IN THE COURT OF APPEALS OF THE
STATE OF OREGON

JUSTICE, an American Quarter Horse,
by and through his Guardian, Kim Mosiman,
Plaintiff-Appellant,

v.

GWENDOLYN VERCHER,
Defendant-Respondent.

Washington County Circuit Court
18CV17601

CA No. A169933

DEFENDANT-RESPONDENT'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

Appeal from the Order of the Circuit Court
for Washington County entered December 26, 2018 by the
Honorable John S. Knowles, Pro Tem Circuit Judge

October 2019

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought.

Defendant disagrees with Plaintiff's description of the proceedings and relief sought in that Plaintiff's description is not a "statement, without argument, of the nature of the action or proceeding…" as required by Oregon Rule of Appellate Procedure 5.40(1), but to the contrary is one that improperly includes argument and irrelevant matters. The appropriate description pursuant to Oregon Rule of Appellate Procedure 5.40(1) should be two sentences: "Plaintiff sued defendant for damages claiming negligence per se. The trial court granted defendant's motion to dismiss for lack of legal capacity to sue and failure to state a claim".

B. Nature of Order Sought To Be Reviewed.

Defendant agrees with Plaintiff's characterization of the nature of the order sought to be reviewed.

C. Statutory Basis of Appellate Jurisdiction.

Defendant agrees with Plaintiff's statement of the statutory basis of appellate jurisdiction.

D. Dates of Entry of Judgment and of Notice of Appeal.

Defendant agrees with Plaintiff's designation of the date the trial court entered the judgment and designation of the date on which the notice of appeal was filed.

E. Questions Presented on Appeal.

Plaintiff's questions do not comply with Oregon Rule of Appellate Procedure 5.40(6) in that they are not "brief statements without argument" of the questions since they rely on argument as the predicate for the questions through the addition of immaterial facts and use of the rhetorical descriptor "nonhuman victim of criminal animal cruelty" to express a personal opinion. The single question should be "Did the trial court commit reversible error when it dismissed Plaintiff's action?"

F. Summary of Argument.

Plaintiff's summary does not comply with Oregon Rule of Appellate Procedure 5.40(7) in that it is not "a concise summary of the argument appearing in the body of the brief" at all, but instead is a recitation of irrelevant and immaterial facts the majority of which are either not part of the actual record on appeal or material to the appeal.

Defendant's summary of her argument in response is that the trial court did not commit reversible legal error in granting Defendant's motion.

G. Statement of Facts.

The Statement of Facts listed in Plaintiff's Brief does not comply with Oregon Rule of Appellate Procedure 5.40(9) in that it does not set forth "a concise summary, without argument, of all the facts of the case material to determination of the appeal" (Emphasis added). Pursuant to Oregon Rule of

Appellate Procedure 5.55(2), Defendant supplements the record with the following three additional relevant facts which Plaintiff failed to recite to the Court and which are applicable to the appeal:

1. In the Complaint at 3:13-16, Plaintiff asserted that "Kim Mosiman is the Executive Director of Sound Equine Options and is Justice's guardian. She is the person responsible for Justice's care and well-being. As such, Justice's interests are represented in this suit by and through Ms. Mosiman pursuant to ORCP 27(A)."

2. On October 3, 2018, subsequent to prevailing in the case, Defendant sought an award of enhanced prevailing party fees on the basis that Plaintiff's statements "Kim Mosiman…is Justice's guardian", and "Justice's interests are represented in this suit by and through Ms. Mosiman pursuant to ORCP 27(A)", were both patently false statements made with no objective basis in fact or law.

3. On November 15, 2018, the Honorable John Knowles issued an "Opinion-Letter" setting forth his ruling on Defendant's request for enhanced prevailing party fees, awarding them on the finding that "there was no objectively reasonable basis for naming Ms. Mosiman as the Guardian of Justice in this matter." (SER-24).

II. RESPONSES TO ASSIGNMENTS OF ERROR

The trial court did not err in the singular decision which Plaintiff challenges, and its decision should be affirmed.

A. Standard of Review

Defendant agrees that Plaintiff has set out the correct standard for this Court's review of legal questions.

B. Assignment of Error

1. Preservation of Error

Plaintiff has failed to comply with Oregon Rule of Appellate Procedure 5.45(4)(a) and (b) in demonstrating that the particular question or issue presented by either assignment of error was actually raised and/or preserved in the trial court. Because Plaintiff has not shown any detail of exactly where in the lower court proceeding it specifically preserved any claimed error, then it has not raised an issue that can be reviewed as error. Pursuant to Oregon Rule of Appellate Procedure 5.45(4)(c), therefore, the Court should decline to consider Plaintiff's claimed assignments of error.

2. Argument

a. No Reversible Error Is Identified Or Exists

Plaintiff's core position in this appeal is apparently not that a certain error occurred at the trial level, but instead that this Court needs to "recognize legal personhood status" for a horse. Appellant's Opening Brief at 18. That

fundamental misapprehension of what taking an appeal to a reviewing court actually entails, highlights the significance of Plaintiff's inability to refer this Court to any reversible error in the reviewable record. The requirement that an appellant set out the pertinent portions of the record as part of its assignments of error in its opening brief is not a meaningless formality; rather, the information the rules require enables the Court and the opposing party to identify not just the specific ruling that the appellant assigns as error, but truly determine whether an objection was properly preserved, and genuinely understand the basis for the trial court's ruling. Hayes Oyster Co. v. Dulcich, 170 Or. App. 219, 12 P.3d 507 (Or. App. 2000).

Because Plaintiff has failed to set forth specifically *how* the trial court was itself erroneous as a matter of law (see, Edwards v. Uncle Don's Mobile City, Inc., 273 Or. 736, 543 P.2d 4 (Or. 1975)), the Court of Appeals is not obligated to search for pertinent parts of the trial court record that would reveal it and thus the assignments should be disregarded. Roseburg Investments, LLC v. H. of Fabrics, Inc., 166 Or. App. 158, 995 P.2d 1228 (Or. App. 2000). See, J. A. Terteling & Sons, Inc. v. McKague, 58 Or. App. 65, 646 P.2d 1377 (Or. App. 1982) (where appellant failed to identify verbatim pertinent portions of record and failed to direct panel to portion of record where objection or motion and court's ruling could be found, Court was under no duty to search record in order to consider assignments of error, and would not do so).

b. The Trial Court Ruled Properly

The trial court correctly granted Defendant's motion and was justified in doing so on several bases.

i. Plaintiff Lacked Standing To Sue

First, the trial court correctly granted Defendant's motion since Plaintiff undeniably lacked standing.

Every complaint in a civil case must state a cause of action belonging to the named plaintiff. Title & Trust Co. v. U.S. Fid. & Guar. Co., 32 P.2d 1035 (Or. 1934); Keerins Bros. v. Mauney, 219 P.2d 753, 755 (Or. 1950); Serv. v. Sumpter Valley Ry. Co., 171 P. 202, 212 (Or. 1918) ('to be a good complaint, immune from the effects of a general demurrer, the plaintiff must show in himself legal connection with the matter involved in litigation and a right in himself to recover the amount demanded"); Schleef v. Purdy et. al., 107 Or. 71, 214 P. 137 (Or. 1923).

Whether a cause of action belongs to the named plaintiff in turn requires a determination of their "standing", the traditional legal doctrine that addresses whether a party to a legal proceeding possesses a recognized status or qualification necessary for the allowable assertion, enforcement, or adjudication of legal rights or duties. City of Damascus v. Brown, 266 Or App 416, 337 P3d 1019 (2014). Every standing analysis begins with the basic axiom that it is a "person" or "legal entity" whom is attempting to assert the right, the

core question really then being whether that person or entity in particular has the requisite status or qualification to make the specific claim being asserted.

Here, where the named plaintiff was not a person or legal entity but an animal, that threshold assumption is not even met, and the trial court was obligated to focus on the proposed plaintiff's very *capacity* to even be a recognized form of legal entity that could bring *any claim at all* regardless of what type of claim it might be. The term "capacity" to sue and be sued refers to an entity's legal ability to bring or appear in any action whatsoever, much less a specific type. See, Ass'n of Unit Owners of Bridgeview Condominiums v. Dunning, 187 Or App 595, 69 P3d 788 (2003) (holding that any properly organized nonprofit corporation has the power to sue and be sued).[1]

Only once capacity is initially determined to exist can the standing analysis then proceed onward, since standing is an aspect of justiciability that refers to the question whether the plaintiff – *as a person or legal entity* – will be substantially and practically affected themselves by some decision in the case; if not, then the plaintiff has no right to ask the court to decide the issue in the first instance. Advanced Drainage Sys., Inc. v. City of Portland, 214 Or App 534, 166 P3d 580 (2007).

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[1] An ORCP 21A(4) motion on "capacity" is different from one under ORCP 26 regarding the "real party in interest", a rule Plaintiff's attorneys mistakenly address but which refers to a person with an already legally cognizable interest, the party who will be "benefited or injured by the judgment in the case." Pulkrabek v. Bankers' Mortg. Corp., 115 Or. 379, 238 P. 347 (Or. 1925).

Here, this "plaintiff" 's capacity was nonexistent from the start. Animals are simply not entities with a recognized legal ability to bring or appear in an action. Lack of capacity to sue refers to some legal disability of the plaintiff, such as infancy or the condition of being deceased, status level circumstances entirely foreclosing an ability to be a litigant at all, and a horse's legal disability is too patent to ignore. See, Hendrickson's Estate v. Warburton, 276 Or 989, 998, 557 P2d 224, 230 (1976).

An entity must qualify as a juridical person, that is, an entity to which the law attributes juridical personality, in order to have the capacity to sue. See generally, In re Succession of Sims, 210 So 3d 394 (La Ct App 2016); Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs, 212 NC App 313, 712 SE2d 372 (2011) (a legal proceeding must be prosecuted by a legal person, whether it be a natural person, *sui juris*, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency). Not only is a horse neither a natural person, nor an artificial person, nor a quasi-artificial person (see, ADP Dealer Servs. Grp. v. Carroll Motor Co, 195 SW3d 1 (Mo Ct App 2005)), but there is no state statute or state appellate court opinion in Oregon legislatively defining "person" to *include* a horse or any animal in any manner. For that reason, the issue of lack of capacity ends the analysis.

