COURT OF APPEALS, STATE OF COLORADO 101 West Colfax, Suite 800 Denver, Colorado 80203 (303) 837-3785 Appeal from District Court, Adams County Honorable C. Scott Crabtree, District Judge Case No. 2007CV287 **Appellants/Plaintiffs:** KATHLEEN SULLIVAN et al., **v.** **Appellant/Defendant:** DANIEL BOWEN.	
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REPLY BRIEF	

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CERTIFICATE OF COMPLIANCE	

We hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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I. BOWEN'S STATEMENT OF FACTS DOES NOT ACCURATELY REFLECT PORTIONS OF THE RECORD.

It goes without saying that Appellants/Plaintiffs (Plaintiffs) disagree with much of Bowen's Statement of Facts set forth in the Answer Brief. However, Plaintiffs are compelled to respond to certain representations in the Answer Brief that are material to Bowen's legal arguments but do not accurately reflect the record.

First, Bowen argues that it was improper to put objections to jury instructions on the record after the instructions had gone to the jury. *See Answer Brief* at 10-16. In aid of this argument, Bowen states that "Appellants suggested that the parties make their record after the jury started deliberations" and references a quote from the transcript at CD 3223:15-23. *Answer Brief* at 14.

In fact, the portion of the transcript quoted reflects Plaintiffs' counsel's *response* to the *trial court's* request that a record of the parties' pre-deliberation objections be made at a later time. *Transcript of Trial Held April 5-9, 2010* (hereinafter, *Transcr.*), CD at 3223:12-14 (trial court suggesting that "we talk about what we have [as far as jury instructions], and at a [later] point allow to you [sic] make a record on these. Would that be acceptable to you, Ms. Orsini?"). In response, Plaintiffs' counsel said formally placing the objections on the record "later on" was acceptable, in part because it would "be repetitive of what was done before." *See id.*, CD at 3223:15-23.

In a second instance, Bowen argues that Plaintiffs did not preserve their challenge to the trial court's directed verdict on Plaintiffs' trespass claim. *Answer Brief* at 37. Bowen again quotes a portion of the transcript to support his argument that Plaintiffs only made the relevant arguments about their nuisance claim, not their trespass claim. *Id*. However, Bowen misquotes the record. The last sentence of the quoted statement expressly says that the arguments in question went to "the issues of nuisance *and* trespass." *Transcr.,* CD at 2994:25-2995:1 (emphasis added).

In addition, the Answer Brief unfairly mischaracterizes the evidence to support Bowen's defenses to the merits. Those that require response follow briefly:

- Bowen states in the Answer Brief at 2, that Plaintiff Eickbush's dog, Doc, was trespassing on Bowen's land before the poisoning occurred. The record shows that Eickbush and Doc had permission to be on Bowen's leased property and that Doc was only there, accompanied by Eickbush, some days before Doc fell ill. *Transcr.*, CD at 2667:8-2668:1 (Eickbush rode horses on Bowen's lease for years with Bowen's knowledge); 2691:9-13 (Doc did not wander off Eickbush property unaccompanied); 2683:24-2684:12 (Doc accompanied Eickbush on a horseback ride on Bowen's land two days before Doc fell ill). Nowhere did Bowen testify that Doc was trespassing on his property prior to his poisoning.

- Similarly, Bowen asserts that Plaintiff Sullivan "admitted" that she had her dogs off leash before they were poisoned, suggesting that they ate poisoned meat while wandering on Bowen's property. *Answer Brief* at 2. In fact, Ms. Sullivan's testimony was that each of her dogs was off leash only when completely in her verbal control and her sight and within Eickbush's property. *Id*., CD at 2792:15-18 (dogs were never out of her sight);

2792:23-2793:13(Kirby was off leash but under voice control); 2793:24-2794:6 (Boomer was off leash one time because he stayed close by); 2793:17-2794:7 (neither dog ever moved beyond the trees bordering Eickbush's property).

