RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

Adam P. Karp and Margrit Lent Parker

Adam P. 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. He received the ABA Excellence in the Advancement of Animal Law Award in 2012 and recently authored Understanding Animal Law (Carolina Academic Press: 2016). Margrit Lent Parker is an attorney with Childs McCune LLC in Denver, Colorado and a member of the TIPS Animal Law Committee, Equine Law Subcommittee. Margrit can be reached at mparker@childsmccune.com and on LinkedIn.

I. INTRODUCTION

This year saw several signal developments in the law of animals. Indiana reaffirmed its fair market value measure for companion animals, while Louisiana and New York explored the qualified privilege of criminal reporting in defamation claims. Texas determined if a dog is "stock" for purposes of awarding attorney's fees, as New Jersey examined whether a private citizen may bring a qui tam action to enforce animal cruelty laws. Florida scrutinized dog park liability where canines collide with park visitors, and Idaho took a fresh conceptual look at adjudicating dog bite claims. Puerto Rico contemplated whether a natural neurotoxin renders shrimp a defective product, Pennsylvania determined liability of Amazon.com with respect to a malfunctioning retractable dog leash, and the Sixth Circuit reversed a police shooting case covered in the last survey. California and Texas explored premises liability for swarming bees and wasps.

In this survey year, horseback riding accident cases interpreting the Equine Activity Liability Acts (EALAs) abounded and demonstrated the strength of these statutes. Injuries, including one tragic death, occurred in several contexts: guided trail rides, horseback riding lessons, riding with family friends, and a sale horse test ride. In every case in this survey involving an EALA, the activity provider prevailed over the injured plaintiff. In the one case discussed that did not have an applicable EALA, the appellate court reversed summary judgment for the activity provider based on material disputed facts. One case is surveyed this year that involved an automobile–horse collision and the operation of a running-at-large statute, and it too favored the purported horse owner. On the insurance front, in a case involving liability insurance, the court denied summary judgment in the face of disputed fact questions relevant to whether a mule-drawn carriage struck by an automobile after a holiday parade fell within a policy exclusion such that there was no coverage for the carriage owner's liability to the carriage passenger. Three surveyed cases involved homeowners' insurance and dogs, two involving disclaimed coverage for injuries caused by dogs with prior histories of attacking and injuring humans, and one involving material misrepresentations and fraud about the existence of a dog in the first instance and subsequently disclaimed coverage for injury caused by that dog.

II. ANIMAL TORT LAW

A. *Valuation*

In *Liddle v. Clark*,[1] Melodie Liddle sued the Indiana Department of Natural Resources Director Cameron Clark, Versailles State Park (VSP) Manager

1. 107 N.E.3d 478 (Ind. Ct. App. 2018).

Paul Sipple, and VSP security officer and trapper Harry Bloom, after her ten-year-old beagle mix named Copper died in an inconspicuous animal trap set in Versailles State Park. Bloom set these lethal traps, intended to kill raccoons, in hidden locations without posting signs warning park visitors they were nearby. While visiting the park with Cooper on leash, Cooper got her head caught in an open-ended wooden box when a trap closed upon her neck, causing her to asphyxiate, despite Liddle's frantic efforts to free her.[2] Liddle's claim for declaratory judgment holding that emergency rules allowing trapping in state parks violated governing statutes was dismissed as moot, with the court declining to apply the public interest exception.[3] Citing long-standing precedent fixing damages at fair market value for animals, the court also refused to depart from that 150 year tradition and declined to embrace the holding of *Campins v. Capels*,[4] which did not limit a plaintiff to market value for wedding and award rings as they were not ordinary jewelry but more akin to heirlooms, family papers, photographs, handicrafts, and trophies, to which sentimental value applied.[5] The court distinguished *Campins* by restricting it to "inanimate items whose special origin would likely add actual value."[6]

B. *Defamation*

Kyle Holmes's girlfriend found a stray dog at his residence. Steps to locate the dog's owner proved futile, so Holmes delivered the dog to a former high school classmate, Lori Williams, and then left for a six-day hunting trip. Shortly after his departure, a neighbor told Holmes that he believed Tommy Lea (who was also a state trooper) owned the dog. Though given his contact information, Holmes did not attempt to contact Lea until days after his return from the hunting trip. Meanwhile, Lea contacted Deputy Kevin Garig, only to learn from Williams that the dog allegedly ran away. In truth, Williams gave Lea's dog to a third party, from whom the canine was eventually recovered. Though thereafter arrested and charged with theft of an animal, Holmes was found not guilty. Thereafter, Holmes sued Lea and Garig for defamation, libel, slander, past lost wages, future lost wages, intentional infliction of emotional distress, negligent infliction of emotional distress, incurrence of legal expenses, and court costs premised on allegations that they made false and malicious statements injuring Holmes and conspiring to cause his arrest.[7]

2. *Id*. at 479–80.
3. *Id*. at 482.
4. 461 N.E.2d 712 (Ind. Ct. App. 1984).
5. 107 N.E.3d 478, 482–84.
6. *Id*. at 484.
7. Holmes v. Lea, 250 So. 3d 1004, 1008–09 (La. Ct. App. 2018).

In affirming dismissal of Holmes's suit on summary judgment, the Louisiana Court of Appeals held that Lea's communication of possible criminal wrongdoing by Holmes to Garig was conditionally privileged given that the unrefuted evidence supported that Lea's statements were made in good faith in the public interest of reporting criminal activity.[8] This was the case even though Holmes had given the dog to Williams before being contacted by Lea; Holmes only provided Williams's contact information after Lea notified Garig.[9] The appellate court also rejected that Lea used his authority as a trooper to persuade Garig to charge Holmes and that Lea's voicemail to Holmes was not outrageous, even where he threatened, "[Y]ou have until Sunday, Sunday to give me my dog or your ass is going to jail, for felony theft and you can kiss your Exxon job good bye."[10]

Finding that mere insults or petty oppressions do not rise to the level of outrageous conduct, that Lea's voicemail was not "without provocation," and that the evidence failed to support a scheme by Lea to misuse his position as a law enforcement officer, to fabricate probable cause or misdirect Garig's investigation, the court affirmed dismissal of the outrage claim.[11] The court also rejected the negligent infliction of emotional distress ("NIED") claim, finding that while Lea had a duty not to recklessly make a baseless report of suspected criminal activity, he did not breach it on the record presented. Nor did Louisiana Revised Statute section 3:2771, the state leash law, create an actionable duty for purposes of NIED, as it was concerned with "protect[ing] others from being tangibly harmed by unrestrained animals," not being criminally charged with theft of an animal.[12] Furthermore, NIED claims lacking physical injury required proof of scienter by the defendant that his actions would cause "serious mental distress" or prove outrageous. Although Holmes saw his doctor once for anxiety and was prescribed Lexapro, the most generous view of such evidence did not establish the requisite severity of anguish.[13]

A similar qualified defamation privilege issue arose in *New York Horse Rescue Corp. v. Suffolk County Society for the Prevention of Cruelty to Animals*.[14] There, the New York Appellate Division affirmed dismissal of claims for defamation, tortious interference with contract, and intentional infliction of emotional distress against Ann Collins Studer, a parent of a former riding student of New York Horse Rescue Corp. (NYHR), who complained

8. *Id.* at 1010–11.
9. *Id.* at 1011.
10. *Id.* at 1012.
11. *Id.* at 1013–14.
12. *Id.* at 1015.
13. *Id.* at 1014–15.
14. 83 N.Y.S.3d 566 (App. Div. 2018).

to the SPCA that the owner and operator of NYHR, Mona Kanciper, abused animals and euthanized dogs and horses without a license, including once in the presence of Struder's ten-year old daughter, an accusation that led to Kanciper's conviction for endangering the welfare of a child (later reversed[15]). Specifically, NYHR and other plaintiffs quoted Studer in an Internet post: "In the short time that my daughter rode. . . . I have seen and heard more horror stories than one could possibly hear in a lifetime regarding the treatment of animals and people including her dearly beloved husband who happened to be a really nice guy."[16]

