To be argued by
ADAM P. KARP

Washington Supreme Court

Docket No. 94389-3

Court of Appeals Division III Docket No. 340490

Kittitas Cy. Sup. Ct. Cause No. 142002176

ROBERT REPIN,

Plaintiff-Appellant,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

PETITION FOR REVIEW (RAP 13.4)

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I. IDENTITY OF PETITIONER

Robert Repin, through his attorney Adam P. Karp, petitions for review pursuant to RAP 13.4(b)(1, 2, and 4).

II. COURT OF APPEALS DECISION

Mr. Repin seeks reversal, in the entirety, of the attached Court of Appeals decision (**Exh. A**) and Order on Summary Judgment (**Exh. B).**

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in:

1. Refusing to permit Mr. Repin to recover noneconomic damages arising from the reckless and material breach of a contract to euthanize a companion animal arising from a veterinarian-client-patient relationship?

2. Refusing to permit Mr. Repin to recover noneconomic damages arising from the zone of danger rule?

3. Dismissing Mr. Repin's claim for outrage?

4. Dismissing Mr. Repin's claim for conversion/trespass to chattels?

5. Dismissing Mr. Repin's claim for lack of informed consent?

IV. STATEMENT OF THE CASE

To conserve space, Mr. Repin refers this Court to the Court of Appeals's factual summary recounted in the light most favorable to him. *Slip op.,* at 2-10. He offers these highlights:

Then three weeks of age, orphaned by a lactating mother struck on a rural highway, the pup should have died. Rescued by Mr. Repin's niece, who nursed her to vigorous health, she instead was delivered to her uncle. This Alaskan Malamute began her life just as Mr. Repin entered his late 40s, single and with no biological children, living alone in a small cabin built by hand on the Blewett Pass

Highway. Mr. Repin thrived independently and by his own wits and skill as a gold prospector digging tunnels into the earth to find that elusive symbol of freedom – with Kaisa by his side for nearly twelve years. **CP 337 ¶ 2.**

Only an exceptional few could hold their faces near hers, a closeness founded on unconditional trust. When veterinarians prodded, Kaisa acquiesced because Mr. Repin held her, stating, "It's OK, baby, I'm here." From the day she entered his life to the moment she died, Mr. Repin vowed to never betray her trust in him. **CP 337 ¶ 3.** Mr. Repin knew that when her health began to falter, and the time came to give her peace, she deserved no less than euthanasia under the most respectful and humane circumstances possible.

On Sept. 26, 2012, at his regular veterinarian's recommendation, Mr. Repin traveled 200 miles from Cle Elum to Pullman to have Kaisa seen by Dr. Cohn-Urbach and staff at the WSU/CVM-Veterinary Teaching Hospital, to determine whether the time to let her go had come and, if so, to do so without disruption, fear, or suffering. Believing she only had a few weeks to live and that Kaisa would suffer, "rather than a few weeks of continual agony," Mr. Repin signed a *Consent for Euthanasia* agreement and decided that it was the most humane thing he could do for her, at "the place where they are the best of the best at what they do." **CP 186 (25:1-7).**

WSU/CVM showcases "A gentle goodbye" video (**CP 178**), complete with a touching, 2012-posted, 3-minute video clip narrated by Kathy Ruby, Director of the Pet Loss Hotline. Ms. Ruby invites the public to learn more about the CVM and its pet loss/euthanasia services

https://www.youtube.com/watch?v=vYwTrBaBFRw (accessed Apr. 20, 2017); see www.youtube.com/watch?v=Y_PMOGKtdnE for longer 11-minute version (accessed Apr. 20, 2017).

Alerting her to the deeply emotional and delicate nature of the procedure to be performed, Mr. Repin cautioned Cohn-Urbach, "[I]f there are any papers that I need to sign, I want to do it now ahead of time." He explained he "would not be able to afterwards." **CP 185 (24:20-23)**. Cohn-Urbach admits that once or twice, before attempted euthanasia, Mr. Repin expressed that Kaisa did not like being handled without him present. **CP 207 (104:16-25).** Indeed, when she first met Kaisa, Mr. Repin was in the back of the hospital with Kaisa, in an area where clients are not typically allowed – because he insisted on being with her and did not want to leave her side. **CP 208 (105:1-10).** Cohn-Urbach acknowledges that Mr. Repin spent a great deal of time reflecting on how best to proceed. ***Id.*, 208 (105:15-17)**.

Following her "reaction" to the first injection of Euthasol, there was no pause in Kaisa's agony. **CP 189-90 (39:22—41:1).** If Mr. Repin lost his hold of Kaisa, she would have "chewed the shit out of [Cohn-Urbach and Ms. Feist], and maybe me." **CP 190 (42:1-13).** He adds, "I was placed in imminent danger and fear that Kaisa might turn on me and cause grievous physical injury…. Her jaws were close enough to my neck or other appendages that in her panic she could have easily bitten me." **CP 338-39 ¶ 7. Exh. D** (*Repin Decl*. and excerpt from *Repin Dep*.) After Kaisa died, in a sadly cold, dismissive, and unprofessional manner, Cohn-Urbach offered Mr. Repin a green, extra heavy duty Hefty trash

bag in which to place her, even though she was lying on her own personal blanket from home the entire time.

Following Kaisa's death, Mr. Repin had Kaisa exhumed by Carl Wigren, MD and Victoria Peterson, DVM, JD. As described in their reports, Kaisa's limbs and heart blood were sent to Bruce Goldberger, Ph.D. at the University of Florida for testing of the concentration of pentobarbital and phenytoin in Kaisa at various locations. Dr. Goldberger opined, and Dr. Peterson joined in this opinion, that the Euthasol injected into the catheter went perivascular (i.e., outside the vein). **CP 240-41 ¶ 13(f).**

Kaisa suffered "the worst possible way." **CP 191 (54:9).** As a result, Mr. Repin endured exquisite and long-lasting mental anguish. He describes the impact extensively in deposition, including the change from being a nice, happy guy with a perfect life and no complaint in the world to a depressed, alcohol-dependent insomniac who lost his girlfriend and friends and suffered from years of headaches and inappetence. **CP 191-93 (56:13—58:14, 61:18—62:4).**

On Jan. 8, 2016, Kittitas County Superior Court Judge Frances Chmelewski heard Defendants' motion for summary judgment dismissal. While allowing a few claims to survive, she dismissed several causes of action and categorically eliminated the basis to recover any noneconomic damages. **Exh. B** (**CP 390-93).** The parties stipulated to discretionary review of the order, and the Court so certified. **CP 394-96.** On March 8, 2016, Commissioner Wasson granted discretionary review under RAP 2.3(b)(4), stemming from the question of whether Mr. Repin could recover noneconomic damages under *Restatement*

(2nd) Contracts § 353:

> This Court found no authority to support or disavow Mr. Repin's thesis. Indeed, the issue may be one of first impression, not only in Washington, but throughout the United States. Therefore, as to this narrow issue, the certification for discretionary review is appropriate. Because the Court accepts discretionary review, the other issues raised in Mr. Repin's motion are also accepted for review under principles of judicial economy.

Exh. C, at 4. On March 21, 2017, Division III affirmed in a 3-0 opinion, with a concurrence from Chief Judge Fearing and another from Judge.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. RAP 13.4(b)(1) – Conflict with Supreme Court Decision

Barr v. Interbay Citizens Bank, 96 Wn.2d 692, 700 (1981), states clearly that "nothing [is] stinted" in the "exceedingly liberal" rule of compensation, allowing recovery of "every actual loss, and some which frequently border on the imaginary." While the State may want to belittle Mr. Repin's experience and depreciate his damages by some nonexistent rule of legal insensitivity, the Washington Supreme Court has taken a decidedly different view, and this panel's decision conflicts with *Barr.*

On the issue of outrage: The panel found that the allegations did not support a finding of outrageousness notwithstanding that the question of outrageousness is traditionally a question of fact, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 64 (2002), and that several domestic and foreign appellate decisions, including *Womack* itself, recognize the delicate emotional connection endangered by injuring or killing a pet while pronouncing that animals are family and much more than mere property. *See Fearing Conc.*, at 7-8.

Womack v. von Rardon, 133 Wash.App. 254 (III, 2006), in examining a claim of outrage, did not hold that setting a cat named Max on fire was not outrageous. Rather, it affirmed dismissal because Womack could not prove that the defendants torched Max in order to cause her severe emotional distress and, further, due to insufficient evidence of severe emotional distress. Womack was not present when the young men doused Max in gasoline, yet this was not a basis for the court denying the claim. *Womack* is distinguishable from Mr. Repin's case given the existence of a veterinarian-client-patient relationship, fiduciary relationship, contract for euthanasia, and Mr. Repin's known emotional fragility related to the decision to end Kaisa's pain.

Cohn-Urbach's manner of killing Kaisa, in defiance of contractual promises to the contrary, is the type of "outrageous" conduct that "shocks the conscience." Reasonable minds would certainly disagree with the contention that her conduct was not outrageous, if only based on RCW 16.52.205-.207, Washington's animal cruelty code, guarding against unnecessary and unjustifiable infliction of pain and suffering to an animal.

After noting that only one case addressed outrage in the veterinary context, but finding it wanting (*slip op.*, 25), the panel turns to highly inapposite decisions—concerning rude physicians, insensitive nursing home nurses, misleading statements by obstetricians, a psychologist who accused a patient of being a faker and raising his voice, a doctor who screamed at the top of his voice at a client concerning the presence of a service dog in the exam room, a head nurse at an emergency room who allegedly said "We do not like to deal with rape

victims," interviewed rape victims in a public waiting room, and inferred that a minor lost her virginity by falling or riding a bike or horse rather than being a victim of rape—that do not at all resemble Mr. Repin's experience. He contracted with Defendants to euthanize his dog in a peaceful, painless setting. Instead, his dear Kaisa was recklessly injected with a caustic substance, causing her extreme torment and fear, jeopardizing Mr. Repin's personal safety and producing substantial and foreseeable emotional turmoil. *Slip op.*, 25-26. The overwhelming majority of dog and cat owners who choose to be present for euthanasia would find this behavior outrageous, without a moment's hesitation. WSU's "A gentle goodbye" videos tacitly acknowledge this.

Jackson v. Peoples Federal Credit Union, 25 Wash.App. 81, 89 (II, 1979) cites approvingly to *Restatement (2nd) Torts* § 46 cmt. *f*, which provides that an actor's conduct may be deemed outrageous because he is aware of the other person's susceptibility to emotional distress due to a physical or mental condition. From his statements made at the time of signing the contract, to his insistence on being with Kaisa whenever possible, Defendants knew of Mr. Repin's vulnerable nature and, amidst other argument and facts raised below, such factors strongly favor granting review under RAP 13.4(b)(1). The panel erred denying Mr. Repin the right to have this factual question brought before a jury.

On the issue of zone of danger: The panel claimed, "Nevertheless, Repin presents no evidence of such fear [for his own physical safety]." *Slip op.*, 19. This statement, however, ignores Mr. Repin's December 27, 2015 declaration at Para. 7 and his deposition at 42:6-9. **CP 190, 338**. It thus contradicts the holding of

Reynolds v. Hicks, 134 Wn.2d 491, 495 (1998), that the court should only grant summary judgment if no genuine issue of material fact exists after considering the evidence, including all reasonable inferences, in the light most favorable to the nonmoving party. Mr. Repin presented sufficient evidence to establish this claim to defeat summary judgment and the panel erred in finding otherwise.

2. <u>RAP 13.4(b)(2) – Split of Divisions</u>

On the subject of emotional damages for contract breach: The panel quotes *Hendrickson v. Tender Care Animal Hosp., Corp.*, 176 Wash.App. 757 (II, 2013), which stated, at 767, "In fact, 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." *Slip op.*, 14-15. This position, however, taken by both Divisions, contradicts the holdings of *Thomas v. French*, 30 Wash.App. 811, 817 (III, 1981), *rev. o.g.*, 99 Wn.2d 95 (1983), and *Cooperstein v. Van Natter*, 26 Wash.App. 91, 99 (I, 1980), *rev. den'd*, 94 Wn.2d 1013 (1980), which remain good law, creating a basis for review under RAP 13.4(b)(2).

Thomas, at 814, acknowledged the cognizability of noneconomic damages relating to breach of contract for education at a cosmetology school. *Cooperstein* predated *Thomas* by a year and similarly found that emotional distress damages may be recovered for reckless breach of a real estate contract. In 1982, Division I again embraced *Cooperstein* 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 (I 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.

Gaglidari "specifically disapproved" only that *Thomas* and *Cooperstein* adopted a standard that:

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

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

> 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.

Id. (emphasis added). *Gaglidari* did not reject the *Restatement* itself but any excesses taken by *Thomas* and *Cooperstein* in pronouncing a broader rule to award damages for emotional distress for any "ordinary breach of contract action." *Id.,* at 445. Though *Gaglidari* refused to apply *Restatement* remedies to breach of an employment contract, it did not disavow the *Restatement*.[1] Were there such intention, it would not have needed to allude to the *Restatement* in explaining the refusal to expand the common law to the employment termination context:

> The quantum leap which the plaintiff urges us to take in explicating the common law is justified neither by the cases of other jurisdictions, **the Restatement**, Washington law, nor public policy in dealing with employment contracts.

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

Id., at 448 (emphasis added). To be clear, Mr. Repin does not ask this court to overreach. Rather, he seeks damages based on a type of contract and breach that are hardly ordinary, and which are occupationally and institutionally foreseeable. Accordingly, this Court's ruling creates a split with Division I and disregards Division III's earlier holding in *Schwarzmann.*

On the subject of conversion: Contrary to the panel's assertion that "Washington courts have never applied those sections of *Restatement (Second) of Torts* addressing conversion," (*slip op.*, 32), Washington adopted *Restatement (2nd) Torts* § 227 in *Burr v. Lane*, 10 Wash.App. 661, 667 (I 1974).[2] Its failure to apply § 227 to Mr. Repin's case presents another basis for review under RAP 13.4(b)(2).

3. RAP 13.4(b)(4) – Substantial Public Importance

Issues of first impression that affect not only the parties at bar, but potentially thousands of other daily interactions throughout this State, warrant review under RAP 13.4(b)(4). *State v. Watson*, 155 Wn.2d 574, 577 (2005). Examples where the Court of Appeals has granted RAP 2.3(d)(3)[3] review include *Guillen v. Contreras*, 147 Wash.App. 326, 330 (III, 2008)(first impression) and *In re Estate of Haviland*, 161 Wash.App. 851, 854 (I, 2011)(first impression). As

[2] See *Restatement (2nd) Torts* § 226 (**Exh. E**) and Ill. 4 (conversion lies where A intentionally feeds poisonous weeds to B's horse; where horse made ill for a few hours, but promptly recovers, **trespass lies** where horse is made ill for a month, **both trespass and conversion lie**). See also *Restatement (2nd) Torts* § 227 (**Exh. E**) and Ill. 4 (noting that conversion lies where A owns desk and lets B use it but with or without negligence on the part of B, the desk is seriously damaged by its use).

[3] RAP 2.3(d)(3) serves as a rough analog to RAP 13.4(b)(4).

each claim made by Mr. Repin arises from common law, this is the proper forum to address each. As Division I explained:

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

Roth v. Bell, 24 Wash.App. 92, 100 (1979); see also RCW 4.04.010 and *In re Parentage of L.B.,* 155 Wn.2d 679, 689 (2005) (construing RCW 4.04.010, in the absence of governing statutory provisions, to "endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law"); *Irwin v. Coluccio,* 32 Wash.App. 510, 512 (I 1982)(when rule of law originates in common law and is creature of courts, courts may change or modify such rule). In honoring the mandate of RCW 4.04.010, Division III did not just extend common animal law, but created an entirely new cause of action of malicious injury to a pet. *Womack v. von Rardon,* 133 Wash.App. 254 (III 2006).

Perhaps the strongest arguments favoring review under RAP 13.4(b)(4) come from the panel itself, stating:

As to zone of danger: "Washington has never addressed the applicability of the zone of danger rule to a medical or veterinarian malpractice claim." *Slip op.,* 17. While acknowledging a national split, the panel adopts the reasoning of Texas, Connecticut, and Nebraska, while rejecting California and New Jersey, but does so without any direction from this court.

As to conversion: "We must decide if a veterinarian commits a conversion in the civil law when the veterinarian engages in gross negligence during treatment of a companion animal or when the veterinarian disobeys instructions for care of the animal. We find no case law directly applicable." *Slip op*., 29. "Washington courts have never applied those sections of *Restatement (Second) of Torts* addressing conversion, but both Robert Repin and WSU cite some of those sections." *Slip op.,* 32.

The unauthorized intermeddling with the property rights of Mr. Repin in Kaisa in a manner inconsistent with his express (and contracted) instructions amounts to an intentional tort, whether a conversion or a trespass to chattels.[4] Indeed, the act of using a damaged catheter and pompously admonishing Ms. Feist that she would "make it work" was an intentional act that proximately caused perivascular administration, tremendous pain, and deprived both Kaisa and Mr. Repin of the expected results of euthanasia.