- Bowen now describes "no trespassing" signs on his perimeter fences. *Answer Brief* at 2. The uncontroverted evidence at trial was that there were no such signs at the time of the poisoning and that the signs described in the Answer Brief were erected a month *afterwards*. *Transcr.,* CD at 2922:23-2924:6; 2667:25-2668:2. Bowen himself testified that there were no signs between his property and the properties of Plaintiffs Hanks, Caprio and Eickbush. *Id*., CD at 2639:11-23. Moreover, Plaintiffs testified that prior to the poisonings they had express or tacit permission from Bowen to cross his leased land. *See, e.g., id.*, CD at 2463:18-2464:13 (Hanks testifying to mutual permission to enter on each other's land); CD at 2667-2668 (Eickbush testifying to custom of walking and riding across Bowen's leased land).

- Bowen now states that he was battling a 25% predation rate on his calves, justifying his extraordinary use of poisoned meat to allegedly poison coyotes. *Answer Brief* at 2-3. The portions of the record cited by Bowen say nothing about a 25% predation rate. *See id.*, CD at 3165:25-3166:1 (expert witness defining predation); 3171:5-8 (expert witness testifying Bowen's predation rate was above average); 2617:1-2618:14 (Bowen testifying about using llamas to protect cattle); 2596:8-16 (Bowen testifying about using lights to deter coyotes). Bowen also cites to Trial Exhibit C, attached as Appendix 2 to the Answer Brief, which purports to be a log of calves born in Bowen's herd. Appendix 2 shows a list of approximately 61 calves born and eight notations of "killed" or "eaten" by "predators," yielding approximately a 13% predation rate, half of Bowen's current contention. This is assuming the notations in Appendix 2 are even correct; Bowen admitted that calves could be stillborn or die of disease and later be mauled by predators, making it difficult to determine the cause of death. *Transcr.*, CD at 2632:22-25. The trial court itself noted that the evidence of coyote damage to Bowen's cattle was "sketchy." *Id.*, CD at 3022:2-8.

While Plaintiffs acknowledge Bowen's need to advocate on his own behalf, evidence in the record should not be mischaracterized to that end. An independent

review of the cited portions of the record will reveal the actual state of the evidence.

II. PLAINTIFFS ADEQUATELY AND PROPERLY PRESERVED THEIR LEGAL OBJECTIONS TO THE JURY INSTRUCTIONS.

Recognizing the plain and serious jury instruction errors identified by Plaintiffs, Bowen focuses his response on whether Plaintiffs adequately preserved their objections for appeal. Bowen attacks the timing of objections, arguing that objections put on the record after the instructions were finalized do not preserve appellate issues. Bowen confuses the stenographic recording of the objections with the actual making of objections. Plaintiffs made all necessary objections to the trial court before the instructions were complete, giving the trial court ample opportunity to correctly instruct the jury. *Scheer v. Cromwell*, 158 Colo. 427, 429, 407 P.2d 344, 345 ((1965) (proper objections to instructions "enable trial judges 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").

Like most trial courts, the trial court here conserved judicial resources by making a stenographic record of the parties' objections made in informal conference after the jury had gone to deliberate. This procedure suffices to preserve appellate issues and satisfy C.R.C.P. 51. If this Court were to disapprove

of this procedure, off-the-record jury instruction conferences generally held on evenings and weekends would require the attendance of court staff, at great expense and probable expansion of trial length. There is no reason for this requirement so long as the parties made their objections and arguments to the trial court to allow any changes to be made before the jury instructions were read to the jury.

Secondly, Bowen argues that Plaintiffs' objections were not specific enough to preserve the issues they present to this Court. The purpose of the contemporaneous objection requirement is to fully inform the trial court of the legal issues in time to allow the trial court to resolve those issues. *Scheer*, 158 Colo. at 429, 407 P.2d at 345. Objections made off the record in informal conference, together with all iterations of the parties' legal contentions, serve this purpose. *See Silva v. Wilcox*, 223 P.3d 127, 134 (Colo. Ct. App. 2009) ("the parties' continuing dispute" over the jury instruction challenges raised on appeal served to preserve those issues); *Valdez v. Pringle*, 143 P.3d 1069, 1072 (Colo. Ct. App. 2005) *aff'd in part, rev'd in part on other grounds, Pringle v. Valdez* 171 P.3d 624 (Colo. 2007) (finding jury instruction objection properly preserved where counsel "raised the issue numerous times," including in pre-trial briefing, and "the court had ample opportunity to address it"). Plaintiffs amply objected to the legal

issues they raise here, and the trial court's own comments demonstrate that it was well apprised of those issues prior to finalizing the jury instructions.

