



Spring Newsletter

“Rebuttal”

In the March edition of *The Advocate*, Amy Lombardo authored *Idaho Law Regarding the Measure of Damages for Animals Need Not Be Revisited*, a response to my article *The Animal World Takes a Special Place in Society and Our Courtrooms*. I seek to evaluate and rebut Ms. Lombardo's contentions so each reader may draw conclusions based on a complete recitation of common and statutory law in Idaho.

Contention: "Accordingly, the current measure of damages for an animal in a lawsuit is the replacement value of the animal. In Idaho, this has been established statutorily and by case law."

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“No Pets Allowed”

The federal Fair Housing Act requires housing providers to make reasonable accommodations in rules, policies, practices or services when necessary to provide equal opportunity for a person with a disability to use and enjoy a residential dwelling. Disability is defined under the Fair Housing Act as a physical or mental impairment that substantially limits one or more major life activities.

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The Animal Law Section of the Idaho State Bar promotes the education, training and networking of animal law practitioners.

Upcoming Events

- The section meets at 12:00 p.m. noon (MT) on the second Monday of the month at The Law Center, 525 W. Jefferson Street in Boise. Participation via telephone conference is also available.
- **Annual Bar Meeting CLE: *Monkey in the Middle: What Every Idaho Lawyer Needs to Know about the Law Pertaining to Animals* Thursday, July 18 from 1:30 – 3:30 pm (2.0 CLE credits)**

“No Pets Allowed” (continued from Page 1)

The Fair Housing Act covers most housing programs and types of housing, including: homes, apartments, condos, nursing homes, manufactured homes, shelters and other structures occupied as residences. In order for a building or housing provider to be covered, the provider must engage in four or more housing transactions – for example, renting out four or more units, or owning their own home and renting out three units, or owning a home and renting out three bedrooms to three different tenants – each of these could qualify as meeting the four transactions threshold of the Fair Housing Act.

If a property does not allow pets, a person with a disability can submit a Reasonable Accommodation request to her housing provider and the housing provider must permit an assistive animal when necessary to provide the tenant with an equal use and enjoyment of the property. The person requesting the Reasonable Accommodation may need to provide documentation from a qualified professional (*e.g.*, physician, psychiatrist, social worker) to prove they have a need for the assistive animal. The qualified professional does not have to be a doctor, but it does have to be someone who is familiar with and has adequate information about the requestor’s disability. However, neither the requestor of the accommodation, nor their qualified professional is required to provide information about the nature or extent of the disability.

“Service animals perform tasks for the benefit of a person with a physical, intellectual, or mental disability.”

When a “Pet” is Not a “Pet” – Assistive Animals

Assistive animals help persons with physical or psychiatric disabilities. Assistive animals can include service animals, emotional support animals, or other animals that assist a person with a disability. The terms “service,” “support,” and “assistive” can be used interchangeably to describe the different roles of assistive animals.

Service animals perform tasks for the benefit of a person with a physical, intellectual, or mental disability. Examples include: seeing eye dogs, an animal pulling a wheelchair, or hearing dogs. Service animals do not need to be registered with a service animal organization in order to be considered a “service animal.” Support animals provide therapeutic benefit to a person with a mental or psychiatric disability. Support animals have been shown to be highly effective at mitigating the symptoms of disabilities such as PTSD and depression.

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“Rebuttal” (Continued from Page 1)

To support this contention, Ms. Lombardo quotes I.C. 25-2807. However, that section does not specify "replacement value." Rather, it commands application of the "usual rules of evidence relating to values of personal property" to establish value of an animal in any civil or criminal proceeding. It cites no specific rule of evidence to limit plaintiffs to replacement value because no such evidentiary rule exists. If anything, I.C. 25-2807 endorses the view that authentic, relevant, nonhearsay or hearsay-excepted evidence may be considered to determine an animal's value. In other words, the statute says nothing of the sort.

Hurtado v. Land O'Lakes, Inc., 153 Idaho 13, 278 P.3d 415, 423 (2012) confirms that the destruction of personalty yields a measure of damages that “is the value of the property at the time and place of its destruction.” As described below, the value of companion animals is intrinsic to “the owner of property,” who is “qualified to testify to its value.” *Hurtado*, at 423.

Ms. Lombardo then cites *Gill v. Brown*, 107 Idaho 1137, 1138 (Id.App.1985), a nearly thirty-year-old decision not decided by Idaho’s highest court and whose discussion of property valuation is complete *dictum*. At 1138, the court explains, emphasis mine, “The **sole issue** is whether the Gills’ complaint alleges facts that, if proven, would permit them to recover damages for mental anguish.” Indeed, there is no evidence that the Gills even assigned error to the issue of whether the value of an animal is market, replacement, or other. They focused exclusively on the *sua sponte* pretrial ruling denying them recovery of any general damages. Accordingly, the question of value of an animal companion remains one of first impression in Idaho.

