RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

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I. INTRODUCTION

Cases in this last survey period decided many issues of first impression, such as whether Ohio's Dangerous Wild Animals and Restricted Snakes Act violated the First Amendment right against compelled association and compelled subsidization of private speech; Washington's police dog handler immunity statute barred suit against a K-9 officer who shot and killed a civilian dog in defense of his drug detection dog; Vermont should break with tradition and impose absolute common law liability for dog bites; housing a dog but not undertaking any further care makes one a statutory owner under Arizona's strict liability statute; a "one-scratch" rule exists in Rhode Island; the working dog exemption exempts strict liability under Colorado's dog bite statute; and wild alligators create actionable private nuisances.

This survey period also included application of the doctrine of occupational assumption of risk to a farrier and to a llama caretaker for vacationing owners, as well as assessment of whether a barn owner was an "employer" of an injured plaintiff who rented the barn from the owner and ran it as a boarding facility. Governmental immunity protected mounted police who allegedly injured a person in a college football crowd and a university equine reproduction lab from liability for stored semen that was lost in a fire that destroyed the lab.

The Connecticut Supreme Court wrestled with the question of whether horses are considered to have mischievous and vicious propensities, only to have the state legislature answer the question differently two months later with new legislation. Cases involving equine activity liability acts addressed definitions of key terms in respective state statutes affecting exceptions to immunity under those laws. Another case in which a dog spooked a horse causing injury addressed the question of whether the state's strict liability dog statute applied instead of the equine activity liability statute.

On the insurance coverage side, courts once again tackled questions involving bat guano and pollution exclusions in homeowners' policies, as well as coverage in auto liability policies for dog bites.

II. ANIMAL TORT LAW

A. *Government and Humane Society Liability*

The Sixth Circuit decided *Wilkins v. Daniels*,[1] in which seven "self-described exotic animal enthusiasts" brought First and Fifth Amendment challenges to the Ohio Dangerous Wild Animals and Restricted Snakes

1. 744 F.3d 409 (6th Cir. 2014).

Act, Ohio Revised Statutes Sections 935.01–935.99, which requires possessors of dangerous wild animals to register with the Department of Agriculture and microchip each animal at their own expense.[2] Those possessing dangerous wild animals at the time the law took effect on January 1, 2014, could continue to own the animals only if they acquired a wildlife shelter or wildlife propagation permit.[3] The Act provided an exemption from the permitting requirement if owners are "accredited by the Association of Zoos and Aquariums (AZA) or the Zoological Association of America (ZAA)."[4] The plaintiffs "testified that they would not be willing to join either the AZA or ZAA, whose views they abhor, because those organizations 'are at opposite ends of the spectrum.'"[5]

The *Wilkins* court rejected the plaintiffs' effort to dismantle the Act based on two First Amendment bases—"compelled association" and "compelled subsidy."[6] Despite having fifteen ways to comply with the Act, including getting a permit or satisfying one of the fourteen exemptions, one of which involved joining the AZA or ZAA, the plaintiffs urged that it forced upon them a "textbook Hobson's choice" since the permitting requirement costs too much and none of the fourteen exemptions applied except affiliating with organizations that they found objectionable.[7] However, the court found that because the Act did not penalize the plaintiffs for failure to join either association, it did not constitute the type of unlawful compulsion of concern to the First Amendment, especially in light of their "mere unwillingness to conform their conduct to the permitting requirements or the other thirteen exemptions."[8] The court also rejected the contention that the microchipping requirement constituted a Fifth Amendment physical takings requiring compensation since chip implantation did not "occupy" or in any way deprive the plaintiffs of possession of the animals.[9]

In a case before the U.S. District Court for the Eastern District of Washington on remand from the Ninth Circuit,[10] the trial court interpreted the state's police dog handler immunity statute, which bars suit against a police dog handler "who uses a police dog in the line of duty in good faith,"[11] as well as another statute, which provides that it "shall

2. *Id.* at 410–11.
3. *Id.* at 415.
4. *Id.* at 411.
5. *Id.* at 413.
6. *Id.* at 414–15, 416.
7. *Id.* at 415.
8. *Id.* at 416.
9. *Id.* at 419.
10. Criscuolo v. Grant Cnty., 2014 WL 527218 (E.D. Wash. Feb. 10, 2014). One of the authors, Adam Karp, was counsel for the plaintiff.
11. *Id.* at *1 (citing WASH. REV. CODE § 4.24.410).

be the duty of the sheriff or any deputy sheriff to kill any dog found running at large without a metal identification tag."[12] In *Criscuolo v. Grant County*, Deputy Beau Lamens of the Grant County Sheriff's Department shot and killed Slyder, a seven-year-old mixed breed dog in a public park with his owner Nicholas Criscuolo standing nearby.[13] The unleashed Slyder was trying to interact with Maddox, a police drug detection dog, which Lamens claimed "was assisting with the arrest of an individual for possession of methamphetamine,"[14] although the dog apparently was "not yet prestimulated to perform a search for methamphetamine in a parked vehicle."[15] Lamens contended that he killed Slyder because he possessed an imminent fear that Slyder would maim or kill Maddox.

Defendants Grant County and Lamens sought dismissal of all of Criscuolo's state claims and to limit his damages to market value only.[16] They also sought to immunize Beau Lamens under Washington Revised Code Section 16.08.030, which bars suit against police dog handlers who, in the line of duty, use police dogs in good faith.[17] The court rejected Lamens's position that the shooting of Slyder arose from his use of the police dog, finding instead that the killing arose from the use of his weapon. The court's order was the first in Washington to interpret Section 4.24.410 in a case where the dog handler and not the handler's police dog inflicted the injury.

The defendants also claimed that Section 16.08.030, which requires police to kill dogs running at large without metal ID tags, barred suit.[18] Lamens argued that he was compelled to shoot and kill Slyder because he was not wearing a metal identification dog tag and was running at large.[19] The court rejected this position as well, finding that "the record supplies no evidence that Deputy Lamens looked at the tags Slyder was wearing" or that Slyder "was [] roaming unattended or 'at large' within the meaning of the statute."[20] Moreover, the court found that Slyder's rabies tag and microchip tag sufficed.[21] The order was the first in Washington to interpret Section 16.08.030. The deputy also argued that no reasonable jury could conclude that he maliciously injured Slyder, that he recklessly inflicted emotional distress, or that he converted Slyder.[22]

12. *Id.* at *5 (citing WASH. REV. CODE § 16.08.030).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *7, 12.
17. *Id.* at *3.
18. *Id.* at *5.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at *11.