Finally, if this Court is not satisfied that Plaintiffs timely or adequately objected to the jury instructions, the issues Plaintiffs raise constitute plain error. *See, e.g.*, *People v. Zapata*, 759 P.2d 754, 755 (Colo. Ct. App. 1988) ("contemporaneous objection" rule is softened by plain error review if it would result in manifest prejudice or unfairness); *see also* *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 587 (Colo. 1984) (where the instruction improperly stated the burden of proof, it "implicated a critical aspect of the plaintiffs' strict liability claim and, as such, affected the substantial rights of the parties," and was reviewable despite the lack of *any* objection).

For these reasons fully explained below, Plaintiffs request this Court to review their appellate issues on the merits and reverse the challenged trial court rulings.

A. Rule 51 was satisfied because the trial court heard argument on jury instructions before giving instructions to the jury and memorialized those arguments on the record after the jury retired to deliberate.

As is common practice, the trial court held the bulk of jury instruction discussion and argument off the record and allowed that argument to be memorialized on the record after the jury went into deliberation. Trial courts and counsel generally engage in lengthy and complicated arguments over jury instructions, resulting in numerous sets of modifications before the trial court makes its final decisions. Rather than requiring a court reporter to attend these conferences and record them, most trial courts use the time spent waiting while the jury deliberates to stenographically memorialize the legal arguments made earlier. This procedure promotes efficiency and conserves resources. Moreover, it is a familiar procedure to trial counsel. By this procedure, the requirements of C.R.C.P. 51 and interpretive caselaw are met; the trial court receives all legal argument and drafting assistance necessary to correctly instruct the jury prior to reading them the jury instructions. This was the procedure followed in this case.

At the end of the fourth day of trial, late in the afternoon, the trial court began discussion of jury instructions and told counsel the conference would be off the record and they would have the opportunity to steongraphically record their objections later. *Transcr*., CD at 3213:19-24 (trial court stating, "well, does anyone need anything more on the record? I'm going to let my court reporter

go.”). As discussion began of the jury instructions, the reporter stayed and recorded five pages of jury instruction discussion, including argument on the availability of non-economic damages on the remaining claims. *See id.*, CD at 3213:25-3218:23. At that point, the discussion abruptly went off the record without warning to counsel. *See id.*, CD at 3218:24-3219:1 (“Whereupon there was discussion off the record regarding the instructions, and no further record was made in this matter”).

At the start of the following day, the trial court suggested that, “we talk about what we have [as far as jury instructions], and at a [later] point allow to you [sic] make a record on these.” *Id.*, CD at 3223:12-13. As highlighted earlier, the trial court asked Plaintiffs’ counsel, “[w]ould that be acceptable to you, Ms. Orsini?” *Id.*, CD at 3223:14. Plaintiffs’ counsel confirmed that the record made “later on” would be “repetitive of what was done before,” and was acceptable. *Id.*, CD at 3223:15-23. Plaintiffs’ counsel also alerted the trial court that there was “something new” in last minute instructions she had been handed by Bowen’s counsel, to which she wished to make an objection on the record. *Id.*, CD at 3223:23-3224:3. The trial court responded that counsel would be given an opportunity to make a record on jury instructions, but again said, “can we just sit here and go through these – these off the record . . . and I will ask you if you have additional instructions or verdict forms and objections . . . so that your record is

made?" *Id.*, CD at 3224:4-11. There was no suggestion by the trial court—or by counsel—that the later time for making a record would be after the instructions had been read to the jury. *See generally, id.*, CD at 3223-24. Without another opportunity for counsel to make objections to instructions on the record, the trial court began reading the jury instructions to the jurors. *See id.*, CD at 3226:22.

Demonstrating the familiarity of recording prior objections after the jury retired to deliberate but before the verdict was rendered, Bowen's counsel—not Plaintiffs' as asserted in the Answer Brief—suggested to the trial court, "[d]o we need – still need to make a record on the objections to the instructions?" *Id.*, CD at 3272:5-6. Also acknowledging this common practice, the trial court had the parties memorialize their objections to the instructions. *Id.*, CD at 3272:14-22; *see also, Amended Opening Brief* at 11 (citing CD at 3280 for objections to necessity of proving willful and wanton conduct beyond a reasonable doubt made during jury deliberation).

