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Washington State Court of Appeals
Division II

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Docket No. 39767-6-II

Kitsap Cy. Sup. Ct. Cause No. 08-2-01979-1

JULIE HENDRICKSON,

Plaintiff-Petitioner,

-against-

TENDER CARE ANIMAL HOSPITAL CORPORATION, et al.,

Defendants-Respondents.

APPELLANT'S BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err by dismissing all tort claims based on the economic loss rule (CP 273, ¶ 1; CP 274)?
2. Did the trial court err by dismissing the negligence and negligent misrepresentation by omission (lack of informed consent) claims (CP 273, ¶ 1; CP 274)?
3. Did the trial court err by dismissing Ms. Hendrickson's reckless breach of (bailment) contract claim and attendant emotional distress damages (CP 273, ¶¶ 2-3; CP 274)?

II. STATEMENT OF THE CASE

Ms. Julie Hendrickson, a Commander in the United States Navy, serving as a military nurse (CP 107 ¶ 1), sued Tender Care Animal Hospital Corporation d/b/a Ridgetop Animal Hospital and veterinarian Dr. Kristen T. Cage¹ for reckless breach of (bailment) contract, professional negligence, and negligent misrepresentation/lack of informed consent – all pertaining to her four-year-old, Golden Retriever mix named Bear (photographs: CP 116-117), who died from gastric dilatation (bloat) shortly after being discharged from Defendants' hospital. On this date, Ms. Hendrickson left Bear for an elective neuter and microchip implantation. CP 110 ¶ 8. The neutering surgery was uneventful, but

substantial vomiting complicated postoperative recovery. Ms. Hendrickson was told by an employee, “I’ve never seen a dog throw up as much as he has.” **CP 110 ¶ 8**. For this, Bear received a Reglan injection and Ms. Hendrickson was told that, after the injection, “he is much better now.” **CP 110 ¶ 8**.

Just prior to Bear’s discharge that evening, an abdominal radiograph was made showing significant gastric dilatation. Even the chart notes confirmed a diagnosis of bloat, yet no steps were taken to decompress Bear’s stomach, much less discuss alternatives to treatment with Ms. Hendrickson. “A dilated stomach, even without torsion, is an emergent and life threatening situation that requires immediate response when presented to a veterinarian.” **CP 122** (Dr. Kern’s expert opinion). Indeed, from moment of intake to moment of discharge, not one veterinarian ever spoke to Ms. Hendrickson (**CP 111:11-12**), nor did any person seek consent from Ms. Hendrickson for the x-ray taken by Dr. Cage, nor did any person explain the risks associated with discharging Bear in his current condition (**CP 112 ¶ 12**), nor did any person discuss alternative treatment (e.g., orogastric tube placement, trocharization, cannula placement) – despite Ms. Hendrickson’s attempt to confirm that a veterinarian on-site was aware of Bear’s condition. **CP 111:4-6**.

¹ Veterinarian Dr. Shannon L. Heath was dismissed with prejudice. CP 59-61.

Instead, Defendants discharged Bear to Ms. Hendrickson bloated and weak, with slightly pale gums, recommending orally (through an inexperienced 22-year-old) that Ms. Hendrickson obtain and administer Gas-X, take him on short walks once home, and if his condition worsened, to go to the emergency hospital. The written discharge sheet said nothing of the sort. **CP 115**. Ms. Hendrickson monitored Bear in accordance with the insufficient information given to her by Ms. Bridgette Pribyl, the 22-year-old technician charged with speaking to Ms. Hendrickson while Dr. Cage remained, obscurely and anonymously,² in the back of the hospital.

Upon arriving at home, Bear's condition remained unstable, so Ms. Hendrickson called the Animal Emergency and Trauma Center ("AETC") for advice. While on the phone with AETC, Bear lay down in her driveway and did not move, even after being leashed. She attempted to guide him to her car, without success, so she carried Bear. Noting he stopped breathing and had a weak, rapid pulse, she began CPR and, with a neighbor's assistance, drove to AETC. Over the long drive, she continued performing CPR. **CP 111 ¶ 10, CP 112 ¶ 11**.

Bear arrived at AETC in respiratory and cardiac arrest. Despite AETC's efforts, Bear could not be resuscitated. As a result of the alleged

² Ms. Hendrickson did not even know Dr. Cage had attended Bear since no veterinarian made her or his presence known.

misconduct of the Defendants, Ms. Hendrickson lost the intrinsic value of Bear, as well as the loss of his utility, companionship, love, affection, and solace. Ms. Hendrickson suffered profound emotional distress arising from watching Bear die, trying to save his life to no avail, and being lost, numb, and exhausted in the aftermath of the tragedy. **CP 112-13 ¶¶ 13-14.**

Had she been informed of the risks of discharge as instructed, she would have insisted upon immediate decompression or gone straight to an emergency room. **CP 112 ¶ 12.**

Ms. Hendrickson retained board-certified, historically seven-state licensed, surgeon Douglas A. Kern, D.V.M., M.S. After reviewing discovery and the veterinary records, he opined, with reasonable medical certainty and on a more probable than not basis, that the Defendants' acts and omissions "clearly breached the standard of care," "certainly led to his death," and that the inactions "constitute recklessness and a deliberate indifference to the information gathered by their radiographs and evaluations." **CP 121-123.**

On May 8, 2009, the Hon. Leila Mills heard Defendants' motion for summary judgment dismissal. The oral ruling granting relief in part by applying the economic loss rule to dismiss all tort and emotional distress claims, but denying the request to fix damages at a pretended market or replacement value of less than \$450 (noting that fact issues existed, and

relying on *Sherman v. Kissinger*, 146 Wash.App. 855 (I, 2008)), was memorialized in a written order on May 22, 2009, and which dismissed with prejudice:

1. All claims sounding in tort.
2. All claims for emotional distress damages.
3. Plaintiff's claim for reckless breach of bailment.

CP 272-73. This ruling left unscathed Ms. Hendrickson's single claim for non-reckless breach of (bailment) contract. **CP 5.** At the same time, the court denied Ms. Hendrickson's motion for reconsideration. **CP 274.** Resultantly, only the contract claim remained with emotional distress damages (as well as any other damages inconsistent with the economic loss rule) eliminated. Judge Mills decided Defendants' motion while the matter was in MAR, though the arbitration had not yet taken place.

Prior to arbitration, Ms. Hendrickson filed a motion for voluntary partial dismissal without prejudice of those claims not dismissed with prejudice on summary judgment (viz., non-reckless breach of (bailment) contract). On Sept. 18, 2009, over Defendants' objection, Judge Jeanette Dalton granted Ms. Hendrickson's motion. **CP 275-276.** Ms. Hendrickson filed the *Notice of Appeal* that same day, seeking review not of the claims voluntarily dismissed, but those involuntarily dismissed on summary judgment. **CP 277-281.**

The Appellate Court required that Ms. Hendrickson brief the question of appealability as of right. On Dec. 11, 2009, Judges Armstrong, Van Deren, and Penoyar modified Comm. Schmidt's Oct. 8, 2009 ruling to permit the direct appeal to proceed. Defendants did not cross-appeal.

III. ARGUMENT

This court reviews summary judgment orders *de novo*. Any findings of fact are superfluous and not considered on appeal. *Sherman v. Kissinger*, 146 Wash.App. 855, 864 fn. 3 (I, 2008), as amended.

A. Economic Loss Rule.

The economic loss rule marks 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 reasonable duty of care on others.

