THE
INDIANA COURT OF APPEALS

Cause No. 49A04-1707-MI-01662

MELODIE LIDDLE,	)	Appeal from Marion Superior Court D02
	)	
Appellant,	)	
	)	
v.	)	
	)	**Trial Court Case No.** 49D02-1306-MI-016812
CAMERON F. CLARK, IN HIS OFFICIAL CAPACITY OF THE INDIANA DEPARTMENT OF NATURAL RESOURCES, ET AL.,	)	
	)	**The Honorable** Timothy Oakes, Judge
	)	
Appellees.	)	

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The lower court erred in dismissing Liddle's declaratory relief claim as moot because the evidence demonstrates the agency has not stopped the conduct at issue in her claim. The lower court erred in applying *Lachenman v. Stice*, 838 N.E. 2d 451 (Ind. Ct. App. 2005) because unlike the dog in *Lachenman*, Ms. Liddle's dog, Copper, has no market value and therefore, *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984) should apply.

ARGUMENT

I. Public Interest Doctrine grants Liddle standing for declaratory judgment, *Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978 (Ind. 2003).

IDNR contends, initially, that Liddle lacks standing to obtain declaratory relief.[1] That argument fails. Standing in the federal system, unlike Indiana state courts, is grounded in the "case or controversy" requirement of Article III of the United States Constitution. The federal case or controversy requirement limits standing in federal court to parties with a "concrete and particularized" injury.[2]

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[1] Appellee Br. p. 24

[2] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), remand, *Robins v. Spokeo, Inc.*, No. 11-58643 (9th Cir. Aug. 15, 2017). In that case, the Court addressed whether a willful violation of the Fair Credit Reporting Act ("FCRA"), absent proof of actual damages, constituted sufficient harm to confer Article III standing to a FCRA plaintiff. The Court declined to resolve the issue and remanded the case back to the Ninth Circuit for a two-step inquiry to determine whether the plaintiff's injuries were sufficiently "concrete" to confer Article III standing. On remand, the Ninth Circuit ruled the plaintiff's injuries were "concrete". Liddle could meet that standard, although that showing is unnecessary.

Principles of Federalism, a fascinating issue far beyond the scope of this Reply, relieve state courts of the federal courts' limitation. Indiana's Supreme Court has long-recognized those principles and has held its courts are not bound by the strict federal "case or controversy" requirement in cases, like this, where the plaintiff has "public interest standing"[3] The core of the public interest standing doctrine is that every citizen is injured when public officials fail to uphold the constitution or fail to fulfill the delegated duties.[4]

In *Cittadine*, the court affirmed the vitality of the public interest standing doctrine in cases like the one at hand. In that case, an individual lacking any injury-in-fact or connection to the defendant railroad had standing for a mandamus order requiring the Indiana Department of Transportation to enforce a railroad regulatory statute. Liddle's declaratory judgment claim seeks a judicial declaration of IDNR's public duty; specifically, Liddle's claim is that IDNR acted without legislative authority when the agency allowed or permitted commercial fur-trapping on public state park property, regardless of how IDNR effectuates the contested 'trap/sell

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[3] *Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003).

[4] *Id.*, at 979-981.

permit'. Liddle, like the plaintiff in *Cittadine,* does not need an injury-in-fact to establish standing for declaratory relief.

Finally, assuming *arguendo* this court deems the pending claims moot as a matter of fact, the public interest exception to the mootness doctrine permits this court to decide the claims on their merits because they raise a question of "great public interest".[5] Issues meeting that standard are not necessarily constitutional although they have far-reaching effect and are likely to recur.[6] The issue here has far-reaching effect; anyone using a state park in Indiana is affected by IDNR's actions and there is no evidence IDNR has halted or stopped the conduct at issue in the complaint. That alone indicates the issue meets the public interest standard.

II. Liddle's claim for declaratory relief is not moot.

IDNR contends that Liddle's claim for declaratory judgment is moot, however, and an issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or if the court cannot provide effective relief.[7] IDNR's first argument is that the lower court's ruling on her tort/premises

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[5] *Ind. High Sch. Athletic Ass'n. Inc. v. Durham,* 748 N.E.2d 404, 411-412 (Ind. Ct. App. 2001) (citations omitted). In that case, the court held the public interest exception to mootness doctrine applies to statewide participate in sports under the IHSAA eligibility rules and ruled on the merits.

[6] *Id.,* at 412.

