DEFENDING THE DOG BITE CASE

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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 natura, i.e., wild beasts, but are classified as mansuetae natura, 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).

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

Said law provides:

2. 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.

B. "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:

(b) 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.

(i) Killed or inflicted severe injury on a domestic animal without provocation while off the owner's property.

(ii) Attacked a human being without provocation.

(iii) 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).

C. Underwood vs. Wind, et. al., 2008 Pa. Super. 158, 954 A2nd 1199 (2008).

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).

D. Moeller vs. Simmons, et. al., No.: 2295 WBA 2007 (See Superior Court I.O.P. 65.37)

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) the 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.

E. Rosenberg vs. Evans, 2012 WL1383051, 2012 Pa. Super. 91 (Pa. Super. 2012)

In Rosenberg v. Evans, the Pennsylvania Superior Court addressed several issues concerning dog bite cases. In this case, plaintiff mother, acting individually and as parent of her minor child, commenced the negligence action against the landlord of the leased premises where the child was bitten by a pit-bull dog. The trial court granted summary judgment for the landlord and plaintiff appealed.

The first issue raised by plaintiff on appeal was whether or not the trial court erred and abused its discretion in finding that a genuine issue of material fact did not exist as to (A) the "dangerous propensities" of the pit-bull dog in question, and (B) defendant/appellee, Robert Miller's knowledge of the dangerous propensities of this animal, when such determination was based purely on testimony of non-adverse witnesses. Plaintiff also raised the issue of whether or not the trial court erred and abused its discretion in finding there was no evidence that the pit-bull in question was dangerous. Lastly, plaintiff raised the issue of whether or not the lower court erred and abused its discretion in finding that there was no evidence that defendant/appellee, Robert Miller, was aware that the pit-bull in question was a dangerous animal. Rosenberg vs. Evans, supra, 2012 WL1383051 at *2.

The court, in discussing negligent actions arising from the conduct of animals, noted the opinion in McCloud v. McLaughlin, 203 Pa. Super. 451, 837 A.2d 541 (2003). Id. McCloud is also discussed above. The Superior Court in McCloud noted that Pennsylvania does not impose absolute liability upon the dog owners for injuries occasioned by their dogs. The court in Rosenberg further noted that "In order to establish a cause of action in negligence against the landlord for injuries caused by his tenant's dog, it must be proven that the landlord owed a duty of care, that he breached that duty, and that the injuries were proximately caused by the breach." Id. The issue of actual knowledge of a dog for dangerous propensities by a landlord is discussed below.

The Superior Court in Rosenberry first addressed the question of whether there was no genuine issue of material fact that the dog did not have any dangerous characteristics. The Superior Court noted that the trial court relied upon a record replete with testimonial evidence that the dog in question had a gentle disposition and wonderful temperament as the basis for its finding that the dog did not have a dangerous propensity. The plaintiff argued that the trial court violated the Nanty-Glo rule in relying upon the oral testimony of witnesses who were co-defendants of the landlord. The Rosenberry Court found that

the defendants in this case including the landlord and the co-defendant were not adverse as to the issue of dangerous propensities and, therefore, the Nanty-Glo rule applied. Therefore, the Rosenberry Court found that the trial court erred in finding no issue of material fact based solely on the testimony presented to support the Motion for Summary Judgment. Id. at *3, *4. The Court also found, in the alternative, that there was a genuine issue of material fact as to the dangerous propensities of the dog as there was undisputed evidence that the dog had a tic, or an involuntary spasm, which intermittently caused the dog to clench its teeth in a biting motion. Although the Rosenberry Court found that there was no evidence that the dog was vicious, it was undisputed that the dog had a tic that caused her to clench her teeth in a biting motion. The parties disagreed about the reasonable inferences to be drawn from this undisputed fact. The plaintiff argued that the inference to be drawn of the clenching motion was that the dog was dangerous. Whereas, the defendants characterized this behavior as an involuntary muscle spasm in a gentle dog. The Rosenberry Court noted that "As this was summary judgment, the inferences should have been drawn in favor of the plaintiff, the party opposing the motion". Therefore, the Superior Court found there was sufficient evidence from which a jury could reasonably infer that the dog displayed a characteristic, even though non-aggressive, that rendered it dangerous. Accordingly, the Court found that summary judgment on this basis, was inappropriate. *Id.* at *4, *5.