New York confers a qualified privilege against defamation to statements made "in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned."[17] Studer's statements were made to the SPCA in good faith to obtain assistance from law enforcement to rectify a potentially unsafe environment for children, establishing a *prima facie* case for such privilege that was not rebutted by raising a triable issue as to whether they were made with malice.[18] The Internet post constituted nonactionable opinion as it consisted of "imprecise, subjective characterizations which could not be objectively verified."[19]

C. *Attorney's Fees*

Rita Palfreyman's dogs died while boarded at Dog Gone Good, a business of Becky Gaconnet and Leslie Jones. After the court awarded $900 for actual damages, Palfreyman sought attorney's fees under a Texas statute that provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . (6) killed or injured stock."[20] Citing to the Texas Penal Code, the Texas Court of Appeals held in *Palfreyman v. Gaconnet*[21] that a neutered dog kept solely for companionship, and not for sale or work on a farm or ranch, would not constitute livestock. It rejected Palfreyman's attempt to invoke a more expansive definition based on the statute's liberal construction, and her effort to distinguish "stock" from "livestock," as used in the Texas Constitution.[22]

15. People v. Kanciper, 954 N.Y.S.2d 146, 146 (App. Div. 2012).
16. *New York Horse*, 83 N.Y.S.3d at 568.
17. *Id.*
18. *Id.*
19. *Id.*
20. Tex. Civ. Prac. & Rem. § 38.001(6).
21. 561 S.W.3d 258, 262 (Tex. App. 2018)
22. *Id.*

D. *Qui Tam*

In *Goldman v. Critter Control of New Jersey*,[23] Stuart Goldman, a former chief humane law enforcement officer and trustee for two nonprofit animal welfare organizations, filed actions against Critter Control of New Jersey and Simplicity Farms for civil penalties under a penalty provision of New Jersey's Prevention of Cruelty to Animals Act (PCAA),[24] which were consolidated in *Goldman*. The PCAA provides that a person violating the act "[s]hall forfeit and pay a sum," which may be "sued for and recovered, with costs, in a civil action by any person in the name of the New Jersey Society for the Prevention of Cruelty to Animals. . . ."[25] Specifically, Goldman alleged that Critter Control trapped a lactating female adult raccoon from the roof of a house, leaving behind baby raccoons in the gutters and that Simplicity Farms mistreated horses, causing the death of a colt. Goldman styled these actions "by way of . . . qui tam."[26] After the trial court dismissed both, Goldman appealed.

Affirming, the appellate court concluded that Goldman lacked standing for he did not claim to own, control, or have any financial interest in the animals involved and that the PCAA did not permit private citizens to sue for penalties notwithstanding the use of the phrase "any person in the name of the New Jersey [SPCA]."[27] Finding insufficient intrinsic authority within the PCAA, the court turned to extrinsic sources, such as the Penalty Enforcement Law (PEL), which the PCAA references as the framework to collect fines issued under the PCAA. The PEL afforded no mechanism by which private citizens could enforce statutory penalties for public entities, thus leading the court to remark that "[i]t makes little sense for plaintiff to be able to file a civil action and then not be able to enforce a judgment or keep any portion of the penalties."[28] Further, qui tam suits require express legislative authorization, and the PCAA did not provide that authorization.[29]

E. *Replevin*

In *Zelenka v. Pratte*,[30] Peter Zelenka sued Jason Pratte for the return of Pavlov, a French bulldog claimed by Zelenka as a birthday gift from Pratte. Both men cohabited in a romantic relationship for four years when Zelenka vacated the residence for about one week. On his return, Pratte changed

23. 185 A.3d 946 (N.J. Super. Ct. App. Div. 2018).
24. N.J. Stat. § 4:22-26.
25. *Goldman*, 185 A.3d at 948 (quoting N.J. Stat. § 4:22-26).
26. *Id.*
27. *Id.* at 950.
28. *Id.*
29. *Id.*
30. 300 Neb. 100 (2018).

the locks, preventing Zelenka from retrieving various items of personal property, including Pavlov. Pratte contended that he purchased Pavlov as a companion to his Labrador retriever, that he paid for Pavlov, and that Pavlov had only lived at his residence.[31] While styled as a conversion, not a replevin action, the case was tried to a judge by implied consent as a replevin action seeking only a ruling as to possessory rights in Pavlov, not Pavlov's value.

To establish an enforceable *inter vivos* gift, Zelenka had to demonstrate that Pratte intended to transfer title to Pavlov with delivery to (and acceptance of) Zelenka by clear and convincing evidence.[32] Testimony of Pavlov's breeder, Zelenka, and Zelenka's mother proved more credible to the trial court than that of Pratte as to the issue of donative intent.[33] On the issue of delivery and acceptance, technically, Pratte did not part with dominion and control over Pavlov by conveying him directly into Zelenka's arms. Rather, the breeder had dominion and control prior to the gifting. Yet, this chain of physical custody did not negate that the gift for delivery took place through a third party. That Zelenka brought Pavlov to Pratte's house from the breeder did not foil the gift, either; while Zelenka was not then living with Pratte at the time of the gift, he moved from an apartment to Pratte's home shortly thereafter, an act consistent with delivery and acceptance of a gift. Accordingly, subsequent possession of a gift by the donor does not necessarily void a gift if an explanation can be proffered.[34]

F. *Dog Bite Liability*

While volunteering at a local humane society to manage a nearby dog park, Deborah Davison suffered a broken leg after Rebecca Berg's dog collided with Davison while chasing another dog. Davison sued Berg in *Davison v. Berg*[35] on the theory of strict statutory liability under Florida Statute section 767.01, which "has consistently been construed to virtually make an owner the insurer of the dog's conduct" in causing harm to people and animals, without proof of scienter.[36] The only complete defense consists of prominently displayed signage including the words "Bad Dog."[37] The park had two signs visible at the entrance, titled "Dog Park Rules" (listing numerous rules for entrance), including that park use is at "the dog owner's risk," that dogs "exhibiting aggressive behavior" were barred, and that "rough play and chasing" were disallowed if any of the dogs or owners were

31. *Id.* at 101–03.
32. *Id.* at 106–07.
33. *Id.* at 107.
34. *Id.* at 108.
35. 243 So. 3d 489 (Fla. Dist. Ct. App. 2018).
36. *Id.* at 490 (quoting Jones v. Utica Mut. Ins. Co., 463 So. 2d 1153, 1156 (Fla. 1985)).
37. Fla. Stat. § 767.04.

uncomfortable with the behavior. One sign added that visitors entering the park do so at their own risk. Davison saw and understood these signs.[38]

In dismissing the case, the trial court held that park signage adequately warned Davison of the risk of such harm and, alternatively, that she assumed the risk of same. Reversing the trial court, the Florida Court of Appeals held that the Dog Park Rules were insufficient equivalents of "Bad Dog" signs so as to preclude liability under section 767.01.[39] And while Davison knew she could suffer harm in the park, including the precise trauma that she sustained,[40] such assumption of risk or actual consent to injury required a jury determination for comparative negligence under Florida Statute section 767.04 and could not operate as a complete bar to liability as provided by the "Bad Dog" signage provision of the Act.[41]

Stephen Boswell and his wife Karena Boswell sued the estate of his mother-in-law Mary Steele and Ms. Steele's granddaughter (and owner of Zoey, the dog at issue) Amber Steele when Zoey bit Mr. Boswell in Mary Steele's home. After the trial court limited all causes of action to those sounding in negligence, dismissing instructions on strict common law and strict statutory liability (given Zoey's known propensity to bite without provocation and a local ordinance), the jury found for the defendants. The Boswells appealed to the Idaho Supreme Court, which reversed, vacated the defense verdict, and remanded for a new trial in *Boswell v. Steele*.[42]

The jury instruction modified the century-old holding of *McClain v. Lewiston Interstate Fair & Racing Ass'n*:[43] "The owner of a dog is negligent if the owner knew or should have known of the dog's dangerous tendencies. Similarly, the custodian of a dog is also negligent for injuries caused if such custodian knew or should have known of the dog's dangerous tendencies."[44] The trial court then instructed that negligence means:

> [F]ailure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

38. *Davison*, 243 So. 3d at 490–91.
39. *Id.* at 491.
40. One year before she saw a dog collide with another person, causing a broken leg; and, moments before her own injury, she saw dogs chasing one another and remarked to another park visitor, "This looks like leg breaking territory. I better get out of here." Id. at 491–92.
41. *Id.*
42. 428 P.3d 218 (Idaho 2018).
43. 17 Idaho 63 (1909).
44. *Boswell*, 428 P.3d at 220.