Dispossession is not the only means of proving conversion. Other manners include destroying or altering a chattel (*Restatement (2nd) Torts* § 226), misusing a chattel in a manner that seriously violates the right of another to control its use (*Id.,* § 227); and one who uses chattel in a manner exceeding authorization and seriously violates the other's right of control (*Id.,* § 228). The fundamental nature of this transaction was not just "to destroy the property in question," but to do so according to Mr. Repin's express authorization to do so in a manner that was *humane* and without undue pain and suffering according to sound veterinary principles. In other words, in failing to euthanize or humanely destroy, Cohn-

[4] Trespass to chattels is something less than a conversion. *Restatement (2nd) Torts,* § 217.

Urbach caused tremendous psychological damage and physical injury to Kaisa; mishandled Kaisa in a way that violated Mr. Repin's right to control the manner of her death; and exceeded the authorization he had given to her. Conversion and trespass lie.

As noted above, Washington adopted *Restatement (2nd) Torts* § 227 in *Burr v. Lane,* 10 Wash.App. 661, 667 (I 1974). This court should apply § 227 here and adopt *Restatement (2nd) Torts* §§ 226 and 228, as done in nearby jurisdictions.[5]

As to lack of informed consent: Though declining to apply lack of informed consent (LOIC) doctrine to veterinarians, the court:

> Recognize[s] sound reasons for permitting a claim for informed consent when the veterinarian fails to divulge relevant facts. Veterinarian literature encourages practitioners to disclose pertinent information to an animal's owner before prescribing and performing treatment. One's autonomy by virtue of being human, a rationale behind informed consent, may not be a concern. Nevertheless, veterinarians should be encouraged to disclose material risks so an owner may make informed decisions regarding the care of companion animals.

Slip op., 37. It adds:

> We recognize that novelty does not necessarily prevent an intermediate appeals court from the application of a cause of action never recognized in this State. Nevertheless, we proceed with the utmost caution and deliberateness in the face of such a request. … We encourage our Supreme Court, in the appropriate case, to determine whether to permit a claim against a veterinarian for failure to obtain informed consent from an animal's owner.

Slip op., 39 (cit.om.).

[5] See *Restatement (2nd) Torts* § 228 (attached as **Exh. E**) and Ill. 6 (noting that conversion lies where A rents car to B to drive to X City and return but while in Y City seriously damages car in collision with or without negligence).

It also asserts, "We also find that no foreign state has definitively adopted informed consent as a cause of action against a veterinarian." *Slip op.,* 39. But this is an erroneous statement. For no clear reason, the panel disregarded favorable unreported decisions from Ohio and Texas. *See Lawrence v. Big Creek Vet Hosp., LLC,* 2007 WL 2579436, *3-*4 (Ohio Dist.11) ("The informed consent doctrine is not codified in Ohio. However, such practice is clearly indicative of the veterinarian's duty of care. This is an evidentiary issue that goes directly to the standard of care in a malpractice case... Informed consent is part of and necessary to a veterinarian's duty of care.")[6]; also, in 2013, the Texas Court of Appeals reversed summary judgment dismissal on a lack of informed consent claim in a veterinary context. *Gonzalez v. South Texas Veterinary Assoc., Inc.,* 2013 WL 6729873 *4-*5 (Tex.App.-Corpus-Christi-Edinburg, 2013)(citable under TRAP 47.7(b) (memorandum opinion)).

The American Veterinary Medical Association ("AVMA"), a national professional organization for veterinarians akin to the American Medical Association ("AMA"), also set forth a policy on *Owner Consent in Veterinary Medicine,* stating:

> The public is best served when veterinarians provide sufficient information in a form and manner that enables owners or their authorized agents to make appropriate decisions when choosing the veterinary care provided.
>
> To the best of their ability and in a manner that would be understood by a reasonable person, veterinarians should inform animal owners or their authorized agents of the diagnostic and treatment options available. They should also provide an assessment of the risks and benefits of such choices, a prognosis,

[6] Citable per Ohio Supreme Court Rules for Reporting of Opinions, Rule 3.4 and Wash.GR 14.1(b).

> and a documented estimate of the fees expected for the provision of services. The owners or authorized agents should indicate that their questions have been answered to their satisfaction, the information received by them has been understood, and that they are consenting to the recommended treatments or procedures.
>
> The consent of owners or authorized agents should be provided in a verbal or written form and should be documented in the medical record by veterinarians or their staff members.

See https://www.avma.org/KB/Policies/Pages/Owner-Consent-in-Veterinary-Medicine.aspx.

In citing *Crawford v. Wojnas*, 51 Wash.App. 781 (1988), which rejected an LOIC claim by the mother on behalf of her child, to whom the duty was owed as patient, the panel forgets that animal patients are *owned property* of the veterinarian's client. The pet is not the client. Additionally, while the dyadic physician-patient relationship in *Crawford* involved the doctor and the child, here, a triadic relationship existed, one that expressly included the owner. The child in *Crawford* was not "owned' by the mother. And, it was Mr. Repin who contracted with WSU to euthanize Kaisa, not Kaisa herself. Washington has codified this tripartite relationship. WAC 246-933-200 (**Veterinary-client-patient relationship**). The AVMA has also long acknowledged and discussed the veterinarian-client-patient relationship, defined it in the AVMA's Principles of Veterinary Medical Ethics and the AVMA Model Veterinary Practice Act. See https://www.avma.org/KB/Resources/Reference/Pages/VCPR.aspx (visited Apr. 20, 2017).

Mr. Repin claims emotional damages for breach of a euthanasia contract in two respects: (1) material breach of this type of contract *per se*; and (2) reckless breach of this type of contract. *Restatement (2nd) of Contracts* § 353 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.

Note the disjunctive in the phrase "contract or the breach." In comment *a* to this section, the commentators give "common examples" to include "contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." *Id.* The brutalization of a beloved family member who, instead of being "put to sleep," faces pre-death terror, excruciating pain, and disorientation, hews more closely to the thanatic theme of the *Restatement.* If contracts breached by carriers, innkeepers, conveyers of corpses, and death messengers are "particularly likely to cause serious emotional disturbance," and fall within the Rule, it seems plain that contracts breached by veterinarians to peacefully end the lives of their clients' beloved animal companions, especially where they profit directly from the human-animal bond[7] and are trained to anticipate the complex and foreseeable emotions that attend the presence of an owner at the laying to rest of his devoted dog, also are particularly likely to create such emotional disturbance.

[7] Todd W. Lue, Debbie P. Pantenburg et al., *Impact of the owner-pet and client-veterinarian bond on the care that pets receive,* Journal of the American Veterinary Medical Association, Vol. 232:4, Feb. 15, 2008; Katie Burns, *Human-Animal Bond Boosts Spending on Veterinary Care, Jo*urnal of the American Veterinary Medical Association, Vol. 232:1, Jan. 1, 2008; *What are your Clients Willing to Pay?,* Veterinary Economics (August 2007), pp. 100, 104.

In other words, if the contract is not of the type that when breached would cause such psychological suffering, the recklessness or willfulness of the breach itself would justify recovery. Whether a contract for euthanasia of an animal companion is of the type contemplated by the *Restatement* is a matter of first impression, as well whether its breach permits recovery of emotional damages.

Chief Judge Fearing writes a separate concurrence that directly urges this Court to accept review:

> I write this concurring opinion to advocate a change in the law. Principles underlying the law of damages for breach of contract and values basic to the law of negligent infliction of emotional distress call for an award of emotional distress damages to the owner of a companion animal when a veterinarian commits malpractice and breaches the implied covenant of competent care in the treatment of the pet. Unfortunately, Washington has strayed from these principles and values by jaundicely viewing pets as just another piece of personal property. I am bound by earlier Washington Supreme Court and Court of Appeals decisions to affirm denial to Robert Repin of emotional distress damages, but I recommend our state Supreme Court's consideration of our ruling. I do not recommend any changes to the law with regard to commercial animals.

Fearing, C.J., concurrence at 1. On the subject of **breach of contract damages**, he notes:

> No Washington court has expressly adopted *Restatement (Second) of Contracts* § 353. Nevertheless, the Washington Supreme Court in *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, and the Court of Appeals in *Hendrickson v. Tender Care Animal Hospital, Corp.*, 176 Wn. App. 757, 312 P.3d 52 (2013) discussed the section as if Washington had adopted it.

Conc., at 2. After quoting cmt. *a* to § 353, he explains:

> Regardless of the current state of the law regarding common carriers and hoteliers, more reason exists to allow the owner of a pet to recover for emotional distress resulting from the negligence of a veterinarian's causing death or injury to a companion animal.

> Breach of contract by the veterinarian will likely cause serious emotional disturbance or at least more so than contract breaches by innkeepers and carriers. The veterinarian knows of the bond between a human being and his companion animal and the trauma resulting from a breach of the contract to competently care for the pet.

Conc., at 4. In calling attention to *Gaglidari*'s failure to define a contract intended to protect "some personal interest," Chief Judge Fearing adds:

> Regardless, pet owners hold a personal interest, not simply an economic interest, in companion animals. Pets possess an enormous hold on Washington residents, as illustrated by Kaisa being the sole companion of Robert Repin. Washingtonians devote hours to walking, playing, feeding, stroking, and caring for pets. Washingtonians mourn the death of a pet. In turn, pets return hours of love, devotion and companionship to owners. Veterinarians know well the devotion that owners possess toward pets. Small animal veterinarians uncynically and legitimately make money from this devotion.
>
> According to the American Pet Products Association, total pet industry expenditures in the United States reached $60.28 billion in 2015. Americans spent a total of $23.05 billion on pet food, $14.28 billion on supplies and medicine, $15.42 billion on veterinarian care, $2.12 billion on live animal purchases, and $5.41 billion on pet services like grooming and boarding. According to a report by the Bureau of Labor Statistics, on average, each U.S. household spent over $500 on pets in 2015. Since some households lack a pet, those households with pets spend on average more than $500 per year.

Conc., at 6 (cit.om.). Chief Judge Fearing then notes that while *Hendrickson* "is an indistinguishable decision that we follow," its "historic treatment [of animals as any other article of personal property] now belies reality." *Conc.*, at 6-7.

Referencing cases raised by Mr. Repin in his briefing, Chief Judge Fearing cites to numerous domestic and foreign decisions "recogniz[ing] the bond between animal and human and the intrinsic and inestimable value of a companion animal." *Conc.*, at 7-8 (citing *Mansour v. King Cy.*, 131 Wash.App.

255, 265 (I 2006); *Womack v. von Rardon,* 133 Wash.App. 254, 263-64 (III 2006); *Pickford v. Masion,* 124 Wash.App. 257, 263 (II 2004); *Rhoades v. City of Battle Ground,* 115 Wash.App. 752, 766 (II 2002); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir.2005); *Barrios v. Safeway Ins. Co.,* 97 So.3d 1019, 1023-24 (La.App.2012)[8]).[9]

Chief Judge Fearing then identifies "the flaw" in his colleagues' position seeking to leave such issues to the prerogative of the legislature by reminding them that "the judiciary, without input from the legislature, created the rule denying emotional distress damages for breach of veterinarian contracts," a rule

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[8] Louisiana's Court of Appeals provides a suitable persuasive precedent. *Smith v. University Animal Clinic, Inc*., 30 So.3d 1154 (La.App.2010), *cert. denied*, 36 So.3d 247 (2010), ruled in favor of awarding emotional damages for breach of a cat boarding contract by a veterinary hospital. *Barrios v. Safeway Ins. Co*., 97 So.3d 1019 (La.App.2012), a negligence case, cited *Smith* in affirming the award of $10,000 in emotional distress for the motor vehicle death of Yellow, the Barrioses' dog, adding, at 1023-24:

> Although a pet is considered corporeal movable property in Louisiana, clearly, pets are not inanimate objects. This Court takes judicial notice of the emotional bond that exists between some pets and ***1024** their owners and the "family" status awarded some pets by their owners. In the present matter, the trial judge based her award of $5,000.00 each to the Barrioses on her finding that they had a close family-like relationship with Yellow; that the dog was a part of their lives for approximately twelve years and that his loss caused them psychic trauma.

[9] Consider also the remarks of Texas Court of Appeals Judge Andell who explained:

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

Bueckner v. Hamel, 886 S.W.2d 368, 376-78 (Tex.App.1994)(Andell, J., concurring). *See also Rabon v. City of Seattle*, 107 Wash.App. 734, 744 (2001)("There may be merit to the argument that a person's relationship with a dog deserves more protection than a person' s relationship with, say, a car[,]" in which the property interest is perfect and unqualified); *Downey v. Pierce Cy*., 165 Wash.App. 152, 165 (2011)(private interest of pet owners in keeping their pets is "arguably more than a mere economic interest because pets are not fungible.")

that "conflicts with underlying legal principles," such that "the courts, not the legislature, should correct the error and align the rule with the underlying principles." *Conc.,* at 8. As the legislature never addressed this issue, "it is both appropriate and proper that the courts decide the question." *Conc., id.* Each of the claims raised by Mr. Repin originate at common law, none by statute.

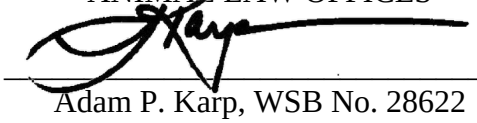
Finally, Chief Judge Fearing "criticize[s] current Washington law in that state law may impose a strict prohibition on a pet owner recovering emotional distress damages for loss of a human-animal bond based on the negligent death or injury to a pet," concluding that, "Because of the role of pets in our society, this recognition should extend to instances of negligent injury." *Conc.*, at 9-10.

VI. CONCLUSION

Mr. Repin urges this court to accept review.

Dated this April 20, 2017

ANIMAL LAW OFFICES



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2017, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

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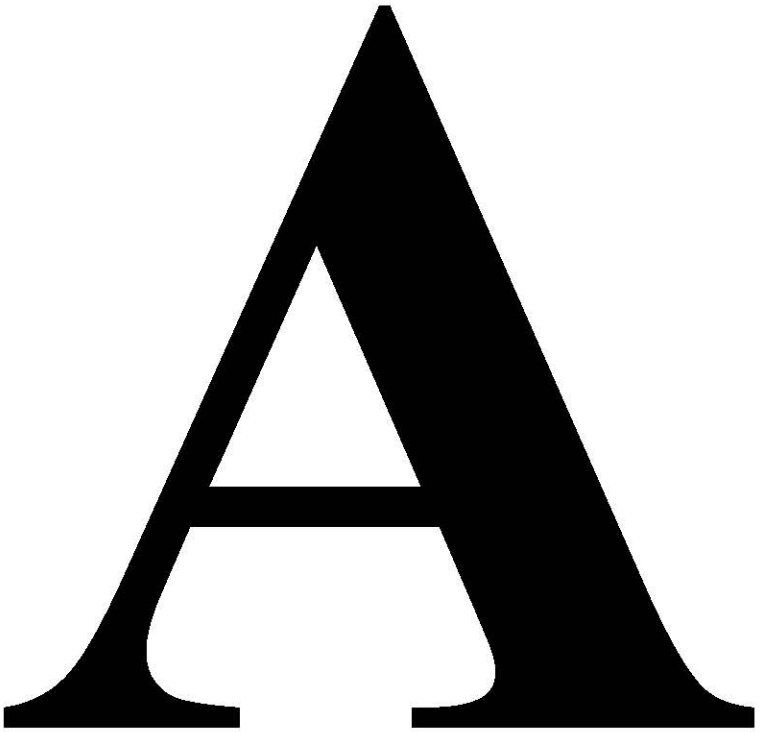

FILED
MARCH 21, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

ROBERT REPIN, Petitioner, v. STATE OF WASHINGTON; WASHINGTON STATE UNIVERSITY; AND MARGARET CHON-URBACH, BVSC; and DOES 1-10, Respondents.	)	No. 34049-0-III PUBLISHED OPINION

FEARING, C.J. — Robert Repin sues Washington State University (WSU) and WSU veterinarian, Dr. Margaret Cohn-Urbach, for conduct arising from the euthanasia of his beloved Alaskan Malamute, Kaisa. Repin alleges that Cohn-Urbach, with gross negligence, performed the euthanasia and thereby caused Kaisa pain and prolonged her death. Cohn-Urbach also purportedly failed to fully inform him of the repercussions of the method of euthanasia. Repin pleads causes of action in breach of contract, reckless breach of contract, professional negligence, lack of informed consent/negligent misrepresentation by omission, intentional or reckless infliction of emotional distress, and conversion/trespass to chattels or trespass on the case. WSU and Cohn-Urbach moved

for summary judgment to dismiss all claims. The trial court dismissed the lack of informed consent/negligent misrepresentation by omission, intentional and/or reckless infliction of emotional distress, conversion, and trespass claims. The trial court also ruled, as a matter of law, that Repin could not recover emotional distress damages for a reckless breach of contract. We affirm all of the trial court's rulings.

FACTS

Since the trial court granted WSU and Dr. Margaret Cohn-Urbach (collectively WSU) summary judgment in part, we recount the facts in a light favorable to Robert Repin. This factual statement occasionally, however, adds WSU's version of the facts.

Plaintiff Robert Repin is a single man, with no children, who works as a gold prospector. In 2001, Repin adopted Kaisa, an Alaskan Malamute puppy, who his niece rescued. Kaisa grew to become an indispensable part of Repin's reclusive life.

