RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

Adam P. Karp and Margrit Lent Parker

I. INTRODUCTION

In this survey, Mississippi debates whether what is good for the goose is also good for the gander in the context of the dangerous propensity strict common law liability rule, while Indiana contends with the plaintiffs' assertion that vicious pigs should be treated as abnormally dangerous domestic animals. Indiana also looks at the malady of rat bite fever and, in the course of taking diagnostic inventory of various causes, concludes

Adam Karp of Animal Law Offices is a vice-chair of the TIPS Animal Law Committee and in private practice, handling cases in Washington, Oregon, and Idaho. Margrit Lent Parker is an attorney with Childs McCune LLC in Denver and handles matters in Colorado, Wyoming, and surrounding states. *Ms. Parker thanks Taylor Carrillo, a first-year law student at University of Denver Sturm College of Law, for her research assistance.*

that rats are not products. North Carolina signals a departure from decades of Virus-Serum-Toxin Act preemption jurisprudence. Maryland upholds perhaps the largest jury verdict for noneconomic damages involving the shooting injury of a dog by a police officer, while Georgia limits the actual value of a dachshund to economic considerations only. Florida finds that a condominium association had no duty to prevent a unit owner's suicide resulting from the removal of his emotional support animal, and Wisconsin takes a conservative approach to dog harborers.

On the insurance front, two cases address the applicability of homeowner's insurance policies to dog-related incidents, including whether a bitten dog sitter was an "insured" under the policy, and thus, excluded from bodily injury coverage, and whether a homeowner's adult son, who owned the dog in question, was an "insured."

This year's survey also contains a case involving governmental immunity relating to an equine animal cruelty investigation, including whether an assisting veterinarian could be held liable for complying with her statutory duty to report her findings of suspected animal neglect. There are several cases involving equine torts: the scope and applicability of liability releases as a defense to wrongful death claims; and the application of states' equine activity liability statutes in cases involving horse bites, slipping saddles, and injuries to a barn manager providing daily care to horses. Two other cases are highlighted that involved stable owners' policies and the extent of coverage and application of exclusions to cover injuries in a car versus rider collision and the loss of horses in a trailer fire.

II. ANIMAL TORT LAW

A. *Products Liability*

Trista and Rickey McCoy, parents of G.M., bought two rats from PetSmart, Inc. PetSmart purchased the rats from distributor Rainbow Exotics, Inc., which in turn obtained them from the breeder Slam Ventures, Ltd.[1] At the time of purchase, Trista signed a "pet sales record & customer contract" warning her about the risk of rat bite fever, which G.M. contracted about six months after bringing them home.[2] The McCoys sued the retailer, distributor, and breeder on theories of products liability and negligence.[3] Because the McCoys failed to produce expert testimony establishing specific causation that would rule out multiple, alternative, potential etiologies, the court found that the McCoys could not carry their burden on either of their

1. G.M. v. PetSmart, Inc., 2015 WL 5095726 (S.D. Ind. Aug. 28, 2015).
2. *Id.* at *1.
3. *Id.*

claims.[4] A generalized assertion that rat bite fever can pass from a rat's bite or scratch would not suffice. In a footnote, the court offered an alternative basis to grant summary judgment to the defendants—that the rat could not be considered a defective product since, as the plaintiffs conceded, the animal "did not suffer from a manufacturing defect or a design defect."[5]

Because animal immunobiologicals are licensed, monitored, and regulated by the federal government,[6] courts have traditionally deemed state law claims (including failure-to-warn, inadequate disclosure, failure-to-instruct, and mislabeling) to be preempted by federal law, except for claims for failure to comply with labeling and packaging requirements set forth by the USDA's Animal and Plant Health Inspection Service (APHIS).[7] The tide may be turning, however, if *Franklin Livestock, Inc. v. Boehringer Ingelheim Vetmedica, Inc.*, discussed below, is any harbinger.[8]

In *Franklin Livestock*, commercial cattle farmers administered USDA-licensed and APHIS-tested vaccines that caused endotoxemia, a condition that killed thousands of cattle and diminished the value of thousands more.[9] The vaccine manufacturer moved for summary judgment on the farmers' claims for breach of warranty, negligent design and manufacture, failure to warn, failure to comply with the Animal, Virus, Serum, Antitoxin Act (Virus-Serum-Toxin Act, or VSTA), as well as unfair and deceptive trade practices, premised on federal regulatory preemption.[10] Although Congress intended to establish nationally uniform standards for preparing and selling animal vaccines via the VSTA, the Act did not expressly speak to state law preemption,[11] although APHIS regulations did.[12] In denying the motion, the trial judge held that the Supreme Court's 2009 decision in *Wyeth v. Levine*[13] called into question precedents

4. *Id.* at *2.
5. *Id.* at *2 n.2.
6. The Virus-Serum-Toxin Act makes it "unlawful to prepare, sell, barter, exchange, ship, or deliver for shipment any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in treating domestic animals unless and until it has been prepared in compliance with USDA regulations." 21 U.S.C. § 151. Violations of the VSTA are prosecuted as misdemeanors. 21 U.S.C. § 158. The Final Rule Pertaining to Restrictions Which May Be Imposed by States on the Distribution and Use of Veterinary Biological Products declared an intention to occupy the field "[w]here safety, efficacy, purity, and potency of biological products are concerned . . . [because] Congress clearly intended that there be national uniformity in the regulation of these products." 57 Fed. Reg. 38758, 38759 (Aug. 27, 1992).
7. *See, e.g.*, Lynnbrook Farms v. SmithKline Beecham Corp., 79 F.3d 620, 630 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 178 (1996).
8. 2015 WL 3855135 (E.D.N.C. June 22, 2015).
9. *Id.* at *1.
10. *Id.*
11. *Id.*
12. 57 Fed. Reg. 38758.
13. 555 U.S. 555 (2009).

finding preemption. It held that, *Wyeth*, a decision that concluded agency intent to preempt is relevant but not dispositive to a preemption determination, "counsels against construing APHIS's preemption proclamation so broadly as to leave plaintiff with no remedy in the instant case."[14] As to whether the manufacturer failed to comply with APHIS regulations, the trial court cited well-established precedent allowing the state law claim of per se negligence, a tort paralleling federal requirements.[15]

