

# DOG DAMAGES: THE CASE FOR EXPANDING THE AVAILABLE REMEDIES FOR THE OWNERS OF WRONGFULLY KILLED PETS IN COLORADO

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*For most people, the death of a loved one can have devastating emotional consequences. This is especially true where the person's death was the result of an accident caused by the negligent, or worse, malicious actions of another person. In most of these situations, both common law and statutory law usually provide some means of compensation for the surviving party. However, when the dead loved one is not another person, but rather a pet or companion animal, the owner's recovery is usually very limited. This Comment argues that such limited recovery is inappropriate and that Colorado should adopt a rule allowing the owners of wrongfully killed pets to recover emotional distress damages. It pays special attention to the history of the legal status of companion animals and questions whether the original rationales for conceptualizing pets as property are still applicable today. It then looks at the theory behind various types of damage awards in general, and suggests that the pets-as-property rule is inconsistent with modern theories of tort compensation. Finally, it proposes a rule that would expand the bases of recovery for the owners of wrongfully killed pets. The Comment analyzes arguments that have been put forth both in favor and against such an expansion, and concludes that the arguments raised in its favor are sounder.*

## INTRODUCTION

People love their pets. Every year the American Pet Products Association conducts a national survey that measures

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trends in pet ownership and consumer spending on pets.<sup>1</sup> According to the Association's 2009–2010 survey, approximately 62 percent of U.S. families—about 71.4 million households—own a pet.<sup>2</sup> This figure has risen from 56 percent when the survey was first conducted in 1988.<sup>3</sup> Dogs and cats are the most popular pets in the United States, with 77.5 million dogs owned in 45.6 million households and 93.6 million cats owned in 38.2 million households.<sup>4</sup> In 2008, \$43.2 billion was spent on pet products<sup>5</sup>—more than the total GDP of around 100 countries in the world.<sup>6</sup> Billionaire Leona Helmsly made headlines when she bequeathed \$12 million in the form of a trust fund to care for her Maltese, “Trouble” (the amount was later reduced to \$2 million by the judge who settled her estate).<sup>7</sup> The dog's caretaker estimated the dog's annual expenses to be approximately \$190,000, about half of which was necessary to pay the dog's “security squad.”<sup>8</sup>

Despite the increasingly popular sentiment that pets are “members of the family,”<sup>9</sup> when it comes to the available tort remedies for a pet's wrongful destruction, the majority of states view pets as property, thereby limiting the owner's recovery to the market value of the animal.<sup>10</sup> While this rule may result in

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1. *Industry Statistics and Trends*, AM. PET PRODS. ASS'N, [http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited Dec. 30, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See THE WORLD BANK, DEVELOPMENT INDICATORS DATABASE: GROSS DOMESTIC PRODUCT 2009 (Dec. 15, 2010), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (listing Azerbaijan, with a GDP of approximately \$40 billion, as the country with the seventy-fifth highest GDP in the world).

7. John Woestendiek, *Helmsley Dog's Fortune Shrinks*, BALTIMORE SUN: UNLEASHED (June 16, 2008), [http://weblogs.baltimoresun.com/features/mutts/blog/2008/06/helmsley\\_dogs\\_fortune\\_shrinks.html](http://weblogs.baltimoresun.com/features/mutts/blog/2008/06/helmsley_dogs_fortune_shrinks.html).

8. *Id.*

9. See Kris Bulcroft, *Pets in the American Family*, 8 PEOPLE, ANIMALS, ENV'T 11, 13 (1990), available at <http://www.deltasociety.org/Document.Doc?id=35> (survey indicating that 87 percent of respondents strongly agreed with the statement that pets are members of the family).

10. See *Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980); *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000); *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999); *Fowler v. Town of Ticonderoga*, 131 A.D.2d 919, 921 (N.Y. App. Div. 1987); *Johnson v. Douglas*, 187 Misc. 2d 509, 511 (N.Y. Sup. Ct. 2001) (“While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the

a substantial recovery if the pet in question is, for example, a show animal or an animal employed in the performing arts, for the majority of family pets such an award will amount to very little.<sup>11</sup> In some states, owners of wrongfully killed<sup>12</sup> pets may recover damages based on the value of the animal to them.<sup>13</sup> The usual rationale for the value-to-the-owner standard is an evidentiary one—owners are allowed to testify as to their subjective valuation of their animals where it would be difficult to determine a proper “market price” for the animal.<sup>14</sup> Beyond this value-to-the-owner standard, though, only a few states allow pet owners to recover damages for emotional distress or the loss of companionship in pet wrongful death cases.<sup>15</sup>

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law is to limit the legal consequences of wrongs to a controllable degree.’ The court is unaware of any recent case law extending the rule to the loss of a family pet.” (quoting *Bovsun v. Sanperi*, 461 N.E.2d 843, 851 (N.Y. 1984) (Kaye, J., dissenting)); *Strawser v. Wright*, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992); *Dolan v. Pearce*, No. CIV.A. 97-7519, 1998 WL 252114, at \*4 (E.D. Pa. May 19, 1998) (applying Pennsylvania law); *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. Ct. 1993); *Julian v. De Vincent*, 184 S.E.2d 535, 536 (W. Va. 1971); *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001); see generally Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545 (2004).

11. See *Dreyer v. Cyriacks*, 297 P. 35, 37–38 (Cal. Dist. Ct. App. 1931) (upholding a trial court grant of a new trial on the grounds that the damage award of \$100,000 in compensatory damages was excessive for the negligent destruction of “Peter the Great,” a dog who had been in many motion pictures described by plaintiffs as “the most human like dog that ever displayed its skill in film drama.”).

12. Unless otherwise stated, this Comment uses the term “wrongfully killed” to refer to either the negligent or intentional destruction of a pet.

13. See *Bowers v. Horen*, 53 N.W. 535, 536 (Mich. 1892); *Hodges v. Causey*, 26 So. 945, 946–47 (Miss. 1900); *Wilcox v. Butt’s Drug Stores*, 35 P.2d 978, 989 (N.M. 1934); *Green v. Leckington*, 236 P.2d 335, 337 (Or. 1951); *McCallister v. Sappingfield*, 144 P. 432, 434 (Or. 1914); see generally, Robin Cheryl Miller, Annotation, *Damages for Killing or Injuring Dogs*, 61 A.L.R. 5th 635, § 4 (2004).

14. See cases cited *supra* note 13; *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (“Market value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner.” (quoting *Bishop v. E. Ohio Gas Co.*, 56 N.E.2d 164, 166 (Ohio 1944))).

15. See *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (recognizing intentional infliction of emotional distress for the malicious killing of a dog, but holding that the threshold level of emotional distress was not met in the case before it); *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267, 269 (Fla. 1964) (“[W]e 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 such as a Seeing Eye dog or sheep dog.”); *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38 (Fla. Dist. Ct. App. 1978);

Colorado law in this area is underdeveloped: there are no cases or statutes that clearly specify what damages are available to the owner of a wrongfully killed pet.<sup>16</sup> This Comment argues that Colorado should reject the majority “market value” rule and allow pet owners to recover for their emotional distress caused by the wrongful destruction of their animals. Part I discusses the existing law in various states concerning the recovery available to the owners of wrongfully killed pets. Part II lays out a theoretical framework for discerning what policies are served by awarding different types of damages for different types of injury. Focusing on the different features between injury to property and injury to close relations, it suggests that treating pets as property for tort compensation purposes is theoretically unsound. Part III proposes and defends a rule that would allow the owners of wrongfully killed pets to recover non-economic damages.

#### I. DIFFERENT APPROACHES TO REMEDIES FOR THE WRONGFUL DESTRUCTION OF A PET

This part discusses the ways in which courts have treated pet-based wrongful death cases. Section A of this part surveys the law in other states concerning the available remedies for the owners of wrongfully killed pets and analyzes the rationale of court decisions that have restricted and expanded such remedies. Section B of this part evaluates Colorado law by surveying the available causes of action that the owner of a wrongfully killed pet might bring and their prospects for success. As Section B illustrates, a fundamental inconsistency exists in Colorado between a rule limiting the recovery for owners of wrongfully killed pets to the market value of the animal and

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*Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981); *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985); *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001); *see generally* Zitter, *supra* note 10, § 3. Of the listed states, only Florida and Hawaii have held that an owner of a wrongfully killed pet can recover for emotional distress damages on a theory other than intentional infliction of emotional distress. *See Johnson*, 592 So. 2d at 1226; *Campbell*, 632 P.2d at 559–60.

16. Some members of the Colorado General Assembly have attempted, unsuccessfully, to pass a statute that would allow the owners of dogs or cats who were killed due to cruelty or veterinary malpractice to recover non-economic damages. *See infra* Part IV.B; H.B. 03-1260, 64th Gen. Assemb., 1st Reg. Sess. (CO 2003); Julia C. Martinez, *Pet Bill Killed by House Sponsor*, DENVER POST, Feb. 16, 2003, at B1.

the existence of a cause of action that allows owners to recover for intentional infliction of emotional distress.

