NO. 34049-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT REPIN,

Petitioner,

v.

STATE OF WASHINGTON, et al.,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

"[C]ourts should think hard, and then think hard again, before turning small cases into large ones." *Camreta v. Greene*, 563 U.S. 692, 707, 131 S. Ct. 2020, 179 L.E.2d 1118 (2011). This is not to trivialize this action or to diminish Robert Repin's loss of his dog, Kaisa. To the contrary, as Washington's only Veterinary school, respondent Washington State University certainly does not dispute the familial and emotional importance of pets to their owners. But it is undisputed that pets are owned. Under Washington law, pets are personal property. Accordingly, in Washington, there is no cause of action for wrongful death of a dog, for recovery of emotional distress damages based upon the negligent death or injury to a pet, or for recovery of emotional distress damages based upon breach of a contract for veterinary services. Indeed, just as there is no wrongful death cause of action for siblings, grandparents or close personal friends, there is no wrongful death cause of action for "man's best friend."

Despite the clear Washington law to the contrary, Mr. Repin seeks recovery of Kaisa's pre-death pain and suffering and for his own emotional distress damages. In arguing that pre-death pain and suffering and emotional distress damages should be available to him, Mr. Repin quotes 18th Century philosopher Jeremy Bentham: "The question is not, Can they reason? Nor, Can they talk? But, Can they suffer?" Br. of

Appellant at 19. A question like Bentham's is not for the courts to decide. This is the sort of public policy inquiry that is only appropriate for the Legislature to consider and resolve.

The trial court also properly dismissed Mr. Repin's outrage, conversion/trespass, and lack of informed consent/negligent misrepresentation causes of action. And it correctly held Mr. Repin was not entitled to recover emotional distress damages under either his breach of contract or professional negligence claims.

Washington State University and Margaret Cohn-Urbach request that this Court—after *de novo* review of the evidence and law presented to the trial court—affirm the trial court's decision. The damages Mr. Repin seeks are unsupportable under Washington law.

II. COUNTERSTATEMENT OF ISSUES

1. Whether a plaintiff can recover emotional distress damages for breach of a euthanasia contract?

2. Whether a plaintiff can recover emotional distress damages for negligent injury to a pet?

3. Whether an animal suffering unintended pain, during euthanasia by a veterinarian, is atrocious and utterly intolerable in a civilized society?

4. Whether dismissal of Mr. Repin's conversion claim was proper?

5. Whether dismissal of Mr. Repin's lack of informed consent claim was proper?

III. COUNTERSTATEMENT OF THE CASE

A. Substantive Facts

Robert Repin acquired Kaisa in February 2001. Clerk's Papers (CP) at 2, 45. Kaisa had a history of being a vocal animal. CP at 46. In September 2012, Kaisa was diagnosed with cancer. CP at 47. On September 26, 2012, Mr. Repin's local veterinarian informed him they did not have the facilities to treat Kaisa's condition and referred him to the Veterinary Teaching Hospital (VTH) at Washington State University. CP at 48-49. Mr. Repin immediately loaded Kaisa into his car and drove from his home in Cle Elum to Pullman. CP at 49.

Upon arrival at the VTH, Kaisa was checked into the hospital by veterinary students Jasmine Feist and Jessica Miller. CP at 50-51, 78. At the time, Ms. Feist was a fourth year veterinary student and was doing an ICU rotation. CP at 77. Dr. Margaret Cohn-Urbach was an intern at the VTH. CP at 95. Dr. Cohn-Urbach was Ms. Feist's supervisor for that rotation. CP at 77, 95. During the time Kaisa was being checked in, Ms. Feist placed a catheter in her left front leg. CP at 51. After Kaisa's initial check in, it was a few hours before Kaisa was examined because another animal required emergency treatment. CP at 52, 98.

After the emergency situation was resolved, Dr. Cohn-Urbach examined Kaisa. CP at 53. Repeat radiographs were taken. CP at 53,

101. The radiographs indicated Kaisa was probably suffering from cancer. CP at 53. A consult with an oncology resident was arranged. CP at 54, 100. Kaisa's prognosis was grave and euthanasia was recommended. CP at 53-54. Euthanasia is an elective procedure. CP at 91. However, after considering what to do, Mr. Repin authorized Kaisa's euthanasia. CP at 55, 79, 109.

After he signed a Consent for Euthanasia form, Dr. Cohn-Urbach explained to Mr. Repin what he might expect to see during the euthanasia procedure. CP at 59, 126. Mr. Repin testified that, based on this conversation, he expected that any adverse reaction would include a "slight leg twitch, possibly a deep breath." CP at 60. Dr. Cohn-Urbach testified she has a "very standard discussion" that she uses to explain the euthanasia procedure:

> I just want to warn you that sometimes animals have adverse effects to the drugs, sometimes they'll have deep gasps, tremors, other adverse effects, however, it doesn't mean they are in pain, it doesn't mean they are suffering, it's just a side effect of the drug and it can happen. It's not expected, but it can happen.

CP at 96. Dr. Cohn-Urbach is confident she had this standard discussion with Mr. Repin. CP at 96.

The euthanasia was performed in a room called the quiet room. CP at 79. Dr. Cohn-Urbach asked Ms. Feist if she would like to perform

the euthanasia and Ms. Feist agreed to do so. CP at 80. As the VTH is a teaching hospital, Dr. Cohn-Urbach wanted Ms. Feist to learn from the experience. CP at 111. Dr. Cohn-Urbach told Mr. Repin they would give Kaisa a mild sedative, followed by the euthanasia solution. CP at 61. Mr. Repin and Kaisa got comfortable on the floor of the quiet room and Mr. Repin told Dr. Cohn-Urbach to proceed. CP at 62.

Mr. Repin makes much of the condition of the catheter. Repin testified he heard Ms. Feist say to Dr. Cohn-Urbach that Kaisa had chewed the end of the catheter. CP at 62. Ms. Feist was concerned that when she tested the catheter, she did not get any "flashback" of blood into the syringe. CP at 84, 103. Looking for flashback is a common way to test patency of a catheter in horses, not in small animals like dogs. CP at 84, 103. She made a note of this to Dr. Cohn-Urbach. CP at 82. As a result, they tested the catheter by flushing a large amount of saline through the catheter to ensure it was patent.[1] CP at 82, 84. Neither Ms. Feist nor Dr. Cohn-Urbach had any concerns that the catheter looked damaged or chewed on. CP at 83, 85, 114. Dr. Cohn-Urbach testified the catheter looked "perfect." CP at 111. Ms. Feist and Dr. Cohn-Urbach were confident the catheter was patent prior to the euthanasia. CP at 93, 115.

[1] The term "patent" refers to something that is "open, unobstructed, or not closed." *Dorland's Illustrated Medical Dictionary* 976 (26th ed. 1981).

