

PUNITIVE DAMAGE AWARDS IN PET-DEATH CASES:
HOW DO THE RATIO RULES OF *STATE FARM V.*
CAMPBELL APPLY?

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INTRODUCTION

This Article considers due process limitations on an award of punitive damages against a defendant who has intentionally or recklessly killed the plaintiff's pet, resulting in a small award of economic damages based on the market value of the pet and no recovery for emotional damages suffered by the pet owner—even though severe distress was caused by the pet's death—because such noneconomic damages are barred under governing state law.

Part I of this Article poses a factual situation involving the malicious shooting of a beloved mixed-breed dog that raises several questions concerning the applicability of exceptions laid out in the United States Supreme Court's 2003 decision in *State Farm Automobile Insurance Co. v. Campbell*¹ to the general rule that due process considerations limit a punitive damages award to four times the amount of compensatory damages, although in rare cases a punitive damages award not exceeding a nine-to-one ratio can be upheld. This Part also details the constitutional issues arising out of the factual scenario and briefly outlines how this Article predicts the courts will resolve such questions.

Part II explores the tort law of most states of the United States and demonstrates that in a majority of jurisdictions an award of emotional damages for grief suffered due to the death of a beloved pet is not recoverable even though the distress was severe and probable and the degree of fault by the defendant who killed the pet was at the level that would normally authorize a punitive damages award under applicable local

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¹ 538 U.S. 408, 429 (2003) (holding that award of \$145 million in punitive damages on a \$1 million compensatory judgment violated due process).

law.

Part III of this Article examines in detail two of the three exceptions recognized in *Campbell* to the applicability of the four-to-one and nine-to-one ratios that ordinarily limit a punitive damages award as a matter of substantive due process. This Part concludes that it is impossible to intelligently guess whether the United States Supreme Court would hold that emotional damages arising out of the death of a pet are the kind of noneconomic damages that are difficult to quantify in monetary terms under one of the *Campbell* exceptions. Part III also calls for expansion of the *Campbell* exceptions based on egregious misconduct causing small economic damages so that it applies if the small amount of damages is noneconomic only or a combination of economic and noneconomic damages.

I. A NOT UNCOMMON FACT PATTERN IN WHICH THE OWNER OF A PET
MALICIOUSLY KILLED BY THE DEFENDANT IS AWARDED A SMALL SUM
BASED ON THE MARKET VALUE OF THE PET AND PUNITIVE DAMAGES FAR
IN EXCESS OF NINE TIMES THAT SUM

The Scenario:

Widow/retiree Paula lived on Social Security benefits and payments from a small pension. Just over a year ago she acquired a mixed-breed dog, Rover, as a puppy from her local animal shelter for an adoption fee of twenty-five dollars. She had Rover neutered, had her veterinarian give him all appropriate vaccinations, and took good care of him. Her feelings of loneliness subsided as she grew more and more attached to Rover. After a few months he was the center of her life.

Ten months after Rover's adoption he escaped from Paula's fenced-in back yard while she was exercising at the local senior center. He ran away when a neighbor's child, seeking to retrieve a ball that had been tossed into the yard, failed to close the gate upon removing the ball from the yard. Rover wandered out and was seen entering the front yard of Duncan, five houses down the block from Paula's house. Duncan's neighbor Wally observed Duncan come out of his house to the yard with a shotgun, which he fired at Rover for no reason discernible to Wally. Several children were playing in the yard across the street when Duncan fired his gun. Rover was seriously injured. Duncan kicked the young animal into the gutter.

Wally knew that Rover belonged to Paula and phoned Paula's home only to find her not there. Wally called animal control to report what had happened, but no one responded to his call. Rover painfully dragged his injured body back home only to lose consciousness near Paula's front door,

where she found him dead when she returned two hours later. Wally's voicemail message explained what had happened.

The devastated Paula was emotionally crushed. She began having migraine headaches and extreme episodes of fear, causing her to consult both her physician and a psychiatrist he recommended. She brought suit against Duncan for trespass to chattels and intentional infliction of emotional distress. Wally testified that he saw Duncan shoot Rover and then kick his still living body, adding that he had seen Duncan twice before shoot and kill dogs that wandered into his yard. On the first claim, the jury was instructed not to award damages in excess of the fair market value of Rover, since he died before Paula could expend any funds on veterinary care in an attempt to save his life. The jury awarded Paula twenty-five dollars² on the trespass to chattels claim.

On the intentional infliction of emotional distress (IIED) claim, the jury did not determine Paula's damages because it answered a special verdict in favor of Duncan, finding that he did not know who owned Rover. The jurisdiction in which the litigants lived and the killing of Rover occurred denies IIED recovery unless the defendant's outrageous conduct was intended by the defendant to cause distress to a particular person.³

The jury also was instructed that if it awarded compensatory damages to Paula on either claim and found Duncan's killing of Rover intentional it could award punitive damages. The jury awarded \$100,000, making the ratio of compensatory to punitive damages 4,000-to-one.

Duncan moved to reduce the punitive damages award to \$100 or at the most \$225 pursuant to the United States Supreme Court's 2003 decision in *Campbell*, where the Court said that as a matter of a defendant's due process

² A juror who spoke to Paula's attorney after the trial related that the jury chose this sum not because that was the amount of the adoption fee she had paid to acquire Rover but because Rover was young, had been neutered, and was well-trained by Paula so that she could sell him via a classified ad if she needed to move to a health-care facility that banned dogs and would not have been forced to dispose of him by a "free to good home" ad.

³ A recent survey of jurisdictions by the Supreme Court of Tennessee determined that this is an element of the IIED tort in six states. See *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 34 (Tenn. 2005) ("[S]ix states have clearly decided that direct claims for intentional or reckless infliction of emotional distress must be based upon conduct that had been directed at a specific person or performed in the presence of the plaintiff: California, Georgia, Oregon, Pennsylvania, South Carolina, and Washington."). The court conceded that it could be inferred that Minnesota belonged on the list and that a decision of the United States District Court for the District of Columbia placed the District there as well. *Id.* at 35 n.19. This Article demonstrates that Wisconsin and North Dakota are also "directed at" jurisdictions. See *infra* notes 53-54, 66 and accompanying text (discussing the IIED law in these states).

rights under the Fourteenth Amendment, “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety” and “that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”⁴ Courts construe the reference to a “single-digit ratio” as meaning a nine-to-one ratio.⁵

Reading *Campbell*, the trial court concluded that uncompensated damages to Paula that Duncan caused were pertinent in determining if Duncan’s motion had merit. The judge, as trier of fact on the issue, determined that Paula’s emotional distress was severe and that, had Duncan known she was the owner of Rover, he would have owed her \$15,000 in emotional damages, which would not include any element of punishment of Duncan.⁶ The punitive to compensatory damages ratio would be 6.65-to-1 if the uncompensated emotional damages were added to the twenty-five dollars in economic damages that were awarded. The trial judge noted that the Court in *Campbell* suggested that the four-to-one and nine-to-one ratios might not apply “where ‘a particularly egregious act has resulted in only a small amount of economic damages,’” or “where ‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’”⁷

The trial court denied Duncan’s motion to reduce punitive damages, and Duncan appealed, relying solely on *Campbell*’s discussion of

⁴ *Campbell*, 538 U.S. at 426.

⁵ See *McClain v. Metabolife Int’l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (“[I]f the ratio of punitive to compensatory damages exceeds 9 (the highest possible single digit), a red flag goes up.”); *Boyd v. Goffoli*, 608 S.E.2d 169, 183-84 (W. Va. 2004) (explaining that ratios of punitive to compensatory damages not exceeding nine-to-one are more likely to comport with due process requirements).

⁶ This latter finding was in response to a passage of *Campbell* where the court noted that “[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant’s act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.” *Campbell*, 538 U.S. at 426 (quoting RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977)).

⁷ *Campbell*, 538 U.S. at 425 (quoting *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

permissible ratios of punitive to compensatory damages.⁸

The appeal raises the following issues:

1. Because economic damages of twenty-five dollars were small and the misconduct could be found egregious, were *Campbell*'s four-to-one and nine-to-one ratios rendered inapplicable? This Article concludes that if twenty-five dollars of noneconomic damages were the only damages suffered, the *Campbell* ratios would not apply.

2. Is \$15,025 a "small amount" under *Campbell*? This Article proposes that any amount over \$10,000 is not "small" as that term is used in the first *Campbell* exception.

3. Can uncompensated damages caused by the defendant be considered in applying the ratios? This Article concludes that the plaintiff can have uncompensated economic damages valued to establish, based on the total economic damages caused by the defendant, that the punitive damages awarded are within either *Campbell*'s four-to-one or nine-to-one ratios and that the defendant is entitled to have uncompensated economic damages valued to establish that the combined total of economic damages caused is not "small" so that no exception to the ratio analysis of *Campbell* applies. Both propositions should also apply where unawarded damages are noneconomic rather than economic; i.e., the combined economic and unawarded noneconomic damages qualify the punitive damages as within the four-to-one or nine-to-one ratios, and the total amount obtained by combining economic damages awarded and noneconomic damages suffered but not awarded is "small."

4. Do grief and agony suffered by the owner of a dog who discovers the dog's dead body after he was maliciously killed by a neighbor constitute noneconomic damages hard to quantify in monetary terms, thereby rendering *Campbell* ratios inapplicable to a punitive damages award added to an award for that type of noneconomic damages? This Article concludes that it is impossible to answer this question.

⁸ *Campbell* provides many avenues of constitutional attack on a punitive damages award other than that based on ratio analysis. The "scenario" at the outset of this Article was structured to present a strong case of reprehensible conduct by Duncan in light of *Campbell*'s statement that the degree of reprehensibility is "important" and is assessed

by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit or mere accident.

Campbell, 538 U.S. at 419.

II. THE GENERAL COMMON LAW RULES IN PET-DEATH CASES ARE THAT ECONOMIC DAMAGES ARE LIMITED TO THE FAIR MARKET VALUE OF THE PET AND NONECONOMIC (EMOTIONAL) DAMAGES ARE SELDOM RECOVERABLE⁹

A. *The Market Value of Most Pets Is Very Low*

The basic common law rule holds that if a companion animal that has been tortiously killed had a market value, that is the maximum amount of recoverable damages for the animal's death.¹⁰ This rule applies whether the theory of recovery is negligence or trespass to chattels, the pet being viewed in law as the property of its owner.¹¹ A pet typically has a "low value" in the marketplace;¹² "average cats and dogs have a negligible fair market value."¹³ As a result, the pet owner usually cannot afford to bring suit

⁹ 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 (2005).

¹⁰ See, e.g., *Mitchell v. Heinrichs*, 27 P.3d 309, 312-13 (Alaska 2001) (holding that courts generally limit the damage award in cases in which a dog is wrongfully killed to its market value); *Nichols v. Sukarno Kennels*, 555 N.W.2d 689, 691-92 (Iowa 1996) (same); *Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994) (same); *Oberschlake v. Veterinary Assoc. Animal Hosp.*, 785 N.E.2d 811, 813 (Ohio. Ct. App. 2003) (same); *Bueckner v. Hamel*, 886 S.W.2d 368, 371 (Tex. App.-1st 1994), writ denied (same); Note, "Man's Best Friend": *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 423-24, 450 n.8 (2002) (same).

¹¹ Abolishing the property status of companion animals would do nothing to advance the legal case for recovery of emotional damages in pet-death cases by the party viewed as owner of the animal under the current system that classifies the animal as property. Proposed changes in the law are to classify the person now viewed as owner of the animal as the animal's guardian, see ANIMAL LAW 98 (Sonia S. Waisman et al. eds., 2d ed. 2002), or to classify the person now viewed as owner of the animal as trustee of a trust of which the animal is the corpus (and owner of the equitable estate), with the trustee having only legal title. David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L. J. 473, 496 (2000). A guardian has no standing to sue for the wrongful death of his or her ward; similarly, a trustee has no standing to sue for the death of the beneficiary of the trust. See 22A AM. JUR. 2D, *Death* §§ 78-81 (2005) (describing how statutes typically confer standing to sue for wrongful death on heirs or the decedent's next of kin). On the contrary, eliminating the property status of companion animals also eliminates one of the most attractive avenues for seeking emotional damages: a suit for trespass to chattels by the owner of a damaged chattel based on the theory that pets are unique items of property, unlike inanimate chairs, books, automobiles, etc., because of the emotional attachments between persons and pets, so that a special rule for measuring damages should apply.

¹² Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199, 213 (2002) (stating that unless the companion animal is a celebrity, it is likely to have value only for "food or apparel" uses).

¹³ Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82

against the potential defendant who killed his or her companion animal.

If the tortfeasor injures, but does not kill, a companion animal, the animal's owner may recover veterinary treatment expenses from the tortfeasor.¹⁴ Recovery of veterinary fees would also be appropriate where a veterinarian attempts unsuccessfully to save the life of an injured companion animal.¹⁵ The great majority of pet-death cases, however, involve a death occurring so quickly that no veterinary care is provided.

Courts deciding pet-death cases based on the theory of negligence or trespass to chattels often expressly recognize that pet owners do suffer genuine emotional damages upon the death of their companion animals, similar in some respects to the grief suffered upon the death of a human relative, but declare that in pet-death cases such damages cannot be awarded.¹⁶ The reason for denial of recovery of emotional damages is the slippery slope argument: that "allowance of recovery would enter a field that has no sensible or just stopping point."¹⁷

NEB. L. REV. 783, 789 (2004).