Berschauer/Phillips Construction Co. v. Seattle School District No.1, 124 Wn.2d 816, 821 (1994). Washington courts have applied the economic loss rule to negligent misrepresentation claims against home sellers and builder-vendors,³ defective product claims,⁴ and negligent

³ *Alejandre v Bull*, 159 Wn.2d 674, 686-87 (2007); *Berschauer/Phillips Constr. Co. v. Seattle Sch Dist. No. 1*, 124 Wn.2d 816, 827-28, (1994); *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 211-13 (1998).

⁴ *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 857-67 (1989); *Hofstee v. Dow*, 109 Wash.App. 537, 542-46 (2001); *Staton Hills Winery Co. v. Collons*, 96 Wash.App. 590, 593-603 (1999).

construction/design claims against architects, structural engineers, project inspectors and others in the building industry.⁵

Other than claims made against professionals in the building industry – professionals whose negligence leads to a defective tangible product – after diligent search, Ms. Hendrickson cannot find a case where Washington appellate courts have invoked the economic loss rule as a bar to claims for healing arts negligence or malpractice. The contracts here did not involve sales of goods or realty or construction services.⁶ Rather, they concerned professional services governed by independent legal and fiduciary duties and a special relationship. Further, veterinarians who treat an extant companion animal, brought to them for care, differ from the “design professionals” in *Berschauer*, whose services pertained to the construction of realty that did not previously exist.

The economic loss rule only applies to damages that are purely economic in character. *See Alejandro v. Bull*, 159 Wn.2d 674 (2007):

⁵ *Berschauer/Phillips*, 124 Wn.2d at 821-28; *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 526-27, 533-34 (1990); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417-22 (1987).

⁶ *Alejandro* appears confined to the construction industry. *Id.*, at 828 (rejecting application of *Restatement (2nd) of Torts* § 552 to allow negligent misrepresentation claim by general contractor against design professional and aligning with cases that all dealt with construction defect claims, at 826 (see *Atherton* [suit against builder-vendor, architect, and inspector for construction defect claims by owners of condominium complex]; *Stuart* [negligent construction claim by condo homeowners association against builder-vendor for defects in private decks and walkways])).

In short, the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses ... 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. ...

The same fundamental approach applies to products liability claims governed by the Washington Product Liability Actions Act, chapter 7.72 RCW (WPLA). ... Rather, the WPLA “confines recovery to physical harm of persons and property and leaves economic loss, standing alone, to the Uniform Commercial Code.”

Id., at 683-684 (quoting *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 351 (1992)). Any losses suffered as a result of veterinary malpractice are not purely “economic” in character, as the term is understood by the Supreme Court. That is, to mean “commercial loss,” reserved for “resolving purely commercial disputes” and distinguished “from an injury to the plaintiff’s person or property (property other than the product itself), the type of injury on which a products liability suit usually is founded.” *Id.*, at 695 (Chambers, J., concurring)(quoting Judge Posner in *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir.1990)). These are the precise types of injuries suffered by Ms. Hendrickson (i.e., personal and property).

The performance of an elective neuter, implantation of a microchip, and post-operative monitoring was decidedly not a “purely

commercial dispute.” Indeed, the type of contract between Ms. Hendrickson and the Defendants was fundamentally non-economic, in the sense that Bear was not kept as a commercially gainful tool or profit-bearing item, damaged inventory or equipment belonging to a retailer or wholesaler. As with most transactions involving veterinarians, companion animals receive treatment because guardians regard them as family members, not as sources of income. *Alejandre* notes that “recovery is confined to contract 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.” *Id.*, at 868. Here, no such allocation, determination, or bargain was made. The parties never negotiated remedies for contract breach, orally or in writing. The consent to treatment form does not trigger the economic loss rule in that it does not attempt to limit remedies arising from mistreatment of bloat and wrongful discharge, or even address the risk occasioned in this matter. **CP 152.**

Moreover, damages resulting from veterinary malpractice, aside from the emotional distress claim for reckless breach of contract, are more properly remediable in tort, not in contract. *Id.*, at 681 (the economic loss rule is a “device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.”) (citations omitted, emphasis added); *see also Sherman v.*

Kissinger, 146 Wash.App. 855 (I, 2008) (providing for tort remedies related to veterinary malpractice in death of companion canine).

In the end:

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.

Id., at 684 (emphasis added). Such exceptions include (1) independent legal duty and (2) special relationship. But the exceptions are not needed, since the rule does not apply where (3) Bear is “property” not constituting an “economic loss.”

1. Independent Legal Duty.

In medical malpractice case law, contract around tort duties violates public policy. *Vodopest v. MacGregor*, 128 Wn.2d 840, 861-62 (1996). *Vodopest* holds that pre-injury exculpatory clauses for negligence are unenforceable in the context of medical research on grounds of public policy. It is a legal maxim that a contract made in violation of a statute is void. *Golberg v. Sanglier*, 27 Wash.App. 179 (1980) (courts will not enforce illegal contracts). Equally recognized is that a party may not exempt itself from a duty imposed on him or her by law, particularly where the duty benefits the public. 57 Am.Jur.2d *Negligence* § 57. While

the Defendants in this case have not asserted that any exculpatory clause applies, invoking the economic loss rule practically obliterates the tort of negligence. In this regard, the above doctrines are judicious here. Furthermore, Washington courts have repeatedly adopted the sentiment of *Restatement (2nd) of Contracts* § 195 (1991), applying public policy to invalidate contract terms attempting to utilize pre-event release language for intentional and reckless injury.⁷

In *Nat'l Union Ins. Co. v. Puget Power*, 94 Wash.App. 163 (I, 1999), the court refused to apply the economic loss rule where the duties arose by statute or regulation and not by contract. The court stated:

Moreover, National Union's claims against Puget Power are for breaches of statutory and regulatory duties independent of Boeing and Puget Power's contract. Therefore, National Union's claims are better described as sounding in tort.

In contrast, tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property. Tort standards are imposed by law without reference to any private agreement. They obligate each citizen to exercise reasonable care to avoid

⁷ Section 195 provides: "A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." See *Bly v. Rainier Mountaineering, Inc.*, 30 Wash.App. 571, 573-74 (1981)(noting that, "Absent some statute to the contrary, the generally accepted rule is that contracts against liability for negligence are valid except in those cases where a public interest is involved ... or where the negligent act falls greatly below the standard established by law for the protection of others against unreasonable risk of harm."); *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443 (1971) (embracing *Restatement of Contracts* § 574 (1932)(exculpatory clause for acts falling greatly below standard established by law for protection of others against unreasonable risk of harm is unenforceable); and *Vodopost*, at 868 (Talmadge, J., concurring)(calling for formal adoption of Section 195).

foreseeable physical harm to others. As such, tort law primarily is concerned with enforcing standards of conduct.

Id., at 177 (quoting Sidney R. Barrett Jr., *Recovery of Economic Loss*, 40 S.C. L. REV. at 901-02). It continued:

And the Legislature specifically authorizes aggrieved parties to sue electric utilities in tort for violations of state law or WUTC regulations. See RCW 80.04.440. Therefore, the economic loss rule does not bar National Union, as Boeing's subrogee, from recovering damages in this case under tort law principles.