[7] *Id.,* at 410.

liability claim rendered the declaratory judgment moot.[8] Although IDNR fails to identify facts, issues, or the legal mechanism enabling that result, the argument has no merit. Liddle's claim is that IDNR lacked statutory authority to allow commercial fur-trapping on state park property. In essence, IDNR's contention is Liddle obtained judicial review of her declaratory judgment claim when the court ruled on her tort and the claim was thereby mooted.

IDNR's argument fails for two reasons. First, as a matter of record Liddle's declaratory judgment claim was no longer before the lower court when it ruled on her premises liability claim. The lower court had already dismissed the declaratory judgment as moot a year earlier.[9] Furthermore, even if the lower court had not already ruled on Liddle's equitable claim, the court never could have reached that claim in ruling on the tort as a factual matter. The undisputed evidence is that IDNR's Property Manager, Sipples, never authorized the individual who maintained the commercial fur-trap that killed Liddle's dog to engage in the trapping activity on the park's property to begin with. Since the person who caused Liddle's negligence damages lacked IDNR authorization to maintain traps and sell

[8] Appellee Br. p. 24.

[9] Appellant's App. 2, p. 30.

furs, the lower court's ruling on Liddle's negligence claim left the declaratory judgment claim unresolved and mootness is not an issue.

Liddle's declaratory judgment claim challenges IDNR's power to make "temporary amendments" to the agency's administrative code whereby the agency effectuated the public-property commercial fur-trapping permit.[10] IDNR contends that claim is moot because the temporary amendments that Liddle challenged had built-in expiration dates, expired on their own accord, and thereby became moot. IDNR's argument conflates the temporary amendments with the agency's power to make them.[11] Liddle's claim challenges IDNR's power to make the temporary amendments; their built-in expiration dates are irrelevant unless the agency has statutory authority to make those amendments to begin with. If the temporary amendments are not legitimate exercises of IDNR's statutory authority, they are *void ab intio* and their expiration dates are irrelevant.

Liddle's declaratory judgment claims IDNR's "temporary amendments" to the agency's administrative code in 2012 and 2013 are legislative rules and lack

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[10] Liddle did not appeal the trial court's erroneous ruling (February 12, 2014) (Appellant's App. 2, p. 55) that her declaratory judgment claims prior to 2012 were barred by the statute of limitations, although that ruling was clear error. *SMD Fund, Inc. v. Fort Wayne-Allen County Airport*. 831 N.E.2d 725, 727-28 (Ind. 2005). The reason Liddle did not pursue that issue is that the claims the court deemed time-barred are repetitions or reiterations of the claims at issue here.

[11] Appellee's Br. pp. 23-24.

statutory authorization. The 2012 and 2013 amendments[12,13] effectuated the agency's public-property fur-trapping permit, whereby the agency allowed an "authorized person" to maintain commercial fur traps on public, state park property. The written authorizations or "public-property" permits/documents Liddle designated as evidence merely demonstrate that IDNR allowed the challenged activity – allowed the traps to be maintained on state park property and allowed those maintaining the traps to sell fur from the trapped animals. The permits/documents, themselves, are not the issue; the agency's conduct they allow is the gravamen of Liddle's claim for declaratory relief.[14]

Liddle's claim is that IDNR's temporary amendments effectuating the public-property fur-sale/trapping permits are legislative, not interpretative rules.[15]

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[12] LSA #12-48(E); Appellant's App. 2, p. 46-47.

[13] LSA #13-4(E); Appellant's App. 2, pp. 48-49.

[14] The lower court's ruling in this case is proof positive that IDNR did not always provide the commercial fur-trappers with the documents/written authorizations. The trapper at issue here maintained his traps and sold the furs from the animals he trapped in Versailles State Park from 2005 – 2011, (Appellant's App. 2, p. 97) by his own admission, but he never once had written authorization. Appellants App. 2, pp. 58, 98. Liddle requested all "permit" documents/written authorizations in discovery but IDNR did not provide public property commercial fur-trappers with written authorization in 2012 or 2013.

[15] *United States v. Mersky*, 361 U.S. 431, 437-38 (1960) (labeling rule requiring Eastern Bloc violins labeled conspicuously prior to sale is legislative rule); *Arrow Air, Inc. v. Dole,*, 784 F.2d 1118, 1122-23 (D.C. Cir. 1986) (general principles to ascertain whether a rule is legislative or interpretive, include the agency's label for the rule, the rule's general language, whether the rule merely reiterates duties created by statute, whether the policy expressed in the rule has been consistently followed by the agency, and whether the agency's intent or the practical impact of the rule is to create new law, rights, or duties).

