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

9 MARILYN DANTON,

10 Plaintiff,

11 vs.

12 ST. FRANCIS 24 HOUR ANIMAL  
13 HOSPITAL, P.C. a Washington professional  
14 services corporation (UBI 602-029-072); and  
DOES 1-10;

15 Defendants.

Case No.: 06-2-01172-8 (Wulle)

**PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTIONS IN LIMINE  
AND REPLY ON PLAINTIFF'S MOTIONS  
IN LIMINE**

**Hearing Date: Friday, July 20, 2007  
Time: 1:30 p.m.  
Judge John P. Wulle**

16 **I. Relief Requested**

17 Marilyn Danton, through her attorney of record Adam P. Karp, stipulates and objects to  
18 Defendant's motions in limine, and replies to Defendant's objections to her motions in limine, as  
19 stated below.

20 **II. Stipulations and Objections to Defendant's Motions in Limine**

21 1. **Liability insurance**: Stipulated - so long as reciprocal.

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24 PLAINTIFF'S RESPONSE TO  
25 DEFENDANT'S MOTIONS IN LIMINE  
AND REPLY ON PLAINTIFF'S  
MOTIONS IN LIMINE- 1

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1 again embraced the *Cooperstein* doctrine in a case involving a residential Board’s refusal to  
2 swiftly remedy a water problem. *Schwarzmann v. Association of Apartment Owners of*  
3 *Bridgehaven*, 33 Wash. App. 397, 404 (Div. 1, 1982) (citing *Cooperstein*). Although  
4 *Cooperstein* and *Schwarzmann* did not find a reckless breach of contract under the evidence  
5 presented, both courts recognized that the cause of action was viable.

6 The Supreme Court evaluated both *Thomas* and *Cooperstein* in 1991. *Gaglidari v.*  
7 *Denny’s Restaurants, Inc.*, 117 Wn.2d 426 (1991). Though it tempered the holdings of these  
8 cases by emphasizing that they do not support “the general availability of emotional distress  
9 damages in breach of contract actions,” neither case was overruled. *Id.*, at 445. Rather, the court  
10 recognized that:

11 Emotional distress damages are available under the original Restatement only  
12 when the type or character of the contract renders emotional suffering for reasons  
13 other than pecuniary loss foreseeable from the outset. The Court of Appeals’  
14 standard goes beyond the Restatement by allowing emotional distress damages  
15 regardless of the type of contract involved whenever the breach was wanton or  
16 reckless and emotional distress was foreseeable from the outset.

17 *Id.* The cases cited below – *Pickford v. Masion*, *Womack v. von Rardon*, *Mansour v. King Cy.*,  
18 and *Rhoades v. City of Battleground* – all acknowledge that emotional suffering is foreseeable  
19 and expected when companion animals are injured or killed, given the nature of the “more than  
20 mere property” relationship existing between them.

21 In *Gaglidari*, the court was faced with determining whether a breach of employment  
22 contract was the “type of contract” that might give rise to emotional distress damages. It looked  
23 to the Restatement of Contracts § 341 (1932), which was cited as primary authority in *Thomas*  
24 and *Cooperstein*. Although it ruled that a particular type of contract (viz., employment) was not  
25 of the type contemplated in the Restatement as justifying emotional distress damages, *Gaglidari*  
relied on both the First and Second Restatements to reaffirm that reckless breaches of contract

1 allow for emotional distress damages in other contexts. *Gaglidari.*, at 443. In evaluating whether  
2 an employment contract is the type contemplated by the Restatements, the *Gaglidari* court  
3 quoted a Michigan court:

4 **Loss of a job is not comparable to the loss of a marriage or a child and**  
5 **generally results in estimable monetary damages....** An employment contract  
6 will indeed often have a personal element. Employment is an important aspect of  
7 most persons' lives, and the breach of an employment contract may result in  
8 emotional distress. **The primary purpose in forming such contracts, however,**  
9 **is economic and not to secure the protection of personal interests.** The psychic  
10 satisfaction of the employment is secondary. Mental distress damages for breach  
11 of contract have not been awarded where there is a market standard by which  
12 damages can be adequately determined....

