COLORADO COURT OF APPEALS 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Appeal from District Court, Adams County The Honorable C. Scott Crabtree, District Judge Case No. 2007CV287	
Appellants/Plaintiffs: KATHLEEN SULLIVAN; DYANNE CAPRIO, KENNETH HANDS; AND THOMAS EICHBUSH, individually and as parent and next friend of WYATT EICKBUSH, a minor; v. Appellee/Defendant: DANIEL BOWEN.	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 2010CA1578
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ANSWER BRIEF	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Sources

Appellee Daniel Bowen ("Bowen") hereby files this Answer to the appeal filed by Appellants Kathleen Sullivan, Dyanne Caprio, Kenneth Hanks and Tom Eichbush, individually and as next of friend of Wyatt Eichbush (collectively "Appellants") and states as follows:

STATEMENT OF THE CASE

This is a property damage case arising out of Appellants' admitted violation of the Jefferson County leash law and Appellants' admitted trespass onto Bowen's ranch. Appellants' dogs were accidentally poisoned while running at large. At trial, Appellants accused Bowen of recklessly killing their dogs and sought significant economic damages from Bowen. Additionally, Appellants asked the jury to award them a shocking amount in non-economic damages for emotional distress.

At the time of this incident, Bowen raised cattle on land which abutted vacant property owned by Appellants Dyanne Caprio ("Caprio") and Kenneth Hanks ("Hanks") (collectively, the "Caprio-Hanks Appellants") and Bowen stored hay on land which abutted the rental property of Appellant Thomas Eichbush, individually and as parent and next of friend of Wyatt Eickbush, a minor ("Eichbush"). *See* (CD 2575:17-19; CD 2536:11-25; *See also* Defs. Trial Ex. J,

attached hereto as Appendix 1; CD 2623:10-12) Bowen has "No Trespassing" signs posted on his perimeter fences. (CD 2628:10-18)

It is undisputed that Appellants disregarded Bowen's "No Trespassing" signs. The trial evidence established that the dogs owned by Eichbush and the Caprio-Hanks Appellants were trespassing and running at large on Bowen's ranch. (CD 2683:24-CD 2684:1-5; CD 2535:1-9) Eichbush testified that he allowed his son's dog to roam off leash and trespass on Bowen's property. (CD 2683:24-CD 2684:1-5) Eichbush conceded that shortly before this incident, he and his dog were trespassing in Bowen's field. *Id.*

Hanks testified that shortly before his dogs became ill, he crossed a fence and went onto Bowen's property with the Caprio-Hanks Appellants' two dogs. (CD 2522:10-18) At the time of this incident, Sullivan was visiting Eichbush with her two dogs. Sullivan admitted that, at various times, she allowed her dogs to run off leash. (CD 2792:23-CD 2793:1; CD 2793:24-CD 2794:1-2)

At around the time of Apellants' trespass, Bowen was having problems with coyotes. (CD 2537:23-CD 2538:1-3) During the 2005/2006 calving season, Bowen suffered more severe calf losses than normal because coyotes were eating his calves. (CD 2588:21-25; CD 2629:1-12; Def. Trial Ex. C, attached hereto as Appendix 2; CD 2631:15-17) In Colorado, it is expected that a rancher could lose

one to two percent of his cattle to coyotes, but Bowen's predation rate was much higher – *25 percent*. (CD 3165:25-CD 3166:1; CD 3171:5-8)

A rancher has an obligation to care for his cattle. (CD 3166:14-23) Hence, Bowen took several reasonable, non-lethal steps to protect his cattle from coyotes. (CD 3171:19-cd 3172:1-6) For example, Bowen stored animal feed that otherwise might attract the coyotes, played loud music, turned on the lights in the area of his barn, put llamas in his pastures, increased his pasture patrols and tried to put birthing cows in the barn. (CD 2613:3-CD 2624:23) Despite all of these efforts, by the end of January 2005, Bowen lost one-fourth of his calves to coyotes. (CD 2617:1-CD 2618:14; CD 2596:8-16)

Bowen and his son contacted the Department of Wildlife for assistance with the coyote problems. (CD 2597:3-11) In Colorado, a rancher can legally and kill coyotes and, thus, an officer from the Department of Wildlife advised Bowen to shoot the coyotes. (CD 2776:2-12; CD 2597:3-11) As advised, Bowen hired a man to shoot coyotes. (CD 3136:10-13) Despite Bowen's efforts, coyotes continued to attack his calves.

Bowen felt like he had run out of alternatives and decided to use poison on his property to stop the coyotes. He knew the coyotes were running through a tall grassy area of his property, located within 700 feet of his calving barn. (CD

2573:6-CD 2574:1-21) This area is fence enclosed. (CD 2624:18-CD 2625:3) Bowen figured if a coyote was within 700 feet of his barn, "the coyote must be up to no good." (CD 2625:2-3)

Bowen soaked meat in Paraquat, a restricted use herbicide, that was left behind by one of his commercial farming tenants. (CD 2554:12-21) Jim Daniel, an agricultural chemical expert, testified that Paraquat is a commonly used herbicide for killing annual weeds. (CD 3040:13-20; CD 3063:12-13; CD 3042:23-25) Paraquat is a brown liquid that is colorless when it dries. (CD 3049:3-22) The undisputed testimony of Mr. Daniel was that Paraquat is not a powder and it would never appear as a white powdery substance. *Id.* Paraquat has zero-soil activity, meaning once Paraquat touches soil, it is totally inactivate. (CD 3042:23-CD 3043:1-6) Mr. Daniel testified that Paraquat is benign to the environment. (CD3069:5-15) He also testified that Paraquat does not cause permanent damage to land. (CD 3047:3-CD 3048:1-16)

Bowen placed the poisoned meat in the fence enclosed parcel of his ranch, where he knew the coyotes were running. (CD 2624:18-CD 2625:3; CD 2555:17-24; CD 2573:6-CD 2574:1-7) Bowen did not put poisoned meat in any other part of his property (CD 2625:4-8) and did not put poisoned meat on his neighbor's property. (CD 2626:9-11) Although the Caprio-Hanks Appellants claim Bowen

put poison meat on their property, Appellant Hanks admitted that he never saw Bowen put poisoned meat on his property and had no proof that Bowen put poisoned meat on his property. (CD 2537:10-16) Bowen had no obligation to tell his neighbors that he was shooting or poisoning coyotes on his own property. (CD 3173:19-25)

While running off leash and trespassing, Appellants' dogs were poisoned. Bowen did not intentionally kill his neighbor's dogs. (CD 2631:19-21; CD 2640:22-CD 2641:3) Upon learning that Appellants' dogs were poisoned, Bowen immediately told Appellants that he put poison out to kill coyotes. (CD 2627:2-12; (CD 2539:10-17) Bowen even gave Appellant Hanks the label off the Paraquat bottle. (CD 2627:2-9) Finally, Bowen apologized or tried to apologize to all of the Appellants. (CD 3030:22-25-CD 3031:1-20)

Although it is true that Bowen used Paraquat in an unauthorized manner, Bowen did not believe he acted recklessly when using the poison to protect his own cattle on his own property. (CD 2641:4-6; CD 2643:19-CD 2644:4) The jury could infer that Bowen was not reckless based on Bowen's testimony that: (1) he limited his placement of poisoned meat to a 20 acre, fence enclosed section of his larger ranch; (2) the Caprio-Hanks Appellants' property was vacant at the time

(CD 2536:11-15); and (3) Bowen had never seen his neighbor's dogs roaming near his cows. (CD 2641:4-20)

The jury entered a verdict against Bowen on the negligence claim. (CD 1299-CD 1305) The jurors concluded that Bowen and Appellants Caprio, Hanks and Eichbush were all partially at fault, but did not attribute any negligence to Sullivan. *Id.* Accordingly, the jury awarded Plaintiffs a fair amount, based on the evidence, to compensate them for their economic losses. *Id.* The jury did not, however, conclude that Bowen engaged in ultrahazardous activity and did not believe Bowen acted willfully and wantonly. (CD 1306-CD 1323) Therefore, the jury entered a verdict in Bowen's favor on the ultrahazardous activity and punitive damages claims.

