,* 170 Wn.2d at 450 n.3.

Most recently, the Court visited this issue in *Jackowski v. Hawkins*, 278 P.3d 1100 (Wash. 2012). After a landslide damaged their home, the homeowners sued the sellers of the home, seeking rescission or, in the alternative, damages for fraud, fraudulent concealment, negligent misrepresentation, and breach of contract. *Id.* at 1102. The Court held because the duty to not commit fraud is independent of the contract, the independent duty doctrine permits a party to pursue a fraud claim regardless of whether a contract exists. *Id.* at 1109. *See Eastwood,* 170 Wash.2d at 390, 241 P.3d 1256. The same is true for a claim of negligent misrepresentation, but only to the extent the duty to not commit negligent misrepresentation is independent of the contract. *Id.*

(ii) Legislative Policy

In the product liability setting, the Court chose not to apply the former economic loss doctrine in *Berg* v. *General Motors Corp.*, 87 Wn.2d.584, 555 P.2d 818 (1976*Berg* permitted a plaintiff to recover in tort for purely commercial loss after a defectively manufactured engine

malfunctioned during a commercial fishing trip. The Legislature, however, overruled *Berg* in 1981 by enacting RCW 7.72.010(6) where it excluded from the definition of harm any direct or consequential economic (commercial) loss under the Uniform Commercial Code. *See also,* RCW 7.72.020(2).

In *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992), the Court analyzed the proper application of RCW 7.72.010(6). There, claims arose from the catastrophic collapse of a grain storage building; the Court concluded the claims met either of two possible tests: the risk of harm test or the sudden and dangerous test, and upheld a tort claim against a truss supplier. More than simply economic loss was involved; catastrophic property damage had occurred and, while not stated, someone could have easily been seriously injured or killed.

Indeed, the Legislature's limitation of mere economic claims arising from product defect to warranty liability under Uniform Commercial Code was one of the solid reasons for the rule adopted in *Berschauer/Phillips* barring negligence theories of recovery of commercial loss claims in construction cases. *Berschauer/Phillips,* 124 Wn.2d at 822. The Court aptly noted it would be incongruent to deprive an unsophisticated consumer a tort recovery under RCW 7.72 where the

product caused only economic loss damages, yet allow a tort recovery to a sophisticated consumer like a general contractor. *Id.* General contractors, owners, developers and design professionals are sophisticated consumers who are privy to the economic risks associated with their business. Similarly, people who pay for veterinary services are in a small percentage of pet owners who do and are not uneducated. The contract itself is clear and uncomplicated. Ms. Hendrickson does not need more protection than what the law gives the ordinary consumer.

Thus, by legislative policy, commercial loss is not recoverable in tort, but rather must be recovered in contract.[7]

The logic of setting a boundary between contract and tort damages remains true today. The law of negligence is well suited to ensure that injured persons are compensated for their personal injuries or property

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[7] It is well-recognized in the treatises on torts that tort law traditionally redresses injuries properly classified as physical harm; while, in contrast, contract law protects expectation interests. W. Prosser, *Torts* § 101 at 665 (4th ed. 1971). In the context of product liability, Prosser said:

> Where there is no accident, and no physical damage, and the only loss is a pecuniary one, through the loss of the value or use of the thing sold, or the cost of repairing it, the courts had adhered to the rule that purely economic interests are not entitled to protection against mere negligence...

Id. at 665. This principle has been recognized in the Third *Restatement of Torts* as well. In the *Restatement of Torts* (3d), Liability for Physical and Emotional Harm, physical harm is explicitly a factual predicate to a claim for negligence: "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable." *Id.*, section 6 at 67.

damages. The law of negligence properly invokes safety-insurance policies to spread the cost of such injuries, often by means of insurance. On the other hand, claims for defeated commercial expectations are best and properly governed by the contracts in which those expectations were created and the risks and benefits were allocated and priced.

(iii) To Maintain a clear Boundary Between Tort and Contract, This Court Should Adopt a Risk of Harm Analysis

The proper focus for the Court in applying the independent tort duty analysis is not the characterization of the cause of action, but the nature of the harm for which redress is sought. Whether the claim advanced by a plaintiff is negligent misrepresentation or tortious interference with a contractual relationship, or breach of contract is less consequential analytically than whether a plaintiff seeks redress for personal injuries and property damages, or commercial loss.

Historically, that is the distinction that has been of moment in drawing the line between contractual and tort damages, as noted by Justice Benjamin Cardozo, then of the New York Court of Appeals, in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916). There, he wrote that the law allows for liability of a manufacturer in tort for personal injuries caused by a Buick automobile's defective wooden wheel without privity of contract. Similarly, *Ultramares v.*

Touche, 255 N.Y. 170, 174 N.E. 441 (N.Y. 1931) involved liability in negligence for investment losses. Ultramares was an accountant who prepared a financial statement. He was then sued, not by his client, but by an investor who relied upon his statement. The court rejected the investor's claim for negligence because the accountant owed no duty to third persons to refrain from negligently causing commercial losses.

Justice Roger Traynor, writing for the California Supreme Court, similarly observed the same dichotomy between personal injury and commercial loss. In *Seely v. White Motor,* 63 Cal.2d 9, 403 P.2d 145 (1965), the court held that lost profits in the absence of a personal injury are not recoverable in negligence. The abolition of the rule of privity in product liability law was impelled by "the distinct problem of physical injuries." *Id.* at 15. "Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone." *Id.* at 18.

Thus, the theory of recovery for personal injury should be broad enough to pass the risk of loss to those who are culpable. By contrast, the remedies for commercial loss should be defined by the agreement under which the relationship of the parties is created.