B. *Veterinary Liability*

Gomez v. Innocent[16] examined Georgia's veterinary lien statute, which provides that "[e]very licensed veterinarian shall have a lien on each animal or pet treated, boarded, or cared for . . . [and] the right to retain the animal or pet until the charges are paid."[17] Veterinarian Garry Innocent invoked the statute to hold Gomez's dog Pilot on August 27, 2007.[18] Dr. Innocent diagnosed parvovirus and estimated $1,453.25 for treatment. Because Gomez could not pay the entire estimate up front, Dr. Innocent accepted $400 for that night's care and initiated treatment.[19] The next day, an employee explained that Gomez owed another $751.25, which Gomez paid on August 28. When Gomez returned on August 29 to recover Pilot, Innocent told him that he owed yet another $484.80 (exceeding the estimate by $182.80).[20] Gomez did not dispute the charges at the time and, at Dr. Innocent's request, removed Pilot from his car and left him at the hospital until the bill was paid twenty days later, at an accrued cost of $972, by a good Samaritan.[21]

Among other claims, Gomez sued Dr. Innocent and PetFirst for breach of contract, stating that Pilot had been withheld based on "additional sums not agreed by the parties in their initial contract."[22] At the jury trial, before Gomez rested, the trial judge sua sponte granted summary judgment to the defendants, a determination resulting in reversal and remand with instructions to adjudicate whether Dr. Innocent justifiably relied on the lien statute to keep Pilot from Gomez.[23] The trial court again found for the defendants, and Gomez appealed a second time.[24]

14. *Franklin*, 2015 WL 3855135, at *3.
15. *Id.* at *4. *But see* Wyo. Premium Farms, LLC v. Pfizer, Inc., 2013 WL 1796965 (D. Wyo. Apr. 29, 2013) (distinguishing *Wyeth*, but not ascertaining impact of preemption on state common law remedies).
16. 765 S.E.2d 405 (Ga. Ct. App. 2014).
17. GA. CODE ANN. § 44-14-490(a) (date).
18. *Gomez*, 765 S.E.2d at 405.
19. *Id.*
20. *Id.*
21. *Id.* at 406.
22. *Id.*
23. *Id.* (citing Gomez v. Innocent, 746 S.E.2d 645 (Ga. Ct. App. 2013)).
24. *Id.*

The Georgia Court of Appeals affirmed dismissal, rejecting Gomez's conclusory assertion that "[n]othing was agreed to or mutually acknowledged" because he undisputedly agreed to pay at least the estimate and signed a treatment authorization form explaining that the estimate might be exceeded depending on medical needs.[25]

C. *Police Shootings*

While executing a search warrant for drug paraphernalia, three officers shot and killed Wrinkles, Marietta Robinson's thirteen-year-old pit bull mix.[26] Before entry, the search team saw and heard Wrinkles growling and barking. With their permission, Robinson secured Wrinkles in her first-floor bathroom, and the warrant execution commenced by several officers crossing the threshold into her home. Shortly after they were underway, Officer Pezzat opened the bathroom door, apparently unaware that Wrinkles was inside. Claiming that Wrinkles bit through her steel-toed boot and began to drag her into the bathroom, Pezzat fired, as did Officer Glynn, standing nearby. Wrinkles then left the bathroom and charged Officer McLeod, who also discharged a firearm until Wrinkles changed course and ascended the stairs, forcing one officer to deploy a defensive shield. Over a dozen shots later, Wrinkles lay dead.

Robinson sued the District of Columbia and various officers under 42 U.S.C. § 1983 and a "kaleidoscope" of common law tort claims in *Robinson v. Pezzat*.[27] In addition to declining to exercise supplemental jurisdiction, the trial court dismissed the federal claims on summary judgment, holding that no unreasonable Fourth Amendment seizure occurred in the slaying of Wrinkles due to the split-second nature of what amounted to an imminent and actual threat of injury.[28] Nor did the court find a Fourth Amendment seizure violation in the subsequent smearing of Wrinkles's blood on Robinson's personal effects or the numerous bullet holes throughout her residence, which the court reasoned that the damage sustained was reasonably necessitated by defensive efforts to avoid being bitten and to find potentially concealed drugs or drug-related items.[29] Although one of the officers considered using oleocapsicum spray, and, as the court noted, "in retrospect, nonlethal force may have been preferable, the equities still favored the government in officer self-preservation.[30] The court did not address the failure of the defendants to exercise due care in opening the door to the area where they had authorized Robinson to secure Wrinkles.

25. *Id.* at 407.
26. Robinson v. Pezzat, 83 F. Supp. 3d 258 (D.D.C. 2015).
27. *Id.* at 264.
28. *Id.* at 266.
29. *Id.* at 268.
30. *Id.* at 267.

In *Brooks v. Jenkins*,[31] the Maryland Court of Special Appeals examined the soundness of a jury verdict that awarded substantial economic and noneconomic damages arising from the shooting of Roger and Sandra Jenkinses' chocolate Labrador Retriever, Brandi, by Frederick County Sheriff's deputy Timothy Brooks. Sheriff's deputy Brooks visited their home to execute an arrest warrant for the Jenkinses' eighteen-year-old son.[32] Mr. Jenkins asked the deputy to wait until he could move the dog to an outdoor kennel.[33] When Mr. Jenkins allowed Brandi to emerge from the rear of the house without a leash, she went around to the front of the house instead of to the kennel.[34] According to Brooks, over the course of eight seconds, he observed Brandi barking aggressively and trying to attack him, even though she came no closer than three feet away. Brandi survived a bullet shot to her chest.[35]

Six counts of the twelve-count complaint in *Jenkins* proceeded to jury trial. After deliberating four hours, the jury awarded Roger and Sandra Jenkins each $10,000 in economic damages and $100,000 in noneconomic damages for Brandi's shooting.[36] The defendants appealed the verdict, arguing first that the trial court improperly allowed the jury to consider whether Brooks acted with gross negligence.[37] The appellate court explained that Brooks' dash camera and other trial testimony allowed the jury to infer that he acted indifferently to the Jenkinses' rights because Brandi did not pose a credible threat.[38] Brandi approached Brooks "wagging her tail" and not "at an inordinate speed or in a crouched position."[39] Further, Brooks could have, but did not, use any lesser form of force.[40]

Next, Brooks argued that the court should have capped damages under Section 11-110 of the Maryland Code, Courts & Judicial Proceedings. Section 11-110 provides that all compensatory damages for the tortious death or injury to a pet may not exceed $7500 "in lost economic (not emotional) value and veterinary bills."[41] Finding that the statute did not extend to constitutional torts of the nature raised by the Jenkinses under Maryland Constitution Articles 24 and 26, the court held that "the trial court was correct

31. 104 A.3d 899 (Md. Ct. Spec. App. 2014).
32. *Id.* at 901.
33. *Id.* at 902.
34. *Id.* at 903.
35. *Id.*
36. *Id.* at 904. There was also an award for the alleged unlawful entry into the Jenkinses' home after shooting, which is not germane to this survey. *Id.*
37. *Id.*
38. *Id.* at 909. Indeed, the defense counsel acknowledged in his opening statement that "[t]here's not going to be any evidence [in] this case that . . . Brandi was a vicious animal in any way. The evidence is going to be that Deputy Brooks didn't know." *Id.* at 910.
39. *Id.*
40. *Id.*
41. *Id.* at 911.

