RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

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I. INTRODUCTION

Joining the ranks of every other Circuit to decide the question, the Sixth Circuit answered whether a dog shot by police implicates the Fourth Amendment, and a district court within that Circuit added a wrinkle by deciding whether it attaches to *unlicensed* dogs, akin to contraband. A Utah district court weighed the urgency of finding a missing toddler against warrantless entry into a neighbor's backyard followed by a warrantless seizure of his dog. The Oregon Court of Appeals and U.S. Bankruptcy Court of Oregon touched upon the financial and surgical sequelae of a decade's worth of nuisance barking. California examined whether a proprietor broke discrimination laws pertaining to a service animal *in training*. Missouri evaluated the soundness of a rescue's repossession clause and Oregon's state and federal courts considered the right of a city to adopt out a dog owned by a once-convicted, but later retried and acquitted, woman. Georgia's high court held that an *attempted* bite establishes a vicious propensity to penetrate skin. Idaho's high court refused to hold a landlord liable as harborer of his tenant's dog or to treat Belgian Shepherds as abnormally dangerous. In addition, Colorado's high court excused from fault the owner of dogs who scared a child into traffic. Ohio followed the trend of refusing to limit veterinary bill recovery to market value, but Washington rejected mental anguish damages to a man who witnessed an allegedly botched euthanasia.

This past survey year saw several equine-related tort cases addressing regularly litigated issues in the now predominant equine liability statutes that exist in forty-eight of fifty states, as well as addressing common law tort principles where there is no such statute. Cases involving loose horses reinforce the importance of control over the care and keeping of the escaped horse in determining whether there is a duty of care to the plaintiff. On the insurance front, two cases considered and rejected insurance companies' denial of coverage due to untimely notice of a claim by an animal advocacy group sued for RICO violations and denial of coverage for dog-bite liability due to failure to disclose prior biting incidents.

II. ANIMAL TORT LAW

1. *Officer-Involved Animal Shootings*

During this survey period, the Sixth Circuit finally had an opportunity to examine Fourth Amendment consequences of police slaying dogs in *Brown v. Battle Creek Police Department*.[1] The Battle Creek Police Department (BCPD) executed a search warrant at the residence where Vincent

1. 844 F.3d 556 (6th Cir. 2016).

Jones, a known gang leader and drug dealer, reportedly lived. Though they observed two pit bull terrier-type dogs barking at the living room window, the officers used a battering ram to breach the front door, prompting the dogs to react. The male dog barked at the officers, standing his ground in the entryway except for "a few inches." The officer who shot the male classified the behavior as a "lunge." The female dog ran into the basement.[2] Though Officer Klein wounded the ninety-seven-pound, unleashed, male dog, causing him to retreat to the stairway, and even though the dog did not then present a direct, imminent threat, he prevented officers from sweeping the basement, stymieing their efforts to secure the residence. Thus, lethal force of two additional shots by Klein was justified even though the male dog had just turned his body and barked.[3] As to the fifty-three-pound, unleashed, female dog, though she had run to the basement and stayed there while the officers secured the upstairs and killed the male dog, whereupon she simply stood in the middle of the basement and barked, the court deferred to the officers' testimony that they were "unable to safely clear the basement" with her there. Hence, the court deemed it reasonable for Klein to shoot the female dog, as well.[4] Sadly, that shot did not kill her, so she ran to hide in a corner of the basement, but this kept Officer Young from searching that area. When she moved in his direction, he shot her, followed by Officer Case shooting her a third time to "put her out of her misery" as she had "blood coming out of numerous holes." The court deemed all three discharges authorized, including the one that caused her death.[5]

The Browns sued individual officers under 42 U.S.C. § 1983, asserting Fourth Amendment seizures in the slaying of the two dogs and breaching the front door after Mr. Brown, who had been arrested just outside the dwelling, offered his key to the officers. They also asserted a *Monell* claim against the city due to lack of training to address what they characterized as the known risk of constitutional injury officer-involved canine shootings.[6] After the trial court dismissed all claims, the Browns appealed.[7] As a matter of first impression, the Sixth Circuit joined all sister Circuits (viz., District of Columbia, Second, Third, Fourth, Seventh, Ninth, and Tenth) by finding "a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized."[8] As of 2013, the date of the incident, neither the U.S. Supreme Court nor the Sixth

2. *Id.* at 563.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 564.
7. *Id.*
8. *Id.* at 566.

Circuit had determined whether it was clearly established that seizing a dog triggered the Fourth Amendment; however, every other circuit and a district court within the Sixth Circuit had, sufficing to put the officers on notice of such constitutional directive.[9]

Turning then to whether the officers violated this clearly established right, the Sixth Circuit considered the reasonableness of the slayings in light of any imminent threat to a reasonable officer on the scene.[10] While crediting the Ninth Circuit's assessment that shooting dogs constitutes a "severe intrusion[] given the emotional attachment between a dog and an owner," the *Brown* court found no admissible evidence sufficient to create a genuine issue of material fact to persuade a reasonable jury to return a verdict in the Browns' favor, a holding ostensibly fashioned in part from the imminent threat created *not of the dogs*, but of Vincent Jones, or, to be precise, Jones's gang associates expected to be at the home or nearby during the raid.[11] Additionally, the court found probative the testimony of Officer Klein, who deposed to the dogs' consistent and aggressive barking, lunging toward the windows as the officers approached, rushing to the front door after the breach, and otherwise standing their ground.[12] While Mr. Brown offered testimony challenging the timing of the entry-level gunshots and whether the dogs were barking as alleged by the officers, he could not rebut the officers' testimony that the dogs threatened the officers' safety. For that reason, the appeals court determined that the trial court properly granted summary judgment.[13]

In reaching the foregoing conclusions, the Sixth Circuit distinguished the Ninth Circuit's *Hells Angels* decision,[14] which declared it unreasonable to kill guard dogs of whose existence the officers were aware a week prior to executing the warrant. In contrast, because the BCPD officers only learned of at least one dog on the way to the raid, they lacked meaningful time to formulate a plan to enter without killing the dogs while at the same time thwarting the suspects' escape from the premises, destruction of evidence, or preparing to ambush the officers.[15] Breed discrimination also informed the Circuit's ruling, given its discussion of the Fourth Circuit's *Altman* decision[16] stating that pit bulls were a "dangerous breed of dog." The court held that "confront[ing] two large pit bulls for the first

9. *Id.* at 567.
10. *Id.*
11. Jones was apprehended *en route* to the residence. *Id.* at 568–69.
12. *Id.* at 569.
13. *Id.* at 570.
14. San Jose Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005).
15. *Id.* at 570–71.
16. Altman v. City of High Point, 330 F.3d 194 (4th Cir. 2003).

time in an unsupervised environment where they were unleashed and in an enclosed space with the officers," coupled with:

> Jones' criminal history, gang affiliations, the types of drugs he was suspected of distributing, the fact that the officers had no time to plan for the dogs, in addition to the officers' unrebutted testimony that the dogs either lunged or were barking aggressively at the officers, the nature and size of the dogs, the fact that the dogs were unleashed and loose in a small residence, all culminate into a finding that the officers acted reasonably when they shot and killed the two dogs.[17]

The Sixth Circuit affirmed dismissal of the *Monell* claim as well given the lack of evidence that the City of Battle Creek acted with deliberate indifference to historical constitutional abuses of which it would have been clearly on notice that deficient training would likely promote further injuries.[18] Though officers would tally and compare canine body counts, the Browns failed to persuade the court that "the need" for a specific policy or training "was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great that the [City] as an entity can be held liable here for the extent of [Plaintiffs'] determined damages."[19] Had the Browns been able to prove systemic or widespread participation in the tally system that the police department's supervisory personnel sanctioned or even knew existed, a different outcome might have been obtained.[20] Yet, given the *Brown* court's earlier analysis clearing the officers of violating the Browns' Fourth Amendment rights, municipal liability would not arise as a matter of law, because even a policy encouraging a tally system or knowingly failing to instill canine neutralization training was not causally blameworthy; being the moving force behind *constitutional* conduct fails to state a claim.

After *Brown*, a district court in the Sixth Circuit decided another shooting case that raised the issue of whether the same protections apply to unlicensed dogs. *Smith v. City of Detroit*[21] examined the claim of Nikita Smith and Kevin Thomas, who sued the City of Detroit and numerous police officers when they shot and killed three dogs—Debo, a pit bull terrier-type dog; Smoke, a Rottweiler; and Mama, a pit bull terrier-type dog—during the execution of a search warrant at a residence at which Smith and Thomas were squatting.[22] Three days before executing the warrant, a confidential informant shared that he "thought he heard a

17. *Id.* at 572.
18. *Id.* at 574.
19. *Id.* (quoting Leach v. Shelby Cty. Sheriff, 891 F.2d 1241, 1248 (6th Cir. 1989)).
20. *Id.* at 574.
21. 2017 WL 3279170 (E.D. Mich. Aug. 2, 2017).
22. *Id.* at *1.

small dog" at the dwelling from which marijuana was allegedly dealt.[23] The plan to neutralize the small dog was to "either shoot [it] or kick [it] away."[24] After knocking and announcing, officers heard barking from more than one large dog, yet they did not alter the plan, citing concern that the occupants would destroy evidence. Smith claimed that she called out to officers that she was going to secure the dogs before they entered and that she then relocated Debo and Mama to the basement, pushing the stove in front of the stairs leading to it, and ensuring that Smoke was behind a closed door in the bathroom.[25] Unfortunately, by the time they entered, Debo had pushed aside the stove and escaped from the basement. Smith claimed Debo stood or sat by her when an officer killed him with several rounds to the head.[26] Officer Morrison testified that Debo charged aggressively, prompting him to fire at Debo's legs to avoid striking Smith, who stood behind him.[27] Morrison then alleged he asked Smith to "put the dog up," at which point Smith took Debo to the kitchen but lost control, allowing Debo to charge Officer Gaines. It was then that Morrison killed Debo.[28]