In September 2012, Kaisa fell ill. After a grim night, Robert Repin took Kaisa to an emergency veterinarian. The veterinarian diagnosed Kaisa with cancer and prescribed medication for her. Repin then transported Kaisa to Kaisa's regular veterinarian, who recommended a visit to the WSU Veterinary Teaching Hospital.

On September 26, Robert Repin drove Kaisa from Cle Elum to Pullman and presented Kaisa to WSU's Veterinary Teaching Hospital. Jasmine Feist and another fourth-year veterinary student registered Kaisa with the hospital. Feist placed Kaisa in

the intensive care unit and inserted a catheter in Kaisa's left front leg. Hours later, defendant Dr. Margaret Cohn-Urbach, an intern at the hospital, examined Kaisa. During this time, Repin remained with Kaisa.

Following radiographs, Veterinary Teaching Hospital clinicians diagnosed Kaisa with metastatic cancer. Staff predicted Kaisa would live only several months. Robert Repin insisted on a consultation with an expert. Repin spoke, on the phone, with Dr. Kevin Choy, an oncologist, who agreed with the diagnosis of metastatic cancer. WSU veterinarians recommended euthanasia.

After reflection, Robert Repin directed the Veterinary Teaching Hospital to euthanize Kaisa. Repin viewed the WSU hospital to be the best at veterinary medicine. He did not wish Kaisa to undergo weeks of agony.

Robert Repin requested that he sign paperwork before the euthanasia because he did not trust his mental state after the procedure. He signed a Washington State University Veterinary Teaching Hospital consent for euthanasia form. The form read, in relevant part:

> I, the undersigned, do hereby certify that I am the owner (or duly authorized agent of the owner) of the animal described above; that I hereby give the clinicians of the Washington State University Veterinary Teaching Hospital full and complete authority to humanely destroy the aforementioned animal. . . .
>
> . . . .

> I hereby release the Washington State University Veterinary Teaching Hospital, their agents, and representatives, from any and all liability for said animal.

Clerk's Papers (CP) at 126. Repin denies seeing the release language because of his distraught state of mind. No hospital employee discussed the language with him. Repin checked the form's box directing Kaisa's remains be returned to him rather than studied at the hospital. Repin paid $260.56 for the euthanasia.

Robert Repin and a Veterinary Teaching Hospital attendant walked Kaisa from the intensive care unit to the euthanasia room, euphemistically labeled the quiet room. Dr. Margaret Cohn-Urbach then described the procedure to Repin. Cohn-Urbach advised that Kaisa would be administered a mild sedative to relax her and thereafter dispensed Euthasol, a drug that would stop the Malamute's heart and allow a peaceful death. According to Dr. Cohn-Urbach, she informed Robert Repin that, as Kaisa passes, she may have deep gasps, tremors, and other adverse effects. Repin claims Cohn-Urbach only warned that Kaisa might take a deep breath and exhibit a slight leg twitch.

Robert Repin laid on the quiet room floor with Kaisa. Dr. Margaret Cohn-Urbach told Robert Repin the hospital procedure would commence. According to Margaret Cohn-Urbach and Jasmine Feist, Feist performed the euthanasia, while Cohn-Urbach supervised. Repin contends that Cohn-Urbach performed the procedure.

According to Robert Repin, he heard Jasmine Feist exclaim: "[O]h, look, Kaisa

has chewed off the end of her catheter, should I go get another one?" CP at 62. Margaret Cohn-Urbach responded: "[N]o. I will show you how to still make this one work." CP at 62. Repin did not look at the catheter and never observed Kaisa chewing the catheter. Feist and Cohn-Urbach deny any such conversation or Kaisa chewing the catheter.

Robert Repin contends that no hospital staff member flushed the catheter to ensure patency, a medical term for open or unobstructed. Dr. Margaret Cohn-Urbach and Jasmine Feist both declare that one of them flushed 20 milliliters (ml) of saline solution through the catheter. Each avers that the saline flushed unimpeded and that she lacked any concern regarding patency.

Kaisa slept on the quiet room floor when the veterinarians began the euthanasia. After the flushing, Either Dr. Margaret Cohn-Urbach or Jasmine Feist injected 1.1 ml of Acepromazine into the catheter. Five to ten minutes later, either Cohn-Urbach or Feist started the second injection. Repin turned from observing the injection. Repin describes the ensuing events:

> [Kaisa] woke up screaming. She was on her feet panicking, screaming in agony. I said, What the fuck is going on here? I said, this can't fucking be happening. I had to wrestle [Kaisa] back to the floor. I had to hold her down and listen to her scream. [Dr. Cohn-Urbach] and [Feist] had backed up against the wall. They didn't know what the fuck to do. Jasmine said, My God, it's not working. What should we do, she says? My dog didn't know what the fuck was going on. She would have tore those girls apart if I let go of her. All she knew was she was in fucking pain and she wanted to get out of there and I had to hold her down. . . . [Feist] said somewhere, What do we do? Should I go get another catheter?

> [Dr. Cohn-Urbach] says, I'm out of medication. I said, This can't be fucking happening.

CP at 67-68.

According to Robert Repin, Dr. Margaret Cohn-Urbach left the quiet room and retrieved more Euthasol. Repin believes five to seven minutes passed between the two injections of Euthasol, during which time Kaisa constantly struggled on her two front feet, while Repin toiled to restrain her. Kaisa's agony never ceased. On Cohn-Urbach's return, Repin rolled Kaisa on her back to afford Cohn-Urbach a clear shot at her right forelimb. Jasmine Feist and Repin restrained Kaisa as Cohn-Urbach injected Euthasol into the right forelimb. Fifteen seconds later, Kaisa expired.

According to Jasmine Feist, Kaisa lifted her head and upper torso and uttered one loud howl at the end of the first Euthasol injection. Kaisa did not scream in agony. Dr. Margaret Cohn-Urbach leaped to her feet and exited the quiet room. Robert Repin grabbed Kaisa around the neck and held her. Kaisa lay down and emitted large breaths. Kaisa died after she slouched. Feist estimates Dr. Cohn-Urbach left the room for up to two minutes.

According to Dr. Margaret Cohn-Urbach, Kaisa uttered three howls and gazed at her left leg, which Jasmine Feist handled. Kaisa did not act violently or thrash. As Kaisa reacted, Cohn-Urbach observed Robert Repin's unhappiness. Dr. Cohn-Urbach decided

to hurry the euthanasia. She left the quiet room for more Euthasol and returned within two minutes. Cohn-Urbach injected the Euthasol directly into the cephalic vein in Kaisa's right leg. As Dr. Cohn-Urbach administered the second dose of Euthasol, Kaisa howled again. After the second injection, Kaisa died.

After Kaisa expired, Dr. Margaret Cohn-Urbach offered Robert Repin a trash bag for Kaisa's remains, a suggestion that offended Repin. Repin removed Kaisa on a gurney from the Veterinary Teaching Hospital to his car, while colorfully expressing displeasure.

Dr. Margaret Cohn-Urbach wrote in her clinical notes concerning the euthanasia:

> During the euthanasia procedure, Kaisa showed a reaction to the injection of 20ml of Euthasol through an 18G catheter in the left cephalic vein. The catheter was tested prior to injection of the Euthasol and we are confident that it flushed fine. Kaisa only reacted to the injection when the final 1ml was given, and showed no response while the first 19ml Euthasol and 1.1ml Acepromazine were given. As Kaisa was reacting to the injection, we used the right cephalic vein to inject and this was administered smoothly without delay. Kaisa again did show a reaction at the end of the injection of the 15ml Euthasol in the right cephalic vein, even though this was confirmed as definitely being in the vein. The left forelimb did not appear swollen after injection, suggesting that Kaisa may have reacted poorly to the euthanasia due to underlying intracranial and other disease. The owner expressed anger at the situation.

CP at 212-13.

Dr. Harmon Rogers, a colleague of Dr. Margaret Cohn-Urbach, reported to a supervisor:

> At the time of euthanasia the IV catheter looked questionable. Dr. Cohn-Urbach tested it several times and confirmed patency by flushing 20

> mls of fluid through it. The euthanasia did not go smoothly and the dog cried out while being euthanized. That greatly upset the owner. It is possible that the euthanasia solution was perivascular. Dr. Cohn accessed another vein and completed the euthanasia. She was very apologetic to the owner about the circumstances. I wonder if her apologies increased the owner's dismay and made him believe she was more responsible for the difficulty than might be the case. He left very upset and swearing many times about how she had f'd everything up.

CP at 131. "Perivascular" means tissue surrounding a blood vessel.

In a declaration, Robert Repin affirmed that Dr. Margaret Cohn-Urbach never informed him of the risks of proceeding with a damaged catheter, the use of Acepromazine alone or at an inappropriate dosage, a fourth-year student injecting Euthasol, a high dose of Euthasol, or Kaisa responding to the procedure in distress. Had Cohn-Urbach informed Repin of the risks, he would not have consented to the procedure as performed at the Veterinary Teaching Hospital. He would have instead demanded a different catheter, a proper first medication, a dilution to the Euthasol, and all injections being performed by a licensed veterinarian.

Robert Repin reports severe emotional distress resulting from the painful euthanasia of Kaisa. Repin now lacks patience, easily angers, suffers headaches, and drinks alcohol to sleep.

Robert Repin hired Dr. Victoria Peterson, a licensed Washington veterinarian, as an expert witness. In a declaration opposing WSU's summary judgment motion,

Peterson declared that veterinarians act in a fiduciary capacity of trust and confidence. She averred that she knows the standard of care of small animal veterinarians in the State of Washington. Peterson opined that:

> Defendant Cohn-Urbach committed veterinary medical malpractice and breached the contract with Mr. Repin, proximately causing him economic and noneconomic damages. Indeed I find that her acts and omissions were cumulatively reckless and grossly negligent. In short, one does not euthanize a dog by injecting caustic solution outside the vein, causing her to experience tremendous fear and suffer agonizing pain for an extended duration while she is forcibly, physically restrained by the owner until the veterinarian can leave the room to obtain more euthanasia solution and return to administer it properly. That is not euthanasia. It is torturous to both the animal and her owner.

CP at 236.

Dr. Victoria Peterson faulted Dr. Margaret Cohn-Urbach for administering Acepromazine precedent to Euthasol, because the former acts as a tranquilizer, rather than a sedative. A tranquilizer does not alter the dog's perception to the situation, but rather limits her ability to respond. Acepromazine may render the animal more excited, unpredictable, and dangerous. The small dose administered to Kaisa would not have sedated Kaisa or relieved her of any pain. According to Peterson, Margaret Cohn-Urbach was also grossly negligent for administering a large dose of Euthasol because of the age of Kaisa. The drug increased the risk of a geriatric dog's vein bursting such that the caustic solution travels perivascular. Euthanasia requires only 9 ml of Euthasol, but

Cohn-Urbach's two injections amounted to 34 ml. Since Kaisa was an Arctic breed, Dr. Cohn-Urbach should have warned Robert Repin that Kaisa would whine and cry upon being euthanized. According to Peterson, Cohn-Urbach's treatment was not humane but led to minutes of conscious pain.

Another of Robert Repin's experts, Dr. Bruce Goldberger, a forensic toxicologist, examined Kaisa's exhumed leg after the animal's death. Goldberger determined that the first injection of Euthasol entered Kaisa's perivascular region, a conclusion consistent with Victoria Peterson's conclusion that Kaisa suffered from the perivascular injection.

PROCEDURE

Robert Repin sues the State of Washington, WSU, and Margaret Cohn-Urbach. We assume that WSU and the State of Washington are the same legal entity. In the complaint, Repin asserts six claims: breach of contract, reckless breach of contract, professional negligence, lack of informed consent/negligent misrepresentation by omission, intentional and/or reckless infliction of emotional distress, conversion/trespass to chattels or trespass on the case. Repin requests reimbursement of amounts billed by WSU for services provided and his emotional distress and loss of enjoyment of life. In seeking emotional distress damages, Repin alleges that the "zone of danger" doctrine applies. CP at 7. We do not read the complaint as seeking any damages for pain suffered by Kaisa.

The trial court granted, in part, WSU's motion for summary judgment. The trial court dismissed reckless breach of contract, lack of informed consent/negligent misrepresentation by omission, outrage, and conversion/trespass to chattels. The trial court also dismissed any claim for emotional distress damages no matter the cause of action pled. We granted discretionary review of the trial court's summary judgment rulings.

LAW AND ANALYSIS

Reckless Breach of Contract and Noneconomic Damages

We find no case that recognizes a cause of action for reckless breach of contract distinct from a cause of action for breach of contract. We explore, however, whether the law may provide recovery for emotional distress or other noneconomic damages for a breach of contract under some circumstances, including egregious conduct of the breaching party. Robert Repin may allege reckless breach of contract in order to recover noneconomic damages. Repin may also allege reckless breach of contract in order to avoid the release contained in the euthanasia contract. WSU does not assert the defense of the release in support of its summary judgment motion.

The trial court did not dismiss Robert Repin's breach of contract claim. Therefore, we do not address whether Repin maintains a viable claim in contract. We assume that Repin does not seek recovery for the value of Kaisa, since regardless of any

professional negligence, Kaisa faced death. We address, however, whether Repin may recover noneconomic damages for the alleged breach of contract.

Robert Repin contends that noneconomic damages should be recoverable when a veterinarian breaches, regardless of reckless conduct, a euthanasia contract because of the distressful nature of euthanasia. He emphasizes, however, that more reason exists to allow emotional distress damages on a reckless breach of a euthanasia contract. WSU responds that Washington courts have not recognized recovery of emotional distress damages for breach of a contract, even where emotional distress is foreseeable.

In general, parties cannot recover noneconomic, emotional disturbance damages for breach of contract. RESTATEMENT (SECOND) OF CONTRACTS § 353 (Am. Law Inst. 1981); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 440-48, 815 P.2d 1362 (1991). An exception arises if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353. The comments explore this exception:

> 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 cmt. a.

Both parties cite extensively to *Gaglidari*. Repin argues that *Gaglidari* embraced a broadened understanding of recovery for emotional damages in breach of contract cases. WSU responds this is a complete misstatement of *Gaglidari*, which did not expand recovery for breach of contract.

In *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426 (1991), Denny's hired Ronda Gaglidari, in 1980, to be a bartender for their Tukwila store. A fight broke out at the Denny's restraunt. Denny's fired Gaglidari as a result of the altercation. Gaglidari sued Denny's for, among other things, breach of contract. Following a trial, the jury returned a verdict awarding Gaglidari $55,000 in economic damages and $75,000 in noneconomic damages. Denny's appealed. The Washington Supreme Court determined that it was inappropriate to award emotional distress damages in this context. In doing so, the court explored Washington common law, other states' common law, public policy, and the *Restatement of Contracts*. The court wrote:

> . . . [B]y allowing emotional damages whenever they are a foreseeable result of the breach, the traditional predictability and economic efficiency associated with contract damages would be destroyed. In order to avoid the unpredictable and destabilizing results of such an approach, most courts have generally limited emotional distress damages to contracts uniquely intended to protect some personal interest or security and which are incapable of compensation by reference to the terms of the contract.
>
> . . . .
>
> 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 probably can be explained only by adverting to the "Law of Unintended Consequences." If there is to be a change in the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring.

Gaglidari, 117 Wn.2d 446, 448.

In 2013, this court decided the more analogous *Hendrickson v. Tender Care Animal Hospital, Corp.*, 176 Wn. App. 757, 312 P.3d 52 (2013). In *Hendrickson*, Julie Hendrickson brought her golden retriever, Bear, to Tender Care for neutering and implanting of a microchip. Following the procedure, veterinarian Kristen Cage noticed Bear's abdomen as swollen. Cage ordered x-rays to rule out gastric dilation volvulus. When Cage examined Bear's x-rays, she noticed significant gastric distention but no volvulus. Tender Care sent Bear home with instructions on how to treat gastric distention. Bear eventually died, likely from gastric dilation volvulus. Hendrickson sued Tender Care, in part, for reckless breach of bailment contract. The trial court dismissed the reckless breach of bailment contract and emotional distress damages. This court affirmed. This court wrote:

> [A]lthough the Washington cases Hendrickson cites 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 and the limitation on emotional distress damages for such injury except in cases of malicious or intentional infliction of injury to those animals. In fact, 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.

Hendrickson, 176 Wn. App. at 767.

Robert Repin cites to cases from Michigan and Louisiana to support his contention that he can recover emotional distress damages for breach of contract. *Lane v. KinderCare Learning Centers, Inc.*, 231 Mich. App. 689, 588 N.W.2d 715 (1998); *Smith v. University Animal Clinic, Inc.*, 09-745 (La. App. 3 Cir. 2/10/10), 30 So. 3d 1154; *Barrios v. Safeway Insurance Co.*, 2011-1028 (La. App. 4 Cir. 3/21/12), 97 So. 3d 1019. Louisiana law lacks persuasive authority because its Napoleonic code allows recovery of damages in breach of contract for nonpecuniary losses. LOUISIANA CIVIL CODE art. 1998. The Michigan decision helps Repin some, but we remain bound by Washington precedence. Under Washington law, recovery of emotional disturbance damages for breach of contract is generally not recoverable. Therefore, the trial court did not err in limiting Repin's potential recovery for breach of contract to economic damages.