to reduce the Jenkinses' recovery for Brandi's *veterinary* bills from the original $20,000 award to the total of $7,500," but "nothing about CJ § 11-110 vitiated their existing right to recover, on appropriate proof, whatever non-pet damages they could prove, including their non-economic damages, for the [d]eputy's grossly negligent violation of their constitutional rights."[42] The court affirmed the $200,000 award of general damages on two grounds. First, the court rejected the contention that Maryland permits mental-anguish damages only where tortious harm *to personalty* is coupled with fraud, malice, or similar motives, noting that the authority relied upon by Brooks pertained to claims involving *realty*.[43] Second, the court found that such damages assuredly arose from the grossly negligent violation of the Jenkinses' state constitutional rights.[44]

Last, Brooks argued that the noneconomic damages award was so grossly disproportionate to the costs of medical care as to mandate remittitur. Again, the appellate court refused to disturb the award, citing such testimony and videographic evidence as the following: (1) Brandi's cry during the drive to the veterinarian, which Mr. Jenkins described like "something [he] never heard in [his] life"; (2) his fear that she might die in his wife's arms; (3) the burden of changing her bandages every three or four hours for ten days; (4) a lifestyle change requiring the family to stay home to ensure that the dog received the attention she needed; (5) Brandi's anxiety, which kept the Jenkinses up at night "even at the time of trial"; (6) their "kind of feel[ing] that we're little prisoners in our own little area here now" whenever someone came to the door; (7) Mrs. Jenkins's terror that Brooks would shoot her husband as well as well as Brandi; and (8) her panic attacks when she pulled into her driveway.[45]

In *Barking Hound Village, LLC v. Monyak*, Robert and Elizabeth Monyak boarded their two dogs, a dachshund and a mixed-breed Labrador retriever, with defendants Barking Hound Village, LLC and its manager William Furman.[46] The Monyaks left non-steroidal, anti-inflammatory drugs (NSAID) for administration to the retriever during boarding. However, the defendants gave toxic doses of the NSAID to the dachshund, which led to acute renal failure and kidney dialysis treatments and ultimately claimed the dog's life nine months later.[47] The defendants moved for summary judgment on all claims and sought to limit damages for the dog's death to a strictly economic value.[48] Granting interlocutory

42. *Id.* at 914.
43. *Id.* at 915.
44. *Id.*
45. *Id.* at 917.
46. 771 S.E.2d 469, 470 (Ga. Ct. App. 2015).
47. *Id.*
48. *Id.*

review, the Georgia Court of Appeals examined whether the trial judge erred in allowing the Monyaks to introduce "evidence of non-economic factors demonstrating [the dachshund's] intrinsic value . . . mindful of the caveat . . . that purely 'fanciful' factors should not be considered" and erred in dismissing the fraud claim.[49]

After finding that the dog had little or no actual commercial or market value, the appellate court found that the Monyaks were properly allowed to offer evidence to the dog's actual value to them "as demonstrated by reasonable veterinary and other expenses incurred in treating [the dog's] illness."[50] However, the appellate court found that the trial court erred by allowing the Monyaks to offer non-economic evidence demonstrating the dog's intrinsic value.[51]

D. *Discrimination*

In *Peklun v. Tierra Del Mar Condominium Ass'n*, the U.S. District Court for the Southern District of Florida found that a condominium association had no duty to prevent a unit owner's suicide resulting from the removal of his emotional support animal.[52] In 2011, Sergey Pelkun adopted a Morkie named Julia, a dog allegedly "essential to his physical and emotional well-being, his will to live, and his enjoyment and use of his dwelling."[53] Shortly thereafter, Peklun sought a reasonable accommodation from his condominium board to keep her as an emotional support animal protected under the Fair Housing Act (FHA).[54] Among other things, Peklun suffered from heart disease, lung disease, high blood pressure, and depression.[55] Notwithstanding the board's oral grant of the accommodation in the fall of 2011, Peklun received a notice of violation of the building's no-pet rule, demanding that he recertify the earlier accommodation in 2013.[56]

Peklun filed a complaint with the Palm Beach County Office of Equal Opportunity (OEO), alleging the condominium's failure to provide a reasonable accommodation.[57] Around the same time, Frank Speciale, another condominium owner, sued the Pekluns, seeking a preliminary injunction to evict Julia.[58] The trial court granted the preliminary injunction on March 11, 2014, relying in part on a declaration from Maria Verduce, a member of the condominium board, claiming that the Pekluns

49. *Id.*
50. *Id.* at 471–72.
51. *Id.* at 473.
52. 2015 WL 4638602 (S.D. Fla. Aug. 4, 2015).
53. *Id.* at *1.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

kept Julia in their unit without the board's approval.[59] On May 5, 2014, the OEO issued a determination of reasonable grounds of discrimination. On December 4, 2014, Speciale filed a motion for contempt against Peklun.[60] Peklun killed himself three months later.[61]

Peklun's estate and widow sued the condominium association and board member Verduce under the federal Fair Housing Act and Florida Fair Housing Act, as well as the Florida Wrongful Death Act and Florida Survival Statute.[62] The defendants moved for summary judgment dismissal.[63] On the claim that the defendants negligently caused Peklun's suicide, the plaintiffs alleged the defendants' failure to maintain proper records; failure to advise other residents that Peklun received a reasonable accommodation in 2011; and preparation of documents that incorrectly inferred that none was given, including one that contributed to the granting of the injunction. The plaintiffs claimed that the negligent conduct of the condominium and its board caused Mr. Peklun's humiliation and fatal despondency.[64] Even assuming Verduce knew that Julia was integral to Peklun's "will to live," the trial court found that her actions were linked to his suicide "only in the most general way" and were wholly insufficient to create a legal duty as a matter of law.[65] Accordingly, the court granted her Rule 12(b)(6) motion to dismiss negligence.[66] For the same reasons, the court also granted the association's motion for summary judgment on the claim of negligence.[67]

Next, the defendants urged dismissal of the plaintiffs' FHA claim, arguing that because Florida law substitutes a wrongful death action for a personal injury action, which would otherwise survive under the Florida Survival Statute, his suicide extinguished the FHA claims.[68] The Florida Wrongful Death Act allows survivors to recover general damages and loss of the deceased's earnings, as well as medical and funeral expenses. The Florida Wrongful Death Act, however, does not provide a cause of action for the pain and suffering of the decedent.[69] Thus, if Florida law were to govern, Peklun's claim for emotional distress would abate with his death.[70] Holding that application of Florida survivorship law