As the officers continued to clear the residence, Morrison heard barking in the bathroom and cracked the door. He saw Smoke, whom he described as a vicious, growling dog ready to attack, but no people inside. Smoke then "amazing[ly]" opened the closed bathroom door himself, though this detail was not found in any police reports.[29] Although Smoke was trapped between the inward-opening door and vanity, to ensure he could not break free, and to end his suffering from prior gunshots, officers killed him.[30] Smith later stated that she did not know how to handle or control Smoke, because he was not her dog.[31] Officer Paul then attempted to enter the basement but encountered Mama in the stairway. Though still ten to twenty feet away from Paul when he fired his weapon, he claims he shot Mama as she climbed the stairs three to five feet toward him. Police found no narcotics or individuals in the basement and less than twenty-six grams of marijuana in the residence. Smith's misdemeanor charges were dismissed when the officers failed to appear in court to testify against her.[32]

23. *Id.* at *2.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at *3.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

The *Smith* opinion raises a novel licensing argument that may prompt a new defensive trend. The defendants successfully argued that the dogs were contraband unprotected by the Fourth Amendment because Smith and Thomas failed to license them. Citing *Illinois v. Caballes*,[33] the district court agreed.[34] Failure to license constitutes a misdemeanor under Detroit and Michigan law,[35] which also deems unlicensed dogs public nuisances.[36] Delving deeper into the statutory language, the district court noted that the Michigan Dog Law did not prevent the owner of a *licensed* dog from recovering against any police officer or other person to recover the value of a dog illegally killed by same, while also remarking that nothing in the Michigan code authorized officers to seize *unlicensed* dogs.[37] Indeed, though a 2014 amendment excised language mandating that sheriff's deputies search out and exterminate unlicensed dogs, and that the law required due process prior to killing unlicensed dogs, the court nonetheless ruled against the plaintiffs.[38]

A matter of first impression, the *Smith* court recognized that only one other court looked at this question in dictum, *Pena v. Village of Maywood*.[39] *Pena* cited *United States v. Janik*,[40] which found no lawful property interest in a disassembled submachine gun. Following this logic, the district court held that Debo, Smoke, and Mama "present[ed] a danger to the public similar to an unregistered gun." Had the dogs been licensed, "the police may have had advance notice that they existed."[41] The court does not explain how foreknowledge would have caused the officers to deviate from the only, evidently inadequate, plan available to the officers, i.e., to kill the dogs or kick them aside. Nor does it discuss *Brown v. Muhlenberg Township*,[42] which found that, though unlicensed, the Browns had a possessory interest in Immi and stating, "Officer Eberly argues that an unlicensed dog under Pennsylvania law is as a matter of law an abandoned dog. We find no authority for this proposition and, accepting the evidence tendered by the Browns, are unpersuaded that Immi should be regarded as having been abandoned."[43]

33. 543 U.S. 405, 408 (2005).
34. Smith, 2017 WL 3279170, at *5–6.
35. Mich. Comp. Laws Ann. § 287.262; Detroit City Code § 6-2-1(a).
36. Mich. Comp. Laws Ann. § 287.277.
37. *Smith*, 2017 WL 3279170, at *7.
38. *Id.* at *6.
39. 2016 WL 1019487 (N.D. Ill. Mar. 15, 2016) (asking, without answering, the question of whether an unlicensed pit bull constituted contraband).
40. 723 F.2d 537, 547 (7th Cir. 1983).
41. *Smith*, 2017 WL 3279170, at *7.
42. 269 F.3d 205 (3d Cir. 2001).
43. *Id.* at 210 n.1; *see also* Roos v. Loeser, 183 P. 204 (Cal. Ct. App. 1919) and Scharfeld v. Richardson, 133 F.2d 340 (D.C. Cir. 1942) (rejecting that failure to license bars plaintiff

The court nonetheless proceeded to analyze the Fourth Amendment claim, assuming the dogs were not contraband. In granting qualified immunity to the shooting officers, *Smith* held that while the Sixth Circuit had clearly established that citizens have a Fourth Amendment right against unreasonably seized dogs, no circuit had extended such holding to *unlicensed* dogs.[44] On the merits, the court found no evidence to rebut that Mama obstructed the officers' ability to clear the basement or that she presented an imminent threat when ascending the stairs; nor that Debo escaped Smith's hold and charged the officers before being shot in the doorway between the dining and living rooms.[45] The defendants conceded that a genuine issue of material fact existed as to Smoke.[46] The court dismissed the *Monell* claim, finding that "one example in which the City settled with a dog owner" would not establish a pattern of categorical violations of dog owners' rights.[47] On the state claims, the court held that Michigan law does not permit recovery of emotional damages for injury to animals and dismissed the claim for intentional infliction of emotional distress.[48] No conversion would lie, either, based on the court's earlier determination that the plaintiffs had no property interest in unlicensed dogs and that the officers had a privilege to dispose of them.[49] Alternatively, the court also granted governmental immunity to the officers' discretionary acts.[50]

The District of Utah examined *Kendall v. Olsen*.[51] Salt Lake City Police Officer Brett Olsen patrolled on motorcycle for a missing, nonverbal toddler, stopping house-to-house and knocking on doors to inquire.[52] When he knocked on the front door to Sean Kendall's property, about ten houses from the child's residence, he received no response, so he entered through an unlocked gate into Kendall's backyard and searched a shed, wherein he found no one.[53] As he turned to leave the shed, he observed a ninety-pound Weimaraner running at him barking loudly from twenty to twenty-five feet away.[54] Believing he could not outrun the dog to the gate, Olsen stomped his feet and took an aggressive stance, but such behavior did not deter the dog, who continued to close on his position,

from recovering damages for wrongful killing of dogs, albeit not in Fourth Amendment context).

44. *Smith*, 2017 WL 3279170, at *8.
45. *Id.* at *10.
46. *Id.*
47. *Id.* at *11.
48. *Id.*
49. *Id.* at *12.
50. *Id.*
51. 237 F. Supp. 3d 1156 (D. Utah 2017).
52. *Id.* at 1160.
53. *Id.* at 1162.
54. *Id.*

prompting him to fire twice, killing the dog.[55] The missing boy was eventually found sleeping in his family's basement underneath a box.[56]

In granting qualified immunity to Olsen, the district court held that even if his entry to Kendall's backyard and shed constituted a search of protected Fourth Amendment curtilage, exigent circumstances to locate the missing child (who had reportedly been gone for about an hour when Olsen began canvassing, the time at which the likelihood of a positive outcome to the search drops precipitously) excused the warrantless intrusion.[57] As to the reasonableness of that intrusion, Kendall argued that blanket searches of residential yards a certain radius from the missing child's home were per se unreasonable. Further, aside from access and proximity, he argued that police needed to articulate a reason to believe the toddler was in a particular yard.[58] The court, however, held that Olsen and the city confined the search to areas where the toddler may have ambled within an hour's span, intruding no greater than necessary by first knocking for permission and then conducting a quick sweep of backyards, without entry into dwellings.[59]

Though since-reversed Tenth Circuit case law required law enforcement to state a reasonable basis to associate the emergency with the place to be searched, a 2006 decision supplanted that test with the less exacting and general requirement that "the manner and scope of the search [must be] reasonable."[60] Additionally, the court granted qualified immunity due to the lack of clearly established law stating that an officer may not sweep open and accessible nearby backyards when searching for a non-communicative, missing toddler without more to commend the action than proximity.[61] As for the Fourth Amendment seizure of the dog, officer safety prevailed over the admittedly serious intrusion occasioned by the seizure given uncontradicted evidence that the dog presented an imminent threat to Olsen. In an interesting variation on the theme of breed propensity often seen in these opinions, Kendall argued that Olsen should have known of the Weimaraner breed's reputation for docility and warmth, a factor counseling use of nonlethal force and deescalation. This prompted the court to take a breed-neutral, yet weight-specific approach:

> Just as breeds with reputations for being dangerous or aggressive may act in friendly or docile ways in many circumstances, so too can dogs typically

55. *Id.*
56. *Id.*
57. *Id.* at 1164–65.
58. *Id.* at 1165.
59. *Id.* at 1165–66.
60. *Id.* at 1166.
61. *Id.* at 1167.

> thought to be warm and docile act aggressively at times. Regardless, officers are not charged with developing specific expertise in the nuances between breeds. To be sure, had Olsen been greeted with a 5-pound Pomeranian the analysis would be different, but he was confronted with a large, 90-pound dog, and it was reasonable to assume the charging dog posed a threat.[62]

While the dog may have been genteel to neighbors, the shooting officer knew nothing of the animal's reputation to allow him to better read the dog's signalment.[63] Citing *McCarthy v. Kootenai County*,[64] the court found that Olsen did not act unreasonably by failing to initially use non-lethal force, such as a baton or Taser.

