

FILED

DEC 13 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 294161

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

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

JILL AND DAVID DAMIANO,

*Plaintiffs-Appellants,*

-against-

JON AND SUELLEN LIND,

*Defendants-Appellees.*

---

**APPELLANT'S BRIEF**

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*Attorneys for Plaintiffs-Appellants  
Jill and David Damiano*

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**I. ASSIGNMENTS OF ERROR**

**A. The Trial Court Erred Dismissing the Damianos' Claims on Summary Judgment.**

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Did the Trial Court Err Finding No Genuine Issue of Material Fact or Legal Basis (CP 156, Order, ¶ 1) for the Damianos' Claims of:**

1. Ordinary/willful conversion/trespass to chattels (CP 156, Order, ¶ 2a)?
2. Ordinary/willful/reckless/malicious breach of bailment (CP 156, Order, ¶ 2a)?
3. Malicious injury to a pet (CP 156, Order, ¶ 2a)?
4. Outrage (CP 156, Order, ¶ 2a)?
5. Gross negligence, willful or reckless property damage or destruction (CP 156, Order, ¶ 2a)?
6. Fraud (CP 156, Order, ¶ 2a)?

**III. STATEMENT OF CASE**

Appellant Jill Damiano set out her version of the alleged facts in her answers to interrogatories, most contradicted by the Defendant-Respondent Jon Lind.

On July 24, 2009, I woke up at about 5:00 a.m. to the sounds of my cat Boo meowing very loudly. Since I was up an hour later than usual, I assumed Boo was on our back porch waiting for me to let him in and give him breakfast. With my dog in tow, I opened the door and went out. Our cat Buddy was on the back porch, but Boo was nowhere in sight even though I could still hear his meows. I followed Boo's meows to the side of our yard. Boo's meows were

clearly coming from the inside of the Linds' garage. I couldn't figure out why or how Boo was stuck in the Linds' garage because both their cyclone fence gate and "man" garage door were wide open. I assumed Boo was stuck in a small room or cabinet in their garage. I also assumed that when Jon got up, he would let Boo out. For the next hour I went outside approximately every five minutes to see if Boo had come home or Jon and Sue were up. The last time I heard Boo cry was about 6:15 a.m. Shortly after 6:15 a.m., I went back outside to see if Boo had come home. He had not and I no longer heard his meow. I assumed Jon must have gotten up and let Boo out. I was surprised I had missed Jon since I had been outside numerous times that morning.

I then went back in my house and told my husband that I had heard Boo in Jon's garage. I told Dave that Jon must have let him out because Boo had stopped meowing. Dave asked me why I had not gotten him up when I first heard Boo and I explained to him that I had not wanted to wake the Linds this early in the morning. Dave wanted to know if Boo had come home yet. I said he hadn't. I told him I intended on taking two zucchini from our garden to "trade" with Jon for Boo on my way to Safeway. I showered and left the house at about 6:50 a.m., calling and looking for Boo, but he never came. I went back inside the house and told Dave that I would stop and check with Jon on the way to Safeway. At 7:00 a.m., I left my house and about one minute later I knocked on Jon's door, but nobody answered. I proceeded to Safeway.

On my way to town, a few minutes later (not later than 7:05 a.m.), I passed Jon's white, smaller SUV at the intersection of HWY 395 (Park Avenue) and Main Street. Jon was smiling and stuck his arm out the window to wave at me. By the time I made a u-turn and returned to the Linds' residence, Jon was already out in his front yard working. I got out of my car and with two zucchini in hand, amicably greeted Jon with "Good Morning" and told him I had some zucchini to trade with him for my cat Boo, who was locked in his garage. I told him I had heard him early in the morning. Immediately, Jon's demeanor changed drastically. He started to sweat and turned "beet" red. He didn't answer me. He started to stutter "Cat...cat. ...no, I haven't seen a cat." I told him I had heard Boo's meows coming from his garage early in the morning. I apologized and offered to

pay if Boo had knocked over or damaged anything, because as I stated to Jon, "I wanted to be a good neighbor."

Again, Jon didn't answer me, but stuttered he would look in his garage. I followed Jon back to his garage when he opened the door. We stepped in. Jon turned around and said there wasn't a cat in the garage and we went back out and Jon closed the door. His demeanor continued to be totally out of character. He was sweating profusely and seemed agitated.

Jon then started to tell me that the carpenters would be coming soon to enclose his deck and to do some landscaping. He proceeded to tell me that cats had been fighting under the deck and it needed to be closed up. I then left his house and returned to our home where I told Dave about how weird and odd Jon was acting and what was said during our conversation. Throughout the day, I continued to look and call for Boo around the neighborhood. Jon was in his backyard most of the day. I tried several times to get his attention so I could ask him if he saw Boo, but Jon would not acknowledge my presence. Jon heard me several times call for Boo after my morning encounter with him, but he wouldn't look at me.

*Plaintiff Jill Damiano's Answer to Defendants' Int. No. 57* (without waiving objection) (CP 99-101). Despite searching for Boo over an extended period of time all over town, posting signs, knocking on doors, and walking trails, the Damianos never found Boo, even though he habitually would come directly home early in the morning after being let out the evening prior. *J. Damiano Dep.*, 15:19—16:13 (CP 142). Thus, his absence broke with habit, providing additional circumstantial evidence of foul play.<sup>1</sup>

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<sup>1</sup> Incidentally, Respondents have failed to identify either a State or Chewelah feline leash law that would have prohibited the Damianos' cat from walking throughout the neighborhood.

In contrast, Defendant Jon Lind disputed that he ever trapped Boo in the first place. *Defendants' Motion for Summary Judgment*, at 5:32 (“There is no evidence the Damianos’ cat was ever detained or possessed by the Linds.”), and 6:14-17 (“The Damianos have no proof their cat was the cat that was accidentally caught in the live trap on the Linds’ property.”)(CP 20)). His evolving story to conform to the unchanging account offered by Mrs. Damiano through the course of litigation places Mr. Lind’s credibility in considerable doubt and demands intense scrutiny. With respect not only to Mr. Lind’s admission of trapping Boo, but also to Mrs. Damiano’s unwavering confirmation that she distinctly heard Boo on the Linds’ property that morning up until the approximate time Mr. Lind left the house for an initially unconfirmed and nebulous purpose, the jury can find that Mr. Lind in fact trapped and relocated Boo based on Mrs. Damianos’ “earwitness” identification. As further confirmation of Ms. Damiano’s identification, Mr. Lind later confessed to a police officer that he had trapped the Damiano’s cat that morning (CP 73). The Defendants unavailingly attempt to force the court to adopt as “undisputed” the “fact” that neither plaintiff “observed” Boo on the Linds’ property. But the term “observe” relates to all human senses. “Observe” means “To take notice; to give attention to what one sees or hears; to attend. [1913 Webster]” *The Collaborative International Dictionary of English v. 0.48*. While undisputed that the Damianos did not see Boo on the Linds’ property, Mrs. Damiano indubitably heard him. The Defendants have not offered any

evidence or authority to challenge the admissibility of earwitness identification.

Mrs. Damiano's supplemental declaration lays further foundation for why she had the aural perspicacity to distinguish and identify Boo's unique cry.

Boo was an integral special part of our lives whose desires were respected, and whose distinct attributes (such as his voice and cry) were imprinted in my memory. Of the many cats I have come to know over the past decades, I can distinguish their meows and voices the same way people can distinguish human voices from one another. I have no doubt in my mind that Boo was trapped on the Linds' property the morning of July 24, 2009.