With no disrespect to the donkey, the animal at issue in *Gill* is not a species typically falling in league with the class of animal companions who sleep at the foot of the bed or lay in one’s lap while reading a book. *Gill* did not touch upon how to value domesticated animals who become members of the family. *Gill* also did not consider the *per se* intrinsic value doctrine for personal effects and household goods (discussed below). For all the above reasons, *Gill* is ripe for judicial revisiting and analytical distinction to keep pace with social mores of Idahoans. (Continued on Page 5)

“No Pets Allowed” (continued from Page 4)

A housing provider cannot place restrictions on the type of assistive animal allowed. An assistive animal need not be a dog or a cat. As long as the person making the request can show a need for that particular animal, the landlord should grant the request. Additionally, the breed of the animal is typically unimportant. However, under certain circumstances landlords may be allowed to refuse an assistive animal based on breed. In order to do this the landlord must establish that having that specific breed places an undue burden upon her; usually due to higher insurance premiums or other safety risks. If this happens, the tenant can submit a Reasonable Accommodation request to the housing provider’s insurance carrier to request that they waive the higher premiums.

Housing providers cannot ask a tenant who requires an assistive animal to pay a pet deposit or fee for their animal. However, tenants can be held responsible for damages caused to the property by their animal. The housing provider also cannot: require special training for assistive animals; require a pet lease addendum for an assistive animal; or require that the animal have specific shots or vaccinations (unless required by local ordinance). A tenant can have more than one assistive animal if she has a distinct and separate disability-related need for each animal.

Requesting a Reasonable Accommodation

If a place of residence has a no pet policy, the tenant or homeowner will need to request a Reasonable Accommodation from their housing provider, HOA, or property manager. The request should be made in writing and should state that the requester has a disability. The request furthermore needs to explain the “nexus” of how the request for an assistive animal is related to the disability by explaining how the accommodation would benefit and assist them. Include with the request a letter from a qualified professional confirming that the requester meets the Fair Housing Act’s definition of “handicapped” and again explaining the connection between the disability and the need for an assistive animal. A set of interactive Reasonable Accommodation request forms are available at Idaho Legal Aid’s website at www.idaholegalaid.org. If a Reasonable Accommodation request for an assistive animal has been denied, the housing provider should be contacted to request a meeting. Under the Fair Housing Act, housing providers are required to engage in an interactive process, which means working with the requester to reach a solution that allows equal use and enjoyment of the property for the person with a disability. If the housing provider refuses to engage in the interactive process or still refuses to allow a needed assistive animal, the requester can consider contacting the Fair Housing Legal Advice Line at 1-866-345-0106 or filing a fair housing complaint with the U.S. Department of Housing and Urban Development.

-Sunrise Ayers

“Rebuttal” (Continued from Page 3)

Anyone paying attention knows that animal companions are of a different order than inanimate property and should bristle at disingenuous efforts to characterize them as a depreciating Buick. Dogs, cats, birds, horses, and other species with whom we share our lives have a unique rehabilitative, hedonic, and therapeutic value, also known as intrinsic value, to their owner-guardians. Hence, when a groomer dislocated a 13-year-old Yorkie’s hip, resulting in veterinary bills of \$1308.89, the Kansas Court of Appeals did not hesitate in affirming the trial court’s award of those bills, citing “long-standing common-sense jurisprudence” to permit the cost to restore an “injured pet dog with no discernible market value,” finding “there are no true marketplaces that routinely deal in the buying and selling of previously owned pet dogs,” and perceiving “a distinction between the purely economic value of a horse for hire and a pet dog, like Murphy.” *Burgess v. Shampooch Pet Indus. Inc.*, 35 Kan.App.2d 458, 462-63 (2006). *Burgess* approves of a “special value to the owner” instruction, at 461, while rejecting defendant’s “hyperbolic[]” claims that its ruling would “open the proverbial ‘floodgates’ of high dollar litigation on behalf of animals....,” at 465.

But one need not convince the highest court to invoke intrinsic value in the right circumstance. Three decades before *Gill*, the Idaho Supreme Court decided *State ex rel. Rich v. Dunlick, Inc.*, 77 Idaho 45, 54 (1955), upholding a jury instruction that permitted jury to consider “special value” of land taken by eminent domain, to ascertain damages, “If the land possessed a special value to the owner which can be measured in money, such owner has a right to have that value considered in the estimation and determination of the damages sustained. The value of the land taken should be estimated with respect to the use to which it is peculiarly adapted and the purpose theretofore made of it by appellant in the operation of its plant.”

The Supreme Court of Idaho also acknowledged the *per se* intrinsic value rule, where a plaintiff may recover the intrinsic value of certain types of property as a matter of law, without even needing to allege or prove lack of market value. Allow me, however, to start across the border in Washington, with *Kimball v. Betts*, 99 Wash. 348, 351 (1918), where the Washington Supreme Court succinctly stated this rule in a conversion case:

Where household goods, kept for use and not for sale, have been wrongfully converted, it is not necessary to allege and prove that such goods have no market value as a condition precedent to the right to introduce proof of actual value.

