

**IN THE SUPERIOR COURT FOR THE COUNTY OF GLEE
IN AND FOR THE STATE OF UTOPIA**

**CHARLES MFUME V. TENDER CARE ANIMAL HOSPITAL, P.C.
AND AMELIA PHILOFELIS, DVM**

TRIAL RECORD

The jury having been empaneled, all witnesses having been sworn, and following opening statements, the Court is back in session.

CLERK: All rise.

JUDGE: You may be seated. [Reads Instruction No. 1]. Plaintiff's counsel, you may call your first witness.

EXAMINATION OF CHARLES MFUME

PLA: I first call Charles Mfume. Where do you live?

MFUME: Glee city limits.

PLA: When did you acquire the feline at issue in this case?

MFUME: I adopted Pyewacket from the Glee Humane Society on April 22, 2021.

PLA: Why did you adopt her?

MFUME: She was taken in at three days of age around Christmas 2020 after her feral mother was found dead in a steel-jawed leghold trap mere feet from her litter. A lactating rescue cat allowed Pyewacket to nurse on her until she could be weaned. Pye was rare in that she was a Hemingway cat and had heretochromia iridum, mismatched eye colors. It turns out she was also deaf, but I did not know that right away. Oh, and she was on twice daily Phenobarbital for epilepsy.

PLA: What breed was she?

MFUME: Mixed shorthair.

PLA: How much was she?

MFUME: Actually, no charge, due to her medical issues and because I took her in as a foster initially since I volunteer for the Glee Humane Society. But best laid plans were thrown out the window as I came to know her. I then applied to adopt but, sadly, she died literally three days after I was approved and the adoption contract signed.

PLA: How long did you have her before the incident that brings us here today?

MFUME: About four months.

PLA: Can you explain what happened over those four months since you acquired her?

MFUME: To be clear, I fostered her initially and applied to adopt her the morning she sustained an injury that brought me to Tender Care in the first place. Over the roughly four months I had her in my possession, Pyewacket needed close attention, which I was honored to provide.

PLA: What type of attention?

MFUME: Well, as I mentioned, I did not know she was deaf until the garage door debacle.

PLA: Can you explain the debacle?

MFUME: I kept her inside but supervised her unleashed when outside on my premises. About three and a half months after I began fostering, she was enjoying the garden in my front yard while I pruned and weeded. We used the garage door as the main access to the yard, so when I finished yard work, I came back in through the garage. Pye followed. Unfortunately, I was too quick on the draw and engaged the garage door button to close it behind us. She paused to groom right beneath it. I thought for sure she would move, but she did not hear the door coming down upon her. Nor did the garage door sensor detect her, though it should have. The door crushed her pelvis and pinned her. I quickly reversed the garage door and observed her dragging her hind end. It terrified me, and I felt so guilty!

PLA: What then happened?

MFUME: I rushed her to Tender Care Animal Hospital, as it was closest to my house.

PLA: What happened next?

MFUME: Due to COVID, we had to wait due to staff shortages, but I kept her comfortable and, thankfully, it did not appear that she had any broken bones. She was slowly able to walk but could not bear weight on her right hind limb. After a few hours, a veterinary assistant collected her from my car and brought her in, but said I could not enter. I kissed Pye and told her it would be okay.

PLA: Did you ever talk to a vet?

MFUME: Yes. About thirty minutes later, Dr. Philofelis called. She said that Pyewacket's right stifle joint was severely luxated and required immobilization of the joint with a locking plate. When I asked when it could be done, she said she could get her in within an hour. Though this all occurred over the phone, I authorized the surgery and paid the mid-range for the estimate of \$5000 and \$7000. Dr. Philofelis told me she would have the office call when Pyewacket was ready to be discharged.

PLA: Did you inquire about Dr. Philofelis's credentials to perform such a surgery?

MFUME: Not directly but the business's website said that she was an experienced surgeon and that his hospital was AAHA certified. Oh, and that she was boarded.

PLA: Did you believe that she had a credential beyond that of a general practitioner?

MFUME: Yes. I assumed she was a boarded surgeon. And the AAHA logo reassured me that her hospital held itself to a higher standard.

PLA: What happened next?

MFUME: End of day, Dr. Philofelis called and said the surgery went well. She explained that she gave her an injection of Metacam, an anti-inflammatory, but that she wanted me to continue giving her Metacam by mouth for the next 6 days. When I picked her up, the technician who brought her to my vehicle also handed me a bottle of Metacam, a syringe with tape marking the amount it should be drawn up to, and discharge instructions.

PLA: What did the instructions say?

MFUME: They advised that I should minimize her movement and keep her from jumping up or down from heights greater than 12 inches. And that I should give her about half a syringe of Metacam every 24 hours for the first three days and then about one-sixth of a syringe every day for the following three days. It was a tiny syringe and hard to see the lines.

PLA: Did they give you any warnings about the drug?

MFUME: Just to monitor for vomiting and lethargy.

PLA: Were you given the drug packaging, inserts, client information sheets, or other warnings about Metacam?

MFUME: No.

PLA: What happened next?

MFUME: Pye seemed to be doing quite well over the next few days, though she seemed a little nauseated after the second dose I gave her. She did not throw up, but licked her lips, which having had cats for years, I knew was often a prelude to vomiting.

PLA: Did she ever vomit?

MFUME: Not until the 5th day after the surgery. She seemed to be doing well after each dose and was able to meander comfortably on the floor, so I was happy and thought mild nausea was not anything to worry about.

PLA: What did you do then?

MFUME: I called Tender Care and alerted them to the vomiting within an hour of it happening. I also said she seemed a little poopie the first couple hours after I gave the medication, each day but then rallied and was spunky. They told me to stop the drug and pick up some anti-nausea medication, called Cerenia. So I went in and did so.

PLA: How did she do off the Metacam?

MFUME: She did not improve, and the Cerenia did not seem to help more than moderately, when I could get her to take it orally, which was hit and miss. On the 6th day after the surgery, she stopped eating altogether and seemed vanquished, unable or unwilling to move.

PLA: What did you do then?

MFUME: I tried to take her in to Tender Care, but they were so backed up they advised me to go to an ER, PinkPearl. I did so right away.

PLA: Did PinkPearl help?

MFUME: Due to COVID, I did not get to go inside but met a technician at my car. The technician looked her over and said it was probably not emergent, suggested I give Gabapentin, which the technician gave me, and come back another day if her symptoms persisted.

PLA: Did you try the Gabapentin?

MFUME: Yes, but to no effect. The next day she had still not eaten and was looking painful, so I returned to the ER.

PLA: What did PinkPearl do then?

MFUME: This time a veterinarian, Dr. Bhavatu, saw her. She ran blood work and performed a urinalysis, finding that all Pyewacket's kidney enzymes were so high as to be unmeasurable and her urine was not concentrating at all. I do not understand all the acronyms, but in short, Dr. Bhavatu said that Pye's kidneys had completely failed and she would die without a kidney transplant and diuresis. I was quoted \$25,000 and a poor prognosis even with such heroic efforts.

PLA: What did you do?

MFUME: I opted for euthanasia. I just did not have that kind of money and thought it would commit Pye to a life of suffering and setback. It was a terribly hard decision to make, even though I adopted her knowing she would require a lifetime of care and would have given her my all for as long as needed.

PLA: Did you consider adopting other cats before you settled on her?

MFUME: Yes, but I wanted a special needs kitty. It gave me a sense of purpose. Though she probably had no value to anyone else, saving her life meant the world to me.

PLA: I am showing what has been marked for identification as Plaintiff's Exhibit 1. Do you recognize this?

MFUME: Yes. It's Pye.

PLA: Does it truly and accurately represent how she looked around the time she died?

MFUME: It does, except for the polydactyl paws, which are not shown.

PLA: Move to admit Plaintiff's 1.

DEF: No objection.

JUDGE: Plaintiff's Exhibit 1 is admitted.

PLA: How much did you spend at Tender Care altogether?

MFUME: The surgery and treatment came to \$6498.25.

PLA: How much did you spend at PinkPearl?

MFUME: \$517.

PLA: You have sued Dr. Philofelis and Tender Care for Pyewacket's death. What are you seeking from them?

MFUME: I would like to get all the money back that I paid the veterinary hospitals, as well as the cost of private cremation. I also believe I am entitled to the value of Pyewacket, as well as the emotional aftermath of her loss.

PLA: Is the cremation expense included in the PinkPearl invoice?

MFUME: Yes.

PLA: How much are you seeking for Pyewacket's value?

MFUME: It's so hard to come up with a figure. I know I would have spent easily four times what I incurred to try to plate her leg, even though I only had her for a few weeks at that point.

PLA: Tell us about the emotional impact.

DEF: Objection, irrelevant.

PLA: Sidebar, your Honor?

JUDGE: Yes. (Counsel come to the bench out of earshot of jury.)

PLA: It goes to the claim for negligent infliction of emotional distress, your Honor.

DEF: That claim does not exist under Utopian Law.

JUDGE: Plaintiff's counsel, unless you set forth some new evidentiary or legal foundation as to why your client is entitled to emotional distress damages, I am inclined to sustain the objection.

PLA: Your Honor, I intend to introduce testimony that Pyewacket was an emotional support animal to Mr. Mfume, a type of durable medical equipment, if you will. Not a mere pet.

DEF: Makes no difference, your Honor. Caselaw does not even permit an NIED claim for the death of a fiancé or best friend who happens to be a human. It certainly could not apply in the case of a disabled cat.

PLA: Just last year, your Honor, the Indiana Supreme Court allowed a claim for emotional distress by a parent or guardian when, with irrefutable certainty, a child caretaker sexually abused the child, which severely impacted the parent or guardian's emotional health. The case was *K.G. by Next Friend Ruch v. Smith*, 178 N.E.3d 300 (Ind.2021).

