RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

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I. INTRODUCTION

In this article, the Seventh Circuit wrestles with the appropriate jury instruction where a colorblind cop shot and mistakenly killed the *victim*'s dog. A federal district court in Michigan adds to the dialogue about whether to permit noneconomic damages under 42 U.S.C. § 1983 even when state law forbids it. A federal district court examines Nevada's animal death statute to determine whether it limits a plaintiff to no more than $5,000 in veterinary bills and fair market value, even when a dog is outrageously slain, while at the same time considering a plea for qualified immunity by an officer who erroneously entered the wrong backyard and shot and killed the plaintiff's dog. Washington takes a detour from decades of common law in allowing a premises liability claim against a commercial landlord when his lessee sustained a dog bite to his nose. Colorado evaluates premises liability and the working dog exception to the Colorado dog bite statute when sheep herding dogs set upon a cyclist on federal land. Colorado also determines whether liability attaches to a dog that, though contained by a cyclone fence and never makes contact with a child, scares the child into traffic where he is hit by a van.

Louisiana applies the "one free bite" rule to a feline and scrutinizes whether failure to provide proof of rabies to the victim justifies a claim for her painful and costly post-exposure antirabies injections. Connecticut determines whether to hold Petco liable for a urine-based slip-and-fall under the mode of operation rule of premises liability. Ohio and Texas take a hard look at legal and equitable arguments concerning custody of lost dogs, including close examination of municipal stray hold statutes. Texas questions the right of trophy hunters to revoke Delta Air Lines' right to keep flying when the airline imposed a "Big Five" game embargo after the uproar over the death of Cecil the lion. And the Georgia Supreme Court resolves how to value beloved dogs and the significant costs for their cure.

This article also examines equine-related tort actions decided both under common law doctrines, such as assumption of risk and determination of relative fault, as well as the equine liability statutes. It surveys court rulings on culpability for roaming horses causing personal injury and property damage. It discusses insurance coverage provided by a homeowner's policy against a guest's suit for injuries by the insured's dog, and a horse owner's ability to recover against two veterinarians' insurance

policy for the horse's death while under their care. Finally, this article reviews whether an insurance company properly canceled an insurance policy following the payment of a claim resulting from an unprovoked dog bite on the insured's property.

II. ANIMAL TORT LAW

The following cases examine developments in Section 1983 litigation concerning dogs shot by law enforcement, bites inflicted by dogs and cats, custody disputes, international air shipping of animal bodies, and companion animal valuation.

A. *Officer-Involved Animal Shootings*

Jacob and Kathy Saathoff and their daughter Markou owned a Labrador named Dog.[1] A loose pit bull accosted Markou while walking Dog, and the canines began to fight.[2] Efforts to neutralize the altercation failed.[3] Officer Davis detoured to the scene and learned from Markou that the brown Lab was hers, while the gray and white pit dominating Dog was the stray.[4] Owing to his form of colorblindness, Officer Davis could not easily distinguish gray from brown. Reasoning that oleocapsicum spray would not break up fighting dogs, deploying his baton would endanger himself, animal control would arrive too late, and that he had no catchpole, he fired at the dog on top in the fray, whom he perceived to be the aggressive one.[5] Observing no reaction, he fired a second time, later realizing that he shot Markou's dog.[6] Officer Davis then fired at the pit bull five times until it disappeared. Dog died shortly thereafter from the gunshot wounds.[7] After the district court granted summary judgment to defendants on all claims except Section 1983 against Officer Davis, the jury found against Markou.[8] The district court denied her motion for a new trial.[9]

On appeal, the Seventh Circuit found that the slaying of Dog constituted a Fourth Amendment seizure.[10] The court rejected Markou's assertion that the jury instruction should have added the following sentence from *Viilo v. Eyre*,[11] a case involving repeated discharges of a firearm at a

1. Saathoff v. Davis, 826 F.3d 925, 928 (7th Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.* at 929.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 930.
9. *Id.*
10. *Id.* at 932–33.
11. 547 F.3d 707, 710 (7th Cir. 2008).

dog on his own property while the owner was present: "[U]se of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable."[12] The court reasoned that the facts at issue, dissimilar from those in *Viilo*, did not warrant such an instruction because this slaying arose from efforts to break up a dogfight away from the premises of both dog owners.[13] The appellate court also found that the judgment for Davis was not against the manifest weight of the evidence, notwithstanding that he drew on the dogs less than a minute after arriving at the scene and only after having briefly spoken to the witnesses, that he was aware that the twilight worsened his colorblindness, and despite the lack of any imminent threat to a nearby person.[14]

In another case, Erica Moreno and Katti Putman sued police officer Ronald Hughes for maiming their dog, Clohe, when he executed a warrant at the wrong residence.[15] Officer Hughes claimed self-defense when shooting Clohe in the face after he entered the back yard.[16] The defendant moved *in limine* to exclude testimony concerning noneconomic damages as a matter of Michigan law.[17] The trial court denied that relief, asserting that 42 U.S.C. § 1988 allows the district court to disregard state common law where there is "a hindrance to the vindication of civil rights."[18] To preclude emotional distress damages would conflict with Section 1983's twin aims of compensation and deterrence, the court explained.[19] In disregarding the governing Michigan case, *Koester v. VCA Animal Hospital*,[20] the court cited contrary holdings from Florida, Oregon, Texas, and Louisiana.[21] It also cited to a pertinent district court decision, *Henning v. Nicklow*,[22] as well as the U.S. Supreme Court decision *Carey v. Piphus*.[23]

Finally, Victor Patino sued the Las Vegas Metropolitan Police Department for the slaying of his dog, Bubba.[24] The officer had entered Patino's backyard without a warrant but upon hearing what sounded like a gunshot and moaning or muffled yelling from that area and was then approached

12. Saathoff v. Davis, 826 F.3d 925, 933 (7th Cir. 2016).
13. *Id.*
14. *Id.* at 934–35.
15. Moreno v. Hughes, 157 F. Supp. 3d 687, 688 (E.D. Mich. 2016).
16. *Id.*
17. *Id.* at 688–89.
18. *Id.* at 689.
19. *Id.* at 690.
20. 624 N.W.2d 209 (Mich. Ct. App. 2000).
21. Moreno v. Hughes, 157 F. Supp. 3d 687, 690–91 (E.D. Mich. 2016) (citing Knowles Animal Hosp. v. Wills, 360 So. 2d 37 (Fla. Dist. Ct. App. 1978); Fredeen v. Stride, 525 P.2d 166 (Or. 1974); City of Garland v. White, 368 S.W.2d 12 (Tex. Civ. App. 1963); Lincecum v. Smith, 287 So. 2d 625 (La. Ct. App. 1973)).
22. 2009 WL 3642739 (N.D. Ind. Oct. 30, 2009).
23. Carey v. Piphus 435 U.S. 247, 264 (1978) ("[M]ental and emotional distress caused by the denial of [constitutional rights are] compensable under § 1983.").
24. Patino v. Las Vegas Metro. Police Dep't, 2016 WL 4994959 (D. Nev. Sept. 14, 2016).

by Bubba.[25] The trial court found the search justified by the emergency exception to the warrant requirement, and the shooting objectively reasonable under the totality of circumstances.[26] The presence of a "Beware of Dog" sign did not dissuade the court from finding exigency because the sign alone would not have prohibited warrantless entry to assist a potentially injured victim.[27] On the pendent state claim of intentional infliction of emotional distress, the court held that Nevada Revised Statute § 41.740[28] preempted traditional remedies under that common law tort and limited Patino to reimbursement of certain expenses, denying him the right to recover emotional distress or punitive damages.[29]

B. *Bite and Fright Liability*

1. Civilian Dog Bites

Shortly after Alice Tighe adopted a dog from North Shore Animal League America (NSALA), she was bitten on the hand and hospitalized.[30] Two months later, the same dog bit her in the face.[31] The dog had previously bitten someone in the face while with the NSALA, a point it allegedly failed to disclose to Tighe.[32] The staff did warn her, however, of the dog's possessiveness around food.[33]

