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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

JULIE MARIE GRIZZEL, Plaintiff vs. JAMES WILLIAM HICKEY, d/b/a S & S Farms, RON LEE OMARA, and S.S. FARMS, INC. aka S.S. Farms Linn County, Inc. and S&S Farms Linn County, Inc., Defendants	Case No. 90-0722 PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, by and through her attorney, Roger Anunsen and in response to the Motion for Summary Judgment on file herein, submits the following points, authorities and arguments:

Information Regarding Defendants

This matter was filed against two individual defendants, James Hickey ("HICKEY") and Ron Omara. Defendant Omara was served on May 30, 1990 and shortly thereafter, he filed for bankruptcy protection (Case No. 690-62270-R13). That filing stayed any further proceedings against him.

While the other named defendants include two (or three) purported Oregon corporations, the plaintiff has pled that these corporations were essentially sham entities and that Mr. Hickey should be deemed to be fully responsible for the damages suffered by the plaintiff.

STATEMENT OF PLAINTIFF'S CLAIMS

This case involves a claim by the plaintiff that the defendants individually and in concert, acted in such a manner that the plaintiff is entitled, under Oregon law, to damages which she suffered together with punitive damages. Plaintiff has set forth three claims: Negligence, Infliction of Emotional Distress and Conversion. In addition to economic and non-economic damages, the Plaintiff presents a claim justifying an award of punitive

damages. Note: The Motion appears to be against all three claims for relief, but is not neatly seperated. This response is likewise overlapping but nonetheless will plainly justify denial of the Motion for Summary Judgment.

PRELIMINARY REBUTTAL OF MOTION POINTS

Hickey's counsel claims that the plaintiff's dog, "My Girl", was "abandoned" (p.2, line 16). Evidence from the attached affidavits and Hickey's own deposition (attached in its entirety and by this reference incorporated herein) raise numerous genuine issues of material fact including whether this dog was ever abandoned. But is Mr. Ositis arguing that his client had some right to pull out his gun and shoot the dog? Even if the jury were to conclude that the dog was somehow "abandoned", Hickey still remains liable to the plaintiff. Plaintiff will prove at trial that Oregon law does **not** allow such actions. That act was a violation of Oregon law and as such will be proved to be negligence per se. There are **only two** circumstances which would allow a landowner to kill a dog he does not "own", whether a stray or one which has been abandoned: (1) if the dog is killing or chasing livestock and (2) if the dog is attacking a person. Neither was or can be credibly claimed by Hickey and even if he, at this late date, so claims, it will simply be another genuine issue of material fact for the jury.

The complaint clearly states a cause of action for emotional distress and adheres to the rule of law in Oregon on the subject. "A plaintiff may allege a claim for intentional infliction of emotional distress by pleading the defendant's intent to do the act with knowledge that it will cause grave distress, provided that the plaintiff also alleges that the defendant's position in relation to the plaintiff involves **some** responsibility aside from the tort itself." Hall v The May Dept. Stores, 292 Or 131, 637 P2d 126, (1981), Overbay v. Ledrigde 97 Or App 292, 297, 776 P2d 29, (1989)

Hickey had a statutory "responsibility" aside from the tort not to kill the dog, regardless of any claim he may make that he had a right to do so in his capacity as land

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owner. Oregon law sets forth the precise and particular circumstances whereby a land owner may kill a dog. This statute does not protect Mr. Hickey's action. Instead, the law is quite clear that My Girl was, at most, an unwilling trespasser delivered there by the thieves. At worst, the dog was delivered to Hickey as part of the package of the two dogs and when deemed to be an unsaleable piece of merchandise, it was illegally shot by Hickey.

The claim that Hickey "disposed of the cocker spaniel" by a method approved by the USDA (page 2) applies only to animals he has in his ownership. Counsel argues time and again that Hickey never bought the dog, it was abandoned. Hickey may not claim any authorization for his act of killing the plaintiff's pet.