DEF: That case carved out an exception to the proximity requirement where a caretaker conceals the abuse from the parent, who does not learn of it until much after the tort has been

committed. It still maintains the consanguinity rule, and in no way invites an expansion to nonhuman “children.”

JUDGE: Plaintiff’s counsel, I have to agree to Defense counsel. You’ve made your record and can take it up on appeal if need be.

PLA: Then I request a limiting instruction. Let the jury hear the emotional impact but not award for it. Rather, it is probative of the high value placed on Pyewacket, no differently than an inference of low or no value would follow if he suffered no mental disquietude whatsoever.

DEF: But the jury is going to blur the line between economic damages for Pyewacket and noneconomic damages for personal injury. A limiting instruction will not suffice.

JUDGE: I’ll allow the instruction, but counsel, you are opening the door to your client’s mental health and waiving health care provider privileges, understood?

PLA: Yes, your Honor. (Sidebar ends.)

JUDGE: Ladies and gentlemen of the jury, you are going to hear testimony about the emotional impact to Mr. Mfume. In this case, based on existing Utopian law, a plaintiff may not recover emotional distress damages for the non-intentional killing or injury to a nonhuman animal. If you find for the plaintiff, you may not award him anything for emotional distress. However, you may consider his testimony on the subject of emotional distress in determining the value of Pyewacket, should you award anything for Pyewacket.

PLA: Madame Court Reporter, please read back my last question. (The question is read.)

MFUME: After Pye’s death, I had a nervous breakdown. I was involuntarily committed under a 72-hour hold by my partner, as I had attempted to commit suicide. When I was released, I talked to my psychiatrist and was put on medication that helped me. I also spoke to a counselor for six months. It has been a year and I finally am starting to feel relief from the emotional aftershocks of this loss.

PLA: Thank you, Mr. Mfume. No further questions.

CROSS-EXAMINATION OF CHARLES MFUME

DEF: You reside in the city limits of Glee?

MFUME: Yes.

DEF: You claim to have adopted Pyewacket from the local humane society?

MFUME: Yes.

DEF: Isn’t it true that your partner at the time also applied to adopt her with you?

MFUME: That’s true, she did.

DEF: So, you and she were to be co-owners, right?

MFUME: Correct.

DEF: But she is not a plaintiff in this lawsuit, is she?

PLA: Objection, relevance.

DEF: Your Honor, I think the jury should know that only one owner is maintaining this action, and to know why the other owner has not joined.

PLA: Defense never raised failure to join an indispensable party, your Honor, so this is a distraction.

DEF: That's correct, we are not saying Mr. Mfume's case should be dismissed for that reason. But the jury should diminish any award by 50% to account for her 50% interest in the cat.

JUDGE: Overruled, the witness shall answer.

MFUME: You are right, Samantha did not want to be a party to this action. She mourned in her own way but encouraged me to seek justice for Pye.

DEF: Isn't it true that she settled her claim with my clients?

PLA: Objection, 403 and 408.

DEF: Your Honor, Rule 408 only applies to settlement negotiations with a party to this action, not to a nonparty. There is also no prejudice at all to Mr. Mfume.

PLA: The jury may inappropriately try to modulate any award to Mr. Mfume based on what a person who is not a party or even a witness in these proceedings recovered based on completely different facts and circumstances.

JUDGE: Overruled. I am confident you will be able to explain to the jury your position counselor. The witness shall answer.

MFUME: Yes, she did.

DEF: And for \$500, isn't that right?

PLA: Objection, 403 and 408. Move to strike counsel's question.

DEF: Your Honor, this is wholly consistent with your last ruling and merely furthers the line of inquiry.

JUDGE: Overruled, please answer.

MFUME: That's what she told me.

DEF: Isn't it true that Pyewacket was not, in fact, just a "mixed shorthair," but a Bengal or Savannah?

PLA: Objection, foundation.

DEF: Your Honor, the humane society put “Bengal cross” on the adoption contract. Even Tender Care charted her as a “Savannah.”

PLA: Objection, hearsay as to both the adoption and veterinary paperwork.

DEF: They are business records, your Honor. I previously provided declarations from records custodians for the humane society and my client’s veterinary hospital, confirming that they were generated in compliance with Rule 803’s business record exception.

PLA: But under Utopian law, your Honor, opinions or conclusions as to breed require that a foundation be laid by the author of that document. It still contains hearsay.

DEF: Rule 803(6) provides that acts, events, conditions, opinions, and diagnosis memorialized in the record and certified under Rule 902, as we have done, come in.

JUDGE: Overruled. They are allowed under the business records exception to hearsay, but counsel, without calling the authors, a jury will give less weight to those opinions or conclusions. The witness will answer.

MFUME: I am no expert on cat breeds. The humane society did list her as a Bengal cross, and Tender Care apparently identified her as a Savannah without ever talking to me about her breed. I did not even know about that entry until after she died.

DEF: Aren’t Bengals and Savannahs illegal to possess where you live?

PLA: Objection, foundation, calls for legal conclusion.

JUDGE: Sustained.

DEF: Have you heard anyone say that such cats are illegal to possess where you live?

PLA: Yes, I have heard this, but Pyewacket was not.

DEF: Objection, nonresponsive, move to strike statement that Pyewacket was not illegal to possess.

JUDGE: Sustained. Mr. Mfume, please just answer only the question posed. Your attorney will have a chance to ask you further questions.

DEF: When you maimed Pyewacket, the humane society still owned her, yes?

PLA: Objection, argumentative, legal conclusion.

JUDGE: Sustained as to argumentative. Counsel, please remain factual. Overruled as to legal conclusion. Please answer the question of whether the humane society owned Pyewacket at the time the garage door struck her.

MFUME: I’m not exactly sure. I was fostering her with permission of the humane society and discussed fostering to adopt with them before I completed the application with Samantha. I was given no reason to believe we would not be approved. But I did not get back confirmation from

the humane society that the adoption was processed until after the incident. Does that answer your question?

DEF: Yes, thank you. You say there was no adoption fee, but isn't it true that you were in fact charged \$100, which you paid by check?

MFUME: Well, yes, but it was intended as a donation, not a sale price for her.

DEF: And that check bounced, didn't it?

MFUME: Yes, but it was hardly an attempt to defraud anyone. I had just opened a new bank account and the check drew from it before funds I transferred online were deposited. It was a complete mistake.

DEF: You received an NSF notice from your bank for having overdrawn it after Pyewacket was euthanized, right?

MFUME: That's right, and the humane society was kind enough to not request payment for her or the bounced check fee they incurred. They felt so bad.

DEF: Who is Marguerite?

MFUME: A Norwegian forest cat I adopted from Sky's the Limit Cat Rescue.

DEF: When did you get her?

MFUME: About three months ago.

DEF: She replaced Pyewacket?

MFUME: Not at all. She, too, was a special needs cat. I could not fathom adopting again after what happened to Pyewacket, but getting Marguerite was instrumental to my recovery and recommended by my counselor.

DEF: You paid an adoption fee of \$150 for her?

MFUME: Yes.

DEF: Marguerite provides you with emotional support?

MFUME: Yes, but not in the same way as Pyewacket.

DEF: I wish to be tactful, but isn't it true that you were diagnosed with Split Personality Disorder five years ago?

PLA: Objection, 403.

JUDGE: Overruled. Counselor, you opened the door. Please answer.

MFUME: Yes, borderline.

DEF: So which personality or personalities were suicidal and depressed over her death and which personality or personalities were not?

MFUME: I was on medication and therapy for that condition before I adopted Pyewacket. I only have one predominant personality.

DEF: Don't you think it is a bit crazy to ask my clients to pay you over \$25,000 for a cat you got for free and only technically owned for three days?

MFUME: No. I entrusted your clients with a beautiful cat who was looking to me to protect her after her mother was cruelly maimed in an illegal trap, starving, and crying for help when taken in. They should be punished for their wrongdoing!

DEF: But, as the judge will instruct the jury, you can only seek certain compensatory, not punitive, damages. So if we take out your desire to punish, isn't your case really worth, at most, the vet bills?

PLA: Objection, foundation, calls for information protected by the attorney-client privilege.

JUDGE: Sustained, and it is argumentative.

DEF: Would you pay \$10,000 to restore Pyewacket to her previous condition?

MFUME: Yes.

DEF: What about \$100,000?

MFUME: Yes.

DEF: One million?

MFUME: If I had the money, sure.

DEF: But you don't. So would you take out a loan for that amount, impoverish yourself, sell your home?

PLA: Objection, compound, argumentative.

DEF: Your Honor, the plaintiff is testifying to the value of the cat at issue. I am trying to ascertain what that is, in hard numbers.

JUDGE: It is compound, so break it up.

DEF: I'll rephrase. Would you take out a loan for six figures if you could buy Pyewacket back to life?

PLA: Objection, calls for speculation, incomplete hypothetical.

JUDGE: I do not believe the question calls for expert testimony. But I do agree it calls for some guesswork. Yet, how he answers may be probative. I'll allow this question only and we will move on. Please answer.

MFUME: I do not even know if I would qualify for such a loan, but I would do everything in my power to generate funds necessary to give my girl a fighting chance and save her life, even if

that meant financing her treatment. I did pay thousands for her surgery and would have paid tens of thousands more for diuresis and kidney transplant if it were medically reasonable to do with any significant, nonexperimental chance of success. But the vet told me Pye's chances were less than 1% and there were very likely to be complications and she probably would succumb even with heroic efforts. Does that answer your question?

DEF: Thank you, no further questions.

REDIRECT OF CHARLES MFUME

JUDGE: Redirect?

PLA: Mr. Mfume, are you still with Samantha?

MFUME: No, after I became suicidal, she left me. We still are friends, but the emotional impact was too great for her to manage, and I respect that. I was extremely distraught.

PLA: And did she tell you why she settled for \$500?