Although the trial court dismissed her outrage claim on NSALA's motion, it allowed Tighe's other claims to proceed.[34] On appeal from that denial of partial summary judgment, the New York Appellate Division reversed, citing two hundred years of precedent and holding that Tighe was strictly liable for her own injuries; as the owner of the dog she knew or should have known (from living with and observing the dog for months) had vicious propensities.[35] The court articulated a rule that when the prior owner informs the person to whom the dog is delivered of the animal's vicious characteristics so far as known or ascertainable by exercising reasonable care, the prior owner has no liability.[36] Although NSALA did

25. *Id.* at *1–2.
26. *Id.* at *3.
27. *Id.* at *4.
28. NEV. REV. STAT. § 41.740 (2007) ("Damages for which person who kills or injures pet of another person is liable; punitive and noneconomic damages may not be awarded; limitation on amount of damages; exceptions.").
29. Patino v. Las Vegas Metro. Police Dep't, 2016 WL 4994959, at *6 (D. Nev. Sept. 14, 2016).
30. Tighe v. N. Shore Animal League Am., 142 A.D.3d 607, 608 (N.Y. App. Div. 2016).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 609.
35. Tighe v. N. Shore Animal League Am., 142 A.D.3d 607, 608–09 (N.Y. App. Div. 2016).
36. *Id.*

not disclose the prior bite to the face, that breach of disclosure did not proximately cause Tighe's injuries since she had the benefit of nearly fifteen weeks of observation to note his aggressive demeanor; she also had personal knowledge of his vicious propensity, having suffered a bite to her hand months prior.[37]

The court rejected Tighe's contention that NSALA discharged its duty of disclosure only with respect to the dog's specific propensity to attack when defending food.[38] The motivation for exhibiting the propensity was immaterial.[39] Instead, her awareness of the dog's inclination toward violence, and failure to take sufficiently protective measures, was pivotal to the question of proximate cause.[40] Tighe's breach of implied warranty of merchantability claim also failed. Putting aside whether warranty doctrine even applied to this dog adoption, Tighe's failure to notify NSALA of the dog's nonconformity within a reasonable time, per UCC 2-714(1), UCC 2-607(3), did not make a prima facie case.[41]

In another case, Scrappy, a pit bull terrier mix, bit off Steven Oliver's nose as he passed by the passenger side window of a truck in which his owner, Henry Cook, left him.[42] The truck was parked on commercial property Oliver leased in-kind from Eugene Mero to run his automobile repair business.[43] Three years earlier, Scrappy had chased a seven-year-old boy down the street without causing injury, and three years before that, he ripped the toenail off a Dachshund.[44] Grays Harbor County Sheriff's Office twice declared Scrappy potentially dangerous—once in 2004 and again in 2007.[45] Under Washington State's Dangerous Dog law, Scrappy would never have been deemed dangerous due to the 2004 and 2007 incidents because the definition encompassed only dogs "previously found to be potentially dangerous *because of injury inflicted on a human*."[46] In contrast, the sheriff's departmental policy applied a more expansive definition, which did not require that the incident giving rise to the potentially dangerous dog declaration involve a human being.[47]

In affirming dismissal of Grays Harbor County, the appellate court held that the county owed no duty of care to Oliver under the public duty doctrine, and the "failure to enforce" exception to that immunity principle did

37. *Id.* at 609.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 609–10.
42. Oliver v. Cook, 194 Wash. App. 532, 535–36 (Ct. App. 2016).
43. *Id.*
44. *Id.* at 536.
45. *Id.*
46. *Id.* at 537.
47. Oliver v. Cook, 194 Wash. App. 532, 537 (Ct. App. 2016).

not apply.[48] The Washington Supreme Court had applied the failure to enforce exception to duties imposed by statute, ordinance, or regulation, but not to non-legislative, non-promulgated departmental policies, which do not have the equivalent force of law.[49] To expand the exception to policies over which municipalities have no control—e.g., police, fire, building inspectors, and others—would defeat the purpose of the doctrine and untenably introduce "potentially limitless liability."[50]

In a question of first impression, the appellate court reversed the grant of summary judgment to Mero because it found that genuine issues of fact existed as to whether Mero owed Oliver, his invitee, a duty to discover and protect him from Scrappy.[51] The court considered Scrappy a "condition on the land" that presents an unreasonable risk of harm, one that the invitee would not be expected to discover or, even if detected, one that he could not protect himself against.[52] Disregarding that "Washington cases have not yet drawn the distinction between the common law theory and premises liability for dog bites," *Oliver* nonetheless followed over a eighteen other states holding that premises liability presents a distinct claim, thus deviating from Washington's long-standing precedent that relieved landlords of liability for injuries inflicted upon third parties by their tenant's known vicious animals.[53] The court rejected the contrary holding of *Briscoe v. McWilliams*[54] and thereby created a division split at the Washington Court of Appeals level. *Briscoe* refused to create a premises liability exception to the common law rule that only held liable the dog's owner, keeper, or harborer—not the landowner.[55]

Finally, the Colorado Court of Appeals, hearing a dispute between sheep ranchers Samuel and Cheri Robinson and cyclist Renee Legro on appeal from a remand by the Colorado Supreme Court, examined whether Legro was a trespasser under Colorado's Premises Liability Act (PLA), § 13-21-115, and whether the working dog exception to Colorado's dog bite statute, § 13-21-124(5)(f), applied to protect the Robinsons.[56] The Robinsons' dogs, Tiny and Pastor, attacked Legro while she participated in a bike race taking her down a road she and the Robinsons were permitted to

48. *Id.* at 540.
49. *Id.* at 540–41.
50. *Id.* at 542.
51. *Id.* at 543-44.
52. *Id.*
53. *Id.* at 543 n.9, 545–46.
54. 2013 WL 4607603 (Wash. Ct. App. 2013).
55. *Briscoe*, which was unpublished, was handed down by Division I. *Oliver* was decided by Division II. *See also* Boots v. Winters, 145 Idaho 389, 393 (Idaho Ct. App. 2008) (dog is an "activity taking place on the rented property," not a "condition on the land" for purposes of premises liability).
56. Legro v. Robinson, 369 P.3d 785 (Colo. Ct. App. 2015); *see also* Legro v. Robinson, 328 P.3d 238 (Colo. Ct. App. 2012); Robinson v. Legro, 325 P.3d 1053 (Colo. 2014).

use.[57] While conceding that the Robinsons were landowners for purposes of the PLA, the appellate court reversed on the question of Legro's status as a trespasser, instead deeming her a licensee.[58] The court found that the Robinsons impliedly consented to or permitted Legro's presence on the property based on their relationship with the Forest Service, which issued the Robinsons a grazing permit to raise some sheep on federal property.[59] As a permittee, not a leaseholder, the Robinsons had no right to exclude Legro from federal land, nor did the permit limit the Forest Service's right to consent to the Vail Recreation District bike race.[60] And because the Robinsons' grazing permit constituted a revocable license, it did not vest in them an adequate property interest to deem their dogs working "on the property of" the Robinsons.[61] The working dog exception therefore would not aid them.[62] Accordingly, the appellate court reversed and remanded for further proceedings.[63]

2. Dog Frights

Two pit bulls owned by Alexander Trujillo charged his chain-link fence, barking so aggressively as to drive eight-year-old N.M. from the sidewalk and into the street, where he was struck by a service van.[64] This case presented a matter of first impression as to whether a dog owner owes a duty of care to a party not directly injured by the dogs and not harmed on the dog owner's property, especially where the dogs remain properly confined.[65] In a two-to-one decision, the appeals court found that Trujillo had no actionable duty to N.M. given the sufficient mitigation of risk by a four-foot-high chain-link fence; the lack of foreseeability of harm; the social utility of keeping pet dogs as a privileged use of land; and the magnitude of the burden a contrary holding would place upon dog owners forced to erect stronger and taller fences, or redundant fences.[66] Dis-