*Jill Damiano Decl. of Aug. 27, 2010, ¶ 6 (CP 115-16); see also J. Damiano Dep., 6:14-23 (clarifying for the record that "observe" means visual only) (CP 119).*

Defendants' initial argument rested on the disputed premise that Mr. Lind never admitted to trapping Boo. From this, Defendants claimed that inadmissible speculation alone supports the Damianos' contention that Mr. Lind trapped Boo on Defendants' property on the date in question, and from which Boo has never been again seen. Jill Damiano has repeatedly and consistently testified that she distinctly heard Boo crying from the Defendants' garage early on the morning in question, thereby producing "earwitness" testimony sufficient to create a genuine issue of material fact as to whether he was, in fact, confined within a trap admittedly set by Mr. Lind with the intention of trapping cats. Should a jury believe Mrs. Damiano and the police officer who accepted Mr. Lind's

confession, all claims remain viable for determination favoring the Damianos. For if the jury concludes that Mr. Lind in fact intentionally interfered with the movement of the Damianos' cat – by intentionally setting a baited trap for the express purpose of luring animals onto his property, subjectively desiring to trap an animal, and thereby exercising dominion and control over that animal – it may reasonably conclude that Mr. Lind substantially (if not permanently) misappropriated, secreted, abandoned, or impermissibly prevented Boo from returning home. Whether Mr. Lind killed, abandoned far from home, or sufficiently traumatized Boo to the point he would not or could not return home need not be proven with specificity, for his trapping Boo exclusively (or, alternatively, predominantly) resulted in the Damianos' deprivation of Boo during the morning he was trapped and never being seen again. Whatever he actually did with Boo matters not for purposes of summary judgment, for the (even temporary) deprivation without lawful justification alone establishes liability. The spectrum of harm visited upon Boo merely goes to the quantum of damage, not the threshold of fault.

Undisputedly, after years of intentionally baiting and setting traps to catch animals damaging his property, Mr. Lind trapped three cats in three years, including one in 2009 belonging to his immediate neighbors, the Baumans. Though he claims to have never caught a skunk, he nonetheless continued trapping undeterred by failure, leading any reasonable person to believe that his ongoing trapping efforts were done

for some purpose other than as stated, or were simply negligent. Mr. Lind admits to having baited and set a trap on Jul. 23, 2009, and to having found a cat in his trap the morning of Jul. 24, 2009. The timing of Boo's disappearance, the proximity of his cries emanating from the Linds' garage, a short distance from the Damiano household (they are direct neighbors of the Linds), the hearing of Boo's voice by Mrs. Damiano from between 5 a.m. until after 6 a.m., Mr. Lind's confession of trapping the Damianos' cat, the early morning departure of Mr. Lind for a short road trip, returning moments after Mrs. Damiano left to the supermarket at 7 a.m., Mrs. Damiano's telling account of her enigmatic colloquy with Mr. Lind (revelatory of a guilty conscience) moments after she made a U-turn and obsequiously approached him on his property, and then no further utterance or sight of Boo to date (though it was his custom to return when called by Mrs. Damiano after being let out), all provide strong circumstantial and direct evidence that Mr. Lind trapped Boo and then harmed or abandoned him in some fashion proximately causing his evanescence from the Damianos' lives.

A jury may infer malice from several admissions made by Mr. Lind to Fran Jenne, Mrs. Damiano, and Mr. Damiano, where he repeatedly expressed his hatred of cats, a malignant and disturbing sense of entitlement in accepting that animals have only those protections that he confers upon them (most commonly at the end of a firearm, given his long-term involvement in hunting), and delighting in the pitchforking of

skunks in clear violation of state anticruelty law. But for purposes of this motion, the court can simply rely upon Ofc. Molett, who confirms that, in a brief affliction of honesty on Jul. 27, 2009, Mr. Lind admitted to having trapped the Damianos' cat. From that oral confession on, Mr. Lind began re-scripting what happened, unconvincingly and deceptively, with so many corrections as to render his testimony highly suspect. Against this backdrop, the court should allow the jury to determine whether his intentional misconduct gives rise to claims redressible in tort and contract.

**Officer Molett**

In direct contradiction to the Defendants' protestations that Boo was never on their property is the non-hearsay admission by a party opponent, in the form of a declaration from Chewelah Police Department Officer Brandon Molett, who declares:

...Jon Lind admitted to me that he trapped the Damianos' cat, Boo, but did not know it was their cat until later that morning, after he allegedly released Boo and spoke to Mrs. Damiano.

*Second Decl. of Brandon R. Molett (CP 73).* Ofc. Molett adds that Mr. Lind's written statement, where he attempts to plead total ignorance about the identity of the cat he admittedly trapped on Jul. 24, 2009, was prepared after the verbal admission to Ofc. Molett that he indeed trapped Boo. *First Declaration of Brandon R. Molett, (CP 74-75).* This admission must be accepted as true for purposes of this motion, including all reasonable inferences flowing therefrom. Inferential sequelae from changing his story

before Ofc. Molett and not being forthcoming and honest with Mrs. Damiano, include:

1. Setting the trap was intentional and, therefore, whatever Mr. Lind did with Boo in the trap was also intentional.

2. Mr. Lind's lying to Mrs. Damiano about not trapping a cat that morning, much less Boo, was also intentional, depriving her of information she could have used to locate Boo, redouble her search efforts, or more effectively mitigate whatever harm Mr. Lind visited upon Boo by abandoning, scaring, or injuring him. In the event Mr. Lind killed Boo, an act of which he was capable according to a neighbor, Lynnette Bauman, whose own cat was trapped by Mr. Lind prior to Jul. 24, 2009 (see *J. Damiano Dep.*, 5:1-21, **CP 27**), it follows that by failing to disclose this information to Mrs. Damiano, Mr. Lind forced the Damianos to endure added distress associated with vain search efforts and the lingering doubt as to Boo's ultimate fate, thereby preventing closure.

3. Mr. Lind has a duty to truthfully answer Mrs. Damiano's inquiries since he had trapped Boo.

4. Mr. Lind has failed to provide a reasonable explanation for his out-of-character, guilt-laden reaction to Mrs. Damiano's polite and direct inquiries concerning the fate of Boo. Self-disparagement (calling himself a total idiot) does not begin to provide a credible explanation as to why he engaged in such admitted misrepresentation.

For instance, first Mr. Lind concedes to Chewelah Ofc. Molett that he trapped Boo. **CP 73-75**. Nor does he dispute the location of the trapped cat (e.g., not in his garage) (see Molett’s police report). Later that day, Mr. Lind prepares a written statement where he claims, rather awkwardly, that he “do[es] not know the ownership of the cat I trapped,” but still fails to assert that the trap was located elsewhere than in the garage. *Lind Statement* of Jul. 27, 2009 (**CP 78**). Mr. Lind attempts to explain his inexplicable conduct with an otherwise good neighbor of many years by responding to Mrs. Damiano’s direct question as to whether he trapped her cat in his garage by unconvincingly remarking, “I did not mention I’d caught a cat (unknown owner) that morning because Jill didn’t ask and I felt like a total idiot just then.” *Id.*

Thereafter, the Damianos file suit on Oct. 26, 2009, alleging in the *Complaint* that minutes after leaving the Linds’ residence to run errands, Mrs. Damiano saw Mr. Lind traveling westbound on Main Street, returning to his house. *Complaint*, ¶ 15 (**CP 5**). On Dec. 15, 2009, the Defendants answered by denying that Mrs. Damiano saw Mr. Lind on Main Street that morning, as stated. *Answer*, ¶ 8. Then, on Jan. 21, 2010, Mr. Lind answered the Damianos’ first discovery request asking, “Did you leave the house at any time on July 24, 2009. If so, specify: ...” *Plaintiffs’ Int. No. 25 to Defendant Jon Lind* (**CP 89-90**). Mr. Lind objected, noting relevance and CR 26(b)’s scope, but then stated:

Mr. Lind cannot recall whether he left his house that day. If he left his house at all, it is possible he drove to the city

park; he also may have accompanied his wife to Spokane. If he left his house at all, he does not recall when he returned. He would have been in his Honda Pilot if he left his house at all.