A few courts have had to struggle with deciding the (infrequent and unusual) question of whether the plaintiff may be some *special* sort of entity which the law of the forum has never previously dealt with, yet which could potentially be recognized as legally capable of possessing and asserting a right of action. See, e.g., Philadelphia Facilities Mgmt. Corp. v. Biester, 60 Pa Cmwlth 366, 431 A2d 1123 (1981) (city gas works was not a legal entity of any type and thus was precluded from being a party plaintiff in suit); Grp. of Tenants From Grandview Homes v. Mar-Len Realty, Inc., 40 Ohio App 2d 449, 321 NE2d 241 (Ohio Ct App 1974) (a group of unnamed persons not constituting an unincorporated association was not a legal entity capable of initiating an action).

Animal rights activists have pressed the judiciary to advance their political causes through proposals for special entity consideration, but the effort is usually thwarted at the outset. See, e.g., NW. Animal Rights Network v. State, 158 Wash App 237, 242 P3d 891 (2010) (dismissing a group's challenge to a state's animal cruelty legislation by holding that "it is the role of the legislature, not the judiciary, to balance public policy interests and enact law"). Some activists, desirous for publicity and impatient with rules regarding capacity, have gone ahead and just designated actual animals as named parties.

Those few odd cases divide into two procedural camps. One camp involves Endangered Species Act (and related animal welfare statute) type

cases in federal courts where the designation of the animal as one of several plaintiffs was simply never challenged by the defendant, and thus where no decision by a court ever needed to have been made on its validity.[2] See, Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991); Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988); Northern Spotted Owl v. Hodel, 716 F.Supp. 479 (W.D. Wash. 1988); Northern Spotted Owl v. Lujan, 758 F.Supp. 621 (W.D. Wash. 1991).[3]

The other camp is where the designation of an animal as the plaintiff *has* been challenged. Of those, there have been a grand total of six over the last two and one half centuries of American civil litigation. In every one of the six cases in which the defendant took the effort to point out the clear impropriety of an animal being named as the only (or key) plaintiff, each court presented with the

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[2] This is because federal courts have jurisdiction if at least one named plaintiff has standing to sue, even if another named plaintiff in the suit doesn't. Laub v. U.S. Dep't. of Interior, 342 F.3d 1080, 1086 (9th Cir.2003). Because the standing of the other parties was undisputed, no jurisdictional concerns obliged the court to consider whether the animal had standing. Cf. Hawksbill Sea Turtle v. FEMA, 126 F.3d 461, 466 n. 2 (3d Cir.1997) (allowing turtle to remain named in caption, but not deciding if it had standing because named human parties did anyway).

[3] Not only did none of the defendants challenge the animals' standing or the propriety of naming animals as plaintiffs, but none of the cases had the animal as the *only* plaintiff either. Had the designation been challenged in any of those cases, the animal plaintiff would have been dismissed since the ESA's citizen-suit provision only permits "any person" to commence a civil suit to enjoin alleged violations of the ESA or regulations issued under its authority. People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 189 F Supp 3d 1327, 1336 (SD Fla 2016), aff'd sub nom. People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F3d 1142 (11th Cir 2018).

law on the issue has unhesitatingly ruled that animals are treated under the law either as non "persons", or as the property of their owners, rather than as anything like entities with their own legal rights, and thus *cannot sue*.

The six are:

1. Hawaiian Crow ('Alala) v. Lujan, 906 F Supp 549 (D Haw 1991) (bird protected by Endangered Species Act (ESA) was not "person" within meaning of ESA's citizen suit provision, so as to be authorized to be named plaintiff; case dismissed);

2. Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F Supp 45, 49 (D Mass 1993) (dolphin lacked standing to maintain action on violation of the Marine Mammal Protection Act which expressly authorized suits brought by persons, not animals, with the Court stating "The MMPA does not authorize suits brought by animals" and "[I]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly"; case dismissed);

3. Cetacean Cmty. v. Bush, 386 F3d 1169, 1174 (9th Cir 2004) (where the sole plaintiff was a "name chosen by the self-appointed attorney for all of the world's whales, porpoises, and dolphins", and in which the federal district court dismissed on standing grounds under a variety of federal animal welfare statutes holding "It is obvious that an animal cannot function as a

plaintiff in the same manner as a juridically competent human being" and "It is obvious both from the scheme of the [ESA], as well as from the statute's explicit definitions of its terms, that animals are the protected rather than the protectors"; case dismissed);

4. Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F Supp 2d 1259 (SD Cal 2012) (court held that Thirteenth Amendment prohibition on slavery and involuntary servitude applied only to human beings or persons, rather than non-persons, and thus orca whales, acting by their "next friends" PETA, lacked Article III standing to bring action against operator of sea aquarium; case dismissed);

5. People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 AD3d 148, 998 NYS2d 248 (2014) (filed "on behalf of" Tommy, a chimpanzee, a plaintiff which the Court determined was not a "person" entitled to rights and protections afforded by writ of habeas corpus, and in which the Court held that "animals had not historically been considered persons for purposes of the writ, and chimpanzees were incapable of accepting social responsibility, legal responsibility, or duties necessary for rights of legal personhood"; case dismissed); and,

6. Naruto v. Slater, 888 F3d 418, 422 (9th Cir 2018) (a monkey, because it was a non-human, lacked statutory standing under Copyright Act to sue photographer, with the Court stating "if animals are to be accorded rights to

sue, the provisions involved therefore should state such rights expressly"; case dismissed).

Each of the six very well reasoned opinions has made it as clear as any foundational legal principle can be made clear that animals have neither constitutional nor statutory standing. Naruto v. Slater, 888 F3d 418, 425 (9th Cir 2018). The purely imaginary "rights" of animals to prosecute a civil cause of action are simply not protected by the Constitution as are the very real rights of persons to do so. See also, Massachusetts Soc. for Prevention of Cruelty to Animals v. Comm'r of Pub. Health, 339 Mass 216, 228, 158 NE2d 487, 495 (1959).

The Naruto v. Slater opinion is particularly instrumental in disposing of this appeal. In that case, the 9th Circuit called the claim by an animal rights group that animals can sue as plaintiffs "frivolous", and even awarded attorney fees for the claim being a frivolous claim.[4] The Ninth Circuit was particularly galled by what the trial counsel – attorneys for the animal rights organization PETA – had done in that case, disturbed by the realization that PETA "employ[ed] [the animal] as an unwitting pawn in its ideological goals" and that PETA's "real motivation in this case was to advance its own interests, not [the animal's]". The frivolous nature of the gamesmanship by the trial

[4] The Naruto opinion admonishing the claim as nonsense was issued on April 23, 2018, and Plaintiff's attorneys filed their complaint in this case eight days later, on May 1, 2018.

attorneys in exploiting the animal, gamesmanship both literally and functionally identical to what Plaintiff's attorneys here engaged in, was patent:

"Animal-next-friend standing is particularly susceptible to abuse. Allowing next-friend standing on behalf of animals allows lawyers (as in *Cetacean*) and various interest groups (as here) to bring suit on behalf of those animals or objects *with no means or manner to ensure the animals' interests are truly being expressed or advanced.* Such a change would fundamentally alter the litigation landscape. Institutional actors could simply claim some form of relationship to the animal or object to obtain standing and use it to advance their own institutional goals with no means to curtail those actions. We have no idea whether animals or objects wish to own copyrights or open bank accounts to hold their royalties from sales of pictures. To some extent, as humans, we have a general understanding of the similar interests of other humans. In the habeas corpus context, we presume other humans desire liberty. Similarly, in actions on behalf of infants, for example, we presume the infant would want to retain ownership of the property she inherited. But the interests of animals? We are really asking what *another species* desires. Do animals want to own property, such as copyrights? Are animals willing to assume the duties associated with the rights PETA seems to be advancing on their behalf? Animal-next-friend standing is materially different from a competent person representing an incompetent person. We have millennia of experience understanding the interests and desire of humankind. This is not necessarily true for animals. Because the "real party in interest" can actually *never credibly articulate its interests or goals*, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it *imputes* to the animal or object with *no accountability*. This literally creates an avenue for what Chief Justice Rehnquist feared: making the actual party in interest a "pawn to be manipulated on a chessboard larger than his own case."

Naruto v. Slater, 888 F3d 418, 432 (9th Cir 2018) (citations omitted) (Justice N. R. Smith concurring).

Here, the trial court was well supported by that manner of reasoning, as well as by Oregon case law, in dismissing the complaint outright, especially since nothing in State v. Hess, 273 Or App 26, 35, 359 P3d 288, 293 (2015),

rev den, 358 Or 529 (2016), in State v. Newcomb, 359 Or 756, 765–66, 375 P3d 434, 440 (2016), or in State v. Fessenden, 355 Or 759, 333 P3d 278 (2014) holds that animals have rights to sue or are "persons" for purposes of bringing a civil action. Indeed, State v. Newcomb specifically confirmed to the contrary that dogs are "personal property" instead, not "persons".

ii. Plaintiff Failed To State A Claim For Negligence *Per Se*

Second, the trial court correctly granted Defendant's motion since Plaintiff also failed to state any claim for relief as well.

The trial court was presented with a theory of negligence *per se* where a horse's "right to sue" was trumpeted by Plaintiff's attorneys to be divined from ORS 167.305. The trial court was beseeched to "recognize that [a horse is] a member of the class intended to be protected by Oregon's anti-cruelty statute [and] may bring a negligence per se claim based on the standard of care in the anti-cruelty statute, ORS 167.305 et seq." (ER 4-8, 11-12).

Not a single word in ORS 167.305, however, confers standing on any animal to sue at all, and in fact sections 5 and 6 of that statute even specifically designate "a government agency, humane investigation agency or its agent or a person that provides care and treatment for impounded or seized animals" instead as the aggrieved parties, not any affected animal itself. ORS 167.305(5) and (6).