A. *Approaches Taken by Other States and the History of the Pets-As-Property Rule*

State courts that have addressed the issue of the proper recovery for the wrongful death of a pet have split on two distinct but interrelated issues. First, while some courts have held that the owner of a wrongfully killed pet can recover only its market value, others have held that the owner is entitled to recover a sum representing the value of the animal to its owner.<sup>17</sup> Second, a few states allow the owner of a wrongfully killed pet to recover for emotional distress in some circumstances, while others bar such recovery in almost all circumstances.<sup>18</sup> The two concepts are related because states that hold that pets are indistinguishable from other property—and therefore limit recovery for a negligently killed pet to the market value of the animal—are more likely to bar recovery for emotional distress than those that distinguish pets from other types of property.<sup>19</sup> However, even states that use a value-to-the-owner measure of damages may still adhere to the common-law precept that pets are property.<sup>20</sup> While this latter approach has sometimes been justified by reference to the “sentimental” or emotional attachment an owner may have to a pet,<sup>21</sup> in other cases, states may apply the value-to-the-owner standard simply because the market value of the pet is too difficult to determine (for example, because there is no market for the animal in that area) or does not reflect the true pecuniary loss suffered by the owner.<sup>22</sup>

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17. See cases and annotations, *supra* notes 11 and 14; Miller, *supra* note 13, §§ 3–4.

18. See cases and annotations *supra* notes 13 and 15.

19. See *Webster v. Boone*, 992 P.2d 1183, 1185 (Colo. App. 1999) (holding that emotional distress damages are not available for property loss).

20. See cases and annotations discussed *supra* notes 14 and 15.

21. See, e.g., *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084 (Ill. App. Ct. 1987).

22. *McDonald v. Ohio State Veterinary Hosp.*, 644 N.E.2d 750 (1994), is an example of a case where the court held that the owner of a wrongfully killed pet could recover more than the market value of the animal but explicitly excluded “sentimentality” as an element of the recoverable damages. The plaintiff sought recovery from a veterinarian after a negligently performed surgery resulted in irreversible paralysis of her German shepherd, Nemo, requiring that it be euthanized. *Id.* at 751. Liability was stipulated and a trial was held only on damages.

Proponents of limiting the recovery of the owners of wrongfully killed pets often point to the longstanding use of the pets-as-property rule.<sup>23</sup> This view, however, misses an important point: the original cases holding that pets are property did not rely on policy considerations, but rather on positivistic notions of what a pet “is” based on assessments of societal norms. This point, and the overall movement of the law in this area, is illustrated by a nineteenth century case from the New York Court of Appeals, *Mullaly v. People*.<sup>24</sup> The question presented in that case was whether stealing a dog constituted larceny.<sup>25</sup> The answer to that question turned on whether dogs were to be considered property: if they were, then feloniously taking and carrying one away would be larceny, but if they were not, then no larceny would have occurred.<sup>26</sup> The court discussed the “strange status” occupied by dogs at common law: in some respects they were treated as less than property, but in other respects they were not.<sup>27</sup> For example, on the one hand, “feloniously taking and carrying away” a dog was not larceny, but on the other hand, the owner of such a dog could bring an action in trover for the animal’s wrongful conversion.<sup>28</sup> Additionally, dogs were disposed of as assets when their owner died, like other types of property.<sup>29</sup>

The court in *Mullaly* also criticized the precept that dogs were less important than other types of property as resting on an “extremely technical” and archaic distinction.<sup>30</sup> The doctrine originated in Lord Edward Coke’s *Third Part of the Insti-*

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*Id.* At trial, it was established that Nemo had undergone years of rigorous highly specialized training as a “Schutzhund”—a German sport dog. *Id.* Nemo had reached the highest possible level of schutzhund training, which was indicative not only of his advanced skills but also of his bond with the plaintiff. *Id.* After the negligently performed surgery, the plaintiff had tried for two years to rehabilitate Nemo instead of purchasing a new dog with similar skills. *Id.* at 752. Thus, the court awarded damages under the more elastic value-to-the-owner standard, considering among other things the lost stud fees as a result of the dog’s injury. *Id.*; see generally Miller, *supra* note 13, § 4(b)–(c).

23. See Rabideau v. City of Racine, 627 N.W.2d 795, 802 (Wis. 2001); Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need To Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 255 (2006).

24. *Mullaly v. People*, 86 N.Y. 365 (1881).

25. *Id.* at 366.

26. See *id.*

27. See *id.*

28. *Id.* Trover is “a common-law action for the recovery of damages for the conversion of personal property, the damages generally being measured by the property’s value.” BLACK’S LAW DICTIONARY 1647 (9th ed. 2009).

29. *Id.*

30. *Id.* at 367.

*tutes of the Laws: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*: “A man hath a mere property in some things that are tame by nature, and yet in respect of the baseness of their nature, a man shall not commit any larceny . . . though he steal them, as of . . . dogs or of cats. . . .”<sup>31</sup> It also produced incongruous results: while it was not larceny to steal a live dog, it was larceny to steal the body of a dead dog, or to steal “many animals of less account than dogs.”<sup>32</sup> This view might also have been rooted in class distinctions. At common law, for example, taking a trained hawk or falcon of a prince or noble could amount to grand larceny—punishable by death—whereas the taking of a dog could not.<sup>33</sup> In *Mullaly*, the court overruled these precedents.<sup>34</sup> In so doing, the court found that the notion that dogs were fundamentally “base” was, by 1881, “wholly inapplicable to modern society.”<sup>35</sup> Thus, originally, the recognition that dogs were personal property was not so much a limitation on their status as an advance from an older regime where they were something less. Moreover, this advance came from the court’s assessment of dogs’ place in modern society.

In 1914, the reasoning in *Mullaly* was applied to civil disputes involving the wrongful death of a pet. In *McCallister v. Sappingfield*,<sup>36</sup> the Oregon Supreme Court considered what testimony was admissible to prove the value of a “Scotch collie dog” that was wrongfully shot on a public road.<sup>37</sup> The plaintiff, a rancher, introduced evidence that the dog was exceptionally well-trained and able to herd cows and goats in a thirty- to forty-acre field at the owner’s command.<sup>38</sup> He also testified that

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31. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 109 (London, 5th ed. 1671).

32. *Mullaly*, 86 N.Y. at 367.

33. *Id.*

34. *Id.* With reference to history, the court rebutted Lord Coke’s claim that dogs were essentially base:

When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history; and the faithful St. Bernards, which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base and that he should be left a prey to every vagabond who chooses to steal him will not now receive ready assent.

*Id.*

35. *Id.* at 367.

36. *McCallister v. Sappingfield*, 144 P. 432, 432–33 (Or. 1914).

37. *Id.*

38. *Id.*

the dog would protect his wife and father when he would leave the ranch for extended periods of time.<sup>39</sup> The rancher testified that the dog was one of the most useful dogs that he had ever owned, that he would not have sold him for any cost, and that he estimated his value to be at least \$500.<sup>40</sup> The defendant objected to the introduction of this testimony, and the question presented to the court was whether the rancher's recovery would be limited to the market value of the dog.<sup>41</sup> The court held that the rancher would not be "circumscribed in his proof to [the dog's] 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."<sup>42</sup>

In *McCallister*, as in *Mullaly*, the court justified affording full property status to dogs by reference to the importance dogs had taken on in society, both through their roles as companions and through their ability to do useful work.<sup>43</sup> Nonetheless, while the court in *McCallister* used the value-to-the-owner standard, it still relied on a pecuniary measure of the pet owner's loss, and it did not go so far as to hold that owners of wrongfully killed dogs could recover damages for any emotional distress resulting from the loss of their animal.<sup>44</sup> Additionally, the court rejected the notion that the rancher was entitled to recovery by reference to the dog's "intrinsic" value—i.e., value it possessed merely apart from its specific qualities, characteristics, usefulness, or pedigree.<sup>45</sup> It was the plaintiff's burden to submit evidence that proved his dog had any such special features.<sup>46</sup> Both *McCallister* and *Mullaly* illustrate that the common law on the question of the proper recovery for the owner of a wrongfully killed dog has evolved by reference to the

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39. *Id.*

40. *Id.* at 433.

41. *Id.*

42. *Id.* at 434.

43. *Id.* at 433 ("Large amounts of money are now invested in dogs, and they are extensively the subjects of trade and traffic. They are . . . the poor man's friend, and the rich man's companion, and the protection of women and children, hearthstones and hen-roosts. In the earlier law books it was said that 'dog law' was as hard to define as was 'dog Latin.' But that day has passed, and dogs have now a distinct and well-established status in the eyes of the law. . . . [P]oetry and history has been cited in [the dog's] behalf and his achievements recounted in glowing language. . . .").

44. *See id.* at 428, 433.

45. *Id.* at 434 (citing 1 R. C. L. 1130).

46. *Id.*

place that such dogs occupy in society. As society began to value its companion animals more, courts afforded pet owners more expansive theories of recovery when their animals were wrongfully killed.

### *B. The Pets-As-Property Rule and Colorado Law*

In Colorado, the owner of a wrongfully killed pet may bring several claims against the tortfeasor, depending on the circumstances. Subsections 1 through 3 of this section discuss some of those possible claims and analyze the likelihood that a pet owner would be able to recover more than her pecuniary loss under any of them. Subsection 4 then evaluates Colorado statutory law, in an attempt to surmise whether the limitations placed on the recovery available to the owners of wrongfully killed pets are consistent with other legislative policies.

#### 1. Ordinary Negligence

One claim that the owner of a wrongfully killed pet could bring is ordinary negligence. A pet owner may bring a negligence claim against a driver who negligently runs over the animal,<sup>47</sup> or against a person entrusted with taking special care of the animal who fails to do so, such as a veterinarian or a groomer.<sup>48</sup> There is no published Colorado opinion allowing or disallowing a pet owner's recovery for non-economic damages for the wrongful death of his or her animal. However, there are indications that Colorado courts would follow the majority of jurisdictions which do not permit pet owners to recover emotional distress damages for the loss of their animals.