13 *Id.*, at 441 (quoting *Valentine v. General Am. Credit Inc.*, 420 Mich. 256, 262-63  
14 (1984))(emphasis added). *Gaglidari* adds that the contracts for which mental distress damages  
15 are recoverable include those where the contract has “elements of personality” or was ““meant to  
16 secure [the] protection’ of personal interests.” *Id.*, at 446-47 (quoting with approval *Valentine*, at  
17 261-262(first quotation), and *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 416  
18 (1980)(second quotation)). Ms. Danton, like most good caretakers, has described her relationship  
19 to Moochie as if he were her ward and child. The loss of Moochie and painstaking search struck  
20 a similar, heart-rending cord.

21 *Gaglidari* noted that the contracts covered by the Restatements should include elements  
22 of personality or protection of personal interests. *Gaglidari*, at 446-47. The Second Restatement  
23 noted that contracts involving common carriers and innkeepers and guests, as well as handlers of  
24 the deceased, would sustain such an element of damages. Restatement (2nd) of Contracts § 353  
25 provides illustrations identifying the types of contracts for which emotional distress damages  
could be recovered. Illustration 3 allows for such damages where the funeral home knowingly  
fails to provide a vault with a suitable lock, allowing water to enter and requiring reinterment of

1 wife's deceased husband. Illustration 4 provides a case in the medical context, providing for  
2 emotional distress damages resulting from an additional operation on a professional entertainer  
3 whose plastic surgeon botched the first cosmetic surgery. *Restatement (2nd) of Contracts* § 353,  
4 cmt. a, Illustrations 2-4.

5 The question for the court is whether the bailment contract to provide boarding services  
6 under veterinary supervision for a sentient, animate being who occupies a status analogous to a  
7 child and is not maintained or cared for in the hope of realizing any commercial gain (i.e.,  
8 through employment, breeding, show or competition) is the type of contract for which emotional  
9 distress damages are recoverable under *Gagliardi*. Moochie was family, not even a source of  
10 financial stability.

11 Given the analogous nature of the veterinarian-patient-client relationship to the  
12 physician-patient relationship, and the personalizing elements implicit in regarding a nonhuman  
13 animal as a patient, the application of the Restatements to the present fact pattern is sensible.  
14 Where animal guardian-owners are willing to spend many times over the purchase price of  
15 another dog without any hope of recouping the expense through future profits, the entire reason  
16 for seeking veterinary care is to sustain the personal affiliation with that animal patient. The type  
17 of loss related to this breach of contract therefore has nothing to do with pecuniary loss. Rather,  
18 it stems from interference with such "noneconomic values as personal associations, love of a  
19 place, and pride in one's work that add up to one's sense of identity." *Mooney v. Johnson Cattle*  
20 *Co., Inc.*, 291 Or. 709, 717 (1981) (in evaluating the kind of contractual arrangement for which  
emotional distress damages might be recoverable in breach). As one academician commented:

21 If the economic value of companion animals was important to their human  
22 companions, as is normally the case with sofas, chairs, and other inanimate  
23 property, small animal veterinarians could close their doors, because human  
companions would never bring their companion animals for treatment. Instead,  
they would abandon them. They would throw them out. They would euthenize

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MOTIONS IN LIMINE- 5

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1 [sic] them upon any pretext rather than incur the high cost of feeding and caring  
2 for them. They would obtain newer, younger, and healthier companion animals,  
3 who are certainly plentiful and cheap enough. American animal shelters overflow  
4 with millions of potential companion animals who can be had for nearly free.  
5 One need open any small town newspaper or review the community bulletin  
6 board at almost any supermarket to find advertisements for free companion  
7 animals. What owner of a worn and broken chair or sofa would not seize the  
8 opportunity to replace it with a brand new one for free?