To prevail on a statutory liability claim, a plaintiff must be within the class of *persons* that the legislature intended to protect. Doyle v. City of Medford, 356 Or 336, 337 P3d 797 (2014). The Oregon legislature un-confusingly selected to point to "a government agency, humane investigation agency or its agent or a person that provides care and treatment for impounded or seized animals" as the class of *persons* needing protection under ORS 167.305 and declined to add either the specific noun "horses" or the general noun "animals" to that definition.

Plaintiff's attorneys nevertheless encouraged the trial court to creatively add new words to a statute, ones that have never been legislated, read, or interpreted into it. The legally unsupportable invitation to act as a *de facto* legislative body was properly rejected by the trial court. Patten v. State, 273 Or App 476, 359 P3d 469 (2015), rev den, 358 Or 551 (2016) (where statutory language is plain, a court must enforce it according to its terms).

Plaintiff's attorneys also overreached in trying to posit that there was legislative support for their claim. What they pointed to, however – our state legislature's generic observations in ORS 167.305(a) and (b), that "Animals are sentient beings capable of experiencing pain, stress and fear" and that "Animals should be cared for in ways that minimize pain, stress, fear and suffering" – are not in any manner legal determinations that "Animals have rights" or that "Animals can sue". The former two sentences reflect an entirely

distinct type of legislative expression from the latter two sentences: as the Court thoughtfully observed in Cetacean Cmty. v. Bush, 386 F3d 1169, 1174 (9th Cir 2004) a concern for a dolphin's well-being is just that alone, a *concern*, not a grant of power: "Animals are not authorized to sue in their own names to protect themselves." Cetacean, *supra*.

Rights do not arise as a corollary of a legislative body acknowledging the truism that living organisms undergo a variety of internal and external experiences; that position is, in fact, fundamentally antithetical to what courts historically and thoughtfully have explained as to where rights *actually* stem from, i.e., from constitutional charters and provisions written *by* people, *about* people, and *for* people. See, e.g., McGowan v. Lane Cty. Local Gov't Boundary Comm'n, 102 Or App 381, 795 P2d 560, rev den, 310 Or 612 (1990) (regarding legal rights which originate from the due process clause of the state constitution); *cf.*, Miles v. City Council of Augusta, Ga., 710 F2d 1542 (11th Cir 1983) (holding that Blackie the talking cat "cannot be considered a "person" and is therefore not protected by the Bill of Rights" and noting that "even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii.* Blackie can clearly speak for himself"); People v. Fabing, 143 Ill 2d 48, 56, 570 NE2d 329, 333 (1991) ("Snakes...are not entitled to due process"). Not just the *weight* of legal authority, but in fact *all* legal authority says one thing and one thing only: animals can make no claims for relief.

Thus in addition to noting the patent lack of standing, the trial court correctly rejected Plaintiff's sole theory for its claim for relief as having no legal basis.

Our Supreme Court, in Deckard v. Bunch, 358 Or 754, 370 P3d 478 (Or. 2016), held that, to prove a claim for statutory liability, the plaintiff must establish five things: (1) that a statute imposed a duty on the defendant; (2) that the legislature expressly or impliedly intended to create a private right of action for violation of the duty; (3) that the defendant violated the duty; (4) that the plaintiff is a member of the group of persons that the legislature intended to protect by imposing the duty; and (5) that the plaintiff suffered an injury that the legislature intended to prevent by creating the duty.

Applying that rule, the trial court here found that Plaintiff completely failed to satisfy three of the five required elements.

As to the second element, it was obvious on its face that the statutes raised by Plaintiff's attorneys did not expressly provide any independent statutory right of action against Defendant at all. Neither ORS 167.325(1) nor 167.330(1) state any words identical or even akin to the "shall be liable in a civil suit for all damages" type language of clear instances such as ORS 609.140 (right of action given to livestock owners) or ORS 30.780 (right of action given to victims of gambling offenses) expressly establishing private rights of action.

Similarly, neither statute *impliedly* created statutory liability either, given that such an implication is all about the existence of a recognized duty, which in turn is a "legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right." Black's Law Dictionary 615 (10th ed. 2014) (emphasis added). The universal understanding is that one's duties can only arise from the recognition of another's corresponding right.[5] The trial court gleaned correctly that the "right" of a horse was not implied anywhere within ORS 167.325(1) or 167.330(1), the requisite second element of the test.

Neither ORS 167.325(1) nor 167.330(1) even refer to any form of civil liability at all. In determining whether the legislature impliedly intended to create a private right of action for violation of a statutory duty, our state courts generally focus on two factors: one, whether the statute refers to civil liability in some way, and two, whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one. Cruz v. Multnomah Cty., 279 Or App 1, 21–24, 381 P3d 856, 867–69 (2016).

Not only did Plaintiff's attorneys not identify anything in the text or

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[5]See generally, Lyons, David. "The correlativity of rights and duties." *Nous* (1970): 45-55; Donnelly, Jack. "How are rights and duties correlative?" *The Journal of Value Inquiry* 16.4 (1982): 287-294.

relevant context of ORS 167.305 that refers to civil liability, but Plaintiff's attorneys also failed to show anything in the text, context, legislative history, or availability of the statutes implying a right of action, the conclusion being that the legislature's intention was *not* to create new statutory liability of the kind asserted. With no implied right of action, the trial court's inquiry was promptly at an end. Cruz v. Multnomah Cty., 279 Or App 1, 21–24, 381 P3d 856, 867–69 (2016).

As to the fourth and fifth elements, not only was no "person" located who was entitled to invoke statutory protection (see, Brady v. Terminal R. Ass'n of St. Louis, 303 US 10, 58 S Ct 426, 82 L Ed 614 (1938)), but the injury Plaintiff's attorneys raised was not one the legislature created any duty about. Since negligence per se requires statutory expression of both a specific standard of care for a protected category of litigant and a specific duty, the fact that Plaintiff was no member of any protected category at all and that no duty was identified concluded the analysis as well.

iii. Plaintiff Misunderstood What "Rights" Are

Third, the trial court also correctly granted Defendant's motion since, overall, Plaintiff's attorneys were simply wrong about "rights", even as a general legal principle.

Animals are constrained by the traits that nature has bequeathed them through the process of evolution by natural selection, and the horse here was no

exception. As a proposed litigant, the horse was incapable of explaining, arguing, opining, presenting, contending, or asserting, incapable of striving towards justice, of pursuing rights, of using legal process, of comprehending legal process, or of working to discern truth from competing viewpoints; this horse – just like all horses – is an organism that has no positions or viewpoints but instead simply absorbs and emits information from and to the world and then behaves in ways that affect its survival. Its knowledge of the world and its interactions with its conspecifics, competitors, predators, prey, offspring, and mates, has been forged by evolutionary processes and by environmental and developmental influences, not by any voluntary participation in, or recognition of, the human social contract.

Far *different* forces exerted over prehistoric and historic time, on the other hand, have constructed humans to be socially-*participatory* creatures at orders of magnitude well beyond merely socially-*organized* groups such as horses, bees, termites, seagulls, beavers, or chimps.[6] Those forces enmesh us in a communication and idea-driven web that expresses itself most formally and most thoroughly through the rule and operation of law – and law has become established through the evolved mechanisms of expressing rational and logical

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[6] See generally, Scott, John Paul. "The analysis of social organization in animals." *Ecology* 37.2 (1956): 213-221; Elaine Morgan, The Descent of the Child: Human evolution from a new perspective 247 (Oxford University Press 1992).

thoughts via writing, reading, and speaking, i.e., human language.[7]

Language is the basis of all law as a fundamental and founding principle. Language turns humans into conscious agents: individuals with distinct personalities and abilities who realize themselves through their spoken, written, and symbolic interconnections with each other and with the world. [8] Animals are neither truly individual, nor truly social in those senses. They are not truly individual because, while they may have distinct personalities, they lack any capacity to take individual responsibility. They are not truly social because while they may live within groups, those groups cannot take collective decisions (whether conscious or unconscious) to transform themselves.[9]

The fundamental legal rights that we have granted to ourselves are considered such "not simply because they implicate deeply personal and private considerations, but because they have been identified as 'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered

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[7] See, Hinde, Robert A. Individuals, relationships and culture: Links between ethology and the social sciences. CUP Archive, 1987 at pp. 2-5.

[8] See, Anderson, Stephen R. Doctor Doolittle's Delusion. Yale University Press, 2004: "Language as we know it is a uniquely human capacity, determined by our biological nature, just as the ability to detect prey on the basis of radiated heat is a biological property of (some) snakes." See generally, Chomsky, Noam. Language and mind. Cambridge University Press, 2006.

[9] See, Parker, James V. Animal Minds, Animal Souls, Animal Rights at p. 73. University Press of America, Lanham 2010: "Animals don't live within a community in which right or wrong or the claims of rights and correlative duties exist. Human infants, on the other hand, the mentally retarded, the comatose, and the senile all possess basic rights because they are members of a community in which duty is experienced and rights are recognized."

liberty, such that neither liberty nor justice would exist if they were sacrificed'" Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004). As a group, people *have* transformed themselves: Fundamental legal rights are at one and the same time both historically-derived intellectual concepts as well as prehistorically-derived cognitive artifacts for people alone.[10] The rights we have painstakingly carved out and preserved for ourselves are denominated "rights" as a precise result of specific and concrete actions we have taken as people throughout our past in establishing their theoretical and practical value to us, a value that has not always been apparent but which has only become so over time through deciphering the accumulated significance of social and historical events.[11]

Lacking that history, lacking that tradition, lacking that sociality, lacking that language, lacking that burgeoning realization and development of perceived value based on significant incidents of importance to large groups of participants, animals *cannot and do not have legal rights*. See e.g., Kihlstadius v. Nodaway Veterinary Clinic, 697 F. Supp. 1087 (W.D. Mo. 1988) (holding that dogs do not have civil rights).