SUMMARY OF THE ARGUMENT

This case should be affirmed because (1) Appellants did not properly preserve their right to appeal; (2) any error below was invited by the Appellants' actions; (3) pets are personal property and, thus, emotional distress damages are not appropriate under Colorado law; (4) the conduct about which Appellants complain is not legally outrageous; and (5) directed verdict was proper because Appellants did not put forth any evidence to meet the requisite elements of trespass.

ARGUMENT

I. The jury's verdict must be affirmed because Appellants waived any objection to Jury Instruction Nos. 20, 21, 22, 23 and Verdict Form B Noneconomic Damages.

This Court should not review the alleged errors raised in subsection B of Appellants' Opening Brief concerning non-economic damages for two reasons. First, Appellants did not preserve their objections, as required by Rule 51. Second, the alleged errors concerning non-economic damages are being raised for the first time on appeal. Therefore, Appellants waived their objections and the jury's verdict must be affirmed.

A. Standard of review

Bowen disagrees with Appellants. The standard of review is plain error. While the trial court has a duty to accurately instruct the jury on the law, counsel also has a duty to assist the court by tendering correct instructions and by objecting to erroneous instructions. *People v. Zapata,* 759 P.2d 754, 755 (Colo. App. 1988). Consequently, objections made to instructions for the first time on appeal in civil cases will ordinarily receive no consideration by an appellate court. *Robinson v. City and County of Denver,* 30 P.3d 677, 684 (Colo. App. 2000). A properly timed objection could have provided the trial court a chance to focus on the issue, and if need be, correct the error. *Id.*

Only on rare occasions has this court exercised its discretion to soften this rule. *Id.* citing, *Gorsich v. Double B Trading Co.,* 893 P.2d 1357, 1364 (Colo. App. 1994). If an instruction is challenged for the first time on appeal, review is confined to a consideration of whether the error falls within the definition of plain error. *Zapata,* 759 P.2d at 755.

However, "[t]he use of the plain-error exception to the normal rules of appellate practice must be confined to the most compelling cases, especially in civil, as opposed to criminal, litigation." *Robinson,* 30 P.3d at 684 quoting *Johnson v. Ashby*, 808 F.2d 676, n.3 (8th Cir.1987) (emphasis added). Further, the plain error standard "deserves more stringent application to civil jury instructions," because C.R.C.P. 51 explicitly warns counsel of the need to raise objections to instructions. *Robinson,* 30 P.3d at 684-685. "Unlike objections to evidence, jury instructions are not spur-of-the-moment matters." *Robinson,* 30 P.3d at 684-685, quoting *Chute v. Sears Roebuck & Co.,* 143 F.3d 629, 631 (1st Cir. 1998).

Consequently, only in rare instances, involving "unusual" or "special" circumstances, should an appellate court exercise its discretion to review waived instructional error in civil cases for plain error. *Robinson,* 30 P.3d at 685, *citing Scheer v. Cromwell,* 407 P.2d 344, 345 (Colo. 1965); *Bohlender v. Oster,* 439 P.2d 999, 1001 (Colo. 1968); *Warner v. Barnard,* 304 P.2d 898, 900 (Colo. 1956).

Even then, an appellate court should only reverse the outcome of trial when necessary to avert unequivocal and manifest injustice. *Robinson,* 30 P.3d at 685. To meet this stringent standard, Appellants must demonstrate that the error "almost surely affected the outcome of the case." *Robinson,* 30 P.3d at 685.

In this case, Appellants cannot meet the stringent plain error standard. They have not and cannot show the jury would have reached a different verdict on non-economic damages had they been instructed as Appellants now claim. Bowen was trying to protect his own personal property - cattle - from predators. This fact is undisputed. Bowen did not direct his actions towards Appellants, or even at their dogs. Based on Bowen's testimony the jury could infer that he did not act heedlessly and recklessly. Bowen testified that (1) he limited his placement of poisoned meat to a 20 acre, fenced enclosed section of his larger ranch near his cattle; (2) the Caprio-Hanks Appellants' property was vacant at the time (CD 2536:11-15); and (3) Bowen had never seen his neighbor's dogs roaming near his cattle. (CD 2641:4-20). Moreover, the poison that Bowen used is a common herbicide and thus, the jury did not find Bowen engage in ultrahazardous activity. (CD 1306-1323) Based on the testimony and the jury's finding that Bowen did not engage in ultrahazardous activity, Appellants cannot show the jury clearly would

have reached a different verdict. Hence, the jury's verdict on non-economic damages should be affirmed.

B. Appellants did not preserve their objections as required by Colo. R. Civ. P. 51.

This Court should not review the alleged errors raised in the Opening Brief concerning non-economic damages because Appellants did not bring the errors about which they now complain to the Trial Court's attention.

Rule 51 provides:

> All instructions shall be submitted to the parties, who shall make all objections thereto **before they are given to the jury**. **Only the grounds so specified** shall be considered on motion for a new trial or on appeal or certiorari.

Colo. R. Civ. P. 51 (emphasis added). A party cannot seek appellate review of the propriety of a jury instruction unless counsel tenders such an objection prior to the court's presentation of the instructions to the jury. *Bear Valley Church of Christ v. DeBose,* 928 P.2d 1315, 1330 (Colo. 1996); *Scheer v. Cromwell,* 407 P.2d 344, 345 (Colo. 1965).

Relying on Rule 51, the Colorado Supreme Court has stated that "[c]ounsel has the duty to examine the instructions, and his failure to detect errors and call the trial court's attention to them ordinarily operates as a waiver of the objection." *Bear Valley Church of Christ v. DeBose,* 928 P.2d at 1330; *quoting Scheer v.*

Cromwell, 158 Colo. 427, 429, 407 P.2d 344, 345 (1965) (*citing Gilligan v. Blakesley,* 26 P.2d 808, 812 (1933)); *accord, e.g., Blakesley,* 26 P.2d at 812 ("[I]t is the duty of counsel to examine - or at least to listen to the reading of - the instructions at the time they are given; and, by not detecting errors promptly and not calling the trial court's attention thereto, so as to enable the appropriate correction to be made, the point must ordinarily be deemed waived."). As the Colorado Supreme Court noted in *Cromwell*, "the purpose of the "Contemporaneous Objection Rule" is to enable trial courts to clarify or correct misleading or erroneous instructions before they are given to a jury, and thereby prevent costly retrials necessitated by obvious and prejudicial error." *Cromwell*, 407 P.2d at 345 (emphasis added) (citing *McDonald v. Jarka Corp.,* 144 F.2d 53 (2d Cir. 1944); *United States v. Monroe*, 164 F.2d 471 (2d Cir. 1947)).

The Colorado Supreme Court recently acknowledged the Contemporaneous Objection Rule and stated that "*only the objected-upon grounds*" may be considered on appeal. *Day v. Jones,* 09SC 879, 2011 WL 2139906 (Colo. May 31, 2011)., *citing Harris Grp., Inc. v. Robinson,* 209 P.3d 1188, 1195 (Colo. App. 2009). "Alleged errors not objected to are waived." *Day v. Jones,* 09SC 879, 2011 WL 2139906. A waiver will be found even when the issue not objected upon, but later raised on appeal, is that the jury was instructed on the incorrect standard of

proof. *See Itin v. Ungar, P.C.,* 17 P.3d 129 (Colo. 2000). Exceptions to the Contemporaneous Objection Rule are rare. *Id.* In *Cromwell,* the Colorado Supreme Court noted:

> The United States Supreme Court has acknowledged the value of the 'contemporaneous objection' rule by recognizing it as an adequate state ground which prevents review of a constitutional question by that Court. Counsel has the duty to examine the instructions, and his failure to detect errors and call the trial court's attention to them ordinarily operates as a waiver of the objection.

Cromwell, 407 P.2d at 345 (emphasis added.

In this appeal, Appellants complain about Jury Instruction Nos. 20, 21, 22, 33 and Verdict Form B Non-economic Damages. *See* Opening Brief, at pgs. 10-18. Appellants now argue that they were entitled to non-economic damages on their negligence claim, without proving willful and wanton conduct beyond a reasonable doubt. However, the objection raised in Appellants' Opening Brief concerning the burden of proof was not timely called to the Trial Court's attention.

