Washington Supreme Court

Supreme Court Docket No. 103344-3

Division III Docket No. 396762

Yakima Cy. Sup. Ct. Cause No. 22-2-00317-39

TORY GOMSRUD and JEREMY GOMSRUD,

Plaintiffs-Petitioners,

-against-

DANIEL R. CAMPEAU, et ux.,

Defendants-Respondents.

PETITION FOR REVIEW BY WASHINGTON SUPREME COURT

ADAM P. KARP, ESQ.
ANIMAL LAW OFFICES, PLLC
Attorney for Petitioners Gomsrud
114 W. Magnolia St., Ste. 400-104
Bellingham, WA 98225
(888) 430-0001
WSBA No. 28622

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/RULES

I. IDENTITY OF PETITIONER

Tory and Jeremy Gomsrud, through Adam P. Karp, petition for review under RAP 13.4(b)(1), (3), and (4).

II. COURT OF APPEALS DECISION

The Gomsruds seeks reversal of those parts of the attached Court of Appeals decision (**Exh. A**) holding (1) that the doctrine of "reasonable necessity" is confined to constitutional application and, thus, not part of any common law supplementing RCW 16.08.020, nor is it derogated by RCW 16.08.020; and (2) that the intentional slaying of a dog by gunshot does not constitute the common law tort of conversion by destruction or alteration per *Restatement (2nd) Torts* § 226.

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in:

A. Finding that the doctrine of "reasonable necessity" is not borne of common law, or even a common law doctrine with constitutional underpinnings, and thus, does not serve as both a backdrop (and additional element) for justifiable canicide under

RCW 16.08.020 as well as an elucidation of the limit of any relevant constitutional provision?

B. Relatedly, finding "reasonable necessity" is not of common law, so RCW 16.08.020 is not in derogation thereof, requiring its strict construction?

C. Rejecting as a matter of law any conversion premised on the exercise of dominion and control over personalty of another resulting in its destruction or alteration, as described in *Restatement (2nd) Torts* § 226?

IV. STATEMENT OF THE CASE

Daniel Campeau began keeping chickens less than a decade ago and selected them exclusively for egg production to treat his gout. **CP 170:23:6-19.**

In 2017, the Gomsruds rescued Rainier, a female Australian Shepherd mix, from Humacao, Puerto Rico at about three weeks of age, malnourished and bug-infested beneath a pile of leaves. Emma, the Gomsruds' daughter, was then four. In no time, Rainier, a name inspired by her propensity to ascend great

heights to the arms, chest, and shoulders of Tory and fall asleep, became a close family member who proved obedient, loving, and utterly disinterested in birds of any kind, whether in Puerto Rico, Oregon, Michigan, the Seattle area, or in Tieton, where Campeau would later kill her. **CP 138:¶ 2, 139:¶¶ 3-4; CP 149:¶ 5, CP 150-154:¶¶ 8-19; CP 162:¶¶ 31-32.**

In 2018, Campeau and his neighbor Kim Hipner executed a *General Affidavit,* which he understood would allow him to enter her premises to keep her kids safe, her animals safe, the property from having damage, or anything a property owner would do to keep things going, yet he did not consider himself her agent. **CP 174:59:11-20, CP 204.** Hipner did not construe the *General Affidavit* as establishing a principal-agent relationship, either, nor would she indemnify him for his actions, implying she did not convey control to him sufficient in her mind to establish legal agency. **CP 217:70:7—71:16** (adding he is responsible for his choices).

The Gomsruds' friends Simona and Tomme Long, a

married couple, purchased property adjacent to Hipner. **CP 158:¶¶ 3-6; CP 165:¶ 3.** The last week in May 2021, the Gomsruds visited the Longs' farm in Tieton, bringing Rainier. Emma and Tory were with Rainier by the fence line where Jeremy was working. Hipner then appeared and they began conversing. Tory introduced Hipner to Rainier, who had entered Hipner's premises and was in the area where she would later be slain by Campeau. At no time did Rainier show interest in Hipner's chickens or other animals but was, instead, well-tempered and sweet. Hipner never said Rainier was not permitted on her premises. She even commented on how nice Rainier was. **CP 148:¶ 3, 149:¶ 4.** Hipner never trespassed the Longs, their guests, or their animals from her property. **CP 218:89:8-18.**

About two months later, on 7.23.21, Simona traveled to the Tieton property. **CP 159:¶ 7, CP 166: ¶ 5**. On this date, Hipner had two chickens. **CP 212:23:1-6.** She kept them in a coop at the northern edge of her premises abutting the Campeaus. **CP 215:58:2-11, 24—59:1, CP 224.** She last saw them alive the

morning of 7.23.21 when they were let out around 6 a.m. or 8 a.m. **CP 212:24:7-15.** Hipner opined that her 18-year-old son Chance probably locked the pen after the chickens were already out that evening. **CP 213:27:11-14**. Their bodies were never found but, instead, only handfuls of feathers. **CP 213:28:1-14.**

On 7.24.21, about 11:30 a.m., Tomme, her daughter, and her two nephews met Simona at the Tieton property. About an hour later, around 12:30 p.m., Jeremy, Emma, and Rainier joined them. **CP 159:¶¶ 7-8; CP 166:¶¶ 4, 6, 7; CP 140-142:¶¶ 6-9**. Tomme took Emma to the RV on the premises to be with her daughter and nephews while Jeremy assisted Simona with the broken lawnmower. Rainier stayed close to Jeremy as she was wont to do and never entered Campeau's premises. **CP 142:¶¶ 10-12; CP 159:¶ 8, CP 161:¶ 21; CP 166:¶ 8.**

At about 1 or 1:30 p.m., Tomme left the Tieton property with her daughter and two nephews. Emma remained in the RV while Jeremy continued assisting Simona outside. **CP 166:¶¶ 9-10; CP 159:¶ 8; CP 142:¶ 10.** At about 3 p.m., Jeremy and

Simona were pulling posts along the fence line separating Hipner's from the Longs' premises. Rainier was a short distance away and visible to both Jeremy and Simona, sniffing by Hipner's wood pile at the moment Campeau killed her. **CP 142:¶ 12; CP 159-160:¶¶ 9-12.** Jeremy is confident Rainier never left Hipner's premises. **CP 273-274:¶ 3.** Simona Long similarly kept Rainier within her direct line of sight or periphery at all times she was on Hipner's property, never straying onto Campeau's. **CP 276:¶ 2.** Long heard no barking, commotion, or audible chaos typical of an attack on chickens at any time over the period Rainier was at the Longs' farm, and certainly not in the period she was on Hipner's property. **CP 276-277:¶ 3.**

After an initial blast, and then a pause, Jeremy heard three more gunshots in rapid succession, while Simona heard two or three. Between the first discharge and the other blasts, Simona and Jeremy screamed "Stop! Stop!" over and over, "You are shooting our dog! Stop!" **CP 159-160:¶¶ 9-10, 13-15; CP 142-143:¶¶ 12-13.** Jeremy prepared the image below to demonstrate

the approximate locations of Rainier, Campeau, Simona, and Jeremy. He estimates the distance was 171 feet (about 57 yards) from Rainier to Campeau when he fired. **CP 143:¶ 16**.