A legislative rule is the product of an exercise of delegated legislative power to make law through rules.[16] However, IDNR lacks legislative authority to allow the fur-traps and any sale of furs, regardless of whether the agency did or did not issue or produce any "written authorizations". Based on the evidence produced in discovery, IDNR did not issue any public-property permits for 2012 but, nevertheless, used the emergency rule process to effectuate the temporary amendment allowing the conduct authorized by the permit on state park properties again, in 2013. Once again in 2013, the agency did not issue a single permit but allowed the conduct authorized by the permit nevertheless. Most significantly, there is no evidence of mootness. There is nothing in the record that could possibly generate the inference that IDNR stopped or ceased allowing fur-traps to be maintained on state park premises and allowing those persons maintaining them to sell the furs.

As a final matter, IDNR's argument that Liddle's claim is a "procedural challenge"[17] and was rendered moot in 2014 is a red herring. In 2014, IDNR's adjudicative arm, the Natural Resources Commission appears to have issued a declaration prohibiting the agency from using the emergency rule process to

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[16] *Mersky*, 361 U.S. at 437.

[17] Appellee's Br. pp. 22-23.

effectuate commercial fur-trapping on public premises.[18] The NRC's order, indeed, moots any challenge to IDNR's use of the emergency rule procedure. However, the order in no way stops the agency from using a different procedure to allow the conduct challenged in Liddle's claim. Since there is no evidence that possibly could generate the inference IDNR halted, ceased or stopped the challenged conduct, the contention Liddle's claim is moot has no basis and the declaratory judgment should be remanded to the trial court with this court's guidance for a declaratory ruling.

III. **Liddle's actual damages should be measured by sentimental value**

The cases pertaining to Liddle's damages are not inapposite and can be harmonized. *Campins v. Capels*,[19] *Lachenmann v. Stice*[20] and *Mitchell v. Mitchell*[21] stand for the proposition that the plaintiff determines the theory of valuing his or her actual damages/loss in the *ad damnum clause* of the complaint at the outset of the case. Unless there is evidence the plaintiff's measure of damage creates a windfall, the case proceeds accordingly. In all three cases, the plaintiff's

[18] Appellant's App. 2, p. 93.

[19] *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984).

[20] *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. Ct. App. 2005).

[21] *Mitchell v. Mitchell*, 685 N.E.2d 1083 (Ind. Ct. App. 1997).

perception of his or her loss played a dispositive role in the measure of actual damages.

Liddle, unlike the plaintiff in *Lachenmann*, never alleged or argued market value as a basis for measuring the loss of her pet or her actual damages in her complaint or elsewhere. Liddle has maintained sentimental value as the proper measure for her actual damages from the outset. The lower court ruled Liddle's actual damages would be measured by her pet's market value in July of 2016 although there was no designated evidence of the pet dog's market value at that time. The only designated evidence of Liddle's actual damages were those alleged in her Notice of Tort.[22] Subsequently, after the lower court's ruling, the parties stipulated the six beagles were listed *for sale* in the Indianapolis area and those dogs would be "appropriate *if* the measure of actual damages is limited to the cost of a replacement dog"[23]. The stipulation served judicial economy because the court already ruled on the legal issue, despite the absence of evidence.

Restatement of Torts (Second) § 911, comment "e" (1977) speaks specifically to the peculiar "value to the owner":

> The phrase ″value to the owner″ denotes the existence of factors apart from those entering into exchange value that cause the article to be more desirable

[22] The only predicate evidence in the record of Liddle's valuation of her actual damages is reflected in her Notice of Tort claim for $15,000. Appellant's App. 2, pp. 89-90.

[23] Appellant's Br. p.34, fn 34; Appellant's App. 3, pp. 36-37.

> to the owner than to others. Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner. The absence or inadequacy of the exchange value may result from the fact that others could not or would not use the thing for any purpose, or would employ it only in a less useful manner. Thus a personal record or manuscript, an artificial eye **or a dog trained to obey only one master**, **will have substantially no value to others than the owner**. The same is true of articles that give enjoyment to the user but have no substantial value to others…In these cases **it would be unjust to limit the damages for destroying or harming the articles to the exchange value** (**emphasis added**).[24]

In *Lachenman*, the court recognized that even when property is unique and irreplaceable, actual damages may be measured by market value if the plaintiff chose to use that method of valuation and it fairly compensates the plaintiff's loss. However, if the facts demonstrate the property at issue has no verifiable market value and the destroyed property was unique or **possessed qualities the special nature of which could only be appreciated by the owner, "**additional principles are helpful in determining *proper* compensation to the injured party."[25] As the court emphasized in *Aufderheide*, "[t]he underlying principle of universal application is that of fair and just compensation for the loss or damage sustained.[26]

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[24] https://www.scribd.com/document/244805002/Value-Restatement-of-Torts-2d-Section-911 (last accessed Jan. 17, 2018).

