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JOSEPH OWENS, Legal Guardian of KALEIGH OWENS, Plaintiff v. HUMANE SOCIETY OF CAMBRIA COUNTY, INC., Defendant

3196-2006

COURT OF COMMON PLEAS OF PENNSYLVANIA, CAMBRIA COUNTY

2012 PA Sup. Ct. Motions LEXIS 2; 2006 PA C.P. Ct. Motions 585968

January 6, 2012

Response to Motion for Summary Judgment and Brief in Support

COUNSEL: **[*1]** Filed on behalf of Plaintiff: Joseph Owens, Legal Guardian of Kaleigh Owens.

Counsel of Record for this Party: Jeffrey A. Pribanic, Pa. I.D. No.: 56808, Christopher Buck, Ph.D., *[on the Response/Brief]*, Pa. I.D. No.: 205265, PRIBANIC & PRIBANIC, L.L.C., White Oak, PA.

JUDGES: Hon. Norman A. Krumenacker, III, Judge

EXPERT NAME: Jeffrey C. Woods, CPDT.

TEXT: JURY TRIAL DEMANDED

TITLE:

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, Joseph Owens, Legal Guardian of Kaleigh Owens—by and through his counsel, Jeffrey A. Pribanic and Dr. Christopher Buck of Pribanic & Pribanic, LLC—and files the within *Response to Motion for Summary Judgment*. In support of the argument that this case is ripe for a jury determination, Plaintiff avers as follows:

1. The averments set forth in Paragraph 1 of Defendant's *Motion for Summary Judgment* are admitted.

2. Insofar as the averments set forth in Paragraph 2 of Defendant's *Motion for Summary Judgment* express conclusions of law and/or legal arguments, therefore no response is required. To the extent that any averments of said Paragraph **[*2]** are deemed to require a response, the same are denied, for reasons fully set forth in Plaintiff's *Brief in Support of Response to Motion for Summary Judgment*, attached hereto and incorporated by reference herein.

3. The averments set forth in Paragraph 3 of Defendant's *Motion for Summary Judgment* are admitted, in part (as to Defendant's selective factual allegations based on the evidence of record), and are denied, in part (as to any factual and/or legal inferences or conclusions, express or implied therefrom), for the reasons fully set forth in Plaintiff's *Brief in Support of Response to Motion for Summary Judgment*.

4. The averments set forth in Paragraph 4 of Defendant's *Motion for Summary Judgment* are admitted, in part (as to Defendant's selective excerpts from Plaintiff's expert report), and are denied, in part (as to any factual and/or legal inferences or conclusions, express or implied therefrom), for the reasons fully set forth in Plaintiff's *Brief in Support of Response to Motion for Summary Judgment* Please note that Plaintiff's expert's *Addendum to the Canine Behavior Evaluation of Joey*, dated December 1, 2011, which more fully articulates **[*3]** Plaintiff's expert opinion, is appended to Plaintiff's attached *Brief*.

5. The averments set forth in Paragraphs 5(a) and 5(b) (so referenced because there are two paragraphs marked as Paragraph "5") of Defendant's *Motion for Summary Judgment* express conclusions of law and/or legal arguments to which no response is required. To the extent that any averments of said Paragraph(s) of Defendant's *Motion for*

Summary Judgment are deemed to require a response, the same are denied, for the reasons fully set forth in Plaintiffs *Brief in Support of Response to Motion for Summary Judgment*.

6. The averments set forth in Paragraph 6 of Defendant's *Motion for Summary Judgment* express conclusions of law and/or legal arguments to which no response is required. To the extent that any averments of said Paragraph of Defendant's *Motion for Summary Judgment* are deemed to require a response, the same are denied, for the reasons fully set forth in Plaintiff's *Brief in Support of Response to Motion for Summary Judgment*.

WHEREFORE, premises considered, Plaintiff respectfully requests that this Honorable Court deny Defendant's *Motion for Summary Judgment*

Respectfully **[*4]** submitted,

/s/ Christopher G. Buck

Christopher Buck, Ph.D., Associate Attorney
[On the Response/Brief]

Jeffrey A. Pribanic, Lead Attorney
1735 Lincoln Way
White Oak, PA 15131

Counsel for Plaintiff

CERTIFICATE OF SERVICE

On this 6th day of January, 2012, I hereby certify that a true and correct copy of the foregoing *RESPONSE TO MOTION FOR SUMMARY JUDGMENT, BRIEF IN SUPPORT OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT* and *PROPOSED ORDER* has been served on the Party listed below, by way of:

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By: /s/ Christopher G. Buck

Christopher Buck, Ph.D., Associate Attorney
[On the Response/Brief]

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[*5] *Counsel for Plaintiff*.

TITLE:

Brief in Support of Response to Motion for Summary Judgment

NOW COMES Plaintiff, Joseph Owens, Legal Guardian of Kaleigh Owens—by and through his attorneys, Jeffrey A. Pribanic and Dr. Christopher Buck of Pribanic & Pribanic, LLC—and files the within *Brief in Support of Response to Motion for Summary Judgment* In support of the argument that this case should go to the jury, Plaintiff avers as follows:

Before this Court is Defendant's *Motion for Summary Judgment* and supporting *Brief* The purpose of the summary judgment rule (Pa.R.C.P. 1035.2) is to pierce the pleadings and to assess the proof in order to see whether there is genuine warrant for trial. **n1** Summary judgment does not determine jury questions, but determines whether questions exist for the jury. It is not within the purview of summary judgment to try a case, but rather to ascertain whether a case is triable. While summary judgment promotes judicial economy, it denies the nonmoving party (usually the plaintiff) of its day in court. Summary judgment is therefore a harsh remedy that should be applied sparingly. A case cannot be foreclosed if there is an open question, and where the record affords no clear answer regarding an issue of material **[*6]** fact, then the open question remains a jury question.

.....

n1 *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996).

.....

For this Honorable Court's consideration, the instant *Brief* demonstrates that there are genuine issues of material fact ripe for jury determination. Accordingly, this *Brief* not so much argues the merits of the case, or the demerits of Defendant's argument, but rather the existence of unresolved issues that could be argued either way, not just one way. It is not the province of this Court to decide the merits, but to determine whether any merits exist in the evidence adduced, in this case, by Plaintiff.

SUMMARY JUDGMENT STANDARD

Summary judgment should not be granted unless a trial is clearly unnecessary. In order to survive a motion for summary judgment, the non-moving party must establish genuine issues of material fact warranting a *prima facie* case capable of returning a jury verdict in its favor, in order to determine whether a trial is appropriate:

> We have **[*7]** stated that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case (or, in some matters, issues in a case) where a party lacks the beginnings of evidence to establish or contest a material issue. ...
>
> We find the reasoning of the United States Supreme Court to be persuasive, and therefore adopt it. Thus, we hold that a non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **n2**

.....

n2 *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).). See also, Pa.R.C.P. 1035.2.

.....

[*8] In summary judgment proceedings, it is not the Court's function to determine the facts, but only to determine if a genuine issue of material fact exists. **n3** The moving party bears the burden of proof that no genuine issue exists as to any material fact and thus is entitled to judgment as a matter of law. **n4** An issue is "genuine" if sufficient evidence exists from which a reasonable fact finder could find for the

non-moving party. **n5** The court must "determine whether the record documents a question of material fact concerning an element of the claim or defense at issue." **n6** A material fact is outcome-determinative: "A material fact is one that directly affects the outcome of the case." **n7** A disputed material fact thus triggers a genuine issue of material fact.

n3 *Schriver v. Mazziotti*, 638 A.2d 224, 226 (Pa. Super. 1994).

n4 *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 468-69 (Pa. 1979).

n5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

n6 *Fort Cherry Sch. Dist. v. Gedman*, 894 A. 2d 135, 139 (Pa. Super. 2006).

[*9]

n7 *Kuney v. Benjamin Franklin Clinic*, 751 A. 2d 662, 664 (Pa. Super. 2000).

Put another way, summary judgment may be granted "only in those cases which are clear and free from doubt." **n8** and where a trial is neither necessary nor warranted. In deciding a motion for summary judgment, where the evidence of the party having the burden of proof is oral testimony, the credibility of that testimony is always for the jury. **n9** "Where the facts are disputed, where there is any reasonable doubt as to the inference to be drawn from them, or when the measure of duty is ordinary and reasonable care and the degree varies according to the circumstances, the question cannot in the nature of the case be considered by the court; it must be submitted to the jury." **n10** "If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law." **n11**

n8 *Keystone Aerial Surveys, Inc. v. Pennsylvania Property & Casualty Ins. Guar. Ass'n.*, 777 A. 2d 84, 89 (Pa. Super 2001).

