RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

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I. INTRODUCTION

This survey covers several issues relating to animal tort law and animal insurance law, ranging from dog bites to immunity to equine-related injury.

In the realm of dog bites, cases covered topics including the imposition of strict liability on a dog owner for harm caused without contact, the superseding liability of a volunteer in possession of a dog over the animal shelter that owns the dog, the liability of landlords for harm caused by dogs owned by tenants, and the assumption of risk by people who attempt to stop a dog fights and volunteer at animal shelters. The damages available for injuries caused by a dog are also examined, with a court identifying factors relevant to the determination of a dog's market value and proof requirements for emotional distress.

This survey also addresses replevin cases and immunity cases. The replevin cases explore alternative views of determining right to possession, with a New York case recognizing a standard "best for all concerned."[1] The immunity cases include one examining immunity from malpractice for veterinarians at state veterinary schools, a case reviewing a public school's refusal to allow a service dog in a classroom, a trespass action for animal activists protesting a Six Flags park, and a defamation action that answers whether an allegation of animal abuse is a matter of public concern.

With respect to equine-related injury, three cases involving Equine Activity Liability Acts ("EALAs") are reviewed here, each addressing different aspects of their respective state's laws, including addressing definitions of "participant," "equine activity sponsor," and "equine activity professional" in the context of friends out on a ride together; evaluating the exception to immunity for failure to make reasonable and prudent efforts to determine a participant's ability to safely mount a horse; and the exception to immunity for injury to a spectator in areas where horses are not expected in the context of a spectator in the arena who walked into a path where horses traveled.

Finally, this survey also reviews several cases involving insurance coverage related to injury to the person and property damage caused by an animal, as well as coverage for the loss of farmed animals. In a dog bite case where the caretaker was bitten by the dogs, coverage existed because the definition of "insured" varied between the insuring provisions based on whether it was in bold or plain text, rendering the intra-insured exception to coverage inapplicable. In another case, a rider injured during a trail horse competition could not garnish insurance proceeds under the competition sponsor's insurance policy because the policy was designed

1. Finn v. Anderson, 64 Misc. 3d 273 (N.Y. City Court of Jamestown, 2019) (quoting Travis v. Murray, 977 N.Y.S.2d 621 (Sup. Ct. 2013)).

to address injury to spectators and the general public, not competitors on their horses. Three separate property damage cases involving coverage for incidents involving squirrels, raccoons, and feral cats are also covered. Even fish make an appearance—one case involved the loss of 800,000 commercially farmed fish, and whether the loss of the fish was covered under an equipment breakdown endorsement.

II. ANIMAL TORT LAW

A. *Dog Bites*

1. Owner Liability

In *Coppedge v. Travis*,[2] a Connecticut Court of Appeals reviewed the scope of an owner's liability under the state's dog-bite statute, finding that it covered damages caused by a dog even when no dog bite was involved.[3] The statute imposes strict liability on an owner or keeper of a dog that

> does any damage to either the body or property of any person, . . . except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog.[4]

In *Coppedge*, Travis, the defendant, was walking his unleashed dog, Lilly, when she "bounded" toward the plaintiff, Coppedge.[5] Startled, Coppedge fell, fracturing her wrist.[6] Although Lilly did not touch Coppedge, she "came close and stood over" Coppedge where she lay.[7] Coppedge sued. The trial court held Travis liable as Lilly's owner and keeper under the dog bite statute, finding that the "exuberant, unleashed Lilly" caused Coppedge's injuries.[8]

Travis appealed, asserting that Lilly was "innocent" and not the proximate cause of the injuries.[9] The court of appeals disagreed.[10] The court first rejected Travis's reading of *Atkinson v. Santore*[11] as meaning that the statute only applies if a dog is engaged in "vicious or mischievous conduct."[12] Instead, the court read it as not extending to damages "caused by [a] dog's

2. 202 A.3d 1116 (Conn. App. 2019).
3. *Id*. at 1122.
4. Conn. Gen. Stat. § 22-357 (2013).
5. *Coppedge*, 202 A.3d at 1118.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1119.
10. *Id.*
11. 41 A.3d 1095 (Conn. App. 2012), *cert. denied*, 44 A.3d 184 (Conn. 2012).
12. *Coppedge*, 202 A.3d at 1120. *Atkinson* held that the dog bite statute does not cover a plaintiff's exposure to rabies. *See Atkinson*, 41 A.3d at 1098.

merely passive, innocent, and involuntary behavior."[13] Here, the dog was "exuberant" and "bounded" toward Coppedge, resulting in behavior that was not "merely passive, innocent and involuntary."[14] The court also rejected Travis's argument that evidence on Lilly's distance from Coppedge when she fell was essential to determining causation.[15] Citing the Connecticut Supreme Court case *Malone v. Steinberg*,[16] the *Coppedge* court stated that actual contact with a dog is not required for liability under the dog-bite statute; rather, the dog merely has to be the proximate cause of the injuries.[17] Here, the evidence that Coppedge tripped and fell when trying to avoid Lilly was sufficient for causation, and the fact that Lilly stood over Coppedge when she was on the ground showed Lilly's close proximity.[18] Therefore, the trial court's judgment was affirmed.[19]

2. Keeper Liability

In *Derby v. Tails of Courage, Inc.*,[20] a Connecticut Superior Court considered the liability of an animal rescue under the Connecticut dog-bite law for harm caused to the child of a volunteer.[21] The statute imposes liability on "any person . . . owner or keeper" of a dog that causes bodily or property damage to a person, with some exceptions.[22] Derby, the plaintiff, was approved as a foster for the defendant, Tails of Courage.[23] Shortly after Derby picked up her foster dog, the dog attacked Derby's child and acted aggressively toward her other children.[24] Derby later learned that the dog had bitten in the past, which the rescue failed to disclose.[25] Derby returned the dog to the rescue the next day and sued for damages, alleging the rescue was the owner of the dog for purposes of the dog bite statute.[26] The rescue moved to strike, arguing that Derby could not recover because she herself was the dog's "keeper."[27]

The court focused on the word keeper, defined as a non-owner who harbors or has possession of a dog.[28] Looking to case law, the court found that

13. *Coppedge*, 202 A.3d at 1120 (citing *Atkinson*, 41 A.3d at 1095–100).
14. *Id.*
15. *Id.* at 1121–22.
16. 89 A.2d 213 (Conn. 1952).
17. *Coppedge*, 202 A.3d at 1121.
18. *Id.*
19. *Id.* at 1122.
20. 2019 WL 1765866 (Conn. Super. Ct. Mar. 18, 2019).
21. *Id.* at *1.
22. Conn. Gen. Stat. § 22-357(b) (2019).
23. *Derby*, 2019 WL 1765866, at *1.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at *2.
28. *Id.* (citing Conn. Gen. Stat. § 22-327(6) (2019)).