The Court first confronted whether to permit the use of negligence law in resolving construction claims in *Stuart,* and the Court applied a risk

of harm analysis:

> In cases such as the present one where only the defective product is damaged, the court should identify whether the particular injury amounts to economic loss or physical damage. In drawing the distinction, the determinative factor should not be the items for which damages are sought, such as repair costs. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to the claim in question. 109 Wn.2d at 420-21.

Under a risk of harm analysis, the distinction between negligence and contract is maintained by asking, what interests are at issue? Is the court dealing with the safety-insurance principles necessary to ensure within some boundary that injured persons are compensated for personal injuries caused by unsafe conditions? Or is the court dealing with defeated commercial expectations without personal injury or damage to other property?

Subsequent to *Stuart,* courts lost sight of this analysis by focusing instead on the nature of the cause of action pleaded. The expression "economic loss" arose in a context in which there was no personal injury or catastrophic property damage, but over time it came to mean any loss that was economic, including revenue losses arising from a catastrophic

fire in which personal injuries were at risk. In *Affiliated,* for example, the district court applied its conception of the "economic loss" rule to claims arising from a fire on the Seattle monorail that was occupied by tourists. 170 Wn.2d at 446-47. In *Alejandre,* Justice Chambers in his concurrence noted the misnomer in the expression "economic loss" and its concomitant confusion, preferring the more accurate expression "commercial loss." 159 Wn.2d at 695-96.

Ms. Hendrickson urges this court to apply the Court's new independent duty analysis to the cause of action, rather than nature of the harm for which redress is sought. Plaintiff construes "independent duty" to mean that merely because a veterinarian may owe a duty to his or her clients that the independent tort duty analysis is satisfied. In fact, the duty owed by the veterinarian is not "independent" of the contract at all. In the absence of the contract, Ridgetop owed no duty to either the animal or the owner. Plaintiff did not undertake any analysis of the nature of the damage being claimed. While it is true that a veterinarian owes a *contractual* duty to the client, that is too simple a formulation of the independent tort duty analysis. A more rigorous analysis is required, as the risk of harm approach requires. It would not be honoring the necessary line of demarcation between damages in tort and contract if every action pleaded in tort against a veterinarian that involves only commercial loss allowed

recovery of tort damages against a veterinarian. Nor would it explain the cases left unaffected by the Court's decisions in *Eastwood* and *Affiliated.*

For example, in *Jarrard v. Seifert,* 22 Wn.App. 476, 591 P.2d 809 (1979), the claims were in the nature of commercial loss due to a surveyor's error. The Court of Appeals there made its decision without any briefing or any analysis of the distinction between negligence and contract, and its decision came well before the Court ruled in *Stuart* that there was no tort of negligent construction. *Jarrard* also predated the Court's unanimous determination that damages for delay claims in construction cases, economic loss, are not recoverable in *Berschauer/Phillips.*

In *Berg,* the Court of Appeals upheld a summary judgment in favor of the engineering firm because, under the contract between the city and the firm, the firm did not assume any duty to third parties, such as the plaintiff homeowners in that case whose homes were severely damaged by landslides. The court rejected a claim that the firm negligently failed to warn them of the need for remedial measures to avoid landslides when it was making recommendations to the City of Seattle to avoid such landslides where the firm's contract with the City evidenced no intent to benefit the homeowners or their property.

In *Berschauer/Phillips,* the Court held that the contractor and

owner could not sue the architect and engineer for negligence or negligent misrepresentation for delay damages. The Court emphasized that such delay damages are appropriately the subject of risk allocation in contract negotiations between the parties. *Id.* at 826-27.

By contrast, in *Affiliated,* the fire on the Monorail damaged the property of the operator, i.e., the Monorail itself, and it put people's safety at risk. 170 Wn.2d at 452-53.

Plaintiff's argument is logical only if the Court had overruled all of the cases limiting claims lacking personal injury or catastrophic property damage to the remedies of the contract, which it did not: "our decisions in this case and in *Eastwood* leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances." *Affiliated,* 170 Wn.2d at 450 n.3.

A risk of harm analysis will accurately inform practitioners and the lower courts how to determine whether a negligence theory will be permitted. That analysis asks three key questions: What is the nature of the conduct presented by the facts of the case? What is the nature of the risk in the case? How did the injury to the claimant arise? *Stuart,* 109 Wn.2d at 420-21. If the Court applies the risk of harm analysis here, it is clear that Ms. Hendrickson's remedy lies in contract and not in tort.

c. Applying the Risk of Harm Analysis to Ms. Hendrickson's

Negligence Claims Results in Their Dismissal

The core of Ms. Hendrickson's claims involve economic loss due to the total loss of her personal property, a dog; the trial properly barred such recovery in tort based on a risk of harm analysis.

(i) The nature of the conduct

Ms. Hendrickson's complaint alleged that Ridgetop failed to diagnose the dog with the condition that led to its death. The nature of the conduct at issue was failure to diagnose; no conduct by Ridgetop created a risk of harm to the safety of Ms. Hendrickson's person or other property.

(ii) The type of risk

Ms. Hendrickson alleges that, as a result of the Ridgetop's failure to diagnose and the eventual death of the dog, Ms. Hendrickson "suffered reduction in enjoyment of life, emotional distress, and general damages pertaining to loss of use." CP 6. The type of risk is commercial loss only; nobody's person or other property was damaged. This was a risk that was directly addressed in the contract with Ms. Hendrickson with the parties there agreeing on the allocation of risk. CP 152.