Id. The recent *Jackowski* decision aligns with *Puget Power*, adding difficulty for Defendants' position. A published decision from this division, *Jackowski v. Borchelt*, 151 Wash.App. 1, as amended (II, 2009) is binding. In relevant part, Division II states:

Neither do we believe that the economic loss rule, as described in *Alejandre*, abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional. We distinguish this holding from *Alejandre*, which did not involve a buyer suing his real estate agent, but rather, suing the seller. *Alejandre*, 159 Wash.2d at 680, 153 P.3d 864. We are not willing at this time to expand our Supreme Court's holding in *Alejandre* to preclude all recovery for economic loss against professional agents, as to do so would be to abrogate professional malpractice claims for all cases not involving physical harm. We do not believe this to be the *Alejandre* court's intention.

¶ 28 The Jackowskis cite *Alejandre* for the proposition that “ ‘tort law is not intended to compensate parties for losses suffered as a result of a *breach of duties assumed only by agreement.*” Br. of Appellant at 23 (quoting *Alejandre*,

159 Wash.2d at 682, 153 P.3d 864). **They allege that Hawkins-Poe and Johnson breached statutory and common law duties, not duties assumed only by agreement.**

... Accordingly, we hold that the trial court erred by **dismissing the Jackowskis' statutory and common law claims against Hawkins-Poe and Johnson under the economic loss rule.**

Id., at 14-15 (emphasis added). Division I recently cited to *Jackowski* to echo its holding in favor of Ms. Hendrickson's position.

¶ 39 Moreover, as the court in *Jackowski* recently recognized, the economic loss rule, which **"prohibits parties from recovering economic losses in tort claims when the entitlement to recovery comes from the contract," 151 Wash.App. at 12, 209 P.3d 514** (citing *Alejandre v. Bull*, 159 Wash.2d 674, 682, 153 P.3d 864 (2007)), does not **"preclude all recovery for economic loss against professional agents, as ... [doing so would] ... abrogate professional malpractice claims for all cases not involving physical harm." 151 Wash.App. at 14, 209 P.3d 514.** Boguch's claimed right of recovery is not based on the contract itself. In claiming that the realtors were negligent, Boguch sought to recover for breach of the common law and statutory duties they owed to him, not for the realtors' failure to perform a contractual duty.

Boguch v. Landover Corp., 2009 WL 4895110 (I, 2009), at *11. Prior to stating its accord with *Jackowski*, the *Boguch* court analogized to legal and medical malpractice claims. Its elucidation is dispositive here:

*11 ¶ 37 Analogies to legal malpractice or medical malpractice claims are also apt. If an attorney agrees to draft a will for a client and fails to do so, the client would be able to claim breach of contract and recover under an applicable contractual fee provision. "However, if the

attorney drafts the will and negligently omits having its execution properly witnessed, the attorney would be liable in tort for professional malpractice." G.W. Constr., 70 Wash.App. at 366, 853 P.2d 484. **The same would be true for a doctor who performs a medical procedure pursuant to a contract but is negligent in doing so.** That was the underlying situation in *Yeager v. Dunnavan*, in which our Supreme Court held that

"[w]hen an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, *but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it.*"

26 Wash.2d at 562, 174 P.2d 755 (quoting *Compton v. Evans*, 200 Wash. 125, 132, 93 P.2d 341 (1939).

[23] ¶ 38 Thus, **Boguch's claim that Landover violated its duties under chapter 18.86 RCW is a tort claim, rather than a claim on the contract. Although Landover's duty to Boguch arose because the parties entered into a contractual relationship, the listing agreement itself does not specify the duty of care that the realtor must provide.** To the contrary, the common law and chapter 18.86 RCW imposed a duty to exercise reasonable care on the realtors. Although the statute may be read as being incorporated into the listing agreement by reference, it does not follow that any act taken in fulfillment or derogation of that duty constitutes specific contractual performance or breach thereof. G.W. Constr., 70 Wash.App. at 366, 853 P.2d 484.

Id., at *11. *Jackowski* and *Boguch* show that Judge Mills erred in dismissing Ms. Hendrickson's tort claims, as they derived from common law and statutory duties of care.

Here, Ms. Hendrickson suffered losses as a result of duties that Defendants assumed by common law,⁸ statute and regulations,⁹ not

⁸ Generally, veterinarians must employ reasonable skill, diligence, and attention as ordinarily expected of careful, skillful, and reputable persons engaged in veterinary medicine. *Price v. Brown*, 545 Pa. 216 (1996). Accordingly, they owe a heightened standard of care (i.e., beyond lay duties of care) to the patient and client. *Ladnier v. Norwood*, 781 F.2d 490 (5th Cir.(La.),1986); *Carter v. Louisiana State University*, 520 So.2d 383, 388 (1988). While no Washington case has defined the elements of professional negligence with respect to veterinary malpractice, one may assume that they resemble those applicable to other professionals and, specifically, human health care providers (before enactment of Ch. 7.70 RCW).

⁹ Ch. 18.92 RCW governs the practice of veterinary medicine in Washington. It specifies education, training, licensing and safety requirements that protect the public from negligent and incompetent veterinarians. Incorporated into this chapter is the Uniform Disciplinary Act found in Ch. 18.130 RCW, which imposes a duty on veterinarians to not act negligently or commit malpractice. RCW 18.130.180(4,7) defines unprofessional conduct as:

“(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed;” and **“(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice.**

See also RCW 18.120.010(2)(providing mechanism for discipline of veterinarian for such a violation of RCW 18.130.180). WAC Chapter 246-933 regulates veterinarians in Washington. WAC 246-933-060 specifically requires that veterinarians not neglect their patients:

The veterinarian shall always be free to accept or reject a particular patient, but once care is undertaken, **the veterinarian shall not neglect the patient**, as long as the person presenting the patient requests and authorizes the veterinarian's services for the particular problem.

explicitly by contract. Ms. Hendrickson's tort claims arise from duties imposed upon licensed veterinarians and rest on the assumption that the Defendants would comply with the obligations imposed by extracontractual laws. As noted in *Yeager*, the contract for services merely placed Ms. Hendrickson and the Defendants "in such a relation to each other that, in attempting to perform the promised service, a duty imposed by law as a result of the contractual relationship between the parties [was] violated through an act which incidentally prevents the performance of the contract, [such that] the gravamen of the action is a breach of the legal duty, and not of the contract itself." *Yeager v. Dunnavan*, 26 Wn.2d 559, 562 (1946) (quoted by *Boguch*, at *11).

Emergency treatment not authorized by the owner shall not constitute acceptance of a patient.

WAC 246-933-080 also imposes fiduciary-type duties of honesty, integrity and fair dealing on veterinarians. It adds that, as a matter of public policy, veterinarians are forbidden from entering into contracts relating to animal injury:

attempt[ing] to dissuade a client from filing a disciplinary complaint by, but not limited to, a liability release, waiver, or written agreement, **wherein the client assumes all risk or releases the veterinarian from liability for any harm, damage, or injury to an animal while under the care, custody, or treatment by the veterinarian.**

WAC 246-933-080 (emphasis added). Entering into such contracts is deemed "unprofessional and unethical." *Id. see also Thorpe v. Bd. of Examiners in Veterinary Medicine*, 104 Cal.App.3d 111, 117 (1980) (noting that veterinarian is "in a position of a bailee for hire and a fiduciary as far as the care and protection of this personality is concerned. In handling this property of his clients, he owes a deep and abiding obligation of honesty and integrity as to his treatment and their care.")

