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

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

COMES NOW Defendant St. Francis 24 Hour Animal Hospital ("St. Francis"), by and through its undersigned counsel of record, and hereby responds to Plaintiff's Motions in Limine as follows:

I. INTRODUCTION

The function of a motion in limine is the prevention of potentially prejudicial evidence being placed before the jury until the trial court has ruled upon its admissibility within the full context of the trial itself. *State v. Austin*, 34 Wn.App. 625, 628, 662 P.2d 872 (1983); *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984). The granting or denial of a motion in limine is within the discretion of the trial court, subject only to

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review for abuse. *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 286, 686 P.2d 1102 (1984); *Fenimore v. Donald M. Drake Construction*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

The motion should be granted if: (1) it describes the evidence objected to with sufficient specificity to enable the trial court to determine that it is clearly inadmissible; (2) the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it by objecting when it is offered; and (3) the trial court is given a memorandum of authorities showing that the evidence is inadmissible. *Gammon*, 38 Wn.App. at 286-87. Conversely, the motion should be denied if it is too vague or too broad, or if the legal issues are not adequately briefed. *See Fenimore*, 38 Wn.App. 274. The motion should likewise be denied if a proper ruling depends upon a factual background to be developed at trial. *See Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (1977).

The Court should not exclude evidence before trial solely because it lacks credibility. Credibility is a matter for the trier of fact to determine, after direct and cross-examination. *State v. Gosby*, 11 Wn.App. 844, 526 P.2d 70 (1994).

II. RESPONSE TO PLAINTIFF'S MOTIONS IN LIMINE

1. "Millionaire" Statement by Ted Danton.

Plaintiff asks the Court to disallow the testimony by Barbara Baker concerning a statement that Ted Danton made to her during his first visit to St. Francis after learning that his cat was missing. Specifically, Ted Danton told Barbara Baker that, "You just made me a fucking millionaire." Plaintiff contends that this statement should be

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disallowed as inadmissible hearsay, irrelevant, and unfairly prejudicial. Defendant objects to this motion in limine for the following reasons:

"Hearsay" is a statement by an out-of-court witness offered in court to prove the truth of the matter asserted. ER 801. A statement offered for some other purpose is not hearsay.

Here, Ted Danton's statement is not being offered to prove the truth of the matter asserted. Clearly, this case is not going to make him a millionaire. However, his actions and statements during his first interaction with St. Francis employees after the cat was lost provide relevant context for future contact and communications. Where testimony is offered for the limited purpose of providing context or background, it is admissible. *See State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Victim's statement to social worker about defendant's tendency toward violence was not barred because statement was offered for nonhearsay purpose to "show why [the social worker] contacted CPS."); *see also State v. Mason*, 127 Wn.App. 554, 126 P.3d 34 (2005); *In re Theders*, 130 Wn.App. 422, 123 P.3d 489 (2005).

In the Amended Complaint, Plaintiff alleges that, "In addition to offering no explanation for Moochie going missing, none of the Defendants or their staff undertook any appreciable efforts to assist in locating or recapturing Moochie." Complaint, p. 2. General Allegations, ¶ 5. One explanation for why St. Francis employees may not have undertaken any "appreciable efforts" to assist the Dantons in searching for Moochie is because they were physically and verbally intimidated by Ted Danton. Significantly, Ted Danton does not dispute making the statement. *See Deposition of Ted Danton, 23:18-24.*

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Further, it is anticipated that Ted Danton will testify that he drove thousands of miles looking for the cat. It is important for the jury to hear about Mr. Danton's early statements and actions to determine if such testimony is credible.

In sum, because Ted Danton's "millionaire statement" is not being offered for the truth of the matter asserted, but rather to provide context and background for the subsequent actions of the parties, such statement is relevant and admissible, and Plaintiff's motion should be denied.

