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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CLARK COUNTY

MARILYN DANTON,)	
)	
Plaintiff,)	NO. 06-2-01172-8
)	
v.)	DEFENDANT'S
)	MOTIONS IN LIMINE
ST. FRANCIS 24 HOUR ANIMAL)	
HOSPITAL, P.C., a Washington professional)	
services corporation (UBI 602-029-072); and)	
DOES 1-10;)	
)	
Defendants.)	
)	

I. INTRODUCTION AND RELIEF REQUESTED

Defendant St. Francis 24 Hour Animal Hospital, P.C. ("St. Francis") moves the Court, before voir dire of the jury, for an order as follows:

1. To instruct the attorney for Marilyn Danton ("Plaintiff") not to interrogate witnesses concerning the items set out on the following pages, or to mention to the jury in any manner those items, without first obtaining permission of the Court outside the presence and hearing of the jury; and
2. To instruct the attorney for Plaintiff personally to admonish his client and witnesses to refrain from mentioning to the jury in any manner the items set out on the following

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2 pages, without the attorney first obtaining permission from the Court outside the presence and
3 hearing of the jury.

4 This motion is made on the following grounds:

5 (a) The matters set out on the following pages are immaterial and inadmissible.
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7 Were any of such matters made known to the jury, it would be improper and prejudicial, even if
8 the Court were to sustain an objection and instruct the jury not to consider such facts for any
9 purpose. In all probability, any such situation could result in grounds for a mistrial in spite of
10 attempts by the Court to cure the situation. Ordering the jury to disregard interrogation,
11 comments, or offers in front of the jury would not cure such prejudice, but rather reinforce the
12 impact of such prejudicial matters on the minds of the jurors.

13 (b) The granting of this motion cannot be error because it merely requires permission
14 to be asked before prejudicial information is suggested to the jury. The motion here asks only
15 that counsel advise the Court outside the presence of the jury, at such time as he intends to go
16 into the questionable items, so the Court may make its ruling at that time on the proffered
17 question, remark, testimony, or exhibit. The Court in this way will be best able to fulfill its
18 function in keeping the record free of error and prejudice.

19 St. Francis requests that the Court rule on the following issues:

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21 1. Liability Insurance.

22 The existence of liability insurance should be excluded.

23 2. Emotional Distress Damages.

24 Any reference to Plaintiff's emotional distress or "emotional distress damages" should
25 be excluded.

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2 3. Sentimental or Fanciful Value.

3 In the event that the Court determines that intrinsic value is the appropriate measure of
4 damages, then any reference to sentimental or fanciful value that Plaintiff placed on the animal
5 should be excluded.

6 4. Loss of Use and/or Loss of Companionship as a Stand-Alone Claim.

7 Any reference to claims for loss of use and/or loss of companionship should be
8 excluded.

9 5. Loss of Use as an Element of Intrinsic Value.

10 In the event that it is determined that intrinsic value is the appropriate measure of
11 damages, then any reference to "loss of use" should be excluded.

12 6. Pre-Loss Damages.

13 St. Francis anticipates that Plaintiff will put on evidence of veterinary bills and other
14 costs incurred in the care of their cat prior to its disappearance. Any reference to pre-
15 disappearance costs should be excluded.

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17 **II. ISSUE PRESENTED**

18 Whether the Court should grant St. Francis's Motions in Limine with respect to the items
19 identified above?

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21 **III. LEGAL ARGUMENT AND AUTHORITY**

22 Pretrial motions to exclude evidence are designed to simplify and streamline trials and to
23 avoid the prejudice that occurs when a party is forced to object in front of the jury to the
24 introduction of evidence. *Fenimore v. Drake Constr.*, 87 Wn.2d 85, 89, 549 P.2d 43 (1976).
25 Motions in limine avoid such prejudice and simplify the trial by precluding irrelevant evidence,

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2 or overly prejudicial evidence. *See In Re Deming*, 10 Wn.2d 82, 736 P.2d 639 (1987); ER 403;
3 5A K. Teglund, *Wash. Prac., Evidence*, § 9, at 18 (3d ed. 1989).

4 1. Liability Insurance.