(iii) The manner in which the injury arose

The injury arose because Ridgetop allegedly failed to perform its

contracted duties,[8] resulting in the dog's death. This was not a traumatic injury to person or property other than the property that was the subject of the professional services contract.

All of these factors weigh heavily toward dismissal of the negligence claims. Ms. Hendrickson's remedy, if any, is to be found in the parties' contract.

Plaintiff has failed to establish an exception to the economic loss rule. The independent duty rule does not apply here because there was no risk to human life or damage to other property. The acts and omissions alleged by plaintiff did not create a risk of harm to a human life, nor did they risk harm to other property. Hence neither the old "economic loss" rule nor the new "independent duty" rule applies.

> The key inquiry is the nature of the loss and the manner in which it occurs, i.e., are the losses economic losses, with economic losses distinguished from personal injury or injury to **other** property. If the claimed loss is an economic loss, and no exception applies to the economic loss rule, then the parties will be limited to contractual remedies. (emphasis added)

Alejandre v.Bull, 159 Wn.2d 674, 684, 153 P.3d 864 (2007). Neither *Affiliated* nor *Eastwood* change this. Both *Affiliated* and *Eastwood* involved, at least impliedly, risk of harm to

[8] This is a classic services contract: owner pays money to Ridgetop and, as consideration, Ridgetop performs professional services that comport with the standard of care.

people and damage to property other than the property that was the subject of the contract. Here, although the property is a dog, it was the sole thing damaged. Thus, the proper measure of damages, and concomitantly the proper causes of action, is to be found in contract.

d. However Plaintiff Pleads, the Law of Damages Remains the Same

Plaintiff is attempting to use artful pleading to expand her remedies for things like sentimental value and emotional damages for the loss of a domestic animal, in contravention of Washington law. By granting Ridgetop's summary judgment, the Trial Court protects domestic animals from significant risk, is wholly consistent with American jurisprudence, and will prevent a new wave of pet litigation.

If the Trial Court's ruling is reversed and Plaintiff is allowed to proceed with broad, new emotion-based damages, there will be a major adverse impact on pets in this state. The cost of every pet's health care, pet products and other pet services in Washington will go up to accommodate this new liability. People's ability to spend on their pets is limited, though, as demonstrated by tough choices pet owners have made in recent times. *See, e.g.*, Assoc. Press, *Even Pets Feeling Sting of Financial Struggles*, Fosters.com, Nov. 23, 2008 (owners are "putting the

dogs to sleep" rather than treating them). Essential pet-related services, and with it responsible pet ownership, will be out of reach of many Washington residents. To be clear, creating emotion-based liability in pet litigation is not the pro-pet position. Pets do not reap benefits from these awards, only owners do, and pets will be harmed if they do not receive needed care because of lawsuits.

Legally, there is no basis for creating emotion-based liability in pet litigation. *See* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 236 (2006). Courts in thirty-five states have rejected emotion-based liability in pet cases, including as a separate cause of action and as a measure of damages. *See* Appendix A-1. As in Washington, courts throughout America carefully limit when a person may seek emotion-based damages. *See Id.; also Sherman v. Kissinger*, 146 Wn.App. 855, 195 P.3d 539 (Wash. 2008).

Injuries to pets, just as to human best friends and most cherished possessions, do not fit within the restrictive categories. The most recent courts to consider and deny such recoveries, intrinsic damages, are the Supreme Court of Vermont and mid-level appellate courts in California

and Arizona. *See Goodby v. Vetpharm, Inc.*, 974 A.2d 1269 (Vt. 2009)[9]; *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009); *Kaufman v. Langhofer*, 222 P.3d 272 (Ariz. Ct. App. 2009).

These courts recognized that the current legal system promotes responsible ownership, deters abuse, and creates a financial environment for innovative, affordable, and quality pet care. New damages are not needed to honor the human-pet bond or to assure fair compensation. *See* Peter Lewis, *What's Fido Worth?,* MSN Money, Jan. 27, 2009 (veterinary malpractice cases settle for thousands of dollars – a ten-fold increase without new damages law); Maria Vogel-Short, *Tainted Pet Food Class Action Settles for $24M, $6M of it Lawyers' Fees*, 194 N.J.L.J. 347 (2008); Assoc. Press, *Family Gets $56,400 in Dog's Death,* Seattle Times, May 31, 2006.

Finally, the case's importance cannot be understated. Plaintiff is not pursuing a novel legal issue with little application. If tens of thousands of dollars are at stake every time a pet is injured or killed, pet litigation will become a cottage industry. Litigation would arise when pets are injured in car accidents, police actions, veterinary visits, shelter incidents, protection of livestock, and pet-on-pet aggression, to name a few. *See* Steve Malanga, *Pet Plaintiffs,* Wall St. J., May 9, 2007 at A16

[9] *See also Scheele v. Dustin,* 998 A.2d 697 (Vt. 2010) (involving intentional conduct).

("just about everyone would potentially bear more liability."). There is a reason this decision was broadcast on the NBC Nightly News and the litigation's advocates have boasted the ruling "Could Change Everything." *See* Susan Thixton, *This Could Change Everything*, truthaboutpetfood.com, Nov. 14, 2011.

i. Washington Law Regarding Property Damage

In *McCurdy v. Union Pac. R. Co.*, 68 Wash.2d 457, 413 P.2d 617 (1966), the Washington Supreme Court sets forth a three part analysis for the measure of damages for the loss of personal property. If the property is a total loss the measure of damages is the value of the property destroyed or damaged. This is its market value, if it has a market value. If the property is damaged but not destroyed, the measure of damages is the difference between the market value of the property before the injury and its market value after the injury. (Again, if it has a market value.) If the property does not have a market value, then if a total loss, the measure of damages is the cost to replace or reproduce the article.[10] If it cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages. *McCurdy,* 68 Wash.2d at 467, 413 P.2d 617. *McCurdy* is the law of the state and binding precedent.