Under Colorado law, dogs are personal property.<sup>49</sup> In *Thiele v. City & County of Denver*, the Colorado Supreme Court granted dogs "full property status" after discussing the evolution of the status of dogs from the original common law.<sup>50</sup> *Thiele* did not concern a tort claim at all, but rather the constitutionality of a municipal leash law, which the court upheld against a due process challenge.<sup>51</sup> At the same time, the court quoted with approval language from an 1893 United States

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47. See Zitter, *supra* note 10, § 15.

48. See *id.* at III.A.

49. *Thiele v. City & County of Denver*, 312 P.2d 786, 789 (Colo. 1957).

50. *Id.*

51. *Id.* at 791.

Supreme Court case suggesting that dogs are less valuable than other animals which have more direct economic uses:

[Dogs] are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals kept for pleasure, curiosity or caprice. *They have no intrinsic value.* . . . Unlike other domestic animals, they are useful neither as beasts of burden, for draught . . . nor for food. . . . While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.<sup>52</sup>

This language sends mixed messages regarding the current Colorado Supreme Court view of the animal-human relationship. On one hand, the statement that dogs “have no intrinsic value” seems to equate intrinsic value with economic usefulness. On the other, the Court notes that at least some dogs are valued “above all, for their natural companionship with man.”<sup>53</sup> In either case, unlike *McCallister* and *Mullaly*, *Thiele*’s grant of full property status to dogs seems to place less emphasis on the dynamics of any particular dog-owner relationship and more emphasis on the “objective” qualities of individual dogs. After all, only “the higher breeds” of dogs are recognized for their natural companionship with man.<sup>54</sup>

In *Webster v. Boone*,<sup>55</sup> the Colorado Supreme Court held that emotional distress damages are not recoverable for the destruction of property, even for property having special value to the owner beyond its market value.<sup>56</sup> *Webster* did not involve the death of a pet, but instead the destruction of property that had special value to its owner.<sup>57</sup> The court held that the owners of a home which was severely damaged in a flood due to negligent excavation could not recover for the emotional dis-

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52. *Id.* at 789–90 (quoting *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 701 (1897)) (emphasis added).

53. *Id.* at 790 (quoting *Sentell*, 166 U.S. at 701).

54. *Id.*

55. 992 P.2d 1183 (Colo. 1999).

56. *Id.*

57. *Id.* at 1185.

tress suffered as a result of their losing mementos, such as photographs and old school papers of their recently deceased children.<sup>58</sup> Additionally, testimony as to the emotional distress caused by losing such keepsakes was not admissible as showing the value of the items.<sup>59</sup> The court, in dicta, cited approvingly cases denying emotional distress damages to the owners of wrongfully killed pets, apparently drawing no distinction between those cases and cases denying emotional distress damages for the wrongful destruction of other types of property.<sup>60</sup> Taken together, *Thiele* and *Webster* would make it difficult for the owner of a wrongfully killed pet to recover emotional distress damages on an ordinary negligence theory. *Thiele* establishes that dogs are personal property under Colorado law, and *Webster* establishes that emotional distress damages are not recoverable for the negligent destruction of personal property. Moreover, although *Thiele* did not involve a tort claim, the language it used to describe the role of dogs in society suggests that Colorado courts will not be solicitous of claims for enhanced damages based on dogs' special status.

## 2. Negligent Infliction of Emotional Distress

In Colorado, to recover for the tort of negligent infliction of emotional distress ("NIED"), a plaintiff must show (1) that the defendant's negligence created an unreasonable risk of physical harm that caused her to fear for her own safety, (2) that the fear resulted in physical consequences or long-continued emotional disturbance, and (3) that the plaintiff was in the "zone of

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58. *Id.*

59. *Id.* at 1187.

60. *Id.* ("Although there are varying standards for measuring damages for the loss of photographs and similar items of personal property which either have no market value or whose value to the owner is greater than their market value, we agree with those decisions that have declined to allow recovery for the sentimental or emotional value of such items."); *see also* Landers v. Municipality of Anchorage, 915 P.2d 614 (Alaska 1996) (stating that the proper standard for measuring damages resulting from destruction of photographs and videotapes was their value to the owner, which could include such items as cost of replacement, original cost, and cost to reproduce, but not sentimental and emotional value); Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996) (no recovery for mental and emotional distress suffered by pet owners who sued kennel for negligent injury to their pet); RESTATEMENT (SECOND) OF TORTS § 911 cmt. e (1979) (damages for loss of property of "peculiar value to the owner" may include damages for replacement value and the like, but generally cannot include emotional distress caused by the loss of the property).

danger” of the defendant’s conduct.<sup>61</sup> Unlike other states that recognize an NIED cause of action for plaintiffs who observe injury to a family member or close relation, Colorado prohibits suit if the plaintiff was in no danger herself.<sup>62</sup> Moreover, in Colorado, even if the plaintiff can show that she was in the “zone of danger,” she cannot recover for NIED without showing that her presence in the zone of danger itself was the cause of the emotional distress.<sup>63</sup> Thus, in Colorado, even if a plaintiff pet owner could show that she witnessed her animal dying in a particularly traumatic manner, for example by seeing the pet shot by a neighbor or malcontent, she could not recover emotional distress damages for the resulting trauma because she was not herself put in danger by the activity.

### 3. Intentional Infliction of Emotional Distress

A third claim that the owner of a wrongfully killed pet could bring—and the one that provides the most likely basis for the pet owner to recover emotional distress damages—is the tort of Intentional Infliction of Emotional Distress (“IIED”). Colorado’s IIED cause of action follows section 46 of the Restatement (Second) of Torts.<sup>64</sup> The Restatement defines the cause of action as follows: “[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . .”<sup>65</sup> The threshold level of outrageousness necessary to prevail on an IIED claim is high: to recover, a plaintiff must show that the defendant’s conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>66</sup>

An additional obstacle for plaintiffs presenting IIED claims is that, even if the defendant’s conduct as a whole might be

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61. *Coldwell v. Mentzer Invs., Inc.*, 973 P.2d 631, 638 (Colo. App. 1998).

62. *Id.*

63. *Scharrel v. Wal-Mart Stores*, 949 P.2d 89, 93 (Colo. App. 1998) (finding that the trial court erred in refusing to direct a verdict for defense on wife’s NIED claim where wife could not show that the emotional distress for which she was seeking compensation stemmed from the fear for her own safety caused by the defendant’s negligence, rather than from the trauma of seeing her husband injured in the same accident).

64. *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970).

65. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

66. *Rugg*, 476 P.2d at 756.

outrageous, if those aspects of the behavior which are directed at the plaintiff are not outrageous, the plaintiff cannot recover emotional distress damages.<sup>67</sup> Two contrasting cases, *Gluckman v. American Airlines*<sup>68</sup> and *Burgess v. Taylor*,<sup>69</sup> illustrate the difficulty of getting past this aspect of an IIED claim. In each, the courts followed the Restatement definition of IIED in evaluating a plaintiff pet owner's claim, yet only in one did the plaintiff prevail.

In *Gluckman v. American Airlines*, a case heard in the Southern District of New York, Gluckman—a recent high school graduate—went on a camping trip during which he informally adopted a stray Golden Retriever that he named Floyd.<sup>70</sup> Gluckman arranged to have Floyd fly back with him from Phoenix to New York, and was informed by the ticket agent that the dog would have to be kept in the baggage compartment.<sup>71</sup> Gluckman was not informed that the baggage compartment of the plane would not be air conditioned while the plane was on the ground, and, due to mechanical difficulties, his takeoff was delayed by an hour after the plane had taxied away from the gate.<sup>72</sup> The outside temperature was 115 degrees that day, and the temperature inside the plane's baggage compartment reached 140 degrees.<sup>73</sup> When Gluckman decided to disembark from the plane and catch a different flight, he had the agents bring his dog to him.<sup>74</sup> When the agents did so, they discovered that the dog had collapsed from the heat: "Floyd was lying on his side panting; his face and paws were bloody; there was blood all over the crate; and the condition of the cage evidenced a panicked effort to escape."<sup>75</sup> The dog had suffered heat stroke and brain damage, and had to be euthanized.<sup>76</sup>

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67. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999) ("[W]e accept as true Floyd's allegations that Coors engaged in an extensive criminal conspiracy involving illegal drugs and money laundering and that Coors fired Floyd to scapegoat him for these crimes. However, we find that the outrageousness of Coors's alleged criminal conduct towards society . . . is irrelevant to Floyd's claim as an individual tort plaintiff seeking to sue Coors. To assess Floyd's tort claim, we focus on Coors's behavior toward Floyd . . .").

68. 844 F. Supp. 151 (S.D.N.Y. 1994).

69. 44 S.W.3d 806 (Ky. Ct. App. 2001).

70. *Gluckman*, 844 F.Supp at 153–54.