And:

For secondhand household goods and wearing apparel, the measure of damages is the difference in actual value just prior to and just after the injury, and not the difference in the market value of similar goods at secondhand stores at or nearest their destination.

And:

It seems obvious, however, that the secondhand market value, if there be such, would not compensate the owner of goods which had been wrongfully converted for the loss which he had sustained.

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The Supreme Court of Washington applied the *Kimball* rule to personal property, wearing apparel, and household goods damaged from an arson fire at a hotel, finding that the value of household goods, wearing apparel, and other personal effects kept for personal use and not for sale was based on the reasonable value of the item to the individual at the time of loss, and not market or replacement value, citing to the “Kimball rule.” *Herberg v. Swartz*, 89 Wn.2d 916, 930-31 (1978). Idaho cited to *Kimball* relative to pieces of galvanized syphon and reversed the lower court for limiting the claimant to market value in *Condie v. Swainston*, 62 Idaho 472, 112 P.2d 787, 790 (1940).

Using Murphy from the *Burgess* case as an example, should one claim that Murphy does not fall within the class of items contemplated by *Kimball* or *Condie*, consider what would obviously not fit within the category – viz., non-household goods, such as a car, house, or realty; or household goods kept as inventory or re-sale, as in the case of dogs bred for sale. It stands to obvious reason that dogs kept for personal use and not resale, who have become bonded family members, are the type of household goods and personal effects whose value can only be fairly and realistically evaluated in the context of actual or intrinsic measures.

Moreover, the Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. amend. IV. The people’s “effects” include their personal property. *United States v. Place*, 462 U.S. 696, 701 (1983)(luggage is “effect”). In every circuit that has considered the question, including the Ninth, domestic animals are “effects” under the Fourth Amendment. *See San Jose, infra*. Accordingly, there is no material distinction between cats and other “effects” for purposes of applying the *Condie* rule.

Animals are also “goods.” The Idaho State Legislature adopted the Uniform Commercial Code (“UCC”) in 1967, codifying it in Title 28 of the IC. “good” is anything that is movable at the time of its identification in a contract for sale, and includes the unborn young of animals. IC 28-2-105(1). Dogs and other animals, like horses, fit squarely within the statutory definition of a “good.” If deemed “goods,” the only question is whether they are “household” or “non-household” goods. The UCC aids in this distinction as well. IC 28-9-102 (23) defines “consumer goods” as those “used or bought for use primarily for personal, family or household purposes.” The vast majority of animal companions are adopted or bought and used primarily for personal, family or household purposes. Thus, the *Condie* rule applies.



Turning our eyes south to New Mexico yields a nearly eighty-year-old decision applying the *per se* rule to a dog. In *Wilcox v. Butt's Drug Stores, Inc.*, 38 N.M. 502, 35 P.2d 978 (1934), the New Mexico Supreme Court upheld the trial judge's award of \$150 for the value of "Big Boy," a King Charles Spaniel who died from strychnine poisoning in a pharmacist malpractice case. The defendant argued that the judgment should be limited to \$10, the alleged "market" or "pecuniary" value of Big Boy. The Court disagreed with the conclusion that "damages for the wrongful destruction of a dog must be limited to market value or pecuniary value." *Id.*, at 979. In defending this position, the Supreme Court approvingly cited to *Rutherford v. James*, 33 N.M. 440 (1928), *overruled in part on o.g., Reed v. Styron*, 69 N.M. 262 (1961). The *Rutherford* court held:

"Articles in actual use in furnishing and equipping a home, and wearing apparel in use, even though they may have some secondhand market value, are not usually governed by the general rule of market value, for the law recognizes that they have a value when so used in the home that is not fairly estimated by their value as secondhand goods on the market. Where subordinate rules for the measure of damages run counter to the paramount rule of fair and just compensation, the former must yield to the principle underlying all such rules. For the loss of such property so situated and used, the measure of damages in case of loss by another's negligence is the value to the owner under all the circumstances, based on actual damages sustained by being deprived of his property, not including any mere sentimental or fanciful value he may for any reason place upon it."

Id. The *Rutherford* rule is nearly indistinguishable from the *Kimball* rule. Other states also embrace the doctrine that subordinate rules for measures of damages must "yield" to the overarching principle of fair and just compensation. See *Aufderheide v. Fulk*, 64 Ind.App. 149 (1916) (cited by *Kimball*). Similarly, consider *Barber v. Motor Inv. Co.*, 136 Or. 361 (1931), which cites to *Kimball* (note that *Condie* also cites to *Barber*), and recognizes the "cardinal rule of just compensation":

After all, it is the object of the law to make just compensation to the owner of personal property who has sustained damage by being deprived of its use and benefit. Ordinarily the market value of the property meets the requirement of just compensation. When, however, this general rule runs counter to the cardinal rule of just compensation, it is not to be followed. In the case of household goods and furniture owned and kept for personal use, their market value is not, according to the overwhelming weight of authority, considered fair and just compensation, but the owner is entitled to recover the actual value of the property to him, excluding, of course, any fanciful or sentimental value which he might place upon it. See cases cited in exhaustive notes, 63 A. L. R. 240, Ann. Cas. 1917B, 585, L. R. A. 1917D, 495. The mere fact that secondhand furniture has a market value does not preclude full compensation for the damages sustained. Nor would the absence of market value be reason to refuse redress for such injury. It was not a condition precedent to the recovery of the actual value of the furniture converted to show that it had no market value. *Kimball v. Betts*, 99 Wash. 348, 169 P. 849; *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Tex. Civ. App.) 160 S. W. 116.