Despite repeatedly stating that the catheter was damaged, *see* Appellant's Appeal Brief at 7-8, Mr. Repin did not observe the catheter during the euthanasia procedure nor did he observe Kaisa chewing on the catheter at any time. CP at 63. Mr. Repin points to an e-mail by Dr. Harmon Rogers, Director of the VTH, in which Rogers states: "At the time of euthanasia the IV catheter looked questionable." CP at 130. Dr. Rogers testified this statement was based upon what Dr. Cohn-Urbach told him. CP at 123-24. He further testified that "questionable" was his term, not Dr. Cohn-Urbach's, and that Dr. Cohn-Urbach did not say the catheter was "questionable." CP at 123-24. The only two people who observed the condition of the catheter, Dr. Cohn-Urbach and Ms. Feist, testified that there was no damage to it and it was patent after testing it. CP at 83, 85, 93, 111, 114-15. Even though those steps may not have been visible to Mr. Repin, Dr. Cohn-Urbach and Ms. Feist took steps to make sure the catheter they were going to administer the euthanasia drugs into was patent. CP at 83, 85, 93, 111, 114, 115.

Prior to any of the drugs being administered, Kaisa was asleep. CP at 66. As Kaisa was sleeping, the Acepromazine was administered by Ms. Feist. CP at 65, 103. After the administration of the Acepromazine, they waited between five and ten minutes. CP at 65, 104. During this time,

Kaisa continued to sleep. CP at 66. After waiting five to ten minutes, Ms. Feist administered the Euthasol. CP at 66, 81, 97, 104.

The accounts of what transpired after the administration of the Euthasol differ considerably.[2] According to Mr. Repin, within ten to twenty seconds, Kaisa was awake and "screaming in agony." CP at 67. Mr. Repin indicated he had to wrestle Kaisa back to the floor. CP at 67. Repin further indicated Kaisa would have "tore those girls apart" if he had let go of her. CP at 67. Mr. Repin testified that Dr. Cohn-Urbach and Ms. Feist stood there for what seemed like an eternity before Dr. Cohn-Urbach left to get more Euthasol. CP at 68. Repin said Dr. Cohn-Urbach was gone from five to seven minutes and Kaisa struggled the entire time she was gone. CP at 68.

According to Ms. Feist, toward the end of the Euthasol injection, Kaisa lifted her front end up and vocalized. CP at 82. Ms. Feist characterized the vocalization as at least one loud howl. CP at 86. Ms. Feist would not characterize it as screaming in agony. CP at 92. When this happened, Dr. Cohn-Urbach jumped up and left the room. CP at 82. Repin grabbed Kaisa around the neck and held her. CP at 89-90.

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[2] Although there are significant factual differences in the parties' accounts of the euthanasia procedure, and the law requires all inferences be made in favor of the non-moving party, the factual differences between (and among) the accounts do not alter the legal conclusion under Washington law. Even if all of Repin's assertions are accepted as true, he has no claim for damages beyond economic damages.

After Dr. Cohn-Urbach left the room, Kaisa stopped vocalizing, lay back down and started having large breaths. CP at 82. Ms. Feist thought Kaisa died after she lay back down and had a couple large breaths. CP at 87, 89. Ms. Feist estimates Dr. Cohn-Urbach was gone "a minute or two." CP at 88.

According to Dr. Cohn-Urbach, Kaisa made three noises and looked at her left leg which Ms. Feist was handling and injecting. CP at 104. Dr. Cohn-Urbach characterized the noises as a bark or howling sound. CP at 106. Dr. Cohn-Urbach testified Kaisa was not acting violently or thrashing. CP at 107, 112-13. As Kaisa was reacting, Dr. Cohn-Urbach observed that Mr. Repin was "very unhappy." CP at 104. Mr. Repin had positioned himself on Kaisa and was holding her. CP at 107. At that point, Dr. Cohn-Urbach made the decision that she wanted to accomplish the euthanasia as quickly as possible. CP at 104-05. So, she left the quiet room to get more Euthasol. CP at 105. Dr. Cohn-Urbach estimates she was gone two minutes. CP at 107.

When Dr. Cohn-Urbach returned to the quiet room, she told Mr. Repin she was going to inject again in Kaisa's right leg. CP at 69, 82. Dr. Cohn-Urbach then injected the Euthasol directly into the cephalic vein in Kaisa's right leg. CP at 105. As Dr. Cohn-Urbach was administering the second dose of Euthasol, Kaisa made another noise similar to the noise

she made during the first injection. CP at 105. After the second injection, Kaisa died. CP at 70.

Mr. Repin lifted Kaisa onto a gurney and rolled her out to his car. CP at 71. Dr. Cohn-Urbach and Ms. Feist both walked with Mr. Repin out to his car. CP at 71. As they walked, Mr. Repin repeatedly told Dr. Cohn-Urbach, "You fucked this up." CP at 71, 108. Dr. Cohn-Urbach told Mr. Repin, "I know that this is a very difficult time for you, but I hope that at some point in the future you will realize that I just meant the best for Kaisa." CP at 108. Ms. Feist helped Mr. Repin get Kaisa into his car. CP at 72. Mr. Repin then drove home to Cle Elum and buried Kaisa. CP at 73.

B. Procedural Facts

Robert Repin filed this case on June 30, 2014. CP at 1-7. Mr. Repin seeks damages for Kaisa's pain and suffering, his own emotional distress, and the cost of payment for the euthanasia procedure. CP at 74-75. The Respondents (collectively "the University") answered the complaint on August 4, 2014. CP at 8-16. On December 11, 2015, the University filed a motion for summary judgment seeking dismissal of all causes of action brought by Mr. Repin and requested that, if any causes of action were to survive, damages be limited to Mr. Repin's economic loss. CP at 17-40. On January 8, 2016, the Honorable Frances Chmelewski

granted the University's motion in part and denied it in part. CP at 390-93. Judge Chmelewski denied the University's motion as to the professional negligence and breach of contract causes of action and as to the University's affirmative defense based upon the release language in the Consent for Euthanasia form signed by Mr. Repin. CP at 390-93. However, Judge Chmelewski granted the University's motion as to the reckless breach of contract, lack of informed consent/negligent misrepresentation by omission, outrage, and conversion/trespass to chattels causes of action. CP at 390-93. Finally, Judge Chmelewski ruled, as a matter of law, that Mr. Repin's damages are limited to his economic loss, and he was not entitled to emotional distress damages or damages for Kaisa's pain and suffering. CP at 390-93.

On January 20, 2016, Judge Chmelewski signed a Stipulation and Agreed Order Staying Proceedings at Trial Level and Preparing for Interlocutory Review. CP at 394-96. In the Order, the parties stipulated to, and Judge Chmelewski certified, review under RAP 2.3(b)(4). CP at 394-96.

On March 8, 2016, this Court accepted discretionary review of the issues on which the trial court granted the University judgment as a matter of law.