> The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.[45]

While the instructions taken together appear to drive the jury to the conclusion that negligence exists upon dangerous tendency scienter, the supreme court reasoned that the negligence instruction led the jury to conclude that the Boswells needed to prove an ordinary-care scienter requirement. Because vicious propensity scienter establishes liability regardless of ordinary-care scienter, the trial court erred.[46] It should instead have asked the jury if Zoey had vicious tendencies and, further, whether Amber, Mary, or both were aware of them. Ordinary care was not pertinent.[47]

The trial court also instructed that violation of Pocatello Municipal Code section 6.04.050 makes an adult owner/custodian of a "dangerous animal" liable for all injuries sustained by any person who does not provoke the attack, and defines "dangerous animal" to include one who has a known propensity, tendency, or disposition to attack unprovoked, or to bite, inflict injury, assault, or otherwise attack a human being without justifiable provocation.[48] Putting aside that Zoey had never previously been declared a dangerous animal, the jury was instructed that a violation of PMC section 6.04.050 "is negligence."[49] Finding that negligence had nothing to do with liability under the ordinance, the Idaho Supreme Court reversed on this basis, as well.[50]

The court also determined that comparative negligence doctrine applied to strict common law liability claims, even though the language of Idaho's comparative fault statute, Idaho Code section 6-801, did not specifically identify them.[51] However, the doctrine did not extend to municipal strict statutory liability claims, such as Pocatello Municipal Code section 6.04.050. In that case, the single defense afforded to the defendants would be provocation; if proved, it would constitute an absolute bar to the Boswells' claim under that ordinance.[52]

G. *Products Liability*

A federal court certified to El Tribunal Supremo de Puerto Rico the question of whether strict liability applied to the sale of shrimp contaminated with an extremely poisonous natural neurotoxin not resulting from the

45. *Id.*
46. *Id.* at 222.
47. *Id.*
48. Pocatello Municipal Code 6.04.010 (B, C).
49. *Boswell*, 428 P.3d at 222–23.
50. *Id.* at *4.
51. *Id.* at *5.
52. *Id.* at *5.

manufacturing or fabrication process in *Gonzalez Caban v. JR Seafood*.[53] In 2005, Luis Gonzalez Caban ate a single shrimp from an appetizer sampler plate and never walked again, having been diagnosed with Paralytic Shellfish Poisoning. Nine years later, he and other family members sued the restaurant, as well as the manufacturer and seller of the shrimp. Finding that absent human intervention in the contamination of the shrimp, it would not constitute a "defective product," and no strict liability would apply, the Tribunal declined to impose fault as it would not further the goal of protecting the consumer against manufacturer negligence.[54] It based this holding on a concurring opinion in *Mendez Corrada v. Ladi's Place*,[55] which similarly refused to hold a restaurant liable for serving ciguatoxic fish becaue there was no way to prevent the poisoning because the toxin could not be destroyed by conventional cooking methods, or eliminated by conventional handling and processing methods, or detected by smell or appearance.

Four dissenting justices chronicled the history of products liability law in other United States jurisdictions, and also Spain, and then departed from the majority's decision to find that a defective product need not be fabricated or manufactured before liability can be imposed, but that the focus instead should be on whether, having placed the product in commerce to obtain profit, it possesses a defect in manufacturing, design, or insufficient warnings or instructions. While a fabrication or manufacturing process may cause the defect, an inadequate warning or instruction would not and thus remained as a basis to establish strict liability. As to whether the "defect" must be readily discoverable by ordinary means, the dissent held that a fact issue appeared to arise distinguishing Caban's case from Corrada's as an expert report furnished by petitioners asserted that the saxitoxin could be detected through testing and that the toxic substance could be cleaned off by removing the viscera or intestine. If true, the dissent noted, the pronouncement of Judge Negron Garcia in Mendez Corrada that "[n]o one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable," would simply not apply.

The Middle District of Pennsylvania in *Oberdorf v. Amazon.com, Inc*.[56] granted summary judgment to Amazon.com after being sued for damages arising from a malfunctioning dog leash causing permanent eye damage to Heather Oberdorf.[57] She purchased the leash through the Amazon Marketplace, but the product itself was not fulfilled by Amazon itself. Instead, a third-party vendor named "The Furry Gang" sold her the retractable

53. 199 DPR 234, 2017 WL 6612724 (P.R. 2017).
54. *Id.*
55. 127 DPR 568 (1990).
56. 295 F. Supp. 3d 496 (M.D. Pa. 2017).
57. *Id.* at 497.

leash. Unable to contact The Furry Gang or the manufacturer, Oberdorf claimed that Amazon bore strict products liability for failing to adequately warn of the leash's danger, that it was negligent in distributing, inspecting, marketing, selling, and testing the same, that it was responsible per negligent undertaking doctrine, having failed to conduct proper hazard analysis, and that it also committed breach of warranty, misrepresentation, and caused loss of consortium to Mr. Oberdorf. The plaintiffs also sought punitive damages.[58] A matter of first impression, the district court held that Pennsylvania law does not deem an online sales listing service a "seller," for it operates more like an auctioneer and is a third-party vendor's "means of marketing" who does not "pass upon the quality of the myriad of products" available in its Marketplace, which the court described as "sort of [a] newspaper classified ad section."[59] Accordingly, the claims of strict liability claims were dismissed. Section 230 of the Communications Decency Act ("CDA"),[60] which holds that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," precluded the Oberdorfs' negligence and negligent undertaking claims, as they were treating Amazon as the publisher or speaker of information provided by The Furry Group.[61]

H. *Police Shootings*

In the last survey,[62] we discussed *Smith v. City of Detroit*, where the trial court dismissed all claims premised on the notion that the plaintiffs forfeited any property interest in the slain dogs by failing to license them. The Sixth Circuit Court of Appeals reversed in part,[63] finding that Debo and Smoke—dogs killed under circumstances raising genuine issues of fact on the question of exigency—were not contraband and thus were protected under the Fourth Amendment since Michigan state law and Detroit city code, while declaring it unlawful to possess an unlicensed dog, did not authorize them to be killed on sight but, instead, furnished process prior to seizure. The Sixth Circuit reasoned, "Michigan law makes clear that the owners retain a possessory interest in their dogs," particularly because keeping dogs is not "inherently illegal, such as some drugs, but instead is subject to jurisdiction-specific licensing or registration requirements, such as cars or boats or guns. Just as the police cannot destroy every unlicensed car or gun on the spot, they cannot kill every unlicensed dog on the

58. *Id.* at 498–99.
59. *Id.* at 501.
60. 47 U.S.C. § 230.
61. 295 F. Supp. 3d 496, at 502–03.
62. 53:2 Tort Trial Ins. Prac. L.J. 227 (2018).
63. 2018 WL 4961285, ___Fed.Appx. ___ (6th Cir. 2018).

