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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 3; 2006 PA C.P. Ct. Motions 585968

April 9, 2012

Brief in Response to Motion for Reconsideration

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.

TEXT: JURY TRIAL DEMANDED

TITLE:

BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION/ CERTIFICATION FOR INTERLOCUTORY APPEAL

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 Response to Defendant's Motion for Reconsideration*.

MOTION FOR RECONSIDERATION STANDARD

The scope of a motion for reconsideration is narrow:

> The scope of a motion for reconsideration, we have held, is extremely limited. Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence. "Accordingly, a judgment may be altered or amended [only] if the party seeking reconsideration shows at least **[*2]** one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." We have made clear that "'new evidence,' for reconsideration purposes, does not refer to evidence that a party ... submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available." Evidence that is not newly discovered, as so defined, cannot provide the basis for a successful motion for reconsideration. **n1**
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> .....
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> **n1** *Blystone v. Horn*, 664 F.3d 397, 415–416 (3d Cir. Pa. 2011) (citations omitted).
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> .....

Therefore evidence that is not newly discovered cannot provide the basis for a successful motion for reconsideration: "Where evidence is not newly discovered, a party may not submit that **[*3]** evidence in support of a motion for reconsideration." **n2**

.....

n2 *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. Pa. 1985) (citations omitted).

.....

ISSUES

I. Did the Defendant argue "an intervening change in the controlling law" as grounds for a Motion for Reconsideration?

Proposed Answer: No.

II. Did the Defendant "present newly discovered evidence" as a warrant for a Motion for Reconsideration?

Proposed Answer: No.

III. Did the Defendant argue any "error of law or fact" as a predicate for a Motion for Reconsideration, and in so doing, prove such error?

Proposed Answer: Yes and no.

IV. Did the Defendant demonstrate any "manifest injustice" to warrant a Motion for Reconsideration?

Proposed Answer: No.

V. Will an interlocutory appeal of this Court's Order denying summary judgment materially advance the ultimate termination of this matter?

Proposed Answer: No.

[*4]

ARGUMENT

I. DEFENDANT DID NOT ARGUE "AN INTERVENING CHANGE IN THE CONTROLLING LAW" AS GROUNDS FOR A MOTION FOR RECONSIDERATION.

Plaintiff incorporates by reference its *Brief in Support of Response to Motion for Summary Judgment* ("Plaintiff's *Brief"*) as though fully set forth herein.

Defendant does not argue "an intervening change in the controlling law" as grounds for a motion for reconsideration. Instead, in P 19, Defendant summons the following principal cases as controlling law:

> 19. It has long been established in Pennsylvania that civil liability for a dog bite requires proof of negligence on the part of the owner or keeper of the dog—specifically, that the owner or keeper had notice of the dog's vicious propensities. *Andrews v. Smit*h, 324 Pa. 455, 459, 188 A. 146, 148 (Pa. 1936); *Underwood v. Wind*, 954 A.2d 1199, 1204 (Pa. Super. 2008); *Fink v. Miller*, 198 A. 666, 667 (Pa. 1938); *Kinley v. Bierly*, 876 A.2d 419, 422 (Pa. Super. 2005).

Since the most recent of these cases was decided in 2008, Defendant does not argue "an intervening change in the controlling **[*5]** law" as grounds for a motion for reconsideration.

II. DEFENDANT DID NOT "PRESENT NEWLY DISCOVERED EVIDENCE" AS A WARRANT FOR A MOTION FOR RECONSIDERATION.

Defendant's legal and evidentiary arguments are essentially recapitulations of those previously presented in the *Motion for Summary Judgment*. As such, Defendant's *Motion for Reconsideration* raises no new facts and basically reiterates the *Motion for Summary Judgment*, with a changed title. Therefore, there is no warrant for the instant *Motion for Reconsideration* on the basis of newly discovered evidence.

III. DEFENDANT DID ARGUE AN "ERROR OF LAW OR FACT" AS A PREDICATE FOR A MOTION FOR RECONSIDERATION; IN SO DOING, HOWEVER, DEFENDANT FAILED TO PROVE SUCH ERROR.

