THE
INDIANA COURT OF APPEALS

Cause No. 49A04-1707-MI-01662

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

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BRIEF OF APPELLANT, MELODIE LIDDLE

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STATEMENT OF ISSUES

Whether the trial court erred in ruling that Liddle's claim for declaratory relief that commercial fur trapping on state park properties and the transfer of a series of property rights was moot.

Whether the lower court erred in ruling that Ms. Liddle's actual damages should not be measured by sentimental or intrinsic value as set forth in *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984).

STATEMENT OF CASE

On June 19, 2013, Melodie Liddle filed a complaint against Cameron Clark, in his official capacity as Director of Indiana Department of Natural Resources ("IDNR"), Paul Sipples ("Sipples") individually and as Property Manager of Versailles State Park, Natural Resources Commission of the State of Indiana ("NRC"), and Harry Bloom ("Bloom"), individually. (App. 2, CCS p. 5). Liddle sued in tort for premises liability (Counts I and II) and sued for declaratory judgment (Count III). *Id*. Count III asserts a substantive challenge to IDNR's commercial fur trapping in state parks and a procedural challenge to the use of IDNR's Emergency Rule process from 2007 to 2013. *Id*. Liddle also sought injunctive relief (Count IV). *Id*.

Defendants moved to dismiss the NRC as a Defendant along with Counts III and IV on August 13, 2013. *Id*. Plaintiff amended her complaint to remove Defendant NRC and her request for injunctive relief in Count IV, but reasserted her claim for declaratory judgment. (App. 2, pp. 32-49). The Defendants' moved to dismiss Liddle's challenge to the Emergency Rules (Count III) and argued that Liddle was required to exhaust administrative remedies prior to filing her lawsuit. (App. 2, CCS p 6). The lower court ruled that it had jurisdiction and Liddle did not need to exhaust administrative remedies. (App. 2, pp. 50-56). The court also ruled that Liddle's challenge to IDNR's use of the Emergency Rule procedure in 2007 to 2011 was time-barred. *Id*.

On July 1, 2016 (electronically filed with amendments July 5, 2016), the lower court entered orders on Defendants' motion for summary judgment holding that 1) Defendants Sipples and Bloom are immune from personal liability, 2) Liddle's claim for punitive damages and negligent infliction of emotional distress fails, and 3) Liddle's challenge to the 2012 and 2013 Permit Rules is moot. (App. 2, pp. 25-31). Liddle's subsequent motion for interlocutory appeal was granted by the trial court but denied by the Court of Appeals. (App. 2, CCS pp. 19-20). Upon remand, the Parties filed cross motions for summary judgment and designated evidence. (App. 2, CCS pp. 21-22).

On June 27, 2017, the lower court granted Ms. Liddle's motion for summary judgment for premises liability against IDNR. (App. 2, pp. 57-63). Additionally, the court denied IDNR's cross motion for summary judgment alleging contributory negligence. *Id*. at 62. Specifically, the court ruled that IDNR was negligent for failing to warn of the latent dangerous conditions it created within the Park. *Id*. The court declined Liddle's reasserted challenge that Fair Market Value was the improper measure of valuation for her loss. *Id*. at 63. The court further found that the average of the stipulated values of the selling price of beagle dogs was the proper damage amount for Liddle's loss. *Id*.

STATEMENT OF FACTS

A. Liddle's Injuries and the Events Giving Rise to Liddle's Claims

On December 16, 2011, Melodie Liddle, a longtime regular patron and admission pass-holder for Versailles State Park ("Park") was walking her two leashed dogs on an asphalt-paved road on an unseasonably warm afternoon. (App. 3 pp. 5-6, 29 ¶ 6-8). Liddle was strolling along the shoulder of the roadway when the dogs led her down the slight embankment, down a 15' manmade trail, to a well-developed culvert-area near a shallow creek to get a drink of water. (App. 3 pp. 6-7, 29 ¶ 9). While they were drinking and sniffing around, Ms. Liddle's dog, Copper, became ensnared by an unauthorized fur-trap that was concealed inside a wooden-framed box buried in the embankment situated directly underneath where

Ms. Liddle was standing. (App. 3, pp. 7-8, 30). The box containing the trap was inches from the creek and was not visible. (App. 3, p. 8). Ms. Liddle, barehanded, struggled frantically, but unsuccessfully, with the unyielding metal trap to free her pet. (App. 3, pp. 8-9, 30). While Liddle fought with the trap, her pet dog, Copper, died slowly from suffocation. *Id*. Liddle left the site and sought help to remove Copper's remains from the deadly device. (App. 3, p. 9, 31).

Ms. Liddle walked back to her car and called her friend, Gene Beach, a former wildlife trapper, to remove Copper from the trap. *Id*. In all the time Mr. Beach had known Ms. Liddle, he had never seen her so horrified or traumatized. (App. 3, p. 27 ¶ 24). Mr. Beach, a former trapper with over 30 years of wildlife trapping experience concluded, after speaking with the Property Manager, that the trapping occurring at the Park was for commercial purposes. (App. 3, pp. 27-28 ¶ 32-34). Beach was also surprised and angry to learn that IDNR was maintaining commercial fur traps on public park property. (App. 3, p. 32 ¶ 52).

B. Liddle's Companion Dog, Copper

Ms. Liddle rescued her mixed-breed dog, Copper, as a puppy from a neglectful situation. (App. 3, p. 6). Copper joined Ms. Liddle's family when Ms. Liddle's children were 12 and 13 years old and became closely bonded thereafter. (App. 3, p. 13). Copper slept in Ms. Liddle's bed at night. *Id*. Copper was in good

health before she was killed. (App. 2, p. 90). On December 16, 2011, Ms. Liddle buried Copper, a beloved family member of ten years. (App. 3, p. 33 ¶ 57).

C. History of IDNR's Agency Actions

The IDNR used the Emergency Rule process from 2007 until 2013 to "temporarily" amend 312 IAC 9. (App. 2, pp. 39-49). The "temporary" amendment allowed state park Property Managers to issue a written permit ("Permit") that allowed individuals to enter state park premises and to maintain commercial fur traps on park premises for the duration of the commercial fur trapping seasons for the species listed in the rule. *Id*.