IV. STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court conducts the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

V. SUMMARY OF ARGUMENT

Washington law bars Mr. Repin from recovering emotional distress damages for the loss of Kaisa. Washington courts uniformly recognize that animals are personal property. *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006); *Sherman v. Kissinger*, 146 Wn. App. 855, 870, 195 P.3d 539 (2008). Because animals are personal property, Washington courts have barred recovery of emotional distress damages for breach of a contract for veterinary services, for negligent injury to a pet, and for negligent infliction of emotional distress.

Hendrickson v. Tender Care Animal Hosp., 176 Wn. App. 757, 767, 312 P.3d 52 (2013) (breach of contract); *Sherman*, 146 Wn. App. at 873 (negligence); *Pickford v. Masion*, 124 Wn. App. 257, 260, 98 P.3d 1232 (2004) (negligent infliction of emotional distress).

Despite the state of the law, Mr. Repin argues he is entitled to emotional distress damages under each theory. With regard to breach of contract, Mr. Repin argues, with reference to *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), and *Restatement (2nd) of Contracts* § 353 that emotional distress damages are recoverable, because they were foreseeable for breach of contract for euthanasia of a pet. Mr. Repin's claim fails, because Washington courts have not recognized recovery of emotional distress damages for breach of a contract, even where emotional distress is foreseeable. With regards to negligence, Mr. Repin concedes that emotional distress damages are unavailable for negligent injury to a pet. However, he then proceeds to argue, despite not having pled a cause of action for negligent infliction of emotional distress, that he is entitled to recover based upon the outdated "zone of danger" test. Mr. Repin's claim fails, because the "zone of danger" test was replaced by the *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) rule which is based on the established negligence elements of duty, breach, proximate cause, and damages. As such, the

"zone of danger" test is not a stand-alone basis for recovery. If the law is to be expanded in either of these areas, it is within the province of the Legislature, not the courts.

Mr. Repin also appeals the trial court's dismissal of his outrage, conversion, and lack of informed consent causes of action. Mr. Repin's outrage claim fails, because he is unable to show that a euthanasia that had the unintended consequence of inflicting pain on the animal being destroyed went beyond all possible bounds of decency, could be regarded as atrocious, or is utterly intolerable in a civilized community. Mr. Repin's vague conversion claim fails, because Mr. Repin authorized the euthanasia of Kaisa. With regard to lack of informed consent, Mr. Repin's claim fails, because this cause of action is limited in Washington to human patients. Further, to extent there is such a cause of action in the veterinary context, Dr. Cohn-Urbach adequately informed him of the expected risks of the procedure.

For these reasons, this Court should affirm the trial court's dismissal of Mr. Repin's outrage, conversion, and lack of informed consent causes of action as well as limit his damages to his economic loss.

VI. ARGUMENT

A. Mr. Repin's Complaints Are More Appropriately Addressed To The Legislature.

"[T]he Legislature is the fundamental source for the definition of this state's public policy and [the courts] must avoid stepping into the role of the Legislature by actively creating the public policy of Washington." *Sedlacek v. Hills*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). In other words, it is the Legislature's role to "set policy and to draft and enact laws." *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). There is no cause of action in Washington for wrongful death of a dog. *Sherman*, 146 Wn. App. at 860 n.1. There are also no emotional distress damages available in Washington for "negligent infliction of emotional distress or damages for loss of companionship and the human-animal relationship based on the negligent death or injury of a pet." *Id.* at 873. Finally, there is no recovery for emotional distress damages in Washington based on breach of a bailment contract for veterinary services. *Hendrickson*, 176 Wn. App. at 767. *Sherman* even left open whether claims like breach of bailment contract, negligent misrepresentation, conversion, and trespass to chattels are viable claims in the veterinary context. *Sherman*, 146 Wn. App. at 869 ("By reinstating

these claims, we are not deciding that these claims are viable or that Sherman is entitled to proceed to trial on any of them").

It is undeniably a question for the Legislature whether to establish a cause of action for wrongful death of a dog, or emotional distress damages for negligent injury to a pet, or emotional distress damages based on reckless breach of a bailment contract for veterinary services. *See Sherman*, 146 Wn. App. at 860 n.1 ("Whether to establish a cause of action for the wrongful death of a dog is a matter for the legislature"); *Hendrickson*, 176 Wn. App. at 767 ("If there is to be a change of the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring"); *Pickford*, 124 Wn. App. at 263 ("Still, no Washington case has recognized the claims Pickford urges us to find. Such an extension of duty and liability is more appropriately made by the legislature").

Although at times unclear, the gravamen of Mr. Repin's complaint is that he seeks recovery of emotional distress damages in connection with the euthanasia of Kaisa and for Kaisa's pre-death pain and suffering. *See, e.g.*, CP at 5 ("Cohn-Urbach and WSU did not euthanize Kaisa. They killed her by a means causing undue suffering and unnecessary physical harm"); Br. Appellant at 14 ("Mr. Repin endured exquisite and long-lasting mental anguish"), 18 ("Dr. Cohn-Urbach deprived him of the

expected benefit (i.e., euthanasia/humane death); for which he could not be adequately compensated simply by refunding the modest sum for the injectables and procedure"), 18 ("The infliction of severe pain to Kaisa during what were to be her final moments could not be cured by leaving the room and trying again").

There is no dispute as to the familial and emotional significance of pets. *See Pickford*, 124 Wn. App. at 263; *Mansour*, 131 Wn. App. at 267. However, while Washington recognizes the importance of the human-animal bond, Washington also uniformly recognizes that pets are personal property. *See Mansour*, 131 Wn. App. at 267 ("[A]lthough we have recognized the emotional importance of pets to their families, legally they remain in many jurisdictions, including Washington, property"); *Sherman*, 146 Wn. App. at. 870. Mr. Repin does not dispute this longstanding determination. *See* CP at 192 ("I know the law considers an animal as property, and property is no different, a live animal is no different from a toaster oven when it's defined as property"). Indeed, the "human-animal bond, while undeniable, is uncompensable." *Strickland*, 397 S.W.3d at 198. This is not a matter of the Defendants trivializing or belittling this action as Mr. Repin suggests. *See* Br. of Appellant at 38; CP at 136. This is a matter of Repin requesting a remedy that is unavailable in the state of Washington. As such, the trial court did not err in dismissing Mr. Repin's

outrage, lack of informed consent, and conversion claims, as well as Mr. Repin's claim for emotional distress damages. The trial court should be affirmed.

B. Mr. Repin Cannot Recover Emotional Distress Damages For Breach Of Contract Under Washington Law.

"Washington law is clear that 'a pet owner has no right to emotional distress damages or damages for loss of human-animal bond based on the negligent death or injury to a pet.'" *Hendrickson*, 176 Wn. App. at 762 (quoting *Sherman*, 146 Wn. App. at 873). Mr. Repin asserts a claim for reckless breach of contract, just as the plaintiff did in *Hendrickson*. CP at 5:24-25. Further, Mr. Repin also asserts a claim for emotional distress damages under *Restatement (2nd) of Contracts* § 353, just as the plaintiff did in *Hendrickson*. CP at 6:25-7:2. These claims fail for the same reasons they failed in *Hendrickson*.