Jeremy and Simona jumped the fence and raced to Rainier's side, encountering Campeau and Hipner. They saw Rainier's internal organs sprayed onto the wood pile. **CP 161:¶**

22; CP 143:¶ 13. Campeau was still carrying the lethal weapon, showed no remorse, but emanated a "righteous" indignation and anger at Jeremy and Simona purportedly allowing Rainier to leave the Longs' premises. **CP 143:¶ 14.** Simona describes Campeau as "enraged and physically shaking with anger." **CP 160:¶ 16, CP 161:¶ 23.** Campeau specifically told Simona he did not see Rainier attack the chickens. **CP 160:¶ 18.** Campeau never told Hipner that he saw a dog actually enter the enclosure and make contact with any chickens the date of the incident. **CP 219:104:10-13.** When Simona asked if Campeau saw her and Jeremy when he shot, as they were feet from Rainier, and she asked what if there were a ricochet, or Emma present, Campeau just held his rifle and stared, and walked away silently. **CP 161:¶ 24.**

Simona urged Jeremy to quickly bury Rainier before Emma came out to see her bloodied remains. He did so, and then broke the horrible news to his daughter, while holding back his own immense emotion. She sobbed, Jeremy cradled her, and

picked her up to comfort her. **CP 161:¶ 22, CP 162:¶¶ 28, 29; CP 143:¶ 15.** The incident continues to afflict the Gomsrud family. **CP 149-150:¶¶ 6-8.**

In deposition, Campeau claimed that he saw a white animal in the backyard around 2 or 3 a.m. on 7.24.21, between the pin oak and the pen (which he believes was possibly Rainier); then claimed he saw Rainier lunging at his coop around 5 or 6 a.m. on that day, trying to get into the pen, causing the birds to alarm (in the same area he saw the white animal earlier) but that he got her to leave by opening the window and screaming; then later in the morning around 9 or 10 a.m., Hipner told him that her chickens were missing, which he assumed were taken by Rainier. **CP 180:85—182:91, CP 183:95:13.**

Later in the day after lunchtime, Campeau allegedly saw Rainier by his pen. **CP 180:85:23-24.** Campeau claims he exited the garage and screamed at her, causing her to run to the other side of the coop and harass the chickens who had gone there, but does not recall her ever coming at him or acting aggressively

toward him in that moment. **CP 184:100:16-23.** Campeau immediately ran into his house through the back door and got the gun. **CP 184:101:4-7, CP 195**. After about half a minute, he emerged from the front door of his house, not having seen the animal over that period. **CP 185:103:7-19.**

When he emerged from the front door, he saw the animal at the southwest corner of his property. **CP 185:105:13—186:106:15.** He watched her heading southbound. **CP 186:106:16-23**. Though she went forward and sideways, she did not retreat back toward the coop at any point. **CP 186:106:23—107:9.** Campeau walked down his driveway toward the garages, stalking her as she continued to meander south. **CP 186:107:10-16.** He observed her leave his property, stop and sniff at Hipner's empty coop and continue all the way across Hipner's property to the wood pile (adjacent to the Long property), where she stopped and was killed. **CP 186:107:17—108:25.**

Campeau testified that from the moment he emerged from the house with the gun to when he killed her, she was unaware

of his presence. **CP 189:119:7-19.** She was also not then going after any animal, because, in his words, "[t]here were no animals for her to go after…." **CP 191:126:17-20.** When he killed Rainier, he claims to have fired three times, and he was standing against an oak tree. **CP 186:109:5-13, CP 188:114:7-12.** He estimated 65 yards for the distance from the oak tree to the wood pile. **CP 186:109:17-19.** Rainier was not moving the moment before he killed her. **CP 191:127:16-22.**

At no point between exiting the house with the gun to killing her did Campeau try at all to communicate with Rainier. **CP 192:131:19—132:5**. He never tried to befriend the dog. **CP 192:133:9-21.** On the date of the incident, Campeau had an arsenal from which to select, and chose the Bushmaster XM-15 with hunting ammunition (boat-tailed soft tip 60 grain). **CP 176:69:22—177:70:4**. He used the same ammunition against squirrels. **CP 177:70:24—71:4.**

Campeau admits that before he went inside to get the gun, he intended to kill, based on his false belief that Rainier had

killed Hipner's chickens and, having the "taste" of birds, would "not stop until [she] ha[d] everything." He claimed the "only manner that was appropriate was the kill the predator." **CP 179:78:8-17.** Yet, there was undisputedly no damage to the perimeter fence or any structural component of the pen. **CP 180:83:10-17** (noting just "loose dirt thrown around"); **CP 180:84:16—185:1** (confirming no damage to physical structure). And Rainier was nowhere near the chickens when he slew her. The next morning, Campeau found one of his Wyandotte's deceased securely within his pen; no necropsy was done to determine why she died. **CP 180:82:20-22.**

Defendants moved for summary judgment dismissal. On 2.17.23, Judge Gibson entered an order superseding initial Findings and Conclusions of 1.17.23 under CR 56(d). **CP 355-356:¶¶ 1-6.** From these "findings," the court interpreted the Campeaus' affirmative defense RCW 16.08.020 so that a dog who never touches a chicken, and is blocked by a fence, is nonetheless statutorily "chasing" and "injuring" her. **CP 357:¶¶**

7-8. The court also held as a matter of law that "reasonable necessity" had no place in adjudicating RCW 16.08.020. **CP 357:¶ 9.** It further concluded that if the dog seen by Campeau was Rainier, then the entire case would be dismissed. **CP 359:¶ 13.**

Defendants filed a second motion for partial summary judgment, which the court granted in its entirety by dismissing the conversion claim as a matter of law and denying emotional distress damages for conversion and trespass to chattels. **CP 362:¶¶ 1-2.** Judge Gibson certified both orders on summary judgment for immediate review under RAP 2.3(b)(4) and CR 54(b). **CP 360-361, 365.** On 5.30.24, Division III rendered an unpublished decision affirming dismissal of conversion, refusing to interpret RCW 16.08.020 strictly, rejecting "reasonable necessity" as an element of the statutory defense, and declining to interpret undefined terms used therein (like "chase" and "control") narrowly.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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

a. RCW 16.08.020

Though the *Gomsrud* decision is itself unpublished, it furthers the reasoning from the published case *State v. Wilson,* 10 Wash.App.2d 719 (II, 2019). At 11-12 of the opinion, quoting *Wilson,* Division III held that "reasonable necessity" was a limitation on the "*constitutional* right to shoot animals to protect property," not "grafted into a *statutory* defense." *Id.,* 728. Further, it held that RCW 16.08.020 was not in derogation of common law but, one must assume, in derogation of a "constitutional right," to which the canon of strict construction would not apply. In reaching this conclusion, *Gomsrud* and *Wilson* mistakenly asserted that the:

> seminal [Washington Supreme Court] cases all discuss the 'reasonable necessity' requirement as it applies to the constitutional right to shoot animals to protect property,

adding that none of the three Supreme Court cases referenced—

State v. Burk, 114 Wash. 370 (1921)*, Drolet v. Armstrong,* 141 Wash. 654 (1927), and *State v. Vander Houwen,* 163 Wn.2d 25 (2008)—"address RCW 16.08.020 or its predecessor statutes." *Gomsrud,* 13 (quoting *Wilson,* 728). This reasoning, from two divisions of the Court of Appeals, not only misreads the Supreme Court decisions, but upends the very principle of common law derogation articulated by yet two other Supreme Court cases, *Potter v. Washington State Patrol,* 165 Wn.2d 67 (2008) and *State v. Kurtz,* 178 Wn.2d 466 (2013).

First, the "reasonable necessity" condition predated enactment of the Washington Constitution, which, in turn, enshrined the common law. In this regard, *Gomsrud* conflicts with *Potter*, which reiterated that the common law governs so long as not inconsistent with constitutional, federal, or state law, citing RCW 4.04.010. It also explained being "hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law." *Id*. Without this, the common law remains in

effect. *See Kurtz,* 476-477 (*Potter* does not require clear evidence to *preserve* the common law, but, instead, to *deviate* from it). That *Burk, Drolet,* and *Vander Houwen* did not examine the derogation argument comes as no surprise, since no party invoked the statutory defense.

Putting aside that the right to defend one's property predated statehood, and even nationhood, and is one of the preeminent natural laws of human civilization, Divisions II and III's holdings suggest there simply was no common law constraint on the right to defend oneself or one's animals, and that the entire concept of "reasonable necessity" arose with respect to the Washington Constitution. Taking *Burk, Drolet,* and *Vander Houwen* to their sources, however, we end up not at the foothills of the Constitution, but the wuthering heights of the common law.

Drolet states:

> Under well-considered cases and in all good reason, **a person has a natural right to defend and **656* protect his domestic fowls**, and in doing

> so may kill dogs engaged in injuring and destroying them if there is reasonable and apparent necessity therefor, to be determined by the trier of the facts.

