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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **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 TRIAL BRIEF

16 Marilyn Danton, through her attorney Adam P. Karp, presents the following trial brief.

17 **Plaintiff's Trial Brief**

18 ***Facts & Procedural History***

19 Ms. Danton adopted Moochie, a neutered, Siamese mix in 2002 and has always regarded
20 him as if he were a beloved member of the family. From the date she obtained him, Moochie was
21 treated and boarded by only one veterinary hospital – St. Francis Animal Hospital (“SFAH”). In
22 September 2004, Moochie was boarded for 17 days. He was also seen by SFAH for veterinary
23 treatment of a wound and for his routine vaccinations. On September 23, 2005, Ms. Danton left
Moochie with SFAH to board until October 1, 2005. On or about September 28, 2005, however,

24 PLAINTIFF'S TRIAL BRIEF - 1

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1 Moochie disappeared from the premises. Ms. Danton and her husband terminated their vacation
2 early and returned the next day after receiving a call that Moochie was missing. They then
3 searched diligently for weeks and months to find Moochie, incurring several expenses. The
4 searches continued into 2006 and 2007. At this time, although Ms. Danton still holds out hope,
5 Moochie is likely permanently lost or deceased.

6 This case is straightforward, focusing on whether the Defendant was negligent and/or
7 reckless in failing to confine Moochie and prevent his escape. Liability has been alleged with
8 respect to simple negligence and breach of bailment contract. In both circumstances, a
9 presumption of negligence applies – as *res ipsa loquitur* for the former, and as a common law
10 presumption for the latter law of bailments. Defendant has denied liability and has argued that
11 damages, if any, should be restricted to Moochie’s replacement value. Ms. Danton respectfully
12 disagrees and notes that to provide full compensation, the court should allow for Moochie’s
13 intrinsic value, including loss of his companionship. She also seeks search time and costs
14 incurred to find Moochie, as well as emotional distress damages.

15 To date, the court has dismissed Ms. Danton’s claims for breach of fiduciary duty and
16 loss of companionship (as a stand-alone claim). Defendant has stipulated to the application of
17 respondeat superior for the acts or omissions of its employees. Accordingly, the claim for
18 negligent hiring and supervision has been withdrawn.

19 On motions in limine, the court has ruled as follows:

- 20 1. Moochie has no fair market value.
- 21 2. Moochie has, at the jury’s election, a value between replacement value and intrinsic
22 value, inclusive (meaning that replacement and intrinsic value are jury options, not
23 just a value in-between both measures).
- 24 3. Emotional distress may be discussed as inherent in an intrinsic value measure.

1 4. While Ms. Danton may not recover sentimental value, the court has not defined
2 whether this includes usual or unusual sentiment, pursuant to *Mieske*, but has
3 reserved ruling.

4 **A. Res Ipsa Loquitur Established by Uncontested Facts**

5 The present facts squarely fit within the doctrine of *res ipsa loquitur*. This is a rule of
6 evidence that warrants the court or jury to infer negligence, thereby shifting to the defendant the
7 duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the
8 inference. *Momer v. Union Pac. R. Co.*, 31 Wn.2d 282 (1948). “The inference which the doctrine
9 permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or
10 innocent, is practically accessible to the defendant but inaccessible to the injured person.” *Covey*
11 *v. Western Tank Lines*, 36 Wn.2d 381, 390 (1950). The doctrine is inapplicable where “there is
12 direct evidence as to the precise cause fo the injury and all the attending facts and circumstances
13 appear.” *Id.* Here, the defendant cannot submit evidence that is “so completely explanatory of
14 how the accident occurred that no inference is left that the accident may have happened in any
15 other way, there is nothing left upon which the doctrine need or can operate.” *Id.*

16 The test for *res ipsa loquitur* turns on the following factors:

- 17 (1) the accident or occurrence producing the injury is of a kind which ordinarily does not
18 happen in the absence of someone’s negligence;
- 19 (2) the injuries are caused by an agency or instrumentality within the exclusive control of
20 the defendant; and
- 21 (3) the injury-causing accident or occurrence is not due to any voluntary action or
22 contribution on the part of the plaintiff.

23 *Zukowsky v. Brown*, 79 Wn.2d 586, 593 (1971). The loss of Moochie from a 24-hour animal care
24 facility with latched cages and locked entrances and exits normally would not occur except

1 through inattentive confinement of Moochie by Defendant's employees. The care over Moochie
2 was in the exclusive control of the Defendant. And Mrs. Danton did not in any way contribute to
3 the loss or death of Moochie. For these reasons, Defendant must come forward with admissible
4 evidence sufficient to overcome the presumption of negligence provided through *res ipsa*
5 *loquitur*.