¹⁴ See, e.g., *Kaiser v. U.S.*, 761 F. Supp. 150, 156 (D.D.C. 1991) (awarding \$1,786.50 in veterinary expenses recovered from defendant whose agent shot plaintiff's dog). In this case the dog died after five days of treatment. The court held that the defendant's agent was only guilty of ordinary negligence even though the shooting was intentional. The police officer was found to have made a negligent error in judgment in concluding the dog was about to attack him and his own dog. *Id.*

¹⁵ See, e.g., *id.* at 157 (awarding \$1,786.50 in veterinary expenses to plaintiff whose dog was shot by the defendant's agent). In this case the dog died after five days of treatment. The degree of fault on the part of the defendant's agent found by the court was ordinary negligence even though the shooting was intentional. The agent, a police officer, was found to have made a negligent error in judgment including that the plaintiff's dog was about to attack him and his own dog.

¹⁶ The Supreme Court of Virginia very recently stated that "an emotional bond may exist with a pet resembling that between parent and child, and the loss of such an animal may give rise to grief approaching that attending the loss of a family member." *Kondaurov v. Kerdasha*, 619 S.E.2d 457, 463 (Va. 2005) (depublished). See also *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (recognizing that even in a negligence case "loss of a beloved pet can be especially distressing"); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) ("[W]e are mindful of the suffering an owner endures upon the death or injury of a beloved pet, [but] we resolve to follow the majority of jurisdictions that do not allow recovery of damages for such mental distress."); *Strawser v. Wright*, 610 N.E.2d 610, 612 (Ohio Ct. App. 1992) ("We sympathize with one who must endure the sense of loss which may accompany the death of a pet . . ."); *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (recognizing that distress over the loss of dog is "understandable"); Note, *supra* note 10, at 435-41 (discussing policy justifications and psychological studies demonstrating that courts should treat pets more like members of the family).

¹⁷ *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001). The court worried that if emotional damages were allowed for the death of a pet, they would have to be recoverable as well for the death of a best friend. *Id.* at 801. That is not correct if the cause of action recognized was trespass to chattels. Additionally the court worried that if the owner of

B. Alternate Measure of Economic Damages: Intrinsic Value of the Pet

If the companion animal has no market value—often the case with older, mixed-breed dogs and cats—the usual¹⁸ measure of damages is value to the owner, often called intrinsic value. As stated by the Supreme Court of Oregon:

The true rule being that the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for *if it has no market value*, he may prove its special value to him by showing its qualities, characteristics, and pedigree, and may offer the opinions of witnesses who are familiar with such qualities.¹⁹

In two states, the sentimental attachment the owner had for the pet that was killed can be considered, according to case law precedent, in assessing intrinsic value. The Illinois Court of Appeals in 1987 held:

[W]here the object destroyed [here a dog] has no market value, the measure of damages to be applied is the actual value to the owner. The concept of actual value to the owner may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages. It appears clear that

the pet could recover emotional damages, so could the non-owner but primary caretaker of the pet and members of the owner's family who lived with the pet. *Id.* at 801. Again, not so if the cause of action is trespass to chattels, under which the plaintiff is the owner of damaged property. *Lefebvre v. Utter*, 22 Wis. 189, 189 (Wis. 1867). Finally, the court worried about recovery of emotional damages for death of "an enormous array of living creatures." *Rabideau*, 627 N.W.2d at 802. Surely the Wisconsin jury can be trusted to distinguish whatever feeling one has when his "pet" tarantula is tortiously killed to the distress suffered when the victim is a dog or cat or parrot, a companion animal that can return the affection given to it by its owner. There exist other cases stating the slippery slope rationale—sometimes called the parade of horrors argument—for denying recovery of emotional damages upon tortious killing of a pet. *See, e.g., Myers v. City of Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004) (noting "fears of flooding the courts with spurious and fraudulent claims"); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145 (N.J. Super. Ct. Law Div. 2001) ("[A]llowing such claims to go forward would open the floodgates to future litigation."); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1126 (Ohio. Ct. App. 2003) (referring to "the difficulty in defining classes of persons entitled to recover, and classes of animals for which recovery should be allowed").

¹⁸ The Alaska Supreme Court has suggested that in lieu of recovery of intrinsic value to the owner, a court there could use replacement value as the measure of damages when the animal killed had no market value. *Mitchell v. Heinrichs*, 27 P.3d 309, 313-14 (Alaska 2001).

¹⁹ *Green v. Leckington*, 236 P.2d 335, 337 (Or. 1951) (quoting *McCallister v. Sappingfield*, 144 P. 432, 434 (Or. 1914)). The intrinsic value measure of damages in the absence of market value is well established in Texas. *See City of Canadian v. Guthrie*, 87 S.W.2d 316, 318 (Tex. Civ. App.-Amarillo 1932), *reh'g denied* (holding that if an animal has no market value, damages for wrongful killing of the animal be measured by its intrinsic value); *Int'l & G. N. Ry. Co. v. Williams*, 175 S.W. 486, 488 (Tex. Civ. App.-San Antonio 1915), *reh'g denied* (same); *Int'l & G.N.R. Co. v. Carr*, 91 S.W. 858, 859 (Tex. Civ. App.-La Salle 1905), *reh'g denied* (same).

damages in such cases, while not merely nominal, are severely circumscribed.²⁰

The Austin Court of Appeals in Texas also recently stated in a case involving the death of a dog that “intrinsic value is an inherent value not established by market forces; it is a personal or sentimental value.”²¹ But there is no suggestion that allowing consideration of sentiment authorizes an award of damages for distress, grief, and emotional harm. Recall that the Illinois court warned that intrinsic value damages are “severely circumscribed.” Moreover, outside of Illinois and Texas, courts are adamant that sentimental value must be excluded from intrinsic value, which apparently is to be determined under the test used by the Oregon Supreme Court quoted above.²²

In states where sentiment is not allowed to influence the amount of damages calculated under the intrinsic value approach, death of a companion animal “may produce a minimal recovery, because courts tie ‘value to the owner’ to pecuniary considerations.”²³

By statute in Tennessee, something like intrinsic value is recoverable in cases where “a person’s pet”²⁴ has been intentionally²⁵ killed by the defendant even if the animal has some fair market value, with these intrinsic-type damages capped at \$5,000.²⁶ The statute provides that

²⁰ *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987). *Jankoski* was followed in *Anzalone v. Kragness*, 826 N.E.2d 472, 477-78 (Ill. App. Ct. 2005). However, the court in *Anzalone* cautioned that the damages-to-the-owner method of valuing the loss suffered by the plaintiff is not intended to include emotional damages in disguise. *Anzalone*, 826 N.E.2d at 477-78.

²¹ *Petco Animal Supplies, Inc., v. Schuster*, 144 S.W.3d 554, 563-64 (Tex. App.-Austin 2004), *reh’g denied*.

²² See *Mitchell*, 27 P.3d at 313 n.20 (criticizing the Illinois Court of Appeals in *Jankoski* for including sentimental value as part of the measure of intrinsic value). See also *Pickford v. Masion*, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (citing *Mieske v. Bartell Drug Co.*, 593 P.2d 1308 (Wash. 1979) (declaring that intrinsic value excludes sentimental value)).

²³ *Livingston*, *supra* note 13, at 790.

²⁴ TENN. CODE ANN. § 44-17-403(a)(1) (2005). This phrase in the Tennessee statute has not been construed. Likely the courts will hold that only one with an ownership interest in the pet has standing to invoke the statute.

²⁵ *Id.* If the pet dies due to the negligence of the defendant, the statute applies only if the death occurred on the property of the pet’s owner or caretaker or while under the control and supervision of the owner or caretaker. *Id.*

²⁶ *Id.* When the pet killed is co-owned by two or more persons—husband and wife co-ownership ought to be common—the statute is unclear as to whether each co-owner can recover \$5,000. The statute seems to envision only one owner, so the likely construction is that the damages cap is \$5,000 per pet, not per owner.

In cases where the degree of wrongdoing is ordinary negligence, the statute exempts non-

recovery under it is “limited to compensation for the loss of the reasonably expected society, companionship, love and affection of the pet.”²⁷ This should be construed as excluding damages based on grief and related emotional harms, because another subsection of the statute authorizes an additional recovery at common law “for intentional infliction of emotional distress.”²⁸

C. Minority View: Emotional Damages Are Recoverable as a General Rule or Where the Degree of the Defendant's Misconduct Warrants a Punitive Damages Award

In four states the fact-law pattern that is the focus of this Article— involving a pet owner who recovers a small economic damage award and substantial punitive damages but no emotional damages despite having suffered genuine grief—will not arise because the states have adopted a minority position either (1) that emotional damages are always recoverable where a pet has been tortiously killed or (2) that such damages are recoverable if the defendant's misconduct was willful or grossly reckless, i.e., at the level of misconduct that will support a punitive damages award.

In another small group of states the fact-law pattern considered in this Article will not arise for a quite different reason. According to a recent survey,²⁹ five states do not permit an award of punitive damages in any tort case: Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington.³⁰ Accordingly, the law in these states on recovery of

profit organizations, governmental organizations, and veterinarians. *Id.* at § 44-17-403(e). A noncodified section of the legislation states that it “shall not apply to any animal while that animal is being used for training, for an occupational purpose, or for hunting.” 2004 Tenn. Pub. Acts 940 § 8. It is highly questionable why legislators would want to preclude damages based on loss of companionship for the owner of a performing dog shot and killed while participating in the filming of a television advertisement but not bar the damages if the shooting occurred after the work session was completed.

²⁷ TENN. CODE ANN. § 44-17-403(d) (2005).

²⁸ § 44-17-403(c). See also Sonia S. Waisman & Barbara R. Newell, *Recovery of “Non-Economic” Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 69-70 (2001) (discussing the Tennessee statute before it was amended in 2004). The 2004 amendments to the statute also changed its popular name from the T-Bo Act—T-Bo was the Shih Tzu of a Tennessee state senator who was killed by another dog—to “The General Patton Act.” 2004 Tenn. Pub. Acts 940 § 1.

²⁹ Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1339-45 (2005).

³⁰ *Id.* Rustad's survey also references the several statutes that have been enacted to impose caps on awards of punitive damages. Those whose cap is based on a dollar amount do not preclude the possibility that punitive damages will not, when compared to economic and/or noneconomic damages caused by the defendant, exceed either *Campbell's* four-to-one

emotional damages for death of a companion animal is not addressed in this Article. Likewise excluded is Colorado, where by statute a punitive damages award may not exceed “the amount of actual damages awarded to the injured party.”³¹ The word “awarded” in this statute precludes the argument that emotional damages suffered but not awarded can be considered in determining an appropriate amount of punitive damages.

1. Hawaii: Emotional Damages Are Always Recoverable

Hawaii gives the broadest rights to recover emotional damages for the death of a companion animal. In 1981 the Supreme Court of Hawaii awarded emotional distress damages to the members of a family who lived with a dog killed by the defendant’s ordinary negligence.³² The plaintiffs did not see the dog die, nor did they seek medical or psychiatric care for the distress suffered, although the Supreme Court stressed that the trial court found the emotional distress suffered by five family members was “serious.”³³ The theory of recovery in the Hawaii case was an ordinary negligence action, not trespass to chattels or intentional infliction of emotional distress.³⁴ Manifestly, emotional damages would also be

or nine-to-one ratios.

³¹ COLO. REV. STAT. ANN. § 13-21-102(1)(a) (2005).

³² See *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981) (allowing damages for emotional distress where plaintiff’s dog was negligently killed).

³³ *Id.* at 1067. Apparently one family member was denied recovery because her distress was not serious. *Id.* at 1067 n.1. Even if distress suffered is serious, Hawaii will bizarrely deny emotional damages to a dog’s owner who is outside the state at the time of the tort. *Id.* at 1069 (citing *Kelley v. Kokua Sales and Supply, Inc.*, 532 P.2d 673 (Haw. 1975)). I submit that it is untenable to conclude, as the Hawaii courts are required to do, that it “could not reasonably be foreseen” that a family member in, for example, California at the time of a pet dog’s death in Hawaii would not be immediately notified by phone of the death as were the plaintiffs in Hawaii in Hawaii’s *Campbell* case. *Id.* at 1069.

³⁴ *Id.* at 1066-67. The Hawaii *Campbell* case relied primarily on *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970), which affirmed an award of emotional damages for damage to a home caused by intruding flood waters. Suit there was brought under the State Tort Liability Act and grounded in negligence, with the Hawaii Supreme Court’s opinion considering at length whether the defendant owed a duty of care to prevent flooding of the plaintiff’s home. *Rodrigues*, 472 P.2d at 521. Prior to its decision in *Campbell v. Animal Quarantine Station*, the Hawaii Supreme Court recognized a tort cause of action for intentional infliction of emotional distress in *Fraser v. Morrison*, stating that one element of the tort was that the conduct was willful and was “intended by the wrongdoer to wound the feelings and produce mental anguish” on the part of the plaintiff. *Fraser v. Morrison*, 39 Haw. 370, 375 (Haw. 1952) (citations omitted). Other cases prior to *Campbell v. Animal Quarantine Station* where the Hawaii courts recognized a cause of action for intentional infliction of emotional distress are *Sherman v. Sawyer*, 621 P.2d 346 (Haw. 1980) and *Andy Lauer v. Young Men’s Christian Ass’n of Honolulu*, 557 P.2d 1334 (Haw. 1976). The Hawaii *Campbell* decision clearly was

awardable in Hawaii if the misconduct were of a more aggravated nature so as to warrant a punitive damages award.