71. *Id.* at 154.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Gluckman sued the airline, alleging IIED.<sup>77</sup> In support of his claim, Gluckman alleged that the airline's treatment of his dog violated a federal statute concerning the treatment of animals being shipped in interstate commerce, a consent decree from an earlier lawsuit requiring the airline to show all of its employees a video on the proper handling of animals in-flight, and its own internal policies requiring it to refuse to transport pets if the time on the ground is greater than forty-five minutes and the temperature is greater than eighty-five degrees.<sup>78</sup> Nonetheless, the court dismissed Gluckman's IIED claim: "[a]s deplorable as it may be for American [Airlines] to have caused the death of an innocent animal, the Court finds no allegation, and no evidence from the facts alleged, that American's conduct was directed intentionally at Gluckman."<sup>79</sup> *Gluckman* suggests that even blatant mistreatment of animals will not be sufficient to support an IIED claim short of the very unusual case in which the defendant intended to harm the animal *for the purpose of causing* the plaintiff to suffer emotional distress.<sup>80</sup>

In contrast to *Gluckman*, the Kentucky Court of Appeals, in *Burgess v. Taylor*, also applying the Restatement standard for the tort of IIED, allowed a plaintiff pet owner to recover where she had additional evidence that she had endured outrageous conduct directed toward her specifically.<sup>81</sup> In *Burgess*, an older woman, Julie Taylor, had owned and cared for two horses for about fourteen years.<sup>82</sup> When she grew too old to care for them, she decided to find someone who owned a farm who would care for the horses in exchange for the pleasure of having them—an arrangement known as a "free-lease" agreement.<sup>83</sup> Some family friends were willing to engage in such an arrangement with her.<sup>84</sup> As part of the agreement, Taylor did not transfer ownership of the horses, nor did she ever indicate that she did not want them anymore.<sup>85</sup> The caretakers assured her that they would take care of the horses and that she could visit them whenever she liked.<sup>86</sup> A few days after taking pos-

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77. *Id.* at 157.

78. *Id.*

79. *Id.* at 158.

80. *See id.*

81. *Burgess v. Taylor*, 44 S.W.3d 806, 813–14 (Ky. Ct. App. 2001).

82. *Id.* at 809.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

session of the horses, however, the caretakers sold them for slaughter.<sup>87</sup> In order to cover up what they did, the caretakers first told the owner that they had given the horses away to a man they had met while on a trail ride.<sup>88</sup> The caretakers even enlisted another friend of theirs to pose as the trail rider when the woman continued to make inquiries.<sup>89</sup> The trail rider told Taylor that her horses were safe and gave her a fictitious location where he claimed they resided.<sup>90</sup> Because he gave her only vague directions, Taylor drove out to the area he described and searched frantically for her horses, asking strangers if they had seen them.<sup>91</sup> After it became dark, she returned home, distraught.<sup>92</sup> Taylor eventually learned that her two horses had been slaughtered, and sued the caretakers for IIED.<sup>93</sup> The jury awarded her \$1,000 for the fair market value of the horses and the caretakers' breach of the free-lease agreement, \$50,000 in compensatory damages for IIED, and \$75,000 in punitive damages.<sup>94</sup>

The Kentucky Court of Appeals affirmed the trial court's denial of the caretakers' motions for remittitur, a new trial, and judgment notwithstanding the verdict.<sup>95</sup> The court rejected the caretakers' argument that the proper measure of damages for loss of an animal is a market-value standard for two reasons.<sup>96</sup> First, the cases cited by the caretakers for the proposition that pets are mere property did not involve claims for emotional distress.<sup>97</sup> Second, the court held that "the conduct of the offender rather than the subject of the conduct determines whether the conduct was outrageous."<sup>98</sup> The court would not refuse to award the woman compensatory damages for her emotional distress "simply because the facts giving rise to the claim involve[d] an animal."<sup>99</sup>

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87. *Id.*

88. *Id.* at 809–10.

89. *Id.* at 810.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 809.

96. *Id.* at 812–13 (rejecting defendants' reliance on *Cincinnati, N.O. & T.P. Ry. Co. v. Rankin*, 156 S.W. 400 (Ky. 1913)).

97. *Id.* at 812–13.

98. *Id.* at 809.

99. *Id.* at 813.

Thus, in *Burgess*, unlike in *Gluckman*, the plaintiff was able to prevail on an IIED claim because she could show that the defendant's conduct was sufficiently outrageous and directed toward her. The caretakers in *Burgess*, unlike the airline in *Gluckman*, deliberately misled the plaintiff, lied to her, and sent her on a frivolous trip in order to find her horses.<sup>100</sup> Significantly, however, once Taylor could make this showing, her award for emotional distress included the grief that resulted from the death of her animals.<sup>101</sup> Taylor testified that when she learned the horses were slaughtered she broke down, knowing that "[her] babies were dead," and that she had since suffered from panic attacks, high blood pressure, anxiety, and depression.<sup>102</sup> She also testified that she had recurring nightmares in which she heard one of her horses scream in her head.<sup>103</sup>

*Burgess* illustrates an anomaly in a common-law regime that bars recovery of emotional distress damages for the loss of animals in all situations except where the intent of the tortfeasor was to harm the plaintiff. In either case, the plaintiff suffers emotional distress as the result of losing a companion animal to which she was emotionally attached. However, only when the plaintiff shows additional outrageous conduct directed at herself can she recover anything.<sup>104</sup> IIED is the most promising theory of recovery for a plaintiff pet owner seeking emotional distress damages under the current law. However, the tort by itself does not provide an adequate basis for plaintiffs to recover in the majority of cases. It is unlikely that an act of veterinary malpractice, or negligent driving, either of which results in the death of a pet, will rise to the level of "outrageousness" necessary to sustain an IIED action. Moreover, as *Gluckman* illustrates, even where the facts of a particular case do show that the defendant has engaged in shocking, outrageous behavior, recovery will still be barred if the plaintiff cannot show that the outrageous conduct was directed at the plaintiff.

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100. *Id.* at 809–12.

101. *Id.* at 812.

102. *Id.*

103. *Id.*

104. This discrepancy cannot be justified by the argument that compensatory damages in an IIED claim—unlike a claim for simple negligence—serve to punish the tortfeasor, because such punishment is the function of punitive damages. *See id.* at 814 (rejecting the defendant's argument that awarding Taylor punitive and compensatory damages for her IIED claim amounted to a double recovery).

#### 4. Legislative Policy

Two Colorado statutes indicate legislative recognition that modern pet ownership is distinct from property ownership. The first of these, Colorado's Pet Trust Statute, recognizes as valid "a trust for the care of designated domestic or pet animals and the animals' offspring in gestation."<sup>105</sup> The statute creates a presumption in the interpretation of any written instrument claiming to effect such a trust "against the merely precatory or honorary nature of the disposition."<sup>106</sup> By creating a public policy which allows people to provide for the care of their companion animals after they die, the Colorado General Assembly has recognized the unique place pets occupy in modern society.

The second statute is Colorado's Animal Cruelty Statute, which makes it a crime to abuse animals.<sup>107</sup> Cruelty to animals is classified as an "Offense[] Against Public Peace, Order, and Decency"<sup>108</sup> in a separate section of the criminal code than the offenses which are classified as "Offenses Against Property," such as trespass, tampering, and criminal mischief.<sup>109</sup> The statute defines the offense broadly:

A person commits cruelty to animals if he or she . . . overdrives, overloads, overworks, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, allows to be housed in a manner that results in chronic or repeated serious physical harm, carries or confines in or upon any vehicles in a cruel or reckless manner, engages in a sexual act with an animal, or otherwise mistreats or neglects any animal . . . or, having the charge or custody of any animal, fails to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandons an animal.<sup>110</sup>

Cruelty to animals is a class-one misdemeanor,<sup>111</sup> carrying a sentence of six to eighteen months in prison, and a \$500 to \$5,000 fine.<sup>112</sup> In a case upholding the constitutionality of an earlier version of the statute in 1896, the Colorado Supreme

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105. COLO. REV. STAT. § 15-11-901(2) (2010).

106. *Id.*

107. COLO. REV. STAT. § 18-9-202 (2010).

108. *See id.* §§ 18-9-201 to -209.

109. *See id.* §§ 18-4-101 to -802.

110. *Id.* § 18-9-202(1)(a).

111. *Id.* § 18-9-202(2)(a).

112. *Id.* § 18-1.3-501(1)(a).

Court recognized that it abrogated the common-law rule that mistreatment of animals is permissible.<sup>113</sup> Thus, the Animal Cruelty Statute is an example of an area in which the Colorado Supreme Court has relied upon legislative policy to narrow the applicability of the common law's low regard for the status of animals. As a part of the criminal code, its purpose is to vindicate public rights, and in so doing it recognizes a public interest that is harmed when the statute is violated.<sup>114</sup> Moreover, the very fact that "cruelty" constitutes an element of the offense in the Animal Cruelty Statute suggests that the subject protected by the statute is of a different character than mere property: one cannot "cruelly beat" a chair or a photo album.<sup>115</sup>

More generally, the two statutes call into question the soundness of applying the pets-as-property rule in the tort context. Over one hundred years ago in *Mullaly*, the court looked to legislative policy to upgrade the status of dogs from "less than property" to "property."<sup>116</sup> Today, if Colorado courts were to upgrade the status of pets from "property" to "something more than property" for tort-compensation purposes, the Pet Trust Statute and the Animal Cruelty Statute would give it similar justification to do so.<sup>117</sup>

## II. THEORETICAL UNDERPINNINGS: INJURY TO PETS

This section evaluates whether and to what extent treating pets as property serves the compensatory function of tort law. A fundamental purpose of compensatory damages is to place the injured party in the position that he or she would have occupied had the injury never occurred.<sup>118</sup> One way to consider the different policies served by allowing or disallowing various damage remedies is to compare the available remedies in three types of tort cases: personal injury, injury to property, and injury to others with whom the law recognizes a close relation-

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113. *Waters v. People*, 46 P. 112, 113–15 (Colo. 1896).

114. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.01(A)(1) (4th ed. 2006).