[*10]

n9 *Resolution Trust Corp. v. Urban Redevelopment Auth. of Pittsburgh*, 638 A. 2d 972, 975 (Pa. 1994).

n10 *Groner v. Hendrick*, 169 A.2d 302, 303 (Pa. 1961) (citing Esher v. Mineral R. R. & Mining Co. (No. 1), 28 Pa. Super. 387 (1905)).

n11 *Fort Cherry Sch. Dist. v. Gedman*, 894 A. 2d 135, 139 (Pa. Super. 2006).

ISSUES

I. Does a genuine issue of material fact exist as to whether Defendant's alleged violation of Pennsylvania's Dangerous Dog Statute constitutes negligence *per se*"?

Proposed Answer: Yes.

II. Does a genuine issue of material fact exist as to whether a temperament test can be admitted as "subsequent incident" evidence (subject to the Court's ruling on this issue) of the subject dog's "dangerous propensities" for jury determination?

Proposed Answer: Yes.

III. Does a genuine issue of material fact exist as to whether a jury could find that the Humane Society of Cambria County, as a purveyor of dogs, was under a duty to perform temperament testing prior to allowing [*11] the subject dog to be adopted, since the incident took place on Defendant's premises?

Proposed Answer: Yes.

IV. Does a genuine issue of material fact exist as to whether a jury could find that Joey, the subject dog, may have been "dangerous from playfulness" and that

Defendant was aware, or should have been aware, of this dangerous propensity?

Proposed Answer: Yes.

V. Does a genuine issue of material fact exist as to whether a jury could find, by a reasonableness standard, that at the moment that the dog knocked over the younger sister of Minor–Plaintiff, Defendant's agent was negligent in that he should have recognized the dangerous propensity of the dog and then to have immediately shouted to the dog, or have taken another instant action, to prevent the dog from biting Minor–Plaintiff in the face after she fell (or was knocked down)?

Proposed Answer: Yes.

VI. Does a genuine issue of material fact exist as to whether a could jury find, by a reasonableness standard, that Defendant should have performed an aggression assessment, as do an increasing number of animal shelters?

Proposed Answer: Yes.

VII. Does a genuine issue [*12] of material fact exist as to whether Plaintiff presented sufficient evidence of prior knowledge on the part of the Defendant as to the possible dangerous propensity of its dog to present a question for the jury?

Proposed Answer: Yes.

ARGUMENT

I. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEFENDANT'S ALLEGED VIOLATION OF PENNSYLVANIA'S DANGEROUS DOG STATUTE, 3 P.S. § 459-502-A, CONSTITUTES NEGLIGENCE *PER SE*.

A. Under the *Miller* rule, Defendant's violation of Pennsylvania's Dangerous Dog Statute, 3 P.S. § 459-502-A is sufficient to establish, for jury determination, Defendant's "unexcused violation of the Dog Law is negligence *per se*" and "as the standard for determining whether" Defendant "has complied with the common law duty to exercise ordinary care."

The Pennsylvania Supreme Court has affirmed that a court may regard a statute as the standard of conduct for a tort action: "A statute providing for criminal liability but not civil liability leaves a court free to accept or not accept the legislatively established standard of conduct for purposes of a tort action." **n12** Pennsylvania's Dog Law is a regulatory statute, administered and **[*13]** enforced by the Department of Agriculture (Title 7, Chapter 27 of the Pa. Code), and not a penal statute. **n13** Violation of this statute has been found to be negligence per se. In a footnote in Defendant's *Brief in Support of Motion for Summary Judgment*, the Humane Society of Cambria County, Inc., correctly notes that "*Miller* overruled *Freeman* to the extent that Freeman rejected the notion that an unexcused violation of the Dog Law constitutes negligence *per se*." **n14** Stated directly, the Pennsylvania Superior Court has explained: "*Miller* ... held that an *unexcused* violation of the Dog Law is negligence *per se*." **n15** In *Miller v. Hurst, 448 A.2d 614, 618 (Pa. Super. 1982)*, the Pennsylvania Superior Court enunciated this rule:

> We conclude that a society which has become as urbanized as it presently exists in Pennsylvania can no longer permit dogs to run free without imposing responsibility ... This, we believe, was the intent of the

legislature when it enacted the Dog Law of 1965 ... enacted as part of a statute intended to protect the public from personal injury ... created by roving dogs. Indeed, Section 702 is directly supplemented **[*14]** by Section 501 [3 P.S. § 460-501] which provides specific remedies to persons who have sustained bodily injury ... caused by unrestrained dogs.

Section 286 of the *Restatement (Second) of Torts* suggests that "a *court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment ....*" These are the considerations which prompted enactment of the Dog Law. We are unable to perceive any good reason for failing to adopt the requirement of the statute as the standard for determining whether a person has complied with the common law duty to exercise ordinary care.

We conclude, therefore, that an unexcused violation of the Dog Law is negligence *per se*. *Restatement (Second) of Torts*, § 288B. **n16**

.....

n12 *Manning v. Andy*, 310 A.2d 75, 80 (Pa. 1973).

.....

n13 *Commonwealth v. Hake*, 738 A.2d 46, 47, n.3 (Pa. Comwlth. 1999).

.....

n14 *Defendant's Brief in Support of Motion for Summary Judgment*, p. 8, n. 3 (citing *Miller v. Hurst*, 448 A.2d 614 (Pa. Super. 1982)).

.....

n15 *Underwood v. Wind, 954 A.2d 1199, 1204 (Pa. Super. 2008)* (jury instruction allowing for consideration of a single incident of infliction of severe injury or attack on a human being in determination of a dog's propensity to attack was proper).

.....

[*15]

.....

n16 *Miller v. Hurst*, 448 A.2d 614, 618 (Pa. Super. 1982) (superseded by procedural statute in *Billig v. Skvarla*, 853 A.2d 1042 (Pa. Super. 2004)).

.....

Even the dissent agreed with this rule: "I add my concurrence to their ruling that an unexcused violation of the 'Dog Law' constitutes negligence *per se*." **n17**

.....

n17 *Miller v. Hurst*, 448 A.2d at 620.

.....

Consistent with this social policy position under Pennsylvania law, there is other case law authorizing single incident evidence of a dog's dangerous propensity, which is an elements that must be proven in order to establish that a person is guilty of the offense of harboring a dangerous dog. The Pennsylvania Commonwealth Court explained its interpretation of the 1996 amendments to the Pennsylvania Dog Law in terms of legislative purpose pursuant to social policy interests:

> Most importantly, the 1996 amendments specifically **[*16]** provide that the propensity to attack may be proven by a single incident of the infliction of severe injury or attack on a human being, clearly permitting a finding of a "propensity" to attack human beings by virtue of the attack in question, even if it is only the first attack. While this interpretation may impose absolute criminal liability for any unprovoked attack by the owner or keeper's dog, such an interpretation is not without basis in predecessor dog statutes ...
>
> The 1996 amendments [present 502-A of the Dog Law] clearly address the legislature's response to holdings, such as *Eritano* [*Eritano v. Commonwealth, 690 A.2d 705 (Pa. 1997)]* which required multiple incidents before liability could have been imposed. The 1996 amendments added specific words such as "single incident" to ensure that where it is clear from one attack that a dog is dangerous, that the "owners or keepers" are criminally liable for the

summary offense of harboring a dangerous dog. **n18**

.....

n18 *Commonwealth v. Baldwin*, 767 A.2d 644, 646–647 (Pa. Comwlth. 2001). See also *Underwood ex rel. Underwood v. Wind*, 954 A.2d 1199, 1205 (Pa. Super. 2008); *Commonwealth v. Hake*, 738 A.2d 46 (Pa. Comwlth. 1999).

.....

[*17] To show that, as applied to the facts of this case, Defendant's "unexcused violation of the Dog Law is negligence *per se*" and "as the standard for determining whether" Defendant "has complied with the common law duty to exercise ordinary care." Plaintiff will now make out a *prima facie* case for Defendant's violation of Pennsylvania's Dangerous Dog Statute, 3 P.S. § 459-502-A, which statute provides:

> (a) SUMMARY OFFENSE OF HARBORING A DANGEROUS DOG.—Any person who has been attacked by one or more dogs, or anyone on behalf of the person, a person whose domestic animal, dog or cat has been killed or injured without provocation, the State dog warden or the local police officer may file a complaint before a magisterial district judge, charging the owner or keeper of the a dog with harboring a dangerous dog. The owner or keeper of the dog shall be guilty of the summary offense of harboring a dangerous dog if the magisterial district judge finds beyond a reasonable doubt that the following elements of the offense have been proven:
>
> (1) The dog has done any of the following:
>
> (i) Inflicted severe injury on a human being without provocation on public or private property. **[*18]**
>
> (ii) Killed or inflicted severe injury on a domestic animal, dog or cat without provocation while off the owner's property.
>
> (iii) Attacked a human being without provocation.
>
> (iv) Been used in the commission of a crime.
>
> (2) The dog has either or both of the following:
>
> (i) A history of attacking human beings and/or domestic animals, dogs or cats without provocation.
>
> (ii) A propensity to attack human beings and/or domestic animals, dogs or cats without provocation. A propensity to attack may be proven by a single incident of the conduct described in paragraph (1)(i), (ii), (iii) or (iv).
>
> (3) The defendant is the owner or keeper of the dog.