Although the Rosenberry Court found that there was a genuine issue of fact regarding whether the dog had a dangerous propensity, said Court stated that its inquiry did not end there. The Superior Court noted that "In order to establish that the Landlord had a duty, [the plaintiff] had the burden of offering some evidence that he had actual knowledge of the dog's muscle spasm or other dangerous propensity and sufficient control over the leased premises to prevent the injury." *Id.* at *5.

The Rosenberry Court found that the Nanty-Glo rule on this issue did not apply as the defendants, that is, the landlord versus the dog owner had an adverse interest. The Superior Court noted that the trial court did not rely solely upon oral testimony in support of summary judgment on the issue of the landlord's knowledge and thus, did not trigger Nanty-Glo. Id. at *5. The plaintiff contended that the trial court erred in finding there was no genuine issue of material fact as to the landlord's knowledge of the dog's dangerous propensities. The plaintiff had argued that the landlord's knowledge could be inferred from the knowledge of co-defendant, an alleged employee of the landlord, as well as the landlord's own direct observations of the dog or rumors of the dog's reputation in the community.

The Rosenberry Court noted that "Before a landlord will be charged with a duty, he must have actual knowledge that his tenant harbors a dog with dangerous propensities." Id. at *6. citing Palermo. The Superior Court noted that the Pennsylvania courts have not addressed whether imputed knowledge of an agent is sufficient to satisfy this actual knowledge requirement. The Superior Court noted that "Generally, the language of imputed knowledge is used in those situations involving the principal's liability for the conduct of the agent, which is not the case herein." Id. The Superior Court also noted that although the knowledge of an agent may be imputed to the principal, the agent's awareness of a given fact is not imputed to the principal if knowledge of the facts is not material to his duties to the principal. Id. The Court noted that the facts of the Rosenberg case did not involve a corporate principal. Furthermore, the alleged employee only did odd jobs for the landlord and was not a property manager and was questionably an employee. Additionally, the Court noted that the alleged employee's awareness that the dog had a spasm, knowledge he acquired while he was performing a maintenance chore on the tenant's property, was not material to his duties for the landlord. Id. Therefore, the Court found that it was unreasonable to hold that the alleged employee had a duty to report to the landlord that a tenant's dog had a tic. Moreover, the alleged employee did not perceive the tic as dangerous. Therefore, even if the knowledge of a tic was imputable

to the landlord, the Superior Court held that the alleged employee's belief that the teeth clenching was harmless should likewise be imputed to the landlord. *Id.*

The Superior Court also found that an occasional visit by the landlord to collect rent did not establish any evidence that any complaints were ever brought to the landlord's attention nor that any alleged behavior of the dog was brought to the landlord's attention. Furthermore, said Court also found that any alleged rumors about the dog previously attacking and killing a poodle constituted inadmissable hearsay and could not be used to defeat a Motion for Summary Judgment. *Id.* at *7, *8.

Accordingly, the Superior Court found that there were genuine issues of material fact regarding the dog's dangerous propensities. However, there was no evidence from which one could reasonably infer that the landlord had actual knowledge of the dog's alleged propensities to impose a duty of care. Therefore, the finding of summary judgment was affirmed. Id. at *8.

Also, see below discussion of Franciscus v. Sevdik, __Pa. Super._, 135 A.3d 1092 (Pa. Super. 2016).

F. Commonwealth of Pennsylvania, Appellee vs. Simon RABAN, Appellant
85 A.3d 467 (Pa. 2014)

The Pennsylvania Supreme Court could not decide whether or not a charge of failing to keep the dog secured should be treated as an absolute liability offense. The Pennsylvania Supreme Court, divided on a three to three vote, issued a per curiam Order February 12, 2014, letting stand the state Superior Court's ruling that the law is an absolute liability offense, with conviction not contingent on evidence of the defendant's intent. In this case, the court focused on whether law makers intended Section 495-305(a) (1) of the state's Dog Law to create an absolute liability offense.