115. For an argument that the capacity for cruelty itself is a uniquely human attribute, the prevention of which should be the foremost ethical concern, see Judith N. Shklar, *Putting Cruelty First*, 111 DAEDALUS, Summer, 17–28 (1982).

116. *Mullaly v. People*, 86 N.Y. 365, 368 (1881).

117. See *infra* Part III.

118. See *Cope v. Vermeer Sales & Serv. of Colo., Inc.*, 650 P.2d 1307, 1308–09 (Colo. App. 1982) ("The principle of making the injured party whole underlies all negligence cases.").

ship. While the wrongful death of a pet is, obviously, not analogous to personal injury, it is debatable which of the latter two types of injury most aptly describes it. Generally, non-economic damages are not recoverable for the former,<sup>119</sup> but are recoverable for the latter.<sup>120</sup> This section argues that the rationale of compensation is better approximated by treating the wrongful destruction of a pet as a “wrongful death” case rather than as a “destruction of property” case.

### A. Property

*Black’s Law Dictionary* defines property as “[a]ny external thing over which the rights of possession, use, and enjoyment are exercised.”<sup>121</sup> In Colorado, property owners may not recover damages for emotional distress resulting from the loss of property even if they lost items with great sentimental value.<sup>122</sup> Thus, in most circumstances, an award of economic damages in a case involving injury to property is believed to completely restore the plaintiff to her pre-injury position by providing her monetarily with what was lost because of the defendant’s conduct.<sup>123</sup>

Pet ownership has many things in common with property ownership. Pets can be bought or sold, and their owners possess nearly unlimited authority in making decisions as to the pet’s health, safety, and welfare.<sup>124</sup> Characterizing pets as “external things,” however, is more problematic. Companion animals are alive, can interact, and can form attachments; many have distinct personalities.<sup>125</sup> While the extent to which animals can be said to exercise free will may be subject to considerable philosophical debate, they certainly possess more of it

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119. See, e.g., *Webster v. Boone*, 992 P.2d 1183, 1185 (Colo. App. 1999); discussion *supra* Part I.B.1.

120. See, e.g., RESTATEMENT (SECOND) OF TORTS § 693 cmt. 18 (1965) (describing elements of tort of loss of consortium).

121. BLACK’S LAW DICTIONARY 1335–36 (9th ed. 2009).

122. *Webster*, 992 P.2d at 1185.

123. See *id.* at 1185; *Cope v. Vermeer Sales & Serv. of Colo., Inc.*, 650 P.2d 1307, 1308–09 (Colo. App. 1982).

124. These decisions are subject, of course, to animal cruelty laws. See COLO. REV. STAT. § 18-9-202 (2010).

125. See Jane McGrath, *Do Animals Have Personalities?*, HOWSTUFFWORKS.COM, <http://animals.howstuffworks.com/animal-facts/do-animals-have-personalities.htm> (last visited Mar. 12, 2011) (discussing recent studies on animal personality); see also Samuel D. Gosling, *Personality in Non-Human Animals*, 2 SOC. & PERSONALITY PSYCH. COMPASS 985, 988 (2008).

than an inanimate object.<sup>126</sup> Additionally, animal cruelty laws, existing in every state, impose duties on pet owners toward their animals that do not correspond with any duties owed to their tangible or intangible property.<sup>127</sup> As discussed in Part I, a person cannot “torment[]” or “unnecessarily or cruelly beat[]” a car, chair, or photo album.<sup>128</sup>

More importantly, there exists an emerging and growing body of social science literature that recognizes the depth and significance of the human-animal bond.<sup>129</sup> Pets provide emo-

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126. See, e.g., Peter Singer & Richard A. Posner, *Dialogues: Animal Rights*, SLATE (June 12, 2001) [hereinafter “*Letters*”], <http://www.slate.com/id/110101/entry/110109>.

Professor Singer argues that there is a strong ethical argument to be made for treating the moral status of animals as similar to that of humans:

The fundamental form of equality is *equal consideration of interests*, and it is this that we should extend beyond the boundaries of our own species. Essentially this means that if an animal feels pain, the pain matters as much as it does when a human feels pain—if the pains hurt just as much. How bad pain and suffering are does not depend on the species of being that experiences it.

*Id.*

Judge Posner responds that this position is too extreme, that it ignores the moral relevance of membership in the human race, and that philosophical argument alone cannot compel an expansion of the law to protect the ethical status of animals:

Suppose a dog menaced a human infant and the only way to prevent the dog from biting the infant was to inflict severe pain on the dog—more pain, in fact, than the bite would inflict on the infant. You would have to say, let the dog bite . . . . But any normal person . . . including a philosopher when he is not self-consciously engaged in philosophizing, would say that it would be monstrous to spare the dog . . . . And so to expand and invigorate the laws that protect animals will require not philosophical arguments for reducing human beings to the level of the other animals but facts, facts that will stimulate a greater empathetic response to animal suffering and facts that will alleviate concern about the human costs of further measures to reduce animal suffering.

*Id.*

This Comment’s proposal does not require resolution of this debate. However, both positions highlight the unique moral status of animals in modern society. Whether one prefers Singer’s appeal to rational philosophical argument or Posner’s appeal to deeply held human intuitions, the notion that the grief and mental anguish that results from the wrongful death of a pet is so unreasonable as to be entitled to no recognition under the law is ethically suspect.

127. See, e.g., COLO. REV. STAT. § 18-9-202; *Waters v. People*, 46 P. 112, 113 (Colo. 1896).

128. See COLO. REV. STAT. § 18-9-202.

129. See Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 802–03 (2004) (surveying several studies on the psycho-social aspects of pet ownership); Ann Ottney Cain, *Pets as Family Members*, 8 MARRIAGE & FAM. REV. 5, 6 (1985) (describing the explosion of research into the human-animal bond); CHERI BARTON ROSS & JANE BARON-SORENSEN,

tional and psychological benefits to their owners including “companionship, protection, entertainment . . . stimulus for exercise, social opportunities, and the chance to love and nurture something outside of themselves.”<sup>130</sup> The very fact that pets are dependent on people can foster self-esteem and a sense of accomplishment in pet owners by giving them something to care for that shows appreciation and gratitude.<sup>131</sup> Service animals serve not only as companions, but as extensions of their owners’ individuality.<sup>132</sup> Furthermore, the bonds some people have with their pets can be even deeper than those they form with other people because pets can provide something that not all people always can: unconditional love.<sup>133</sup>

As a result of these factors, the death of a companion animal can bring about feelings of grief and loss that are as intense, or more intense, than those brought about by the death of a human friend or family member.<sup>134</sup> Owners who share a close bond with their pets can be expected to go through all of the classic stages of grief when their pets die, including denial, bargaining, anger, guilt, sorrow, and resolution.<sup>135</sup> Such owners may face additional embarrassment and shame if they have been taught that it is unacceptable to publicly express their feelings of grief at the loss of a pet.<sup>136</sup> The death of a pet is also made more difficult to resolve due to the lack of widely accepted mourning rituals and ceremonies.<sup>137</sup> Pet owners whose animals are wrongfully killed may suffer a more extreme degree of grief because they must cope not only with the loss, but

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PET LOSS AND HUMAN EMOTION: A GUIDE TO RECOVERY 5 (2d ed. 2007) (“Changes in human mobility and family structure have increased the likelihood that people will form significant attachments to pets.”).

130. ROSS & BARON-SORENSEN, *supra* note 129, at 3.

131. *Id.* at 7.

132. *Id.* (“Animals can be trained to be the eyes or ears of a blind or hearing-impaired person.”).

133. *Id.* at 17. As the point was put by John Grogan in the *New York Times* bestseller, *Marley and Me*,

[a] dog has no use for fancy cars, big homes, or designer clothes. A water-logged stick will do just fine. A dog doesn’t care if you’re rich or poor, clever or dull, smart or dumb. Give him your heart and he’ll give you his. How many people can you say that about? How many people can make you feel rare and pure and special? How many people can make you feel extraordinary?

JOHN GROGAN, *MARLEY AND ME* 280 (2005).

134. ROSS & BARON-SORENSEN, *supra* note 129, at 17; Livingston, *supra* note 129, at 803.

135. ROSS & BARON-SORENSEN, *supra* note 129, at 18.

136. *Id.* at 3–4.

137. *Id.* at 3.

also with feelings of rage and anger at the person whose negligent or intentional acts caused it.<sup>138</sup> When an emotional loss cannot be vindicated by the law, these feelings can be aggravated further.<sup>139</sup>

There is another important respect in which the pets-as-property analogy seems inapt: the policy justifications for precluding non-economic damages for the destruction of property do not apply with equal force to the killing of a pet. Professors Schwartz and Laird, arguing against expanding the available remedies to the owners of wrongfully killed pets, point to three such justifications:

(1) [T]he plaintiff's right to freedom from mental disturbance is not one which the law undertakes to protect, so that one who works a purely mental injury has breached no duty and committed no wrong, (2) . . . in most cases, such injuries are so remote from the normal, foreseeable consequences of the wrong involved that they cannot be said to have been proximately caused thereby, and (3) . . . such damages are so subjective that they are beyond the capacity of the legal process to investigate and evaluate, so that to entertain claims based thereon would open the door to fraud and greatly swell the burden of litigation.<sup>140</sup>

None of these justifications, however, warrants a categorical ban on non-economic damages for the wrongful death of a pet. The first justification is inapplicable because a tortfeasor who negligently kills a pet owner's animal has not "work[ed] a purely mental injury."<sup>141</sup> Rather, such a tortfeasor has deprived a pet owner of a companion, which has characteristics that distinguish it from ordinary property.<sup>142</sup> Moreover, the underlying premise of this argument is untrue: as the existence of the tort of intentional infliction of emotional distress demonstrates, a plaintiff can, in some circumstances, seek redress for a "purely mental injury."<sup>143</sup> Schwartz and Laird's second argument

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138. *Id.* at 70.