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Kimball, at 366 (emphasis added). Another case applying a *Kimball*-type rule to animals presents in rather morbid fashion, as it were, in the incarnation of a fur coat damaged by negligence of the carrier in transportation to a furrier for storage. In *Employers’ Fire Ins. Co. v. United Parcel Service, Inc.*, 89 Ohio App. 447 (1950), the court held that because the coat was for strictly personal use, the measure of damages was reasonable value to the owner. The court added that it was an almost universal exception to the market value rule that in cases where the property converted consisted of purely personal belongings, such as household goods and the like, the courts refused to subject this class of goods to the market value rule, not because they had no market value, but because such market value did not afford the plaintiff a fair and just compensation, and the market value of used wearing apparel, although relevant evidence, would be an uncertain guide in determining the compensation for the loss.

Let us revisit *Restatement of Torts* § 911 (1939) to identify the class of items for which there is only an intrinsic value. Comment *e* to Section 911 ties together the dog, the family portrait, and second-hand clothing and furniture (as addressed by *Kimball*):

e. Peculiar value to the owner. The phrase “value to the owner” denotes the existence of factors apart from those entering into exchange value which cause the subject matter to be more desirable to the owner than to others.

Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner. The absence or inadequacy of the exchange value may result from the fact that others could not or would not use the things for any purpose, or would employ them only in a less useful manner. Thus a personal record or manuscript, an artificial eye or a dog trained only to obey one master, will have substantially no value to others than the owner. The same is true of articles which give enjoyment to the user but have no substantial value to others, such as family portraits. Second-hand clothing and furniture have an exchange value, but frequently the value is far less than its use value to the owner. In such cases it would be unjust to limit the damages for destroying or harming the articles to the exchange value ...

Restatement of Torts § 911, cmt. *e* (emphasis added).

Contention: "The replacement cost of the animal may include costs related to the purchase of a new animal of the same breed -- including immunization, neutering, and comparable training, as well as lost profits of the owner proximately caused by the injury. It may also include evidence of pedigree, breeding, and whether its offspring would be valuable, as well as other reasonable and necessary expenses. Thus, Idaho law provides for recovery of economic losses for the value of an animal."

Take Orbit, our 26-year-old, neutered male, orange tabby whom my wife adopted from a shelter at the age of two for probably less than \$50 in 1989. Though equally photogenic, Orby did not turn profits like his similarly-colored Morris of 9Lives fame, whom *Time* declared "The Feline Burt Reynolds" and others touted as "The Clark Gable of Cats," who also ran for president in 1988, and "authored" three books. Nor did Orby solicit donations (and run afoul of municipal business licensing laws) as did Blackie the Talking Cat, discussed at length in *Miles v. City Council of Augusta*, 51 F.Supp. 349 (S.D.Ga.1982), and again on appeal at 710 F.2d 1542 (11th Cir.1983). Nor could Orby claim the accolade "Best Cat" for the North Atlantic region of the Cat Fanciers' Association for 2011-2012 as did Levi, short for Grand Champion National Winner Divine Design's Leviticus of Naumkeag, a blue British shorthair from New England. Does this mean that if wrongfully killed, Orby's value would be limited to the cost to replace him with another 26-year-old, neutered male, nonpedigreed, orange tabby?



By Ms. Lombardo's calculation, one would be lucky to get more than a few bucks for Orbit. But this presumes that animals can be replaced. Ask any shelter or humane society and they will tell you that not only have they never had such a cat surrendered by owner or found as a stray, but if such a cat were to exist, they would likely find none to adopt him at that age - in part due to the need to treat Orbit with bidaily subcutaneous fluid therapy, oral doses of liquid and pill medication, and methimazole application to treat his hyperthyroid condition – tasks my wife and I

lovingly and patiently performed because we valued him so immensely. In short, no replacement would exist because, generally, animal companions are not fungible - a point twice made by the Washington Court of Appeals, first in 2006 (*Rhoades v. City of Battleground*, 115 Wash.App. 752) and again in 2011 (*Downey v. Pierce Cy.*, 165 Wash.App. 152). Specifically, no replacement could ever be found who matches the phenotypic and genotypic characteristics of Orbit, not to mention his personality and the extent to which he enlivened the household, provided stability (my wife described him as her "rock"), and delighted us with his gentle and loving manner, all which made him so precious.