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Peklun*, 2015 WL 4638602, at *1.
64. *Id.* at *6.
65. *Id.* at *8.
66. *Id.* at *6.
67. *Id.* at *8–9.
68. *Id.* at *9.
69. *Id.*
70. *Id.* at *11.

would prove consistent with the FHA, the court dismissed his general damages claim.[71] However, the court allowed Peklun's widow to maintain a claim for her mental anguish under the FHA and his estate to recoup its economic damages.[72]

E. *Statutory Animal Injury Liability*

The Wisconsin Supreme Court held in *Augsburger v. Homestead Mutual Insurance Co.* that "mere ownership of the property on which a dog resides is not sufficient to establish that an individual is an owner of a dog" under Wisconsin's strict dog bite liability statute.[73] George Kontos owned, but did not reside at, property in Larsen, Wisconsin, which he bought for his daughter Janet Veith and her family, including horses and dogs.[74] He had limited contact with the dogs on his infrequent visits and did not feed, water, bathe, or groom them.[75] One day, when Kontos was not present, Veith invited Julie Augsburger to her home, where Ausburger was attacked by four dogs.[76] Ausburger sued the Veiths, Kontos, and Homestead Mutual Insurance Company.[77] Cross-summary judgment motions lodged by Kontos and Augsburger queried whether Kontos was a statutory "owner" of the dogs.[78] In granting relief to Augsburger, the circuit court held that Kontos was an "owner" by giving shelter or refuge to the dogs.[79] On interlocutory review, the Wisconsin Court of Appeals affirmed.[80]

The Wisconsin Supreme Court reversed. Wisconsin Statute § 174.001(5) defines "owner" as "any person who owns, harbors or keeps a dog."[81] It does not define "harbors." The court concluded that whether a person is a "harborer" turns on "a totality of the circumstances," including "whether the landowner lives on the premise with the dog."[82] Existence of a formal landlord-tenant relationship between the landowner and the dog owner was a subsidiary and minor consideration.[83] Thus, whether the Veiths were Kontos's tenants-at-will did not speak to court's "focus," namely, "the amount of control the landowner exerts over the premises on which the dog is kept—whether the dog's legal owner is

71. *Id.*
72. *Id.* at *12.
73. 856 N.W.2d 874, 876 (Wis. 2014).
74. *Id.* at 877.
75. *Id.*
76. *Id.*
77. *Id.* at 877–88.
78. *Id.* at 878.
79. *Id.*
80. *Id.* (citing Augsburger v. Homestead Mut. Ins. Co., 838 N.W.2d 88 (Wis. Ct. App. 2013)).
81. WIS. STAT. ANN. § 174.02(1) (date).
82. *Augsburger*, 856 N.W.2d at 876–77.
83. *Id.* at 881.

more akin to a houseguest or a tenant."[84] Because Kontos did not live on the premises, the majority found that he did not harbor the dogs at issue.[85] Adopting a narrow construction, the court held that a "harborer" has control over *the property*, while the "keeper" has control over *the dog*; mere ownership of the land on which the dog is kept or owned by others is not enough.[86]

F. *Strict Common Law Animal Injury Liability*

The Mississippi Supreme Court considered whether the state's dangerous propensity rule imposes strict liability on owners of domesticated birds.[87] Sharing botanical interests, defendant Donna Bailey invited plaintiff Janet Olier to her home to view her garden. Bailey kept a gaggle of "attack geese" in her garden. The geese were separated from the plants by a barrier of water-filled, five-gallon buckets.[88] When Olier stepped over the buckets to look closer at a particular plant, a goose reacted, scaring Olier. Bailey assured her not to worry about the geese but instead to protect herself with a bamboo pole. Nevertheless, one of the geese nipped Olier, causing her to trip over a bucket and break her arm.[89] Olier sued the Baileys for $200,000, asserting premises liability and dangerous propensity strict liability.[90] In granting summary judgment to Bailey, the trial court held that she breached no duty to Olier as a licensee, and the dangerous propensity rule did not apply.[91]

A plurality opinion of the Mississippi Supreme Court affirmed dismissal of the premises liability claim, but reversed on the dangerous propensity claim.[92] Because Olier entered the property "for her own convenience, pleasure or benefit, she became an licensee," to whom Bailey owed a duty only to "not willfully or wantonly injure her" (not a duty to safeguard or to warn of latent dangers as owed to invitees).[93] While a social guest may earn the status of invitee where she "bestows sufficient benefit upon the landowner," Olier was not performing a service to aid Bailey, such as "helping take someone to a doctor, helping someone

84. *Id.*
85. The majority relied on the RESTATEMENT (SECOND) OF TORTS § 514 cmt. a (1977), which provided the following example: "A father, on whose land his son lives in a separate residence, does not harbor a dog kept by his son, although he has the power to prohibit the dog from being kept and fails to exercise the power." *Augsburger*, 856 N.W.2d at 881.
86. *Id.* at 882.
87. Olier v. Bailey, 164 So. 3d 982 (Miss. 2015).
88. *Id.* at 985.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 986–87.

move in, or assisting with housework."[94] Rather, Olier came at Bailey's invitation "entirely for her own benefit to look at Bailey's plants and perhaps take a sample home with her."[95] Finding she was a licensee as a matter of law, the court turned to the contention that Bailey exposed Olier to a trap with hidden perils. The court opined that Bailey did not breach any duty to Olier as a matter of law. The geese were hardly a hidden danger, and there was no evidence that Bailey knowingly or intentionally allowed her geese to roam the yard and bite or that she placed the buckets in a hazardous configuration.[96] Furthermore, the majority concluded that the presence of domestic animals did not constitute a condition on the land for purposes of premises liability analysis, distinguishing geese from "spills on the floor, cracks in the sidewalks, improperly stacked shelves, or exposed electrical wiring."[97]

Having concluded that Bailey breached no duty as the landowner, the court examined her duty as an animal owner. Mississippi's dangerous propensity rule imposes strict liability on owners of animals who know or should know of that animal's propensity to cause the type of harm visited upon the plaintiff.[98] While traditionally applied to land mammals, this "aggressive bird" scenario presented a matter of first impression, particularly where the gosling at issue had never bitten or chased anyone before. Nonetheless, at one point, the plurality appeared to adopt an inherent vicious goose rule, stating:

> Where, as here, the goose is just being a goose, and being a goose includes biting and chasing people, then there need not have been a prior incident to put its owner on notice of that propensity, as the owner knew or should have known that its animal naturally engaged in that kind of behavior.[99]

In reversing and remanding for trial, the high court determined that fact issues existed, such as whether Bailey had foreknowledge of the geese's dangerous propensity.[100] The court also took care to distinguish individual aggression from collective crabbiness, extending the dangerous propensity rule from *per quod* to *en masse* application, stating:

> Here, Olier was not fearful of one particular animal, or a pair, but an entire group. That is why Bailey may be held liable for her geese's behavior without determining whether the particular goose that attacked Olier had exhibited a dangerous propensity in the past. Whether a pack of dogs, a herd of rodeo

94. *Id.* at 987.
95. *Id.* at 988.
96. *Id.*
97. *Id.* at 988–89.
98. *Id.* at 995.
99. *Id.*
100. *Id.* at 995–96.