In *Hendrickson*, the plaintiff brought a golden retriever to the defendants to have the dog neutered and implanted with a microchip. *Hendrickson*, 176 Wn. App. at 759. After performing the procedures, the veterinarians noticed the dog had a swollen abdomen. *Id.* The veterinarian ordered x-rays to rule out gastric dilatation volvulus (GDV), a potentially lethal condition. *Id.* The x-rays indicated the dog had significant gastric distention, but not GDV. *Id.* After the dog was

released, his condition deteriorated to the point that the dog died. *Id.* at 760. The likely cause of death was GDV. *Id.* The plaintiff sought, amongst other things, emotional distress damages arising from a reckless breach of a bailment contract. *Id.* Mr. Repin makes the same claim here. *See* CP at 5:25, 6:25-7:2.

Mr. Repin recognizes that *Hendrickson* declined to apply *Restatement (2nd) of Contracts* § 353 and *Restatement of Contracts* § 341 to a veterinary bailment contract for neutering a dog. Br. of Appellant at 21. However, Mr. Repin attempts to distinguish *Hendrickson*, stating: "[T]he contract at issue here explicitly sought to ensure a dog's painless death without undue suffering – an accord of a completely different order." Br. of Appellant at 21. Mr. Repin proceeds to argue, with reference to *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), and not to *Hendrickson*, that a contract for euthanasia is the type of contract for which emotional damages follow. *See* Br. of Appellant at Response at 26:18-30:21. Mr. Repin's reliance on *Gaglidari* is misplaced.

In *Gaglidari*, the plaintiff brought a claim for breach of an employment contract for discharging her without complying with the terms of her employment handbook. *Gaglidari*, 117 Wn.2d at 430. The plaintiff sought emotional distress damages for the breach of contract. *Id.*

at 431. The court held it was error for the trial court to have awarded emotional distress damages based on a breach of contract, stating: "We do not believe a change is warranted either on the basis of common law, the Restatement of Contracts, Washington precedent, or public policy." *Id.* at 440. In so doing, the *Gaglidari* court considered *Restatement (Second) of Contracts* § 353. *Id.* at 442-44. This section states:

> Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or *the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.*

Restatement (Second) of Contracts § 353 (emphasis added by *Gaglidari* court). The *Gaglidari* court also considered Comment *a* to § 353:

> In the second exceptional situation, the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. *Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.*

Restatement (Second) of Contracts § 353, at comment *a* (emphasis added by *Gaglidari* court).

Mr. Repin claims the *Gaglidari* court "embraced" this section. Br. of Appellant at 20. *See also* CP at 161 ("Thus, far from negating the recovery of emotional distress in all breaches of contract, *Gaglidari* embraces *Restatement of Contracts* § 341 and *Restatement (2nd) of Contracts* § 353"). This is emphatically not the holding of *Gaglidari*. Instead, the *Gaglidari* court held that emotional distress damages are not recoverable for breach of an employment contract, stating:

> The quantum leap which the plaintiff urges us to take in explicating the common law is justified neither by the cases of other jurisdictions, the Restatement, Washington law, nor public policy in dealing with employment contracts. It was error for the trial court to allow plaintiff to seek emotional distress damages in this case.

Gaglidari, 117 Wn.2d at 448. The *Gaglidari* court explained its reasoning thus:

> The impact of allowing emotional distress damages for breach of contract would indeed be enormous. It is easily predictable there would be a jury issue on emotional distress in nearly every employee discharge case and in fact nearly every breach of contract case. The contractual consensus of the parties will become secondary to an action in tort. This will represent a profound change in the law, the implication of which can be explained only by adverting to the 'Law of Unintended Consequences.' If there is to be a change of the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring.

Id.

Although the *Gaglidari* court denied that plaintiff's claim for emotional distress damages, the plaintiff in *Hendrickson* asked that court to apply the *Restatement* rules set forth in *Gaglidari* to a claim for breach of a bailment contract for veterinary services. *Hendrickson*, 176 Wn. App. at 765. The plaintiff in *Hendrickson* cited multiple Washington cases discussing the relationship between humans and companion animals, many of which are also included in footnote 8 to Appellant's Appeal Brief. *See Hendrickson*, 176 Wn. App. at 766. *See also* Br. of Appellant at 21 n.8. However, the *Hendrickson* court, while acknowledging that several Washington cases "recognize the existence of emotional suffering resulting from the injury to or loss of a companion animal, those cases uniformly recognize the historic treatment of those animals as property under Washington law." *Hendrickson*, 176 Wn. App. at 767. The court went on to state:

> Hendrickson has failed to submit, and this court is not aware of, any Washington case applying the *Restatement* rule and creating a claim for emotional distress damages arising out of a contract action. Thus, recognizing for the first time the existence of emotional distress damages for reckless breach of a bailment contract for veterinary services would constitute a significant change in the law.

Hendrickson, 176 Wn. App. at 767. The court then quoted the language from *Gaglidari* above. *See supra* at 20-21. Ultimately, Mr. Repin, like the plaintiff in *Hendrickson*, does not draw the Court's attention to any

Washington cases applying the *Restatement* rule and creating a claim for emotional distress damages arising out of a contract action. Mr. Repin's argument is better suited for the Legislature. *Gaglidari*, 117 Wn.2d at 448; *Hendrickson*, 176 Wn. App. at 767. No action for emotional distress damages for reckless breach of contract exists in Washington.

In support of his claim for emotional distress for breach of contract, Mr. Repin cites cases from Michigan and Louisiana. These cases are distinguishable. Mr. Repin cites *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich. App. 689, 588 N.W.2d 715 (1998), for the proposition a mother can recover emotional distress damages in a breach of contract action against the day care provider for her 18-month-old child. However, Michigan allows emotional distress damages for breach of contract actions that involve "contracts of a personal nature." *Stewart v. Rudner*, 349 Mich. 459, 469, 84 N.W.2d 816 (1957). Damages of this sort are specifically disallowed in Washington. *Gaglidari*, 117 Wn.2d at 448. Likewise, Mr. Repin points to *Smith v. Univ. Animal Clinic, Inc.*, 30 So.3d 1154 (La.App. 2010), *Grather v. Tipery Studios, Inc.*, 334 So.2d 758 (La.App. 1976), and *Mitchell v. Shreveport Laundries, Inc.*, 61 So.2d 539 (La.App. 1952). However, these cases are distinguishable from Mr. Repin's case because emotional distress damages for breach of contract are allowed by Louisiana statute. *See Smith*, 30 So.2d at 1156-58;

Grather, 334 So.2d at 761; *Mitchell*, 61 So.2d at 540-41. As there is no Washington statute analogous to Louisiana's statute, and the Washington Supreme Court has specifically disallowed emotional distress damages for breach of contract, the Michigan and Louisiana cases cited by Mr. Repin are distinguishable.

De novo review of the law and facts underpinning Mr. Repin's claim should lead this Court to dismiss Mr. Repin's claim for emotional distress damages resulting from breach of contract.

