
Washington State Court of Appeals
Division II

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Docket No. 39767-6-II

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

JULIE HENDRICKSON,

Plaintiff-Petitioner,

-against-

TENDER CARE ANIMAL HOSPITAL, CORP., et al.,

Defendants-Respondents.

APPELLANT'S SUPPLEMENTAL BRIEF

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JULIE HENDRICKSON, through her attorney of record ADAM P. KARP, submits this supplemental brief pursuant to the Court's Mar. 18, 2010 *Order Denying Motion to Modify*, the Supreme Court having decided *Jackowski v. Hawkins Poe, Inc.*, 278 P.3d 1100 (Wash., Jun. 14, 2012).

A. Only the Name has Changed.

The Supreme Court's determination of *Jackowski*, while using a different nomenclature of "independent duty doctrine," acknowledges that the doctrine long preexisted as the "economic loss rule." *Id.*, at 1105 ("In its place we adopted the nomenclature independent duty doctrine."; referring to economic loss rule as "misnomer"); and at 1105 fn. 1 (noting C. J. Madsen's concurrence in *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380 (2010), stating that "rearticulation of the economic loss rule as the independent duty doctrine was 'unnecessary.'") Rather predictably, *Jackowski* confirms that its holdings are applied retrospectively. *Id.*, at 1106.

Eastwood adds, "The rule is merely a case-by-case question of whether there is an independent tort duty," where "[a] review of our cases on the economic loss rule shows that ordinary tort principles have **always resolved** this question." *Id.*, at 387, 389 (emphasis added). In applying the independent duty doctrine, *Jackowski* found real estate licensees bound by statutory fiduciary duties and affirmed the Court of Appeals's reinstatement of plaintiffs' claims for breach of same. With respect to independent tort

duties imposed upon veterinarians, Ms. Hendrickson directs the court to her opening brief, Section III(A)(1), particularly page 15, fns. 8 and 9. The Illinois Court of Appeals and Supreme Court provides a judicious chronicling of the evolution of the veterinarian's independent tort duties. *Loman v. Freeman*, 375 Ill.App.3d 445 (2006), states in relevant part:

Traditionally, at common law, the term "malpractice" applied to physicians and attorneys but not to veterinarians. *Southall v. Gabel*, 28 Ohio App.2d 295, 298, 277 N.E.2d 230, 232 (1971); J. Young, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 Hastings Women's L.J. 201, 209 (2005); Black's Law Dictionary 978 (8th ed.2004) (definition of "malpractice"). "Through judicial rule and the adoption of legislation over the last [50] years or more, there has been an expansion of the concept of malpractice to include veterinarians." 16 Hastings Women's L.J. at 209. Our legislature's use of the word "malpractice," in the Veterinary Practice Act, presupposes a set of professional standards applicable to all veterinarians. "Malpractice" is "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary 978 (8th ed.2004). A "professional" is a member of "a learned profession." Black's Law Dictionary 1246 (8th ed.2004). A learned profession*453 implies the existence of a body of learning relevant to that profession as a whole—the "standard of care" to which the veterinary examining committee referred in *Massa*. Presumably, this body of learning is what the faculty teaches at the College of Veterinary Medicine. When deciding whether the case at hand fits into "a general class of cases of which the court has jurisdiction," we "accept as true all well[-]pleaded facts and reasonable inferences drawn therefrom." *Skinner v. Mahomet Seymour School District No. 3*, 90 Ill.App.3d 655, 656-57, 46 Ill.Dec. 67, 413 N.E.2d 507, 508 (1980). According to the amended complaint, one of the tenets of veterinary medicine is that before performing a nonemergency surgery on an animal, the veterinarian must obtain the owner's consent to that surgery. We accept that allegation as true. See M. Nunalee &

G. Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, Animal L. 125, 150 (2004) (article cowritten by a lawyer and a veterinarian, stating that “[v]eterinarians must always remain mindful of client communication. Effective client communication includes securing informed consent from the client before performing a procedure”).

Id., at 452-53. The Illinois Supreme Court affirmed this position on appeal:

We conclude that section 299A of the Restatement (Second) of Torts is an accurate statement of the common law of Illinois with respect to the duty of care owed by members of professions or trades, and we, therefore, agree with the appellate court's holding that a veterinarian owes a duty of care. See C. Bailey, Annotation, *Veterinarian's Liability for Malpractice*, 71 A.L.R.4th 811, § 2(a), 1989 WL 571915 (1989) (noting that “the gravamen of such an action is that in providing veterinary care, the veterinarian failed to use such reasonable skill, diligence, and attention as might ordinarily have been expected of careful, skillful, and trustworthy persons in the profession”). Thus, the duty owed by defendant arises independently of his employment by the state and he was not performing a “uniquely governmental function” (*Jenkins*, 209 Ill.2d at 335, 282 Ill.Dec. 787, 807 N.E.2d 411) when he treated plaintiffs' horse.

Loman v. Freeman, 229 Ill.2d 104, 119 (2008).

B. Alternative Defenses to Economic Loss Rule Not Addressed by *Jackowski*

Even if this Court found that Respondents did not owe Ms. Hendrickson an independent legal duty, she raised two other, alternatively dispositive defenses to the economic loss rule not addressed by *Jackowski*, viz., (1) The Special Relationship Exception to the economic loss rule

(Section III(A)(2), *App's Brief*) and (2) Whether the Animal Patient is an Economic Loss (Section III(A)(3), *App's Brief*).

C. Conclusion.

Jackowski did not represent a sea change in administering the economic loss rule, yet it presages reversal of Judge Mills's decision dismissing Ms. Hendrickson's tort claims. This Court should apply *Jackowski* to proclaim that veterinarians in the State of Washington may not evade independent common law and statutory tort duties through contractual legerdemain.

Dated this Jul. 12, 2012.

ANIMAL LAW OFFICES

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CERTIFICATE OF SERVICE

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