DEF: Objection, hearsay.

PLA: Your Honor, 804(b)(1). I have learned that declarant was in a car accident yesterday and is unavailable to testify in any event. Yet, her prior deposition testimony explored this area. I can offer the deposition under Civil Rule of Procedure 32, if the court prefers.

DEF: Oh, I was not aware. Objection withdrawn.

MFUME: She explained that she did not want to litigate for religious reasons and, also, that she regarded me as the sole owner. I am the one who paid all the vet bills, picked her out, proposed adopting her, and wrote the check that unfortunately did not clear my account. We were dating and cohabiting for about a year at that point and imagined we would be together forever, so naturally, I had her sign the adoption paperwork with me. Indeed, the insurance company offered...

DEF: Objection, Rule 411, move to strike part of answer.

PLA: While that rule might apply if raised as to Mr. Mfume, it pertains to a third party, and defense opened the door on this one by expressly asking about settlement terms.

JUDGE: Overruled. You may continue.

MFUME: Defendants' insurance company offered her \$500 at the same time they made me the same offer. I rejected it. She accepted it. And the settlement agreement only resolved her claim, not mine. I'll note also that she never even made a demand. She wanted nothing to do with the case and they made the offer unsolicited by her. Furthermore, she gave me the \$500 to help with my fees and costs in this case.

PLA: Has anyone told you that you had no legal right to possess Pyewacket?

MFUME: No, not even Dr. Philofelis or Dr. Bhavatu.

PLA: Was Marguerite a "replacement"?

MFUME: Not at all. She was, as I said, a cat in need. I came to her aid, begrudgingly, because my heart was so raw from the experience with Pyewacket.

PLA: How as she a cat in need?

MFUME: Well, she was diagnosed with FIV, and would have been euthanized if not adopted. I took her in mindful of the risk she would pose to any other cats, which is why she is a one-cat household. I also anticipate she will have a short lifespan due to her disease.

PLA: Thank you, nothing further.

JUDGE: You may step down. Next witness?

EXAMINATION OF AMELIA PHILOFELIS, DVM, DABVP

PLA: I call Dr. Amelia Philofelis as an adverse witness.

JUDGE: Dr. Philofelis, please come forward. You've been previously sworn. Counsel, you may inquire.

PLA: Dr. Philofelis, you owned and operated Tender Care in May 2021?

PHILOFELIS: Yes.

PLA: And you employed Rickie Lake as a veterinary assistant at the time?

PHILOFELIS: Yes, she had worked for me for five years at that time and by April 2021 had just been graduated with her Master of Science in Biology and Organic Chemistry.

PLA: She was not a licensed veterinary technician at any point she worked for you, correct?

PHILOFELIS: Right.

PLA: Nor a veterinarian?

PHILOFELIS: That's true.

PLA: On the date of the surgery you performed on Pyewacket, Lake administered premedications to Pyewacket?

PHILOFELIS: Yes.

PLA: Induced anesthesia for Pyewacket?

PHILOFELIS: Yes.

PLA: Intubated her?

PHILOFELIS: Yes.

PLA: Maintained and monitored anesthesia, including vitals and capnography?

PHILOFELIS: Yes.

PLA: But she was not legally permitted to perform those health care tasks as an unregistered veterinary assistant, was she?

DEF: Objection, calls for legal conclusion, foundation. Sidebar? (The attorneys speak out of earshot of jury.)

PLA: The Veterinary Board of Governors reprimanded Dr. Philofelis for precisely this in relation to Pyewacket, your Honor.

DEF: Further objection to counsel's disclosure of what the Board did or did not do as it is irrelevant, constitutes hearsay, and is not binding in these proceedings.

PLA: That's not the case. The Board's action has preclusive effect in these proceedings by settling a factual issue of whether Lake was lawfully allowed to perform the tasks she did. Furthermore, Dr. Philofelis signed a stipulation to informal disposition that admitted such facts, so it comes in as nonhearsay admission.

DEF: But none of this matters without evidence that those tasks proximately caused any harm to Pyewacket. Also, the board complaint never went to an adjudicative hearing but was resolved early on by stipulation. It was never actually litigated.

JUDGE: I am not convinced that the Board finding on an informal stipulation has any preclusive effect. But an admission of fact in another proceeding, not in response to a request for admission of fact under Civil Procedure Rule 36, mind you, but as part of an agreement terminating a regulatory matter, is a nonhearsay admission by party opponent. Even so, Plaintiff's counsel, to what end? I see this detail as nonprobative and prejudicial.

PLA: The willingness of Dr. Philofelis to knowingly use an unregistered assistant to perform tasks that he knew she was not permitted by law to perform shows astounding recklessness and is consistent with our theme of malpractice.

DEF: But it also constitutes improper 404 evidence. Plaintiff is not claiming Pyewacket suffered any injury due to what happened during surgery but, rather, what happened afterward when Dr. Philofelis prescribed Metacam. In this respect, anything that occurred prior to the prescription of the drug is a prior bad act that is not admissible under any of the exceptions of 404(b).

PLA: It shows a pattern of devil-may-care veterinary practice, your Honor.

JUDGE: But what about causation?

PLA: We have no evidence that having Lake perform those tasks caused any harm to Pyewacket, that is true.

JUDGE: I understand the desire of Plaintiff to introduce evidence that Dr. Philofelis had a pattern of making bad calls, but I struggle to see more than very minimal relevance and the risk of unfair prejudice. I do not believe 404 was intended to split temporal hairs in the fashion contemplated by defense counsel, so would overrule that objection. Here's what I will do. I will

allow the question but also give wide berth to Dr. Philofelis to explain in detail her answer. Dr. Philofelis, please do so.

PHILOFELIS: Yes, I understand now that Lake was not technically permitted to perform those tasks. But I will note that she had an advanced postbaccalaureate education, she was finishing her studies to become a licensed veterinary technician and was scheduled to sit for that exam in August 2021, which, by the way, she passed, and had five years of on-the-job training by me and my other employee, a licensed veterinary technician. More importantly, though, Pyewacket suffered no harm from that procedure or Lake's involvement. I was also supervising most of the time she was anywhere near her.

PLA: Having acknowledged your error, the Veterinary Board did admonish you?

PHILOFELIS: Yes, and I have already completed continuing education and paid a fine for my oversight. With COVID and undersupply of veterinary personnel, all veterinary practices are struggling to staff procedures and still handle the flood of patients in need. I am sorry this occurred and am glad she is now licensed.

PLA: You were graduated from veterinary school at Colorado State University in 2000?

PHILOFELIS: That's correct.

PLA: Early in your practice, nonsteroidal anti-inflammatory drugs, NSAIDs, for long-term in use in cats was unheard of?

PHILOFELIS: True.

PLA: Metacam, also known as meloxicam, is an NSAID that was approved for use in dogs by the Federal Drug Administration, in 2003?

PHILOFELIS: Yes. And we began using it as an very effective method of pain management for our canine patients.

PLA: But not feline patients, because it was not FDA approved.

PHILOFELIS: That's right, some years ago it was expressly allowed in its injectable form for cats.

PLA: A single injection, right?

PHILOFELIS: Yes.

PLA: On the date of surgery, you weighed Pyewacket at 15 pounds?

PHILOFELIS: Correct, 6.8 kilograms. She was a bit chunky. I gave her a body condition score of 8/9.

PLA: Her lean body mass, or ideal weight for her age would have been 10?

PHILOFELIS: That sounds right. She was an easy keeper Mr. Mfume said.

PLA: You administered her a subcutaneous injection of Metacam before you began surgery, but while she was sedated for intubation?

PHILOFELIS: I did, as part of her premed since it was a major surgical procedure and I did not want her to suffer postoperatively.

PLA: You gave her 1.7mg Metacam?

PHILOFELIS: Yes, or 0.25mg/kg. She weighed 6.8kg.

PLA: But you also prescribed and sent her home with oral Metacam?

PHILOFELIS: I did due to what was bound to be significant postoperative pain and inflammation.

PLA: And you directed that Mr. Mfume administer 0.65mg once a day for the next three days and then down to 0.15mg for the next three days?

PHILOFELIS: I decided to give her just under 0.1mg/kg for the three days postop and then 0.025mg/kg for the next three days.

PLA: What drug formulary did you rely upon to pick this dosage?

PHILOFELIS: Plumb's.

PLA: That's the veterinary drug handbook authored by veterinary pharmacologist Donald Plumb?

PHILOFELIS: Yes, but there are other formularies, such as on VIN or BSAVA.

PLA: I am showing you what has been previously stipulated for admission as Plaintiff's Exhibit 2. It is Plumb's 9th edition's tab for meloxicam. Do you recognize it?

PHILOFELIS: I do. We have a copy in our office.

PLA: But not in May 2021?

PHILOFELIS: No, I was using my 5th edition.

PLA: And it was the 5th edition you were looking at when you administered it to Pyewacket?

PHILOFELIS: That's right. I have such a busy practice, I did not think to update the formulary, as they rarely change between editions and I had used meloxicam successfully in cats without casualty for nearly a decade.

PLA: So, your 5th edition did not include a bold note discussing how the drug sponsor and FDA issued a warning saying "**Repeated use of meloxicam in cats has been associated with acute renal failure and death. Do not administer additional doses of injectable or oral meloxicam to cats.**"

PHILOFELIS: No, it did not.

PLA: Nor did it include the section on Contraindications/Precautions/Warnings saying, “The manufacturer warns that additional doses of meloxicam or other NSAIDs are contraindicated, as no safe dose for repeated NSAID administration has been established.”

PHILOFELIS: No.

PLA: Nor that, “Preoperative use in cats undergoing major surgery, in which hypotensive episodes are possible, may result in a higher risk of renal damage.”

PHILOFELIS: No.

