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“DEFENDING THE DOG BITE CASE”
(A DEFENSE PERSPECTIVE)

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DEFENDING THE DOG BITE CASE

I. Common Law in Pennsylvania

1. In the Commonwealth of Pennsylvania, the common law has long provided that an owner is not responsible for a dog bite unless he knew or had reason to know of his dog's vicious propensity. See Andrews v. Smith, 324 Pa. 455, 188 A. 146 (Pa. 1936). In Andrews, the Pennsylvania Supreme Court stated:

Animals such as horses, oxen and dogs are not beasts that are *ferae naturae*, i.e., wild beasts, but are classified as *mansuetae naturae*, i.e., tamed and domesticated animals, and their owners are not responsible for any vicious acts of theirs unless the owners have knowledge that they are likely to break away from the domestic nature and become vicious. Of all the animals, dogs have probably been the longest domesticated and the vast majority of them can be allowed their freedom without imperiling the public safety.

The Pennsylvania Supreme Court in the Andrews case further held that:

It would be unfair to hold the owners of animals that are normally harmless responsible for the vicious acts of these animals unless they were put on notice that the animal was vicious. In so holding, the courts have merely applied the principle that no man is responsible for injuries caused by his property unless he himself was guilty of negligence in his manner of controlling or not controlling that property... Knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. If the thing is generally supposed to be harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it and who had no warning would not be held liable for the harm...

The Pennsylvania courts have held that the "one free bite rule" is not accepted as a defense in civil cases in Pennsylvania. That is, the courts have held that where a domesticated dog has demonstrated "vicious or ferocious propensities," the "one free bite rule" does not apply. Andrews v. Smith, 324 Pa. 455, 188 A. 146 (1936). The court in Deardorff v. Burger, 414 Pa. Super. 45, 606 A.2d 489 (1992) held that "as soon as the owner knows or has reason to believe that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of." See Deardorff v. Burger, *supra*.

A defendant may assert that liability may be excused. In Deardorff, the court held that "a dog owner may always show that his or her dog escaped despite the exercise of reasonable care."

In Kinley v. Bierly, 2005 Pa. Super. 168, 876 A.2d 419 (2005), the Pennsylvania Superior Court reiterated that the standard set forth in Andrews is still controlling for common law animal bite liability. In Kinley, the court found that a horse owner was not liable when his horse bit another person. The court noted that before liability from animal bite attaches, the defendant must know or have reason to know that the animal will display vicious tendencies. The Kinley court cited Andrews as well as the Restatement (Second) of Torts, Section 518 which is titled "Liability for Harm Done By Domestic Animals That Are Not Abnormally Dangerous." The Pennsylvania courts have not expressly adopted this section.

II. Negligence Per Se

It is anticipated that a plaintiff may argue that the 1996 amendments to the dog law may make it easier to recover civilly for a dog bite under a negligence per se theory. The plaintiff could argue in pursuing a claim under negligence per se that the common law standard of care does not apply. To prove negligence per se a plaintiff must show that there is a statute, that a violation of that statute caused harm of the kind that the statute was intended to avoid and the harm was done to a person within a class of persons that the statute was designed to protect. McCloud v. McLaughlin, 2003 Pa. Super. 451, 837 A.2d 541 (2003).

1. Pennsylvania's Leash Law, 3 P.S. Section 459-305.

Said law provides:

1. Confinement of dogs

It shall be unlawful for the owner or keeper of any dog to fail to keep at all times such dog either:

- (1) confined within the premises of the owner;
- (2) firmly secured by a means of collar and chain or other device so that it cannot stray beyond the premises on which it is secured; or
- (3) under the reasonable control of some person, or when engaged in lawful hunting, expedition or field training.

2. "Dangerous Dog Statute"/3 P.S. Section 459-501-A through Section 459-507-A

Originally, the statute departed very little from the common law on civil liability. The statute, originally, stated that in order to hold an owner criminally liable for a dog bite there had to be evidence of a dog's history or propensity to attack without provocation. However, the amendments in 1996 changed the law regarding liability. Said amendments created a law that imposes criminal liability on a dog owner for any

unprovoked attack.

3 P.S. Section 459-502A provides:

(a) Summary offense of harboring a dangerous dog. - Any person who has been attacked by one or more dogs, or anyone on behalf of such person, a person whose domestic animal has been killed or injured without provocation, the State Dog Warden or the local police officer may file a complaint before a district justice, charging the owner or keeper of such a dog with harboring a dangerous dog. The owner or the keeper of the dog shall be guilty of the summary offense of harboring a dangerous dog if the district justice finds beyond a reasonable doubt that the following elements of the offense have been proven:

- (1) The dog has done one or more of the following:
 - (i) Inflicted severe injury on a human being without provocation on public or private property.
 - (ii) Killed or inflicted severe injury on a domestic animal without provocation while off the owner's property.
 - (iii) Attacked a human being without provocation.
 - (iv) Been used in the commission of a crime.
- (2) The dog has either or both of the following:
 - (i) A history of attacking human beings and/or domestic animals without provocation.
 - (ii) A propensity to attack human beings and/or domestic animals without provocation. A propensity to attack may be proven by a single act of the conduct described in paragraph (1)(i), (ii), (iii) or (iv).
- (3) The defendant is the owner or keeper of the dog.