The court rejected all these arguments and allowed those claims to go to the jury.[23]

B. *Service/Emotional Support Animal Discrimination*

In a Fair Housing Act (FHA) case, *Bhogaita v. Altamonte Heights Condominium Association, Inc.*,[24] the Eleventh Circuit reined in the invasive scope of questioning by a condominium association in evaluating whether to grant the reasonable accommodation of an emotional support animal (ESA).[25] Air Force veteran Ajit Bhogaita suffered from post-traumatic stress disorder and acquired Kane, a dog that exceeded the association's weight limitations.[26] "Although no medical professional prescribed the dog initially, Bhogaita's psychiatric symptoms improved with Kane's presence" to the point where he formally requested that the association grant an exception to the weight restriction.[27] Over the next six months, the association made three highly detailed requests for information about Bhogaita's disabilities, medications, psychiatric sessions, and why a smaller dog would not suffice but never formally rejected his request.[28] He cooperated at each step until receiving the third request that ended with a threat to file for arbitration and the admonition to "PLEASE GOVERN YOURSELF ACCORDINGLY."[29]

Acting on Bhogaita's complaint, the U.S. Department of Housing & Urban Development found cause against the association, which then allowed Bhogaita to keep Kane.[30] Shortly afterwards, Bhogaita sued for violation of 42 U.S.C. §§ 3604(f)(2) and (3).[31] A jury found for Bhogaita, awarding $5,000 in compensatory damages.[32] The district court awarded $127,512 in attorney fees, and the association appealed.[33] Affirming, the Eleventh Circuit held that while a housing provider need not immediately decide whether to grant an accommodation, failure to timely determine constitutes constructive denial.[34]

A similar outcome hailed from Florida. Afflicted with multiple sclerosis and wheelchair-bound, Deborah Fischer resided in the Sabal Palm Condominium of Pine Island Ridge Association with her service dog Sorenson

23. *Id.* at *12.
24. 765 F.3d 1277 (11th Cir. 2014).
25. *Id.* at 1281.
26. *Id.*
27. *Id.*
28. *Id.* at 1281–83.
29. *Id.* at 1283.
30. *Id.*
31. *Id.*
32. *Id.* at 1284.
33. *Id.*
34. *Id.* at 1286.

and husband Laurence.[35] The condominium association denied her request for a reasonable accommodation to keep Sorensen due to its no-pets policy and sought a declaratory judgment in federal court to ascertain whether the FHA required modification for Sorenson.[36] Fischer counterclaimed by raising a refusal-to-accommodate claim under the FHA against the association, its attorney, and its board president.[37] Despite providing a letter from a regional manager from the Canine Companions for Independence (CCI) and a medical history form completed by her primary care doctor as part of her application to CCI, the association claimed it needed actual medical records.[38] Fischer acquiesced, but two months later, the association commenced the declaratory judgment action and corresponded that the records were insufficient to entitle her to an accommodation but she could "temporarily keep" Sorenson during the litigation.[39]

In ruling for Fischer, the district court judge called it "a sad commentary on the litigious nature of our society" and a "disservice to people like Deborah who actually are disabled and have a legitimate need for a service dog as an accommodation under the FHA" when the association "turned to the courts to resolve what should have been an easy decision."[40] Indeed, "Sabal Palm got it exactly—and unreasonably—wrong."[41] Rejecting the association's untenable claim that it was unreasonable to accommodate a dog in excess of twenty pounds, the court found the argument unpersuasive and lacking in common sense, noting that Sorensen was matched to the height of Fischer's chair, enabling him to reach light switches, open and close doors, and retrieve items.[42]

C. *Religious Discrimination*

In *Badillo v. Amato*,[43] purported Santerian priest Jorge Badillo ritually sacrificed various animals. While Captain Martin of the Monmouth County Sheriff's Department was executing an unrelated domestic violence warrant and a search for a firearm, he inspected a shed in the backyard, which was strewn with bodies of dead chickens.[44] A Santeria temple was inside the shed.[45] The next day, Martin notified Chief Amato of the Monmouth

35. Sabal Palm Condo. of Pine Island Ridge Ass'n, Inc. v. Fischer, 6 F. Supp. 3d 1272 (S.D. Fla. 2014).
36. *Id.* at 1274.
37. *Id.* at 1277.
38. *Id.* at 1277–78.
39. *Id.* at 1278.
40. *Id.* at 1275.
41. *Id.* at 1279.
42. *Id.* at 1277.
43. 2014 WL 314727 (D.N.J. 2014).
44. *Id.* at *1.
45. *Id.*

County Society for the Prevention of Animals about "possible animal cruelty."[46] Amato allegedly arrived at Badillo's home, let himself into the fenced backyard without consent or a warrant, and took pictures of the dead animals and the Orishas.[47] On learning from Badillo's sister that the chickens were sacrificial victims, Amato allegedly said they "had no right to practice Santeria in Monmouth County or in New Jersey or anywhere in the United States."[48] Amato also allegedly added that "he targeted Santeros and had just arrested two Santeros in Spring Lake recently."[49] He also allegedly demanded that three guinea hens and a pet rabbit be returned to their original owner and that Badillo properly dispose of all dead animals on the property.[50] He threatened to arrest Badillo if he failed to comply.[51] The sister called the prosecuting attorney's office to complain and learned that the office deemed Amato to be within his rights.[52]

The next day, Amato left nine municipal court summonses for animal abuse and neglect in Badillo's mailbox and allegedly notified a local newspaper, which ran an article about his religious practices and his home address.[53] Badillo's home and cars were vandalized and his family threatened.[54] Badillo also alleged that the summonses adversely impacted his ability to adopt two children.[55]

He pleaded guilty to one count of neglect of the rabbit, and the remaining eight counts were dismissed.[56] Thereafter, Badillo sued under 42 U.S.C. § 1983 for violation of his First Amendment right to exercise his religion and for conspiracy under 42 U.S.C. § 1985(3). He sought monetary damages and "an injunction to prevent the defendants from targeting Santeros for discriminatory prosecution of animal cruelty laws."[57] He also sought to have the defendants "undergo sensitivity training."[58]

In denying SPCA Chief Amato's motion for qualified immunity, the district court held that the right to practice the Santerian ritual of sacrificing is clearly established,[59] adding that "absent any allegations that

46. *Id.*
47. *Id.* n.1 (Orisha is the deity to which the Santerios pray).
48. *Id.* at *1.
49. *Id.* at *2.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at *6, 7 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Merced v. Kasson, 577 F.3d 578, 582 (5th Cir. 2009)).

Plaintiff did not conduct these killings in accordance with the requirements of his religion," charging him with animal cruelty "would violate Plaintiff's clearly established right to conduct sacrificial rituals."[60]

The judge did not appear willing to concede that even if the actual method employed by Badillo was "in conformance with his religion" but nonetheless cruel, criminal liability would still exist.[61] The court dismissed the 42 U.S.C. § 1985 conspiracy claims, as well as the claims against the SPCA itself for lack of any *Monell*-type liability, and granted qualified immunity to Captain Martin, who did not violate Badillo's constitutional rights by merely "informing Chief Amato of Plaintiff's ritual."[62]

D. *Pet Store Litigation*

In *San Diego Puppy, Inc. v. City of San Diego*,[63] the owners of two pet stores selling purebred puppies sued the City of San Diego and several other defendants, including animal rights and welfare organizations, after the store owners learned that the city attorney planned to enforce the San Diego Companion Animal Protection Ordinance (CAPO), which bans the sale or display of any dog, cat, or rabbit not acquired from a California non-profit rescue center or sale.[64] Before the city attorney could act, the owners moved their dogs to their other store, which was outside city limits.[65] Acting pro se, the owners filed claims against the city and several non-profit animal rights and welfare organizations. They

> (1) [sought] a declaratory judgment that the ordinance was unconstitutional, (2) allege[d] that the "activist defendants" and the city improperly colluded in

60. *Id.* at *8.