The three required elements—beginning with the third, then first, and then the second elements of this section of the Dog Law (i.e. the Dangerous Dog Statute)—are set forth in the following elemental analysis:

B. The third element of the Dog Law is met since it is an undisputed fact that the Defendant, Humane Society of Cambria County, Inc., was the owner and keeper of "Joey," the subject dog, thus satisfying the requirements of P.S. § 459-502-A(a)(3).

Here, Plaintiff can establish the third **[*19]** element in that the Defendant, the Humane Society of Cambria County, was the owner and keeper of the subject dog, "Joey," as this fact is undisputed. **n19** Furthermore, Section 102 of the Dog Law defines "Owner" as follows:

When applied to the proprietorship of a dog, includes every person having a right of property in such dog, and every person who keeps or harbors such dog or has it in his care, and every person who permits such dog to remain on or about any premises occupied by him. **n20**

n19 Suppose this fact were to be contested, in that this incident occurred after the pet adoption papers were signed and the new owners took possession. Under Pennsylvania law, even a landlord out of possession may be held liable for injuries by an animal owned and maintained by the tenant when the landlord has knowledge of the presence of the dangerous animal and where the landlord has the right to control. *Palermo v. Nails, 483 A.2d 871, 873 (Pa. Super. 1984)*.

n20 3 P.S. § 459-102 (2011). Definitions.

[*20] Here, the Humane Society permitted Joey "to remain on or about any premises occupied by him" (i.e. the premises owner).

C. The first element of the Dog Law is met since it is an undisputed fact that "Joey" (1) attacked Minor–Plaintiff, Kaleigh Owen, without provocation; and/or (2) inflicted severe injury on Kaleigh, without provocation, on the private property of the Defendant, Humane Society of Cambria County, Inc., thus satisfying the requirements of P.S. § 459-502-A(a)(l)(iii) and (i).

Section 102 of the Dog Law defines "Attack" as follows: "The deliberate action of a dog, whether or not in response to a command by its owner, to bite, to seize with its teeth or to pursue any human, domestic animal, dog or cat." **n21** Instantly, Joey deliberately proceeded "to bite, to seize with its teeth or to pursue" Minor–Plaintiff, Kaleigh Owens, on June 8, 2006. More than one bite occurred:

Q. Were you able to tell what was—did the dog just bite one time or what did you notice about— ?

A. He tried different times to try to get a better bite on the face. We had gotten him off one time, released him from her face, tried to get them separated and then he got her again, **[*21]** came back a second time. **n22**

n21 3 P.S. § 459-102 (2011). Definitions.

n22 *Deposition of Richard Strushensky*, 36:23-25; 37:1–6.

Joey was not heard to growl or make any menacing noises or movements prior to the incident, as might indicate provocation by Kaleigh. **n23** Thus the "attack ... without provocation" element is met.

n23 *Deposition of Suzanne Rudy,* 48:10–18.

D. The second element of the Dog Law is met in that Joey had a propensity to attack Minor–Plaintiff, Kaleigh Owen, without provocation, which dangerous propensity may be proven by the subject incident whereby Joey: (1) attacked Minor–Plaintiff, Kaleigh Owen, without provocation; and/or (2) inflicted severe injury on Kaleigh, without provocation, within the terms of of P.S. § 459-502-A(a)(1)(iii) and (i).

Pennsylvania has enacted its Dangerous **[*22]** Dog Law to provide an alternative to the common-law remedy available only to those who could plead and prove that the dog's owner either knew or should have known of that dog's propensity to injure. The Pennsylvania Superior Court has stated that "'the propensity to attack may be proven by a single incident of the infliction of severe injury or attack on a human being, clearly finding a 'propensity' to attack human beings by virtue of the attack in question, even if it is only the first attack'." **n24**

Thus the Dog Law renders a dog legally "dangerous" if that dog inflicts serious injuries on a person just once.

.....

n24 *Underwood v. Wind*, 954 A.2d 1199 (Pa. Super. 2008) (quoting *Commonwealth v. Hake*, 738 A.2d 46, 49 (Pa. Cmwlth. 1999).) See also *Commonwealth v. Baldwin*, 767 A.2d 644, 646 (Pa. Cmwlth. 2000).

.....

Plaintiff has presented sufficient evidence for a *prima facie* case of a violation of 3 P.S. § 459-502-A, such that summary judgment is not justifiable. **[*23]** To the contrary, criminal liability, that is, negligence per se, has been sufficiently established by Plaintiff to warrant submission to a jury, as a single incident is an offer of proof, not a conclusive proof:

> We note, however, that the statutory language does not provide that a single incident of attacking a human being *proves* a propensity to attack, *only that it may prove* such propensity. It appears that a plaintiff may prove a cause of action by establishing the facts of a single incident, but a defendant will have the opportunity, and burden, of proving that such incident does not rise to a determination of a "propensity" to attack. *It is axiomatic that such determination will be left for the trier of fact*. **n25**

.....

n25 *Rosen v. Tate*, 64 Pa. D. & C.4th 524, 531-32 (Pa. Cmwlth. 2003) (emphasis added).

.....

Under the *Miller* rule, Defendant's violation of Pennsylvania's *Dangerous Dog Statute*, 3 P.S. § 459-502-A is sufficient to establish, for jury determination, Defendant's **[*24]** "unexcused violation of the Dog Law is negligence *per se*" and "as the standard for determining whether" Defendant "has complied with the common law duty to exercise ordinary care."

> Where proof of negligence rests upon a violation of the Dog Law, liability does not attach unless the violation is a substantial factor in bringing about the injuries sustained. ... These issues, however, will normally be for the trier of the facts. **n26**

.....

n26 *Miller v. Hurst*, 448 A.2d at 619.

.....

The Pennsylvania Supreme Court has, in dicta, referred to the *Miller* rule: "... [regarding] those legislative enactments whose violation is considered to constitute negligence per se, compare *Miller v. Hurst*, 302 Pa. Super. 235, 448 A.2d 614, 618 (1982) (violation of law requiring dog to be kept on leash constitutes negligence *per se*)." **n27** Where Plaintiff's proof of negligence rests upon a violation of the Dog Law, having alleged that the violation is a substantial factor in bringing about **[*25]** the injuries sustained, these issues are now ripe for a jury determination.

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n27 *Shamnoski v. PG Energy*, 858 A.2d 589, 602 (Pa. 2004).

.....

E. Because "Pennsylvania had previously adopted *Restatement (Second) of Torts* § 286 (1965), which provides that courts can define the standard of a 'reasonable man' by adopting standards of conduct from legislative enactments designed to protect a class of individuals." Plaintiff has satisfied his burden of establishing that Defendant's conduct was negligent, and therefore such negligence is ripe for a jury determination.

The rule in Pennsylvania is that violation of a statute is negligence *per se*. **n28** The Court in *McCloud* described this premise as follows:

> Negligence *per se* begins with the recognition that ordinances as well as statutes regulate conduct. As these regulate conduct they can also be said to impose legal obligations on individuals and cause people to conform their behavior to what is mandated by the ordinance or statute. **[*26]** *The law has acknowledged this and has held that, through an individual's violation of a statute or ordinance, it is possible to show that the individual has breached*

his duty to behave as a reasonable person: in other words, that the individual is "negligent per se." **n29**

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n28 *Garcia v. Bang*, 544 A.2d 509 (Pa. Super. 1988).

.....

n29 *McCloud v. McLaughlin*, 837 A.2d 541, 545 (Pa. Super. 2003) (emphasis added).

.....

The Court in *McCloud* explained that "before an individual can be held negligent *per se*, his violation of the statute or ordinance must 'cause harm of the kind the statute was intended to avoid and to a person within the class of persons the statute was intended to protect'." **n30** Whether a plaintiff can assert a cause of action based on negligence *per se* is closely related to the question of whether a private cause of action exists under a statute. The Third Circuit Court of Appeals has explained that the duty, or standard of conduct, required by a reasonable **[*27]** person in a particular situation may be established by legislative fiat:

> Most formulations of the standards for implying a private cause of action center on the presence or absence of a legislative intent to impose civil liability. In theory, at least, application of the negligence *per se* doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability. Both, however, address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability. **n31**

.....

n30 Id. (citation omitted).

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n31 *Frederick L. v. Thomas*, 578 F.2d 513, 517, n.8 (3d Cir. Pa. 1978).

.....