2. Florida, Oregon, and Illinois: Emotional Damages Recoverable When Misconduct Reaches a Degree of Severity to Support a Punitive Damages Award

Florida is one of three states in which emotional damages are recoverable in almost any action where the misconduct leading to death or injury of a pet would support a punitive damages award. The Florida Supreme Court in its 1964 *La Porte* decision affirmed a trial court judgment awarding \$2,000 in compensatory damages, primarily emotional in nature, and \$1,000 in punitive damages, flatly holding that emotional damages are appropriate in the case of conduct that “was malicious and demonstrated an extreme indifference” to the rights of the owner of a companion animal that was killed.³⁵ The court mentioned in the opinion that the plaintiff pet owner had seen defendant’s agent hurl a garbage can at her tethered miniature dachshund and heard the dog yelp when struck and that plaintiff had to consult a physician due to her resulting “marked hysteria.”³⁶

Although the Florida Supreme Court had prior to *La Porte* recognized a “strong current of opinion in support of . . . recognition” of the tort of intentional infliction of emotional distress, in doing so the court had said that recovery on the IIED theory, if adopted, would have to rest on “conduct exceeding all bounds which could be tolerated by society.”³⁷ Its description of the degree of wrongfulness involved in the tortious act of the defendant in *La Porte*—malicious and exhibiting extreme indifference to the rights of the pet owner—makes clear that that decision was not based on the IIED theory.

not based on that theory of liability. After Hawaii’s *Campbell* decision, the elements of IIED laid out in *Fraser* were revised in *Hac v. University of Hawaii*, 73 P.3d 46 (Haw. 2003).

³⁵ *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267, 268 (Fla. 1964). In the part of Florida that constitutes the Third District of Florida’s Court of Appeals, damages may be recovered for “mental pain and suffering” by a dog owner resulting from death of the pet due to defendant’s “gross negligence [that] amounted to great indifference to the property of the plaintiffs.” *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38-39 (1978). A subsequent Fifth District decision, *Kennedy v. Byas*, 867 So. 2d 1195, 1196 (Fla. Dist. Ct. App. 2004) held that the Third District decision was wrong and certified the case before it to the Florida Supreme Court based upon a conflict between decisions in the third and fifth districts of the Court of Appeals. A voluntary dismissal was then taken in *Kennedy v. Byas*, 879 So. 2d 622 (Fla. 2004), suggesting that the *Kennedy* case was settled.

³⁶ *La Porte*, 163 So. 2d at 268.

³⁷ *Slocum v. Food Fair Stores*, 100 So. 2d 396, 397 (Fla. 1958).

That the *La Porte* plaintiff sensed the impact on her pet, as mentioned by the court, would be a relevant fact if the theory of recovery were the right of a bystander to recover for emotional distress for observing a close family member tortiously injured. But even ten years after *La Porte*, the Florida Supreme Court adhered to the rule that one suffering distress from observing tortious activities that caused injury to another human being had to incur some physical impact on himself or herself in order to be able to recover for mental anguish.³⁸ *La Porte* is thus not a liability to “bystander” case. Rather, *La Porte*, one can confidently infer, involved a cause of action for trespass to chattels, sometimes called in Florida, trespass to personal property.³⁹

In Florida, punitive damages are recoverable upon proof that the defendant acted “wantonly or wilfully or with reckless indifference to the rights of others.”⁴⁰ That closely corresponds to the malicious/extreme indifference test *La Porte* employed to decide when emotional damages can be awarded due to the killing of a companion animal. Thus it is very unlikely in Florida that there can arise a pet-death case where punitive damages are recoverable but emotional damages are not.

Oregon allows emotional distress damages for non-severe anguish arising out of conversion of a pet. In the 1974 *Stride* case,⁴¹ the plaintiff took her wounded dog, Prince, to defendant veterinarian and paid to have Prince euthanized. Instead the defendant allowed his staff to nurse Prince back to health and gave the dog to a woman to be her pet. Months later, the plaintiff saw Prince with this woman, phoned the defendant to find out why Prince was still alive, and was upset upon learning what had transpired. The Oregon Supreme Court affirmed a judgment against the veterinarian

³⁸ *Gilliam v. Stewart*, 291 So.2d 593, 602 (Fla. 1974), *overruled by Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995).

³⁹ A legal encyclopedia published in Florida less than a year after *La Porte* was decided stated that “[t]respass to personal property” is any injury to or use of the property of another by one who has no authority or right to do so.” 24 FLA. LAW & PRAC. Trespass § 7 (1965). *Banaszek v. Kowalski*, 10 Pa. D. & C.2d 94 (1979), was an action in trespass seeking emotional damages for the intentional shooting of two dogs. The trial court’s opinion overruled a demurrer, citing *La Porte*. In *Daughen v. Fox*, 539 A.2d 858, 863-64 (Pa. Super. Ct. 1988), the court refused to extend *Banaszek* to the case of the death of a dog by conduct that was at most reckless. That court also questioned whether the Pennsylvania Supreme Court would apply the IIED theory to the death of a pet. *Id.* at 860-61.

⁴⁰ *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1063 (Fla. 1983). *Accord Brown v. Ford*, 900 So. 2d 646, 648 (Fla. Dist. Ct. App. 2005) (“In order to be entitled to an award of punitive damages, a complaining party must show that the defendant acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others.”).

⁴¹ *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974).

defendant of \$500 for loss of the dog, \$4,000 for mental anguish, and \$700 in punitive damages. Obviously, both emotional and punitive damages would have been awarded had the defendant with the same degree of recklessness killed Prince without permission of the dog's owner rather than giving him away.

The Oregon Supreme Court in *Stride* said that if the degree of fault in a conversion case were mere negligence, market value of the dog would be the sole measure of damages. But if the conversion was done "intentionally" or was the result of "aggravated conduct on the part of the defendant," emotional damages could be recovered; proof of fraud or malice was not required.⁴² In Oregon, apart from the *Stride* case, the lowest level of wrongdoing that will support a punitive damages award appears to be "wanton misconduct," or conduct that is done "so recklessly as to imply a disregard of social obligation."⁴³ This is not a level of misconduct lower than that in *Stride*, hence in Oregon in every pet-death case where the defendant's misconduct was at a level of wrongfulness that would authorize an award of punitive damages, emotional compensatory damages will also be recoverable.

By statute in Illinois,⁴⁴ damages for "emotional distress suffered" are recoverable by the owner of a pet from one who "intentionally commit[s] an act that causes a companion animal to suffer serious injury or death."⁴⁵ The statute may create a new cause of action based on the common law's trespass to chattels or provide a new and broader measure of damages in certain types of cases of trespass to chattels⁴⁶ at common law. In Illinois, the lowest level of wrongdoing that will support an award of punitive damages is "such gross negligence as to indicate a wanton disregard of the rights of others."⁴⁷ The Illinois Supreme Court has acknowledged this

⁴² *Id.* at 168.

⁴³ *Joachim v. Crater Lake Lodge, Inc.*, 617 P.2d 632, 635 (Or. Ct. App. 1980).

⁴⁴ 510 ILL. COMP. STAT. § 70/16.3. The statute does not require that the plaintiff see the injury or death of his or her pet nor that the distress suffered be severe or subject to medical care. The statute caps punitive damages at \$25,000.

⁴⁵ 510 ILL. COMP. STAT. § 70/3.02. This section is incorporated by reference into the statute providing for emotional damages. Emotional damages are also available under 510 ILL. COMP. STAT. § 70/16.3 if the defendant has tortured the pet, due to incorporation by reference of § 70/3.03 and for an injury or death caused by the defendant through a bad faith violation of the Illinois animal fighting statute, § 70/3.06, also incorporated by reference.

⁴⁶ See, e.g., *Fuller & Fuller Co. v. Feinberg*, 86 Ill. App. 585 (1900) (involving common law suit for trespass to chattels); *Meinke v. Nelson*, 56 Ill. App. 269 (1894) (involving common law suit for trespass to personal property).

⁴⁷ *Giles v. General Motors Corp.*, 802 N.E.2d 858, 865 (Ill. App. Ct. 2003).

degree of wrongdoing is somewhat “less than intentional wrongdoing.”⁴⁸ Accordingly, there will be in Illinois a few cases arising that will raise the issue addressed in this Article: whether and to what degree to restrict the amount of punitive damages the defendant must pay when the actor’s misconduct is sufficiently egregious to warrant an award of punitive damages but not such that permits an award of emotional damages for loss of a companion animal. That is, the misconduct resulting in death of a pet is wantonly negligent but not intentional. In most Illinois pet-death cases, however, the wrongdoer’s misconduct that authorizes a punitive damage award will also entitle the pet’s owner to emotional damages under the recently enacted statute.

III. A NARROW EXCEPTION IN SOME BUT NOT ALL STATES: EMOTIONAL DAMAGES ARE RECOVERABLE IF DISTRESS IS SEVERE AND DEFENDANT’S CONDUCT OUTRAGEOUS IN THE EXTREME

A. A Plaintiff Whose Pet Has Been Killed Often May Be Able to Recover Economic Compensatory Damages and Punitive Damages but Not Emotional Damages Even Though the State Recognizes the Tort of Intentional Infliction of Emotional Distress

In a dozen or so jurisdictions, a narrow exception to the ban on an award of emotional damages for the death of a companion animal is recognized through the tort of intentional infliction of emotional distress, sometimes called the tort of “outrage.”⁴⁹ The majority of the IIED cases involving death of a pet—or other harm to a companion animal—require that the defendant’s misconduct be both intentional and extremely outrageous, putting it a level of wrongfulness greater than is necessary to support an award of punitive damages. In these states the fact pattern that is the focus of this Article—involving a plaintiff recovering punitive damages who also suffered uncompensated emotional damages for death of a pet—can arise where the defendant’s misconduct is intentional but not outrageous.

The IIED cases also demand that the emotional distress be “severe,” creating another fact pattern where the problem of how uncompensated

⁴⁸ Ziarko v. Soo Line R.R. Co., 641 N.E.2d 402, 406 (Ill. 1994).

⁴⁹ See Harrelson v. R.J., 882 So. 2d 317, 321 (Ala. 2003) (describing IIED as the tort of outrage); Bell v. McManus, 742 S.W.2d 559, 560 (Ark. 1988) (same); Fusaro v. First Family Mortgage Corp., Inc. 897 P.2d 123, 127 (Kan. 1995) (same); Burgess v. Taylor, 44 S.W.3d 806, 811 (Ky. 2001) (same); Doe 1 *ex rel* Doe 1 v. Roman Catholic Diocese, 154 S.W.3d 22 (Tenn. 2005) (same).

emotional damages affects the due process cap on punitive damages can arise: the misconduct was intentional and outrageous and the resulting emotional distress, while genuine, was not severe because the pet owner was a person used to taking hard knocks in life. A few states require that the severity of the distress be proved in court by physicians or mental health experts who treated the pet owner victim.⁵⁰ In those states the issue can arise even though severe distress was caused by intentional and outrageous conduct because treatment by a psychiatrist, physician, etc., was not sought by the pet owner whose companion animal was killed.

In a few states that have broadened the IIED tort so that wrongdoing that is merely reckless can be the basis for recovery,⁵¹ the degree of the tortfeasor's wrongdoing will always be at the mens rea level required for an emotional damages award in a case in which punitive damages are awarded.⁵² But the "recklessness" states still require "severe" emotional distress as a condition of recovery, so the issue addressed in this Article can arise in those states.

In North Carolina and Alabama, older cases allow recovery of emotional damages for the intentional killing of a pet in the immediate presence of the pet's owner or caretaker. The misconduct need not be outrageous nor the distress suffered severe, as with the IIED tort. In these states the problem addressed in this Article arises where the killing of the animal is intentional but not in the presence of the pet's owner: a small noneconomic damages award is made along with a large punitive damages award, but emotional damages go uncompensated.

At least three states—New Mexico, Arkansas, and Mississippi—have IIED precedents allowing recovery for severe emotional distress caused by outrageous conduct for incidents not involving companion animals but not allowing recovery for emotional damages in pet-death cases. These precedents do not specifically say that the IIED tort remedy is unavailable in pet-death cases but strongly suggest that such is the state of the law in those three states.

⁵⁰ See *Van Eaton v. Thon*, 764 S.W.2d 674, 676 (Mo. Ct. App. 1988) (requiring that plaintiff be "medically diagnosed" and that expert medical testimony be presented at trial to show the "severity" of the distress); *Waddle v. Sparks*, 414 S.E.2d 22, 28 (N.C. 1992) (requiring "medical documentation" in an IIED case). See also *Holloway v. Wachovia Bank & Trust Co.*, 452 S.E.2d 233, 243 (N.C. 1994) (adopting requirements from *Waddle* with respect to proof of distress); *Johnson v. Scott*, 528 S.E.2d 402, 404 (N.C. 2000) (same).

⁵¹ Which could make the acronym RIED, although I have not seen such an acronym used in any of the cases I have come across.

⁵² In other words, it is assumed that no jurisdiction awards punitive damages based on conduct at a mens rea level lower than recklessness.

B. Emotional Damages Are Most Difficult to Recover Under the IIED Theory in States that Require Not Only Proof of an Intentional Act that Killed or Injured a Companion Animal but Also of Intent to Cause Emotional Distress for the Particular Plaintiff

The Supreme Court of Wisconsin has held in a case involving the shooting of a dog that emotional damages arising out of the killing of a pet can be awarded if the plaintiff establishes the elements of the tort of intentional infliction of emotional distress: “extreme and outrageous” conduct causing “an extreme disabling emotional response.”⁵³ But Wisconsin, along with a handful of other states,⁵⁴ adds an element to the IIED cause of action that is not included in the IIED law of several jurisdictions: actual intent to cause the distress must be proved. It is insufficient to prove that the defendant knew that shooting a pet dog—even in the presence of the owner—would cause severe distress.⁵⁵

In Wisconsin, punitive damages are by statute awardable if “the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.”⁵⁶ The latter ground is established if “the person is aware that the result or consequence is substantially certain to occur from the person’s conduct,” according to the Wisconsin Supreme Court, in a case which also held that the malice need not be directed against the plaintiff himself.⁵⁷ Wisconsin and the eight or more other states with similar IIED laws are jurisdictions where the “scenario” in Part I of this Article would present the legal issues outlined there, because the defendant who shot Rover did not know who owned the dog and thus could not have been intending to cause emotional distress to the plaintiff, Paula.