2. Alleged Assault on St. Francis Employees by Ted Danton.

Plaintiff asks the Court to disallow any questioning or testimony about Ted Danton's attempts to "force his way into the clinic" to search for his cat. Defendant objects to this motion for the reasons set forth above. The police were called after Ted Danton shoved the St. Francis' receptionist. *Dep. of Dr. Michael Baker,* 63:3-8. It is important for the jury to hear evidence about the initial interaction between the Dantons and St. Francis to put later actions and statements into context.

Plaintiff argues that the evidence should also be excluded because no criminal charges were filed against Mr. Danton arising out of the alleged assualt, and because St. Francis did not assert a counterclaim against Mr. Danton (despite the fact that he is not a party to the lawsuit). This argument misses the mark. "Assault" is defined as: "Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm." Black's Law Dictionary (6th Ed. 1990). Whether criminal charges were filed is irrelevant. Mr. Danton attempted to force his way into the clinic and he threatened clinic staff.

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In sum, as was the case with his statements, Ted Danton's actions are relevant and admissible, and Plaintiff's motion should be denied.

3. **Other Lawsuits, Actions, Grievances, Criminal Actions, or Potential Claims involving Plaintiff or Ted Danton.**

ER 609(a) provides that:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment.

Certain prior convictions may be used for purposes of impeachment. To the extent that either Plaintiff or Mr. Danton have been convicted of a felony or crime involving dishonesty or false statement, Defendant is entitled to put on evidence of such conviction. If not such convictions exist, then Plaintiff doesn't have anything to worry about. If Plaintiff is concerned about testimony concerning any particular criminal convictions, it would be helpful if Plaintiff identified such convictions. However, to the extent that Plaintiff is asking the Court for a blanket prohibition on all claims and crimes, Plaintiff's motion should be denied.

4. **Settlement Offers, Demands, Negotiations, or Discussions.**

Defendant does not oppose this motion.

5. **Alleged Inequality of Financial Status of the Parties or Discrepancy in Income.**

Defendant does not oppose this motion.

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6. **Mr. Karp's Practice.**

Defendant does not oppose this motion.

7. **Mention of Fair Market Value or Replacement Value, or "Anything other than Intrinsic Value."**

This motion is closely related to Plaintiff's Motion in Limine No. 12 and Defendant's substantive response to this motion in response to that motion, below. Defendant does not intend to mention fair market value but will be offering testimony and argument regarding replacement cost at trial. Nothing in the Court's prior orders precludes Defendant from offering such evidence or argument.

8. **Attorney's Fees.**

Defendant does not oppose this motion.

9. **Filing of Motions in Limine.**

Defendant does not oppose this motion.

10. **Reservation of Objections for Trial.**

Defendant does not challenge Plainiff's right to object to specific testimony as it relates to specific witnesses during trial. As noted in Defendant's Motions in Limine, the purpose of such motions is to preclude questioning and/or testimony at trial that the Court determines to be improper and prejudicial before trial. Obviously, the filing of such motions does not preclude objections to trial testimony and evidence not covered by the pending motions.

11. **Loss of Use as an Element of Intrinsic Value.**

This motion is the mirror image of Defendant's Motion in Limine No. 5. Defendant objects to this motion for the reasons set forth in Defendant's motion on this

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same issue, and incorporates those arguments as though fully set forth herein. Plaintiff's motion should be denied.

12. Intrinsic Value as the Measure of Damages.

Plaintiff asks the Court to rule that intrinsic value is the measure of damages as a matter of law. This issue was extensively briefed and argued on August 25, 2006. The Court ruled on the issue at that time, and Plaintiff's supplemental briefing on the issue is both unnecessary and improper. A Revised Order was signed and filed on January 3, 2007, which provides as follows:

> The court RESERVES RULING on whether intrinsic value is the only appropriate measure of damages for the value of Moochie. While Defendant may argue that replacement value be included in the jury instructions, Plaintiff may present evidence of and argue for intrinsic value or something more than replacement value in jury instructions and at trial.