Appellants first claim they preserved the issues raised about Jury Instruction Nos. 20, 21, 22, 33 and Verdict Form B Non-economic Damages at CD 3199:16-19 of the Record. This contention is disingenuous. The portion of the Record to which Appellants cite is not oral argument on jury instructions. (*See* CD 3198:25-CD 3199:1-19) Rather, Appellants point this Court to their argument in opposition

to Bowen's request for a directed verdict. *See id.* A review of this argument, however, will note no mention of Jury Instruction Nos. 20, 21, 22, 33 and/or Verdict Form B Non-economic Damages in opposition to the directed verdict motions, nor mention of willful or wanton conduct or burden of proof. *See id.* As such, the portion of the record at CD 3199:16-19 to which Appellants cite, did not preserve the errors raised in subsection B of the Opening Brief.

Appellants did not object to Jury Instruction Nos. 20, 21, 22, 23 and each Verdict Form B Non-Economic Damages prior to the Trial Court's presentation of instructions to the jury, as required by Rule 51. Appellants now suggest the Trial Court prohibited them from timely making their objections. *See* Opening Brief at pg. 11. This is simply not the case. The parties made their initial objections concerning jury instructions on the record the day before the instructions were presented to the jury. (CD 3212:14-CD 3219:1-25) Appellants never once complained about the burden of proof for willful and wanton conduct on their negligence claim. *See id.* The next morning - prior to instructing the jury – the Trial Court gave the parties the instructions. (CD 3223:4-11) The parties had sufficient time to review the jury instructions. The Trial Court asked the parties if they wanted to make a record concerning jury instructions at that time. *Id.* at 9-14. Appellants did not alert the court that they believed the burden of proof for non-

economic damages was incorrect. (CD 3223:4-CD 3226:1-23) Rather, Appellants suggested that the parties make their record after the jury started deliberations. (CD 3223:9-CD 3324:1-9) Through counsel, Appellants stated:

> Ms. Orsini: Um, I do. You know I noticed that its 9:45. So I don't know how long it will take, but I do think there at least needs – some of them, obviously, the argument is going to be repetitive of what was done before, and the Court already made those decisions, and I think we can, if opposing counsel is okay with that, make those records –
>
> The Court: oh sure.
>
> Ms. Orsini: -- later on. . . .

(CD 3223:15-23) The Court accepted Appellants' suggestion. (CD 3224:4-18) And thus, Appellants did not make their objections to Jury Instruction Nos. 20, 21, 22, 33 and Verdict Form B Non-economic Damages before the instructions were read to the jury, as required by Rule 51. (CD 3223:4-CD 3226:1-23) Since Appellants did not timely object, they waived their right to appeal this issue. *Itin,* 17 P.3d at 135 (finding review of proper burden of proof waived); *Cromwell,* 407 P.2d at 345; *Day v. Jones,* 09SC 879, 2011 WL 2139906.

Furthermore, Appellants could have, and should have, interrupted the reading of the jury instructions to alert the Trial Court to their concerns regarding the burden of proof. The Trial Court certainly would have reviewed the issue, if it

had been brought to its attention. Appellants did not stop the jury instruction presentation, even though they had an opportunity and an obligation to do so. *Blakesley,* 26 P.2d at 812 (counsel has a duty to listen to the reading of the instructions and promptly alert the court to errors). Under these circumstances, Appellants waived their right to appeal the alleged errors raised in subsection B of their Opening Brief.

In addition to not following the requirements of Rule 51, Appellants still did not preserve the grounds for alleged error. Appellants did not object to Jury Instruction Nos. 20, 21, 22 or 33 during oral argument on jury instructions. (*See* CD 3278:14-CD 3281:1-7) Although Appellants did object to Verdict Form B, the objected-upon grounds had absolutely nothing to do with the burden of proof required to establish willful and wanton conduct. (*See* CD 3280:9-18) Rather, Appellants objected as follows:

> I would object to the verdict forms to the extent that they include comparative negligence. Object to the fact that noneconomic damages required willful and wanton conduct. It is my client's position that they should have flowed from the negligence instruction, and should not require willful wanton conduct in that regard.

(CD 3280:9-14) As such, the objected-upon grounds are limited to (1) whether it was error for the jury to consider comparative negligence; and (2) whether it was error to require Appellants to prove willful and wanton conduct for non-economic

damages. Under *Day v. Johnson* and this Court's decision of *Harris Grp., Inc. v. Robinson*, these are the only two objected-upon grounds, *if any*, that can be considered on appeal. Any other alleged error in Jury Instruction Nos. 20, 21, 22, 33 and/or Verdict Form B Non-economic Damages concerning the burden of proof has been waived. *Day v. Jones,* 09SC 879, 2011 WL 2139906, citing *Harris Grp., Inc. v. Robinson,* 209 P.3d 1188, 1195 (Colo. App. 2009). There is no justification, based on the record in this case, for an exception to the rule requiring contemporaneous objections to jury instruction for preservation of issues on appeal.

C. Appellate review is waived because the alleged errors are being raised for the first time on appeal.

At trial, the only measure of non-economic damages that Appellants sought was emotional distress. (*See* CD 3202:19-CD 3203:1-14; CD 3206:24-CD 3207:1-3; CD 3241:22-25; CD 3242:25-CD 3242:1-11; CD 3244:2-5) It was not until this appeal that Appellants thought to describe their non-economic damages as loss of companionship, security, loss of business reputation or goodwill.

For example, Appellants had the opportunity to define their non-economic losses in the jury instructions. Noneconomic losses were defined in Jury Instruction No. 33 to include "physical and mental pain and suffering, inconvenience, emotional stress and impairment of the quality of life." (CD 1283)

Appellants did not object to Jury Instruction No. 33. (CD 3278:14-CD 3281:1-7) Appellants never argued for the inclusion of loss of companionship, security, and/or loss of business reputation or goodwill in the definition of noneconomic damages and, therefore, such elements of non-economic damages were not included within Jury Instruction No. 33. *Id.* This is because Appellants did not put forth evidence of, and had no intention of seeking, non-economic damages for loss of companionship, security or business reputation and goodwill.[1]

According to Appellants' own counsel, the "real harm" related to non-economic damages in this case was emotional distress. (CD 3241:22-24) Emotional distress is the only measure of non-economic damages that Appellants raised in the Trial Court.[2] (CD 2242:25-CD 2243:1-11) During closing arguments Appellants took the opportunity to clearly define their non-economic damages for the jury. *Id.* Not once did Appellants claim that they obtained their dog for

[1] This Court should note that Appellants did not argue in their Opening Brief that they presented evidence of inconvenience or impairment of quality of life. Nor did Appellants present evidence of, or ask the jury to award them, non-economic damages for inconvenience or impairment of quality of life. *See* Opening Brief at pgs. 10-18.

[2] Appellants did not present evidence which even remotely suggested non-economic loss of business reputation or goodwill with regard to their respective businesses. Rather, they sought such losses as economic damages. Appellants essentially concede that this argument is a sham in the Opening Brief at pg. 16. Moreover, Appellants did not cite to, nor could Bowen find, Colorado case law extending noneconomic damages to the loss of pet companionship. And, thus, this Court should not extend non-economic damages for loss of pet companionship.

security nor define their noneconomic damages as loss of companionship, business reputation or goodwill. *Id.* Rather, Appellants argued:

> What are non-economics in this case? You know, I will give you two factors that will help decide that number. When you look at the emotional distress that they had, you look at, was it mild? Was it moderate? Was it severe? And how long has it lasted?
>
> You were here. You saw the honest and truthful testimony. You saw the emotions. Now, if it was mild emotional distress, you know, I would tell you probably would add 15, 20,000 to the economic damages. I don't think anyone saw that the emotional distress, that was observed here, was mild.

(CD 2242:25-CD 2243:1-11) Since at trial, Appellants never argued that their non-economic damages included anything other than emotional distress, the arguments raised in the Opening Brief are being made for the first time on appeal. The Appellants are asking this Court to decide an argument and claim that was never made in the Trial Court, and that Appellants therefore waived and have no right to appeal. *People v. Salazar,* 964 P.2d 502, 507 (Colo.1998) ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

D. The Trial Court properly instructed the jury that Appellants' request for emotional distress damages required proof of willful and wanton conduct.[3]

Even if this Court were to find Appellants preserved this issue for appeal, the jury's verdict should still be affirmed. Since the *only* measure of non-economic damages that Appellants presented evidence of, and asked the jury to award, was emotional distress damages, the Trial Court's instructions were correct.