Professional Negligence, Noneconomic Damages, and Zone of Danger

The trial court did not dismiss Robert Repin's claim for veterinarian negligence, but ruled that Robert Repin cannot recover for his emotional distress under this cause of action. On appeal, Repin argues that the trial court erred in denying him recovery of noneconomic damages based on his position in the "zone of danger" of the traumatic

incident of Kaisa's painful death and based on the theory of negligent infliction of emotional distress. We address each argument separately starting with the zone of danger doctrine.

In 1962, the Washington Supreme Court adopted a zone of danger test to determine whether a bystander may recover for emotional distress caused by the defendant's negligence. *Murphy v. City of Tacoma*, 60 Wn.2d 603, 620-21, 374 P.2d 976 (1962). With the adoption of this criterion, the plaintiff need not establish physical impact to her body in order to recover for emotional distress. Nevertheless, the "zone of danger" measure requires either an immediate physical invasion of the plaintiff's person or security or a direct possibility of such an invasion in order that recovery may be had for mental anguish. *Murphy v. City of Tacoma*, 60 Wn.2d at 620-21.

Under the later creation of a cause of action for negligent infliction of emotional distress, Washington recognized a broader rule whereby the bystander may recover for emotional distress regardless of the possibility of invasion of her body space. *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976); *Hegel v. McMahon*, 136 Wn.2d 122, 126, 960 P.2d 424 (1998). The zone of danger doctrine still holds relevance, however. Under the zone of danger standard, the plaintiff need not prove objective symptoms to recover emotional distress damages. *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 809-10, 701 P.2d 518 (1985); *McRae v. Bolstad*, 32 Wn. App. 173, 178, 646 P.2d 771 (1982)

aff'd, 101 Wn.2d 161, 676 P.2d 496 (1984). A plaintiff, in a negligent infliction of emotional distress cause of action, must establish objective symptomatology. *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 962, 577 P.2d 580 (1978); *Hunsley v. Giard*, 87 Wn.2d at 436 (1976); *Wilson v. Key Tronic Corp.*, 40 Wn. App. at 810.

Robert Repin claims he lodged within the zone of danger because he watched his beloved Malamute experience an agonizing death and because the conduct exposed him to grievous bodily harm from Kaisa. We explore these alternate contentions in such order. If he is correct with regard to either contention, he need not show objective symptoms of emotional distress.

Washington has never addressed the applicability of the zone of danger rule to a medical or veterinarian malpractice claim. Other jurisdictions deny such a claim. We follow the other American jurisdictions.

In *Owens v. Childrens Memorial Hospital, Omaha, Nebraska*, 480 F.2d 465 (8th Cir. 1973), parents alleged that health care providers at the defendant hospital negligently diagnosed and treated their son. They asserted that they remained in close proximity to their son throughout the period of his hospitalization and that they personally witnessed the malpractice of the providers and the physical and mental suffering of their son. They further alleged that, as a direct and proximate result of the negligence, they suffered physical and mental anguish, great emotional disturbance, and shock to their respective

nervous systems. The reviewing court affirmed the lower court's dismissal on the pleadings. The court reasoned in part that the parents were not within the zone of physical danger. The court was reluctant to extend the liability of health care providers beyond the patient.

In *Squeo v. Norwalk Hosp. Association*, 316 Conn. 558, 113 A.3d 932 (2015), parents brought action against a nurse and the hospital for medical malpractice, alleging that the defendants negligently discharged their suicidal son after the nurse conducted an emergency psychiatric examination. The parents found the son hanging in their front yard. The Connecticut court affirmed summary judgment dismissal of the claim. The court noted that bystander medical malpractice claims will rarely if ever arise under a zone of danger rule, as it is the rare form of medical malpractice that would pose a physical threat to bystanders.

Finally in *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex. 1997), Oscar Trevino alleged that he suffered severe mental anguish after witnessing the negligent treatment of his wife. Trevino argued that he should be permitted to recover mental anguish damages against the hospital as a bystander to the wife's treatment. The Texas high court denied recovery, in part, from fear that hospitals might curtail patient visitation to prevent bystander suits. The very nature of medical treatment is traumatic to the layperson. Even when a medical procedure proves beneficial to the patient, the

procedure may shock the senses of the ordinary bystander who witnesses it.

We note that California and New Jersey promote a contrary view. *Ochoa v. Superior Court*, 39 Cal.3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985); *Gendek v. Poblete*, 139 N.J. 291, 654 A.2d 970 (1995). Nevertheless, other courts allow recovery for only those bystanders who are within the zone of danger and suffer emotional distress as a result of a reasonable fear of a physical injury to themselves, a factor we discuss below. *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595, 599 (Mo. 1990); *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 139 Vt. 138, 425 A.2d 92, 95 (1980). We accept the reasoning employed in Texas, Connecticut, and Nebraska.

We might reverse dismissal of the negligence claim based on Robert Repin's fear for his own physical safety. Nevertheless, Repin presents no evidence of such fear. CR 56(e) reads, in pertinent part:

> . . . an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In his testimony, Robert Repin mentioned that he needed to wrestle Kaisa to the

floor. Dr. Margaret Cohn-Urbach and Jasmine Feist cowered against the wall. Kaisa would have attacked the two women if Repin did not restrain her. Repin did not testify of any fear that Kaisa would harm him. He failed to place himself in a zone of danger. Therefore, as a matter of law, he cannot sustain a claim for his emotional distress resulting from WSU's alleged professional negligence.

Negligent Infliction of Emotional Distress

Robert Repin does not expressly plead a cause of action for negligent infliction of emotional distress. Therefore, WSU contends that Repin may not claim error on appeal for a phantom claim. In response, Repin urges us to review a claim for negligent infliction because WSU did not assert this contention before the trial court. We disagree. WSU asserted this argument in its trial court reply brief. We note that an issue raised and argued for the first time in a reply brief is generally too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Nevertheless, WSU may have lacked knowledge of Repin's asserting the claim until Repin filed his memorandum responding to WSU's summary judgment motion.

WSU's attempt to preclude consideration of any cause of action for negligent infliction of emotional distress begs several questions. Is a claim for negligent infliction of emotional distress encompassed in a claim for negligence? Should WSU, before Robert Repin filed his brief responding to WSU's summary judgment motion, have

known that Repin sought to recover for negligent infliction of emotional distress? May the trial court allow an implied amendment, pursuant to CR 15(b), when the plaintiff raises a new cause of action in a summary judgment response brief? We decide to ignore these questions and address whether Repin identified facts sufficient to sustain a negligent infliction of emotional distress claim in response to WSU's summary judgment motion. We rule in favor of WSU on this issue so the university suffers no prejudice by addressing the merits of the claim.

The tort of negligent infliction of emotional distress encompasses three elements: (1) the emotional distress is within the scope of foreseeable harm of the negligent conduct, (2) the plaintiff reasonably reacted given the circumstances, and (3) objective symptomatology confirms the distress. *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 560, 293 P.3d 1168 (2013). Under the tort, a plaintiff who suffers mental distress without physical injury may have a cause of action. *Hunsley v. Giard*, 87 Wn.2d at 431; *Pickford v. Masion*, 124 Wn. App. 257, 259, 98 P.3d 1232 (2004). No absolute boundary surrounds the class of persons whose peril may stimulate the mental distress. *Hunsley v. Giard*, 87 Wn.2d at 436.

We focus on the third element of the tort of negligent infliction of emotional distress. According to the third element, a plaintiff must prove he suffered emotional distress by objective symptomatology and the emotional distress must be susceptible to

medical diagnosis and proved through medical evidence. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97, 66 P.3d 630 (2003); *Hegel v. McMahon*, 136 Wn.2d at 134-35.

In response to a summary judgment motion, the adverse party may not rest on the mere allegations or denials of a pleading, but a response by affidavits must present specific facts showing a genuine issue for trial. CR 56(e). In response to WSU's summary judgment motion, Robert Repin omitted any facts showing objective symptoms of stress.

WSU also argues that Washington law refuses to extend the cause of action for negligent infliction of emotional distress to distress suffered due to injury to a pet. For example, in *Pickford v. Masion*, 124 Wn. App. 257 (2004), this court denied recovery to a pet owner, whose dog was mauled by other dogs, of damages for emotional distress and loss of the human-animal companionship. Gina Pickford alleged negligent and malicious infliction of emotional distress. *Hendrickson v. Tender Care Animal Hospital Corp.*, 176 Wn. App. 757 (2013) and *Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539 (2008) also appear to follow a strict rule that denies a pet owner emotional distress damages for loss of a human-animal bond based on the negligent death or injury to a pet. We do not know if this rule extends to emotional distress suffered as a result of observing one's pet suffer. Nevertheless, we need not base our decision on the nature of Robert Repin's claim. Robert Repin provides no evidence of objective symptomatology.

Outrage

Robert Repin contends that the trial court erred in dismissing his outrage claim. WSU argues that Repin failed to establish that WSU's conduct was outrageous as a matter of law. We agree with WSU.

The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 194-95 (2003); *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 250, 35 P.3d 1158 (2001). In order to make a prima facie case of intentional infliction of emotional distress, a plaintiff seeking to survive summary judgment must produce evidence showing three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d at 195 (2003); *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Contrary to negligent infliction of emotional distress, the plaintiff need not establish objective symptomatology of the distress. *Kloepfel v. Bokor*, 149 Wn.2d at 196-98. The law assumes that intentional, rather than negligent, conduct of the defendant leads to severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d at 202.

Under Washington law, a pet owner may have no right to emotional distress damages or damages for loss of a human-animal bond based on the negligent death or injury to a pet. *Sherman v. Kissinger*, 146 Wn. App. at 873 (2008). Nevertheless,

recovery for emotional distress is possible for malicious or intentional injury to a pet. *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006); *Pickford v. Masion*, 124 Wn. App. at 261 (2004).

This appeal focuses on element one of the tort. Extreme and outrageous conduct must be conduct that the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" *Kloepfel v. Bokor*, 149 Wn.2d at 196; *Reid v. Pierce County*, 136 Wn.2d 195, 201-02, 961 P.2d 333 (1998); *Grimsby v. Samson*, 85 Wn.2d at 59 (1975). Liability exists only when the conduct has been so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Grimsby*, 85 Wn.2d at 59.

Generally, the elements of a claim for intentional infliction of emotional distress are questions of fact. *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977 (2008). On summary judgment, however, a trial court must make an initial determination as to whether the conduct may reasonably be regarded as so extreme and outrageous as to warrant a factual determination by the jury. *Sutton v. Tacoma School District No. 10*, 180 Wn. App. 859, 869, 324 P.3d 763 (2014); *Strong v. Terrell*, 147 Wn. App. at 385. No case suggests that the standard to defeat a summary judgment motion is harsher for plaintiffs asserting outrage claims than plaintiffs in other tort suits. Nevertheless,

Washington courts, like other courts, have considered themselves gatekeepers for purposes of allowing a jury to decide claims of intentional infliction of emotional distress. *Christian v. Tohmeh*, 191 Wn. App. 709, 736, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035, 377 P.3d 744 (2016). The trial court and, in turn, the appeals court, renders an initial screening to determine whether the defendant's conduct and mental state, together with the plaintiff's mental distress, rise to the level necessary to make out a prima facie case. *Benoy v. Simons*, 66 Wn. App. 56, 63, 831 P.2d 167 (1992); *Orwick v. Fox*, 65 Wn. App. 71, 87-88, 828 P.2d 12 (1992). The requirement of outrageousness is not an easy one to meet. *Christian v. Tohmeh*, 191 Wn. App. at 736. The level of outrageousness required is extremely high. *Reigel v. SavaSeniorCare LLC*, 292 P.3d 977, 990 (Colo. Ct. App. 2011).

Washington may be the only jurisdiction with a reported decision involving a claim for outrage attended to veterinarian care. *Baechler v. Beaunaux*, 167 Wn. App. 128, 272 P.3d 277 (2012). Nevertheless, this court affirmed with little discussion the trial court's summary dismissal of the claim because the claimant presented no evidence that the defendant veterinarian violated the standard of care. So, we evaluate Robert Repin's cause of action for outrage by reviewing decisions involving physicians.

In *Benoy v. Simons*, 66 Wn. App. 56 (1992), Saundra Benoy sued neonatologist Robert Simon for intentional infliction of emotional distress. Benoy gave birth to a

severely disabled premature child at Kadlec Medical Center in Richland, where Dr. Simon provided care. When the infant's condition deteriorated, Dr. Simon transferred him to Children's Orthopedic Hospital in Seattle, where the boy later died. Benoy contended that Simon needlessly pressured her family to create a guardianship, maintained the infant needlessly on life support, led her to believe her son's condition improved when it deteriorated, told her to bring her son's body home on a bus, and billed her for needless care. This court affirmed summary judgment in favor of Dr. Simon. Even assuming the events occurred as described by Benoy, the physician's conduct did not fall within the perimeters of outrageous conduct.

In *Christian v. Tohmeh*, 191 Wn. App. 709 (2015), Diane Christian presented evidence that Dr. Antoine Tohmeh engaged in a pattern of intentional behavior to obfuscate a true diagnosis of Christian's neurological deficits in an attempt to avoid legal liability; referred Christian to a neurologist but not ordering nerve conductions studies at the level of spine of her pain; yelled and shouted at her; told Christian that she had no neurological deficits, her problems were all in her head, and whatever was wrong would have happened anyway; implied to Christian that she was lazy and obese; spoke angrily to Christian's later treating physician and attempted to influence the physician's diagnosis; told the second physician that Christian suffered from significant emotional or psychological issues that rendered Christian's history less valid; and referred Christian to

a urologist, who found a neurogenic bladder, yet told Christian that the urologist's findings were normal. This court affirmed a summary judgment dismissal of the claim against Dr. Tomeh. In doing so, we reviewed decisions, from other jurisdictions, in which the appellate courts also dismissed claims of outrage against a physician. *Reigel v. SavaSeniorCare LLC*, 292 P.3d 977 (Colo. Ct. App. 2011); *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 845 N.E.2d 792, 300 Ill. Dec. 903 (2006); *Harris v. Kreutzer*, 271 Va. 188, 624 S.E.2d 24 (2006); *Hart v. Child's Nursing Home Co.*, 298 A.D.2d 721, 749 N.Y.S.2d 297 (2002); *Albert v. Solimon*, 252 A.D.2d 139, 684 N.Y.S.2d 375 (1998), *aff'd*, 94 N.Y.2d 771, 721 N.E.2d 17, 699 N.Y.S.2d 1 (1999); *C.M. v. Tomball Regional Hospital*, 961 S.W.2d 236 (Tex. App. 1997).

The conduct of Dr. Margaret Cohn-Urbach, viewed in a light most beneficial to Robert Repin, at best shows gross negligence. None of the conduct leads to a reasonable person uttering "outrageous." We conclude that Repin has failed to show outrageous conduct.

Trespass to Chattels

Robert Repin argues that he established a prima facie case for an intentional tort along the trespass-conversion spectrum. We are unacquainted with such a spectrum so we address each theory separately beginning with trespass.

In his brief, Robert Repin cites only *Restatement (Second) Torts* §§ 226, 227, and 228 (Am. Law Inst. 1965) in his discussion about trespass and conversion. Each *Restatement* section concerns conversion alone. Although we recognize a cause of action for trespass to chattel, Repin cites no authority to support a claim for trespass to chattel under the circumstances on appeal. Therefore, we affirm the summary judgment dismissal of the claim.

RAP 10.3(a)(6) directs each party to supply, in his brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." This court does not review errors alleged but not supported with citation to authority. *Valente v. Bailey*, 74 Wn.2d 857, 858, 447 P.2d 589 (1968); *Meeks v. Meeks*, 61 Wn.2d 697, 698, 379 P.2d 982 (1963); *Avellaneda v. State*, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012). Appellate courts are precluded from considering such alleged errors. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999); *Escude v. King County Public Hospital District No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

Conversion

Robert Repin argues that Dr. Margaret Cohn-Urbach without authorization intermeddled with his property rights in Kaisa in a manner inconsistent with his express and contracted instructions to humanely euthanize Kaisa. Under Repin's version of the

facts, Dr. Cohn-Urbach utilized a damaged catheter and pompously admonished Jasmine Feist to complete the euthanasia with the impaired instrument. Repin argues that Cohn-Urbach's insistence on use of the compromised catheter constituted an intentional act that caused the Euthasol to enter Kaisa's perivascular region with the result of tremendous pain to the Malamute. His physician and veterinarian experts support this claim. According to Repin, Cohn-Urbach's actions deprived both Kaisa and Repin of the expected results of euthanasia.

Robert Repin further argues that the fundamental nature of his transaction with WSU was to destroy his property in a humane manner and without undue pain and suffering according to sound veterinary principles. The euthanasia form signed by Repin authorized the Veterinarian Teaching Hospital to humanely destroy Kaisa. When WSU failed to fulfill this purpose, the veterinarian hospital converted Repin's property, Kaisa.

WSU argues that Repin's authorization of the demise of Kaisa thwarts a cause of action for conversion. WSU emphasizes the nebulous nature of Repin's claim.

We must decide if a veterinarian commits a conversion in the civil law when the veterinarian engages in gross negligence during treatment of a companion animal or when the veterinarian disobeys instructions for care of the animal. We find no case law directly applicable. Because we conclude that Robert Repin's claim does not fulfill the letter or purpose behind the cause of action for conversion, we reject his claim for

conversion as a matter of law.