spot."[64] Even if Debo and Smoke were contraband, the trial court erred finding that the Fourth Amendment does not otherwise apply. For at least four decades, the United States Supreme Court has inquired whether a warrantless seizure of contraband is reasonable if it was not "immediately apparent" to an officer that the item was, in fact, contraband.[65]

Furthermore, even though Michigan law required dogs to wear license tags, the officers could not determine that the dogs were unlicensed simply because they did not sport tags, and if the dogs were adolescents or within city limits for fewer than thirty days, they would not need to be licensed or tagged in any event.[66] Though a split decision, the court remanded for further proceedings on the 42 U.S.C. § 1983 and conversion claims against Officers Morrison and Gaines as to Debo and Smoke, and rejected any grant of qualified immunity.[67] Dissenting Judge Batchelder would have interpreted Michigan state law differently and conferred qualified immunity to the officers. She also cautioned that the majority misinterpreted the constitutional analysis of Fourth Amendment seizures of contraband and threatened to "extend sweeping monetary liability to officers who seize contraband during searches and to the municipalities that employ them."[68]

I. *Insects*

Carolyn Staats sued Vintner's Golf Club, LLC, for negligence and premises liability after she nearly died following an attack by a swarm of yellow jackets during a golf lesson. Reversing and remanding summary judgment for the defense, the court in *Staats v. Vintner's Golf Club, LLC*[69] held that golf course operators owed a duty to maintain their premises in reasonably safe condition, which included exercising reasonable care to protect patrons from such nests.[70] The nest at issue was hidden from view near the edge of a sand trip with a partial lip of grass covering the one and a half inch underground hole. Although stray yellow jackets and bees were observed before the nest's discovery, the club indisputably had no actual knowledge of any swarm, hive, or nest ever on the grounds or of any patron ever previously being stung. No traps or countermeasures were taken prior to the attack on Staats because the club perceived that stinging insects presented no danger.[71]

64. *Id.* at *5.
65. *Id.* (quoting, *e.g.*, *Horton v. California*, 496 U.S. 128, 136–37 (1990)).
66. *Id.* at *6.
67. *Id.*
68. *Id.*
69. 25 Cal. App. 5th 826 (2018).
70. *Id.* at 830.
71. *Id.* at 831.

Though conceding that it owed a general duty to Staats, the club maintained a categorical exclusion "when the harm at issue is caused by insects," particularly ones undetected and subterranean.[72] Declining to apply the holdings of *Brunelle v. Signore*[73] (which held that a bite from a brown recluse spider, which had never been seen before on vacation home property, was unforeseeable as a matter of law and thus could not support a premises liability claim) and *Butcher v. Gay*[74] (which held that a tick carried by homeowner's dog that bit a house guest and caused Lyme disease could not support premises liability because the tick was not readily identifiable as inherently harmful and the homeowner had no actual or constructive knowledge that ticks carrying Lyme disease were on premises), the California Court of Appeal instead distinguished these cases, noting they involved stray, individual insects, not nests or hives which might be more easily detected upon reasonable inspection.[75] In deciding not to categorically exempt golf course operators from the duty to protect patrons from yellow jacket nests, the appellate court considered the factors set forth in *Rowland v. Christian*[76]: foreseeability, certainty, and connection between plaintiff and defendant, as well as moral blame, prevention of future harm, burden, and availability of insurance.[77]

Based, in part, on expert entomologist testimony confirming the prevalence of yellow jackets in the area and, specifically, abandoned gopher, ground squirrel, and rabbit holes, which were eminently foreseeable on lands such as golf courses, the appellate court remanded for further examination of whether the operator in fact exercised reasonable care.[78] Of interest was the club's concern that a rule imposing a legal duty on landowners to find and kill animals found in their natural environment would transgress moral principles and legal prohibitions against taking animal life without justification, citing, for instance, laws that protect bees and endangered or threatened species.[79] In finding that yellow jackets do not need special protection, the court held that "in this instance, the policy of protecting human life outweighs the policy of protecting animal life."[80]

Texas also decided an insect law matter this survey period in *Nichols v. McKinney*.[81] The estate of Melody Nichols, and heirs thereto, sued Steven

72. *Id.* at 833.
73. 215 Cal. App. 3d 122 (1989).
74. 29 Cal. App. 4th 388 (1994).
75. *Id.* at 834–36.
76. 69 Cal. 2d 108 (1968).
77. *Id.* at 837–42.
78. *Id.*
79. *Id.* at 842.
80. *Id.*
81. 553 S.W.3d 523 (Tex.App.-Waco 2018).

McKinney for negligence causing Nichols's death when a swarm of bees exited a hive in the wall of McKinney's garage and attacked as she parked her riding lawnmower on her property adjacent to the garage.[82] Invoking the *ferae naturae* defense, McKinney claimed he could not be held liable for indigenous wild animals occurring on his property unless he reduced them to possession or control or introduced a non-indigenous animal into the area. The trial court dismissed the action, and the heirs appealed. While courts had applied the doctrine to negate a duty in premises liability cases where the act occurred on the defendant's property, no courts had applied it to off-premises incidents.[83]

In passing on this question, the Texas Court of Appeals did not export the *ferae naturae* doctrine (one reserved for premises liability claims) to the general negligence arena, but instead undertook a common law duty analysis to determine whether such concepts as risk, foreseeability, and likelihood of injury, social utility of actor's conduct, magnitude of burden of guarding against injury, and consequences of placing such burden on the defendant warranted expansion.[84] In declining to do so, the court observed:

> [J]ust as landowners do not have a duty to warn their *guests* about the presence and behavior patterns of every species of indigenous wild animals and plants which pose a potential threat to a person's safety, landowners should not have a duty to guard against injury to someone *in another location* from every species of indigenous wild animals which may roam from the landowner's property.[85]

Though overruling the heirs' challenge to the general negligence dismissal, the court sustained their objection to the dismissal of the negligent undertaking claim. By McKinney allegedly attempting to eliminate the bees but failing in that endeavor, he ostensibly assumed a duty of care that could not be negated by *ferae naturae* doctrine.[86] The court also sustained the heirs' objections to dismissal of the intentionally caused nuisance and strict-liability nuisance claims.[87] Finding that McKinney conclusively eliminated an essential element of the negligence *per se* claim premised on a city of Midlothian ordinance that prohibited the allowance of a breeding place for bees, the court affirmed dismissal of that claim.[88]

82. *Id.* at 526.
83. *Id.* at 528.
84. *Id.*
85. *Id.* at 529 (citation omitted).
86. *Id.* at 530.
87. *Id.* at 531.
88. *Id.* at 531–32.