For purposes of this appeal, the "temporary" amendments, referred to herein as so-called "emergency rules" are identical from year to year. Some years the amendment added a new species or increased the number of affected public properties; however, the essential rights granted are identical. *Id*. Every rule authorized Indiana state park Property Managers to issue a Permit that allowed its holder to enter the park, to maintain commercial fur-traps on the premises, and to sell the furs from the wildlife trapped on those premises. (App. 2, p. 64, 92, 97 ¶ 6). The "emergency rules" relevant to this appeal are:

> Emergency Rule LSA Document #10-34(E), effective January 15, 2010;
> Emergency Rule LSA Document #11-45(E), effective January 18, 2011;

> Emergency Rule LSA Document #12-48(E), effective January 15, 2012; Emergency Rule LSA Document #13-4(E), effective January 15, 2013. (App. 2, pp. 42-49).

Neither the Permit nor the emergency rules explicitly allow the Permit-holder to sell the furs from wildlife trapped on public, state park premises, but it was IDNR's intention that they use the pelts. (App. 2, p. 64). Permit-holders did sell the furs. (App. 2, p. 92, 97 ¶ 6).

The Emergency Rules expressly require a written Permit. (App. 2, pp. 39-49, 53 n.3).[1] For 2012 and 2013, IDNR was unable to produce any evidence of an emergent condition in any state park or any evidence of a Property Manager having issued a written Permit. (App. 2, pp. 65-88; Supp. App. 2, pp. 2-3). After 2013, IDNR stopped using the ER process. (App. 2, p. 93). The agency did not stop authorizing Property Managers to issue the Permit. (App. 2, p. 101). On October 31, 2014, Pokagon State Park issued a Permit with no expiration date. *Id.* Presumably that Permit was effective through the end of the commercial fur-trapping season in 2015. *Id*.

[1] The Park Property Manager at Versailles never provided written authorization (Permit) to the grounds keeper to maintain commercial fur traps at the Park. (Supp. App. 2, p. 2; App. 2, p. 65-88). The grounds keeper nevertheless maintained commercial fur traps, one of which killed Ms. Liddle's dog. (App. 3, pp. 8-9, 30). The grounds keeper also sold the furs of animals trapped in the Park. (App. 2, p. 92, 97 ¶ 6).

Throughout the proceedings below, IDNR has argued consistently that the Natural Resources Code, Controlled Hunt Statute[2], authorizes the agency to permit commercial fur-trapping on state park premises and allows permit-holders to sell the furs from wildlife trapped in the parks. (App. 2, CCS p. 10, Memo. in Support of Defs. Motion for Summary Judgment). The Legislature amended the Statute while this case was pending; the amendment became effective July 1, 2014. The amendment affected Section (3) of the statute by changing the phrase "may order a

[2] Ind. Code § 14-22-6-13. Controlled hunts in state parks and historic sites.

Sec. 13. If the director:

(1) determines that a species of wild animal present within a state park or historic site poses an unusual hazard to the health or safety of one (1) or more individuals;

(2) determines, based on the opinion of a professional biologist, that it is likely that:

(A) a species of wild animal present within a state park or historic site will cause obvious and measurable damage to the ecological balance within the state park or historic site; and

(B) the ecological balance within the state park or historic site will not be maintained unless action is taken to control the population of the species within the state park or historic site; or

(3) is required under a condition of a lease from the federal government to manage a particular wild animal species;

the director shall authorize the taking of a species within the state park or historic site under rules adopted under IC 4-22-2. *(Emphasis added).* I.C. § 14-22-6-13 (2017). *http://iga.in.gov/legislative/laws/2017/ic/titles/014/#14-22-6*

hunt" to "shall authorize a taking".[3] Notwithstanding the 2014-2015 Permit, the lower court found Ms. Liddle's 2013 claim for declaratory relief was moot and granted IDNR's motion for summary judgment filed July 5, 2016. (App. 2, pp. 25-31). On February 12, 2014 the lower court rightfully questioned how the Controlled Hunt Statute could possibly apply to trapping. (App. 2, p. 54 n.4).

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[3] In 2013, the legislature amended subsection (3) of the Controlled Hunt Statute The old language is stricken and the new language, effective in 2014 is underlined: SECTION 23. IC 14-22-6-13, AS AMENDED BY P.L.140-2013, SECTION16, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2014]: Sec. 13. (a) If the director:
(1) determines that a species of wild animal present within a state park poses an unusual hazard to the health or safety of one (1) or more individuals;
(2) determines, based upon the opinion of a professional biologist, that it is likely that:
(A) a species of wild animal present within a state park will cause obvious and measurable damage to the ecological balance within the state park;
and
(B) the ecological balance within the state park will not be maintained unless action is taken to control the population of the species within the state park;
or
(3) is required under a condition of a lease from the federal government to manage a particular wild animal species; the director shall establish a controlled hunt for the authorize the taking of a species within the state park under rules adopted under IC 4-22-2.
(b) An order issued by the director under this section must set forth the conditions of the hunt.
(c) The director may issue an order under this section under IC 4-21.5-4-t to manage a particular wild animal species;
the director shallestablish a controlled hunt for theauthorize the taking of a species within the state park under rules adopted under IC 4-22-2. http://iga.in.gov/static-documents/5/e/a/5/5ea5cd4c/HB1307.06.ENRH.pdf

"Controlled hunt" is not defined in the Indiana Code. *Id.* "Trapping" is expressly excluded from the definition of "hunt". Ind. Code § 14-8-2-128 (2017). (*See n.26 infra for full statutory text*).