9 But human companions do not usually throw their companion animals out. They  
10 do not usually abandon them. They do not euthenize [sic] them merely to obtain  
11 newer, younger, or healthier ones. This is because the value of their companion  
12 animals to them is not economic. Companion animals are not fungible. They are  
13 of a different order.

14 Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society,*  
15 *and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 *Animal L.* 33, 47  
16 (1998).

17 The legally protectible interest in maintaining the integrity of one's nonhuman  
18 companion has been recognized by the Washington Court of Appeals and Ninth Circuit Court of  
19 Appeals. See *Mansour v. King Cy.*, 131 Wash.App. 255 (Div. I, Jan. 23, 2006)(recognizing that  
20 "the bond between pet an downer often runs deep and that many people consider pets part of the  
21 family," as well as the "emotional importance of pets to their families."); *Rabon v. City of*  
22 *Seattle*, 107 Wn.App. 734, 744 (2001) (recognizing that liberty interest more apposite than  
23 property interest in evaluating due process rights in person's dog and, in any event, is greater  
24 than same interest in a car); see also *San Jose Charter of Hells Angels Motorcycle Club v. City of*  
25 *San Jose*, 402 F.3d 962, 975 (9<sup>th</sup> Cir.(Cal.)2005) ("The emotional attachment to a family's dog is  
not comparable to a possessory interest in furniture."); see also Ch. 9.08 RCW (the pet theft  
chapter) and 7 U.S.C. § 2158 (the pet theft protection act); see also *Rhoades v. City of*  
*Battleground*, 115 Wash.App. 752, 766 (II, 2003), which, in examining procedural due process

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MOTIONS IN LIMINE- 6

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1 in light of whole species bans, states as a matter of law that “pets are not fungible” and the  
2 private interest in keeping pets is “greater than a mere economic interest.”

3 The jury should be permitted to determine whether Defendant was reckless in allowing  
4 Moochie to escape. If they find that this was the type of contract contemplated by the  
5 Restatement, then Ms. Danton would be entitled to emotional distress damages.

6 ***Breach of Fiduciary Duty***

7 Emotional distress damages are permissible on the basis that public policy considerations  
8 support recognition of such breach as either an intentional tort or a form of recklessness, given  
9 the supererogatory duties owed by the fiduciary. *See Nord v. Shoreline Savings Ass’n*, 116  
10 Wn.2d 477, 485 (1991)(though not reached on merits, court acknowledged that recovery of  
11 emotional distress for breach of fiduciary duty was matter of first impression). Ms. Danton refers  
12 the court to her briefing on the issue of whether this claim is cognizable, as reiterated in her  
13 motion in limine no. 13.

14 ***Emotional Distress as Evidence of Intrinsic Value***

15 Even if not technically recoverable under the above causes of action, emotional distress  
16 testimony should be permitted to inform the degree of Moochie’s intrinsic value and loss of his  
17 utility. This point resembles that made with respect to pre-loss expenses, as discussed below.  
18 Emotional distress response, even if not independently recoverable, is probative of valuation and  
19 lost use in that they are foreseeable and dependent (i.e., related) features of harm to the plaintiff.  
20 Again, a counterfactual illuminates. If a person witnessed her “beloved” cat being ripped to  
21 pieces by a neighbor’s dog in her front yard, but continued reading her Sunday paper and sipping  
22 her coffee, then went inside to freshen up before running errands while her cat’s agonal breaths  
23 fade into the background, and leaves the home an hour later without taking one look at her cat’s  
24 macerated body, leaving it to decompose on her lawn and get picked at by crows for the

1 following week, it would follow that her *lack of emotional reaction* would undermine any claim  
2 that the cat possessed an immense intrinsic value. The same can be said for a father who learns  
3 that his 3-year-old has escaped from day care in a dangerous and congested part of town, but  
4 instead of initiating a search, continues watching the football game, playing pool with his  
5 buddies, and sleeping off a rousing evening of beer-drinking before turning his attention the next  
6 day to his son. If the lack of emotion is probative of value, then the presence thereof is  
7 permissible.