J. *Equine-Related Injury*

1. Claims Limited by Equine Activity Liability Acts

In *Dullmaier v. Xanterra Parks & Resorts*, the Tenth Circuit addressed in detail the analysis for determining what constitutes an "inherent risk" of a recreational opportunity under Wyoming's Recreation Safety Act (WRSA), and whether an inherent risk existed in the case.[89] The WRSA provides that a participant in "any sport or recreational opportunity assumes the inherent risks in that sport or recreational opportunity."[90] Correspondingly, providers of those opportunities do not have a duty "to eliminate, alter or control" those inherent risks.[91] The facts of *Dullmaier* are tragic: Dullmaier was participating in a guided trail ride through a wilderness area in Yellowstone National Park when one of the horses spooked at a group of ducks that suddenly took flight from under a bridge, reared, unseated its rider, and began to run.[92] This startled the other horses into running, including Dullmaier's.[93] Dullmaier was eventually unseated from his running horse, and he sustained fatal injuries from the fall.[94]

Dullmaier's widow sued under multiple theories of negligence, all of which the trial court rejected on summary judgment. On the general negligence claim, the trial court granted summary judgment reasoning that the risks associated with spooked runaway horses were inherent risks of horseback riding and, therefore, per the WRSA, Xanterra owed no duty to protect Dullmaier from those risks.[95] The Tenth Circuit agreed after a detailed discussion of the proper inquiry to determine whether Dullmaier's death was the result of an inherent risk of the guided trail ride.[96]

The court identified three guideposts for the inquiry. First, under the WRSA, a court must examine the nature of the risk at issue with "the greatest level of specificity permitted by the factual record," namely, what exactly were the specific risks to which the consumer was exposed.[97] Second, after carefully identifying the risk at issue that caused the injury, the court must determine whether it was an inherent risk associated with the activity or whether it was an atypical, non-inherent risk to which the activity provider exposed the consumer.[98] Third, in distinguishing between inherent and non-inherent risks, the nature of the opportunity chosen by the consumer

89. 883 F.3d 1278 (10th Cir. 2018).
90. *Id.* at 1281; Wyo. Stat. Ann. § 1-1-123(a).
91. *Dullmaier*, 883 F.3d. at 1281; Wyo. Stat. Ann. § 1-1-123(b).
92. *Dullmaier*, 883 F.3d. at 1282.
93. *Id*. at 1282–83.
94. *Id*. at 1283.
95. *Id.*
96. *Id.* at 1286–95.
97. *Id.* at 1291 (quoting *Cooperman v. David*, 214 F.3d 1162, 1167 (10th Cir. 2000)).
98. *Id.*

is also relevant (for example, a private riding lesson for young children).[99] Applying this analysis, the court concluded that Dullmaier's death was the result of the inherent risks associated with the horse activity in which he chose to participate, a guided horseback tour of a wilderness area.[100]

Importantly, the court rejected Mrs. Dullmaier's attempt to argue that the ability of the provider to reduce or eliminate a risk is relevant in deciding whether a risk is inherent or not.[101] This reverses the order of the analysis. If a risk is inherent in the activity, the provider has no duty to mitigate or eliminate it by taking certain actions, even if additional steps could have been taken.[102] Only when the provider introduces an atypical risk not inherent in the activity does the analysis look to whether the provider could have done anything to reduce the risk.[103]

In a similar vein, the Seventh Circuit took up the Wisconsin Equine Activity Liability Act (EALA) in a pair of consolidated cases, *Dilley v. Holiday Acres Properties, Inc.* and *Brown v. Country View Equestrian Center, Inc.*[104] Like *Dullmaier*, *Dilley* involved injury occurring during a paid trail ride. The court affirmed summary judgment for the defendants, beginning with the analysis of inherent risk. It reasoned that a trail operator's negligence was an "inherent risk of equine activities" to which statutory immunity applied under the Wisconsin law.[105] The definition of "inherent risk" included "[t]he potential for a person participating in an equine activity to act in a negligent manner."[106] The trail operators in this case assisted Dilley in selecting the horse and during the ride.[107] Therefore, by statute, their negligence was an inherent risk for which there was immunity because they were persons "participating in an equine activity" in the sense that they were "[a]ssisting a person participating" in an equine activity.[108]

The court next addressed the claimed exceptions to immunity for inherent risks, determining that they did not apply. Contrary to Dilley's argument, the court held that the exception to immunity for providing a horse and failing to make a reasonable effort to assess the rider's ability "to engage safely in an equine activity or to safely manage the particular

99. *Id.*
100. *Id.* at 1291, 1293.
101. *Id.* at 1294.
102. *Id.*
103. *Id.*
104. Nos. 17-2485 & 17-2970, No. 17-3289, 2018 U.S. App. LEXIS 27346 (7th Cir. Sept. 25, 2018).
105. *Id.* at *2. See last year's survey for more discussion of the trial court's analysis and decision. Adam P. Karp & Margrit Lent Parker, *Recent Developments in Animal Tort & Insurance Law*, 53:2 Tort Trial & Ins. Prac. L.J. 227, 248–50 (2018).
106. *Id.* at *8.
107. *Id.*
108. *Id.*

equine provided" has to do with the *rider's* ability to safely manage the horse, and not the trail operator's ability to safely manage the horse.[109] To conclude otherwise would render the statute internally inconsistent.[110] The undisputed evidence was that the trail operators assessed Dilley's riding experience (none) and paired her with their most docile horse.[111] Thus, the exception did not apply to remove immunity. The exception for wilful and wanton conduct did not apply either to the undisputed facts that, at most, indicated negligence.[112] Finally, the court rejected Dilley's attempt to invoke the exception for negligent provision of faulty tack causing injury; the allegation of failure to adjust stirrups was not an allegation that tack was defective.[113]

In the companion case *Brown*, the plaintiff did not challenge the initial step of the analysis and conceded that the Wisconsin EALA applied but, as Dilley did, argued for application of the exception to immunity that applies when the defendant provided a horse to the plaintiff.[114] However, because Brown rode her own horse at the time of her injury, the court concluded that that exception did not apply.[115] Criticizing the illogical nature of Brown's argument, the court explained that it was irrelevant that Brown was a student in a riding lesson over which the instructor "exercised control"; Brown still provided her own horse.[116] As a result, the court affirmed dismissal of the claims for failure to state a claim for which relief could be granted.[117]

Another EALA case arose in New Hampshire, where the New Hampshire Supreme Court for the first time examined its state's EALA in *Franciosa v. Hidden Pond Farm, Inc.*[118] New Hampshire's statute is consistent with the numerous statutes in other states that establish immunity for inherent risks associated with equine activities but also create specific exceptions for circumstances where there is no immunity.[119]

In *Franciosa*, a thirteen-year-old experienced rider who had been riding for eight years and taking lessons with the same instructor for the prior two, fell during a "free ride" (an unsupervised ride outside of a lesson) at

109. *Id.* at *9–11
110. *Id.* at *10–11.
111. *Id.* at *12–13.
112. *See id.* at *14–15.
113. *Id.* at *15–16.
114. *Id.* at *16.
115. *Id.*
116. *Id.*
117. *Id.* at *18–19.
118. No. 2017-0153, 2018 N.H. LEXIS 174; 2018 WL 4517252 (Sept. 21, 2018).
119. 2018 N.H. LEXIS 174, at *2–5.

her instructor's stable.[120] She had completed her ride but fell while dismounting, and the horse stepped on her, causing serious injury.[121]

The rider sued and, in a cross-motion for summary judgment, argued that the incident did not involve an inherent risk subject to statutory immunity from liability and, alternatively, that the two exceptions for providing a horse but failing to match horse to rider and for wilful and wanton conduct applied.[122] Granting summary judgment for the instructor, the trial court rejected the rider's arguments, finding that the rider's injuries resulted from inherent risks of equine activities and that neither exception applied because no reasonable juror could find failure to make reasonable efforts to match the horse to the rider and because the rider failed to establish that the instructor's failure to supervise the ride caused the accident.[123]

The New Hampshire Supreme Court affirmed. Interpreting the statute's legislative intent for the first time, the court stated that the statute's purpose was "to shield persons involved in an equine activity from liability for negligence claims related to a participant's injuries resulting from the inherent risks of equine activity. . . while at the same time ensuring the right of an injured participant to recover under certain narrowly defined circumstances."[124] The court thus rejected the rider's argument that the statute did not apply to limit her negligence claims, given that to do so would "eviscerate" the statute.[125] The court rejected other arguments that the injury here was not the result of an inherent risk of equine activity. For example, the statutory definition for inherent risk that excluded the failure of an equine professional to take corrective measures where a participant's negligence can be reasonably foreseen did not apply.[126] This was because, even assuming the rider had been negligent here, there was no evidence that the instructor could have reasonably foreseen the negligence.[127]