Pennsylvania has adopted Section 286 of the *Restatement (Second) of Torts §* 286, which provides:

> § 286. *When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted*
>
> The court may adopt as the standard of conduct of a reasonable man the requirements **[*28]** of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

The Pennsylvania Supreme Court has recently has affirmed that this is good law in Pennsylvania: "We have previously relied upon this Section and accepted it as an accurate statement of the law." **n32** In 2008, the Pennsylvania Supreme Court reiterated that "Pennsylvania had previously adopted *Restatement (Second) of Torts* § 286 (1965), which provides that courts can define the standard of a 'reasonable man' by adopting standards of conduct from legislative enactments designed to protect a class of individuals." However, "[a] finding of negligence *per se* does no more than satisfy plaintiffs burden of establishing that a defendant's conduct was negligent." **n33** In *Rosen v. Tate,* the Court found:

> In addition, *the legislature expanded* **[*29]** *what constitutes a dangerous dog by including a category of dogs that does not have a history of attacking without provocation, but does have a propensity to attack without provocation*. Further, under certain circumstances, that propensity to attack may be proven from the incident at issue. Nothing in the new statutory language

changes the purpose for which the Dog Law was originally enacted. Accordingly, we find that section 459502-A of the Dog Law is an appropriate standard for determining whether a person has complied with the common-law duty to exercise ordinary care, and a violation of said statute constitutes negligence *per se*. **n34**

n32 *Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 (Pa. 1983).

n33 Id. at 518 n.4.

n34 *Rosen v. Tate,* 64 D & C 4th 524, 530-531 (C.C.P. Lehigh Co. 2003).

It is well established under Pennsylvania law that "[t]he concept of negligence *per se* establishes both duty and the required breach of duty where an individual **[*30]** violates an applicable statute, ordinance or regulation designed to prevent a public harm." **n35** Instantly, Defendant's alleged violation of the Dog Law is sufficient to establish negligence per se as the Minor–Plaintiff, Kaleigh Owens (victim of the attack by Joey, the Alaskan Malamute), is in the class of persons (i.e potential victims of a dog attack) that the Dog Law was intended to protect from a prevent a public harm (i.e. attack by a dog).

n35 *Braxton v. Dep't of Transp.*, 634 A.2d 1150, 1157 (Pa. Cmwlth. 1993).

With regard to violation of P.S. § 459-502-A(a)(3) for the purpose of establishing negligence *per se*, Plaintiff has satisfied his burden of establishing Defendant's duty of care and breach of that duty, and therefore such negligence is ripe for a jury determination.

F. Under a *Restatement (Second) of Torts* § 286 analysis, (1) Minor–Plaintiff was in class of those individuals the statute was intended to protect; (2) the Dog Law applies to Defendant; (3) Defendant violated [*31] the Dog Law; and (4) Defendant's violation of the Dog Law factually caused Minor–Plaintiff's injuries.

The Pennsylvania Superior Court has set forth the following *Restatement (Second) of Torts* § 286 test for the purpose of determining negligence *per se*:

> In order to prove a claim based on negligence *per se*, the following four requirements must be met:
>
> (1) The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;
>
> (2) The statute or regulation must clearly apply to the conduct of the defendant;
>
> (3) The defendant must violate the statute or regulation;
>
> (4) The violation of the statute or regulation must be the proximate cause of the plaintiff's injuries. **n36**

n36 *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. 1996).

Under a *Restatement (Second) of Torts* § 286 analysis, Plaintiff can show: (1) Minor–Plaintiff, Kaleigh Owens, was in class of those individuals the statute **[*32]** was intended to protect (i.e. "[a]ny person who has been attacked by one or more dogs"); (2) the Dog Law applies to Defendant, the Humane Society of Cambria County, as the owner and purveyor of "Joey," the subject Alaskan Malamute; (3) Defendant violated the Dog Law (having met all three required elements (see I. (B), (C) and (D), *supra*); and (4) Defendant's violation of the Dog Law, per Joey's attack, factually and proximately caused Kaleigh's injuries.

II. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER A TEMPERAMENT TEST CAN BE ADMITTED AS "SUBSEQUENT INCIDENT" EVIDENCE (SUBJECT TO THE

COURT'S RULING ON THIS ISSUE) OF THE SUBJECT DOG'S "DANGEROUS PROPENSITIES" FOR JURY DETERMINATION.

In *Crance v. Sohanic,* the Pennsylvania Superior Court held that subsequent incidents were admissible at trial to show that the subject dog had dangerous propensities:

> **Evidence of subsequent behavior.**
>
> Pennsylvania courts, to our knowledge, have never discussed whether evidence of a dog's subsequent bites is properly admissible in a dog bite case. The plaintiff argues that the evidence was relevant to whether the defendants knew the dog was vicious, and that **[*33]** evidence of vicious behavior after the bite which led to this suit would tend to show the defendants knew the animal was prone to bite.
>
> The trial court held that evidence of subsequent bites was probative on the issue of the dog's nature. Under the circumstances of this case, where the plaintiff was using the evidence to show the dog had a vicious nature, the evidence was relevant. **n37**

n37 *Crance v. Sohanic*, 496 A.2d 1230, 1233 (Pa. Super. 1985).

Plaintiff argues that the SAFER test, performed on the August 11, 2007 by Plaintiff's Canine Behavior Consultant, Jeffrey C. Woods, CPDT, is admissible as a subsequent incident to demonstrate to the jury that Joey exhibited dangerous propensities, namely:

> *With [the] strong prey drive of the Alaskan Malamute[,] one must be careful when young children are present, due to the quick reactions they may have with the fast movement of children. The Alaskan Malamute may interpret these fast movements of children as prey and react* **[*34]** *with a quick snap and hold[,] just as Joey demonstrated with his squeak toy and the wing on the pole during testing.* With Joey's high[ly] excitable state of mind when he was outside walking and his confident attitude[,] I understand his propensity to possibly snap at and or bite at a young child. **n38**

n38 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Canine Behavior Evaluation." August 11, 2007, p. 5. (Exhibit 1, attached hereto and incorporated by reference herein.)

III. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER A JURY COULD FIND THAT THE HUMANE SOCIETY OF CAMBRIA COUNTY, AS A PURVEYOR OF DOGS, WAS UNDER A DUTY TO PERFORM TEMPERAMENT TESTING PRIOR TO ALLOWING THE SUBJECT DOG TO BE ADOPTED, SINCE THE INCIDENT TOOK PLACE ON DEFENDANT'S PREMISES.

The Restatement (Second) of Torts: Liability for Harm Done by Domestic Animals that Are Not Abnormally Dangerous § 518 (1977) enunciates the principle of injury-by-animal law. It is cited with approval by the Pennsylvania **[*35]** Superior Court **n39** and so presumably Pennsylvania follows this section of the Restatement. Used in determining a person's liability for harm caused by a domestic animal within that person's control, § 518 provides:

> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,
>
> (a) he intentionally causes the animal to do the harm, or
>
> (b) he is negligent in failing to prevent the harm.

This section applies to a dog owner, because a dog meets the definition of a "domestic animal," which the *Restatement* elsewhere defines as "an animal that is by custom devoted to the service of mankind at the time and in the place

in which it is kept." *The Restatement (Second) of Torts* § 506.

Comment "f" to *The Restatement (Second) of Torts §* 518 explains: "The amount of care that the keeper of a domestic animal is required to exercise is commensurate with the character of the animal." Comment "h" adds, in part:

> One who keeps a domestic animal that possesses only those dangerous propensities that are normal to **[*36]** its class is required to know its normal habits and tendencies. He is therefore, required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm.

Comment "k" states further:

> Even if a dog is permitted to run at large, there are circumstances that would result in negligence by permitting such animal to do so. **n39**
>
> .....
>
> **n39** *Kinley v. Bierly*, 876 A.2d 419, 422 (Pa. Super. 2005).
>
> .....

Of course, application of this principle requires a fact-intensive application and analysis that should be considered by a jury. The Arizona Supreme Court further explains:

> This subsection is applicable to domestic animals such as a horse or cow which can be confined to the premises of their keepers or otherwise kept under control without seriously affecting their usefulness and which are not abnormally dangerous. ... The owner or keeper is required to know the normal habits and tendencies of **[*37]** animals of its class, realizing that even ordinarily gentle animals are likely to be dangerous under particular circumstances. **n40**
>
> .....
>
> **n40** *Vigue v. Noyes*, 550 P.2d 234, 240 (Ariz. 1976).
>
> .....

In the case at bar, the evidence is sufficient to submit this case to the jury on the question of whether this canine, given his size and weight and playful propensity, was foreseeably dangerous for the Minor–Plaintiff, Kaleigh Owens. Here, Defendant retained control over the area where the incident occurred. There is substantial evidence that the characteristics of these characteristics created a foreseeable risk of harm. It is undisputed that Joey was extremely playful and rambunctious around staff and guests on the premises. This evidence shows a foreseeable risk of harm.