Bowen's counsel waived the right to complain about this procedure by agreeing that the record made in this manner would memorialize the jury instruction. Plaintiffs relied on the record produced this way, without expressly agreeing to the procedure, to preserve their objections. Since the Court had the opportunity to make any changes to the jury instructions before they were read to the jury and a record was made, nothing more is required under Rule 51 to

preserve Plaintiffs' appellate issues. Requiring trial courts to create a full record of all jury instruction conferences before the instructions are finalized would impose significant cost and inefficiency on the system. Even if this Court determines to set this requirement, it should not be retroactively imposed to prejudice Plaintiffs in this case.

B. Plaintiffs fully informed the trial court of their legal contentions about the jury instructions before the instructions were finalized and read to the jury.

Plaintiffs timely and adequately objected to the jury instructions challenged in this appeal. Some of those objections were made off the record at the trial court's request and memorialized later.

In addition to those objections made both on and off the record before the instructions were finalized, the parties had a clear and continuing dispute throughout the trial over both instructional issues presented here. The parties' arguments on Bowen's directed verdict motion covered the same legal issues and expressly referred back to jury instruction issues, so the two cannot be taken separately. *See, e.g., Transcr.,* CD at 3197:18-25 (during directed verdict argument, Plaintiffs' counsel referring to the truncation of jury instruction argument the previous day and referring back to instructional issues); *id.*, CD at 3202:19-3203:14 (also during directed verdict argument, trial court asking what kinds of damages were available to Plaintiffs and Plaintiffs' response, a key

appellate issue). The totality of these arguments and objections to instructions were more than adequate to bring the issues to the trial court's attention and give it the opportunity to correct instructional errors. *See Scheer*, 158 Colo. at 429, 407 P.2d at 345 (purpose of argument on instructions is to inform the trial court of the issues); *see also Silva*, 223 P.3d at 134 (parties' "ongoing dispute" is part of fully informing trial court before instructions are given); *Valdez*, 143 P.3d at 1072 (parties are not required to continuously repeat objections).

Proceeding chronologically through the record, Plaintiffs raised their appellate issues on the record before the jury instructions were finalized in at least the following ways:

1. Plaintiffs' counsel argued to the court that the value of Plaintiffs' dogs included numerous factors beyond cost or "market" value, *Transcr.*,CD at 3198:25-3199:19;

2. The trial court asked what types of damages were available under the law and were established by evidence for Plaintiffs' negligence and ultrahazardous activity claims; Plaintiffs responded that economic and non-economic damages were available and established, including "loss of business" (as separate from loss of income), emotional distress and "the value of the dogs," *id*., CD at 3202:19-3203:14;

3. In on-going discussion of available damages, Plaintiffs' counsel referenced *Chryar v. Wolf*, 21 P.3d 428 (Colo. Ct. App. 2000), which allows for non-economic and emotional distress damages for injury to property in certain instances, *id.*, CD at 3206:25-3207:3.

4. During on-record jury instruction argument, Plaintiffs argued that willful and wanton conduct is not required to support an award of non-economic damages on the basis of a negligence claim. *Transcr.*, CD at 3215:8-15.

After the instructions were read to the jury, the parties recorded their prior objections and arguments for the transcript. *See generally, Transcr.,* CD at 3272-3284. Plaintiffs then recorded these and other objections, as cited in the Amended Opening Brief at 11.

The arguments and objections referenced demonstrate that Plaintiffs adequately brought these legal issues to the trial court's attention. Plaintiffs met their duty under C.R.C.P. 51 and associated case law.

C. Plaintiffs' objections were sufficiently specific to preserve their legal issues for appeal.

Bowen argues that the Plaintiffs' objections were not specific enough to preserve their appellate issues. Trial objections to jury instructions must indicate how the subject instruction varies from a correct statement of the law. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 887 (Colo.1986); *see also Scheer*, 158 Colo. at 429, 407 P.2d at 345 (objections must enable trial court to correctly instruct the jury); *Blueflame Gas*, 679 P.2d at 586-87 (insufficient objections deprive the trial court of an opportunity to correct its error).