8 3. **Sentimental or fanciful value: Objection** – such damages are permitted so long as  
9 within normal limits and the usual sentiment foreseeable from such a loss. Ms. Danton  
10 incorporates her briefing from her motions in limine nos. 7 and 12, and request for clarification  
11 contained in her motions in limine, as they pertain to similar issues.

12 4. **Loss of use and/or loss of companionship as a stand-alone claim: Stipulated as to**  
13 **form only** because the court has already dismissed loss of use/companionship as stand-alone  
14 claim. However, see response to defendant’s motion in limine no. 5 below.

15 5. **Loss of use as an element of intrinsic value: Objection** – the court has reserved  
16 ruling on this point. Ms. Danton incorporates her briefing from her motions in limine nos. 7 and  
17 11, and request for clarification contained in her motions in limine, as they pertain to similar  
18 issues.

19 6. **Pre-loss damages: Objection** - these expenses indicate the extent to which Ms.  
20 Danton cared for Moochie and valued him. Analogously, a person who provides the minimum,  
21 no, or harmful (lack of) care to a human child would be estopped from later asserting a profound  
22 commitment to his feelings, needs, predilections, and health (e.g., in a case of wrongful death of  
23 a child and interference with the parent-child relationship). In essence, these expenses are  
24 probative in helping the jury ascribe a number to Moochie’s intrinsic value and loss of use. This



1 is characteristic of the type of evidence that makes “the existence of any facts that is of  
2 consequence to the determination of the action more probable or less probable than it would be  
3 without the evidence.” ER 401. The counterfactual bespeaks this point. Imagine a plaintiff  
4 possessing a history of no care or concern, who keeps the animal chained 24 hours a day, lets  
5 wounds fester, and abuses him verbally and physically, essentially treating him like trash. Such  
6 pre-loss conduct shows less or no intrinsic value and loss of use. The maxim that you get out of  
7 something what you put into it, or GIGO (“garbage in, garbage out”) directly applies here,  
8 except that with Ms. Danton, the appropriate acronym is QIQO (“quality in, quality out”).

### 9 **III. Reply to Defendant’s Objections to Plaintiff’s Motions in Limine**

10 1. **“Millionaire” statement:** The plaintiff reiterates that her husband’s statements have  
11 no relation to the intrinsic value and loss of use she placed on Moochie, or her emotional  
12 reaction to this tragedy. Defendant intimates that Mr. Danton “does not dispute making this  
13 statement,” but fails to produce the relevant part of the transcript. *See Def’s Obj. to Pl’s MIL*, at  
14 3:22-23. Whether Mr. Danton drove thousands of miles to help the plaintiff search for Moochie  
15 will be substantiated by shop records showing odometer readings and under oath testimony as to  
16 his efforts. The millionaire statement does not his search efforts more or less probable, unless the  
17 jury would conclude that he therefore felt justified in spending significant amounts of time and  
18 logging thousands of miles. The plaintiff did not make or instruct Mr. Danton to make this  
19 alleged statement. The claims raised in this action are hers, not Mr. Danton’s. This statement has  
20 no bearing on liability. If it applies to damages, they belong solely to the plaintiff. While he  
21 assisted in her search for Moochie using vehicles co-owned by the plaintiff, his expectation of  
22 any recovery is immaterial to this action as he is a non-party. Similarly, if the plaintiff’s friend  
23 made such an alleged outburst, the friend’s statement would be inadmissible.

1           2. **Alleged Assault:** Defendant did not assert a counterclaim against Ms. Danton (the  
2 plaintiff). Nor did they assert a third party claim against Mr. Danton. His alleged actions have no  
3 bearing on Ms. Danton’s case. As stated above, such action has no bearing on the plaintiff’s  
4 damages or the issue of liability. For the reasons stated earlier, it should be barred.