2. Special Relationship.

Although the “special relationship” exception to the economic loss rule is mentioned apparently only once in Washington,¹⁰ several other jurisdictions have extended it to professionals like veterinarians.¹¹ Dale D. Goble, in *All Along the Watchtower: Economic Loss in Tort (The Idaho Case Law)*, 34 Idaho L. Rev. 225 (1998), focuses on the historical exception to the economic loss rule for the category of “special relationships involv[ing] professionals and others with special knowledge, judgment, or skill.” *Id.*, at 251-252. He adds that the difference between a contract for sale and contract for service “appears to lie at the core” of the “conclusion that service contracts can form the basis for a relationship between the parties that is sufficiently ‘special’ to give rise to a tort duty

¹⁰ See *Bloor v. Fritz*, 143 Wash.App. 718, 739 (II, 2008)(“Although the Fritzes argued lack of a ‘special relationship’ in their motion to dismiss, nothing in that argument alerted the trial court that Fritzes were also arguing the economic loss rule as a bar to the tort claim... We conclude that the Fritzes waived their economic loss argument by not raising it before the trial court.”)).

¹¹ See *Simpkins v. Connor*, 210 Or.App. 224 (2006)(plaintiff could bring negligence claim against hospital for failing to produce medical records, despite economic loss doctrine, where hospital owed plaintiff duty to produce records under former statute); *Congregation of the Passion v. Touche Ross & Co.*, 159 Ill.2d 137, 162 (1994)(“Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty.”) In *Passion*, the court found that the economic loss rule did not apply to a case of professional malpractice by an accounting firm, noting that duty was extracontractual. *Id.*, at 162-165. “As a matter of public policy, attorneys, accountants, and other professionals owe special duties to their clients, and breaches of those duties are generally recognized as torts. The essential nature of actions to recover for the breach of such duties is not one arising out of contract, but rather one arising out of tort-breach of legal duties imposed by law.” *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance*, 221 Ariz. 433 (Ariz.App.I,2009).

to act with care in providing the service.” *Id.*, at 248. He explains:

Despite the seeming similarities, the differences between sales and service contracts are more significant. Most fundamentally, the difference between the sale/purchase of a product and the sale/purchase of a service is the difference between the mass-produced and the personal. [FN89] The purchaser of a product seldom obtains it directly from the manufacturer; the purchaser of a service, on the other hand, is quite likely to deal directly with the provider. While the personal element in service contracts is declining with the rise of the service economy - and a concomitant increasing scale of service providers that is approaching something akin to mass-production - nonetheless, service contracts remain more personal and idiosyncratic: even taking a mass-produced VCR into the franchised warranty service provider requires a level of personal interaction that the purchaser of a product seldom has with its manufacturer.

Id., at 246. Citing to three cases, Mr. Goble applies the distinction:

Thus, for example, the court has held that agreements to send a telegraph message, [FN91] to insure plaintiff's business, [FN92] or to repair his truck [FN93] are special relationships that do not to fall within the no-duty-in-tort rule. Such situations are distinguishable from situations involving the sale of goods, the court has stated, because the sale of goods does “not involve the rendering of personal services by one with specialized knowledge and experience.” [FN94]

Id., at 246-47 (citing three Idaho Supreme Court cases). *McAlvain*, cited by Mr. Goble, offers a clear explanation as to why the economic loss rule does not apply to an insurance agent and sensibly applies here given similarities of public interest, training, licensure, and testing:

The court rejected the defendant's argument that it had only contractual duties to the plaintiff:

A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, pass an examination administered by the state, and meet certain qualifications. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services. [FN124]

These factors - the expertise of the agent, the reliance of the client, and the personal relationship between them - the court asserted, distinguished the plaintiff's claim in *McAlvain* from that in *Taylor* which involved only the sale of potatoes and thus did not involve "the rendering of personal services by one with specialized knowledge and experience" present in *McAlvain*. [FN125]

Id., at 252-53.

The only case found directly addressing the application of the economic loss rule to veterinarians is *Loman v. Freeman*, 375 Ill.App.3d 445 (2006). It held that Illinois's relatively analogous "economic loss

doctrine” (*Moorman*) did not apply. The trial court in *Loman* invoked the doctrine to dismiss the negligence claim, but the Court of Appeals reversed, holding as follows:

Although the parties in this case explicitly agreed that defendant would refrain from operating on the right stifle, defendant's duty to refrain from doing so did not arise exclusively from the service contract. The parties' agreement in this respect was nothing more than an acknowledgment of defendant's preexisting common-law duty to refrain from altering the horse in any manner except as authorized by plaintiffs. ... Contract or no contract, if one cuts, carves, lacerates, incises, or otherwise alters someone else's property except as authorized by that person, one commits a classic tort: either trespass to chattels or conversion, depending on the extent of the alteration.

Essentially, count I of the amended complaint seeks compensation for tortious property damage resulting from the negligent practice of veterinary medicine. The “occurrence”-laceration with a scalpel-was relatively “sudden,” compared with a process of deterioration such as the development of a crack in a grain-storage tank. The occurrence was “dangerous” (*Moorman*, 91 Ill.2d at 86, 61 Ill.Dec. 746, 435 N.E.2d at 450), not only because surgery is inherently dangerous but because “surgery on the stifle [was] very risky.” If a veterinarian makes an unauthorized incision on the horse, thereby reducing its value, the nature of the wrong is no different from that of a stranger who walks into the owner's stables and, without authority, cuts the horse. Count I of the amended complaint does not violate the *Moorman* doctrine.

Id., at 457-58.¹² As in *Loman*, Ms. Hendrickson formed a special relationship with the Defendants, negating application of the economic loss rule.

3. Bear is Not an Economic Loss.

“The *Alejandre* court explained that the key inquiry is the nature of the loss and the manner in which the damage occurred: [E]conomic losses are generally distinguished from physical harm or ... damage to property other than the defective product or property.” *Stieneke v. Russi*, 145 Wash.App. 544, 556 (II, 2008)(quoting *Alejandre*, at 685).

In other words, when a product fails to function properly and injures only itself, the loss is an economic loss and the parties are limited to their contract remedies. However, when a defective product injures something other than itself, such as a person or other separate property, the loss is not merely an economic loss and tort remedies are appropriate.

Id. (citing *Griffith v. Centex Real Estate Corp.*, 93 Wash.App. 202, 213 (1998)). To determine whether the product has injured only itself, or other property as well, “courts have held that it is necessary to look to the product the plaintiff purchased and not the product the defendant sold.” *Id.*, at 557.

¹² The Supreme Court decided an appeal from *Loman*, at 229 Ill.2d 104, 890 N.E.2d 446 (Ill.2008), but did not address the *Moorman* doctrine for purposes of affirming or reversing because the Defendant failed to preserve the issue for appeal.

It should be noted that this is not a product liability case, and Bear was not a defective product or defective property. He was not sold by Defendants to Ms. Hendrickson. Nor was he constructed by the Defendants. Rather, Ms. Hendrickson hired the Defendants to provide *services* to care for “property” she already owned. Accordingly, the death of Bear constitutes “damage to property *other than the defective product or property.*” This interpretation is supported by *King v. Rice*, 146 Wash.App. 662 (I, 2008). *King* involved suit by a vendor against purchasers of realty for purchasers’ destruction of a modular living unit situated on the property, asserting that the structure was personal property. The Court of Appeals concluded that the economic loss rule did not apply, citing *Alejandre*, and adding, “But the rule does not bar recovery for personal injury or damage to property other than a defect in the property.” *Id.*, at 671.

