IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

STAN BROCK, LORI BROCK, SARAH BROCK, and JESSICA BROCK, individually; and STAN BROCK on behalf of RACHEL BROCK and EMILY BROCK, minors, Plaintiffs, vs. BRIAN RAYMOND ROWE, and DOES 1 - 10, Defendants.	Case no. C002535CV PLAINTIFFS' OPPOSITION TO DEFENDANT ROWE'S MOTIONS TO DISMISS AND STRIKE

COME NOW plaintiffs, who hereby oppose defendant's several motions against the complaint as follows:

I. ALL CAUSES OF ACTION PLED IN THE COMPLAINT ARE VALID

To begin with, it is apparent that plaintiffs' core operative set of facts – that a family's companion pets, their personal properties, were wantonly destroyed by another – easily supports a tort remedy. Defendant apparently hopes the Court may ignore that owners have sued and won on such claims in Oregon since the beginning of last century.[1] Plaintiffs here have, as they are allowed to do, simply pled different alternative theories setting forth the legal bases for which compensation would be justified. Each theory asserted is as valid as the complaint is in general.

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A. Motions 1, 2, 3 and 4

First, defendant moves to dismiss plaintiffs' simple and gross negligence claims based on the curious notion that dismissal is appropriate where plaintiffs have not pled any harm from such claims other than emotional distress damages. Defendant is wrong on three counts.

One, the very premise itself is incorrect: a claim for negligence is not susceptible to dismissal simply on account of the manner of damages it seeks. Here, the essential elements of negligence have been pled and are factually supported regardless of the types of compensation sought under the proof of those elements.[2] Two, and in any event, a quick glance at the complaint itself points out a glaring oversight by defendant: future medical expenses and economic damages for special value have all been straightforwardly asserted in the pleading.[3] Three, and most importantly, defendant refuses to acknowledge that for over a century Oregon law has allowed the pleading of the exact type of damages plaintiffs assert anyway:

> "[P]roperty may have a value for which a recovery may be had if it is destroyed, although it may have no actual market value…It is not necessary in any case that there should be an actual market value for an article in order to entitle the owner thereof to a recovery for its destruction…[T]his principle of law has been applied in actions to recover for the destruction of a dog. The true rule being that the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics and pedigree, and may offer the opinions of witnesses who are familiar with such qualities."[4]

The McAllister holding is crucial to this case, its validity has been confirmed time and again[5], and its reasoning remains current in Oregon as to valuing animal deaths.[6]

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[1] See, e.g., McAllister v. Sappingfield, 72 Or. 422 (1914); Stull v. Porter, 100 Or. 514 (1921).
[2] See generally, Roberts v. Fearey, 162 Or.App. 546 (1999).
[3] Complaint For Damages at 4:17-21; 5:9-13; 8:21-24.
[4] McAllister v. Sappingfield, supra, 72 Or. 422 at 427 (1914) (citing to Prettyman v. Oregon R. & N. Co., 13 Or. 341 (1886) (emphasis added).
[5] See, Barber v. Motor Investment Co., 136 Or. 361, 366 (1931); Mattechek v. Pugh, 153 Or. 1, 11 (1936).
[6] See, Green v. Leckington, 192 Or. 601 (1951).

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B. Motions 5 and 6

Second, defendant moves to dismiss or strike plaintiffs' trespass to chattels claim, again under a specious argument that only emotional distress damages have been pled. Defendant seems anxious to disregard the persistent critical problem with his position – that is, that each and every element of the tort has been pled and is competently supported by factual allegations:

> "Plaintiffs…are…the owners of the animals at issue.[7]
> "On September 4, 2000, [Rowe] intentionally damaged and/or destroyed…Rookie and Jake.[8]
> "As a direct result…plaintiffs lost the special value of their properties."[9]

The gist of a claim for trespass to chattels is disturbance of plaintiffs' possession of their personal property.[10] The trespasser is liable for all harm done to the chattel as well as all harm done to the possessor of the chattel by reason of the interference.[11] The claim has been adequately pled.

Finally, it is instructive to note that recent Oregon law supports emotional distress damages under a general trespass claim in any event. The Court of Appeals has held specifically:

> "As a general rule, the law does not provide for compensation for mental anguish or emotional distress in trespass cases. An exception may exist, however, where the preponderance of the evidence has shown the existence of such damage as the direct and natural result of aggravated conduct on the part of the defendant. It is proper for the jury to take into account a claim for mental suffering only where there is evidence of genuine emotional damage in some special sense, different than that which would flow from any substantial interference with the use and enjoyment of property, and which is shown to be attributable to aggravated conduct on the part of defendant."[12]

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[7] Complaint For Damages at 1:20-21.
[8] Complaint For Damages at 5:18-19.
[9] Complaint For Damages at 5:22-24.
[10] Swank v. Elwert, 55 Or. 487 (1910).
[11] Id.
[12] McGregor v. Barton Sand & Gravel, Inc., 62 Or.App. 24 at 31 (1983) (emphasis added). Oregon is hardly alone – other states allow damages for mental distress suffered by loss of personal property, including under circumstances similar to those here. See, Campbell v. Animal Quarantine Station, Etc., 632 P.2d 1066, 1069 (Haw. 1981) (concerning animals).