[10] Presumably replacement cost of a new item would be reduced by applying the appropriate measure of depreciation.

It is well established that as a matter of law, in Washington, domestic animals are characterized as personal property. Dogs are, "as a matter of law," "characterized as personal property.") *Sherman v. Kissinger*, 146 Wash.App. 855, 861, 195 P.3d 539 (2008). "[A]lthough we have recognized the emotional importance of pets to their families, legally they remain in many jurisdictions, including Washington, property." *Mansour v. King County*, 131 Wash.App. 255, 267, 128 P.3d 1241 (2006)).

Whether the underlying cause of actions sounds in contract or tort, this is still a standard property damages case. There are no more damages available to Plaintiff in contract than in tort. Since the recoverable damages are virtually the same (fair market value at time of loss), there is no public policy reason to extend beyond contract damages.[11] If Ms. Hendrickson is allowed to proceed under tort, the court would be giving her something she did not pay or bargain for.

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[11] Plaintiff claims her dog was irreplaceable. "Irreplaceable" is just a euphemism for sentimental attachement as is clear given the state of pet overpopulation in our country and the number of rescue resources in the area with readily available dogs (*See* Seattle Purebred Dog Rescue, Golden Retriever Chapter, http://www.spdrdogs.org/BreedInfo/GoldenRetriever/, and Golden Bond Rescue of Oregon http://www.goldenbondrescue.com) as well as the fact that the Kitsap County Humane Society is so overcrowded they have offered a "Name Your Price" promotion, allowing people to adopt a pet virtually free. *See* Kitsap News, July 11, 2012: *http://www.kitsapsun.com/news/2012/jul/11/kitsap-humane-society-holds-special-adoption/#ixzz20ZgU2WGH.*

Additionally, the standard of care is the same. The only difference is whether plaintiffs will be permitted to get a bite at the general damages apple, even though any claims for damage based on emotional attachment, sympathy, companionship, etc. are not allowed under Washington law. *See Pickford v. Masion*, 124 Wash.App. 257, 98 P.3d 1232 (2004) (declining to award loss of companionship damages for death of a pet). "In Washington, damages are recoverable for the actual or intrinsic value of lost property but not for sentimental value." *Id.* at 263, 98 P.3d 1232 (citing *Mieske v. Bartell Drug Co.*, 92 Wash.2d 40, 45-46, 593 P.2d 1308 (1979)).

ii. The Trial Court's Ruling is Wholly Consistent With American and Washington Jurisprudence

1. Courts Throughout the Country Have Widely Rejected Similar Attempts At Emotion-Based Damages in Pet Injury and Death Cases

As detailed in the Appendix, a 50-state survey revealed courts in thirty-five states where the issue has arisen, including the Court of Appeals in Austin, have broadly and consistently rejected damages based on the emotional relationship between an owner and a beloved pet – no matter how significant the owner's emotional investment in a pet, legal theories asserted, or circumstances in which the harms arose. The rulings

demonstrate the legal shortcomings of and public policy reasons against permitting any such recovery.

Among the remaining states, Hawaii briefly allowed emotion-based liability for harm to property, including pets, but that was legislatively overturned. *See Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981); Haw. Rev. Stat. § 663-8.9.[12] In Maryland and Tennessee, statutes define damages for pets and would not allow emotion-based recovery in the situation at bar. *See* Maryland MD Code Cts. & Jud. Proc. § 11-10S (fair market value plus reasonable and necessary cost of care.); Tenn. Code Ann. § 44-17-403 (capping noneconomic damages in narrow set of cases, but exempting veterinarians and certain organizations, including shelters, acting on behalf of public or animal welfare). Defendant is unaware of reported appellate cases in Alabama, Arkansas, Colorado, the District of Columbia, Maine, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.[13]

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[12] That is to say, the Legislature overruled the courts intrusion in to its prerogative.

[13] Legislation to authorize emotion-based damages in pet litigation has failed. In Colorado, once the sponsor understood the impact on pets, he withdrew his bill. *See* Julia C. Martinez, *Pet Bill Killed by House Sponsor; Move Outrages Senate Backer*, DENVER POST, Feb. 16, 2003, at B1.

Further, the draft Restatement of the Law, approved by the members of the American Law Institute, addresses and excludes emotion-based damages from pet cases:

> While pet animals are often quite different from chattels in terms of emotional attachment, damages for emotional harm arising from negligence causing injury to a pet are also not permitted. Although there can be real and serious emotional disturbance in some cases of harm to pets (and chattels with sentimental value), lines, arbitrary at times, that limit recovery for emotional disturbance are necessary.

Am. L. Inst., Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm 64 (Prelim. Draft 5, Mar. 13, 2007) .

2. Courts Have Specifically Rejected Adding Broad Emotional Damages Under a Pet's Intrinsic Value, Value to the Owner and Actual Damages

The steadfast reaction against emotion-based liability in pet litigation includes the courts' responses to the recent trend to recast the claims under vague-sounding measures of damages: intrinsic value, peculiar value and actual value to the owner. These phrases are, in fact, merely euphemisms for sentimental attachment and a sense of companionship.