*Answer to Plaintiffs' Int. No. 25.* Pleading ignorance as to whether he left the house at all brings into focus another genuine issue of material fact – viz., the challenge to Mr. Lind's assertion that he simply opened the trap, on his property, allowing Boo to allegedly run across the street. For if this is what occurred, then why did Mr. Lind see the need to leave his home briefly (at or after 6:30 a.m.) and return moments after 7:00 a.m. as Mrs. Damiano had just left his front door to see if anyone was home? The facts construed in the light most favorable to the Damianos supports a rendition placing Mr. Lind in a vehicle with a trapped Boo, being driven away from the neighborhood and dumped or killed in an undisclosed location, returning home directly after having eliminated all evidence of second-degree animal cruelty (RCW 16.52.207 [abandonment]) or taking, concealing, injuring, or killing a pet animal (RCW 9.08.070) or first-degree animal cruelty (RCW 16.52.205).

Further, in answer to another interrogatory, Mr. Lind states that he “set a Havahart live trap on or about July 23, 2009 adjacent to his sun deck in his backyard.” *Answer to Plaintiffs' Int. No. 35 (CP 87-88)*. Note that he has now modified his story to relocate the trap from the detached garage to adjacent to the back of his house, notwithstanding that his answer to third interrogatory confirms that the “live traps were placed at the front/south of Defendants' garage at Defendants' current residence.”

*Answer to Plaintiffs' Int. No. 7 (CP 81-82)*. This, too, creates a genuine issue of material fact, for what better way to distance oneself from a claim of trapping and abandoning or killing a neighbor's cat than to assert that the trap was not in the location asserted by the neighbor? Hence, Mr. Lind has relocated the trap from garage to deck for purposes of evading liability. Even so, he has merely created an issue of fact to be resolved by a jury.

One month after Mr. Lind answered the discovery requests, on Feb. 25, 2010, Mrs. Damiano provided additional detail of the encounter, providing the lengthy statement at the preface of this *Statement of Facts* section. It thus came as little surprise that Mr. Lind would suddenly “remember” leaving the house and even waving to Mrs. Damiano as she passed him on his way home:

Q: Did you speak to Jill that morning?

A: Yes.

Q: When did you first see her that morning?

A: I saw her as I was returning home on where Main Street intersects with Highway 395.

Q: What direction were you traveling?

A: I was traveling west.

Q: Where were you coming from?

A: I was coming from either the storage unit or the park, whichever.

*J. Lind Dep.*, 64:18—65:2 (CP 106-07). Mr. Lind adds:

Q: Did you gesture at her?

A: I actually waved at her.

*Id.*, 65:13-14 (CP 107). A full eight months after the incident, Mr. Lind now recalls where he went when he left the house that morning, seeing

Mrs. Damiano, and even gesturing hello, but he denied such an allegation a mere three months after the incident (per the *Answer*) and again six months after the incident in response to a direct interrogatory.

**Trapping “Accidentally On Purpose”**

The court should also be aware that this was not the first time Mr. Lind “accidentally” trapped a cat that was ostensibly set to catch a skunk. *Answer to Plfs’ Int. No. 20* (acknowledging in 2009 he trapped Lynette Bauman’s cat) (**CP 85-86**); *Answer to Plfs’ Int. No. 7* (acknowledging he trapped three cats in three years, thereby proving he knew or should have known of the high likelihood that he would lure and capture one of the Damianos’ cats (**CP 81-83**)). As noted above, a jury may determine whether Mr. Lind’s trapping and subsequent handling of Boo arose from mere negligence or from a place more dark-hearted and insidious, but that will only determine the cause of action, not an absence of liability. In this regard, the following party-opponent admissions provide the jury with statements and actions by Mr. and Mrs. Lind that support a *modus operandi* and enmity toward felines that make firmer methods of deterrence (e.g., abandonment and killing) more probable than not a remedy to cure spraying, caterwauling, and lawn furniture damage.

With respect to skunks, Mr. Lind repeatedly admitted to Mrs. Damiano that he enjoyed trapping and pitchforking them to death.

Q: anything else that you have as evidence that my client injured, harmed or killed your cat, Boo?

A: Just comments he had made to me previously about how he, him and another friend of his trapped and killed skunks.

Q: And when were those comments made?

A: Oh, probably – it had been a few times over a three or four-year period.

...

Q: And specifically what do you recall regarding his comments?

A: How him and this other gentleman liked to trap skunk and pitchfork them.

Q: What other gentleman?

A: Doug Sassman.

Q: And how, did he describe how he trapped skunks?

A: No. He just said that him and Doug Sassman just trapped skunks and then they would pitchfork them.

...

Q: Was that the first time that he said that to you? You said he mentioned it three times.

A: Yes.

*J. Damiano Dep.*, 6:16—7:23 (CP 119).

Mr. Damiano recalls speaking to Mr. Lind in 2007 while he was in his driveway. He asked Mr. Lind if it would be acceptable to him not to spray Round-Up weed killer along the property line fence. Mr. Lind inquired why, to which Mr. Damiano responded that his cat “sometimes chewed on the grass and [he] did not want [his] cat to eat the weed killer.” Mr. Damiano offered to weed-eat the grass and make sure it stayed trim if Mr. Lind would accommodate his request. *D. Damiano Decl.*, ¶ 1 (CP 122). To this, Mr. Lind asked if he were “one of those ‘animal rights people’?” Before Mr. Damiano could answer, Mr. Lind quipped, “I don’t think animals have rights. And if they did, it’s the rights I give them.” *Id.*,

¶ 2. Mr. Lind admits to having had a discussion with Mr. Damiano about weed-killer. *J. Lind Dep.*, 132:22—133:5 (CP 110-11).

Chewelan Katy Hoskins lost her cat about one month after Boo went missing. Never found, Ms. Hoskins nonetheless canvassed the neighborhood, going door to door with her four-year-old daughter to inquire if Bear had been found. As they approached the Linds' home, her daughter knocked on the door and was greeted by Mrs. Lind, who responded to her daughter's polite question, "Have you seen a little black cat, with no tail? His name is Bear," with a rude exclamation, "There's lots of cats in this neighborhood!" This utterance was coupled with an abrupt door slam in the faces of Ms. Hoskins and her young daughter. *Hoskins Decl.*, ¶¶ 2-3 (CP 124).

Long-term Chewelan Fran Jenne states that Mr. Lind strongly insinuated he would injure, relocate, or kill a mother cat and her kittens who had taken refuge in the Community Celebrations Building on King Street. In order to prepare for the Chataqua event, Mr. Lind wanted Ms. Jenne's assistance in moving the felines, noting that if she didn't resolve it, he would. *Jenne Decl.* (CP 127-28). He told Ms. Jenne that "he hated cats" and that if she had lived in Couer d'Alene, she would, too.

### **Emotional Distress**

Lastly, on the question of severe emotional distress, Mrs. Damiano has testified in detail to the anxiety, agitation, fear, anger, sleep disturbance, weight loss, and bouts of uncontrollable crying resulting from

Mr. Lind's acts and omissions. *Answer to Defs' Int. No. 11* (without waiving objections) (CP 96-97); *Answer to Defs' Int. No. 10* (Norvell and Imsland entries only, without waiving objections (CP 94-95))(noting diagnosis with acute stress disorder and panic attacks, PTSD, acute stress reaction and chest pain caused from Mr. Lind's actions and omissions); *Answer to Defs' Int. No. 14* (noting ongoing expense of mental health treatment (Norvell) and the chest pain treatment (Imsland), as well as prescription medications to manage emotional distress (CP 98)).