61. The U.S. Supreme Court recognized that anticruelty laws could prohibit Santerian practice under some circumstances:

> The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter.

Lukumi, 508 U.S. at 521 (Kennedy, J.).

> A harder case would be presented if [the Santerians] were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.

Id., at 580 (O'Connor, J. & Blackmun, J.) (emphasis added).

62. *Id.* at *10.

63. 2014 WL 4546390 (S.D. Cal. Sept. 11, 2014).

64. San Diego Mun. Code § 42.0706.

65. *San Diego Puppy*, 2014 WL 4546390, at *1.

> passing the ordinance in violation of 42 U.S.C. §§ 1983, 1985, and (3) assert [ed] tort claims (nuisance & trespass) as well as a hate crimes claim under Cal. Civ. Code § 52 (Ralph Act).[66]

The owners' claims under the Ralph Act alleged that the defendants "incited and encouraged radical and threatening conduct, including death threats and other racial slurs."[67]

Three of the seven defendants filed an Anti-SLAPP (strategic lawsuit against public participation) motion to strike.[68] California enacted its Anti-SLAPP law in response to the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[69] The defendants argued "that their activities were legitimate efforts to influence government action, not an unlawful plot to hijack the City Council."[70]

The owners voluntarily withdrew their suit against the City of San Diego and the San Diego Humane Society.[71] The court granted the Anti-SLAPP motions, thereby allowing the defendants to recover court costs and attorney fees.[72] As to the remaining federal cause of action, the allegation that the defendants "violated 42 U.S.C. § 1985 by conspiring to disrupt the local puppy supply and thereby decimate Plaintiffs' business,"[73] the court found otherwise, noting that their allegations, "even when construed liberally in Plaintiffs' favor, do not constitute a colorable claim."[74]

A contrary result was found in Phoenix where pet store owners pursued the constitutional claims that the San Diego store owners dropped, and sought to obtain a restraining order and preliminary injunction against the implementation of a comparable ordinance, which made it a crime to "sell puppies purchased from a breeder."[75]

In order to obtain a preliminary injunction, the court held that the plaintiffs must "establish that they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest."[76] Noting that the "[p]laintiffs' fear of prosecution under

66. *Id.* at *1.
67. *Id.* at *5.
68. *Id.* at *2, 5, 7.
69. CAL. CIV. CODE § 426.16(a).
70. *San Diego Puppy*, 2014 WL 4546390, at *4.
71. *Id.* at *1.
72. *Id.* at *7.
73. *Id.* at *8.
74. *Id.* at *9.
75. Puppies 'N Love v. City of Phoenix, 2014 WL 1329296 (D. Ariz. Apr. 2, 2014) (quoting PHOENIX MUN. ORD. § G-5973).
76. *Id.* at *1 (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

the Ordinance is not imaginary or speculative," the court found their challenge to the ordinance to be sufficiently ripe.[77] Submitting evidence that they did not purchase puppies from puppy mills, the plaintiffs claimed that they could not compete with animal shelters and that implementation of the ordinance would force them to go out of business.[78] The court agreed that the ordinance would cause irreparable harm.[79] The court also found that the balance of hardship tipped in the plaintiffs' favor, weighing the loss of their business versus the city's "inability to prosecute a business that is not supporting puppy mills."[80] Finally, the court found that the public interest "can be served in this case only by preserving the status quo while the serious questions raised by Plaintiffs' complaint are resolved."[81]

E. *Dog Bite Liability*

Continuing the trend that permits recovery of veterinary bills in excess of the acquisition price, the Massachusetts Court of Appeals in *Irwin v. Degtiarov* affirmed judgment awarding over $8,000 in veterinary bills incurred by the owners of a Bichon Frise that was mauled by an unleashed German Shepherd.[82] In so ruling, the court rejected diminution in market value as the proper calculation for animals injured but not immediately killed.[83] However, where an animal dies prior to veterinary intervention, "recovery has historically been based on market value."[84]

In *Spirlong v. Browne*, the Arizona Court of Appeals found that a landlord was not responsible for the injuries caused by his tenant's dog.[85] Charles Browne rented two rooms in his home to the owner of a Belgian Malinois named Joop.[86] Browne took no responsibility for Joop or the tenant's other dog.[87] After the tenant and Browne's girlfriend put Joop in the backyard, he escaped and bit the Spirlongs' son, who was riding his bike down a nearby street.[88] The Spirlongs sued Browne, his girlfriend, and the tenant, claiming strict liability under Arizona Revised Statutes Sections 11-1020 and 11-1025.[89] They obtained default judgments

77. *Id.* at *3.
78. *Id.*
79. *Id.*
80. *Id.* at *4.
81. *Id.*
82. 8 N.E.3d 296 (2014).
83. *Id.* at 300.
84. *Id.* at 300 n.10 (citing Uhlein v. Cromack, 109 Mass. 273, 275 (1872)).
85. 336 P.3d 779 (Ariz. Ct. App. 2014).
86. *Id.* at 781.
87. *Id.*
88. *Id.* (citing ARIZ. REV. STAT. § 11-1001(10), which defines an owner as "any person keeping an animal other than livestock for more than six consecutive days").
89. *Id.*

against Browne's girlfriend and tenant, while Browne answered the complaint and contended fault of others and further disputed that he was an "owner" for purposes of statutory fault.[90]

The trial court granted partial summary judgment to the Spirlongs on the issue of whether Browne bore strict liability as a statutory owner and instructed the jury accordingly.[91] However, over the Spirlongs' objection, the judge also advised the jury on comparative fault allocation as to the tenant and girlfriend, resulting in a jury verdict favoring Browne.[92] The dispositive issue on appeal was whether Browne met the "keeping" requirement in Arizona's dog bite statute, which defines an owner as "any person keeping an animal other than livestock for more than six consecutive days."[93] In affirming the judgment for Browne, the appellate court held that the trial court should have dismissed the statutory dog bite claim against Browne as a matter of law.[94] It reasoned that the ambiguous term "keeping" requires the exercise of care, custody, or control of the dog, not merely "housing" the dog, since the focus is on maintenance of the animal, not the land on which the animal sits, stays, or rolls over.[95]

In *Coogan v. Nelson*, the Rhode Island Supreme Court found that a genuine issue of fact existed concerning whether a dog's prior behavior rose to the level of "vicious propensity."[96] While delivering a package, UPS driver Gregory Coogan was bit on his left forearm and right leg by one of two dogs, a German Shepherd named Sammy and a rat terrier called Gizmo, owned by Cheryl Nelson.[97] The trial court dismissed the case, finding that the Nelsons had no prior knowledge of either dog's vicious propensity, except for Gizmo scratching their young son's nose, prompting the court to lecture that "[t]here is no one-scratch rule [;] there is a one-bite rule."[98]

Finding the situs of the bite to be outcome-determinative, the supreme court reversed and remanded, noting that genuine issues of material fact existed as to the precise boundaries of the "enclosure," given that the land lacked any demarcation by fence, wall, or other tangible boundary.[99]

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 782 (citing ARIZ. REV. STAT. § 11-1001(10)).
94. *Id.* at 781.
95. *Id.* at 785.
96. 92 A.3d 213 (R.I. 2014).
97. *Id.* at 214.
98. *Id.* at 216.
99. *Id.* at 217–18. R.I. GEN. LAWS § 4-13-16 imposes strict liability on dog owners whose dogs assault, bite, or otherwise injure any person traveling the highway or "out of the enclosure of the owner or keeper of that dog."