A. In PP 31–34, Defendant predicated the instant *Motion for Reconsideration* on an alleged manifest error of law.

In P3 of its *Motion for Reconsideration*, Defendant asserts the primary basis for its *Motion for Summary Judgment*:

> Defendant's *Motion for Summary Judgment* was based upon Plaintiff's failure to produce any evidence that the dog in question (known as "Joey") exhibited any vicious propensities while it was in the **[*6]** Humane Society's possession prior to the incident.

In all fairness, Plaintiff concedes that Defendant has, in so many words, asserted that this Honorable Court has committed the following manifest error of law:

> 31. Additionally, Defendant respectfully submits that the Order in question indicates that an incorrect standard may have been applied in the Court's review of Defendant's summary judgment motion, in that the Order specifies that the Court accepted all "well-pleaded facts and reasonable inferences drawn from them" as true.
>
> 32. Rule 1035.2 provides that a party may move for summary judgment when, "after the completion of discovery relevant to the motion, including the production of expert reports," the party who will bear the burden of proof at trial "has failed to **produce evidence** of facts essential to the cause of action. ...." Pa.R.C.P. 1035.2(2) (emphasis added).
>
> 33. Defendant's argument for summary judgment, as set forth in its previously submitted *Brief in Support of Motion for Summary Judgment* and as presented at oral argument, is premised upon the Plaintiff's failure to produce evidence that Defendant had notice of the dog's vicious propensities, **[*7]** as is essential to establish a civil cause of action for injuries resulting from a dog bite.
>
> 34. With due deference to this Honorable Court, Defendant respectfully submits that the mere pleading of facts is insufficient, at the summary judgment stage, to establish a triable issue. Pa.R.C.P. 1035.3(a) (providing that, in responding to a motion for summary judgment, the non-moving party "may not rest upon the mere allegations of [*sic*; read: "or"] denials of the pleadings." but must identify "one or more issues of fact arising from **evidence in the record ...**" or **"evidence in the record** establishing the facts essential to the cause of action ... which the motions [*sic*; read "motion"] cites as not having been produced") (emphasis added).

B. To the contrary, Plaintiff has submitted permissible "subsequent evidence"; therefore, Plaintiff did not "rest upon the mere allegations of denials of the pleadings" to establish a triable issue.

Plaintiff's *Brief* presents "subsequent evidence" under the following argument, in PP 16–17:

II. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER A TEMPERAMENT TEST CAN BE ADMITTED AS "SUBSEQUENT INCIDENT" [*8] 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 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. **n3**

.....

n3 *Crance v. Sohanic*, 496 A.2d 1230, 1233 (Pa. Super. 1985).

.....

[*9] 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 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. **n4**

.....

n4 Jeffrey C. Woods, CPDT (Canine Behavior Consultant), *"Canine Behavior Evaluation."* August 11, 2007, p. 5. (Exhibit 1, attached hereto and incorporated by reference herein.)

.....

[*10]

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.)*

Since Defendant does not present a legal argument against the admission of this subsequent evidence, as narrowly permitted by *Crance v. Sohanic*, 496 A.2d 1230 (Pa. Super. 1985), therefore, Defendant cannot argue that Plaintiff "'has failed to produce evidence of facts essential to the cause of action.' Pa.R.C.P. 1035.2(2)." Plaintiff has indeed met his burden of production in producing this subsequent evidence.

C. Plaintiff has also submitted evidence of *constructive* knowledge on the [*11] part of Defendant as to the possible dangerous propensity of its dog, to present a question for the jury; therefore, Plaintiff did not "rest upon the mere allegations of denials of the pleadings" to establish a triable issue.

Defendant conveniently neglects to mention the other evidence that Plaintiff has summoned, including, *inter alia*, the following evidence of *constructive* knowledge on the part of Defendant as to the possible dangerous propensity of its dog, on PP 30–31 of Plaintiff's *Brief*:

IV. 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 **[*12]** to prevent the contact 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. **n5**

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.

A. You did?

A. Yes. **n6**

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. **n7**

From his nine years' experience with three such dogs, Mr. Snyder should have known what Plaintiffs expert had opined in his expert report regarding Alaskan 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 **[*13]** with his squeak toy and the wing on the pole during testing. **n8**

n5 *Defendant's Brief in Support of Motion for a Summary Judgment*, 12.

n6 *Deposition of Ross Snyder*, 81:11–17.

n7 *Deposition of Ross Snyder*, 82:2–9.

n8 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 evidence, which includes expert evidence, creates a genuine issue of material fact, ripe for jury determination. The "notice" requirement can also be met under a constructive notice argument, as stated in Plaintiff's *Brief* (p. 39):

> 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 **[*14]** Defendant fulfilled its duty must be resolved by the trier of fact.