PLA: Even so, the 9th edition says it is FDA approved to give only a single subcutaneous injection of Metacam in cats no more than 0.3 mg/kg, right?

PHILOFELIS: That’s what it says.

PLA: But you gave oral meloxicam after the injection?

PHILOFELIS: Yes.

PLA: You say you gave 0.65mg for 3 days, after the injection at 0.25mg/kg. But even Plumb’s 9th says not to give more than 0.05mg/kg for four days following an initial injection. You agree that 0.05mg/kg for a cat weighing 6.8kg is 0.34 mg, not 0.65 mg?

PHILOFELIS: Yes, that sounds like a correct calculation.

PLA: You also sent Mr. Mfume home with the higher concentration formulation of meloxicam, i.e., 1.5mg/ml vs. 0.5mg/ml?

PHILOFELIS: That’s all we had.

PLA: So, if you advised her to give Pyewacket 0.65mg on days 2-4, that would mean she had to draw up about four-tenths of a cc?

PHILOFELIS: Right.

PLA: That’s a really tiny amount, no?

PHILOFELIS: In a 3ml syringe, yes, but we give 1ml syringes.

PLA: Yet even a slight error of one-tenth of a cc could mean she gets an additional 0.15mg, right?

PHILOFELIS: Yes.

PLA: And when you prescribed 0.15mg for days 4-6, that was the equivalent of one-tenth of one cc, or nearly just a hub of the syringe?

PHILOFELIS: Yes, hardly anything.

PLA: But, again, room for error. And this is all based on a weight of 15 pounds, not lean body weight of 10 pounds?

PHILOFELIS: True.

PLA: So, you were giving her a dose that included her body fat, but that's not standard of care, is it?

PHILOFELIS: It is how I was trained. We do not adjust for lean body weight.

PLA: But, if you did, you would have given her less of the drug?

PHILOFELIS: Right. A cat weighing 4.5 kg would have received a 1.13mg injection instead of 1.65mg and I would have prescribed 0.45mg for days 2-4 instead of 0.45mg, and 0.13mg for days 5-7 instead of 0.11mg.

PLA: You never checked her kidney function before you administered the metacam, did you?

PHILOFELIS: No, but the humane society ran bloodwork on her about a month prior and it was normal. During surgery we also did a cystocentesis and pulled urine for analysis and she was concentrating fine, so I was not worried about her ability to handle the drug.

PLA: How old was she at the time of the procedure?

PHILOFELIS: I believe she was four months old.

PLA: And who charted her breed?

PHILOFELIS: I did. She was large for her age and a little on the heavy side, and had markings of a Bengal, so I assumed she was one.

PLA: But nobody told you she was?

PHILOFELIS: The humane society paperwork listed her as a Bengal cross, so that supported my finding.

PLA: No further questions.

JUDGE: Defense?

CROSS-EXAMINATION OF AMELIA PHILOFELIS, DVM, DABVP

DEF: Dr. Philofelis, you were graduated at the top of your class at CSU?

PHILOFELIS: Yes, I was.

DEF: And you are boarded?

PHILOFELIS: Yes, I am a diplomate of the American Board of Veterinary Practitioners with a focus on small animal medicine.

DEF: What does that mean compared to a general practitioner?

PHILOFELIS: I sat for boards to become certified as having knowledge and expertise beyond general practice, as recognized by my peers and the American Veterinary Medical Association.

DEF: Prior to this incident, were you ever subject to discipline?

PHILOFELIS: No, and this case did not result in any finding of malpractice by me.

PLA: Objection, irrelevant, hearsay, and motion to strike. Sidebar please (The attorneys speak out of earshot of the jury.) That the Board did not discipline Dr. Philofelis relative to the Metacam is not admissible in this proceeding. There is no defensive collateral estoppel because Mr. Mfume was never a party to that administrative inquiry. Furthermore, the standard of proof in a veterinary disciplinary proceeding is clear and convincing, not preponderance, which is the operative standard here. Finally, that a third party chooses not to act is irrelevant to whether my client has a right to do so and whether the jury will conclude he has proved the elements of his case. I ask that her answer be stricken.

DEF: I agree to the disparate standards, but counsel opened the door by asking the doctor to speak to the veterinary board action taken against her relative to Ms. Lake. It is only fair that a jury know the full extent of action taken or not taken by the board.

JUDGE: Overruled, but I will advise the jury that they are not bound by any decision of the vet board. Ladies and gentlemen of the jury, Dr. Philofelis has testified that the vet board did not find Dr. Philofelis committed malpractice. You are not to consider that determination as evidence of her having no fault in this case. The veterinary board is not here to explain its reasoning. It is not a party to this case, nor was Mr. Mfume a party to their inquiry. Further, the standard of proof is much higher when a vet board seeks to take action against a veterinarian's license. The standard here is preponderance, which is a lower standard, so while the vet board did not allege malpractice based on a clear and convincing standard, we all would just be guessing, which we cannot do, if they were to find that she did commit malpractice based on a more likely than not standard. That is for you, and you alone, to decide.

DEF: You've used Metacam in cats for over a decade without harm?

PHILOFELIS: I've never seen or heard of an adverse outcome for the drug in my cases.

DEF: Why didn't you use the 9th edition of Plumb's?

PHILOFELIS: Plumb's is a guide, not the law. As a veterinarian, I am expected to consider various authorities but am not obligated to do so. I am also a boarded practitioner with additional experience who has taken into account not only the signalment of the animal, and her health status, but also anecdotal and personal administration of the drug, mindful of the costs and benefits.

DEF: Do you have an opinion as to whether you committed malpractice?

PLA: Objection, in discovery, Dr. Philofelis was never disclosed as an expert witness.

DEF: Your Honor, must I really? Dr. Philofelis was sued as a veterinarian, alleging malpractice in the practice thereof. She clearly has a right to defend herself, and in deposition, Plaintiff's counsel interrogated her at length about standards of care.

JUDGE: Overruled, but, counsel, you need to follow the rules. I will allow Dr. Philofelis to opine only on such matters as broached in deposition or written discovery. Please answer.

PHILOFELIS: Yes.

DEF: What is it?

PHILOFELIS: In my expert opinion as a boarded veterinary practitioner in practice over two decades and having run a small animal practice for nearly that same duration, I state with reasonable medical certainty that not only did I not violate the standard of care, but I did not cause any harm to Pyewacket in the course of performing the orthopedic surgery or prescribing Metacam.

DEF: Do you believe anyone did?

PLA: Objection, Dr. Philofelis never offered an opinion as to third party liability.

DEF: That is true, your Honor, but we did put plaintiff on notice of an empty chair, PinkPearl.

JUDGE: Did you disclose an opinion of Dr. Philofelis as to PinkPearl?

DEF: No.

JUDGE: Sustained.

DEF: What are the reasons you believe you did not commit malpractice?

PHILOFELIS: Well, for one, there was no necropsy performed, so we do not know with scientific certainty the cause of Pyewacket's death.

DEF: Anything else?

PHILOFELIS: I committed no surgical error and the dose I administered for postoperative pain management was well within parameters that have been evolving for decades. I am unaware of any studies that have indicated prescribing even slightly over the dosage recommended by Plumb's caused an appreciable risk of harm beyond the normal risks of the drug—which I took into account by confirming Pyewacket's kidneys were functioning well based on blood work and urinalysis.

DEF: Anything else?

PHILOFELIS: My clinic is AAHA certified, meaning we have voluntarily demonstrated compliance with a higher standard of care recognized nationally. It is a rigorous process and I believe it reflects quality and competency. Oh, and the vet board never did discipline me or accuse me of malpractice.

JUDGE: As to the last comment, I remind the jury of the limiting instruction given previously as to the relevance, if any, of the veterinary board actions or inactions.

DEF: Doctor, did you provide warnings about the drug to Mr. Mfume?

PHILOFELIS: I certainly did. The vial had a label indicating in bold caps, “**MONITOR FOR LETHARGY, VOMITING, AND DIARRHEA. DISCONTINUE IMMEDIATELY IF ANY SUCH SIGNS ARE OBSERVED.**”

DEF: Did you convey this orally to him as well?

PHILOFELIS: No, but my veterinary medication clerk would have, in addition to showing him how to draw up the medication.

PLA: Objection, hearsay. Move to strike comments about what clerk allegedly said.

JUDGE: Sustained. Ladies and gentlemen of the jury, you will disregard what the clerk allegedly told Mr. Mfume.

DEF: Do you train your employees, particularly, your veterinary medication clerks, to go over the label warnings at the time the drug is delivered to the client?

PHILOFELIS: Yes, it is standard procedure.

DEF: Did Mr. Mfume stop the drug when he should have?

PHILOFELIS: No, unfortunately. He should have stopped on day 2 when he noticed nausea. Or at least called my clinic for direction.

DEF: Did he?

PHILOFELIS: Again, sadly, no.

DEF: No further questions.

JUDGE: Plaintiff’s counsel, the witness is yours.

REDIRECT OF AMELIA PHILOFELIS, DVM, DABVP

PLA: AAHA... Sounds like an epiphany. Might as well be called “Eureka,” ...

DEF: Objection, argumentative,...

PLA: Withdrawn. Dr. Philofelis, are you familiar with the Anesthesia Standards of AAHA?

PHILOFELIS: There are numerous standards, relative to anesthesia and virtually all aspects of veterinary practice. But I cannot recite them from memory.

PLA: Let me help you. Do you recognize that AAHA Anesthesia Standard AN04.1 requires that only credentialed veterinary technicians are used to induce and maintain anesthesia and sedation in collaboration with and under supervision of the veterinarian?

DEF: Objection, relevance. This is a reprise of the issue raised before about using Ms. Lake.

JUDGE: Counsel, how is this relevant?

PLA: Dr. Philofelis just got done telling the jury how he is held to a higher standard imposed by AAHA, signaling quality and competency. I wish to impeach his assertions in that regard, which also will impact the basis for her opinion she did not commit malpractice.