5 ER 411 provides in relevant part that, "Evidence that a person was or was not insured
6 against liability is not admissible upon the issue whether the person acted negligently or
7 otherwise wrongfully." Insurance coverage is irrelevant to a party's legal liability and may
8 prejudice the jury by suggesting that the party can afford to pay the plaintiff. The rule bars both
9 direct and indirect evidence of insurance. For example, under a rule identical to Rule 411, an
10 Iowa court refused to allow inquiry into the fact that defendant's expert witnesses were retained
11 by the defendant's liability insurer. *Strain v. Heinssen*, 434 N.W.2d 640 (Iowa 1989). In this
12 case, whether or not St. Francis is insured is irrelevant and inadmissible, and all evidence of
13 insurance should be excluded.

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15 2. Emotional Distress Damages.

16 Plaintiff seeks damages for "emotional distress and loss of enjoyment of life." Such
17 damages are clearly not allowed in Washington for the loss of an animal (or any other personal
18 property) except in the case of *intentional* torts. Plaintiff has not alleged an intentional tort, nor
19 is there evidence to support such a claim.

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21 In *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.2d 968 (1997), the Washington
22 Supreme Court specifically addressed whether damages for emotional distress could be awarded
23 in a case involving the timber trespass statute, RCW 64.12. After recognizing that emotional
24 distress damages may be awarded for the intentional destruction of property, the Court reasoned
25 that, because "intent" is inferred by the application of the timber trespass statute, such damages

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2 may be awarded in that case. The Court, however, was careful to point out that the award of
3 such damages has only been allowed in circumstances where intentional acts have been proved,
4 or where the inference of intent is established by statute. *Birchler*, 133 Wn.2d at 116-17, notes
5 4-5.

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7 To the extent that the Washington Supreme Court left any ambiguity on this particular
8 issue after *Birchler*, the Court clarified itself seven months later in *White River Estates v.*
9 *Hiltbruner*, 134 Wn.2d 761, 953 P.2d 796 (1998). *Hiltbruner* specifically addressed the
10 question of whether the statutory violation involved in *Birchler* (violation of the timber trespass
11 statute) triggered recovery for emotional distress damages, or whether an intentional act was
12 required to trigger recovery. The *Hiltbruner* Court held that the prerequisite for the recovery of
13 emotional distress damages is the presence of an intentional tort. *Hiltbruner* states:

14 While the statute in *Birchler* did not expressly address the availability of
15 emotional distress damages, the court explained that a wide variety of
16 Washington cases permit damages for emotional distress upon proof of an
17 intentional tort. The court then looked to the statute and found that a violation
18 of RCW 64.12.030 requires proof that a person has “willfully” trespassed and
19 damaged the property of another person. These actions, the court found,
20 amounted to an intentional interference with another’s property interests and
21 thus determined that emotional distress damages were available for a violation
22 of RCW 64.12.030.

23 Consistent with the rule that damages for emotional suffering are available
24 only upon proof of an intentional tort, this court has declined to allow
25 emotional distress damages where the statutory violation requires only proof of
negligence as opposed to intentional conduct.

Hiltbruner, 134 Wn.2d at 767-68 (emphasis added) (citations omitted).

The present case does not involve any allegation of willful or intentional acts. Rather,
Plaintiff’s Complaint states causes of action for reckless breach of bailment contract and
negligence.

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2 *Hiltbruner* is consistent with the 2004 case of *Pickford v. Masion*, 124 Wn. App. 257, 98
3 P.3d 1232 (2004). In *Pickford*, plaintiff's dog was attacked and mauled by defendants' dogs.
4 Plaintiff sued, asserting claims for negligent infliction of emotional distress, malicious infliction
5 of emotional distress, and destruction of the guardian-companion animal relationship. Plaintiff
6 argued that she was entitled to emotional distress damages under *Hunsley v. Giard*, 87 Wn.2d
7 424, 435, 553 P.2d 1096 (1976). Defendants moved for summary judgment, arguing that
8 Washington law does not authorize claims for emotional distress arising from injuries to a pet.
9 The trial court granted defendant's motion, and the Court of Appeals affirmed, distinguishing
10 *Hunsley* on the ground that the emotional distress in that case arose out of "fear of what might
11 have happened to two humans." "No Washington case has extended the *Hunsley* rule to
12 emotional distress suffered because of injury or threatened injury to a pet." *Pickford*, 124 Wn.
13 App. at 260. The *Pickford* Court concluded that "intent" was the touchstone for recovery of
14 emotional distress damages for property damage. In support of that conclusion, the Court cited,
15 with approval, the analysis from *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 562
16 (Tex. 2004), where the Texas Court of Appeals explained that mental anguish arising from
17 property damage is only appropriate where there is "some ill will, animus, or desire to harm the
18 plaintiff personally." *Pickford*, 124 Wn. App. at 262.