In Colorado, pets are unquestionably considered personal property under the law. *Theil v. City & County of Denver,* 312 P.2d 786, 789 (Colo. 1957); *Colo, Dog Fanciers, Inc. v. City and County of Denver,* 820 P.2d 644, 653 (Colo. 1991). The Colorado Supreme Court has clearly and unquestionably stated that under ordinary circumstances there can be no recovery in tort for mental anguish suffered in connection with an injury to personal property. *Valley Dev. Co. v. Weeks,* 364 P.2d 730, 733 (Colo. 1961). "In the absence of fraud, malice or other willful and wanton conduct, there is generally no recovery for mental suffering resulting from injury to property." *Webster v. Boone,* 992 P.2d 1183, 1185 (Colo. App. 1999).

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[3] The cases to which Appellants cite for the proposition that emotional distress damages are available in negligence cases are entirely distinguishable because they are not property damage cases. *See Boatright v. Derr*, 919 P.2d 221 (Colo. 1996) (legal malpractice case); *Martinez v. Shapland* 833 P.2d 837 (Colo.App. 1992) (personal injury case).

Since the only measure of non-economic damages that Appellants sought was emotional distress, the Trial Court correctly instructed the jury that proof of willful and wanton conduct was required. *Webster v. Boone,* 992 P.2d at 1185. Accordingly, the jury's verdict should be affirmed.

II. The jury was properly instructed regarding economic damages.

In the Opening Brief, Appellants incorrectly, and without preserving error, claim the Trial Court improperly instructed the jury on economic damages and limited their recovery of economic damages. The jury was properly instructed on economic damages and, therefore, this Court should affirm the jury's verdict. Alternatively, the jury's verdict should still be affirmed based on the doctrine of invited error.

A. Standard of Review.

As previously noted, Appellants did not preserve the alleged error for appeal. The portion of the transcript to which Appellants cite in the Opening Brief was argument concerning Bowen's Motion for Directed Verdict. (*See* CD 3196:2-CD 3199:1-8) The Court was not hearing argument on jury instructions at that point. *See id.* Thus, the issue was not preserved at CD 3198:25-CD 3199:1-4 of the Record.

For the same reasons set forth above in subsection A(2), Appellants did not timely preserve this issue for appeal, as required by Colo. R. Civ. P. 51. Indeed, Appellants did not object to Jury Instruction Nos. 2, 20, 21 and 22 during oral argument on Jury Instructions. (CD 3278:14-CD 3281:1-7) Accordingly, Appellants waived any such objections. *See* Colo. R. Civ. P 51; *Bear Valley Church of Christ v. DeBose,* 928 P.2d at 1330. The standard of review is plain error. *Robinson,* 30 P.3d at 684-685.

B. Appellants are barred from seeking review of Jury Instruction Nos. 2, 20, 21 and 22 under the doctrine of invited error.

Appellants now argue that the court failed to give guidance as to the definition of "cost" so as to include within its meaning "value." Opening Brief, pgs. 22-23. However, Appellants waived this argument. Appellants had the opportunity to instruct the jury that "cost" included "sentimental value," but failed to tender such an instruction or object to the instruction given. As such, Appellants waived their objection.

Next, Appellants claim that Jury Instruction No. 2 confused the jury about damages because the jury asked: "Instruction #2 says [Appellants] damages are limited to the market value of the dogs: 1) Does this mean the vet bills cannot be included in damages?" (CD 1240; CD 3286:19-22) The confusion, if any, was cured by the Court. (CD 3286:19-CD 3287:1-4; CD 3288:10-25-CD 3290:1)

Furthermore, Appellants' request for reversal is improper under the doctrine of invited error. Appellants requested the language that the Court used to answer the jury's questions concerning economic damages. Through counsel, Appellants stated:

> And I –you know, I think the way to clarify that is to explain that those are the claims of the parties in 2:1

(CD 3288:17-19) As instructed, the Court answered the question concerning Jury Instruction No. 2 by stating "[t]his is the Defendant's argument. The jury should refer to the instructions on damages." (CD 1240; CD 3288:21-22) Appellants also requested:

> I think, Your Honor, um – I think the compromise, because as the Court knows, I raised concerns about that Instruction 2:1, is if we're going to refer them to the instructions on damages, I would like them referred to the instruction which talks about let's say Instruction Number 21.

(CD 3289:18-23) The Court directed the Jury to the Jury Instructions on damages as Appellants requested. (CD 1240; CD 3289:24-CD3290:1) Appellants expressly "[a]greed" that the Trial Court cured any alleged deficiency in the Jury Instructions in its responses to the jury's questions concerning economic damages. (CD 3288:23) Under these circumstances, if there were errors in Jury Instruction Nos. 2, 20, 21, and 22, then Appellants invited the error.

Invited error is a cardinal rule of appellate review applied to a wide range of conduct. *Horton v. Suthers,* 43 P.3d 611, 618 (Colo. 2002), *quoting Roberts v. Consolidation Coal Co.,* 539 S.E.2d 478, 488 (2000). The invited error doctrine has been stated as a rule of strict preclusion of review. *Zapata,* 759 P.2d at 756. Under the invited error doctrine, when a party injects or invites error in trial proceedings, he cannot later seek reversal on appeal because of that error. *Id.* Accordingly, the doctrine "[o]perates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." *Horton,* 43 P.3d at 618, *quoting Brett v. Great Am. Rec.,* A.2d 705, 717 (1995).

The invited error doctrine is applicable in civil cases. *Horton,* 43 P.3d at 619; *Palmer v. Gleason,* 389 P.2d 90, 91 (Colo. 1964) (invoking the doctrine against a defendant in a civil case). The doctrine applies where one party expressly acquiesces to conduct by the court or the opposing party. *Horton,* 43 P.3d at 619.

Here, Appellants were fully advised and acquiesced in the Courts' response to the jury's question concerning economic damages. Indeed, Appellants asked the Trial Court to direct the jury to Jury Instruction No. 21.[4] This was obviously a tactical decision by Appellants to ensure the jury awarded any veterinary bills in

[4] Jury Instruction Nos. 20, 21 and 22 are all the same instruction, except for the fact that they relate to different Appellants.

evidence as part of economic damages. Appellants agreed that the response the Court gave was the appropriate response to their questions. (CD 3288:23) The fact that Appellants asked the Trial Court to direct the jury to Jury Instruction No. 21, and expressly acquiesced in the Court's response to the jury's questions concerning economic damages, warrants application of the invited error doctrine. *See Horton,* 43 P.3d at 619; *see also Boothe v. People,* 814 P.2d 372, 376 (Colo. 1991) (Lohr, J., concurring) (holding that the invited error doctrine applied where defendant's counsel "was fully advised and acquiesced in the court's response to the jury's question" and "did agree that the appropriate response" was the response suggested by the court).

Finally, Appellants contention that the Trial Court caused their economic damages to be limited to the "cost" of their dogs is absurd. This is true because Appellants failed to present any evidence whatsoever concerning how much Appellants Hanks, Caprio and Sullivan paid for their dogs, yet the jury still awarded these Appellants economic damages. Additionally, the jury's questions and their verdict demonstrate that the jury wanted to, and indeed awarded, Appellants more than the costs of their dogs. (CD 1240) The jury told the Court that they were awarding Appellants their veterinary bills. *Id.* For these reasons, the jury's verdict should be affirmed.

C. Sentimental value is not a proper measure of economic damages in this case.

In Colorado, pets are unquestionably considered personal property under the law. *Theil,* 312 P.2d at 789; *Colo. Dog Fanciers, Inc.,* 820 P.2d at 653. And, indeed, dogs are viewed as personal property in most states. *Smith v. Costello,* 290 P.2d 742 (Idaho 1955); *Richardson v. Fairbanks North Star Borough,* 705 P.2d 454, 457 (Alaska. 1985); *Miller v. Peraino,* 626 A.2d 637, 640 (Pa. Super. 1993); *Fackler v. Genetzky,* 595 N.W.2d 884, 891 (Neb. 1999); *Koester v. VCA Animal Hospital*, 624 V.W.2d 209, 211 (Mich. App. 2000); *Johnson v. Douglas,* 723 N.Y.S.2d 627 628 (N.Y. Misc. 2001); *Schrage v. Hatzlacha Cab Corp.,* 13 A.D.3d 150, (N.Y. App. 2004); *Carbasho v. Musulin,* 618 S.E.2d 368, 371 (W. Va. 2005).