Drolet, 655-56 (emphasis added). It could not have been any clearer about the justification for Armstrong's son killing Drolet's dogs as they were in the midst of attacking, injuring, and killing the Armstrong family's chickens. *Id.,* 654-655. The Constitution is not referenced a single time in the entire opinion,[1] nor would it sensibly apply.

Rather, it affirmed the jury's finding for the Armstrongs based on the *common law/natural right* to defend one's animals with lethal force as reasonably necessary. The dogs depredating upon the Armstrongs' chickens were not owned by the State, and were not wild game, but were privately owned dogs. Due process has no place in the dispute, making *Drolet* on all fours with the

[1] Concurring Justice Fullerton does speak to the Legislature's "constitutional power … to prescribe the terms and conditions under which [dogs] may be kept by their owners, and under what circumstances they may be impounded or destroyed by persons other than their owners." *Id.,* 658. However, this single reference has no bearing on the majority holding of the case except insofar as Justice Fullerton is examining the predecessor to RCW 16.08.020 (RCS § 3107), which yet again contradicts the holdings of *Gomsrud* and *Wilson,* stating that *Drolet* did not address the predecessor statute to RCW 16.08.020.

case at bar in that Rainier was not wildlife nor owned by the State, yet accused of having been engaged in mischief with the Campeaus' chickens.

State v. Burk, 114 Wash. 370 (1921), also discusses the common law/natural right origins of reasonable necessity. In discussing a criminal case, *State v. Ward,* 170 Iowa 185 (1915), *Burk* repeats a question presented therein:

> 'The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it in another way: Is it open to the *375 defendant to justify an admitted killing by showing a **reasonable necessity** in defense of person or property?

Burk, 374-75 (quoting *Ward*) (emphasis added). *Burk* then, in complimentary fashion, references a New Hampshire case that answers that question:

> This whole question is elaborately and learnedly discussed in the case of **Aldrich v. Wright,** 53 N. H. 398, 16 Am. Rep. 339. In that state there was a law for the protection of, and against, the killing of mink. Wright had some geese which these mink were in the habit of chasing and threatening to kill. On one occasion, when the mink were in the act of

> chasing the geese, Wright, for the purpose of protecting the latter, shot and killed the mink.

Id., 375 (emphasis added). The very first paragraph of *Aldrich* confirms that the common law indubitably existed before, and was enshrined by, the federal Constitution:

> "All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property." Bill of rights, art. 2. In this declaration of the right of defending life and liberty, and protecting property, the bill of rights, more properly called the declaration of rights, **professes to set forth a mere recognition of a natural right**. **The right thus recognized is maintained by the elementary principles of the common law, which are, in general, adopted by the ninetieth article of the constitution**, subject to legislative alteration and repeal: as a fundamental and essential right, the defence of life, liberty, and property is here put, by a special guaranty, above the altering and repealing power of the legislature.

Aldrich v. Wright, 53 N.H. 398, 399 (1873) (emphasis added). *Aldrich* endorses the common law derivation of the doctrine several times throughout the opinion. *Id.,* 399-400 ("His natural, common-law, and constitutional right of defence…"); 400 ("Long upheld by the common law, it has, under the

administration of that law, theoretically been what it was before; and not, reinforced by a constitutional guaranty, it is what it has always been."); 405-06 ("The right to kill a man in self-defence is not the test of the right to kill a dog in self-defence. Reasonable necessity is the test in both cases…."). In speaking of an older British case *Vere v. Cawdor & King,* 11 East 568, involving the killing of a dog (characterized as trespass), the concept of reasonable necessity also arose. *Aldrich,* 411.

State v. Vander Houwen, 163 Wn.2d 25 (2008), was, like *Burk,* a criminal case involving killed wildlife, not a civil case concerning a privately owned dog. *Vander Houwen* held that the wildlife code did not abrogate a constitutional right to protect property from destructive game, specifically Wash.Const. Art.I, Sec. 3's guarantee of due process. *Id.,* 33. In explaining *Burk*'s holding, however, it does not confine the "reasonable necessity" doctrine to the Constitution but admits that it "illustrates more than a common law principle." *Id.* That "reasonable necessity" is a common law precept does not prevent it from also being

elevated to a constitutional right. Neither does such exaltation obliterate its humble origins.

State v. Wilson, 10 Wash.App.2d 719 (2019), also a criminal case, made the same error as *Gomsrud* by failing to observe that "reasonable necessity" is more than simply a limitation on a constitutional right, but is additionally a preexisting limitation on a common law defense. And, as *Potter* and *Kurtz* warned, common law endures unless legislatively eschewed. And RCW 16.08.020 does not evince an intent to allow dog killings without reason or need. Indeed, it should be evident that the second section of RCW 16.08.020 (concerning "after the fact" killings) has no counterpart at common law and is evidently in derogation thereof.

The lesson from reviewing all three cases, and authorities they rely upon, is that reasonable necessity boasts a dual pedigree—in both common law and constitutional reach. To say, or imply, that no common law exists on the subject of defending animate personalty from dogs, which may be abrogated or

derogated by statute, lacks merit, as the foregoing authorities articulate. More to the point, the Armstrongs would not have prevailed, and *Drolet* simply could not exist as written, were there no common law "reasonable necessity" defense of animals bestowed upon the boy and his father who killed Drolet's dogs in the act of killing their chickens. Had RCW 16.08.020 been drafted to state that killings are justified "regardless of reasonable necessity,"[2] then at least strict construction principles would govern. Accordingly, *Gomsrud* has conflicted with several Supreme Court decisions (as has *Wilson*, the only other case to have interpreted RCW 16.08.020 to date.)

b. Conversion

At 25-26, *Gomsrud* declined to find a conversion under *Restatement (2nd) Torts* § 226, stating Washington has not adopted it. In so holding, it cites to *Burton v. City of Spokane,* 16 Wash.App.2d 769, 773 (2021), *Repin v. State,* 198 Wash.App.

[2] RCW 16.08.040 creates liability "regardless of the former viciousness of such dog or the owner's knowledge of such viciousness," thus making the deviation from common law explicit.

243 (2017), *Judkins v. Sadler-MacNeil,* 61 Wn.2d 1, 3 (1962), and *Spokane Grain Co. v. Great Northern Express Co.,* 55 Wash. 545 (1909).

Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 4 (1962), concerned conversion by bailee, citing to *Restatement of Torts* § 237 at fn. 3 and to *Salmond on the Law of Torts,* at 3, where it defined conversion as willful interference with a chattel, without lawful justification, whereby a person entitled thereto is deprived of possession of it. In examining the question of knowledge or intention, it quotes from "[a]n excellent statement on this proposition, typifying a long line of authority," i.e., *Poggi v. Scott,* 167 Cal. 372, 375 (1914), which explains the "foundation" upon which "conversion" rests, viz., the "unwarranted interference by defendant with the dominion over the property of the plaintiff from which **injury to the latter results**." *Id.,* 4 (emphasis added). This Supreme Court of Washington decision remains good law 62 years later.

Division III attempted to narrow the broader holding of

Judkins in *Burton v. City of Spokane,* 16 Wash.App.2d 769, 773 (2021), by referencing a new element of "(2) by either taking or unlawful retention," which it credits to *Judkins,* though no such limitation exists, and, indeed, the words "taking" and "retention" are not found in the *Judkins* opinion. Nor in two other Supreme Court cases, *Wilson v. Wilson,* 53 Wn.2d 13, 16 (1958) and *Martin v. Sikes,* 38 Wn.2d 274, 278 (1951). The *Martin* court goes on to consult 2 Cooley on Torts (4th ed.) and find that the use of the term "dominion" goes beyond the narrow concept of depriving a plaintiff of possession, stating, "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." *Id.*, 280 (quoting 2 Cooley on Torts (4th ed.) 498, § 331). As *Martin* explained:

> A judgment for conversion has normally no other consequence than to compel the defendant to buy the converted goods at what is in reality a forced sale. Prosser on Torts, p. 96, § 15; Harper on Torts, p. 63, § 32; Warren, Trover and Conversion, pp. 3, 29, 30…

Id., 287. It follows that when a defendant destroys plaintiff's

property without legal justification, he has exercised unauthorized dominion inconsistent with and hostile to all rights incident to normal ownership of the property, such that the defendant has in essence denuded the property of all value and for which the remedy of a "forced sale," or damages for breach of constructive trust, is appropriate. And, in that regard, dispossession has occurred. *Gomsrud* conflicts with Supreme Court precedent here, as well.