A. Damages

Ms. Liddle prevailed on her tort claim against IDNR. (App. 2, pp. 57-63). The parties filed a Stipulation of Fact that consisted of sale prices for several beagle-type dogs in the Indianapolis area. (App. 3, pp. 36-37). Ms. Liddle's Notice of Tort demanded $15,000 for actual damages for the loss of Copper. (App. 2, pp. 89-90). The trail court awarded Ms. Liddle damages in the amount of $477 despite Liddle's argument that she should have been entitled to sentimental value. (App. 2, pp. 57-63).

SUMMARY OF ARGUMENT

The lower court erred in dismissing Liddle's declaratory relief claim as moot because the evidence demonstrates the agency is still conducting the activity 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. The lower court's ruling that Liddle's claim of declaratory relief is moot is clearly erroneous and should be reversed and remanded for an evidentiary hearing on the merits.

A. Introduction and Overview of Procedural History Pertinent to Mootness.

Liddle filed her action for declaratory judgment in 2013.[4] Liddle's claim for relief is a declaratory judgment that Defendant Department acted and continues to act beyond the scope of the agency's legislative authorization by allowing state park Property Managers to permit commercial fur-traps to be maintained on state park premises and to permit those maintaining the traps to sell the furs from the trapped animals.

When Liddle filed suit in 2013, IDNR had been using the administrative emergency rule procedure for several years consecutively to allow IDNR's state park Property Managers to issue a written permit to "authorize" persons to

[4] In addition to declaratory relief, Liddle sued and recently won her tort claim against IDNR for having breached the duty to maintain safe premises. (App. 2, pp. 57-63). Liddle sued IDNR via *respondeat superior*; the groundskeeper at Versailles State Park maintained unauthorized commercial fur-traps during 2011, one of which, located fifteen-feet from an asphalt-paved road, killed Liddle's dog while she was dog-walking nearby the road in the park. *Id.*

maintain commercial fur-traps on state park properties and to sell the fur.[5] The Permit (also known as the "Public Property Permit") grants three property rights: The right to enter a state park, which is uncontroversial, the right to maintain the trapper's personal property, commercial fur-traps, on public park premises during the relevant fur-trapping season, and, most controversially, the right to sell the fur from animals trapped on public state park property.

Liddle's primary claim for declaratory judgment stems from the argument that IDNR lacks legislative authorization to permit anyone to sell furs from animals trapped on public, state park premises under any auspices. The right to sell the fur from trapped wildlife distinguishes commercial fur-trapping, and the Permit at issue here, from other forms of animal trapping and animal management.[6]

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[5] The series of agency acts, as such, is irrelevant to the mootness issue; that issue is discussed, *infra*, pp. 18 - 33. All the so-called "emergency rules" expressly state they "[t]emporarily amend[s] 312 IAC 9 [Fish and Wildlife Article] concerning the taking of raccoons [and other fur-bearing species used for commercial fur-trapping] at state parks and reservoir properties, to allow the property manager of any state park listed to authorize a person or persons to take any raccoon, beaver, skunk, or muskrat from that state park or reservoir." The series alleged in the complaint begins in 2007 and ends in 2013, *LSA #07-760(E), LSA #08-931(E), LSA #10-34(E), LSA #11-45(E), LSA #12-48(E) and LSA #13-4(E).* (App. 2, pp. 39-49).

[6] 312 Ind. Admin. Code 9-10-11(p) (2017) (Prohibits the selling, trading, bartering or gifting of the pelts of nuisance or wild animals causing property damage except to IDNR or accredited scientific and educational institutions with a special salvage permit, if gifted with no compensation.) http://www.in.gov/legislative/iac/T03120/A00090.PDF?&iacv=iac2017 p. 117-118.

IDNR's prime directive as an agency is set forth in its own administrative code, 312 Ind. Admin. Code 9-2-11(a) (2017) which prohibits "taking" wildlife on state park property.

> ***An individual must not take or chase a wild animal, other than a fish, in a state park or a state historic site***.[7] [emphasis added]

The legislature defines "take" in Ind. Code § 14-8-2-278 (2017) to include "trap" as a generic activity but does not authorize commercial activity or commercial fur-trapping.[8] Selling fur is incompatible with any legislative delegation authorizing IDNR to "manage" or otherwise "take" public wildlife on state park premises. The agency counters that the Controlled Hunt provision of the Indiana Natural Resources Code delegates authority to the agency to grant the property rights encompassed by the Public Property Permit and authority to use various administrative procedures to effectuate the Public Property Permit.[9]

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[7] http://www.in.gov/legislative/iac/T03120/A00090.PDF?&iacv=iac2017 p. 10.

[8] I.C. § 14-8-2-278: "Take" has the following definition:
"(1) For purposes of IC 14-22, except as provided in subdivisions (2) and (3):
(A) to kill, shoot, spear, gig, catch, trap, harm, harass, or pursue a wild animal; or
(B) to attempt to engage in such conduct…."
http://iga.in.gov/legislative/laws/2017/ic/titles/014/#14-8-2

[9] I.C. § 14-22-6-13 "Controlled hunts in state parks and historic sites" discussed *supra*. at n.2. http://iga.in.gov/legislative/laws/2017/ic/titles/014/#14-22-6

The first ruling on Ms. Liddle's standing to bring declaratory relief was in February of 2014. (App. 2, pp. 50-56). At that time, the lower court ruled on IDNR's first motion for partial summary judgment. *Id.* IDNR alleged Ms. Liddle did not have standing to obtain declaratory relief and the lower court lacked jurisdiction to hear her claim. (App. 2, CCS p. 6, Mem. in Support of Defs. Partial Motion to Dismiss First Amended Complaint). IDNR further argued the Controlled Hunt Statute imposed an administrative exhaustion requirement on Ms. Liddle and she failed to exhaust remedies. *Id.* At the time, the Controlled Hunt Statute still authorized IDNR to "order" "controlled" "hunts".[10] The lower court rejected IDNR's argument and ruled the Controlled Hunt Statute, by itself, does not impose an exhaustion requirement. (App. 2, pp. 50-56). The court further ruled IDNR's conduct foreclosed the exhaustion argument because the agency had been using the emergency rule process to allow Property Managers to issue the Public Property Permit that Ms. Liddle challenged. *Id.* However, the court found Ms. Liddle's challenge to the procedure the agency used to authorize the Public Property Permit from 2007 to 2011 was time-barred.[11] Since standing was at issue and the court reached the limitations issue, the court necessarily considered mootness and ruled

[10] The Legislature subsequently amended the Controlled Hunt Statute and changed IDNR's procedural delegation. That issue is developed, *infra.*, p. 28-33.