Under modern jurisprudence, conversion is the unjustified, willful interference with a chattel that deprives a person entitled to the property of possession. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008); *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005). Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. *Washington State Bank v. Medalia Healthcare LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999); *Consulting Overseas Management, Ltd. v. Shtikel*, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001).

An essential element of conversion is the taking of possession, actual or constructive, of the chattel. *Martin v. Sikes*, 38 Wn.2d 274, 287, 229 P.2d 546 (1951). In its ordinary sense, conversion means to take and keep another's property. *Hess v. Starwich*, 149 Wash. 679, 684, 272 P. 75 (1928). Nevertheless, even a willful or an unlawful taking will not always amount to conversion. *Clark v. Groger*, 102 Wash. 188, 194, 172 P. 1164 (1918). There must be some assertion of right or title hostile to the true owner. *Clark v. Groger*, 102 Wash. at 194.

We observe that the essence of conversion is the dispossession of property from the rightful owner. We note that Robert Repin lay next to or held Kaisa during the euthanasia. Dr. Margaret Cohn-Urbach never sought title or possession of the Malamute.

Repin never relinquished possession of Kaisa. Although Repin strongly objects to the care given by Cohn-Urbach, he agreed to some care being given.

The most analogous Washington decision involving care of a companion animal is *Sherman v. Kissinger*, 146 Wn. App. 855 (2008). Nevertheless, *Sherman* provides no legal assistance. Arlene Sherman brought her dog Ruby to a veterinarian hospital to obtain a urine sample to determine if Ruby suffered from a urinary infection. The hospital receptionist informed Sherman that the hospital would collect the urine sample by placing a sheath under Ruby's cage. Nevertheless, veterinarian Jennifer Kissinger took the sample by inserting a needle into the urinary bladder. No one warned Sherman of the use of a needle. When inserting the needle, the veterinarian drew blood, rather than urine. Kissinger immediately removed the needle, applied pressure to the puncture area, and returned Ruby to her cage. Ruby died one minute later. Sherman sued for breach of bailment contract, negligent misrepresentation, conversion, trespass to chattels, and breach of fiduciary duty. The trial court dismissed on the ground that the medical malpractice act, chapter 7.70 RCW, controlled and did not afford recovery for Sherman's claims. This court reversed and held that the act does not apply to veterinarians and veterinary clinics. We reinstated all claims, including the claim for conversion. But we qualified the holding by observing that we did not decide whether any of the claims were viable.

Washington courts have never applied those sections of *Restatement (Second) of Torts* addressing conversion, but both Robert Repin and WSU cite some of those sections. To excuse its conduct, WSU relies on *Restatement (Second) of Torts* § 252, which reads:

> 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.

Robert Repin counters with a different section of the *Restatement*.

> 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.

RESTATEMENT (SECOND) OF TORTS § 228.

Restatement (Second) of Torts § 228 lists many examples in an attempt to breathe living meaning into the static words of the section. None of the examples given under § 228, however, concern gross negligence or failure to follow contract instructions when caring for an animal. None of the examples involve the owner of the property retaining possession of the property while the defendant performs services on the property. The examples involve putting the chattel to a significant use other than authorized, such as one renting a car that ferries passengers, but using the car to haul heavy freight. In all examples, the defendant exclusively possessed the chattel and applied the chattel to her

own use. Dr. Margaret Cohn-Urbach never sought to use Kaisa for her own pleasure. Cohn-Urbach never assumed complete physical control of Kaisa.

Although more than a century old, the Washington case most analogous in which the court reviewed the law of conversion is *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 P. 794 (1909). The grain company hired the defendant railway to transport fourteen horses from St. Paul to Seattle. The grain company provided its own car for the journey. During the trip, hay in the horse car caught fire and seriously injured two horses. The grain company later blamed the fire on sparks from the train's engine. The railway company blamed the fire on the faulty car provided by the grain company. During a stop in Spokane, the railway company removed the two horses to attend to their injuries. One horse died within days. The other horse recovered and completed the train trek to Seattle. The grain company sued the railway company for conversion of the two horses. The trial court denied a directed verdict requested by the railway. The jury awarded the grain company $360.

On appeal, the Great Northern Express Company argued that no evidence supported a claim for conversion. The Supreme Court agreed, reversed the verdict, and directed judgment for the railway. The Supreme Court observed that the grain company might have a claim for negligence against the railway in conducting the train or caring for the horses or a claim for breach of contract, but not for conversion. The railway never

sought title to the horses or to permanently deprive the grain company of possession of the equines.

Lack of Informed Consent

Robert Repin's complaint pleads as one cause of action "lack of informed consent/negligent misrepresentation by omission." We know of no such conglomerated cause of action. We do not consider the sum of the stated cause of action to be greater than its parts. We analyze the pled cause of action's constituent parts as separate causes of action.

Robert Repin contends that lack of informed consent in the context of veterinary care is a creature of common law and its lack of codification does not affect its vitality. He testified that he would not have authorized the methods employed by the Veterinary Teaching Hospital such as veterinary student injections, use of Acepromazine alone and in an insufficient dose, failure to flush the catheter, use of a damaged catheter, administration of Euthasol perivascularly, and a failure to store a second dose of Euthasol in the quiet room for a hasty second injection. WSU argues that lack of informed consent does not exist in the context of veterinary practice. We agree with WSU.

RCW 7.70.050 recognizes a duty of a physician to inform a human patient of material facts relating to treatment, and the statute acknowledges a cause of action for informed consent. Robert Repin recognizes that chapter 7.70 RCW, addressing actions

for injury resulting from health care, does not apply to claims against veterinarians. *Sherman v. Kissinger*, 146 Wn. App. at 869 (2008). Repin instead contends that a claim for informed consent arises from common law, the health care act codified the claim in the context of human care, and the act imposes no restrictions on an informed consent claim against a veterinarian. We agree with the first two arguments. We must decide if Washington recognizes a claim for lack of informed consent for animal health care treatment.

Robert Repin concedes that no Washington decision recognizes a cause of action for informed consent in the setting of animal treatment. He contends that other jurisdictions recognize the claim. We question this argument.

Robert Repin cites *Henry v. Zurich American Insurance Co.*, 2012-888 (La. Ct. App. 3 Cir. 2/6/13), 107 So. 3d 874. The *Henry* court recognized that its courts had held that the standards in medical malpractice actions controlled veterinarian malpractice cases. Nevertheless, Louisiana's Napoleonic code expressly incorporated medical malpractice standards to veterinarian malpractice suits. The owners of a horse sued a veterinarian after a minor surgery that led to the death of the equine. The horse's trainer, not the owners, consented to treatment. The owners sought liability against the veterinarian for failing to obtain their consent to the surgery. The trial court ruled in favor of the veterinarian, and the appellate court affirmed. Both courts noted that the

owners presented no proof that the veterinarian's care fell below the standard of care, and the owners omitted any testimony that they would not have consented to the procedure if granted an opportunity to consent. The court assumed that the doctrine of informed consent applied to suits against a veterinarian. Nevertheless, the claim surrounded the alleged failure to gain any consent, not a failure of the veterinarian to disclose material risks, the heart of an informed consent claim.

Robert Repin also cites *Zimmerman v. Robertson*, 259 Mont. 105, 854 P.2d 338 (1993). During trial, the other Robert Zimmerman attempted to question the defendant veterinarian on whether the veterinarian obtained Zimmerman's informed consent to an allegedly risky surgery. The trial court excluded testimony on informed consent because Zimmerman failed to plead a cause of action for informed consent and pleading medical malpractice did not suffice. The Montana court never directly addressed whether the owner of an animal can maintain a cause of action for informed consent.

Next Robert Repin cites *Hoffa v. Bimes*, 954 A.2d 1241 (Pa. Super. 2008). Robert Hoffa sued a veterinarian who performed an abdominal tap on Hoffa's horse. Like *Henry v. Zurich American Insurance Co.*, the claim surrounded the lack of any consent rather than informed consent. The court dismissed the claim because the veterinarian performed the tap in an emergency. The court never expressly adopted informed consent in the context of a claim against a veterinarian.

Loman v. Freeman, 375 Ill. App. 3d 445, 874 N.E.2d 542, 314 Ill. Dec. 446 (2006), *aff'd*, 229 Ill. 2d 104, 890 N.E.2d 446, 321 Ill. Dec. 724 (2008) also involves the failure to garner any consent for surgery on a horse. Unreported cases cited by Robert Repin do not necessarily support his position either. We choose not to rely on unreported decisions anyway.

We recognize sound reasons for permitting a claim for informed consent when the veterinarian fails to divulge relevant facts. Veterinarian literature encourages practitioners to disclose pertinent information to an animal's owner before prescribing and performing treatment. One's autonomy by virtue of being human, a rationale behind informed consent, may not be a concern. Nevertheless, veterinarians should be encouraged to disclose material risks so an owner may make informed decisions regarding the care of companion animals.

As noted by Robert Repin, Washington licenses veterinarians similar to the manner by which it licenses health care providers for humans. Chapter 18.92 RCW. Veterinary science is a profession, the practice of which includes prescribing or administering drugs, performing operations, and applying treatments in order to cure. RCW 18.92.010; *Baechler v. Beaunaux*, 167 Wn. App. 128 (2012).

Still, the principle rationale of patient sovereignty behind informed consent clumsily fits in the context of animal care. Under the doctrine of informed consent, a

health care provider has a fiduciary duty to disclose relevant facts about the patient's condition and the proposed course of treatment so that the patient may exercise the right to make an informed health care decision. *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 122, 170 P.3d 1151 (2007). The doctrine of informed consent refers to the requirement that a physician, before obtaining the consent of his or her patient to treatment, inform the patient of the treatment's attendant risks. *Crawford v. Wojnas*, 51 Wn. App. 781, 782, 754 P.2d 1302 (1988). The doctrine is premised on the fundamental principle that every human being of adult years and sound mind has a right to determine what shall be done with his own body. *Crawford v. Wojnas*, 51 Wn. App. at 782-83; *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92 (1914), *abrogated on other grounds by Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957). A necessary corollary to this principle is that the individual be given sufficient information to make an intelligent decision. *Smith v. Shannon*, 100 Wn.2d 26, 29-30, 666 P.2d 351 (1983); *Canterbury v. Spence*, 150 U.S. App. D.C. 263, 464 F.2d 772, 783 (1972). In *Crawford v. Wojnas*, this court denied a mother's informed consent claim against a physician, who administered a vaccination to the mother's child, because the duty to disclose was only for the child, the patient.

In the context of veterinarian care, the party suing is not the patient. The sentient being undergoing the treatment lacks the ability to reason and decide a course of care.

We also find that no foreign state has definitively adopted informed consent as a cause of action against a veterinarian.

We recognize that novelty does not necessarily prevent an intermediate appeals court from the application of a cause of action never recognized in this State. *Hoffman v. Dautel*, 189 Kan. 165, 168, 368 P.2d 57 (1962). Nevertheless, we proceed with the utmost caution and deliberateness in the face of such a request. *Hester v. Hubert Vester Ford, Inc.*, 239 N.C. App. 22, 31, 767 S.E.2d 129 (2015). We consider the expansion of duties under the law to be better addressed by our Supreme Court or the legislature, who can engage in a cost-benefit analysis to determine if public policy warrants the expansion. *Ritchie v. Rupe*, 443 S.W.3d 856, 878 (Tex. 2014). We encourage our Supreme Court, in the appropriate case, to determine whether to permit a claim against a veterinarian for failure to obtain informed consent from an animal's owner.

Negligent Misrepresentation by Omission

Robert Repin argues that he presented facts supporting a case for negligent misrepresentation by omission. He argues that, because of a fiduciary or special relationship between Kaisa and him, on the one hand, and Dr. Margaret Cohn-Urbach, on the other hand, Cohn-Urbach held a duty to affirmatively disclose information concerning the proposed course of treatment. WSU contends that Repin's negligent misrepresentation by omission claim fails as matter of law because an omission alone

cannot constitute negligent misrepresentation. We decline to apply this theory because WSU did not deal with Robert Repin in the course of the latter's business.

Under Washington law, a plaintiff claiming negligent misrepresentation must prove by clear, cogent, and convincing evidence that (1) the defendant supplied information for the guidance of another in his or her business transactions, (2) the information was false, (3) the defendant knew or should have known that the information was supplied to guide the plaintiff in his or her business transactions, (4) the defendant was negligent in obtaining or communicating the false information, (5) the plaintiff relied on the false information, (6) the plaintiff's reliance was reasonable, and (7) the false information proximately caused the plaintiff damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

Robert Repin emphasizes *Restatement (Second) of Torts* § 551 (Am. Law Inst. 1977), which creates a duty to disclose under certain fiduciary situations. Nevertheless, negligent misrepresentation under section 551 invokes the duty to disclose only in terms of a business transaction. *Colonial Imports v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 731, 853 P.2d 913 (1993). Liability is further limited by section 551(2) to those situations when business advice is given by one who proclaims expertise or has a financial stake in the matter under consideration. *Colonial Imports v. Carlton Northwest,*

Inc., 121 Wn.2d at 732; *Richland School District v. Mabton School District*, 111 Wn. App. 377, 386, 45 P.3d 580 (2002).

We find no case in which negligent misrepresentation by omission has been applied in the context of veterinarian services. Dr. Margaret Cohn-Urbach did not provide financial information or advice to Robert Repin. Repin's business did not include raising dogs.

CONCLUSION

We affirm all rulings of the trial court. We remand the case to the superior court for further proceedings on those claims not dismissed on summary judgment.

Fearing, C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.

No. 34049-0-III

FEARING, C.J. (concurring) — *Gentlemen of the Jury: The best friend a man has in this world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has he may lose. It flies away from him perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us, may be the first to throw the stones of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog.*

Closing argument of U.S. Senator George Vest, *Burden v. Hornsby* (1870).

I write this concurring opinion to advocate a change in the law. Principles underlying the law of damages for breach of contract and values basic to the law of negligent infliction of emotional distress call for an award of emotional distress damages to the owner of a companion animal when a veterinarian commits malpractice and breaches the implied covenant of competent care in the treatment of the pet. Unfortunately, Washington law has strayed from these principles and values by jaundicely viewing pets as just another piece of personal property. I am bound by earlier Washington Supreme Court and Court of Appeals decisions to affirm denial to Robert

Repin of emotional distress damages, but I recommend our state Supreme Court's consideration of our ruling. I do not recommend any changes to the law with regard to commercial animals.

Breach of Contract Damages

As noted in the majority opinion, in general, parties cannot recover noneconomic, emotional disturbance, damages for breach of contract. RESTATEMENT (SECOND) OF CONTRACTS § 353 (Am. Law Inst. 1981); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 440-48, 815 P.2d 1362 (1991). Nevertheless, under the *Restatement*, an exception arises if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353.

No Washington court has expressly adopted *Restatement (Second) of Contracts* § 353. Nevertheless, the Washington Supreme Court in *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, and the Court of Appeals in *Hendrickson v. Tender Care Animal Hospital, Corp.*, 176 Wn. App. 757, 312 P.3d 52 (2013) discussed the section as if Washington had adopted it. Washington courts have adopted or acknowledged other sections of *Restatement (Second) of Contracts*. Some examples are *Restatement (Second)* § 90 in *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 398, 879 P.2d 276 (1994); § 151 in *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 898-99, 691 P.2d 524 (1984), and *Scott v. Petett*, 63 Wn. App.

50, 58, 816 P.2d 1229 (1991); § 261 in *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694, 707, 773 P.2d 70 (1989); § 265 in *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d at 696; § 347 in *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984); § 348 in *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d at 47; § 371 in *Young v. Young*, 164 Wn.2d 477, 487-88, 191 P.3d 1258 (2008); and § 374 in *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 711, 893 P.2d 1127 (1995).

The comments to *Restatement (Second) of Contracts* § 353 read, in part:

> 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 cmt. a.

The *Restatement*'s historic examples of contracts of carriers and innkeepers with passengers and guests may be outdated. Few, if any, recent cases award a passenger of a common carrier or guest of a hotel emotional distress damages for break of contract. As to carriers, the federal ICC Termination Act of 1995 will likely bar any claim against a motor carrier for emotional distress. 49 U.S.C. § 14706; *Moffit v. Bekins Van Lines Co.*,

6 F.3d 305, 306-07 (5th Cir. 1993). Other federal law will, in turn, likely bar any claim against an air carrier for emotional distress damages. 49 U.S.C. § 41713; *Tobin v. Federal Express Corp.*, 775 F.3d 448, 452 (1st Cir. 2014). As to innkeepers, the hotel owner may still remain subject to emotional distress damages for breach of contract. *Amick v. BM & KM, Inc.*, 275 F. Supp. 2d 1378 (N.D. Ga. 2003) (applying Georgia law); *Dold v. Outrigger Hotel*, 54 Haw. 18, 501 P.2d 368 (1972), *overruled, Francis v. Lee Enterprises, Inc.*, 89 Haw. 234, 971 P.2d 707 (1999).

Regardless of the current state of the law regarding common carriers and hoteliers, more reason exists to allow the owner of a pet to recover for emotional distress resulting from the negligence of a veterinarian's causing death or injury to the companion animal. Breach of contract by the veterinarian will likely cause serious emotional disturbance or at least more so than contract breaches by innkeepers and carriers. The veterinarian knows of the bond between a human being and his companion animal and the trauma resulting from a breach of the contract to competently care for the pet.