As Defendant's agent, Ross Synder's prior knowledge of Alaskan Malamutes may be considered constructive knowledge of their dangerous propensity. Furthermore, Defendant had constructive, if not actual, knowledge that this breed of dogs in general—and "Joey" in particular—could be "dangerous from playfulness," as argued in Plaintiff's Brief in response to Defendant's *Motion for Summary Judgment*:

> A dog may even be playful, yet have 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." **n9**

The Supreme Court further stated: "Since intention forms **[*15]** no part of an animal's assault and battery, the mood in which it inflicts harm is immaterial, so far as the owner's duty goes." **n10** 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." **n11** Plaintiff argues that this Honorable Court should hold likewise.

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n9 *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)).

.....

n10 *Groner v. Hendrick*, 169 A.2d 302, 303 (Pa. 1961).

.....

n11 *Snyder v. Milton Auto Parts, Inc.*, 428 A. 2d at 188–89.

.....

Therefore, Defendant cannot argue that Plaintiff "'has failed to produce evidence of facts essential to the cause of action.' Pa.R.C.P. 1035.2(2)." Plaintiff **[*16]** has further met his burden of production in producing this subsequent evidence.

D. Defendant's criminal liability argument does not avail.

Plaintiff's *Brief* (PP 8–9) argues:

> 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**

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

.....

Pennsylvania's Dog Law is a regulatory statute, administered and 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 **[*17]** 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 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. **[*18]**

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

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**

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).

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)).

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 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 **[*19]** 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).

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.

[*20] Defendant has failed to address, much less refute, Plaintiff's negligence *per se* argument, based on an analysis and application of *Miller v. Hurst*, 448 A.2d 614, 618 (Pa. Super. 1982) **[*21]** and its progeny.

IV. DEFENDANT DID NOT DEMONSTRATE ANY "MANIFEST INJUSTICE" TO WARRANT A MOTION FOR RECONSIDERATION.

Even when read in a light most favorable to the Defendant, Defendant's Brief does not advance any line of reasoning that may be liberally construed as a "manifest injustice" argument. Therefore, Defendant did not demonstrate any "manifest injustice" to justify its *Motion of Reconsideration*.

V. AN INTERLOCUTORY APPEAL OF THIS COURT'S ORDER DENYING SUMMARY JUDGMENT WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS MATTER.

In P 39 of its *Motion for Reconsideration*, Defendant asks this Court for an Order, certifying, at its discretion, an interlocutory appeal: "Based upon the foregoing, Defendant respectfully requests that the Order of February 21, 2012, be amended to include the language prescribed by 42 Pa.C.S. § 702(b)." Here, Defendant invokes 42 Pa.C.S. § 702(b), which provides:

> **§ 702. Interlocutory orders.**
>
> (b) *Interlocutory appeals by permission*.—When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate **[*22]** court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

In P 41 of its *Motion for Reconsideration*, Defendant asks this Court for an Interlocutory Order: "Defendant further requests that this Honorable Court stay the Order of February 21, 2012, pending the Appellate Courts' review of Defendant's Petition for Permission to Appeal." Here Defendant is invoking 42 Pa.C.S. § 702(c), which conditions the interlocutory order by the following:

> (c) *Supersedeas*.—Except as otherwise prescribed by general rules, a petition for permission to appeal under this section shall not stay the proceedings before the lower court or other government unit, unless the lower court or other government unit or the appellate court or a judge thereof shall so order.

An interlocutory appeal, as attractive as it may be as an academic exercise in **[*23]** reviewing the Commonwealth of Pennsylvania's relevant social policy and for clarifying the legal issues and arguments that have been raised in this matter, is an appeal for judicial expediency, not an appeal for the purpose of reviewing the applicable statutes and case law. Defendant's justifications for an interlocutory appeal are set forth in P 37 of its *Motion for Reconsideration*:

> Defendant respectfully submits that immediate review of the Order by the Superior Court is necessary in order to resolve the questions of law controlling this case—specifically, (1) whether, in the context of civil claims for injuries caused by a dog, a higher duty of care applies to an animal shelter than to an ordinary dog owner; (2) whether an animal shelter is under a duty to conduct formal behavioral assessments on dogs in its custody prior to permitting their adoption, and (3) whether, in a civil action for damages arising from a dog bite, the single act of aggression in question is sufficient to support a reasonable inference

by a fact-finder that the dog owner had notice of the dog's dangerous propensities.