Though not required to resolve this issue, if the court construes “product” to be a “service,” then the “product purchased” was professional veterinary services. Alleged to be “defective,” the service “product” caused damage to “other property” – viz., Bear. For this additional reason, the economic loss rule does not apply. An animal-related case that excludes application of the economic loss rule and would support this alternative approach is *A.J. Decoster Co. v. Westinghouse*

Electric Corp., 634 A.2d 1330 (Md.1994), involving a farmer who lost over 140,000 chickens when a defective transfer switch failed to activate a back-up ventilation system in his chicken house.¹³ For the reasons given above, Bear constitutes “other property,” nullifying the economic loss rule. Further, Ms. Hendrickson’s “personal injury,” in the form of emotional distress, also excludes its application.

B. Lack of Informed Consent and Professional Negligence.

Although Judge Mills did not indicate the reason she dismissed the Third (Professional Negligence) and Fourth (Negligent Misrepresentation) Claims except the economic loss rule, Ms. Hendrickson acknowledges that this court may affirm on any basis supported by the record below. For this reason only, she makes these arguments. As to the Third Claim, Dr. Kern’s declaration amply puts at issue the question of malpractice.

As to the Fourth Claim, the *Restatement (Second) of Torts* sets the governing standard for claims of negligent misrepresentation. *See Haberman v. WPPSS*, 109 Wn.2d 107, 161-62 (1987). A duty to disclose, within or without a fiduciary context, gives rise to a claim of negligent misrepresentation. *Colonial Import, Inc. v. Carlton Northwest*, 121 Wn.2d

¹³ The farmer sued in tort to recover his losses. Maryland’s highest court had to determine whether the farmer’s deceased chickens constituted economic or non-economic loss. It held that the loss of the chickens was the loss of physical property, i.e., non-economic loss, not economic loss. *Id.*, at 1334. Thus, the farmer’s tort claim was appropriate. *Id.*

726 (1993). The *Restatement* discusses failure to disclose as a basis for negligent misrepresentation based on the duty-bound nature of a trust relationship and asymmetry of knowledge and skill in a commercial transaction. *Restatement (2nd) of Torts* § 551(1) (1977). Washington recognizes that the duty may arise even outside a fiduciary relationship.¹⁴

A physician has a fiduciary duty to the patient to obtain consent. *Miller v. Kennedy*, 11 Wn. App. 272, 286, 522 P.2d 852 (1974), *aff'd and adopted*, 85 Wn.2d 151 (1975). Not having obtained such informed consent to discharge Bear in lieu of immediate treatment, the Defendants breached their fiduciary duty to Ms. Hendrickson. Over time, the creation of different types of fiduciaries has expanded to include bailments (as asserted here) as well as health care providers, so the concept is not static, as described below:

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That duty arises where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent.

Colonial Import, at 732 (quoting *Oates v. Taylor*, 31 Wn.2d 989, 904 (1948); *see also Miller v. U.S. Bank*, 72 Wash., App. 416, 426 (I, 1994). Where there is a quasi-fiduciary relationship, or where a:

special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, a duty to disclose may arise.

[V]arious types of fiduciaries have evolved over the centuries. **Trustees**, administrators, and **bailees are of ancient origin**, whereas agents appeared only at the end of the eighteenth century. In the business realm, the fiduciary duties of partners, corporate directors, and officers originated with the formation of partnerships and corporations, but majority shareholders were not subjected to fiduciary duties until this century. Union leaders were cast in the fiduciary role at a still later date, when they acquired the statutory power to represent workers in negotiations with management. The twentieth century is witnessing an unprecedented expansion and development of the fiduciary law. For example, **physicians and psychiatrists** have recently become members of the fiduciary group, and one commentator has suggested trust law as a model for the **relations between the state, parents, and children**.

T. Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795 (1983) (quoted by *Konover Development Corp. v. Zeller*, 228 Conn. 206, 223 (1994)) (emphasis added).

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

Id. (quoting *Favors v. Matzke*, 53 Wash.App. 789, 796, rev. den'd, 113 Wn.2d 1033 (1989)).

fully inform the patient of his or her condition, to avoid patient abandonment, to refer to specialists as necessary, and to obtain informed consent. 61 Am.Jur.2d § 167, at 299; 70 C.J.S. § 58, at 448-49. Indeed, the Department of Health has recognized the existence of the veterinarian as fiduciary by regulatory language in WAC 246-933-080, which echoes traditional fiduciary duties (veterinarian's practice must be conducted on "highest plane of honesty, integrity and fair dealing with clients in time and services rendered, and in the amount charged[.]") The California Court of Appeals also recognized the fiduciary relationship in the veterinary context.

Certainly the fact that a veterinarian takes his clients' animals, pets often as deeply revered as members of the family, puts him in a position of a bailee for hire and a fiduciary as far as the care and protection of this personalty is concerned. In handling this property of his clients, he owes a deep and abiding obligation of honesty and integrity as to his treatment and their care.

Thorpe v. Bd. of Examiners in Veterinary Medicine, 104 Cal.App.3d 111, 117 (1980). Further, veterinary medicine is a regulated profession subject to discipline for unprofessional conduct.¹⁵

¹⁵ RCW 18.130.180(4)(incompetence, negligence, or malpractice); RCW 18.92.046 (incorporating Ch. 18.130 RCW by reference). Indeed, in violating Ch. 18.92 RCW, Defendants arguably committed a criminal misdemeanor. RCW 18.92.240.

The true issue does not primarily concern the canine. Instead, much like the driver who leaves his car at the automobile mechanic for an expensive and experimental repair of the transmission, the dog's owner-guardian – *before* spending a sum many times in excess of the acquisition cost of the animal, and which could conceivably kill the dog – has a right to know all material facts pertaining to his treatment options, including nontreatment, at time of presentation and, as here, upon discharge.¹⁶

Defendants argue that Ms. Hendrickson was not misled in any fashion by omitting information that would guide her in making a decision to leave with Bear instead of demanding immediate decompression or going straight to the emergency hospital. Applying the CR 56 standard appropriately, Ms. Hendrickson convincingly demonstrated a *prima facie* violation through her expert, Dr. Douglas Kern, a board-certified surgeon, and her own declaration that not even an attempt was made to discuss

¹⁶ Even an auto mechanic has an obligation to secure authorization from the car owner, after providing a written estimate for the repairs in question. See Ch. 46.71 RCW (Automotive Repair Act). This law allows automobile mechanics to recover only up to 110 percent of the estimated amounts authorized by the customer for repairs and allows the car owner to request a call if the repairs will exceed a price certain. The estimate must be written. RCW 46.71.025 (1993). This statutory measure protects the public from mechanics imposing an extortionate retention lien on their cars by disregarding the promised estimates. Though not wheeled, a companion animal is to a car much what veterinarians are to an auto repair shop. The ARA requires that repair facilities present the following written price estimate to the customer. RCW 46.71.025(1). Given the specialized training and knowledge required of veterinarians, does it not follow that similar authorization should be obtained from the client particularly on matters that are beyond the realm of lay understanding and which furnish the entire basis for seeking veterinary treatment from the start?

risks or alternatives prior to discharging Bear. Ms. Hendrickson relied upon the representations of Ms. Pribyl, who purportedly had conferred with Dr. Cage, and went home.

To prevail on this claim, Ms. Hendrickson need not prove “false information,” but that the Defendants had a duty to disclose material risks and alternatives, and failed miserably in this endeavor. Ms. Hendrickson justifiably relied upon the risk- and alternative-omitted dialogue to her (and Bear’s fatal) detriment. Ms. Hendrickson followed the erroneous instructions given by monitoring him for worsening of condition and then taking him to the emergency hospital as soon as an appreciable change occurred. The failure to give Bear Gas-X is immaterial, in that it would not have helped Bear in any event, and the time to treat Bear was prior to discharge. As Dr. Kern noted:

It was at that time [of reacting to findings of x-rays to determine cause of postoperative vomiting] that treatment needed to be instituted, and it was not. ... Recognized forms of treatment included passage of an orogastric tube for gastric lavage and decompression or trocharization through the abdominal and gastric walls. ... Nontreatment was not an option. ... Simethicone administration is not universally accepted as a treatment for gastric distention. ... I opine that its administration would be of little to no benefit to Bear which was unfortunately born out in his case.