"harbor" meant "afford[ing] lodging, shelter or refuge," and "possession" required the keeper to have full dominion and control equal to that of an owner.[29] Full dominion and control was required to prevent the "anomalous result . . . that both the nonowner of a dog and its owner would be held to the same heavy liability . . . even when the . . . former exercised considerably less control over the dog than the latter."[30] Looking to the facts of this case, the court granted the motion to strike, finding that Derby was considered the keeper of the animal during the term of her foster agreement because she had unlimited authority to care for the dog.[31]

3. Landlord Liability

In *Armstrong v. Hill*,[32] the Alabama Supreme Court considered the extent of a landlord's liability for harm caused by a tenant's dog.[33] In that case, the defendant landlord, Armstrong, leased a house to McKithen, another defendant.[34] Hill, the plaintiff, was in her yard when she was attacked by three dogs that came from the vicinity of the Armstrong land.[35] She suffered injuries to her hand and elbow.[36] Hill sued both Armstrong and McKithen based on negligence, wantonness, and premises liability.[37] At trial, Armstrong testified that her lease with McKithen contained a clause prohibiting pets without Armstrong's written consent, that she was unaware of any dogs on the property, and that she had seen no dogs on her two inspections of the property.[38] Notwithstanding her testimony, the trial court found Armstrong liable for Hill's damages.[39] Armstrong moved to set aside the judgment, which was denied.[40] Armstrong appealed.[41]

The Alabama Supreme Court held that the evidence presented at trial could not sustain the trial court's ruling.[42] For negligence, the court found that Alabama law only imposed a duty on "owners" and "keepers" to prevent dogs from biting others.[43] Citing *Humphries v. Rice*,[44] which held that a landowner who merely interacted with her son's dog while he lived on her

29. *Id.* (quoting Auster v. Norwalk United Methodist Church, 943 A.2d 391, 396 (Conn. 2008) (internal quotation marks omitted)).
30. *Id.* (quoting *Auster*, 943 A.2d at 396 (internal quotation marks omitted)).
31. *Id.* at *3.
32. 2019 WL 2066681 (Ala. May 10, 2019).
33. *Armstrong*, 2019 WL 2066681 at *1.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at *1–2.
39. *Id.* at *2.
40. *Id.* at *3.
41. *Id.*
42. *Id.* at *7.
43. *Id.* at *6.
44. 600 So. 2d 975 (Ala. 1992).

property was not a keeper,[45] the *Armstrong* Court found that Armstrong was not an owner or keeper because Hill neither owned nor had responsibility for the dogs.[46] The Court similarly found no evidence of wantonness, which it defined as "'the conscious doing of some act or omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result.'"[47] For premises liability, the Court noted that it had never expanded the scope of a landlord's liability for dog bites under premises liability to include bites that occur off premises, nor could premises liability apply unless Armstrong was aware of a dangerous condition on the premises.[48] Here, Armstrong was unaware of the dogs' presence on her land and the danger they presented, and the fact that she inspected the property and may have seen fencing or "dog structures" was unlikely to have placed her on notice of a dangerous condition.[49] Finding no evidence of liability, the Court reversed and remanded.[50]

In *Tyner v. Matta-Troncoso*,[51] the Georgia Supreme Court considered a landlord's liability under the Georgia dog-bite statute, which provides:

> A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash.[52]

In the case, the landlord, Tyner, leased a house to the tenants, the Thorntons, who acquired two dogs.[53] The lease contained no pet restrictions.[54] At some point, the front gate latch broke, but it was not repaired.[55] The Thorntons began to secure the gate by tying it closed with a dog leash.[56]

45. *See Humphries*, 600 So. 2d at 977.
46. *Armstrong*, 2019 WL 2066681 at *6.
47. *Id.* (quoting Ex Parte Essary, 992 So. 2d 5, 9 (Ala. 2007)).
48. *Id.* at *6.
49. *Id.* at *6 n.11. One judge concurred and dissented based on a procedural issue that made it unclear whether the trial court had given Armstrong a trial on the merits relating to the liability issue. *Id.* at *7 (Mitchell, J., concurring in part and dissenting in part). The judge would have remanded to the trial court to allow plaintiff Hill to present all of her liability evidence. *Id.*
50. *Id.* at *7.
51. 826 S.E.2d 100 (Ga. 2019).
52. Ga. Code Ann. § 51-2-7 (2019).
53. *Tyner*, 826 S.E.2d at 101.
54. *Id.*
55. *Id.* at 102. Evidence differed on whether the Thorntons notifed Tyner of the broken latch. *Id.*
56. *Id.*

After the Thorntons' first dog died, they acquired two others.[57] Because there was some evidence suggesting that Tyner knew about the dogs, Tyner's knowledge was assumed for summary judgment.[58]

The two dogs attacked Matta-Troncoso as she was walking her small dogs, causing her serious injuries.[59] Matta-Troncoso sued both the Thorntons and Tyner.[60] The claim against Tyner was based on his failure to repair the gate as landlord.[61] Tyner moved for summary judgment, which was granted because there was no evidence that the dogs had ever displayed or that Tyner knew about a vicious propensity.[62] The court of appeals reversed, holding that proof of the landlord's awareness of vicious propensities was not required to prove liability under the statute as the dogs were off-leash in violation of a local ordinance.[63] The court further concluded that a fact issue existed as to whether Matta-Troncoso's injuries were due to Tyner's failure to repair the gate latch, raising potential liability under section 44-7-14 of the Georgia Code, which imposes premises liability on a landlord "for damages arising from defective construction or for damages arising from the failure to keep the premises in repair."[64] Even though Matta-Troncoso's injuries occurred two blocks from the leased premises, the court of appeals noted that Tyner might be liable because "the statute did not limit a landlord's liability to injuries occurring on a leased premises."[65]

The Georgia Supreme Court held that the court of appeals erred by reversing summary judgment.[66] The Court first noted that Tyner could not be liable for Matta-Troncoso's injuries because the dog-bite statute only imposes liability on owners and keepers, neither of which describes an out-of-possession landlord;[67] therefore, vicious propensity could not be presumed.[68] Further, there was no issue of fact because Tyner's lack of knowledge of any "harmful tendencies or propensities" meant that it was not reasonably foreseeable that Matta-Troncoso's injuries could arise from

57. *Id.*
58. *Id.*
59. *Id.* at 101–02. An officer arriving on scene fatally shot the dogs. *Id.* at 102. Mr. Thornton later pleaded guilty to criminal charges related to the attack. *Id.* at 103.
60. *Id.* at 101.
61. *Id.*
62. *Id.* at 101–02. The trial court did find that the landlord's failure to repair the gate breached the landlord's statutory duty to repair the premises, but granted summary judgment based on the lack of vicious propensities. *Id.*
63. *Id.* at 102.
64. Ga. Code Ann. § 44-7-14 (2019).
65. *Tyner*, 826 S.E.2d at 102.
66. *Id.* at 103.
67. *Id.*
68. *Id.*

failing to repair the latch.[69] As for Matta-Troncoso's statutory negligence claim for failure to repair, the Court expressed doubt as to section 44-7-14's applicability to a dog bite, but assumed its application for purposes of analysis.[70] The Court also assumed that the section created a duty to repair that Tyner breached.[71] However, the Court noted that foreseeability is a necessary part of proximate cause and applies to actions under section 44-7-14.[72] Referencing prior dog bite cases, the Court noted that a plaintiff must show, even under the statute, that the landlord had prior knowledge of the dog's vicious propensity[73] because neither vicious propensity nor dangerousness could be presumed and mere knowledge of the existence of a dog on the premises is insufficient to create such knowledge.[74] Without this proof, the plaintiff cannot show the necessary foreseeability to hold the landlord liable.[75] Because there was no evidence showing Tyner's knowledge of any vicious propensities of the Thornton's dogs, no issue of material fact was created and summary judgment was appropriate.[76]

4. Assumption of the Risk

In *Saulsbury v. Wilson*,[77] a Georgia Court of Appeals considered whether a person who intervened in a dog fight with her bare hands assumed the risk of injury as a matter of law.[78] In the case, Saulsbury's and Wilson's dogs were fighting.[79] While trying to break up the fight, Saulsbury was bitten by Wilson's dog and suffered injuries.[80] Saulsbury sued under the state's dog bite statute.[81] Wilson moved for summary judgment, but was denied.[82] On appeal, the court reversed, determining that Saulsbury had assumed the risk.[83] It based its decision on Saulsbury's experience in breaking up dog fights, her knowledge that Wilson's dog had bitten before, and case law holding that a person assumes the risk when intervening in human fights.[84]

69. *Id.* at 103–04.
70. *Id.* at 104 n.6.
71. *Id.* at 104.
72. *Id.* at 105.
73. *Id.* (citing, *inter alia*, Griffiths v. Rowe Props., 609 S.E.2d 690, 691 (Ga. Ct. App. 2005), and Pickard v. Cook, 478 S.E.2d 432, 433 (Ga. Ct. App. 1996)).
74. *Tyner*, 826 S.E.2d at 106.
75. *Id.* at 104–06.
76. *Id.* at 106–07.
77. 823 S.E.2d 867 (Ga. Ct. App. 2019).
78. *Saulsbury*, 823 S.E.2d at 868.
79. *Id.*
80. *Id.* at 868–69.
81. *Id.* at 869.
82. *Id.*
83. *Id.*
84. *Id.* at 869–70. The court rejected Saulsbury's arguments that Wilson violated the city's animal control ordinance and the plaintiff's reading of the ordinance as requiring her intervention in the dogfight. *Id.* at 870-71.