Further, the court found error in the trial judge concluding that scienter of vicious propensity lies only with bites, not other modalities of harm:

> The so-called "one-bite rule" is only a convenient shorthand expression which courts have adopted to describe the knowledge requirement of a prior incident involving a dog to indicate a vicious propensity. This Court has never stated that the only type of prior incident which would suffice to indicate a dog's vicious propensity is restricted to a bite.[100]

Thus, the Gizmo scratch incident required factfinder assessment to decide whether it rose to the level of a vicious propensity.

In a case that received widespread local and national media attention, the Colorado Supreme Court addressed the working dog exemption of the state's dog bite act.[101] With the aid of several Great Pyrenees dogs, the Robinsons ranched sheep on land permitted for term grazing by the U.S. Forest Service.[102] Two of these dogs attacked mountain bicyclist Renee Legro as she participated in a race sponsored by the Vail Recreation District on land that both the Robinsons and the district were permitted to access.[103] Neither the Robinsons nor their employees were within earshot of the severe mauling and had no direct control over the dogs.[104]

The trial court dismissed Legro's suit against the Robinsons for negligence, negligence per se, loss of consortium, and strict statutory liability under Colorado's dog bite statute, finding that the Colorado Premises Liability Act preempted the common law claims because the Robinsons' grazing privileges conferred upon them "landowner" status, and that the "working dog" exemption of the dog bite statute nullified the statutory claim.[105] The exemption states:

> A dog owner shall not be liable to a person who suffers bodily injury, serious bodily injury, or death from being bitten by the dog . . . *[w]hile the dog is working as a hunting dog, herding dog, farm or ranch dog, or predator control dog on the property of or under the control of the dog's owner.*[106]

Although affirming the Colorado Court of Appeals' reversal of the trial court, the Colorado Supreme Court did so for a different reason by applying the plain and ordinary meaning of the phrase "on the property of or under the control of the dog's owner."[107] Instead of reading the working

100. *Id.* at 219.
101. Robinson v. Legro, 325 P.3d 1053 (Colo. 2014).
102. *Id.* at 1055.
103. *Id.*
104. *Id.*
105. *Id.* at 1055–56.
106. *Id.* at 1057 (emphasis added by the court).
107. *Id.* at 1059.

dog exemption as the appellate court did, i.e., that the exemption applies if the bite occurred on land owned or under the control of the dog's owner, the supreme court noted that: "The working dog exemption applies if: (a) the attack occurred on the Robinsons' property (which requires an analysis of whether the Robinsons' grazing permit confers a 'property' interest); or (b) the dogs were working under the control of the Robinsons at the time of the attack."[108]

The "single issue raised in the appeal" in *Martin v. Christman* was whether the Vermont Supreme Court "should change the common law rule requiring proof of a dog owner's negligence as the sole basis for liability for personal injuries inflicted by the dog."[109] Strict common law liability exists where the owner or keeper of an animal knows or should know of the animal's dangerous propensities.[110] Regardless of the level of care exercised (i.e., even if non-negligent), if the plaintiff can establish knowledge (or scienter), the owner or keeper will be held strictly liable.[111] Absolute liability thus derives from the legislative or judicial excision of the scienter requirement, thus eliminating "one free bite" (i.e., the one that creates scienter).[112]

The Vermont Supreme Court decided to stay the course with long-standing precedent by affirming dismissal of the Martins' strict liability claim against the Christmans, whose Boxer allegedly attacked three-year-old Gracie Martin in the face after she tried to pet the dog with permission.[113] While recognizing that negligence may lie from failure to exercise care in restraining a dog despite knowledge of his vicious tendencies, the court refused to impose liability without exception whenever even a good-natured dog with no known history draws first blood.[114] It reasoned:

> [W]e see no reason to single out dog ownership for treatment that is different from that we apply to auto drivers, storekeepers, and other human pursuits. These are all activities which are usually safe and generally beneficial. An attack by a dog that came without warning is very similar to an auto accident caused by an unforeseen medical emergency.[115]

While eighteen or so states adopted absolute liability for dog bites, the court noted that the "overwhelming majority have done so by statute," and only South Carolina had "judicially eliminated the requirement of

108. *Id.*
109. 99 A.3d 1008 (Vt. 2014).
110. *Id.* at 1010–11.
111. *Id.*
112. *Id.*
113. *Id.* at 1009.
114. *Id.* at 1012.
115. *Id.* at 1011.

scienter for dog bites, and that decision has not been followed by other jurisdictions."[116]

F. *Nuisance*

Tom and Consandra Christmas bought land next to an alligator-infested waste disposal site owned by Exxon.[117] After their suit for private nuisance was dismissed and then reinstated by the Mississippi Court of Appeals, Exxon sought review by the Mississippi Supreme Court, which reinstated dismissal on different grounds.[118] After observing that this "wild alligator case" of first impression did not begin by Exxon bringing the reptiles to the site, the court, in a five-to-four decision, held that wild alligators "not reduced to possession, but which exist in a state of nature" cannot constitute a private nuisance as a matter of law.[119]

G. *Custodial Torts*

In *Greater Houston German Shepherd Dog Rescue, Inc. v. Lira*, the Texas Court of Appeals found against owners trying to reclaim an escaped dog because (1) they had not complied with city ordinances; (2) the dog rescue organization involved was a recognized city shelter partner; and (3) an ordinance providing for a longer redemption period did not apply.[120] When Alfonso and Lydia Lira allowed their dog to escape from their open garage, Houston's animal control agency impounded and held the unidentified dog over the requisite stray three-day retention period, tested her as a weak positive for heartworm, found that she had not been spayed, and adopted the dog to the Greater Houston German Shepherd Dog Rescue, Inc. (GHGSDR).[121] Seven days after the dog escaped, Lydia Lira called GHGSDR and asked for the dog back.[122] When GHGSDR refused, the Liras filed suit to recover the dog and won.[123]

The appellate court reversed, finding that the Liras had failed to comply with the redemption protocols set by city law and finding unpersuasive their effort to create a "diligence" exception to the requisite procedure.[124] The Liras also argued that GHGSDR was not an authorized rescue partner, despite "undisputed testimony . . . that the City and appellant had an agreement in place" at the time the dog was transferred to GHGSDR.[125]

116. *Id.* at 1011–12.
117. Christmas v. Exxon Mobil Corp., 138 So. 3d 123 (Miss. 2014).
118. *Id.* at 125–26.
119. *Id.* at 127.
120. 447 S.W.3d 365 (Tex. App. 2014).
121. *Id.* at 368.
122. *Id.* at 369.
123. *Id.*
124. *Id.* at 372–73.
125. *Id.* at 374.