[11] The lower court's statute of limitations ruling is not at issue in this appeal.

in Ms. Liddle's favor. (App. 2, pp. 50-56). The court expressly stated it did not reach the merits of the declaratory judgment claim but offered in dicta,

> "Controlled hunt" is not defined in the Indiana Code, and is only mentioned in one case, *Shuger v. State*, 859 N.E.2d 1226, 1234 (Ind. Ct. App. 2007) ("lethal removal via controlled hunts, open hunting or sharp shooters [are] basically the only viable controlled methods to reduce [the] deer population"). Based on this language, it is difficult to see how the Emergency Rules attached to Plaintiff's First Amended Complaint could be considered "controlled hunts" rather than open hunts, but that is of no consequence for purposes of this Order." (App. 2, p. 54 n.4).

In 2015, this case was transferred from the Environmental Court to the Marion County Superior Court 2 Civil Division and acquired a new trial judge. (App. 2, pp. 102-105). Shortly thereafter, IDNR filed a second motion for summary judgment and renewed its standing challenge. (App. 2, CCS p. 10 Memo. in Support of Defs. Motion for Summary Judgment). This time IDNR conflated Ms. Liddle's challenge to the agency's use of the "emergency rule" procedure with her substantive claim challenging authorization to issue the Permit. *Id*. By that time, IDNR was no longer using the emergency rule process, although there was no dispute that the agency continued to issue the Permit. (App. 2, p. 101). The undisputed evidence consisted of a Permit IDNR issued on October 31, 2014

authorizing a person to maintain the traps on state park premises and to sell the fur from the animals he trapped. (App. 2, p. 64, 92, 97 ¶6, 101). The lower court's ruling from 2016 fails because it is not supported by the designated evidence, conflates Ms. Liddle's substance and procedure,[12] and misunderstands the mootness doctrine.

B. The lower court's summary judgment on mootness fails to meet the burdens of proof and production required by Ind. Trial Rule 56(C).

The issues in this case were decided on summary judgment. An appellant challenging a ruling granting summary judgment must persuade the appellate court that the lower court erroneously determined there was no genuine issue of material

[12] IDNR's so-called "emergency rules" defy any reasonable definition of an "emergency". The agency "adopted" the same (or similar) "emergency rule" for seven years consecutively to allow state park Property Mangers to issue the Public Property Permit during commercial fur-trapping seasons. (App. 2, pp. 39-49).

While IDNR's "emergency rules" comply with the letter of Ind. Code § 4-22-2-37.1(g)(2)(3) (2017) forbidding use of the emergency rule process for more than two consecutive years, the agency's persistence in deeming apparently ordinary conditions, wildlife living on state park premises, an "emergency" year-in and year-out indicates the agency was not responding to an "emergency".

The so-called "emergency rules" are identical insofar as they permit fur-traps on state park premises during the fur-trapping season and allow the person maintaining the traps to sell the furs. (App. 2, p. 64, 92, 97 ¶ 6). The "emergency rules" relevant to this appeal are: Emergency Rule LSA Document #10-34(E), effective January 15, 2010; Emergency Rule LSA Document #11-45(E), effective January 18, 2011; Emergency Rule LSA Document #12-48(E), effective January 15, 2012; and, Emergency Rule LSA Document #13-4(E), effective January 15, 2013. (App. 2, pp. 42-49).

fact and the moving party was entitled to judgment as a matter of law.[13] When reviewing questions of law, the appellate court applies the same standard as the trial court. The appropriate standard of review is *de novo*. The pivotal issue in this appeal, mootness, is purely a question of law and therefore should be reviewed *de novo*.[14] The court cannot affirm summary judgment if the designated evidence fails to meet the burden of proof.[15] The Indiana Supreme Court emphasized that summary judgment is a "high bar" for the moving party to clear in Indiana. *Id.*

The lower court's mootness ruling fails to meet the evidentiary burdens imposed by T.R. 56(C) for summary judgment and is erroneous for that reason alone. The lower court failed to consider the undisputed designated evidence. (App. 2, p. 101). On October 31, 2014, IDNR issued a Public Property Permit authorizing fur-traps on state park premises and the sale of the furs. *Id.* The Permit

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[13] *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014); see also *Ind. Dep't of Natural Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App. 2015) (appellate review of purely legal issue, statutory construction).

[14] *Hughley*, 15 N.E.3d at 1004 (Noting that "Indiana's summary judgment policies aim to protect a party's day in court).

[15] *Abbs v. Town of Syracuse*, 655 N.E.2d 114 (Ind. Ct. App. 1995), *trans. denied, rev'd on other grounds*, 686 N.E.2d 928 (1997). In that case, this court reversed the trial court's summary judgment in favor of the Town and remanded the case for further proceedings because the ruling was ambiguous and failed to settle the parties' rights.

has no expiration date and was presumably valid for the entire 2014-2015 commercial fur-trapping season. *Id.* Significantly, IDNR never claimed, nor did it produce any evidence that it had stopped issuing the Permit or planned to do so in the future. Nevertheless, the lower court ruled Liddle's claim challenging the Permit was moot. (App. 2, pp. 25-31).

The lower court in the instant case failed to articulate its reasoning, much like the trial court in *Abbs*. In that case, the issue was a dispute between a landowner and town about property ownership and riparian rights. The court granted summary judgment in favor of the town but failed to address whether and to what extent, the town's public rights-of-way included a right to use or enjoy the landowner's riparian rights; a key issue that was unresolved and left outstanding. In the instant case, the lower court ruled Ms. Liddle's claim for declaratory relief was moot even though the only designated evidence showed the conduct she challenged was ongoing. The 2014-2015 Public Property Permit was proof-positive. Nevertheless the court ruled her claim was moot. Ms. Liddle, like the landowner in *Abbs*, was left with incomplete relief notwithstanding a summary judgment ruling.