In *Morris v. Best Friends Animal Society*,[85] a California Court of Appeals considered whether an animal shelter volunteer assumes the risk of being bitten by a shelter animal.[86] Plaintiff Morris was a volunteer at defendant's animal shelter.[87] Prior to volunteering, Morris signed a release waiving future liability of Best Friends.[88] The release also provided:

> Assumption of Risk. I am voluntarily participating in the activities of Best Friends with full knowledge of the risks and dangers involved and hereby agree to accept any and all risks of injury, death, or damage to myself and/or my personal property. As a volunteer, I may come into contact with and interact with animals, and such work entails risk of personal injury due to proximity to animals, dangerous equipment, long-distance driving, and other considerations. These include, but are not limited to, being bitten, kicked, clawed, tripped and possibly exposed to zoonotic diseases.[89]

The release included an acknowledgement that it applies "to the entire term of [the] volunteer relationship, starting with the date [the volunteer] first perform[s] volunteer duties for Best Friends, even if it predates the date of this agreement, and continuing as long as [the volunteer] continue[s] to be a Volunteer."[90]

While at the shelter, Morris entered a kennel to take a dog for a walk.[91] The dog attacked, causing Morris serious injury.[92] The kennel contained no alarm or means of stopping the attack, and it took some time before shelter employees successfully intervened.[93] Morris sued Best Friends based on negligence and gross negligence.[94] Best Friends moved for summary judgment, asserting it was protected by the release and because the doctrine of primary assumption of the risk controlled.[95] Morris argued the release was unenforceable because she did not sign it until after she began volunteering and because she did not sign another release when she restarted the volunteer program after an absence of two years.[96] The court rejected the arguments, noting that the release specifically stated that it applied in both instances.[97] The court also found no error with the trial court's application of

85. 2018 WL 6191029 (Cal. App. Nov. 28, 2018) (unpublished).
86. *Id.* at *1.
87. *Id.*
88. *Id.*
89. *Id.* (emphasis omitted).
90. *Id.* at *4.
91. *Id.* at *2.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at *3.
97. *Id.* at *3–4. The court also rejected the plaintiff's arguments that the release was invalid because it impaired the public interest and violated federal and state labor laws and violated public policy by waiving gross negligence. *Id.* at *4–5, *7.

the doctrine of primary assumption of the risk, which bars recovery "when, 'by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury."[98] Noting that the doctrine applied regardless of vicious propensities and had been used in cases involving kennel workers, veterinarians, and veterinarian assistants, the court found that it applied to shelter volunteers as in this case.[99] The court stated:

> Plaintiff's argument that Best Friends could have minimized her injuries . . . has no relevance to application of the primary assumption of risk doctrine. Best Friends had no duty to eliminate or minimize the risks inherent in interacting with shelter dogs. Its sole duty was not to unreasonably increase that risk.[100]

B. *Damages*

In *Keller v. Chism*,[101] an Ohio Court of Appeals considered what damages are available for strict liability and negligence claims relating to a dog attack.[102] In the case, Domer and Jeffrey Keller, the plaintiffs, and Jeffrey's dog, Bunny, sustained injuries when defendant Chism's three dogs attacked them.[103] Domer and Jeffrey suffered scratches, bruises, and emotional distress and Bunny required veterinary care.[104] The plaintiffs alleged claims of strict liability under the state's dog-bite statute, negligence, and negligent infliction of emotional distress.[105] The jury found Chism strictly liable under the statute, but found no negligence because the dogs were not vicious nor did the defendant know of any viciousness prior to the attack.[106]

Jeffrey received $500 for his own injuries, $524.81 for veterinary costs, and $400 for the reduced value of Bunny.[107] Domer was awarded $500 in compensatory damages and $500 in punitive damages.[108] Both men received attorney's fees.[109] Chism challenged the damages award on appeal.[110] The court of appeals rejected the awards of punitive damages and attorney's fees based on the claim under the dog-bite statute because the

98. *Id.* at *7 (citation omitted).
99. *Id.*
100. *Id.* (citation omitted).
101. 136 N.E.3d 27 (Ohio Ct. App. 2019).
102. *Id.* at 29–30.
103. *Id.* at 29.
104. *Id.*
105. *Id.* at 30.
106. *Id.* at 30–31.
107. *Id.* at 30.
108. *Id.*
109. *Id.*
110. *Id.*

statute limited liability to compensatory damages.[111] The court upheld the emotional distress damages because emotional distress comprises a part of pain and suffering.[112] The damages were allowed even though no expert medical testimony was provided because, according to the court, no expert testimony is required when "'the cause and effect are so apparent that they are matters of common knowledge.'"[113] Here, plaintiffs' testimony alone was sufficient evidence to support damages.[114]

The court also upheld the property damages award, noting that personal property damages are generally calculated as "the difference between the property's fair market value before and immediately after the loss," but in "exceptional circumstances" the court may use the "value to the owner."[115] Factors to be considered in determining value to the owner include "'fair market value, age of the pet, pedigree, training, breeding income, recommendation of the treating veterinarian, circumstances of the injury, and anticipated recovery,'" with the greatest consideration being reasonableness and specificity of the expenses.[116] Further, veterinary costs may also be awarded in addition to the animal's value, even if the animal ultimately dies from its injuries.[117] The court therefore upheld the award of veterinary costs and reduced value based on testimony establishing Bunny's pedigree and training for rabbit hunting.[118]

C. *Replevin*

In *Finn v. Anderson*,[119] a New York City Court was asked to determine ownership of a cat.[120] The facts of the case were simple. Anderson, the defendant, was given a cat in 2009.[121] She had the cat neutered when he was young, but had not taken the cat to a veterinarian since then.[122] Anderson allowed the cat to be both inside and outside.[123] In 2019, Finn, the plaintiff and neighbor to Anderson, noticed the cat wandering on her property, began feeding him, and after several months, brought him into her

111. *Id.* at 30–31.
112. *Id.* at 32–33.
113. *Id.* (quoting Garcea v. Woodhull, 2002 WL 1065687, at *2 (Ohio Ct. App. May 22, 2002)).
114. *Id.* at 34.
115. *Id.*
116. *Id.* at 35 (quoting Rego v. Madalinski, 63 N.E.3d 190, 192 (Ohio Ct. App. 2016) (quoting Irwin v. Degtiarov, 8 N.E.3d 296, 301 (Mass. App. Ct. 2014)) (internal quotation marks omitted)).
117. *Id.*
118. *Id.*
119. 64 Misc. 3d 273 (N.Y. City Court of Jamestown 2019).
120. *Id.* at 274.
121. *Id.*
122. *Id.*
123. *Id.*

home.[124] A month later, the cat got out of Finn's house and was taken back by Anderson.[125] Finn asked for return of the cat, but Anderson refused.[126] Finn sued in replevin.[127]