2. *Nuisance Barking*

Plaintiffs Dale and Debra Krein lived next to defendants Karen Szewc and Jon Updegraff. The defendants bred Tibetan Mastiffs, who barked uncontrollably when left alone. Though the barking began in 2002, it took until 2004 and 2005 for Jackson County, Oregon, to cite Szewc for nuisance barking. In 2006, a hearing officer found her in violation of Jackson County Code § 612.09(c)(2), deeming such unbridled vocalization a public nuisance, fining her, and ordering the dogs moved or debarked.[65] The officer rejected the farm-use defense of OR. REV. STAT. § 30.935-.936, which rendered invalid any ordinance or regulation making a farm practice a nuisance or trespass and, further, which barred any private right of action based thereon. The Oregon Court of Appeals affirmed the officer's decision without opinion in *Szewc v. Jackson County*.[66]

Six years after the hearing officer's decision, in 2012, the Kreins sued the Szewces in state court for over a decade of disruptive canine vocalizations, claiming intentional and maliciously inspired nuisance, and seeking damages for barking from 2002 to 2012. They also sought an injunction preventing the defendants from having any dogs who bark so as to disturb their neighbors. The Kreins moved for partial summary judgment as to barking between 2002 and 2006, asserting preclusive effect of the hearing officer's decision and for summary judgment as to barking thereafter. As to Szewc, the court granted the motion for pre-2006 barking, but not as to Updegraff, who was not a party to the 2006 proceeding. The court also denied the Kreins' motion as to post-2006 matters.[67] The defendants' motion to dismiss on grounds of the statute of limitations was also rejected. The trial court found that one may not acquire a prescriptive

62. *Id.* at 1169.
63. *Id.*
64. 2009 WL 3823106, at *6 (D. Idaho Nov. 12, 2009).
65. Krein v. Szewc, 287 Or. App. 481, 483 (Or. Ct. App. 2017).
66. 222 Or. App. 525 (Or. Ct. App. 2008).
67. 2013 WL 12126292 (Or. Cir. Ct. Sept. 19, 2013).

right to maintain a public nuisance no matter how long maintained, thereby allowing the Kreins to seek damages from 2002.[68] A jury found actionable nuisance from 2002 to 2015 based on negligence, nuisance, and intentional conduct. Following trial, the bench held an injunction evidentiary hearing, ordering the defendants to debark all adult Mastiffs or remove them from the premises.

On appeal, the defendants urged reversal of the injunction based on the Kreins' failure to expressly plead they had no adequate remedy at law, an argument rejected by the doctrine of trial by consent. The court also dismissed the contention that the Kreins were forced to elect between compensatory and injunctive remedies, holding instead that they were not mutually exclusive and explaining that because the monetary award recompensed retrospective injury only, and the injunction sought to stem prospective harm, no inconsistency arose. Surprisingly, the defendants "d[id] not otherwise challenge the propriety of an injunction" that required nontherapeutic devocalization.[69]

In the midst of the civil litigation that commenced in February 3, 2012, on March 14, 2014, the Szewces filed for Chapter 13 bankruptcy. In June 2014, the Kreins lodged an adversary complaint seeking nondischargeability of the entire judgment under 11 U.S.C. § 1328(a)(4), which excepts debts for restitution or damages awarded in a civil action against a debtor as a result of willful or malicious conduct by the debtor that caused personal injury to an individual. It was not until April 2, 2016, however, when the jury ruled in favor of the Kreins for $238,942, that the adversary complaint could ripen. As the undifferentiated judgment failed to specify with exactness what portion of the damages pertained to barking prior to filing of the Chapter 13 petition, the bankruptcy court apportioned damages per diem,[70] excluding $34,643 as post-petition debt, and rejecting the debtors' argument that "their post-petition tortious conduct should be wrapped into a potentially dischargeable pre-petition claim simply because Plaintiffs were on fair notice the dogs would likely keep barking post-bankruptcy."[71]

The court analogized Section 1328(a)(4) to the willful and malicious injury exception of 11 U.S.C. § 523(a)(6), which requires dual intent—to perform both the act leading to injury as well as the injurious consequences thereof.[72] It further examined whether the Kreins proved a "personal injury," defined to mean bodily injury, not invasion of property or business interests, looking to Oregon nuisance law, upon which the state court judgment was rendered. Finding that the state court record

68. 2012 WL 12886623 (Or. Cir. Ct. May 3, 2012).
69. Krein v. Szewc, 281 Or. App. at 486 n.2.
70. $46.19 per day. *Id.* at nn.9 & 10.
71. *In re* Szewc, 568 B.R. 348, 356 (Bankr. D. Or. 2017).
72. *Id.* at 357–58.

did not dispose of the issue of whether the debtors interfered with a primarily personal interest, because the "special injury" pleaded for private nuisance involved interference with use and enjoyment of *property*, the court nonetheless found the Kreins proved one: "becoming prisoners in their own homes, rendering them mentally and physically debilitated."[73] Further, the "evidence adduced easily satisfie[d] either the willful or malicious requirement" in Section 1328(a)(4).[74] Accordingly, the court held that damages from March 23, 2006, through March 14, 2014, nondischargeable. Should the debtors complete their Chapter 13 plan, $69,701 of the $238,942 in damages would be dischargeable. The rest, $134,598 plus interest, would be nondischargeable.[75]

3. *Disability Discrimination*

Cognitively disabled and autistic twenty-year-old Joey Miller sued Fortune Commercial Corp., owner of a chain of Seafood City markets, among other defendants, claiming denial of service when he tried to enter two different stores with his then one-year-old German Shepherd Dog mix named Roxy. Accompanying them was Miller's stepfather (also his guardian ad litem) entering with the intent to buy seafood.[76] Though Miller's family worked with a Petco trainer to teach Roxy basic obedience, they had her only about two months before the incidents.[77] In dismissing Miller's lawsuit, the California Court of Appeal found no violation of the Unruh Act, which prohibits discrimination against disabled individuals by places of public accommodation and adopts the Americans with Disabilities Act (ADA) as a platform for actionable discrimination. While the Unruh Act and ADA do not specifically speak to service dogs, 28 C.F.R. § 36.104 does, defining them as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. . . ."[78] The U.S. Department of Justice published a guidance stating that service-animals-in-training were not protected under the ADA.[79] Holding that Roxy was not fully trained but still in the process of achieving such status, Miller's claim failed as a matter of law.[80]

Miller's claim under the California Disabled Persons Act (DPA or Act) similarly faltered, even though the Act, which defined "service animals" to include a guide dog for the blind, signal dog for the deaf, or dog "espe-

73. *Id.* at 361–62.
74. *Id.* at 362–63.
75. *Id.* at 363.
76. Miller v. Fortune Commercial Corp., 15 Cal. App. 5th 214, 218 (Cal. Ct. App. 2017).
77. *Id.* at 227.
78. *Id.* at 223.
79. *Id.* at 224.
80. *Id.* at 224–25.

cially trained" for the purpose of aiding other disabled persons, also extended protection to those dogs still in training. Unfortunately for Miller, he could not prove that Roxy entered either of the Seafood City markets "for the purpose of training" her as a service dog for Miller, or that his stepfather was "licensed" to train guide dogs or "authorized" to train signal or service dogs.[81] The defendants urged that Miller's cognitive disabilities rendered him incapable of training Roxy due to his low IQ, so that he could not be considered Roxy's trainer for purposes of the DPA.[82] Though the stepfather was also Miller's guardian ad litem and authorized by Miller to escort Roxy into the store, such an interpretation of "authorize" under the DPA was held "entirely inconsistent with the manifest intent of the statute, which is to allow service-animals-in-training to complete their training in such a way that it does not jeopardize other public policy goals, such as public health."[83] The court urged that Miller's interpretation "would make a mockery of the statute, especially in light of the DPA's requirement that a guide dog must be trained by a licensed professional trainer."[84] Miller's outrage claim, hinging upon proof of an Unruh Act or DPA violation, similarly failed.[85]

4. *Custodial Interference*

Jamie Patterson sued Rough Road Rescue (Rescue) for replevin and conversion when it repossessed Mack, a boxer-mastiff mix, from Patterson for repeated breaches of its adoption contract after Mack bolted and escaped from her yard, causing Patterson to be cited and plead guilty three times for dog running at large.[86] The Rescue asserted that Patterson retained a right to possess and own Mack only subject to conditions subsequent, *viz.*, compliance with the covenants of the adoption contract, including specifically to "comply with all laws and ordinances in force in the area in which I reside, applicable to said animal" and to fence the yard by a date certain. Patterson claimed that ownership was not conditional, notwithstanding that she agreed that "any noncompliance of this adoption contract . . . may void this contract" and "could immediately give a representative of Rough Road Rescue, Inc. the authority to take possession of said animal."[87] The Rescue counterclaimed for breach of contract.