In the case of Commonwealth v. Hake, ___ Pa. Cmwlth. ___ 738 A.2d 46 (1999), the Pennsylvania Commonwealth Court held that the 1996 amendments to the statute added that a propensity to attack human beings without provocation may be proven by a single incident, including the incident giving rise to the criminal charge. In subsequent cases, the Pennsylvania Commonwealth Court found that the single incident of an attack on a human need not produce severe injury. See Commonwealth v. Austin, 2004 WL 7846284 at 2 (Pa. Cmwlth. 2004); Commonwealth v. Baldwin, ___ Pa. Cmwlth. ___, 767 A.2d 644 (2001).

3. The Pennsylvania Superior Court in the case of Underwood v. Wind, et al., 2008 Pa. Super. 158, 954 A.2d 1199 (2008), addressed several issues concerning common law liability and

negligence per se. In the Underwood case, the owner of two pit bull dogs, Dana Wind, had rented a home from a relative, Sherry Kasprzyk, who was also a defendant. The issues concerning defendant Kasprzyk will be discussed below. Defendant Wind kept her two dogs within her home. She claimed that the latch on her front door was faulty which allowed her dogs to escape the house through the front door. Defendant Wind testified that she tried to fix the latch but was unsuccessful. Unfortunately, the dogs escaped through the door in question and attacked a minor child and two Good Samaritans that had come to the assistance of the minor child.

Defendant Wind, after a jury trial, was found to be negligent. The jury awarded damages and defendant Wind filed an appeal. On appeal, defendant Wind argued that the trial court's instruction stating that she was negligent per se because her dogs escaped from the house precluded the jury from having an opportunity to consider whether her explanation for the dogs' escape was reasonable and she, therefore, was not negligent and liable for the claimed injuries. Defendant Wind claimed that the court erred by instructing the jury pursuant to the holding in the case of Miller v. Hurst, 302 Pa. Super. 235, 448 A.2d 614 (1982). Defendant Wind argued that the trial court should have instructed in accordance with Villaume vs. Kaufman, 379 Pa. Super. 561, 550 A.2d 793 (1988). The trial court in Underwood, in its charge, summarized Sections 459-305 and 459-502(a).

In Miller, the Pennsylvania Superior Court had held that an unexcused violation of the dog law was negligence per se. In Villaume, the Pennsylvania Superior Court explained that the Miller holding did not "impose absolute liability upon dog owners whose dog is unrestrained despite their exercise of due care." The Villaume court, citing Miller, held that a mere violation of the dog law does not establish the causation factor required for finding liability; "where proof of negligence rest upon a violation of the dog law, liability does not attach unless the violation is a substantial factor in bringing about the injury sustained."

The court in Underwood found that although the trial court's charge may have been inarticulate at times, the charge, when considered in its entirety, with regard to informing the jury of the law of liability as it applies to dog owners whose dogs escape and harm someone, was legally sound and adequately informed the jury of the applicable law. The court in Underwood also noted that subsequent case law after Miller has been expanded and clarified the law in Pennsylvania. The Underwood court noted that the Pennsylvania courts have held that "we are convinced that proof of negligence, in contrast to holding one absolutely liable, is the vehicle by which accountability for injury sustained because of a dog bite is to be established" citing McCloud vs. McLaughlin, 2003 Pa. Super. 451, 837 A2d 541, 544, (2003) quoting Deardorff vs. Burger, 414 Pa. Super 45, 606 A2d 489, 493 (1992) appeal denied 532 Pa. 655, 615 A2d 1312 (1992).

4. The Pennsylvania Superior Court on June 18, 2009 issued a non-precedential decision (see Superior Court I.O.P. 65.37) in Moeller v. Simmons, et al., No. 2295 WDA 2007. This was an appeal from the Court of Common Pleas of Allegheny County. In this case, the plaintiff appealed an order granting summary judgment in favor of one of the defendants, Elaine A. Wolfe. The other defendant had settled and was dismissed from the lawsuit. On appeal, plaintiff claimed that:

(1) the trial court erred in awarding the summary judgment as to defendant Wolfe as defendant Wolfe was negligent per se, or even under negligence theories, the question of

whether the pit bull exhibited vicious tendencies was for the jury;

- (2) trial court should have taken judicial notice that a pit bull is a vicious animal; and
- (3) the trial court failed to consider the conviction of Denver Simmons of a violation of a City of Pittsburgh Animal Control law when rendering its decision.