CP 122.

Of course, Ms. Hendrickson alternatively pleaded lack of informed consent and professional negligence with respect to discharge. While it is true that the statutory lack of informed consent claim under RCW 7.70.030(3) and RCW 7.70.050(failure to secure informed consent) does not apply to veterinarians, per *Sherman v. Kissinger*, 146 Wash.App. 855, 869 (I, 2008), this does not mean that the common law doctrine of lack of informed consent does not apply.

An action for total lack of consent sounds in battery, while a claim of lack of informed consent is a medical malpractice action sounding in negligence.⁴ “The performance of an operation without first obtaining any consent thereto may fall within the concepts of assault and battery as an intentional tort, but the failure to tell the patient about the perils he faces is the breach of a duty and is appropriately considered under negligence concepts.”

Bundrick v. Stewart, 128 Wash.App. 11, 17 (I, 2005)(quoting *Miller v. Kennedy*, 11 Wash.App. 272, 281-82 (1974)). It should also be noted that Ms. Hendrickson has alleged that the failure to properly treat Bear prior to discharge itself constitutes malpractice, thereby raising a third, alternative cause of action – professional negligence. **CP 8 ¶ 38**. Unlike negligent misrepresentation, the standard of proof for lack of informed consent and professional negligence is not clear and convincing, but evidentiary preponderance (the same as for traditional negligence theories).

Based on the CR 56 standard, a jury could easily conclude by either clear and convincing evidence, or lesser standard, that the Defendants committed negligent misrepresentation and failed to obtain informed consent.

C. Restatement-Based Emotional Damages.

While *Pickford v. Masion*, 124 Wash.App. 257, 260-61 (II, 2004) barred emotional distress damages in the death of an animal, it did so only with respect to *negligence*. *Womack v. von Rardon*, 133 Wash.App. 254, 253 (III, 2006) expressly permitted it for *malice*. And the *Sherman* court expressly permitted it for *intentional* torts like conversion. *Sherman*, at 873 fn. 8. Ms. Hendrickson claims emotional damages for *reckless* misconduct based on the Supreme Court's decision *Gaglidari v. Denny's Restaurants*, 117 Wn.2d 426 (1991), *Restatement of Contracts* § 341, and *Restatement (2nd) of Contracts* § 351. The Supreme Court states:

Plaintiff also cites two prior decisions by this state's Court of Appeals which have announced a general right to recover emotional distress damages in contract actions. Both Divisions One and Three have stated emotional distress damages are available in breach of contract actions where the breach was wanton or reckless and the defendant would have reason to know when the contract was made that a breach would cause mental suffering for reasons other than pecuniary loss. *Thomas v. French*, 30 Wn. App. 811, 817, 638 P.2d 613 (1981), rev'd on other grounds, 99 Wn.2d 95, 659 P.2d 1097 (1983); *Cooperstein v. Van Natter*, 26 Wn. App. 91, 99, 611 P.2d 1332 (1980). Both *Thomas* and *Cooperstein* rely on *Restatement of*

Contracts § 341 (1932) for their primary authority. However, as shown above, Restatement of Contracts § 341 does not support the general availability of emotional distress damages in breach of contract actions. Rather, Restatement [***35] of Contracts § 341 comment a focuses on the type or character of the contract. **Emotional damages are available under the original Restatement only when the type or character of the contract renders emotional suffering for reasons other than pecuniary loss foreseeable from the outset. The Court of Appeals' standard goes beyond the Restatement by allowing emotional distress damages regardless of the type of contract involved whenever the breach was wanton or reckless and emotional distress was foreseeable from the outset.**

Both Cooperstein and Thomas cite Cherberg as analogous authority. However, as discussed above, Cherberg simply held a breach of contract could also support a claim for the tort of intentional interference with economic relations. Cherberg did not allow recovery of tort damages on a breach of contract claim. **Therefore, while Washington case law has recognized that a breach of contract may also lead to a related tort claim, we have yet to erase the traditional distinction between tort and contract damages in order to award damages for emotional distress on an ordinary breach of contract action. Anything to the contrary in Thomas or Cooperstein is specifically disapproved.**

Id., at 444-446 (emphasis added); see also headnote 7. In so clarifying, far from negating the recovery of emotional distress in all breaches of contract, *Gagliardi* embraces the *Restatement of Contracts* § 341 and *Restatement (2nd) of Contracts* § 353, acknowledges that a contract breach may lead to a related tort claim (for which emotional distress damages are recoverable), and simply narrows the scope of contracts from “all” to

those “when the type or character of the contract renders emotional suffering for reasons other than pecuniary loss foreseeable from the outset.” *Id.* Thus, whether a veterinary contract for treatment of an animal companion is of the type contemplated by the *Restatement* and *Gaglidari* is a matter of first impression and for which emotional damages may be recoverable – whether in contract or in tort. This is particularly the case where the veterinary industry relies upon the human-animal bond to profit. *See Plaintiff’s Notice of Supplemental Authority* (dated Jan. 25, 2010).

Since *Gaglidari*, Washington courts have shed light on what constitutes a “merely economic” contractual relationship (as in employment) versus one that is “not primarily economic,” which permits emotional damages when recklessly or wantonly breached. *Price v. State*, 114 Wash.App. 65 (II, 2002), in reversing summary judgment dismissal in a wrongful adoption case, invoked *Gaglidari* to support recovery of emotional distress damages in a dispute between an adoption agency and prospective adoptive parents, even absent proof of physical impact or objective symptomatology, finding that “a reasonable person standing in the defendant’s shoes would easily foresee that its breach is likely to cause significant emotional distress.” *Id.*, at 73.

In reaching this conclusion, *Price* cited to other analogous noneconomic relationships – at 72, citing *Harbeson v. Parke-Davis, Inc.*,

98 Wn.2d 460, 475 (1983) (**patient-physician relationship**: a tort case for “wrongful birth,” styled as a lack of informed consent claim, allowing for parents’ emotional injury caused by the birth of the defective child); at 72-73, citing *Berger v. Sonneland*, 144 Wn.2d 91 (2001) (**patient-physician relationship**: a tort case arising from “unauthorized disclosure of confidential information” to ex-husband, allowing emotional distress damages due to breach absent physical impact or objective symptoms); at 73, citing *Anderson v. State Farm Insurance Co.*, 101 Wash.App. 323 (2000), *rev. den’d*, 142 Wn.2d 1017 (2001) (**insurer-insured relationship**: a tort case claiming insurer impermissibly failed to advise insured of UIM coverage, the court allowing emotional damages due to bad faith).

The proposition that recklessly failing to immediately and properly treat Bear’s diagnosed bloat condition, followed by recklessly and prematurely discharging him to Ms. Hendrickson, proximately causing his death – when he had been delivered to veterinarians’ custody for competent treatment – will cause mental suffering for nonpecuniary reasons approaches the level of a truism that any reasonable person, especially a veterinarian, would embrace as self-evident. Moreover, the distress was paradigmatically not the type related to pecuniary loss. Dr. Kern alleges recklessness.