Because the risk of the horse stepping on the rider was an inherent risk of the activity, the court addressed the rider's alternative arguments that an exception to immunity applied.[128] The exception to immunity for failing to reasonably determine the ability of the rider to engage safely in riding the horse did not apply because there was ample evidence of the rider's experience and the instructor's knowledge of that experience, and no reasonable juror could find that the instructor had not reasonably assessed the rider's

120. *Id.* at *1–2.
121. *Id.* at *2.
122. *Id.* at *5–6.
123. *Id.* at *6.
124. *Id.* at *11.
125. *Id.*
126. *Id.* at *13–14.
127. *Id.*
128. *Id.* at *15–20.

ability before permitting the ride.[129] The exception for wilful and wanton conduct likewise did not apply here where no evidence indicated that the instructor acted with a conscious purpose to disregard the rider's safety or with malicious or unreasonable disregard for the rider's safety with indifference to the consequences.[130]

Continuing in this line, the Texas Court of Appeal in *James v. Young* evaluated that state's statutory exception to immunity for failure to reasonably assess a rider's ability to manage the horse.[131] In *James*, six-year-old Bradey and his family were riding horses on the property of their friends, the Young family.[132] With the consent of Bradey's parents, who knew his ability to ride, Bradey was permitted to ride a horse belonging to the Youngs.[133] On the ride back to the group, Bradey's horse and another horse began running, causing Bradey to fall and sustain injuries.[134] Bradey's father sued, but the trial court granted summary judgment for the defendants. Affirming, the Texas court of appeal explained that the Texas EALA applied and that the one exception to immunity that Bradey's father invoked was not applicable because there was no evidence that the defendants had failed to reasonably assess Bradey's riding ability, much less that such a failure was a cause of the accident.[135]

Addressing Kentucky's statutory immunity exception for providing a horse and assessing rider ability, and the exception for wilful and wanton conduct, the Kentucky Supreme Court in *Daugherty v. Tabor*[136] reversed its court of appeal in a case surveyed here last year.[137] In this case, Tabor was injured during a test ride of a horse for sale by the defendants, after she had made numerous representations to the sellers that she was an experienced rider. While the Kentucky Court of Appeal concluded that Tabor's statements to the contrary created an issue of fact whether the defendants reasonably assessed her ability to manage the horse in question,[138] the Ken-

129. *Id.* at *15–17.
130. *Id.* at *19–20.
131. 2018 Tex. App. LEXIS 2406; 2018 WL 1631636 (Apr. 4, 2018). Texas's EALA was expanded in 2011 to more broadly include farm animal activities and is not limited to just equine activities. Rodriguez v. Waak, NO. 01-17-00755-CV, 2018 Tex. App. LEXIS 6596, at *7–8 (Aug. 21, 2018). In this survey year, the Texas Court of Appeals reaffirmed that, even under the "updated" version of the statute, the statute does not insulate employers from liability for their employees' injuries because employees still are not "participants" as contemplated by the statute. *Id.* at *11–13, 24–26.
132. 2018 Tex. App. LEXIS 2406, at *1–2.
133. *Id.* at *2–3, 11.
134. *Id.* at *2–3.
135. *Id.* at *10–12.
136. 554 S.W.3d 319 (Ky. 2018).
137. Tabor v. Daugherty, No. 2016-CA-000047-MR, 2017 WL 2829403 (Ky. Ct. App. June 30, 2017); Karp & Parker, *Recent Developments in Animal Tort & Insurance Law*, 53:2 Tort Trial & Ins. Prac. L.J. 227, 253–54 (2018).
138. *Tabor*, 2017 WL 2829403, at *6.

tucky Supreme Court was unpersuaded.[139] The statute anchors the defendants' duty to assess a rider's ability "on the participant's representations of [her] ability."[140] Tabor exaggerated her experience and skills both before and on the day in question, and the defendants were entitled to rely on her multiple representations in assessing the horse's suitability for her.[141]

As to the question of wilful and wanton conduct, at issue were sudden movements the defendants allegedly made with their arms to stop the runaway horse, which further startled it.[142] The Kentucky Supreme Court explained that these allegations could not support liability—let alone wilful and wanton conduct—because "sudden movements" are part of the statutory "inherent risks" associated riding horses and thus a risk that Tabor assumed and for which the defendants were immune from suit. The court also noted that the record was devoid of any evidence that it was unreasonable to raise one's arms to stop a runaway horse.[143]

The familiar case of a slipping saddle was involved in *Fishman v. GRBR, Inc.*, where Fishman fell when his saddle slipped off his horse during a guided trail ride.[144] Fishman, over six feet tall and 210 pounds, was assigned "Big," a horse with custom saddle and tack capable of carrying heavier riders.[145] Before the ride, Fishman also signed a release form that specifically identified the risk that a saddle girth (also known as a cinch) can loosen during the ride resulting in a slipping saddle and a rider's fall.[146] At the start of the ride, the activity sponsor checked Big's cinch multiple times, Big was ridden by a wrangler, and the cinch was checked yet again before Fishman was mounted.[147] After mounting, wranglers gave Fishman and other riders instructions and observed them riding in a corral as part of a safety check before taking to the trail.[148] One of the activity sponsors noticed Fishman "leaning to one side and tipping the saddle."[149] She instructed him to shift his weight and keep the saddle centered over the horse, and he complied.[150] On the trail, Fishman attempted to re-center the saddle again, but the trouble grew worse as he and the saddle slid to one side.[151] He jumped from Big, who apparently just stood there after the incident.[152]

139. 554 S.W.3d at 322.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 323.
144. 403 P.3d 660 (Mont. 2017)
145. *Id.* at 660.
146. *Id.* at 661.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*

On these facts, the Montana Supreme Court affirmed the trial court's grant of summary judgment, reasoning that no exception applied to abrogate the statutory immunity under Montana's Equine Activities Act.[153] Fishman agreed that the circumstances fell within the statute and the "risks inherent in equine activities," but argued that they also fit the immunity exception for provision of tack and failure to reasonably inspect or maintain it.[154] However, Fishman did not claim that the tack failed, was improperly maintained, or was otherwise defective, and he made no showing that the method of routine inspections was not done reasonably.[155] Moreover, via the release form, Fishman was on notice of this inherent risk that slippage can occur during a ride.[156]

The *Fishman* dissent conflates the condition of a rider leaning to one side in a saddle, causing the saddle to tip or slip, with the condition of a loose girth or cinch.[157] Nowhere in the facts as stated by the majority did the activity sponsor notice that the cinch was loose but fail to tighten it before the trail ride.[158] Yet, that is the fact upon which the dissenting justice based his opinion.[159] A saddle can be affixed tightly to the horse, and yet an imbalanced rider can nevertheless cause the saddle to slip.[160]

2. Assumption of the Risk

In *Jones v Smoke Tree Farm*, the only horse accident case in this survey not involving the application of an EALA and the only one to resolve in favor of the injured plaintiff, the New York appellate court considered whether a rider who fell during a riding lesson assumed the risk of this injury and thus was barred from bringing her common law tort claim.[161] Jones was

153. *Id.* at 662–63.

154. *Id.* at 662.

155. *Id.*

156. *Id.* at 663 (acknowledging that the release agreement itself was invalid and unenforceable under Montana law, but nevertheless was evidence of notice to Fishman of the inherent risks of horseback riding).

157. *See id.* at 663. The majority seems at one point to also make this mistake when it assumes that the cinch loosened during the trail ride. *See id.* At least in the fact summary of this opinion, this fact is not evident. *See id.* at 660–61.

158. *See id.* at 660–61.

159. *See id.* at 663.

160. *See*, *e.g.*, Kovnat v. Xanterra Parks & Resorts, 770 F.3d 949, 952, 958–59 (10th Cir. 2014) (As explained by a wrangler in this case, 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.").