> cattle, a swarm of honey bees, or a gaggle of geese—when analyzing the behavior of any grouping of nonhuman creatures with a dangerous propensity *collectively*, it is unnecessary and counterintuitive to analyze the unique history of each and every creature in the unit. This has been a truth accepted by mankind since we drew on cave walls. We fear not the wolf, but the pack; not the bee, but the swarm; not the buffalo, but the herd. Janet Olier feared not the goose, but the gaggle. The bamboo stick was provided for her defense against *all* of the geese, not just one. Bailey attempted to distract *all* of the geese, not just one. . . . A jury could find that, under the totality of circumstances, this incident could have been foreseeable to Bailey, and therefore summary judgment was inappropriate.[101]

At issue in *Gruber v. YMCA of Greater Indianapolis* was whether pigs should be treated as abnormally dangerous domestic animals.[102] In April 2011, eleven-year-old Jake Gruber was injured when a naturalist at the Flat Rock River YMCA Camp took twelve children, including Jake, into his pig's pen.[103] The naturalist frequently brought his pig, who had never harmed anyone or displayed vicious proclivities, to work. After feeding, the pig lunged at Jake, sticking its head through the cage bars and grabbing his hand.[104] Jake was taken to an emergency room and discharged with antibiotics.[105] Two years later, he sued various YMCA entities claiming negligence and strict liability.[106] In affirming summary judgment for the YMCA, the Indiana Court of Appeals extended the dangerous propensity rule to porcines as "domestic animals" (like canines and felines).[107] In urging enactment of an absolute liability rule, thereby dispensing with the requirement of proof of scienter of vicious propensity, *Gruber* rejected the plaintiffs' contention that pigs "can't be compared to a dog or cat which provide companionship as someone's pet."[108]

G. *Governmental Immunity—Animal Cruelty Investigation and Prosecution*

After being acquitted of animal cruelty charges relating to treatment of several horses at their boarding stable, the plaintiffs in *Hatlee v. Hardy* sued law enforcement and the assisting equine veterinarian for malicious prosecution and Fourth Amendment violations under 42 U.S.C. § 1983. The plaintiffs, however, were largely unsuccessful.[109]

101. *Id.* at 996.
102. 34 N.E.3d 264 (Ind. Ct. App. 2015).
103. *Id.* at 265.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 267.
108. *Id.* at 268.
109. 2015 WL 5719644 (D. Colo. Sept. 29, 2015).

In the initial part of the underlying investigation, an equine veterinarian examined the horses for the investigating officer and concluded that the horses were victims of starvation and malnutrition.[110] The officer did not initially seize the animals, but instead issued a warning to the plaintiffs that if there was no improvement in the horses, the plaintiffs would be charged with animal cruelty.[111] However, due to substantial public attention to the investigation, the plaintiffs signed a written "protective custody agreement" with law enforcement to move the animals to an undisclosed location to be under the care of a third party. The animals remained the financial responsibility of one of the plaintiffs.[112] The law enforcement investigation continued, and the plaintiffs' regular veterinarian examined the horses, concluding that the horses had deteriorated far beyond the point at which the plaintiffs should have taken corrective measures.[113]

Despite the fact that the horses were already under a third party's care, the investigating officer seized the horses and charged the plaintiffs with animal cruelty.[114] On a challenge to the warrant, the trial court found probable cause to believe that the horses were subject to animal cruelty.[115] However, it found no probable cause to issue the warrant for the horses' seizure because, as of the date of the second veterinarian's examination, they were not in imminent danger.[116] As a result, the court suppressed all evidence obtained as a result of the seizure.[117] The plaintiffs were acquitted at trial and brought this federal lawsuit.[118]

The federal district court granted summary judgment as to the veterinarian on the § 1983 claim. The court held that the veterinarian was not acting under color of state law, and there was no evidence of the alleged conspiracy with law enforcement that would give rise to a joint action claim under the statute.[119] The veterinarian was also entitled to summary judgment on the malicious prosecution claims because she had statutory immunity under state law for the good faith report of animal cruelty, and there was no evidence to rebut the presumption of good faith.[120]

With respect to the law enforcement officers, the court addressed numerous dispositive motions and granted most of them after extensive

110. *Id.* at *4.
111. *Id.* at *5.
112. *Id.* at *5, *11.
113. *Id.* at *6.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *8–10.
120. *Id.* at *8.

analysis, leaving in place only (1) claims for breach of contract against the county for seeking seizure of the horses despite the protective custody agreement, and (2) the § 1983 claim for Fourth Amendment violation against the single officer who obtained the warrant to seize the horses.[121]

H. *Equine Torts*

A divided three-member panel of the Ohio Court of Appeals wrestled with the application of the rescue doctrine and assumption of the risk in *Sanders v. Frank*.[122] In this case, Sanders was injured while she voluntarily helped collect one of her neighbor's loose horses that had escaped yet again from his property.[123] At the time of the rescue and Sanders' injury, police were on the scene and the horse had already crossed the road into a neighboring field.[124] After a bench trial, the court found the neighbor in violation of Ohio's "running at large" statute and thus in breach of the corresponding duty of care to prevent his horse's escape. Despite the neighbor's fault, the trial court concluded that the affirmative defense of assumption of the risk applied and that Sanders was more than 50 percent at fault for her injury.[125]

A divided appellate court affirmed. The majority opinion first rejected Sanders' argument that the running-at-large statute imposes strict liability on a horse owner.[126] The majority then found the rescue doctrine inapplicable here, where there was no imminent threat to human safety. The court explained that while the possibility of a car hitting a horse was a real threat, it was not imminent given that the horse in question was not on the roadway.[127] Because there was no imminent danger, the majority reasoned that the doctrine of assumption of the risk applied to Sanders.[128] In a portion of the opinion in which no other judge concurred, the writing judge went on to discuss the relationship between contributory fault and assumption of the risk under Ohio law and concluded that the trial court reasonably found Sanders to be more than 50 percent at fault for her injuries. Because she was more than 50 percent at fault, Sanders was barred from recovery under Ohio law.[129] As the opinion explained, the inquiry is not one of comparing the relative reasonableness of the parties' conduct (here, good Samaritan versus serially negligent horse