The lower court may have adopted IDNR's argument conflating Liddle's challenge to the agency's substantive authority, to authorize the activity at issue, with the agency's authority to use the emergency rule process, which the agency abandoned three years earlier, in 2013. If so, the lower court was diverted by red

herrings. IDNR's so-called "emergency rules" may or may not have been legitimate but the lower court never made any determination and appears to have determined their expiration ended the dispute.[16] In so ruling, the court overlooked the only evidence that mattered, the Permit IDNR issued in 2014 -2015. (App. 2, p. 101). The only evidence in the record demonstrates IDNR allowed fur-traps to be maintained on state park premises and allowed the person maintaining them to sell the furs long after the so-called "emergency rules" expired in 2013.

C. The doctrine of prudential mootness cannot justify or support the lower court's ruling.

The lower court's 2016 mootness ruling is opaque; the court granted summary judgment with little explanation. (App. 2, pp. 25-31). In support of IDNR's 2016 summary judgment motion, the agency argued it stopped using the emergency rule process in 2013 and the 2014 amendment to the Controlled Hunt Statute provided legislative authorization for the agency to grant the property rights encompassed in the Permit, regardless of whether the statute, prior to the amendment, authorized the agency's substantive action.[17] Mootness is an issue of

[16] The lower court's 2016 ruling never reached the merits of Liddle's claim since the issue was deemed moot on summary judgment. The lower court's previous ruling in 2014 expressly stated that it was not ruling on the merits.

[17] I.C. § 14-22-6-13 "Controlled hunts in state parks and historic sites" (2017), discussed, *supra*., at n.2.

law; a finding of mootness should be reviewed *de novo*.[18] The United States Supreme Court held that the defendant's voluntary cessation of the challenged conduct cannot moot the claim for declaratory judgment[19] unless the defendant established that "there is no reasonable expectation that the wrong will be repeated."[20]

IDNR carries the burden of demonstrating mootness; the agency failed as a matter of fact. Mere allegations are not evidence. IDNR has never made any claim to have stopped issuing the Public Property Permit. The agency does claim to have stopped using the emergency rule process in 2013 to effectuate the Permit and may not have used it while Ms. Liddle's claim was pending. While this may be true, there is no evidence the conduct at issue stopped, or that the agency's misuse of the administrative process would not recur. The only evidence in the record is that IDNR issued the same Permit. (App. 2, p. 101). Since IDNR has never denied Ms.

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[18] *Cittadine v. Ind. Dep't. of Transp.*, 790 N.E.2d 978, 981-82 (Ind. 2003) (reviewing standards for standing for declaratory judgment and mandamus or public lawsuit relief).

[19] *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167, 189, 193 (2000) (*quotations and citations omitted*); compare*, declaratory judgment claim for third-party rights, *Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67 (1983).*

[20] *W.T. Grant Co.*, 345 U.S. at 633.

Liddle's claim that the agency continued to authorize the trapping and sale, there is no evidence those events are not on-going or that the agency intends to abate the practice. Accordingly, the conduct at issue still exists and Ms. Liddle's claim is not moot. To rule otherwise would encourage IDNR, or any defendant, to refrain from the challenged conduct while a claim is pending, and, to then resume the same conduct after the claim has been dismissed.

The undisputed designated evidence is that IDNR continued to issue the Permit that Ms. Liddle challenged in her declaratory judgment. For that reason, there are still potential consequences traceable to the fur-trapping and sale activity IDNR still permits. Indiana's state park patrons, including Ms. Liddle, are still at risk for the same injuries that happened here – property damage and perhaps personal injuries caused by commercial fur-traps hidden on state park premises. Finally, wildlife is a public asset and the public is harmed by its unauthorized taking and sale. The public values its interest in wildlife highly enough to invest taxpayer dollars in its protection. Unauthorized taking or "poaching", a concern in this case, is a crime.[21]

D. The Amendment to the Controlled Hunt Statute does not render Liddle's declaratory judgment claim moot.

[21] Ind. Code § 14-22-38 (2017). http://iga.in.gov/legislative/laws/2017/ic/titles/014/#14-22-38

The "Controlled Hunt" Title of the Natural Resources Code expressly authorizes IDNR to permit "controlled" "hunts" through procedures consistent with Indiana's Administrative Procedures and Orders Act.[22] The "Controlled Hunt" statute identifies specific environmental conditions that must exist for IDNR to order a "controlled" "hunt". *Id.* In 2013 and again in 2014, the legislature amended the "Controlled Hunt" statute. The operative amendments are from 2014, effective July 1st of that year.[23]

When a statute is clear and unambiguous, as it is here, the court has no reason to look beyond the words' plain, ordinary, and usual sense.[24] The plain meaning of the Controlled Hunt Statute effectuates legislative intent without compromising the relationship or complexity of the underlying concepts. The court's analysis in *Whitetail Bluff* provides guidance as it too involved IDNR and raised the same analytical issues that are raised here. The first step in ascertaining plain meaning is to identify the audience the legislation is addressing to determine

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[22] *See* full text of Controlled Hunt statute *Supra.*, at p. 15 n.2.

[23] H.B. 1307, 118th Gen Assem. (Ind. 2014), *see* § 23. http://iga.in.gov/legislative/2014/bills/house/1307#document-5ea5cd4c

[24] *Ind. Dep't of Natural Res. v. Whitetail Bluff, LLC*, 25 N.E.3d 218, 225 (Ind. Ct. App. 2015); *see also*, *Thatcher v. City of Kokomo*, 962 N.E.2d 1222, 1227 (Ind. 2012); *compare*, *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 915 (Ind. 1993) (statute is facially ambiguous and requires judicial gloss or construction).

whether the specific audience, IDNR in this case, and the statute's public audience, Ms. Liddle and other Indiana state park patrons, share a common understanding about what the words mean. When these two understandings converge, the statute is not ambiguous and the plain meaning rule is used to construe the statute.