Plaintiff submits that § 518 is the appropriate principle to apply if the injury occurs on the premises of the keeper of the animal, so long as the condition of those premises in no way contributed to the injury. Since the facts in **[*38]** this case, taken most favorably to Plaintiff, present a fact-finder's question as to Defendant's negligence in his control of the subject dog, and showed no connection between the injury and any condition of the premises, it would be error to grant summary judgment for the Defendant.

In summary, Defendant had a duty to exercise reasonable care to protect Kaleigh from unreasonable risk of harm while she was interacting with Joey on Defendant's premises. Whether Defendant breached that duty is a genuine issue of material fact. Reasonable minds could differ whether it was foreseeable that a child, interacting with a large, playful dog on the premises, could fall down and then bitten without any signs of viciousness on the dog's part.

IV. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER A JURY COULD FIND THAT JOEY, THE SUBJECT DOG, MAY HAVE BEEN "DANGEROUS FROM PLAYFULNESS" AND THAT DEFENDANT WAS AWARE, OR SHOULD HAVE BEEN AWARE, OF THIS DANGEROUS PROPENSITY.

The law of Pennsylvania places the burden of proof of prior knowledge by the owner of a domestic animal's dangerous propensity upon

the plaintiff: "The owner of a dog is not responsible for the consequences of the **[*39]** dog's bite if he has no reason to know the viciousness or dangerous propensities of the dog beforehand." **n41** The question to be decided is whether or not the injured Minor–Plaintiff has produced any evidence from which a jury could conceivably find that the owner of the dog which attacked the minor had prior knowledge, whether actual or constructive, of its dangerous propensities.

.....

n41 *Freeman v. Terzya, et al.*, 323 A.2d 186 (Pa. Super. 1974) (cases cited), overruled on other grounds by *Miller v. Hurst*, 302 Pa. Super. 235 (1982); *Clark v. Clark*, 215 A.2d 293 (Pa. Super. 1965) (cases cited).

.....

In an action against the owner or harborer of a dog for injury inflicted by it, an essential element of the cause of action is defendant's actual or constructive knowledge of the vicious or dangerous propensities of the dog. it is Plaintiff's burden to show any such propensity. A dog does not have to be vicious in order to be dangerous. A dog may even be playful, yet have **[*40]** a dangerous propensity. The Pennsylvania Superior Court has stated:

> In the instant case, there was testimony that the dog in question, was large and would jump up on people in a "friendly" manner. In *Groner v. Hendrick, 403 Pa. 148, 169 A.2d 302 (1961),* the Supreme Court held, *463 Pa. at 303, 169 A.2d 302:*
>
> > "A large, strong, and overly friendly dog may be as dangerous as a vicious one, and one recital of the dog's behaviour at home is enough to bring knowledge to his owners' when considered together with its size and their apparent knowledge that it might jump up on people." **n42**

.....

n42 *Snyder v. Milton Auto Parts, Inc.*, 428 A. 2d 186, 188 (Pa. Super. 1981). See also *Clark v. Clark*, 215 A.2d 293, 295 (Pa. Super. 1965) (citing *Groner v. Hendrick*, 169 A.2d 302, 303 (Pa. 1961)).

.....

The Supreme Court further stated: "Since intention forms no part of an animal's assault and battery, the mood in which it inflicts harm **[*41]** is immaterial, so far as the owner's duty goes." **n43** The Snyder Court, immediately after citing *Groner,* held: "The plaintiff presented sufficient evidence of prior knowledge on the part of the defendant as to the possible dangerous propensities of its dogs to present a question for the jury." **n44** Plaintiff argues that this Honorable Court should hold likewise.

.....

n43 *Groner v. Hendrick*, 169 A.2d 302, 303 (Pa. 1961).

.....

n44 *Snyder v. Milton Auto Parts, Inc.*, 428 A. 2d at 188–89.

.....

In a case involving an Alaskan Malamute, which is the same breed of dog as Joey in the instant case, the dog, named Tosca, made a vicious and unprovoked attack upon the plaintiff, Billy Boosman, then five years of age, while he was a guest in the residence of the defendant. n45 Plaintiff produced evidence to show that Tosca had become "ill-natured and acquired the menacing habit of growling, bristling and snapping at people." **n46** Defendant argued that Tosca did not have a dangerous or vicious **[*42]** propensity. The court, however, was able to constructively impute knowledge of Tosca is dangerous propensity from the defendant's own evidence: "The jury was justified in returning a verdict on the basis that the injury to Billy resulted from a propensity of the dog to do bodily harm in anger—as the plaintiffs proof suggested—or from the playfulness and fawning nature of this large dog—inferable from defendant's evidence." **n47** Similarly, the Supreme Court of Missouri has held: "Whether the dog lunged or jumped at people out of anger or viciousness or out of playfulness is immaterial so long as the defendant had knowledge of the

fact that the dog had a tendency through his actions to injure persons." **n48**

n45 *Boosman v. Moudy*, 488 S.W.2d 917, 918 (Mo. Ct. APP 1972).

n46 *Boosman v. Moudy*, 488 S.W.2d at 920.

n47 *Boosman v. Moudy*, 488 S.W.2d at 921.

n48 *Dansker v. Gelb*, 352 S.W.2d 12, 16-17 (Mo. 1961) (citations omitted).

[*43] There is evidence that Defendant knew, or had good reason to know—in the words of the Pennsylvania Supreme Court in the case just cited: (A) that "Joey," the subject dog, was "a large, strong, and overly friendly dog"; (B) that Defendant had "apparent knowledge that Joey might jump up on people"; (C) that, given the dog's behavior at the Human Society when considered together with its size, this dog may have a propensity to pose a danger to children.

A. Evidence suggests that Defendant knew, or had good reason to know, that "Joey," the subject dog, was "a large, strong, and overly friendly dog."

"Joey," a Alaskan Malamute (not mixed), **n49** was a stray, brought to the Humane Society of Cambria County by Officer Andary, a Stonycreek Township police officer. **n50** Around four years old, this dog, a large mixed-Malamute male, was brought to the Humane Society of Cambria County on June 2, 2006. Prior to June 8, 2006, the date of the subject incident, Joey was in Defendant's custody for six days. **n51**

n49 *Deposition of Delores Black*, 85:15–20.

n50 *Police Incident Report* (Exhibit A, Defense Brief); *Statement of Officer Ardary*. (Exhibit B, Defense *Brief*.)

[*44]

n51 Humane Society of Cambria County, *Intake Records*. (Exhibit C, Defense *Brief*.)

B. Evidence suggests that Defendant had "apparent knowledge" that Joey "might jump up on people" and knock over a child:

Instantly, the absence of any evidence that Joey had ever before attacked or bitten anyone is not conclusive proof that the dog did not possess any vicious or dangerous propensity. Here, Joey manifested a dangerous propensity relative to small children (a tendency to knock them over), albeit not a vicious propensity or a dangerous propensity relative to adults. Therefore, Mr. Snyder, as agent of the Defendant, had constructive knowledge of the dog's dangerous propensity, because the knocking over of small children can present a danger to such children, even though no vicious behavior is evident. Mr. Snyder, moreover, had personal knowledge of Alaskan Malamutes, having owned three such dogs personally "when I was growing up." **n52** although he did not mention having knowledge of any dangerous or vicious characteristics of the breed. **n53**

n52 *Deposition of Ross Snyder*, 82:11–15.

[*45]

n53 *Deposition of Ross Snyder*, 82:14–17.

C. Evidence suggests that Defendant knew, or had good reason to know that, given the dog's behavior at the Human Society when considered together with its size, this dog may have a propensity to pose a danger to children.

There is persuasive precedent supporting the proposition that any proclivity of a dog to harm a child creates an inference of a dangerous propensity of which the owner, transferor, or keeper which knowledge may be constructively imputed to the handler of the dog in question:

"Any tendency of a dog to injure persons, whether the dog acts from a purpose to do bodily harm, from ill-temper, or only playfulness, is a dangerous propensity for which a keeper who has reason to know of such habit will be liable." **n54**

n54 *Boosman v. Moudy, 488 S.W.2d 917, 920 (Mo. APP 1972)* (citing *Dansker v. Gelb, Mo., 352 S.W.2d 12, 16*(5); 3 C.J.S. Animals § 148(c); 4 Am.Jur.2d, Animals, p. 342).

[*46]

D. A jury should be permitted to hear the testimony of Plaintiff's expert and Defendant's expert in order to make a determination as to whether or not the subject Alaskan Malamute would have shown signs of possible dangerousness had that dog then temperament tested prior to placement with the Owens family.