139. *Id.*

140. Schwartz & Laird, *supra* note 23, at 232–33 (quoting W.E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2d 1070 § 2 (2004)).

141. *Id.* at 232.

142. See articles and annotations cited *supra* at notes 130 and 134.

143. See *supra* Part I.B.3; RESTATEMENT (SECOND) OF TORTS § 46(1) (noting that, under IIED, the tortfeasor is "subject to liability for such emotional distress, and *if bodily harm to the other results from it*, for such bodily harm" (emphasis added)).

illustrates the qualitative difference between pets and other types of property to which people form sentimental attachments. It is reasonable that someone who accidentally destroys an antique chair, for example, would not have been on notice that the specific piece of furniture she destroyed held great sentimental importance for its owner, and thus cannot fairly be charged with responsibility for the resulting emotional distress. To most people, a piece of furniture is a piece of furniture. With pets, however, this intuition is much less plausible. Someone who runs over a dog cannot claim the same kind of surprise upon learning that the animal's owner grieved the loss of her animal. Finally, the last justification, that recognizing an additional cause of action for emotional distress will promote fraud on the court, while possible in some cases, can be checked by an appropriately limited cause of action.<sup>144</sup>

### *B. Relationships*

In certain tort cases, plaintiffs are able to recover damages based on the wrongful death of a person related to the plaintiff in a way that the law recognizes as meaningful or important. This can take a couple of different forms. In a common law "loss of consortium" claim, a tortfeasor who causes the death of the plaintiff's spouse can be required to compensate the plaintiff for the loss of the spouse's "affection, society, companionship, and aid and comfort."<sup>145</sup> Similarly, wrongful-death statutes allow the family members of a negligently killed relative to recover damages for emotional distress, loss of companionship, or both.<sup>146</sup>

In each of these cases, the plaintiff is able to recover damages for emotional distress resulting from the grief of a close relation's wrongful death, for the loss of benefits that the plaintiff derived from his or her relationship with the decedent, or both. The relationship between the plaintiff and the decedent is not one of "possession, use, or enjoyment" as in the case of the relationship between person and property, and the injured party is a "person" under the law, with all of the attendant rights, privileges, and interests. Further, the damages awarded to a plaintiff for a loss-of-consortium claim are not a measure of the value of the relationship in an economic sense—indeed, it is

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144. See *infra* Part III.

145. See COLO. JURY INSTRUCTIONS—CIVIL § 6:6 (2010).

146. See, e.g., COLO. REV. STAT. § 13-21-201 to -204 (2010).

difficult to conceive of a market price for the emotional companionship of a spouse.

Of the three categories of injury for which the law provides damage awards, claims brought by the owners of wrongfully killed pets are closest to loss-of-consortium cases. It is not uncommon for pet owners to treat their animals as “part of the family.”<sup>147</sup> Pets live with and are cared for by their owners, and the closeness of the relationship between pets and their owners is a well-documented phenomenon.<sup>148</sup> In some cases, a pet owner’s animal may be the closest thing to family that she has.<sup>149</sup> Moreover, the effects of the death of a pet on its owner can be just as emotionally devastating as the death of a family member.<sup>150</sup>

At the same time, there are notable differences between the two types of claims which counsel against making a pet owner’s recovery identical to that of a widower who loses a spouse, or parent who loses a child. Any attempt to model a remedy for the owners of pets who are wrongfully killed must also account for some significant differences between the relationship between people and pets on the one hand, and between people and other people on the other. In the first place, pets are animals. As such, they are generally assigned less moral value than people.<sup>151</sup> Another distinction between pet ownership and intra-human relationships is that the manner in which people form relationships with pets is, generally speaking, markedly different than that in which people form relationships with other people. This much is suggested by the term “pet owner.” Pets can be bought and sold, and, to a certain extent, replaced.<sup>152</sup> And while it would be incorrect to suggest that a replacement pet can completely eliminate the grief that accompanies the loss of a previous pet, it is easier for a pet owner to replace a wrongfully killed pet than for a widower to obtain a replacement spouse or for grieving parents to

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147. See Kris Bulcroft, *Pets in the American Family*, DELTA SOC’Y, <http://www.deltasociety.org/Document.Doc?id=35> (last visited Jan. 17, 2010).

148. See Livingston, *supra* note 129, at 802–03; *supra* notes 130–33.

149. *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980).

150. See *supra* Part II.A.

151. This assertion is certainly up for debate, see, for example, *Letters*, *supra* note 126, but intuitively it seems safe to say that, given a choice between saving the life of a dog and a human of comparable intelligence, few people would consider the matter a wash.

152. Livingston, *supra* note 129, at 822 (“Although companion animals are not fungible creatures by any means, any number of substitutes can successfully fill their role in the household.”).

obtain a replacement child.<sup>153</sup> While the status of pets under the current law is uneasy, the emotional toll imposed on pet owners whose animals are wrongfully killed is nonetheless immense, and is not sufficiently remedied by the mere replacement of an animal.

### III. TOWARD A FAIRER RECOVERY

The previous discussion has argued that treating pets as property and limiting the recovery of the owners of wrongfully killed pets to the market value of the animal dramatically under-compensates pet owners. A better rule would consider the actual nature of the costs suffered by the owners of wrongfully killed pets and tailor the compensation afforded to them accordingly. This part begins by sketching the possible components of any expanded-compensation regime, and then turns to a discussion of how Colorado might effect such a change. It concludes by addressing some principal objections to this proposed expanded theory of recovery.

#### A. *Components*

Any regime which expands the available remedies to the owners of wrongfully killed pets must address the following two questions: (1) who can recover, and (2) what can be recovered? This section answers these questions in turn.

##### 1. Who Can Recover?

The nature of pet ownership raises two related issues with respect to who is eligible to recover damages that are unique from other types of relationships for which the law allows one party to recover damages as a result of injury to another party. First, it may be difficult in some cases to determine whether the relationship between a particular claimant and a particular wrongfully killed pet is sufficiently close to justify awarding that plaintiff non-economic damages. While some plaintiffs may have legal ownership of their pets and the papers to prove it, it is equally possible for a person to form the same kinds of emotional bonds to an animal as a legal owner without ever

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153. *Id.*

taking formal ownership.<sup>154</sup> This might raise difficult issues where two parties with competing claims to ownership of a deceased companion animal both seek non-economic damages from a tortfeasor.<sup>155</sup> This problem could be solved by drawing a bright-line rule limiting recovery to the legal owners of a wrongfully-killed pet, at the obvious risk that such a rule might exclude deserving plaintiffs. Conversely, a court could move in the opposite direction and adopt a flexible standard where, to recover for emotional distress damages, a plaintiff would have to make some kind of threshold showing that she was sufficiently attached to the animal. The problem with this approach is that it makes the eligible class of plaintiffs in pet cases far larger than the class of eligible plaintiffs in non-pet cases. Comparing such a cause of action to a loss-of-consortium claim, it is notable that the existence of a close bond between two people, by itself, has never been sufficient to give either person the right to recover for the wrongful death of the other.<sup>156</sup>

A second problem, related to the first, concerns the possibility of multiple members of a family seeking damages for emotional distress for the wrongful death of their animal.<sup>157</sup> If a negligently killed pet lived in a household with a large number of people, each with a meaningful emotional tie to the animal, allowing each to recover substantial damages for emotional distress could result in a recovery larger than any defendant could be expected to satisfy, or than would ever be awarded in a human wrongful death case.<sup>158</sup> However, limiting the eligibility for compensation to the legal “owner” of the animal could under-compensate those family members who had suffered the most from a tortfeasor’s conduct—for example, the children who had the closest relationship with the animal.

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154. For example, in *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, 153–54 (S.D.N.Y. 1994), discussed previously in Part I, the plaintiff adopted Floyd as a stray he met on a camping trip.

155. Assume, for example, that the original owner of the Golden Retriever in *Gluckman* learned about his animal’s death and also sought to recover non-economic damages from the airline.

156. For example, in Colorado, loss-of-consortium claims apply only to the spousal relationship. See COLO. JURY INSTRUCTIONS—CIVIL § 6:6 (2010).

157. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001) (identifying the multiple plaintiff obstacle as a reason to disallow recovery for emotional distress for the wrongful destruction of a pet); Schwartz & Laird, *supra* note 23, at 255.

158. See *Rabideau*, 627 N.W.2d at 802.

These problems could best be addressed by adopting some variant of the single recovery rule.<sup>159</sup> Under the single recovery rule, multiple owners of the same wrongfully killed pet would be required to present their claims jointly, and the total amount of damages recoverable would be limited to one sum, subject to any applicable caps.<sup>160</sup>

Under existing law, the applicability of damage caps to multiple claimants in Colorado varies based upon the nature of the injury and the cause of action. In wrongful death actions, where the right of claimants to recover is wholly derivative of the death of the decedent, the sum of all claims is subject to any applicable statutory cap.<sup>161</sup> Claims of co-owners of property, however, are not subject to the same cap: each property owner can recover for his or her damages subject to a separate cap.<sup>162</sup> Lastly, multiple loss-of-consortium claims appurtenant to the same injury are each subject to a separate damages cap.<sup>163</sup>

The wrongful death of a pet presents a situation not perfectly analogous with any of these three situations. To begin, a pet owner's recovery for the wrongful death of a pet is not "wholly derivative" of the pet's cause of action because an animal has no standing to bring suit in an American court. Moreover, the multiple people who might bring an action for a pet's wrongful death are not necessarily the pet's co-owners, and the types of damages that would be subject to a cap under the proposed expanded liability regime in this Comment are not those typically available to property owners. Finally, the proposed rule in this Comment is distinct from a loss-of-consortium claim in that it proposes compensating the owners for their actual mental distress, rather than the value of the lost companionship of their deceased animal.