Before deciding which party would be the owner and take possession of the cat, the court discussed factors to consider when making that decision.[128] The court first noted animals' current status as personal property and the traditional view that "the property rights of the litigants, rather than their respective abilities to care for the dog or their emotional ties to it, . . . are ultimately determinative."[129] However, the court also noted that New York and many United States courts are moving to the "de-chattelization" of companion animals, although they have not gone so far as to adopt a "best interests" standard equivalent to child custody cases.[130] The court set out the reasons the traditional best interests standard has been rejected, referencing the impossibility of determining an animal's happiness short of looking at a tail wag and questioning whether resources and court time should be spent making that determination.[131] However, the court stated, "New York courts have developed a 'quasi-interests based standard' that 'takes into consideration, and gives paramount importance to, the intangible, highly subjective factors that are called into play when a cherished pet is the property at issue.'"[132]

Announcing that "it is time to declare that a pet should no longer be considered 'personal property' like a table or car,"[133] the court decided to use an evolved standard described as "best for all concerned."[134] Under that standard, the court would "analyze proof offered by each party that they will benefit from having the animal in their life, and why the animal has a better chance of living, prospering, loving and being loved in their care."[135] Using that standard, the court "hope[d] to take the intangible needs and interests of a pet into account along with the ordinary indicia of ownership or right to possession (title, purchase, gift, expenses, etc.)."[136] Applying the standard to the case before it, the court decided that the cat would remain in the Anderson's possession because she had cared for the cat for ten years,

124. *Id.*
125. *Id.*
126. *Id.* at 274–75.
127. *Id.*
128. *Id.* at 275.
129. *Id.* at 276 (internal quotation marks and citation omitted).
130. *Id.*
131. *Id.*
132. *Id.* at 276–77 (quoting Travis v Murray, 42 Misc. 3d 447, 455 (N.Y. Sup. Ct. 2013)).
133. *Finn*, 64 Misc. 3d at 278.
134. *Id.* at 277.
135. *Id.*
136. *Id.*

her children were emotionally attached to the cat, and the cat "may have 'voted with his feet'" by returning to Anderson's home.[137]

Animals R Family, Inc. v. Sunrise Assisted Living of Stamford[138] involved a request for a prejudgment remedy in a replevin case before a Connecticut Superior Court.[139] The case arose out of the breach of an adoption contract.[140] The defendant, Sunrise Assisted Living, adopted a dog from the plaintiff, Animals R Family, a rescue organization.[141] The adoption contract included a provision that allowed the rescue to reclaim the dog if the dog was not adequately cared for and required the defendant to obtain the rescue's consent prior to transferring possession or ownership of the dog to anyone else.[142] After retiring the dog from service and without seeking permission first, Sunrise gave the dog to an employee.[143] The rescue later learned of the transfer and that the dog had "masses" on his legs.[144] The rescue contacted Sunrise, and Sunrise admitted that it breached the contract.[145] Sunrise asked the employee to return the dog, but she refused.[146]

Lacking Connecticut authority, the court relied on *Arguello v. Behmke*,[147] a New Jersey case involving a shelter's transfer of a Katrina dog without prior notice to the owner.[148] Like *Arguello*, the court focused on the contract, awarding the rescue possession of the dog because a court would likely find that the employee's care was insufficient under the contract.[149] Although noting the employee's care and affection for the dog, the court stated that the dog's "best interests" were irrelevant to a replevin action, and ordered the dog returned to the plaintiff.[150]

137. *Id.* at 279.
138. 2019 WL 3526443 (Conn. Super. Ct. July 10, 2019) (unpublished).
139. *Id.* at *1.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. 2006 WL 205097 (N.J. Super. Ct. Ch. Div. Jan. 26, 2006).
148. *Id.* at *1. *Arguello* involved an ownership dispute between an owner and an emergency shelter after Hurricane Katrina. *Id.* The agreement between owner and shelter required the shelter to contact the owner before transferring the dog, but the shelter transferred the dog to a shelter in New Jersey without notifying owner. *Id.* The New Jersey shelter adopted the dog out to a third party who refused to return the dog. *Id.* at *2. In ordering return of the dog in a replevin action, the New Jersey court relied on the shelter's breach of the contract's notification requirement. *See id.* at *4–5.
149. *Animals R Family, Inc.*, 2019 WL 3526443, at *2–3.
150. *Id.*

D. *Immunity*

1. Law Enforcement Officers

Bullman v. City of Detroit[151] involved a Section 1983 action against the City of Detroit and a police officer[152] who shot and killed two pit bulls during a narcotics raid.[153] The dogs barked briefly when the police officers broke down the door, but did not act aggressively and spent most of the time "cowering" in a corner behind a wooden barricade.[154] Although Castro, the dogs' owner and a plaintiff, pleaded with an officer not to do so, the officer fired six bullets into the dogs, killing them.[155] Castro sued for unreasonable seizure under the Fourth Amendment and a violation of 42 U.S.C. § 1983.[156] The city and officer moved for summary judgment, claiming qualified immunity and arguing that the seizure was reasonable because the dogs were an imminent threat and that one of the pit bulls was "contraband" because the dog was not licensed.[157] The district court denied qualified immunity, concluding that the officers' safety was not in imminent threat because the dogs never lunged or attacked and were separated by a barricade.[158] The Sixth Circuit Court of Appeals affirmed.[159] The court found the shooting unreasonable based on trial testimony and because, even assuming an unlicensed dog is contraband, the officer here did not know the dog was unlicensed at the time he shot the dog.[160]

2. Public Universities and Employees

In *Kutyba v. Watts*,[161] a Texas Court of appeals reviewed whether a state university was immune from suit for alleged malpractice by its university-employed veterinarian.[162] In the case, the plaintiff, Kutyba, sued the defendant, Texas A&M University ("TAMU") and a veterinarian employed at TAMU's Veterinary Medical Teaching Hospital for the death of her horse.[163]

151. 2019 WL 4691416 (6th Cir. Sept. 26, 2019).
152. Several officers were sued by the plaintiffs, but only the actions of one related to the death of the dogs. *Id.* at *1.
153. *Id.*
154. *Id.* at *2.
155. *Id.* Other officers at the scene testified that they heard Castro's pleas for the dogs. *Id.* The officer who killed the dogs testified that the dogs tried to jump the barricade into the living room and were actively viciously. *Id.* Several other officers testified that they were afraid of or in danger of being attacked by the dogs. *Id.*
156. *Id.* at *1. Other claims were filed by the plaintiffs that did not involve the dogs. *See id.* at *3.
157. *Id.*
158. *Id.* at *4.
159. *Id.* at *8.
160. *Id.*
161. 2019 WL 1187427 (Tex. App. Mar. 13, 2019).
162. *Id.* at *1.
163. *Id.*

TAMU and the veterinarian asserted immunity and sought, and the lower court granted, dismissal of the veterinarian under the Texas Tort Claims Act ("TTCA").[164] The TTCA provides:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.[165]

Kutyba argued on appeal that the state had waived immunity under subsection (2) of the statute because subsection (1) requires that the property damages result from use of a motor vehicle.[166] The court of appeals rejected the argument, however, stating that subsection (2) only speaks in terms of personal injury and death.[167] Death, the court explained, refers to the death of a human, not animal, and since horses are personal property, liability for harm or death to the horse could not be considered waived by this provision.[168]

As for the veterinarian's liability, where a plaintiff sues both the state and an employee, the employee is dismissed upon motion by the state because suing the state "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employees of the governmental unit regarding the same subject matter."[169] Therefore, prior to filing a complaint, a plaintiff must decide whether to sue the employee or the state if the activity causing the harm was within the employee's scope of employment or whether to sue the employee individually if the harm was caused by actions outside the scope of employment.[170] In addition, an error in the choice of whom to sue cannot be rectified by filing an amended complaint that excludes reference