121. *Id.* at *17–21.
122. 37 N.E.3d 1305 (Ohio Ct. App. 2015).
123. *Id.* at 1308.
124. *Id.*
125. *Id.*
126. *Id.* at 1310.
127. *Id.* at 1311.
128. *Id.*
129. *Id.* at 1314.

owner); rather, analysis of comparative fault is a question of the degree to which each party proximately caused the plaintiff's injury.[130]

A highly critical dissenting judge in *Sanders* would have applied the rescue doctrine and criticized the finding that there was no imminent risk of danger from the loose horses. The dissent cited the negative public policy implications from this opinion that would deter volunteers from aiding others out of fear that they would bear responsibility for injuries they suffered as a result.[131]

Vendrella v. Astriab Family Limited Partnership, a horse bite case, makes another appearance in this survey after a remand from the Connecticut Supreme Court and legislative action taken in direct response to the appellate ruling.[132] The trial court had originally granted summary judgment in 2010, finding that the defendant lacked actual knowledge that this specific horse, Scuppy, as opposed to horses generally, had a "vicious propensity" to bite, and thus, the defendant owed no duty of care to the plaintiff as a matter of law.[133] Reversing on appeal, the Connecticut appellate and supreme courts concluded that horses do have a natural propensity to bite. Therefore, a genuine issue of material fact existed as to whether it was foreseeable that Scuppy would bite under the circumstances of the case.[134] The state legislature reacted to these decisions with a law declaring—contrary to the appellate courts' rulings—that horses do not have a vicious propensity and that there is a presumption to this effect.[135] The defendants could not benefit from this legislation, however, and in denying a second motion to dismiss, the trial court declined to retroactively apply the law, even though the legislature specifically referenced this case as the reason for the new law.[136]

I. *Equine Activity Liability Acts*

In another horse bite case, *Werner v. Walker*, the Ohio Court of Appeals held that a barn owner was entitled to immunity under Ohio's equine immunity statute because the plaintiff failed to establish that the barn owner had acted with willful and wanton conduct.[137] The barn owner had warned the plaintiff that the ponies the plaintiff was handling were going to fight because the plaintiff had tied them up very close to one

130. *Id.* at 1312, 1314.
131. *Id.* at 1318–20.
132. 2015 WL 4775334 (Conn. Sup. Ct. 2015). *See* Adam P. Karp & Margrit Lent Parker, 50 *Recent Developments in Animal Law*, Tort Trial & Ins. Prac. L.J. 179, 195–96 (2015).
133. *Vendrella*, 2015 WL 4775334, at *1.
134. *Id.*
135. Substitute H.B. 5044, Public Act 14-54 (Conn. 2014) (An Act Concerning the Liability of Owners and Keepers of Domesticated Horses, Ponies, Donkeys and Mules).
136. *Id.* at *5–6, *8.
137. 2015 WL 2058960, at *4 (Ohio Ct. App. May 1, 2015).

another.[138] When the ponies in fact did fight, the barn owner stepped in to stop them. The plaintiff stepped in to try and help the owner, at which point one of the ponies bit the plaintiff on the neck.[139] On these undisputed facts, the barn owner's conduct was not willful, wanton, or negligent as those terms are defined in Ohio law.[140] The appellate court also summarily rejected the plaintiff's claim that granting summary judgment was unconstitutional under the Ohio Constitution as the denial of a substantive right to a remedy.[141]

A slipping saddle and uneven stirrups were at issue in *Kovnat v. Xanterra Parks & Resorts*, a case in which plaintiff Kovnat fell from her horse and fractured vertebrae in her lower back after her saddle slipped during a trail ride in Yellowstone National Park.[142] Kovnat testified in deposition that her stirrups felt uneven, but a wrangler told her they were fine. Deposition testimony also revealed that the wranglers had checked Kovnat's cinch multiple times before the trail ride began and that the cinch was still extremely tight, even after Kovnat slid off the saddle and the saddle ended up on the horse's belly.[143] As a wrangler explained it, the saddle "was tight enough to where . . . the only way it could have been moved was to have a substantial amount of weight pulling it to one side or the other," and in his view, there "would not have been a loose cinch or a malfunction of the saddle causing it to roll."[144]

Kovnat sued for negligence/premises liability as well as for negligent training and supervision.[145] In granting summary judgment, the district court concluded that, under Wyoming's equine activity statute, the saddle slippage and the uneven stirrups were an inherent risk of horseback riding, and, thus, the resulting injuries were not actionable under Wyoming law.[146] The trial court reasoned that there can be no scientific precision in the tightening of a cinch or the adjustment of stirrups. Thus, the possibility of a too-tight or too-loose cinch or uneven stirrups is characteristic of—and therefore an inherent risk of—horseback riding.[147] The court concluded that Xanterra had no actionable duty to Kovnat to eliminate, alter, or control the risk.[148]

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at *5.
142. 770 F.3d 949 (10th Cir. 2014).
143. *Id.* at 958–59.
144. *Id.* at 952.
145. *Id.*
146. *Id.* at 953.
147. *Id.*
148. *Id.*

On appeal, the Tenth Circuit affirmed summary judgment as to the cinch but not the uneven stirrups. The appellate court confirmed that Xanterra had no duty or liability to Kovnat for injuries resulting from the inherent risk from cinching the saddle under the facts.[149] The uneven stirrups were a different story, however, creating disputed issues of fact from which a jury could reasonably find that there was not inherent risk, but rather negligence, in failing to address whether the stirrups were uneven.[150]

In another case involving a cinch, this time an untightened one, the Georgia Court of Appeals in *Holcomb v. Long* concluded that the failure to tighten a cinch did not constitute faulty tack and therefore barred the plaintiff's claims.[151] In that case, Holcomb took his granddaughter to ride horses at the farm of his friend Long.[152] After Long paired the two with horses, they rode in an arena in a fenced enclosure for a few minutes so that Long could assess their abilities.[153] Satisfied with their riding abilities, Long allowed them to ride to the pasture and nearby trails. Long did not re-tighten the front girth of Holcomb's saddle after Holcomb began riding.[154] An hour into the ride, when Holcomb turned left to look behind him, his saddle slid to the right and his horse began to gallop. Holcomb fell, suffering serious injuries.[155] Holcomb sued, alleging negligent failure to tighten the cinch and failure to use a cinch hobble to secure the flank cinch to the front cinch. After discovery and expert depositions, the court granted summary judgment in favor of Long, concluding that he was protected from liability by Georgia's equine activity statute.[156]

The appellate court affirmed, explaining that the faulty tack exception was not so broad as to cover Long's conduct, noting that Holcomb's own expert opined that the absence of a cinch hobble did not cause the accident and that there was nothing defective about the cinch or saddle.[157] Citing the legislative intent to give broad immunity under the statute, the court explained that the failure to tighten a cinch is not, in and of itself, faulty tack under the Georgia statute.[158] Holcomb's additional claim that Long's actions were willful and wanton and therefore not entitled to immunity, also failed on the undisputed evidence that, at worst, showed gross negligence.[159]

149. *Id.* at 958–59.
150. *Id.* at 959–60.
151. 765 S.E.2d 687 (Ga. Ct. App. 2014).
152. *Id.* at 688.
153. *Id.*
154. *Id.* at 689.
155. *Id.* at 688.
156. *Id.* at 689.
157. *Id.* at 691.
158. *Id.*
159. *Id.* at 692.