#### IV. ARGUMENT

This court reviews summary judgment orders *de novo*. Any findings of fact are superfluous and not considered on appeal. *Sherman v. Kissinger*, 146 Wash.App. 855, 864 fn. 3 (I, 2008), *as amended*. Relying only upon the rhetorical, but empty, force of the argument that the Damianos have no evidence placing Boo in Mr. Lind's trap undercuts Defendants' motion, for a reasonable juror could find liability under each theory should he or she believe that Mr. Lind trapped Boo, which he confessed to doing. Accordingly, the matter should go to a jury, as it did in *Peloquin v. Calcasieu Parish Police Jury*, 378 So.2d 560 (La.App.1979), a case involving the Peloquins, who asserted that their cat George was trapped by the Linscombs, who obtained a trap from animal control for the purpose of capturing one or more cats climbing on their car and scratching the paint.

The Linscombs succeeded in trapping a cat on the second day the trap was set, took the cat to animal control and caused it to be euthanized. Though the jury concluded that the Peloquins could not prove that the Linscombs trapped George, it was permitted to hear the claim of conversion, as the jury in this case should hear those claims of the Damianos with respect to Boo. Indeed, the decision cited above was the second appellate decision concerning the Peloquins. For in *Peloquin I*, 367 So.2d 1246 (La.App.1979), the court reversed and remanded for jury trial, holding that plaintiffs' allegations of their ownership of George and their subsequent dispossession of him stated a cause of action and, further, that if they could prove possession, they were entitled to damages for conversion, to include the cat's value and mental anguish, inconvenience, and humiliation.

The various theories of liability applicable to this dispute, yet dismissed on summary judgment, follow *seriatim*:

**A. Bailment**

Washington law recognizes that animals may be subjects of bailments and imposes upon the bailee a presumption of negligence. *Hatley v. West*, 74 Wn.2d 409 (1968) (agistment of horse is kind of bailment); *Anzalone v. Kragness*, 356 Ill.App.3d 365 (2005) (recognizing claim of professional negligence and breach of bailment in veterinary medical malpractice action concerning dog). When the bailed item is lost, destroyed, or compromised while in the bailee's possession, the plaintiff

raises a prima facie case, or presumption of negligence. *Chaloupka v. Cyr*, 63 Wn.2d 463 (1963). Where the bailee “can show that he has exercised due care or can show the loss was caused by burglary, larceny, fire, or other causes which of themselves do not point to negligence on the part of the bailee, he can rebut the presumption.” *Id.*, at 467. Given the nature of the voluntary constructive bailment created unilaterally by Mr. Lind, a presumption of negligence arises as a matter of law. Once the property leaves the bailor’s hands (and enticed by the bailee to come into his possession), the bailor no longer has day-to-day knowledge of, or control over, the property’s handling. Had Mr. Lind not wanted to be responsible for rebutting this presumption, he should not have set a live trap knowing and intending to attract animals. But for Mr. Lind’s intentional actions, the Damianos could have retrieved their cat that morning when he mewed to get Mrs. Damiano’s attention, thus depriving them of the ability to care for and protect their cat.

Bailments of personalty require a change of possession and assumption or acceptance of possession by the bailee. *Theobald v. Satterthwaite*, 30 Wn.2d 92 (1948). Transfer of possession was complete at the time Boo entered Mr. Lind’s baited trap. This occurred pursuant to a contract implied-in-law, as described below. Mr. Lind breached the bailment contract when he failed to return Boo to the Damianos alive.. A presumption of fault therefore applies, as described above in *Chaloupka v. Cyr*. The failure was unauthorized and unjustified since he had no legal

authority to capture or mishandle Boo in the aforementioned ways. This bailment involved delivery of property to the bailee with instructions implied by common law and statute (described below) that he be returned to the Damianos' property. While the Linds may argue that they attempted to return Boo to the Damianos by allegedly releasing him on the street opposite the fence separating the parties' lots, they did not, in fact, complete return of possession. For purposes of bailment, a prima facie breach exists, based in part on Boo's predictable schedule of returning home between 4 and 5 a.m. each morning yet being lured and admittedly detained in the Linds' trap until about 7 a.m., impeding his return as customary.

The act of allegedly releasing Boo on the Linds' property did not satisfy any bailment obligation even if a jury believed it. A penetrating analysis requires that the court consider where the transfer occurred. If the Damianos left Boo with the Linds for cat-sitting and delivered possession to their home, they would breach if they released Boo into the street instead of returning him to the Damianos, no differently than a doggie daycare facility or agister failing to confine and protect an animal placed in their temporary custody. By luring Boo without the Damianos' knowledge or consent, they drew him from his last-known location (i.e., on the Damianos' property) but failed to return him there. Furthermore, as explained below, because the duty of care is extraordinary for this bailment for the sole benefit of the bailee (not merely ordinary, as in the

case of a bailment for mutual benefit), the Linds failed to satisfy the heightened duty even if the jury were to accept as true that Mr. Lind simply released Boo into the street without ever telling the Damianos what he did with their cat. Indeed, communicating what he did with Boo would be the barest offering to complete any bailment transaction, especially when all cats in the neighborhood had owners (*J. Damiano Dep.*, at 17:8-21 (CP 142)) and this presumption should have excited inquiry by Mr. Lind by keeping Boo safe in a trap and contacting his neighbors to see which one owned him. Instead, admittedly, he failed to return Boo to them, or even disclose what he did with Boo, not even admitting that he trapped or released a cat when directly confronted by Mrs. Damiano.

In soliciting animals to enter his property through use of a baited trap, Mr. Lind analogously placed a magnetized rod in a pool of iron shavings, or a baited fishing pole in the midst of a school of spawning fish. In this endeavor, Mr. Lind wanted to catch an animal. Clearly, there was some benefit to Mr. Lind or else he would not have used an attractant like tuna fish, as opposed to a repellent. Hence, he initiated a bailment for the sole benefit of the bailee subject to vesting at some future point in a member of a foreseeable class of bailors (via their animals – the “bailed properties”) or, at least, a bailment for mutual benefit. Accordingly, Mr. Lind owed a duty of extraordinary care and failing to exercise that duty even through slight neglect exposes him to liability. “If the bailment is for the benefit exclusively of the bailee, he must use extraordinary care; if for

the mutual benefit of the parties, ordinary care; and if for the exclusive benefit of the bailor, slight care will suffice.” *Renfro v. Fouche*, 26 Ga.App. 340 (1921) (quoting *Merchants’ National Bank of Savannah v. Guilmartin*, 88 Ga. 797, 799); *see also Pitman v. Pitman*, 717 N.E.2d 627 (Ind.App.1999); 8A Am. Jur. 2d Bailments § 109; *see Maitlen v. Hazen*, 9 Wn.2d 113 (1941)(on gratuitous bailees); *Chaloupka v. Cyr*, 63 Wn.2d 463, 465-66 (1964)(on ordinary care for mutual benefit-bailments).

Even without mutual benefit, an involuntary bailment may arise. The involuntariness or constructiveness of the bailment emerges where finders take possession of lost items, possession occurs by mistake, or where the item is forced upon another nonconsensually:

It is the element of lawful possession, **however created, and the duty to account for the thing as the property of another**, that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not. Laidlaw, "Principles of Bailments," 16 Cornell L.Q. 286 (1931).