57. *Id.* at 787.
58. *Id.* at 789–90.
59. *Id.*
60. *Id.* at 791.
61. *Id.* at 791–93.
62. *Id.*
63. *Id.* at 794.
64. Lopez v. Trujillo, 2016 WL 1385610, at *1 (Colo. Ct. App. 2016).
65. *Id.*
66. *Id.* at *3–4. In reaching this conclusion, the court distinguished a New York case where liability was found against the owner of a German Shepherd, who startled a pedestrian traversing a snow-covered sidewalk and fell due to treacherous and uncertain footing. *Id.* at *3 (discussing Machacado v. City of New York, 80 Misc.2d 889 (N.Y. Sup. Ct.1975) and Nava v. McMillan, 123 Cal. App. 3d 262 (Ct. App. 1981)). It instead adopted the holding of a California case with more similar facts, describing such canine behavior as "quite common." *Id.* On the other assignment of error, the court unanimously found Trujillo was not a landowner of the abutting sidewalk and, thus, was not liable under Colorado's Premises Liability Act. *Id.* at *6.

senting Judge Vogt bristled at this analysis, finding it "eminently foreseeable that a child on his way to the elementary school across the street would be frightened when two 'large, vicious, loud-barking pit bulls' rushed up to and jumped up on the chain-link fence next to the sidewalk, and that the child would run into the street to get away from them."[67] Vogt also contended that the social utility of keeping pet dogs may be great, but not in keeping allegedly "vicious" dogs, who are subject to several restrictions on control.[68]

3. Cat Bites

While out for an evening stroll, Michael Boleware's ten-to-twelve year-old cat named Buddy—adopted as a kitten from the SPCA, with no history of biting, scratching, showing aggression toward anyone—jumped on Wardette Ducote and bit her wrist.[69] Ducote asked Boleware if Buddy was up to date on his rabies vaccination, but Boleware could not furnish proof.[70] Although told by the emergency room physician that the threat of contracting rabies was extremely minimal, Ducote opted for the painful and expensive antirabies prophylaxis.[71] Boleware was later cited for violating two municipal ordinances—roaming at large and proof of rabies vaccination.[72] Two days after the bite, Boleware surrendered Buddy to the SPCA for a rabies quarantine, where he was deemed friendly and healthy and ultimately released with no sign of the disease.[73] Ducote alleged negligence for failure to confine and vaccinate Buddy.[74] The appellate court affirmed dismissal of the suit against Boleware in a two-to-one decision.[75]

First, the court held that Louisiana Civil Code article 2321 established a "one free bite" rule, and, as this was Buddy's first, strict liability did not exist.[76] Absent evidence of scienter of viciousness, the only alternative basis of liability would arise from negligent control premised on municipal ordinance violations.[77] As to the roaming at large ordinance, the court found insufficient evidence since it provided that "[c]ommunity cats may be allowed outside so long as the cats do not prove to be a nuisance to neighbors."[78] Although the record may not have supported Buddy's status

67. *Id.* at *8.
68. *Id.*
69. Ducote v. Boleware, 2016 WL 659022, at *1, *7 (La. Ct. App. 2016).
70. *Id.* at *1.
71. *Id.* at *3.
72. *Id.* at *2.
73. *Id.*
74. Ducote v. Boleware, 2016 WL 659022, at *7, *10 (La. Ct. App. 2016).
75. *Id.* at *11.
76. *Id.* at *4–5.
77. *Id.* at *4.
78. *Id.* at *9.

as a "community cat," the court in *Ducote* stated that no jurisdiction has recognized a common law duty to restrain or muzzle domestic cats having shown no propensity to cause harm to another.[79]

Second, Ducote acknowledged that Buddy was vaccinated, but asserted liability from Boleware's failure to offer *timely* proof thereof.[80] Uncertainty surrounding Buddy's ability to ward off the disease from a potentially expired vaccination, she claimed, proximately caused her to undergo the treatments.[81] However, Boleware introduced unrefuted testimony of an infectious disease expert who opined that her treatments were medically unnecessary and that the risk in Ducote's parish approached zero.[82] Boleware's violation thus did not create a duty to Ducote and, in addition, was not the legal cause of the injections.[83]

Dissenting Judge Lobrano found that while a cat owner with proper documentation evidencing a current rabies vaccination gets a first bite or scratch free, those *without such proof* may not.[84] Judge Lobrano argued that the proof of vaccination ordinance served to protect bite victims from the doubt and anxiety associated with delaying treatment until expiration of the quarantine and that a jury should be permitted to determine whether it was reasonable for Ducote not to wait.[85]

4. Dog Messes

The Connecticut Court of Appeals examined whether the mode of operation rule within premises liability applied to Petco when Katerina Porto slipped and fell on dog urine. Finding that the facts did not meet any of the three rule requirements, it affirmed dismissal.[86] First, Petco's pet-friendly mode of operation (which took the form of allowing leashed dogs to enter the store as one of its "core values") did not significantly deviate from the general operation of similar businesses.[87] Second, permitting dogs to enter did not alone excuse Porto from proving Petco's actual or constructive notice of the urinary hazard, for, while messes will happen, they are not so prevalent as to create an inherently foreseeable danger.[88] Lastly, the mode of operation rule intends to cover only "those areas where the risk of injury is continuous or foreseeably inherent," such as a self-service salad bar line. Here, no similar zones of the store

79. Ducote v. Boleware, 2016 WL 659022, at *9 (La. Ct. App. 2016).
80. *Id.* at *10.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at *11.
85. *Id.* at *13.
86. Porto v. Petco Animal Supplies Stores, Inc., 167 Conn. App. 573, 585 (Ct. App. 2016).
87. *Id.* at 581–82.
88. *Id.* at 582–83.

bore so great a risk as to confer actual or constructive notice merely by Petco's mode of operation.[89] The court specifically rejected Porto's claim that the zone of risk followed the dogs, making them "moving targets," because such an interpretation would unreasonably characterize the entire store as undifferentiated, perilous premises, and would unreasonably expose Petco to nearly constant liability.[90]

It is important to note that this decision concerned only the mode of operation involving admission of *leashed* animals and did not impact case law regarding *unleashed* animals.

C. *Custodial Interference*

The Mercer County Dog Warden (MCDW) impounded Carl Green's dog for running at-large without identification tags.[91] Four days later, pursuant to Ohio's three-day redemption stray hold law, Ohio Revised Code § 955.12, MCDW lawfully adopted out the dog to Animal Protection League of Mercer County (APL), which then adopted out the dog to Winner.[92] After the trial court granted Green's motion for replevin, Winner, who intervened, appealed.[93] The appellate court reversed, finding that the trial court's ruling that it was in the "best interest of the dog" to return to Green went against the manifest weight of the evidence because Green provided no competent, credible evidence of his right to possess the dog.[94] The court criticized the introduction of any concept of equity by holding that replevin "is an action at law, not in equity, and, therefore, a court cannot provide remedies not specifically enumerated by statute,"[95] and it also held best interests standards irrelevant in adjudicating a replevin action.[96]

In another case, brother and sister Alfonso and Lydia Lira owned a German Shepherd named Monte Carlo.[97] On January 1, 2013, he escaped.[98] The next day, Houston's Bureau of Animal Regulation and Care (BARC) impounded him for running at large without identification tags or microchip.[99] Though Lydia often searched Pet Harbor, the virtual clearinghouse for lost and found dogs, she did not find Monte, who

89. *Id.* at 583–84.
90. *Id.* at 584.
91. Green v. Animal Prot. League of Mercer Cty., 51 N.E.3d 718, 719–20 (Ohio Ct. App. 2016).
92. *Id.* at 720.
93. *Id.* at 719–20.
94. *Id.* at 721.
95. *Id.*
96. *Id.* at 724.
97. Lira v. Greater Houston German Shepherd Dog Rescue, Inc., 488 S.W.3d 300, 302 (Tex. 2016), *rev'g* 447 S.W.3d 365 (Tex. 2014).
98. *Id.*
99. *Id.*

BARC had listed as a Belgian Malinois, not a German Shepherd.[100] After a weak heartworm test rendered Monte unadoptable, BARC advertised Monte to rescue groups for possible transfer on January 5th.[101] Two days later, Greater Houston German Shepherd Dog Rescue (GHGSDR) agreed to foster Monte.[102] Two days after that, Lydia identified Monte from a photograph at BARC.[103] She contacted GHGSDR that day, but they refused to return him to her.[104]