JUDGE: Overruled. Proceed.

PHILOFELIS: I'll take your word for it.

PLA: But you did not comply with AN04.1 in Pyewacket's case, did you?

PHILOFELIS: No, but it caused no....

PLA: Objection, nonresponsive.

JUDGE: Dr. Philofelis, just answer the question.

PHILOFELIS: No.

PLA: The same can be said for AAHA Patient Care Standard PC16.2, requiring that only credentialed team members who graduated from an AVMA accredited program and passed national and/or state and provincial board exams are distinguished by the title "technician," right?

PHILOFELIS: Right.

PLA: The anesthesia record for Pyewacket fails to comply with AAHA Anesthesia Standards AN20.2 and AN21.1, concerning interval charting of vital signs, capnography, and more?

PHILOFELIS: Well, I would have to see it.

PLA: I can show it to you if you wish, but we discussed this in deposition. Do you remember?

PHILOFELIS: Yes, I do.

PLA: And Ms. Lake failed to chart Pyewacket's heart rate, respiratory rate, end tidal CO₂, SpO₂, temperature, blood pressure, and more during the entire period of anesthesia, isn't that right?

DEF: Objection, and motion to strike. None of this affected Pyewacket in the slightest. At best it is a recordkeeping error.

PLA: Impeachment, your Honor.

JUDGE: Overruled.

PHILOFELIS: Ms. Lake was relying on our SurgiVet monitor to record all vitals at five-minute intervals, but it malfunctioned and nothing was recorded. She was watching the patient at all times and paying attention to any alarms or warnings, but none was flagged.

PLA: Let's talk about Metacam again. You used Plumb's 5th edition. I am showing you what has been previously admitted as Plaintiff's Exhibit 3, the tab for Metacam in Plumb's 5th. Do you recognize this?

PHILOFELIS: I do. This is what I had at my practice the day I prescribed it.

PLA: And it is customary for veterinarians, including boarded ones, like yourself, to rely upon Plumb's as part of making drug selection and administration decisions?

PHILOFELIS: Yes, one of many formularies.

PLA: You consider it an authoritative source among veterinarians?

PHILOFELIS: I do.

PLA: Do you maintain that you complied with the outdated 5th edition dosages?

PHILOFELIS: More or less. Remember, this is not law, but suggestion.

PLA: According to the edition you used, you agree that for surgical pain, a cat should get 0.2 mg/kg (or less) by mouth or subcutaneously once, then 0.1 mg/kg (or less) subcutaneous or by mouth for no more than 3-4 days?

PHILOFELIS: That is one option. But it also allows for chronic pain an additional regimen of 0.025 mg/kg by mouth 2-3 times a week after day 5.

PLA: With the restriction of no more than 0.1mg maximum dose per cat, right?

PHILOFELIS: That's what this guideline says.

PLA: As I recall, you injected 1.7mg, then prescribed 0.65mg for 3 days by mouth, and 0.15mg for 3 more days by mouth.

PHILOFELIS: Yes, and she weighed 6.8kg, so following Plumb's 5th, she could have received 1.36mg injection on day one, and then 0.68mg for the next three days by mouth, and then 0.17mg every 2-3 days.

PLA: So, by that logic, you gave too much on day 1 and too much on days 5-7?

PHILOFELIS: Well, only very slightly – 1.7mg vs. 1.36mg on day 1 and I actually gave less on days 4-6 – 0.15mg v. 0.17mg.

PLA: But doesn't Plumb's 5th say 0.17mg every 2-3 days? Which averages out to about 0.05 to 0.09mg per day? So you were giving her 2-3 times as much?

PHILOFELIS: If she had taken it through day 6 you would be right, but she stopped on day 5.

PLA: And doesn't it also cap a max dose at 0.1mg, so your giving 0.15mg was still to high, even if every 2-3 days?

PHILOFELIS: You got me. Yes, we're talking about an infinitesimally small dose.

PLA: Of course, that's a calculation based on actual, not lean, body weight. Shouldn't you have dosed her based on lean body mass?

PHILOFELIS: No, there is nothing in Plumb's even talking about that.

PLA: But it is discussed in the article referenced in the warning section of Plumb's 9th, right? I'm referring to the *ISFM and AAFP Consensus Guidelines: Long-Term Use of NSAIDs in Cats*, which was published back in 2010.

DEF: Objection, hearsay.

PLA: Your Honor, Dr. Philofelis has given an expert opinion in this matter and confirmed it is customary for veterinarians in his field to rely upon Plumb's. Plumb's references the ISFM Guidelines. This comes in under Rule 704.

JUDGE: Well, you have commandeered him as your own expert, it seems. Are you sure that is what you want to be doing?

PLA: He is certainly not my expert, but he is offering expert opinions, and relies upon Plumb's as an authoritative resource. If he is not familiar with this learned treatise, I can offer it.

JUDGE: Not sure you've laid the foundation.

PLA: Dr. Philofelis, have you read the *ISFM Guidelines* of 2010?

PHILOFELIS: I doubt it.

PLA: So, you can neither confirm nor refute that they say, "In overweight or obese cats, it is prudent to calculate initial doses for NSAIDs according to their lean or ideal bodyweight"?

DEF: Objection, hearsay, move to strike.

PLA: Learned treatise exception.

JUDGE: I've reviewed the treatise and agree it falls within the exception, and it comes in under 704, albeit obliquely. Overruled. Please answer. But the treatise itself cannot be admitted.

PHILOFELIS: No, I cannot.

PLA: Do you profess no familiarity with any veterinary standard that advises to adjust the dose to lean body mass?

PHILOFELIS: Sure, some practitioners are overcautious and do so.

PLA: But not you?

PHILOFELIS: No, and not even the manufacturer says to dose to lean body weight.

PLA: Well, the manufacturer does not even advise to give to cats, does it?

PHILOFELIS: Touché.

PLA: The warning you gave to Mr. Mfume was on the label only, meaning there was no handout given to him?

PHILOFELIS: Correct, but my clerk was trained, and expected, to walk him through those details.

PLA: The Client Information Sheet for Metacam, which I am showing you as previously admitted Plaintiff's Exhibit 4, did you or your clerk give that to him?

PHILOFELIS: No, it would have just created confusion because it only pertains to dogs.

PLA: But it does warn, "Do not use Metacam Oral Suspension in cats. Acute renal failure and death have been associated with the use of meloxicam in cats," doesn't it? In bold even?

PHILOFELIS: Yes, it does, but as we have discussed, it is customary among American and European veterinarians to engage in off-label use of this drug in cats. The FDA has expressly approved it for single injection at 0.3 mg/kg.

PLA: But why deprive Mr. Mfume of a sheet that even the FDA indicated should be included in all client communications?

PHILOFELIS: Again, it is not a legal requirement to deliver the Client Information Sheet or package insert, especially when my own pharmacy has drawn up the medication into a vial that we have labeled with specific instructions of administration. We did not just sell the drug in a box taking it right off the shelf.

PLA: You concede the FDA warning echoes the package insert warning?

PHILOFELIS: I do, but I had no reason to believe it would harm Pyewacket, and gave instructions that Mr. Mfume disregarded.

PLA: Well, but did he? You never mentioned nausea.

PHILOFELIS: Nausea goes hand in hand with vomiting.

PLA: No further questions.

JUDGE: Next witness?

DIRECT EXAMINATION OF REINA VULPES, DVM, DACVIM

PLA: I call Dr. Reina Vulpes.

JUDGE: The doctor has been sworn. Proceed.

PLA: What type of veterinarian are you?

VULPES: I am a boarded veterinary internist, meaning I have a Doctor of Veterinary Medicine, completed a veterinary internship and 3-year veterinary residency, and passed the boards to become a Diplomate of the American College of Veterinary Internal Medicine.

PLA: How long have you practiced?

VULPES: Ten years.

PLA: From what school were you graduated?

VULPES: Ross University.

PLA: Where did you do your internship and residency?

VULPES: I did my internship at West Los Angeles Veterinary Medical Group, one of the largest practices in the United States, and a residency at the University of California–Davis.

PLA: Are you familiar with the case of Pyewacket?

VULPES: I am, having reviewed the Complaint, Answer, depositions of Dr. Philofelis and Mr. Mfume, and complete medical records of Pyewacket at Tender Care and PinkPearl.

PLA: Do you possess opinions on the standard of care in this matter?

DEF: Objection, foundation. Dr. Vulpes is not licensed to practice in Utopia.

PLA: True. May I voir dire the witness to lay foundation?

JUDGE: Go ahead.

PLA: Dr. Vulpes, where are you licensed?

VULPES: The States of Dystopia, Serenity, and Nihilism. Not Utopia.

PLA: So how can you say anything about practicing in Utopia?

VULPES: Cat physiology and anatomy are the same in Utopia as in Dystopia. Pharmacological effects of Metacam are the same in all States. The laws of physics, chemistry, and biology do not change across State lines. And the standard of practice is the same across States, for we all take the same national exam and go to national veterinary schools.

PLA: Are you familiar with the Utopia veterinary practice act?

VULPES: Yes, it's much the same.

JUDGE: I believe an adequate foundation has been laid, but will give defense a chance to inquire.

DEF: Thank you, Your Honor. But Dr. Vulpes, there is no reciprocity between Utopia or any of the States in which you are licensed, right?

VULPES: Correct.

DEF: And Utopia in fact adheres to a lower standard of care than other States in certain respects, doesn't it?

VULPES: Sure, it allows veterinary technicians to, for instance, do dental extractions, but not so in most of the country. It also does not require training in pain management or charting when a client declines a recommended diagnostic, treatment, or referral. But none of that matters here.

DEF: You are boarded as an internist, so aren't you applying a higher standard than that of a general practitioner?