In *Glover v. Weber*, the Washington Court of Appeals held that a property owner was entitled to immunity under the state's equine activities statute when a child was injured while test-riding a horse for sale.[160] The parties disputed whether the property owner was an "equine activity sponsor" under the statute, which defines an equine activity sponsor to include an individual who provides facilities for an equine activity.[161] Because the property owner provided facilities to board the horse, the court concluded that she fit within the definition. The court reasoned that although the statute's list of examples of an equine activity sponsor included group-based activities, it was a non-exhaustive list and did not exclude non-public or group-based activities.[162] Accordingly, Glover was entitled to immunity under the statute for the rider's negligence claims. Interestingly, unlike the Connecticut courts' conclusion in *Vendrella*, the court went out of its way in dicta to point out that even if it were to reach the issue of negligence, horses are not presumed to be unreasonably dangerous, and the facts of the case—that the horse was gentle mannered and well behaved—did not appear to support a finding of negligence.[163]

An Ohio plaintiff, Carrie Cornett, makes her second appearance in this survey, this time in *Cornett v. Red Stone Group*,[164] attempting unsuccessfully to recover on negligence and premises liability claims for injuries sustained after being trampled by horses that had broken through an old, defective gate. Cornett's prior case seeking workers compensation failed because she was not an employee of the stable where she was working.[165] This time, Ohio's equine activity statute barred her claims. The Ohio Court of Appeals, relying on *Smith v. Landfair* (another previously surveyed case),[166] rejected Cornett's first argument that she was not an "equine activity participant" under the statute, explaining that she voluntarily placed herself in the vicinity of the horses out of concern that a horse may have been injured and in an effort to regain control of the horses.[167] Nor could Cornett escape that she was engaged in an "equine activity" because she participated in the boarding and daily care of horses, activities expressly covered by the statute.[168] Cornett further conceded that caring for horses comes with an inherent risk of injury, again

160. 2014 WL 4988156 (Wash. Ct. App. Oct. 6, 2014).
161. *Id.* at *5.
162. *Id.* at *6.
163. *Id.* at *7–8.
164. 41 N.E.3d 155 (Ohio Ct. App. 2015).
165. Karp & Parker, *supra* note 148, at 202.
166. 984 N.E.2d 1016 (Ohio 2012), discussed in Adam P. Karp & Julie I. Fershtman, *Recent Developments in Animal Law*, 49 TORT TRIAL & INS. PRAC. L.J. 27, 43 (2014).
167. *Cornett*, 41 N.E.3d at 167 (applying OHIO REV. CODE § 2305.321).
168. *Id.*

bringing her within the statute.[169] Finally, the court rejected Cornett's attempt to attach liability on the basis of a defective gate. The gate and fence post in question were not faulty "equipment" within the meaning of the equine activity statute's immunity exception.[170]

J. *Equine Liability Releases*

Eriksson v. Nunnink involves tragic facts, but nevertheless provides guidance to the practitioner in the drafting of liability waivers and their application at trial.[171] In *Eriksson*, a skilled young rider died during the cross-country phase of a high-level eventing competition when her horse struck a fence and fell on her.[172] The rider's parents sued the rider's coach for wrongful death and negligent infliction of emotional distress. The trial court entered a directed verdict at trial, relying in part on a release of liability signed by both the rider and her mother that released the coach from all liability except damages caused by the coach's "direct, willful and wanton negligence."[173] The trial court concluded that the release was binding as against both parents and that the coach's negligence, if any, was not willful and wanton such that the coach could be held liable.[174]

The California Court of Appeal affirmed, albeit on different grounds.[175] The rider's mother was not a party to the release by virtue of signing it as the "rider's parent," and, thus, neither parent was contractually bound to any of the rider's contractual promises.[176] Nevertheless, the release still was available as a defense to the claims for wrongful death and negligent infliction of emotional distress because of the rider's express assumption of risk as a defense to the parent's claims.[177] Although the release did not necessarily preclude the parents' wrongful death claim, which was not a derivative claim under California law, the rider's express release and waiver of the coach's negligence and corresponding assumption of all risk established a complete defense to the claims.[178] In other words, the release "effectively extinguished [the coach's] duty of ordinary care to [the rider]."[179] Because there can be no greater duty to the heirs than there is to a decedent, the coach could rely on the release as a defense

169. *Id.* at 166–67.
170. *Id.* at 167–68.
171. 183 Cal. Rptr. 3d 234 (Ct. App. 2015).
172. *Id.* at 239.
173. *Id.* at 239–40, 244–45.
174. *Id.* at 243.
175. *Id.* at 243–44.
176. *Id.* at 245.
177. *Id.* at 245–48.
178. *Id.* at 249.
179. *Id.*

to the parents' claims.[180] Although the release did not bar claims of gross negligence, in an unpublished portion of its decision, the court affirmed the trial court's conclusion that the parents failed to establish the existence of gross negligence.[181]

III. ANIMAL INSURANCE LAW

A. *Homeowners Insurance*

In the declaratory judgment action of *Van Kleek v. Farmers Insurance Exchange*, the trial court entered summary judgment against a dog sitter bitten by the owner's dog.[182] The court ruled that she was an "insured" under the owner's homeowner's insurance policy and subject to the policy's exclusion for bodily injury to the insured. Thus, there was no coverage under the policy for her injuries.[183] The policy defined "insured" as any person "legally responsible" for covered animals and contained an "intra-insured exclusion" that excluded coverage for bodily injuries to insureds.[184] In affirming summary judgment against the dog sitter, the Nebraska Court of Appeals acted consistently with courts from other jurisdictions in concluding that the dog sitter was "legally responsible" for the dog because she had a legal duty to prevent unreasonable risks of harm to third parties and exercised control over the dog relative to the outside world.[185] The dog sitter was responsible for feeding, watering, and letting the dog in and out of the house; she also conceded that she had the responsibility of retrieving the dog if he got loose and taking him to the vet if he became sick.[186] She was, therefore, herself, potentially liable to third parties if they were harmed by the dog. As a result, she was an "insured" under the homeowner's policy, and the intra-insured exclusion applied to bar her claims.