Objections and arguments need not cover the precise instruction or language challenged, as long as they bring the trial court's attention to the legal issues. *Lewis v. La Nier*, 84 Colo. 376, 384, 270 P. 656, 659 (1928) (accepting arguments on certain instructions as preserving those issues with regard to other instructions).

In *Silva v. Wilcox,* a division of this Court found that a very general objection was sufficient to preserve the issue for appeal, based in part on "the parties' continuing dispute" over the primary legal issues raised on appeal. 223 P.3d at 134. Another division of this Court accepted an objection stating only that the correct standard of care was presented in the objector's submitted instruction, as opposed to any more detailed recitation of legal analysis or authority. *Blueflame Gas*, 679 P.2d at 587. Thus, the course of the parties' legal arguments during the trial and general references to the nature of the instructions can suffice to preserve appellate issues. *See also, Valdez*, 143 P.3d at 1072 (where issue raised several times and trial court had ample opportunity to correct instructional error, issue preserved for appeal). This Court should consider the totality of arguments, on and off the record, timely supplied to the trial court in determining the sufficiency of Plaintiffs' objections. *Silva*, 223 P.3d at 134; *Valdez*, 143 P.3d at 1072.

Bowen first argues that Plaintiffs did not assert at trial the specific types of non-economic damages used as examples in the Amended Opening Brief. This is both inaccurate and irrelevant. The issue is whether *any* non-economic damages other than emotional distress were legally available on Plaintiffs' negligence and ultrahazardous activity claims and whether there was any evidence in the record to support those damages. *See Amended Opening Brief* at 10-18. The examples in the Amended Opening Brief are just that—illustrative examples of possible types

of non-economic damages, within broader categories such as inconvenience and loss of enjoyment of life, that were legally available to Plaintiffs and supported by the evidence. *See Amended Opening Brief* at 15-17. As explained above, Plaintiffs clearly preserved this issue by repeatedly arguing and objecting that non-economic damages were available on their negligence and ultrahazardous activity claims. The trial court was aware of and focused on the availability of non-economic damages before the instructions were finalized. *Transcr.*, CD at 3202:20-3203:14 (during discussion of directed verdict, asking Plaintiffs what economic and non-economic damages were available).

Second, Bowen asserts that Plaintiffs never "complained" about the proper burden of proof for willful and wanton conduct on the record. *See Answer Brief* at 13. Even if true, this is not material because Plaintiffs ask this Court whether willful and wanton conduct is required, under any burden of proof, to obtain non-economic damages other than emotional distress from negligence destruction of property. *See Amended Opening Brief* at 1.

Third, Bowen misunderstands Plaintiffs' arguments regarding the proper measure of value for their dogs. Plaintiffs do not argue that the dogs' "sentimental" value was the basis for economic damages on the negligence claim; the issue is whether other factors than original purchase or replacement costs can be considered when attaching economic measures to the dogs. Colorado has not

decided this issue in this context and can take the authorities provided in the Amended Opening Brief and the Amicus Brief into account. Bowen's counter-citations regarding "sentimental" value alone are inapplicable to this argument.[1] As explained in the Amended Opening Brief and the Amicus Brief, courts have often recognized the complex and far-ranging "value" of companion animals. *See, e.g.*, *Womack v. Van Rardon*, 135 P.3d 542, 546 (Wash. App. 2006) (holding that pet animals have "actual and intrinsic value" that affects their owners' well-being upon their loss). As required to preserve the issue, Plaintiffs argued to the trial court that their dogs had a value beyond their market price. *See, e.g., Transcr.*, CD at 3198:25-3199:19. The trial court demonstrated its awareness and consideration of this issue both during discussion of directed verdict and during the recordation of objections to instructions. *Transcr.*, CD at 3202:20-3203:14; 3283:23-3284:2.

D. The jury instructions fail plain error review should the Court find technical defects in the jury objection procedure.