⁵³ *Rabideau v. City of Racine*, 627 N.W.2d 795, 803 (Wis. 2001).

⁵⁴ See *supra* note 3 (discussing states in which this is a required element of an IIED cause of action).

⁵⁵ *Rabideau*, 627 N.W.2d at 803 (“There must be something more than a showing that the defendant intentionally engaged in the conduct that gave rise to emotional distress in the plaintiff; the plaintiff must show that the conduct was engaged in for the purpose of causing emotional distress.”).

⁵⁶ WIS. STAT. § 895.85(3) (2005).

⁵⁷ *Strenke v. Hogner*, 694 N.W.2d 296, 304, 307 (Wis. 2005) (explaining that the drunk driver knew he was so out of control he would likely cause an automobile accident).

C. *Some States Retain the IIED Element that the Defendant Must Intend to Cause Distress to the Particular Plaintiff While at the Same Time Authorizing Recovery of Emotional Damages Where the Level of Wrongdoing Is Recklessness*

California, like Wisconsin, in an IIED case requires proof that the object of the defendant's wrongdoing resulting in the death of a companion animal was to cause emotional distress to the owner of the animal, the plaintiff, but a recovery of emotional damages is easier to obtain in California than in Wisconsin because in California the level of wrongdoing can be reckless conduct, whereas in Wisconsin it must be intentional. In California's *Katsaris* case decided in 1986,⁵⁸ the defendant was the employer of a ranch hand who intentionally shot and killed two of the plaintiff's dogs and dumped their bodies in a ditch on the ranch. Although the defendant was found to have been aware of what the employee had done, when the plaintiff twice asked her if she knew anything about the dogs she told him she did not, causing him to be in anguish until he found the bodies about a week later.

The state Court of Appeal held the intentional infliction of emotional distress claim could go to trial, at which time the plaintiff would have to prove that the defendant's conduct was "extreme and outrageous" and the plaintiff's resulting distress "severe."⁵⁹ The court also held:

The specific intent required for intentional infliction of emotional distress is that the defendant either acted intending to inflict the injury or with the realization that the injury was substantially certain to result from his conduct. Alternatively, the defendant may fulfill the specific intent requirement if he acts recklessly in disregard of the likelihood that he will cause emotional distress to the plaintiff.⁶⁰

A federal district court, applying California law in a case where the defendant's agent shot and wounded the plaintiff's dog after the dog advanced toward the agent while growling, said of the mental element of the IIED tort: "Only conduct 'exceeding all bounds usually tolerated by a decent society, of a nature which is *especially calculated to cause*, and does cause mental distress,' is actionable."⁶¹

⁵⁸ *Katsaris v. Cook*, 225 Cal. Rptr. 531 (Cal. Ct. App. 1986).

⁵⁹ *Id.* at 537.

⁶⁰ *Id.*

⁶¹ *Brooks v. U.S.*, 29 F. Supp. 2d 613, 618 (N.D. Cal. 1998) (emphasis added). The court held as a matter of law that the conduct complained of failed to meet this test, granting summary judgment. The decision was affirmed per curiam, 162 F.3d 1167 (9th Cir. 1998). The same legal test is used in the District of Columbia. *Kaiser v. U.S.*, 761 F. Supp. 150, 156

A 1992 California Supreme Court⁶² case not involving animals makes clear that the federal court was correct in listing “calculated to cause . . . distress” as an element of the IIED tort and that the state Court of Appeal erred in *Katsaris* when it stated that recovery was proper if the defendant merely had a “realization” that the killing would cause emotional distress or did no more than to “disregard” the likelihood that killing the animal would result in emotional distress to its owner. California law requires, said the Supreme Court, “[t]hat the defendant’s conduct was directed to and was intended to cause severe or extreme emotional distress to a particular individual or, when reckless disregard was the theory of recovery, that the defendant directed his conduct at, and in conscious disregard of the threat to, a particular individual.”⁶³

By statute in California, punitive damages may be awarded for “wrongful injuries to animals” upon a showing of mere gross negligence,⁶⁴ and California “case law has defined gross negligence as ‘the want of even scant care or an extreme departure from the ordinary standard of conduct.’”⁶⁵ Obviously even many intentional killings of companion animals will not involve an intent to cause emotional distress to the owner of the animal; also there will be California cases where the reckless conduct even though directed at the owner of the animal was not “outrageous” as well as cases where the emotional distress suffered was not “severe.” California, therefore, is also a jurisdiction where the problem addressed in this Article can arise.

(D.D.C. 1991).

⁶² Christensen v. Super. Ct., 820 P.2d 181 (Cal. 1992).

⁶³ *Id.* at 202.

⁶⁴ “For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given.” CAL. CIV. CODE § 3340 (2006). What “in disregard of humanity” means has not been decided in California. The only case involving § 3340 was one where the defendant was shooting at a car containing human beings and killed a dog, with another bullet hitting the hat worn by one of the men in the car, thereby establishing that the misconduct was in disregard of a risk of harming a human. *Dreyer v. Cyriacks*, 297 P. 35 (Cal. Ct. App. 1931). In *Dreyer* the court seems to assume the statute addresses killing of a dog although it refers only to “injuries” to an animal. *Id.* at 36. Two other states have borrowed § 3340 from California verbatim: Montana, MONT. CODE ANN. § 27-1-222, and Oklahoma, OKLA. STAT. tit. 23, § 68.

Where the harm is to a human being or property other than an animal, curiously a tougher test for awarding punitive damages is employed in California: the plaintiff must prove “oppression, fraud or malice.” CAL CIV. CODE § 3294(a). Cases define malice as including “wanton and reckless misconduct,” *Donnelly v. S. Pac. Co.*, 118 P.2d 465, 465 (1941), and “willful and wanton negligence,” *G.D. Searle & Co. v. Super. Ct.*, 49 Cal. App. 3d 22, 29-30 (1975).

⁶⁵ *Eastburn v. Reg’l Fire Prot. Auth.*, 7 Cal. Rptr. 3d 552, 559 (2003).

North Dakota law is similar to that of California. The North Dakota Supreme Court recently held in a dog shooting case that the tort of intentional infliction of emotional distress could be the legal vehicle for a recovery of emotional damages for the killing of pet dogs but that there had to be proof of “extreme and outrageous conduct that is intentional *or reckless* and causes severe emotional distress.”⁶⁶ Outrageous conduct is that which “exceeds ‘all possible bounds of decency.’”⁶⁷ North Dakota also requires that the intent to cause distress be directed at the owner of the dog; malice solely against the animal that is killed is insufficient.⁶⁸ A North Dakota statute provides that “[e]xemplary damages may be given to the owner of any animal for any wrongful injury thereto when such injury is committed willfully or by gross negligence.”⁶⁹

D. In Some States Damages for Emotional Distress Are Recoverable Based on Reckless Conduct Directed at the Companion Animal, Not Its Owner

Tennessee law is similar to that of California and North Dakota to the extent that mere recklessness can be the basis for recovery, but Tennessee does not require proof that the misconduct was calculated to cause emotional distress to the particular plaintiff. In *Lawrence v. Stanford*,⁷⁰ the defendant veterinarian threatened to “do away with” the plaintiff’s pet dog if the plaintiff did not pay a disputed bill for veterinary services. The Tennessee Supreme Court held that these facts entitled the plaintiff to a trial on a claim of intentional infliction of emotional distress because a jury could find the conduct “outrageous and intolerable in present day society” and the resulting emotional distress to be “severe.” Obviously the result would have been the same had the defendant carried out his threat and killed the dog.

⁶⁶ *Kautzman v. McDonald*, 621 N.W.2d 871, 876 (N.D. 2001) (emphasis added). An allegation that the dogs’ owners “continued to agonize” over the shooting deaths of their companion animals was held insufficient to satisfy the “severe” emotional distress element of the tort. *Id.* at 877.

⁶⁷ *Id.*

⁶⁸ *Id.* at 877 (“There is no dispute that the officers [defendants] were unaware the dogs belonged to the Kautzmans [plaintiffs], and therefore they could not have intended the Kautzmans any harm.”).

⁶⁹ N.D. CENT. CODE § 36-21-13 (2005). For many years North Dakota had a statute governing punitive damages in non-animal contexts similar to California’s basic punitive damages statute, and California’s treatment of malice express or implied still influences North Dakota law. See *McLean v. Kirby Co.*, 490 N.W.2d 229, 246 n.1 (N.D. 1992) (discussing the California exemplary damages statute).

⁷⁰ 655 S.W.2d 927, 930 (Tenn. 1983).

Subsequently the Tennessee Supreme Court clarified that misconduct merely at the “reckless” level of mens rea supports a recovery of emotional distress damages⁷¹ and that the claim “need not be based on conduct that was directed at a specific person,” the plaintiff.⁷² In Tennessee the lowest level of misconduct that authorizes a punitive damage award is recklessness.⁷³ Still, the problem addressed in this Article can arise in Tennessee where emotional damages cannot be recovered in a pet-death case because the misconduct was not outrageous or the distress suffered not severe.

As applied in *Burgess v. Taylor*,⁷⁴ a pet-death case, Kentucky law is identical to that of Tennessee. The outrageous misconduct causing severe emotional distress can be either intentional or reckless, and there is no requirement that it be calculated to cause distress to the owner of the animal killed by the defendant.⁷⁵ In this case, the owner of two horses whom the defendants sent to their deaths recovered \$1,000 as the fair market value of the animals, \$50,000 emotional damages via the IIED tort, and \$75,000 in punitive damages. Because emotional damages were recovered, the ratio of punitive damages to combined economic and noneconomic damages was less than 1.5-to-one. But if the case had arisen in Wisconsin or another state requiring that the misconduct be calculated to cause emotional distress, the \$50,000 award could not have been made, and the ratio of punitive damages to recovered economic damages would have been 75-to-one, well outside *Campbell*’s four-to-one and nine-to-one ratios.⁷⁶

⁷¹ Doe 1 *ex rel.* Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 43 (Tenn. 2005). In this case the court relabeled the tort as that of “reckless infliction of emotional distress.” *Id.* at 31.

⁷² *Id.* at 39.

⁷³ Metcalfe v. Waters, 970 S.W.2d 448, 451 (Tenn. 1998). See also Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (“In Tennessee . . . a court may . . . award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly.”).

⁷⁴ 44 S.W.3d 806 (Ky. Ct. App. 2001).

⁷⁵ *Id.* at 811 (“[I]t is clear that the Burgesses’ [defendants’] conduct was reckless in that they intended their specific conduct and either knew or should have known that emotional distress would result.”). Having accepted a bailment of two horses owned by the plaintiff so that the plaintiff would have a place to come visit these pets, defendants sold the horses to a “slaughter-buyer” for \$1000 then repeatedly lied to the owner of the horses as to where the horses were so she would not discover their deaths. The apparent purposes of the acts of misconduct by the defendants were to get some money and to cover up the wrong that was done, not to cause distress to the plaintiff.

⁷⁶ According to the analysis presented in this Article in the text accompanying notes 114-18, *infra*, the *Campbell* ratios might not have applied because \$1,000 of economic damages is a “small amount” of recovery and the misconduct of the defendants was egregious.

The Alaska Supreme Court went out of its way, in a case involving only the negligent killing of a dog, to declare in dictum that it was “willing to recognize a cause of action for intentional infliction of emotional distress for the intentional *or reckless* killing of a pet animal in an appropriate case.”⁷⁷ The court stated that mere reckless conduct could rise to the level of “extreme or outrageous conduct,” and it said that the emotional distress had to be “severe,” although it was not required that the victim receive medical care for it.⁷⁸ Nothing in the opinion suggested the misconduct had to be directed at the animal’s owner, thus Alaska appears to have, via dictum, the same law as Tennessee. Punitive damages in Alaska may be awarded based on conduct that “evidenced reckless indifference to the interest of another person.”⁷⁹

The situation in Idaho is identical, except based on holding not dictum. Proof of “reckless” conduct causing death of a pet and resulting in “severe” mental anguish entitles the pet owner to emotional damages, with no mention in the reported cases of a requirement that the misconduct be calculated to cause emotional distress.⁸⁰

E. North Carolina and Alabama: Emotional Damages Recoverable for Intentional Killing of a Pet Witnessed by the Plaintiff Owner or Caretaker

North Carolina first recognized the IIED tort in 1979,⁸¹ the same year that the Alabama Supreme Court first discussed this tort.⁸² Neither state has

However, the Article concludes that the plaintiff would have been able to have uncompensated emotional damages considered, *see infra* notes 124-32 and accompanying text, thereby bringing the ratio well within what *Campbell* suggests might be a due process limit.

⁷⁷ *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985) (emphasis added).

⁷⁸ *Id.* at 456, 457 n.6. Subsequently, in *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001), recovery for intentional infliction of emotional distress due to the defendant’s deliberate shooting of plaintiff’s pet dog was denied. The dog had been threatening the defendant’s livestock on defendant’s land when shot, and thus “shooting of the dog was not an outrageous, malicious or utterly intolerable act.”

⁷⁹ ALASKA. STAT. § 09.17.020(b)(2).

⁸⁰ *Gill v. Brown*, 695 P.2d 1276 (Idaho 1985) (holding that plaintiffs were permitted to assert a claim for IIED following the reckless shooting of a donkey that was both their pet and a pack animal).

⁸¹ *Stanback v. Stanback*, 254 S.E.2d 611, 621-22 (N.C. 1979), *modified by* *Dickens v. Puryear*, 276 S.E.2d 325, 332-35 (N.C. 1981) (repudiating dictum that physical injury was an element of the tort).

⁸² *Vincent v. Blue Cross-Blue Shield of Ala., Inc.*, 373 So.2d 1054, 1058-59 (Ala. 1979) (Jones, J., concurring).

yet produced a reported IIED decision based on death of a companion animal. But decades before 1979, each state seems to have recognized a cause of action for emotional distress, quite different from IIED, allowing an owner or caretaker of a companion animal who witnessed the defendant's intentional killing of the pet to recover such damages.