This theory has been rejected in California, Washington, Alaska, Ohio and North Carolina. In California, a pet's intrinsic or peculiar value must enhance its "economic value to the owner ... not its sentimental or emotional value." *McMahon,* 97 Cal. Rptr. 3d at 566 ("pedigree,

reputation, age, health and ability to win" events). In Washington, value to the owner is "confined by the limitation on sentimental or fanciful value," as "it is well established that a pet owner has no right to ... damages for loss of human-animal bond." *Sherman*, 146 Wash.App. 855, at 873, 195 P.3d 539 (2008).

The Supreme Court of Alaska and Courts of Appeal in Ohio and North Carolina have ruled the same. *See Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001) (owner "may not recover damages for her dog's sentimental value as a component of actual value to her as the dog's owner"); *Sokolovic v. Hamilton*, 960 N.E.2d 510 (Ohio Ct. App. 2011) (*e.g.*, "time invested in specialized, rigorous training, which established that a similar dog was not available on the open market"); *Shera v. N.C. State Univ. Veter. Teach'g Hosp.*, No. COA11-1102, *18-19 (N.C. Ct. App. Feb. 21, 2012) (applying "actual or intrinsic value ... to compensate owners for the value of their emotional bond with their pet" would expand those damages beyond what is currently recognized).

Illinois has held this line too. There, as the Second Court of Appeals suggests is law in Texas, an item's "value to the owner may include some element of sentimental value." *See Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987). The court refused to turn the limited exception into a broad loophole for emotion-

based damages in pet cases, saying such recoveries must be "severely circumscribed." *Id.* (plaintiffs "expressly disavow[ed this] limited recovery").

3. Public Policy Concerns with Broad New Damages in Pet Cases

Courts have expressed a wide-range of concerns over introducing into pet litigation emotion-based damages that are severely limited elsewhere. *See Goodby*, 974 A.2d at 1273 (A pet's "special characteristics as personal property" do not make it appropriate to create a common law wrongful death action for pets similar to "what the Wrongful Death Act does for the death of immediate relatives due to the fault of others."). Some courts have understood that there would be "no sensible or just stopping point" for the litigation. *Rabideau v. City of Racine*, 627 N.W.2d 795, at 802 (Wis. 2001). It would be impossible "to cogently identify the class of companion animals" – dogs, cats, hamsters, rabbits, parakeets, etc. – "because the human capacity to form an emotional bond extends to an enormous array of living creatures."[14] *Id.* Veracity of claims would be hard to prove, and, in many cases, "charging tortfeasors with financial burdens" for an owner's emotional loss for a pet may be unfair. *Id.* Finally, given that two-thirds of Americans own 200 million pets,

[14] In fact, the ability to form emotional bonds extends to inanimate objects, *e.g.*, jewelry and classic cars.

domestic animal litigation would increase the "ever burgeoning caseloads of the court" and interfere with a court's ability to adjudicate "serious tort claims for injuries to individuals." *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. App. Div. 2001).

These courts, unlike the Second Court of Appeals, separated the love and affection between owners and pets from any need to create new, uncertain liability. *See Rabideau,* 627 N.W.2d at 798 ("To the extent this opinion uses the term 'property' in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case."); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003) ("[w]ithout in any way discounting the bonds between humans and animals, we must continue to reject recovery for noneconomic damages"); *Ammon v. Welty*, 113 S.W.3d 185, 187-89 (Ky. Ct. App. 2003) (bond "is undeniable," but dog is "not a family member."); *Strawser v. Wright*, 610 N.E. 2d 610, 612 (Ohio Ct. App. 1992) ("sympathiz[ing] with one who must endure the sense of loss which may accompany" a pet's death, but "cannot ignore the law").

Thus, the law of this land is clear. The emotional attachment between owner and pet is not compensable as a matter of law regardless of how it is pled: as a measure of damages (including intrinsic value), a cause of action for emotional distress, loss of companionship or any other

theory. The Court should uphold the Trial Court's ruling on Defendant's motion or summary judgment to assure that Washington law follows clear precedent as well as traditional, widely accepted American jurisprudence.

iii. Allowing Emotion-Based Damages Will Jeopardize Affordable Pet Care and Broadly Impact People Not Represented By Parties Before the Court

Pet welfare and social policy weigh heavily against broad new emotion-based damages in pet litigation. There is a stark dichotomy between pet welfare and interests of the few owners who seek these damages – and the animal rights groups supporting them.[15]

1. Allowing the Appeal will Adversely Impact Pet Welfare

The primary concern for pet welfare is that veterinary care will resemble human healthcare, where emotion-based damages increase costs and dictate care. People's ability to spend on pet care is limited.[16] Many families will avoid preventive care, not treat an ill pet, or be forced to euthanize a pet. *See* Assoc. Press, *Even Pets Feeling Sting of Financial*

[15] *See* Douglas Belkin, *Animal Rights Gains Foothold as Law Career*, Boston Globe, Mar. 6, 2005, at 6 (seeking sentimental damages in pet cases lays a foundation to "support a ruling that animals are not property but have rights of their own and thus legal standing").

[16] "[P]et owners have a limit — often a few hundred dollars or less — on how much they will spend on veterinary services. . . . [O]wners would pay $688 for treatment for their pets if there is a 75% chance of recovery and only about $356 if there is a 10% chance of recovery." John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States*, 215:2 J. Am. Veterinary Med. Ass'n 161, 167 (1999).