The Court agreed that intrinsic value is an appropriate measure of damages for the value of Moochie; the question is whether intrinsic value is the only appropriate measure of damages. In other words, does Moochie have a replacement value? As noted by the Court at the summary judgment hearing, St. Francis gets another opportunity to argue replacement costs, presumably this time before the jury. Ultimately, it will be up to the jury to decide if Moochie has a replacement cost. If the jury determines that Moochie does not have a replacement cost, then it will be up to the jury to determine Moochie's intrinsic value.

In sum, Plaintiff's motion is an attempt to preclude St. Francis from offering evidence that the Court has already ordered could be presented to the jury at trial. Accordingly, Plaintiff's motion should be denied.

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13. Fiduciary Duty.

St. Francis refers the Court to, and incorporates by reference, its briefing on fiduciary duty related to Defendant's Motion to Dismiss. The Court reserved ruling on this issue at hearing on August 25, 2006.

In her Fifth Claim for Relief, plaintiff alleges as follows:

> Defendants, through their health care relationship with Danton and Moochie, became fiduciaries or quasi-fiduciaries. Through their actions, Defendants breached their fiduciary duties to Plaintiff, as beneficiary, to act for her benefit in preserving the psychic and physical integrity of the Plaintiff's ward and sentient property, to wit, Moochie as described. Said breach proximately caused damage.
>
> Amended Complaint, p. 5, ¶ 18.

St. Francis denied the allegations and asserted, as an affirmative defense, that Plaintiff failed to state a claim upon which relief can be granted. St. Francis supplements its argument for dismissal of this Claim for Relief as follows:

Since companion animals are considered to be personal property in this State, the relationship that existed between plaintiffs and defendants can be characterized as a bailment for mutual benefit.[1] "Where a bailment is for mutual benefit, the bailee is held to the exercise of ordinary care in relation to the property, and is responsible only for ordinary negligence." *See* 19 Williston on Contracts § 53:11 (4th ed. 2006).

Plaintiff's reliance of cases, statutes, and secondary sources regarding the physician-patient relationship are misguided, and are a creative attempt to circumvent the simple fact that there are no legal authority in this state imposing a fiduciary duty on veterinarians or veterinary facilities. For example, in *Hunter v. Brown*, 4 Wn.App. 899,

[1] A "bailment for mutual benefit" is defined by Black's as: "a bailment for which the bailee is compensated and for which the bailor receives some additional benefit, as when one leaves a car with a parking attendant who will also wash the car while it is parked." Black's Law Dictionary, p. 152 (8th ed. 2004).

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484 P.2d 1162 (1971), Division 1 of the Court of Appeals found that the physician-patient relationship is of a fiduciary character, requiring "scrupulous good faith" on the part of the physician. However, that was a case involving failure to obtain informed consent, and had nothing to do with statements after the fact. The *Hunter* court explained that, "[the physician] must explain to his patient all material facts which reasonably should be known if his patient is to make an informed and intelligent decision." *Id.* at 906.[2] There is nothing in *Hunter*, or any other Washington case, that implies or suggests that a veterinarian's duty rises to a fiduciary's "scrupulous" standard of care.

Plaintiff cites to WAC 246-933-080 as evidence that "the Veterinary Board of Governors has recognized the existence of the veterinarian as fiduciary by regulatory language." However, nothing in WAC 246-933-080 specifically addresses the boarding of animals. The Code does indeed recognize that, "A veterinarian's practice shall be conducted on the highest plane of honesty, integrity and fair dealing[.]" However, that mandate governs veterinarians' ethical standards; it does not concern either the physical care or the boarding of animals in veterinary facilities.

Construction and maintenance of veterinary medical facilities is governed by WAC 246-933-320(1), which provides that, "All facilities shall be so constructed and maintained as to provide comfort and safety for patients and clients. All areas of the premises shall be maintained in a clean and orderly condition, free of objectionable odors. All facilities shall comply with applicable state, county and municipal laws, ordinances, and regulations." "Minimum physical facilities" are identified in WAC 246-933-330, and with regard to "animal housing areas provide that, "Any veterinary medical

[2] *Hunter* held that: "[I]f a patient-plaintiff presents substantial evidence that (1) his physician failed to disclose material facts reasonably necessary to form the basis of intelligent consent, and (2) he has been injured as a result of submitting to a surgical procedure, he has made out a prima facie case." *Id.* at 907-08.

