SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

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| CHRISTINE VALPIANI and ANTHONY VALPIANI, husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>LISA K. REISING, D.V.M., a Washington State veterinarian (VT6431); et al.,<br><br>Defendants. | ) | NO. 06-2-05560-8 SEA<br><br>ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT |

THIS MATTER came before the Court on defendants' motion for summary judgment seeking dismissal of several of plaintiffs' claims and a limitation as to the damages that may be recoverable on any remaining claims. The Court has considered all of the briefing submitted in connection with the motion, including the declarations of Dr. Lisa Reising and of Christine and Anthony Valpiani, and the oral argument presented by counsel in open court on Friday September 29, 2006. Deeming itself fully advised in the premises, the Court now issues this brief memorandum opinion and Order.


HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

At its outset and at its core, this is a case of alleged professional negligence. Plaintiffs claim that the negligence of the defendant veterinarian caused the death of their dog Karl. Since the defendants have admitted negligence, and since the plaintiffs have passionately asserted that their loss is much greater than would be experienced on the destruction of an ordinary item of personal property, the scope of recoverable damages is very much in issue.

From the evidentiary submissions and review of the case law, the Court is well satisfied that the situation is, in large measure, akin to that in Mieske v. Bartell Drug Co., 92 Wn. 2d 40, 593 P. 2d 1308 (1979). Like the family photographs in that case, an established family pet like Karl possesses a value that goes beyond a fair market value or an immediate replacement cost. Therefore, the central measure of damages would be the intrinsic value of the property that was lost. The inquiry is: what has *this particular owner* lost in becoming 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, *Restatement (Second) of Torts* § 912, Comment c at 481 (1965).

This discretion would not, however, be unbridled. A jury would be properly instructed that the calculation of such a value would directly include neither purely sentimental value nor the emotional distress occasioned by the loss. Mieske, supra, at 46.

It has been accurately observed that the courts may be engaging in something of a "legal fiction" in disallowing recovery for emotional harm in this

context while simultaneously permitting consideration of the owner's feelings as a part of the subjective measure of the value to that individual. Anzalone v. Kragness, 356 Ill. App. 3d 365, 826 N.E. 2d 472 (2005) (citing 1 D. Dobbs, Remedies § 5.15(3)). With a refreshing show of practicality, Professor Dobbs pronounces all of this "unsatisfactory in theory" but then adds this comment: "Perhaps the value to the owner rule suffices to invite some help from the jury and at the same time to provide a tool for control if the award becomes too generous; if so, maybe no more should be demanded." 1 D. Dobbs, Remedies § 5.16(3), at 907. Anzalone, supra, at 372.

Plaintiffs in the present case assert as an element of their damages - in addition to the loss of value - the loss of use of the property in question. In support, they rely on cases allowing such a recovery for the use of a personal car not used for commercial purposes. See, Holmes v. Raffo, 60 Wn. 2d 421, 374 P. 2d 536 (1962). "The rule with respect to loss of use of an automobile is that the owner may recover, as general damages, the use value of which he is deprived because of the defendant's wrongful act." Holmes, supra, at 429-430.

The analysis of the automobile cases appears applicable here. However, this does not lead to an open-ended calculation. In an automobile case, the jury is told that this type of award is compensation "for being deprived of the use of their automobile during the time necessarily consumed in repairing the damage proximately resulting from the accident." Holmes, supra, at 432. Where repair is impossible, then the time period applicable would be until replacement could reasonably be effected. A parallel instruction will be crafted for use in this case.

A beloved family dog cannot be replaced as easily as the Holmes' Ford but is more readily replaceable than the Mieskes' photographs. The Court is confident in the ability of twelve jurors to fairly assess the reasonable value of this dog's utility (for want of a better word) as well as the duration in which the loss of that utility would reasonably be experienced. Although counsel may use the word "companionship" in arguing to a jury the nature of a pet's utility, the jury would not be instructed to award damages specifically for "loss of companionship."

The defendants seek dismissal of the plaintiffs' third claim for relief ("loss of companionship"). Washington law does not presently provide for a cause of action for loss of the companionship of an owned animal -- treating this the same as an owned piece of art or a classic car, each of which may be loved by its human possessor. While there is nothing absolute or immutable compelling this approach, our society has always treated pets as property and so the notions of "ownership" and "possession" are very much applicable as are the legal ramifications that go along with such a relationship.

For a loss of companionship claim to exist, the object of the human plaintiff's affection must be another human, and only certain humans at that. See, Philippides v. Bernard, 151 Wn. 2d 376, 88 P. 3d 939 (2004). This is where the line is clearly drawn. Moving that line to include "household pets" or "household pets capable of reciprocating the affection" (as discussed in our

interesting discussion at oral argument) is a matter to be addressed to the legislative branch.

Since there is no cognizable cause of action for loss of companionship of a pet, any such claim in this lawsuit is dismissed. Further, as mentioned above, there can also be no "line item" for loss of companionship *per se* in a measure of damages instruction on the remaining claims.

The defendants seek dismissal of the plaintiffs' sixth claim for relief ("conversion and trespass to chattels") and the plaintiff has agreed. Accordingly, this claim is hereby dismissed.

The defendants seek dismissal of the plaintiffs' eighth claim for relief ("breach of fiduciary duty"). The Court can find neither authority for the assertion of such a relationship between veterinarian and pet owner nor that a cause of action, characterized thus, exists in a situation such as this. Indeed, the Court does find that any such claim would be fully subsumed in plaintiffs' claims for negligence and breach of an implied bailment contract. Plaintiffs' claim for breach of fiduciary duty is dismissed.

As to that contract claim (a "bailment for mutual benefit"), there is an issue as to what damages may be recoverable in the event of a finding of a breach. At this stage, the Court must conclude that emotional distress damages remain potentially recoverable if a jury were to find that there was a wanton or reckless

breach and that the defendant had reason to know, when the contract was made, that a breach would cause mental suffering for reasons other than pecuniary loss. Cooperstein v. Van Natter, 26 Wn. App. 91, 611 P. 2d 1332 (1980). It may be noted that the present motion does not call upon the Court to consider the sufficiency of the available evidence in support of such findings but only the potential scope of damages.

Both common sense and our law recognize that a family pet is neither a chattel nor a child. It may well be that the pet's location along that continuum is in a state of motion. If so, this Order may be seen, like the Mieske family photographs, as simply a snapshot at this particular point in time. As indicated herein, the defendants' motion for summary judgment is GRANTED in part and DENIED in part. The Court's additional commentary may be relied upon by counsel in framing discovery, in trial preparation and in any ongoing negotiations.

IT IS SO ORDERED.

DATED this 2nd day of October, 2006.

HON. WILLIAM L. DOWNING