Struggles, Fosters.com, Nov. 23, 2008 ("we're putting the dogs to sleep" over finances); Kim Campbell Thornton, *Pet Owners Skipping Vet Visits as Economy Sinks*, MSNBC.com (Nov. 12, 2008) ("pet owners [are] skimping on preventive care"). Households that "continue to purchase veterinary services are spending substantially more, but an increasing proportion of households are choosing not to spend any money for veterinary services." Christopher A. Wolf, et al., *An Examination of U.S. Consumer Pet-Related & Veterinary Serv. Expenditures*, 1980-2005, 233 J. Am. Veterinary Med. Ass'n 404, 410 (2008).

A quarter of owners spend no money on veterinary care, twenty percent postpone wellness visits and forty-five percent postpone care for sick pets.[17] This fact alone belies the notion that societal regard for pets has changed in recent years.

Liability concerns also may cause some services, such as free clinics for spaying and neutering, to close. Shelters, rescues and other services may no longer afford to take in dogs and other pets if they and their staff, as in this case, face liability if an owner alleges a pet is wrongfully injured under their care. In addition, the risks and costs for other pet services, such as dog walking and boarding, will rise and become less available.

[17] *See* AMERICAN VETERINARY MEDICAL ASSOCIATION, 2007 US PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK (2007); JOHN W. ALBERS & MICHAEL T. CAVANAUGH, 2010 AAHA STATE OF THE INDUS. REPORT; National Commission on Veterinary Economic Issues, *Survey of Veterinarians*, Quick Poll Jan. 2010.

Even friends may not take on the risk of watching a pet if they could be sued for emotion-based damages if the pet is injured under their care. Of equal concern is that, given the increase in costs of pet ownership, fewer people will obtain pets, leaving pets abandoned and in shelters to die. Also, less veterinary care increases public health risks, as controlling rabies and zoonotic disease is an important function of veterinary services.

2. Most People Adversely Affected by This Ruling Are Not Represented by the Parties Before the Court

The impact of overruling the Trial Court's decision and allowing new, broad emotion-based damages that would be available in all types of litigation involving injuries to pets, will also be felt outside of the pet care community. A pet owner would face liability if her pet attacked another animal. *See, e.g., Pickford v. Masion,* 124 Wash.App. 257, 98 P.3d 1232 (2004) (pet-on-pet injuries); *Rowbotham v. Maher*, 658 A.2d 912, 913 (R.I. 1995) (same). "[P]et-on-pet aggression is at least as common as attacks on humans, [and] big awards would sharply increase insurance company liabilities and force homeowners to choose more often between their insurance and their pets." Malanga, *supra* at A16. Car insurance rates would also rise because of risks associated with pets running into roads and riding in cars. *See, e.g., Johnson,* 723 N.Y.S.2d at 628 (struck by car); *Kondaurov v. Kerdasha,* 629 S.E.2d 181 (Va. 2006) (in car); *see*

also Malanga, *supra,* at A16 ("Actuaries probably haven't even contemplated what cases like that would do to our insurance premiums."). Washington police could be subject to liability, even when taking appropriate action against a threatening dog. *See, e.g., Kautzman v. McDonald*, 621 N.W.2d 871, 876-77 (N.D. 2001) (dog shot to protect community); Laura Summers, *Suit Seeks $125,000 in Officer's Killing of Dog,* Tulsa World, July 2, 2008 at A14 (officer: "I hated to shoot the dog, but had no choice").

A majority of the public recognize these problems and oppose compensating owners for emotional loss in pet litigation. *See* Joseph Carroll, *Pet Owners Not Worried That Their Pets Will Get Sick From Pet Food: Most Don't Agree With Pain and Suffering Damages for Pets*, Gallup News Service, Apr. 3, 2007. The Court should affirm the Trial Court's decision to avoid the adverse consequences that new, broad emotion-based damages would have on pets, in diminished care, and Washington residents, by increasing their liability.

iv. Affirming the Trial Court's Decision Will Prevent Significant Expansions of Common Law Liability

The Court should affirm the Trial Court's decision so that other courts in Washington will not depart from the Court's specific precedent or create new, uncertain liability law in the area of pet litigation.

First, the Court has already held that the measure of damages available in pet litigation where the pet is a total loss is either the value of the pet or the, if there is no market value to determine the value, the replacement cost. *See McCurdy v. Union Pac. R. Co.,* 68 Wash.2d 457, 413 P.2d 617 (1966). There is a narrow exception to that rule, when the pet, "...cannot be reproduced or replaced, then its value to the owner may be considered in fixing damages." *Id.* at 467. However, "[i]n Washington, damages are recoverable for the actual or intrinsic value of lost property but not for sentimental value." *See Pickford v. Masion*, 124 Wash.App. 257, at 263, 98 P.3d 1232 (2004) (declining to award loss of companionship damages for death of a pet). (citing *Mieske v. Bartell Drug Co.*, 92 Wash.2d 40, 45-46, 593 P.2d 1308 (1979)).

Second, before a huge, new source of liability is created, the Court should determine whether pets fit within the narrow *McCurdy* "intrinsic value" exception. The primary value of a pet is not idle sentiment, but companionship — not compensable under Washington law. *See, Sherman v Kissinger.*. Pets provide security and hunting services. A pet is also not an heirloom, like the items lost in *Mieske* (e.g., wedding photo negatives) that were kept to remind the plaintiff of someone or an event in the past. Rather, owners expect pets, which often have life spans of 10-15

years,[18] to pass away during their lifetimes and often get other pets. While no two pets are alike, the emotional attachments a person establishes with each pet cannot be shoe-horned into keepsake-like sentimentality for litigation purposes. The public policy implications are also entirely different. Rendering an award for heirlooms does not impact the medical community, owners of other heirlooms, or the care provided by other owners to protect their own heirlooms.