1. Malamutes have a strong, inbred "prey drive."

In his expert report (Exhibit l), **n55** Plaintiff's expert, Jeffrey C. Woods, CPDT (Canine Behavior Consultant), **n56** stated generally that Alaskan Malamutes have a strong "prey drive" or hunting instinct, which can be aroused around young children, due to quick movements and high-pitched voices, either or both of which the Malamute may instinctively interpret as "prey":

> Alaska Malamutes possess a strong "prey drive" which is part of the hunting instinct. *If it moves or squeals, a mal [Malamute] will chase —sometimes with dangerous consequences*. ... Mals should be taught caution and control around children. Besides their love of humans, they are also attracted to children because of the quick movements and high-pitched voices (similar to those of small hurt animals—a natural prey). Mals tend **[*47]** to play rough and due to their size and power, could injure a child without meaning to. **n57**

n55 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Canine Behavior Evaluation." August 11, 2007. (Exhibit 1, attached hereto and incorporated by reference herein.)

n56 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), CV. (Exhibit 3, attached hereto and incorporated by reference herein.)

n57 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Canine Behavior Evaluation." p. 2. (Exhibit 1.)

2. Pre-adoption temperament testing would have disclosed Joey's strong prey drive.

Specifically, Mr. Woods, after administering the SAFER test on the August 11, 2007 to Joey, concluded:

> During the testing, Joey exemplified a typical Alaskan Malamute specimen. He was confident, playful at certain times, independent and strong-willed. Although friendly to humans, Malamutes must establish a pack order. Alaskan Malamutes in general are taught to have dominant characteristics. *With* **[*48]** *[the] strong prey drive of the Alaskan Malamute[,] one must be careful when young children are present, due to the quick reactions they may have with the fast movement of children. The Alaskan Malamute may interpret these fast movements of children as prey and react with a quick snap and hold[,] just as Joey demonstrated with his squeak toy and the wing on the pole during testing*. With Joey's high[ly] excitable state of mind when he was outside walking and his confident attitude[,] I understand his propensity to possibly snap at and or bite at a young child. Outside Joey was very energetic, his tail was high, ears forward which displays quite a dominant behavior. To the uninformed handler, the behavior may look like play[;] however, in this case there was no play bow, and his tail

> and ears were clearly up and forward. A dominant dog does not mean an aggressive dog, but a dog that so clearly states his dominance. Joey tested without overt aggression but had behaviors that could possibly have lead [led] to aggression. He demonstrated to me that he is one dog who should have been potentially adopted to at least a level three handler. Level three dogs are defined as ones **[*49]** with certain challenges (not serious aggression) that could work out successfully in the right home, but could be trouble in the wrong home. **n58**

n58 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Canine Behavior Evaluation." August 11, 2007, p. 5. (Exhibit 1, attached hereto and incorporated by reference herein.)

This dog should have been placed in a "level one" home, which is defined as follows: "Level one adopters are inexperienced people with young children (under 7 years old)." **n59** Since Joey was a level three dog, the appropriate placement would have been with a level three adopter, defined as follows: "Level three adopters are professionals, either trainers, or sport hobbyist[s], or volunteers or staff at a shelter willing to live with a challenging dog that requires some kind of management for life." **n60**

n59 Jeffrey C. Woods, CPDT, "Canine Behavior Evaluation." P 3. (Exhibit 1.)

n60 Jeffrey C. Woods, CPDT, "Canine Behavior Evaluation." PP 2–3. (Exhibit 1.)

[*50] In his *Addendum* report (Exhibit 2), Mr. Woods further opines that had a temperament test been performed prior to adoption, then the the fact that Joey was not suitable for the Owens family would have become evident:

> If a temperament test had been applied to Joey prior to adoption, there would have been evidence sufficient to determine that Joey would not be suitable to a family with young children. During the prey drive test which was applied to Joey by me on 08/11/07, there was clear evidence his prey drive instinct was very strong. The prey drive test determines a dog's instinctive reaction to fast moving small objects that simulate small prey animals. My observations during this test showed Joey exhibiting very strong predatory instincts. Joey was very interested in a baby crying recording. He jumped on the table where the tape recorder was positioned. He was very adamant with his interest toward the baby crying until I presented a prey-like furry animal squeak toy. He re-directed his focus and grabbed the furry squeak toy animal in his mouth, bit and held onto it—which parallels the type of bite Kaleigh Owens was subjected to by Joey that was stated in the deposition **[*51]** of Ross Snyder on pages 63 through 71. **n61**

n61 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), *"Addendum to the Canine Behavior Evaluation of Joey."* December 1, 2011, p. 3. (Exhibit 2, attached hereto and incorporated by reference herein.)

Since the temperament testing of Joey, performed by Mr. Woods on August 11, 2007, was videotaped (see Exhibit 4), his opinion, as expressed in the foregoing paragraph, can be illustrated by the following two photos taken from that same video:

Fig. 1: *Video shot from the August 11, 2007 "SAFER" test by Canine Behavior Consultant, Jeffrey C. Woods, CPDT. This still shot (at 15:40) shows Joey, the subject Alaskan Malamute, with immediate interest in the sound of a baby crying. (Video attached as "Exhibit 4" and incorporated by reference herein.)*

Fig. 2: *This still shot (at 16:36) shows Joey, the subject Alaskan Malamute, biting a "squeaking stuffed toy" while the sound of a baby crying was played, showing Joey's* ***[*52]*** *"prey drive." "During this test Joey demonstrated a strong predatory response." (Video attached as "Exhibit 2" and incorporated by reference herein.)*

3. "Prey drive" instinctively triggers "predatory aggression," which occurs suddenly and without warning.

"Prey drive" and "predatory aggression" are instinctual and therefore innate behavior. In his Addendum, Mr. Woods explains how the "prey drive" triggers "predatory aggression":

> Prey drive is the instinctive inclination of a dog *(canis familiaris)* to pursue and capture prey. *Prey drive triggers predatory behavior.* Dogs with high prey drive have greater potential to pursue and perhaps kill any perceived prey species. All dogs have some level of prey drive because hunting and killing was a way of life for their ancestors, the wolf *(canis lupus)*, and the means for survival. ... Some dogs have higher levels of prey drive and predatory aggression, making them unsafe around smaller animals, and, in some cases, even children. In domestic situations, joggers, skateboarders, cyclist, automobiles, and running children frequently awaken the dog's otherwise dormant predatory instincts. ...
>
> Many of my own cases **[*53]** histories working with aggressive dogs prove to me that there is a correlation and a behavioral dynamic relationship that suggests that dogs with higher levels of prey drive can have higher bite levels and stronger predatory aggressive behavior. A child that runs away from a dog can initiate prey chasing, and if caught could suffer severe wounds (Beaver 1994). Predatory aggression, of course, does not involve growling or snarling as a preliminary warning. ...
>
> Predatory behavior is not preceded by significant mood change or threatening gestures because either would be counter-productive to the objective—to catch and kill prey. The absence of warning signs, plus the fact that killing is the natural end point for the behavior, makes it dangerous for target animals and prey facsimiles" ... On page 33 the deposition of Richard Strushensky's states: Question: "Did the dog ever growl or

bark or do any—?" Answer: "No." Question: "So it gave no warning whatsoever"? Answer: "Nothing." **n62**

.....

n62 Jeffrey C. Woods, CPDT (Canine Behavior Consltant), *"Addendum to the Canine Behavior Evaluation of Joey."* P 2. (Exhibit 2).

.....

[*54]

4. The shrill voice of Mikala's "fussing." followed by Kayleigh's sudden fall, excited Joey's prey drive, triggering Joey's predatory aggression in attacking Kayleigh, instinctively perceived as "small prey":

From Mr. Wood's original report and Addendum, a jury may infer that, after Kayleigh was knocked down by Joey, her quick movement, immediately preceded by the "fussing" voice of her younger sibling, Mikala, could easily triggered an inbred "prey response" in Joey, prompting him to instinctively bite and hold. In his *Addendum* report, Mr. Woods explicitly reaches this conclusion:

> It is my opinion the biting incident was caused by and the result of Joey's prey drive being stimulated and triggered by the synergy of the children running, Kayleigh's sudden fall, the high-pitched scream of her sister, Suzanne's screaming (page 50 deposition of Richard Strushensky's), and Joey's lead rope tightened around Richard's leg. Either of these events could excite prey drive in a prey driven canine. However in this case all of these events created a provocative circumstance and Joey instinctively interpreted the children as wounded small prey. The deposition of Richard Strushensky **[*55]** page 29 regarding the two children involved states: "They were right behind me. They ran around me, in front of me. They wanted to take the dog across the lot to the grassy area, and the dog had knocked my daughter down. I was reaching down to pick her up. She was already crying. And then like I turned around—the rope was almost around my leg. I turned around and as soon as I turned around, he was on Kaleigh." Then on P 37, Richard states: "He tried different times to try to get a better bite on the face. We had gotten him off one time, released him from her face, tried to get them separated and then he got her again, came back a second time." **n63**
>
> .....
>
> **n63** Jeffrey C. Woods, CPDT (Canine Behavior Consultant), *"Addendum to the Canine Behavior Evaluation of Joey."* p. 3. (Exhibit 2.)
>
> .....