*Zuppa v. Hertz Corp.*, 111 N.J.Super. 419, 423 (1970)(emphasis added); *see also Capezzaro v. Winfrey*, 153 N.J.Super. 267, 270-271 (1977) (police seizing money found in inmate’s girdle during search of cell after her arrest on robbery charge were involuntary bailees of cash); *State v. Rhine*, 773 P.2d 762 (Okla.Cr.1989) (police officers deemed involuntary bailees and convicted of embezzlement by a bailee when seizing hog under emergent conditions and then, though initially intending to return to original owner, slaughtered same as “compensation for their services”); *State v. White*, 135 Wn.2d 761, 770, n.9 (1998) (police officers who

impound vehicles become involuntary bailees over the car and its contents). Upon principles of justice, the possessor who acquires property by accident or fortune should keep the item safe and restore or deliver it to its owner, particularly where duty-bound, given RCW 63.21.

Accordingly, Mr. Lind may not completely abdicate any responsibility for the bailed being, even if regarded as an involuntary bailee. Of course, here, by having admittedly baited a live trap with the intent to lure animals onto his property (note that he was not attempting to repel them through barriers, sound-or-light-emitting devices, vibratory disturbance, hotwire, or a dog, but was instead using means to coax animals onto his property), Mr. Lind was either maintaining an attractive nuisance or running the proven risk that he might trap cats belonging to neighbors. In fact, he had only trapped neighborhood cats in Chewelah and never skunks. Foreseeably tempting felines, Mr. Lind was voluntarily causing cats to encroach for either his sole benefit (should a jury conclude that he sought to trap and harm cats as he had done with skunks, in which case a duty of extreme care applies) or as an incidental, though unsolicited, benefit of eliminating nuisance cats.

Informing this bailment analysis is the Lost Property Law (Ch. 63.21 RCW),<sup>2</sup> which mandates that a finder wishing to claim the found property belonging to an unknown owner, and seeking to divest the

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<sup>2</sup> See *Farrare v. City of Pasco*, 68 Wash.App. 459, 462 (1992)(applying Ch. 63.21 RCW to currency discovered in locked luggage at airport). Although *Graham v. Notti*, 147 Wash.App. 629 (2008) held that Ch. 63.21 RCW does not directly apply to the animal context, it found that it served “at most to indicate this state’s general preference for returning lost property to

original owner of his title and transfer it by operation of law, must, within seven days, comply with express statutory requirements. RCW 63.21.010. Only property “not unlawful to possess” may be claimed by the finder. *Id.* The acts of enticing Boo, trapping Boo, and then taking actions inconsistent with the Damianos’ wishes pertaining to Boo, amount to Mr. Lind asserting a “claim” over Boo. As finders of lost property, Mr. Lind was bound by and violated this state law.

As a “finder” under Washington statutory and common law, he was also a “bailee.” Division II of the Court of Appeals held that:

By contrast, at common law, one does not relinquish ownership in goods by losing or misplacing them: “‘Finders keepers, losers weepers’ is a time-worn old saying, but not true. The finder of lost goods is a bailee of them for the true owner with certain rights and obligations....”

*State v. Kealey*, 80 Wash.App. 162, 172 (1995); *see also Collins v. Boeing Co.*, 4 Wash.App. 705, 710-711 (1971) (recognizing constructive or involuntary bailment case where “possession taken by a finder”); *Waugh v. Univ. of Hawaii*, 63 Haw. 117, 133 (1980) (bailment implied where finder of lost goods takes them into possession and noting, “The law imposes an obligation upon the finder to use due care in keeping the goods and requires the finder to deliver the goods to the owner upon demand.”); *Hertz Corp. v. Paloni*, 95 N.M. 212, 214 (1980) (a “constructive bailee” is a person who lawfully acquires possession of another’s property by mistake, accident, or through force of circumstances

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its original owner where reasonable.” *Id.*, at 639.

under which law imposes upon him duties of a bailee.) In a lost dog context, the Vermont Supreme Court noted:

The value of a pet to its human companions has already been noted. Accordingly, apart from providing care and shelter, finders of stray pets should also be encouraged to make every reasonable effort to find the animal's owner. Although circumstances will vary, this might include contacting the local humane society, veterinarians, or the police department, posting notices near where the animal was found, and placing newspaper or radio advertisements. Additionally, owners of lost pets should be enjoined to undertake reasonable efforts to locate their animals by contacting local humane societies and other appropriate agencies, printing and placing notices, or taking out appropriate advertisements. Together these requirements provide an incentive to finders to care for stray pets and attempt to locate their owners, and place the onus on owners to conscientiously search for their pet.

*Morgan v. Kroupa*, 167 Vt. 99, 103 (1997). Mr. Lind took no steps to try to find the cat's owner, even when confronted by Mrs. Damiano shortly after he trapped the cat..

As stated above, however, this is not the case simply of Mr. Lind coming upon a lost companion animal while out and about. Rather, he intentionally lay in wait for, if not effectuated the lost status of, the companion animal – imposing and thus assuming an even greater duty of care and bailment obligation. For purposes of summary judgment, the Damianos having stated a prima facie case, and a legal presumption of fault thereby arising, the court clearly erred by dismissing this claim.

## **B. Negligence**

Defendants relied on what they asserted was an undisputed fact -- viz., that there was no evidence Mr. Lind trapped Boo. In light of the above, however, this contention clearly fails (whether from Mrs. Damiano's identification or Mr. Lind's admission to Ofc. Molett), and along with it, the grounds to dismiss the negligence claim. Accordingly, having come into possession of Boo in a trap set, baited, and positioned on Defendants' property with the express intent to capture animals, Mr. Lind assumed a duty of care to:

(a) attempt to reunite the "lost" trapped cat with his owner and notify law enforcement of the discovery (see the section on Bailment above, incorporated by reference here), and

(b) to not harm, kill, or abandon the animal in direct violation of state law (viz., RCW 16.52.205, RCW 16.52.207, and RCW 9.08.070).

If accidental finders of lost property owe a duty of care, then so must intentional collectors of property responsible for causing those items (or here, animals) to become "lost." Having trapped a domestic animal, a duty to act reasonably must exist, particularly where one has actual or constructive knowledge of the cat's domesticated status and substantial certainty exists that the animal belongs to a close neighbor. Here, it should have been plainly obvious to Mr. Lind that he had quite recently trapped Mrs. Damiano's cat, Boo, yet, inscrutably, he failed to describe to her the events that transpired literally minutes prior. Unless so remote that the court can determine as a matter of law that no such duty exists, a court

weighs policy along with common law and statutory authority to determine the existence and extent of a duty of care. The existence of a duty may be predicated upon statutory provisions or on common law principles. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932 (1983). “In general, courts will find a duty where reasonable persons would recognize it and agree that it exists. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 53, at 359 (5th ed. 1984).” *Tallariti v. Kildare*, 63 Wash.App. 453, 456 (1991). In this case, the preferable public policy and existing Washington law requires individuals who intentionally set traps that ensnare domestic animals to seek out the owner of said animals.

### **C. Malicious Injury to a Pet**

As with the prior claims, the court must accept as true that Mr. Lind trapped Boo, that he made the malicious comments about skunks, cats, and animals as asserted by Mr. Damiano, Mrs. Damiano, and Ms. Jenne, that his wife expressed exasperation and disgust with the abundantly populated neighborhood of cats when presented with a docile request from Ms. Hoskins’s four-year-old daughter, and that Mr. Lind had the resources (traps, bait, training, firearms, vehicle) and incentive (unabating property damage from nuisance animals, including “feral” cats) to engage in misconduct expressly proscribed by state anticruelty and pet theft law. For all the above reasons, this claim should go to a jury.