If this Court is persuaded that Plaintiffs failed to make sufficient timely objections, the instructions challenged nevertheless fail plain error review. *See Gorsich v. Double B Trading Co., Inc.*, 893 P.2d 1357, 1363 (Colo. Ct. App. 1994)

[1] Colorado law does recognize the sentimental value of personal property when assessing damages for IED directed at that property. *See Chryar v. Wolf*, 21 P.3d 428 (Colo. Ct. App. 2000). Plaintiffs' IED claim did not reach the jury and therefore this issue was not relevant to the jury instructions. Plaintiffs argue below that the IED claim should have reached the jury, in which case the sentimental value of the dogs would have been appropriately considered. *Id.*

(contemporaneous objection rule may be softened to prevent manifest error); *Zapata*, 759 P.2d at 755 (requirement of objections softened if there is manifest prejudice or unfairness in its application).

Where the trial court improperly imported the beyond a reasonable doubt standard of proof into Plaintiffs' claim for non-economic damages, the error was fundamental to Plaintiffs' rights under the civil law system. *See Blueflame Gas*, 679 P.2d at 587 (where the instruction improperly stated the burden of proof, it "implicated a critical aspect of the plaintiffs' strict liability claim and, as such, affected the substantial rights of the parties," and was reviewable despite the lack of *any* objection). As explained in the Amended Opening Brief, Plaintiffs concede that *punitive* damages require proof of willful and wanton conduct beyond a reasonable doubt, but the instructions in this case applied that requirement to simple non-economic damages.

Additionally, by failing to instruct the jury that Plaintiffs' dogs had value beyond their bare "cost," the trial court deprived Plaintiffs of significant economic damages to which they were entitled.

These errors certainly affected the outcome of the case. *See Robinson v. City and County of Denver*, 30 P.3d 677, 685 (Colo. Ct. App. 2001) (plain error is shown where instructions "almost surely affected the outcome"); *Zapata*, 759 P.2d at 755 (plain error shown if the error substantially influenced the jury's verdict or

affected the fairness of the trial). The jury did not find beyond a reasonable doubt that Bowen acted willfully and wantonly, preventing them from awarding Plaintiffs simple non-economic damages of which evidence had been presented due to the instructional error. Further, the instructions prevented the jury from determining a holistic value for the lost dogs.

Bowen argues that Plaintiffs "invited" error regarding the cost of the dogs by agreeing with the trial court to refer the jury to Instruction 21 when it asked a question about the market value of the dogs during deliberation. *See Answer Brief* at 21-25. Plaintiffs' agreement to refer to Instruction 21 at that time, when it was complete and had been given to the jury, was not a waiver of their earlier objection to instructing the jury on the "cost" of the dogs or an invitation of error. *Valdez*, 143 P.3d at 1072 (once objection is made, counsel is not required to repeatedly object); *cf. Roblek v. Horst*, 147 Colo. 55, 62, 362 P.2d 869, 873 (1961) (where counsel initially objected but later expressly withdrew objection, issue could not be reviewed on appeal).

Where Plaintiffs did not create or invite any error, and where manifest injustice would result, the contemporaneous objection rule should not be strictly applied. For these reasons, Plaintiffs' appellate issues should be reviewed de novo. Plaintiffs adequately and timely preserved their issues for appeal or, if the Court disagrees, the plain error doctrine should be applied to prevent manifest injustice.

III. PLAINTIFFS' INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS (IED) CLAIM SHOULD HAVE GONE TO THE JURY; IED CAN ARISE OUT OF DAMAGE TO PROPERTY AND THE EVIDENCE SUPPORTED THE OUTRAGEOUSNESS OF BOWEN'S BEHAVIOR.

Plaintiffs demonstrated in the Amended Opening Brief that the trial court erred when it granted a directed verdict on Plaintiffs' Intentional or Reckless Infliction of Emotion Distress (IED) because the trial court's findings of fact more than supported sending the claim to the jury.