164. *Id.*
165. Tex. Civ. Prac. & Rem. Code § 101.021 (West 2019).
166. *Kutyba*, 2019 WL 1187427 at *2.
167. *Id.* at *3.
168. *Id.*
169. *Id.* at *4 (quoting Tex. Civ. Prac. & Rem. Code § 101.106(a)).
170. *Id.*

to the employee.[171] Because the veterinarian was acting within the scope of employment in this case, the court found that dismissal of the veterinarian was appropriate.[172]

E. *Service Animals*

A United States District Court in Michigan reviewed a public school's refusal to allow a disabled student's service dog into classes in *E.F. by Fry v. Napoleon Community Schools*.[173] In the case, E.F., the plaintiff, suffered from cerebral palsy and qualified for special education.[174] His parents enrolled him in Napoleon Community Schools, the defendants, and informed the superintendent of their intent to acquire a service dog to accompany E.F. to classes.[175] Despite frequent contact with the school, including a letter from E.F.'s doctor, the defendants remained generally unresponsive.[176] The parents acquired a task-trained and certified service dog, which attended classes with E.F. for one day.[177] After that, the parents were told to leave the dog at home, but the school eventually allowed the dog into the school's foyer and hallways.[178] The defendants did provide E.F. with a human aide, a walker, and a wheelchair.[179] E.F.'s parents and school officials met, and the principal expressed concerns, also vocalized by parents, regarding potential dog phobias of classmates and distractions in the classroom.[180] Further correspondence and meetings ensued, followed by mediation and an unsuccessful trial period during which the dog was allowed into the classrooms.[181] Eventually E.F.'s parents withdrew her from defendants' school and began home-schooling.[182] E.F.'s counsel filed a discrimination complaint with the Office of Civil Rights ("OCR") of the United States Department of Education, alleging a violation of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973.[183] After a two-year investigation, OCR determined that the defendant had violated both provisions.[184]

171. *Id.*
172. *Id.* at *5.
173. 2019 WL 4670738 (E.D. Mich. Sept. 25, 2019).
174. *Id.* at *2.
175. *Id.*
176. *Id.* at *3.
177. *Id.* at *3–4.
178. *Id.* at *4.
179. *Id.*
180. *Id.*
181. *Id.* at *5–6.
182. *Id.* at *7.
183. *Id.*
184. *Id.* To settle the OCR complaint, the defendants signed an agreement under which they would allow E.F. to return to the school with complete access for her service dog. *Id.* E.F.'s parents, however, chose not to allow E.F. to return. *Id.*

The court began its discussion by noting that ADA and Section 504 claims are similar enough that one analysis would serve for both provisions.[185] Title II of the ADA prohibits a public entity from "exclud[ing] from participation in or [denying] the benefits of [its] services, programs, or activities" to a qualified disabled individual.[186] Although there is some disagreement, claims that may be brought under Title II are intentional discrimination claims and reasonable accommodation claims.[187] The court read E.F.'s complaint as raising both types of claims and then explained the proof requirements.[188] To prove a claim of intentional discrimination, the plaintiff must show either direct evidence of intentional discrimination or prove discrimination through the use of indirect evidence.[189] Proof through indirect evidence requires a burden-shifting analysis: the plaintiff makes a *prima facie* case of discrimination under Title II, after which the burden shifts to the defendant to prove a "legitimate, nondiscriminatory reason" for its action, and, if the defendant does so, the burden shifts back to the plaintiff to show the defendant's reason is "a pretext for unlawful discrimination."[190] To prove a reasonable accommodation claim, the plaintiff must show that the defendant could have provided a reasonable accommodation but refused to do so.[191]

E.F. moved for summary judgment, basing the motion on a confused argument that began as an intentional discrimination argument but ended as a reasonable accommodation argument with reference to regulations that applied to Title III rather than Title II.[192] The court found no support for plaintiffs' summary judgment motion, because the plaintiffs had not fully proven a *prima facie* case of intentional discrimination, failed to provide evidence of a pretext, and skipped entirely the defendant's burden to state a reason for the discrimination.[193] As for the reasonable accommodation

185. *Id.* at *8.
186. *Id.* (quoting 42 U.S.C. § 12132 (2019)).
187. *Id.* at *9–10. A reasonable accommodation claim arises from a public entity discriminating by

> fail[ing] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii) (2019).
188. *E.F. by Fry*, 2019 WL 4670738, at *10.
189. *Id.*
190. *Id.* at *11 (quoting Anderson v. City of Blue Ash, 798 F.3d 338, 357 (6th Cir. 2015)).
191. *Id.* at *13.
192. *See id.* at *12–13.
193. *Id.*

argument, after extensive case analysis, the court found no support that the defendants should be held to Title III regulations.[194]

The defendants also moved for summary judgment on reasonable accommodation, arguing that the plaintiffs were entitled to an accommodation, but not a specific accommodation of their choosing.[195] The court denied the motion, stating:

> A public school is bound by the provisions of the ADA and does not have carte blanche to accommodate in any way it chooses when a covered individual has requested another accommodation. . . . To accept Defendants' position would be to ignore the mandate of the ADA that requires public entities provide a requested "reasonable accommodation" when doing so is not unduly burdensome.[196]

The defendants also argued that plaintiff was not entitled to compensatory damages without a showing of intentional discrimination or "deliberate indifference," but the court ordered the case to trial because the plaintiff might be able to make that showing.[197]

F. *Free Speech*

In *Park Management Corp. v. In Defense of Animals*,[198] Park Management sued animal activists in trespass, seeking an injunction for protesting outside Six Flags Discovery Kingdom, an amusement park with animal attractions.[199] Over a period of years, the plaintiff limited expressive activity on its property to certain locations until, in 2014, it banned all expressive activity at the park, thereby limiting protestors to public sidewalks for their activities.[200] A month after the ban went into effect, a small group of people protested about the park's treatment of animals outside the park's front entrance.[201] When local authorities refused to intervene without a court order, plaintiff sued several animal advocacy groups and their members for private trespass.[202] One protestor, Joseph Cuviello, had peacefully demonstrated at the park for over twenty years and had even refused to move when employees of plaintiffs requested him to do so.[203] Cuviello intervened as a defendant, asserting a right to protest under the state and federal constitutions

194. *Id.* at *13–14.
195. *Id.* at *15.
196. *Id.* at *16.
197. *Id.* at *17.
198. 248 Cal. Rptr. 3d 730 (Ct. App. 2019).
199. *Id.* at 732.
200. *Id.* at 734. The complete ban occurred shortly after plaintiff learned of a trial court decision holding that Sea World in San Diego could prohibit protests and demonstrations in its parking lot and entrance area without running afoul of the constitution. *Id.*
201. *Id.* at 735.
202. *Id.*
203. *Id.* at 735–36.

because the location was dedicated to a public use and was a public forum and because he had a prescriptive easement.[204] Park Management moved for summary judgment, which was granted.[205] The trial court ruled that the First Amendment did not apply to the land because it was private and that it did not constitute a public forum under state law.[206] The court also rejected the prescription argument.[207]

On appeal, Cuviello made the same constitutional and state law claims.[208] The court first reviewed the state public forum claim, concluding after a long analysis of case law and balancing the public's right to free speech against the plaintiff's private property rights that the exterior portion of Six Flags Discovery Kingdom that did not require a ticket for entry was a public forum.[209] However, the court clarified that its opinion was limited to this specific venue, and that each case required its own separate analysis.[210] Because the case was resolved based on the state law issue, the court found it unnecessary to resolve the federal constitutional and prescriptive easement claims.[211]