#### **D. Trespass to Chattels and Conversion**

As with negligence, Mrs. Damiano's earwitness testimony and Ofc. Molett's declaration defeat the premise that Mr. Lind did not trap Boo and thus interfere with the Damianos' possession and enjoyment of their property either on a temporary or permanent basis. Furthermore, undisputed is that Mr. Lind willfully set a trap filled with tuna fish, using an attractant that in essence waived any objection to having wildlife and neighborhood cats enter his private property. *Answer to Plfs' Int. No. 7 (CP 81-83)*. Comparable doctrines include assumption of risk, license, waiver of trespass – all amounting to an invitation to hungry animals far and wide to visit the Linds' home. Having trapped for years at multiple locations, beginning in Coeur d'Alene, Mr. Lind cannot plead ignorance in this process, for he was both allegedly trained in trapping feral cats and nuisance animals (see *Answer to Plfs' Int. No. 7*) through the Kootenai Humane Society several years ago, and he had repeatedly trapped neighborhood cats, including the Baumans', just the year before. In other words, Mr. Lind's trapping activities are of long duration, involve considerable planning and some training, and were part of a deliberate design to achieve a specific result – viz., willful action.

What Mr. Lind did with Boo after being trapped was also intentional. Of the numerous alternative outcomes, the jury will have to select one. For purposes of summary judgment, however, the court must permit a jury to conclude that Mr. Lind intentionally abandoned, injured, or killed him, instead of letting him out of the cage (and then not telling

Mrs. Damiano that he did so, at any point, even after she approached him moments thereafter). Indeed, even releasing a cat from a trap without returning him directly to his owner is an intentional act. Part and parcel with the trapping, however, the court must account for the post-trapping discussion between Mr. Lind and Mrs. Damiano. In lying to her about not trapping a cat that morning, Mr. Lind engaged in intentional misconduct, depriving her of information she could have used to locate Boo and causing her distress to mount.

Whether the actions were also without legal justification is a question for the jury. For if the jury believes that Mr. Lind abandoned, injured, stole, secreted, or killed Boo, then all actions assuredly could never qualify as justifiable. See RCW 16.52.205, 16.52.207, 9.08.070. Having admitted that he lured and trapped Boo, Mr. Lind cannot dispute having intentionally interfered with the Damianos' property interests in Boo.

Mr. Lind may suggest that his acts were in "good faith," and therefore excuse or provide legal justification for the intentional interference. Good faith, however, is immaterial to whether he had "lawful justification." Defendants' citation to *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 566 fn. 8 (2005), undercuts any assertion to the contrary by stating that "good faith is irrelevant in a conversion action[.]" In *In re Litzinger*, 340 B.R. 897 (2006), Defendant's good faith belief that she had a right to funds in bankruptcy estate held jointly with her

estranged husband was irrelevant to a conversion claim. It need only be proved that defendant intended to do the act that deprived the other person of his property. *Id.*, at 904.

“An actor is not relieved of liability to another for trespass to a chattel or for conversion by his belief, because of a mistake in law or fact not induced by another, that he (a) has possession of the chattel or is entitled to immediate possession, or (b) has the consent of the other or of one with power to consent for him, or (c) is otherwise privileged to act.” *Id.*, at 904. Here, the act depriving the Damianos of their property was Mr. Lind’s luring and trapping Boo and then preventing him from being found and saved – whether by failing to disclose his actions to an inquiring Mrs. Damiano, or abandoning, injuring, or killing Boo. *See also Federal Ins. Co. v. Fries*, 78 Misc.2d 805, 355 N.Y.S.2d 741 (1974) (citing Restatements (2<sup>nd</sup>) of Torts § 229); *Wiseman v. Schaffer*, 115 Idaho 537, 768 P.2d 800, 803-04 (1989) (citing to Restatement (2<sup>nd</sup>) of Torts §§ 222, 223, 224); *Luciani v. Stop & Shop Companies*, 15 Conn. App. 407, 544 A.2d 1238, cert. denied 209 Conn. 809, 548 A.2d 437 (1988). The threshold question is whether Mr. Lind had authorization from Boo’s owners to abandon, injure, or kill him, who were the only individuals at law who had the right to make such decisions (barring abandonment, which is a crime even when committed by the owner herself; RCW 16.52.207(2)(c)). Evidently, the answer is no.

Although the conversion claim was made against a Good Samaritan in *Lincecum v. Smith*, 287 So.2d 625 (La.App.1974), the holding is judicious and facts similar given the discovery of an “unexpected” guest. In *Lincecum*, a man took an ill puppy he found in his father’s front yard to another city for medical treatment. When informed that the puppy was blind and treatment would be expensive, the man authorized the veterinarian to euthanize the puppy. The court held that the defendant finder of the dog was liable for conversion, noting it was not necessary that defendant’s motive or intent be wrongful, willful, or corrupt. It was sufficient that he deprived the owner of his property “by the act of another who had assumed an unauthorized dominion and control over it.” *Id.*, at 627. Further, the defendant did not do “what the law expected of him under the circumstances.” *Id.*, at 628. He should have realized the puppy was a stray and took action to determine whether someone had reported the dog missing, consistent with the statutory duty imposed upon finders of lost things. *Id.*, at 628 (quoting Louisiana Civil Code Art. 3422, and requiring that the finder do “all that was possible to find out the true owner.”) Even though the result of a “humanitarian act,” as the dog did not belong to defendant, the Louisiana Court of Appeal reversed and found a conversion. *Id.*, at 628. “However, when he authorized the veterinarian to ‘put this dog to sleep’, he asserted both dominion and a right of ownership which he did not legally possess.” *Id.* The court found that when the taking is “wrongful and without the consent

of the plaintiff, some humiliation, embarrassment and inconvenience follows.” *Id.*, at 629. As with *Lincecum*, Mr. Lind found Boo. For purposes of summary judgment, should a jury conclude that he abandoned, injured, or killed Boo – or even that he released moved the trap to his driveway and released Boo into the street, all without having told Mrs. Damiano what he had done with him (thereby frustrating her efforts and opportunity for a successful reunion) – the Damianos have amply stated a claim for intentional intermeddling rising to the level of trespass or conversion.

#### **E. Outrage**

If a jury believes that Mr. Lind trapped Boo, lied to Mrs. Damiano about trapping Boo, and then abandoned, injured, or killed Boo, it may undoubtedly conclude that Mr. Lind engaged in criminal misconduct punishable as a misdemeanor (abandonment), gross misdemeanor (theft), or felony (intentional first-degree cruelty). Assuredly, criminal violations of this nature offend all possible bounds of decency and are intolerable in a civilized community, thereby satisfying the first prong. In that Mr. Lind intentionally or recklessly engaged in the various actions described above (see the analysis of the claims for Trespass to Chattels and Conversion, as well as Bailment, supra), including at and after the moment he was apprised by Mrs. Damiano of her wrong belief (that he refused to correct, viz., that Boo had been trapped in his garage and has gone missing), thereby putting him on specific notice that she was emotionally invested

and actively searching, the second prong is met. Finally, having sought medical treatment for emotional distress and anxiety, been diagnosed with PTSD and acute stress reaction as a result of the actions at bar, and describing in detail the severity of her mental pain, Mrs. Damiano has also furnished evidence satisfying the third prong. Whether conduct is outrageous is ordinarily a jury question. *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wash.App. 407 (I, 2007)(trial court properly left for jury the question of whether failure to report child abuse was outrageous)

**F. Gross Negligence, Reckless, Willful Property Damage and Destruction**

Necessarily assuming that Mr. Lind has lied about possessing Boo, it follows that his failure to notify Mrs. Damiano that he had trapped a cat that morning, that the cat in question was hers, and that he had driven the cat to an undisclosed location to be abandoned, injured, or killed – all after he voluntarily attracted Boo to his property and into the trap from which Boo could not escape and return to Mrs. Damiano, who had been calling him for hours, shows a continuing failure to exercise even slight care in managing Mrs. Damiano’s raw emotional state and caring for her beloved “property” through safekeeping. Should the court refuse to dismiss the intentional torts, then the jury is entitled to determine liability premised on lesser, alternative mental states along the culpability continuum. Lying to Mrs. Damiano about what happened (and then maintaining the silence and secrecy by averting his gaze later in the day and not approaching her in the

days that followed so he could disclose to her that he had trapped Boo) transformed what otherwise might have been deemed mere negligence into something more nefarious, such as gross negligence or outrage, as it places into doubt the veracity of Mr. Lind's other assertions (if he lied about trapping Boo, then it is not a far stretch to conclude he would lie about what he did with Boo), demonstrates willful concealment of misconduct (a jury may reasonably infer that he must be hiding his actions else he would tell the truth), and augments the injury as an aggravating factor.