Ruling that the contract was governed by the Uniform Commercial Code and that Mack was a "good" and the transaction a "sale," the trial

81. *Id.* at 225–26.
82. *Id.* at 228.
83. *Id.* at 226.
84. *Id.*
85. *Id.* at 229.
86. Patterson v. Rough Road Rescue, Inc., 2017 WL 3138002, at *1, *3 (Mo. Ct. App. 2017).
87. *Id.* at *2–3.

court ruled in favor of Patterson as sole owner, ordering Mack's return.[88] One of the Rescue officers was even jailed for contempt when she refused to relinquish Mack to Patterson. At the time of appeal, Mack remained in possession of the Rescue per supersedeas bond.[89] The Missouri Court of Appeals affirmed, finding the contract ambiguous and imprecise. For instance, it found that the phrase "will provide humane care, giving the animal proper food, water, shelter, exercise and love" to be "aspirational, but subjective"; that the "repossession" provision used equivocal language like "may" and "could" in the context of voiding the contract and giving the Rescue authority to repossess; and reference to the adopter as "owner" conceded that Patterson had full and exclusive rights in Mack.[90] Construing vagaries against the Rescue, and noting that a former board member of the Rescue testified for Patterson in stating the Rescue's intent was to find a permanent home for Mack, the court, quoting the photographer, writer, and host of the annual Westminster Kennel Club Dog Show Robert A. Caras, who said, "Dogs are not our whole life, but they make our lives whole," directed Mack to be returned to Patterson.[91]

The saga of Silvia Milburn of Oregon presents two important issues: (1) confiscation and forfeiture following conviction and before acquittal on appeal; and (2) whether animal control must hold the seized animals and not adopt them out without providing post-conviction due process pending appeal. Milburn was charged and convicted of animal abuse under Or. Rev. Stat. § 167.315, upon which a municipal court sentenced her and ordered forfeiture of her dog Sam per Or. Rev. Stat. § 167.350.[92] That day, Milburn appealed to circuit court and moved for a stay of execution of the sentence pending appeal. This request was denied and, upon delivery of Sam to Linn County Animal Control by the Lebanon Police Department, Sam was rehomed.[93] Milburn's appeal from Lebanon Municipal Court to the Linn County Circuit Court for a de novo appeal resulted in acquittal by jury. Milburn then moved for return of Sam under Or. Rev. Stat. § 133.633, concerning return or restoration of seized things, stating Sam was no longer needed as evidence and she was lawfully entitled to possess him. The circuit court ordered the city to return Sam to Milburn.[94] The city refused and appealed that order.

Meanwhile, Milburn sought (but did not obtain) a peremptory writ of mandamus. Desperate to recover Sam, Milburn filed a federal civil action

88. *Id.* at *3.
89. *Id.*
90. *Id.* at *6.
91. *Id.*
92. City of Lebanon v. Milburn, 286 Or. App. 212, 213–14 (Or. Ct. App. 2017).
93. *Id.*
94. *Id.* at 214.

against the city, claiming a violation of her procedural due process rights.[95] The city moved to dismiss for failure to state a claim, asserting that she did not challenge a specific procedure as inadequate or, alternatively, that insufficient post-deprivation remedies existed under state law. On August 3, 2016, the district court dismissed Milburn's case with leave to amend.[96] After amending to state that Milburn suffered injury from an official policy or practice, the court again dismissed her suit, finding that she challenged not the process (or lack thereof), but the result of that completed procedure.[97] "Attacking the result instead of the process of a procedure does not state a procedural due process claim.[98] Next, the court turned to the *Rooker-Feldman* doctrine, which holds that federal courts lack the subject matter jurisdiction to hear questions inextricably intertwined with a forbidden de facto appeal of a state court decisions.

In granting dismissal of her injunction claim under this doctrine, the court held that Milburn could not in essence treat the U.S. District Court for the District of Oregon as an Oregon Court of Appeals. However, the court refused to dismiss her damages claim of $76,000 since it was not affected by the state court's denial of mandamus relief. "[W]hether plaintiff's procedural due process rights were violated by defendant's failure to follow the state court order and whether plaintiff was entitled to mandamus relief are two separate questions."[99] While the damages claim might be intertwined with the criminal court's order to return the dog, Milburn did not lose on that issue in state court, so *Rooker-Feldman* would not apply as a matter of law.

Milburn amended her complaint a second time, alleging that the city deprived her of due process by not building in additional safeguards similar to those found in civil forfeiture proceedings, to guard against Sam's rehoming pending appeal of her conviction to circuit court. In denying this third motion to dismiss, the court pointed to Oregon's forfeiture statutes (OR. REV. STAT. §§ 131.582,[100] 167.347[101]). OR. REV. STAT.

95. Milburn v. City of Lebanon, 221 F. Supp. 3d 1217, 1218–19 (D. Or. 2016).
96. Milburn v. City of Lebanon, 2016 WL 4163551 (D. Or. July 3, 2016).
97. *Milburn*, 221 F. Supp. 3d at 1222.
98. *Id.*
99. *Id.* at 1223.
100. This section pertains to criminal forfeitures of all types of property and requires the district attorney to present the forfeiture to a grand jury for indictment. If returning an indictment, and the forfeiture is contested, the forfeiture proceeding and underlying criminal case must be tried in the same proceeding. The burden of proof is beyond a reasonable doubt.
101. This section provides for animal forfeiture prior to disposition of certain animal-related criminal charges brought under state law, such as OR. REV. STAT.§ 167.315 (with which Milburn was charged), placing the onus on the county or animal care agency to petition the court for such relief upon establishing probable cause to believe a criminal violation occurred and giving the owner the right to post a bond to cover costs of care through date of trial.

§ 167.347 permits forfeiture while certain animal abuse charges are pending. The city never initiated such forfeiture proceedings, but instead relied on the municipal court sentence. While a forfeiture order may validly inhere in a criminal sentence in an animal abuse case, once overturned on appeal, "the entire sentence—including the forfeiture provision—must be vacated."[102] In weighing the *Mathews* factors to determine if additional procedural safeguards were due Milburn, the court acknowledged the heightened private interest in pets, who "have a value in excess of that which would ordinarily attach to property, because unlike other forms of personal property, they are not fungible."[103]

Further, in an unusual wrinkle in criminal appellate procedure in Oregon, Milburn enjoyed the right to de novo appeal of her municipal court conviction, conferring presumptive innocence and treating her "appeal" as unlike a typical one where a deferential scope of appellate review would otherwise apply. This de novo appeal increased the risk of erroneous deprivation, tipping the scales further in her favor.[104] Though the city argued that Milburn received the "pinnacle of all process—a [criminal] jury trial" prior to the forfeiture order, the court noted that such determination pertained to her guilt, not the taking of Sam and, furthermore, the forfeiture statute (Section 167.347) provided an opportunity for the animal owner to post a bond to pay costs of care in the event she were acquitted, a mechanism denied Milburn here.[105]

On the *Monell* claim, the district court found grounds to support that the city had an official policy grounded in deliberate indifference to the rights of individuals like Milburn when, "pursuant to official policy, it executed the terms of plaintiff's municipal-court sentence before her circuit-court trial was complete."[106] Last, the city argued that Milburn had due process per Section 133.633, which provides for the return of seized property on motion within ninety days of notice of seizure and noting that Milburn failed to timely move for such relief. Calling dismissal on such grounds "positively Kafkaesque," the court noted that even Milburn did not reject the right of the city to seize Sam pending criminal charges because such pretrial motion would certainly be denied. Further, she did not benefit from the statute as she did not get Sam back.[107] The district court then stayed proceedings until completion of the state court appeal, which was resolved about one month later.[108]

102. Milburn v. City of Lebanon, 2017 WL 2219986, at *2 (D. Or. May 19, 2017).
103. *Id.* at *3 (quoting McDougall v. Lamm, 48 A.3d 312, 324 (N.J.2012)).
104. *Id.*
105. *Id.*
106. *Id.* at *4.
107. *Id.*
108. Milburn v. City of Lebanon, 286 Or. App. 212 (Or. App. Ct. 2017).

In that appeal, the city argued that the forfeiture part of the municipal court sentence was irreversible, although the part pertaining to her guilt was not. In rejecting this argument, the Oregon Court of Appeals wrestled with the tension between Section 167.350, authorizing forfeiture on conviction for second-degree animal cruelty, and Section 133.633, allowing for return of seized things the movant has a legal right to possess. As Milburn could not "continue to be subject to a punitive sanction after she has been acquitted," the court held that reversal of the lower court decree nullified it and all sequelae that flowed from the vacated conviction.[109]

5. *Bite and Fright Liability*

Rocks, a pit bull terrier-type dog owned by the Easons, bit neighbor Lori Steagald twice when she visited the Eason home and attempted to greet him by extending her arm in his direction.[110] The trial court granted summary judgment to the Easons, and the Georgia Court of Appeals affirmed, finding no statutory liability under GA. CODE ANN. § 51-2-7, which states that owners or keepers of vicious or dangerous animals carelessly managed or allowed to go at liberty and injure another are liable to the person injured, barring provocation.[111] To establish scienter of vicious or dangerous propensity, Steagald identified two previous incidents about a week prior to her bite: the first day Rocks lived with the Easons, he growled and snapped at Mrs. Eason as she tried to feed him; later that day, Rocks growled, barked, and snapped at Mr. Eason when he extended his hand close to the pen.[112] As Georgia law presumes all dogs "of a harmless species," "regardless of breed," a plaintiff invoking GA. CODE ANN. § 51-2-7 must prove that the incident dog possessed peculiar, vicious propensities.[113]The Court of Appeals construed the foregoing incidents as "merely menacing behavior," holding that "the record is devoid of evidence of previous attacks on people or animals."[114] In reversing, however, the Georgia Supreme Court found that one might reasonably infer that Rocks was attempting to bite Mr. and Mrs. Eason without provocation, establishing vicious propensity to inflict the type of injury sustained by Steagald.[115] *Steagald* instructs that to survive a motion for summary judgment, the plaintiff need not furnish mirror evidence of the incident at bar.

109. *Id.* at 215–16.
110. Steagald v. Eason, 300 Ga. 717, 717 (Ga. 2017).
111. *Id.* at 718.
112. *Id.*
113. *Id.* at 719.
114. Steagald v. Eason, 334 Ga. App. 113, 115 (Ga. App. Ct. 2015).
115. *Steagald*, 300 Ga. at 720–21.