Justice J. Michael Eakin said the use of the word "fail" clearly pointed to legislative intent to make the statute an absolute liability offense. Specifically, he stated: "If one chooses to own or keep a dog, the failure to keep it confined violates the plain and unambiguous language of the statute, regardless of the reason for failure."

However, Justice Debra M. Todd, writing an opinion in support of reversal, found that the use of the word "fail" did not carry such a clear implication as found by Justice Eakin. Justice Todd noted that absolute liability offenses are disfavored without clear expressions of legislative intent. In this statute, Justice Todd found no clear expression with regard to failure to keep a dog confined.

At the trial, the prosecutors did not present any evidence of intent or knowledge of the dog owner. The dog owner was found guilty of violating Section 305(a)(1).

The dog owner appealed and contested the interpretation of Section 305(a)(1) as an absolute liability offense. The Superior Court affirmed the lower court in which it found that the knowledge of the dog owner was not an element of the offense.

Although the Raban case is a criminal matter, there is argument to be made as to what, if any, effect it has upon a possible subsequent civil lawsuit. At this time, there is no definitive answer.

G. Hughes v. Badaracco-Apolito, et al., 21016 U.S. Dist. LEXIS 24292 WL775187 (U.S. M.D. Pa. 2/29/16).

The United States District Court for the Middle District of Pennsylvania in Hughes v. Badaracco-Apolito, et al., 2016 U.S. Dist. LEXIS 24292, 2016 WL775187 (U.S. Middle District Court of Pennsylvania, 2/29/16), addressed the issue of whether a defendant who had been found to have violated the Pennsylvania Dog Law would be negligent per se in a civil action. The court in Hughes, found hat "a mere violation of the dog law does not establish the causation factor required for a finding of liability", citing Underwood ex rel. v. Wind, 2008 Pa. Super. 158, 954 A.2d 1199, 1205 (Pa. Super. Ct. 2008). Instead, the court in Hughes found "[w]here proof of negligence rests upon a violation of the dog law, liability does not attach unless the violation is a substantial factor in the bringing about of the injury sustained.", citing Miller v. Hurst, 302 Pa. Super. 235, 448 A.2d 614, 619. Hughes, supra, 2016 U.S. Dist. LEXIS 24292. The Hughes court further noted that "Whether a party's conduct has been a substantial factor in causing injury to another is ordinarily a question of fact for the jury, and may be removed from the jury's consideration only where it is clear that reasonable minds cannot differ" citing Mangino v. Cowher, No. 1194OF 2008, 2010 Pa. Dist. & Cnty. Dec. LEXIS 252, 2010 WL3923581 (Pa. Com. Pl. June 11, 2010) (quoting Vernon v. Stash, 367 Pa. Super. 36, 46, 532 A.2d 441, 446 (1987)). *Id*. Furthermore, the Hughes court noted that only "An unexcused violation of the dog law is negligence per se." citing Miller, Supra., 448 A.2d at 618-19; and Villeume v. Kaufman, 379 Pa. Super. 561, 550 A.2d 793, 795 (1988). Hughes v. Badaracco-Apolito, Supra, 2016 U.S. Dist. LEXIS 24292 (U.S. District Court for the Middle District of Pennsylvania, February 29, 2016).

In the Hughes case, Plaintiff Hughes had been bitten by dogs owned by Defendant Badaracco-Apolito. Plaintiff and Defendant Badaracco-Apolito filed cross-motions for summary judgment. The court denied both options for summary judgment as the court determined there were issues of fact as to whether or not plaintiff could establish the requirements of negligence per se. The court noted that the defendant was not collaterally estopped from asserting a defense to the plaintiff's claim and that the defendant was not collaterally estopped from asserting a defense to the plaintiff's claim and that the plaintiff was not entitled to judgment as a matter of law on his claim of negligence per se based upon defendant's after-the-fact conviction for harboring a dangerous dog. Hughes, Supra, 2016 U.S. Dist. LEXIS 24292. The court found that under the standard for negligence per se, there remains a question of material fact with regard to whether the violation of 502(a) of the dog law was a substantial factor in bringing about plaintiff's injuries. Hughes, Supra, 2016 U.S. Dist. LEXIS 242292 (United States District Cour for the Middle District of Pennsylvania, February 29, 2016). The Hughes court further explained that a jury must determine if defendant's dogs exhibited dangerous or vicious propensities and, if so, if she took sufficient precautionary steps, or failed to exercise due care. Hughes, Supra., 2016 U.S. Dist. LEXIS 242292 (United States District Court for the Middle District of Pennsylvania, February 29, 2016, citing Mangino, Supra., 2010 Pa. Dist. & Cnty., Dec. LEXIS 252, 2010 WL3923581 (Pa. Com. Pl. June 11, 2010).