As discussed in the majority opinion, *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426 (1991) is a principal Washington decision involving recovery of emotional distress damages for breach of contract. Ronda Gaglidari sued Denny's for breach of an employment contract. The Washington Supreme Court reversed a jury award of emotional distress damages. The court wrote:

> . . . [B]y allowing emotional damages whenever they are a foreseeable result of the breach, the traditional predictability and economic efficiency associated with contract damages would be destroyed. In order to avoid the unpredictable and destabilizing results of such an approach, most courts have generally limited emotional distress damages to contracts uniquely intended to protect some personal interest or security and which are incapable of compensation by reference to the terms of the contract.
>
> . . . .
>
> 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 probably can be explained only by adverting to the "Law of Unintended Consequences." If there is to be a change in the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring.

Gaglidari, 117 Wn.2d at 446, 448.

One flaw in *Gaglidari v. Denny's Restaurants, Inc.*, is that a discharged employee nearly always now sues in tort, regardless of whether the employee adds a claim in contract, such that most every employee discharge case now entails a jury question of emotional distress. More importantly, the *Gaglidari* court wished to limit emotional distress damages to contracts uniquely intended to protect some personal interest or security and which are incapable of compensation by reference to the terms of the contract. The court does not define a contract intended to protect "some personal interest." The court may have pondered contracts wherein the breach may defame the plaintiff or injure his or her status in the community or contracts that concern the psyche of the plaintiff such as counseling contracts.

Regardless, pet owners hold a personal interest, not simply an economic interest, in companion animals. Pets possess an enormous hold on Washington residents, as illustrated by Kaisa being the sole companion of Robert Repin. Washingtonians devote hours to walking, playing, feeding, stroking, and caring for pets. Washingtonians mourn the death of a pet. In turn, pets return hours of love, devotion and companionship to owners. Veterinarians know well the devotion that owners possess toward pets. Small animal veterinarians uncynically and legitimately make money from this devotion.

According to the American Pet Products Association, total pet industry expenditures in the United States reached $60.28 billion in 2015. Americans spent a total of $23.05 billion on pet food, $14.28 billion on supplies and medicine, $15.42 billion on veterinarian care, $2.12 billion on live animal purchases, and $5.41 billion on pet services like grooming and boarding. *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODS. ASS'N, http://americanpetproducts.org/press_industrytrends.asp [https://perma.cc/QP5H-WE94]. According to a report by the Bureau of Labor Statistics, on average, each U.S. household spent over $500 on pets in 2015. Amelia Josephson, *The Economics of the Pet Industry*, SMARTASSET (Dec. 25, 2015), https://smartasset.com/personal-finance/the-economics-of-the-pet-industry [https://perma.cc/JLP9-LNW9]. Since some households lack a pet, those households with pets spend on average more than $500 per year.

Hendrickson v. Tender Care Animal Hospital, Corp., 176 Wn. App. 757 (2013) is

an indistinguishable decision that we follow. The *Hendrickson* court summarily dismissed Julie Hendrickson's claim for emotional distress damages resulting from the death of her pet dog during the care by a veterinarian. A primary rationale behind the court's ruling was the historic treatment of animals as any other article of personal property. 176 Wn. App. at 767. This historic treatment now belies reality.

Many decisions, including Washington decisions, recognize the bond between animal and human and the intrinsic and inestimable value of a companion animal. "We recognize that the bond between pet and owner often runs deep and that many people consider pets part of the family." *Mansour v. King County*, 131 Wn. App. 255, 265, 128 P.3d 1241 (2006). Harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property. *Womack v. Von Rardon*, 133 Wn. App. 254, 263-64, 135 P.3d 542 (2006). "Pickford, with good reason, maintains that Buddy is much more than a piece of property; we agree." *Pickford v. Masion*, 124 Wn. App. 257, 263, 98 P.3d 1232 (2004).

> Here, first, the private interest involved is the owners' interest in keeping their pets. This is greater than a mere economic interest, for pets are not fungible. So the private interest at stake is great.

Rhoades v. City of Battle Ground, 115 Wn. App. 752, 766, 63 P.3d 142 (2002).

Foreign decisions echo this sentiment. The emotional attachment to a family's dog is not comparable to a possessory interest in furniture. *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005). Pets are

not inanimate objects, and an emotional bond exists between some pets and their owners. *Barrios v. Safeway Insurance Co.*, 2011-1028 (La. App. 4 Cir. 3/21/12), 97 So. 3d 1019, 1023-24.

The other concurring opinion mentions two typical objections to judicial changes in the law. First, this court should leave any changes to the state legislature. The flaw in this argument lies in the fact that the judiciary, without input from the legislature, created the rule denying emotional distress damages for breach of veterinarian contracts. The rule conflicts with underlying legal principles. Therefore, the courts, not the legislature, should correct the error and align the rule with the underlying principles.

The legislature has never addressed whether pet owners may recover emotional distress damages. When no statute in this state examines a subject matter, it is both appropriate and proper that the courts decide the question. *In re Welfare of Bowman*, 94 Wn.2d 407, 420, 617 P.2d 731 (1980).

Second, the other concurring opinion worries about harm to the veterinarian profession and the end to some veterinarians' practices. Nevertheless, one may recover emotional distress damages against physicians and lawyers. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 477, 656 P.2d 483 (1983) (physician); *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 7 (D.D.C. 2008) (attorney); *Gillespie v. Klun*, 406 N.W.2d 547, 558 (Minn. Ct. App. 1987) (attorney); *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995) (attorney); *In re Jackson*, 92 B.R. 987, 999 (Bankr. E.D. Pa. 1988) (attorney);

Wagenmann v. Adams, 829 F.2d 196, 221 (1st Cir. 1987) (attorney). The availability of such damages has not irreparably harmed these or other professions. The noble veterinarian profession deserves no protections denied other professions.

Negligent Infliction of Emotional Distress

I agree with Washington law's requirement that, to recover in negligent infliction of emotional distress, the plaintiff must show objective symptomatology and the emotional distress must be susceptible to medical diagnosis and proved through medical evidence. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196-97, 66 P.3d 630 (2003); *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). The majority opinion denies Robert Repin recovery in negligent infliction of emotional distress based on the absence of medically documented objective symptomatology.

I criticize current Washington law in that state law may impose a strict prohibition on a pet owner recovering emotional distress damages for loss of a human-animal bond based on the negligent death or injury to a pet. *Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539 (2008); *Pickford v. Masion*, 124 Wn. App. 257 (2004). No reason exists to distinguish between emotional distress suffered from the death or serious injury to a pet and emotional distress suffered from other events caused by the negligence of a defendant.

At least one Washington decision recognizes the harm that may be caused to a person's emotional well-being by malicious injury to that person's pet. *Womack v. Von*

Rardon, 133 Wn. App. at 264 (2006). Because of the role of pets in our society, this recognition should extend to instances of negligent injury.

Fearing, J.

Fearing, C.J.

LAWRENCE-BERREY, J. (concurring) — Current law that requires dismissal should not be judicially changed. To subject veterinarians to a claim for a pet owner's emotional distress damages would have profound societal effects. It would likely put many veterinarians out of business, it would sharply increase veterinarian bills for pet owners, and it would result in veterinarians refusing to perform emergency operations.

Our concurring brother dismisses these concerns, in part, by noting how well physicians have adjusted to increased damage awards. Increased damage awards against physicians are funded by increased medical insurance rates, which in turn are funded by several millions of people who pay medical insurance. Pet owners, however, pay veterinarian bills from their pockets. Because pet owners generally do not (or cannot) buy pet insurance, increased veterinarian costs cannot be funded in the same manner as increased physician costs. We are confident that veterinarians would not fare as well as physicians if Washington was to permit recovery of emotional damages for pet owners. Nevertheless, we should leave it for the legislature to weigh the benefits and costs of such a rule. *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 448, 815 P.2d 1362 (1991).

Lawrence-Berrey, J.

I CONCUR:

Korsmo, J.

B

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KITTITAS COUNTY
SUPERIOR COURT CLERK

STATE OF WASHINGTON
KITTITAS COUNTY SUPERIOR COURT

ROBERT REPIN, Plaintiff, v. STATE OF WASHINGTON; WASHINGTON STATE UNIVERSITY; AND MARGARET COHN-URBACH, BVSC; and DOES 1-10, Defendants.	NO. 14-2-00217-6 ~~[PROPOSED]~~ ORDER

On January 8, 2016, the Court heard argument on the Defendants' Motion for Summary Judgment. The Defendants were represented by JASON D. BROWN, Assistant Attorney General. The Plaintiff was represented by ADAM P. KARP. In addition to the argument of the parties, the Court considered the pleadings on file, which specifically included:

- Defendants' Motion For Summary Judment;
- Memorandum In Support Of Defendants' Motion For Summary Judment
- Declaration Of Jason Brown In Support Of Defendants' Motion For Summary Judgment;
- Defendants' Note For Hearing;
- Plaintiff's Response To Defendants' Motion For Summary Judgment;
- Declaration Of Victoria H. Peterson;

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- Declaration Of Bruce A. Goldberger;
- Declaration Of Adam P. Karp;
- Declaration Of Carl Wigren;
- Declaration Of Robert Repin;
- Reply In Support Of Defendants' Motion For Summary Judgment; and
- Second Declaration Of Jason Brown In Support Of Defendants' Motion For Summary Judgment.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

1. Defendants' Motion for Summary Judgment with regards to Defendants' waiver affirmative defense is Denied.
2. Defendants' Motion for Summary Judgment with regards to Plaintiff's breach of contract claim is Denied.
3. Defendants' Motion for Summary Judgment with regards to Plaintiff's reckless breach of contract claim is Granted.
4. Defendants' Motion for Summary Judgment with regards to Plaintiff's professional negligence claim is Denied.
5. Defendants' Motion for Summary Judgment with regards to Plaintiff's lack of informed consent/negligent misrepresentation by omission claim is Granted.
6. Defendants' Motion for Summary Judgment with regards to Plaintiff's outrage claim is Granted.
7. Defendants' Motion for Summary Judgment with regards to Plaintiff's conversion/trespass to chattels/trespass on the case claim is Granted.
8. Defendants' Motion for Summary Judgment with regards to Plaintiff's emotional distress damages is Granted as to all aspects and claims, including zone of danger.

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DATED this 8th day of January, 2016.

JUDGE

Presented by:

ROBERT W. FERGUSON
Attorney General

JASON D. BROWN, WSBA# 39366
Attorneys for Defendants

Approved as to form and notice of presentation waived:

ADAM P. KARR, WSBA # 28622
Attorney for Plaintiff

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid to:

Adam P. Karp
Animal Law Offices
114 West Magnolia Street, Suite 425
Bellingham, WA 98225

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

DATED this _____ day of January, 2016, at Spokane, Washington.

_____
MARKI STEBBINS
Legal Assistant to Jason Brown

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The Court of Appeals
of the
State of Washington
Division III

FILED
Mar 8, 2016
Court of Appeals
Division III
State of Washington

ROBERT REPIN, Petitioner, v. STATE of WASHINGTON and WASHINGTON STATE UNIVERSITY, et al., Respondent.	)	No. 34049-0-III COMMISSIONER'S RULING

Robert Repin has appealed the Kittitas County Superior Court's January 8, 2016 Order that granted in part the State's motion for summary judgment and eliminated the possibility of noneconomic damages in the action he filed after the alleged improperly performed euthanasia of his pet dog. The superior court certified the matter for discretionary review pursuant to RAP 2.3(b)(4). The parties have stipulated to review, as well. The stipulation and agreed Order assert that the Order on summary judgment "involves several controlling questions of law as to which there is a substantial ground

for a difference of opinion and for which immediate review will materially advance the ultimate termination of the litigation." That language is exactly that used in RAP 2.3(b)(4).

Mr. Repin's motion describes his dog's agonizing death which occurred in his presence. He states that

> [a]t about 1:30 a.m. on Sept. 27, 2012, however, the contract was breached and the opposite (dysthanasia) transpired. *Id.* As she was supposed to be drawing her last breaths, Kaisa's whole body jerked violently and she screamed in agony, knowing she was being killed. For the next several minutes of hell, Kaisa struggled in desperation, staring deeply into Mr. Repin's face, her eyes begging that he explain why he was ending her life so torturously while at the same time showing panic and agitation that could have resulted in severe personal injury to Mr. Repin, the veterinary student present in the room, and Dr. Cohn-Urbach had he not restrained her with all his might. Because of her unpreparedness and refusal to place a new, working catheter prior to administering the Acepromazine and first injection of Euthasol, Dr. Cohn-Urbach had to leave Kaisa and Mr. Repin to retrieve another 15 ml of Euthasol and return to attempt uncatheterized intravenous administration in a now struggling, painfully conscious, and terrified patient.
>
> . . . In the crucible of the attempted euthanasia, Dr. Cohn-Urbach singlehandedly destroyed a lifetime of trust between Mr. Repin and Kaisa. Those who choose to be present during the euthanasia of their animal companions present acute medical concerns of foreseeable adverse psychological reactions. Dr. Cohn-Urbach knew or should have known the peril involved when allowing a veterinary student to administer caustic euthanizing solution (without Mr. Repin's consent) through a damaged catheter (the end of which having been chewed off), using a contraindicated premedicating tranquilizer (in insufficient dose), and failing to sufficiently warn Mr. Repin of such risks taken not only with Kaisa, but also Mr. Repin.

Motion at 3-4. Mr. Repin asserts that had he not been present to restrain his pet, she would have bitten the doctor and nurse. He himself suffered the risk of his pet biting him

in the neck, which would have caused him grievous bodily injury.

The issues Mr. Repin presents for review consist of the following:

> 1. Did the trial court err in excluding recovery of noneconomic damages for reckless breach of contract?
>
> 2. Did the trial court err denying recovery of noneconomic damages for negligence?
>
> 3. Did the trial court err dismissing the claim for outrage?
>
> 4. Did the trial court err dismissing the claim for conversion/trespass to chattels?
>
> 5. Did the trial court err dismissing the claim for lack of informed consent/negligent misrepresentation by omission?

Motion at 1.

The first issue is dispositive of the motion for discretionary review. I.e, Mr. Repin seeks review of the decision that dismissed his cause of action for reckless breach of contract. He cites Restatement 2d Contracts §353 which states that "[r]ecovery 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.*" (Emphasis added.) He argues that the question here – whether a contract for euthanasia of an animal companion is of the "kind" contemplated by the Restatement – is a matter of first impression. In his view, the focus is the type of contract at issue, not whether the conduct was reckless or willful. And, "the foreseeability of an

emotional upheaval arising from breach of . . . a contract [to euthanize a pet] is undeniable." Motion at 11-12.

This Court found no authority to support or disavow Mr. Repin's thesis. Indeed, the issue may be one of first impression, not only in Washington, but throughout the United States. Therefore, as to this narrow issue, the certification for discretionary review is appropriate. Because this Court accepts discretionary review, the other issues raised in Mr. Repin's motion are also accepted for review under principles of judicial economy.

Accordingly, IT IS ORDERED, the motion for discretionary review is granted. The Clerk of Court is directed to set a perfection schedule for this matter.

Monica Wasson
Commissioner

D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITTITAS

ROBERT REPIN, Plaintiff, vs. **STATE OF WASHINGTON** et al.; Defendants.	Case No.: **14-2-00217-6** **DECLARATION OF ROBERT REPIN**

DECLARATION

I, **ROBERT REPIN**, being over the age of eighteen and fully competent to make this statement, and having personal knowledge of the matters contained herein, hereby affirm:

1. My acquisition of Kaisa, my "Millennium Girl," along with a description of the final days of her life; my ability to interpret her vocalizations as pain instead of some involuntary, unintentioned or unconscious muttering; my thought process behind choosing euthanasia to be performed by those I was led to believe were the best of the best so I could end her suffering; the promises made and risks not shared about the procedure; the extreme emotional impact this event has had upon me; are contained in my deposition, which I understand my attorney will be excerpting for purposes of opposing Defendants' motion for summary judgment. Accordingly, I

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will not repeat myself on those points. However, I will use this opportunity to address other aspects of my relationship with Kaisa and the horrific experience of taking her from Cle Elum to Pullman's Washington State University/Veterinary Teaching Hospital – what I call the worst mistake of my life.

2. Then three weeks of age, orphaned by a lactating mother struck on a rural highway, the pup should have died. Rescued by my niece, who nursed her to vigorous health and delivered the pup to me, my path was bound to memorably cross with that of my "millennium baby." "Kaisa" entered this world on January 1, 2001, as near as anyone can tell. This Alaskan Malamute began her life just as I entered middle age. I am 58, single, with no biological children, living alone in a small cabin built by hand on the Blewett Pass Highway. I have lived independently and by my own wits and skill as a gold prospector digging tunnels into the earth to find that elusive symbol of freedom – with Kaisa by my side for nearly twelve years.

3. As adventurous as she was independent, I bonded with Kaisa and we aided one another through life's vicissitudes. Kaisa put her exclusive trust in me – a rare honor bestowed by an alpha female who would not tolerate strangers or allow them to approach, much less touch her, without my assurance. Only an exceptional few could hold their faces near hers, a closeness founded on unconditional trust. I cherished it, throughout Kaisa's entire life. When veterinarians prodded, Kaisa acquiesced because I held her, stating, "It's OK, baby, I'm here." From the day she entered my life to the moment she died, I vowed to never betray her trust in me.