The plain meaning rule acknowledges the Legislature is responsive to its public audience and the developments, technological and otherwise, in the everyday world. In *Whitetail Bluff*, the Supreme Court examined Indiana's Natural Resources Code pertaining to hunting wild deer, Ind. Code § 14-22-20.5-2 (subsequently repealed) to determine whether it allowed or prohibited high-fence deer-hunting. IDNR argued the statute expressly forbids hunting privately owned deer from captive-deer breeding operations. In that case, the public audience was the proprietor of such an operation, Whitetail Bluff ("Whitetail"). Whitetail claimed the plain language of Ind. Code § 14-22-1-1 did not grant IDNR jurisdiction over wild animals if they are privately owned or held in captivity under a license or permit; and, that IDNR overstepped its statutory authority by adopting emergency rules to issue the contested permit. The court agreed that the express statutory authorization to IDNR did not authorize IDNR to regulate or to make rules effectuating the agency's regulatory power.

Ms. Liddle's relationship to IDNR is the same as that of the plaintiff in *Whitetail Bluff*. Both speak for the Legislature's public audience. Ms. Liddle

brought her amended declaratory judgment action in October of 2013. (App. 2, CCS p. 6). However, the changes to the Statute had no effect on her claim for declaratory relief. The statute's short-title remained the same, "Controlled" "Hunt".[25] The operative term is "controlled", a limitation on the activity. The "controls" are specified in the statute to ensure the authorized activities are environmentally sound. Although "hunt"[26] expressly excludes "trapping", the term "hunt" in the body of the statute was replaced by the term, "taking"[27], a term that includes "trapping", as a generic activity. Most significantly, the legislature defined "take" to expressly exclude any right to sell the fur from the animal trapped. I.C. § 14-8-2-278.

The 2014 amendment limits IDNR's discretion. Prior to the amendment's effective date, July 1, 2014, the agency had discretion and "may" order a hunt. By making a "taking" mandatory when all the specified conditions are met, the amendment furthers the intent articulated in the short-title. By its use of the word, "controlled", the activity must serve an environmental purpose.

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[25] *See* full text of Controlled Hunt statute *Supra.*, at p. 15 n.2.

[26] The Natural Resources Code defines "hunt" to exclude "trapping". I.C. § 14-8-2-128 (2017) provides, "Hunt", for purposes of IC 14-22, means to take a wild animal except by trapping. http://iga.in.gov/legislative/laws/2017/ic/titles/014/#14-8-2

[27] *See* full text of 2014 amendments to Controlled Hunt statute *Supra.*, at p. 16 n.3.

Commercial fur-trapping, or trapping animals for the purpose of selling their fur, destroys the animal. The purpose of the activity is to target fur-bearing wildlife for the purposes of acquiring merchantable furs. Trap-placement, timing, and other strategies orient toward that goal to make the endeavor successful. Any population management is purely incidental. Selling fur is not mentioned anywhere in the statute that defines "take". (I.C. § 14-8-2-278). The plain meaning of the Controlled Hunt Statute does not enable IDNR to permit anyone to sell the furs from animals "taken" on state park premises.[28]

On October 31, 2014, four months after the Controlled Hunt Statute amendment became effective, July 1st of 2014, IDNR issued a Public Property Permit granting the same rights to its holder as the Permits at issue in Liddle's claim for declaratory judgment. The IDNR Permits issued prior to the 2014 amendment consist of the very same property rights[29] as the Permit the agency issued thereafter. The amendment could not have rendered Liddle's claim moot; the issue was ripe for review. Nevertheless, the lower court never ruled on it. The primary issue, statutory construction of the Controlled Hunt Statute, remains unresolved.

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[28] *See* full text of Controlled Hunt statute *Supra.*, at p. 15 n.2.

[29] App. 2, pp. 65-88.

Finally, the 2014 amendment to IDNR's procedural authorization requires the agency to use "rules adopted under Indiana's Administrative Orders and Procedures Act, Ind. Code 4-22-2 to effectuate a controlled hunt.[30] IDNR never adopted or promulgated any rule but the agency, nevertheless, issued the Public Property Permit in 2014-2015[31] as a matter of record. Accordingly, the lower court's mootness ruling should be revered and the case remanded for a ruling on the merits.

II. THE TRIAL COURT ERRED IN RULING THAT MS. LIDDLE'S ACTUAL DAMAGES SHOULD NOT BE MEASURED BY SENTIMENTAL OR INTRINSIC VALUE, AS SET FORTH IN *CAMPINS v. CAPELS*, 461 N.E.2d 712 (Ind. Ct. App. 1984).

The lower court decided the issue at hand, actual damages, on summary judgment. An appellant challenging a ruling granting summary judgment must persuade the appellate court the lower court erroneously determined there was no genuine issue of material fact, and the moving party was entitled to judgment as a matter of law.[32] When reviewing a matter of law, the appellate court applies the same standard as the trial court, the appropriate standard of

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[30] *See* full text of 2014 amendments to Controlled Hunt statute *Supra.*, at p. 16 n.3.

[31] App. 2, p. 101.

[32] *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014).

review is *de novo*.[33] The issue here, the proper measure of actual damages, is purely a question of law and, therefore, should be reviewed *de novo*.

The trial court ruled that Ms. Liddle's actual damages, the loss of her healthy pet dog, Copper, should be measured using conventional market value and applied *Lachenman v. Stice*, 838 NE. 2d 451 (Ind. Ct. App. 2005). The court awarded Ms. Liddle four-hundred and seventy–seven dollars for her loss.[34] The lower court's ruling is thoughtful but erroneous because Ms. Liddle's actual loss of a beloved family pet should be measured by the standard set forth in *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1997)[35]. The unique facts presented here make market value an arbitrary measure of actual damage that fails to make Ms. Liddle whole. This appeal does not seek to establish emotional damages; sentimental value is a distinct issue. Ms. Liddle's claim is modest and bows to Indiana precedent. Nevertheless, it is noteworthy that state courts are evolving rapidly.[36]

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[33] *Terra-Products v. Kraft Gen. Foods,* 653 N.E.2d 89, 91 (Ind. Ct. App. 1995) (measure of damages in tort claim is a matter of law).