In a 1913 case,⁸³ after finding error in the jury instructions, the North Carolina Supreme Court ordered a new trial for damages on the theory of trespass where the defendant had entered the home where a man's dog was located and, with a shotgun, "kill[ed] the dog almost at the [man's] wife's feet."⁸⁴ Speaking of the damages suffered by the plaintiff wife, the court said that "the alarm and shock caused by the defendant's conduct had caused her great suffering."⁸⁵ In North Carolina punitive damages are awarded for harm caused by "willful or wanton" conduct or "malicious" conduct.⁸⁶ The owner of a dog willfully shot would be entitled to such damages even if not present to witness the killing and thus unable to recover emotional damages under the 1913 precedent.

In a 1915 Alabama case,⁸⁷ the defendant also entered the home of a husband and wife and willfully shot the husband's dog; a few hours later the wife learned of this and became "hysterical." It was held the wife had no cause of action based on the hysteria, her injury being "too remote" because "the act was committed in her absence."⁸⁸ The implication is strong that the owner or caretaker of a dog who does witness its intentional killing could recover emotional damages in Alabama. The actual witnessing of the killing by the plaintiff would not have to be proved in Alabama to entitle the pet's owner to recover punitive damages for an intentional tort such as trespasses to chattels.⁸⁹

⁸³ *Beasley v. Byrum*, 79 S.E. 270 (N.C. 1913).

⁸⁴ *Id.* at 271.

⁸⁵ *Id.* at 270. Whether the North Carolina appellate courts will in the future hold that *Beasley* has been in effect subsumed by the later-recognized IIED tort remains to be seen. *Beasley* did not use the term "outrageous" to describe the misconduct nor the term "severe" to describe the distress suffered, yet the tenor of the short opinion is consistent with such descriptions. Until such a decision is announced, however, North Carolina pet owners who witness the intentional killing of their animals on their premises by a trespasser should be able to recover emotional damages without a jury's having to find the defendant's conduct outrageous and the resulting distress severe.

⁸⁶ N.C. GEN. STAT. § 1D-15(a)(3) (2005).

⁸⁷ *Allen v. Camp*, 70 So. 290, 291 (Ala. Ct. App. 1915).

⁸⁸ *Id.*

⁸⁹ See *Mobile Infirmary Med. Ctr. v. Hughes*, 884 So.2d 801, 821 (Ala. 2003) (affirming punitive damages award based on hospital's injecting plaintiff with five times amount of prescribed drug when there was no indication plaintiff was then aware of the

F. Some States that Recognize the IIED Tort but Have Yet to Consider Whether the Theory Can Apply to the Pet-Death Context Will Hold that It Can

There are a number of states that have recognized the IIED tort but have no precedent dealing with a fact situation where the defendant killed or injured the plaintiff's companion animal through misconduct more aggravated than negligence and sufficient under local law to support an award of punitive damages. In several states in this category, such as Arizona⁹⁰ and West Virginia,⁹¹ there is precedent that emotional damages may not be recovered where a pet is killed or injured due to ordinary negligence by the defendant, but the opinions make no specific mention of a possible different rule where the tortious conduct was intentional, causing severe emotional distress.

States like New Mexico⁹² that have upheld an award of emotional damages against a defendant who intentionally converts inanimate personal property very likely would apply such a precedent to the killing or injuring of a companion animal owned by the plaintiff. On the other hand, such a

mistake).

⁹⁰ See *Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (holding that the plaintiff could not recover for negligent infliction of emotional distress following an incident in which the defendant's dog attacked the plaintiff's dog while the plaintiff was walking her dog).

⁹¹ See *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005) (limiting the plaintiff's recovery to the fair market value of her dog after her dog was hit by a car in 2001). This opinion notes that in 2003 the West Virginia legislature repealed a clause in W. VA. CODE § 19-20-12(a) (2005) which restricted the amount of damages in a case where a plaintiff's dog was "wrongfully or unlawfully" killed or injured to the dog's assessed valuation. *Id.* at n.4. This statute also provides that one who "intentionally, knowingly, or recklessly" kills or injures a cat, dog, or other companion animal is guilty of a misdemeanor and seems to define "wrongfully or unlawfully" in the part of the statute creating the civil cause of action for damages. W. VA. CODE § 19-20-12(a) (2005). The *Carbasha* opinion lumps assessed value of a dog with its market value. The 2003 amendment may be seen by the West Virginia courts as the legislature's attempt to send a message that where the killing of a companion animal is intentional, market value damages are inadequate.

⁹² See *Gracia v. Bittner*, 900 P.2d 351, 358 (N.M. Ct. App. 1995) (allowing damages for IIED based on a four-to-one ratio where a landlord entered his tenant's apartment removed the tenant's belongings and put them the parking lot). See also *Bell v. McManus*, 742 S.W.2d 559, 561 (Ark. 1988) (affirming award of punitive damages to plaintiff for the "tort of outrage" after defendant directed teenagers to steal plaintiff's personal property); *Fusaro v. Family Mortgage Corp.*, 897 P.2d 123, 133 (Kan. 1995) (affirming dismissal of claim for "tort of outrage" due to the fact that defendant's agent's removal of plaintiff's property from plaintiff's fire-damaged garage was not outrageous because agent believed that property had been abandoned); cf. *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 178-79 (Miss. 1999) (holding that where plaintiff's allegation that defendant willfully caused plaintiff's land to become contaminated stated a cause of action for intentional infliction of emotional distress).

state could elect to follow the lead of three jurisdictions, next examined, that recognize the IIED tort but decline to apply it to cases of the killing of a companion animal.

G. In Three States the IIED Tort Remedy Apparently Does Not Extend to Grief Caused by the Death of a Companion Animal

The highest courts of Minnesota,⁹³ Connecticut⁹⁴ and New York⁹⁵ have stated that in some fact situations recovery for intentional infliction of emotional distress will be granted. But in pet-death cases courts in these states have imposed what appears to be a flat ban on recovery of emotional damages even though the misconduct of the defendant was intentional. While not specifically stating so, these cases strongly suggest that recovery of emotional damages would be barred even if the defendant's misconduct causing the death of a pet were outrageous and the resulting distress severe. If so, in these states there will always be uncompensated emotional damages suffered by pet owners who recover a modest economic damages award plus punitive damages based on the defendant's killing the plaintiff's companion animal.

In a 1987 New York case, *Fowler v. Town of Ticonderoga*, the plaintiff alleged that he observed as defendant's agent "negligently and *maliciously* shot and killed his dog," and as a result, plaintiff claimed, he was entitled to recover damages for "the psychic trauma suffered as a result of the dog's death."⁹⁶ Reversing the trial court's refusal to dismiss for failure to state a cause of action, the Appellate Division held that "a dog is personal property and damages may not be recovered for mental distress caused by its *malicious* or negligent destruction."⁹⁷

In a subsequent federal case in which New York law was applied, the district court suggested in dictum that emotional damages for the intentional killing of a pet could be recovered in an IIED suit upon proof of "conduct

⁹³ See, e.g., *Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983) (recognizing the IIED tort but holding that the allegations did not support a claim of IIED).

⁹⁴ See, e.g., *Appleton v. Board of Ed.*, 757 A.2d 1059, 1062 (Conn. 2000) (recognizing the IIED tort but holding that the allegations did not support a claim of IIED).

⁹⁵ See, e.g., *Howell v. N.Y. Post Co., Inc.*, 612 N.E.2d 699, 701-05 (N.Y. 1993) (recognizing the IIED tort but holding the conduct at issue privileged); *Fischer v. Maloney*, 373 N.E.2d 1215, 1217 (N.Y. 1978) (recognizing the IIED tort but holding the conduct at issue privileged).

⁹⁶ *Fowler v. Town of Ticonderoga*, 516 N.Y.S.2d 368, 369 (N.Y. App. Div. 1987) (emphasis added).

⁹⁷ *Id.* (emphasis added).

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.”⁹⁸ In addition, the conduct had to be “intentionally directed at the plaintiff.”⁹⁹

Reviewing this federal case and New York cases dealing with the tort of intentional infliction of emotional distress, Steve Wise has concluded that it is “unlikely” that emotional damages can be recovered in New York based on the intentional killing or injuring of a companion animal, referring to the “severe limitations” New York has placed on this tort.¹⁰⁰ Yet the *Town of Ticonderoga* court certainly knew that New York did in some fact settings allow recovery for IIED, as New York’s Court of Appeal in 1978 recognized the tort where the conduct was extreme and outrageous and the resultant distress severe.¹⁰¹ The court in *Town of Ticonderoga* would have appreciated that upon proof of the details of a dog shooting alleged to be “malicious” the degree of misconduct needed for IIED recovery might be established. The decision implies that IIED cannot be predicated on harm to a companion animal owned by the plaintiff.¹⁰² Since *Town of Ticonderoga* is precedent in New York and the federal district court decision is not, I must place New York in the “no recovery at all” category, with the caveat that a highly respected expert in the field of animal law is not quite so certain.

In Minnesota’s 1994 *Soucek* case, the defendant deliberately shot

⁹⁸ *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 157 (S.D.N.Y. 1994) (citations omitted).

⁹⁹ *Id.* at 158. The passage is dictum not because the conduct in permitting a pet dog to bake for over an hour in the cargo hold of a plane in temperatures up to 140 degrees, leading to the dog’s death, was held to be less than outrageous but because there was no evidence that the wrongdoing was directed intentionally at the owner of the dog. The court dismissed the IIED claim based on this reasoning.

¹⁰⁰ Steven Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 92 (1998).

¹⁰¹ *Fischer v. Mahoney*, 373 N.E.2d 1215, 1217 (N.Y. 1978). The high court of New York restated the elements of the IIED tort shortly before *Town of Ticonderoga* was decided in *Friehofer v. Hearst Corp.*, 480 N.E.2d 349, 355 (N.Y. 1985).

¹⁰² See also *Murphy v. Murphy*, 486 N.Y.S.2d 457, 459 (N.Y. App. Div. 1985), (reducing an IIED award to \$45,000). Although in *Murphy* plaintiff relied heavily on proof that defendant intentionally killed her pet goose, the facts cited by the court as constituting the “deliberate and malicious campaign of harassment” by the defendant that supported the IIED award were not the killing of the pet but instead the violation of court orders, breaking of screens, smashing of windows, threats of force, assaults and “wanton destruction of plaintiff’s belongings” (which could, of course, include the goose, but in the context of the opinion the court seems to have in mind other property). *Id.*

plaintiff's pet dog.¹⁰³ Plaintiff sought emotional damages on various theories of negligence and in addition sued for intentional infliction of emotional distress, with the latter count being dismissed. The Minnesota Court of Appeals considered two issues: the proper measure of compensatory damages and whether punitive damages should be awarded. Since the Supreme Court of Minnesota had recently held that punitive damages could not be awarded based on a defendant's gross negligence but only for willful or wanton disregard of the rights of the plaintiff,¹⁰⁴ the court in *Soucek* must have considered that the allegation of intentional misconduct survived dismissal of the claim of intentional infliction of emotional distress, since the court at length considers whether punitive damages can be awarded where the injury is only to property and not to the person.¹⁰⁵ That is, it assumed the evidence showed willful misconduct.¹⁰⁶ Surely if the court thought that the IIED remedy was available to the plaintiff it would have said so.

With respect to compensatory damages recoverable in such a case, the Court of Appeals held: "[u]nder Minnesota law dogs are personal property The proper measure of damages for destroying an animal is the fair market value of the animal Intrinsic value of a pet to its owner is not currently included in damages that may be recovered for intentionally killing a pet."¹⁰⁷

In 2001 the Minnesota Supreme Court considered a case where the plaintiffs sued for "intentional damage to property," seeking compensatory and punitive damages.¹⁰⁸ The defendants had stolen the plaintiffs' electric meter, cut their telephone line, painted an obscenity on their garage door, thrown eggs at their houseboat and other property, and participated in puncturing tires on vehicles parked at the plaintiffs' real property. The

¹⁰³ *Soucek v. Banham*, 524 N.W.2d 478 (Minn. Ct. App. 1994).

¹⁰⁴ *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (1990). The current test in Minnesota for whether punitive damages can be awarded is whether the defendant's conduct evidenced "deliberate disregard for the rights or safety of others." MINN. STAT. ANN. § 549.20 (2005).

¹⁰⁵ *Soucek*, 524 N.W.2d at 478-81. *Soucek* has been overruled insofar as it held that damage to property could never be the basis for a punitive damages award. *Monlenaar v. United Cattle Co.*, 553 N.W.2d 424, 428 (Minn. Ct. App. 1996).

¹⁰⁶ The dissent in *Soucek* described the cause of action as "damage to property," viewing the tort of trespass to chattels—which can be committed by willful misconduct—as inherent in the facts pleaded. *Soucek*, 524 N.W.2d at 481.

¹⁰⁷ *Id.*

¹⁰⁸ *Jensen v. Walsh*, 623 N.W.2d 247 (Minn. 2001). A claim for intentional infliction of emotional distress was dismissed by the trial court for a reason not appearing in the *Jensen* opinion.

court held punitive damages could be recovered but did not discuss the measure of compensatory damages. This 2001 decision dealing with inanimate property is not inconsistent with the apparent rule of *Soucek* that even in the case of an intentional tort, compensatory damages for the death of a pet are limited to fair market value.

Connecticut law is similar to that of New York, according to one recent trial court decision. In the 2005 *Pantelopoulos* case, plaintiff ex-husband pleaded that in connection with his divorce he was enjoined from entering the home where his ex-wife lived. She had possession of his dog, and when she left the home she intentionally locked the dog in the garage, where it died of starvation and dehydration.¹⁰⁹ The ex-husband pleaded that this was done with the intent to cause him extreme emotional distress.¹¹⁰ A Connecticut Superior Court granted a defense motion to strike this cause of action because their “common law has never recognized a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to such property as a pet.”¹¹¹ Certainly the defendant’s conduct in *Pantelopoulos* was outrageous, and if the court believed that the state would authorize an IIED recovery based on killing of a pet, it would have said so.