Thomas, *Cooperstein*, and *Gaglidari* all address the recoverability of emotional distress damages arising from breach of contract. They govern here. In *Thomas*, Division III acknowledged the cognizability of these noneconomic damages relating to breach of contract for education at a cosmetology school. *Thomas*, at 814. *Cooperstein*, a Division I decision, predated *Thomas* by a year and similarly found that emotional distress damages may be recovered for reckless breach of contract. *Cooperstein v. Van Natter*, 26 Wash. App. 91, 99 (Div. 1, 1980), *rev. den'd*, 94 Wn.2d 1013 (1980) (real estate contract breach). In 1982, Division I again embraced the *Cooperstein* doctrine in a residential Board's refusal to swiftly remedy a water problem. *Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 33 Wash. App. 397, 404 (Div. 1, 1982) (citing *Cooperstein*). Although *Cooperstein* and *Schwarzmann* did not find a reckless breach of contract under the evidence presented, both courts recognized that the cause of action was viable.

The Supreme Court evaluated both *Thomas* and *Cooperstein* in *Gaglidari*. Though it tempered the holdings of these cases by emphasizing that they do not support "the general availability of emotional distress damages in breach of contract actions," neither case was overruled. *Id.*, at 445. Rather, the court recognized that:

Emotional distress damages are available under the original Restatement only when the type or character of the contract renders emotional suffering for reasons other than pecuniary loss foreseeable from the outset. The Court of Appeals' standard goes beyond the Restatement by allowing emotional distress damages regardless of the type of contract involved whenever the breach was wanton or reckless and emotional distress was foreseeable from the outset.

Id. The animal cases cited above – *Pickford* (“Pickford, with good reason, maintains that Buddy is much more than a piece of property; we agree.” 124 Wash.App. at 263), *Womack* (“The damages are consistent with actual and intrinsic value concepts as found in *Pickford* because, depending upon the particular case facts, harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property.” 133 Wash.App. at 263-64); and *Sherman* (146 Wash.App. 855, 873 fn. 8) – and the cases *Mansour v. King Cy.*, 131 Wash.App. 255, 265, 267 (citing *Pickford*; recognizing “emotional importance of pets to their families; acknowledging pets regarded as family) (I, 2006) and *Rhoades v. City of Battle Ground*, 115 Wash.App. 752, 766 (“pets are not fungible” and “private interest at stake is great”) (II, 2002) – all acknowledge, expressly or tacitly, that emotional suffering is foreseeable and expected when companion animals are injured or killed, given the nature of the “more than mere property” relationship existing between them.

In *Gaglidari*, the court was faced with determining whether a breach of employment contract was the “type of contract” that might give rise to emotional distress damages. It looked to the *Restatement of Contracts* § 341 (1932), which was cited as primary authority in *Thomas* and *Cooperstein*. Although it ruled that a particular type of contract (viz., employment) was not of the type contemplated in the Restatement as justifying emotional distress damages, *Gaglidari* relied on both the First and Second Restatements to reaffirm that reckless breaches of contract allow for emotional distress damages in other contexts. *Gaglidari.*, at 443. In evaluating whether an employment contract is the type contemplated by the Restatements, the *Gaglidari* court quoted a Michigan court:

Loss of a job is not comparable to the loss of a marriage or a child and generally results in estimable monetary damages.... An employment contract will indeed often have a personal element. Employment is an important aspect of most persons' lives, and the breach of an employment contract may result in emotional distress. **The primary purpose in forming such contracts, however, is economic and not to secure the protection of personal interests.** The psychic satisfaction of the employment is secondary. Mental distress damages for breach of contract have not been awarded where there is a market standard by which damages can be adequately determined....

Id., at 441 (quoting *Valentine v. General Am. Credit Inc.*, 420 Mich. 256, 262-63 (1984))(emphasis added). *Gaglidari* adds that the contracts for which mental distress damages are recoverable include those where the

contract has “elements of personality” or was “‘meant to secure [the] protection’ of personal interests.” *Id.*, at 446-47 (quoting with approval *Valentine*, at 261-262 (first quotation), and *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 416 (1980)(second quotation)). Ms. Hendrickson, like most good caretakers, described her relationship to Bear as if he were her ward and child. **CP 5 ¶ 14**. The loss of Bear struck a similar, heart-rending cord.

The question for this court is whether the bailment contract to provide veterinary care for a sentient, animate being who occupies a status analogous to a child and is not maintained or cared for in the hope of realizing any commercial gain (i.e., through employment, breeding, show or competition) is the type of contract for which emotional distress damages are recoverable under *Gaglidari* – where the veterinary industry profits directly from, and markets to, the foreseeable emotional connection between human and “man’s best friend.” Bear was family, not even a source of financial stability. Given the analogous nature of the personalizing elements implicit in regarding a nonhuman animal as a family member, the application of the *Gaglidari* doctrine to the present fact pattern is sensible. Where animal guardian-owners are willing to spend many times over the purchase price of another canine without any hope of recouping the expense through future profits, the type of loss

related to this breach of contract therefore has nothing to do with pecuniary loss. Rather, it stems from interference with such “noneconomic values as personal associations, love of a place, and pride in one’s work that add up to one’s sense of identity.” *Mooney v. Johnson Cattle Co., Inc.*, 291 Or. 709, 717 (1981) (in evaluating the kind of contractual arrangement for which emotional distress damages might be recoverable in breach).

Should the court find that this is the type of contract that provides for emotional damages, the next question is whether Ms. Hendrickson created genuine issues of material fact as to (1) recklessness and (2) scienter.

1. Recklessness.

Ms. Hendrickson’s expert Dr. Kern unambiguously stated that the Defendants were reckless in their failure to immediately decompress Bear’s stomach or transfer him to an emergency clinic. **CP 123**. While Dr. Cage, Dr. Paulson, and Dr. Gavin disagree, such dispute creates (it does not negate) a fact issue. During oral argument only, Defendants first asserted that Dr. Kern was not licensed in Washington and not familiar with the standard of care in Washington, so his opinion should be disregarded. However, no motion to strike his declaration was ever brought. Nevertheless, Dr. Kern expressed his familiarity with the

Washington standard of care and noted that the standard is, in fact, national in scope:

Since shortly after graduating from the College of Veterinary Medicine at the University of Minnesota in 1987, I have been performing referral surgeries. I successfully completed an American College of Veterinary Surgeons (ACVS) approved residency program and passed their rigorous examinations to receive my board certification in 1996. I have practiced in Massachusetts, Virginia, Ohio, Nebraska, Iowa and Maine and have also been licensed to practice in Minnesota. I currently maintain active licensure status in Maine and Connecticut. **My experience in these states, familiarity with the national scope of veterinary colleges, similarities among veterinary practice acts, and the professional literature corroborate that the standard of care and expectations among states is in essence equal, i.e., a national standard of veterinary care. Therefore, the standard of veterinary medical care that I am applying to this case is national in scope and expectation and applies to practitioners in Washington State.** I am familiar with the veterinary practice act in Washington State and reciprocity of licensure exists between Maine, Connecticut and Washington State. **The anatomy, medicine, diagnostic evaluations, risks and benefits of action are the same in Washington State as in Maine.** In the case of Bear Hendrickson, the failure to respond to an enlarging postoperative abdomen and lethargy or weakness clearly breached the standard of care. The notations by staff at the Ridgetop Animal Hospital document at least the recognition of his gastric distention.

Id., at CP 122-23 (emphasis added). While Defendants may dispute that Dr. Kern is familiar with the Washington standard of care, for purposes of summary judgment, the court must accept that a factual dispute exists for resolution by the jury.