H. G.T.R. v. DiCandia, 217 U.S. Dis. LEXIS 87264, 2017 WL 2463168 (June 7, 2017, Civil Action No. 3:15-CV-02126)

The United States District Court for the Middle District of Pennsylvania in G.T.R. v. DiCandia, 217 U.S. Dis. LEXIS 87264, 2017 WL 2463168 (June 7, 2017, Civil Action No. 3:15-CV-02126), addressed the issue of whether plaintiff was entitled to summary judgment regarding a dog bite in which the plaintiff argued that there was no genuine dispute of material fact and that the elements of establishing negligence per se under the Pennsylvania Dog Law, 3PS. Sections 459-101-1205 had been met. In response

thereto, the defendant, in said matter, argued that there were genuine factual disputes that existed and, therefore, summary judgment was not appropriate.

In G.T.R., the court discussed the four requirements for negligence per se which were:

1. The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;

2. The statute or regulation must clearly apply to the conduct of the defendant;

3. Defendant must violate the statute or regulation; and

4. The violation of the statute or regulation must be the proximate cause of plaintiff's injury.

G.T.R. v. DiCandia, 217 U.S. Dis. LEXIS 87264, 2017 WL 2463168 citing Mahan v. Am-Gard, Inc., 2003 Pa. Super. 510, 841 A.2d 1052, 1058-59 (Pa. Super. Ct. 2003) citation and quotations omitted; see also Roth v. Cabot Oil & Gas Corp, 919 F. Supp. 2d 476, 488 (M.D. Pa. 2013).

The court in G.T.R. noted that the dog law was enacted "to protect the public from personal injury, property damage, and other hazards created by roving dogs", G.T.R. v. DiCandia, Supra., 217 U.S. Dis. LEXIS 87264 citing Deardorff v. Burger, 414 Pa. Super. 45, 606 A.2d 489, 492 (Pa. Super. Ct. 1992).

In this case, the plaintiff claimed that the defendant violated the dog law by harboring a dangerous dog in violation of Section 459-502-A. The court set forth the contents of the law (see above).

The plaintiff argued that defendant could not prove the attack was provoked and as such the plaintiff argued that the attack must have been unprovoked thus rendering summary judgment appropriate. The defense, in response thereto, stated that such logic was "inconsistent", given there was no evidence to prove the converse, that is, that the dog was not provoked. G.T.R. v. DiCandia, Supra., 217 U.S. Dis. LEXIS 87264. *Id.*

The Middle District Court noted that as this was a motion for summary judgment, the standard for ruling upon a motion for summary judgment requires the court to credit the facts in the light most favorable to the non-moving party. Therefore, the court could not credit the plaintiff's position that the dog was not provoked, even without conclusive evidence to the contrary. *Id.*

The court then proceeded to discuss plaintiff's argument that the dog's propensity to attack human beings could be proven by the incident itself, or in conjunction with the dog's nip of the defendant's daughter the day before. The court acknowledged that while a single incident cannot prove a propensity to attack human beings, "a mere violation of the dog law does not establish the causation factor required for finding of liability." citing Underwood Ex Rel. Underwood v. Wind, 2008 Pa. Super. 158, 954 A.2d 1199, 1201 (Pa. Super. 2008) Id. The Middle District Court further stated "instead, 'where proof of negligence rests upon a violation of a dog law, liability does not attach unless the violation is a substantial factor in bringing about the injuries sustained'" citing Miller v. Hurst, 302 Pa. Super. 235, 448 A.2d 614, 619 (Pa. Super. Ct. 1982). Id. The Middle District Court further stated: "Whether a party's conduct has been a substantial factor in causing injury to another is ordinarily a question of fact for the jury, and may be removed from the jury's consideration only where it is clear that reasonable minds cannot differ on the issue." citing Mangino v. Cowher, 13 Pa. D. & C.5th 427, 432 (Lawrence County C.C.P. 2010) (quoting Vernon v. Stash, 367 Pa. Super. 36, 532 A.2d 441, 446 (Pa. Super. Ct. 1987). Id. Lastly, the Middle District