VULPES: No, not in this case. But I'll note that Dr. Philofelis is boarded, although the ABVP is not at all the same as the ACVIM.

DEF: How so?

VULPES: To become a diplomate of the ABVP requires taking boards, to be sure, but you do not have to be residency trained and it is not as rigorous. Further, it boards you as a "veterinary practitioner," but that does not make you a veterinary internist, oncologist, surgeon, cardiologist, etc.

JUDGE: I'm going to overrule the objection. He can testify. Please answer counsel's question about whether you have an opinion to offer, and what it is.

VULPES: Yes. On a more probable than not basis, I find that Dr. Philofelis and Tender Care Animal Hospital proximately caused renal failure in Pyewacket, requiring her euthanasia. Specifically, Dr. Philofelis prescribed an overdose of Metacam and gave insufficient warnings about the nephrotoxic drug.

PLA: What is the foundation for your opinions?

VULPES: The Boehringer Ingelheim drug insert, FDA Client Information Sheet, Plumb's 9th edition, the *ISFM Consensus Guidelines*, and resources from the Veterinary Information Network, a clearinghouse of information for veterinarians around the world, with boards moderated by experts like myself answering questions from practitioners.

PLA: Do you disagree with Dr. Philofelis that the dose he prescribed was close enough to be sufficiently in compliance with the standard of care?

VULPES: Respectfully, I do not. You've heard the saying "close only counts in horseshoes and hand grenades"? Well, Metacam is neither. You don't have to be exacting when it comes to certain modalities of treatment because of a very high margin of safety, or tolerance for high or low doses without causing any significant adverse impact. But Metacam has an extremely low

margin of safety. Coupled with the highly concentrated form of the drug given—1.5 mg/ml vs. 0.5 mg/ml—the risk of an erroneously excessive dose is increased in the hands of a lay owner who may not understand how to draw up drugs in a syringe with precision.

PLA: Should the practitioner exceed the limits set by drug formularies?

VULPES: Unless one possesses an astounding arrogance, why? These formularies are prepared by veterinary pharmacologists with extensive experience, drawing from scientific studies and peer-reviewed journals that guide the practitioner to titrate to the lowest effective dose without unnecessarily jeopardizing patient safety. It would be one thing if this drug were approved for all indications in cats, but the FDA has not approved it except in a very limited case of a single injection before surgery. Who are we to second-guess the FDA?

PLA: How do you know the drug caused her death?

VULPES: Labs taken the day she was euthanized showed her creatinine and BUN so high as to be unmeasurable. Urine taken from her bladder by sterile cystocentesis revealed high levels of protein in her urine and an extremely low specific gravity of 1.002.

PLA: What is the significance of 1.002?

VULPES: Water has a specific gravity of 1.000 and is clear. It weighs 1 gram per cc. Very dark urine, or cloudy urine, has a lot of “stuff,” if you will, besides water. It also increases the density or weight of the liquid. If your kidneys are functioning properly, they are processing toxins and helping excrete them in your urine, which changes the color from clear to yellow or otherwise. The darker the urine, the more concentrated it is, the heavier its specific gravity, and evidence they are functioning properly. 1.002 is virtually the same as water. It is too low. That, coupled with off the chart kidney enzymes taken from her blood, and the abdominal ultrasound showing her kidneys had shrunk to nearly half their size, are all the evidence one needs to show kidney failure.

PLA: Thank you, no further questions.

CROSS-EXAMINATION OF REINA VULPES, DVM, DACVIM

DEF: Doesn't a necropsy tell us, without guessing, why an animal died?

VULPES: It is a post-mortem tool that provides medical evidence of cause of death, true. But it is not dispositive.

DEF: There was no necropsy of Pyewacket, was there?

VULPES: No, there wasn't.

DEF: That's an important piece of information missing, right? Like asking why a person died without conducting an autopsy?

VULPES: Again, it is a piece of evidence.

DEF: One that tells you about each of an animal's organs, looks for occult conditions, masses, deformities, lesions, and more, right? And in the case of histopathology, takes a look at tissues under a microscope to examine disease processes and more, no?

VULPES: True, it can do all of that.

DEF: So you have no idea if she had an occult heart condition, a cardiomyopathy, that may have claimed her life regardless, no?

VULPES: The physical exams performed by Drs. Philofelis and Dr. Bhavatu of PinkPearl indicated they auscultated no heart murmur.

DEF: What about her epilepsy? Perhaps it was from a brain tumor that could have occupied so much space in her skull as to cause seizures? Perhaps it was inoperable?

VULPES: That is true, but her epilepsy was likely not due to a brain tumor, not at her age.

DEF: Or her odd weight gain? 15 pounds for a 4 month old cat is a sign of a metabolic condition?

VULPES: We could go around all day long exploring each of her body systems and try to come up with a number of alternative conditions that might, someday, if left untreated, cause illness or death. But the medical evidence that we do have points strongly toward the only incriminating variable—Metacam, which is known to cause acute renal failure, which is precisely what happened to Pyewacket.

DEF: Agree that she would have lived if the drug were stopped even two days sooner?

VULPES: Probably yes.

DEF: Agree that even if she got the maximum dose stated in Plumb's 9th edition, she still could have suffered acute kidney failure?

PLA: Objection, calls for speculation, assumes facts not in evidence.

DEF: Your Honor, I am merely trying to explore whether a slightly lower dose would have carried substantially the same risk of harm as the dose actually given. It goes to causation.

JUDGE: Plaintiff has the burden of proving that the dose actually given and prescribed fell below standard of care and proximately caused kidney failure and death, not that a lower dose did so. I do want to hear the answer to this question on sidebar and then rule. Dr. Vulpes, please answer.

VULPES: It is possible.

JUDGE: More likely than not?

VULPES: I would not say so. But I suppose 1 cat in a thousand, or 1 in 10,000, could have an acutely negative reaction even to a dose within the off-label range set by Plumb's or other formularies.

JUDGE: This is a tough call but I am going to permit the testimony. I believe it goes to weight of the evidence and helps elucidate the opinions in this case. Dr. Vulpes, please repeat your answer for the jury.

VULPES: Yes, it is possible that a rare cat could have acute kidney failure from a “normal” dose. But I would not say it is probable. It is probable that an overdose, like the one given in Pyewacket’s case, would do so.

DEF: You were recently convicted of a felony, weren’t you?

PLA: Objection, rules 401-403, 609. Sidebar. (Attorneys approach out of earshot of jury.)

JUDGE: Counsel, you better have an extremely good reason for this or I’ll call a mistrial.

DEF: Your honor, goes to impeachment. A abusive veterinarian raises questions about the legitimacy of any opinion given by her.

JUDGE: Make an offer of proof.

DEF: Dr. Vulpes recently was convicted of felony animal cruelty in the State of Discordia. The charge was based on physically abusing a patient under her care, stabbing a dog in the leg with a syringe in anger when the dog would not calmly sit for restraint during a blood draw.

JUDGE: Why did you not bring this up sooner?

DEF: She was tried just last week.

JUDGE: I’m sorry, Plaintiff’s counsel, but Rule 609 clearly lets this come in under 609. However, there is the question of unfair prejudice. Please speak to this.

PLA: Even if admissible under 609 and marginally relevant, Dr. Vulpes’s violent reaction to a noncompliant patient does not remotely speak to her knowledge of Metacam’s pharmacology, pharmacokinetics, indications, contraindications, etc. The risk is that the jury will disregard all her opinions because they hate what she did to a dog, which is not a proper reason.

DEF: Plaintiff called this witness, warts and all. I understand she may lose her license, which is another area I would ask about given the pending board complaint arising from the same incident. This is classic impeachment.

JUDGE: It’s a close call. Overruled. Dr. Vulpes, please answer.

VULPES: It is true, I was convicted of abuse of a canine patient who attacked me and my staff during a blood draw. The dog was a pit bull terrier confiscated from a dog fighting ring and used to kill bait dogs and cats over many years. I was asked to draw blood on this dog and give an opinion on whether methamphetamine and other drugs were used to dope up the dog for an upcoming fight. I used the syringe in self-defense and defense of my technician while about to draw blood.

DEF: But the jury did not buy the self-defense did they?

VULPES: Sadly, not. I will admit I was terrified and angered. I am in the process of appealing.

DEF: You are charging \$850 an hour for your testimony and case review?

VULPES: Yes.

DEF: How many hours have you put in on this case to date?

VULPES: Fifteen hours.

DEF: Could Pyewacket have been saved if PinkPearl had not discharged Pyewacket to home the day before euthanasia?

VULPES: Possibly.

DEF: In fact, her chance of survival could have risen from less than 50% to more than 50%, agreed?

VULPES: Each day without intensive fluid therapy, kidney support medications, a proper diet, and even diuresis increases the possibility of an irreversible situation. While I cannot fix a percentage, I would agree that her chance of survival was greater the day before she died.

DEF: And would you not agree that it was completely irresponsible to not even have her seen by a veterinarian, a physical exam done, or blood work or urinalysis even offered?

VULPES: You packed in a lot there, but I would agree that PinkPearl dropped the ball. I get running a busy ER in COVID times can be harrowing and you want to offer some support for every patient and client. But just as Dr. Philofelis should not have had Ms. Lake perform tasks that only a licensed veterinary technician could, it was inappropriate for PinkPearl to rely on a licensed veterinary technician to make diagnostic and prognostic decisions that only a veterinarian should.

DEF: Lastly, you cannot assign odds to the risk of acute renal failure based on administering, say, 10% more than the maximum dose recommended by Plumb's, versus, say, 100% more, or 200% more, can you?

VULPES: No, I have no such data and NSAID toxicity studies on cats have, of course, ethical limitations as it would be cruel to subject animals to experimentation even in the name of science to help that species.

DEF: Nothing further.

JUDGE: Redirect?