The measure of damages for injury to personal property in Colorado is the difference between its market value immediately before and after the injury. *Biosera, Inc. v. Forma Scientific, Inc.,* 941 P.2d 284, 286 (Colo. App. 1996). Thus, it follows that the appropriate measure of damages for Appellants' dogs – as personal property under Colorado law – is fair market value at the time of their deaths.

The majority of states clearly and unequivocally conclude that damages for sentimental value, mental suffering and emotional distress are not recoverable for the death of a pet dog. *Carbasho,* 618 S.E.2d at 371, *Oberschlake v. Veterinary*

Associates Animal Hosp., 785 N.E.2d 811 (Ohio 2003); *Koester,* 624 N.W.2d at 211; *Harabes v. Barkery, Inc.*, 791 A.2d 1142 (N.J. Super. 2001); *Fackler*, 595 N.W.2d at 891; *Zeid v. Pearce*, 953 S.W.2d 368 (Tex. App. 1997); *Jason v. Parks*, 638 N.Y.S.2d 170 (N.Y. 1996); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996); *Petco Animal Supplies, Inc. v. Schuster,* 144 S.W.3d 554, 563-565 (Tex. App. 2004) (no award of intrinsic value loss of companionship damages based on sentimental considerations).

Appellants cites to *U. S. v. Hatahley,* 257 F.2d 920 (10th Cir. 1958), *Smith v. Stevens,* 60P. 580 (Colo. App. 1900) and *Arkansas Valley Land & Cattle Co. v. Mann,* 130 U.S. 69 (1889) to suggest that Colorado Courts recognized the "enhanced" value of pets. Opening Brief, pgs 20-21. Appellants' argument is misleading for several reasons. First, both the *Hatahley* and *Smith v. Stevens* cases involve animals whose value was services only. The "value" discussed in these cases was loss profits incurred because of inability to use their farm/ranch animals – not sentimental value. For example, the *Hatahley* plaintiffs were seeking loss profits arising out of the unlawful taking of their horses and burros. *Hatahley,* 257 F. 2d at 923. The plaintiffs claimed that they used their horse and burros to look after their livestock. *Id.* As a result of the taking, their livestock herd was reduced. *Id.* Similarly, in *Smith v. Stevens,* the plaintiff requested economic damages for the

value of the use of his cow. *Smith v. Stevens,* 60 P. at 581. In neither *Hatahley* or *Smith* were the plaintiffs even seeking sentimental value as damages.

Second, the U.S. Supreme Court case upon which Appellants rely does not suggest that sentimental value is a proper measure of economic damages for loss of household pets. Again, the Court was referring to animals valuable for service only. *Mann,* 130 U.S. at 79. Third, in *Hatahley,* the damages were analyzed under Utah – not Colorado law. *Hatahley,* 257 F. 2d at 922. Finally, and importantly, the *Smith v. Stevens* Court concluded that the plaintiff was not entitled to recover the value of his cow as an element of economic damages. Accordingly, the Colorado cases to which Appellants cite are irrelevant to this analysis.

For the reasons set forth above, this Court should follow the majority rule which holds damages for sentimental value is not a proper measure of economic damages. Furthermore, if this Court finds the trial Court erred in its instructions on economic damages, than any such error was harmless. Appellants could not recover for the sentimental value of their dogs because sentimental value is not a proper measure of economic damages in this case. *Petco Animal Supplies, Inc.,* 144 S.W.3d at 563-565.[5]

[5] The Court can well imagine the plethora of litigation engendered when every personal pet killed or injured in a car accident becomes the basis for this type lawsuit.

III. The directed verdict on Appellants' outrageous conduct claim should be affirmed.

A. Standard of Review

Bowen agrees that a directed verdict is reviewed de novo.

B. Appellants cannot state an outrageous conduct claim because Bowen's conduct was not directed at them.

Appellants' outrageous conduct claim is based on conduct directed at their pets. None of the Appellants were present when the alleged conduct occurred. A panel of this Court has interpreted Restatement (Second) of Torts § 46(2) to require a plaintiff to be present when the alleged tortuous conduct directed at the third party occurs. *Bradshaw v. Nicolay*, 765 P.2d 630, 632 (Colo. App. 1988). If the plaintiff is not present, the plaintiff's outrageous conduct claim fails as a matter of law. *Id.*

At least one state has specifically concluded a dog owner cannot state a claim for emotional distress based upon Restatement (Second) of Torts, § 46(2)(a) or (b). *Miller v. Peraino,* 626 A.2d at 640. Although Colorado has adopted the Restatement (Second) of Torts, § 46(2), this Court should not extend the rule to cover dogs. The Pennsylvania Court correctly concluded a dog is not a "person" within the meaning of the Restatement (Second) of Torts, § 46(2)(a) or (b). *Id.*

Colorado does not treat dogs as people. Rather, in Colorado, dogs are viewed as personal property. *Theil*, 312 P.2d at 789 (Colo. 1957).

Even if this Court finds a dog is a "person" within the meaning of Restatement (Second) of Torts, § 46(2)(a) or (b), Appellants' outrageous conduct claim was properly dismissed. If the Court accepts Appellants' testimony that they do not know where their dog got into the poison, then it must conclude Appellants were not present when their dogs ate poison. As such, Appellants' outrageous conduct claim could not go to a jury, as a matter of law. *Bradshaw*, 765 P.2d at 632; *see also Brown v. Muhlengberg Township,* 269 F.3d 205, 220 (3d Cir. 2001)(dismissing a dog owner's outrageous conduct claim because the owner did not witness the tortuous conduct which resulted in his dog's death).

C. The alleged conduct was not sufficiently "outrageous" as a matter of law.

"The tort of outrageous conduct was designed to create liability for a *very narrow* type of conduct." *Green v. Qwest Services Corp.,* 155 P.3d 383, 385 (Colo. App. 2066) (emphasis added). To establish a *prima facie* case of outrageous conduct, a plaintiff must show that the defendant (1) engaged in extreme and outrageous conduct; (2) recklessly or intentionally caused the plaintiff emotional distress; and (3) the plaintiff incurred severe emotional distress which

was caused by the defendants' conduct. *See Culpepper v. Pearl Street Building, Inc.*, 877 P.2d 877, 882 (Colo. 1994).

The level of outrageousness required to create liability for intentional infliction of emotional distress is extremely high. *See Bob Blake Builders, Inc. v. Gramling et al.*, 18 P.3d 859, 866 (Colo. App. 2001). Only "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970), *citing* Restatement (Second) of Torts § 46 (1965).

A plaintiff must allege behavior by a defendant that is extremely egregious. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). The Colorado Supreme Court has stated, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Rugg v. McCarty*, 476 P.2d at 756. When determining whether conduct is sufficiently egregious, the Court's focus should not be on the consequences of the defendant's conduct. *Green,* 155 P.3d at 387. Rather, this Court is required to focus on the *defendant's conduct. Id.*

Here, when the focus is on Bowen's conduct, it becomes clear that Appellants did not meet their burden of proof. Allegations that Bowen placed

poisoned meat on his own property to kill coyotes are not legally outrageous for several reasons.

First, it is lawful for Bowen to kill coyotes. Appellants' own witness, Officer Joe Padilla from the Division of Wildlife, conceded that ranchers can legally kill coyotes. Padia 19:2-24. Bowen's ranching and livestock management expert agreed. Peel 163:7-22. Indeed, Bowen has a constitutional right to poison coyotes. Colo. Const. Ar. XVIII, § 12b. The Colorado Constitution specifically provides in a section titled "Prohibited Methods of Taking Wildlife" that:

> (1) It shall be unlawful to take wildlife...by poison in the State of Colorado.
>
> . . .
>
> (3) Notwithstanding the provisions of this section 12, the owners or lessee of private property primarily used for commercial livestock or crop production, or the employees of such owner or lessee, *shall not be prohibited from using the devices or methods described in subsection (1) of this section on such private property* so long as:
>
> (a) such use does not exceed one thirty day period per year; and
>
> (b) the owner or lessee can present on-site evidence to the division of wildlife that ongoing damage to livestock or crops has not be alleviated by the use of non-lethal or lethal control methods which are not prohibited.