Besides, a national standard of care may be referenced to claim a standard of care violation in Washington. In *Hill v. Sacred Heart Medical Center*, 143 Wash.App. 438 (III, 2008), Division III reversed Judge Cozza's order dismissing a medical malpractice case on summary judgment, based, in part, on declarations from physicians offered by the plaintiff claiming that the Washington doctors violated the standard of care in their treatment of heparin-induced thrombocytopenia. While Plaintiff's experts were from Wisconsin and Massachusetts, they noted that a national standard of care applied. The *Hill* court held:

Dr. Willard's and Dr. Bauer's affidavits show that the applicable standard of care is the national standard. The standard of care in Washington is, then, the same standard as in their states. The same standard that applies to Dr. Willard in Wisconsin and to Dr. Bauer in Massachusetts applies to physicians here in Washington.

Id. It was also noted that the defendants did not challenge the procedures required by the applicable standards of care. *Id.*, at 454. Finding that plaintiff's affidavits raised genuine issues of material fact, summary judgment was reversed and the matter remanded in a unanimous decision. *Id.*, at 455. As in *Hill*, defendants do not challenge the procedures required by the standard of care articulated by Dr. Kern. Nor do they attempt to distinguish Washington's standard of care from any other state's standard

of care by stating that in Washington veterinarians abide by lower standards than the rest of the country.

Another case worthy of review is *Elber v. Larson*, 142 Wash.App. 243 (III, 2007)(finding expert witness qualified to express standard of care opinion where out-of-state neurosurgeon aware of national standard of care based on his work in other states); *see also Pon Kwock Eng v. Klein*, 127 Wash.App. 171 (2005) (cited by *Hill*). Yet reliance on *Hill*, *Elber*, and other post-Ch. 7.70 RCW cases pertaining to human medical malpractice is unnecessary for a more significant reason – all these cases deal with claims of personal injury against human health care providers made under Ch. 7.70 RCW and referencing RCW 7.70.040 explicitly, which states:

Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, **in the state of Washington**, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

Sherman v. Kissinger, 146 Wash.App. 855, 869 (I, 2008) categorically held that Ch. 7.70 RCW does not apply to actions against veterinarians. Accordingly, the “locality” rule is not “re-adopted” per

RCW 7.70.040 for veterinarians. For all other cases not brought under Ch. 7.70 RCW, a chapter admittedly enacted in abrogation of common law (both substantive and procedural)¹⁷, plaintiffs need only introduce an expert familiar with the standard of care in “similar communities.”

There is evidentiary limitation to Washington expert testimony in veterinary malpractice cases. Veterinarians are to be regarded no differently than those subject to any other professional negligence claim. *See Mazon v. Krafchick*, 158 Wn.2d 440 (2006)(in noting the “familiar standard of care for professionals,” quoting *Restatement (2nd) of Torts* § 299A (1965), which states, “[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.” As to physicians, Washington abolished the locality rule in 1967. *Pederson v. Dumouchel*, 72 Wn.2d 73 (1967). *Pederson* was decided *prior* to the enactment of Ch. 7.70 RCW. Importantly, it held that physicians were subject to the standard of care in an “area co-extensive” or in the “community” of the physician. The Supreme Court added, *in refusing to impose a statewide geographic restriction*:

¹⁷ See RCW 7.70.010.

The comprehensive coverage of the Journal of the American Medical Association, the availability of numerous other journals, the ubiquitous “detail men” of the drug companies, closed circuit television presentations of medical subjects, special radio networks for physicians, tape recorded digests of medical literature, and hundreds of widely available postgraduate courses all serve to keep physicians informed and increasingly to establish **nationwide standards. Medicine realizes this, so it is inevitable that the law will do likewise.**

Louisell and Williams, The Parenchyma of Law (Professional Medical Publication, Rochester, N.Y.1960) p. 183.

We have found no better statement of existing conditions. The ‘locality rule’ has no present-day vitality except that it may be considered as One of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances. In other words, local practice within geographic proximity is one, but not the only factor to be considered. **No longer is it proper to limit the definition of the standard of care which a medical doctor or dentist must meet solely to the practice or custom of a particular locality, a similar locality, or a geographic area.**

The ‘locality rule’ has never been suggested in any English case. (Nathan, Medical Negligence (Butterworth & Co., Led. 1957), p. 21.) **In England, the same standard is applicable throughout the country. The extent of our country is such, however, that we hesitate to fix a definite geographic limit upon the standard of care-be it statewide or expanded to the Pacific Northwest, as suggested by plaintiff’s requested instruction.**

A qualified medical or dental practitioner should be subject to liability, in an action for negligence, if he fails to exercise that degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances. **This standard of care is that established in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient.**

Id., at 78-79 (emphasis added); see also *Stone v. Sisters of Charity of House of Providence*, 2 Wash.App. 607, 611 (1970) (“The national minimum standard is one established ‘in an area coextensive with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient.’”) Thus, following viable Supreme Court precedent, there is no requirement that Ms. Hendrickson’s expert be familiar with a Washington standard of care. That said, Dr. Kern is, and he found a reckless breach.

2. Scierter.

The other component of the *Gagliardi* rule is that at the time of contracting, the defendant must know or have reason to know that a breach will cause mental suffering for nonpecuniary reasons. Veterinary hospitals catering to guardians of companion animals market to and rely upon the emotional connection and human-animal bond, and that their clients will intrinsically value their patients. The primary, if not sole, reason small animal veterinary hospitals flourish is because of

nonpecuniary associations and affiliations to their animal companions. For a veterinarian to claim that she would not know or have reason to know that recklessly killing a dog would cause emotional distress to the dog's owner is not only incompatible with the ethos of veterinary medicine, and the business model of modern veterinary practice, but it fails the smell test. See *Plaintiff's Statement of Additional Authority* (dated Jan. 25, 2010).

Indeed, notwithstanding Dr. Paulson's dismaying comments that animals are not technically "family," and that perhaps he sees himself as more of a car mechanic working on inanimate hunks of steel than a healer of a sentient patient who is the subject of a life shared with the client, the remarks of Dr. Paulson are tempered by his acknowledgement that "love" does enter into the picture: "I am **also** a dog **lover** and the owner of dogs." **CP 201 ¶ 3** (emphasis added). And Dr. Gavin agrees that the "emotional bond" is "an admittedly very real phenomenon." **CP 159 ¶ 10**. Of course, if Dr. Paulson wants to run his self-named "Tender Care" animal hospital like an auto repair shop, then perhaps he should revisit the reason he entered veterinary medicine. That said, the *Gagliardi* rule looks not only to whether the defendant "knew," but also whether he "should have known." For the reasons previously stated and herein, Dr. Paulson and his employees should have so known, and if this element is truly disputed,

then a fact issue exists.

IV. CONCLUSION

For the reasons stated herein, the assignments of error should be sustained and the matter remanded.

Dated this Jan. 25, 2010

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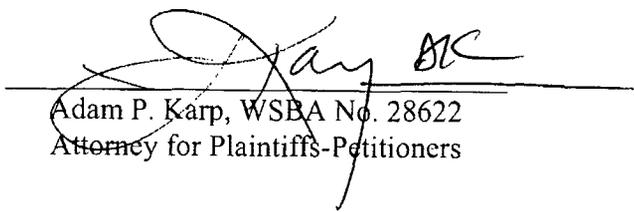
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Jan. 25, 2010, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served upon the following person(s) in the following manner:

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