Moreover, the practical benefits of social relations arise straight out of

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[10] See e.g. James B. Reichmann Evolution, Animal 'Rights', and the Environment 256-263; Catholic University of America Press 2000; Melden, Abraham Irving. Rights and persons. Univ of California Press, 1980.
[11] See, Dworkin, Ronald. Taking rights seriously at 184-205. A&C Black, 2013.

the burdens created by voluntarily engaging in them; in essence, rights are tightly welded to responsibilities because responsibilities *define* rights.[12] We, as people, demand of ourselves that we restrain our instinctual behaviors, while animals are expected to be subservient to instinct. We, as people, socially obligate ourselves to control all sorts of desires, while animals are expected to be subservient to those as well. Animals don't have obligations, social or otherwise, and at most are only expected to control (or be taught to control) a few *learned* behaviors, if even those.

Animal rights activists such as Plaintiff's attorneys nevertheless overlook this crucial distinction, and, in seeking to create a horse's right to sue, fail to account for the horse's exclusion from every last social expectation and obligation that rights-holders endure. Plaintiff's attorneys look expectantly to an important right being granted to their "client"[13], but ignore that fairness would absolutely require important obligations then be imposed on it in

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[12] See, Raz, Joseph. "On the nature of rights." *Mind* 93.370 (1984): 194-214.

[13] Their actual "client" could not be a horse given the impossibility of compliance with state professional responsibility rules, including Or. R. Pr. C. 1.2(a)'s requirement to "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued"; Rule 1.4(a) and (b)'s requirements to keep clients "reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"; and Rules 1.6(a) and 1.8(a-k)'s requirements to get a client's "informed consent" on certain decisions.

conjunction with earning such a right.[14]

If this horse truly possessed its own tort claim enabling recovery for harm to itself, then, just like humans, it would be correspondingly expected to restrain its own instinctual behaviors and propensities to harm others; it would be correspondingly expected to socially obligate itself to control itself in the same public aspects that humans control themselves; and it would be correspondingly expected to labor under the yoke of being bound by its own admissions and statements under oath, being exposed to contempt of court, accepting the dismissal or reversal of its claim, suffering sanction for its own misbehavior during any proceeding, and incurring payment, reprimand, incarceration, punishment, or the loss of some privilege for losing or violating any of those obligations along the way.[15]

It is a core principle that rights concern matters basic to our conception of justice and define the community sense of fair play by being tied to corresponding responsibilities. See, State v. Amini, 175 Or. App. 370, 28 P.3d

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[14] For one, the doctrine of a "right to sue" is inextricably tied to the doctrine of "waiver of the right to sue" (See, e.g., B & D Inv. Corp. v. Petticord, 61 Or App 585, 659 P2d 400 (1983), rev den, 294 Or 792 (1983)) yet the horse's execution of any waiver would be an exercise in absurdity. Two, Defendant's own rights to assert a counterclaim under ORCP 22A for the horse injuring her, or to assert the affirmative defense of comparative negligence entitling her to examine the horse under oath to determine its own parallel culpable conduct are also made hollow by Plaintiff's attorneys' charade.

[15] In our justice system, we abhor laws that provide only benefits to a preferred group yet shield the group's members from any corresponding burdens. See, e.g. State v. Borowski, 231 Or App 511, 220 P3d 100 (2009).

1204 (Or. App. 2001). For animals the requisite "collective conscience" is missing and that omission is critical. *Cf.* Smith v. State, 6 S.W.3d 512 (Tenn. Crim. App. 1999) ("if the right cannot be logically deduced from the text of the Constitution, the court must look to the traditions and collective conscience of our people to determine whether a principle is so rooted as to be ranked as fundamental"); King v. South Jersey Nat. Bank, 66 N.J. 161, 330 A.2d 1 (N.J. 1974).

Since to have a right means also to be responsible for one's actions, then an "entity" incapable of accepting responsibility is a legal nullity as far as rights are concerned; such a thing can only be accorded "protections", never rights, since a right requires any "entity" to make and abide by the consequences of its own conscientious decisions.[16] In accomplishing that neat trick of decision-making and consequence-holding, possessing the attribute of utilizing language is absolutely key: humans – as rights-holders – make

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[16] See, Parker, James V. Animal Minds, Animal Souls, Animal Rights at p. 74. University Press of America, Lanham 2010: "A claim to be able to do what is ours to do – exercise choice – is just what we mean by a right. We make this claim against other individuals in whom we perceive the same freedom that we discover in ourselves. Moral or natural rights are rooted in that level of responsibility on which consciousness turns into conscience." The absurdity offered in Appellant's Opening Brief (p. 20) – that a state statute authorizing the killing of a dangerous dog imposes "legal accountability" on animals sufficient to grant them "personhood" – is frighteningly ignorant of what accountability actually is. If "legal accountability" is conferred on a thing by virtue of a law ordering its destruction, then flower gardens, ornamental trees (ORS 570.345), noxious weeds (ORS 569.390), and mosquitoes (ORS 452.240) would all become gifted with "personhood" status as well.

conscientious decisions and incur obligations because we can distinguish between right and wrong in a moral sense, and we can do that because language enables us to express and appreciate such a distinction.[17]

The generic ability to simply "communicate" or to "experience", to the contrary, does not rise to the requisite level. Yes, horses likely experience what people describe as pain, but the yawning chasm between having a right just because one "experiences" something, and having a right because one is a language-user who is a voluntary, knowing member of the social contract obligated to both benefit from and be burdened by its written rules, is immense.[18] Rights and duties are corollaries of individual freedom, not of bare

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[17] See, Frey, Raymond Gillespie. Interests and rights: The case against animals. Oxford: Clarendon Press, 1980 at p. 8: "To have a legal right is to be able to make claims, claims which can be enforced, and which the courts, properly petitioned, will see are enforced. In this way, being able to make claims, enforced and backed by sanctions, form an important part of what it is for a person to function in society, which is why the deprivation of one's legal rights…is such a severe loss." See also, Leahy, Michael P.T. Against Liberation: Putting Animals In Perspective at pp. 117-120; Routledge. London 1991: "Animals do not use language. Activities like commanding, questioning, recounting, and chatting are beyond even parrots but are definitive of many basic human activities and central to numerous others. If we try to apply such descriptions to creatures who do not share these features of our natural history then, to the extent of the divergence, the terms gradually lose their point…[T]he absence of the capacity to use language rules out even the possibility of their sociability involving self-conscious debate about territorial boundaries, conservation of food stocks, the peaceable settlement of disputes, or the taming and 'exploitation' of inferior species, which are the features of human society."

[18] Roitblat, Herbert L., Louis M. Herman, and Paul E. Nachtigall. Language and communication: Comparative perspectives. Psychology Press, 2013: "[Human] language serves functions other than communication. Language may

experience, and those who are the subjects of rights are "persons" in the *principled* sense of the word as a function of that freedom, not the artificially constructed and facile version of simply "things that might experience pain" proffered by Plaintiff's attorneys.[19]

To apply the term "person" to the horse, indeed, to any animal on the basis of it simply being "sentient"[20], is to play word games at the cost of foundational principles, and it undermines the true, authentic meaning of both personhood and of responsibility.[21]

If "sentiency" is taken to mean "reaction to sensory stimuli", then that criterion necessarily yields legal rights to motion sensors and litmus paper, resulting in nonsense. If "sentiency" is taken to mean "capacity to feel pain", then that criterion necessarily yields an exclusion of legal rights to people with

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influence the categories that are used to make sense of the world, the very nature of thought itself."

[19] It is worth observing that, while animals have an enormous number of different kinds of experiences, animal rights activists insist on singling out "pain" as the winning candidate for moral pride of place; equally significant sensory experiences, such as the contemplation of beauty or the generation of creative ideas, are thrown by the wayside for no discernible or logical reason.

[20] "Sentience" may be the magic talisman that animal rights activists rub to summon forth legal rights, but as an actual scientific concept it is a disaster, riddled with insurmountable empirical obstacles given that it refers to subjective states of living things and thus is impossible to measure objectively. See, Proctor HS, Carder G, Cornish AR. "Searching for Animal Sentience; A Systematic Review Of The Scientific Literature". Animals (Basel). 2013 Sep c4;3(3):882-906. Simply because a political body legislatively inserted the word into ORS 167.305(1) doesn't magically make it any more empirically legitimate – the "science" behind it remains just as spurious.

[21] See, Pinker, Steven. How the mind works. Penguin UK, 2003.

certain types of nerve damage and the comatose, yet supports an inclusion of shrimps and lobsters, again, with nonsense on stilts as a consequence.[22]

Regardless of which current informal definition enjoys popularity at any given moment, the worse problem is that merely *citing* "sentiency" as the measure for the possession of rights neither shows that it *is* one, nor even creates a presumption that it is; it is not apparent at all how *appealing* to sentiency is supposed to *prove* that animals have rights.[23] A critical exploration of the term's legal foundation for inclusion in the class of rights-holders is simply empty. Where "sentience" is proposed as a synonym for "persons", then that tactic ends up obliterating the term's own semantic usefulness: if every animal that possesses sensory consciousness is a "person", then there is little point in referring either to animals or to humans as "persons" in the first place, since "person" would then add absolutely nothing not already contained in the

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[22] Grounding rights in the experience of suffering alone, as animal rights activists frequently propose, shreds the connection between rights and the mantle of personal responsibility necessary to respect and value rights: there is nothing that the animal need do to be entitled to rights, no test for it to meet to demonstrate its rationality, no set of actions it must perform to justify its autonomy, no sounds or gestures it must make to disclose its command of language or obligation – it need only sit there and suffer and miraculously rights are bestowed upon it as a reward. See, e.g., D'Silva, Joyce, and Jacky Turner, eds. Animals, ethics and trade: The challenge of animal sentience. Routledge, 2012.

[23] This is the core defect of the attempted contribution by the *amici* horse scientists: for all their extended discussion of the wide range of horses' cognitive and behavioral experiences, they are speechless as to how having those experiences then necessarily generates a bestowment of legal rights.

term "animal".[24]

Legal subjects are rights-holders. Legal objects are those things in which rights are held. If one possesses a right, then one is by definition a legal subject and the thing one possesses that right in, by definition, is then a legal object. Humans happen to be the only legal subjects around because the core distinction between the rights-holders and the objects of their rights is a distinction based exclusively on the use of language, and only humans have language.[25] The acid test for rights-holding is not "sentience", nor consciousness, nor experience, but language use and language use alone. Rights are concepts created whole cloth via language, and have been and can only be made viable through the actual use of language.