[25] *Campins v. Capels*, 461 N.E.2d 712, 720 (Ind. App. Ct. 1984) (emphasis added) (citing *Aufderheide v. Fulk*, 112 N.E. 399, 400 (1916)).

[26] *Aufderheide*, 112 N.E. 399, 400 (1916) (citations omitted).

The court emphasized, “Where subordinate rules for the measure of damages [fair market value for personal property] run counter to the paramount rule of fair and just compensation, the former must yield to the principle underlying all such rules."[27]

The *Aufderheide* ruling was groundbreaking and should be considered in its historical context. The case was decided in 1916, a time when mass-production of identical goods made personal property inexpensive, readily-available, and more easily replaced than ever before. Nevertheless, the court recognized that even utilitarian property with second-hand value can be unique and irreplaceable. In that case, the defendant/appellant broke-into the plaintiff/appellee’s home and illegally removed clothing, house-wares, and utilitarian personal property.[28] The appellant argued actual damages should be measured by the property’s market value as second-hand goods.[29] Although there was evidence the items had second-hand value, the court ruled, “such proof and finding do not preclude appellee's recovery **of the value to her** of the property.[30] The court emphasized, “If the property has

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[27] *Aufderheide,* 112 N.E. at 400.

[28] *Id.,* at 401.

[29] *Id.,* at 400.

[30] *Id.,* at 402 (emphasis added) (citations omitted).

little or no marketable value, the **actual value to the owner is the just rule**…"[31] The law is well-established, even in cases where there is a market for the property. Market value is not the appropriate measure of damage if that valuation does not reflect "the fair value of such property to the plaintiff." Accordingly, the lower court erred by not having considered if Liddle's pet had special value to her and by failing to allow her to present evidence of that value. Unlike Liddle's pet, Copper, the six Beagle dogs in the stipulated evidence were purebred and had commercial value.

IDNR misunderstand this court's reasoning in *Lachenman v. Stice*; the fact a family pet was at issue had no bearing on the court having rejected the plaintiff's sentimental value argument. If that fact was determinative, *Lachenman* would result in an absurdity. A court could measure the loss of a photo of the family pet using sentimental value but not use that measure to value the pet, itself.

Additionally, the facts in *Lachenman* distinguish it from the case at hand. The dog in that case was a purebred Jack Russell Terrier registered as a breeding stud with the National Kennel Club.[32] *Lachenman* purchased her dog for "approximately $500"[33] and attributed significant value to the dog's pedigree and

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[31] *Aufderheide*, at 402 (citation omitted) (emphasis added).

[32] *Id*. at 463.

[33] *Id.*, at 468, n.16.

breeding potential.[34] Lachenman's dog, by her own admission and by objective measure had commercial value and was not "an item of *almost purely* sentimental value."[35] Notably, sentimental value was an afterthought in *Lachenman;* she conceded that fair market value applied in her complaint, provided substantial evidence of her dog's commercial value and relied on cases to support a fair market valuation.[36]

In *Lachenman* this court recognized pet-dogs are irreplaceable property, the court's acknowledgement that the plaintiff's veterinary bills could be part of the damage award speaks to this point.[37] The veterinary bill is unequivocal evidence of Lachenman's intent to salvage or save, rather than replace her property, the dog at issue. Likewise, Liddle, invested her significant effort to salvage or to save her

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[34] In her complaint, Lachenman sought to recover, "Loss of future breeding income figured at one litter of four (4) pups for each of the next seven (7) years at $500.00 per pup ($14,000.00)… *Lachenman*, 838 N.E. 2d at 463 ("…evidence that a specific animal had breeding potential or was a breeder could be relevant to the issue of the fair market value of that specific animal. Our holding is limited to affirming the trial court's summary judgment ruling upon Lachenman's claim that she lost $14,000 because her dog would have littered four puppies per year for seven years."); *Id*., at 468, n. 12.

[35] *Id.* at 467 (emphasis added).

[36] *Id*., at 466-467 (citations omitted).