Third, the lack of any structure to these damages would lead to bizarre results. As just one example, a five-year old show dog with a market value of $3,000 may retrieve that amount in litigation, but the owner's emotional attachment to the dog would be noncompensable because the dog had market value. By contrast, a twelve year old, sick dog with no market value could retrieve several times that amount because the owner could sue for unlimited emotion-based damages. Because of the complexity of creating such new broad liability, courts traditionally leave this task to legislatures. *See, e.g., Koester v. VCA Animal Hosp.,* 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) ("[w]e refuse to create a remedy where there is no legal structure ...plaintiff and others are free to urge the Legislature to" enact this change).

[18] Larger breeds, such as mastiffs, live only 7 or 8 years.

This issue has indeed been broached by the Washington State Legislature as recently as 2008. In that legislative session, the legislature considered, but did not adopt, a bill creating "a cause of action for the wrongful injury or death of a companion animal." House Comm. on Judiciary, H.B. Rep. on H.B. 2945, 60th Leg., Reg. Sess. (Wash.2008). The bill appears to have been modeled on the timber trespass statute, RCW 64.12.030, as well as the livestock statute, RCW 4.24.320, both which allow recovery of exemplary damages up to three times the actual damages sustained plus attorney's fees. H.B. 2945's sponsor's intent was to provide a comparable statute which would create an equal cause of action for companion animals, not to elevate the status of animals beyond property. By urging this Court to expand liability and allow such damages, Ms. Hendrickson is asking this Court to cast aside the separation of powers and adopt legislation the Legislature declined to enact. [19] The Legislature, by not acting, provided the best evidence of societal values. This does not demean the existence of companion animals or their roles in our lives; it just means society has decided this type of loss is not properly compensable beyond remedies already in existence.

[19] Ms. Hendrickson's counsel attended the hearing and thus is well aware of this fact.

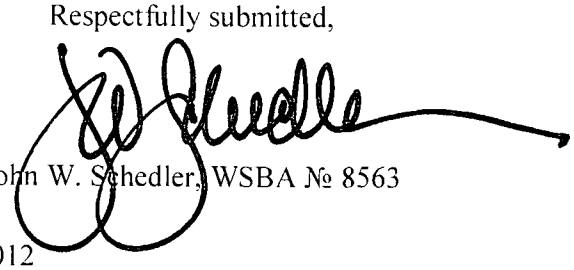
VI. CONCLUSION

In applying the independent tort duty analysis here, the Trial Court correctly concluded that because of the careful articulation of the commercial responsibilities and expectations of Hendrickson and Ridgetop in their professional services contract, Hendrickson was not entitled to pursue damages in tort against Ridgetop. As in *Berschauer/Phillips*, Ms. Hendrickson's relief is more appropriately found in the parties' contract. The Trial Court correctly ignored the nature of Ms. Hendrickson's theory of recovery, and instead looked at the elements of the risk of harm analysis.

Ridgetop therefore prays the Court AFFIRM the Trial Court's ruling on their motion for summary judgment dismissing Ms. Hendrickson's claims for tort-based damages against Ridgetop, and reject new, broad measures of damages in pet injury litigation.

Costs on appeal, including reasonable attorney fees, should be awarded to Ridgetop.

Respectfully submitted,



John W. Schedler, WSBA № 8563

Dated: August 27, 2012

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on August 27, 2012, I caused service of the foregoing on each and every attorney of record herein:

VIA EMAIL ATTACHMENT [PDF] AS AGREED BY COUNSEL
Adam Karp: adam@animal-lawyer.com.

DATED this 27th day of August, 2012 at Seattle, Washington.

John W. Schedler, WSBA № 8563

VII. APPENDIX

a. State by State Analysis of Emotional Damages in Pet Litigation

- **Alaska:** "[Plaintiff] may not recover damages for her dog's sentimental value." *Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001).
- **Arizona**: "Expanding Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages would be inappropriate as it would offer broader compensation for the loss of a pet than is currently available in this state for the loss of a person." *Kaufman*, 222 P.3d at 278-79.
- **California**: "Regardless of how foreseeable a pet owner's emotional distress may be in losing a beloved animal, we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated." *McMahon*, 97 Cal. Rptr. 3d at 564.
- **Connecticut**: Common law authority does not allow "noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet." *Myers v. City of Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004).
- **Delaware: "**Delaware law does not provide . . . for the pain and suffering of either dog or owner." *Naples v. Miller*, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009), *aff'd*, 992 A.2d 1237 (Del. 2010).
- **Florida**: "[A]llowing recovery for these types of cases would place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for individuals." *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004); *compare Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (allowing "gross negligence and damage to property causing emotional distress.").
- **Georgia**: Plaintiff "cannot recover for any of her emotional distress" from her pet's death. *Holbrook v. Stansell*, 562 S.E.2d 731, 733 (Ga. Ct. App. 2002).