¹⁰⁹ *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 281 (Conn. Super. Ct. 2005).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 283 (quoting *Myers v. Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004). The facts of the *Pantelopoulos* case were centered in New Jersey, and the *Pantelopoulos* court predicted that New Jersey would agree with this flat ban on recovery. However, the only New Jersey case cited—which was the only New Jersey case concerned with emotional damages for the death of a pet—*Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. Law Div. 2001), held only that there could be no such recovery where the wrongdoing was ordinary negligence and in no way addressed the kind of intentional and malicious killing of a pet that was before the Connecticut court in *Pantelopoulos*.

Altieri v. Nanavati, 573 A.2d 359, 361 (Conn. Super. Ct. 1989), held there could be no recovery for emotional damages against a veterinarian who neutered plaintiff’s dog without plaintiff’s consent, but the plaintiff claimed the misconduct was negligent and reckless, not done with intent to harm the plaintiff.

By common law rule, Connecticut restricts an award of punitive damages to the plaintiff’s cost of litigation, not including costs the defendant was ordered to pay. *Alaimo v. Royer*, 448 A.2d 207, 210 (Conn. 1982); *Vandersluis v. Weil*, 407 A.2d 982, 986 (Conn. 1978); *Triangle Sheet Metal Works v. Silver*, 222 A.2d 220, 225 (Conn. 1966). That rule restricts the number of pet-death cases that would present the problem addressed in this Article if I am wrong in concluding that Connecticut will not extend the IIED tort to cases of intentional killing of a companion animal.

IV. THE *CAMPBELL* RATIOS WILL OFTEN NOT APPLY IN PET-DEATH CASES BECAUSE ECONOMIC DAMAGES WILL BE SMALL, BUT BOTH PARTIES ARE ENTITLED TO HAVE THE AMOUNT OF UNCOMPENSATED EMOTIONAL DAMAGES CONSIDERED IN APPLYING THE *CAMPBELL* RATIOS

Having demonstrated that in most states the case can arise where a pet owner recovers small economic damages, substantial punitive damages, and no emotional damages from the defendant who intentionally killed the plaintiff's companion animal, this Article now addresses the several constitutional questions such a case presents in light of the *Campbell* ratios.

A. If Compensatory Damages Are \$10,000 or Less and the Defendant's Misconduct Is Egregious, the Campbell Ratios Do Not Apply, Although Other Due Process Considerations Discussed in Campbell Could Support a Holding that Punitive Damages Awarded Were Constitutionally Excessive

The first exception laid out in *Campbell* to the application of the four-to-one and nine-to-one ratios comprises three elements: (1) the misconduct must be "particularly egregious," causing (2) "economic damages" in (3) "only a small amount."¹¹² Almost all pet-killing cases in which the plaintiff owner recovers punitive damages will meet this test. On a rare occasion deliberate killing of a pet could be held not to be particularly egregious because, for example, the defendant mistakenly believed that killing the plaintiff's dog was necessary to protect the defendant's own animals or family members or himself.¹¹³ Applying my own concept of what is "particularly egregious" wrongdoing, the large majority of reported pet-killing cases concerned misconduct that meets this standard.

An award of damages based on the fair market value of the pet will obviously consist of economic damages only. In the case of a pet with no market value, intrinsic value—value to the owner—is the measure of damages. The recovery will consist of economic damages except to the extent that two states permit some element of sentimental value to increase the award.¹¹⁴

¹¹² *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

¹¹³ *See Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001) (holding that the deliberate killing of a pet dog was not "outrageous" as claimed by plaintiff in an IIED suit because the dog had been threatening defendant's livestock).

¹¹⁴ *See supra* notes 19-20 and accompanying text (discussing Texas and Illinois law which allow intrinsic value as a measure of damages). As explained in the text accompanying note 136, *infra*, if compensatory damages consist of both economic and noneconomic components and the total is still under \$10,000, the "smallness" exception to applicability of the *Campbell* ratios should be available to the plaintiff.

No court has suggested a particular sum of damages to mark the cut-off between a “small amount” and something larger. I propose \$10,000, based on a large sampling of cases dealing with the *Campbell* ratios. That was the total of economic damages that supported a \$290,000 punitive damages award in a 2003 case where the wrongdoing was sexual harassment and retaliation.¹¹⁵ In a 2005 case, \$4,280 was held to be a “small amount of economic damages” that could support a punitive damages award of \$325,000 because the *Campbell* ratios had been rendered inapplicable.¹¹⁶

Awards of economic damages in the amounts of \$6,191 and \$5,000 have been held to be small under the rule at issue, although in these cases the smallness exception was inapplicable because the misconduct was held not to be particularly egregious.¹¹⁷ Not surprisingly economic damage awards of \$115.05¹¹⁸ and \$100¹¹⁹ have triggered the “small amount” exception.

An occasional case may depart from my \$10,000 cutoff, such as the 2005 federal district court decision applying *Campbell*’s nine-to-one ratio where economic damages could not exceed \$5,500.¹²⁰ The \$10,000 figure could be adopted by some courts as a presumptive cutoff, and with respect to litigation in courts that have not adopted it, the figure still may be useful

¹¹⁵ *Jones v. Rent-a-Center, Inc.*, 281 F. Supp. 2d 1277, 1289 (D. Kan. 2003). There the court stressed that *Campbell* permitted a ratio above nine-to-one where “particularly egregious conduct . . . cause[d] little actual economic damage.” *Id.* It is hard to believe that some part of the \$10,000 did not consist of noneconomic damages to compensate the victim for the humiliation suffered by the sexual harassment to which she was subjected. *Jones* may well be a case where the court extended the “smallness” exception to a situation where the compensatory damages awarded were a mix of economic and noneconomic damages. See also *Jeffries v. Wal-Mart Stores, Inc.*, 15 Fed. Appx. 252 (6th Cir. 2001) (finding \$8,500 to be a small amount of economic damages under the original formulation of the smallness exception in *Gore* and thus a proper foundation for a \$425,000 award of punitive damages).

¹¹⁶ *Lowe Excavating Co. v. Int’l Union of Operating Engineers Local No. 150*, 832 N.E.2d 495, 505-06 (Ill. App. Ct. 2005).

¹¹⁷ *Atkinson v. Orkin Exterminating Co.*, 604 S.E.2d 385, 393 (S.C. 2004) (awarding \$6,191 in economic damages where defendant’s conduct was not particularly egregious); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 77-78 (Cal. 2005) (finding defendant’s misconduct “not highly reprehensible” and awarding \$5,000 in economic damages).

¹¹⁸ *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1357 (11th Cir. 2004).

¹¹⁹ *Kelvin Cryosystems, Inc., v. Lightnin*, No. Civ.A. 03-CV-00881, 2005 WL 2994693, at *12 (E.D. Pa. Sept. 28, 2005) (declining to reduce a \$100,000 punitive damages award). Some might consider \$100 a nominal damage award, but that would not be correct in pet-death cases where the fair market value of most pets is surely less than \$100.

¹²⁰ *Hunter v. District of Columbia*, 384 F. Supp. 2d 257, 262 (D.D.C. 2005) (ignoring the “small amount” exception). See also *infra* note 134 and accompanying text (discussing the *Harrelson* case where a \$15,000 compensatory damage award was treated as “small” under *Campbell*).

to attorneys trying to predict where courts will draw the line between small and “non-small” economic damages.

Applicability of the smallness exceptions frees the plaintiff from *Campbell*’s four-to-one and nine-to-one ratios; since it involves a finding of particularly egregious misconduct by the defendant, the exception also would seem to moot consideration of what *Campbell* referred to as “the most important indicium of the reasonableness of a punitive damages award” under attack as violative of due process, “the degree of reprehensibility of the defendant’s conduct.”¹²¹ But the award might have to be reduced due to other considerations employed by *Campbell* to determine if there has been a due process violation: whether the wrongdoing “evinced an indifference to or a reckless disregard of the health or safety of others,” whether the victim was financially vulnerable, whether the misconduct “involved repeated actions or was an isolated incident,”¹²² and whether there exists a “disparity between the punitive damages awarded and the ‘civil penalties authorized or imposed in comparable cases.’”¹²³

B. Either Party Can Require the Court to Add Uncompensated Emotional Damages to Economic Damages Awarded in Applying the Campbell Ratios

1. Uncompensated Damages Should Be Considered

A trio of commentators has considered, broadly, whether damages caused by a defendant but not awarded to the victim in a judgment that contains a punitive damages award can be considered in applying the *Campbell* ratios: “[o]ne of the biggest issues regarding this [ratio] guidepost involves what types of damages may properly be part of the denominator: should it be limited to compensatory damages, or should it also account for factors such as potential harm or *uncompensated injuries*?”¹²⁴

¹²¹ *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2005). By a parity of reasoning, a holding that the smallness exception applies should result in little relevance to the *Campbell* consideration of whether “the harm was the result of intentional malice, trickery, or deceit or mere accident.” *Id.* If the court does not expand the smallness exception—as proposed in the text accompanying notes 133-36, *infra*—to a situation where the damages awarded are not solely economic but a mix of economic and noneconomic damages or even solely noneconomic damages, holding that the smallness exception is applicable moots the *Campbell* consideration of whether “the harm was physical as opposed to economic.”

¹²² *Id.* at 409.

¹²³ *Id.* at 428.

¹²⁴ Laura Clark Fey et al., *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After State Farm v. Campbell*, 56 BAYLOR

Because the Supreme Court in *Campbell* referred to “the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,”¹²⁵ the writers concluded that potential harm is properly considered if an award is within the four-to-one or nine-to-one ratios discussed in *Campbell*. At least where the reason that damages actually caused by the defendant were not compensated in a verdict for the plaintiff was not the fault of the plaintiff,¹²⁶ it would make sense to take into account in applying the ratios not just potential harm not actualized but uncompensated damages in fact inflicted but unrecoverable in a lawsuit because of the jurisdiction’s foolish fear of the floodgates of litigation opening up if the law were to recognize family pets as a unique type of personal property.

In a 2005 case decided by the Supreme Court of Iowa the plaintiff, whose child had been abducted by the defendant, received a compensatory damages award of \$1, which was all he sought, and \$25,000 in punitive damages.¹²⁷ Rejecting the defendant’s disproportionality attack on the punitive damages award based on *Campbell*, the court held that “[a]lthough the amount of compensatory damages awarded was nominal, the actual harm to the plaintiff was substantial.”¹²⁸

L. REV. 807, 833-34 (2004) (emphasis added).

¹²⁵ *Campbell*, 538 U.S. at 424, quoted in Fey et al., *supra* note 124, at 834. In *Roberie v. Vonbokern*, No. 2002-CA-001940-MR, 2003 WL 22976126, at *11 (Ky. Ct. App. Dec. 19, 2003), the court relied on this passage of *Campbell* to affirm a \$5,000 punitive damages award against a defendant who blocked road access to plaintiff’s property because the action could have caused damage to plaintiff, although it did not.

¹²⁶ For example, the jurisdiction in question has a comparative negligence statute. The defendant intentionally—or recklessly, if that degree of wrongdoing will support a punitive damages award—shot the plaintiff’s pet dog. But the plaintiff had negligently let the dog run free, and the jury finds the plaintiff 50 percent at fault. As a result, the total emotional damages of \$12,000 found by the jury are reduced to \$6,000. Punitive damages of \$100,000 are awarded. If \$6,000 in uncompensated emotional damages are added in, the ratio of punitive damages to total harm done by the defendant is within the nine-to-one *Campbell* ratio but well beyond nine-to-one if they are not added. There is good reason not to do so.

In many states, a plaintiff’s recovery for his damages is reduced based on the percentage of causation assigned by the jury due to his mere ordinary negligence even though the degree of misconduct by the defendant was gross negligence, recklessness, or even wanton and willful misconduct. See, e.g., *Jannette v. Deprez*, 701 S.W.2d 56, 61 (Tex. App.-Dallas 1985), writ refused, overrule on other ground by *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990) (holding that plaintiff’s 65 percent ordinary negligence totally offset defendant’s 35 percent gross negligence and therefore the plaintiff was not entitled to recover). See generally Annotation, *Application of Comparative Negligence in Action Based on Gross Negligence, Recklessness, or the Like*, 10 A.L.R. 4th 946 (1981-2004).

¹²⁷ *Wolf v. Wolf*, 690 N.W.2d 887, 895 (Iowa 2005).

¹²⁸ *Id.* “Suffice it to say that the deprivation of a parent’s relationship with a child, over several years, with attendant costs such as attorney fees spawned by the defendant’s contumacious conduct are sufficient potential damages to make the award of \$25,000 in

The California Supreme Court recently agreed that “uncompensated . . . harm may in some circumstances be properly considered in assessing the constitutionality of a punitive damages award.”¹²⁹ The California court reached this conclusion based on the United States Supreme Court’s reference in *Campbell* “to the relationship between punitive damages and both ‘the amount of harm’ and ‘the general damages recovered,’ impliedly recognizing that these two are not always identical.”¹³⁰

The California Supreme Court cited a 1978 decision¹³¹ as an example where uncompensated harm should be considered in determining if a punitive damages award is constitutionally excessive. In that case, bad faith refusal by an insurer to pay benefits owed caused the original plaintiff emotional distress, but the plaintiff died before judgment was entered, and a statute provided that a claim for that type of damage did not survive the victim’s death. The California Supreme Court said of this situation: “[c]onsidering it ‘likely that absent this limitation plaintiff would have recovered a substantial amount in compensation for emotional distress,’ this court held the disparity between the relatively small compensatory damages award and the significant award of punitive damages did not require nullification of the latter.”¹³²

I submit that the California example where recovery of emotional damages is barred by adherence to an antiquated non-survival rule is very analogous to the scenario laid out at the outset of this Article where emotional damages were denied to the owner of a pet dog who was shot to death because of a court’s insisting that a companion animal is mere property in the same sense as a chair or book and not a special class of property to which genuine emotional attachments arise.

punitive damages well within the constitutional parameters.” *Id.* at 896.