Hickey claims that the description of the plaintiff's pet "didn't match" that of the one he had shot. Plaintiff will prove that Hickey intentionally misled the plaintiff by giving a description (see affidavit). Plaintiff will challenge Hickey's credibility by calling as witnesses Officer Mark Willis of the Linn County Sheriff's Office and Joe Fick who will describe Hickey admitting to them that he shot My Girl on May 16, 1988. See affidavits. Contrast these witnesses recollections of the shooting of My Girl with Hickey's. Hickey testified that he did not shoot the plaintiff's pet until 3 to 5 days later when the dog came back to his property. (see transcript of deposition at page 43, lines 9 & 21).

Hickey argues that the allegations of "objective characteristics of the circumstances" as precisely and specifically set forth within the complaint are not enough to place liability upon Hickey for the injury suffered by the plaintiff. Whether these allegations, when proven at trial, will be sufficient for a reasonable jury to conclude that Hickey **should have known** certain readily ascertainable facts. Hickey's knowledge (or constructive knowledge) is a central and genuine issue of material fact and as such may not be taken from the jury by way of Summary Judgment. These are the types of determinations which are particularly well suited for juries.

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Counsel states that Hickey somehow had every reason to believe that this dog was not a stray and was a pet, apparently owned by one of the two thieves. But Hickey not only knew or should have known from the circumstances as alleged in the complaint that these two were not the owners, Hickey had had extensive prior dealings with one of them (see Hickey transcript). Hickey testified that he had known one of the two (Curtis Eubanks, then a juvenile) for several years. Hickey had gone hunting with Eubanks, knew his parents and admitted that he had bought other dogs from Eubanks most of them being "hounds" sold at $25 to $35 each. (Transcript pages 34)

Counsel discusses in a flip manner the problem his client faces when he tries to explain why he would shoot a well-fed, groomed purebred cocker spaniel. (page 4 of Motion). But the facts which will be proven at trial will reveal that Hickey intentionally attempted to mislead the plaintiff and investigating officer with a description of the dog as being sick and mean. (see affidavits including eyewitness accounts of Hickey's statements). We find Hickey first stating that the dog was "too damn small", sick and tried to bite him. (see affidavits). But he testified in August of 1990 that he never really saw the plaintiff's dog and that the My Girl never was out of the crate in the back of pickup. (see transcript p 39, lines 12 - 18). Then, according to his testimony, the two thieves drove off with the cocker spaniel and he never had any contact with the dog again. (see transcript page 40, lines 18-20).

Many of the material issues of fact will turn on the credibility of Mr. Hickey and whether the jury would reasonably conclude that his actions were done with a disregard for the rights of the plaintiff, even though he had never then met Julie Girzzel.

NEGLIGENCE: "DUTY"

Counsel seeks to hide behind the element of a duty owed by Hickey to Grizzel, who was unknown to him on May 16, 1988. Plaintiff has alleged and will prove at trial

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material facts from which a duty may clearly be implied by law. At it's most elementary, the duty owed by someone in our society to a pet owner when dealing with that person's pet is rooted in common sense let alone laws and court imposed public policies. Few, if any, dogs survive in our modern civilization without being cared for by a human companion. This is the basis for a duty owed by virtually anyone coming in contact with a healthy, well groomed pet. But in our case, the circumstances are even clearer considering Hickey's background. This is a man who was very familiar with pets and pet owners. This is the man who ran the Linn County Dog Control in the 1970's. (see Hickey transcript, p. 10) See additional arguments herein regarding the duty owed by Hickey to avoid the reasonably foreseeable consequences of his action of killing the Plaintiff's pet.

RESPONSE TO POINTS & AUTHORITIES

Counsel cites Torres v. U.S. National Bank 65 Or App 207 (1983) regarding responsibility for a third party's criminal activities. This is an obvious effort to distance Hickey from the fatal act. It was not the theft of My Girl that killed her. It was the illegal act of James Hickey which killed her. The Torres decision is of no comfort to Hickey. Julie Grizzel is not asking this court to create a duty in Hickey to "protect" her from the criminal activities of Omara or Eubanks. The plaintiff has alleged that Hickey had a duty to protect her against the type of injury she suffered, that Hickey's conduct was a substantial factor in causing her injury and that the breach caused her damage. Torres v. U.S. National Bank 65 Or App 207, 210. citing Yanzick v. Tawney 44 Or App , 605 P2d 297 (1980). The Torres decision on the issue of the existence of a "duty" looked to Yanzick :

> "In order to state a cause of action in negligence, plaintiff's complaint must state facts which **imply** that defendant had a duty to the plaintiff. 44 Or App @62 Emphasis added.