The Superior Court affirmed the trial court's summary judgment.

In the case of Moeller, the plaintiff had attended a graduation party with a friend, Wendy Lapp. Apparently, plaintiff and others proceeded to a few bars and then returned home. They then went over to Ms. Wolfe's house where there had been a dog chained in the backyard of this home. The plaintiff proceeded to pat the dog, asking one of the men at the house if it was a nice dog to which he responded yes. She leaned forward and extended her hand to the dog at which time she was bitten in the face. There was no dispute that the dog was in the custody and control of defendant Wolfe, although not the owner of the dog.

Initially, the Superior Court addressed the issue of negligence per se. The plaintiff had claimed that there was negligence per se of defendant Wolfe as there had been a violation of the Dog Law, 3 P.S. Section 459.502(A). However, the court noted that the defendant was not the owner of the dog. The Court found that the statute as referenced by the plaintiff is clearly applicable to dog owners. Therefore, defendant Wolfe could not be found negligent per se as her conduct was not regulated under any statute. The court found the fact that the co-defendant, who was dismissed, violated the Pittsburgh dog ordinance was of no significance. The Superior Court also addressed the issue of plaintiff's allegation that the dog in question exhibited vicious tendencies. The court discussed Restatement (Second) of Torts Section 518 as well as the decision in Andrews vs. Smith, supra. The court did not address the third issue due to plaintiff failing to properly address the issue in her brief. The Superior Court found that there was no evidence of the dog's vicious tendencies; therefore, summary judgment was properly granted.

III. Liability of Non Owners

In Pennsylvania, the courts have held that a non-owner of a vicious dog may be subject to liability to others by knowingly keeping or harboring a dog on his premises after knowledge of its vicious propensities. Snyder v. Patterson, ___ Pa. ___, 28 A. 1006 (1894).

Additionally, the Pennsylvania courts have held that a landlord may be liable for a dog bite depending on their knowledge of the dog and their control of the premises. In Palermo v. Nails, 334 Pa. Super. 544, 483 A.2d 871 (1984), the Pennsylvania Superior Court held, "a landlord out of possession may be liable for injuries by animals owned and maintained by his tenant when the landlord has knowledge of the presence of the dangerous animal and where he has the right to control or remove the animal by retaking possession of the premises." See also Gallick v. Barto, 828 F. Supp. 1168, 1993 U.S. Dist. LEXIS 10412 (M.D. Pa. 1993). Moreover, the court in Palermo held

that a landlord's knowledge of a dog's violent propensities may be inferred from the facts and the circumstances.

In the Underwood case, cited above, concerning liability of a dog owner and negligence per se, the court also addressed the issue of liability of landlord out of possession. In Underwood, defendant Kasprzyk, was the aunt of defendant Wind, who rented a home to Ms. Wind. A lease agreement had been entered for the property in question. As the dogs in question had caused property damage to a prior property occupied by codefendant Wind, defendant Kasprzyk had a verbal agreement with codefendant Wind, the tenant, that the dogs would not reside at the address in question. However, defendant Wind did have the dogs in question reside with her without the knowledge of defendant Kasprzyk, the landlord.

The jury in Underwood found liability against both the owner and the landlord. However, although the Superior Court in Underwood found that the trial court's instruction as to the owner of the dog was legally sound and adequately informed the jury of the law of liability as to dog owners, the Superior Court found that the trial court confused the jury and misstated the law when instructing the jury on the standard of care to be applied to an out-of-possession landlord when considering the landlord's liability for injuries caused by a dog with violent propensities. The Underwood court found that pursuant to Pennsylvania law as stated in Palermo, a landlord may be liable for injuries caused by a tenant's pet if it is proven that he or she knows of the presence of that pet and that pet's violent propensities. The Underwood court found that adding the language of "or should have known" mandated a new trial on the issue of liability of the landlord.

As stated above, the Superior Court in Moeller did not address any findings in the Underwood case. In Moeller, although defendant Wolfe was not an owner of the dog, the Superior Court noted that it was undisputed that defendant, Wolfe had custody and control of the dog in question. The Moeller Court found there was no evidence of violent tendencies exhibited by the dog. Therefore, there was no liability of the non owner of the dog. The Moeller Court, in its discussion, stated: "defendant must know or have reason to know that the animal will display vicious tendencies before defendant can be held liable." This statement appears contrary to the holding in Underwood where the Court held that it must be proven that the non owner "knows" not "should have known" of violent propensities. As the Moeller Court did not discuss Underwood, there may be question as what is needed as to "knowledge", that is, "knows or should have known". The Moeller Court may have raised more questions than have provided answers.