6 **B. Prima Facie Case of Bailment Breach Not Overcome**

7 Defendant breached the duty of care as a professional bailee in a bailment contract for
8 mutual benefit. A bailment "arises generally when personalty is delivered to another for some
9 particular purpose with an express or implied contract to redeliver when the purpose has been
10 fulfilled." *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 431-32, 788 P.2d 1096 (1990)
11 (quoting *Freeman v. Metro Transmission, Inc.*, 12 Wn. App. 930, 932, 533 P.2d 130 (1975)). A
12 bailment for mutual benefit arises when both parties to the contract receive a benefit flowing
13 from the bailment. 8 C.J.S. *Bailments* §16 (1988). "To constitute a bailment for mutual benefit,
14 therefore, it is not necessary that the bailee receive compensation in cash. If he derives a benefit
15 to himself by taking possession of the bailor's property, that in itself constitutes sufficient
16 consideration." *White v. Burke*, 31 Wn.2d 573, 583 (1948).

17 Transfer of possession (but not ownership) was complete at the time Mrs. Danton
18 delivered Moochie to Defendant. This occurred pursuant to an express written contract to board
19 and monitor the health of Moochie. Defendant accepted Moochie and agreed to perform
20 according to the terms of this agreement. A bailment was thus created, and Defendant essentially
21 admits this in the Answer. ***Amended Answer*, 3 ¶¶ 3-5 (admitting to receipt of Moochie for**
22 **express purpose of boarding and failure to re-deliver Moochie).** The law recognizes that
23 animals may be subjects of bailments. *Hatley v. West*, 74 Wn.2d 409 (1968) (agistment of horse
24 is kind of bailment); *Anzalone v. Kragness*, 356 Ill.App.3d 365 (2005) (recognizing claim of

1 professional negligence and breach of bailment in veterinary medical malpractice action
2 concerning dog).

3 Defendant is a professional bailee. A professional bailee is one (1) whose principal
4 business is to act as bailee, and (2) who deals with the public on a uniform rather than individual
5 basis. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 231 (1990); 8
6 Am. Jur. 2d *Bailments* § 145 (1980). Defendant, in running an animal emergency center, is a
7 professional bailee of animals presented for treatment, boarding, and overnight care. As
8 professional bailees in a bailment for mutual benefit, public policy will not permit the bailee to
9 limit his or her liability for negligence. *American Nursery*, 115 Wn.2d at 230 (citing *Wagenblast*
10 *v. Odessa School Dist.*, 110 Wn.2d 845, at 849 (1988)).

11 Defendant thus became charged with exercising reasonable care in ensuring the return of
12 the bailed property consistent with the bailor's instructions. *Roberts v. Johnson*, 91 Wn.2d 182,
13 203 n2 (1978) (citing 8 C.J.S. *Bailments* §29 (1962)). When the bailed item is lost, destroyed, or
14 compromised while in the bailee's possession, the plaintiff raises a prima facie case, or
15 presumption of negligence. *Chaloupka v. Cyr*, 63 Wn.2d 463 (1963).

16 In this regard, bailment doctrine recognizes a *res ipsa loquitur* analysis. For the same
17 reasons stated in Section B above, Defendant is liable for breach of bailment contract.

18 **C. Respondeat Superior Established**

19 To the extent that liability is established through *res ipsa loquitur* or breach of bailment
20 contract due to acts or omissions of Defendant's employees in the scope of their employment,
21 vicarious liability attaches. See *Orwick v. Fox*, 65 Wash.App. 71, 80 (1992) and *James v. Ellis*,
22 44 Wn.2d 599, 605 (1954). As stated above, Defendant has stipulated to respondeat superior.

23 **D. Damages**

24 The briefing on damages has been extensive. Ms. Danton refers the court to her earlier

1 briefing on motions for partial summary judgment on damages and in motions in limine and
2 objections thereto. As to emotional distress, she incorporates by reference pages 2-7 from her
3 response to Defendant's motions in limine, dated July 18, 2007 (discussing *Gaglidari v. Denny's*
4 *Restaurants, Inc.*, and reckless breach of bailment contract).

5 Respectfully submitted this August 13, 2007.

6 ANIMAL LAW OFFICES

7 **/s/ Adam P. Karp**

8 _____
9 Adam P. Karp, WSBA #28622
10 Attorney for Plaintiff

11 **CERTIFICATE OF SERVICE**

12 I HEREBY CERTIFY that on August 13, 2007, I caused a true and correct copy of the foregoing
13 to be served upon the following person(s) in the following manner:

- 14 U.S. Mail, First Class, Postage Prepaid
15 U.S. Mail, Certified, Return Receipt Requested
16 **Email (by agreement of defense counsel)**
17 Express Mail
18 Hand Delivery/Legal Messenger
19 Facsimile Transmission
20 Federal Express/Airborne Express/UPS Overnight
21 Personal Delivery

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