Court noted "Only 'an unexcused violation of the dog law is negligence per se'" again citing Miller v. Hurst, Supra. at 618-19 as well as Villaume v. Kaufman, 379 Pa. Super. 561, 550 A.2d 793, 795 (Pa. Super. Ct. 1988). *Id.*

The Middle District Court further discussed that Section 502-A has been deemed "an appropriate standard for determining whether a person has complied with the common-law duty to exercise due care, and a violation of said statute constitutes negligence per se" citing Rosen Ex Rel. Rosen v. Tate, 64 Pa. D. & C. 4th 524, 530-31 (Lehigh County C.C.P. 2003) (additional citations omitted). *Id.*

Thereafter, the Middle District Court noted that in order to demonstrate that the violation of Section 502-A was a substantial factor in bringing about the injuries complained of, liability for negligence per se must be based on "an owner's knowledge of his dog's viciousness and his failure then to take proper steps to prevent the viciousness displaying itself to the hurt of human beings" citing Deardorff v. Burger, 414 Pa. Super., 606 A.2d 489, 492 (1992) (citing Andrews v. Smith, 324 Pa. 455, 188 A. 146, 148 (Pa. 1936). Therefore, the Middle District Court found that the plaintiffs in those cases must demonstrate that the dog had vicious or dangerous propensities and that the defendant was aware of those propensities and failed to take adequate precautionary measures. *Id.*

The Middle District Court then noted "An owner cannot be liable for injuries caused by his or her dog 'unless the owner had knowledge of the animal's dangerous propensities and failed to take proper steps to prevent the animal from harming people.'" citing Mangino, 13 Pa. D. & C.5th at 442. Id. The Middle District Court found that this knowledge was still a question of material fact as the defendant specifically denied that the dog ever exhibited aggressive behavior prior to biting the victim. Id. The court further noted that the plaintiff's reliance on the incident in question or the prior day's provoked "nip", while potentially satisfying propensity requirements of the dog law, did not demonstrate as a matter of law that the dog had dangerous or vicious propensities that the defendant was aware of [at the time of the incident]. Id. Therefore, the court found it was up to the jury to determine if the dog had exhibited dangerous or vicious propensities, and if so, if the defendant knew or should have known thereof and failed to exercise due care. *Id.*

Therefore, the court concluded "Under the standard for negligence per se, there remains a question of material fact with regard to whether 502-A was violated, and if so, whether defendant possessed knowledge rendering the violation of substantial factor in bringing about the plaintiff's injury. Accordingly, the plaintiff's motion for summary judgment [was] denied." *Id.*

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, 161 Pa. 98, 28 A. 1006 (1894).

A. Landlord

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.

1. Palermo v Nails, 334 Pa. Super. 544, 483 A.2d 871 (1984).

In Palermo, 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 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.

2. Underwood v. Wind, et al, 2008 Pa. Super. 158, 954 A.2d 1199 (2008)

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.

3. Moeller v. Simmons, et al 2295 WBA 2007 (See Superior Court I.O.P. 65, 37).

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.

Although it would appear that the Moeller Court, which is a non-precedential decision, raised the issue of "should have known", the Pennsylvania Superior Court in Rosenberg v. Evans, supra., discussed, above, clearly held that "Actual knowledge of a dog's dangerous propensity is required before a duty is imposed upon a landlord to protect against or remove an animal housed on rental property." Rosenberg v. Evans, supra., 2012 WL 1383051 at *3. (Pa. Super. 2012). The Superior Court in Rosenberg cites the Underwood case. The Rosenberg Court noted that the Underwood Court held that "the landlord's actual knowledge of the dog's dangerous propensities was a prerequisite to imposition of a duty." Id. The Superior Court in Rosenberg also discussed holdings from other jurisdictions. Specifically, the Superior Court noted that the law in Florida allows for liability or injuries resulting from an attack by a tenant's dog if the landlord knew or, should have known, that the tenant kept a vicious dog on the premises, and the landlord had

ability to control its presence. Id. at *7. The Superior Court noted that this is not the law in Pennsylvania. That is, "constructive knowledge is not sufficient" and cited Underwood as its authority. *Id*

B. Dog Walker and Pet Service Company

The Pennsylvania Superior Court in Franciscus v. Sevdik, ___Pa. Super.___135 A.3d 1092 (Pa. Super. 2016) reversed summary judgment in favor of defendant dog walker and defendant pet service.