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Genuine emotional damage flowing from patently aggravated conduct on the part of Mr. Rowe has been pled and will eventually be proven in this case based on the factual allegations presented.[13]

C. Motions 7 and 8

Third, defendant moves to dismiss or strike plaintiffs' conversion claim. Oregon courts hold that conversion is an intentional exercise of dominion or control over a chattel that so seriously interferes with another's right to control it that the tortfeasor must pay the full value of the chattel.[14] Defendant neglects to attack plaintiffs' competent allegations of exactly those elements, but once again focuses only on the damages claimed under the tort.

Plaintiffs must emphasize themselves then once again that economic damages are already alleged in the claim.[15] Even so, defendant's own citation supports the idea that emotional distress that is a direct and natural result of the conversion is a proper element of damages regardless:

> "[I]f mental suffering is the direct and natural result of the conversion, the jury may properly consider mental distress as an element of damages."[16]

Anyone would be hard pressed to deny that the conversion of two living animals by deliberately perforating them with deadly weapons near their home would not directly and naturally result in distress to their owners. Moreover, while defendant is undeniably correct that the Fredeen case requires an intentional deprivation to support emotional distress damages under such a claim, once again, the complaint actually asserts the same:

> "Mr. Rowe…voluntarily admitted to having intentionally shot and killed both Rookie and Jake with a hunting bow and arrows."[17]

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[13] Emotional distress naturally flowing from trespass has been historically allowed. See, Douglas v. Humble Oil and Refining Co., 251 Or. 310 (1968); Senn v, Bunick, 40 Or.App. 33 (1979); Lunda v. Matthews, 46 Or.App. 701 (1980).

[14] Hemstreet v. Spears, 282 Or. 439, 444 (1978); Mustola v. Toddy, 253 Or. 658 (1969).

[15] Complaint For Damages at 6:14-17.

[16] Fredeen v. Stride, 269 Or. 369 at 372-373 (1974).

[17] Complaint For Damages at 3:7-9.

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There is no requirement in the law, nor does or could defendant cite to any, that states that defendant's liability for conversion requires that he "knew" that the dogs he killed belonged to someone else. Under the tort, the "intent" inherent in the tort is that intent to exercise control, not that to harm the plaintiff.[18] The law states that domestic animals are personal property and the circumstances alleged here indicate that a reasonable person would have known full well that the dogs were another's regardless. The motion is absolutely defective.

D. Motion 9

Fourth, defendant moves to dismiss or strike plaintiffs' IIED claim. It is difficult to imagine the level of callousness to which one would have to descend to claim that the methodical and systemic slaughter of a family's two pet Labradors with a brutal hunting weapon would not transgress socially tolerable behavior. Such behavior unquestionably subjects the victim to abuse, fright and shock,[19] and courts have allowed the tort to be pled on much less egregious circumstances.[20] Plaintiffs rely on the core sense of human decency of this Court to recognize that which a jury should be allowed to themselves recognize – that proof of the actions pled here reflect barbaric and violently anti-social conduct and easily meet the standard for the tort.

E. Motion 10

Fifth, defendant moves to dismiss or strike plaintiffs' NIED claim. Plaintiffs concede the point and will withdraw the cause of action in an amended pleading.

F. Motion 11

Sixth, defendant moves to dismiss or strike plaintiffs' claim for loss of companionship. Defendant mischaracterizes the claim as one sounding in negligence, and therefore moves against it on the incorrect analysis that negligent injuries to one's animals are no more compensable than negligent injuries to a child's parent. The tort as stated, however, refers to intentional misconduct on the part of this defendant that has destroyed a relationship. In that

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[18] Francis v. Farnham, 58 Or.App. 469 (1982).
[19] See, Hall v. May Dept. Stores Co., 292 Or. 131 (1981).
[20] Whelan v. Albertson's, Inc., 129 Or.App. 501 (1994) (invective and verbal abuse); Franklin v. Portland

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aspect, whether the tort states a cause of action is not an open question, but one, actually, with quite forceful precedential guidance.

First, guidance within Oregon law has already been set forth in Norwest v. Presbyterian Intercommunity Hospital, 293 Or. 543 (1982). That holding explicitly referred to an invasion of the relationship identical to that presented here as actionable:

> "This court has recognized common law liability for psychic injury alone when defendant's conduct was either intentional or equivalently reckless of another's feelings in a responsible relationship or when it infringed some legally protected interest apart from causing the claimed distress, even when only negligently… Under these principles, to use a simple illustration, a child might well have a cause of action for solely emotional distress if someone, in order to cause that distress, injured not the child's parents but a favorite family pet."[21]

Current caselaw thus supports an owner's ability to allege liability for intentional or reckless conduct toward an animal where it is entirely foreseeable that the owner will predictably suffer loss in consequence of the injury. The Norwest opinion suggests that an intentional tort, where the conduct is directed toward creating the loss of society, companionship and services within a close relationship, is well fashioned.