On the other hand, let us take Ms. Lombardo's argument to the logical conclusion, backed again by the rules of evidence, here ER 702. A true "replacement" in the genetic sense only (recall the nature vs. nurture debate) would require that the tortfeasor produce a clone. Putting aside that cloning costs in excess of \$100,000, will take over six months, and require air travel from Soom Biotech Research Foundation in Seoul, Korea, the state of science in 2013 now permits juries to ascertain and put a number on the economic value of once-animate property and signifies the best way to replicate a roughly equivalent specimen. In so doing, one can determine replacement value. Such evidentiary tack does not suffer forays into a plaintiff's emotional distress, excessive sentimentality, or human-animal bond. Therefore, let Ms. Lombardo's replacement value guide Idaho courts, at six figures per nonhuman decedent.

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Contention: "The overwhelming majority of states have found that an animal owner cannot recover for emotional distress for harm to one's pet, or for loss of companionship."

While this statement is accurate with respect to negligently-inflicted harm to animals, it is egregiously false with respect to other culpable mental states. For instance, see:

- **Alaska:** *Mitchell v. Heinrichs*, 27 P.3d 309, 311-12 (Ak.2001) reiterates that it permits IIED relative to the intentional or reckless killing of a pet animal;
- **Arizona:** *Kaufman v. Langhofer*, 223 Ariz. 249, 254 and 256 fn.13 (2009) states, “Several states allow damages for the intentional infliction of emotional distress when a pet is injured or killed through intentional, willful, malicious, or reckless conduct,” and adds that Arizona law may allow recovery of such damages “when [plaintiff] sustains an economic loss involving fraud, intentional conduct, or a willful fiduciary breach.”
- **California:** *Plotnik v. Meihaus*, 146 Cal.Rptr.3d 585, 598-99 (Cal.App.4, 2012)(allows emotional damages for IIED and trespass to chattels where defendant hit plaintiffs’ Min-Pin with a baseball bat, rejecting defendants’ contention that California “[has] rejected the concept that an animal owner may recover emotional distress damages due to injuries his animal received at the hands of a[nother]....” *Id.*, at 599. In upholding the general damages award based on a trespass to chattels theory, the court quoted *Johnson v. McConnell*, 80 Cal. 545, 549, where it noted:

While it has been said that [dogs] have nearly always been held “to be entitled to less regard and protection than more harmless domestic animals,” it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.
Id., at 600.

- **Delaware:** *Naples v. Miller*, 2009 WL 1163504 (Del.Super.2009), at *3 and fn.9, only rejected NIED but implied that plaintiff could recover noneconomic damages if there was impact upon Ms. Naples, she was in the zone of danger, or there were “aggravating circumstances where intentional or reckless conduct was involved”;
- **Florida:** *Kennedy v. Byas*, 867 So.2d 1195 (Fla.App.2004) only precludes negligence-based noneconomic damages;
- **Indiana:** *Lachenman v. Stice*, 838 N.E.2d 451 (Ind.App.2005) only rejected NIED as a matter of law, but not IIED;

- **Iowa:** *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996) only rejected NIED and did not close the door to malicious injury;
- **Kentucky:** *Amm on v. Welty*, 113 S.W.3d 185, 188 (Ky.App.2002) states, “Simply because a claim involves an animal does not preclude a claim for intentional infliction of emotional distress”;
- **Massachusetts:** *Krasnecky v. Meffen*, 56 Mass.App.Ct. 418 (2002) only rejected NIED;
- **Michigan:** *Koester v. VCA Animal Hosp.*, 244 Mich.App. 173, 177 (2000) only involved NIED;
- **Minnesota:** *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn.App.1993) rejected NIED only;
- **Nebraska:** *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb.1999) only rejected NIED;
- **Nevada:** *Thomson v. Lied Animal Shelter*, 2009 WL 3303733 (D.Nev.2009) did not *per se* reject IIED but simply found defendants’ conduct not sufficiently outrageous, and it further noted there was no state law on point relative to NIED or IIED (at *7), and NRS 41.740 is a nonexclusive statutory cause of action;
- **New Jersey:** *Harabes v. The Barkery*, 791 A.2d 1142 (N.J.Super.2001) only involved negligence, and the court noted that “in this case plaintiffs do not allege, and there is no evidence to suggest, that plaintiffs’ dog died as a result of intentional, willful, malicious or reckless conduct by the defendants” (at 1144);
- **Texas:** *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex.App.-Austin 2004) only denied noneconomic damages arising from negligence;
- **Vermont:** *Goodby v. Vetpharm, Inc.*, 186 Vt. 63 (2009) only negated NIED;
- **Virginia:** *Kondaurov v. Kerdasha*, 271 Va. 646 (2006) only restricted plaintiffs from recovering noneconomic damages from “ordinary negligence”;
- **Washington:** *Sherman v. Kissinger*, 146 Wash.App. 855, 873 fn.8 (2008) allows recovery of emotional distress damages for intentional torts to animals and remarks it is consistent with the modern rule; *Womack v. von Rardon*, 133 Wash.App. 254 (2006) creates cause of action for malicious injury to a pet.