[34] (App. 2, p. 63). The lower court awarded the average of the cost of several proposed replacement dogs. The parties stipulated that those dogs would be appropriate if the measure of actual damages is limited to the cost of a replacement dog.

[35] *See also Mitchell v. Mitchell*, 685 N.E.2d 1083 (Ind. Ct. App. 1997) (injured party best suited to testify to loss).

[36] There have been many rulings in the past twenty years, however the rulings have proliferated during the last decade. These cases are by no means exhaustive,

The question presented in this appeal is not whether the measure of actual damages established for personal property in *Campins*[37] should apply, but why it should not. Although *Campins* involved inanimate property and this case involves animate property, a dog, the distinction has no significance. Indiana's courts have long recognized that dogs are personal property having "intrinsic value".[38] The lower court based its ruling on *Lachenman* although that case is inapposite. In that case, the dog was a purebred Jack Russell Terrier registered as a breeding stud with the National Kennel Club.[39] As such, the dog had breeding potential, a well-established market value the court relied on in measuring the dog's value, the

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although they are representative. The first is nearly 20 years old, the others have been decided within the past five years: *Hyland v. Borras*, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998) (reasoning though pets "have no calculable market value beyond the subjective value of the animal to its owner," "[i]t is purely a matter of 'good sense' that defendants be required to 'make good the injury done' as the result of their negligence"); *Martinez v. Robledo*, 210 Cal.App.4th 384, 392 (Cal. Ct. App. 2012). (holding market value is inadequate when applied to injured pets); *Barrios v. Safeway Ins. Co*., 97 So.3d 1019, 1022-24 (La. Ct. App. 2012) (emotional damages proper due to family-like relationship with dog and psychic trauma caused by dog's violent death).

[37] *Campins*, 461 N.E.2d at 722 (property-owner's valuation proper measure of actual damage when market value cannot make him whole).

[38] *Seidner v. Dill*, 206 N.E.2d 636, 640 (Ind. Ct. App. 1965) (citations omitted) (acknowledging long-standing Indiana precedent that dogs are personal property and have "intrinsic value" for purposes of assessing damages).

[39] *Lachenman*, 838 NE. 2d at 463.

actual damages in that case. The dog's breeding potential was evidence of market value. Accordingly, the court based its ruling on the animal's status as a commodity with a market value and used that measure of actual damages. The court did not foreclose sentimental value as a matter of law; however, the fact the dog had market value resolved the issue: "[a] family dog may well have sentimental value, but it is not an item of almost purely sentimental value such as an heirloom."[40]

Copper, the dog, in this case, is a ten-year-old, mixed- beagle Ms. Liddle and her daughter rescued from a neglectful situation ten years ago. Copper had been a beloved family pet ever since.[41] Copper had no breeding potential and has nothing in common with the dog in *Lachenman*.[42] During the ten years Copper lived with Ms. Liddle and her family they invested both, human and financial capital in the dog.[43] As a responsible citizen and committed pet-owner, Liddle

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[40] *Lachenman*, 838 NE. 2d at 453.

[41] App. 3, p. 13 (Deposition of Melodie Liddle, pp. 42-43).

[42] *Lachenman*, 838 NE. 2d at 451.

[43] App. 2, pp. 89-90. Ms. Liddle provided a total sum in the Notice of Tort, $15,000, an amount that approximates the total amount she spent on Copper during the ten years she owned the dog.

invested substantially in Copper's food, shelter, veterinary care[44], and exercise, walking and playing.

Walking the dog fulfills one of the pet-owner's responsibilities. The public values the duties established in Indiana's animal-cruelty prevention statute highly enough to invest public funds in their enforcement; failure to comply is a crime.[45] The actual damage in this case arose when Ms. Liddle was walking Copper in the same place she had walked the dog for years, Versailles State Park. During an ordinary dog-walk, Copper was killed when she was ensnared in a hidden fur-trap IDNR's agent, Versailles' grounds keeper, had been maintaining with IDNR's knowledge but without proper authorization, in a well-developed creek area or the Park only fifteen feet from a public road.

Generally, *Campins* stands for the principle that the injuries people suffer from property deprivation are different in kind, depending on the nature of the property.[46] Courts must acknowledge, if not embrace these differences, otherwise the law fails its purpose, to make injured parties whole. There are many different

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[44] App. 2, CCS. p. 13 (Plaintiff's Designation of Evidence, Ex. "R", pp. 42-43 of 120).

[45] Ind. Code § 35-46-3. http://iga.in.gov/legislative/laws/2017/ic/titles/035/#35-46-3

[46] *Campins*, 461 N.E.2d at 722.

kinds of personal property, some are so unique that they're irreplaceable. In those cases, like the case at hand, the actual loss cannot be measured by market value because that measure fails to make the aggrieved party whole.

When a person suffers deprivation of unique property, her actual loss may not be compensable by conventional market value. When market value fails, other valuations must be considered. In this case, market value fails because there is no market for the unique property at issue and "sentimental value" should be the measure of actual damages.[47] In *Campins*, the court reiterated the fundamental tenet of the law of damages: The underlying principle of universal application is that of fair and just compensation for the loss or damage sustained... "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."[48]

Campins involved jewelry, three automobile racing national championship trophy-rings the property-owner earned as a mechanic and race-car driver. The rings had been stolen, pawned, and reduced to scrap-metal; their value was

[47] *Campins*, 461 N.E.2d at 722 citing *United States v. Maryland*, 322 F.2d 1009, 1016 (D.C. Cir. 1963) *rev'd on other grounds* 382 U.S. 158 (1965).