Restatement (2nd) Torts § 221 defines "dispossession" in five ways. Applicable here is (d) destroying a chattel while it is in another's possession. Comment *c* adds:

> A dispossession may consist of an assumption of complete control and dominion over the chattel without an actual taking or carrying away. If the assumption of control effectively deprives the other of all the essential advantages of possession, the dispossession is complete, although the physical position of the chattel may remain unchanged…

Further, comment *d* notes, "The complete destruction of a chattel, as in the case of burning a paper, is a dispossession." Lighting up a dog with gunfire is no different.

Gomsrud's recognition of trespass to chattels as a viable cause of action, but not conversion, creates doctrinal inconsistency, as well. *See Kozol v. JPay, Inc.*, 1 Wash.App.2d 1050, *5 (2017), an unpublished decision, adopting *Restatement (2nd) Torts* § 217's holding that a trespass to chattels may be committed by intentionally "(a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." "Intermeddling" means "intentionally bringing about a physical contact with the chattel," and may take the form of:

> beat[ing] another's horse or dog, or by intentionally directing an object or missile against it, as when the actor throws a stone at another's automobile or intentionally drives his own car against it.

Restatement (2nd) Torts 217 cmt. e. Animal illustrations continue in *Restatement (2nd) Torts* § 226:

> 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.

Ill. 4. If Washington courts embrace *Restatement (2nd) of Torts* for purposes of trespass to chattels, then, when the exertion of dominion and control results in complete destruction (or death of an animal), does not conversion lie? Whether fed poisonous weeds or lethal bullets, the outcome is identical for conversion.

Failing to embrace shooting a dog as a conversion under *Restatement (2nd) Torts* § 226, but recognizing a lesser, reversible intermeddling as a trespass to chattels under *Restatement (2nd) Torts* § 217 leaves blind to the law of torts a graveyard of totaled cars, torched artwork, and gunned-down animals. What is all the more surprising, however, is that the Court of Appeals adopted the *Restatement* as to trespass to chattels without the Supreme Court having entered the discussion whatsoever.

2. RAP 13.4(b)(3) – Significant Constitutional Issues

Gomsrud invoked the Constitution to resist any attempt to restrict the lethal reach of RCW 16.08.020, making "reasonable necessity" such a significant Constitutional issue as to render it wholly insignificant to Washington statutory law. As

so conceived, the "issue" warrants Supreme Court adjudication at two levels – as to its etiology, in the first place, and its applicability, in the second.

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

Issues of first impression that affect not only the parties at bar but affect 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). Skirmishes between farmers and dogs have clearly been part of Washington's pastoral legal fabric since long before RCW 16.08.020's enactment in 1929 (and Rem.Comp.Stat. 3107 (1917 c 161)). The topic of killing depredating dogs drew the attention of Chief Judge Fearing in *Repin v. State,* 198 Wash.App. 243, 279 (2017)(Fearing, C.J., concurring), quoting, nearly 150 years later, the closing of U.S. Senator George Vest in *Burden v. Hornsby* (1870). Vest represented the owner of dog slain by shepherd in putative protection of his flock, a case that made its

way to the Missouri Supreme Court after a fourth trial.[3] Reconciling common, constitutional, and statutory law on this subject that has modernly taken a turn from defending livestock with shotguns to launching arrows at pit bulls (*State v. Wilson*) is long overdue. So is the common law development of conversion, which pertains to all specie of personalty.

VI. CONCLUSION

In failing to find that "reasonable necessity" was required as a common law gloss upon RCW 16.08.020, or that the statute was enacted in derogation of that common law requirement, Divisions II and III have construed RCW 16.08.020 in a fashion that will embolden individuals charged with animal cruelty while denying innocents the protection that reasonable necessity has, since time immemorial, conferred upon them.

Further, the time has come for this Court to adopt the many ways in which conversion may occur as exposited by the

[3] https://www.sos.mo.gov/archives/education/olddrum/StoryofBurdenvHornsby (accessed 8.5.24)

Restatement (2nd) Torts § 223.

Dated this 8.6.24,

[Certified RAP 18.17(c)(10) compliant at under 4999 words]

ANIMAL LAW OFFICES, PLLC

Adam P. Karp, WSB No. 28622
Attorney for Gomsruds

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 8.7.24, I caused a true and correct copy of the foregoing to be served upon Jacob Lara via E-filing Portal of the Court of Appeals.

Adam P. Karp, WSBA No. 28622

EXHIBIT A

FILED
MAY 30, 2024
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

TORY GOMSRUD and JEREMY GOMSRUD, Petitioners, v. DANIEL R. CAMPEAU, and marital community of DANIEL R. CAMPEAU, and MELANIE CAMPEAU, Respondents.	)	No. 39676-2-III UNPUBLISHED OPINION

C●●NEY, J. — Jeremy and Tory Gomsrud (Gomsruds) sued Daniel Campeau and Melanie Campeau (Campeaus) after Mr. Campeau shot and killed their dog. On the Campeau's motion for summary judgment, the superior court dismissed the Gomsruds' claims for conversion, reckless or intentional infliction of emotional distress, and malicious injury to a pet.

On appeal, the Gomsruds challenge the superior court's application of RCW 16.08.020, dismissal of their claims, and holding that noneconomic damages are not cognizable for trespass to chattel or conversion.

We hold that Mr. Campeau presented sufficient evidence that the dog he witnessed harassing his chickens was "chasing" them but not "injuring" them within the meaning of

RCW 16.08.020. As to the dismissal of the Gomsruds' claims for conversion, reckless infliction of emotional distress, and malicious injury to pet claims, we affirm. Finally, we hold that emotional distress damages are available for the Gomsruds' trespass to chattel claim.

BACKGROUND

The Campeaus, Kimberly Hipner, and Simona Long are neighbors. Ms. Hipner's property lies between the Campeaus and the Longs. The Gomsruds are friends with the Longs and would occasionally visit them at their property with their dog, Rainier, and their daughter, Emma.

Mr. Campeau keeps chickens on his property, primarily for their egg production. Mr. Campeau has a gated enclosure for his chickens bounded by "deer fencing." Clerk's Papers (CP) at 172. Ms. Hipner also kept chickens in a coop on her property. In 2018, after Mr. Campeau lost his flock of chickens to a dog attack, he and Ms. Hipner entered into the following agreement titled "General Affidavit:"

> PERSONALLY came and appeared before me, the undersigned Notary, the within named Kimberly I. Hipner and Daniel R. Campeau, who are residents of Yakima County, State of Washington, and makes this his/her statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his/her knowledge:
>
> I Kimberly I Hipner have given Daniel R. Campeau permission to help me care take [sic] my land/buildings and all that this entails, Security of premise ingress and regress of all property boundaries against predators, illegal activities, harm to livestock. Location of this premise is as follows:

> 1550 Old Cowiche rd. Tieton Washington, 98947. This agreement to commence on June 16, 2018. This agreement between the above listed parties will remain in affect [sic] until such time as both parties agree to dissolve the above agreement.

CP at 61 (some capitalization omitted). The General Affidavit was signed by both Ms. Hipner and Mr. Campeau and notarized.

INCIDENT

Mr. Campeau stated that in the early morning hours of July 24, 2021, he saw what appeared to be a dog in his backyard. He noticed the dog again around "dawn" that same morning "lunging" at his chicken coop. CP at 40. Later that morning, Ms. Hipner informed Mr. Campeau that her chickens were gone and presumed dead.

In the early afternoon, Mr. and Mrs. Gomsrud, along with their daughter Emma, and their dog Rainier, traveled from Seattle to visit the Longs. They arrived at the Longs at approximately 12:30 p.m. After working on a lawnmower, Mr. Gomsrud and Mr. Long began pulling fence posts along the border of the Long's property, directly adjacent to Ms. Hipner's property.