In light of these difficulties, courts or the legislature should fashion a single recovery rule for the availability of non-economic damages for pet owners. If the rule adopted includes a cap on damages, that cap should not be applied separately to anyone claiming ownership of the animal. Plaintiffs could choose how much or how little evidence to submit as to the

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159. Livingston, *supra* note 129, at 846.

160. *Id.*

161. See Steedle v. Sereff, 167 P.3d 135, 138–39 (Colo. 2007).

162. See *id.*; Colo. Springs v. Gladin, 599 P.2d 907, 908 (Colo. 1979).

163. Steedle, 167 P.3d at 139; Lee v. Colo. Dep't of Health, 718 P.2d 221, 230 (Colo. 1986).

emotional toll wrought by a tortfeasor's actions, but the single recovery rule would provide a check against excessive or disproportionate recovery.<sup>164</sup>

## 2. What Can Be Recovered?

A second question that must be addressed by a new compensation regime for the owners of wrongfully killed pets concerns what types of damages the plaintiffs can recover. The purpose of a compensatory damage award is to restore the plaintiffs to their pre-injury position.<sup>165</sup> This requires both accounting for the actual losses suffered by a plaintiff as a result of a tortfeasor's conduct and not compensating a plaintiff with any more than will make him or her whole. Professor Livingston's proposed remedy for the owners of wrongfully killed pets provides a useful sketch of how such damages should look.<sup>166</sup> Livingston proposes that aggrieved pet owners be awarded three types of damages.<sup>167</sup> First, she proposes that owners be compensated for the market value, or replacement cost of their deceased animal.<sup>168</sup> The purpose of this award would be to redress any pecuniary injury as a result of a tortfeasor's conduct as well as to permit the plaintiff to obtain a replacement pet.<sup>169</sup> Next, Livingston proposes that plaintiffs be able to recover damages for their emotional distress resulting from their pets' deaths as well as the fact of the loss itself, subject to the single-recovery rule and a statutory cap.<sup>170</sup> Presumably, these damages will be larger where the circumstances of the animal's death are particularly jarring or graphic. Lastly, Livingston proposes that plaintiffs be able to recover damages for the lost

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164. Livingston, *supra* note 129, at 846 (“[The ‘single recovery’ concept] reduces the chances of overcompensation and excessive liability. The members of the household in which the animal resided receive a single recovery of damages for their collective emotional anguish and lost companionship.”).

165. *See, e.g.*, *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky. Ct. App. 2001); *Sullivan v. Old Colony St. Ry.*, 83 N.E. 1091, 1092 (Mass. 1908) (“The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims for the inclusion of new elements of damage.”).

166. *See* Livingston, *supra* note 129, at 823.

167. *Id.* at 823–24.

168. *Id.*

169. *Id.*

170. *Id.*

companionship of their animals for a “reasonable replacement period.”<sup>171</sup>

The reasonable replacement period would constitute the length of time necessary for an aggrieved pet owner to locate, select, and obtain a replacement animal with similar characteristics and qualities as the one that was wrongfully killed, taking into account the possible need for a grieving pet owner to move past the loss of the first pet and to be emotionally ready to care for another.<sup>172</sup> Livingston argues that this compensation is conceptually distinct from damages for emotional distress because, while emotional distress damages concern the mental pain and injury suffered by a plaintiff as a result of the defendant’s conduct, damages for loss of companionship compensate the plaintiff for the lack of the pet’s “typical role in the family as comforter, playmate, and protector.”<sup>173</sup>

This Comment agrees with the first two aspects of Livingston’s proposal, but disagrees with her proposal to provide injured pet owners damages for lost society during a “reasonable replacement period.” In an area where excessive recoveries and excessive frivolous litigation are already live concerns, it seems that providing this type of compensation would cause more problems than it would solve. Litigation could be expected over the issue of how long the “reasonable replacement period” should last and over how to place a dollar figure on the value of the pet’s “role in the family.” Granted, valuing emotional distress is also difficult, but plaintiffs claiming those damages can present evidence indicating what they suffered, the intensity or duration of their mental anguish, the physical symptoms of emotional distress, and other types of evidence.<sup>174</sup> Because claims for emotional distress in this way are not wholly novel, attorneys, judges, and courts would be familiar with litigating the types of issues that might arise.

Lastly, despite the argument that damages for the loss of a pet’s role in the family and for the emotional distress that accompanies losing a pet are conceptually distinct,<sup>175</sup> awarding both amounts to injured plaintiffs may still constitute “double counting.” As an illustration, assume that a plaintiff pet owner

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171. *Id.*

172. *Id.*

173. *Id.* at 825.

174. See generally JON R. ABELE, EMOTIONAL DISTRESS: PROVING DAMAGES 91–117 (2003).

175. Livingston, *supra* note 129, at 825.

is awarded all three types of damages in an amount that fully compensates her for the loss of her animal, where full compensation is defined as that amount of compensation that completely restores the plaintiff to her pre-injury position. The damages she receives for the market value of her pet allow her to purchase a replacement animal. The damages she receives for her emotional distress put her in the position that she would have occupied, mentally, had she never lost the animal to begin with; they compensate her for the emotional distress resulting from the fact of the loss as well as the circumstances surrounding the loss. At this point, the hypothetical, fully compensated plaintiff occupies the position she would have occupied had the loss never occurred: she suffers no emotional disturbance due to her lack of a companion animal and is able to purchase a new companion animal to fulfill all of the same functions as her old one. It is thus impossible to point to a yet-uncompensated loss.

In sum, the owner of a wrongfully killed pet should be able to recover two types of damages: (1) the market value or replacement cost of the animal, and (2) compensation for the emotional distress the owner suffered as a result of the loss of the animal. This recovery would compensate the owners of wrongfully killed pets for all aspects of their loss and would be workable insofar as courts have experience measuring market value and emotional distress in other contexts.

### *B. Mechanisms for Change*

Having discussed the components of a workable expansion of the available remedies for the owners of wrongfully killed pets, the final part of this Comment discusses how such change might come about through either the Colorado courts or the General Assembly. These two mechanisms would differ primarily in their means for limiting frivolous or fraudulent claims.

#### 1. Judicial Change

A judicial rule that expanded the recovery available to the owners of wrongfully killed pets would be based upon two primary principles. First, as illustrated in Part II of this Comment, the claim that pets are personal property is not mandated by the common law. Cases holding that pets were

personal property did so not as a means of limiting the available remedies to their owners, but as a means of expanding them. More importantly, such cases recognized that the legal compensation afforded to the owners of wrongfully killed pets should accord with the evolving place of pets in society. In light of the ever-increasing number of pet owners in the United States, as well as the studies indicating both the familial bond between owners and their pets and the devastating emotional impact that the wrongful death of a pet can have on pet owners, the judiciary could recognize that the injury to the owners of wrongfully killed pets is valid and should be compensable. Second, and perhaps most importantly, any remaining common law presumption that pets are mere property has been abrogated by the General Assembly through the Pet Trust Statute and the Animal Cruelty Statute. Both acts distinguish pets from ordinary property. It therefore follows that their wrongful destruction should be compensated differently than that of other property.

Whether a judicially enacted expansion of the available remedies to aggrieved pet owners would require the recognition of a new cause of action altogether, or merely an expansion of the remedies available for an existing cause of action, would depend upon the circumstances of the case before the court. For example, in an appropriate test case, a Colorado court could adopt the reasoning of the Kentucky Supreme Court in *Burgess* and hold that the owner of a pet killed in an outrageous manner is not precluded from recovering for intentional infliction of emotional distress merely because the outrageous conduct involved the killing of an animal. In the more typical case, where a pet is killed as a result of, say, veterinary malpractice or negligent driving, a court could rely on traditional negligence principles to assess liability, and then expand the basis of recovery only as a means of measuring damages. For example, a plaintiff would still have to prove that the defendant did not act with the requisite standard of care and that the defendant's actions were the proximate cause of the pet's death before he or she could recover emotional distress damages.

In recognizing any new cause of action, a court must be cautious of inviting frivolous or fraudulent claims and allowing excessive recoveries by plaintiffs. To achieve these goals, courts have a number of tools at their disposal. First, courts should adopt Professor Livingston's proposal as to the exten-

sive proof that should be required of plaintiffs claiming emotional distress damages for the loss of a pet.<sup>176</sup> Noting that the risk of fraudulent claims or feigned emotional distress is equally possible in cases where plaintiffs claim damages for the loss of a spouse, sibling, or child, Livingston recommends that plaintiffs “be required to prove the nature and duration of the relationship with the animal and the extent of the mental suffering experienced upon the animal’s death.”<sup>177</sup> This suggestion allows juries to make the same kinds of credibility determinations that they are charged to make when presented with a claim for emotional distress or loss of society of a human relative, where fraudulent claims may also be a concern (but not enough so as to justify barring recovery altogether).<sup>178</sup>

Second, courts can use several more traditional methods to limit excessive recoveries or prevent frivolous claims: if a claimant cannot produce sufficient evidence to create a genuine issue of material fact as to whether she suffered emotional distress, a court could dispose of her claim through summary judgment;<sup>179</sup> if a jury verdict is grossly excessive and not supported by the evidence, the court can issue an order of remittitur;<sup>180</sup> if a party presents a claim that is wholly baseless or unsupported by evidence, the court could impose Rule 11 sanctions.<sup>181</sup> Thus, through heightened standards of proof and through traditional docket management tools, courts could control excessive recoveries or frivolous suits should the judiciary adopt a rule which allows the owners of wrongfully killed pets to recover for their emotional distress damages.