G. *Defamation*

In *Duncan v. ACIUS Group, LP*,[212] a Texas appellate court considered whether allegations of animal abuse were a matter of public concern, thereby falling under the state's anti-SLAPP statute.[213] The case arose when the ACIUS Group, the defendant, terminated the plaintiff, Andrew Duncan, for abuse of his position as chief officer of operations.[214] Tom Maxwell was the sole member of ACIUS' limited partnership, another plaintiff.[215] After the termination, Duncan's wife published statements that accused Maxwell of "abusing and/or killing his cherished horses, cattle, and dogs."[216] The defendants sued Duncan and his wife for defamation.[217] Duncan and his wife moved to dismiss under the Texas Citizens Participation Act ("TCPA"), which allows dismissal of legal actions and recovery of court costs and attorney's fees if the action "is based on or is in response to [a] party's 'exercise of . . . the

204. *Id.* at 736.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 736–37.
209. *Id.* at 740–42.
210. *Id.* at 744.
211. *Id.*
212. 2019 WL 4392507 (Tex. App. Sept. 13, 2019).
213. *Id.* at *1.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* Plaintiffs asserted additional claims against Duncan based on his actions as an employee, but none of those claims were impacted by this decision. *Id.*

right of free speech,'"[218] meaning "a communication made in connection with a matter of public concern."[219] The defendants amended their petition dismissing the defamation claim.[220] Although the trial court held a hearing, it failed to issue a timely order, so the motion was denied by law.[221]

Duncan and his wife appealed, and defendants argued the dismissal motion was moot because they nonsuited the plaintiffs.[222] The court of appeals rejected that argument based on prior case law holding that a nonsuit does not moot pending claims for court costs and attorney's fees.[223] Finding that plaintiffs' defamation claim fell within the TCPA,[224] the court analyzed whether an accusation of animal abuse was a matter of public concern.[225] The court held that it was, finding that the public's concern is manifested through the enactment of cruelty laws, the existence of national animal protection organizations, and the government funding of animal shelters.[226] Because the plaintiffs were able to show the basis for a TCPA dismissal, the burden moved to defendants to prove "by clear and specific evidence" each element of the defamation claims.[227] Finding that the plaintiffs had not done so, the court held that the trial court erred in failing to grant dismissal.[228]

H. *Equine-Related Injury*

1. Claims Limited by Equine Activity Liability Acts

a. *Defining "Participant," "Equine Activity Sponsor," and "Equine Professional"*

Christie v. Forecki involved a pair of riders, each on their own horses, out for a ride.[229] The more experienced of the two was Christie, the eventual plaintiff.[230] Twenty minutes into the ride, they arrived at a field where they decided to swap horses, with Christie mounting Forecki's horse, who was known to be gentle and who Christie had ridden once before.[231] While cantering, Christie attempted to steer the horse away from a tree, but the horse reared three times and ultimately flipped over backwards, injuring

218. *Id.* at *1 (quoting Tex. Civ. Prac. & Rem. Code §§ 27.005(b), 27.009(a) (West 2019) (internal quotation marks added)).
219. *Id.* at *4 (quoting Tex. Civ. Prac. & Rem. Code § 27.001(3) (West 2019)).
220. *Id.* at *1.
221. *Id.*
222. *Id.* at *2–3.
223. *Id.* at *3.
224. *Id.*
225. *Id.* at *4.
226. *Id.*
227. *Id.* at *5.
228. *Id.*
229. 2019 WL 4140783 (N.D. Ill. Aug. 28, 2019).
230. *Id.* at *1.
231. *Id.*

Christie.[232] With suit filed, the Forecki defendants claimed immunity under the Illinois EALA which protects "equine activity sponsors" and "equine professionals" from liability for negligence but does not protect people who do not fit the definition of either of those terms.[233] The court rejected this claim of immunity.[234] Initially, the court rejected Forecki's argument that Christie was a "participant" as defined by the statute. Although Christie was engaged in an "equine activity" which includes "riding . . . an equine belonging to another," the definition of participant is more narrowly applicable only to activities associated with purchasing a horse.[235] However, even if Christie was a participant within the meaning of the statute, the court concluded that Forecki was entitled to immunity only if she was an equine activity sponsor or equine professional, and that to conclude otherwise would create the absurd result that the statute could protect any person from liability, a result that could not have been intended.[236] Because there was no dispute here that neither rider was acting as an equine activity sponsor or equine professional, the court concluded that the Illinois EALA did not apply to limit Forecki's liability.[237]

Even though Christie's negligence claim could proceed despite the EALA, the court dismissed the case on summary judgment because no reasonable fact finder could rule in Christie's favor.[238] Christie brought three claims for willful and wanton conduct: the horse had improper training and was inappropriate for Christie's level of experience; failure to disclose that the horse was unusually dangerous; and faulty riding equipment.[239] Under Illinois law, there is no independent claim for willful and wanton conduct, so the court reviewed them as negligence claims.[240] The court concluded that no reasonable fact finder could find in favor of Christie because she was fully informed of the risks of riding the horse and failed to prove that rearing rendered the horse unusually dangerous to a person with her level of experience.[241] Christie herself testified that she was an experienced rider (more so than the horse's owner) and was well aware of the inherent risks of riding; had ridden the horse before; had (along with Forecki) drank alcohol and smoked marijuana before the ride; observed and was satisfied with the tack before mounting; came up with the idea of swapping horses; and

232. *Id.*
233. *Id.* at *2.
234. *Id.* at *2–4.
235. *Id.* at *3 (quoting 745 Ill. Comp. Stat. 47/10(c)(4) (2019)).
236. *Id.* at *4.
237. *Id.*
238. *Id.* at *5–6.
239. *Id.* at *5.
240. *Id.* at *5–6.
241. *Id.*

decided to canter the horse before he reared.[242] Thus, while the Illinois EALA did not bar Christie's claims, the court granted summary judgment on the undisputed facts.[243]

b. *Exception to Immunity for Failure to Make Reasonable and Prudent Efforts to Determine Ability*

In *Pezzani v. United States*,[244] a case stemming from a trail riding injury sustained at the Air Force Academy Equestrian Center in Colorado, the District of Missouri recently issued a lengthy opinion and judgment following a bench trial. Compared with the many cases addressing EALAs on dispositive motions, this case provides a look into how fact finders evaluate horse injury cases in the context of those statutes. The basic facts are straightforward: Plaintiff signed up for a horse ride sponsored by the Equestrian Center.[245] It apparently was a busy day at the center, and the wrangler assisting Plaintiff with mounting laughed off her request to lower the stirrups on the saddle, and he did not offer her the alternatives of a mounting block, a platform, or a leg up.[246] As she began to mount her horse, she placed her left foot in the left saddle stirrup and attempted unsuccessfully to swing her right leg over the horse, injuring her right leg when it came down hard on the ground.[247]

Plaintiff alleged that the Equestrian Center wrangler negligently failed to assess her ability to safely mount a horse, refused to lower the horse's stirrups, failed to adequately instruct her on safe mounting, and failed to have a mounting platform that would allow for stepping onto the saddle rather than "boosting" up.[248] In defense, the United States alleged that it was immune from liability under the Colorado EALA because the risks of mounting a horse are inherent to equine activities, and alternatively because it was not negligent.[249] Even if it were negligent, the United States argued that Pezzani was at least or more negligent, precluding recovery under Colorado's law of comparative fault.[250] In reaching its decision, the court first addressed the facts and determination of common law negligence before analyzing immunity under the state EALA because the question of immunity and any exception to it involved analysis of the wrangler's negligence.[251]

242. *Id.*
243. *Id.*
244. 2019 WL 4737120 (E.D. Mo. Sept. 27, 2019).
245. *Id.* at *1.
246. *Id.* at *2.
247. *Id.* at *2–3.
248. *Id.* at *1.
249. *Id.*
250. *Id.*
251. *Id.*

This case turned largely on expert testimony. Plaintiff offered an expert certified by a national horsemanship association who has taught and certified instructors for 25 years and who, in forming her opinions for the case, relied on written industry manuals about appropriate practices and procedures for evaluating rider abilities and for mounting and dismounting riders for trail rides.[252] She opined that the wrangler fell below those standards and that his decisions and failures were not part of the inherent risks of equine activities.[253] Defendant's expert also had years of professional horse industry experience in consulting, teaching, and acting as a legal consultant.[254] In his opinion, the plaintiff's expert's industry manuals were inapplicable to the unguided ride here, where a rider takes on more responsibility and risk than in a guided ride.[255]