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Contention: “However, *Gill* only outlines that negligent infliction of emotional distress may be a viable cause of action for loss or injury provided an owner can show objective physical evidence of distress... The *Gill* case established only that if a plaintiff meets the stringent criteria for intentional infliction of emotional distress – requiring extreme and outrageous conduct – would an animal owner be awarded damages for emotional suffering.”

Ms. Lombardo ignores the plain language of the opinion of *Gill v. Brown*, 107 Idaho 1137, 1138 (1985), which permits the claim of negligent infliction of emotional distress and only upheld dismissal of the NIED claim because the Gills could not show physical injury, not because they suffered distress over the death of a donkey:

In order for the tort of [NIED] to lie, the actions of the defendant must have caused some physical injury to the plaintiff which accompanies the emotional distress. ... In this case the Gills have not alleged they suffered any physical injury. Thus their claim cannot be considered as one for recovery of damages for the negligent infliction of emotional distress.

Last year the Idaho Supreme Court reaffirmed the cognizability of NIED and the symptomology requirement:

This Court has recognized physical manifestations of emotional distress as including sleep disorders, headaches, stomach pains, suicidal thoughts, fatigue, loss of appetite, irritability, anxiety, reduced libido and being ‘shaky-voiced.’ ... Under our precedent, these physical manifestations are sufficient to support recovery for [NIED].

Carrillo v. Boise Tire Co., Inc., 152 Idaho 741, 750 (Idaho 2012). Accordingly, provided a plaintiff can furnish evidence of physical manifestation arising from the negligent injury or death to an animal, NIED remains cognizable. And most plaintiffs predictably and understandably suffer several of the enumerated ailments upon death of an animal.

Contention: “There must be a distinction made between the argument to increase the value of an animal under the law, which would have negative consequences in litigation against veterinarians...”

A larger judgment will always prove “negative” to the judgment debtor and “positive” to the judgment creditor. What Ms. Lombardo elides is the hypocritical distinction that somehow veterinarians should command five-star prices when all goes swimmingly but pay bargain-basement prices when the proverbial fecal matter hits the fan. The best defense to any argument to increase damages is simply not to engage in misconduct that creates liability.

Contention: “Idaho courts would be wise to decline to revisit the debate regarding the value of damages for a domestic animal, and to follow the reasoning of courts all over the country which have found that ‘the claim for emotional distress arising out of the malicious destruction of a pet should not be confused with a claim for the sentimental value of a pet, the latter claim being unrecognized in most jurisdictions.’”

As noted above, the debate never took place. Furthermore, devaluation proponents like Ms. Lombardo assume that the word “sentimental” sweeps far more broadly than as actually defined.

Consider the Washington Supreme Court’s reasoning in *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40 (1979), in which the Mieskes brought developed movie film to Bartell Drug for splicing onto larger rolls. Dozens of canisters filled with irreplaceable memories were subsequently lost or



destroyed due to the negligence of the defendant, who deemed rolls of raw negative sufficient compensation. Plaintiffs argued that the memories, while contained on the film, had no market value, and could not be replaced or restored. They added, however, that the memories were so unique that some other measure of damages must exist to ensure full compensation. The court agreed, affirming the jury’s award of \$7500¹ as the actual value of the film to the plaintiff:

The defendants argue that plaintiffs' property comes within the second rule of *McCurdy*, *i.e.*, the film could be replaced and that their liability is limited to the cost of replacement film. **Their position is not well taken.** Defendants' proposal would award the plaintiffs the cost of acquiring film without pictures imposed thereon. That is not what plaintiffs lost. **Plaintiffs lost not merely film able to capture images by exposure but rather film upon which was recorded a multitude of frames depicting many significant events in their lives.**

Id., at 44 (emphasis added). *Mieske* added that “[a]warding plaintiffs the funds to purchase 32 rolls of blank film is hardly a replacement of the 32 rolls of images which they had recorded over the years.” *Id.* (emphasis added). As in *Mieske*, Ms. Lombardo’s argument misses the mark in the case of animal injury and death, for it fails to fully compensate the plaintiff for his loss – namely, the impairment or destruction of years of extensive training, labor, financial investment, and trust, an agglomeration of life experiences built between the plaintiff and the animal at issue (like the “images” in *Mieske*) that are “recorded,” as it were, over time.