4. This is why I knew that when her health began to falter, and the time came to give her peace, she deserved no less than euthanasia under the most respectful and humane circumstances possible. On Sept. 26, 2012, at my regular veterinarian's recommendation, I traveled to Pullman to have Kaisa seen by Dr. Cohn-Urbach and staff at the WSU/CVM-Veterinary Teaching

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Hospital, to determine whether the time to let her go had come and, if so, to do so without disruption, fear, or suffering. Instead, at about 1:30 a.m. on Sept. 27, 2012, the opposite transpired.

5. When I signed the *Consent for Euthanasia* form at about 1:30 a.m. on September 27, 2012, my attention was never brought to the sentence, "I hereby release the Washington State University Veterinary Teaching Hospital, their agents, and representatives, from any and all liability for said animal." Neither Dr. Cohn-Urbach nor Ms. Feist even discussed the sentence with me. Nor was this sentence bolded, set apart in a different color or larger font size. As I signed the document while making an extremely difficult and emotional decision, I was not aware of the sentence at all. Rather, I was focusing on the handling of her remains and not wanting them to do anything except return her to me.

6. I never expected the Defendants to use this *Consent for Euthanasia* to prevent me from suing them for torturing Kaisa and harming me. Besides, the sentence is ambiguous, and does not clearly ask me to hold them harmless from any specific claims, including negligence. Putting aside that it is unenforceable, as my attorney will explain, at most the sentence indicates that the Hospital and its staff would not be sued if Kaisa were to attack, bite, or hurt anyone or another animal while in their custody. I would also note that I did not sign a *Consent for "Dysthanasia."* I consented to a quiet, peaceful, "good death," not the violent "bad death" that actually transpired.

7. When Kaisa "reacted" to the first injection of Euthasol, to use Dr. Cohn-Urbach's own words in her report, what I have described as Kaisa "kn[owing] something horrible was happening," enduring excruciating pain, and being conscious enough that "if I had lost my grip on her she would have chewed the shit out of [Dr. Cohn-Urbach and Ms. Feist]," I was placed in

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imminent danger and fear that Kaisa might turn on me and cause grievous physical injury. As I deposed, she "didn't know what the fuck was going on" except that "she was in fucking pain and she wanted to get out of there and I had to hold her down." Her jaws were close enough to my neck or other appendages that in her panic she could have easily bitten me. Ms. Feist was so petrified that she had her back to one of the walls of the quiet room. Neither she nor Dr. Cohn-Urbach even attempted to help me restrain her. Ms. Feist was visibly terrified. Remember that Kaisa was about 90 pounds and an Alaskan Malamute – not a small, weak dog, even in her compromised state.

8. I was never informed by Dr. Cohn-Urbach of the risks of proceeding with a damaged catheter; using Acepromazine alone and at an inappropriate dosage; using Acepromazine as a premedication for Euthasol (which contains phenytoin); allowing a 4th year veterinary student to inject the Euthasol; that Kaisa could respond in a very distressing and potentially dangerous way; what steps may be taken to minimize or eliminate such response; and not diluting the Euthasol. Had I been told about any or all of these risks, I would never have consented to the procedure as performed but, instead, demanded that the catheter be changed, that proper premedications be used, that only a licensed veterinarian would inject (note: I believe that Dr. Cohn-Urbach injected the Acepromazine and Euthasol, but she and Ms. Feist dispute this), and that the Euthasol be diluted. In short, had I been so informed, I would have demanded that every precaution be undertaken to ensure that Kaisa would not have suffered any fear or pain but would drift off peaceably as I held her. The Defendants deprived me of this information and caused an outcome that continues to create extreme anguish even to this day, over three years later.

9. This action should not be trivialized or ridiculed. It rests on the disturbing premise that

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Dr. Cohn-Urbach took numerous reckless, grossly negligent, and completely unnecessary gambles with Kaisa and myself. Dr. Cohn-Urbach singlehandedly destroyed a lifetime of trust between me and Kaisa, tortured Kaisa, and has caused years of irreversible anguish.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this Dec. ___, 2015 in the city of _____.

_____
Robert Repin

ANIMAL LAW OFFICES OF
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Executed this Dec. 27, 2015 in the city of Cle Elum.

Robert A. Repin

Robert Repin

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STATE OF WASHINGTON
KITTITAS COUNTY SUPERIOR COURT

ROBERT REPIN, Plaintiff,

V. 14-2-00217-6

STATE OF WASHINGTON; WASHINGTON STATE UNIVERSITY; AND MARGARET COHN-URBACH, BVSC; and DOES 1 - 10, Defendants.

DEPOSITION OF ROBERT REPIN

Taken at the instance of the Defendants

NOVEMBER 4, 2015

1:00 P.M.

700 EAST 1ST STREET

CLE ELUM, WASHINGTON

BRIDGES REPORTING & LEGAL VIDEO
Certified Shorthand Reporters
1030 North Center Parkway
Kennewick, Washington 99336
(509) 735-2400 - (800) 358-2345

BE IT REMEMBERED that the deposition of ROBERT REPIN, was taken on behalf of the Defendants pursuant to the Washington Rules of Civil Procedure before Jori L. Moore, Certified Court Reporter in and for the State of Washington, on the 4th of November 2015, 700 East 1st Street, Cle Elum, commencing at the hour at 1:00 p.m.

APPEARANCES:

FOR THE PLAINTIFF:

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REPIN vs. STATE OF WASHINGTON; et al.
NOVEMBER 4, 2015

TESTIMONY

EXHIBITS:

(ROBERT REPIN, called as a witness by the Defendants, being first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:)

EXAMINATION

BY MR. BROWN:

Q. Can you please state and spell your name for the record.

A. Robert Repin, R-e-p-i-n is the last name.

Q. What's your current residential address?

A. 20800 Highway 97, Cle Elum.

Q. Ever had your deposition taken before?

A. No.

Q. Okay. So a few ground rules. Communication is important. And arguably, the most important person in the room is this lady sitting to my left. She's taking down everything that we say, so it's important that we have audible responses, so shakes of head and nods don't show up very well in the record so yeses and nos. Does that make sense?

A. Understood. Yes.

Q. And it's important that we don't talk over each other. So I will give -- attempt to extend the courtesy to you of letting you finish your answers, if you'll extend the same courtesy to me and let me finish my question. Does that sound fair?

straight injection.

Q. So is it your testimony that she shaved the leg for the second injection?

A. I think they did but I can't be certain on that. I thought they -- I thought they ran a razor over it real quick. I think they did, because the vein, they could see the vein pretty good. I don't remember looking for that vein through a bunch of fur. I'm pretty sure they shaved it.

Q. Okay. So then what happened after they accessed that other vein?

A. What should have happened the first time.

Q. What do you mean by that?

A. As Cohn-Urbach said in her report that night, she said, As Kaisa was reacting, we injected. That part is true. That's probably the only true thing she said, ever said. As Kaisa was reacting, we injected. I was holding Kaisa, Jasmine was helping me hold her leg still so that Urbach could inject. Urbach injected Kaisa. She was still screaming and struggling. In just a few seconds she started to settle down, and within a maximum of 15 seconds she died.

Q. So then after she died, what transpired?

A. Cohn-Urbach sat there with her stethoscope listening for a heartbeat. And I laid there waiting. Might have been a minute, I don't know, that she listened pretty intently. It was quiet. It was all over.

Q. Was your head burrowed into her fur at that point listening too?

A. No. No, I knew it was done. My head wasn't burrowed into her fur like initially. When she was panicking it was all I could do -- I wasn't holding and listening to her breathing. I knew what the fuck was going on. And I was restraining her to keep her from -- as I said before, if I had lost my grip on her she would have chewed the shit out of those two girls, and maybe me. I'm not sure. I'm not sure if she was coherent enough to really honestly know that I was there in my normal capacity as her friend. I don't know what was going on for sure in her brain, other than she knew something horrible was happening and she wanted out of there.

Q. Dr. Cohn-Urbach was listening for her heartbeat. Did she at some point confirm that it was done?

A. Yes, she did. I sat there and I waited. I didn't say a word. Jasmine didn't say a word. Urbach didn't say a word. She was listening for her heartbeat. And within the minute, I don't know how long, she said there's no heartbeat, I think were her exact words, there is no heartbeat.

Q. Okay. After that confirmation, what transpired?

A. I'm pretty sure it was Urbach that left the room to get a gurney. Through the side door -- there's two doors on opposite corners. She left to get a gurney, rolled it back in that door. I bent over to pick up Kaisa and put her on the

gurney. I think they both leaned over to help me lift her up, and I said, Get the fuck away from my dog. I lifted her up on the gurney. Somewhere in there, the part that astounded me probably more than -- and, again, I'm trying to get the sequence of events in order.

Q. Take your time.

A. I don't remember for certain who went to get the gurney. It might have been Jasmine, come to think of it. Because Margaret Urbach, when it was all done, she was pronounced dead, she got to her feet, I got to my feet, I think Jasmine was off going to get the gurney, and Margaret reaches over onto a shelf or into a little cubbyhole in a closet or something or on the floor, I don't even know where she got it, but she hands me an extra heavy duty Hefty trash bag, green, fully expecting I was going to throw my dog in the fucking garbage bag. And I think that's about the time Jasmine rolled in with the gurney, and I struggled, because the whole time Kaisa was on her own personal blanket from home this whole entire time. On the gurney when we first got there in the ICU and during the euthanasia procedure, she was on her own blanket so that she had some semblance of a familiar smell other than me. And I was fully prepared to wrap her up in her own blanket and take her home. And Margaret hands me a Hefty trash bag. That's incredibly insensitive for anybody. Which is probably the other thing that really set me off when I

said, get the fuck away from my dog. Somebody during that time, and I honestly can't remember who, removed the catheter.

Q. Okay. So you got Kaisa up onto the gurney?

A. I got her on up on the gurney.

Q. With her blanket?

A. With her blanket.

Q. I don't mean this to sound insensitive, but you didn't accept the trash bag?

A. No, sir, I did not.

Q. So then what happened after you got her up on the gurney did you leave?

A. We headed for the door. I wanted out of there. I wanted out of there as soon as possible.

Q. Did they walk with you?

A. They walked with me.

Q. How far did they walk with you?

A. All the way.

Q. All the way to your car?

A. We headed down the hallway, yes, they did. I was pushing Kaisa on the gurney. Margaret was to my right as I'm heading towards the main door. And I am very vocal with her, I said, You knew that fucking catheter was bad and you used it anyway. You fucked this up. You fucked this up so bad. Somewhere between this, it's a relatively short walk to the main entrance, it's right there in plain view, somewhere in

Restatement (Second) of Torts § 226 (1965)

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Topic 2. Conversion

§ 226 Conversion by Destruction or Alteration

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.

See Reporter's Notes.

Comment:

a. As to the liability to one entitled to the future possession of the chattel, see § 243.

b. The rule stated in this Section applies where the defendant is not in possession of the chattel, as where he intentionally shoots and kills the horse which the plaintiff is riding. It applies also where the defendant is in possession but the plaintiff is entitled to immediate possession, as where there is a bailment of the horse at will, and the bailee intentionally shoots him.

c. The complete destruction of a chattel, as where a paper is burned, is the extreme degree of damage to it. Where a chattel is intentionally destroyed, there is always so serious an interference with the right of another to control it as to amount to a conversion. If the chattel is so destroyed while it is in the possession of another, there is a dispossession under §§ 221 and 222.

d. There may, however, be conversion by alteration of the physical condition of the chattel falling short of complete destruction. Again this is true whether the chattel is altered while it is in the possession of the actor himself or of another.

As in the case of other ways of committing a conversion listed in § 223, the liability for conversion is limited to those interferences with the other's right to control the chattel which are so serious as to make it just to require the actor to pay the full value of the chattel, as stated in § 222A. This means that the alteration must be so material as to change the identity of the chattel or its essential character. Damage to the chattel which does not amount to such a change may be a trespass to the chattel and permit recovery under §§ 217- 220, but it is not a conversion.

In many cases this becomes a question of degree, as to which no fixed rule can be stated. If the identity of the chattel is changed, as when grapes are made into wine, lumber into logs, or cloth into clothing, there is clearly a sufficient alteration

for a conversion of the grapes, lumber, or cloth. But even though there is no such change in identity, the chattel may be so materially altered that its essential character is changed, and such a change is sufficient for conversion. This is true, in general, whenever the change materially affects the value of the chattel to the plaintiff for the normal uses to which such chattels are put. If a horse is permanently lamed, it remains a horse, the owner may still be in possession, and the horse may have value to a glue works, but it has become useless for the ordinary purposes of a horse. In such a case there is a conversion.

Whether destruction or damage to a part of a chattel is a sufficient change of the whole to amount to a conversion of more than the part is ordinarily a question of degree, and of the relation of the part to the whole under the particular circumstances. If the loss of the part renders the whole substantially useless for a considerable length of time, there may be a conversion of the whole. See Illustration 5 below.

The alteration need not damage the chattel in the sense of diminishing its value, but may even increase it. When leather is made into shoes, its value may in fact be greatly increased, but there is still an obvious serious interference with the right of the owner to control the leather in its original condition, which justifies recovery of the original value of the leather in an action for conversion.

Illustrations:

1. A has a large number of cakes of ice stored in an ice-house. B intentionally opens the wall of the room in which the ice is stored, exposing it to a current of warm air. As a result part of the ice is melted, and the cakes of ice are solidified into a mass. This is a conversion, not only of the part of the ice which is melted, but of all of the ice.
2. A leaves her fur coat with B for repairs. B intentionally dyes the coat a darker color. This is a conversion.
3. The fender of A's automobile is damaged in a collision. A leaves the automobile at B's garage with instructions not to repair it until B hears from A. In violation of these instructions, B repairs the fender. This is not a conversion of the automobile.
4. A intentionally feeds poisonous weeds to B's horse. The horse is made ill for a few hours, but promptly recovers. This is a trespass to the horse, but not a conversion. If, however, the horse is made ill for a month, there is both a trespass and a conversion.
5. A intentionally slashes the tire of B's automobile, ruining the tire. This is a conversion of the tire, but under ordinary circumstances in which the tire is easily replaced it is not a conversion of the automobile. If, however, the automobile is in a desert where another tire cannot be obtained for a month, there is a conversion of the automobile.

e. Commingling goods. The intentional and unauthorized commingling of fungible goods, by which the identity of the original goods is lost, is a sufficient alteration of their physical condition to constitute a conversion. Even where the goods are not fungible, as where wheat is commingled with barley, the identity may be so clearly affected, or the physical condition so materially changed, as to amount to a conversion. Commingling may be authorized by consent, by custom or by statute, and it is not within the scope of this Restatement to state when it is so authorized.

In many grain-producing states a long standing custom authorizes proprietors of grain elevators to mingle grain of various owners. Under such circumstances, unless a depositor forbids the commingling, the warehouseman is not liable for a conversion of grain by reason of the mere fact that it is mixed with grain of similar kind and quality. The warehouseman, however, must at all times retain sufficient grain to meet the demands of all depositors, and if he disposes of so much grain as to reduce the amount in his possession below the total quantity deposited, he becomes liable to each depositor under the rule stated in § 234 for the conversion of such depositor's proportional share of the deficiency.

f. Rule under uniform acts. Under the Uniform Warehouse Receipts Act, § 23, the Federal Warehouse Act, § 16, and the Uniform Commercial Code, § 7-207, a warehouseman can properly mingle fungible goods with other goods of the same

kind and grade when authorized by agreement or by custom, and the various depositors are entitled to their proportional share of the goods. However, by the Uniform Warehouse Receipts Act as well as by the Federal Warehouse Act, a warehouseman, unless authorized by agreement or by custom, is bound to keep the goods of his bailor so far separate from the goods of other depositors as to permit at all times identification for redelivery of the goods deposited. These statutes state in substance the common law rule concerning the commingling of such goods.

g. The rule stated in this Section is applicable only where the destruction or change of identity of the chattel is the intended result of dealing with the chattel by the possessor. It has no application to a destruction to which the possessor contributes only by his non-feasance or lack of care, or by acts which, though not intended to destroy the chattel, do in fact destroy it. The possessor may be liable for such destruction if his failure to preserve the chattel amounts to negligence (see §§ 497- 499), but he is not liable for conversion.

Illustration:

6. A rents a car for a week from a Drive Yourself Company. A intentionally drives it through heavy traffic at a rate of speed which is not only prohibited by a statute but is so great that A recognizes that it involves a serious risk of harm to the car. The speed causes the car to skid and collide with a telephone pole, as a result of which the car is completely demolished. A's executor, under a survival statute, is not liable for the conversion of the car, although he is liable for harm done to it by reason of A's negligence.

Reporter's Notes

This Section has been changed from the first Restatement, by broadening it to include destruction or alteration of the chattel by one not in possession of it.

As to destruction of the chattel, see Keyworth v. Hill, 3 B. & Ald. 685, 106 Eng.Rep. 811 (1820); Simmons v. Sykes, 2 Ired. (N.C.) 98 (1841).