Briefly, it is Plaintiff's recommendation that issue (3) has been sufficiently **[*24]** addressed by the *Underwood* Court—which Defendant has invoked passim in its *Motion for Reconsideration*, albeit with an incomplete and misleading interpretation—and issues (1) and (2), while these would foreseeably receive clarification and guidance from an appellate court, are not the sole basis of Plaintiff's theory of liability, and thus the instant case should proceed to trial. Taken separately and in order, Plaintiff submits the following rationale for this Court's consideration:

A. Under Pennsylvania law, whether a higher duty of care applies to an animal shelter than to an ordinary dog owner is not the sole, outcome–determinative issue of the case at bar, since Defendant may be found liable on other grounds.

While it is true that the instant case may also be one of first impression on this particular issue, there is no compelling reason to stay this case for appellate review. Since Defendant, the Humane Society of Cambria County, may be found negligent on other grounds (particularly as warranted by the doctrine of negligence per se; see § C, *infra*), an appellate ruling on this area of law is not necessary for a final adjudication of the instant case. **[*25]** Since Plaintiff had simply offered this rationale as an alternative theory of liability, the case may proceed to trial for a proper jury determination.

B. Under Pennsylvania law, whether an animal shelter is under a duty to conduct formal behavioral assessments on dogs in its custody prior to permitting their adoption is not the sole, outcome-determinative issue of the case at bar, since Defendant may be found liable on other grounds.

While it is true that the instant case may also be one of first impression on this particular issue, there is no compelling reason to stay this case for appellate review. Since Defendant, the Humane Society of Cambria County, may be found negligent on other grounds (particularly as warranted by the doctrine of negligence *per se*; see § C, *infra*), an appellate ruling on this area of law is not necessary for a final adjudication of the instant case. Since Plaintiff had simply offered this rationale as an alternative theory of liability, the case may proceed to trial for a proper jury determination.

C. Under Pennsylvania law, in a civil action for damages arising from a dog bite, a single act of aggression in question is sufficient [*26] to support a reasonable inference by a fact-finder that the dog owner had notice of the dog's dangerous propensities.

In support of its position, Defendant invokes the *Underwood* case throughout its *Motion for Reconsideration*, as in P 27:

> However, *Underwood* does not hold that the single attack in question constitutes evidence that the owner had notice of the dog's dangerous propensities. Defendant respectfully submits that any such interpretation of *Underwood* would be contrary to the law—as confirmed by the Superior Court in that same case - that civil liability for a dog bite requires "proof of negligence."

The *Underwood* Court, however, approved the following jury instructions, in part:

> The first thing you need to understand is an unexcused violation of the dog law is negligence *per se*. *Per se* is Latin, and it means by itself or in itself.
>
> Negligence *per se* means if a law or statute is violated, that violation by itself or in itself is negligence. ...
>
> The dangerous propensities of an animal may be established by a single incident of an attack on a human being. ...

> In order to prove the vicious propensities of an animal, actual **[*27]** notice is not necessary. It is sufficient if one knew or should have known that the animal was a probable cause of harm. ...
>
> If you find that there was a violation of this state law, you must find Defendant negligent as a matter of law. ...
>
> The Pennsylvania dog law, which is a state law in effect at the time this harm occurred, provided in part that when a dog owner's dog has inflicted severe injury on a human being without provocation, the dangerous propensities of the animal are established by a single incident of attacking the human being. **n19**
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> .....
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> **n19** *Underwood v. Wind, 954 A.2d 1199, 1203-1204 (Pa. Super. 2008)* (jury instruction, as to the tenant and keeper of the dog, 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; the jury instructions relating to the out-of-possession landlord, however, were improper).
>
> .....

The *Underwood* Court upheld these jury instructions, **[*28]** as to negligence *per se*, as fundamentally sound:

> While the court's jury charge may have been inarticulate at times, we find the charge, when considered in its entirety, with regard to this specific argument was legally sound and adequately informed the jury of the law of liability as it applies to dog owners whose dogs escape and harm someone. ... Citing *Miller*, the *Villaume* Court stated that a mere violation of the Dog Law does not establish the causation factor required for a finding of liability; "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." Id. This is exactly the law with which the jury was charged. The court's charge was accurate and adequate on this point. **n20**
>
> .....
>
> **n20** *Underwood v. Wind*, 954 A.2d 1199 at 1204.
>
> .....