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21 Plaintiff does not allege any "ill will, animus, or desire to harm" her personally. Under
22 the strong Washington precedents of *Birchler*, *Hiltbruner*, and now, *Pickford*, it is indisputable
23 that emotional distress damages are only recoverable upon proof of an intentional, wrongful act.
24 Since there is no such allegation here, Plaintiff is not entitled to recovery any damages for her
25 emotional distress and "loss of enjoyment of life."

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2 3. Sentimental or Fanciful Value.

3 Plaintiff seeks damages based on Moochie's "intrinsic value." The Court's Order on
4 Plaintiff's Motion for Partial Summary Judgment on Damages, entered on September 18, 2006,
5 and modified by Stipulation on January 3, 2007, provides that, "The court RESERVES
6 RULING on whether intrinsic value is the only appropriate measure of damages for the value of
7 Moochie. While Defendant may argue that replacement value be included in the jury
8 instructions, Plaintiff may present evidenced [sic] of and argue for intrinsic value or something
9 more than replacement value in jury instructions and at trial." In the event that the Court
10 determines that intrinsic value is the appropriate measure of damages, then, in calculating
11 intrinsic value, compensation for sentimental or fanciful values is not allowed. *See Mieske v.*
12 *Bartell Drug Co.*, 92 Wn.2d 40, 593 P.2d 1308 (1979).
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14 Under *Mieske*, emotional distress damages for an "irreplaceable" companion animal
15 cannot be part of the intrinsic value equation, regardless of Plaintiffs' theory of liability. If
16 emotional distress damages were allowed, the courts would blur the bright line between
17 recovering for the value of personal property (which is allowed) and recovering one's emotional
18 distress damages (which is clearly disallowed).
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20 When calculating "intrinsic value," it would not be permissible for the jury to consider
21 the unique emotional tie that Plaintiff attaches to her relationship with her cat. "Recognizing
22 that value to the owner encompasses a subjective element, the rule has been established that
23 compensation for sentiment or fanciful values will not be allowed." *Mieske*, 92 Wn.2d at 45
24 (emphasis added). The *Mieske* court also cited with approval its earlier decision, *Palin v.*
25 *General Constr. Co.*, 47 Wn.2d 246, 287 P.2d 325 (1955). In *Palin*, the Court adopted the

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2 following language from 15 Am. Jur. § 125, Damages, 134 which articulated the limits of
3 damages that may be recovered for the destruction of personal property that has no market
4 value:

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6 In such a case the proper measure of damages is generally its actual value or its
7 value to the owner. The value of an article may be shown by proof of such
8 elements or facts affecting the question as may exist - such as its cost, the cost
9 of reproducing or replacing it, its utility and use, its condition and age, and the
10 extent, if any, to which it has deteriorated or depreciated through use, damage,
11 age, decay, or otherwise. A recovery cannot be had on the basis of a purely
12 sentimental value to the owner or of a fanciful price which he might for special
13 reasons place thereon.

14 *Palin*, 47 Wn.2d at 253 (emphasis added).

15 In the Complaint, Plaintiff alleges that, she “lost the intrinsic value of Moochie, as based
16 on is unique qualities, characteristics, training, bonding, and personality, as well as the loss of
17 his companionship, love, affection, and solace.” Amended Complaint, p. 2. Further, Plaintiff
18 alleges that, “Moochie was a close family companion ... and had special value, aiding [Plaintiff]
19 in her well-being, growth, development, and daily activities, including in work and play.”
20 Amended Complaint, p. 3.