- **Idaho**: "We are not persuaded to depart from this general rule" of denying recovery for mental anguish in pet cases. *Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985).
- **Illinois**: "[Plaintiffs] are asking us . . . to permit recovery by a dog owner for the loss of companionship of a dog. We do not believe this is consistent with Illinois law." *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987).
- **Indiana:** "The loss of a pet dog is similarly only an economic loss." *Lachenman v. Stice*, 838 N.E.2d 451, 461 (In. Ct. App. 2006).
- **Iowa**: "[S]entimental attachment of an owner to his or her dog has no place in the computation of damages for the dog's death or injury." *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996).
- **Kansas**: Sentimental value is not recoverable. *Burgess v. Shampooch*, 131 P.3d 1248 (Kan. Ct. App. 2006).
- **Kentucky**: "[L]ove and affection . . . from the loss or destruction of personal property is not compensable." *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky. Ct. App. 2003).
- **Louisiana**: "Personal or sentimental considerations cannot enter into . . . an award such as this." *Kling v. U.S. Fire Ins. Co.*, 146 So. 2d 635, 642 (La. Ct. App. 1962).[12]
- **Massachusetts**: "It would be illogical, however, to accord the plaintiff greater rights than would be recognized in the case of a person who suffers emotional distress as a result of the tortiously

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[1] This case was based upon a LA statute. Note that LA is not a common law state, however, the main citation to support the limit of damages for the loss of a companion animal is to an Oregon Supreme Court decision, *McCallister v. Sappingfield*, 144 P. 432, 72 Or. 422 (Or. 1914) citing to *Prettyman v. Oregon Ry. and Nav. Co.*, 10 P. 634, 13 Or. 341 (Or. 1886) (as to the value of a well trained sheep and cattle dog for which there was no market value in the area).

[2] Compare: In a contract case, a Louisiana Court of Appeal allowed emotion-based damages for harm to a cat against a boarding facility. *Compare Smith v. Univ. Animal Clinic, Inc.*, 30 So. 3d 1154 (La. Ct. App. 2010) *with Keller v. Case*, 757 So. 2d 920 (La. Ct. App. 2000) (applying traditional damages against a boarding facility over pet's death).

caused death of a member of his immediate family." *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1287-90 (Mass. App. Ct. 2002).

- **Michigan**: No authority "permits the Court to take the drastic action proposed by plaintiff." *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000).
- **Minnesota**: "We have found no law supporting" emotional distress or noneconomic damages. *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. Ct. App. 1993).
- **Missouri**: Damages in pet cases "is the difference between fair market value" before and after the injury. *Wright v. Edison*, 619 S.W.2d 797, 802 (Mo. Ct. App. 1981).
- **Nebraska:** "The Court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property." *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999).
- **Nevada:** Plaintiff cannot sue for emotional distress "based on the death of an animal." *Thomson v. Lied Animal Shelter*, 2009 WL 3303733, at *7 (D. Nev. Oct. 14, 2009); *see also* Nev. Rev. Stat. § 41.740 (barring noneconomic damages in pet litigation).
- **New Jersey:** "[T]here is no authority . . . for allowing plaintiffs to recover non-economic damages resulting from defendants' alleged negligence" in killing plaintiffs' pet. *Harabes v. The Barkery*, 791 A.2d 1142, 1146 (N.J. Super. Ct. App. Div. 2001).
- **New Mexico:** "[D]amages for sentimental value are not recoverable" for death of a pet. *Wilcox v. Butt's Drug Stores, Inc.*, 35 P.2d 978, 979 (N.M. 1934).
- **New York:** Pet owner "may not recover damages for loss of companionship." *DeJoy v. Niagara Mohawk Power Corp.*, 786 N.Y.S.2d 873, 873 (N.Y. App. Div. 2004).
- **North Carolina**: "[T]he sentimental bond between a human and his or her pet companion can neither be quantified in monetary terms or compensated for under our current law." *Shera v. N.C. State Univ. Veter. Teach'g Hosp.*, No. COA11-1102, *18 (N.C. Ct. App. Feb. 21, 2012).

- **Ohio**: "Without in any way discounting the bonds between humans and animals, we must continue to reject recovery for noneconomic damages for loss or injury to animals." *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003).
- **Oregon**: "The trial court did not err in denying plaintiffs' claim for damages based on emotional distress." *Lockett v. Hill*, 51 P.3d 5, 7-8 (Or. Ct. App. 2002).[3]
- **Pennsylvania**: There can be no recovery for "loss of companionship" due to a pet's death. *Daughen v. Fox*, 539 A.2d 858, 864-65 (Pa. Super. Ct. 1988).
- **Rhode Island:** "[E]motional trauma" for pet injuries is not recoverable. *Rowbotham v. Maher*, 658 A.2d 912, 913 (R.I. 1995).
- **South Carolina:** The "law does not support a cause of action for emotional distress for injury to one's pet." *Bales v. Judelsohn*, slip op., No. 011-268-05 (S.C. Ct. App. 2005).
- **Texas:** The Court of Appeals in Austin rejected expanding intrinsic value "to embrace the subjective value that a dog's owner places on its companionship." *Petco Animal Supplies, Inc. v. Schuster,* 144 S.W.3d 554, 565 (Tex. App.—Austin 2004, no pet.).
- **Vermont**: There is no "compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom, or memento – all of which can be prized beyond measure, but for which this state's law does not recognize recovery for sentimental loss." *Goodby*, 974 A.2d at 1274.
- **Virginia:** Damages for pet injury is diminution in value "plus reasonable and necessary expenses." *Kondaurov v. Kerdasha,* 629 S.E.2d 181, 186 (Va. 2006).
- **Washington**: "[I]t is well established that a pet owner has no right to emotional distress damages for loss of human-animal bond."

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[3] *Freeden v. Stride*, 525 P.2d 166 (Or. 1974) (allowing mental distress in conversion case).

Sherman, 146 Wn.App. 855, 195 P.3d 539 (Wash.App. Div. 1 2008).

- **West Virginia:** "[S]entimental value, mental suffering, and emotional distress are not recoverable" for pets. *Carbasho v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005).
- **Wisconsin**: "We note that this rule of nonrecovery applies with equal force to . . . a best friend who is human as it does to a plaintiff whose best friend is a dog." *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001).