In establishing the standard of care for mounting, the court found Plaintiff's expert to be the more credible expert given her direct experience with trail riding operations and training those professionals in safe mounting practices, and that her opinions were supported by industry manuals and more consistent with the evidence.[256] By contrast, the court gave little weight to the defense expert who had less experience with trail riding operations and essentially testified on his own *ipse dixit* inconsistently with the evidence and without support from any industry manuals or other documentary evidence.[257] On the facts and in light of the credible expert testimony, the court concluded that the wrangler breached his duty of care and that negligence of the wrangler caused Plaintiff's injury.[258]

The court then turned to whether the United States was entitled to immunity the under Colorado EALA.[259] It first concluded that while a participant's own negligence is an inherent risk of equine activities, it can only grant immunity to the extent the participant was comparatively negligent, which here was 25%.[260] The court also rejected that the risks of mounting and stirrup length decisions were inherent risks, explaining that under Colorado decisional law, wrangler negligence is not an inherent risk.[261] The court additionally and alternatively concluded that the facts—and the credible, supported testimony of Plaintiff's expert—also supported application of the exception to immunity for failing to make reasonable efforts

252. *Id.* at *3.
253. *Id.* at *3–4.
254. *Id.* at *5.
255. *Id.* at *5–6.
256. *Id.* at *9.
257. *Id.* at *10.
258. *Id.* at *10–11.
259. *Id.* at *13.
260. *Id.*
261. *Id.* at *15–16 (discussing Fielder v. Academy Riding Stables, 49 P.3d 349 (Colo. Ct. App. 2002)).

to assess the ability of the participant to participate safely.[262] Among other takeaways, this case emphasizes the importance of credible equine expert testimony to the outcome of a case.

c. *Exception to Immunity for Spectators in Areas Where Horses Are Not Expected*

In *McCandless v. Ramsey*,[263] the Maine Supreme Court had its first opportunity to evaluate the scope of Maine's EALA.[264] McCandless was a spectator watching children riding horses in an indoor riding arena.[265] Although there was a closed observation room with a window through which spectators could watch, McCandless was sitting in a folding chair inside the indoor arena along its side and away from the horses.[266] She got up to exit, and to do so, she walked into the circular riding track that had been worn into the perimeter of the arena by horses.[267] In other words, she arguably walked directly into a space where horses are expected to be.[268] However, she asserted in this case that when pedestrians were present, horses did not travel in this area, which was a place where pedestrians regularly exited the building.[269] The Ramseys' ten-year-old daughter was riding a horse new to her.[270] After three times around the arena without incident, on the fourth pass, the child was unable to steer the horse clear and they made contact with McCandless, causing her to fall and injure her wrist.[271]

After McCandless filed suit, the Ramseys successfully obtained summary judgment asserting immunity under Maine's EALA.[272] Reviewing the statute for the first time, the Maine Supreme Court affirmed.[273] The state EALA grants immunity to a person engaged in an equine activity for injury to a participant or spectator "resulting from the inherent risks of equine activities."[274] While there was no dispute that the Ramseys' daughter was a person engaged in an equine activity, McCandless disputed whether her injury was the result of an inherent risk of equine activities.[275] After reviewing the non-exclusive statutory list of dangers that are an "integral part of equine activities," the Court concluded that the circumstances in this

262. *Id.*at *16.
263. 211 A.3d 1157 (Me. 2019).
264. *Id.* at 1159.
265. *Id.*
266. *Id.*
267. *Id.* at 1159–60.
268. *Id.*
269. *Id.* at 1163.
270. *Id.* at 1160.
271. *Id.*
272. *Id.*
273. *Id.* at 1164.
274. *Id.* at 1161 (quoting Me. Rev. Stat. Ann. tit. 7 § 4103-A (2019)).
275. *Id.*

case "epitomize" the risks inherent in equine activities, such as the risk of injury when a horse passes too closely to a spectator standing in the track of an arena and the risk that the horse will resist the rider's directions.[276] To conclude otherwise would defeat the purpose of the EALA which was to limit liability for injuries resulting from risks that are "impracticable or impossible to eliminate due to the nature of equines."[277]

Having concluded that statutory immunity applied, the Court evaluated whether any of the statutory exceptions to immunity applied to allow the claims to proceed.[278] A divided court ruled in the negative and affirmed summary judgment.[279] The majority opinion reasoned that there were no facts on which one could infer that the ten-year-old rider acted with a conscious disregard for the safety of others, where she was riding the particular horse for the first time and had attempted to steer clear of McCandless but failed.[280] Likewise, by McCandless's own admission, the incident occurred where a reasonable person would expect an equine activity to occur, namely, in the arena on its track where the horse had already been by three times.[281] Nor was she in a "designated spectator area" given that there was a designated observation room, notwithstanding the fact that people regularly used the same area in the arena to exit the arena as McCandless did.[282]

Dissenting as to the analysis of the exceptions to immunity, three of the seven justices would have reversed summary judgment on the ground that there were disputed issues of fact.[283] They reasoned that there was a dispute as to whether McCandless was in a place where a reasonable person would expect an equine activity to occur because of McCandless's asserted fact that the area where she was exiting the building was not an area that horses traveled in when exiting pedestrians were present.[284] They also reasoned that the existence of the folding chairs inside the arena created a dispute as to whether McCandless was in a place designated for spectators and thus avoided immunity under the second statutory exception to immunity.[285] This divided opinion on the issue of what facts will cause a loss of immunity demonstrates the uncertainty of whether a commonplace circumstance in this horse industry—such as spectator chairs lining the perimeter of an arena—might result in liability.

276. *Id.* (quoting Me. Rev. Stat. Ann. tit. 7 § 4101(7-A) (2019)).
277. *Id.*
278. *Id.* at 1162–63.
279. *Id.* at 1164.
280. *Id.* at 1163.
281. *Id.*
282. *Id.*
283. *Id.* at 1164–65 (Mead, J., concurring in part and dissenting in part).
284. *Id.*
285. *Id.* at 1165.

III. ANIMAL INSURANCE LAW

A. *Coverage for Injury to the Person*

In the dog-bite case *Auto-Owners Insurance Co. v. Kammerer*,[286] the District of Minnesota concluded that a word in an insuring agreement, which is bold in some places and in plain text in others, reasonably could have different definitions affecting coverage.[287] Specifically, the use of the word "insured" in a homeowners policy, which when in bold was defined as "any person legally responsible for animals . . . owned by the [homeowners],"[288] could when written in plain text mean something different.[289] As a result, while the person who was caring for the homeowners' dogs was an "insured" for the purpose of personal liability, a reasonable interpretation of the ambiguous use of both bold and plain text is that she was not an 'insured' for the purpose of the intra-insured exception.[290] Therefore, construing the ambiguous language against the insurer, the caretaker's injuries from the homeowners' dogs were covered under the policy because her injuries were not excluded under the intra-insured exception.[291] The court accordingly dismissed the insurer's declaratory judgment action.[292]

In *Neary v. American Competitive Trail Horse Association*,[293] Neary was injured during a trail horse competition when two members of the association discharged a cap gun near her and while she was on her horse, causing her horse to react and fall, resulting in injuries to her leg and ankle.[294] The association failed to respond to suit, and Neary alerted its insurer of her intent to seek default judgment.[295] The insurer denied coverage, default judgment entered, and Neary filed this garnishment action against the insurer.[296] The parties each filed summary judgment motions.[297] The insurer argued that coverage was excluded for multiple reasons, including a Saddle Animal Exclusion and an Athletic or Sports Participants Exclusion.[298] Neary argued that the insuring agreement expressly included coverage for competitive trail events, that the Saddle Animal Exclusion was ambiguous and should be construed to provide coverage, and that under that exclusion she was not "riding" her horse at the time because her horse was standing