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facility confining animals shall have individual cages, pens, exercise areas or stalls to confine said animals in a comfortable, sanitary and safe manner." Further, "Runs and exercise pens shall provide and allow effective separation of adjacent animals and their waste products, and shall be constructed in such a manner as to protect against escape or injury." *Id.* The fact that the veterinary facility shall "protect against escape" rather than "prevent escape" strongly suggests that "ordinary care" rather than "fiduciary duty" is the appropriate standard of care here.

Finally, Plaintiff cites to a 1980 case from California to support his argument that a fiduciary relationship exists in the veterinary context. In that case – *Thorpe v. Bd. of Examiners in Veterinary Medicine*, 104 Cal.App. 3d 111 (1980), Dr. Thorpe's license to practice was revoked after he was convicted of conspiring to import 12,000 pounds of marijuana and mail fraud. The veterinary board determined that the drug conviction and charges of mail fraud constituted crimes involving moral turpitude and dishonesty and were bases for license revocation. The Court of Appeals, 4th District, affirmed the veterinary board's decision to revoke Dr. Thorpe's license. In dicta, the court referenced the fiduciary relationship between veterinarian and client to the extent that the veterinarian "owes a deep and abiding obligation of honesty and integrity[.]" As is the case with WAC 246-933-080, the references to "fiduciary" and "highest plane" of conduct refer to honesty and fair dealing. These references do not concern the standard of care with regard to treatment or boarding of animals.

In sum, if this case concerned fraud, then discussion of "fiduciary duty" would probably be appropriate. However, the facts of this case dictate that the "ordinary care"

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standard applies. Accordingly, Plaintiff's motion should be denied, and Plaintiff's claim for breach of fiduciary duty should be dismissed.

III. RESPONSE TO PLAINIFF'S MOTION FOR CLARIFICATION

Plaintiff moves in limine "for clarification from the court on what constitutes "unusual sentimentality" and by standards it will be "considered" such?" Assuming that the jury determines that intrinsic value is the appropriate measure of damages, then the inquiry is: what has *this particular owner* lost in being deprived of *this particular item*? Assessing such damages entails appraising the actual value to the owner and this necessarily vests some significant discretion in the trier of fact. *See, Restatment (Second) of Torts*, § 912, Comment c at 481 (1965). The discretion would not, however, be unbridled.

The jury should be instructed that such a calculation of value would include neither purely sentimental value nor the emotional distress occasioned by the loss. *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 45-46, 593 P.2d 1308 (1979). The *Mieske* court cited with approval its earlier decision of *Palin v. General Constr. Co.*, 47 Wn.2d 246, 287 P.2d 325 (1955). In *Palin*, the Washington Supreme Court adopted the following language from 15 Am. Jur. § 125, Damages, 134, which articulated the limits of damages that may be recovered for the destruction of personal property that has no market value:

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

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

In this case, and under the standard set forth in *Mieske* and *Palin*, testimony regarding "the relationship that [Plaintiff] shared with Moochie, her interactions, [and] loving moments" with Moochie is improper and should be precluded.

Defendant does not consider "any testimony beyond species, age, health, and coloration to be 'excessively sentimental.'" However, a line must be drawn distinguish between evidence supporting recovering for the value of personal property (which is allowed) and recovery for emotional distress damages (which is clearly disallowed). Other than instructing the parties consistent with the above standard, it does seem possible or practical for the Court to provide any further clarification on what testimony is or is not admissible.

DATED this 16th day of July, 2007.

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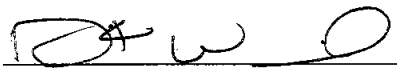

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