¹²⁹ *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 67 (Cal. 2005). The theory did not apply because the fraud by the defendant was not the cause in fact of an alleged uncompensated harm of \$400,000 arising out of a failed effort by the plaintiff to purchase real property at a bargain price.

¹³⁰ *Id.* at 71 (quoting *Campbell*, 538 U.S. at 426).

¹³¹ *Id.* at 73 (citing *Neal v. Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978)).

¹³² *Id.* (quoting *Neal*, 582 P.2d at 991). The result in the 1978 *Neal* case was affirmance of a punitive damages award of \$740,011.48 although compensatory damages were only \$9,573.65. Under my proposal that \$10,000 is a “small amount” of damages, an additional basis was present for upholding the punitive damage award that exceeded compensatory damages actually awarded despite the ratio of over seventy-seven-to-one.

2. Adding in Uncompensated Damages Can Save a Plaintiff's Punitive Damages Award by Bringing It Under a Nine-to-One Ratio or Can Doom the Award by Eliminating the "Smallness" Exemption

The law review authors and state supreme courts that have endorsed reference to uncompensated harm apparently were envisioning a plaintiff who—not able to invoke the “small amount” exception—relied on uncompensated damages to bring the punitive damages awarded within *Campbell*'s four-to-one or nine-to-one ratios. Once the ratio analysis is made applicable, no distinction is made between economic and noneconomic damages. The two are lumped together under the term “compensatory” damages in applying the ratios.¹³³

But the party invoking the uncompensated damages could be the defendant, arguing that such damages should be added to those recovered by the plaintiff to obtain a total sum that exceeds the “small amount” of compensatory damages. Example: the jury awards \$8,000 in economic damages for the intentional killing of a horse that was both a pet of the plaintiff and a source of stud fee income. Emotional damages not awarded—because, perhaps, the defendant's conduct was not outrageous so that plaintiff's IIED claim failed—were \$8,000 as well. The combined \$16,000 in harm done by the defendant is not a small amount under the test I propose.

Since the purpose of *Campbell* is to rein in runaway punitive damages awards through constitutional restrictions, I should think the defendant can combine uncompensated economic damages with a “small amount” of compensated economic damages to show that the total damages caused by the defendant are not “small” and, as a result, the normal ratio analysis should apply. But the hypothetical case above of the pet horse involves something different: combining unawarded *noneconomic* damages with a small amount of economic damages. The question is thus presented as to whether the United States Supreme Court will expand the “smallness” exception to a situation where the damages are a mix of economic and noneconomic or even a case where all damages are noneconomic, such as pain and suffering.

In my view it would make no sense to recognize a “small amount”

¹³³ “[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.” *Campbell*, 538 U.S. at 410. “[I]n upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* at 425 (emphasis added).

exception to applicability of the *Campbell* ratios where economic damages are \$10,000 or less but no similar “small amount” exception where the only compensatory damages are noneconomic damages. Whatever logic led the *Campbell* court to make a “small amount” exception to the four-to-one and nine-to-one ratios where damages were solely economic, such as lost wages, should also apply when damages are solely noneconomic, such as for fright or grief. Actually, the latter category seems more consistent with a relaxation of the ratios than the former.

There is some judicial support for expanding the “smallness” exception to a case where damages are solely noneconomic. In a 2003 Alabama case,¹³⁴ the jury awarded \$15,000 in compensatory damages to a fifteen-year-old girl subjected to a sexual assault by the defendant, plus \$75,000 in punitive damages, creating a five-to-one ratio falling in between *Campbell*’s four-to-one ratio that will in most cases be the due process limit and the nine-to-one ratio that is the maximum due process will tolerate absent the applicability of an exception. Although the compensatory damages awarded were obviously noneconomic as opposed to economic, the Alabama court upheld the punitive damages award because in *Campbell* the Supreme Court had “noted that a greater ratio [than four-to-one] is permissible where ‘a particularly egregious act has resulted in only a small amount of economic damages.’”¹³⁵ In other words, the court extended the “smallness” exception from the situation where compensatory damages were solely economic to a case where they were solely noneconomic.¹³⁶

¹³⁴ Harrelson v. R.J., 882 So.2d 317, 321 (Ala. 2003).

¹³⁵ *Id.* at 324 (quoting *Campbell*, 538 U.S. at 410). Since I propose that \$10,000 should be the largest amount of a “small” compensatory damages award under *Campbell*, see *supra* notes 114-18 and accompanying text, I do not agree with the Alabama court’s invoking the “smallness” exception but do agree with the court’s notion that such an exception should be expanded to an award of noneconomic damages such as the fright experienced by a child who was sexually assaulted.

¹³⁶ See also *Wolf v. Wolf*, 690 N.W.2d 887 (Iowa 2005), *supra* notes 127-28 and accompanying text, where the defendant abducted the plaintiff’s child, and the plaintiff recovered \$1 in compensatory damages and \$25,000 in punitive damages. The Iowa Supreme Court invoked the *Campbell* exception involving a “particularly egregious act [that] has resulted in only a small amount of economic damages.” *Id.* at 895 (quoting *Campbell*, 538 U.S. at 924). The court noted that damages not compensated by the \$1 award were for “the deprivation of a parent’s relationship with a child” [noneconomic damages] as well as attorney’s fees in fighting to recover custody. *Id.* at 896. Yet the court reversed an award to plaintiff of attorney’s fees, *id.* at 895-96, meaning that the \$1 awarded was solely for noneconomic damages.

In *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003), the awards for unconstitutional search and seizure were \$100 noneconomic compensatory damages and \$15,000 punitive damages per plaintiff. Citing *Campbell* but not specifically referring to its

If the “smallness” exception is to apply to an award consisting solely of noneconomic damages, it should follow that the defendant can ask the court to add to a small amount of economic or noneconomic damages awarded any amounts of economic and noneconomic damages that were uncompensated via litigation to create a total that is no longer small, thereby eliminating the exception to applicability of the four-to-one and nine-to-one ratios.

Of course, if combining noneconomic damages—whether awarded or not—with economic damages leaves a total compensatory award of \$10,000 or less, the smallness exception should still apply. Thus in a pet-killing case, the court might award \$100 in economic damages, the market value of a dog killed by the defendant, \$1,000 for grief suffered by the pet’s owner,¹³⁷ and \$100,000 in punitive damages. It would be sound for the court to declare that the total compensatory damages award, \$1,100, was “small” under the *Campbell* exception focusing, as written, on economic damages so that the ratios did not apply.

3. Attorney’s Fees, Whether Awarded or Uncompensated, Should Not Be Considered in Applying the *Campbell* Ratios

What of attorney’s fees that a plaintiff had to pay to win the judgment constituting a small amount of damages (such as the market value of a pet killed by the defendant) and substantial punitive damages? Are they uncompensated damages that can be added to the damages actually awarded for the purposes of demonstrating that the punitive damages award is under a four-to-one or nine-to-one ratio or for demonstrating that total damages are not small, so that the smallness exception is lost? According to the logic of the Third Circuit’s 2005 *Willow Inn* decision,¹³⁸ the plaintiff’s attorney’s fees should be so considered. There an insured sued its insurer for bad faith delay in paying a damages claim and obtained a judgment of \$2,000 economic damages and \$150,000 punitive damages. Relying on *Campbell*’s nine-to-one ratio, the defendant on appeal asked to have punitive damages reduced. Instead, the Third Circuit court compared the \$150,000 punitive damages to attorney’s fees and court costs in excess of \$135,000 incurred

“small amount” exception, the court held that the *Campbell* ratios are inapplicable when compensatory damages are nominal, in effect extending the “smallness” exception to noneconomic damages. *Id.* at 1016 n.76.

¹³⁷ Such was the amount of emotional damages awarded for death of a pet dog in *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981).

¹³⁸ *Willow Inn, Inc., v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005).

by the insured in fighting to enforce its rights.¹³⁹ Under the applicable state statute concerning liability of an insurer acting in bad faith to deny or delay payment of sums it owes, the plaintiff in *Willow Inn* had received an award of the \$135,000 taxed against the defendant. But if uncompensated damages such as for pain and suffering are to be added to awarded compensatory damages for the purposes of applying the *Campbell* ratios, it should be irrelevant that the *Willow Inn* judgment included an award of attorney's fees rather than leaving such fees as a head of unawarded damages, if unawarded attorney's fees would not be "added in."

I think *Willow Inn* is illogical and that attorney's fees the plaintiff has to pay to win his or her judgment based on the killing of a companion animal should not be counted as part of the uncompensated damages to be added to damages awarded in determining how, if at all, the *Campbell* ratios apply. I believe the *Campbell* court envisioned the situations where uncompensated damages—including damages threatened but which did not occur—were to be considered as unusual or even rare instances.¹⁴⁰ But since it is a tort case that usually generates a punitive damages award, and since under the American approach to fee shifting the plaintiff seldom recovers attorney's fees from the defendant in a tort case,¹⁴¹ uncompensated damages would exist in the large majority of cases where *Campbell* ratios were at issue if this category included attorney's fees.¹⁴²

¹³⁹ The *Willow Inn* court cited a decision of a Pennsylvania appellate court that had compared a punitive damages award to awarded attorney's fees and costs in considering the effect of *Campbell*. 399 F.3d at 236 (citing *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 421 (Pa. Super. Ct. 2004)). After the *Willow Inn* decision was handed down, the Pennsylvania Supreme Court granted review in the case relied on. *Hollock v. Erie Ins. Exch.*, 878 A.2d 864 (Pa. 2005) (appeal granted in part). Moreover, how the *Campbell* ratios are applied is not a matter of state tort law but of federal constitutional law and the dictates of the Due Process clause of the Fourteenth Amendment.

¹⁴⁰ *Campbell's* recognition that departures from the ratios referred to may be permitted in cases of egregious acts causing small economic damages, where injury is hard to detect, and where noneconomic damages are difficult to quantify in monetary terms are viewed as "exceptions" to the general applicability of the ratios. Solange E. Ritchie, *The World After State Farm v. Campbell: Punitive Damages Past, Present and Future*, 33 W. ST. U. L. REV. (forthcoming 2006). Surely the Supreme Court would have considered taking into account uncompensated damages in determining what numbers to use to form the ratios to be just as much if not more than an exceptional case.

¹⁴¹ See, e.g., Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract With America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 317 (1998) (discussing how attorney's fees are handled in the United States).

¹⁴² I would distinguish attorney's fees incurred in litigation from those incurred before the parties anticipated there would be litigation. Thus in *Simon v. San Paolo Holding Co., Inc.*, 113 P.3d 63, 72 (Cal. 2005), the plaintiff spent \$5,000 to retain an attorney to prepare for an anticipated escrow arrangement although one final detail remained to be agreed on before a

At least one court has rejected the theory of *Willow Inn*, declining to consider attorney's fees and costs that the defendant was ordered to pay to the plaintiff as constituting compensatory damages in applying the due process standard in *Campbell*. In 2003, a Connecticut Superior Court judge confirmed an arbitrator's punitive damages awards of \$150,000 each in favor of two plaintiffs, accompanied by a zero award of compensatory damages despite a finding that harm had occurred to plaintiffs who were defrauded out of the opportunity to stand for election to the board of an advertising trust.¹⁴³ The defendants were also ordered to pay \$150,000 to both plaintiffs in costs and attorney's fees. Had that award been considered as a recovery of economic damages, the ratios of punitive damages to compensatory damages would have been two-to-one, well within the *Campbell* ratios. Instead the court viewed the "ratio" as 150,000-to-zero but upheld the punitive damages awards on the theory that the noneconomic damages—including harm to reputation arising out of malicious charges of unfitness to hold office—were "not readily susceptible to monetary valuation."¹⁴⁴ In other words, the second *Campbell* exception—discussed in the next subsection of this Article—was found to be applicable.

I do not mean to suggest that where the prevailing pet owner has a contingent fee arrangement with his or her attorney, economic damages should, in formulating the *Campbell* ratios, be reduced by the percentage thereof that will be taken by counsel under the fee arrangement. That amount can be viewed as actual economic damages that are uncompensated because the plaintiff was unable to afford to pay his or her attorney an hourly rate. Moreover, it would be unacceptable for a rule generated by considerations of due process for litigants to operate in such a manner that a wealthy victim of pet killing, able to pay an attorney an hourly rate, is entitled to receive a larger punitive damages award than the less affluent plaintiff forced into a contingent fee arrangement, when the wrongdoing by the defendant is identical in the two cases.

binding contract for sale of real property existed. Because of fraudulent representations, a meeting of the minds was prevented. The California Supreme Court properly held that an economic damages award to reimburse the plaintiff for the \$5,000 paid to his attorney could support a \$50,000 punitive damages award.

¹⁴³ *Hadelman v. DeLuca*, No. CV970060279S, 2003 WL 21493968 (Conn. Super. Ct. June 12, 2003), *aff'd*, 876 A.2d 1136 (Conn. 2005). The court's holding that the due process limitations of *Campbell* and *Gore* were not violated was affirmed by the Supreme Court of Connecticut on the theory that the due process rulings of these cases did not apply because no state action was involved in the award made by private arbitrators. *Hadelman v. DeLuca*, 876 A.2d 1136, 1138-39 (Conn. 2005).

¹⁴⁴ *Hadelman*, 2003 WL 21493968 at *5.