Meanwhile, Rainier was sniffing near a wood pile on Ms. Hipner's property along the Long-Hipner property line. Mr. Gomsrud and Mr. Long heard a gunshot, and then heard Rainier cry out, followed by three more gunshots. Mr. Gomsrud and Mr. Long ran to Rainier, who had already succumbed to her injuries. Ms. Hipner and Mr. Campeau, who was carrying a rifle, walked over to Mr. Gomsrud and Mr. Long. Mr. Campeau

claimed he shot Rainier because he saw her at his chicken enclosure harassing his chickens about 30 to 40 seconds before he shot her.

Mr. Gomsrud and Mr. Long buried Rainier's remains on the Long's property. Mr. Gomsrud told his daughter Emma what had happened and she was "emotionally devasted." CP at 143. The Gomsruds enlisted a counselor for Emma to help her "process her complicated feelings about Rainier's heedless death." *Id.*

The day after Rainier was killed, Mr. Campeau reported that one of his chickens, which had become very "despondent" following its harassment by the dog, was dead on the floor of the coop. CP at 36-37. Mr. Campeau also reported that his chickens became "skittish" and did not produce eggs "for several days after the incident." CP at 38, 86.

LAWSUIT AND SUMMARY JUDGMENT

The Gomsruds filed a lawsuit against the Campeaus alleging conversion, trespass to chattel, malicious injury to a pet, intentional or reckless infliction of emotional distress, and property damage for Mr. Campeau's killing of Rainier.

The Campeaus moved for summary judgment dismissal of the Gomsruds' claims based on their contention that RCW 16.08.020 permitted Mr. Campeau to dispatch Rainier under the circumstances. RCW 16.08.020 is a statutory defense that allows a person to kill any dog that he or she sees "chasing, biting, injuring or killing" livestock,

including chickens, "on any real property owned or leased by, or under the control" of that person. RCW 16.08.020.

In addition to arguing that all of the Gomsruds' claims should be dismissed under RCW 16.08.020, Mr. Campeau argued that the Gomsruds' claim for intentional or reckless infliction of emotional distress must be dismissed because Mr. Campeau's conduct was not outrageous as a matter of law. Further, Mr. Campeau argued that the Gomsruds' malicious injury to pet claim must be dismissed absent evidence of malice.

Finally, Mr. Campeau claimed that "chickens can in fact be scared to death," that was confirmed when one of his chickens expired the day after the incident. CP at 87. He alleged in his motion for summary judgment that though "[t]here was no other physical injury to Mr. Campeau's chickens" the birds "were stressed and . . . stress to a chicken is an injury." *Id.*

The Gomsruds opposed the motion arguing that the dog Mr. Campeau saw near his chicken enclosure was not "chasing" his chickens or "injuring" them within the meaning of the statute, that Mr. Campeau did not have "control" of the property on which Rainier was shot (Ms. Hipner's property), and that RCW 16.08.020 required proof of "'reasonable necessity.'" CP at 115-16. The Gomsruds also argued that Rainier could not have been the dog Mr. Campeau saw near his chicken enclosure in the early morning

hours because Rainier was never on Mr. Campeau's property and did not arrive at the Longs until 12:30 p.m.

The Gomsruds further argued that their intentional or reckless infliction of emotional distress claims remained viable because Mr. Campeau's actions were outrageous, and the Gomsruds experienced foreseeable emotional distress. As to the malicious injury to pet claim, the Gomsruds argued that a reasonable fact-finder could conclude that Mr. Campeau's actions were done with malice.

Finally, the Gomsruds argued that Mr. Campeau's "lay opinion is inadmissible under ER 702-04 to support any causal connection" between the dog's harassment of the chickens and why one chicken died. CP at 120. They argued that the chicken's death was never confirmed by any medical evidence and that Mr. Campeau could not opine as to why the chickens became despondent.

After considering the evidence on summary judgment, the trial court concluded that:

> 6. Mr. Campeau possesses requisite skill to offer an admissible expert opinion on causation of injury to his chickens so as to overcome Plaintiffs' objection under ER 702, which this court overrules and deems admissible under CR 56.
>
> 7. Whether the factfinder concludes it was Rainier or not, the animal Mr. Campeau saw as described in findings 2 and 3 above, was "chasing" so as to fall within RCW 16.08.020.

8. Whether the factfinder concludes it was Rainier or not, the animal Mr. Campeau saw as described in findings 2 and 3 above, was "injuring" so as to fall within RCW 16.08.020.

9. The common law doctrine of "reasonable necessity" does not apply to RCW 16.08.020.

10. Plaintiffs' claim Mr. Campeau's actions constituted malicious injury to a pet. . . . [T]he Court finds [Mr. Campeau's] actions were without malice. Therefore, the malicious injury to pet claim is hereby dismissed with prejudice.

11. Plaintiffs alleged the theory of intentional infliction of emotional distress, but conceded in their briefing that Mr. Campeau did not act with the intention of inflicting emotional distress on the Plaintiffs. Therefore, the intentional infliction of emotional distress claim is hereby dismissed with prejudice.

12. Plaintiffs also allege the theory of reckless infliction of emotional distress, sometimes referred to as the tort of outrage. . . . The problem for Plaintiffs is that the Restatement (Second) Torts, sect. 46, requires that the conduct be directed at the person injured, or toward another "person". Mr. Campeau's actions undeniably were not directed at the Plaintiffs, but at their dog. A dog is not a person, even though Plaintiffs try to characterize the dog as a member of the Plaintiffs' "immediate family". . . . Therefore, Plaintiff's claim for outrage is hereby dismissed with prejudice.

CP at 306-08. The court declined to dismiss the Gomsruds' conversion, trespass to chattel, or property damage claims at this stage.

Later, Mr. Campeau brought a motion for partial summary judgment seeking dismissal of the Gomsruds' conversion claim on the basis that Mr. Campeau never took title to Rainier. Mr. Campeau also sought a ruling from the court that emotional distress damages were unavailable for the Gomsruds' conversion and trespass to chattel claims.

The court concluded that the Gomsruds' "claim for conversion is not cognizable on these facts" and dismissed the claim. CP at 362. The court also concluded that the Gomsruds were not "entitled to emotional distress damages as a matter of law for the claims of conversion and trespass to chattels." *Id.*

The Gomsruds appeal.

ANALYSIS

The Gomsruds present four issues for review: (1) whether the Campeaus can assert the defense of RCW 16.08.020; (2) whether Mr. Campeau was qualified to offer expert testimony on the cause of death or injuries his chickens suffered; (3) whether their conversion, reckless infliction of emotional distress, and malicious injury to pet claims were improperly dismissed; and (4) whether they should be permitted to seek damages for emotional distress flowing from their conversion and trespass to chattel claims.

I. APPLICABILITY OF RCW 16.08.020

The Gomsruds argue the court erred when it concluded that the Campeaus had alleged facts sufficient to raise RCW 16.08.020 as a defense at trial. Specifically, the Gomsruds contend Mr. Campeau failed to present evidence that his chickens were being "chased" or "injured" as those terms are used in the statute. They further contend that Mr. Campeau was not qualified to offer an expert opinion regarding the causation of the "injuries" to his chickens. The Gomsruds also argue the court erred when it concluded

that the doctrine "of 'reasonable necessity' does not apply to RCW 16.08.020." CP at 307. Finally, the Gomsruds claim Mr. Campeau was not in "control" of Ms. Hipner's property within the meaning of RCW 16.08.020. Thus, the Gomsruds contend RCW 16.08.020 is not an affirmative defense in this case.

We disagree with the Gomsruds' arguments and hold that Mr. Campeau has produced sufficient evidence to entitle him to raise the defense provided in RCW 16.08.020. With this holding, we need not decide whether Mr. Campeau was qualified to opine as to the cause of his chickens' alleged injuries or death.