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The Yanzick case involved an injury suffered in a Plaid Pantry parking lot when a customer was pinned between a parking car and the outdoor ice machine. The court looked to whether Plaid Pantry knew or had reason to know, **"from past experience"**, that a person in the general class of potential customers (even though not individually known to the defendant) would foreseeably be injured. 44 Or App @64. That precise fact situation is present between Hickey and Grizzel. Just as Hickey can honestly say that on May 16, 1988 he did not know the identity of Julie Grizzel, Plaid Pantry did not know the identity of the grocery patron, Yanzick, when that injury occurred. And just like that case, from the amended complaint before this court, "a jury could reasonably find both that the injury suffered by plaintiff is within the general class of harms reasonably to be anticipated from the negligent acts alleged, and that plaintiff was within the class of persons who might reasonably be expected to suffer such harm." 44 Or App @64.

EMOTIONAL DISTRESS & CONVERSION

Hickey asserts that the opinion in Fredeen v. Stride 269 Or 369,372, 525 P2d 166 (1974) is "directly on point" and "dispositive" of the issues of the mental distress and punitive damages (Hickey Motion page 7). It is neither and counsel either misread the opinion or simply avoided mentioning the heart of the decision. The case is readily distinguished in that Mrs. Fredeen took her dog to the defendant veterinarian to have the animal killed. The veterinarian acted, without the owner's permission or knowledge, to find another home with a Mrs. MacDonald. Counsel boldly points out that Mrs. MacDonald "was held not liable for such damages." (Motion page 8, line 5) **But** the court held that the other defendant, Dr. Stride, had acted in such a manner to be liable for both mental distress and punitive damages which had been awarded by the jury at trial. Even the doctor's good intentions were not enough to avoid liability for the foreseeable consequences of his act. Hickey killed the plaintiff's pet without permission of anyone

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and with a sufficient knowledge that such an act would reasonably cause distress to the pet's owner-companion.

Counsel recites the following in support of Hickey's Motion: "**Ordinarily** a conversion does not cause the property owner sufficient mental anguish to merit an award of damages for pain and suffering and the amount of damages is limits to the value of the property converted." Fredeen v. Stride 269 Or @ 372 emphasis added on the word "Ordinarily". But, immediately following the first portion of the opinion quoted by counsel (Page 7, line 20), we see the complete context of the issue: "However, if mental suffering is the direct and natural result of the conversion, the jury may properly consider mental distress as an element of damages." 269 Or @372

A pet owner's suffering is certainly a "direct and natural result" of the killing of such a well kept and well loved dog. We note that in the Fredeen decision, the dog's new owner was not found liable since she did not "act in conscious disregard of plaintiff's property rights." 269 Or @374. Hickey certainly had no legal right to kill My Girl under any reasonable scenario. Hickey's act was not only a "conscious disregard" of the pet's owner's rights, but given Hickey's background and the objective circumstances alleged in the complaint, the act was one which constituted "sufficiently aggravated violation of societal interests to justify the sanction of punitive damages as a preventative measure." 269 Or @375.

Consider also Oregon's specific exception to the general rule that mental suffering is not compensable in ordinary conversion actions. The Oregon Supreme Court has set forth the following: "There is, however, an exception to the general rule, and if mental suffering is the direct and natural result of a specific trespass **or other tort**, a jury can take such suffering into account." Douglas v. Humble Oil , 251 Or 310, 317, 445 P2d 590 (1968). Emphasis added.