C. Mr. Repin Cannot Recover Emotional Distress Damages For Negligent Injury To A Pet.

As noted above, a pet owner has no right to emotional distress damages or damages for loss of human-animal bond based on the negligent death or injury to a pet, under Washington law. *Hendrickson*, 176 Wn. App. at 762 (quoting *Sherman*, 146 Wn. App. at 873). Likewise, Washington courts have refused to extend the cause of action for negligent infliction of emotional distress to emotional distress suffered due to injury to a pet. *Pickford,* 124 Wn. App. at 260. *See also Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006) (recognizing the holding in *Pickford*). Washington's bar to recovery for emotional distress damages in the animal context is in accord with the overwhelming majority of other states. To assist the Court, concise summaries of cases

from 27 other states barring recovery for emotional distress damages for negligent injury to a pet are included in the appendix to this brief.

In opposition to the multitude of cases disallowing negligent injury to a pet, Mr. Repin cites only one case, *Barrios v. Safeway Ins. Co.*, 97 So.3d 1019 (La.Ct.App. 2012), where emotional distress damages were awarded for negligent injury to a pet. Br. of Appellant at 22. However, he does not cite it in support of his argument for general damage recovery on his negligence claim. *See* Br. of Appellant at 23-26. Indeed, cases like *Barrios* "are aberrations flying in the face of overwhelming authority to the contrary." *Gluckman v. Am. Airlines, Inc.*, 844 F.Supp. 151, 158 (S.D.N.Y. 1994).

Washington's bar to recovery is also in accord with the Restatement, which states:

> An actor whose negligent conduct causes serious harm to another is subject to liability to the other if the conduct:
>
> (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or
>
> (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.

Restatement (Third) of Torts: Phys. & Emot. Harm § 47 (2012). The comments to this section make it clear that it does not apply to property damage, such as pets. Comment m states:

> Recovery for emotional harm resulting from negligently caused harm to personal property is not permitted under this Section. Emotional harm due to harm to personal property is insufficiently frequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner. *This rule against liability for emotional harm secondary to injury to a pet limits the liability of veterinarians in the event of malpractice and serves to make veterinary services more readily available for pets. Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines—arbitrary at times—that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter.*

Restatement (Third) of Torts: Phys. & Emot. Harm § 47 at cmt. m. (emphasis added). Significantly, Washington law limits wrongful death actions to those brought on behalf of spouses, domestic partners, and children. RCW 4.20.020. *See also Sherman*, 146 Wn. App. at 860 n.1 (no wrongful death action for death of a pet). Just as there is no cause of action for siblings, grandparents or close personal friends, there is no cause of action for "man's best friend."

Mr. Repin acknowledges that Washington law denies recovery of emotional distress damages arising from negligent injury or death to an animal. CP at 164. Instead, Mr. Repin attempts to rebrand his professional negligence cause of action as a negligent infliction of

emotional distress cause of action. Br. of Appellant at 23-26. Mr. Repin's argument fails for four reasons. First, negligent infliction of emotional distress is an independent cause of action. *Stanfield v. Douglas County*, 107 Wn. App. 1, 14, 27 P.3d 205 (2001). Mr. Repin did not plead negligent infliction of emotional distress in his complaint.[3] CP at 1-7. "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (quoting *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 974 P.2d 847 (1999)).

Second, the "zone of danger" test is not a stand-alone cause of action separate from negligent infliction of emotional distress as portrayed by Mr. Repin. Mr. Repin goes to great pains in arguing the "zone of danger" test remains good law. Br. of Appellant at 24-26. Mr. Repin is incorrect. The modern test for negligent infliction of emotional distress was announced in *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). The *Hunsley* court noted that "liability for negligently causing

[3] Mr. Repin pleaded the following causes of action: (1) breach of contract; (2) reckless breach of contract; (3) professional negligence; (4) lack of informed consent/negligent misrepresentation by omission; (5) intentional and/or reckless infliction of emotional distress; and (6) conversion, trespass to chattels and/or trespass on the case. CP at 1-7. Although he includes noneconomic damages based on the zone of danger doctrine in his prayer for relief, a claim for negligent infliction of emotional distress is simply not pleaded in his complaint. CP at 1-7. As Mr. Repin failed to plead a claim for negligent infliction of emotional distress, he cannot amend his complaint by including that theory of recovery in opposition to judgment as a matter of law.

fright, mental disturbance, shock or emotional distress, resulting in physical injury, without impact to the person, has been a divided, confused and unsettled area of the law." *Hunsley,* 87 Wn.2d at 427. In light of the "embarrassed perplexity" of the law, the *Hunsley* court announced "we consider this to be the case to reexamine the question of liability for the negligent infliction of emotional distress." *Id.* at 427, 433.

In so doing, the *Hunsley* court held that claims of negligent infliction of emotional distress shall be tested "against the established concepts of duty, breach, proximate cause and damage or injury." *Id.* at 434. As a result, the *Hunsley* court "dispens[ed] with the previous limiting requirement that the plaintiff be within the zone of danger." *Hegel v. McMahon*, 136 Wn.2d 122, 126, 960 P.2d 424 (1998). *See also Colbert v. Moomba Sports, Inc.*, 132 Wn. App. 916, 925, 135 P.3d 485 (2006) ("These four elements replaced earlier requirements that the plaintiff be within the zone of danger"); *Wilson v Key Tronic Corp.*, 40 Wn. App. 802, 809-10, 701 P.2d 518 (1985) (characterizing the test as the "former 'zone of danger' test").

The "zone of danger" test is not a stand-alone cause of action for negligent infliction of emotional distress separate from the *Hunsley* rule which is rooted in the established four elements of negligence. To the extent Mr. Repin attempts to make a distinction, it is a distinction without

a difference. As Mr. Repin's "zone of danger" claim is simply a negligent infliction of emotional distress claim, that claim is not available for negligent injury to a pet. *Pickford,* 124 Wn. App. at 260; *Womack*, 133 Wn. App. at 263. Mr. Repin's argument would return the law to a state of "embarrassed perplexity." *Hunsley*, 87 Wn.2d at 427. Consequently, to the extent a cause of action for negligent infliction of emotional distress claim is pleaded by Mr. Repin, it fails as a matter of law.

Third, the cases cited by Mr. Repin are distinguishable from the case at bar. None of these cases Mr. Repin cites involve a claim for negligent infliction of emotional distress. In *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (1982), the court allowed recovery of emotional distress damages for common law fraud and violation of the consumer protection act. In *Wilson v Key Tronic Corp.*, 40 Wn. App. 802, 701 P.2d 518 (1985), the court allowed recovery of emotional distress damages for nuisance. In *Murphy v. City of Tacoma*, 60 Wn.2d 603, 374 P.2d 976 (1962), the plaintiffs sought recovery of emotional distress damages against the city for damages to their property resulting from a landslide on a public road maintained by the city. *Id.* at 604. After a trial, the jury awarded emotional distress damages to the landowners. *Id.* at 616. The city moved for judgment notwithstanding the verdict as to the award of emotional distress damages. *Id.* The trial court granted the

motion and set those awards aside. *Id.* at 617. The Supreme Court affirmed the trial court, finding that, as there was no evidence the city acted with malice in its maintenance of the road, the plaintiffs were not entitled to emotional distress damages. *Id.* 619-22. None of these cases was a negligence case. As a result, Mr. Repin's reliance on them in support of his negligent infliction of emotional distress theory is misplaced.