[48] *Campins*, 461 N.E.2d at 720 (citing *Aufderheide v. Fulk*, 112 N.E. 399, 400 (Ind. App. 1916) (emphasis added).

diminished accordingly.[49] In determining what measure of damages should apply, the court initially observed that personal property, like wearing apparel and household goods, have a greater actual value to their owners than they could garner on the secondhand market because the owner has a personal history of use and corresponding attachment to those things. In those situations, Indiana courts may allow the owner to recover the owner's valuation, without emotional embellishment, when the owner's valuation exceeds the property's market-value.[50]

The *Campins* court observed that analogizing the trophy-rings to household property, while helpful, missed the mark because house-wares have utilitarian value and can be used for practical purposes, whereas jewelry and other sentimental memorabilia does not. The distinction is germane. The working dog in *Seidner*, although kept by a hobbyist, nevertheless had utility like the household items *Campins* distinguished from the trophy-rings.

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[49] *Campins v. Capels*, 461 N.E.2d at 720. The trophy-rings were the focal issue of the appeal. The case included a wedding ring that had been appraised at $700, neither party contested its valuation.

[50] *Campins*, 461 N.E.2d at 720 (citing *Anchor Stove & Furniture Co. v. Blackwood*, 35 N.E.2d 117, 119 (Ind. Ct. App. 1941); *Cannon v. Northside Transfer Co.*, 427 N.E.2d 712 (Ind. Ct. App. 1981); *Aufderheide v. Fulk*, 112 N.E. at 399; Am. Jur. 2d *Damages* § 145 *et seq*. (1965); 25 C.J.S. *Damages* § 88 (1966) (other citation omitted)).

In the instant case, Copper is a family pet and is like the rings in the purpose she served and its corresponding value. Like the rings, Copper's purpose, primarily, was not that of utility, but a purpose having equal or, perhaps, greater value. The trophy rings, embodied and signified their owner's investment of his own human capital and the value that capital generated in himself and others. As such, the rings were irreplaceable.[51] Likewise, Copper, or any family pet embodies and represents her owner's human capital and investment. Ms. Liddle's futile struggle with the fur-trap the day Copper died speaks to that point. While the pet dog may not be symbolic like a trophy-ring, she is equally emblematic.

Indiana courts have recognized the family pet dog as the emblem of loyalty, a happy home and solid family life:

> "A man's dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground where the wintry wind blows and the snow drifts fiercely, if only he may be near his master's side. He will kiss the hand that has no food to offer. He will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains…. We therefore emphatically state that the indiscriminate killing of

[51] State courts have increasingly recognized that pets are irreplaceable and market value fails to make the victim whole. *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008). In that premises liability case, the court ruled that the owner of a seven and one-half year-old pet dachshund, having only nominal value before she was injured in a fight, was entitled to recover nearly five-thousand dollars in veterinary costs restoring Molly to health. If Molly were "replaceable", the damages would have been limited to Molly's nominal value.

> a dog, without proof of more cannot be justified especially when such a dog is a child's or a household pet or the companion of an elderly person…."[52]

The beloved family pet and the rings, both, by their very nature, have "an element of sentiment essential to [their] existence"[53]. For that reason, the measure of actual damages should be based on the property-owner's valuation, her "blood, sweat, and tears."[54]

The actual damages at issue here, are principled and measurable. Liddle invested substantial human capital and financial capital for Copper's food, shelter, veterinary care[55], and exercise. In *Mitchell,* 685 N.E.2d at 1083, this court honed the law of sentimental value damages. In that case, the daughter of a deceased man sued her stepmother for having denied her access to late father's photographs, videos, and personal effects. In affirming *Campins*, this court reiterated that proving sentimental value does not require, "mathematical exactitude"[56] The costs Ms. Liddle invested in Copper during her life, although not precise, are neither

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[52] *Seidner,* 206 N.E.2d at 647 (Justices Hunter and Smith Concurring).

[53] *Campins,* 461 N.E.2d at 722.

[54] *Campins*, 461 N.E.2d at 715 (quoting the trophy-ring-owner's trial testimony.

[55] App. 2, CCS p.13 (Plaintiff's Designation of Evidence, Ex. "R", pp. 42-43 of 120).

[56] *Mitchell,* 685 N.E.2d at 1088.

difficult nor abstract to ascertain. Compensation of some or all of those expenses is compensation, not a windfall. In *Mitchell*, the court noted that the person asserting the claim is the best-suited witness to determine the amount of her damages since she experienced the loss, and other sources may be speculative.[57] Thus, as an evidentiary matter, the finder of fact should consider the testimony of the person who had the sentimental relationship to the property. Here, Ms. Liddle's testimony is key and should be considered in measuring the sentimental value of her actual damages.[58]

Copper is like the trophy-rings, a treasured heirloom and irreplaceable. The trophy-rings were not ordinary jewelry and could not be bought and sold in a readily available market. Rather, they were coveted awards and symbols of certain achievements accomplished by very few, such awards not having many willing sellers and therefore no real market. For that reason *Campins* valued them

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[57] *Mitchell*, 685 N.E.2d at 1087.

[58] *Edmonds v. United States*, 563 F.Supp.2d 196 (D.D.C. 2008) is inapplicable since Indiana recognizes sentimental value as a measure of actual damage. In that case, the federal court was faced with a pendant state law claim from the District of Columbia for conversion. The plaintiff sought to recover sentimental value for the destruction and loss of photographs of her father. The court recognized that the District of Columbia's highest court had never ruled on the matter. Citing Section 911 from the Restatement (Second) Torts, and comment (e) the court awarded the plaintiff $2,500 a piece for two of her photographs and nominal damages for the third.

differently than other jewelry. Likewise, Copper was unique, and not susceptible to replacement. Copies of the trophy-rings would be imposters and never could have made their owner whole. Copper is no different. Accordingly, the issue of damages should be reversed and remanded for evidentiary development to compute Ms. Liddle's sentimental loss.

CONCLUSION

For the reasons argued herein, Plaintiff-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 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.

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CERTIFICATE OF WORD COUNT

I hereby verify that this brief contains no more than 14,000 words as required by Indiana Appellate Rule 44(E).

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