The Liras sued GHGSDR for conversion, declaratory judgment, and an injunction; the trial court ruled in their favor, ordering GHGSDR to return Monte.[105] The Texas Court of Appeals reversed, but the Texas Supreme Court reinstated the trial court judgment.[106] At common law, the mere fact that a dog escapes for a few days does not divest the owner of all property rights in the lost animal.[107] Houston's municipal code furnished owners of *licensed* dogs six days from the date of notification of impound to redeem the animal or risk it being offered for adoption or euthanized.[108] However, as to *unlicensed* dogs, like Monte, the code required impoundment for only three days.[109] By code, unredeemed, impounded dogs could be adopted out through a city facility, placed with a private nonprofit humane shelter, or euthanized.[110] Furthermore, if such animals were adoptable, but not redeemed within three days, they were directed by statute to be offered for sale.[111] The animal would not become the "absolute property of the purchaser" until thirty days from date of sale, however.[112] The true owner could redeem the animal within the thirty-day period by paying "double the amount paid by [the purchaser] for such animal and his reasonable expenses for keeping the same."[113]

Citing Texas's highly publicized case on animal valuation, *Strickland v. Medlen*[114] in a manner that exalted the status of pets by embracing enhanced chattelization principles, the court repeated the maxim that the

100. *Id.*
101. *Id.*
102. Lira v. Greater Houston German Shepherd Dog Rescue, Inc., 488 S.W.3d 300, 302 (Tex. 2016).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 302, 305.
107. Lira v. Greater Houston German Shepherd Dog Rescue, Inc., 488 S.W.3d 300, 303 (Tex. 2016).
108. *Id.*
109. *Id.* at 303–04.
110. *Id.*
111. *Id.*
112. *Id.* at 305.
113. *Id.* at 303.
114. 397 S.W.3d 184 (Tex. 2013).

law abhors a forfeiture, particularly of those objects in which superior rights inhere.[115] Thus, while pet dogs are "property in the eyes of the law," they take on a "special form[,]" for they are "not a fungible, inanimate object like, say, a toaster."[116] With such concepts in mind, *Lira* acknowledged that while the city ostensibly had a right to place Monte with a private nonprofit humane shelter, whether or not GHGSDR qualified as one mattered not since placement does not equate with transfer of ownership rights, which the Liras retained.[117]

D. *Airline Cargo Discrimination, or* In re: Cecil the Lion

Following the public uproar surrounding dentist Walter Palmer's killing of a much-admired lion named Cecil, Delta Air Lines refused to contract with shippers to import the "Big Five," i.e., lion, leopard, elephant, rhinoceros, and buffalo trophies.[118] Corey Knowlton, a hunter-conservationist, and other hunting, conservation, and tourism groups, sued Delta for adopting the Big Five embargo.[119] Knowlton first argued that Delta, a common carrier, engaged in unlawful discrimination by treating shippers of Big Five cargo differently from other shippers, including those who sending trophies from different species.[120] The court dismissed the common carrier claim, holding that Delta "may discriminate in what it chooses to carry, but it may not discriminate as to the persons for whom it carries" and that it was none of the plaintiffs' business why Delta chose to transport *non*-Big Five trophies from Africa.[121] Second, the Airline Deregulation Act of 1978, which prohibited states from enacting any law that related to the price, route, or service of an air carrier, preempted the plaintiffs' claim that the embargo had a deceptive and defamatory impact on their business relations.[122] Third, finding no private right of action for the plaintiffs to enforce Federal Aviation Act regulations and implementing statutes prohibiting those providing foreign air transportation from engaging in unreasonable discrimination, the court dismissed those claims without discussion on the merits.[123] Finally, owing to claims that Delta engaged in knowing violations of the law and acted with unclean hands, the plaintiffs' sought to invalidate Delta's certificate of public convenience and necessity, required by

115. Lira v. Greater Houston German Shepherd Dog Rescue, Inc., 488 S.W.3d 300, 304 (Tex. 2016).
116. *Id.*
117. *Id.* at 305.
118. Conservation Force v. Delta Air Lines, Inc., 2016 WL 3166279, at *1 (N.D. Tex. June 6, 2016).
119. *Id.*
120. *Id.* at *2.
121. *Id.* at *3-4.
122. *Id.* at *4–5.
123. *Id.* at *6–9.

49 U.S.C. § 41101(a)(1), which would have the effect of grounding Delta's planes.[124] This tactic failed because the court found no private right of action to invalidate an air carrier's certificate for failure to comply with its terms.[125] Only the U.S. Department of Transportation could take such action, and only the federal appellate courts had exclusive jurisdiction over challenges to DOT-issued certificates.[126]

E. *Valuation*

The Georgia Supreme Court reversed and affirmed the Georgia Court of Appeals, in part, in *Barking Hound Village, LLC v. Monyak*,[127] on the question of how to value Lola, Robert and Elizabeth Monyak's eight-and-a-half year old Dachshund mix whom they adopted from a shelter at about two years of age.[128] Lola died after Barking Hound Village, LLC (BHV), a boarding facility, allegedly administered toxic levels of Rimadyl intended for the Monyaks' other boarded dog.[129] Despite their spending over $67,000 on veterinary and related care, Lola died from acute renal failure.[130] The high court acknowledged that Georgia law permitted recovery of the market value of the animal as well as reasonable expenses incurred to save the animal's life.[131] So holding, Georgia joined the trend of appellate jurisdictions allowing even five-figure recoveries, without cap, in costs to cure at the animal's purported market value.[132] But the high court limited the owner's recovery to fair market value without additional value for sentimental increment of loss, thereby reversing part of the appellate court's decision.[133] Even so restricted, the court noted that the Monyaks could present qualitative and quantitative evidence of Lola's attributes, such as breed, age, training, temperament, and use.[134] The "key" in permitting such evidence on remand, the court warned, would be to restrict it to that which "relates to the value of the dog in a fair market, not the value of the dog solely to its owner."[135]

124. *Id.* at *9.
125. *Id.*
126. *Id.*
127. Barking Hound Village LLC v. Monyak, 299 Ga. 144 (2016), *rev'g and aff'g in part* 331 Ga. App. 811 (2015).
128. *Id.* at 145.
129. *Id.*
130. Id. at 144.
131. *Id.* at 147–48.
132. *Id.* at 150.
133. *Id.* at 152.
134. *Id.* at 153.
135. *Id.* at 153.

F. *Equine Related Injury*

The following cases consider actions in which plaintiffs brought suit against an equine professional or facility after suffering an alleged injury. Broadly speaking, courts analyze the cases under either standard negligence principles, such as assumption of risk, or applicable statutes.

1. Negligence

In the following cases, state legislatures have not enacted an Equine Activity Liability Act[136] and therefore standard negligence principles are applied.

a. Primary Assumption of Risk—In *Carter v. Heitzler*,[137] an "experienced equestrienne" filed suit against a horse facility when she fell from a spooked horse.[138] The trial court granted summary judgment to the defendant horse facility, finding that the defendants had not engaged in any conduct that increased risks inherent to horseback riding.[139] Thus, the primary assumption of risk defense absolved the defendants of any liability.[140] The appellate court affirmed.[141]

The plaintiff, who was residing at the equine facility, had "decades of experience riding horses" and "thus [was] well aware that riding horses carries a risk of injury from being thrown, even with well-mannered horses."[142] On the date of the injury, the plaintiff was riding her horse, IB Brilliant, in an indoor arena when another rider with a "difficult-to-control" horse, Colton, entered the arena.[143] As the other rider began to mount, Colton shook her off and began running around the arena, eventually crashing into a fence.[144] IB Brilliant began to buck and threw the plaintiff to the ground.[145]

Under California common law, "the doctrine of primary assumption of the risk absolves a defendant from any duty in the context of recreational activities (depending on the role the defendant plays in the situation) to minimize or protect a plaintiff from the inherent risks of an activity."[146] The trial court found "[h]orses, being horses, run in the arena and run into the arena fence causing a commotion; and horses being spooked by the conduct of other horses is something that is part of the sport and hap-