Finally, the Liras' contention that a city ordinance gave them thirty days to redeem a "healthy" animal after being "sold" to a "purchaser" did not apply since the dog was "released" at no charge to GHGSDR in lieu of being euthanized due to health concerns.[126]

H. *Governmental Immunity—Horses*

1. Mounted Police

In *Prater v. Catt*, the Kentucky Court of Appeals held that a mounted patrol officer was engaged in discretionary acts and thus entitled to qualified official immunity.[127] A football fan sued the officer and her supervisor, claiming severe injuries caused by the officer's horse after it spun and reared at the approach of the university's marching band.[128] The plaintiff alleged that the officer's supervisor had negligently caused or allowed the officer to position the horse near the area where the plaintiff was standing, and that the officer negligently failed to keep her horse under control.[129]

The officer and her supervisor sought summary judgment on the basis of immunity.[130] Among other arguments in response, the plaintiff argued that the officer negligently failed to select a safe path of travel and to control her horse.[131] The plaintiff further alleged that neither the officer nor her supervisor should be immune from suit because the alleged negligent acts arose out of ministerial duties, thereby negating governmental immunity.[132] The appellate court affirmed the grant of summary judgment, rejecting the plaintiff's attempt to classify the officer's control and direction of her horse as a ministerial rather than a discretionary task.[133] As the court explained:

> Officer Catt's mount was not merely a mechanical means of transportation governed by discrete and absolute rules of the road. . . . While many of Officer Catt's actions astride the horse were likely rote and reactive, the actions challenged by the Praters were predominately discretionary in nature.[134]

2. Breeding Facilities—Stored Semen

In *Foster v. Board of Governors of Colorado State University*, governmental immunity prevented a stallion owner from recovering for the loss of her

126. *Id.* at 375.
127. 443 S.W.3d 6 (Ky. Ct. App. 2014). For another case involving injuries allegedly caused by mounted patrol, see Wingfield v. Cleveland, 2014 WL 2932780 (Ohio Ct. App. June 26, 2014).
128. *Prater*, 443 S.W.3d at 7.
129. *Id.* at 7–8.
130. *Id.* at 8.
131. *Id.*
132. *Id.*
133. *Id.* at 9.
134. *Id.*

stallion's stored semen at the university's Equine Reproduction Laboratory (CSU).[135] The plaintiff brought her stallion to CSU for the collection and storage of semen for later use in vitro fertilization.[136] The parties' bailment agreement apparently was not in writing.[137] Less than two years later, a fire broke out, destroying much of the lab, including the semen straws from the plaintiff's stallion.[138] The plaintiff sued the university, claiming breach of an oral bailment contract for the loss of the straws.[139] As a public university, CSU sought dismissal for lack of subject matter jurisdiction based on governmental immunity under the Colorado Governmental Immunity Act for claims that lie in or could lie in tort.[140] The trial court denied the motion.[141]

On interlocutory appeal, the Colorado Court of Appeals reversed, agreeing with CSU that damages claims for loss of bailed property "lies in tort or could lie in tort" and therefore barred the claim against CSU.[142] Under the Colorado Governmental Immunity Act, a contract claim is barred if the allegations support an independent tort claim.[143] A claim will survive only if it arises solely in contract, and there can be no tort claim on the facts.[144] Relevant to this case, liability under the common law of bailment sounds in tort.[145] A bailment relationship can arise independently of contract and imposes upon the bailee (CSU) the duty of reasonable care to prevent loss of the bailed property (the semen straws).[146] Thus, a bailee's liability is contingent upon a showing of negligence.[147]

As a result, the appellate court concluded that the plaintiff's claim sounded in tort or could support a tort claim because (1) to prevail on her claims, the plaintiff must show that CSU was negligent; (2) the only duty allegedly breached, that of reasonable care, is one implied by law and does not arise from contract; and (3) an action for loss of bailed property can be pled in either contract or tort.[148] Therefore, CSU was im-

135. 2014 WL 784854 (Feb. 27, 2014), *cert. denied*, Foster v. Colo. State Univ., No. 14SC252, 2015 WL 339152 (Colo. Jan. 20, 2015).
136. *Id.* ¶ 2.
137. *Id.*
138. *Id.* ¶ 3.
139. *Id.* ¶ 4
140. *Id.* ¶ 4.
141. *Id.* ¶¶ 6, 7.
142. *Id.* ¶ 9.
143. *Id.* ¶ 15.
144. *Id.*
145. *Id.*
146. *Id.* ¶¶ 17–18.
147. *Id.* ¶ 19.
148. *Id.* ¶ 25.

mune from suit for the plaintiff's contract claim because it could be brought as a tort claim.[149]

I. *Equine Torts*

Connecticut continued to wrestle with a question of first impression in that state: whether horses may be viewed to have mischievous and vicious propensities, such that an owner could be liable for injury caused by the horse, even if the horse had no such aggressive history. The Connecticut Supreme Court answered in the affirmative in *Vendrella v. Astriab Family Limited Partnership*,[150] only to be reined in by the Connecticut legislature less than two months later.

In *Vendrella*, a horse bit the two-year-old plaintiff while he was at the defendants' horse facility.[151] In granting summary judgment, the trial court concluded that because the defendants had no knowledge of this horse's—as opposed to horses generally—propensity to bite others, the defendants owed the plaintiffs no duty of care.[152] The Connecticut Court of Appeals reversed, and the Connecticut Supreme Court affirmed. The state supreme court stopped just short of declaring that horses as a matter of law have naturally mischievous propensities, but held that (1) as a general rule of law, "a keeper of a domestic animal has a duty to take reasonable steps to prevent foreseeable injury when an animal that belongs to a class of animals with naturally mischievous propensities, even if that specific animal has not previously displayed those propensities;"[153] and (2) it was a question for the jury whether the "injury in this case was reasonably foreseeable given the evidence presented on the propensity of horses to bite."[154]

Because Connecticut common law had not squarely addressed the first issue, the court engaged in a lengthy discussion of why public policy permits such liability. Among other reasons for its holding, the court explained that a reasonable person would expect an owner, who has the expertise and opportunity to foresee harm, to take reasonable steps to prevent the animal from causing foreseeable injury.[155] The court noted also that the state's equine activity liability statute, which does allow for liability for injuries resulting from negligence, does not distinguish between negligence related to a horse with a known mischievous propensity

149. Foster v. Colo. State Univ., No. 14SC252 (Colo. filed Apr. 9, 2014).
150. 87 A.3d 546 (Conn. 2014).
151. *Id.* at 551.
152. *Id.* at 552.
153. *Id.* at 548.
154. *Id.* at 549, 563–64 (adopting Restatement (Second) Torts § 518 (1977)).
155. *Id.* at 558.