Colo. Const. Ar. XVIII, § 12b (emphasis added). The provisions of subsection (3) are fully satisfied in this case. Bowen uses the private property on which he placed poison primarily for livestock production – namely raising cattle. (CD 2624:18-CD 2625:1-3; CD 2573:6-CD 2574:1-7) Bowen's use of poison did not exceed a thirty-day period in one year. Hence, there is nothing extreme and outrageous about killing coyotes.

Second, allegations that Bowen possessed Paraquat are not legally extreme or outrageous. Bowen had a right to possess Paraquat. At all relevant times, Bowen was an EPA certified pesticide applicator, which entitled him to possess and apply Paraquat on his property. (CD 2557:18-22) Although Bowen used Paraquat inconsistent with the label, he did not act beyond the bounds of decency or in an atrocious manner that is intolerable in a civilized farming community. For example, the EPA did not revoke Bowen's licenses. He is still certified to possess and apply restricted use pesticides, including Paraquat, today. (CD 2557:18-22)

Third, allegations that Bowen caused Paraquat to touch farm land are not sufficiently outrageous. Paraquat is a commonly used herbicide for killing annual weeds. (CD 3063:12-13; CD 3042:23-25) It is probably one of the top five herbicides sold worldwide. (CD 3063:14-22) Paraquat does not cause permanent

damage to land. (CD 3047:3-CD 3048:1-16) Therefore, the fact that Bowen caused Paraquat to touch farm land cannot be outrageous.

Fourth, allegations that a rancher, like Bowen, killed trespassing dogs are not outrageous. Under no circumstance is trespassing on ranch land appropriate. (CD 3162:12-23) Domesticated dogs can be a threat to livestock. (CD 3163:2-13) Appellants acknowledged that Bowen had a right to kill trespassing dogs. Appellant Hanks testified that had his trespassing dogs been shot by Bowen's coyote hunter that he would have no right to sue Bowen. (CD 2538:4-7) Appellant Hanks also acknowledged that had his trespassing dogs been killed by Bowen's guard llamas he would have no right to sue Bowen. (CD 2538:12-24) Similarly, Bowen should not be liable on a theory of outrageous conduct based on the fact that he accidentally poisoned Appellants' trespassing dogs.

Furthermore, it should not be forgotten that Bowen was trying to prevent the killing of his livestock by coyotes. Appellants have never been able to articulate how protecting ones property from predators can ever be considered outrageous conduct.

Finally, Appellants argue that the Trial Court's factual findings related to their ultra hazardous activity claim were sufficient to sustain their outrageous conduct claim. A similar argument was made in *Green.* The *Green* Court

concluded the fact that an accident occurred while the defendant was engaged in an inherently dangerous activity does not elevate it to outrageous conduct. *Green,* 155 P.3d at 386. For the same reason, Bowen's conduct cannot be deemed legally outrageous merely because it occurred while he was allegedly engaged in ultra hazardous activity.

Colorado courts have affirmed the dismissal of outrageous conduct claims alleging far worse conduct than that alleged by Appellants. *See Culpepper*, 877 P.2d at 882 (conduct of negligently cremating plaintiffs' son did not support a claim for outrageous conduct); *Coors Brewing Co.,* 978 P.2d at 665 (employer's alleged conduct of instructing employee to conduct illegal undercover narcotics investigation, laundering money to fund investigation and firing employee as a scapegoat to cover up involvement in criminal activity was not sufficiently outrageous to support outrageous conduct claim); *English v. Griffith*, 99 P.3d 90, 93 (Colo. App. 2004) (allegations that defendant started a fight with a roommate known to be emotionally unstable and suicidal insufficient to state a claim of outrageous conduct); *Card v. Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996) (therapists' publishing of letter to third parties claiming family members abused their relative not sufficiently heinous to create liability for outrageous conduct). This Court should not give greater rights to these Appellants, whose outrageous

conduct claims are based upon allegations related to unlawful trespassing dogs, than accorded the litigants in *Culpepper, Coors Brewing Co., English, Card* and *Green.*

Rather, this Court should follow the Washington Court of Appeals and the New York Federal District Court on this issue. In 2006, the Washington Court of Appeals affirmed the dismissal of a cat owner's outrageous conduct claim. The Court concluded the allegations were not sufficiently extreme and outrageous. *Womack v. Von Rardon,* 135 P.3d 542, 546 (Wash. App. 2006). In *Womack*, the defendants took the plaintiff's cat, Max, to a nearby school and using gasoline, set the plaintiff's cat on fire. *Id.* at 543. The cat sustained first, second and third degree burns and had to be euthanized. *Id.* The court concluded "[w]hat happened to Max was deplorable, but the record does not sufficiently establish the required intent *or the necessary severity.*" *Id.* Accordingly, the court affirmed the dismissal of the plaintiff's outrageous conduct claim.

The New York federal district court refused to recognize a claim for emotional distress for the intentional or reckless killing of a pet. *Gluckman v. American Airlines, Inc.,* 844 F. Supp. 151, (S.D. N.Y. 1994) The district court held bystander liability for outrageous conduct does not extend to a pet owner.

This is because the tortuous conduct must be intentionally directed toward the pet owner plaintiff, *not the animal*. *Id.*

For these reasons, Appellants did not prove Bowen engaged in legally sufficient extreme and outrageous conduct. Hence, the Court should affirm the dismissal of Appellants' outrageous conduct claim.

D. Appellants failed to prove that they sustained severe emotional distress.

Appellants failed to present evidence demonstrating that they actually sustained legally cognizable severe emotional distress. While it is true Appellants retained Dana Durrance, a grief-support counselor, Durrance did not actually treat Appellants. (CD 2890:22-23) Appellants never even asked Durance to recommend treatment. (CD 2889:10-12) Rather, Durance was retained solely to speak to the jury. (CD 2890:24-CD 2891:1-6)

Durance never met any of the Appellants in person. (CD 2885:24-CD 2886:1; CD 2545:2-9; CD 2796:7-24) Rather, she spoke to some, but maybe not all Appellants over the telephone. (CD2796:16-19) At trial, neither Caprio nor Wyatt Eichbush even remembered speaking with Durrance.[6] (CD 2959:16-17; CD 2712:11-19)

---

[6] Although Wyatt thought he *might* have spoke with Durrance on the telephone. (CD 2712:11-19)

The first and only time Durance spoke with Appellants was in February 2010 – two months prior to trial. (CD 2887:9-17; CD 2889:13-16) Durance did not make any diagnosis or assessment of Appellants (CD 2885:9-11; CD 2891:7-8) or recommend any of the Appellants seek additional treatment. (CD 2885:12-18)

While Appellants presented evidence demonstrating that they were saddened by their dogs' deaths, they did not present evidence of emotional distress that was beyond ordinary. As such, Appellants failed to prove the level of severe emotional distress required to sustain a claim for outrageous conduct.

IV. The Trial Court's directed verdict on Appellant's trespass claim should be affirmed.

A. Standard of Review

The standard of review of a directed verdict is de novo. *City of Westminister v. Centric-Jones Constructors,* 100 P.3d 472, 477 (Colo. App. 2005). Bowen does not believe Appellants preserved their right to appeal. Appellants pointed the Court to argument concerning their nuisance claim, not trespass. (CD 2994:12-25) Contrary to Appellants' assertions, the transcript demonstrates that the Court did not interrupt counsel's argument or prevent counsel from making argument concerning trespass. (CD 2994:12-CD 2995:1-19) Rather, Appellants neglected to make a record on their trespass claim. *See id.*

B. Appellants failed to prove Bowen intentionally caused Paraquat to come upon their land.

To establish trespass, Appellants were required to show (1) they were in lawful possession of the property; (2) Bowen intentionally caused Paraquat to come upon their property; and (3) Paraquat caused physical damage to Appellants' property. CJI-Civ. 18:1 (CLE ed. 2010). Appellants did not present evidence of the second and third elements. Therefore, the directed verdict should be affirmed.