286. 386 F. Supp. 3d 1030 (D. Minn. 2019).
287. *Id.* at 1031.
288. *Id.* at 1033.
289. *Id.* at 1036.
290. *Id.* at 1036–37.
291. *Id.* at 1032, 1037
292. *Id.* at 1037.
293. 2019 WL 3505453 (N.D. Ga. Mar. 11, 2019).
294. *Id.* at *1.
295. *Id.*
296. *Id.*
297. *Id.* at *2.
298. *Id.*

still and she had lost control of it due to the firing of the cap gun.[299] The court concluded that the Saddle Animal Exclusion, which excluded coverage for injury while "saddling, riding, mounting, or dismounting any saddle animal," applied.[300] Neary's strained and overly narrow construction of the term "riding" was unreasonable.[301] She herself testified that she was "riding" when her horse fell, and she was in fact in the saddle on her horse at the time.[302] Moreover, the exclusion covered activities broader than just riding, indicating intent to capture all actions taken when in contact with a saddle animal.[303] Further, this broader reading of the exclusion was consistent with the insurance policy as a whole, including the Athletic or Sport Participants Exclusion for "participating in any sports . . . contest . . . that [the association] sponsor[s]."[304] As the insurer argued and as is common for insurance policies used by sports organizations, the policy was intended to provide coverage to the association for liability to spectators and the general public during sponsored events, *not* athletic participants.[305] Thus, Neary's garnishment action against the insurer failed for lack of coverage.[306]

B. *Coverage for Injury to Property*

Following an incident started by a squirrel, the Iowa Supreme Court in *City of West Liberty v. Employers Mutual Casualty Co.*[307] held that the City's "all-risk" insurance policy did not cover property damage from the electrical arc triggered by the squirrel when it happened onto a municipal electrical transformer.[308] The insurance policy excluded coverage for "loss caused by arcing or by electrical currents other than lightning."[309] The Iowa Supreme court affirmed the lower courts' rulings that this exclusion foreclosed coverage, explaining that the "efficient proximate cause" doctrine did not apply here. That doctrine provides for coverage when two causes, one covered and one not, contribute to a loss.[310] However, here, the squirrel was not an independent cause of the loss.[311] It was the reason the arcing occurred, but it did not independently cause any damage.[312] As the court explained, arcing will always have some cause, and it would

299. *Id.*
300. *Id.* at *4.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at *4–5.
305. *Id.*
306. *Id.* at *5.
307. 922 N.W.2d 876 (Iowa 2019).
308. *Id.* at 877.
309. *Id.*
310. *Id.* at 879–80.
311. *Id.* at 880.
312. *Id.*

render the exclusion meaningless if one could avoid the exclusion by pointing to that cause.[313] The squirrel did not, independent of the arcing, cause any damage; rather, the damage was from the arc induced by the squirrel touching the transformer.[314]

In *Goldberger v. State Farm Fire & Casualty Co.*,[315] the court found that feral cats could be a covered cause of property damage because the feral cats, at least as described in the complaint, were not "domestic animals" and did not fit within the domestic-animal exclusion in the plaintiffs' rental dwelling insurance policy.[316] According to the plaintiffs, the property had sustained $75,000 in damage after a tenant allowed feral cats on the property.[317] State Farm filed a Rule 12(b) motion to dismiss, which assumed that the cats were "peaceably living" in the home with the tenant, and therefore were domesticated.[318] However, because one must look only to the complaint which stated that the tenant "allowed [the cats] to access the property," the Arizona Court of Appeals declined to accept State Farm's additional facts for the purpose of this review and presumed that the cats were feral for the purpose of the motion.[319] Concluding that the undefined term "domestic animal" was ambiguous and capable of at least two reasonable, conflicting interpretations, one species-based and the other based on the individual circumstances of the animal, the court looked to the transaction and the policy as a whole to evaluate its purpose, public policy, the parties' intent, and the reasonable expectations of the insured.[320] Completing an in depth review of these factors, the court concluded that the individualized definition of "domestic animals" applied here and included "specific animals that are subject to the care, custody and control of a person."[321] Thus, whether the cats in this case were domestic or not would turn on the facts, and the complaint stated sufficient facts to require the presumption that they were feral and had no owner or keeper who exercised care, custody and control over them.[322] On these alleged facts that fell within coverage, the court reversed dismissal of the complaint.[323]

313. *Id.* at 880–81.
314. *Id.*
315. 448 P.3d 302 (Ariz. Ct. App. 2019).
316. *Id.* at 303.
317. *Id.*
318. *Id.*
319. *Id.* at 303–04, 309.
320. *Id.* at 304–05.
321. *Id.* at 305–09.
322. *Id.* at 309.
323. *Id.*

Moving on to raccoons, the Western District of Pennsylvania in *Capital Flip, LLC v. American Modern Select Insurance Co.*[324] concluded that raccoons cannot as a matter of law engage in "vandalism and malicious mischief" such that property coverage for damage from that kind of conduct applied.[325] Raccoons had found their way inside the insured dwelling and caused significant damage to its interior.[326] Animals were not covered in the list of perils in the insurance policy, and so the property owner relied on the vandalism provision, claiming it was undefined and ambiguous, and could include damage caused by racoons.[327] In granting the motion to dismiss, the court rejected that argument, finding instead that the vandalism provision was unambiguous, even in the absence of a specific definition, because common knowledge and the weight of judicial interpretation are clear that "vandalism" and "malicious mischief" refer to human conduct, not animal conduct.[328]

C. *Coverage for Loss of Animals*

In *Westfield Insurance Co. v. TCFI Bell SPE III, LLC*,[329] involving a power outage at a commercial fish farm, the insured sustained significant financial losses due to equipment loss and loss of approximately 800,000 farmed fish.[330] While the insuring agreement provided an Equipment Breakdown Coverage ("EBC") Endorsement,[331] the EBC Endorsement also contained an "animal exclusion" provision, and the insurer, seeking partial summary judgment, argued that the policy thus excluded coverage for the loss of the fish.[332] The insured argued that fish were not "animals" under the policy and thus the loss was not excluded.[333] The EBC Endorsement specifically stated, "We will not pay under this endorsement for any loss or damage to animals."[334] However, the EBC Endorsement did provide coverage for spoilage of "perishable goods," which were defined as "personal property maintained under controlled conditions for its preservation, and susceptible to loss or damage if the controlled conditions change."[335] After extensive analysis of the parties' arguments and governing authority, the court found no ambiguity and concluded that the usual and common meaning

324. 2019 WL 4536164 (W.D. Pa. Sep. 19, 2019).
325. *Id.* at *1.
326. *Id.*
327. *Id.* at *3.
328. *Id.* at *4.
329. 2019 WL 1434716 (S.D. Ind. Mar. 30, 2019).
330. *Id.* at *2.
331. *Id.*
332. *Id.* at *4.
333. *Id.* at *8.
334. *Id.* at *6.
335. *Id.* at *11.

of "animal" includes fish, noting that the insured itself referred to fish as animals on its website.[336] Thus, the EBC Endorsement did not include coverage for loss of animals, including fish.[337] However, the insurer won the battle and lost the war on this particular issue. After the extensive discussion of whether fish are animals, in just a few short sentences, the court nevertheless concluded that there was coverage because the fish were within the definition of "perishable goods" because they were maintained under controlled conditions for preservation and were lost when those conditions changed.[338]

336. *Id.* at *10.
337. *Id.* at *11.
338. *Id.* The court separately addressed and granted summary judgment for the insurer on Bell's bad faith claim. *Id.* at *11–16.