Fourth, proof of negligent infliction of emotional distress requires that plaintiffs demonstrate objective symptoms of their emotional injury. *Hegel*, 136 Wn.2d at 126 (citing *Hunsley*, 87 Wn.2d at 436). To satisfy this objective symptomology requirement a plaintiff's emotional distress "must be susceptible to medical diagnosis and proved through medical evidence." *Hegel*, 136 Wn.2d at 135. Mr. Repin has no medical evidence to show his emotional distress is susceptible to medical diagnosis. In fact, he admits he did not seek treatment for his emotional distress. CP at 191. As such, to the extent he is able to bootstrap a negligent infliction of emotional distress claim onto his professional negligence claim, that claim fails. The trial court correctly limited the damages available to Mr. Repin for his professional negligence claim to his economic loss. No evidence in the record before this Court supports the award of damages to Mr. Repin for negligent infliction of emotional distress.

D. The Trial Court Correctly Dismissed Mr. Repin's Outrage Claim.

Initially, it should be noted that Mr. Repin is correct that *Womack* does not stand for the proposition that setting a cat on fire is not outrageous. *Womack*, 133 Wn. App. at 260-61. However, it does stand for the proposition that the record, even though it involved setting a cat on fire, was insufficient to establish the requisite intent to inflict severe emotional distress or the necessary evidence of severe emotional distress. *Id.* If torching a cat is not evidence of intent to inflict emotional distress, then a euthanasia procedure that had the unintended consequence of causing pain does not meet that standard either.

To prevail on a claim of outrage, Mr. Repin must prove three elements: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe emotional distress on the part of the plaintiff. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002). *See also Womack*, 133 Wn. App. at 260-61. "The first element requires proof that the conduct was '*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*'" *Robel*, 148 Wn.2d at 51 (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)) (emphasis in original).

Although the three elements present fact questions for the jury, the first element only goes to the jury after the court "determine[s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Robel*, 148 Wn.2d at 51 (quoting *Dicomes*, 113 Wn.2d at 630). Mr. Repin gives this initial inquiry short shrift, stating in conclusory fashion: "Reasonable minds would certainly disagree with Defendants' contention that Defendant Cohn-Urbach's conduct was not outrageous." Br. of Appellant at 26-27. An example of extreme and outrageous conduct is where "A, who knows B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage." *Restatement (Second) of Torts* § 46 cmt. f, illus. 11. Another example of extreme and outrageous conduct is where defendant's conduct of harassing, threatening, and stalking the plaintiff over a three-year period that included the defendant threatening to kill the plaintiff and the man she was dating, calling plaintiff's home 640 times, her work 100 times, and the homes of various men she knew numerous times. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 198, 202-03, 66 P.3d 630 (2003).

This is not the type of behavior we see in this case, and none of the authority Mr. Repin cites even comes close. Here, even though those steps may not have been visible to Mr. Repin, Dr. Cohn-Urbach and Ms.

Feist took steps to make sure the catheter they were going to administer the euthanasia drugs into was patent. CP at 83:16-25, 85:22-25, 93:2-4, 111:10-15, 114:14-23, 115:11-16. When Kaisa reacted to the euthanasia drug, Dr. Cohn-Urbach implemented an alternate course of action immediately so as to accomplish the procedure in as quick a time as possible. CP at 104:21-105:1. Mr. Repin can argue that a euthanasia that had the unintended consequence of inflicting pain on an animal he had agreed to destroy went beyond all possible bounds of decency, could be regarded as atrocious, or is utterly intolerable in a civilized community—but there is no reasonable basis, under Washington law, for such arguments to be presented to a jury. Viewing the evidence in a light most favorable to Mr. Repin, his complaint sounds in negligence. However, negligent conduct is not enough to send an outrage claim to a jury. *Grimsby v. Sampson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). As Mr. Repin cannot meet this threshold requirement, as a matter of law, his outrage claim fails. Even if all facts and inferences are interpreted in Mr. Repin's favor, his outrage claim is unsupported by Washington law.

E. The Trial Court Correctly Dismissed Mr. Repin's Conversion Claim.

Mr. Repin claims the manner in which the University destroyed Kaisa amounts to an intentional tort at some unidentified point "along the

trespass-conversion spectrum." Br. of Appellant at 28. In support of his argument, Mr. Repin cites various sections of the *Restatement (2nd) of Torts*. However, due to the nebulous nature of his claim, and the fact that Mr. Repin authorized Kaisa's destruction, Mr. Repin's claim fails.

Conversion is the unjustified and willful interference with a chattel that deprives a person entitled to the property of possession.[4] *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005). None of the *Restatement* sections cited by Mr. Repin support his vague trespass-conversion claim. First, *Restatement (Second) of Torts* § 226 states:

> One who intentionally destroys a chattel or so materially alters its physical condition as to change its identity or character is subject to liability for conversion to another who is in possession of the chattel or entitled to its immediate possession.

The comments to this section all discuss some intentional act that either destroys or materially alters the physical condition of a chattel. *See id.* Here, the University undeniably committed an intentional act that destroyed Kaisa. However, the destruction of Kaisa was authorized by Mr. Repin. *See* CP at 126. There is no cause of action for trespass to chattels or conversion where the defendant has legal authority to seize or take dominion over the plaintiff's property. *Bakay v. Yarnes*, 431

[4] In making a conversion claim, Mr. Repin necessarily concedes that Kaisa was personal property.

F.Supp.2d 1103, 1111 (W.D. Wa. 2006) (citing *Martin v. Sikes*, 38 Wn.2d 274, 278, 229 P.2d 546 (1951)). As Mr. Repin consented to Kaisa's destruction, Mr. Repin fails to state a cause of action under *Restatement (Second) of Torts* § 226.

Second, *Restatement (Second) of Torts* § 227 states:

> One who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion.

The comments to this section contain an illustration involving a desk. *Id.* cmt. b. In this illustration, A owns a desk which is his private property. *Id.* cmt. b, illus. 1. Without A's consent, B uses the desk to write his wife. *Id.* If B does this for six months, or does this with the assertion that the desk is his, or the desk is seriously damaged by B's use, then B has converted the desk. *Id.* cmt. b, illus. 2-4. Here, the University did not use Kaisa in the same way that B used the desk. Instead, Mr. Repin hired the University to destroy Kaisa and the University did so. *Restatement (Second) of Torts* § 227 is distinguishable from the case at bar.

Third, *Restatement (Second) of Torts* § 228 states:

> One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.