136. *See, e.g.*, Illinois Equine Activity Liability Act, 745 ILL. COMP. STAT. ANN. 47/1 (West).
137. No. C076833, 2015 WL 6470502 (Cal. Ct. App. Oct. 27, 2015).
138. *Id.* at *1.
139. *Id.*
140. *Id.*
141. *Id.* at *4.
142. Carter v. Heitzler, No. C076833, 2015 WL 6470502, at *2 (Cal. Ct. App. Oct. 27, 2015).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at *1 (citing Nalwa v. Cedar Fair, L.P., 290 P.3d 1158 (Cal. 2012)).

pens from time to time."[147] The plaintiff was unable to suggest any precaution the defendants could have taken other than prohibiting the other rider from riding Colton in the presence of others.[148] The appellate court said this was akin to a ski resort banning beginner skiers from more advanced slopes, something that would "chill[ ] the vigorous engagement of co-participants in the activity through prohibiting them from pushing their skill levels."[149] Because the plaintiff was unable to show that the defendants *increased* risks inherent to horseback riding, the trial court's ruling was affirmed.[150]

In a remarkably concise decision, *Blumenthal v. Bronx Equestrian Center, Inc.*,[151] the Appellate Division of the New York Supreme Court ruled that a stable operator and the City of New York were not liable when a horse threw a rider at a city park stable.[152] The trial court denied defendants' motion for summary judgment on the basis of assumption of risk.[153] The appellate court, citing several of its past decisions, simply said: "The risk of a horse acting in an unintended manner resulting in the rider being thrown is a risk inherent in the sport of horseback riding. . . . There is no evidence that defendant stable was reckless, nor were there any concealed or unreasonably increased risks."[154] Accordingly, the appellate court reversed the trial court's order and directed summary judgment to be entered for the stable operator.[155] In addition, the court ruled the City of New York, which owned and operated the park, was entitled to dismissal because there was no evidence of defects in the property and nothing in the licensing agreement with the stable gave rise to a duty.[156]

In contrast to these decisions, in *Georgiades v. Nassau Equestrian Center at Old Mill, Inc.*,[157] the Appellate Division of the New York Supreme Court found that an instructor unreasonably increased a horse rider's risk of falling from a horse, thus precluding summary judgment.[158]

147. Carter v. Heitzler, No. C076833, 2015 WL 6470502, at *3 (Cal. Ct. App. Oct. 27, 2015).
148. *Id.*
149. *Id.* at *4 (citing Staten v. Super. Ct., 53 Cal. Rptr. 2d 657, 660 (Cal. Ct. App. 1996)).
150. *Id.*
151. 26 N.Y.S.3d 78 (N.Y. App. Div. 2016).
152. *Id.* at 79.
153. *Id.*
154. *Id.* (citing Quintanilla v. Thomas Sch. of Horsemanship, Inc., 11 N.Y.S.3d 241 (N.Y. App. Div. 2015) (holding rider assumed the risks inherent in riding a horse, including falling form horse when it acted in an unintended manner); Dalton v. Adirondack Saddle Tours, Inc., 836 N.Y.S.2d 303 (N.Y. App. Div. 2007) (same); Eslin v. Cty. of Suffolk, 795 N.Y.S.2d 349 (N.Y. App. Div. 2005) (same)).
155. *Id.*
156. *Id.* at 432–33.
157. 22 N.Y.S.3d 467 (N.Y. App. Div. 2015).
158. *Id.* at 469.

On the date of the injury, an infant rider, Chloe, attempted to perform a maneuver with her feet out of the stirrups.[159] According to Chloe's deposition testimony, she felt uncomfortable making the maneuver; however, the instructor insisted.[160] While attempting to make the maneuver, Chloe fell off the horse, sustaining injuries.[161] The trial court granted summary judgment for the equine facility after determining the equine center did not act in a manner that increased the dangers inherent in horseback riding.[162]

On appeal, the order was reversed because there was a genuine issue of material fact as to whether the instructor unreasonably increased Chloe's risk of falling from horse.[163] The court cited the fact that Chloe was struggling to control the horse and execute the maneuver.[164] The court likewise found there was a triable issue of fact as to whether Chloe informed the instructor that she was uncomfortable before the maneuver and whether the instructor nonetheless insisted.[165] These facts could lead a reasonable jury to believe the instructor increased the risks inherent in horseback riding.[166]

b. Determination of Relative Fault—In *Prejean v. State Farm Mutual Automobile Insurance Co.*,[167] the Louisiana Court of Appeal considered a negligence suit in which a horseback rider brought suit when his horse was struck by vehicle on the highway.[168] The trial court ruled the vehicle driver was 100 percent at fault, but the appellate court reversed in part, finding the horseback rider and the driver were each 50 percent at fault.[169]

The plaintiffs were two horseback riders riding on the highway at approximately 6:25 p.m. (dusk) when they were struck by the defendant's vehicle.[170] Each of the plaintiffs suffered personal injuries, but the horse died from a gunshot wound to ease his suffering.[171] At trial, the judge ruled the plaintiff had no legal obligation to outfit the horse with lights and ruled the driver was 100 percent liable for the plaintiffs' damages arising from the accident.[172]

159. *Id.*
160. *Id.*
161. *Id.*
162. Georgiades v. Nassau Equestrian Ctr. at Old Mill, Inc., 22 N.Y.S.3d 467, 469 (N.Y. App. Div. 2015).
163. *Id.* at 470.
164. *Id.*
165. *Id.*
166. *Id.*
167. 183 So. 3d 823 (La. Ct. App.), *writ denied*, 190 So. 3d 1204 (La. 2016), *writ denied*, 190 So. 3d 1208 (La. 2016).
168. *Id.* at 826.
169. *Id.* at 831.
170. *Id.* at 826.
171. *Id.*
172. Prejean v. State Farm Mut. Auto. Ins. Co., 183 So. 3d 823 (La. Ct. App. 2016).

On appeal, the court affirmed the plaintiff had no legal obligation to outfit the horse with lights.[173] The appellate court reviewed several Louisiana statutes and ruled there was no such statute on the books.[174] But, the appellate court found the trial court's determination of liability to be flawed. The court stated that it did "not think that reasonable people" could find the driver to be completely at fault.[175] "Riding a dark horse in dark clothing at dusk is simply unwise."[176] The court noted that people had in fact "called to report that horses were traveling in the roadway, a condition which reasonable people obviously find dangerous."[177] The court therefore assessed the rider and driver were each 50 percent at fault in causing the collision and determined the damages accordingly.[178]

2. Equine Activity Liability Acts

In contrast to the prior cases, the following originate in jurisdictions that have enacted an Equine Activity Liability Act (EALA).[179]

a. Participants Under the Act—In *Germer v. Churchill Downs Management*,[180] the Florida District Court of Appeal considered whether a patron visiting a horse stable was a "participant" under the Florida EALA.[181] The plaintiff, a former licensed jockey, was visiting an equine racing facility with a friend.[182] Because he was no longer licensed, the plaintiff obtained a "guest pass" from the facility for permission to enter the stables.[183] While plaintiff was en route through the barn to see his friend's horse, another horse stuck her head out from her stall and bit plaintiff's chest.[184]

The Florida EALA defines a "participant" as "any person, whether amateur or professional, who engages in . . . an equine activity, whether or not a fee is paid to participate in the equine activity."[185] The EALA specifically defines "engages in an equine activity" to include "visiting or touring or utilizing an equine facility as part of an organized event or activity."[186]

173. *Id.* at 827.
174. *Id.* at 828 ("Further, [the statute cited by plaintiff] clearly refers to 'animal drawn vehicles.' If the legislature wanted to include ridden animals, it could have easily done so.").
175. *Id.* at 830.
176. *Id.*
177. *Id.*
178. *Id.* at 831.
179. *See, e.g.*, Illinois Equine Activity Liability Act, 745 ILL. COMP. STAT. ANN. § 47/1–25; Vt. Stat. Ann. tit. 12, § 1039.
180. 3D14-2695, 2016 WL 4697692 (Fla. Dist. Ct. App. Sept. 7, 2016).
181. FLA. STAT. ANN. § 773.01–773.06 (West).
182. *Germer*, 2016 WL 4697692 at *1.
183. *Id.*
184. *Id.*
185. Germer v. Churchill Downs Mgmt., 3D14-2695, 2016 WL 4697692 (Fla. Dist. Ct. App. Sept. 7, 2016) (citing FLA. STAT. ANN. § 773.01(7)).
186. *Id.* at *2 (citing FLA. STAT. ANN. § 773.01(1) (emphasis omitted)).