Thus, a bitten plaintiff need not prove a prior bite to prevail, but may instead draw attention to a dog's inchoate behaviors.[116]

Whitney Bright sued Roman and Natalya Maznik and their tenants James and Katherine Thomas after the Thomases' dog bit Bright when she visited Mr. Thomas at his apartment concerning an outstanding debt.[117] Though she took a default judgment against the Thomases, the Mazniks obtained summary judgment dismissal on her negligence *per se* claim that they violated IDAHO CODE § 25-2805(2). This Idaho statute provides that, "[a]ny dog which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing, is vicious," imposing a duty on harborers to securely confine the animal or face criminal sanction.[118] Taking the "one free bite approach," the trial court held that as the dog had never attacked, wounded, or bit a person before, it could not be considered "vicious." The Idaho Supreme Court affirmed, but on different grounds, *viz.*, that the Mazniks had not "harbor[ed]" the Thomases' dog, meaning that they did not "receive clandestinely and conceal, "have (an animal) in one's keeping," nor were they "protecting" an animal or "undertak[ing] to control [its] actions[.]"[119] Indeed, the lease provisions firmly placed the onus of control on the Thomases by imposing anti-nuisance and restraint conditions on keeping dogs.[120]

On the claim that the Mazniks were strictly liable at common law based on scienter of vicious propensity, again the high court affirmed, finding no evidence that the Mazniks possessed actual or constructive notice that the Thomases' dog was vicious or dangerous. If they had, summary judgment would have been improper because in Idaho, "[a] property owner may have a duty to protect others from an animal if the property owner had notice of the animal's vicious or dangerous propensity, even if the property owner is not the animal's owner."[121] Bright's contention that the Belgian Shepherd breed possessed inherent aggression known widely via a simple internet search failed to create a material fact issue, because the court repeated that, "in Idaho, 'all dogs, regardless of breed or size, are presumed to be harmless domestic animals.'"[122] Efforts to impute notice to the Mazniks through their agent, Trina Neddo of the Cashflow property management company, also did not succeed because the court held

116. *Id.* at 721–22 (citing Restatement (Third) of Torts: Physical and Emotional Harm § 23, cmt. c. "Scienter"; Restatement (Second) of Torts, § 509, cmt. g).

117. Bright v. Maznik, 396 P.3d 1193, 1195 (Idaho 2017).

118. *Id.* at 1196.

119. *Id.* at 1197 (adopting the dictionary definition and the holdings of *Markwood v. McBroom*, 110 Wash. 208 (1920) and *Hagenau v. Millard*, 182 Wis. 544 (1923)).

120. *Id.*

121. *Id.* at 1198.

122. *Id.* (quoting 4 AM.JUR.2D *Animals* § 75 (2007)).

that her awareness that the Thomases' dog would protectively bark when she knocked on the door to collect rent or her seeing a posted "Beware of Dog" sign out front were insufficient to establish *scienter* of viciousness.[123]

The case of *N.M. v. Trujillo* was covered in last year's survey.[124] This survey discusses its affirmation by the Colorado Supreme Court.[125] Alexander Trujillo's two pit bulls charged his chain-link fence, barking so aggressively as to drive eight-year-old N.M. from the sidewalk and into the street, where he was struck by a service van[126] In a two-to-one decision, the Colorado Court of Appeals found that Trujillo had no actionable duty to N.M. The Colorado Supreme Court affirmed, approaching the question through the lens of misfeasance versus nonfeasance, or active misconduct working a positive injury to the plaintiff versus passive inaction or failure to act to protect the plaintiff from harm.[127] Only where a special relationship or "definite relation" exists between the parties, such as the recognized types of common carrier/passenger, innkeeper/guest, possessor of land/invited entrant, employer/employee, parent/child, and hospital/patient will nonfeasance violate a duty of care.[128] Absent such a relationship between Trujillo and N.M., the negligence claim was properly dismissed as a matter of law.[129]

6. *Veterinary Bills and Liabilities*

Jamie Rego sued Shawn Madalinski after her dog sustained veterinary bills in excess of $10,000 following an attack by Madalinski's dog. After the trial court fixed damages at $400, the "market value" of Rego's dog, she appealed.[130] Traditionally, Ohio does not to recognize the right to recover damages beyond "fair market value," such as the intrinsic or peculiar value of an animal to the owner. In fashioning the appropriate measure of economic damages, the Court of Appeals of Ohio set forth a rule of fact-specific reasonableness as to expenses incurred, permitting consideration of factors apart from "fair market value" to include "age of the pet, pedigree, training, breeding income, recommendation of the treating veterinarian, circumstances of the injury, and anticipated recovery."[131] Holding that "pets do not have the same characteristics as

123. *Id.* at 1198–99.
124. 2016 WL 1385610 (Colo. Ct. App.2016); *see also* Adam P. Karp, Yvonne C. Ocrant & Cody L. Lipke, *Recent Developments in Animal Tort & Insurance Law*, 52:2 TORT TRIAL & INS. PRAC. L.J. 237, 244 (2017).
125. 397 P.3d 370 (Colo. 2017).
126. *Id.* at 372.
127. *Id.* at 374.
128. *Id.*
129. *Id.* at 375.
130. Rego v. Madalinski, 63 N.E.3d 190 (Ohio Ct. App. 2016).
131. *Id.* at 192.

other forms of personal property, such as a table or sofa which is disposable and replaceable at our convenience," the court acknowledged that "the owner's affection for the animal may be considered in assessing the reasonableness of the decision to treat the animal" at a cost beyond acquisition price.[132] The matter was remanded for further hearing consistent with the ruling.

Robert Repin, a single gold prospector by trade, living in a wood cabin built by hand, adopted an orphaned Malamute puppy named Kaisa in 2001.[133]At the age of 11, Kaisa showed signs of cancer and was referred by his regular veterinarian to the Washington State University (WSU) Veterinary Teaching Hospital about two hundred miles away.[134] There, Repin met Margaret Cohn-Urbach, an Australian veterinary intern. After an oncology consult, Repin made the hard decision to euthanize Kaisa and executed a consent for euthanasia form, where WSU promised to humanely end her life. Cohn-Urbach explained Kaisa might suffer a muscle twitch and possibly a deep breath but made no mention of convulsions, her fighting to get away, or more disturbing reactions.[135]

Kaisa weighed twenty pounds. Prior to administration of 20 ccs of Euthasol, to be administered in the presence of Repin, who was present and holding Kaisa, a fourth-year veterinary student allegedly alerted Cohn-Urbach to a defective catheter that Kaisa had chewed off. Cohn-Urbach allegedly stated she would show her how to "make this one work."[136] The defendants claimed they flushed the catheter copiously to check for patency before injecting the Euthasol in the catheterized vein.[137] As the nineteenth milliliter exited the syringe, Kaisa became conscious with eyes open, looked at the catheterized leg, vocalized, and struggled to her feet. Repin physically restrained Kaisa, he claimed to keep her from mauling Cohn-Urbach, the student, and himself. Cohn-Urbach left the room to acquire more Euthasol and returned several minutes later with 15 more ccs. Injected into an uncatheterized limb, Kaisa succumbed swiftly.[138] Cohn-Urbach then offered Repin a Hefty bag within which to remove her from the hospital.

Postmortem testing by a board toxicologist, following exhumation of Kaisa's body and shipment of her limbs and heart blood, confirmed that there was a concentration of pentobarbital several orders of magnitude

132. *Id.* at 192–93 (quoting Irwin v. Degtiarov, 8 N.E.3d 234, 302 (Mass. Ct. App. 2014)).
133. Repin v. State, 198 Wash. App. 243, 248 (Wash. Ct. App. 2017). One of the authors (Mr. Karp) represented the petitioner.
134. *Id.* at 249.
135. *Id.* at 249–50.
136. *Id.* at 250.
137. *Id.*
138. *Id.* at 250–51.

higher in the catheterized limb than elsewhere, confirming perivascular administration.[139] On summary judgment, Repin's claims for reckless breach of contract, lack of informed consent, negligent misrepresentation by omission, outrage, conversion, and trespass to chattels were dismissed, leaving only professional negligence and breach of contract. With his damages also limited to strictly economic, the court rejected his right to claim any for emotional distress, leaving his claim amounting to hundreds of dollars at most, given that the actual cost of the attempted euthanasia was under $50. Repin thereafter appealed.