#### **G. Fraud**

For purposes of summary judgment, Mr. Lind did trap (and thus, see) a cat (specifically, Boo) in his garage the morning of Jul. 24, 2009 and he relocated or killed that cat. His specific fraudulent assertions follow:

1. Mr. Lind did not see a cat in his garage.
2. Mr. Lind did not trap a cat in his garage.
3. Mr. Lind did not see Boo in his garage.
4. Mr. Lind did not trap Boo in his garage.
5. Mr. Lind did not relocate and/or kill Boo, identifying to where he was relocated and/or that he was killed and disposed of.

*Complaint*, ¶ 28 (CP 6-7). Fraud requires proof by clear, cogent and convincing evidence of: (1) representation of existing fact; (2) materiality; (3) falsity; (4) speaker's knowledge of falsity; (5) intent of speaker that it

be acted upon by plaintiff; (6) plaintiff's ignorance of falsity; (7) plaintiff's reliance on truth of representation; (8) plaintiff's right to rely upon it; and (9) damages. *Stiley v. Block*, 130 Wn.2d 486 (1996).

Factors 1-6 and 8 are established based on the evidence and legal authority discussed above. On the question of factor 7 (Mrs. Damiano's reliance on the truth of these representations) and factor 9 (damages suffered by Mrs. Damiano), the court must accept as true for purposes of summary judgment that Mrs. Damiano walked away from Mr. Lind earnestly wanting to believe, and not beginning to be able to fathom, that her neighbor of several years and with whom she had a good rapport could do something so horrible (and criminal). So she continued believing that perhaps Boo had simply gone missing, undertook days searching for miles to no avail, posting flyers, and feeling the increasingly wearisome fear and grief building each day, and then each week, culminating in the tragic recognition that Boo would never return. Aside from concentrating their efforts in the appropriate area, or curtailing their search after learning that it would be futile to save the life of a deceased feline, Mr. Lind's knowing false representations intending to kick the Damianos (and law enforcement) off the scent leading to him and his garage were relied upon by the Damianos to their financial, emotional, and temporal detriment.

Further, as to ¶ 28(e), if the court finds that the post-trapping handling of Boo remains a jury question, and that one plausible outcome is that Boo was abandoned or killed, then all elements are easily satisfied. Of

relevance to this claim and that of outrage is *Katsaris v. Cook*, 180 Cal.App.3d 256 (1986), an action involving a claim for negligence and IIED arising from the shooting of the plaintiff's dogs by the livestock owners' employee. Though the court dismissed claims arising from the actual killing of the plaintiff's trespassing dogs, it held that the justifiable canicide statute did not immunize postshooting assertions that the defendant knew nothing about the dogs or their whereabouts. "In the case at hand Mrs. Harvey arguably knew by the time of Katsaris' second visit to her house that he was extremely concerned by the disappearance of the dogs and anxious to locate them." *Id.*, at 267-68. Agreeing that reckless disregard can sustain a claim for outrage and adding that it could, "like any other specific intent, be proven circumstantially by inference from the conduct of the actor," the California Court of Appeals reversed the trial court to the extent it "erred when it granted the motion for judgment as to the claim for intentional infliction of emotional distress." *Id.*, at 269.

While the Court did not assess directly whether Harvey's post-shooting assertions were, in fact, outrageous, this case illustrates that fact questions for the jury exist with respect to Mr. Lind's post-trapping assertions, which – when coupled with his trapping and post-trapping actions relative to Boo (none of which is immune as in *Katsaris* and the statute permitting landowners to repel trespassing dogs through lethal force, for no Washington law permits landowners to bait traps and then relocate or kill animals specifically invited onto the property), and

however recklessly or intentionally represented – remain nevertheless false for purposes of summary judgment. In essence, the fraud lies in the concealment of wrongdoing.

#### **H. Inference and Speculation**

The Damianos anticipate that the Linds will assert that even the most liberal interpretation of CR 56 does not permit leaving reasonable inference behind and entering the prohibited realm of what they consider inadmissible speculation. While the court might be initially inclined to conclude that the Damianos could not build one reasonable inference upon another, that conclusion would fail to give due regard for pre-filing and post-filing factual developments (specifically, Mr. Lind’s ever-changing story to conform to Mrs. Damiano’s unchanging one). Washington has not embraced a fixed rule to the effect that an inference cannot be piled upon another to reach a conclusion, unless the underlying inferences are untrustworthy. *Tegland*, 5 Wash.Prac. § 301.2 (Burden of proof in civil cases)(citing *Petersen v. Seattle Auto. Co.*, 149 Wash. 648 (1928)(dictum: the underlying inference was said to be unsatisfactory and the general rule was applied); *see also U.S. v. Brown*, 943 F.2d 1246 (10<sup>th</sup> Cir.1991)(allowing pyramiding of inferences to find that inference of knowledge of illegal scheme supported further inference that defendant’s purpose, in failing to intervene at the deposition and in destroying the records, was to participate in the clients’ scheme to defraud the United States and the clients’ creditors); *Benson v. State*, 526 So.2d 948

(Fla. Dist. Ct. App. 1988) (store receipts and palm prints of defendant on same permitted jury to infer defendant bought materials a day before bombing identical to those used in the bomb, which in turn permitted jury to infer that defendant built and detonated bomb).

Prior to filing suit, Mr. Lind told Ofc. Mollett that he trapped Boo, yet later that day, in a written statement, he completely disavowed having trapped him, and even clouded the identification by suggesting that he trapped a feral.

After filing suit, Mr. Lind first denied ever seeing Mrs. Damiano that morning in his vehicle (in his *Answer*), then claimed not to recall if he ever left the house that day (in his answer to *Interrogatory No. 25*), and later, in deposition, suddenly recalled seeing Mrs. Damiano and even waving at her (in his deposition). With respect to the location of the trap, before filing suit, Mr. Lind never asserted that the cat was trapped elsewhere than in his garage, where Mrs. Damiano clearly heard Boo. *See Mollett Report (CP 76) and Lind Statement (CP 78)*.

After filing suit, he also updated his testimony by moving the trap's location from the front of his detached garage to adjacent to his sun deck in his backyard (in other words, away from where Mrs. Damiano heard Boo). *Answer to Int. Nos. 7* ("front/south of Defendants' garage at Defendants' current residence") and 35 ("adjacent to his sun deck in his backyard") (**CP 81-82, 87-88**).