Language is what transformed humans into conscious subjects of their own interactions with each other and with the natural world.[26] Humans are

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[24] See, e.g., James B. Reichmann Evolution, Animal 'Rights', and the Environment 261 (Catholic University of America Press 2000).

[25] See e.g. Leda Cosmides and John Tooby, "Cognitive adaptations for social exchange" in Barkow, J. Cosmides, L. and J. Tooby (eds.) The Adapted Mind: Evolutionary psychology and the generation of culture (Oxford University Press 1992); See e.g. Andrew, R.J. "Evolution of Intelligence and Vocal Mimicking", Science, August 24, 1962; MacDonald, C. "The Evolution of Man's Capacity For Language", in Evolution After Darwin, Vol. 2, Chicago; University of Chicago (1960); Hockett, C.F. and R. Ascher "The Human Revolution" Current Anthropology, June 1964; Ian Tattersall, Becoming Human: Evolution and Human Uniqueness 233-234 (Harcourt Brace and Co. 1998).

[26] See, Carstairs-McCarthy, Andrew. The origins of complex language: An inquiry into the evolutionary beginnings of sentences, syllables, and truth. Oxford University Press on Demand, 1999.

individual agents in that they are uniquely social beings with the capacity to take individual responsibility. A right requires its holder to make moral and conscientious decisions about oneself, and common law and statutory protections require rights-holders to also make moral and conscientious decisions for and about others.[27] Humans – as rights-holders – make moral and conscientious decisions because we can distinguish between right and wrong in a moral sense, and we can do that because language provides us a construction about what "right" and "wrong" even is. As language leads directly and inexorably to the conception and implementation of rights, then humans "live within a web of reciprocal rights and obligations created by our capacity for rational dialogue".[28]

Rights are the products of a historically founded social compact where the agreement among its members has been that if each does not want to be unreasonably constrained by the others, then each agrees to be reasonably constrained themselves.[29] Historically, we have produced and cemented such

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[27] See, Tasioulas, John. On the nature of human rights. na, 2012: "Human rights norms protect moral properties that each person has by virtue of their humanity…"

[28] See, Malik, Kenan. Man, Beast, and Zombie: What Science Can and Cannot Tell Us About Human Nature. (2002) at pp. 372.

[29] See, Langbein, John H., Renée Lettow Lerner, and Bruce P. Smith. "History of the common law: The development of Anglo-American legal institutions." (2009): 09-07.

agreements by talking and writing about them.[30] In doing so, humans bind themselves to certain obligations, to be punished or penalized if they violate the compact.[31] A voluntary agreement to comport one's behavior to a communal standard is what rights are all about – in governing ourselves we require ourselves to be subject to procedural and institutional strictures, and, to be formal about it, we codify those strictures by statute, our most formal style of writing of all.[32] Comporting with mutually agreed upon written rules is the whole point of the law game. If one can't or won't be a fundamental part of that agreement – such as the horse here – one can't play.[33]

We use language to also ascertain that others will voluntarily restrain

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[30] See, Gough, John Wiedhofft. The social contract: A critical study of its development. Oxford: Clarendon Press, 1957.

[31] See, Osborne, Catherine, and Catherine Rowett. Dumb Beasts and Dead Philosophers: Humanity and the Humane in Ancient Philosophy and Literature. Oxford University Press, 2007 at p. 180: "We can discover whether someone has a certain right by determining whether the legal statutes are in force and whether they apply to people in that category. Checking whether the right exists thus involves checking whether the law still applies, whether the candidate has the necessary qualifications, whether the body charged with fulfilling the attendant obligations is operative, and whether the candidate has any way of claiming the right."

[32] Bruncken, Ernest. "The Common Law and Statutes." *Yale Law Journal* 29.5 (1920): 4.

[33] In that sense, were animals rights-holders, then "animal cruelty laws" must apply to them exactly as they apply to all other rights-holders – yet when animal rights activists are confronted with adjudicating competing rights among all rights-holders as an intrinsically defined group, they falter: they know in their hearts that in the real world the lion is not planning on laying down with the lamb anytime soon, yet neither can they agree to hold the lion legally accountable in law for what lions "naturally" do to lambs, acts encompassing intentional violations of every animal cruelty law imaginable.

their instinctual behaviors in exchange for us restraining *ours* – contrastingly, spoken or written promises or assurances are simply not available from animals.[34] The "agreement" is an exclusively human invention. Laws, also an exclusively human invention, both arise from and give richness to the core idea of what an "agreement" is. Our twin capacities for a) self-imposed restraint, and b) the means to broadcast that we are engaging in such restraint, are the massive foundations underlying our rapacity for mutually negotiated rules of performance, the *aqua vitae* of all of our agreements and all our rules.[35]

And the rules of how to play are transmitted from one person to the next, as well as from one generation to the next, by language – the rich and complicated acts of speaking, listening, writing, and reading. An ability to communicate conceptually and linguistically is absolutely essential to giving life to the concept of a right. The immense, manipulative power of language is what gives our enjoyment of any freedoms, and our displeasure at any restraints, true meaning.

Plaintiff's attorneys claim a direct psychic pipeline to divining the

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[34] See generally, Pinker, S. The Language Instinct Harper Collins, New York (1995) at p.368-9: "In all [human] cultures, social interactions are mediated by persuasion and argument. How a choice is framed plays a large role in determining which alternative people choose…[E]volving humans lived in a world in which language was woven into the intrigues of politics, economics, technology, family, sex, and friendship that played key roles in individual reproductive success."

[35] Cohen, Morris R. "The basis of contract." *Harvard Law Review* 46.4 (1933): 553-592.

interests of a horse to sue its former owner – somehow they are specially privileged to be the transmitters of the horse's internal and unarticulated desires, intents, and purposes. Yet the attorneys are themselves suspiciously silent as to how that mystifying process works. No independent assurances can possibly be provided that the horse wants to sue, or wants compensation for damages, or wants anything conceptually at all.[36] Where courts normally obtain those assurances via translators and interpreters[37], no such avenue is available here – and the judiciary then has no guarantee that whatever interests this litigant might sincerely have are not slyly circumvented by its lawyers' private agenda or subterfuge.

Rights-holders have three obligations imposed on them as the admission

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[36] Ingold, Tim. *The animal in the study of humanity*. Vol. 99. 84â, 1988: "The words of a language, unlike the components of a communication system like the honeybees' dance, function primarily as symbols rather than signs. This means that their reference is to the internal world of concepts rather than the external world of objects. Thus language is, first and foremost, an instrument of thought, and not just the means for an outward expression of broadcasting of thoughts that are somehow already there, but which – in the absence of a broadcasting medium – would remain private, known only to the subject…We cannot grasp animals' thoughts simply by learning and practicing their communicatory mode, because the animals have no thoughts, as such to grasp…The normal non-human animal is the very opposite of the muted thinker. Throughout its waking life the animal continually emits a veritable profusion of signals, but without a reflexive linguistic facility it cannot isolate thoughts as objects of attention. That is, rather than thinking without communicating, the animal communicates without thinking; so that the signals it transmits correspond to bodily states and not to concepts."

[37] See generally, Morris, Marshall, ed. Translation and the Law. John Benjamins Publishing, 1995; Schroth, Peter W. "Legal translation." *Am. J.*

price to enjoying a right: one, the formal and public assertion of the right by the act of *pleading*; two, the formal and public uncovering of the right by the act of *discovery*; and three, the formal and public presentation of the right by the act of *trial*.[38] Pleading is a stylized form of written communication that frames a factual problem in the accoutrements of a legal terminology. Discovery is a stylized form of oral and written communication that marshals the evidence necessary and sufficient for resolving the problem. Trial is a stylized form of oral and written communication that marries the pleadings to the facts to the evidence to the law, all in order to ultimately resolve the problem publicly and with (hopefully) some finality.

There is not a single step in the sequence that does not impart both a burden and a benefit on any participant who wishes to resolve concerns through the application of law. "Filing a suit" can no more be divorced from "proving a suit" or "trying a suit", than the behavior of "suing" in general can

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Comp. L. Supp. 34 (1986): 47; Cao, Deborah. Translating law. Multilingual Matters, 2007.

[38] Sunderland, Edson R. "Theory and Practice of Pre-Trial Procedure." *Mich. L. Rev.* 36 (1937): 215; Stephen, Henry John. A Treatise on the Principles of Pleading in Civil Actions... The second edition, with corrections and improvements. London, 1827: "In the course of administering justice between litigating parties, there are two successive objects – to ascertain the subject for decision, and to decide. It is evident that, towards the attainment of the first of these results, there is, in a general point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy. Thus far, therefore, the course of every system of judicature is the same."

be divorced from language utilization in the three forms described. Plaintiff's attorneys compartmentalization of an animal's "right to sue" by itself without accepting any of the other steps is not just artificial, it belies the intimate connection to complex linguistic usage that we recognize as making legal participation via all three steps valuable in the first place.[39]

Language, being an ultimate social activity, makes it so the translation of organic processes inside our heads into "thoughts" and "ideas", and from there into "claims, "evidence" and "proof", requires a group concurrence in using symbolic thought to bind together members of that pact, and requires mutual agreements about spoken and written conventions to make sense of how the symbols are used.[40] In or out of a courtroom, it takes language to be able to identify any fact as a legally interesting one, to be able to ascertain how facts are best proven, to be able to present the evidence via argument, to reach a rational conclusion from the assembly of evidentiary pieces.[41] An analysis of

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[39] See, Brenneis, Donald. "Language and disputing." *Annual Review of Anthropology* 17.1 (1988): 221-237. The *amici* law professors fall down at exactly this point: all the semantics in the world can't help them make the jurisprudential connection between an insistence that horses need "legal protections" (which horses already have plenty of) with the corollary that they also need – or could utilize – "a right to sue".