IV. Sovereign Immunity

In the case of Govan v. Philadelphia Housing Authority, 204 Pa. Cmwlth. LEXIS 321, 848 A.2d 193 (2004), the Pennsylvania Commonwealth Court found immunity for the Philadelphia Housing Authority. The court found that the authority did not have "direct control over the dog." In Govan, a resident at the development tied a dog to a tree in the common area where she left the dog unattended. Unfortunately, the dog bit a child who sustained serious injuries. The authority had a policy concerning dog ownership and reserved the right to remove from the development any pet that threatened the health or safety of the tenants. Prior to this incident, tenants had complained about this dog. The plaintiffs in this matter claimed that the authority was responsible for the injuries

of plaintiff as the authority had “control over the dog and could have removed it.” The Pennsylvania Commonwealth Court held that “constructive control” by means of reserving the right to remove threatening dogs does not rise to the level of control required to invoke the exception to sovereign immunity regarding the care, custody or control of animals.

V. Liability of Rescues, Shelters or other Organizations from whom a dog was adopted

Currently, there is no such specific law in Pennsylvania as to the issue of whether a shelter or rescue organization can be held liable for injuries sustained by a third party by the acts of the dog adopted by said party. Mostly recently, at the trial level, Defendant Rescue successfully argued that Defendant Rescue was entitled to Summary Judgment as the Rescue would not be liable to the plaintiff, who adopted a dog from the rescue, as the plaintiff failed to establish any knowledge of vicious or dangerous propensities. Plaintiff, who adopted the dog in question from Defendant Rescue, had brought several claims against the rescue and individuals associated with the rescue. The claims included contractual claims and negligence claims. After discovery was complete, a motion for summary judgment was brought by the defendant rescue on all claims. At the time of the oral argument, all contractual claims were withdrawn and plaintiff proceeded only on the negligence claims against the rescue and an officer of the rescue. As to the contractual claims, from a defense perspective, defendant rescue had argued that the language of their contract protected the rescue from any liability or any potential claims by the now owner of the dog or other third parties. Although the plaintiff had withdrawn said claim, the Court found that there was no breach on contract. Defendant also argued that the contract controlled any negligence claim and, therefore, any negligent action was not proper. That is, defendant argued that the claim was barred by the “Gist of the Action”. The trial court did not grant summary judgment as to the “Gist of the Action” defense and, instead, granted summary judgment on the basis that the plaintiff had failed to establish that there was any evidence that the dog had exhibited any signs of viciousness, dangerousness or aggression while in custody of the rescue. In fact, the Court noted that there was no evidence that the dog had exhibited any signs of aggression, viciousness or dangerousness at any time. The Court noted, as did the parties, that there was no specific case that set forth the standard of care applicable to the facts of this case. However, defendant argued and the Court agreed that the standard of care set forth in the case of Andrews vs. Smith, supra, was controlling.

There was also an issue of the Volunteer Statute as to one of the officers of this rescue. In this matter it was argued that the individuals, who were volunteers for the rescue would be considered a volunteer under 42 Pa. C.S. Section 8332.4, known as the “Volunteer in Public Service Standard”. This standard is lower than that of negligence. The statute states in relevant part that:

No person who, without compensation and as a volunteer renders public service for a non-profit organization under Section 501(c) (3) ... shall be liable to any person for any civil damages as of a result of any acts or admissions in rendering such services, unless the conduct of such person falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such services and unless it is shown that such person was under a recognized duty to another to do, knowing or having reason

to know that such act or omission could create a substantial risk of actual of harm to the person and property of another. 42 Pa. C.S. Section 8332.4 (1).

In this case against the rescue, the Court agreed that the said individual was a volunteer and there was no liability against said individual. This matter is currently in the Superior Court.

VI. Investigation/Discovery

In defending a case, counsel should secure information and/or documentation as to:

1. history of the dog.
2. care of the dog by current owners as well as prior owners.
3. all records relating to the care and treatment of a dog including veterinarian records, pet shop records, shelters, etc.
4. identity of any and all witnesses as to the behavior of the dog at the time of the incident as well as prior to the incident.
5. Secure a liability expert.
6. Secure any photographs and/or video of the dog, the area where the incident occurred or any other matter that may relate to issues concerning the behavior of a dog, behavior of the owner, knowledge of the owner, behavior of the victim, the environment.
7. Through written discovery requests and deposition secure information specifically relating to any behavior of the dog, including the dog's behavior around people, other dogs, other animals; the dog's environment before ownership, during ownership and during the incident; medical history including any injuries, illnesses, medications; any training of the dog including where training was received, by whom, the extent of training, how training was conducted.