In response, Bowen first argues that the claim was properly dismissed because Bowen's conduct was not aimed at Plaintiffs but at their dogs, which are legally considered personal property. *Answer Brief* at 28-29. Bowen ignores the reasoning and holding of a division of this Court in *Chryar v. Wolf*, 21 P.3d 428 (Colo. Ct. App. 2000). In *Chryar*, the plaintiffs asserted an IED claim against their landlord, who removed their personal property from their home and caused it to be damaged and stolen. This Court clearly approved an IED claim arising out of such property damage. *Chryar*, 21 P.3d at 430. In fact, in another case, the *Chryar* landlord's actions were deemed aimed directly at the plaintiffs themselves. *See Green v. Qwest Svcs. Corp.*, 155 P.3d 383, 386 (Colo. Ct. App. 2006) (listing *Chryar* among cases permitting IED claims on conduct "*directed toward the plaintiffs*") (emphasis in original). Thus, Bowen's destruction of Plaintiffs' property is grounds for an IED claim. Bowen cites the Restatement (Second) of

Torts § 46(2) and cases such as *Bradshaw v. Nicolay*, 765 P.2d 630, 632 (Colo. Ct. App. 1988), for the proposition that conduct aimed a third *person* cannot support an IED claim unless the claimant was there to witness the conduct. As Bowen points out and Plaintiffs concede, dogs are not classified as persons but as property. *Answer Brief* at 29; *Amended Opening Brief* at 18. Therefore, this case falls under the rule of *Chryar*, rather than the rule as stated in *Bradshaw*. Holdings of other jurisdictions are not binding and need not be considered where there is Colorado law on point.

Bowen's second argument is that his conduct did not meet the "extreme and outrageous" factor of the IED claim. *Answer Brief* at 29-36. However, Plaintiffs amply demonstrated in the Amended Opening Brief that the trial court made specific and voluminous findings of the outrageousness of Bowen's conduct. *See Transcr.*, CD at 3017-3024. In addition, Plaintiffs re-emphasize that the trial court also allowed Plaintiffs' request for punitive damages to go forward to the jury. *Id.*, CD at 3023:9-3024:8. To be entitled to punitive damages (as opposed to simple non-economic damages), Plaintiffs had to present evidence of willful and wanton conduct proven beyond a reasonable doubt, a much higher standard than "extreme and outrageous" in the IED context. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1351 n.7 (Colo. 1988) (explaining that exemplary damages require proof of "fraud, malice, or willful and wanton conduct . . . beyond a reasonable doubt,"

while outrageous conduct "need only be proved by a preponderance of the evidence"). Therefore, by the trial court's own findings and conclusions, Plaintiffs' IED claim should have been given to the jury to decide.

Moreover, Plaintiffs' IED claim included reckless conduct, not only intentional. Among the trial court's findings listed in the Amended Opening Brief at 26-28, the trial court specifically found that Bowen's conduct was "done heedlessly and recklessly and without regard to the consequences." *Transcr.*, CD at 3024:2-4. In addition, there was uncontested evidence that Bowen had an extreme dislike for domestic dogs in and around his leased ranchland, from which reasonable jurors could have concluded that Bowen's conduct was vindictively and purposefully aimed at dogs and not at coyotes at all as he asserted. *See Transcr.*, CD at 2674:20-2675:12 (describing Bowen's "rant" about dogs and concluding "he didn't like the dogs. He didn't want the dogs around. He was tired of seeing dogs crossing his property lines"). The trial court's findings and evidence in the record demonstrate that the jury could have found Bowen's conduct reckless and outrageous.

Bowen's final argument is that Plaintiffs presented insufficient evidence of severe emotional distress. As stated in the Amended Opening Brief, physical injury and proof of treatment are not required to support an IED claim. Plaintiffs testified without refutation that they experienced severe emotional responses to the

deaths of their dogs that lasted for months and even years. *Transcr.*, CD at 2491:8-2492:12 (emotional impact on Plaintiffs Hanks and Caprio); 2670:22-25 (emotional impact on T. Eickbush); 2704:13-2706:1 (emotional impact on W. Eickbush); 2748:18-2750:16 (impact on Plaintiff Sullivan); 2951:1-13 (impact on Plaintiff Caprio). Considered under the proper standard, this evidence was more than sufficient to allow at least one reasonable juror to conclude that Plaintiffs experienced severe emotional distress. *Fair v. Red Lion Inn*, 943 P.2d 431, 436-37 (Colo. 1997) (if a reasonable juror *could* return a verdict in the non-movant's favor, a motion for directed verdict must be denied).