Here, a jury should be permitted to hear expert opinion as to whether the presence of small children, with their shrill voices and sudden movements, could foreseeably have triggered an instinct prey drive and predatory aggression **[*56]** by a Malamute, i.e. by Joey.

V. A JURY COULD FIND, BY A REASONABLENESS STANDARD, THAT AT THE MOMENT HE KNEW THAT THE DOG KNOCKED OVER THE YOUNGER SISTER OF MINOR–PLAINTIFF, DEFENDANT'S AGENT WAS NEGLIGENT IN THAT HE SHOULD HAVE RECOGNIZED THE DANGEROUS PROPENSITY OF THE DOG AND THEN TO HAVE IMMEDIATELY SHOUTED TO THE DOG, OR HAVE TAKEN ANOTHER INSTANT ACTION, TO PREVENT THE DOG FROM BITING MINOR–PLAINTIFF IN THE FACE AFTER SHE FELL (OR WAS KNOCKED DOWN).

Ross Snyder, acting as an agent of Defendant, Humane Society of Cambria County, testified in deposition that, shortly before the attack that took place on June 8, 2006, after the two girls went outside: "They were standing there with the dog ... Then the dog turned and knocked the youngest one [Mikala] down." **n64** Then Joey turned and bit Kaleigh Owens. **n65** There is differing testimony as to whether Kaleigh fell down on her own or was knocked down by Joey. **n66**

n64 *Deposition of Ross Snyder,* 61:7 and 11.

n65 *Deposition of Ross Snyder*, 64:7-8; 71:3–4.

n66 *Deposition of Richard Strushensky*, 62:10–16.

[*57] Conflicting testimony was offered as to the approximate length of time between Joey's knocking down the younger child and subsequently biting the older child, except that it is undisputed that the first event was followed by the second event shortly thereafter.

Snyder testified that there was no interval between the time that Joey knocked down Mikala and subsequently knocked down Kaleigh and bit her on her face:

> A. The child went down, and then boom, he grabbed the other child.
>
> Q. Just like that? Instantaneously?
>
> A. Just like that. **n67**

n67 *Deposition of Ross Snyder*, 65:10–14.

The testimony of Suzanne Rudy, however, establishes a definite interval of time of unspecified duration: "I was walking over because Mikala was still fussing because the dog, his back-end had knocked her over. She was still fussing because she got a brush burn on her hands or on her knees or something." **n68** This interval was long enough for Mr. Richard Strushensky to attempt to ask a question of either Ms. **[*58]** Suzanne Rudy or Mikala: "At this point, I think I was by Rick [Mr. Strushensky], getting ready to go over to Kaleigh because he had a question he was trying to ask me or Mikala." **n69** Richard Strushensky testified that he estimated the interval to have been "[w]ithin less than half a minute, less than 30 seconds." **n70**

n68 *Deposition of Suzanne Rudy*, 47:1–6.

n69 *Deposition of Suzanne Rudy*, 50:7–10.

n70 *Deposition of Richard Strushensky*, 32:24–25.

In this intervening interval—of long enough duration for Mikala to have been observed "fussing" due to her being hurt as a result of having been knocked over by Joey—Mr. Snyder should have recognized Joey's dangerous propensity and could have the least shouted to the dog to attract his attention away from the children. That would have been the most responsible thing to do, Plaintiff argues.

VI. A JURY COULD FIND, BY A REASONABLENESS STANDARD, THAT DEFENDANT SHOULD HAVE PERFORMED AN AGGRESSION ASSESSMENT, AS DO AN INCREASING [*59] NUMBER OF ANIMAL SHELTERS.

The Humane Society, holding itself out as a specialist in the field of animal care and adoption, failed to apply the knowledge and use the skill and care ordinarily used by other reasonably well-qualified humane societies in the following respects:

1. The Humane Society failed to conduct any screening or testing to determine the extent of the dog's dangerous nature and hazardous propensity to bite when it knew or should have known of the procedures available for making those types of assessments.

Across the United States, animal shelters, humane societies and other organizations caring for and placing dogs regularly use behavioral tests (such as the "Safety Assessment for Evaluating Rehoming" (SAFER) test) to evaluate a dog's behavioral tendencies in order to make safe and appropriate placements. In Pennsylvania, for instance, the Humane Society of Greene County, for instance, regularly does temperament testing for all dogs. Similarly, the "Paws Here Awhile Pet Resort" of Georgetown, PA makes it a practice to "carefully select and

temperament test homeless pets from the local animal shelters." **n71** "Helping The Helpless Pet Rescue" in Coatesville, **[*60]** PA states: "We pull pets from Shelters along the entire Eastern USA, who are due to be euthanized. ... All dogs are held in Foster Care for at least 3 weeks while we Temperament Test, Train and continually Socialize." **n72** Lee Nesler, Executive Director of the Western Pennsylvania Humane Society in Pittsburgh, not only utilizes the "Safety Assessment for Evaluating Rehoming" (SAFER) test in his facility, but states that it is now a widespread practice:

> **n71** "Paws Here Awhile Pet Resort." Website at http://www.pawshereawhile.com/pet-lovers-info. Accessed 10/23/2011.
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> **n72** "Helping The Helpless Pet Rescue." Website at http://www.adoptapet.com/adoption rescue/74958.html. Accessed 10/23/2011.
>
> It is modern animal sheltering philosophy that dogs be behaviorally screened prior to adoption for the safety of our clients as well as the staff. Since the practice of canine assessment began in shelters in 1999–2000, the SAFER assessment has helped animal welfare professionals all over the country identify **[*61]** potential aggression and opportunities for behavior modification—which ultimately leads to more adoptions through appropriate placement.
>
> The Western PA Humane Society utilizes the SAFER test (Safety Assessment For Evaluating Rehoming) which was created to determine the suitability of an animal to be rehomed once relinquished to a shelter environment. SAFER was originally developed by Dr. Emily Weiss, C.A.A.B., who has joined the ASPCA as Senior Director of Shelter Behavior Programs in 2005.
>
> The SAFER test acts as a canine aggression assessment tool for shelter staff that have to determine if an animal is safe to read home to their clients. The assessment process allows for all of the dogs to receive the same test in the same conditions and allows the staff to make an accurate assessment of their canines prior to making the animals available for adoption. **n73**
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> **n73** Lee Nesler (Executive Director, Western Pennsylvania Humane Society, Pittsburgh, letter dated May 8, 2008 and addressed, "To whom it may concern." Attached as an exhibit to the report by Plaintiff's expert, Jeffrey C. Woods, CPDT (Misty Pines Dog Park Company, 2523 Wexford Bayne Road, Sewickley, PA 15143), *"Canine Behavior Evaluation."* August 11, 2007. (Exhibit 1, attached hereto and incorporated by reference herein.)

[*62] So, although there is no duty to perform temperament testing on dogs that are being "rehomed," the increasing practice by humane societies in performing aggression assessments has established a reasonableness standard.

The Humane Society failed to avail itself of readily available and specific testing programs for behavior evaluations and assessments of the dog it was releasing to Plaintiff. The Humane Society further failed to implement any formal testing, screening, or observation procedures upon receiving the dog to ensure that the dog would be safe when adopted. Whether or not the Humane Society was under a duty, by a reasonableness standard based on the increasingly standard practice of animal shelters across the country to implement testing to ensure the safe placement of dogs, should be decided by a jury and not disposed of as a matter of law.

In his *Addendum* report (Exhibit 2), Mr. Woods opines that on the standard of care for animal shelters in 2006:

> Ideally, a systematic behavioral evaluation should be performed on all animals prior to

> re-homing or other placement ... Organizations that develop their own evaluation should do so in consultation with a veterinarian **[*63]** or behaviorist familiar with the science and theory of behavior assessment. Staff performing evaluations must receive adequate training in performance, interpretation, and safety. A standardized behavior examination form should be used and each evaluation should be documented. Although the above is cited on p. 27 of the attached Association of Shelter Veterinarians (ASV) Guidelines for Standards of Care in Animal Shelters (2010), it is largely based on pre-2006 studies ... There were comparable HSUS standards in 2006. However, there were, and still are no requirements to apply some type of temperament testing in HSUS or any animal shelter agencies. "In Pennsylvania currently and in 2006 there was no law regulating the requirements of temperament testing in animal shelters. However, temperament testing in 2006 and to date is a reasonable standard and ethical responsibility by each individual animal shelter to assist in making appropriate adoptions" (Stoehr 2011; Pa. state dog warden, Dept. of Agriculture). **n74**
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> .....
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> **n74** Jeffrey C. Woods, CPDT (Canine Behavior Consultant), *"Addendum to the Canine Behavior Evaluation of Joey."* P 4. (Exhibit 2).
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> .....