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Hickey cites Meyer v. 4-d Insulation Company, Inc. 60 Or App 70, 652 P2d 852 (1982) for the qualified statement that "damages for mental distress are generally not recoverable in an action alleging damage only to property." (Hickey Motion page 7, line 6) However, that case provides much more and directs us to some of the most important recent decisions on the issue of damages suffered by owners of companion animals. Justice Warren notes at some length that any property loss, will result in "some emotional upset". @ 74. "We do not *yet* live in an 'egg-shell society" he writes. 60 Or App @79 There must be a line drawn, but rather than looking at the "quality of the defendant's conduct" or the "predictability of the distress",

> "it is the kind of interest invaded that, as a policy matter, is believed to be of sufficient importance to merit protection from emotional impact, that is critical. Regardless of the language used to describe when such damages are recoverable, the Oregon cases allowing such damages all involve an interference with the person beyond the inconvenience and distress always resulting from interference with property." 60 Or App @ 74-75

The Supreme Court has extended the right to compensation for the infliction of mental distress by use of a "species of case" test with a built-in "reluctance of courts in general to give credence to mental distress claims absent some indication that they are real and not feigned." 60 Or App 79. As can be seen by a review of the attached affidavits, there will be much more than "some indication" that the mental distress which Hickey caused Julie Grizzel was real. In those affidavits, Gailen L. Keiling, a qualified mental health expert, has outlined some of his testimony expected at trial, and Plaintiff's counsel, presents the appropriate affidavit under ORCP 47E regarding another highly qualified expert retained by the Plaintiff who has rendered the requisite expert opinion on the subject. There will therefore be more than sufficient material facts presented at trial to unquestionably prove that the interest invaded, the bond between a pet owner and his or

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her companion, is just such the "species" of interest which Oregon's case law, as a matter of policy, is prepared to protect.

This type of interest is certainly well "beyond the inconvenience and distress always resulting from interference with property." When property is categorized into replaceable assets, they may be easily replaced on the open market with a like brand item. Simple damages for replacement will suffice and little or no "real" distress will result. But a household pet, a personal companion like My Girl, is plainly irreplaceable. As described in the pleadings and by the experts in this case, the bond between a human and its companion pet is precisely the type which our society has designated and should be protected as a matter of "public policy". Specifically, the experts at trial will show the interest of the average reasonable pet owner would be invaded by conduct such as Hickey's, and will specifically testify as to the direct and proximate damage which the Plaintiff suffered and continues to suffer as a direct result of Hickey's unlawful killing of her cocker spaniel .

In Justice Rossman's dissent in Meyer v. 4-D Insulation Co., Inc., he notes the public policy issues in the area of mental distress which have been discussed in other jurisdictions. Of particular interest is the mention of Rodrigues v. State, 52 Haw 156, 472 P2d 509 (1970) which stated that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Meyer v. 4-D Insulation, Co., Inc. 60 Or Ap 70, 86. Under any analysis, we are not concerned with Mr. Hickey's opinion of what may cause a pet owner serious distress. (see Hickey transcript, page 13, line 2 where the defendant is of the opinion that dogs are "the same as cattle".) How a reasonable pet owner in our society would react under such circumstances is a question which must be determined solely by the jury after it is presented all the circumstances of the case including the opinion of properly qualified experts.

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EMOTIONAL DISTRESS / DUTY / FORESEEABILITY

Precisely on point and of direct importance to the issues raised in this case is Campbell v. Animal Quarantine Station, Etc. 63 Hawaii 557, 632 P2d 1066 (1981). There the plaintiff family owned a nine-year-old boxer raised from a puppy, as in our case. The family pet died of heat prostration while under required quarantine and the family sought compensation for mental suffering. Like Hickey, the defendants did not know the identity of pet's owners. The plaintiffs were nowhere near the scene of the accident. They were on the mainland and learned of the death of their dog later. The defendants in Campbell were not accused of any intentional wrongdoing, as it was not an intentional act as alleged in our case. Nonetheless, the court held the negligent defendants responsible for the emotional distress the act caused the family members. The court adopted the reasonable man standard coupled with a reasonable foreseeability test. The importance of the issue of negligent or reckless infliction of mental distress was highlighted in 4 U. Hawaii L.R. 207, *Campbell v. Animals Quarantine Station*: Negligent Infliction of Mental Distress , Alan T. Kido and Elizabeth Quintal (1982) [copy attached to this Response].