This court reviews orders on summary judgment de novo, engaging in the same inquiry as the trial court. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The moving party bears the initial burden of establishing that there are no disputed issues of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When considering a motion for summary judgment, evidence is considered in a light most favorable to the nonmoving party. *Keck*, 184 Wn.2d at 370. If the moving

party satisfies its burden, then the burden shifts to the nonmoving party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 226. While questions of fact typically are left to the trial process, they may be treated as a matter of law if "reasonable minds could reach but one conclusion." *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

Further, a nonmoving party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a nonmoving party must put "forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.*

A. WHETHER "REASONABLE NECESSITY" IS AN ELEMENT OF RCW 16.08.020

The Gomsruds argue that RCW 16.08.020 provides a defense to Mr. Campeau's shooting of Rainier only if he satisfies the additional common law requirement of "reasonable necessity." The Gomsruds further contend that if "reasonable necessity" is not an element of RCW 16.08.020, the statute is in derogation of the common law and must be strictly construed. We disagree with both arguments.

RCW 16.08.020 reads:

> *It shall be lawful for any person who shall see any dog or dogs chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or*

> *leased by, or under the control of, such person, or on any public highway, to kill such dog or dogs*, and it shall be the duty of the owner or keeper of any dog or dogs so found chasing, biting or injuring any domestic animal, including poultry, upon being notified of that fact by the owner of such domestic animals or poultry, to thereafter keep such dog or dogs in leash or confined upon the premises of the owner or keeper thereof, and in case any such owner or keeper of a dog or dogs shall fail or neglect to comply with the provisions of this section, it shall be lawful for the owner of such domestic animals or poultry to kill such dog or dogs found running at large.

(Emphasis added.)

The court in its order on Mr. Campeau's motion for summary judgment stated: "The common law doctrine of 'reasonable necessity' does not apply to RCW 16.08.020." CP at 307.

In *State v. Wilson*, Division Two of this court held that the common law doctrine of "reasonable necessity" is not an element of RCW 16.08.020. 10 Wn. App. 2d 719, 728, 450 P.3d 187 (2019). In *Wilson*, the defendant was attempting to use RCW 16.08.020 as a statutory defense to the crime of animal cruelty, but the reasoning in *Wilson* nevertheless applies under these facts.

The court in *Wilson* reasoned that "[a] 'reasonably necessary' requirement cannot be treated as a fourth requirement for the application of RCW 16.08.020 for two reasons." *Id.* First, the court distinguished the State's cited cases, which included *State v. Burk*, 114 Wash. 370, 195 P. 16 (1921), and *Drolet v. Armstrong*, 141 Wash. 654, 252 P. 96 (1927); the same cases the Gomsruds rely on to support the same proposition.

Wilson, 10 Wn. App. 2d at 728. The court stated that *Burk* and *Drolet* did "not address RCW 16.08.020 or its predecessor statutes." *Id.* Instead, "[t]he court in *Burk* identified a *constitutional* right to shoot animals to protect property, and imposed the 'reasonably necessary' requirement as a limitation on that right." *Id.* The court concluded that nothing in either case suggested that the 'reasonably necessity' requirement could be "grafted into a *statutory* defense." *Id.* Secondly, the court in *Wilson* reasoned that the plain language of RCW 16.08.020 does not contain a "reasonable necessity" requirement. Thus, the court held that "reasonable necessity" is not a requirement of RCW 16.08.020.

We follow Division Two and, for the same reasons, hold that "reasonable necessity" is not an element of RCW 16.08.020. Alternatively, the Gomsruds argue that RCW 16.08.020 is in derogation of the common law and must be strictly construed. We disagree that RCW 16.08.020 is in derogation of the common law.

As discussed above, the seminal cases all discuss the "reasonable necessity" requirement as it applies to the constitutional right to shoot animals to protect property. *Burk*, 114 Wash. at 376 (holding that "the appellant in this case had a constitutional right to show, if he could, that it was reasonably necessary for him to kill these elk for the protection of his property"); *Drolet*, 141 Wash. at 655-56 ("[A] person has a natural right to defend and protect his domestic fowls, and in doing so may kill dogs engaged in injuring and destroying them if there is reasonable and apparent necessity therefor."

(Emphasis added.)); *State v. Vander Houwen*, 163 Wn.2d 25, 177 P.3d 93 (2008) (discussing the constitutional right to defend property under Washington's Constitution article I, section 3). Indeed, the court in *Wilson* noted that "*Burk*, *Drolet*, and *Vander Houwen* do not address RCW 16.08.020 or its predecessor statutes." 10 Wn. App. 2d at 728. Thus, the Gomsruds' argument that RCW 16.08.020 is in derogation of the common law is unpersuasive.

B. MEANING OF "CHASING" AS USED IN RCW 16.08.020

The Gomsruds argue that the word "chasing" as used in RCW 16.08.020 contemplates "free and unrestricted pursuit." Appellants' Br. at 35. Thus, the Gomsruds contend that the fence of Mr. Campeau's chicken enclosure prevented the dog he espied from "chasing" the chickens within the meaning of the statute.

The term "chasing" is not defined within the chapter. The first step in discerning the meaning of the term "chasing" is to look to the ordinary definition of the term. *Lockett v. Saturno*, 21 Wn. App. 2d 216, 223, 505 P.3d 157 (2022). If the statute's meaning is plain on its face then the court gives effect to that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). A dictionary may be used to ascertain the ordinary meaning of the undefined term. *Seattle Hous. Auth. v. City of Seattle*, 3 Wn. App. 2d 532, 538, 416 P.3d 1280 (2018). "Unlikely, absurd or

strained results are to be avoided." *Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d 482 (1992).

The dictionary definition of the verb "chase" is "the act of pursuing for the purpose of seizing, capturing, molesting, doing violence, or killing." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 379 (1993). This definition does not require that the "chase" be free and unrestricted, as the Gomsruds suggest.

Even with a fence between the dog and Mr. Campeau's chickens, a dog running up and down a fence line attempting to snatch chickens from the enclosure fits squarely within our definition of "chase." A fence or other barrier does not negate a pursuer's purpose of attempting to seize, capture, molest, do violence, or kill. The dog Mr. Campeau witnessed harassing his chickens was "chasing" them within the meaning of RCW 16.08.020.

C. MEANING OF "INJURING" AS USED IN RCW 16.08.020

The Gomsruds argue that the dog Mr. Campeau saw harassing his chickens was not "injuring" them within the meaning of the statute. We agree that the dog was not "injuring" Mr. Campeau's chickens within the meaning of RCW 16.08.020.

Mr. Campeau alleges that the injury to his chickens was not, initially, physical but that his chickens were "stress[ed]" by the encounter with the dog. Resp'ts' Corrected Resp. Br. at 17. He alleges that this produced "latent physical manifestations of injury."

Id. Mr. Campeau points to the fact that his chickens did not produce eggs for several days after the incident and that one of them was found dead the next day. We disagree that the mental stress to Mr. Campeau's chickens, even if it later became apparent in the chickens' physical condition, qualifies as an "injury" within the meaning of RCW 16.08.020.

Our "fundamental objective in interpreting statutes 'is to ascertain and carry out the Legislature's intent.'" *Silver v. Rudeen Mgmt. Co.*, 197 Wn.2d 535, 542, 484 P.3d 1251 (2021) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10.

The dictionary defines "injure" as "to inflict bodily hurt on." WEBSTER'S, *supra*, at 1164 (1993). The definition of "injure" does not contemplate harm to a chicken's mental health or death due to mental distress.

Further, RCW 16.08.020 uses the terms "biting" and "killing" as alternative justifications for slaying a dog seen doing harm to a person's livestock or poultry. The use of these terms supports our interpretation of the term "injuring" as requiring "bodily hurt." It is undisputed that the dog seen by Mr. Campeau harassing his chickens did not, in the present sense, inflict any bodily hurt on them. Mr. Campeau conceded at his

deposition that there was no "physical injury" to his chickens. CP at 39. At most, Mr. Campeau was injured by the dog's harassment of his chickens because he did not receive eggs for several days. However, RCW 16.08.020 discusses "injuring" livestock, not to the livestock owner.

Additionally, the statute uses the present tense when describing the justifications for killing a dog ("chasing, biting, injuring or killing"). The injuries Mr. Campeau claims his chickens experienced did not present themselves until after the dog chased them. Thus, Mr. Campeau's chickens were not "injured" within the meaning of the RCW 16.08.020.