The comments and illustrations to this section all use the example of a person who has rented or borrowed an automobile or entrusted an automobile to a dealer to sell the car, and the person's use of the automobile exceeds the scope of the agreement. *Id.* cmt. d. illus. 1-6. Here, the University did not use Kaisa in the same manner as the people in the illustrations used the automobiles. Mr. Repin's right to control use of Kaisa was not violated by the University's "particular use" of the dog; Repin consented to Kaisa's destruction and the dog was destroyed by the University. *Restatement (Second) of Torts* § 228 is also distinguishable from the case at bar.

Restatement (Second) of Torts § 252 states: "One who would otherwise be liable to another for trespass to a chattel or for conversion is not liable to the extent that the other has effectively consented to the interference with his rights." *See also Michel v. Melgren*, 70 Wn. App. 373, 378, 853 P.2d 940 (1993) ("One who would otherwise be liable for conversion...is not liable to the extent the other has effectively consented to the interference with his rights"). Here, Mr. Repin consented to the euthanasia procedure. CP at 57, 126. The simple fact is that Mr. Repin authorized Kaisa's destruction. Contrary to Mr. Repin's assertion, this nebulous cause of action that exists "somewhere along the trespass-

conversion spectrum" does not lie. There is no basis in Washington law for the claim Mr. Repin asserts.

F. Washington Law Does Not Recognize Lack Of Informed Consent In The Veterinary Context.

Mr. Repin argues that *common law* lack of informed consent applies to this case, rather than *statutory* lack of informed consent. Br. of Appellant at 29-33. However, Mr. Repin fails to explain how *common law* lack of informed consent differs from *statutory* lack of informed consent or how it applies to the veterinary context and cites no Washington authority in support of his position. As courts have recognized, they are the same cause of action and do not apply in the veterinary context.

Common law lack of informed consent requires a plaintiff to prove the following elements:

> (1) [The] physician failed to inform the patient of a material risk involved in submitting to the proposed course of treatment;
>
> (2) [T]he patient consented to the proposed treatment without being aware of or fully informed of the material risks of each choice of treatment and of no treatment at all;
>
> (3) [A] reasonable, prudent patient probably would not have consented to the treatment when informed of the material risks; and
>
> (4) [T]he treatment chosen caused injury to the patient.

Miller v. Kennedy, 11 Wn. App. 272, 289, 522 P.2d 852 (1974) *superseded by statute as recognized in Gomez v. Sauerwein*, 180 Wn.2d 610, 617, 331 P.3d 19 (2014). *Statutory* lack of informed consent requires a plaintiff to prove the following elements:

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1). "In adopting RCW 7.70.050, the legislature codified the common law doctrine of informed consent as set forth in *Miller*." *Stewart-Greaves v. Vaughn*, 162 Wn.2d 115, 125, 170 P.3d 1151 (2007). *See also Gomez v. Sauerwein*, 180 Wn.2d 610, 617, 331 P.3d 19 (2014) ("The legislature intended to adopt the elements as they appeared in *Miller v. Kennedy*"). As a result, any distinction between *common law* lack of informed consent and *statutory* lack of informed consent is a distinction without a difference. They are the same cause of action.

As they are the same cause of action, under Washington law, they are both inapplicable to veterinary care. *See Sherman*, 146 Wn. App. at

865-69. In the context of this discussion, the *Sherman* court specifically discusses the claim of lack of informed consent. *Id.* at 867. The policy behind the lack of informed consent doctrine supports the University's argument that this cause of action is inapplicable:

> The phrase 'informed consent' refers generally to legal theories of recovery in medical tort cases that depend, not on the appropriateness or inappropriateness of the doctor's diagnosis and treatment of the patient's condition, *but on the patient's right to know the conditions of his body and to make a decision regarding his medical care.*

Keogan v. Holy Family Hospital, 95 Wn.2d 306, 313, 622 P.2d 1246 (1980) (emphasis added). *See also Stewart-Greaves*, 162 Wn.2d at 123 ("The doctrine of informed consent is based on 'the individual's right to ultimately control what happens to his body'").

As lack of informed consent stems from the individual's right to control what happens to his own body, not the body of his pet, logic dictates that the doctrine only be applied to human patients. *See Ladnier v. Norwood*, 781 F.2d 490, 494 n.8 (5th Cir. 1986). The medical malpractice act, Chapter 7.70 RCW, only applies to human health care, and does not apply to veterinarians. *Sherman*, 146 Wn. App. at 867. As there is no distinction between *common law* lack of informed consent and *statutory* lack of informed consent, *see Stewart-Greaves*, 162 Wn.2d at 125 and *Gomez*, 180 Wn.2d at 617, the *common law* informed consent

doctrine also does not apply to veterinarians under *Sherman*. If the law is to be expanded in this area, that would be a policy-based decision within the province of the legislature, not the courts. *Sherman*, 146 Wn. App. at 860 n.1; *Hendrickson*, 176 Wn. App. at 767. The trial court correctly dismissed this claim.[5]

G. Washington Law Does Not Recognize Negligent Misrepresentation by Omission

Mr. Repin's alternative claim of negligent misrepresentation by omission blurs the distinction between the separate and distinct causes of action for intentional misrepresentation or fraud and negligent misrepresentation. There is no basis in Washington law for the blurring Mr. Repin attempts.

To prove negligent misrepresentation, Mr. Repin must show by clear, cogent, and convincing evidence that: (1) the defendant supplied information for the guidance of others in their business transactions that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied on the false information; (5) the

[5] "[A] claim for lack of informed consent is a medical malpractice action sounding in negligence." *Bundrick v. Stewart*, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005). As such, to the extent it exists, Repin's damages are limited to his economic loss just as with his professional negligence claim. *Sherman*, 146 Wn. App. at 873.

plaintiff's reliance was reasonable; and (6) the false information proximately caused the plaintiff damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). "An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." *Id.* Due to the requirement that plaintiffs rely on an affirmative misrepresentation, rather than an omission, Washington courts do not recognize a cause of action for negligent misrepresentation *by omission*. Here, Mr. Repin appears to claim that Dr. Cohn-Urbach failed to inform him of a material fact or facts relating to the euthanasia procedure. *See* CP at 1-7. As failing to inform a plaintiff is insufficient to give rise to a claim for negligent misrepresentation, this claim fails as well. The trial court did not err in dismissing Mr. Repin's claim for lack of informed consent/negligent misrepresentation by omission.[6]

VII. CONCLUSION

Mr. Repin states the State of Washington wants to "belittle" his experience and "depreciate" his damages by urging the Court to adhere to "some nonexistent rule of legal insensitivity." Br. of Appellant at 38. Despite this characterization, the rule barring emotional distress damages for negligent injury to a pet and for breach of a contract for veterinary

[6] As this claim is also a negligence-based claim, Repin's damages are limited to his economic loss just as with his professional negligence claim. *Sherman*, 146 Wn. App. at 873.

services does, in fact, exist. If the law is to be expanded to allow recovery in either area, that is a policy decision for the legislature, not the courts. Indeed:

> It is an inconvenient, yet inescapable, truth: "Tort law...cannot remedy every wrong." Lines, seemingly arbitrary, are required. No one disputes that a family dog...is a treasured companion. But it is also personal property, and the law draws sensible, policy-based distinctions between types of property. The majority rule throughout most of America...leavens warm-heartedness with sober-mindedness, applying a rational rule rather than an emotional one.