On appeal, the main issue was whether plaintiff was "part of an organized event or activity" as to be included in the statute.[187] The court looked to the legislative intent: "to limit the liability of Florida's equine facilities for injuries resulting from inherent risks associated with equine activities."[188] The court noted that the legislature, in accordance with this intent "broadly defined those activities constituting an equine activity" and "carved out only one specific exception from this broad definition. . . ."[189] Based off this stated intent, the court took an expansive approach to interpreting the "organized event or activity" language in the EALA.[190] Because plaintiff had to obtain a guest pass (i.e., a "hurdle to entry"), the creation and existence of this protocol constituted the requisite "organization" so as to make plaintiff's visit to the stables "an organized activity."[191] Accordingly, the plaintiff was a participant under the EALA and the defendants were entitled to immunity.[192]

On the other hand, the Louisiana Court of Appeal in *Larson v. XYZ Insurance Co.*[193] considered whether a person bitten while feeding treats to a horse was a "participant" and came to the opposite conclusion as the Florida court in *Germer*.[194] The plaintiff, Ms. Larson, was visiting a stable in a New Orleans City Park and brought carrots to feed the horses.[195] Although Ms. Larson had previously received permission to enter the stable, she did not on the date of the injury.[196] When she went to feed one of the horses a carrot, the horse knocked it out of her hand.[197] When she went to pick up the carrot from the ground, the horse reached for the carrot at the same time, biting off her thumb.[198]

Under the Louisiana EALA, a "participant" is anyone who "engages in equine activity."[199] However, there is a specific exception in the definition for "engages in equine activity" in that the term "does not include being a spectator at an equine activity, except in cases where the spectator places himself in an unauthorized area and in immediate proximity to the equine activity."[200] The appellate court found that the act of giving horses "love and affection" and feeding them treats does not align with any of the sec-

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at *3.
191. *Id.*
192. *Id.*
193. 192 So. 3d 181 (La. Ct. App.), *writ granted*, 192 So. 3d 782 (La. 2016).
194. *Id.* at 183.
195. *Id.* at 184.
196. *Id.*
197. *Id.*
198. Larson v. XYZ Ins. Co., 192 So. 3d 181 (La. Ct. App. 2016).
199. *Id.* at 187 (citing LA. STAT. ANN. § 9:2795.3(A)(7)).
200. *Id.* (citing LA. STAT. ANN. § 9:2795.3(A)(1)).

tions of the EALA,[201] but found that genuine issues of material fact existed as to whether plaintiff was a spectator who placed herself in an unauthorized area and sent the case back to the trial court for fact determinations.[202] The Louisiana Supreme Court granted a writ of certiorari for review.[203]

b. Statutory Exceptions to the EALA—One particularly helpful federal district court decision, *Melendez v. Happy Trails and Riding Center, Inc.*,[204] considered summary judgment when a rider's stirrup broke.[205] The plaintiff was a rider at an equestrian center in a guided group trail ride.[206] The plaintiff asked several times during the trail ride if he could gallop or canter the horse, but was told this activity was too dangerous on the trails.[207] After the trail ride was over, however, the guide allowed the plaintiff to canter at the equine center.[208] While rounding a turn, a stirrup broke and the plaintiff fell from the horse.[209]

The defendant equine center moved for summary judgment on two independent theories: (1) the exculpatory agreement that plaintiff signed prior to the horseback ride insulates defendant from liability or (2) the Pennsylvania EALA provides the defendant equine center with immunity.[210] The district court rejected both of these arguments and denied the defendant's motion for summary judgment.[211]

First, the court ruled the exculpatory clause was facially valid under Pennsylvania law because the agreement was not against public policy and not a "contract of adhesion."[212] However, the court's main analysis was whether the equine facility acted recklessly in providing faulty equipment,[213] which was brought up *sua sponte* by the court even though the issue was not briefed.[214] Because the valid, enforceable exculpatory clause

201. *Id.* at 189.
202. *Id.* at 190.
203. 192 So. 3d 782 (La. 2016).
204. No. 3:14-CV-1894, 2016 WL 5402745 (M.D. Pa. Sept. 26, 2016).
205. *Id.* at *1.
206. *Id.*
207. *Id.*
208. *Id.*
209. Melendez v. Happy Trails & Riding Ctr., Inc., No. 3:14-CV-1894, 2016 WL 5402745, at *1 (M.D. Pa. Sept. 26, 2016).
210. *Id.* at *3 (citing 4 PA. STAT. ANN. § 601–606 (West)).
211. *Id.* at *10.
212. *Id.* at *4. This was not a contract of adhesion because "[t]he signer is under no compulsion, economic or otherwise, to participate, much less to sign the exculpatory agreement, because it does not relate to essential services, but merely governs a voluntary recreational activity." Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1191 (Pa. 2010).
213. Melendez v. Happy Trails & Riding Ctr., Inc., No. 3:14-CV-1894, 2016 WL 5402745, at *8 (M.D. Pa. Sept. 26, 2016).
214. *Id.* ("[T]he fact that Plaintiff did not specifically plead recklessness in his Complaint is not fatal to his claim. In his Complaint, Plaintiff alleged that, among other things, Defendant 'provid[ed] equipment or tack that defendant knew or should have known was faulty.'

only barred claims against negligence, and not recklessness, the court found there were genuine issues of material fact as to whether the equine center acted recklessly in providing faulty equipment.[215]

Second, the court ruled that the Pennsylvania EALA did not provide the equine center with immunity under these facts.[216] Pennsylvania, unlike many states, does not have an explicit exception for faulty and/or defective equipment.[217] The court looked to the EALA and interpreted the statute to mean plaintiff "knew that the equipment he was provided with might break and voluntarily continued with the horseback ride in spite of that knowledge."[218] Because faulty equipment is not inherent in horseback riding and because the defendants could point to no evidence the plaintiff "decided to use the equipment with the knowledge that the stirrup or any other equipment Plaintiff was provided with might break," the court found the EALA did not provide the equine facility with immunity.[219]

In a New Jersey appellate decision, *Kane v. Majoda Stables*,[220] the court considered two exceptions to the state's EALA after a trial court dismissed the complaint.[221] The plaintiff, who had been taking lessons for several months, pled that he was instructed to mount the horse from the ground although he had not done previously and had never been instructed in this technique.[222] While the instructor was "talking to her boyfriend," the plaintiff attempted to mount the horse, but the horse "took off running" dragging the plaintiff approximately thirty yards.[223]

The defendants, who denied these allegations, moved to dismiss the complaint because the claims were governed and barred by the New Jersey EALA.[224] The trial court granted the motion to dismiss for failure to state a claim, but the appellate court reversed the decision.[225]

The court relied on two of the enumerated exceptions to the New Jersey EALA: (1) "failure to make reasonable and prudent efforts to deter-

This statement encompasses the allegation that Defendant recklessly provided Plaintiff with defective or faulty equipment. The fact that Plaintiff's Complaint does not contain the word 'reckless' is immaterial.").

215. *Id.* at *9.

216. *Id.*

217. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 47/20(b)(1) (creating an exception when defendant "[p]rovided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and the equipment or tack was faulty to the extent that it caused the injury"); FLA. STAT. ANN. § 773.03(2)(a) (same).

218. Melendez v. Happy Trails & Riding Ctr., Inc., No. 3:14-CV-1894, 2016 WL 5402745, at *10 (M.D. Pa. Sept. 26, 2016).

219. *Id.*

220. No. A-3568-14T3, 2016 WL 1723842 (N.J. Super. Ct. App. Div. May 2, 2016).

221. *Id.* at *1.