In Franciscus, the Pennsylvania Superior court reviewed the lower court's summary judgment in favor of defendant Ashley Dailey and defendant John Steigerwald, individually t/d/b/a Fetch Pet Care of West Hills/South Hills. In this case, plaintiffs brought an action on behalf of their daughter who was bitten by a dog owned by defendant Sevdik. Said dog was being walked by defendant Ashley Dailey, an employee of Fetch Pet Care of West Hills/South Hills, which was owned and operated by John Stegerwald. Said defendants had filed a motion for summary judgment which the lower court granted. The underlying case proceeded against the dog owner in which there was an agreement for binding arbitration for which there was a verdict in favor of the plaintiffs against defendant dog owner. Thereafter, the plaintiffs appealed the summary judgment that was granted on behalf of defendant dog walker and defendant pet service company. *Id* at 1093.

On appeal, the Superior Court in Franciscus found the issue to be whether the trial court erred in finding no evidence that the pet care defendants (dog walker and dog/pet service company) knew or should have known of the dog's dangerous propensities that could subject them to liability for negligence. *Id.* at 1093.

The court in Franciscus noted:

"One who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

A. He intentionally causes the animal to do the harm or

B. He is negligent in failing to prevent the harm. (citing Kinley v. Bierly, 20 Pa. Super. 168, 876 A.2d 419 422 (Pa. Super.2005) (quoting Restatement (Second) of Torts Section 518): Liability for Harm Done by Domestic Animals That re Not Abnormally Dangerous). *Id*. At 1094.

The court in Franciscus further noted that "A dog owner is subject to liability for negligence fo injuries caused by his dog when he knows or has reason to know that the dog has dangerous propensities and yet fails to exercise reasonable care to secure the dog to prevent it from injuring another." Citing Deardorff v. Burger, 414 Pa. Super. 45, 606 A.2d 489, 492 (Pa. Super 1992). The court noted that the same liability extends to custodians and keepers of the dog with known propensities while the dog is in their custody and control. Id. At 1094. The court in Franciscus noted that this is consistent with the Pennsylvania Dog Law, 3 P.S. Section 459-102.

The plaintiffs in Franciscus allege that the pet care defendants were subject to the same liability as an owner while the dog was in their custody and control. Plaintiffs set forth evidence that said defendants had knowledge of behavior of the dog in question, which arguably would establish dangerous propensities. The pet are defendants countered that the dog was loving and affectionate and never exhibited any type of vicious or violent behavior. Specifically, the pet care defendants argued that the duty of a pet sitting service is akin to the duty of a landlord out of possession in Rosenberry v Evans, 202 Pa. Super. 91, 48 A.3d 1235

(Pa. Super. 2012). *Id.* At 1094. As noted above in Rosenberry and as noted by the court in Franciscus, the Superior Court declined to impose liability for a pet bite unless the landlord had actual knowledge of a dangerous animal on its rental property and the right to control or remove the animal by retaking the premises. *Id.* at 1096.

The court in Franciscus found that the Rosenberry case was far different than the facts presented in the **Franciscus** case. *Id.* at 1096. The court in Franciscus noted that the landlord had no duty in Rosenberry unless he had both actual notice of the dog's dangerous propensities and the ability to control or remove the animal by retaking the premises. However, in Franciscus, the court found that the duty in Franciscus flows from the pet care defendant's contractual undertaking to assume responsibility for the dog while it was in its custody and control and its knowledge of the dangerous propensities. Therefore, the Franciscus court found that the circumstances in the Franciscus case are sufficient to subject the pet care defendants to liability for failure to use reasonable care to prevent the dog from harming others while in their custody and control. Accordingly, summary judgment was improper. *Id*. at 1096.