This tune-changing conduct is as admissible a fact (not an inference) as any pre-filing conduct except that the former has the added weight of sworn, undisputed admission. In this regard, post-filing assertions bind a party and possess potentially conclusive evidentiary value in similar fashion to a concession made in response to a request for admission or in answer to a complaint, or judicial estoppel arising from a party taking inconsistent assertions of fact. *King v. Clodfelter*, 10 Wash.App. 514, 519-520 (I, 1974). A jury may reasonably infer that Mr. Lind has swapped one lie for another, and thereby discount anything else he might say about the purported handling of Boo after removing him from the trap, for the jury remains the sole judge of credibility:

‘The jury is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony, and, in passing upon the testimony of any witness, the jury has the right to take into consideration the interest that any such witness may have in the result of the trial, the manner of testifying, the former life or conduct, and the addiction to immoral habits of any such witness, as shown by the evidence, in determining the credibility of such witness and the weight to be given to his testimony. State v. Gaul, 88 Wash. 295, 152 P. 1029. Since it is the exclusive province of the jury to pass upon the credibility of the witness, under rules laid down by the court, the jury may accord to the testimony such weight as it deems proper, even though the testimony be uncontradicted and not directly impeached, and may exercise its judgment and discretion in this respect to the extent of wholly disregarding the testimony where there are facts or circumstances, admitted or proved, which tend to establish the untruth of such testimony. Wainscott v. State, 8 Okl. Cr. 590, 129 P. 655; Meiggs v. State, 16 Okl. Cr. 557, 185 P. 450.’ *State v. Foley*, 174 Wash. 575, 25 P. (2d) 565, 567.

*Simmons v. Anderson*, 177 Wash. 591, 596 (1934)(emphasis added). The doctrine articulated in *Simmons* articulates the permissive variation of the Latin maxim *falsus in uno, falsus in omnibus*. Absent independent corroboration of Mr. Lind's self-serving claim that he simply let Boo out of the trap, the jury has added justification to disregard his rendition of events. On summary judgment, and especially in the context where he and only he had exclusive custody and control over Boo (one of the justifications for presuming fault upon prima facie proof of breach of bailment and for inferring negligence through the evidentiary doctrine of *res ipsa loquitur*), the trial court improvidently assumed the truth of Mr. Lind's statements, utterly disregarding the surfeit of contradictory circumstantial evidence and reasonable inference. Defendants may argue that courts should not make credibility determinations on summary judgment, but such a contention does not justify assuming, as the trial court did here, that the defendant must be taken at his word (i.e., as fully credible). In so doing, the trial court usurped the role of the jury and denying them their exclusive right to ascertain credibility and either accept or reject Mr. Lind's tale. If Mr. Lind were opposing the Damianos' motion for summary judgment, the court would have correctly accorded full credibility to Mr. Lind's statements, as required when construing the facts in the light most favorable to the nonmoving party. Yet in this case, the trial court inverted the rule, accepting Mr. Lind's assertions as gospel truth and relying on them to grant his motion for summary judgment dismissal.

In speaking of the fallacy of the rule that piling inferences upon inferences reaches into the realm of inadmissible speculation, various courts have explained that if this interpretation were adopted, juries could rarely convict by circumstantial evidence, for if enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking and the question, especially on summary judgment, is merely whether the total evidence, including reasonable inferences, when put together, suffices to warrant a jury in concluding fault by evidentiary preponderance.

Today most students of the problem of inference recognize that any single vision about the world or conclusion of fact rests on a multitude of inferences, premises, and beliefs, on a large complex of assumptions, and on a body of implicit or explicit principles by which the human organism perceives, organizes, structures, and understands experience; thus it is generally conceded that it is meaningless to denounce multistaged or cascaded inferences.

1A John H. Wigmore, Evidence § 41, at 1112 (Peter Tillers rev. 1983). In the criminal context, see *Dirring v. U.S.*, 328 F.2d 512 (1<sup>st</sup> Cir.(Mass.)1964), *cert. den'd*, 377 U.S. 1003, *reh. den'd*, 379 U.S. 874 (criminal conviction upheld); *State v. Brunson*, 128 Wn.2d 98, 114 (1995)(allowing inference as sole and sufficient proof of element of crime where nexus between foundational fact and elemental fact is sufficient beyond a reasonable doubt).

In the civil and most applicable context of proof of accidental death, see *Englehart v. General Elec. Co.*, 11 Wash.App. 922, 927

(1974)(allowing accidental death to be established by reasonable inference from circumstantial evidence). In *Englehart*, the Court of Appeals reversed the trial court in finding that a piling of inferences upon inferences insufficiently proved accidental death and, thus, life insurance coverage. The jury was asked to infer death and how death occurred from these undisputed facts:

Those who last communicated with the insured were told that he was on his way fishing. His car was discovered at the Yacht Club; the boat was found adrift with the ignition on, the throttle at one-quarter speed in a forward running position; and the tie-ropes were all in place. Testimony by the insured's children indicated that he was not a good swimmer, but when he swam he put his wallet in the glove compartment of the boat. Calhoun's swim trucks were found in the car, but his wallet was not in the boat or in the car. The children also testified that on occasion the insured had difficulty with the automatic lift of the propeller on the inboard-outboard motor, and that it was necessary for him to enter the water or lean over the back of the boat to correct the problem. Further, the jury was entitled to believe from all of the evidence that the insured was in good health; had a great deal of love and affection for his children and was attentive to them; and he was not depressed, but in a healthy state of mind. In light of the foregoing, the jury reasonably concluded that the insured died accidentally as defined by the court's instruction.

*Id.*, at 926-27. When the jury found that the insured died and his death was accidental, it properly drew inferences from the above facts, requiring reversal of the trial court's dismissal n.o.v. The court should keep in mind that the rule concerning conflicting inferences only applies in the context of trial, not on summary judgment where, by definition, any conflicting inference mandates denial of the motion. As with *Englehart*, a jury could

reasonably infer that Boo was abandoned or killed after being trapped by Mr. Lind.

In a remarkable twist of inferred fate, the court in *Cappo v. Allstate Life Ins. Co.*, 809 S.W.2d 131 (Mo.App.1991) held that an alleged death by murder was not an accident where the insured (an associate of organized crime indebted to the mob) anticipated his own murder. Though murder was not factually proven, the inference of murder properly arose because his death was neither unforeseeable nor unexpected. Similarly, the evidence offered in opposition to summary judgment, concerning Mr. Lind's personal views and violent actions involving animals, and cats in particular, before Boo's disappearance, raises the inference that Boo was abandoned, injured, or killed by Mr. Lind, as Defendants' contrary assertion that Boo's simply wandered away never to return home was neither foreseeable nor expected.

## V. CONCLUSION

The Damianos have suffered immensely from the brutal realization that Boo will never come home. However, this case impacts not only the Damianos, but the entire Chewelah community and those like Ms. Hoskins who lose their cats due to neighbors' improvident trapping. A reversal of this dismissal is not only legally required but will send the message that if people choose to set traps for cats in congested residential areas, they bear the risk that they may succeed in trapping cats regarded as family members by those a stone's throw away. In turn, they are bound by the

law to deliver the cats to animal control or to the actual owner instead of engaging in self-help.

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

DATED this 10th day of December, 2010.

PAUKERT & TROPPEMANN,  
PLLC

A handwritten signature in black ink, appearing to read 'B.L. Beggs', written over a horizontal line.

BREEAN L. BEGGS, #20795  
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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

Breean L. Beggs, certifies as follows:

I am a citizen of the United States of America, over the age of 18 years, and competent to be a witness herein.

That on the date set forth below, I caused to be served a copy of the foregoing Appellant's Brief to the following by the method indicated below:

- Via U.S. Mail, postage prepaid
- Via Hand Delivery
- Via facsimile to \_\_\_\_\_

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

12.10, 2010, Spokane, WA

  
\_\_\_\_\_  
BREEAN L. BEGGS