D. WHETHER MR. CAMPEAU WAS QUALIFIED TO GIVE AN EXPERT OPINION ON THE CAUSATION OF HIS CHICKENS' DEATH AND "INJURIES"

The Gomsruds argue that Mr. Campeau was not qualified to offer expert testimony as to the causation of his chickens' death or injury. Because we determined Mr. Campeau's chickens were not injured within the meaning of RCW 16.08.020, it is immaterial whether Mr. Campeau is qualified to opine as to the cause of his chickens' death or injuries. Thus, we decline to address the issue.

E. WHETHER MR. CAMPEAU HAD "CONTROL" OF MS. HIPNER'S PROPERTY WITHIN THE MEANING OF RCW 16.08.020

Both the Gomsruds and the Campeaus agree that Mr. Campeau had to "own," "lease," or "control" the property on which he saw his livestock being harassed and the

property on which he killed Rainier to allow the defense under RCW 16.08.020. Appellants' Br. at 39; Resp'ts' Corrected Resp. Br. at 27-28. The Gomsruds argue that Mr. Campeau did not have control of the property on which Rainier was shot within the meaning of RCW 16.08.020. Mr. Campeau argues that the General Affidavit between he and Ms. Hipner shows that he had control of the property. Whether or not Mr. Campeau had control of Ms. Hipner's property when Rainier was shot is a question of fact that we leave to the jury.

The General Affidavit between Ms. Hipner and Mr. Campeau states, in relevant part:

> I Kimberly I Hipner have given Daniel R. Campeau permission to help me care take [sic] my land/buildings and all that this entails, Security of premise ingress and regress of all property boundaries against predators, illegal activities, harm to livestock. Location of this premise is as follows: 1550 Old Cowiche rd. Tieton Washington, 98947. This agreement to commence on June 16, 2018. This agreement between the above listed parties will remain in affect [sic] until such time as both parties agree to dissolve the above agreement.

CP at 61.

The Gomsruds note that Ms. Hipner testified at her deposition that Mr. Campeau was not her agent and she would not indemnify him for his actions on her property:

> Q. Did you believe [Mr. Campeau] to be your agent for these express purposes?
>
> A. I think he was just—he was just looking out for my best interests. *I wouldn't necessarily say he was an agent.* I would say he was being a good neighbor. You know, I didn't hire him as security. It wasn't—it

was just something he wanted in writing and I was fine with it, you know.

Q. BY MR. KARP: Go ahead. Like your insurance or personally. Do you believe that you are responsible to pay for any harm that Mr. Campeau inflicted on your property?

A. Oh, absolutely not. No. It was just the good neighbor thing. So if he had someone at gunpoint that was breaking into my house and the police showed up, then he would say, you know, "No, wait. Kim knows me. Let me get my paper," blah, blah, blah, you know, but—yeah, *he wasn't my agent.*

Q. Okay.

A. I didn't hire him to do things. *It was still he's responsible for his choices. I'm responsible for mine.* It's just because I have friends in law enforcement and they see my name and they know me, but they don't know him, and they don't know if I would vouch for him or if he, you know, has my permission to be on my property kind of thing.

I mean, if she [sic] showed up and he was kicking a door in on my property, that would not be appropriate, and I would not—*I mean, that paper doesn't say he can do whatever he wants on my property*, even if it's illegal.

CP at 217 (emphasis added).

Here, a jury could find that Mr. Campeau was in "control" of Ms. Hipner's property within the meaning of RCW 16.08.020 based on their agreement. Alternatively, the Gomsruds provided deposition testimony from Ms. Hipner suggesting that Mr. Campeau may *not* have had the requisite control of her property at the time he shot Rainier. Given the competing evidence, there is an issue of material fact related to

whether or not Mr. Campeau had "control" of Ms. Hipner's property within the meaning of the statute.

II. WHETHER THE GOMSRUDS' RECKLESS INFLICTION OF EMOTIONAL DISTRESS CLAIM WAS IMPROPERLY DISMISSED

The Gomsruds posit that Mr. Campeau "killed Rainier with reckless indifference to the foreseeable emotional distress that would befall her family." Appellants' Br. at 41. The Gomsruds also argue that Rainier was an "immediate family member" of Mr. Gomsrud and that he should therefore be able to recover for reckless infliction of emotional distress under a bystander theory. *Id.* at 47. The Gomsruds concede that the current state of the law is that a dog is not an "immediate family member" but they urge us to hold otherwise. We decline the Gomsruds' invitation to designate a dog an "immediate family member" for purposes of reckless infliction of emotional distress.

Reckless infliction of emotional distress, also known as "the tort of outrage" requires proof of three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). A claim for reckless infliction of emotional distress requires behavior "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* at 196 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)).

"Bystander negligent infliction of emotional distress claims involve emotional trauma resulting from one person's observation or discovery of another's negligently inflicted physical injury." *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998). In order to recover for a claim of reckless infliction of emotional distress under a bystander theory, "the plaintiff must be an immediate family member of the person who is the object of the defendant's actions, and he must be present at the time of such conduct." *Grimsby*, 85 Wn.2d at 60.

The class of "immediate family members" who can recover for reckless infliction of emotional distress is limited to those who are permitted to bring a wrongful death action pursuant to RCW 4.20.020 (spouses, domestic partners, children, stepchildren, parents, and siblings). 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 14.03, cmt. at 185 (2019); *See Strickland v. Deaconess Hosp.*, 47 Wn. App. 262, 268-69, 735 P.2d 74 (1987) ("Therefore, we determine the class of 'immediate family members' entitled to recover under a theory of outrage consists of those who are permitted to bring wrongful death actions.").

The Gomsruds' first theory of liability for their reckless infliction of emotional distress claim is that Mr. Campeau's conduct was directed at the Gomsruds themselves because Mr. Campeau knew, or should have known, that his actions would cause the Gomsruds severe emotional distress. Alternatively, they argue that Mr. Gomsrud can

recover under a bystander theory because Rainier was an "immediate family member" of the Gomsruds. We disagree with the Gomsruds and conclude that their claim for reckless infliction of emotional distress was properly dismissed on summary judgment.

Here, Mr. Campeau's actions were undeniably directed at Rainier, not the Gomsruds. In a declaration filed with his reply brief on his first motion for summary judgment, Mr. Campeau stated, "I never saw Ms. Long or Mr. Gomsrud until they came onto Ms. Hipner's property to confront us." CP at 296. He further declared that he "believed Rainier was a stray with no owner because there were no visible tags and Rainier appeared as if she had been rolling around in dirt." *Id.* This statement was consistent with Mr. Campeau's deposition testimony in which he stated, "I had no idea the dog belonged to anybody. It was filthy dirty and it had no identification that could be discerned even through a 40-power scope on full magnification." CP at 54. Mr. Campeau's actions could not have been directed at the Gomsruds if he did not even see them when he shot Rainier and if he thought Rainier was a stray.

As to the Gomsruds' bystander theory, the state of the law is that a dog is undisputedly not an "immediate family member" and we decline the Gomsruds' provocation to create such an extension.

The Gomsruds' point to comment *c.* in the *Restatement* (*Second*) *of Torts* § 46 (AM. L. INST. 1965), titled "*Outrageous Conduct Causing Severe Emotional Distress*:"

> The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This Section states the extent of the liability thus far accepted generally by the courts. The Caveat is intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed.

The Gomsruds argue that this comment demonstrates the evolving nature of the common law doctrine of reckless infliction of emotional distress. While the nature of the doctrine may be ever changing, we decline to take the drastic leap of qualifying a dog as an immediate family member.

The Gomsurds also point to illustration 11 contained in the *Restatement* § 46:

> A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.

This illustration does not support the Gomsruds' position. In this illustration, B's conduct was directed at A. B shot the dog, knowing A was greatly attached to it, while A was present. Here, Mr. Campeau's conduct was *not* directed at Mr. Gomsrud or the Gomsruds in general. In fact, he thought Rainier was a stray. Further, B's conduct resulted in bodily hurt to A, who miscarried. If an individual's outrageous conduct directed at a third person (or dog, as the Gomsruds urge us to treat as akin to a human) results in actual bodily hurt to the bystander, the third person need not be an immediate family member. RESTATEMENT § 46.