The *Underwood* Court was critical only of those jury instructions relating to the out-of-possession landlord, **n21** which issue **[*29]** is not presently before this Court, since the incident at issue took place on Defendant's premises. Given the clear guidance of the *Underwood* Court on this very point, there is no need to for an interlocutory appeal for clarification and guidance on this issue of law.

> .....
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> **n21** *Underwood v. Wind*, 954 A.2d 1199 at 1208.
>
> .....

In P 25 of its *Motion for Reconsideration*, Defendant's statement, while correct, ignores the *Underwood* holding that negligence may be found as a matter of law under the doctrine of negligence *per se*, as conveyed in the foregoing jury instruction, provided that causation is likewise shown. Negligence *per se* imputes constructive notice:

Defendant seeks to justify its request for an interlocutor appeal as it "involves a controlling question of law as to which there is substantial ground for difference of opinion." Be that as it may, Plaintiff submits that an interlocutory appeal, requiring a stay in the proceedings, would not meet the other requirement of 42 Pa.C.S. § **[*30]** 702(b), which warrants an interlocutory appeal on the condition that such and appeal "may materially advance the ultimate termination of the matter." Defendant has provided compelling reasons for how an interlocutor appeal would materially advance the ultimate outcome of the case at bar. In P 38, Defendant argues:

> Defendant respectfully submits that resolution of these issues via an immediate appeal will materially advance the ultimate determination of this matter, in that a

> resolution which compels the granting of summary judgment would be a dispositive event, and, in the event that the appellate court's resolution of the issues does not warrant summary judgment, such resolution will provide essential guidance and clarification to the parties as to the issues to be decided by a jury in this matter and the relationship, if any, of the criminal provisions of the Dog Law statute to civil claims for injuries inflicted by dogs, as well as providing guidance to other persons and entities in the position of the Humane Society as to their duties and potential liability with respect to allegedly dangerous dogs.

Defendant, in stating that "a resolution which compels the granting **[*31]** of summary judgment would be a dispositive event," is correct that summary judgment is a dispositive event. The Pennsylvania Supreme Court, in fact, has likened an interlocutory appeal to summary judgment: "Summary relief under Pa.RAP. 1532(b) is similar to the relief envisioned by the rules of civil procedure governing summary judgment." **n22** In effect, Defendant is asking this Court to permit two bites at the apple of summary judgment. Since this Honorable Court has properly denied Defendant's Motion for Summary Judgment, an interlocutory appeal would have the effect of allowing the Defendant to relitigate its Motion for Summary Judgment anew, which would defeat the purpose of an interlocutory appeal.

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n22 *Brittain v. Beard*, 974 A.2d 479, 484 (Pa. 2009).

.....

Defendant seeks to justify its request for an interlocutor appeal as it "involves a controlling question of law as to which there is substantial ground for difference of opinion." Be that as it may, Plaintiff submits that an interlocutory **[*32]** appeal, requiring a stay in the proceedings, would not meet the other requirement of 42 Pa.C.S. § 702(b), which warrants an interlocutory appeal on the condition that such and appeal "may materially advance the ultimate termination of the matter." Defendant's rationale for showing how an interlocutory appeal might materially advance the ultimate outcome of the case at bar is developed in P 38, in which Defendant argues:

> Defendant respectfully submits that resolution of these issues via an immediate appeal will materially advance the ultimate determination of this matter, in that a resolution which compels the granting of summary judgment would be a dispositive event, and, in the event that the appellate court's resolution of the issues does not warrant summary judgment, such resolution will provide essential guidance and clarification to the parties as to the issues to be decided by a jury in this matter and the relationship, if any, of the criminal provisions of the Dog Law statute to civil claims for injuries inflicted by dogs, as well as providing guidance to other persons and entities in the position of the Humane Society as to their duties and potential liability with **[*33]** respect to allegedly dangerous dogs.