[*64] In his Addendum, Mr. Woods applies this 2006 animal shelter standard of care to the case at bar:

> What responsibilities did the Humane Society of Cambria County Humane Society have in 2006 in placing an Alaskan Malamute for adoption? I feel in 2006 and prior to that time there was certainly ample and proven information and knowledge about temperament testing and breed traits and characteristics with the Humane Society of the United States and ASPCA that any responsible animal shelter would incorporate this information into their animal adoption program. Any animal shelter that did not would be negligent. The Humane Society of Cambria County fell short in 2006 of their responsibilities because the knowledge available was accessible to them. Cambria County Humane Society should have known the liabilities they were placing on the children with an unknown, untested, untrained Alaskan Malamute. Responsible animal shelters now, and in 2006 did apply some form of temperament testing and breed knowledge to their dogs. If the Cambria County Humane Society did apply this knowledge they would have known that Joey, the Alaskan Malamute, is a dog that inherently has high prey drive, and **[*65]** a dog that has the power and potential to jump up, knock down and to bite a child. **n75**
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> .....
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> **n75** Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Addendum to the Canine Behavior Evaluation of Joey." p. 3. (Exhibit 2).
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> .....

This expert opinion on the 2006 standard of care for animal shelters should be heard by a jury.

VII PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE OF PRIOR KNOWLEDGE ON THE PART OF DEFENDANT AS TO THE POSSIBLE DANGEROUS PROPENSITY OF ITS DOG TO PRESENT A QUESTION FOR THE JURY.

This negligence cause of action requires resolution by the jury because the issues of negligence are jury questions and the court may rarely decide such questions without submitting them to a jury. In its *Brief*, Defendant has argued:

> As fully set forth above, the record is absolutely devoid of any evidence that Defendant knew or should have known that Joey had vicious propensities, such that no

duty arose for Defendant to disallow Joey's adoption by Minor–Plaintiff's family or to prevent the contact **[*66]** which occurred between Minor–Plaintiff and Joey. Accordingly, Plaintiffs cannot establish one or more essential elements of their cause of action, such that Defendant is entitled to summary judgment. **n76**

Ross Snyder, as an agent of the Humane Society, testified:

Q. Do you know anything, sir, about the characteristics of the breed Alaskan Malamute?

A. I had three of my own when I was growing up.

Q. You did?

A. Yes. **n77**

Q. What time periods did you own Alaskan Malamutes?

A. They were huskies, which are basically the same thing, I would think. Probably from the age of 9 to the age of 18.

Q. Three during that period?

A. Yes. **n78**

n76 *Defendant's Brief in Support of Motion for a Summary Judgment*, 12.

n77 *Deposition of Ross Snyder,* 81:11–17.

n78 *Deposition of Ross Snyder*, 82:2–9.

From his nine years' experience with three such dogs, Mr. Snyder should have known what Plaintiff's expert had opined in his expert report regarding Alaskan **[*67]** Malamutes:

> With [the] strong prey drive of the Alaskan Malamute[,] one must be careful when young children are present, due to the quick reactions they may have with the fast movement of children. The Alaskan Malamute may interpret these fast movements of children as prey and react with a quick snap and hold[,] just as Joey demonstrated with his squeak toy and the wing on the pole during testing. **n79**

n79 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), "Canine Behavior Evaluation." August 11, 2007, P 5. (Exhibit 1, attached hereto and incorporated by reference herein.)

CONCLUSION

According to a 2011 study, "the Siberian Husky and Alaskan Malamute" (i.e. the so-called "lupine" breeds) "are thought to be the best representatives of the ancestral dog gene pool"—meaning the gene pool of the gray wolf *(Canis lupus)*. **n80** A major difference from the wolf is that the behavior of domesticated dogs resembles that of juvenile wolves, not adult wolves: "Many dogs not only appear juvenile, **[*68]** even as adults, but they also act in a manner similar to juvenile wolves." **n81**

n80 Tammie King, *et al.*, "Breeding dogs for beauty and behaviour: Why scientists need to do more to develop valid and reliable behaviour assessments for dogs kept as companions." *Applied Animal Behaviour Science* (2011) (in press). doi:10.1016/j.applanim.2011.11.016.

n81 Id.

Aggression in dogs, incidents of canine aggression resulting in dogs biting children, is a significant public health issue and a public danger. The research literature has shown that rescued dogs are more likely than non-rescued dogs to have behavioral problems. Although aggression is a normal canine behavior, biological and environmental factors, in addition to behavioral conditioning by previous experiences, may combine to create a degree of aggression that is considered unacceptable. This is the case with Joey, the Malamute which

attacked young Kayleigh and scarred her face for life.

The temperament test demonstrated that Joey was a dominantly aggressive **[*69]** dog. Sadly, this testing took place after the fact of the incident, when it should have been conducted prior to Joey's adoption. Pre-adoption temperament could have easily demonstrated Joey's dominance, high prey drive and associated propensity for predatory aggression (as distinct from possessive aggression, protective aggression, punishment-elicited aggression, pain-elicited aggression, and intra-specific [inter-male or inter-female] aggression), and the "eliciting stimuli" that could foreseeably have triggered aggression:

> **Predatory aggression**
>
> The initial components of predatory aggression involve visual scanning and attending to the area where "prey" are anticipated, followed by stalking and chasing of a wide range of moving stimuli. Barking, nipping, and/or biting complete the sequence; growling is apparently not observed. This behavior may be directed to cats, birds, squirrels, smaller dogs, etc. (and in these cases may involve killing), or towards children or adults who move in a particular way, usually quickly. **n82**
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> .....
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> **n82** Peter L. Borchelt, "Aggressive behavior of dogs kept as companion animals: Classification and influence of *sex*, reproductive status and breed." *Applied Animal Ethology* 10.1–2 (March 1983): 45-61 [48].
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> .....

[*70] Plaintiff maintains that the record presents evidence that the Humane Society of Cambria County ("Humane Society" or "Defendant") knew or should have known that Joey had dangerous propensities, such that a duty arose for Defendant (1) to disallow Joey's adoption by Minor–Plaintiff's family; or (2) to prevent the contact which occurred between Minor–Plaintiff and Joey.

While on its premises, the Humane Society of Cambria County had a duty to maintain control over the dog to prevent it from injuring Kaleigh. The central question in this case is whether, under the circumstances presented in this case, Defendant acted reasonably to prevent the attack on Kaleigh. That question presents an undeniable fact issue that should go to the jury. At a minimum, a fact issue exists as to whether Defendant had actual or constructive notice that this dog might at least knock over a child and whether the quick movements and high-pitched voices of children can trigger an instinctive "prey response" involving biting and holding. In light of the controversial evidence, a question whether Defendant fulfilled its duty must be resolved by the trier of fact.

In *Rogers v. Moody, 242 A.2d 267, 279* (Pa. 1968), **[*71]** Justice Musmanno of the Pennsylvania Supreme Court described the damage inflicted upon a male's "image and status" in society by facial scarring and disfigurement. In the words of Justice Musmanno, a facial disfigurement is an "objective loss" which was described as follows:

> A man's face is a lamp in which glows the wick of graciousness and friendly appeal, fueled by the spirit within. This lamp can illumine his path to the fulfillment of his aspirations when tended by the virtues of sincerity and conscientious endeavor. But if the globe of the lamp is broken, the flame suffers from all the winds of unkindness blown by those who are too preoccupied with their own affairs to extend a sympathetic hand to the man who has been doomed to walk for the rest of his days in semi-darkness. **n83**
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> .....
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> **n83** *Rogers v. Moody*, 242 A.2d 267, 279 (Pa. 1968).
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> .....

Justice Musmanno concluded that the "most that ugly scars gain for their wearer is pity, which can only add to a reflective person's pain." **n84 [*72]** How much more true is this pain to a young girl like Kaleigh.

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n84 Id.

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In sum, Plaintiff has presented sufficient evidence of prior actual and/or constructive knowledge on the part of the Defendant—as well as evidence of the dangerous propensities of the subject Alaskan Malamute, "Joey," by way of "evidence of subsequent behavior" (admissible under Pennsylvania law) by way of a video and expert report on Joey's "prey drive" on August 11, 2007—as to the possible dangerous propensities of its dog to present a question for the jury. The question of Defendant's negligence is a question of fact, and reasonable persons could fairly and conscientiously reach different conclusions under the evidence.

WHEREFORE, premises considered, Plaintiff respectfully requests that this Honorable Court deny Defendant's *Motion for Summary Judgment*.

Respectfully submitted,

/s/ Christopher G. Buck

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[On the Response/Brief]

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