Finally, the Gomsruds argue that we should consider Judge George Fearing's sagacious concurrence in *Repin v. State* in which he advocated for a change in the law to allow recovery for the loss of "a human-animal" bond via a negligent infliction of emotional distress claim. 198 Wn. App. 243, 286, 392 P.3d 1174 (2017). However, "[w]e are bound to follow Supreme Court precedent." *Peterson v. Dep't of Lab. & Indus.*, 17 Wn. App. 2d 208, 222, 485 P.3d 338 (2021). As the law stands, dogs are not immediate family members.

III. WHETHER THE GOMSRUDS' CLAIM FOR MALICIOUS INJURY TO A PET WAS IMPROPERLY DISMISSED

The Gomsruds argue that their malicious injury to pet claim was improperly dismissed. We disagree because the Gomsruds failed to establish malice.

In *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006), we recognized malicious injury to a pet as a cause of action for which emotional distress damages could be recovered. The elements of malicious injury to a pet are: (1) injury to a pet, and (2) malice. *See id.* Title 16 RCW titled "Animals and Livestock" states "'Malice' has the same meaning as provided in RCW 9A.04.110." RCW 16.52.011(k). RCW 9A.04.110(12) states:

> 'Malice' and 'maliciously' shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

The Gomsruds failed to show malice. Mr. Campeau shot Rainier because he thought she had been harassing his chickens and that she was a further threat to them if not neutralized. Even if Rainier was not the dog that Mr. Campeau saw near his chicken coop, Mr. Campeau's mistake in shooting her does not prove malice. The Gomsruds argue that Mr. Campeau was "enraged and physically shaking with anger" after he killed Rainier and that this proves malice. CP at 161. However, Mr. Campeau's emotions following his actions do not prove he acted with an "evil intent."

The Gomsruds' malicious injury to pet claim was properly dismissed.

IV. WHETHER THE GOMSRUDS' CLAIM FOR CONVERSION WAS IMPROPERLY DISMISSED

The Gomsruds argue that their conversion claim was improperly dismissed. They argue that we should adopt the view that destruction of another's property is a way in which a conversion can occur. We disagree.

"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." *Repin*, 198 Wn. App. at 270. There are three elements to conversion: "(1) willful interference with chattel belonging to the plaintiff, (2) by either taking or unlawful retention, and (3) thereby depriving the owner of possession." *Burton v. City of Spokane*, 16 Wn. App. 2d 769, 773, 482 P.3d 968 (2021) (citing *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)). An essential element of conversion is the taking of

possession of the chattel. *Repin*, 198 Wn. App. at 270. "There must be some assertion of right or title hostile to the true owner." *Id.* at 271.

Though it is a very old case, *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 P. 794 (1909), is instructive. There, a grain company hired the defendant railway to transport horses between Seattle and St. Paul. During the trip, a fire broke out injuring two horses, one of which later died. The railway company removed the two injured horses from the train car in Spokane so that they could receive care. The grain company sued the railway company for conversion of the two horses and the jury awarded it $360. On appeal, the railway company argued there was no evidence to support a claim for conversion and the Supreme Court agreed. The Supreme Court held that the railway never sought title to the horses or to permanently deprive the grain company of possession of the horses and thus a claim for conversion could not be supported.

Similarly, here, it is undisputed that Mr. Campeau never sought title to or possession of Rainier. Because the Gomsruds fail to demonstrate that Mr. Campeau sought to take title or possession of Rainier, their claim for conversion fails.

The Gomsruds urge us to adopt the view that destruction of a chattel also constitutes a conversion. *Restatement* § 226, titled "*Conversion by Destruction or Alteration*," states:

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

However, Washington has not adopted this means of conversion, and no Washington case has held that a conversion occurs by destruction even when the defendant does not take title to the plaintiff's property.

The Gomsruds' conversion claim was properly dismissed.

V. WHETHER THE GOMSRUDS MAY RECOVER FOR EMOTIONAL DISTRESS DAMAGES FLOWING FROM THEIR CONVERSION AND TRESPASS TO CHATTEL CLAIMS

The Gomsruds argue that they should be allowed to recover emotional distress damages flowing from their conversion and trespass to chattel claims. We agree, in part. The Gomsruds' conversion claim was properly dismissed by the trial court, however, their trespass to chattel claim survives and they may seek emotional distress damages for that claim.

Recently, we decided *Thorley v. Nowlin* in which we allowed emotional distress damages for conversion. ___ Wn.2d ___, 542 P.3d 137, 151 (2024). We recognized that, "A hundred-year succession of Washington cases supports damages for emotional distress arising from intentional torts." *Id.* at 145. Trespass to chattel is an intentional tort. *See Birchler v. Castello Land Co.*, 133 Wn.2d 106, 115, 942 P.2d 968 (1997).

Thus, the Gomsruds may recover emotional distress damages if their claim for trespass to chattel is successful.

We remand for further proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

I CONCUR:

Staab, A.C.J.

NO. 39676-2-III

FEARING, J. (concurrence) — I disagree with one ruling of the majority. I conclude that the meaning of "injuring," as found in RCW 16.08.020, extends beyond physical injury. The statute should include emotional distress and other psychic injury to an animal, including a chicken.

RCW 16.08.020 declares:

> It shall be lawful for any person who shall see any dog or dogs chasing, biting, *injuring* or killing any . . . domestic animal, including *poultry*, belonging to such person, on any real property owned or leased by, or under the control of, such person . . . to kill such dog or dogs.

(Emphasis added.) The majority employs *Webster's Third New International Dictionary* to confine the meaning of "injuring." The majority actually quotes the definition of "injure" rather than "injuring," but I do not quarrel with failure to use the gerund. I bicker with the majority's limiting the use of the dictionary definition to the first of many definitions presented by the *Webster's Third New International Dictionary* for "injure."

The full definition of "injure" found in the *Merriam-Webster Online Dictionary* reads:

> **1 a :** to inflict bodily hurt on
> **b :** to impair the soundness of
> *injured* her health
> **c :** to inflict material damage or loss on
> **2 a :** to harm, impair, or tarnish the standing of

injured his reputation
b : to give pain to
injure a person's pride
c : to do an injustice to : **WRONG**

https://www.merriam-webster.com/dictionary/injure (last visited May 23, 2024). The impairment of the soundness of the animal and the infliction of pain on the animal extends to stress and discomfort caused by harassment.

I recognize that a court should not always harness all of a word's dictionary definitions when construing a statute. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008); *State v. Valdiglesias LaValle*, 23 Wn. App. 2d 934, 945, 518 P.3d 658 (2022), *rev'd on other grounds*, 2 Wn.3d 310, 535 P.3d 856 (2023). But, the majority and the Gomsruds do not argue for a limitation on the definitions relevant to our construction of RCW 16.08.020. The testimony of Daniel Campeau shows that chickens can suffer as much from psychic injury as with physical injury. The language of RCW 16.08.020 suggests no limits to the forms of injury qualifying for the application of the statute.

I otherwise agree with the analysis of the majority opinion and concur in the result.

I concur:

Fearing, J.

ANIMAL LAW OFFICES OF ADAM P. KARP

August 06, 2024 - 8:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39676-2
Appellate Court Case Title:	Tory Gomsrud, et al v. Daniel R. Campeau, et al
Superior Court Case Number:	22-2-00317-0

The following documents have been uploaded:

- 396762_Petition_for_Review_20240806201157D3495163_1779.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 240807 Gomsrud PFR signed exh A.pdf

A copy of the uploaded files will be sent to:

- boss@mftlaw.com
- lara@mftlaw.com

Comments:

Amended to include Exhibit A

Sender Name: Adam Karp - Email: adam@animal-lawyer.com
Address:
114 W MAGNOLIA ST STE 400
BELLINGHAM, WA, 98225-4380
Phone: 888-430-0001

Note: The Filing Id is 20240806201157D3495163