Plaintiff respectfully submits that would make more sense for this Honorable Court to deny Defendant's *Motion for Reconsideration*, and allow this case to go forward, in the interests of judicial expediency and so as not to prejudice the procedural rights of the Plaintiff. If this case does go to trial, and if it were to result in a Plaintiff's verdict, then Defendant may file an appeal as of right.

Defendant further states that an interlocutory appeal would clarify "the relationship, if any, of the criminal provisions of the Dog Law statute to civil claims for injuries inflicted by dogs." With all due respect to Defendant, this argument is misplaced, as has previously been pointed out in Plaintiff's *Brief* (p. 7):

Pennsylvania's Dog Law is a regulatory statute, administered and enforced by the Department of Agriculture (Title 7, Chapter 27 of the Pa. Code), and not a penal statute. **n23** 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 **[*34]** extent that *Freeman* rejected the notion that an unexcused violation of the Dog Law constitutes negligence *per se*." **n24**

.....

n23 *Commonwealth v. Hake*, 738 A.2d 46, 47, n.3 (Pa. Comwlth. 1999).

.....

n24 *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)).

.....

This guidance is clear. Defendant has already noted this point of law in its *Brief* in support of its *Motion for Summary Judgment*. Technically, Pennsylvania's Dog Law is not a *criminal* statute, but rather a *regulatory* statute. Either way, there is no question that violation of Pennsylvania's Dog Law constitutes negligence per se. No further guidance on this issue is required, as prior appellate courts, and in the *Underwood* case, have already ruled on this very issue.

CONCLUSION

Absent a finding of (1) "manifest errors of law or fact" or (2) "manifest injustice" or (3) "new and material evidence or facts" or (4) **[*35]** "a change in the controlling law" as the foregoing case law mandates, a motion for consideration should *not* be granted as a matter of law. Plaintiff offers, as persuasive precedent, the following rationale as guidance for this Honorable Court's consideration:

> *Reconsideration should be granted sparingly or there will no finality of judgments or orders*. The only proper grounds for granting reconsideration are new and material evidence or facts, a change in the controlling law or a clear error in applying the facts or law to the case at hand so that it is necessary to correct a clear error and prevent a manifest injustice from occurring. *Mere disagreement with the Court's conclusion is not a basis for reconsideration*. ... The only factor at play is the Defendant's disagreement with the Court's decisions ... [and] cannot and does not support a Motion for Reconsideration and only *further frustrates the efficient flow of judicial proceedings, with repeated relitigation of matters previously adjudicated*. **n25**
>
> .....
>
> **n25** *Scartelli Gen. Contrs., Inc. v. Selective Way Ins. Co.*, 6 Pa. D. & C.5th 61, 64–65 (Pa. Dist. & Cnty. 2009) (citing *Ellenbogen v. PNC Bank, N.A.*, 731 A.2d 175 (Pa. Super. 1999) and *Cox v. Monica*, 2008 U.S. Dist. LEXIS 1720, 2008 WL 111991 (M.D. Pa. 2008) (emphasis added).
>
> .....

[*36] This reasoning, Plaintiff submits, is applicable to the case at bar. Resort to an interlocutory appeal may not only be viewed as relitigating this case, but may further be construed as a thin disguise of prospective judicial activism. This is not the venue to create judge-made law. Insofar as Defendant has not shown how an immediate appeal may advance the ultimate termination of the matter, Plaintiff submits that this Court should not certify this matter for interlocutory appeal. Given the lack of

this requisite showing under Pa.RAP. 1532(b), this Court should find that appellate review would be better served by having all issues raised at trial initially reviewed by the trial court.

That said, Plaintiff would invite this Honorable Court to issue a substantive Memorandum, so that, in the event of an appeal as of right, the Pennsylvania Superior Court may more fully address the issues raised in these proceedings—even if only to review this Court's forthcoming jury instructions (as in the *Underwood* case), if this Court permits the instant case to proceed to trial.

WHEREFORE, premises considered, Plaintiff respectfully requests that this Honorable Court deny Defendant's *Motion* **[*37]** *for Reconsideration* and for certification of an interlocutory appeal.

Respectfully submitted,

By: /s/ Christopher G. Buck

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[On the Response/Brief]

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Counsel for Plaintiff.

CERTIFICATE OF SERVICE

On this 9th day of April, 2012, I hereby certify that a true and correct copy of the foregoing *BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION/CERTIFICATION FOR INTERLOCUTORY APPEAL* has been served on the Party listed below, by way of:

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