222. *Id.* at *2.

223. *Id.*

224. *Id.*

225. *Id.* at *3.

mine the participant's ability to safely manage the particular equine animal, based on the participant's representation of his ability"; and (2) "an act or omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury."[226] Analyzing the plaintiff's complaint under the liberal standard of review for dismissal, the court found the allegations were sufficient because the instructor permitted the plaintiff to mount the horse from the ground "either knowing he was unable to do so, thereby negligently disregarding his safety, or having first failed to make reasonable and prudent efforts to determine his ability."[227] The court also found that ignoring the plaintiff while talking to her boyfriend could constitute negligent disregard for the plaintiff's safety.[228]

The court noted that the case very well might have been decided differently on summary judgment, but the liberal standard for dismissal warranted reversal.[229]

In *Penunuri v. Sundance Partners Ltd.*,[230] the Utah Court of Appeals considered a gross negligence exception to the Utah EALA and ruled a horse guide's conduct did not rise to the level of gross negligence.[231] In a previous ruling the trial court found that a release signed by the plaintiff barred an ordinary negligence claim, which was affirmed by the Utah Supreme Court.[232] On remand, the plaintiff amended the complaint with claims for gross negligence.[233] The trial court found the conduct did not rise to the level of gross negligence.[234] The plaintiff again appealed and the appellate court again affirmed for the defendants.[235]

On the date of the injury, the plaintiff was a participant in a guided horseback tour in the Rocky Mountains.[236] She struggled to keep her horse from grazing, which left sizeable gaps between her and the group.[237] The guide

226. *Id.* at *4 (citing N.J. STAT. ANN. § 5:15-9 (West)).
227. *Id.*
228. *Id.*
229. *Id.* at *5 (citing Hubner v. Spring Valley Equestrian Ctr., 1 A.3d 618, 631 (N.J. 2010) (affirming summary judgment for equine center from injuries sustained by participant from inherent risks of equine activities)).
230. 380 P.3d 3 (Utah App. 2016) [hereinafter *Penunuri I*]. Note that the *Penunuri I* court never mentions or cites the basis for the claim being the gross negligence exception to the EALA (UTAH CODE ANN. § 78B-4-202(2)(d)(i) (West)); after the Utah Supreme Court ruled the plaintiff was barred from bringing a negligence claim, however, an exception to the EALA would be the only available basis to amend the complaint.
231. *Penunuri I*, 380 P.3d at 5.
232. Penunuri v. Sundance Partners, Ltd., 301 P.3d 984, 990 (Utah 2013) [hereinafter *Penunuri II*].
233. *Penunuri I*, 380 P.3d at 5.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*

attempted to slow the group down, but eventually provided instructions to the plaintiff on how to mount the horse.[238] After one of the grazing instances, the plaintiff's horse suddenly accelerated to catch up with the group, causing her to fall off and suffer injuries.[239]

Under Utah law, gross negligence is "the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result."[240] The plaintiff relied upon the company's operating manual, which provided guides should not let gaps form.[241] However, the appellate court did not find this persuasive and ruled there was indeed evidence to "show that the guide did observe, at the very least, slight care: she gave [plaintiff] instructions on how to mount the horse and how to stop the horse from grazing."[242] Accordingly, summary judgment was affirmed for the guide facility because this conduct was not grossly negligent.[243]

The Michigan Court of Appeals in *Johnson v. Outback Lodge & Equestrian Center, LLC*[244] considered a rare (and now obsolete) exception to the state's EALA.[245] The statute provided a broad grant of immunity for equine activity sponsors, but included an exception when the sponsor "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage."[246] The EALA has since been amended for "willful or wanton disregard."[247]

The plaintiff, Samantha, was a member of the Girl Scouts who attended a horseback riding camp held at the property of a private horse ranch.[248] Samantha was assisted by both Girl Scout and ranch employees with her helmet, which was too big.[249] While riding on the trails, Samantha's horse was spooked and started running.[250] Her helmet came loose while the horse was running and she hit the ground without any protection.[251]

238. *Id.*
239. *Id.*
240. *Id.* at 6 (quoting Berry v. Greater Park City Co., 171 P.3d 442, 449 (Utah 2007)).
241. *Id.*
242. *Id.*
243. *Id.* at 9.
244. No. 323556, 2016 WL 930738 (Mich. Ct. App. Mar. 10, 2016), *appeal denied*, 885 N.W.2d 265 (Mich. 2016).
245. *Id.* at *1.
246. *Id.* at *2 (citing MICH. COMP. LAWS ANN. § 691.1665(d) (West)).
247. *Id.* at *3 n.4 (noting the EALA was amended September 21, 2015, but the instant injury occurred prior to the amendment).
248. *Id.* at *1.
249. Johnson v. Outback Lodge & Equestrian Ctr., LLC, No. 323556, 2016 WL 930738, at *1 (Mich. Ct. App. Mar. 10, 2016).
250. *Id.*
251. *Id.*

The trial court dismissed the complaint because of the EALA; however, the appellate court reversed because of the negligence exception.[252] The court analyzed the case under traditional negligence principles, as if the EALA did not exist.[253] Under the court's reasoning, a duty was created under the plaintiff's status as a minor at the summer camp and the breach was an issue for a jury.[254] Not forgetting about the EALA, the court instructed the trial court to consider the issue of proximate cause in light of the statute and should "ensure that evidence related to proximate cause does not affect an 'end-run' around the grant of immunity provided by the EALA."[255]

G. *Equine Escape*

Two recent cases grappled with the issue of liability when an equine escaped from the premises and caused injury to a plaintiff.

First, the Supreme Court of Vermont in *Deveneau v. Wielt*[256] ruled that a landowner who leased his property did not have a duty to prevent a horse from escaping and injuring a nearby motorist. The plaintiff was injured when he was driving and struck a horse who had escaped.[257] The horse was owned by Susan Wielt, who leased land from Brian Toomey.[258] The plaintiff sued both Wielt and Toomey for negligence.[259] Toomey moved for summary judgment on the theory he had no duty keep the horse enclosed or to prevent its escape.[260] The trial court granted summary judgment and the supreme court affirmed.[261] The court reasoned Wielt, the lessee, owed the sole duty to plaintiff because "[i]t was Wielt, not Toomey, who undertook to keep and care for these horses."[262] The court considered several adverse persuasive authorities, including case law from New York, but ultimately rejected these arguments and created no new duty on behalf of a lessor.[263]

Second, the North Carolina Court of Appeals in *Peoples v. Tuck*[264] considered a similar case. The defendant rode his horse to his sister's house,

252. *Id.* at *4.
253. *Id.* (analyzing the cause under duty, breach of duty, causation, and damages).
254. *Id.* at *5.
255. *Id.*
256. 144 A.3d 324 (Vt. 2016).
257. *Id.* at 325.
258. *Id.*
259. *Id.*
260. *Id.*
261. Deveneau v. Wielt, 144 A.3d 324, 325 (Vt. 2016).
262. *Id.* at 330.
263. *Id.* at 327 (citing Hastings v. Sauve, 989 N.E.2d 940, 942 (N.Y. 2013) ("We therefore hold that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal . . . is negligently allowed to stray from the property on which the animal is kept.")).
264. No. COA16-293, 2016 WL 6081423 (N.C. Ct. App. Oct. 18, 2016).

fastened the horse on a pole, and left to socialize.[265] While he was socializing, the horse broke free from the pole and ran onto the highway where he was struck by the plaintiff.[266] The plaintiff moved for summary judgment based on *res ipsa loquitor* and, in addition, offered the affidavit of a veterinarian stating that the defendant "failed to properly restrain his horse and as a result thereof his horse was able to break away and get into the roadway causing a collision."[267] Based on the affidavit, the trial judge determined there were no genuine issues of material fact for trial and granted summary judgment.[268] On appeal, the court cited North Carolina Supreme Court authority that horse owners must use ordinary care to prevent escape and *res ipsa loquitur* does not apply.[269] Thus, the appellate court reversed the decision of the trial court because the veterinarian affidavit presented a triable issue of material fact of whether the defendant used ordinary care when fastening the horse to the pole.[270]

III. ANIMAL INSURANCE LAW

Animals—from household pets to livestock—can play a large role in insurance disputes. During the past year, several state and federal have ruled on cases involving animals in insurance policies, coverage, and cancellation. The following cases highlight trends in animal-related insurance developments.