1. In 2013 dollars, this figure approaches \$27,000. <http://www.coinnews.net/tools/cpi-inflation-calculator/>.

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While snapshots and video clips capture and memorialize past moments, and can be spliced together (as requested of Bartell Drug) into a seamless track, they remain inorganic, frozen, and independent of one another. On the contrary, a dog who has lived in loving cohabitation with his owner-guardian is not the same as at the time of being adopted but changes with age and nurturing. The prior experiences undergird the future ones. This is why the value he provides to the owner increases with each passing day. Thus, the dog who existed on the date of the tortious injury or death is actually an embodiment of that same dog the day before, and the day before that, recursively to the date she first came into the plaintiff’s life. Picture the layers of an onion or the rings of a tree. Destroying historical images is tantamount to coring an onion or stumping a tree from the inside out – a form of retrograde amnesia that is occasionally so traumatic as to prove fatal. In this regard, the *Mieske* images are not laid down linearly in celluloid or some other film stock, but concentrically within an organic, living vessel. So when one wrongfully kills an animal companion, she has not only destroyed the present manifestation, but obliterated the set of experiences that made the animal who he was that day, an animal who only existed that day because of the daily investments and value placed thereon by the owner. No other property better deserves application of, nor exemplifies, intrinsic value principles. Indeed, it would be the height of irony to permit the owner to obtain intrinsic value for destroyed *photographs of the animal* (per *Mieske*), but only obtain a fair market value for the genuine article (i.e., *animal himself*).

The *Mieske* court, when wrestling with the question of establishing the “value to the owner” under the intrinsic value measure of damages, addressed the recoverability of “sentimental value.” In upholding the trial court’s jury instruction, it noted that: In essence it allowed for recovery for the actual or intrinsic value to the plaintiffs but denied recovery for any unusual sentimental value of the film to the plaintiffs or a fanciful price which plaintiffs, for their own special reasons, might place thereon.

Mieske, 92 Wn.2d at 45 (emphasis added). By distinguishing “usual” sentimental value from “unusual” sentimental value, however, the court expressly permitted some element of sentimental value. *Mieske* emphasized that the measure of damages is determined by the “value to the owner,” which is intrinsic value. *Id.*, at 44-45 (citing *Rest. of Torts* § 911 (1939)) Further, the *Mieske* court was careful to narrowly interpret the phrase “sentimental value” so as not to exclude usual and customary sentiment:

What is sentimental value? The broad dictionary definition is that sentimental refers to being "governed by feeling, sensibility, or emotional idealism ..." **Obviously that is not the exclusion contemplated by the statement that sentimental value is not to be compensated.** If it were, no one would recover for the wrongful death of a spouse or a child. Rather, the type of sentiment which is not compensable is that which relates to "indulging in feeling to an unwarranted extent" or being "affectedly or mawkishly emotional ..."

Id. (emphasis added, citations omitted). To argue that intrinsic value does not permit recovery of sentimental ties and emotional relationships, one must conclude that the *Mieske* court reasoned in error. Otherwise, how could a jury arrive at a figure of over \$7500 for rolls of film containing images of family members and memorable events that could be replaced with raw negative for less than \$100? The outcome is justified precisely because the factors underlying the award turned on the Mieskes' ties and relationships with deceased individuals. It is for this reason that usual sentimentality remains a subjective yardstick of intrinsic value. *Mieske* only excludes "unusually sentimental" damages, not foreseeable sums. Simply because those sums are not entirely susceptible to easy computation does not mean they should be disallowed. Rather, difficulty of ascertaining damages increases the loss to the person whose property has been destroyed. *Mieske*, 92 Wn.2d at 44-45.

Contention: "Therefore, it is an incorrect assumption from the animal law article that a higher valuation under the law would benefit animals and their owners. If damages increase, so too does the cost of litigating. Ultimately, the cost of veterinary services would likely increase, and owning a fully-insured and fully cared-for pet may become cost-prohibitive."

This refrain occurs with disturbing frequency despite a total lack of supportive empirical evidence. And Ms. Lombardo's citation to Schwartz et al., *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227 (2006) does nothing to change this, for nowhere in the entire article do the authors cite to one study that proves the probability (or even the very real possibility) that the sky will actually fall in the form of a mass exodus of veterinarians from the field or skyrocketing costs of care. Instead, Schwartz (like Ms. Lombardo) just recycle the fits of unsupported doomsaying by lawyers and veterinarians who simply substitute their own opinions for actual evidence.

I encourage readers to examine the thorough and exacting article by Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163 (2004), viewable at no charge at http://www.animallaw.info/journals/jo_pdf/vol10_p163.pdf. Mr. Green uses the insurance industry's own statistics to debunk these unsupported allegations. Further, market research has proved that among those who seek vet care, the cost of veterinary medicine is price-insensitive. See Todd W. Lue et al., *Special Report: Impact of the owner-pet and client-veterinarian bond on the care that pets receive*, JAVMA Vol. 232:4, p. 531, 532 (2008) ("Owners who exhibit behaviors indicative of a strong owner-pet bond are more likely to seek high levels of care, are less sensitive to the price of care, and are more willing to follow the recommendations of a veterinarian, compared with other owners. Although most pet owners are conscious of the cost of veterinary care, the vast extent of owners indicate it does not prevent them from undertaking recommended treatment."); see also Katie Burns, *Human-Animal Bond Boosts Spending on Veterinary Care*, JAVMA, Vol. 232:1 (2008).