versus a horse with no known mischievous propensity.[156] As a result, according to the court, there was no apparent legislative intent to limit liability based on the known propensities of a given horse. The court also rejected the notion that its new rule of law would open the floodgates of litigation and found comfort in the fact that a majority of other jurisdictions have adopted a similar approach.[157]

Turning to the question of whether horses in general have a natural propensity to bite, the court concluded that the evidence offered by plaintiffs created a genuine issue for the jury to decide.[158] However, the concurring justice would have gone a step farther and taken judicial notice of the fact that horses have a natural propensity to bite because it is a commonly known trait.[159] Doing so would result in a remand solely on the question of negligence in failing to prevent the injury.[160]

Less than two months after the *Vendrella* opinion was issued, the Connecticut legislature passed a law limiting the reach of the case, at least as to horses. The new law declares that a horse "shall not be found to belong to a species that possesses a naturally mischievous or vicious propensity."[161] The law goes even farther, stating that "there shall be a presumption that such horse . . . did not have a propensity to engage in behavior that would foreseeably cause injury to humans," unless the horse previously exhibited such behavior.[162]

The Michigan Supreme Court in a lengthy opinion, *Sholberg v. Truman*, held that mere ownership of property, without more, cannot give rise to liability for a public nuisance—here, a loose horse's presence on the roadway—where the owners were not in possession of the property, did not exercise control over the property, and did not create the nui-

156. *Id.* In a footnote, the court noted that in a case in which the statute applied, a jury may find that the natural propensity for horses to bite constitutes an inherent risk assumed by the person engaged in the equestrian activity. *Id.* at 559 n.18.

157. *Id.* at 560.

158. *Id.* at 567.

159. *Id.* at 570–73 (Zarella, J., concurring) (listing cases).

160. *Id.* at 578. The concurring justice also disagreed that the determination of a species' natural tendencies is a jury question, reasoning that natural tendencies are fixed and not subject to reasonable differences of opinion. If a reasonable difference of opinion exists, current knowledge about natural propensities is insufficient, and an owner should not be charged with such knowledge about the species. Instead the question should be based on the owner's knowledge about the specific animal's propensities. *Id.* at 575.

161. Substitute H.B. 5044, Public Act 14-54 (Conn. 2014) (An Act Concerning the Liability of Owners and Keepers of Domesticated Horses, Ponies, Donkeys and Mules). The law was drafted in response to the decision by the Connecticut Court of Appeals in *Vendrella* and in anticipation of the state supreme court's opinion. *See* Conn. Gen. Assembly, OLR Bill Analysis, sHB 5044, http://www.cga.ct.gov/2014/BA/2014HB-05044-R000039-BA.htm (last visited Nov. 11, 2014).

162. Public Act 14-54 (Conn. 2014).

sance.[163] The plaintiff's decedent hit the horse with her car and died.[164] The plaintiff sued not only the tenant who owned the horse and managed the property, but also the property owners.[165] Control and possession generally must exist before liability may attach, and there was no evidence that the owners knowingly permitted the creation or maintenance of a nuisance, as in the case of an "absentee owner."[166]

J. *Equine Activity Liability Acts*

Duban v. Waverly Sales Company makes a second appearance in this survey,[167] this time with the Eighth Circuit affirming the district court's conclusion that the defendant auction company could not avail itself of the immunity provided by Iowa's Domesticated Animal Activity Liability Act, because an exception to the statute applied.[168] Specifically, the court found that a "domesticated animal activity sponsor," i.e., the auction company, could be liable for injuries resulting from the inherent risks of "domesticated animal activity" that occurs in a location intended for non-participants.[169] As the Eighth Circuit explained, for this exception to apply and expose a defendant to liability, what matters is the character of the location where the injury occurred.[170] It is irrelevant whether the injured plaintiff was a "spectator" or "participant" because the statute merely creates an exception when the injury occurs in a place designated to be used by non-participants.[171] Because the auction company had no intent to limit the alley access to the restroom to only auction bidders ("participants"), the injury in this case, which occurred in the alley, fell within an exception to the statutory limited liability, and therefore the defendant auction company was subject to liability.[172]

The Indiana case of *Einhorn v. Johnson* involved a 4-H volunteer trampled by a loose, running horse on the fairgrounds after he had stepped in

163. 852 N.W.2d 89, 90 (Mich. 2014).
164. *Id.*
165. *Id.*
166. *Id.* at 97.
167. Adam P. Karp & Julie I. Fershtman, *Recent Developments in Animal Law*, 49:1 TORT TRIAL & INS. PRAC. L.J. 43 (2014).
168. 760 F.3d 832, 836 (8th Cir. 2014).
169. *Id.* (citing IOWA CODE § 673.2(4), which states "This section shall not apply to the extent that the claim for damages, injury, or death is caused by . . . [a] domesticated animal activity which occurs in a place designated or intended by an animal activity sponsor as a place for persons who are not participants to be present.").
170. *Id.*
171. *Id.* Here, the court departed somewhat from the trial court's analysis. The trial court engaged in significant discussion as to whether the plaintiff was a "participant" or a "spectator," but the Eighth Circuit found that question irrelevant given the way the statute is worded.
172. *Id.* at 836–37.

the horse's path, raised his arms, and said "whoa."[173] Although unpaid for his work at the fair, the volunteer received medical benefits under a workers' compensation policy through the Purdue University Cooperative Extension Service.[174] He nevertheless sued the university, the 4-H fair association, and the horse's owners for negligence, and the defendants filed dispositive motions, all of which the trial court granted, and all of which the plaintiff appealed.[175] As an initial matter, the Indiana Court of Appeals rejected the university's argument of lack of subject matter jurisdiction.[176] Although the plaintiff did receive workers' compensation benefits, the state's workers' compensation act did not bar a later claim because the volunteer was not an employee to whom the act's exclusivity provisions applied.[177] Nevertheless, the university still prevailed because, as the court explained, both it and the 4-H fair association (as sponsors) were immune from liability to the plaintiff (a participant) because his injuries were the result of the inherent risks of equine activities as outlined in the statute.[178] The defendant horse owners were also free from liability because the plaintiff could not show that they were aware of any dangerous propensity for the horse prior to this episode at the fair where it spooked and bucked off its youth rider, and subsequently broke loose.[179]

Another case makes a repeat visit to this survey.[180] The Ohio Court of Appeals took up the case *Smith v. Landfair* for a second time after remand by the Ohio Supreme Court, which had reversed the appellate court and concluded that the plaintiff indeed was a "participant" under the state's equine immunity statute, such that liability may be barred.[181] The court thus took up the plaintiff's remaining appellate issues not previously addressed. The plaintiff, who worked at the stables in question, had gone to assist the defendant whose mare had spooked and knocked him to the ground.[182] In trying to help the defendant, the horse kicked the plaintiff