Illustration 1 is taken from Aschermann v. Philip Best Brewing Co., 45 Wis. 262 (1878).

Illustration 2 is based on Douglas v. Hart, 103 Conn. 685, 131 A. 401, 44 A.L.R. 820 (1925); and May v. Georger, 21 Misc. 622, 47 N.Y.Supp. 1057 (1897). See also Richardson v. Atkinson, 1 Strange 576, 93 Eng.Rep. 710 (1723), drawing out part of wine and substituting water; Dench v. Walker, 14 Mass. 500 (1780), adulterating rum; Colby v. Porter, 129 A. 298 (Me.1925), changes in sleds; Penfolds Wines, Proprietary, Ltd., v. Elliot, 74 Comm.L.Rep. (Austr.) 204, 229 (1946), cutting seals from a deed; Symphony Player Co. v. Hackstadt, 182 Ky. 546, 206 S.W. 803, 1 A.L.R. 1648 (1918), disassembling organ; Jackson v. Innes, 231 Mass. 558, 121 N.E. 489 (1919); Mayer v. Springer, 192 Ill. 270, 61 N.E. 348 (1901); McPheters v. Page, 83 Me. 234, 22 A. 101, 23 Am.St.Rep. 772 (1891); Wilson Cypress Co. v. Logan, 120 Fla. 124, 162 So. 489 (1935).

Illustration 3 is taken from Donovan v. Barkhausen Oil Co., 200 Wis. 194, 227 N.W. 940 (1929). Cf. Simmons v. Lillystone, 8 Ex. 431, 155 Eng.Rep. 1417 (1853); Philpott v. Kelley, 3 Ad. & El. 106, 111 Eng.Rep. 353 (1835).

As to commingling goods, see Peltola v. Western Workman's Pub.Soc., 113 Wash. 283, 193 P. 691, 20 A.L.R. 374 (1920); Crane Lumber Co. v. Bellows, 116 Mich. 304, 74 N.W. 481 (1898); Martin v. Mason, 78 Me. 452, 7 A. 11 (1886); Royce v. Oakes, 20 R.I. 252, 38 A. 371 (1897); Wells v. Batts, 112 N.C. 283, 17 S.E. 417, 34 Am.St.Rep. 506 (1893).

Case Citations - by Jurisdiction

C.A.8
C.D.Cal.
N.D.Ill.
D.Md.
E.D.N.Y.
Alaska
Conn.App.
Ill.
Ill.App.
La.
Me.
Md.
Mass.App.
Nev.
N.H.
N.J.Super.
Or.
S.C.App.
Utah App.

C.A.8

C.A.8, 1989. Cit. in disc. Minority shareholders who objected to the 1973 merger of an insurance company into another insurer filed a class action suit against the purchasing company, inter alia, alleging that the merger was accomplished in violation of the common law and various state statutes, as well as federal securities laws. The district court entered judgment for the plaintiffs for compensatory damages but entered a judgment n.o.v. against punitive damages and reduced the interest allowed the plaintiffs. Affirming in part and reversing in part, this court stated that the district court properly entered summary judgment for the plaintiffs on their conversion claim under state law. The court said that the defendant was liable for conversion of the plaintiffs' shares despite good faith on the defendant's part, since all of the other elements of conversion were present and the defendant had used and derived the benefits of the plaintiffs' stock rights for 16 years and could not return the plaintiffs to their original position. Nelson v. All American Life & Financial Corp., 889 F.2d 141, 148.

C.D.Cal.

C.D.Cal.2011. Quot. in sup. Former employers that provided executive security, event security, and event accreditation services at concert and sporting events sued two former employees who resigned to join a competitor, alleging, among other things, that defendants destroyed plaintiffs' printers prior to their resignation. Denying defendants' motion for summary judgment on plaintiffs' conversion claim, this court held that plaintiffs' testimony provided evidence on which a rational jury could determine that defendants damaged and therefore converted the printers. The court explained that one who intentionally destroyed a chattel or so materially altered its physical condition was subject to liability for conversion. Executive Sec. Management, Inc. v. Dahl, 830 F.Supp.2d 883, 892.

N.D.Ill.

N.D.Ill.2012. Quot. in disc. After business received a one-page unsolicited fax advertisement, it brought a putative class action against sender, asserting, inter alia, an Illinois common-law claim for conversion, premised on the theory that defendant misappropriated plaintiff's fax machine, paper, toner, and time. Granting defendant's motion to dismiss, this

Restatement (Second) of Torts § 227 (1965)

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§ 227 Conversion by Using Chattel

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.

See Reporter's Notes.

Comment:

a. This Section applies to the use of the chattel by any person, including a bailee, a servant, a finder, or one who has already converted the chattel. As to exceeding an authorized use, see § 228.

b. As in the case of other conduct, the use of a chattel will amount to a conversion only if it so seriously interferes with the right of another to control the chattel as to make it just to require the actor to pay its full value, as stated in § 222A. In determining the seriousness of the interference, all of the factors stated in § 222A are important. A single, temporary, and unimportant use which does not damage the chattel or inconvenience the owner, and is not intended as a defiance of his rights, may not be enough for a conversion, whereas an extended use, one which causes damage, or one intended as the assertion of an adverse claim may be sufficient. No fixed rule can be stated, and in each case the question becomes one of whether the defendant's conduct is a matter of sufficient importance to justify requiring him, in effect, to buy the chattel at a forced sale.

Illustrations:

1. A owns a desk, which is his private property. On one occasion, without A's consent, B uses the desk to write his wife. This is not a conversion of the desk.
2. The same facts as in Illustration 1, except that B uses the desk daily for six months. This is a conversion.
3. The same facts as in Illustration 1, except that B uses the desk with the assertion of a claim that it is his own. This is a conversion.
4. The same facts as in Illustration 1, except that, with or without negligence on the part of B, the desk is seriously damaged by its use. This is a conversion.

Reporter's Notes

The Section has been changed from the first Restatement by broadening it to include use by one other than a bailee.

As to conversion by use of the chattel by one not authorized to use it for any purpose, see Gove v. Watson, 61 N.H. 136 (1881); Chew v. Louchheim, 80 F. 500 (3 Cir.1897); Mayer v. Springer, 192 Ill. 270, 61 N.E. 348 (1901).

Illustration 1 is based on Jeffries v. Pankow, 112 Or. 439, 223 P. 745, 229 P. 903 (1924). Cf. Frome v. Dennis, 45 N.J.L. 515 (1883); Fifield v. Maine Central R. Co., 62 Me. 77 (1873).

Illustration 2 is based on Miller v. Uhl, 37 Ohio App. 276, 174 N.E. 591 (1929). Cf. McMorris v. Simpson, 21 Wend. (N.Y.) 610 (1839); Laverty v. Snethen, 68 N.Y. 522, 23 Am.Rep. 184 (1877); Juzeler v. Buchli, 63 N.D. 657, 249 N.W. 790 (1933); West Jersey R. Co. v. Trenton Car Works Co., 32 N.J.L. 517 (1866).

Illustration 3 is based on Oakley v. Lyster, [1931] 1 K.B. 148 (C.A.). Cf. Forster v. Juniata Bridge Co., 16 Pa. 393, 55 Am.Dec. 506 (1851); Cheshire R. Co. v. Foster, 51 N.H. 490 (1871); cf. Lord Petre v. Heneage, 12 Mod. 519, 88 Eng.Rep. 1491 (1701); Bryant v. Wardell, 2 Ex. 479, 154 Eng.Rep. 580 (1848); Peterson v. Wolff, 68 N.D. 354, 280 N.W. 187 (1938); Hillhouse v. Wolf, 166 Cal.App.2d Supp. 833, 333 P.2d 454 (1958).

Illustration 4 is based on Maynard v. James, 109 Conn. 365, 146 A. 614, 65 A.L.R. 427, 29 N.C.C.A. 249 (1929); Baxter v. Woodward, 191 Mich. 379, 158 N.W. 137, Ann.Cas. 1918C, 946 (1916); Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 A. 199, 73 A.L.R. 792 (1931); Palmer v. Mayo, 80 Conn. 353, 68 A. 369, 15 L.R.A.N.S. 428, 125 Am.St.Rep. 123, 12 Ann.Cas. 691 (1907).

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Case Citations - by Jurisdiction

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C.A.10, Bkrtcy.App.

C.A.10, Bkrtcy.App.2000. Quot. in disc. Trustee of bankruptcy estate of Chapter 7 debtor who had fraudulently obtained premature disbursal of escrowed funds that were subsequently repaid to escrow agent brought adversary proceeding to avoid, as a preferential transfer, return of funds to defendant, who had placed a sum of money in the escrow account. Reversing the bankruptcy court's grant of summary judgment for trustee and remanding, this court held, inter alia, that the transferred funds were not recoverable from defendant, since a debtor-creditor relationship existed between debtor and escrow agent, because of debtor's obligation to repay the illegally obtained funds, so that escrow agent was an “initial transferee,” strictly liable for disgorging the money. The court noted that before debtor returned the money to escrow agent, defendant might have had a good-faith claim against debtor for conversion under Utah law. In re Ogden, 243 B.R. 104, 112.

D.Mass.

Restatement (Second) of Torts § 228 (1965)

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§ 228 Exceeding Authorized Use

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.

See Reporter's Notes.

Comment:

a. This Section is a special application of the general rule stated in § 227. It arises most frequently in cases of bailments under contract for a particular use, but it is equally applicable to a servant, an independent contractor, a gratuitous user, or any other person permitted to use the chattel.

b. If a bailee or other person who uses a chattel is not authorized to use it at all, his use of the chattel is a conversion if it is a serious violation of the right of another to control its use, as stated in § 227. He may, however, be authorized to make a particular use of the chattel, and may make a different use of it, exceeding the limits of the authorization. In such a case there is likewise conversion if the unauthorized use is such a serious violation of the right of another to control the chattel as to make it just to require the actor to pay the full value. (See § 222A.)

c. The limits of the permitted use ordinarily are determined by the terms, express or reasonably to be implied, of the contract or other agreement between the parties, and the question becomes one of whether there is a material breach of the agreement. In determining what is implied, the test is frequently whether a reasonable man, in the light of all of the circumstances, would regard the use as of such a character that it would have been included within the agreement if the parties had anticipated the occasion for such a use. The character of the chattel, its adaptability to the use made of it, and the purposes for which it is customarily used, are factors to be considered. Thus an automobile designed to carry passengers only would ordinarily not be rented for the purpose of transporting heavy freight, and consequently the bailee of such a car would be liable for a breach of the contract of bailment in using it for such a purpose, whereas he would not be liable for such a breach if he were to use it to carry small articles of merchandise of the kind customarily carried in passenger cars.

d. Even where there is a clear breach of the agreement, however, the unpermitted use is not a conversion unless it amounts to such a serious violation of the other's right of control as to justify requiring the user to pay the full value of the chattel. Most unpermitted uses are sufficiently serious to constitute such a material violation. There may, however, be minor,

temporary, and unimportant deviations from the authorized use, which do no harm and are not intended as a defiance of the other's rights, and so are not of enough significance to be treated as conversion. This is true in particular where the use made is of the same kind as that permitted, but exceeds it for a brief length of time, or in a relatively slight degree, so that the breach of the agreement is more or less a technical one, which would not support the recovery of substantial damages in an action for breach of contract. It is true also where the use made is altogether different from that permitted, but is in itself so unimportant that under § 227 it would not be a conversion even if no use had been permitted.

As stated in the Comments under § 222A, no fixed rules can be set, and a number of factors are to be considered in determining the seriousness of the interference with the plaintiff's rights. In each case the question becomes one of whether, under the circumstances, there has been so serious a violation that the defendant should justly be required to pay the full value of the chattel.

Illustrations:

1. A lends his automobile to B with definite instructions not to do anything whatever to the car except drive it. In violation of these instructions, B washes the car. This is not a conversion.
2. A entrusts an automobile to B, a dealer, for sale, with definite instructions to do nothing with the car except sell it. On one occasion B drives the car five miles on his own business. This is not a conversion.
3. A entrusts an automobile to B, a dealer, for sale. A says nothing whatever about any use of the car. B drives the car 2,000 miles on his own business. This is a conversion.
4. A rents an automobile to B to drive to X City and return. In violation of the agreement, B drives to Y City, ten miles beyond X City. This is not a conversion.
5. The same facts as in Illustration 4, except that B drives to Y City for the purpose of asserting his own claim to ownership of the automobile. This is a conversion.
6. The same facts as in Illustration 4, except that while the automobile is in Y City it is seriously damaged in a collision, with or without negligence on the part of B. This is a conversion.

e. It should be noted that the defendant may be privileged to use a chattel without the plaintiff's consent, under the rule stated in § 265. Also that where the use made of the chattel is not sufficiently serious or important to constitute a conversion, the defendant may still be liable in trespass for any harm to the chattel, under the rule stated in § 256.

Reporter's Notes

This Section has been changed from the first Restatement, by broadening it to include use by one other than a bailee.

As to Comment *c*, see Weller & Co. v. Camp, 169 Ala. 275, 52 So. 929, 28 L.R.A.N.S. 1106 (1910); Scott-Mayer Commission Co. v. Merchants' Grocery Co., 147 Ark. 58, 226 S.W. 1060, 12 A.L.R. 1316 (1921).

Illustration 1 is based on Donovan v. Barkhausen Oil Co., 200 Wis. 194, 227 N.W. 940 (1929).

Illustration 2 is based on Jeffries v. Pankow, 112 Or. 439, 223 P. 745, 229 P. 903 (1924). See also Johnson v. Weedman, 5 Ill. 495 (1843), agister to feed horse rode him; McNeill v. Brooks, 9 Tenn. (1 Yerg.) 73 (1882), horse rented for riding used to carry goods; Buice v. Campbell, 99 Ga.App. 334, 108 S.E.2d 339 (1959), car left to be repaired, driven to dealer to match parts. Cf. Frome v. Dennis, 45 N.J.L. 515 (1883), unauthorized borrowing of plow, use for three days.

Illustration 3 is taken from Miller v. Uhl, 37 Ohio App. 276, 174 N.E. 591 (1929). See also Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 A. 199, 73 A.L.R. 792 (1931), conditional buyer of car used it for illegal transportation of liquor; Maynard v. James, 109 Conn. 365, 146 A. 614, 65 A.L.R. 427, 29 N.C.C.A. 249 (1929), driving car left to be

washed; E.J. Caron Enterprises v. State Operating Co., 87 N.H. 371, 179 A. 665 (1935), theatre fixtures used in wrong theatre.

Illustration 4 is taken from Doolittle v. Shaw, 92 Iowa 348, 60 N.W. 621, 26 L.R.A. 366, 54 Am.St.Rep. 562 (1894); Spooner v. Manchester, 133 Mass. 270, 43 Am.Rep. 514 (1882); Carney v. Rease, 60 W.Va. 676, 55 S.E. 729 (1906); Daugherty v. Reveal, 54 Ind.App. 71, 102 N.E. 381 (1913). See also Harvey v. Epes, 12 Gratt. (Va.) 153 (1855), slave worked in wrong place.

Illustration 6 is taken from Hall v. Corcoran, 107 Mass. 251, 9 Am.Rep. 30 (1871); Palmer v. Mayo, 80 Conn. 353, 68 A. 369, 15 L.R.A.N.S. 428, 125 Am.St.Rep. 123, 12 Ann.Cas. 691 (1907); Fisher v. Kyle, 27 Mich. 454 (1873); Farkas v. Powell, 86 Ga. 800, 13 S.E. 200, 12 L.R.A. 397 (1891); Baxter v. Woodward, 191 Mich. 379, 158 N.W. 137, Ann.Cas. 1918C, 946 (1916); Woodman v. Hubbard, 25 N.H. 67, 57 Am.Dec. 310 (1852); Disbrow v. Tenbroeck, 4 E.D. Smith (N.Y.) 397 (1855). See also Spencer v. Pilcher, 8 Leigh (Va.) 565 (1837), unauthorized use of slave; Mayor of Columbus v. Howard, 6 Ga. 213 (1849), same; Wallace v. Seales, 36 Miss. 53 (1858), slave used in wrong place; Harvey v. Epes, 12 Gratt. (Va.) 153 (1855), same; Fryer v. Cooper, 53 S.D. 286, 220 N.W. 486 (1928), working stallion entrusted for breeding; De Voin v. Michigan Lumber Co., 64 Wis. 616, 25 N.W. 552, 54 Am.Rep. 649 (1885), horses rented to haul logs used to haul hay; Stewart v. Davis, 31 Ark. 518, 25 Am.Rep. 576 (1876), horses used beyond time limit; Goad v. Harris, 207 Ala. 357, 92 So. 546 (1922), misuse of truck; Wentworth v. McDuffie, 48 N.H. 402 (1869), violent overdriving of horse; Cartlidge v. Sloan, 124 Ala. 596, 26 So. 918 (1899), unauthorized working of horse; McCurdy v. Wallblom Furniture & Carpet Co., 94 Minn. 326, 102 N.W. 873, 3 Ann.Cas. 468 (1905), goods stored in wrong warehouse; Collins v. Bennett, 46 N.Y. 490 (1871), boarded horse used and foundered; Ledbetter v. Thomas, 130 Ala. 299, 30 So. 342 (1900); Fryer v. Cooper, 53 S.D. 286, 220 N.W. 486 (1928).

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