In addition, guidance from outside the state has confirmed that over the last several decades, jurisprudence on the legal status of non-human animals has matured, and courts have been more and more eager to recognize pets to not just be merely personal property but to be given a special status:

> "The restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept. Without indulging in a discussion of the affinity between 'sentimental value' and 'mental suffering', we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal because of its special training…"[22]

and again,

Community College, 100 Or.App. 465 (1990).

[21] Norwest v. Presbyterian Intercommunity Hospital, 293 Or. 543 at 547 (1982) (emphasis added).

[22] La Porte v. Associated Independents, Inc., 163 So.2d 267 at 268 (Fla. 1964).

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> "This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."[23]

and again,

> "As loss of companionship is a long recognized element of damages in this state…the court must consider this an element of the dog's actual value to this owner…Resisting the temptation to romanticize the virtues of a 'human's best friend', it would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years. The difficulty of pecuniarily measuring this loss does not absolve defendant of his obligation to compensate plaintiff for that loss…"[24]

Loss of companionship suffered as a natural consequence from the intentional destruction of a companion pet is a tort that has come of age under the common law. In Oregon, as in all the states, the common law and the development of tort under it is not static, nor does it consist of fixed and unwavering rules. It is instead dynamic, and reflects the best product of human reason and human intellectual development as applied to the premises of ordinary and extraordinary conditions of social life brought before the courts.[25] The extraordinary conditions pled here, asserted as they are in conjunction with the heightened property status which companion animals have been held to by the nation's courts, are a natural extension of common law tort principles and can support an independent remedy.

G. Motions 12, 13, 14 and 15

Finally, defendant moves to strike certain language in plaintiffs' complaint referring to the descriptive events surrounding the death of plaintiffs' dogs. Defendant knows full well that the function of a complaint is to inform the court and the defendant of the facts on which plaintiffs base their right to recover.[26] In addition, as to complaints alleging intentional torts

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[23] Corso v. Crawford Dog and Cat Hospital, Inc., 415 N.Y.S.2d. 182 (1979).
[24] Broussaeu v. Rosenthal, 443 N.Y.S.2d 285 at 286-287 (1980).
[25] In re Hood River, 114 Or. 112 (1924).
[26] See generally, Winans v. Valentine, 152 Or. 462 (1936).

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specifically, Oregon courts have found it permissible for the plaintiff to plead the circumstances accompanying the act and constituting a part of the occurrence, in order to show the purpose and extent of the harms claimed.[27] Plaintiffs here are fully entitled to provide factual allegations that encompass and explain the full nature of their claims and damages. The language need not be struck and is entirely appropriate.

II. PLAINTIFFS SHOULD BE ALLOWED IN THE ALTERNATIVE TO AMEND

ORCP 23A allows for the filing of an amended pleading, upon motion of a party and by leave of court, such permission to be freely given where justice so requires.[28] Amendment is entirely appropriate in the instant case as an alternative, and leave to do so should certainly be freely given in these circumstances.

Even could any of defendant's points be supportable, plaintiffs should in any event be given the opportunity to include details in their factual allegations that would clear up any concerns over the validity of the torts alleged. No answer has yet been filed, and the instant motions do not attack or affect in any manner the core operative set of facts. It is entirely proper for plaintiffs to amend to restate legal theories based on the same formal statement of operative facts.[29] Defendant would suffer no prejudice as to the filing of the amended complaint given that no discovery has taken place, pleadings are still at issue, and no trial date has been set so that there is easily sufficient time for defendant to respond to an amended complaint and prepare defenses to it.

III. CONCLUSION

Were defendant to have matters to his liking, every claim brought against him in this case would be dismissed, based at heart on some irrational belief that his brutal destruction of plaintiffs' animals is apparently not actionable in tort at all. Defendant is absolutely wrong. These killings very well have a classic common law tort remedy, and more than one at that. The

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[27] See, Dornsife v. Ralston, 55 Or. 254 (1910).
[28] Nelson v. Smith, 157 Or. 292 (1937).
[29] See, Cook v. Kinzua Pine Mills, 207 Or. 34 (1956).

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core facts alleged – that one has willfully or recklessly destroyed the personal living properties of another – competently support claims of negligence, trespass to chattels, conversion, intentional infliction of emotional distress, and loss of companionship.[30] The psychic injuries that plaintiffs have alleged they have suffered are clearly compensable where the emotional distress is pled to be both severe and intentionally inflicted.[31]

For all of the reasons stated above, therefore, plaintiffs strenuously urge this Court to recognize that all of the claims are meritorious under the law and should not be dismissed, or, at the very least, that plaintiffs must be given room to amend some of those claims to conform to the factual allegations already asserted for which an adequate remedy at law must exist.

Respectfully submitted,

DATED: December ____, 2000

BLAKE & DUCKLER, L.L.P.

By: _____
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[30] Both negligence and intentional torts may be pled together in the alternative. Cook v. Kinzua Pine Mills Co., 207 Or. 34 (1956).

[31] Bennett v. Baugh, 154 Or.App. 397 (1998), affirmed in part and reversed in part at 329 Or. 282.

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