21 Plaintiff also alleges that: Moochie maintained a “special relationship” with Plaintiff,
22 “situationally and emotionally similar to that of a human, dependent child and family member”
23 (Amended Complaint, p. 4); and Defendant should be liable for destruction of “the parent-child
24 relationship of plaintiff, his situational and nonbiological parent and guardian” (Amended
25 Complaint, p. 4).

26 These allegations are all emotionally charged and reflect overly sentimental and/or
27 fanciful value that Plaintiff placed on her cat. Any statements concerning Plaintiff’s parent-
28 child relationship with her cat serve no legitimate purpose, and will only prejudice the jury.

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2 Accordingly, any questioning, testimony, or argument about such issues should be excluded
3 from the trial.

4 4. Loss of Use and/or Loss of Companionship as a Stand-Alone Cause of Action.

5 On September 18, 2006, Judge Wulle entered an Order Granting Defendant's Motion to
6 Dismiss Plaintiff's stand-alone claim for Loss of Use/Companionship. Per Judge Wulle's
7 Order, Plaintiff is not entitled to any damages for loss of use or loss of companionship as a stand
8 alone cause of action.

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10 5. Loss of Use as an Element of Intrinsic Value.

11 On September 18, 2006, Judge Wulle reserved ruling on Defendant's Motion to Dismiss
12 loss of use as an element of damages. In the summary judgment briefing, Plaintiff argued that
13 the line of cases of *McCurdy*, *Straka Trucking*, and *Holmes* support recovery for loss of use
14 damages for destroyed, non-economically productive personal property. As noted by Plaintiff,
15 "On this strict property basis alone, [Plaintiff] is entitled to loss of use over the term of
16 Moochie's unavailability." Plaintiff's Motion for Partial Summary Judgment on Damages, p.
17 13. Plaintiff outlined the loss of use argument as follows: (1) *McCurdy* allows loss of use for
18 damaged personal property during a period of repair; (2) *Straka Trucking* extends the holding
19 of *McCurdy* to totally destroyed, economically-productive personal property; and (3) *Holmes*
20 predates *McCurdy* and *Straka Trucking* in allowing loss of use for negligently injured non-
21 economically productive automobiles. *Id.*

22
23 Plaintiff's argument, while creative, ignores the fact that the Washington Court's have
24 limited loss of use damages to livestock. Specifically, in *Straka Trucking v. Estate of Peterson*,
25 98 Wn.App. 209, 211, 989 P.2d 1181 (1999), Division 2 of the Washington Court of Appeals,

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2 summarizing the types of cases in which loss of use damages may be recoverable, stated as
3 follows: "Loss of use claims are appropriate in the case of private chattels, such as the family
4 car or the pleasure boat. They are also appropriate in the case of commercial animals and
5 equipment of all kinds...." *Citing to* Dan B. Hobbs, Law of Remedies, § 5.15(1), at 875 (2nd ed.
6 1993) (citations omitted) (emphasis added).

7
8 Loss of use is not recoverable in Washington for cases involving companion animals,
9 and any reference to Plaintiff's "loss of use" of Moochie should be excluded in this case.

10 **6. Pre-Loss Damages.**

11 It is anticipated that Plaintiff will put on evidence of time and money spent on Moochie
12 from the time of his adoption in 2002 until his disappearance in 2005. By way of analogy, if
13 Plaintiff was pursuing damages for loss of her car, she would be entitled to damages based on
14 the fair market value of the car at the time of loss, but not for gas, oil changes, and other
15 maintenance up to the time of loss.

16 The legal framework for determining the proper measure of damages for loss of personal
17 property is as follows: (1) if property has market value, then damages equal the fair market
18 value; (2) if property does not have market value, but can be replaced, then damages equal
19 replacement cost; and (3) if property does not have market value and cannot be replaced, then
20 the court may consider intrinsic value. *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 43, 593 P.2d
21 1308 (1979). There is no statutory or common law basis for awarding pre-loss damages.
22 Accordingly, evidence of pre-loss damages is irrelevant and should be excluded at trial.


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24 **IV. PROPOSED ORDER**

25 A proposed order is attached hereto.

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DATED this 15th day of July, 2007.

FLOYD & PFLUEGER, P.S.



Douglas K. Weigel, WSBA #27192
Attorneys for Defendant St. Francis 24 Hour
Animal Hospital, P.C.