1. Eichbush failed to prove that there was poisoned meat on his property.

There was no evidence of poisoned meat on the Eichbush property. Eichbush conceded at trial that he searched his entire property, but did not find a *single piece* of poisoned meat. (CD 2686:11-23) Eichbush's testimony is consistent with Bowen's testimony. Bowen testified that he did not put poisoned meat on the Eichbush property. (CD 2625:9-13.)

On page 36 of the Opening Brief, Appellants' contention that Doc "had not been off the Eickbush property at the time [it] ingested the meat" is simply not true. Eichbush conceded that he allowed his dog to trespass on Bowen's property shortly before it died. (CD 2683:15-CD 2684:1-5) Eichbush testified:

> Q. …Now, isn't it true, the day before you claim Doc got ill, you were riding your horse, um, on the property—on the property east of you, which is Mr. Bowen's, and you allowed Doc to run

alongside of you while you were riding your horse?

A. Yes, that's correct.

(CD 2683:15-CD 2684:1-5) Based on Eichbush's own admissions no reasonable jury could conclude that the Eichbush dog never left its owner's property. Rather, the only reasonable inference to be drawn is that the Eichbush dog got poisoned while trespassing on Bowen's ranch.

Although Eichbush claims he found a "white residue" in his bushes that he believed to be Paraquat (CD 2661:5-13), Eichbush failed to present competent evidence from which a jury could determine the "white residue" was, indeed, Paraquat. Appellants did not present any expert opinion on this issue. Jim Daniel, the only agricultural chemicals trial expert, testified that there is "no way" the white powdery substance Eichbush found could be Paraquat. (CD 3049:3-17) Paraquat is not white and does not come in a powder form. (CD 3049:14-22). As such, Eichbush failed to prove Paraquat came upon his land.

2. There was no evidence establishing that the "usual course of events" damaged the Caprio-Hanks property.

"A landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of trespass on such property." *Miller v. Carnation Co.,* 516 P.2d 661, 664 (Colo. App. 1973). Bowen, however,

did not set in motion a force that damaged the Caprio-Hanks Appellants' land. The evidence clearly established that Paraquat does not damage land. Appellants called Bowen in their case in chief. Bowen has a bachelor's degree in agronomy. (CD 2557:23-24; CD 2610:9-18) He is an EPA certified pesticide applicator. (CD 2557:18-22) Bowen testified that Paraquat is a common herbicide used by commercial farming applicators. (CD 2560:18-24.) Once Paraquat touches soil it binds up and is no longer harmful or dangerous. (CD 2560:11-16; CD 2562:15-24; CD 2563:20-CD 2564:1) Jim Daniel, the agricultural chemical expert, agreed. Daniel testified that Paraquat "has zero-soil activity. If it gets on the soil, it's totally inactivated." (CD 3043:5-6). Under no circumstance can Paraquat cause permanent damage to land. (CD 3047:3-CD 3048:1-16) For these reasons, the Caprio-Hanks Appellants failed to establish the second element of trespass.

Contrary to the assertions on page 36 of the Opening Brief, the Caprio-Hanks Appellants know exactly where their dogs ate poisoned meat. On cross-examination, Hanks acknowledged that he prepared the hand-written statement that is Trial Exhibit G. (CD 2531:13-CD 2532:1-8) Hanks also acknowledged that he wrote in that statement "at one point I noticed my dog Rooster was eating something in an area of the swale," which was on Bowen's property. *Id.* Based on

Hanks' own admissions, the Caprio-Hanks dogs unquestionably ate the poisoned meat while trespassing on Bowen's ranch.

C. Appellants failed to present evidence of physical real property damage.

Even if the Court erred in directing a verdict on Appellants' trespass claim based on their failure to proffer sufficient evidence of the second element, any such error was harmless. A directed verdict was appropriate because Appellant's failed to establish that Paraquat caused physical damage to their real property.

To sustain a claim of trespass, Appellants were required to present evidence showing the Paraquat caused physical damage to their property. CJI-Civ. 18:1 (CLE ed. 2010); *Public Service Co. of Colo. v. Van Wyk,* 27 P.3d 377, 390 (Colo. 2001). Appellants, however, did not meet their burden of proof. For example, Appellants did not present a single trial witness to testify Paraquat caused physical damage to their property. There was no testimony concerning restoration or repairs. Moreover, not one trial witness was qualified as an expert in property valuation. As such, there was no competent testimony concerning the value or decrease in value of Appellants' property. Finally, there was no documentary evidence concerning the alleged physical damage to Appellants' land or an amount incurred to remediate the alleged physical damage. Since Appellants failed to

present any evidence whatsoever of physical property damage, the directed verdict must be affirmed.

CONCLUSION

WHEREFORE, the Court's directed verdict on Appellants' intentional infliction of emotional distress and trespass claims should be affirmed. Additionally, the jury's verdict should be affirmed.

Respectfully submitted,

NATHAN, BREMER, DUMM & MYERS, P.C.

s/ Allison R. Ailer

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Original signed document on file at the office of Nathan, Bremer, Dumm & Myers, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2011, a true and correct copy of the foregoing Answer Brief was served via the State of Colorado's LEXIS-NEXIS File and Serve e-filing system upon each of the following:

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Jeanne E. Moore

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rules 28 and 32 of the Colorado Appellate Rules. According to the word count features of Microsoft Word, the Answer Brief contains 9,097 words, excluding the Caption, Table of Contents, Table of Authorities, this Certificate of Compliance and the Certificate of Service.

Citations to the record contained on the CD are set forth as (CD page___: line number____)

Respectfully submitted,

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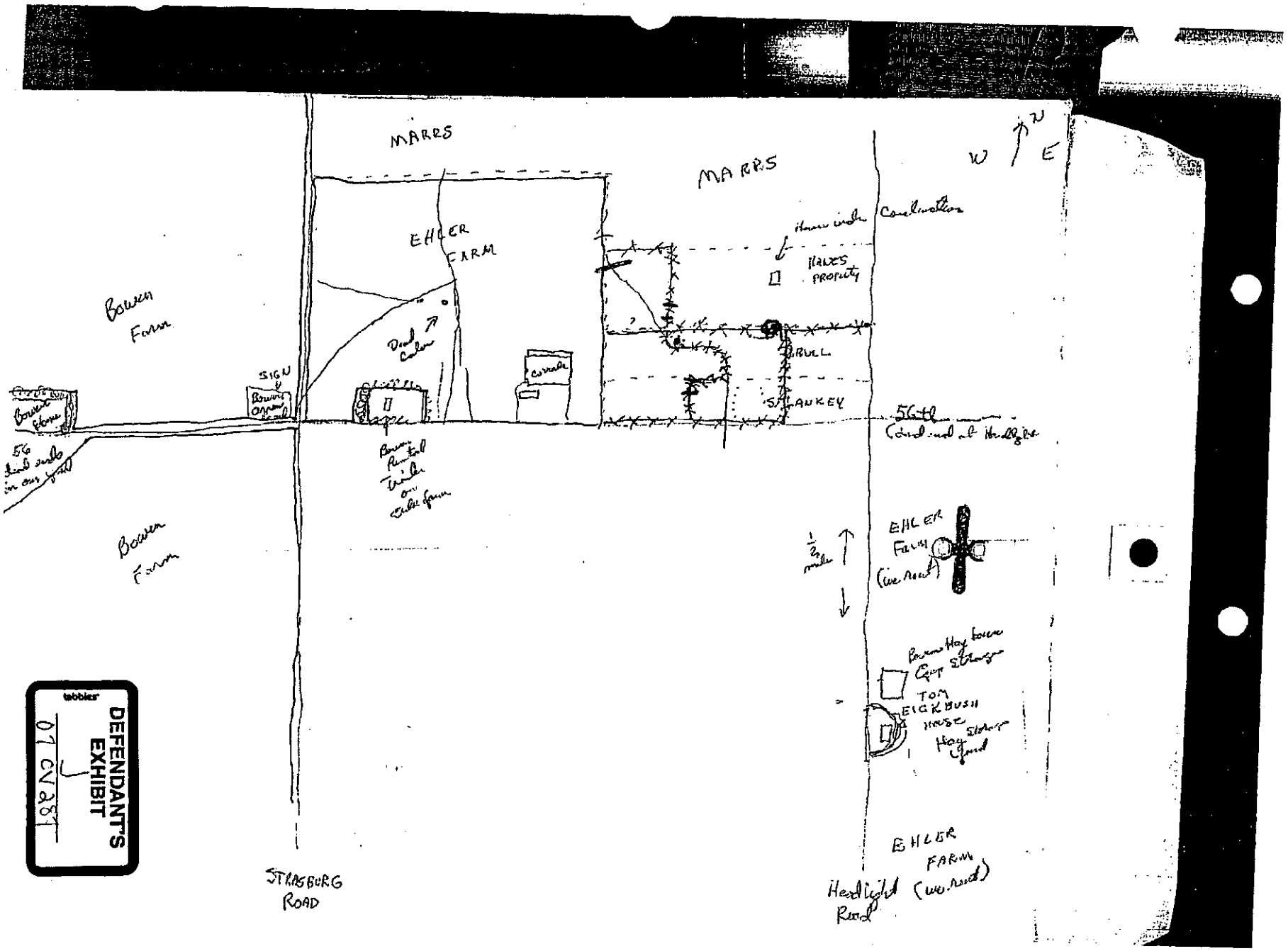
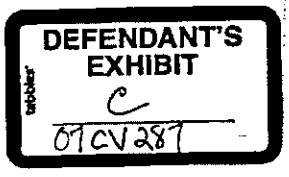