REDIRECT EXAMINATION OF REINA VULPES, DVM, DACVIM

PLA: Yes, although you were convicted of animal cruelty, did it result in your termination?

VULPES: No, my employer understood completely and has supported me.

PLA: And I understand that, though a felony, the prosecutor in the case has not asked for a day of jail time or a fine, but has even recommended a purging condition?

VULPES: Yes, this was a private prosecution by the owner of the dog I stabbed, who himself is facing a dogfighting charge. He pursued that case, in my opinion, to bolster his civil suit against the city and all officers who executed the warrant based on allegedly unconstitutional affidavits used to procure the warrant. The public prosecutor refused to charge the case, so the dog owner pursued it on his own based on a relatively underutilized statute.

PLA: So, to be clear, the State did not want to charge you.

VULPES: Correct. But the judge, who blindly advocates for all pit bulls and thinks they can never do any wrong, disregarded the separation of powers argument of the prosecutor and let the owner privately try me.

PLA: But he cannot recommend sentencing, can he?

VULPES: Alas, he can. But the public prosecutor has urged for no jail or fine. Rather, the prosecutor asked that I be allowed to purge the conviction by participating in an animal cruelty training of the city's officers.

PLA: You said you were appealing?

VULPES: Yes, challenging the constitutionality of the entire fiasco. I am optimistic it will be thrown out. And, by the way, the dog is fine. The needle was only about 1" long and went into mostly fat. The only reason any of this came to light was because the owner was also in the room to "observe" and was infuriated at my touching his dog in the first place.

PLA: Is it your opinion, stated to a degree of reasonable medical certainty, that Pyewacket would never have needed to be seen at PinkPearl had Dr. Philofelis prescribed the appropriate dose of Metacam and gave proper warnings?

VULPES: It is.

PLA: Oh, what percentage of your annual earnings comes from testifying as an expert?

VULPES: Probably 2%, if that.

PLA: Thank you, nothing further.

RE-CROSS EXAMINATION OF REINA VULPES, DVM, DACVIM

DEF: Your Honor, briefly?

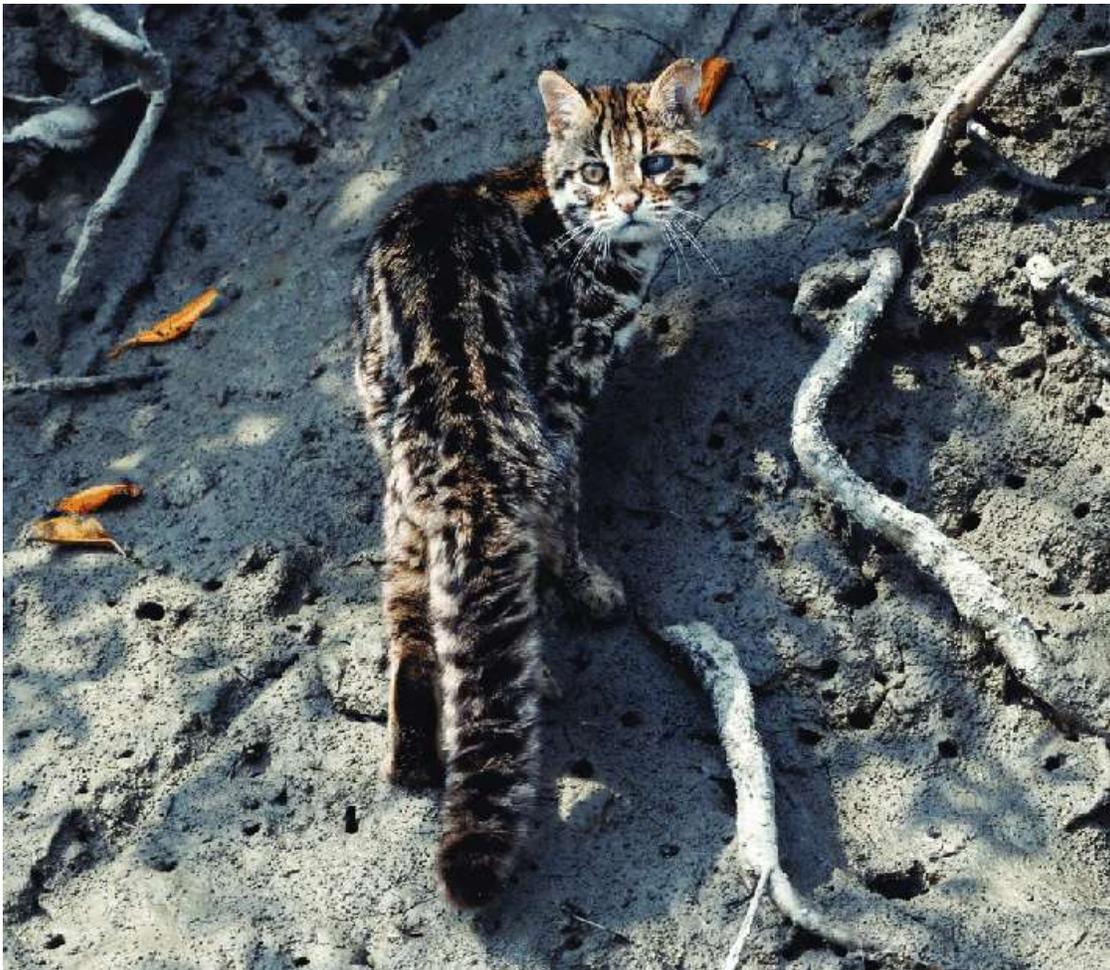
JUDGE: Yes.

DEF: And Doctor, it is also your opinion to the same degree of certainty, that Pyewacket never would have needed to be seen at PinkPearl had the drug been stopped even two days earlier?

VULPES: It is.

DEF: Nothing further.
JUDGE: Any other witnesses?
PLA: No, we rest.
JUDGE: Defense?
DEF: None. We rest.
JUDGE: That concludes trial testimony. Closing arguments will follow after recess.

EXHIBITS
PLAINTIFF'S 1



PLAINTIFF'S 2-4 (ATTACHED)

JURY INSTRUCTIONS

INSTRUCTION NO. 1 PRE-TESTIMONY INTRODUCTION OF ISSUES

This is a civil case brought by plaintiff Charles Mfume against defendants Tender Care Animal Hospital, P.C. and Amelia Philofelis, DVM. This case arises out of treatment of Mfume's cat Pyewacket by Defendants and her subsequent death days later. The plaintiff claims damages for the intrinsic value of his cat as well as out of pocket expenses. Defendants deny liability and damages but note that if anyone is at fault, it is Plaintiff and other entities or persons not named in the lawsuit. Defendants admit that all of Tender Care's employees who were handling or treating Pyewacket or interacting with Mfume were acting within the scope of their employment. Defendants also maintain that if found liable, Pyewacket had a market or replacement value. Accordingly, if you find that an individual employee of Tender Care was liable, then that liability will be imputed to Tender Care as the employer.

In determining the damages to be awarded to the plaintiff, should you find Defendants liable, it will be up to you to determine whether her value is measured by market value, replacement value, intrinsic value, or something in-between. The court also has found that loss of use or companionship, while not independently recoverable, may be considered in determining the measure of damages for the value of Pyewacket. As noted earlier, emotional distress damages are not permitted, but may inform your valuation of Pyewacket.

Defendants also have identified PinkPearl as an empty chair, meaning that they are allocating fault to PinkPearl, if you find anyone at fault, for Pyewacket's death or reduced chance of survival. You do not have to allocate fault to anyone, including a nonparty like PinkPearl, but may do so if persuaded that PinkPearl is at fault in any degree.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify before you, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. Although the lawyers frequently will make reference to the evidence and the law, their statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is the law as I give it to you. You must disregard anything the lawyers say that

is at odds with the evidence or the law as I give it to you.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called, "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law as I give it to you, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from me to the facts and in this way decide the case.

In this courtroom we record all proceedings with a special audio recording system. All of the proceedings are preserved to create a "court record."

At this time, I would like to introduce you to the court reporter who will record everything that is said or done in this courtroom during this trial. The reporter is responsible for recording these proceedings accurately. What is transcribed is referred to as the "record."

I [also] would like to introduce you to the court clerk and the bailiff. The job of the court clerk is to keep track of all documents and exhibits and to make a record of rulings made during the trial. The bailiff keeps the trial running smoothly. You will be in the care of the bailiff throughout this trial. This person will help you with any problems you may have related to jury service. Please follow any instructions that given to you.

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You then will deliberate in order to reach a decision, which is called a “verdict.” Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, the Internet, and radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult any reference materials, such as dictionaries and the like. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, you may review your own notes but may not share or discuss them with other jurors until you begin deliberating. At the end of the day, the note pads must be left with the bailiff and destroyed immediately after rendering the verdict. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am

allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You also are not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

INSTRUCTION NO. 2 DIRECT AND CIRCUMSTANTIAL EVIDENCE

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstances evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3 BURDEN OF PROOF – NEGLIGENCE

In connection with the plaintiff's claims of injury resulting from negligence, the plaintiff has the burden of proving each of the following propositions:

First, that the defendant failed to follow the applicable standard of care and therefore was negligent;

Second, that the plaintiff was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

“Injury,” as used here, means reduced chance of survival or death to Pyewacket, as well as economic damages arising from the alleged negligent injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

**INSTRUCTION NO. 4
STANDARD OF PROOF - PREPONDERANCE**

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

Plaintiff has the burden of proving negligence by a preponderance of the evidence.

Defendants have the burden of proving negligence of the Plaintiff or any other entity or person who is not a party to the lawsuit by a preponderance of the evidence.

**INSTRUCTION NO. 5
EXPERT TESTIMONY**

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness. You also may consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

**INSTRUCTION NO. 6
NEGLIGENCE – GENERAL HEALTH CARE PROVIDER**

A veterinarian owes to the patient a duty to comply with the standard of care for the profession or class to which he or she belongs.