173. 996 N.E.2d 823, 825–26 (Ind. Ct. App. 2013).
174. *Id.* at 826.
175. *Id.*
176. *Id.*
177. *Id.* at 827.
178. *Id.* at 829–30 (citing IND. CODE § 34-35-5-1) ("the propensity of an equine to behave in ways that may result in injury"; "the unpredictability of an equine's reactions to such things as sound [and] sudden movement"; and "the potential of a participant to act in a negligent manner that may contribute to injury . . . such as failing to maintain control over the animal").
179. *Id.* at 831–32. Compare this with Vendrella v. Astriab Family Ltd. P'ship, 87 A.3d 546 (Conn. 2014), in which the Connecticut Supreme Court focused on the propensities of horses in general, as opposed to the specific horse in question, to determine whether a duty existed on the part of the defendants.
180. *See* Karp & Fershtman, *supra* note 167, at 43.
181. 2014 WL 3756139 (July 30, 2014).
182. *Id.* at *1.

in the head.[183] On appeal, the plaintiff made three additional arguments in an effort to avoid application of the state's equine immunity statute. First, she argued that the defendant was not a "participant" as defined by statute because, as he was lying on the ground, he was not "controlling" his horse.[184] The court disagreed, explaining the illogic of the argument: it makes no sense to have sporadic immunity, where that immunity exists while leading the horse, is lost in the fall, and then regained once the defendant got up.[185] Moreover, this argument, if it were successful, would make an end run around the very purpose of the equine activity statute, which is to protect participants from liability for the inherent risks of equine activity, e.g., momentary loss of control over a spooking horse.[186]

The plaintiff also claimed that she should be entitled to assert Ohio's common law rescue doctrine, pursuant to which those who rescue a person in negligently self-inflicted danger may bring a claim in tort against the rescued person.[187] But, this argument failed because Ohio's equine activity statute expressly precluded all actions in tort for injuries that result from an inherent risk of an equine activity except as provided for by statute.[188] Nevertheless, the court returned the case to the trial court for determination of whether there was a genuine issue of fact regarding whether the defendant's conduct was willful and wanton and therefore not entitled to immunity.[189]

In another Ohio case, *Graham v. Shamrock Stables*, the Ohio Court of Appeals took up the question of whether, in a case with injuries caused by a miniature horse spooked by a dog, the state's strict liability dog statute applied, which would result in liability, or whether the state's equine activity statute applied, which would bar recovery.[190] The injured plaintiff argued that because it was the dog that caused the miniature horse to knock her to the ground, the dog was the proximate cause of her injuries, and so the strict liability dog statute applied.[191] The answer lay in the express language of the equine activity statute, which lists one of the inherent risks of equine activity as the "unpredictability of an equine's reaction to . . . other animals," and dogs are not exempted.[192] The court did ac-

183. *Id.*

184. *Id.* at *2. OHIO REV. CODE ANN. § 2305.321(B)(1) defines an equine activity participant as "a person who engages in . . . [r]iding, training, driving, or controlling in any manner an equine, whether the equine is mounted or unmounted."

185. *Id.* at *3.

186. *Id.*

187. *Id.*

188. *Id.* at *4.

189. *Id.* at *5.

190. 19 N.E.3d 578 (Ohio Ct. App. 2014).

191. *Id.* at 580, 583.

192. *Id.* at 583 (quoting OHIO REV. CODE ANN. § 2305.321(A)(7)(b)). The dissenting judge reached the opposite conclusion, suggesting that the more specific dog liability statute

knowledge that other exceptions to limited liability might apply, such as whether the failure to secure unruly dogs constitutes willful and wanton disregard for safety of a participant, but the plaintiff did not argue them, and so lost on summary judgment.[193]

The court in *Estes v. Stepping Stone Farm, LLC* addressed three of the exceptions to Alabama's equine activities liability act.[194] In this case, the minor plaintiff attended a birthday party at a boarding stable and was injured when the horse she was on spooked and bolted, causing her to fall.[195] None of the three exceptions advanced by the plaintiff applied. First, although liability may exist where there is a failure to make "reasonable and prudent efforts" to determine the rider's ability and safely manage the horse, there was no evidence that the minor's position on the horse, her riding ability, or the failure to assess her riding ability caused the horse to spook and bolt.[196] Because causation could not be established, the exception did not apply.[197] Second, the plaintiff failed to establish the requisite state of mind to prove wanton conduct because he admitted that he believed the sponsor was not purposefully trying to injure the rider.[198] Third, with respect to the statutorily required signage under the equine activities liability act, all that is required is visible placement of the warning sign in compliance with the statute; there is no requirement that a sponsor point the sign out to a participant or provide a written contract with the warning language if there is no written contract.[199]

III. INSURANCE LAW

A. *Workplace Injury—Horses and Llamas*

At least two cases discussed the rule of "occupational assumption of the risk" in working with horses and llamas.[200] In the first, *Barrett v. Leech*, a

prevails over the more general immunity statute for equine activities, as a matter of statutory construction. *Id.* at 584 (Carr, J., dissenting).

193. *Id.* at 583.

194. 2014 WL 1407291 (Ala. Civ. App. Apr. 11, 2014) (citing ALA. CODE § 6-5-337).

195. *Id.* at *1.

196. *Id.* at *6 (discussing ALA. CODE § 6-5-337(c)(2)b, which permits liability if the sponsor "[p]rovided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and to safely manage the particular equine based on the participant's representations of his or her ability").

197. *Id.* at *7 (citing Loftin v. Lee, 341 S.W.3d 352, 359 (Tex. 2011), which explained that were this exception to immunity to apply even where the failure to properly assess a rider was not the cause of an injury, this would improperly impose strict liability on the activity sponsor).

198. *Id.* at *8.

199. *Id.* at *9 (discussing ALA. CODE. § 6-5-337(d), which requires that the equine sponsor and equine professional visibly place a warning sign in the manner directed by the statute and that the warning language be included in any written contract).

200. 2014 WL 3659366, at *1 (Cal. Ct. App. July 24, 2014).

farrier died from injuries sustained while working on a horse.[201] His widow sued for premises liability and wrongful death, claiming, among other things, failure to warn of the horse's volatile disposition and failure to maintain the property in a safe condition.[202] The California Court of Appeal affirmed summary judgment in favor of the defendant, explaining that under the doctrine of primary assumption of the risk, the defendant had no duty to protect the farrier against risks inherent to his work.[203] The court rejected the plaintiff's attempt to limit this doctrine to sports activities, noting that it is so widely used in workplace settings that it is often referenced as "occupational assumption of the risk."[204] Especially persuasive was the application of the doctrine to veterinarians, and the court ultimately concluded that because the job of a farrier is at least as inherently dangerous as that of a veterinarian, the doctrine of assumption of the risk barred the claims.[205]

In the second case, *Edwards v. Lombardi*, the defendants' llama attacked a high school student they had hired to take care of their animals while they were out of town. The student had previously had encounters with the same llama acting aggressively toward him.[206] Filing suit, he claimed negligence and violation of the Illinois Animal Control Act.[207] The appellate court affirmed summary judgment on the basis that the student assumed the risk of being attacked by the llama.[208] Even though there was a question of fact as to the defendants' knowledge of the llama's prior aggressive behavior, the plaintiff had assumed the risk of an attack because he entered the barn knowing of the circumstances and the llama's prior aggressive behavior.[209] The court rejected an attempt to distinguish this case from other cases involving injury to professionals, citing the plaintiff's knowledge of the llama's prior behavior. Although the court did not reach the unpreserved issue, the plaintiff raised a final argument claiming that the deliberate encounter exception, which typically applies to open and obvious dangers on land, applied to allow for recovery even if assumption of the risk applied.[210]

201. *Id.* at *1. The farrier had fallen after a horse knocked him down. He hit his head on a rock and died from the injuries. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at *3.