In yet another declaratory judgment action over the question of who was an "insured" in the context of injury by a dog, the New Hampshire Supreme Court in *White v. Vermont Mutual Insurance Co.* affirmed the trial court's findings that the homeowner's adult son, who did not live in the house, was not an "insured" under the homeowner's insurance policy.[187] As a result, the plaintiff's injuries—sustained while at the

180. *Id.* at 250. The court engaged in an extensive discussion as to legal and policy reasons why the rider's release and assumption of risk also gave rise to a defense to the parents' claim for negligent infliction of emotional distress. *Id.* at 250–54.
181. *Id.* at 256.
182. 857 N.W.2d 297 (Neb. 2014).
183. *Id.* at 304.
184. *Id.* at 299–300.
185. *Id.* at 303.
186. *Id.* at 304.
187. 106 A.3d 1159, 1160 (N.H. 2014).

homeowner's house, but caused by her son's dog—were not covered under the policy.[188] Both the trial and the appellate courts concluded that the son was not a "resident relative" under the homeowner's insurance policy because he did not fit the definition of "resident" under New Hampshire law. Namely, the son did not consider the house his principle place of abode and did not physically live there.[189] Residual ties to his mother's home in New Hampshire, including a New Hampshire driver's license and voter registration, were not enough where he held himself out as a Massachusetts resident and lived there 80 percent of the time in one of the units of a rental property he owned.[190] Moreover, to be an insured, the policy also required that a person be a resident of the "household," or part of a group of people "dwelling as a family under one head and under one roof," something that was not established here.[191]

In another New Hampshire case, the state supreme court in *Mellin v. Northern Security Insurance Co.* had occasion to consider and conclude that cat urine odor that plagued a condominium unit could be a covered loss under a homeowner's insurance policy, notwithstanding the intangible nature of the harm and the policy's pollution exclusion clause.[192] The cat urine odor had caused the homeowners' tenant to move out, and remediation did not cure the problem, which the health inspector had formally identified as a health problem.[193] Unable to rent out or live in the unit, the owners sold the unit for a reduced sale price due to the odor.[194] The insurance company denied the owners' claim, and, in this declaratory judgment action, argued that the claim was barred because the odor was not a "physical loss" and because the existence of the pollution exclusion clause applied.[195]

The trial court agreed and granted summary judgment, but the state supreme court reversed on appeal. Reversing the trial court's grant of summary judgment for the insurer, the appellate court explained that "physical loss," which was undefined in the policy, is not limited to tangible changes to property, but rather can encompass changes perceived by the sense of smell provided that there is "a distinct and demonstrable alteration of the insured property," such as temporary uninhabitability.[196] Recognizing a split of authority and over a dissenting opinion, the court

188. *Id.*
189. *Id.* at 1162–63.
190. *Id.* at 1160–11, 1163–65.
191. *Id.* at 1162, 1165.
192. 115 A.3d 799, 802 (N.H. 2015).
193. *Id.* at 801.
194. *Id.*
195. *Id.* at 802.
196. *Id.* at 803–05. The homeowners also argued that the loss of use coverage applied. Because this coverage was dependent on this "physical loss" analysis, the court also reversed

further rejected the applicability of the pollution exclusion clause. It explained that this standard clause is typically associated with substantial environmental and industrial pollutants. When applied to the facts here involving an odor in a private residence caused by domestic animals, the clause was ambiguous and unenforceable.[197]

B. *Stable Owners*

In the New York case of *Fiduciary Insurance Co. v. American Bankers Insurance Co. of Florida*, a stables' commercial general liability (CGL) insurer avoided the statutory classification of a motor vehicle insurer that otherwise would have subjected it to a state law that subjected no-fault auto claims to mandatory arbitration for payment of no-fault benefits.[198] This case arose out of a collision between a taxi and a bolting horse and its rider, causing serious injury to the rider.[199] The taxi insurer paid the rider no-fault benefits and sought reimbursement from the stables' CGL carrier through the state's mandatory arbitration law.[200] The arbitrator denied the claim, and the appellate court affirmed, on the basis that the CGL insurer was not a motor vehicle insurer under the applicable statute.[201] The CGL policy did not provide no-fault insurance for the accident at issue, and only insured the stables where the horse was boarded and not a person, vehicle, or animal involved in the accident.[202]

The Oregon Court of Appeals in *Deardorff v. Farnsworth* held that an insurance company was not estopped from relying on a care, custody, and control (CCC) exclusion in a boarding stable's insurance policy to exclude coverage for the loss of horses that the stable owners were transporting when their horse trailer caught on fire.[203] Prior to the incident, the stable owners had purchased business and commercial farm insurance, but there were unclear communications about the actual extent of the CCC liability coverage from the underwriter to the insurance agent and subsequently to the stable owners.[204] The policy included CCC property insurance—as expressly quoted by the insurer—but not CCC liability insurance. Also, the coverage that did exist was excess coverage only, something the insurer did not expressly note.[205]

summary judgment on this ground so that the trial court could make factual findings under the correct analysis. *Id.* at 810.

197. *Id.* at 808–09.
198. 14 N.Y.S.3d 427 (Sup. Ct. 2015).
199. *Id.* at 428–29.
200. *Id.*
201. *Fiduciary Ins. Co.*, 14 N.Y.S.3d at 428–29.
202. *Id.* at 434.
203. 343 P.3d 687, 688–89 (Or. Ct. App. 2015).
204. *Id.* at 690.
205. *Id.*

The horse owners' insurance company filed a subrogation action against the stable owners for negligence, but the owners' insurance company (and the insurance agency) refused to defend the case based on the CCC exclusion.[206] After successfully defeating the claims, the stable owners filed suit against the insurance company and the agency. The stable owners initially obtained summary judgment against the insurer on the basis that it was estopped from denying liability coverage for the loss and for breach of contract for denying property coverage based on the excess coverage provision in the policy.[207] Based on the ruling that the insurer was liable, the trial court granted summary judgment as to the agency defendants.[208] The insurance company subsequently settled with the stable owners, received an assignment of the stable owners' claims against the agency defendants, and filed a cross-claim for indemnity as well as a motion for reconsideration of the finding of estoppel.[209] The insurance company lost on both issues.

The Oregon Court of Appeals reversed, explaining that the doctrine of estoppel did not apply here because the basis for denying insurance was an express and unambiguous policy exclusion (rather than a condition of forfeiture dependent on the acts of the insured).[210] Were estoppel to apply in this context, it would effectively create coverage and expand the scope of the insurance coverage beyond what was originally contracted. This was not a situation in which the insurance agent interpreted an ambiguous policy provision that estopped the insurance company from denying coverage.[211]

206. *Id.* at 689.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 691–92.
211. *Id.* at 692.