A veterinarian has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent veterinarian in the State of Utopia acting in the same or similar circumstances at the time of the care or treatment in question.

Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

INSTRUCTION NO. 7
NEGLIGENCE – SPECIALIST HEALTH CARE PROVIDER

A health care professional owes to the patient a duty to comply with the standard of care for the profession or class to which he or she belongs.

A veterinarian who holds himself or herself out as a specialist in veterinary medicine or surgery assumes the care or treatment of a condition that is ordinarily treated by a specialist has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent specialist in the State of Utopia acting in the same or similar circumstances at the time of the care or treatment in question.

Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

INSTRUCTION NO. 8
PROXIMATE CAUSE

The term “proximate cause” means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

INSTRUCTION NO. 9
BURDEN OF PROOF – INFORMED CONSENT – HEALTH CARE PROVIDER

In connection with the plaintiff's claim of injury as a result of the failure to obtain the patient's informed consent to the treatment undertaken, the plaintiff has the burden of proving each of the following propositions:

First, that the defendant failed to inform the patient of a material fact or facts relating to the treatment;

Second, that the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

Third, that a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; and

Fourth, that the treatment in question was a proximate cause of injury to the patient.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

Lack of informed consent is regarded as a type of negligence.

INSTRUCTION NO. 10
VALUATION TIME AND PLACE – PURCHASE PRICE

The purchase price of an animal is not a measure of value of the animal by itself but is one factor to consider when determining the value to its owner.

The value of damaged or destroyed property is determined at the time and place thereof, not at the time and place of acquisition of the property that is later damaged or destroyed.

INSTRUCTION NO. 11
DAMAGES

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate plaintiff for such damages as you find were proximately caused by the defendants.

If you find for the plaintiff your verdict must include the following:

- (1) The value of Pyewacket, if any; and/or
- (2) Veterinary expenses but only if medically reasonable and necessary, and of usual and customary price.

Market value is neither a panic price, auction value, speculative value, nor a value fixed by depressed or inflated prices, but is the amount of money that a purchaser willing, but not obligated, to buy the property would pay an owner willing, but not obligated, to sell it, taking into account all uses to which the property is adapted and might in reason be applied.

Replacement value is the cost to replace or reproduce the lost or damaged article, assuming it can in fact be replaced or reproduced.

Intrinsic value is the “actual value to the owner.” While you may not award damages for unusual sentimental value, you may consider such factors as will fairly and justly compensate the plaintiff for the loss sustained, such as feeling, sensibility, or emotional idealism—so long as it is not excessively mawkish or fanciful. Intrinsic value places worth on factors apart from those entering into exchange value that cause the article to be more desirable to the owner than to others. Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner.

In the case of animals, the value to the owner may include considerations such as duration of care, nature of care before the animal’s death, circumstances of acquiring the animal, the method of disposition of the animal after death (e.g., burial versus tossing in the trash), the affection given and received by the animal, the unique personality of the animal, the quality of the bond created, and the emotional reaction to the animal’s loss.

Although you may consider loss of use in calculating Pyewacket’s intrinsic value, should you believe that measure applies, you may not award a separate “line item” measure of damages for loss of companionship.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

INSTRUCTION NO. 12 ADMINISTRATIVE REGULATION

A state administrative regulation governing veterinary facilities states:

Client communication regarding evaluation and treatment.

(1) The veterinarian must communicate when appropriate to the client the following:

- (a) Proposed diagnostic tests;
- (b) Differential diagnoses;
- (c) Definitive diagnoses;
- (d) Proposed treatments;
- (e) Common side effects or adverse outcomes from proposed diagnostic testing or treatment;
- (f) Most likely side effects or adverse outcomes from proposed diagnostic testing or treatment based on patient signalment and disease status. Patient signalment may include, but is not limited to, species, breed, age, and sex;
- (g) Estimated cost;
- (h) Prognosis; and
- (i) Alternate diagnostic and treatment options for the patient.

(2) Such communications must be timely and sufficient to enable the client to understand clearly the problem and the choices that must be made and provide written or verbal consent for a proposed diagnostic and treatment plan. If other staff is involved in the communication process, it is the responsibility of the veterinarian to ensure that such communications are appropriate. All communications must be made prior to rendering treatment, except in cases of emergencies as described in UAC 246-933-050 or when a client cannot be reached for consultation within a reasonable time frame as dictated by the patient's condition.

(3) Client communication required in subsection (1) of this section must be documented in the patient medical record.

The violation, if you find any, of an administrative rule relating to confining animals in veterinary hospitals is not necessarily negligence but may be considered by you as evidence in determining negligence.

INSTRUCTION NO. 13 MUNICIPAL REGULATION

A local regulation governing cats states:

"Exotic animal" means any species of animal that is both: (1) not a domestic animal, and (2) capable of killing or seriously injuring a human being. Subject to the preceding sentence, the definition of "exotic animal" contained in this section includes but is not limited to:

1. All animals of the order Primates (as primates) except humans;
2. All animals of the family Canidae (as dogs, wolves, jackals, or foxes) and their hybrid, except for the domestic dog *Canis familiaris*;
3. All animals of the family Felidae (as lions, tigers, jaguars, leopards, cougars, or cheetahs) and their hybrid, except for the domestic cat *Felis catus*;
4. All animals of the family Ursidae (as bears);
5. All animals of the family Hyaenidae (as hyenas);
6. All animals of the order Crocodylia (as alligators, crocodiles, gavials, or caimans);
7. All animals of the family Elephantidae (as elephants);
8. All animals of the order Perissodactyla (as horses, rhinoceroses, or tapirs);
9. All animals of the order Artiodactyla (as camels, cattle, deer, giraffes, goats, hippopotamuses, llamas, pigs, or sheep);

"Exotic animal" also includes all venomous reptiles and amphibians, (regardless of whether the venom glands have been removed), and all snakes that are 8 feet or more in length.

It is illegal to possess or own an “exotic animal” within the City of Glee.

SPECIAL VERDICT FORM

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1: Were all or any one of the defendants negligent?

Answer: _____ (Write “yes” or “no”)

If you answered “no” to Question 1, do not answer any other questions; sign this verdict form and notify the bailiff. If you answered “yes” to Question 1, proceed to Question 2.

QUESTION NO. 2: Was defendants’ negligence a proximate cause of death to Pyewacket?

Answer: _____ (Write “yes” or “no”)

If you answered “no” to Question 2, proceed to Question 3. If you answered “yes” to Question 2, go to Question 4.

QUESTION NO. 3: Was defendants’ negligence a proximate cause of a reduction in Pyewacket’s chance of survival?

Answer: _____ (Write “yes” or “no”)

If you answered “no” to Question 3, do not answer any other questions; sign this verdict form and notify the bailiff. If you answered “yes” to Question 3, proceed to Question 4.

QUESTION NO. 4: What do you find to be the percentage reduction in Pyewacket’s chance of survival proximately caused by defendants’ negligence?

Answer: _____ % (cannot exceed 50%)

Proceed to Question 5.

QUESTION NO. 5: Was plaintiff negligent?

Answer: _____ (Write “yes” or “no”)

If you answered “no” to Question 5, proceed to Question 9. If you answered “yes” to Question 5, proceed to Question 6.

QUESTION NO. 6: Was plaintiff’s negligence a proximate cause of Pyewacket’s death?

Answer: _____ (Write “yes” or “no”)

If you answered "yes" to Question 6, go to Question 9. If you answered "no" to Question 6, go to Question 7.

QUESTION NO. 7: Was plaintiff's negligence a proximate cause of a reduction in Pyewacket's chance of survival?

Answer: _____ (Write "yes" or "no")

If you answered "no" to Question 7, go to Question 9. If you answered "yes" to Question 7, go to Question 8.

QUESTION NO. 8: What do you find to be the percentage reduction in Pyewacket's chance of survival proximately caused by plaintiff's negligence?

Answer: _____ % (cannot exceed 50%)

Proceed to Question 9.

QUESTION NO. 9: Was another entity or person not named as a party to this case negligent?

Answer: _____ (Write "yes" or "no")

Further Answer _____ (Identify same)

If you answered "no" to Question 9, go to Question 13. If you answered "yes" to Question 9, go to Question 10.

QUESTION NO. 10: Was the entity or person identified in Question 9's negligence a proximate cause of Pyewacket's death?

Answer: _____ (Write "yes" or "no")

If you answered "yes" to Question 10, go to Question 13. If you answered "no" to Question 10, go to Question 11.

QUESTION NO. 11: Was the entity or person identified in Question 9's negligence a proximate cause of a reduction in Pyewacket's chance of survival?

Answer: _____ (Write "yes" or "no")

If you answered "no" to Question 11, go to Question 13. If you answered "yes" to Question 11, go to Question 12.

QUESTION NO. 12: What do you find to be the percentage reduction in Pyewacket's chance of survival proximately caused by the entity or person identified in Question 9's negligence?

Answer: _____ % (cannot exceed 50%)

Proceed to Question 13.

QUESTION NO. 13: How do you allocate fault?

Answer: _____ % to Defendants

_____ % to Plaintiff

_____ % to Other Entity or Person Identified in Question 9

If you answered “no” to Questions 5, 6, and 7, you must not enter any % as to Plaintiff. If you answered “no” to Questions 9, 10, and 11, you must not enter any % as to the Other Entity or Person. Proceed to Question 14.

QUESTION NO. 14: What do you find to be plaintiff’s damages for the value of Pyewacket?

Amount: \$ _____

Proceed to Question 15.

QUESTION NO. 15: What do you find to be the plaintiff’s damages other than for the value of Pyewacket?

Amount: \$ _____

(Sign and return this verdict to bailiff).

Dated: _____

Presiding Juror