[40] See, Noble, William, and Iain Davidson. "The evolutionary emergence of modern human behaviour: Language and its archaeology." *Man* (1991): 223-253; Bickerton, Derek. Language and species. University of Chicago Press, 2018.

[41] See, Fetzer, James H. "The evolution of intelligence: are humans the only animals with minds?" Open Court Publishing, 2005.

the world of legal objects and legal subjects is mandatorily language-bound – it cannot be otherwise.[42]

The trial court thus had no alternative but to dismiss an action founded on the empty argument that an entity – that can't express the fundamental basis for rights or participate at even the most basic level in the core actions on which all rights are founded – nonetheless could demand to exercise them.

iv. Plaintiff Misunderstood "Persons" and "Victims"

Finally, the trial court also correctly granted Defendant's motion since, overall, Plaintiff was flat wrong as well about use of the terms "persons" and "victims".

As to "person", Plaintiff's attorneys' use of the term was logically inconsistent. They claimed a horse to be a "legal person" when referring generically to "the animal cruelty statutes" in their protective capacity.[43] Yet where the word "person" *actually appears* in the "animal cruelty statutes" in an accusatory capacity – ORS 167.315(1) ("A person commits the crime of animal abuse in the second degree…"); ORS 167.320(1) ("A person commits the crime of animal abuse in the first degree…"); ORS 167.322(1) ("A person commits the crime of aggravated animal abuse in the first degree…"); ORS

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[42] Mary Midgley, "Is A Dolphin A Person" at 166-174 in The Animal Ethics Reader, (Armstrong, S.J. and R. G. Botzler, eds.) (London Routledge Press 2003).

167.325(1) ("A person commits the crime of animal neglect in the second degree…"); ORS 167.330(1) ("A person commits the crime of animal abuse in the first degree…") (Emphasis added) – Plaintiff's attorneys decline to apply it to their client or to any animal.[44] The result of that internally contradictory parlance is that as a man injures a horse, both are "persons", yet as a horse injures a man, only the man is a "person", a position governed entirely by whim and personal interests. The trial court understandably declined to endorse such gamesmanship.

Further, the simplistic suggestion of equating animals with children – which Plaintiff's attorneys forwarded and which is a trope found throughout the literature on animal rights as one of several "arguments from marginal cases"[45] – is defective in two basic senses.

First, it does not accomplish the goal at all of demonstrating that animals have rights, but instead merely seeks to undermine criteria traditionally

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[43] "This Court should therefore recognize legal personhood status for Justice with respect to his rights under the animal cruelty statute." Appellant's Opening Brief at 18.

[44] Essential criteria for being deemed a "person" include, at a bare minimum, autonomous agency, affectivity, rationality, and mutual recognizance of other agents, none of which are present in horses. See, Rescher, Nicholas. Human interests: Reflections on philosophical anthropology. Vol. 6. Stanford University Press, 1990 at pp. 6-21.

[45] See, Narveson, Jan. "Animal rights." *Canadian Journal of Philosophy* 7.1 (1977): 161-178.

employed for finding the possession of rights by humans alone.[46] Second, it entirely misses a crucial distinction between the two groups.

Initially and superficially similar to animals, human infants do begin as creatures of natural impulses with constricted physical capabilities, no control over themselves, and no concept of self, much less of responsibility or punishment.[47] However, as an infant learns to control its movements and its body, it slowly begins to attain physical maturity and construct a "self", and as it enters the world of producing and comprehending language it then becomes social in the sense of being free to act independent of its environment, to make choices, to mold and affect the behaviors of others by acts of will, and to accept being punished for transgressions against those parameters.[48]

That manner of freedom and comprehension - the capacity to eventually grow to act rationally in a social milieu aware of, and subject to, potential consequences - is the type of freedom that creates legal rights, and is a

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[46] See, Frey, Raymond Gillespie. Interests and rights: The case against animals. at p. 28-31. Oxford: Clarendon Press, 1980

[47] See, Philippe Rochat and Susan J. Hespos, "Differential Rooting Response by Neonates: Evidence for an Early Sense of Self", Early Development and Parenting Vol. 6.3-4 at 105-112 (1997); de Boysson-Bardies, Bénédicte. How language comes to children: From birth to two years. Mit Press, 2001; Janet Astington, The Child's Discovery of the Mind (Harvard University Press 1993).

[48] See, Rawls, J. (2001). Justice as Fairness. Cambridge, MA. Belknap, Harvard University Press at p. 6: "Social cooperation is distinct from merely socially coordinated activity [in that it] is guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct."

developmental process that animals do not and cannot undergo:

> Our minds have been built by selfish genes, but they have been built to be social, trustworthy, and cooperative . . . Human beings have social instincts. They come into the world equipped with predispositions to learn how to cooperate, to discriminate the trustworthy from the treacherous, to commit themselves to be trustworthy, to earn good reputations, to exchange goods and information, and to divide labour. In this we are on our own. No other species has been so far down this evolutionary path before us, for no [other] species has built a truly integrated society.[49]

From what people learn in their own childhoods, and from our close observations and studies of others, we naturally come to expect that a human infant will eventually change over time and, as it develops a self with advancing age, become slowly enmeshed in the complex web of rules – the laws with which grown humans embroider their lives. Conversely, we do not naturally expect that animals would change in that sense at all as they get older, to become possessed of any more recognition of self than they ever had at any age.[50] That distinction is crucial to the counterfeit analogy of animals to children.[51]

As to "victims", our Supreme Court in State v. Nix, 355 Or 777, 334 P3d 437 (2014), vacated in 356 Or 768, 345 P3d 416 (2015), specifically stated that

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[49] See, Ridley, Matt. The Origins of Virtue: Human Instincts and the Evolution of Cooperation. Penguin UK, 1997.

[50] See, Savage-Rumbaugh, E. Sue, and Duane M. Rumbaugh. "The emergence of language." *Tools, language and cognition in human evolution* (1993): 86-108.

[51] See also, Cupp Jr., Richard L. "Moving beyond animal rights: A legal/contractualist critique." *San Diego L. Rev.* 46 (2009): 27.

"animals are "victims" for the purposes of ORS 161.067(2), [a] decision…based on precedent and on a careful evaluation of the legislature's intentions as expressed in statutory enactments." Two important points arise from that precise language.

One, the Court did not conflate "victim" with "litigant", two very distinct legal categories. Two, and more importantly, the "victim" designation was *only for purposes of applying it to the anti-merger statute* of ORS 161.067(2), nothing more. *That* was the rule that State v. Hess adopted and which does not affect anything whatsoever about the role of civil plaintiffs: "we nonetheless are persuaded by the Nix court's reasoning on the merger question, and we adopt it". State v. Hess, *supra* (emphasis added).

The "merger question" to which Nix and Hess referred is a sentencing concern that involves particular circumstances in which a criminal episode, though implicating only one statute, nevertheless affects more than one victim, and which addresses how to then calculate, in a criminal sentencing proceeding, the number of separately punishable offenses in light of the number of victims involved. State v. Barrett, 331 Or 27, 10 P3d 901 (2000). The calculus of "merging criminal offenses" has nothing whatsoever to do with creating "private rights of action in a civil case" as Plaintiff's attorneys claimed in the lower court, and the clear state of the current law in Oregon in the form of common law, decisional law, statutory law, and constitutional law solidly in

place for centuries supported the trial court's decision to dismiss. See, e.g., Oregon Constitution, Art. 1, Section 10: "…every man shall have remedy by due course of law for injury done him in his person, property, or reputation." (Emphasis added).

Plaintiff's attorneys' incorrect extension of "victim" into the civil realm was in defiance of what our legislature has written. Although Plaintiff's attorneys failed to mention it in their brief, Oregon has a quite clear statutory definition of "victim" already in place in ORS 137.103(4):

(a) "the person or decedent against whom the defendant committed the criminal offense if the court determines that the person or decedent has suffered or did suffer economic damages as a result of the offense";

(b) "any person not described in paragraph (a) of this subsection whom the court determines has suffered economic damages as a result of the defendant's criminal activities";

(c) "the Criminal Injuries Compensation Account, if it has expended moneys on behalf of a victim";

(d) "an insurance carrier, if it has expended moneys on behalf of a victim";

(e) "Upon the death of a victim…the estate of the victim"; and,

(f) "the estate, successor in interest, trust, trustee, successor trustee or beneficiary of a trust against which the defendant committed the criminal

offense, if the court determines that the estate, successor in interest, trust, trustee, successor trustee or beneficiary of a trust suffered economic damages as a result of the offense."

No horse (nor any animal for that matter) is identified in that rather specific list, and the narrow position on merger which Nix and Hess took certainly did not act to alter or abrogate any part of ORS 137.103(4). Yet Plaintiff's attorneys went even further adrift. Building on their misapplication of the true rule in Nix and Hess regarding the merger of offenses, they then proposed a heavily flawed syllogism: If "A", animals are "victims", and if "B", "victims" have rights, then "C", animals have rights.

There are holes in every part of that syllogism, fissures created by dissolving the real world definitions and restrictions necessary to make any of the three sentences effective or usable propositions. For instance, sponges are certainly "animals" but no one could sensibly use "A" to stump for the legal rights of sponges as the "victims" of cruel fishermen, nor is that ever likely to happen without first draining the word "rights" of every ounce of its remaining meaning. Similarly, victims may have a limited right to participate in a criminal sentencing proceeding, but no one could sensibly use "B" to claim they have the right to skip procedural rules which don't appeal to their fancy (such as Plaintiff's attorneys did with ORCP 27). In addition, rights certainly include the right to freedom of association, but no one could sensibly use "C"

to claim that animals should be able to belong to their own religious organizations.

Moreover, an appeal to logic isn't even needed since Oregon also has a "Crime Victims' Bill of Rights" in which seven distinct rights, which crime victims in Oregon actually *do* possess, are already carefully enumerated:

1. The right to have the trial or adjudication, including the imposition and execution of the sentence or disposition, conducted with all practicable speed. ORS 147.430(1)(a).

2. The right to the prompt and final conclusion of the criminal or juvenile delinquency proceeding in any related appellate or post-judgment proceeding. ORS 147.430(1)(b).