C. Emotional Damages in Pet-Killing Cases Are Probably Not Exempt from the Campbell Ratios on the Theory They Are Noneconomic Damages "Difficult to Determine" Monetarily

In addition to the "smallness" exception, *Campbell* provides a second and distinct exception to the applicability of its four-to-one and nine-to-one ratios "where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."¹⁴⁵ If emotional damages suffered by a pet owner upon the killing of his companion animal fall within this category, the defendant should not be able to add such damages, whether compensated or not, to a small economic damages award to eliminate the smallness exemption. It would be bizarre indeed if combining item A, exempt under rule one, with item B, exempt under rule two, could eliminate the first exemption.¹⁴⁶

The question then arises whether emotional damages suffered by the plaintiff whose companion animal was intentionally killed by the defendant are a class of economic damages difficult to value in monetary terms. Support for the conclusion that grief and distress suffered by the owner of a pet that is killed are of that nature of harm is found in the Hawaii decision discussed above—also a *Campbell* case—holding that even where the degree of wrongdoing is negligence, owners and caretakers of a pet that has been killed may recover emotional damages.¹⁴⁷ There, the Hawaii Supreme Court rejected a contention that in order to recover such damages the pet owner had to present medical evidence concerning the distress he or she suffered by invoking the holding of a bystander case precedent.¹⁴⁸ In that earlier case the plaintiff observed his grandmother being run over by a car

¹⁴⁵ *Campbell*, 538 U.S. at 425 (quoting *BMW of N. Am. v. Gore*, 517 U.S. 558, 582 (1996)).

¹⁴⁶ The issue could arise in the unusual case where the jury by special verdict (or judge by findings of fact and conclusions of law) assigned a portion of the punitive damages as related to the loss of the pet and a portion as related to the grief suffered by the pet owner. Example: "We the jury find that defendant intentionally killed plaintiff's dog with a market value of \$100 and assess damages of \$10,000 for this loss; and we further find that, as a result, plaintiff suffered \$15,000 in emotional damages and assess punitive damages of \$25,000 for defendant's having caused this harm." Unless due process analysis allows viewing this as a case involving \$35,000 in punitive damages founded on \$15,000 in total compensatory damages (well within the four-to-one ratio), the plaintiff needs the smallness exception to protect the \$10,000 component of the punitive damages awarded.

¹⁴⁷ See *supra* notes 32-34 and accompanying text (discussing the Hawaii *Campbell* case).

¹⁴⁸ *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1068-70 (citing *Leong v. Takasaki*, 520 P.2d 758 (Haw. 1978)).

and killed, causing “psychic injuries, including shock.”¹⁴⁹ These the Hawaii Supreme Court termed “primary responses,” as opposed to physical injuries, referred to as “secondary responses.”¹⁵⁰ Discussing the opinion in the bystander case, the Hawaii Supreme Court stated:

In discussing primary responses, we acknowledged that they are short in duration and transient in nature, although they may result in painful and serious mental suffering. We stated that the *precise level of mental suffering resulting from primary responses is difficult to measure with accuracy* because the medical expert must rely exclusively on the statements made by the victim.¹⁵¹

Since the Hawaii Supreme Court rejected a claim in the dog-killing case that medical evidence of emotional damages should be required, the court clearly viewed the grief suffered by the pet owner to be a “primary response” of the same nature as the grief suffered by a person who sees his close relative killed.

In a broader context, a 2003 Sixth Circuit decision, known as the “bedbug case,” held that emotional damages are not subject to the *Campbell* ratios under the hard-to-quantify-monetarily exemption for noneconomic damages.¹⁵² There, through the willful and wanton fraud of the defendant’s agent the plaintiffs rented a motel room that was infested with bedbugs that proceeded to bite them.¹⁵³ The jury awarded each plaintiff \$5,000 compensatory and \$186,000 in punitive damages (ratio of 37.2-to-one). The Sixth Circuit affirmed and, when discussing *Campbell*, stated that “the compensable harm was slight and at the same time difficult to quantify because a large element of it was emotional.”¹⁵⁴

Several courts hearing cases involving civil rights violations in which punitive damages were awarded have held that the harm suffered fell under the hard-to-quantify exception.¹⁵⁵ A good example is *Sherman v. Kasotakis*, decided by the United States District Court for the Northern District of Iowa

¹⁴⁹ 632 P.2d at 1068.

¹⁵⁰ *Id.* at 1070.

¹⁵¹ *Id.* (emphasis added).

¹⁵² *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (6th Cir. 2003).

¹⁵³ The agent ignored a written directive concerning Room 504 stating “DO NOT RENT UNTIL TREATED” for the known bug infestation. *Id.* at 675 (emphasis in original).

¹⁵⁴ *Id.* at 677.

¹⁵⁵ One commentator proposes a different reason for excepting punitive damages awarded in a racial discrimination from the application of the *Campbell* ratios: “[S]ociety places particular importance on combating discrimination, and . . . this cause was the subject of the bloodiest war in history as well as constitutional amendments.” Ritchie, *supra* note 140.

in 2004.¹⁵⁶ There, a group of African American patrons were refused seating in an area of the defendant's restaurant by an employee who referred to them as "niggers." They were seated elsewhere in the restaurant, and some in the group ordered and were served food. A jury awarded each one dollar in compensatory damages—which had to be nominal noneconomic damages as the patrons suffered no financial loss—and \$12,500 in punitive damages. The trial court refused to reduce the reward despite the 12,500-to-one ratio, quoting the *Campbell* passage about cases where the "monetary value of noneconomic harm might have been difficult to determine."¹⁵⁷ It declared that "many civil rights violations will fall into this category of cases in which it is difficult to assess a monetary value to the harm suffered."¹⁵⁸

The harm suffered by a black person who has been refused service and denigrated as a "nigger" is emotional yet different from that of the motel customer outraged by a bedbug attack and different from the grief and sorrow suffered by a pet owner upon the death of his animal. What appears from my reading of the cases dealing with the second *Campbell* exception is that the lower court judges do not really know what type of noneconomic harm the Supreme Court had in mind in fashioning the second *Campbell* exception and that any noneconomic harm other than pain and suffering from a physical injury is a likely candidate.

But why should all pain and suffering from physical injuries be excluded from the second exception? What of a female plaintiff who, thought by her boyfriend, the defendant, to be cheating on him, has been cruelly tortured? What of a plaintiff shot in the stomach by the jealous defendant, who lies alone in agony for hours until discovered and taken to a hospital? Is the physical pain suffered in these instances any easier to quantify in term of money damages than emotional suffering? I cannot say so, and how can any judge?

If almost all kinds of emotional damages are considered hard to quantify in monetary terms, what we thought was an "exception" to applicability of the *Campbell* ratios becomes more like a rule than an exception, since emotional damages are common and are presented in many forms. For example, although unusual many years ago, it has become increasingly common for courts to accept grief as a head of damages

¹⁵⁶ *Sherman v. Kasotakis*, 314 F. Supp. 2d 843 (N.D. Iowa 2004).

¹⁵⁷ *Id.* at 874.

¹⁵⁸ *Id.* at 874-75.

suffered by surviving relatives suing as plaintiffs in wrongful death cases.¹⁵⁹ I find it highly unlikely that all harm that is emotional in nature triggers the second *Campbell* exception.

Until the United States Supreme Court provides some guidance as to when the hard-to-quantify-monetarily exception of *Campbell* for cases where both noneconomic and punitive damages have been awarded applies, no one can predict whether emotional suffering of a plaintiff whose pet has been killed will come within it, notwithstanding the analysis of the Hawaii Supreme Court in its own *Campbell* decision that described such harm as “difficult to measure with accuracy.”

V. PROCEDURAL CONCERNS: SHOULD THE JURY OR JUDGE DETERMINE THE AMOUNT OF UNRECOVERABLE EMOTIONAL DAMAGES?

Since *Campbell* was decided in 2003, courts have had repeated opportunities to opine on whether juries should be instructed about the four-to-one and nine-to-one ratios. Perhaps all such courts have treated these matters as for the trial judge in deciding whether to reduce a punitive damages award or an appellate court in deciding whether to affirm or reverse the trial court’s decision on the need to reduce.¹⁶⁰ For example, in a post-*Campbell* decision, the West Virginia Supreme Court said a jury should be instructed that “punitive damages should bear a reasonable relationship to compensatory damages” rather than instructed in terms of four-to-one and nine-to-one ratios.¹⁶¹ As stated by a Second Circuit panel,

¹⁵⁹ See, e.g., *Dawson v. Hill & Hill Truck Lines*, 671 P.2d 589, 594 (Mont. 1983) (affirming award of substantial damages for grief in wrongful death case); *Gaither By and Through Chafin v. City of Tulsa*, 664 P.2d 1026, 1032 (Okla. 1983) (same); *Hartnett v. Union Mut. Fire Ins. Co.*, 569 A.2d 486, 492 (Vt. 1989); *Stump v. Ashland, Inc.*, 499 S.E.2d 41, 53 (W. Va. 1997). A plaintiff in a wrongful death suit seeking punitive damages should ask for a special verdict that will specify whether the jury included emotional damages in its award to create a record on which to base a claim to *Campbell*’s hard-to-quantify-monetarily exception.

¹⁶⁰ See, e.g., *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 82 (Cal. 2005) (remanding case to lower court with instructions to reduce punitive damages award). A Kentucky court did suggest that a trial judge might instruct the jury on the three punitive damages guideposts listed in *Gore*: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and civil penalties that could be imposed. *Roberie v. Vonbokern*, No. 2002-CA-001940-MR, 2003 WL 22976126, at *10 (Ky. Ct. App. Dec. 19, 2003). Guidepost (2) is basically the same point as made by the *Campbell* ratios but without specific numbers.

¹⁶¹ *Boyd v. Goffoli*, 608 S.E.2d 169, 181 (W. Va. 2004). The court goes on to say that in reviewing a jury’s punitive damage award, the trial court should impose a five-to-one ratio to limit the punitive damages where the degree of misconduct was wanton disregard rather

“[w]here a party contends that a punitive damages award is excessive, that issue is ripe for legal challenge after a verdict is entered.”¹⁶²

I suspect few if any states will end up instructing juries in punitive damage cases on the *Campbell* ratios. If this practice does begin and the conclusions reached in this Article are correct, the jury would have to find the amount of damages the defendant’s tortious activity could have caused but did not cause as well as—in pet-death cases—the amount of emotional damages caused to the plaintiff by the killing of his or her pet but which the law bars the pet owner from recovering. Assigning that task to the jury presents a problem which I now address. Even in courts that preclude the jury from learning of the four-to-one and nine-to-one *Campbell* ratios, it could be argued that the jury properly can, via special verdict, place a valuation on damages that could have occurred and those that did occur but which are not recoverable by the plaintiff.

If the jury is instructed to determine the amount of emotional damages suffered by a pet owner in a pet-death case, counsel for the plaintiff will demand that the jury be advised that the plaintiff will not recover them and that they are to be considered only in calculating punitive damages, because the jury cannot help but be influenced in determining each head of damages by the total amount the plaintiff will be receiving.

Counsel for the defendant will strenuously object that if the jury is asked to value emotional damages knowing that although they were incurred the appropriate sum will not be recovered by the plaintiff, the jury will artificially increase the amount of economic and punitive damages to compensate. To which plaintiff’s counsel will rejoin that this possible problem is solved by a jury instruction specifically directing the jury not to do that, while, perhaps, also observing that juries are not made up of fools and must understand that, when in pet-death cases, it is obvious the plaintiff has suffered emotionally yet the jury is not asked to value that type of harm, the law bars an award of such damages.

It is not uncommon for a jury to be asked to determine an amount of damages unaware that the trial court is bound to reduce the award because of a damages cap statute or because the plaintiff has already received a

than intentional wrongdoing and the compensatory damages were neither negligible nor very large. See also *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1102 (D. Alaska 2004) (“Generally, punitive damages instructions are very open-ended as regards how juries should come up with a punitive damages number if liability for punitive damages is determined.”).

¹⁶² Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n v. Pelella, 350 F.3d 73, 89 (2d Cir. 2003).

partial recovery from a co-tortfeasor by way of settlement.¹⁶³ However, at this time I cannot think of any situation in which the jury is asked to make a determination of damages when it is known from the outset that the plaintiff cannot possibly receive one cent of it.

Since both counsel for the plaintiff and for the defendant have reasonable arguments for why the jury should or should not be told that emotional damages the jury assesses will not be paid to the plaintiff, the appropriate legal response is to have the trial judge and not the jury make that determination in a finding of fact that counsel is presented before addressing the issue of whether punitive damages awarded are constitutionally excessive under the *Campbell* ratios.

CONCLUSION

In most pet-death cases in which punitive damages are awarded the plaintiff pet owner is unable to recover emotional damages. The plaintiff nevertheless can ask the trial court judge to determine the dollar amount of such damages and include it with economic compensatory damages awarded to establish that the punitive damages do not exceed the four-to-one or nine-to-one ratios laid out in the *Campbell* decision. It probably follows that the defendant can have unawarded emotional damages added to the economic damages the defendant is ordered to pay to eliminate applicability of the “small amount” exception to the *Campbell* ratios.

¹⁶³ See, e.g., N.C. GEN. STAT. § 1D-25(c) (2004) (stating that the jury may not be made aware of statute limiting punitive damages to greater of \$250,000 or three times compensatory damages); *Whalen v. Kawasaki Motors Corp., U.S.A.*, 242 A.D.2d 919, 920 (N.Y. App. Div. 1997) (withholding from jury that plaintiff had received \$1.6 million in settlement); *Guerra v. City of New York*, 718 N.Y.S.2d 133 (N.Y. Sup. Ct. 2000) (withholding from jury that plaintiff had collected \$225,000 in settlement for pain and suffering and \$277,677 in pension benefits that would offset his lost wages claim).