In a forty-one-page published opinion with two concurrences, the Washington Court of Appeals denied Repin the right to recover noneconomic damages arising from the alleged reckless and outrageous killing of Kaisa and found, as a matter of law, that the contract for euthanasia, even if materially breached, did not authorize such sums under Restatement (2nd) of Contracts § 353, rejecting law from Louisiana and Michigan, which was more favorable to recovery.[140] The court found Repin was not faced with the direct possibility of an immediate physical invasion of his person or security when struggling to control Kaisa so as to state a negligent infliction of emotional distress claim based on the zone of danger.[141] The court further concluded that Repin did not state a claim for conversion because Cohn-Urbach never exclusively possessed Kaisa and applied her to her own pleasure.[142] The court reasoned that Repin did not prove that Cohn-Urbach alleged conduct was so outrageous as to support the tort of outrage.[143] Last, his claim for lack of informed consent was deemed noncognizable, the appeals court rejecting authority from Louisiana, Montana, Pennsylvania, Illinois, and Texas.[144]

In what it called a question of first impression, the court said that Washington had not applied the "zone of danger" doctrine to medical or veterinary malpractice actions nor in the context of a bereft guardian watching his animal companion experience an agonizing death.[145] In rejecting supporting views from California and New Jersey, the court instead followed Nebraska, Connecticut, and Texas in rejecting the doctrine.[146] While the court also rejected the modern negligent infliction of emotional distress claim based on bystander liability, owing to lack of objective symptomatology, it did not venture into dictum when ac-

139. *Id.* at 253–54.
140. *Id.* at 255–59.
141. *Id.* at 259–63.
142. *Id.* at 269–73.
143. *Id.* at 265–68.
144. *Id.* at 274–78. The court also rejected the doctrine of negligent misrepresentation by omission.
145. *Id.* at 260.
146. *Id.* at 260–62.

knowledging an unaddressed open question: "We do not know if this rule extends to emotional distress suffered as a result of observing one's pet suffer."[147]

While this published opinion affirmed the trial court, it included a rarely seen (and very poignant) concurring opinion by Chief Judge George B. Fearing, who, after quoting from the stirring closing argument of U.S. Senator George Vest in what has been coined "Tribute to the Dog," wrote unabashedly "to advocate a change in the law." Chief Judge Fearing added, "Unfortunately, Washington law has strayed from [principles underlying the law of damages . . . and values basic to the law] by jaundicely viewing pets as just another piece of personal property."[148] He recommended that the Washington Supreme Court closely examine the ruling he authored (and in which two other judges concurred) to ostensibly reverse and allow owners of companion animals to recover emotional distress damages upon breach of veterinary-services contracts and in the case of veterinary malpractice. On August 2, 2017, the supreme court denied review.[149]

7. *Equine-Related Injury*

a. Claims Subject to Equine Activity Liability Acts

This year, New York became the forty-eighth state to pass an Equine Activity Liability Act (EALA),[150] a statute that grants a level of immunity to equine activity professionals and sponsors from claims brought by participants and spectators. Cases from this past survey year address commonly litigated issues under these laws, including who is a sponsor or professional entitled to immunity, who is considered a participant or spectator, and whether certain statutory exceptions to immunity apply. These cases reinforce that no two state statutes are the same or will yield consistent results.

b. Equine Activity Sponsors and Professionals

In *Dilley v. Holiday Acres Property, Inc.*,[151] the U.S. District Court for the Western District of Wisconsin evaluated whether under Wisconsin law, a property owner that does not actually provide the equine services is an "equine activity sponsor" entitled to statutory immunity. Holiday Acres

147. *Id.* at 265.
148. *Id.* at 279–80.
149. 188 Wn.2d. 1023 (2017).
150. In October 2017, New York became the forty-eighth state to enact an EALA. N.Y. GEN. OBLIG. § 18-301 to 18-303, effective Oct. 23, 2017. This leaves California and Maryland without some form of an EALA.
151. No. 12-CV-91-JDP, 2017 WL 2371295 (W.D. Wis. May 31, 2017).

Properties, Inc. was a resort that also owned separate property on which another defendant ran a separate business, Holiday Stables, providing horse-riding tours.[152] During one of those tours, the plaintiff was injured when she fell from her horse after, according to her, her guide's horse kicked her horse causing it to rear.[153] The plaintiff sued Holiday Acres, Holiday Stables, and Holiday Stable's owner for negligence, negligence per se, and willful and wanton conduct.[154]

The trial court granted Holiday Acres' motion for summary judgment because it was an "equine activity sponsor" under the Wisconsin EALA and therefore entitled to immunity for injuries caused by the inherent risks of equine activities.[155] The resort provided the land and stables, and the land and stables were the "facilities" for the "equine activity" of horse riding under the statute.[156] The court further explained that none of the statutory exceptions to immunity applied to Holiday Acres because it did not provide the horse or the equipment, did not know of a "dangerous inconspicuous condition," did not act with willful or wanton disregard for Dilley, and did not intentionally injure Dilley.[157] The court also rejected Dilley's attempt to invoke other statutory exceptions and reasons to defeat immunity: (1) the statutory requirement to post a warning sign applied to equine professionals, not sponsors; (2) the "inherent risk of equine activities" includes the potential for other equine activity participants, such as a tour guide, to be negligent, as well as the potential for a horse to be kicked causing rider injury; and (3) Holiday Acres did not "provide an equine" to Dilley because it did not own or control the horses in question, and in any event, there was no evidence that those who did failed to make a reasonable effort to assess Dilley's capacity to ride or her ability to manage the horse they gave her.[158]

The trial court further ruled that the corporate separateness of Holiday Acres and Holiday Stables could not be ignored to impose liability on Holiday Acres based on conduct by Holiday Stables.[159] That said, Holiday Stables and its owner were also entitled to immunity as "equine professionals" for all the same reasons, and more.[160] The failure to offer a

152. *Id.* at *1.
153. *Id.*
154. *Id.* at *1, *4.
155. *Id.* at *4 (citing WIS. STAT. § 895.481(1)(b)–(c) & (2)).
156. *Id.*
157. *Id.*
158. *Id.* at *4–6. Importantly, the court struck Dilley's standard-of-care expert, who opined that Holiday Stables lacked procedures that would have ensured Dilley's safety, because the expert's three-page report was merely *ipse dixit*, providing conclusory opinions without meaningful analysis. *Id.* at *2.
159. *Id.* at *6–8.
160. *Id.* at *8.

helmet or adjust stirrups did not constitute the provision of "faulty" equipment under the statutory exception to immunity.[161] As for required signage, the statute did not require posting this notice to obtain immunity, and the sign in question in any event contained the substance of the required notice, if not word for word.[162]

c. Participants and Spectators

In *Kirkpatrick v. Hidden View Farm*,[163] the New Jersey intermediate appellate court, answered a question of first impression and concluded that a child was a "participant" under the New Jersey EALA, even though he was not at the stables in question to participate in an equine activity, and instead accompanied others who were.[164] Nine-year-old Samuel Kirkpatrick, along with his brother and sister, regularly accompanied his mother Karen to Hidden View Farm where she boarded her horse and also cleaned stalls and taught lessons during the time in question.[165] The facts of the case generally describe that Karen was an experienced and knowledgeable horsewoman; she had expressly instructed her son not to run around the horses and to stay away from horses he did not know; and that on the day in question he was playing with his brother at a pond on the property.[166] Samuel eventually returned to the barn where Karen was cleaning a stall. He walked past a horse in a stall that reached out and bit him on the arm severely enough to require an ambulance ride to the hospital, stitches, an overnight hospital stay, and several plastic surgeries.[167] Samuel and Karen filed suit claiming negligence and provided expert support for their claim that the horse's prior history of aggressiveness required the stable and the horse owner to take precautionary measures to keep the horse away from others.[168]

After an extensive discussion about the history and contours of the New Jersey EALA, the appellate court affirmed summary judgment in favor of the defendant stable and stable owner because Samuel was a "participant" under the New Jersey EALA, which broadly defines "participant" to include anyone "accompanying" a "participant" in an equine an-

161. *Id.* (citing WIS. STAT § 895.481(3)(a)).
162. *Id.* at *8–9 (citing WIS. STAT. § 895.481(4)).
163. 152 A. 3d 216 (N.J. Super. Ct. App. Div. 2017), *cert. denied*, C-822 Sept. Term 2016, 078846 (N.J. May 16, 2017).
164. *Id.* at 217–18, 224.
165. *Id.* at 218–19.
166. *Id.* at 219–20.
167. *Id.* at 220–21. Factual accounts differ as to whether Samuel was simply walking past the horse or actually went into the horse's stall. *See id.*
168. *Id.* at 221.

imal activity.[169] Because Samuel's mother and sister were participants in equine animal activities as defined by statute, Samuel was accompanying "participants," thus bringing him within the statute's immunity.[170] Notwithstanding the expert support for a claim of negligence, because there were no other genuine issues of material fact that could defeat immunity from suit, including statutory exceptions to immunity, the appellate court affirmed summary judgment.[171]

Compare the New Jersey court's finding that a child on the premises who does not engage in any equine-related activity was nevertheless a "participant" with *Larson v. XYZ Insurance Co.*,[172] in which the Louisiana Supreme Court affirmed the court of appeals ruling that a plaintiff at a stable to interact with and feed treats to horses was *not* a "participant" under the Louisiana EALA.[173] However, the Louisiana court further affirmed that even if the plaintiff instead was a "spectator," genuine issues of material fact existed as to whether immunity under that part of the EALA might apply because she placed herself in an unauthorized area and in immediate proximity to the equine activity.[174] Thus, the Louisiana Supreme Court affirmed the reversal of summary judgment and allowed the plaintiff's claims to proceed.

The *Larson* decision is notable for the court's inability to agree on the correct interpretation of the scope of the statutory definition for "equine activity," which in turn affects a plaintiff's classification as a "participant" or "spectator." One concurring justice, joined by a second justice, concurred in affirming just the ruling of the court of appeal, because while he agreed that genuine issues of fact remained to be determined at trial, they were in the context of Larson acting as a "participant" in an "equine activity," not a "spectator."[175] In his view, the trial court was correct (and the court of appeals wrong) that Larson was indeed a "participant" engaging in an "equine activity" under the Louisiana EALA, and that there was evidence to support that the defendant stable was a "sponsor."[176] Another concurring justice wrote separately to criticize the other concurring opinion that Larson was a "participant," reasoning that the definition of "equine

169. *Id.* at 222 (citing N.J. STAT. ANN. § 5:15-2).