161. 161 A.D.3d 1590, 1590 (N.Y. App. Div. May 4, 2018). Prior to October 2017, New York was one of the few states with no statute limiting common law liability for equine activity professionals and sponsors. In October 2017, after summary judgment in this case but prior to this appellate opinion, New York enacted the Safety in Agricultural Tourism Act, which is a limited liability statute applicable to most equine activities along with broad array of agritourism activities. *See* N.Y. Gen. Oblig. Law §§ 18-301 to -303. It provides immunity

a beginner rider and had never previously attempted to mount or ride a horse.[162] She had signed a release in which she "assume[d] the unavoidable risks inherent in all horse-related activities, including but not limited to bodily injury and physical harm to horse, rider, employee and spectator."[163] The doctrine of assumption of the risk generally will bar liability where a participant is aware of the risks, appreciates the nature of those risks, and voluntarily assumes them, but it will not bar liability if the risk is "unassumed, concealed, or unreasonably increased."[164] The majority opinion concluded that summary judgment was not appropriate on the basis of assumption of risk because disputed issues of fact existed as to whether the defendants had unreasonably increased the risks associated with mounting the horse for failure to give adequate instruction or assistance based on Jones's "size, athleticism, and obvious struggles in attempting to mount the horse," and whether a concealed risk existed in the sense of an improperly tacked horse.[165] The majority opinion is vague as to exactly what happened, but the dissenting judge explained that apparently what happened was the saddle slipped and Jones fell.[166]

In a spirited opinion, the dissenting judge emphasized that the law also says that the doctrine of assumption of the risk does not require that the plaintiff have foreseen the manner in which the injury actually occurred, as long as the plaintiff is aware of the potential for injury.[167] Essentially, the dissenting judge opined that it is obvious that falling from a horse is an inherent risk in riding and so too is it reasonably foreseeable that a saddle, which is not permanently attached to a horse, might slip.[168] And those facts are exactly what happened in Jones: the plaintiff "succumbed to gravity and fell off a horse—the very combination of forces that have plagued riders since men and women first mounted up."[169] It was irrelevant to the dissenting judge that the plaintiff testified she was not aware of the risk (despite knowing that she was required to wear a helmet) because "falling from a horse is exactly the type of risk that is universally apparent or, at the very least, reasonably foreseeable to any rider, irrespective of skill level or inexperience."[170] The dissenting judge also "categorically" rejected the

but is decidedly different from the traditional form of EALA and requires compliance with a specific set of signage and other requirements before it affords immunity. *See id.*

162. *Id.* at 1590–91.
163. *Id.* at 1590.
164. *Id.*
165. *Id.* at 1591.
166. *Id.* at 1592.
167. *Id.*
168. *See id.* at 1592.
169. *Id.*
170. *Id.*

notion that "saddle slipping" was not an assumed risk and could constitute an unreasonably increased risk or a concealed risk.[171]

3. Automobile-Horse Collisions

At least one case this year addressed running-at-large statutes and liability for automobile collisions with loose horses. In the Texas case of *Dearbonne v. Courville*,[172] the plaintiffs' car struck a horse at night near the defendant's property on which he kept his five horses, but in an area where other property owners also had horses.[173] The parties disputed the ownership of the horse that plaintiffs hit because the horse left the scene before it could be identified.[174] Witness testimony indicated that, just before the accident, two of the defendant's horses had gotten out of his pasture; he was away on vacation, but had summoned help to check on the horses and put them back in the pasture.[175] However, those who saw the defendant's horses that night found no evidence of injury, and, upon the defendant's return a week later, he found no evidence of injury to his horses from a collision.[176]

However, the disputed ownership ultimately was irrelevant on appeal because the Texas Court of Appeal concluded that even if the defendant owned the horse struck by the vehicle, there was no evidence that the defendant had breached the duty established by the stock law in question.[177] For a breach of a duty of care to exist under Texas law, the defendant must have "knowingly" "permitted" his horse to roam at large, which in turn means that the defendant "'consented . . . expressly or formally' to his horse(s) running at large" or that he "'gave leave' to his horse(s) running at large."[178] To establish this element, a plaintiff must show more than mere ownership of the horse.[179] The appellate court agreed with the trial court that the plaintiffs failed to present any evidence of a breach.[180] There was no evidence that the defendant left a gate open; that he allowed anyone else to do so; of how or when the horse escaped; that the defendant made no effort to corral his horse even while away on vacation; that the fences and gates were in disrepair; or that his horses had escaped previously.[181] As a result, the court affirmed summary judgment in the defendant's favor.[182]

171. *Id.*
172. No. 09-16-00440-CV, 2018 Tex. App. LEXIS 7536; 2018 WL 4354310 (Sept. 13, 2018).
173. 2018 Tex. App. LEXIS 7536, at *1–2, 11–12.
174. *See id.* at *1–4, 16.
175. *Id.* at *2–4.
176. *See id.* at *2–4, 17.
177. *Id.* at *32–33.
178. *Id.* at *28.
179. *Id.*
180. *Id.* at *32.
181. *Id.*
182. *Id.* at *33.

K. *Animal Insurance Law*

1. Coverage for Equine Liability Claims

In *Georgia Farm Bureau Mutual Insurance Co. v. Claxton*, the Georgia Court of Appeals resolved a liability coverage dispute where a mule-drawn carriage was struck by an automobile following a Christmas parade as the carriage was returning to the owner's motor vehicle.[183] Claxton was a passenger in the carriage at the time of the accident and was injured.[184] In a separate case, Claxton sued the owner of the mule and carriage.[185] The owner carried a liability policy with Georgia Farm Bureau, but the insurer denied coverage citing an exclusion it claimed applied to the type of event in question: the exclusion provides that the policy "does not apply to . . . [t]he use of any livestock or other animal, with or without an accessory vehicle, for providing rides to any person for a fee or in connection with or during a fair, charitable function, or similar type of event[.]"[186] The insurer filed a declaratory judgment action seeking a ruling that the exclusion precluded coverage under the liability policy.[187] The trial court denied the insurer's motion for summary judgment.[188] On interlocutory review, the appellate court affirmed, explaining that issues of fact remained to be decided by jury to determine whether the ambiguous terms in the exclusion applied.[189] At issue was whether participation in a Christmas parade fell within the exclusion for "similar type of event[s]" to a fair or charitable function, and whether the fact that the accident occurred post-parade changed whether the owner was giving a ride "in connection with" the event.[190] The court concluded that these questions were genuine issues of fact not susceptible to summary judgment, and thus affirmed the trial court's ruling.[191]

Also in this case, the insurer sought declaratory judgment that Claxton's uninsured motorist (UM) policy, which happened to be with the same insurer, did not apply to provide UM coverage.[192] The court of appeals agreed that the UM coverage did not apply, reversed the trial court, and granted summary judgment.[193] The UM policy unambiguously provided coverage only for "trailers" that can be pulled by passenger autos, pickups, or vans, and thus the mule-drawn carriage was not a "trailer" covered under the policy.[194]

183. 345 Ga. App. 539, 539–40 (Ga. Ct. App. 2018).
184. *Id.* at 540.
185. *Id.*
186. *Id.*
187. *Id.* at 539.
188. *Id.* at 540.
189. *Id.* at 541–43.
190. *Id.* at 541.
191. *Id.*
192. *Id.* at 539–40.
193. *Id.* at 543.
194. *Id.*

2. Homeowners' Insurance and Dog Attacks

The declaratory judgment action of *Battisti v Broome Cooperative Insurance Co.* involved a coverage dispute between a homeowners insurance carrier and the homeowner whose dog bit Battisti, a visiting friend.[195] Primarily at issue was the fact that the dog had either bitten or "attacked" the homeowner's mother a month prior.[196] The parties had competing evidence as to whether her mother had been attacked or bitten.[197] In any event, the insurer based its efforts to deny coverage on two provisions: (1) a "Misrepresentation, Concealment or Fraud" provision that stated that there was no coverage where, before or after a loss, the insured wilfully concealed or misrepresented a material factual circumstance concerning the insurance, or the insured falsely or fraudulently swore to a matter relating to the insurance, and (2) an exclusion for "Canine Related Injuries or Damages," which allows the insurer to disclaim coverage where the dog has a history of one or more "attacks" on people.[198]

The trial court granted summary judgment for the insurer, but the New York appellate court reversed on the basis that triable issues of fact existed as to both issues.[199] On the facts, it was not clear that the insurer's claims manager asked sufficiently specific questions or that the homeowner answered questions in a way that would constitute a willful concealment or misrepresentation of any material fact.[200] Similarly, the undisputed facts did not clearly support application of the canine exclusion because, although the disclaimer was applicable and could support a denial of coverage, the facts were unclear and undeveloped as to whether the insurer timely and reasonably investigated the applicability of the exclusion and timely gave notice of the decision to disclaim.[201] Therefore, summary judgment was improper in the face of disputed material facts.