Strickland v. Medlen, 397 S.W.3d 184, 197-98 (Tex. 2013). As such, "the human-animal bond, while undeniable, is uncompensable." *Id.* at 198. The trial court correctly limited Mr. Repin's damages to his economic loss and correctly dismissed his outrage, conversion, and lack of informed consent causes of action.

Under Washington law, Mr. Repin would not have been able to recover under the causes of action he asserts even if Kaisa had been a human "best friend." There is nothing belittling in the legislature's decision to limit recovery of non-economic damages to a few legally defined relationships.

The University requests that this Court—viewing the evidence and all inferences in Mr. Repin's favor—affirm the trial court.

RESPECTFULLY SUBMITTED this 30th day of June, 2016.

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Appendix

Summary of Nationwide Cases That Bar Emotional Distress Damages in the Context of Negligent Injury to a Pet

Alaska

- *Mitchell v. Heinrichs*, 27 P.3d 309, 312-14 (Alaska 2001) (no recovery for emotional and sentimental value of a dog)

Arizona

- *Kaufman v. Langhofer*, 223 Ariz. 249, 222 P.3d 272, 278-79 (Ct. App. 2009) (no recovery for emotional distress damages for death of a scarlet macaw)

California

- *McMahon v. Craig*, 176 Cal.App.4th 1502, 97 Cal.Rptr.3d 555, 566-68 (2009) (no loss of companionship damages for death of dog)

Connecticut

- *Myers v. City of Hartford*, 84 Conn.App. 395, 853 A2d 621, 626 (2004) (no emotional distress damages for unauthorized euthanasia of a dog)

Florida

- *Kennedy v. Bias*, 867 So.2d 1195, 1198 (Fla.Dist.Ct.App. 2004) (no recovery of emotional distress damages in negligence action against a veterinarian)

Idaho

- *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276, 1277 (Ct.App. 1985) (no recovery for mental anguish suffered by the owner of a destroyed animal)

Illinois

- *Jankoski v. Preiser Animal Hosp., Ltd.*, 157 Ill.App.3d 818, 110 Ill.Dec. 53, 510 N.E.2d 1084, 1087 (1987) (no recovery for loss of companionship of a dog)

Indiana

- *Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind.Ct.App. 2005) (no recovery for emotional distress where there is only an economic loss such as in the loss of a pet dog)

Iowa

- *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) (denial of damages for mental distress for death of a dog)

Kentucky

- *Ammon v. Welty*, 113 S.W.3d 185, 187-88 (Ky.Ct.App. 2002) (emotional distress damages for loss of a dog are not compensable)

Louisiana

- *Kling v. U.S. Fire Ins. Co.*, 146 So.2d 635, 642 (La.Ct.App. 1962) (personal or sentimental considerations not applicable in fixing an award for loss of a dog) *overruled on other grounds by Holland v. Buckley*, 305 So.2d 113, 114 (La. 1974)

Massachusetts

- *Krasnecky v. Meffen*, 56 Mass.App.Ct. 418, 777 N.E.2d 1286, 1289-90 (2002) (no emotional distress damages where defendant's dogs killed plaintiff's sheep)

Michigan

- *Koester v. VCA Animal Hosp.*, 244 Mich.App 173, 624 N.W.2d 209, 211 (2000) (emotional distress damages arising from negligent injury to a pet are not allowed)

Nebraska

- *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884, 891-92 (1999) (emotional distress may not be recovered for negligent injury to a pet)

New Jersey

- *Harabes v. Barkery, Inc.*, 348 N.J.Super. 366, 791 A.2d 1142, 1145-46 (2001) (emotional distress damages should not be recoverable for the loss of a dog)

New Mexico

- *Wilcox v. Butt's Drug Stores*, 38 N.M. 502, 35 P.2d 978, 979 (1934) (sentimental value of a dog not recoverable)

New York

- *DeJoy v. Niagara Mohawk Power Corp.*, 13 A.D.3d 1108, 786 N.Y.S.2d 873, 873 (2004) (animal owner may not recover emotional distress)

North Carolina

- *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352, 357-58 (N.C.Ct.App. 2012) (no emotional distress damages for negligent loss of a pet)

Ohio

- *Pacher v. Invisible Fence of Dayton*, 154 Ohio.App.3d 744, 798 N.E.2d 1121, 1125-26 (2003) (rejecting recovery of noneconomic damages for loss or injury to animals)

Oregon

- *Lockett v. Hill*, 182 Or.App. 377, 51 P.3d 5, 7-8 (2002) (damages based on emotional distress not recoverable)

Pennsylvania

- *Daughen v. Fox*, 372 Pa.Super. 405, 539 A.2d 858, 864-65 (1988) (no recovery for loss of companionship due to death of an animal)

Rhode Island

- *Rowbotham v. Maher*, 658 A.2d 912, 912-13 (R.I. 1995) (no recovery for emotional trauma for injury to domestic animal)

Texas

- *Strickland v. Medlen*, 397 S.W.3d 184, 191-92 (Tex. 2013) (rejecting emotion-based liability for loss of the human-animal bond)

Vermont

- *Scheele v. Dustin*, 188 Vt. 36, 998 A.2d 697, 700-04 (2010) (noneconomic damages are not available in property actions such as death of dog)

Virginia

- *Kondaurov v. Kerdasha*, 271 Va. 646, 629 S.E.2d 181, 187 (2006) (no recovery for emotional distress damages for negligent injury to property such as an animal)

West Virginia

- *Carbasho v. Musulin*, 217 W.Va. 359, 618 S.E.2d 368, 370-71 (2005) (sentimental attachment of an owner to his dog cannot be considered in computation of damages)

Wisconsin

- *Rabideau v. City of Racine*, 243 Wis.2d 486, 627 N.W.2d 795, 798-99, 801-02 (2001) (no claim for emotional distress damages for the negligent loss of a dog)

CERTIFICATE OF SERVICE

I certify that I served all parties, or their counsel of record, a true and correct copy of the Brief of Respondent and Appendix by US Mail Postage Prepaid to the following address:

Adam P. Karp
Animal Law Offices
114 West Magnolia Street, Suite 425
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Sent via electronic mail to:

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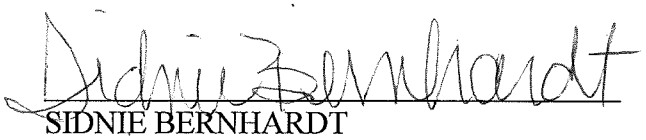
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of June, 2016, at Spokane, Washington.



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