## 2. Legislative Change

Through legislation, the General Assembly could also create a cause of action for the owners of wrongfully killed pets. The legislation should allow the owners of a pet or other family members living in the same household as the pet to sue for emotional distress where a pet is intentionally or negligently killed, incorporate the single recovery concept, require that each claimant present proof of both the extent of his or her re-

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176. *See id.* at 837.

177. *Id.*

178. *See id.*

179. *See* COLO. R. CIV. P. 56 (2009).

180. *See* COLO. R. CIV. P. 59.

181. *See* COLO. R. CIV. P. 11(a).

lationship with the wrongfully killed animal and of his or her emotional distress, and apply to all pets or companion animals legally owned. In 2003, a bill was introduced in the Colorado House of Representatives that would have expanded the available remedies to the owners of wrongfully killed cats and dogs.<sup>182</sup> The bill was co-sponsored by House Representatives Cloer and Hefley and Senators Chlouber and Andrews.<sup>183</sup> Shortly after its introduction, however, Representative Cloer moved to kill the bill as a result of pressure from “veterinarians and opponents of trial lawyers.”<sup>184</sup> The bill would have allowed recovery for “economic damages and noneconomic damages for the loss of companionship” of a wrongfully killed dog or cat.<sup>185</sup> The bill did not further define the scope of the non-economic damages it would have afforded but did provide a number of limitations on the plaintiff’s recovery.<sup>186</sup> First, it limited the types of companion animals for which plaintiffs could recover emotional distress damages to dogs and cats.<sup>187</sup> Second, the bill would afford plaintiffs recovery for non-economic damages only where the death of their pets was a result of veterinary malpractice or animal cruelty.<sup>188</sup> Third, the bill would have capped lost companionship damages at \$100,000.<sup>189</sup> Finally, the bill would have required plaintiffs to attempt to resolve their claims through alternative dispute resolution before they could bring an action for relief in district court.<sup>190</sup>

Should the General Assembly revisit this issue in the future, it could improve on the previous bill in at least two ways. First, for the reasons articulated earlier in this Comment,<sup>191</sup> allowing pet owners to recover damages for emotional distress, rather than lost companionship, would be easier to administer and more fully compensatory.<sup>192</sup> Second, rather than limiting its applicability to cases of animal cruelty, the bill should allow pet owners to recover for their emotional distress for ordinary negligence. The purposes of compensation served by expanding

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182. H.B. 03-1260, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003).

183. *Id.*

184. Julia C. Martinez, *Pet Bill Killed by House Sponsor*, DENVER POST, Feb. 16, 2003, at B1.

185. H.B. 03-1260 § 1.

186. *See id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *See supra* Part III.A.

192. *See supra* Part III.A.2.

the available recovery for the owners of wrongfully killed pets are compromised when such recovery is limited to only certain classes of injuries. For example, the owner of an animal that is killed prematurely due to the negligence of a groomer would be just as likely to suffer the same feelings of grief, depression, and sadness as the owner of an animal that is killed due to the negligence of a veterinarian. The previous efforts of the Colorado General Assembly to expand the available recovery for the owners of wrongfully killed pets were laudable, but more could be done to allow relief for a broader class of claimants while still providing protections against unreasonable recoveries.

### C. Addressing Objections

A principal objection advanced by courts and commentators against proposals to expand the available remedies to owners of wrongfully killed pets states that doing so would require courts to similarly expand the available bases of recovery for other, less meritorious claims.<sup>193</sup> For example, in *Johnson v. Douglas*,<sup>194</sup> a New York court used this reasoning to deny recovery for negligent infliction of emotional distress to the owners of a dog that was run over by a car while being walked by the owners.<sup>195</sup> The complaint alleged that the dog's owners were walking their dog along the street when a speeding car nearly hit all three of them.<sup>196</sup> Although the owners were able to jump out of the way of the speeding automobile, the dog was crushed.<sup>197</sup> The court dismissed the couple's causes of action that sought to recover for emotional distress damages caused by their witnessing the death of their dog.<sup>198</sup> While recognizing the attachment that the owners undoubtedly had to their pet and the likely emotional trauma that would accompany witnessing such a horrific accident, the court reasoned that dogs were personal property, and therefore their emotional distress was not compensable.<sup>199</sup> In support of its holding, it advanced the following argument:

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193. See *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001); Schwartz & Laird, *supra* note 23, at 255.

194. 723 N.Y.S.2d 627, 628 (N.Y. App. Div. 2001).

195. It is important to note that, in Colorado, these plaintiffs would not have been able to recover for NIED for different reasons. See *supra* Part I.B.3.

196. *Johnson*, 723 N.Y.S.2d at 627.

197. *Id.*

198. *Id.* at 628.

199. *Id.*

The extension of such thinking would permit recovery for mental stress caused by the malicious or negligent destruction of other personal property; i.e., a family heirloom or prized school ring. . . . *Such an expansion of the law would place an unnecessary burden on the ever burgeoning case loads of the court in resolving serious tort claims for injuries to individuals.*<sup>200</sup>

There are two aspects to the court's argument. The first is the court's claim that allowing pet owners to recover emotional distress damages for the death of their animals would also commit courts to recognizing claims for emotional distress for intangible objects that have sentimental value.<sup>201</sup> The second is the claim that, as a practical matter, such a holding would overburden the courts and diminish the resources available to the judiciary to resolve more important disputes.<sup>202</sup> Each aspect is problematic.

The first claim is a classic "slippery slope" argument, of the form that "courts should not hold X (that emotional distress damages are recoverable for the wrongful death of a pet) because then they will have to hold Y (that emotional distress damages are recoverable for the destruction of other property)." This argument fails because it is possible to meaningfully distinguish pets from other forms of personal property, by recognizing that pets are animate, sentient beings, and other property is not.<sup>203</sup> Moreover, this distinction is already recognized in laws such as Colorado's Pet Trust Statute<sup>204</sup> and Animal Cruelty Statute,<sup>205</sup> illustrating that this is not a slippery slope; pets, unlike chairs or photo albums, can be protected from cruelty and inhumane treatment and can be the de facto beneficiaries of testamentary instruments.<sup>206</sup>

The second claim is unpersuasive because, even if it were true that there was no way to distinguish pets from other forms of property to which people form deep attachments, it does not necessarily follow that a flood of litigation will result. In Hawaii—one of the few states that allows for pet owners to recover emotional distress damages when their animals are wrong-

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200. *Id.* (emphasis added).

201. *Id.*

202. *Id.*

203. *See supra* Part II.A (discussing the differences between pets and property).

204. COLO. REV. STAT. § 15-11-901(2) (2010).

205. COLO. REV. STAT. § 18-9-202 (2010).

206. *See supra* Part I.B.IV.

fully killed—the courts also allow the recovery of emotional distress damages resulting from the negligent destruction of property.<sup>207</sup> In *Campbell v. Animal Quarantine Station*, the court addressed the flood of litigation argument directly: “Since our holding in *Rodrigues*, there has been no ‘plethora of similar cases’; the fears of unlimited liability have not proved true. Rather, other states have begun to allow damages for mental distress suffered under similar circumstances.”<sup>208</sup> The experience of the Hawaii Supreme Court is instructive because the rules in that jurisdiction allow recovery of emotional distress damages in far more cases than what is proposed here.

Finally, the “flood of litigation” argument is flawed insofar as it would apply to any new cause of action. Indeed, the “flood of litigation” argument was advanced against the creation of the tort of intentional infliction of emotional distress in the 1930s.<sup>209</sup> Professor Prosser’s response to this argument then is equally applicable today:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation’; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.<sup>210</sup>

## CONCLUSION

Colorado should allow the owners of wrongfully killed pets to recover damages for their emotional distress. The pets-as-property rule is based on an overly limited reading of the common law that does not adequately recognize the stature that pets now occupy in modern life. Further, the rule undercompensates the owners of wrongfully killed pets because it often affords them a very limited recovery and ignores the real emotional toll that the loss of a pet takes on its owner. Lastly, the rule is inconsistent with other state policies, expressed

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207. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981).

208. *Id.*

209. See GERALD W. BOSTON, DAVID B. KLINE, & JEFFREY A. BROWN, EMOTIONAL INJURIES: LAW AND PRACTICE § 1:5 (West Group 1998) (citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936)).

210. *Id.* (quoting William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939)).

through the Pet Trust Statute and Animal Cruelty statute, which recognize that pets are more than property.

The arguments that expanding the available remedies to the owners of wrongfully killed pets will result in excessive recoveries, fraudulent claims, or a flood of litigation are theoretically unsound and empirically disproven. Moreover, such claims simply cannot fully account for the damages suffered by those who lose their pets due to the wrongful action of another. The legal status of dogs has evolved from “less than property” to “property.” In Colorado, the time has come for the law to further refine its understanding of the importance of all pets in society by affording full compensation for the very real injuries that their owners suffer.