By contrast, the insurer's claims of fraud and misrepresentation by the homeowners/dog owners were successful in excluding coverage in *United Property & Casualty Insurance Co. v. Surprenant*.[202] The underlying facts were that the homeowners were building a new home and, in deciding on a homeowners insurance policy, were aware that the insurance company asked about ownership of dogs, but ultimately through their agent signed paperwork representing that no "vicious, dangerous, or exotic

195. 163 A.D.3d 1091, 1092 (N.Y. App. Div. 2018). After Battisti obtained a judgment against the homeowners in a separate injury claim, the homeowners assigned their rights in this action to Battisti.

196. *Id.* at 1092–93.

197. *Id.*

198. *Id.* at 1092.

199. *Id.* at 1092–94.

200. *Id.* at 1093.

201. *Id.* at 1093–94.

202. No. 7:17-CV-96-FL, 2018 U.S. Dist. LEXIS 166240, 2018 WL 4655728 (E.D.N.C. Sept. 27, 2018).

animals, dangerous breeds of dogs [were] owned or kept by any insured or tenant."[203] Importantly, the insurer's animal liability underwriting guidelines specifically listed "Mastiff (all variations)" as "dangerous per se."[204] At the time, the homeowners had a American Mastiff dog named Winston.[205] The agent advised them that owning Winston made them ineligible for the insurer's homeowners insurance.[206] However, they told the agent they were not planning to move the dog to the house for a year and did not believe he would live more than a year or two more.[207] They further advised their agent that the dog "definitely won't be [at the house] during any inspection" by the insurance company.[208] In other words, they knew the dog's presence during inspection would preclude coverage.[209] Under this pretense, they signed an application falsely stating that they did not own a dog defined as dangerous. The agent told them that if they ever brought Winston to the property, they would need to call the agent and change insurance companies.[210] The homeowners obtained and renewed their policy three more times for a total of four years.[211] It was during the first policy year that they brought Winston to the home, but they never advised the agent accordingly.[212]

In the fourth policy year, a girl, her mother and sisters were visiting the homeowners, and Winston bit her in the face, requiring her to seek medical treatment.[213] She sued both the homeowners and their insurer. In a motion for summary judgment, the insurer argued that there was no coverage based on the policy exception for material misrepresentations and fraud. The trial judge agreed, explaining that the facts left no doubt that the homeowners had made a false statement that was material and that induced the insurer to insure where it otherwise would not have.[214] The fact that their agent completed the application for their signature does not obviate that the representation in the application was theirs, and they bore the responsibility for their statements.[215] Further, even if the homeowners mistakenly believed that they did not have to state ownership of the dog, "an innocent mistake does not cure a material misrepresentation,"[216] nor

203. 2018 U.S. Dist. LEXIS 166240, at *6–7.
204. *Id.* at *12.
205. *Id.* at *6.
206. *Id.* at *12.
207. *Id.* at *6.
208. *Id.*
209. *Id.* at *18.
210. *Id.* at *18–19.
211. *Id.* at *7–8.
212. *Id.* at *7–8, 20.
213. *Id.* at *8.
214. *Id.* at *11–13.
215. *Id.* at *14.
216. *Id.*

does policy renewal from one year to the next cure a material misrepresentation in the application.[217] For similar reasons, the court also concluded that fraud existed here.[218] Thus the trial court granted summary judgment and concluded that the insurance policy was void and unenforceable.[219]

As in *Battisti*, an exclusion of coverage for injuries caused by a dog that previously injured a person was at issue in *Baumann-Mader v. Integrity Mutual Insurance Co.*[220] There, six months prior to the incident at issue, "Tank," whose breed is not identified in the opinion, had bitten another person in an unprovoked attack.[221] In this case, Tank severely bit two people.[222] Police responded after the first bite, but Tank got loose and attacked plaintiff Kit Baumann-Mader, who was originally on the scene after the first dog bite.[223] Police tased Tank to stop the attack on Kit, resulting in Kit also being tased.[224] Tank then lunged at an officer, causing police to fire on him, and Kit was also shot in her foot.[225] Kit's injuries required hospitalization for a week, twenty-nine staples to the bite wounds, and surgically implanted hardware in her foot to address the gunshot wound.[226]

Tank's owners had homeowners insurance, but the insurance policy had an express and unambiguous exclusion for subsequent injuries by the same dog, stating "we do not cover" "bodily injury or property damage caused by . . . [a]ny dog with a prior history of causing: (1) Bodily injury to a person," which is "established through insurance claims records, or through the records of local public safety, law enforcement or other similar regulatory agency."[227] The attack in this case was clearly excluded from coverage.[228] The plaintiffs and the homeowners sought reformation of the policy, but the Wisconsin court of appeals soundly rejected this effort, finding no factual basis for mutual mistake because the homeowner never asked for coverage for a dog with a prior history of causing injury (and he never even told the insurer about the prior injury), and no facts showed that the insurance agent understood the homeowner to be seeking such coverage and mistakenly failed to include it.[229]

The plaintiffs and the homeowners also argued that Wisconsin's public policy protecting and compensating those injured by dog bites necessarily

217. *Id.* at *14–15.
218. *Id.* at *17–19.
219. *Id.* at *21.
220. 917 N.W.2d 234 (Table); 2018 Wisc. App. LEXIS 496 (Wis. Ct. App. 2018).
221. 2018 Wisc. App. LEXIS 496, at *3.
222. *Id.* at *1–3.
223. *Id.* at *2.
224. *Id.*
225. *Id.* at *2–3.
226. *Id.*
227. *Id.* at *4–5.
228. *Id.*
229. *Id.* at *5–6.

inferred a policy that insurers of dog owners must cover all injuries caused by dogs, regardless of any prior history of causing injury.[230] The Wisconsin Court of Appeals again unequivocally rejected this reasoning. The enactment of a strict liability statute for injuries caused by dogs does not mean that public policy also requires insurers to pay for damages caused by a known vicious dog.[231] Insurers are free to contractually exclude such dogs from coverage.[232] In one of the final attempts to invoke some coverage, the plaintiffs and the homeowners urged that, even if there was no coverage for the dog attack itself, there was coverage for Kit's tasing and gunshot from the responding officers.[233] The court again rejected this argument. Under Wisconsin's "independent concurrent cause rule," there is coverage for an independent concurrent cause only if it itself is the basis for a claim independently of the occurrence of the excluded risk.[234] Here, the police-caused injuries were not independent of Tank's attack, and thus were excluded from coverage. The homeowners' liability for the police-caused injuries existed only because of the dog attack.[235]

230. *Id.* at *11.
231. *Id.*
232. *Id.* at *11–12.
233. *Id.* at*12.
234. *Id.* at *14–15.
235. *Id.* at *16–17.