Whether there existed a duty and whether the damage suffered by Julie Grizzel was foreseeable become intertwined inquiries. Duty is undoubtedly established by determining from the facts and all of the surrounding circumstances that Hickey's shooting of a cocker spaniel like My Girl would reasonably effect someone, namely the real owner. The determinations as to whether Hickey acted in a wrongful or illegal manner and whether he could have "reasonably" believed that he had some permission from the thieves, are jury questions. We look to Fozzolari v. Portland School District No. 1J, 303 Or 1, 734 P2d 1326 (1986) for direction on these issues.

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In Fozzolari, Oregon Supreme Court sets forth the comprehensive analysis of duty and foreseeablility in Oregon. It is clearly the foreseeability of emotionally damaging the plaintiff by illegally shooting the cocker spaniel on which this case will ultimately turn. That opinion determined that "the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." Id. @ 17. This is yet another question for the jury. "The jury is given a wide leeway in deciding whether the conduct in question falls above or below the standard of reasonable conduct deemed to have been set by the community. The court intervenes only when it can say that the actor's conduct clearly meets the standard or clearly falls below it." 303 Or 1, @17-18, quoting Stewart v. Jefferson Plywood Co., 255 Or 603, 607, 469 P2d 783 (1970). That "community standard" is precisely the issue which is only suited for the jury to determine. See Kimbler v. Stillwell, 303 Or 23, 27, 734 P2d 1344 (1987).

Other jurisdictions have also recognized the right pet owners have in our society to be free from negligent or reckless infliction of mental distress as it relates to their companion pets. In Knowles Animal Hospital, Inc. v. Willis 360 So.2d 37 (Fla. App. 1978), the court held that the jury viewed the "negligent conduct which resulted in the burn injury suffered by the dog to have been of a character amounting to great indifference to the property of the plaintiffs, such as to justify the jury award." Id. @ 38, citing LaPorte v.Associated Independents, Inc. 163 So.2d 267 (Fla. 1964). In LaPorte, a garbage collector killed the plaintiff's miniature dachshund, Heidi, as the pet was tethered outside her house and beyond the reach of the garbage can. As the collector departed, he tossed the can at the pet and instantly killed Heidi. The plaintiff presented an expert who testified that he treated the plaintiff for emotional injuries resulting from the incident. The court noted that even though the garbage gatherer did not even know the plaintiff and had never before

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seen the dog, it was for the jury to determine the issue of mental distress. "The affection of a master and his dog is a very real thing and the malicious destruction of the pet provides an element of damage for which the owner should recover". 163 So. 2d 267.

In Richardson v. Fairbanks North Star Borough, 705 P2d 454 (Alaska Sup. Ct. 1985) where an animal shelter employee "mistakenly killed" the plaintiff's pet dog. The court held that "the loss of a beloved pet can be especially distressing in egregious situations." See also Gill v. Brown, 107 Idaho 1137, 695 P2d 1276 (1985) the owners were allowed to bring an action for infliction of emotional distress when the defendant killed the plaintiff's donkey.

PUNITIVE DAMAGES

When Hickey shot the plaintiff's cocker spaniel, he did not know Julie Grizzel. Thus, there is no way that Mr. Hickey acted with specific malice toward her only because he did not know her. But Oregon law is in accord with the direction of the majority of other jurisdictions in expanding the responsibility which may be placed on those who are found to have acted in reckless or negligent disregard for the rights of others. "[I]ntentional disregarding the rights of another is the equivalent of legal malice." McElwain v. Georgia-Pacific Corp. 245 Or. 247, 249, 421 P.2d 957 (1966). The issue of punitive damage is one for the jury which will apply its standard of societal limits not Mr. Hickey's. This position is in accord with Oregon law which has determined that punitive damages issues are to be decided on a case-by-case basis. Lewis v. Wood Prod. Credit Union, 275 Or. 445, 551 P.2d 446 (1976), Glenn v. Esso Corporation 286 Or. 278, 282, 5209 P.2d 443,(1974). See also 18 Willamette Law Review 369, 405 (1982), "Punitive Damages in Oregon", Susan M. Peters (1982)