205. *Id.* at *3–4. The court further rejected argument that the doctrine did not apply because the horse owner increased the risk of harm. The court explained that the rocky ground was obvious and required no warning or preventive measures, and that securing the horse was part of the farrier's job, not the owner's. *Id.* at 5–6.

206. 1 N.E.3d 641, 643–44 (Ill. App. Ct. 2013).

207. *Id.* The Animal Control Act, 510 ILL. COMP. STAT. ANN. § 5/16 (West 2008), was not addressed on appeal.

208. *Id.*

209. *Id.* at 645–47.

210. *Id.* at 647.

At issue in *Cornett v. Administrator, Ohio Bureau of Workers' Compensation* was whether the plaintiff, who had responded to an ad for a "horse barn for rent," was an employee entitled to workers' compensation benefits.[211] The plaintiff rented a barn from the property owner and boarded others' horses, using tools present on the property to clean and maintain the barn.[212] In the oral agreement between the plaintiff and the property owner, the plaintiff agreed to pay the owner $100 per occupied stall per month.[213] The owner also required the plaintiff to purchase her hay from him, perform maintenance and fire safety prevention measures, and be present when the farrier or veterinarian came.[214] While working one day, the plaintiff was trampled and severely injured by the horses.[215] She was denied workers' compensation benefits on the basis that she was not an employee.[216] The appellate court affirmed, explaining that there was no evidence of a contract for hire. The plaintiff did not receive wages or other compensation (such as free services or lodging) from the property owner, and the owner did not withhold taxes; provide the plaintiff with a W-2 or 1099 tax form; or offer her retirement savings, health insurance, sick time or paid leave, or any other employment benefits.[217] Rather, she contracted directly with the boarders and deposited their fees into her own account before paying the property owner.[218] Further, the property owner's requirements that she perform certain tasks were consistent with a landlord-tenant relationship, not just an employer-employee relationship.[219] Finally, the court pointed out that the original advertisement was for a "horse barn for rent," not a help wanted ad for a barn manager.[220]

B. *Homeowner's Insurance*

Bats made a repeat appearance, this time in the federal court case of *Nicholson v. Allstate Insurance Co.*, a breach of contract and bad faith claim over the denial of coverage for the cost of performing a bat exclusion on the plaintiff's house.[221] The court denied all arguments presented for sum-

211. 2014 WL 4058060 (Ohio Ct. App. Aug. 18, 2014).
212. *Id.* at *1.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at *3.
218. *Id.* at *1
219. *Id.* at *4.
220. *Id.*
221. 979 F. Supp. 2d 1054 (E.D. Cal. 2013). "A bat exclusion can consist of removing alive or deceased bats as well as any bat guano from the premises, finding the area of entry into the home, and appropriately sealing the area to prevent further infestation." *Id.* at 1058 n.4.

mary judgment. This summary focuses on one of those arguments, the issue of whether the pollution exclusions in the homeowner's policy excluded the claim.[222] Leaning heavily on the analysis in the California Supreme Court case of *MacKinnon v. Truck Insurance Exchange*, the court explained that the historical intent behind absolute pollution exclusions was to avoid coverage for environmental disasters, and, without some limiting principle, an expansive interpretation of these exclusions would go far beyond their intended scope.[223] The court was not persuaded that a bat infestation could reasonably be understood to constitute an environmental pollutant of the sort covered by the exclusions, finding the defendant's sole supporting case to be distinguishable because the policy in that case expressly listed "waste" in the definition of pollutant and bat guano constituted "waste."[224] In addition, the policy at issue had a separate provision, which did not include bats, dedicated to damage caused by animals, further suggesting that the separate pollution exclusion did not apply to damage caused by animals.[225]

C. *Automobile Insurance—Dog Bites in Cars*

In *State Farm Insurance Co. v. Bell*, the court concluded that an uninsured/underinsured motorist policy covered a claim arising out of the car owner's dog biting a child who reached inside an SUV to hug the dog.[226] The court concluded that under New Mexico's applicable test, such an incident "arises out of the use of the vehicle," bringing it within the policy.[227] As part of its analysis, the court concluded that the vehicle was an "active accessory" in causing the child's injuries because the purpose of the trip, at least in part, was to transport the dog; the dog bite was facilitated by the height of the vehicle, which placed the dog face-to-face with the child; and, according to the veterinarian expert and the dog's owner, the unique setting of the dog being in the car was a contributing factor because of the tendency of dogs to feel threatened by a stranger while in an enclosed space.[228]

222. *Id.* at 1064 ("Exclusion 14 of the policy states there is no coverage for damage caused by 'Vapors, fumes, acids, toxic chemicals, toxic gasses, toxic solids, waste materials or other irritants, contaminants or pollutants.' Exclusion 15(e) is similar, stating there is no coverage for damage caused by 'contamination, including, but not limited to the presence of toxic, noxious or hazardous gasses, chemicals, liquids, solids or other substances at the residence premises or in the air, land or water serving the residence premises.' ").

223. *Id.* at 1064–65 (citing MacKinnon v. Truck Ins. Exch., 73 P.3d 1205 (Cal. 2003)).

224. *Id.* at 1066 (citing Hirschhorn v. Auto-Owners Ins. Co., 809 N.W.2d 529 (Wis. 2012)).

225. *Id.* at 1066–67.

226. 2014 WL 4145413 (D.N.M. Aug. 22, 2014).

227. *Id.* at *3.

228. *Id.* at *3–4. The court considered two other factors, finding that transporting the dog was normal use of the vehicle and that an intervening act did not break the causal chain between the use of the vehicle and the injury.

By contrast, the Missouri Court of Appeals in the thorough and detailed opinion of *Walden v. Smith* held that a dog bite that occurred through the open window of a parked car did not "arise out of the use" of the vehicle and so was not covered under the injured person's uninsured motorist policy.[229] The court emphasized the need for a causal relationship (although not true proximate causation) between the vehicle and the injury and that the use of a vehicle must create a condition that contributes to the cause of the injury.[230] The plaintiff presented only unsupported factual assertions that the use of the vehicle was a contributing factor, which were not enough to withstand summary judgment.[231]

229. 427 S.W.3d 269 (Mo. Ct. App. 2014).
230. *Id.* at 282.
231. *Id.* at 283–84.