3. The right to be notified by the district attorney of the victims' rights described in this section and ORS 138.627 and 144.750. ORS 147.433(1)(a).

4. The right to reasonable, accurate and timely notice from the Attorney General when an appeal is taken in the criminal proceeding. ORS 147.433(1)(b).

5. The right to reasonable, accurate and timely notice from the counsel for the state when a conviction in the criminal proceeding is the subject of a petition for post-conviction relief filed under ORS 138.510 to 138.680. ORS 147.433(1)(c).

6. The right to attend any public hearing related to the criminal

proceeding that is conducted by an appellate court. ORS 147.433(1)(d).

7. The right to be reasonably protected from the offender, if the offender is present, at any related appellate or post-conviction relief proceeding. ORS 147.433(1)(e).

While mention of ORS 147.430 was absent from Plaintiff's attorneys' brief, there is just no avoiding the fact that the "right to be a plaintiff in a civil suit" is simply not in that list anywhere (and it would be pure folly to try to apply the ones that *are* in place to horses or any animals anyway.[52])

c. Plaintiff's Attorneys Still Mislead About "Guardians"

Throughout Appellant's Opening Brief, Plaintiff's attorneys shamelessly sustain their sham contention that the horse has a "guardian".[53] They do so apparently unfazed by the trial court's ruling that "there was no objectively reasonable basis" for doing so below (SER-24), a ruling separate from the dismissal of the action and one which they have not claimed as an assignment of error in this appeal.

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[52] The first two require that the victim assert the right orally, "at any critical stage of the proceedings…" (ORS 147.430(5)(a)), or in writing "after providing a copy to the parties" (ORS 147.430(5)(b)), while the last five require that the victim make a "request to the district attorney before a judgment of conviction is entered" (ORS 147.433(1)). Notably, the horse met none of those requirements, so no right was even preserved anyway.

[53] Appellant's Opening Brief at p. 1 ("Kim Mosiman, through her nonprofit sanctuary Sound Equine Options, subsequently took custody and guardianship over Justice"), at p. 2 ("Justice's guardian Kim Mosiman filed this common law negligence per se claim"); and at p. 8 ("On May 1, 2018, Mosiman filed this common law negligence per se action on Justice's behalf…").

As the trial court implicitly recognized, ORCP 27A refers only to "persons": "When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a *guardian ad litem* appointed by the court in which the action is brought." (Emphasis added). The horse here was not a "a minor or a person who is incapacitated or financially incapable as those terms are defined in ORS 125.005", and ORS 125.005, ORS 125.010, and ORS 125.012 all refer to "persons" as parties, not to "animals".

At the trial level, Plaintiff's attorneys never even attempted to have a guardian or guardian *ad litem* to the horse appointed under ORS 125.010(1) ("any person who is interested in the affairs or welfare of a respondent may file a petition for the appointment of a fiduciary or entry of other protective order"), or under Section (2)(a) ("a protective proceeding is commenced by the filing of a petition in a court with jurisdiction over protective proceedings"), or under Section (3)(a) ("the court may appoint any of the following fiduciaries in a protective proceeding…a guardian, with the powers and duties specified in this chapter.")

Rigorously circumscribed by a set of clear statutory procedures, a guardianship proceeding is a probate court matter per ORS 111.085(7). See, Iremonger v. Michelson, 97 Or App 60, 63, 775 P2d 860, 862 (1989). No

petition for appointment or for any protective proceeding at all under any of those statutes, or under *any* statute, was ever filed in any probate court.

In turn, ORCP 27A only allows appearance once a guardian has been actually appointed and not before. Oregon law dictates that it is the Court, not the parties which make determinations about the ward's interests, special needs and circumstances. State ex rel. Juvenile Dep't of Multnomah Cty. v. Burke, 170 Or App 644, 648, 14 P3d 73, 75 (2000), rev den, 331 Or 583 (2001) (in order to approve a plan for guardianship, the Court must determine the child's interests and find that the "special needs or circumstances" of the child support such a decision). It is the Court, not the parties, which determines just who the guardian is going to be and who in fact is suitable to protect the ward and under what conditions. Windishar v. Windishar, 83 Or App 162, 731 P2d 445 (1986), opinion adh'd to on recons., 84 Or App 580 (1987).

In spite of all those rules, Plaintiff's attorneys nevertheless did not a) file a guardianship petition, b) notice and hold a hearing in open court, c) present competent evidence at the hearing sufficient to meet the applicable standard of proof, d) provide others at the hearing a chance to challenge the petition, or e) obtain a judge's independent decision on the proposed appointment, the competing interests, and the proposed guardian's suitability at the hearing. See, Dept. of Human Servs. v. K.H., 256 Or App 242, 301 P3d 427, modified on recons., 258 Or App 532 (2013), rev den, 354 Or 699 (2014) (outlining all

those steps); Iremonger v. Michelson, 97 Or App 60, 775 P2d 860 (1989) (court must initially determine whether guardianship is warranted). Instead, they blithely skipped all of those steps and merely proclaimed by fiat that a guardian for the horse existed – and were specifically sanctioned in the trial court for doing so.[54] Given that history, it is absolutely reprehensible that on appellate review they impudently persist in the same falsehood in front of this Court as well and without justification.

III. CONCLUSION

This is not an appeal by a horse. Horses cannot appeal judgments any more than they can participate in any other stage of legal proceedings, since horses are fundamentally unable to review, consider, read, write, explain, assert, argue, prosecute, defend, submit, prove, reason, decide or contest *anything*, far less state trial court judgments. This is an appeal instead by an animal rights organization's attorneys undertaken solely for political purposes; the names on the appellant's brief and the rhetoric within it reveal that much

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[54] In addition to enjoying the simplicity of making up one's own civil procedures, Plaintiff's attorneys also apparently rejected state guardianship rules because they just don't trust court-appointed guardians (Appellant's Opening Brief at p. 30: "Moreover, there is no guarantee that damages awarded directly to an animal's guardian would actually be spent on that animal's care.") Apparently Ms. Mosiman's trustworthiness is to be accepted not just without any question but also without any supervision.

and much more.[55] The attorneys and their words disclose that, whether out of ignorance or artifice, they misstate what "facts" are, what "persons" are, what "victims" are, and what "rights" are. Recognizing those inaccuracies, and dismantling the falsehoods built upon them, is critical to an appropriate disposition here.

A true appeal comprises a litigant's request to correct an error by a trial court. This, to the contrary, is an invitation by a political organization to adopt a radical social agenda and transform the law. "Making law", however, is the legislative branch's role, not the judiciary's. Van Winkle v. Fred Meyer, Inc., 151 Or 455, 461, 49 P2d 1140, 1143 (1935) ("Under our Constitution, article 4, § 1, the power to make and declare laws, subject only to the initiative and referendum powers reserved to the people, is vested exclusively in the legislative assembly"). Worse, the *basis* on which this panel is invited to make new law is a complete cipher. A search for the word "animal" in the Oregon Constitution yields a total of two mundane results regarding using lottery proceeds to maintain animal diversity and regarding forfeiture[56] – yet Plaintiff's attorneys are essentially demanding insertion of that word into our state's foundational document because, as animal rights activists, they wish to swap "animal" in for "person" in *all* codified law as if the two terms

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[55] A term search of the opening brief's text reveals an impressive 84 references to "suffering" and "cruelty", yet only 3 references to "error".

encompassed the same concept. A search for the word "sentience" in our constitution (and in the Oregon Revised Statutes) yields *no results at all* – yet Plaintiff's attorneys insist on this Court employing it as a key term because, as animal rights activists, they have unilaterally proclaimed that (non-scientific and non-legal) word's coronation as a synonym for rights.

This invitation must be rejected. The disquiet unleashed by granting serious consideration to this appeal stems not just from the worrisome projection of a new rule beyond a perimeter to preposterous results, the slippery slope of "if horses, why not horseflies" (re other participants) and "if a plaintiff, why not a defendant" (re other roles and procedures).[57] It arises also from the threat of disemboweling the concept of "rights" itself:

> "Rights activists clearly buy into the jargon that belongs to legal rights, in order to charge others, whose actions they deplore, with apparent failures to comply with moral rules that they represent as quasi-legal obligations. They speak as though there were statutes to which we were beholden, although we were never party to their enactment; as though there were candidates whose qualification is written into their genetic code, not deliberately awarded as a privilege; and as though the body charged with supplying the entitlements were the whole human race, regardless of whether anyone is actually in a position to do anything, and despite the fact that there is no recourse to any court of appeal and no sanctions for omitting to comply…"
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> Osborne, Catherine, and Catherine Rowett. Dumb Beasts and Dead Philosophers: Humanity and the Humane in Ancient Philosophy and Literature.

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[56] Art. XV, Sec. 4b(1)(d), Sec. 10(10).

Oxford University Press, 2007 at p. 180-181.

The Naruto court's apprehension that "Institutional actors could simply claim some form of relationship to the animal…and use it to advance their own institutional goals with no means to curtail those actions" (Naruto v. Slater, 888 F3d 418, 432 (9th Cir 2018)) is made genuine by this particular appeal, which exposes just how insatiable animal activist organizations such as ALDF are.

At the trial level, Plaintiff's attorneys began by seeking recovery of a horse's supposed economic and noneconomic damages stemming from a specific purported injury, yet on appeal that's not enough – somehow our state's legal system must now also "ensure that [the horse's] special needs will be satisfied at his permanent home" Appellant's Opening Brief at p. 30.

At the appeal level, Plaintiff's attorneys are restricted to having this Court simply "affirm, reverse or modify the judgment or part thereof appealed from" (ORS 19.420(1)), yet *that* is not enough – somehow this Court is also commanded to spontaneously grant their client "substantive legal rights" and "procedural legal rights" as well. Appellant's Opening Brief at pp. 11,14.