[37] The trial court limited evidence of the value of Lachenman's dog to the purchase price and veterinary bill. *Id*., at 468 (emphasis added).

pet.[38] When Liddle heard Copper yowl, she jumped to save Copper and wrestled with the steel trap for an extended period with no regard for any personal perils. Liddle gave-up only when it was evident Copper was deceased; fortunately Liddle was not injured. Liddle had no alternative but to use self-help to free her dog, she did not have the opportunity to seek an expert analogous to a veterinarian to assist her. While Liddle's self-help is difficult to monetize, it is analogous to the plaintiff's "blood, sweat and tears" in *Campins* and should be given the same consideration.[39]

Thirteen years after the 1984 decision in *Campins*, the Indiana Court of Appeals again addressed the availability of sentimental value damages in *Mitchell*. Relying on *Campins* the court ruled that sentimental value could be considered in determining the recoverable damages.[40] The court expanded the law on sentimental value damages by noting that the person asserting the claim is "in the best position to judge the amount of her damages."[41] In so doing, the court recognized that the

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[38] Appellant's App. 3, p. 30.

[39] Societal values and the law have progressed significantly since this court decided *Lachenman* in 2005 as demonstrated by the other jurisdictional authorities cited in Ms. Liddle's Brief. Those authorities demonstrate how quickly and significantly the law of pet damages has expanded and the trend in other states to recognize pets as irreplaceable personal property. Appellant's Br. pp. 34-35, n. 36.

[40] *Mitchell v. Mitchell*, 685 N.E.2d 1083, 1088 (Ind. Ct. App. 1997). (In affirming *Campins*, this court reiterated that proving sentimental value does not require, "mathematical exactitude".)

[41] *Id.*, 685 N.E.2d at 1087.

finder of fact's consideration for sentimental value damages can be based entirely on the testimony of the person who had the sentimental relationship to the property. In short, *Mitchell* provides guidance for the evidence that should be used to establish sentimental value and reaffirms *Campins.*

As a final point, IDNR misunderstands *Mitchell v. Mitchell*, 685 N.E.2d 1083 (Ind. Ct. App. 1997) and the role that case plays in Liddle's argument.[42] In *Mitchell*, the sole issue transferred from this court to the Supreme Court was the obdurate behavior exception to the American rule for attorneys' fees, an issue that is irrelevant to Liddle's appeal. This court's holding that sentimental value was the appropriate measure of damage in *Mitchell* is unaffected.[43] Evidently, the parties in *Lachenman* misunderstood *Mitchell's* subsequent history since this court deemed it

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[42] IDNR misunderstands *Mitchell* and argues, "*But this case [Mitchell] was vacated after the Indiana Supreme Court accepted transfer, and the testimony regarding sentimental value was in regard to photographs, etc., while the issue regarding the measure of damages here was for the loss of a dog, which was addressed by this Court in Lachenman*". Appellee's Br. p. 29, n. 12.

[43] In granting transfer, the Supreme Court unambiguously stated the scope of review and the holding, "We grant transfer to address whether an appellate court may affirm a judgment on a different legal theory from that relied on by the trial court if special findings…were entered at a party's request pursuant to Trial Rule 52(A). We hold that it [the Court of Appeals] may and affirm the trial court's award of attorney's fees." *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 (Ind. 1998).

necessary to emphasize the fee issue was the sole matter the Supreme Court certified for transfer.[44]

Liddle's position bears repeating: "The question presented in this appeal is not whether the measure of actual damages established for personal property in *Campins* should apply, but why it should not."[45] There was no market for Copper. In reality, she never would have been advertised like the beagles in the parties' stipulation. Copper was unique and irreplaceable. Limiting Liddle's actual damages to fair market value ignores the court's ruling in *Lachenman* and would be tantamount to having awarded *Campins* the funds to replace his championship rings[46] or having awarded *Mitchell* funds to buy photographs of someone else's father.

CONCLUSION

For the reasons argued herein, Appellant, Melodie Liddle, respectfully requests that this Honorable Court reverse the trial court's mootness ruling and remand the case for a ruling on the merits. This Court should reverse the trial

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[44] *Lachenman v. Stice*, 838 N.E.2d 451, 457 n.15 (Ind. Ct. App. 2005) "Upon transfer, the (Supreme) court affirmed the trial court on the issue of attorney fees, but summarily affirmed the opinion of the Court of Appeals in all other respects. See [*Mitchell v. Mitchell*, 698 N.E.2d 1194[sic] (Ind.1998)."

[45] Appellant's Br. p. 35.

[46] Capels testified not only to the actual worth of the rings as mere pieces of custom-embossed gold but also to his emotional attachment to each. *Campins* at 722.

court's ruling that damages should be measured by fair-market value and remand that issue to the trial court for an evidentiary hearing to determine Copper's sentimental value.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby verify that this brief contains no more than 7,000 words as required by Indiana Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2018, the foregoing document was electronically filed and electronically served upon the following:

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