DEFENDANT'S EXHIBIT
01 CV 287

Original
Calving log
for
Herd # 4

RECEIVED



Herd #4 2 time Calving

DATE	Cow Number	Calve Number	type
1/5/06	No tag	NT	Heifer
1/9/06	702	702	cannot tell unknown ate by Predator
1/11/06	4502	4502	STEER Killed by coyote
1/12/06	1902	Twins 1902 A	Heifer
		1902 B	Heifer
	47 From Herd #3	47	STEER
1/14/06	No tag Notch in ear	NE	Heifer
1/14/06	5102	no tag	Steer Killed & Ate
1/15/06	2402	2402	STeer
1/16/06	46 From Herd #3	46	Heifer
1/17/06	2802	2802	STeer
1/17/06	5202	5202	STEER
1/17/06	SHORT EARS	SE	STEER
1/18/06	502	502	STEER
1/18/06	3602 TWINS	3602 A	Heifer
		3602 B	Heifer

Herd 4 2 Twins Calving

Date	Cow #		Calf #		Type
[redacted]	Perfect Cow		PC		Heifer
1/18/06	5502		5502	Killed by Predator	Heifer
1/19/06	BP Cow		BP Cow		Steer
1/19/06	3102	Twins	3102 A 3102 B		Heifer Steer
1/19/06	202		202		Heifer
1/20/06	27		27		Heifer
1/21/06	Red Cow		Red cow		Steer
11	3302		3302		Heifer
1/21/06	Belinx Twin of 202 cow will not take		Bank tag of calf Bottle Elizabeth		Heifer
1/22/06	NO T. of NC		NC cow		Heifer
1/22/06	1802		1802		Heifer
123 06	402		402		Steer
[redacted] 06	102		102	Killed	Steer
1/23/06	white face 4202		4202 white face		Steer

Herd # 4

2 Time calving

Date	Cow #	Calf #	Type
1/23/06	2302	2302	Heifer
1/24/06	NO TAG	NO TAG II	Heifer
1/24/06	2902	LOST CAIE TO UNKNOWN ANIMAL	UNKNOWN ATE UP TOO BAD
1/24/06	1402	1402	Heifer
1/24/06	3002 HORNED	3002	Heifer
1/24	NT - 3 Notches in EAR	NIE	Heifer KILLED by ANIMALS
1/25	3902	3902	KILLED BY ANIMALS Heifer
1/27	3402	3402	Heifer
1/27 06	NO TAG	1-27-06	Heifer
1/28/06	1502	1502	Heifer
1/28/06	4402	4402	Heifer
1 30 06	1002	1002	Heifer
13006	NO TAG	1-30-06	Steer
1 B1/06	1302	1302	STEER

HERD NO 4 2nd time

DATE	COW NO.	CALF NO	TYPE
2/1/06	NO TAG	2-1-06	Heifer
2/1/06	NO TAG	2-2-06	Heifer
2/2/06	NO TAG	2-2-06	STEER
2 7 06	NT	NT III	Heifer
2 7 06	Yellow TAG 22 (52)	22	Steer
2/8/6	2602	2602	Steer
2/9/6	WHITE TITS	WHITE TITS	Steer
2 14 6	1602	1602	Steer
2/14/06	No tag	VALENTINE	STEER
2/17/06	No tag	Cold Snap	Steer
2/17/06	No tag	BLIZZARD	Steer
2 18 6	2002	2002	Steer
2 20 6	3202	3202	STEER
2 20 6	2502	2502	Steer

HERD No 4 2nd

DATE	Cow No.	Calf No	type
2 21 06	3802	3802	~~Steer~~
2 21 06	No TAG	2/21/06	Steer

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Authorized by:	Ellis Jay Mayer, Nathan Bremer Dumm & Myers PC
Authorize and file on:	Jun 17 2011 12:18PM MDT

Court:	CO Court of Appeals
Division/Courtroom:	N/A
Case Class:	Appeal
Case Type:	Civil - General
Case Number:	10CA1578
Case Name:	Sullivan, K. v. Bowen, D.

Transaction Option:	File and Serve
Billing Reference:	fblsulli
Read Status for e-service:	Not Purchased

Documents List
3 Document(s)

Attached Document, 51 Pages **Document ID: 40182243** PDF Format | Original Format

Document Type:	Access:	Statutory Fee:	Linked:
Brief - Answer (COA)	Public	$0.00	Yes

Document title:
Answer Brief

Attached Document, 1 Pages **Document ID: 40182275** PDF Format | Original Format
Related Document ID: 40182243

Document Type:	Access:	Statutory Fee:	Linked:
Attachment (COA)	Public	$0.00	

Document title:
Appendix 1 - Ex. J

Attached Document, 13 Pages **Document ID: 40182310** PDF Format | Original Format
Related Document ID: 40182243

Document Type:	Access:	Statutory Fee:	Linked:
Attachment (COA)	Public	$0.00	

Document title:
Appendix 2 - Ex. C

Close All

Sending Parties (2)

Party	Party Type	Attorney	Firm	Attorney Type
Bowen, Daniel	Appellee	Mayer, Ellis Jay	Nathan Bremer Dumm & Myers PC	Privately Retained Attorney
Bowen, Daniel	Appellee	Ailer, Allison	Nathan Bremer Dumm & Myers PC	Privately Retained Attorney

Recipients (10)

Service List (10)

Delivery	Party

Option	Party	Type	Attorney	Firm	Attorney Type	Method
Service	Caprio, Dyanne	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney	E-Service
Service	Caprio, Dyanne	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney	E-Service
Service	Eickbush, Thomas	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney	E-Service
Service	Eickbush, Thomas	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney	E-Service
Service	Eickbush, Wyatt	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney	E-Service
Service	Eickbush, Wyatt	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney	E-Service
Service	Hanks, Kenneth	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney	E-Service
Service	Hanks, Kenneth	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney	E-Service
Service	Sullivan, Kathleen	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney	E-Service
Service	Sullivan, Kathleen	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney	E-Service

⊟ Additional Recipients (0)

⊟ **Case Parties**

Party	Party Type	Attorney	Firm	Attorney Type
Bowen, Daniel	Appellee	Mayer, Ellis Jay	Nathan Bremer Dumm & Myers PC	Privately Retained Attorney
Bowen, Daniel	Appellee	Ailer, Allison	Nathan Bremer Dumm & Myers PC	Privately Retained Attorney
Caprio, Dyanne	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney
Caprio, Dyanne	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney
Eickbush, Thomas	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney
Eickbush, Thomas	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney
Eickbush, Wyatt	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney
Eickbush, Wyatt	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney
Hanks, Kenneth	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney
Hanks, Kenneth	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney
N/A	N/A	Clerk, Appeals	CO Court of Appeals	Primary Judge
Sullivan, Kathleen	Appellant	Orsini, Rosemary	Berenbaum Weinshienk PC	Privately Retained Attorney
Sullivan, Kathleen	Appellant	Burke, Katherine A	Insight Law LLC	Privately Retained Attorney

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