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Ms. Lombardo also appears to find no value in deterrence and accountability. Erudite sources have acknowledged the two basic functions of the law of torts – to deter future conduct through a finding of liability and to compensate the injured person for damages sustained. See *Restatement (2nd) Torts* § 901 (1979), Learned Hand, 3 A.B.C.N.Y. Lectures on Legal Topics 87 (1926).

Society presumes that companion animals have immense intrinsic and emotional value. Veterinarians know and profit from this. If there were ever any question our love for companion animals, consider the images that flooded our television screens in the wake of Hurricane Katrina. In the hours, days, and weeks after Hurricane Katrina, news reports were predominated by images of desperate hurricane victims begging to be evacuated with their companion animals. Other hurricane victims, forced by local officials to leave their companions behind, worked tirelessly to be reunited with the animal members of their family after the storm passed. The national response to these images was so staggering that the federal government passed disaster relief legislation to ensure that, in the future, disaster evacuation plans include the evacuation of companion animals. See Pets Evacuation and Transportation Standards Act of 2006, 42 U.S.C. §§ 5121, 5196, 5196b, 5170b(a)(3).

Appellate decisions voice awareness of this substantial interest, and rule accordingly. See *Houseman v. Dare*, 966 A.2d 24 (N.J.App., Mar. 10, 2009)(reversing trial court, which held that companion animals are personalty that lack unique value essential to award specific performance, and that money was sufficient remedy for breach of contract involving custody over dog); *Rabon v. City of Seattle*, 107 Wash.App. 734, 744 (2001)(recognizing that liberty interest more apposite than property interest in evaluating due process rights in person’s dog and, in any event, is greater than same interest in a car); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir.(Cal.)2005)(“The emotional attachment to a family’s dog is not comparable to a possessory interest in furniture.”); *Rhoades v. City of Battleground*, 115 Wash.App. 752, 766 (II, 2003)(“Here, first, the private interest involved is the owners’ interest in keeping their pets. This is greater than a mere economic interest, for pets are not fungible. So the private interest at stake is great.”); *Pickford v. Masion*, 124 Wash.App. 257 (III, 2004)(“Pickford, with good reasons, maintains that Buddy is much more than a piece of property; we agree.”); *Mansour v. King Cy.*, 131 Wash.App. 255, 265 (I, 2006)(“We recognize that the bond between pet and owner often runs deep and that many people consider pets part of the family.”); *Womack v. von Rardon*, 133 Wash.App. 254 (2006)(creating malicious injury to pet cause of action).

Despite this truism, some veterinarians disingenuously rely on the human-animal bond for their livelihoods but contend that their malpractice should be economically fixed at fair market value. To restore equilibrium to this doctrinally unfair alignment, and to use the civil justice system to provide both compensation and deterrence, requires discipline.

Unfortunately, deterring veterinary malpractice by forcing adherence to the evolving standard of care is prohibitively costly with marginal return when orchestrated through a civil suit, utterly unlike human malpractice claims. Resultantly, any effective discipline of veterinarians will only occur through the complaint-driven mechanism of the veterinary medical board, serving as the gatekeeper for accountability and protection of the public's animals. However, most veterinary boards suffer from bureaucratic inertia, are crippled by a fox-guarding-the-henhouse mentality, and are bound by an evidentiary standard of proof (such as clear and convincing) that makes enforcement the rarity. Consider national coverage of the vet malpractice crisis, failing to be addressed through litigation and state disciplinary boards. JoNel Aleccia, *When vets make mistakes, pets pay the price: Owners outraged over botched surgeries, medication errors, misdiagnoses*, MSNBC (Feb. 10, 2010) (www.msnbc.msn.com/id/35286379/ns/health-pet_health/). Private litigation is, therefore, a poor and highly costly substitute for discipline. Financial recovery will both entice lawyers to proceed on contingency and incur tens of thousands of dollars in expert fees and litigation costs, as well as effectively deter misconduct by the class of defendants who might have to pay such judgments. Yet the ratio of expert fees and litigation costs to judgments recovered in veterinary malpractice claims are often greater than 1:1 (meaning that the plaintiff breaks even if he prevails), and the judgments are several orders of magnitude smaller than those involving human medical malpractice deaths (or even injuries).



Permitting veterinarians to prey upon intrinsic valuation in the operating room (charging many times over the cost to adopt or purchase the patient) but insisting upon market value in the courtroom, and a depreciated one at that, is inimical to the public interest to protect humans and animals from unprofessional health care providers when those charged with so doing shirk their statutory mandates.

I wrote this rebuttal in the memory of Orbit, who died at our home on Mar. 2, 2013. His veterinarian for most of his life came out in the middle of the night to perform the euthanasia. With deep gratitude for his devotion and expertise, I write this rebuttal in his honor, as well.

Fiat justitia ruat coelum,

Adam P. Karp