A. *Policy Language/Coverage*

In *American Family Mutual Insurance Co. v. Williams*,[271] the Seventh Circuit considered whether a homeowner's guest was "legally responsible" for the homeowner's dog under the insurance policy language.[272] Chief Judge Wood opened the opinion on a light-hearted note: "They say every dog has its day. This case is about a dog—specifically, Emma, a black Labrador."[273]

While a family friend was visiting the insured, he took Emma on a walk.[274] However, during the walk, a neighbor's dog started barking.[275]

265. *Id.* at *1.
266. *Id.*
267. *Id.* at *2.
268. *Id.* at *3.
269. *Id.* at *4 (citing Gardner v. Black, 9 S.E.2d 10, 12 (N.C. 1940) (finding that when defendant's escaped mule struck a motorist, the doctrine of *res ipsa loquitur* did not apply and the defendant had a duty to exercise ordinary care)).
270. *Id.*
271. 832 F.3d 645 (7th Cir. 2016).
272. *Id.* at 647.
273. *Id.*
274. *Id.*
275. *Id.*

Emma lurched toward the sound, pulling the guest to the ground and seriously injuring his shoulder.[276] The guest brought suit against the homeowners for negligence. American Family, however, denied the company had a duty to defend or indemnify because of language in the policy stating, "[w]e will not cover bodily injury to any insured."[277] In relevant part, the policy defined an "insured" as "any person . . . legally responsible for a[n] . . . animal owned by [a named insured or resident relative of a named insured] to which [the policy's personal-liability coverages] apply."[278] American Family sought a declaratory judgment to confirm its reading of the policy; the district court, however, ruled in favor of the homeowner and the guest.[279]

On appeal, the Seventh Circuit affirmed because the guest was neither an "owner" nor a "keeper" of Emma.[280] He was clearly not the owner, and he was not a keeper because this would require much greater participation, such as supplying Emma with "necessities of life."[281] The insurance company further argued the guest was holding the dog as a bailment, but this was rejected by the court.[282] The court reasoned there was no delivery or acceptance of Emma to the guest—two elements required to create a bailment under the law.[283]

The Seventh Circuit therefore found the guest was not an owner, keeper, or bailor of Emma; consequently he was not "legally responsible" for the dog.[284] The insurance company therefore had a duty to defend and indemnify the homeowners against the guest's suit arising from his injuries.[285]

In *Kentucky Insurance Guarantee Association v. Rood*,[286] an insurance company brought a declaratory judgment action after denying coverage under a veterinarian policy.[287] The underlying claim was against a veterinarian after his horse contracted a salmonella infection and was euthanized while under the care of the veterinarian hospital.[288] The owner brought suit against two of the individual veterinarians because the hos-

276. Am. Family Mut. Ins. Co. v. Williams, 832 F.3d 645, 647 (7th Cir. 2016).
277. *Id.*
278. *Id.*
279. *Id.* at 648.
280. *Id.* (citing Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993) ("An owner or keeper who fails to exercise . . . reasonable care may be liable in negligence for the manner of keeping and controlling the dog.")).
281. Am. Family Mut. Ins. Co. v. Williams, 832 F.3d 645, 648 (7th Cir. 2016) (citing 3B C.J.S. ANIMALS § 75).
282. *Id.* at 649.
283. *Id.*
284. *Id.* at 650–51.
285. *Id.* 651.
286. No. 2014-CA-000642-MR, 2016 WL 3226318 (Ky. Ct. App. June 3, 2016).
287. *Id.* at *1.
288. *Id.*

pital did not hold its own insurance policy.[289] The insurance company denied liability, but the trial court found the facts warranted coverage.[290] The company then claimed the owner was entitled only to the statutory maximum of $300,000 and the company was entitled to an offset of $250,000 due to the owner's recovery from his own insurance company stemming from the same loss.[291] The appellate court agreed that the owner was entitled to a maximum of only $300,000 because the death of a horse (even though attributable to two veterinarians) was considered a single loss.[292] The court, however, ruled the company was not entitled to an offset from the owner's policy because the veterinarians were not entitled to this money.[293] Only payments to veterinarians, rather than the horse owner, would have entitled the company to an offset.[294]

B. *Policy Cancelation*

In *Skotnicki v. Insurance Department*,[295] the Commonwealth Court of Pennsylvania (one of the state's two appellate level courts) ruled that an insurance company could cancel a homeowner policy after an unprovoked dog bite.[296] The petitioner purchased a policy from Phoenix Insurance Company in 2003 and renewed the policy each year.[297] In 2009, the homeowner acquired an English springer spaniel, who bit a neighbor in 2013.[298] The insurance company accepted liability for the claim and paid $42,000 in damages.[299] The company then sent the homeowner notice that the policy would not be renewed due to increased risk.[300] The homeowner filed a complaint with the Bureau of Consumer Services, claiming that the dog bite was indeed provoked.[301] The insurance company

289. *Id.*
290. *Id.*
291. Ky. Ins. Guarantee Ass'n v. Rood, No. 2014-CA-000642-MR, 2016 WL 3226318, at *1 (Ky. Ct. App. June 3, 2016).
292. *Id.* at *4 (admitting difficulty in interpreting how many "claims" the facts presented under the policy and statute by stating that "[t]he Centennial policy and the statutes comprising the Kentucky Insurance Guarantee Act combine to form a labyrinth of ambiguous, and perhaps irreconcilable, terms").
293. *Id.* at *5 (citing KY. REV. STAT. ANN. § 304.36-120(1) ("Any person having a claim against an insurer under any provision in an insurance policy other than the policy of an insolvent insurer which is also a covered claim shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this subtitle shall be reduced by the amount of recovery under the insurance policy.")).
294. *Id.*
295. No. 156 C.D. 2015, 2016 WL 4376608 (Pa. Commw. Ct. Aug. 17, 2016).
296. *Id.* at *1.
297. *Id.*
298. *Id.*
299. *Id.*
300. Skotnicki v. Ins. Dep't, No. 156 C.D. 2015, 2016 WL 4376608 (Pa. Commw. Ct. Aug. 17, 2016).
301. *Id.*

responded there was "a substantial change or increase in hazard in the risk assumed . . . [due to a] pet on the residence premises that has exhibited dangerous propensities by biting a person without provocation."[302]

The homeowner requested an administrative law judge (ALJ) review the cancellation.[303] After reviewing the evidence, the ALJ found the dog bite was unprovoked because the "dog bit someone who simply walked rapidly up to them to begin a conversation on the side of a public street. . . . Even though the [neighbor] came close to the couple, the [homeowner] presented no evidence that [neighbor] made any threatening gestures toward the dog or [homeowners] wife."[304] The appellate court looked significantly at the evidence presented to the ALJ, but ultimately concluded the ALJ's determination the dog bite was unprovoked was not erroneous.[305] The court concluded the cancellation of an insurance policy following an unprovoked dog bite was not in violation of the Pennsylvania Unfair Insurance Practices Act.[306]

302. *Id.* at *2.
303. *Id.*
304. *Id.* at *5.
305. *Id.* at *8. The appellate court looked at whether the ALJ's reliance on the insurance claim adjustor's testimony and notes were erroneous. However, the court found under business records hearsay exception, the testimony was sufficiently trustworthy. The ALJ could also consider the alleged hearsay testimony due to a lack of objection.
306. *Id.* at *2–3 (citing Aegis Sec. Ins. Co. v. Pa. Ins. Dep't, 798 A.2d 330 (Pa. Commw. 2002) (holding dog that bit police officer was provoked so that incident did not justify cancellation of policy under Unfair Insurance Practices Act, 40 PA. STAT. ANN. § 1171.5)).