5           3. **Criminal Matters:** So long as Defendant agrees to abide by ER 609’s restrictions, the  
6 court should enter a stipulated order granting Ms. Danton’s motion in limine to bar convictions  
7 addressed by ER 609

8           7. **Valuation:** Ms. Danton incorporates by reference her previous argument and that  
9 contained in plaintiff’s motion in limine no. 12.

10          11. **Loss of Use as Element of Intrinsic Value:** Ms. Danton incorporates by reference  
11 her previous argument and that contained in response to defendant’s motion in limine no. 5.

12          12. **Intrinsic Value:** Ms. Danton incorporates by reference her previous argument and  
13 that contained in plaintiff’s motion in limine no. 5. She adds that the court’s revised order of  
14 January 3, 2007 merely permits the defendant to argue for inclusion of replacement or fair  
15 market value in the jury instructions. Arguing for something does not dictate a favorable result.  
16 Accordingly, the court is asked to rule as to whether it is judicious to permit jury instructions in  
17 the alternative to intrinsic value, a measure that has already been decided by the court as a valid  
18 measure for inclusion in the jury instructcions.

19          13. **Fiduciary Duty:** Ms. Danton incorporates by reference her previous argument but  
20 adds that whether the WAC 246-933-330 uses the language “protect against escape” or “prevent  
21 escape” is engaging in semantics. The defendant may be distinguished from other veterinaries  
22 who incidentally providing a boarding service in two respects: (1) it is a 24-hour hospital, not a  
23 normal business hours veterinary hospital; and (2) it specifically advertised “veterinarian-  
24 supervised boarding.” The WACs do not require direct veterinary supervision of animals not

1 being actively treated as patients. Boarding animals does not, under normally circumstances,  
2 constitute the practice of veterinary medicine. But these circumstances were out of the ordinary  
3 in that Moochie was supervised at regular intervals for his health, vitals were taken, and he was  
4 monitored by direct supervision of an on-staff veterinarian should any health crises emerge. The  
5 supervision was 24 hours a day, and did not end at 5 p.m., as at most non-emergency clinics,  
6 when the clinic staff would normally return the next morning at 8 a.m. The court reserved ruling  
7 last year because it wanted to review further evidence of the degree to which Moochie received  
8 veterinary supervision as part of his boarding. This evidence having been supplemented, the  
9 court should grant Ms. Danton's motion.

10 14. **Clarification:** Ms. Danton incorporates by reference her previous argument but  
11 redirects the court's attention to the language in *Mieske* expressly distinguishing usual from  
12 unusual sentiment in determining what is allowable as intrinsic value. *Mieske*, at 45-56.

13 **IV. Conclusion**

14 Ms. Danton respectfully requests that the parties' motions in limine be denied or granted  
15 as stated above.

16 Respectfully submitted this July 18, 2007

17 ANIMAL LAW OFFICES

18 /S/ **Adam P. Karp**

19 \_\_\_\_\_  
20 Adam P. Karp, WSBA #28622  
21 Attorney for Plaintiff

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23  
24 PLAINTIFF'S RESPONSE TO  
25 DEFENDANT'S MOTIONS IN LIMINE  
AND REPLY ON PLAINTIFF'S  
MOTIONS IN LIMINE- 11

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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on July 18, 2007, I caused a true and correct copy of the foregoing to  
3 be served upon the following person(s) in the following manner:

- 4  U.S. Mail, First Class, Postage Prepaid  
5  U.S. Mail, Certified, Return Receipt Requested  
6  **Email (by agreement of defense counsel)**  
7  Express Mail  
8  Hand Delivery/Legal Messenger  
9  Facsimile Transmission  
10  Federal Express/Airborne Express/UPS Overnight  
11  Personal Delivery

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19 **/s/ Adam P. Karp**  
20 Adam P. Karp, WSB No. 28622  
21 Attorney for Plaintiff

22  
23  
24 **PLAINTIFF'S RESPONSE TO**  
25 **DEFENDANT'S MOTIONS IN LIMINE**  
**AND REPLY ON PLAINTIFF'S**  
**MOTIONS IN LIMINE- 12**

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