170. *Id.* at 224–25.

171. *Id.* at 225.

172. 226 So. 3d 412 (La. 2017), *aff'g* Larson v. XYZ Ins. Co., 192 So. 3d 181 (La. Ct. App. 2016). Last year's survey discussed the court of appeals decision. Karp et al., *supra* note 124, at 255–56.

173. *Larson*, 226 So. 3d at 416–17.

174. *Id.*; *see* LA. STAT. ANN. § 9:2795.3 ("The term "engages in an equine activity" does not include being a spectator at an equine activity, except in cases where the spectator places himself in an unauthorized area and in immediate proximity to the equine activity.").

175. *Larson*, 226 So. 3d at 418–19 (citing the following definition of "equine activity" in LA. STAT. ANN. § 9:2795.3(A)(3)(e): "A ride, trip, hunt, or other equine activity of any type however informal or impromptu that are sponsored by an equine activity sponsor.").

176. *Id.*

activity" must be more strictly construed and did not include petting horses and feeding treats.[177]

d. Statutory Exceptions to Immunity

In *Gadd v. Warwick*,[178] the Georgia Court of Appeals rejected the argument that two exceptions in the Georgia EALA applied to limit the immunity of the owner of horses leased to a summer camp.[179] Defendant Warwick contracted with the summer camp to provide it with horses "appropriate for children ages 7–16."[180] Plaintiff Gadd, a summer camp counselor with previous riding experience and employed by the camp to lead trail rides, was injured while riding a horse on a trail ride.[181] The horse jumped a twelve-inch stream, causing Gadd to lose his balance and fall, and the horse landed on top of him.[182] The horse in question was five years old, without substantial training, the descendant of an "athletic" horse with a reputation of being "a pretty tough horse to ride," and had insufficient conditioning and preparation when delivered to the camp for the summer.[183] However, the horse had also been in the camp program two prior summers and very likely had been on the same trail where the injury occurred.[184] The court further explained that there was no evidence of prior incidents with the horse.[185]

The Georgia Court of Appeals initially concluded that the Georgia EALA applied to provide immunity for Gadd's injuries because they resulted from the inherent risks of equine activities.[186] It then evaluated and rejected application of the exceptions to immunity invoked by Gadd. First, Warwick "provided" the horse to the camp, not Gadd, and had no role in assigning the horse to Gadd that day.[187] Thus, the exception for providing an animal and failing to reasonably to determine the participant's ability to safely participate and manage the particular horse did not apply to Warwick.[188] Second, even though the evidence might support a finding of negligence, there was no disputed issue of genuine fact that could give rise to a finding that Warwick engaged in willful and wanton disregard for Gadd's safety that caused the injury.[189]

177. *Id.* at 417–18 (citing LA. STAT. ANN. § 9:2795.3).
178. 792 S.E.2d 773 (Ga. Ct. App. 2016).
179. *Id.* at 775–76.
180. *Id.* at 775.
181. *Id.* at 774–75.
182. *Id.* at 775.
183. *Id.* at 776 & nn.2–5.
184. *Id.* at 776.
185. *Id.* at 776 & n.1.
186. *Id.* at 775 (citing GA. CODE ANN. § 4-12-2(7)(A) & (B), § 4-12-3(a)).
187. *Id.*
188. *Id.*
189. *Id.* at 775–76.

In *Tabor v. Daugherty*,[190] the Kentucky Court of Appeals addressed the same two immunity exceptions in Kentucky's version of the EALA, as well as a third exception for negligently or wrongfully injuring a participant.[191] In this case, Tabor's injuries occurred during a test ride of a horse for sale by the defendants. Tabor saw the defendants' online listing of several horses for sale and corresponded with defendant Adleta, explaining the extent of her prior horse experience and what she was looking for, giving Adleta the impression that Tabor was looking for advanced horses for herself and her boyfriend, and a beginner horse for his daughters.[192] Tabor, however, later testified that she wanted a gentle horse to begin riding again.[193] Tabor then met with Daugherty, who had talked with his business partner Adleta about what Tabor was looking for so he could have horses ready to show.[194] At that time, Tabor made statements to Daugherty that she "really hadn't ridden a horse in a while" and "wasn't that good" but "understood horse training" and that she was "old and fragile."[195] Tabor test rode a few horses and then asked about Flash who had been advertised as "super sweet and gentle" with a "wonderful temperament."[196] Flash was first ridden by others before Tabor got on.[197] At that point, the accounts of the accident diverge, but Flash began to gallop back to the group, and then toward the woods, at which point Tabor fell, resulting in broken vertebrae, broken ribs, a fractured hip, and an injured shoulder.[198]

The parties disputed whether exceptions applied to remove the defendants' immunity under the Kentucky EALA.[199] Regarding the exception for failure to sufficiently assess a participant's abilities generally and for the particular horse being ridden, the court held that Tabor's exaggerations of her experience and skill to Adleta, passed on to her business partner Daugherty, were sufficient to indicate that he was aware of her stated abilities, and he therefore had no duty to further interrogate Tabor about her ability.[200] However, the court did find a disputed issue of fact as to whether Daugherty had reasonably assessed Tabor's ability to manage the particular horse she was riding, given that she expressed concern before riding the horse, felt out of control from the moment she got

190. No. 2016-CA-000047-MR, 2017 WL 2829403 (Ky. Ct. App. June 30, 2017).
191. *Id.* at *5.
192. *Id.* at *1.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at *1–2.
197. *Id.* at *2.
198. *Id.* at *3.
199. *Id.* at *5 (citing KY. REV. STAT.§ 247.402(2)).
200. *Id.* at *7.

on, and her boyfriend thought the horse was "riding rough."[201] With regard to the exception for willful and wanton disregard for safety, the court concluded that Tabor's version of events, if true, could give rise to a finding of willful and wanton disregard for her safety, and therefore also a finding of negligently caused injury, another exception to immunity.[202] In this three-member panel of the Kentucky Court of Appeals, one judge concurred in the result only, and one just dissented, again demonstrating the divergence of opinions as to how the law applies to the facts in EALA cases.[203]

In *Penunuri v. Sundance Partners, Ltd.*,[204] the Utah Supreme Court agreed with the court of appeals decision to affirm summary judgment because no reasonable jury could find facts that would support a claim of gross negligence, i.e., "evidence that the defendant's conduct dramatically magnified the risk of harm to the plaintiff.[205] Therefore, this exception to the Utah EALA[206] did not apply. This survey previously discussed the facts of *Penunuri*.[207]

8. *Common Law Negligence-based Claims*

California does not have an EALA and continues to apply common law principles to claims of injury. In *Swigart v. Bruno*,[208] a case arising from an accident during an organized endurance horseback riding event, a division of the California Court of Appeal affirmed the application of the doctrine of primary assumption of risk to bar a negligence claim and affirmed summary judgment on claims of recklessness and having a animal with propensity for danger,[209] all based in large part on video evidence from a rider's helmet camera.[210] Plaintiff Swigart, a professional horse trainer, was injured at a designated checkpoint for the endurance ride, where she had dismounted to collect cards for the riders in her group to verify completion of the course.[211] Defendant Bruno, also a very experienced endurance rider, was in that group, two horses behind Swigart.[212] As the horses slowed, his horse bumped into the horse in front of him, that horse kicked,

201. *Id.* at *6.
202. *Id.*
203. *Id.* at *7.
204. No. 20160683, 2017 WL 3697701 (Utah Aug. 25, 2017), *aff'g* Penunuri v. Sundance Partners, Ltd., 380 P.3d 3 (Utah Ct. App. 2016).
205. *Id.* at *2, *8.
206. *See* UTAH CODE ANN. § 78B-4-202(2)(d)(i) (West).
207. Karp et al., *supra* note 124, at 258–59.
208. 220 Cal. Rptr. 3d 556 (Cal. Ct. App. 2017).
209. *Id.* at 559.
210. *Id.* at 561 n.4, 565–69.
211. *Id.* at 560–61.
212. *Id.* at 561.

causing Bruno to be thrown from his horse.[213] Bruno's horse bolted forward, striking Swigart who was on the ground.[214] The trial court granted summary judgment on all three claims brought by Swigart.[215]

On appeal, the court of appeals affirmed. In California, the doctrine of primary assumption of risk relieves a defendant of any duty to the plaintiff for injury caused by risk that is inherent in the activity in which the plaintiff chose to participate.[216] The test is "that a participant in an active sport breaches a legal duty of care to other participants . . . only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."[217] Here, whether Bruno owed Swigart a duty centered on whether the inherent risks of endurance riding included the risk of being struck by a co-participant's horse that followed other horses so closely as to come into contact with them.[218] Interestingly, Swigart's argument that this was not an inherent risk of endurance riding was soundly defeated by evidence that included a forty-minute video from the helmet camera of the rider that was behind Swigart and in front of Bruno at the time of the incident. The court found Swigart's arguments, despite expert support, lacked credibility because the video showed multiple horses and riders tailgating throughout the ride.[219] Therefore, Bruno owed Swigart no duty to protect her from the risk of the injury she sustained.[220] As to the claim of recklessness and the duty not to increase the risk of harm, here again, the helmet camera video played a role in the court's finding that Swigart failed to establish a material fact to defeat summary judgment.[221] The court also rejected Swigart's strict liability claim that Bruno possessed a horse with dangerous propensity because the horse merely behaved like a horse, namely, that his tailgating and rear-ending of other horses was not outside of the range of activity ordinarily expected in endurance riding.[222] Swigart's video evidence from a helmet camera of the ride in essence defeated her claims.