Ostensibly, at its inception, this case was about a single equine, yet that limitation is not *nearly* enough for this zealous group – somehow "all animals", "nonhuman animals", "individual animals" are now *all* to be the "subject of

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[57] See e.g., Lee, Nicholas L. "In Defense of Humanity: Why Animals Cannot Possess Human Rights." *Regent UL Rev.* 26 (2013): 457.

legal rights" and "the law" overall is to now "impose duties on humans to act or refrain from acting in ways that violate those rights".[58] That fantastic leaping without looking from the most modest foundation to the shakiest precipice – from objective damages to universal guarantees, from a single horse to all animals everywhere – strongly signals that the activism will never be sated as increasingly larger monuments are erected across the unfolding path, from defining subcategories of "nonhuman animals" to parsing out exactly which "rights" are affected and which remain untouched.[59]

The evisceration of rights is made manifest by even the most initial of forays onto the slope of Plaintiff's attorneys' proposal. If horses have an implied right to sue people for damages under ORS 167.305, then under the same reasoning horses must also be able to sue people for racing them for money under ORS 462.130; for selling them at auctions under ORS 599.610;

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[58] Appellant's Opening Brief at pp. 14-15.

[59] An animal's "liberty right", for instance, would be more than problematic, it would be insurmountable. Leashes, collars, muzzles, tethers, halters, saddles, and harnesses are as critical as brakes on cars: without them, a potentially dangerous object is transformed into an actually dangerous object. Restraint isn't limited to keeping locomotory movements in check, but includes limiting bodily systems as well like defecation and procreation. As to the former, until animals can voluntarily control their own bowels and bladders in the same manner that humans do, then restraint as to that function is mandated. As to the latter, pet owners, ranchers and vets regularly impose contraception on breeding pairs to prevent surplus animals, yet such actions would undoubtedly violate a right to be free from unwanted interference with bodily functions. Until animals can voluntarily control their sexual activities in the same manner that humans do, then restraint as to that function is mandated as well.

for fencing them in pastures and stockyards under ORS 607.045; for separating them from their mothers under ORS 607.350; for riding them improperly upon the highway under ORS 814.150; for drugging them without their owner's consent under ORS 165.825; for branding them under ORS 604.005, and for quarantining them or slaughtering them under ORS 596.010 or ORS 603.065.

Truly, if horses have an implied right to sue people for distress damages under ORS 167.305, then it has to be that they can also sue people for even using them as horses *at all in any form*, including such as "putting them in shows, fairs, competitions, performances, or parades, making them do dressage, do hunter and jumper shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, endurance trail riding, or western games and hunting, training them, grooming them, breeding and teaching them, boarding them, riding them, inspecting them, or evaluating them", all activities currently permitted and regulated under ORS 30.687. There being nothing zoologically or jurisprudentially unique about equids, then once those statutory obstacles for horses are thrust aside, the analysis must necessarily continue with parallel concerns regarding dogs, cats, rabbits, chickens, fish, and insects, ad infinitum.[60]

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[60] See, Claudio Carere and Jennifer Mather (ed.) The Welfare of Invertebrate Animals (Animal Welfare Book 18) 2019; Springer Publishing: "Welfare is a broad concern for any animal that we house, control or utilize – and we utilize invertebrates a lot. What is pain in crustaceans, and how might we prevent it?

The law-altering privileges which Plaintiff's attorneys stump for come at a steep price, and that price includes an abolition of core substantive concepts and procedural rules. Where the rules say that a protected person must be appointed a guardian by a court (ORS 125.005(4)), Plaintiff's attorneys have simply disregarded it. Where the rules say that a plaintiff is restricted to "a plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition" (ORCP 18A), Plaintiff's attorneys have simply disregarded it.[61] Where the rules say that a law applies to "persons"[62], Plaintiff's attorneys have simply disregarded it. Driven as they are toward

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How do we ensure that octopuses are not bored? What do bees need to thrive, pollinate our plants and give us honey? Since invertebrates have distinct personalities and some social animals have group personalities, how do we consider this? We have previously relegated invertebrates to the category 'things' and did not worry about their treatment. New research suggest that some invertebrates such as cephalopods and crustaceans can have pain and suffering, might also have consciousness and awareness. Also, good welfare is going to mean different things to spiders, bees, corals, etc." See, Barron, Andrew B., and Colin Klein. "What insects can tell us about the origins of consciousness." *Proceedings of the National Academy of Sciences* 113.18 (2016): 4900-4908: "How, why, and when consciousness evolved remain hotly debated topics. Addressing these issues requires considering the distribution of consciousness across the animal phylogenetic tree. Here we propose that at least one invertebrate clade, the insects, has a capacity for the most basic aspect of consciousness: subjective experience."

[61] Plaintiff's Complaint included a color picture of the horse, an "Introduction" and "Legal Background" composed of legal arguments replete with footnotes, and a plea to the trial court to use its "broad inherent authority to prevent injustice", none of which is allowed by ORCP 18A.

[62] Oregon has numerous statutory definitions of the word "person", including ORS 125.802(10)(a), ORS 128.316(6), ORS 161.015(5), ORS 167.205, ORS 174.100, ORS 646A.602(10), ORS 656.005(23), ORS 756.010(5), and ORS 759.500(2) among others, and not one mentions "animal" or anything close.

attaining their political goals[63], they just cannot be bothered with employing the rigor needed to either a) create and implement new laws properly through the legislative process, or b) apply facts to laws currently in place, an application outright devastating to their private purposes.[64]

Stepping down from the precarious ledge on which Plaintiff's attorneys perch, the footing at ground level is solid: the actual record here shows *no* error at all, much less reversible error, and the applicable law demonstrates that the trial court followed the law correctly when it applied state statutes to the letter and granted the motion to dismiss as those statutes command. The trial court's determination was consistent with well-established legal principles and was correct and thoughtful in carefully resolving the singular modest procedural issue actually presented by Defendant's motion.

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[63] On filing the Complaint, Plaintiff's attorneys conducted media interviews to promote ALDF's political stance about how the "groundbreaking" suit will "expand available remedies" and protect the "rights of animals".

[64] Since the severity and anatomical details of a plaintiff's injury are immaterial to the threshold existence of a legal claim, it is curious why plaintiff's attorneys targeted Gwendolyn Vercher given the plethora of injured horses in Oregon to select from. The likely answer is that the salacious generates publicity far more effectively than the mundane, hence the Plaintiff's attorneys hand-wringing about the horse's "extreme pain" from the first words of their brief on, and their devotion of far more pages to an explicit recitation of harms than to any explicit recitation of reversible error (Appellant's Opening Brief at 1, 5-8).

The Appellant having shown no reversible error, and the trial court having committed no reversible error, then the judgment issued by the Circuit Court need not then be reversed.

Dated this 11 day of October, 2019.

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Date: 11/15/2018 01:26 PM
Subject: Justice 18CV17601

Defendant filed a **Costs and Fees Bill** on October 3, 2018. Plaintiff filed a response and defendant filed a reply. Neither party requested a hearing. ORCP 68C(4)(e).

Defendant prevailed on her **Motion to Dismiss** the complaint and is, therefore, the prevailing party entitled to recover some costs and disbursements. ORCP 68C.

Defendant seeks reimbursement from plaintiff for the cost of her first appearance fee of $560. Plaintiff does not object. That amount is awarded.

Defendant also seeks a prevailing party fee of $600 from plaintiff. Plaintiff does not object but the statute dictates that an award of $325 is the correct amount, as there was no trial. ORS 20.190(2)(a)(A). The court, therefore, awards a prevailing party fee of $325.

Defendant further seeks an enhanced prevailing party fee of $5,000 from plaintiff, primarily on the grounds that there was "no objectively reasonable basis in law or fact for the plaintiff's attorneys to have declared Kim Mosiman the 'Guardian' of the plaintiff . . ." . $5,000 is the maximum amount allowed for an enhanced prevailing party fee. ORS 20.190(3). Defendant relies primarily on ORS 20.190(3)(b) as authority for her request. ORS 20.190(3)(b) sets forth one of many factors for the court to consider in exercising its discretion in determining whether to award an enhanced prevailing party fee. That factor is "the objective reasonableness of the claims and defenses asserted by the parties". *Id* . Plaintiff objects and this issue was fully briefed by the parties.

The court first notes that the caption reads "JUSTICE, an American Quarter Horse, by and through his Guardian, Kim Mosiman".

In its September 17, 2018 Order, the court denied defendant's claim for attorney fees, finding that there was "an objectively reasonable basis for the negligence claim asserted by Justice". Plaintiff argues that this finding precludes an award of any enhanced prevailing party fee as the determination of whether to award attorney fees and the determination of whether to award an enhanced prevailing party fee are based on the same standard of "objective reasonableness".

The court's September 17, 2018 finding was directed at the claim of a non-human animal attempting to assert standing on his own behalf. Defendant's request for an enhanced prevailing party fee, however, is primarily addressed to the issue of the standing of Kim Mosiman to sue on behalf of Justice as his Guardian. The court believes this distinction has

merit and finds that there was no objectively reasonable basis for naming Ms. Mosiman as the Guardian of Justice in this matter. Consequently, the court awards defendant an enhanced prevailing party fee.

The court awards an enhanced prevailing party fee of only $675, however, based on a number of factors that mitigate against a higher amount. First, the naming of Ms. Mosiman as Guardian did not cause extensive litigation on that specific issue; defendant's motion to dismiss was primarily directed at the issue of whether a non-human animal had standing to sue. Second, in comparing the conduct of the parties "that gave rise to the litigation", defendant admitted that she engaged in criminal conduct by abusing Justice, an innocent horse, and causing him injury. ORS 190(3)(a). Third, the court agrees with plaintiff's position that counsel for defendant engaged in personal attacks on counsel for plaintiff that were unnecessary and counterproductive. ORS 190(3)(h).

Pro Tem Judge John S. Knowles

CERTIFICATE OF SERVICE

I certify that on the 11 day of October, 2019, I served a true copy of Defendant-Respondent's Answering Brief and Supplemental Excerpt of Record by electronic service on:

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CERTIFICATE OF FILING

I certify that on the 11 day of October, 2019, I electronically filed the original of this Defendant-Respondent's Answering Brief and Supplemental Excerpt of Record with the State Court Administrator.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the Court-approved extension of the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a) and as extended by court order) is 14,804 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this 11 day of October, 2019

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