For these reasons, together with those stated in the Amended Opening Brief, Plaintiffs request that this Court reverse the trial court's entry of a directed verdict in Bowen's favor on their IED claim and remand for a new trial.[2]

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[2] It is with regard to the IED claim that the sentimental value of Plaintiffs' dogs could be considered as part of their economic damages. *Chryar*, 21 P.3d at 430 ("we now hold that sentimental and emotional value of property may be considered in awarding damages in connection with claims for intentional or reckless infliction of emotional distress"); *cf. Webster*, 992 P.2d at 1186 ("recovery for emotional distress was not available where there was no allegation of negligent infliction of emotional distress or outrageous conduct"). If the trial court had properly allowed this claim to go to the jury, the instructions would have had to reflect the applicable law.

IV. PLAINTIFFS' TRESPASS CLAIM SHOULD HAVE GONE TO THE JURY; SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT BOWEN'S CAUSING POISONED MEAT TO ENTER ONTO PLAINTIFFS' PROPERTY AND DAMAGE PLAINTIFFS' DOGS.

As a preliminary matter, Bowen misinterprets the nature of Plaintiffs Hanks, Caprio and Eickbush's trespass claims. The property damage element of that claim relates primarily to the deaths of Plaintiffs' dogs, not damage to their real property. Plaintiffs Hanks and Caprio originally asserted a nuisance claim related to damage to their crop fields from Bowen's poison, which was dismissed. The trespass claim alleged that Bowen caused poison or poisoned meat to enter onto Hanks's, Caprio's and Eickbush's properties, causing damage to their *dogs*, as well as their land. *See Amended Complaint* at 10, CD at 117 (alleging trespass damages "including the loss of their pets, poisoning of their land . . . and other pecuniary and non-pecuniary losses"). Plaintiffs' dogs, indisputably their property, were clearly killed by ingesting poison that Bowen introduced into the area. Bowen's arguments about whether the land itself was damaged are irrelevant.

Bowen also argues that Plaintiffs failed to preserve their objection to the directed verdict on their trespass claim. *Answer Brief* at 37. As stated above, Bowen misquotes the record by saying Plaintiffs' objections related only to their nuisance claim when counsel said her argument went to "the issues of nuisance *and* trespass." *Transcr.,* CD at 2994:25-2995:1 (emphasis added). In relation to *both claims,* Plaintiffs argued that "the meat, which the Defendant placed, in which

he knew would be eaten by other animals, who would re-eat the vomited meat, and would also carry off of his property." *Id.*, CD at 2994:19-21. The trial court was clearly aware of this issue, as it likened this case to cases of water flowing across property boundaries in the "natural course" of events. *Id.* CD at 3010:18-3011:4.

Bowen next argues that there was insufficient evidence that he intentionally caused Paraquat to cross property boundaries. *Answer Brief* at 38-39. First, Bowen forgets that the trial court was under a duty to review the evidence in the light most favorable to Plaintiffs and to reach all permissible inferences in their favor. *Fair*, 943 P.2d at 436-37. Plaintiff Hanks testified that he found Bowen's meat on his own property. *Transcr.*, CD at 2488:14-18. Eickbush and Sullivan testified that they found a substance on Eickbush's property along a road used solely by Bowen, which was suspicious although they could not identify it. *Id.*, CD at 2660:21-2662:7. Secondly, the trial court specifically found that Bowen did nothing to prevent the meat from being dispersed by wild animals. CD at 3021:12-15 ("he did nothing to be able to ensure that it could not be dispersed in a wider area than simply where he initially placed it"). Like *Webster v. Boone*, 992 P.2d 1183 (Colo. Ct. App. 1999), relied on by the trial court, this was a case in which the natural course of events foreseeably caused a trespass that damaged Plaintiffs' dogs, even if Bowen did not actually place poisoned meat outside his property.

The evidence before the trial court and the trial court's own findings demonstrate that Plaintiffs' trespass claim should have been decided by the jury.

For these reasons, together with those set forth in the Opening Brief, Plaintiffs request that this Court reverse the directed verdict entered in Bowen's favor on Plaintiffs' trespass claim and remand for a new trial.

Respectfully submitted this 11th day of July, 2011.

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CERTIFICATE OF DELIVERY

I hereby certify that on July 11, 2011, a true and accurate copy of the foregoing Reply Brief was served by Lexis/Nexis e-service on:

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