On another note, the court in Franciscus found that "Pennsylvania law does not recognize a presumption that pit bulls as a breed are dangerous or have dangerous propensities." *Id.* at 1096. Said court found that "Our legislature, in drafting the dog law, did not define a pit bull or any other particular breed as a dangerous or vicious dog per se." See 3 P.S. Section 459-502-A. "Rather, that statute punishes dogs and owners only when a dog exhibits dangerous behavior. This is consistent with our tort approach to domesticated animals." *Id.* at 1096. Said court also noted that Pennsylvania has not adopted the Rule of Restatement (Second) of Torts Section 519; instead the court in Franciscus concluded that "proof of negligence, in contrast to holding one absolutely liable, is the vehicle by which accountability for injuries sustained because of a dog bite is to be established." Citing McCloud v. McLaughlin, 203 Pa. Super. 451, 837 A.2d 541, 544 (Pa. Super. 2003) (quoting Deardorff v. Burger, 414 PA. Super. 45 606 A.2d 489, 493 (Pa. Super. 1992)). Franciscus, Supra., 135 A.2d at 1096.

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

In the matter of Dobb v. German Shepherd Rescue of Southeastern Pennsylvania, Phila. CCP No. 061200819, 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 of 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 said individual was a volunteer and there was no liability against said individual.

The plaintiff in this matter appealed the decision to the Superior Court. The Superior Court issued a memorandum opinion on April 30, 2010 (James and Donna Bobb vs. German Shepherd & Rescue, et. al.) (Non-precedential Decision). The Superior Court upheld the trial court's decision. However, the Superior Court did so on the basis that the adoption agreement controlled the adoption of the German Shepherd. The Superior Court noted that the following language was the controlling issue:

> Adopter(s) [appellants] acknowledges that he/she/they has read all of the written materials supplied by [GSR] regarding the adoption of previously owned animals and understands that [GSR] can make NO guarantees and/or promises regarding Dog's disposition, temperament and/or future health and personality ...
>
> Adopter(s) [appellants] hereby agrees to release [GSR] and hold [GSR] harmless from any and all liability for damages and/or injury which may be caused to adopter(s) [appellants] his or her

family, friends, neighbors, visitors,, agents, servants, employees and/or workmen, directly or indirectly by Dog.

The Superior Court found there was no genuine issue regarding any material fact that appellants cannot prevail in this action as to GSR due to the operation of the adoption agreement. Thus, the Superior Court found that the trial court's decision to grant GSR summary judgment was correct.

The Superior Court further found that the officer from the Rescue who had also been sued was immune from suit pursuant to the terms of the volunteers statute. The Court held that plaintiffs failed to establish that the individual deviated sufficiently from the applicable standard of care.

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. 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, and 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.

8. Perform social media/internet search including Facebook, Instagram, etc which may provide information as to the dog in question, the owner of the dog and the behavior of the dog as well as that of individuals towards the dog in question or the dogs in general.

9. Secure any agreements executed by the dog owner, rescue, breeder and/or pet shop.

10. The mechanics of the incident as well as any actions of interactions that occurred leading up to the incident.

11. Any posted signs regarding a dog such as "Beware of Dog".

12. Any photographs of the injuries, including the bite marks that could be of assistance in determining the extent of the alleged attack, the mechanism of the alleged attack, etc.

13. Status of each party as well as witnesses.

_____ _____

Carol Ann Murphy has extensive trial and appellate experience in the Pennsylvania Federal and State Courts. Ms. Murphy represents contractors, business owners, product manufacturers, restaurant and bar establishments, municipalities and other governmental authorities and their officials. Also included within Ms. Murphy's client base are insurers, homeowners, industrial plants, apartment complexes, animal owners and rescuers, and vehicle operators.

Ms. Murphy has experience in all trial, appellate and mediation forums including arbitration hearings (UM/UIM, state court and binding high/low), jury and bench trials and appellate courts.

Ms. Murphy has lectured to attorneys for CLE credits and clients on such topics as liquor liability, municipal liability, dog bite liability, premises liability, civil procedure and discovery strategy as well as having several publications on such topics.

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