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 563.
217. *Id.* at 564.
218. *Id.*
219. *Id.* at 565–66. Notably, the court concluded that to the extent the testimony of Swigert's witnesses was inconsistent with the video, the court did not consider that testimony to create a disputed issue of fact. *Id.* at 561 n.4.
220. *Id.*
221. *Id.* at 567–68.
222. *Id.* at 569.

9. *Equine Escape*

The cases surveyed this year reinforce the importance of control over the care and keeping of the escaped horse in determining the existence of any duty of care and liability for resulting injury. In *Hendrickson v. Grider*,[223] plaintiff Hendrickson was injured when her vehicle hit two horses on the road.[224] She and her husband sued the land owner Gartner, her son-in-law Cope, and the horses' owner Grider, claiming common law negligence and violation of Ohio's Animals Running at Large statute.[225] The statute prohibits the "owner or keeper" of horses from allowing them to run at large, creates a rebuttable presumption of negligence if animals are found on the road, and gives injured parties a right of action against the negligent owner or keeper.[226] The trial court granted Gartner's and Cope's motions for summary judgment because they were not owners or keepers of the horses.[227] Aside from procedural irregularities not relevant here, the plaintiffs had argued that there were genuine issues of material fact whether Cope was Gartner's or Grider's agents and whether he was a keeper of the horses.[228] The Ohio Court of Appeals affirmed, explaining that there was no evidence that either Gartner or Cope physically cared for the horses or had a proprietary interest in them.[229] The act of allowing horses on one's land was not enough to trigger potential liability.[230] Nor was indirect interaction enough, such as wandering over to look at the horses, or trying to contact the owner to let him know the horses were loose on a prior occasion.[231] The appellate court also rejected the plaintiffs' argument that Cope as agent for Gartner or Grider was liable for their actions, citing the absence of any legal authority.[232] The plaintiffs' theory of common law negligence also failed to establish that Gartner owed any duty of care due to the absence of disputed fact to show that in this instance she should have reasonably foreseen that the horses would escape and cause injury.[233] One justice dissented on this issue, arguing that there was a question of reasonable foreseeability given

223. 70 N.E.3d 604 (Ohio Ct. App. 2016).
224. *Id.* at 609.
225. *Id.*
226. *Id.* at 609, 618; OHIO REV. CODE. ANN. § 951.02. The statute has since been amended, effective March 28, 2017, but does not impact the substance of this decision.
227. *Hendrickson*, 70 N.E.3d at 609–10, 612.
228. *Id.* at 611.
229. *Id.* at 619.
230. *Id.*
231. *Id.*
232. *Id.* at 621.
233. *Id.* at 624.

the fact that Gartner knew the horses had escaped once before and took no remedial action to prevent further escapes.[234]

In another horse-versus-vehicle case alleging common law negligence, the New York appellate court in *O'Hara v. Holiday Farm*[235] reached a similar result, but this time in favor of the horse's owner, who boarded her horse at a stable where the stable assumed full control over the confinement of the horse.[236] The doctrine of res ipsa loquitur did not apply to her because she did not have exclusive control of the horse or the barn and stalls.[237] The court also rejected the plaintiffs' attempt to assert a strict liability claim for a horse with vicious propensity, explaining that the undisputed evidence was that the horse had never previously escaped, was never violent, and had never harmed anyone; nor was there any evidence that the horse exhibited abnormal or atypical equine behavior.[238] Thus, summary judgment was appropriate.

III. ANIMAL INSURANCE LAW

In *National Union Fire Insurance Co. of Pittsburgh v. Fund for Animals, Inc.* (FFA),[239] the Maryland Supreme Court addressed that state's statutory prohibition on disclaiming insurance coverage due to late notice of claim in the absence of actual prejudice to the insurer. The case stemmed from a long and complex history of litigation between FFA, together with other animal rights groups, and Ringling Brothers and its owner Feld Entertainment, Inc. (together, Feld).[240] FFA initially sued Feld under the Endangered Species Act (ESA) for alleged mistreatment of its Asian elephants.[241] Following a bench trial, the trial judge ruled for Feld in late 2009, finding lack of Article III standing and concluding that the only plaintiff who could establish a cognizable injury was a plaintiff who had been paid for his testimony, concealed those payments, and used the United States mail system to do so.[242]

Feld filed a RICO action based on these and other facts in 2007 while the ESA case was still pending, and the court immediately stayed the case pending the outcome of the ESA case.[243] A little over two years later in January 2010, the court lifted the stay following the judgment in the

234. *Id.*
235. 147 A.D.3d 1454 (N.Y. App. Div. 2017).
236. *Id.* at 1454.
237. *Id.*
238. *Id.* at 1455.
239. 153 A.3d 123 (Md. 2017).
240. *Id.* at 126–31.
241. *Id.* at 129.
242. *Id.* at 130.
243. *Id.* at 130–31.

ESA case.[244] It was not until nearly two months after the stay was lifted that FFA gave notice to its insurance broker of the RICO case demanding coverage under the HSUS 2010 policy, under which FFA was an additional insured, as with the 2007 policy.[245] National Union's claims administrator denied coverage under both the 2007 and 2010 policies because the policies were "claims made and reported" policies, and the claim was made in 2007 but not reported until 2010.[246] The parties settled Feld's RICO claims in May 2014 for $15.75 million, and Feld dismissed its pending claim for attorney fees in the ESA case.[247] Before that, however, in 2012, FFA filed this coverage case against National Union for breach of contract in denying coverage.[248]

At the bench trial in 2015, National Union moved for judgment in its favor on the basis that it suffered actual prejudice as a matter of Maryland law in which prejudice exists if notice was not made until after a verdict or judgment was entered.[249] It argued that the lack of notice of the RICO case until after judgment was entered in the ESA case constituted actual prejudice as a matter of law.[250] Under its theory, the defense of the RICO case was substantially impacted by the adverse findings of the ESA case.[251] FFA disagreed and argued that the question of actual prejudice was a jury question because the facts did not meet the test for establishing prejudice as a matter of law.[252] The trial court granted National Union's motion for judgment, but the intermediate appellate court reversed, and the Maryland Supreme Court affirmed.[253]

Under Maryland law, an insurer seeking to disclaim coverage due to late notice must establish by a preponderance of the evidence that the delay in notice resulted in actual prejudice and that the late notice itself was the cause of the prejudice.[254] Were the case decided under Virginia law, as National Union initially argued, late notice alone, without more, may have been enough to disclaim coverage.[255] Under Maryland law, however, the Maryland Court of Appeals concluded that National Union failed to prove actual prejudice beyond mere possibility and could not show that

244. *Id.*
245. *Id.* at 131.
246. *Id.*
247. *Id.*
248. *Id.* at 131–32.
249. *Id.* at 132.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 133–34.
254. *Id.* at 134, 136 (citing MD. CODE. ANN. INS. § 19-110).
255. *See id.* at 132.

it was the late notice of the RICO claim that had prejudiced it.[256] This was because the outcome of the underlying factual findings would not have changed in the ESA case given that National Union had no right to intervene or affect the outcome of that case, and many critical facts were already established by the time it should have received notice.[257] In other words, it was not the late notice that impaired National Union's ability to defend the RICO case, but rather the fact that it had no right to participate in the ESA case.[258] In the end, National Union showed no actual prejudice and therefore National Union could not disclaim coverage under Maryland law.

In *Schultz v. Tilley*,[259] the Massachusetts Court of Appeals also ruled against an insurer's denial of coverage where a homeowner's insurance application questions were ambiguous and, under the insured's interpretation, his answers were truthful and not material misrepresentations that would render the insured's policy void.[260] There, plaintiff Schultz's two Yorkshire Terriers were attacked by the Tilleys' American bull dog while out for a walk.[261] Ms. Schultz also was injured as she tried to protect her dogs from the attack.[262] She sued the Tilleys and their homeowner's insurance company, Vermont Mutual. Vermont Mutual, in turn sought, among other claims, a declaration that the policy was void because of material misrepresentations by Mr. Tilley in applying for insurance. Following a bench trial on the coverage issues, the court entered judgment in favor of Vermont Mutual.[263]

The Massachusetts Court of Appeals reversed. In the application for insurance, Mr. Tilley had answered "no" to the question of whether his dog had a "bite history."[264] The dog, in fact, had twice previously bitten other dogs, but Mr. Tilley understood the question to ask about a history of biting humans, not a history of biting other dogs.[265] Mr. Tilly also answered "no" to whether there were "[a]ny losses, whether or not paid by insurance, during the last 6 years."[266] In fact, he had personally paid a $200 vet bill for one of the prior dog bites, but he did not understand that to be a "loss" because he thought "a loss is [when] an insurance company pays a claim."[267] The court of appeals agreed with the Tilleys that

256. *Id.* at 134, 138–39.
257. *Id.*
258. *Id.* at 142.
259. 76 N.E.3d 1051 (Mass. App. Ct. 2017).
260. *Id.* at 1054–56.
261. *Id.* at 1053.
262. *Id.*
263. *Id.*
264. *Id.* at 1052.
265. *Id.* at 1052–53, 1055.
266. *Id.* at 1053.
267. *Id.* at 1053, 1056.

these application questions were ambiguous and Mr. Tilley was entitled to the interpretation most favorable to them.[268] As a result, the court reversed judgment on Vermont Mutual's claims and ordered Vermont Mutual to provide coverage.[269]

268. *Id.* at 1055–56.
269. *Id.* at 1056.