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Counsel misstates and misquotes the Oregon Supreme Courts decision in Daly v. Wolfard Bros., Inc. 204 Or 241, 282 P2d 627 (1955). He quotes where there is no such quote. Further, counsel claims that the court held that "[A]s a general rule, punitive damages are not recoverable merely because a conversion takes place." emphasis on words **added by counsel** (Hickey Motion at p. 8, line 6). This claimed "general rule" was taken from was the language which the defendant in Daly "asserted" from another case, Perry v. Thomas, 197 Or 374, 253 P2d 299 (1953) and which the Supreme Court rejected in Daly. The Court found that the case in which that language was taken was "much different from the facts in the case at bar." 204 @ 253. In Perry there were no allegations of any aggravating circumstances. The issue of whether there are in fact such "aggravating circumstances" is certainly a question of material fact for the jury.

To be entitled to punitive damages in Oregon, a plaintiff need not show malice or guilty intent by the tortfeasor where other circumstances as alleged and determined by the jury justify such damages. Even a reckless disregard for the foreseeable consequences can justify such damages.

In Douglas v. Humble Oil, 251 Or 310, 445 P2d 590 (1968), the court determined that such damages are justified when the plaintiff was "understandably disturbed by the experience." Meyer v. 4-D Insulation, Co., Inc. 60 Or App 70,88. "Regardless of the nomenclature by which a violation of these obligations is described (grossly negligent, willful, wanton, malicious, etc.), it is apparent that this court has decided that it it proper to use the sanction of punitive damages where there has been a particular aggravated disregard * * * of the rights of the victim." 251 Ore @ 315. Even if Mr. Hickey claims that he in all good faith believed that the Plaintiff's dog should have been shot, it is still a question for the jury, not one for summary judgment. "In order for the good-faith defense to come into play, however, the jury would have to believe that the tort-feasor acted in good faith." 251 Or. @ 315. The court went further and determined that it is "proper for the jury to consider

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all the facts of the case" in deciding whether the defendant's conduct "warranted the civilizing influence of punitive damages." 251 Or @ 316. The court in Douglas concluded that the "social values offended" are to be seriously considered by the jury in determining whether to apply the general rule cited by Hickey's counsel.

Consider also Friendship Auto v. Bank of Willamette Valley, 300 Or 522, 716 P2d 715 (1986) where the defendant (like Hickey here) attempted to convince the court that the rule in Oregon is that a conversion claim is not an appropriate cause of action for punitive damages. The court cited Lee v. Wood Products Credit Union, 275 Or 445, 551 P2d 446 (1976) as the current law in regard to punitive damages in conversion cases. If, the court reasoned, "the conversion is merely a technical one and the converter acts under a good faith, albeit mistaken, belief that he is legally entitled to proceed in that fashion, an award of punitive damages is inappropriate." Lee 275 Or @ 449. The opinion then discusses the "good faith-technical error" rule in Lee, and concludes: "If there was evidence from which the jury, as reasonable people, could have found that the defendant acted in bad faith, then the verdict for punitive damages must stand if the bad faith reached the level of malice." Friendship Auto 300 Or @534. The reasoning was further refined by adding that "[T]he intentional disregard of the interest of another is the equivalent of legal malice." @535. See also Crowd Management Services, Inc. v. Finley, 99 Or App 688, 784 P2d 104 (1989) involving a conversion which resulted in a punitive damage award.

While no specific factual precedents can be found within Oregon's courts, we conclude by proposing that additional direction can found in Paul v. Osceola County, 388 So.2d 40 (Fla App 1980), where it was held that if the destruction of the pet (a cat) was intentional, as was Hickey's action, that type of "great indifference" to the rights of others would justify the assessment of exemplary or punitive damages. Id. @41.

CONCLUSION

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CONCLUSION

Since Hickey has not shown and can not show that there are no genuine issues as to any material facts, as per the requirements of ORCP 47, the Defendant's motion must be denied and the matter must proceed to trial.

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