

IN THE COURT OF APPEALS OF MARYLAND

Dorothy M. Tracy,

Petitioner,

September Term 2011

Docket No. 53

Anthony K. Solesky and Irene Solesky,
as the Parents, Guardians, and Next
Friends of Dominic Solesky, a minor,

Respondents.

BRIEF OF AMICUS CURIAE
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICUS

The ASPCA is a 501(c)(3) not-for-profit corporation established in 1866, and was the first humane society in North America. Over 81,000 Maryland residents are supporters of the ASPCA, and its 2.5 million supporters nationwide endorse its mission to prevent cruelty to animals throughout the United States.

The ASPCA is also internationally recognized for its substantial expertise regarding issues pertaining to dogs of all breeds, its considerable experience in evaluating dog behavior, its knowledge of and contribution to the scientific literature concerning the relationship between dog breed and behavior, and its understanding of the legal doctrines and social policy governing the role of companion animals in society. The present case concerns, in relevant part for this *amicus*, a doctrine of landlord liability that would impute knowledge of and responsibility for a dog's dangerousness based on the dog's breed, whether the breed is actually known or simply assumed based on the dog's appearance.

The ASPCA's interest in the current proceeding arises from its mandate, implicit in its mission, to provide education and guidance on matters concerning the integration of companion animals into our world. In connection with the instant case, the ASPCA seeks to ensure that the Court is fully aware of the impropriety of the legal doctrine at issue here. The ASPCA is singularly equipped to advise the Court on this issue and to provide it with information within its special knowledge that is outside that of either of the parties. *Amicus* can provide data and discussion that may be vital to the Court in its decisionmaking and, in particular, substantial evidence that dog breeds cannot be readily identified, that a dog's degree of dangerousness does not necessarily correlate with the dog's breed (or suspected breed), and the implications of those points for the issues in this case.

DISCUSSION

A. Factual and Legal Setting of the Case.

A landlord is not normally responsible for injuries caused by tenants' dogs, unless the landlord has knowledge of the dangerous propensity of a tenant's dog. If a landlord is unaware of a dog's potential dangerousness, she is not held responsible for injuries caused by the dog, even if the dog was known by others to be dangerous. The present case suggests a new doctrine of landlord liability that would impute knowledge of danger (and thus tort liability for damages) based on the fact that a tenant's dog looked like or was a "pit bull".¹ Thus, instead of a rule that consider the specific animal and the landlord's knowledge of the animal, this rule uses breed as a proxy for dangerous tendencies. In suggesting such a rule, the Court of Special Appeals referred, in particular, to this Court's assertion in *Mathews v. Amberwood*, relative to dogs commonly referred to as pit bulls, that the "extreme dangerousness of this breed, as it has evolved today, is well recognized." *Mathews v. Amberwood*, 351 Md. 544, 561, 719 A.2d 119 (1998).

The focus for *amicus* is the court's apparent imposition of liability on landlords based on the assessment of what a dog looks like, as opposed to behavior and temperament. *See also id.*; *Shields v. Wagman*, 350 Md. 666, 714 A.2d 881 (1998). These decisions incorrectly assume a connection between a dog's appearance or genetic heritage and the likelihood that the dog will cause injuries to humans, and then use this supposed link as a means of allocating responsibility for those injuries. *Mathews*, 351 Md. at 560-65; *Shields*, 350 Md. at 690. This connection, as established below, is unfounded.

¹ The term "pit bull" does not refer to a specific breed of dog but to a range of several breeds and an endless number of mixed breed dogs who, as shall be explained in detail, are all classified as pit bulls for purposes of the breed-specific rules discussed in this brief. While the phrase "pit-bull-type" or "dogs who look like pit bulls" might be more accurate to describe the dogs targeted by the rule at issue, *amicus* will use the term "pit bull" throughout the brief for ease of reference.

B. Reliance on Breed Identification is Inherently Flawed.

The first problem with breed-specific rules (whether judicial or legislative) is that they rely on the ability to identify a dog's breed by external indicia such as size, shape, and form.

Amicus cites below extensive studies that establish that any reliance on a dog's real or assumed breed as a marker for aggression is contraindicated by empirical data and genetics. These studies make clear both that dog breed cannot be readily identified, and that it cannot be correlated with the danger posed by a given dog.

The breed liability doctrine described in the prior section thus rests on a fallacious foundation, because there is often a significant discrepancy between breed determination based on a visual observation, and actual genetic determination of the dog's breed – even when the visual assessment is conducted by individuals who have substantial experience working with dogs. A 2009 study comparing animal shelter workers' visual appraisals of breed with actual DNA breed analysis found that the shelter workers' conclusions regarding “predominant dog breed” (*i.e.*, the most represented breed or breeds in a dog) were confirmed by DNA analysis in only one-fourth of the subject dogs. And in 87.5 percent of the dogs, DNA analysis revealed many breeds that were not identified by the shelter workers at all.²

As specifically related to dog bites (which may be one indicator of aggression), the U.S. Centers for Disease Control, in its oft-cited study of fatal dog attacks, the American Veterinary Medical Association (AVMA) Task Force on Canine Aggression and Human-Canine

² Victoria Voith, *A Comparison of Visual and DNA Identification of Breeds of Dogs* (Proceedings of Annual AVMA Convention, Seattle, July 11-14, 2009), available at <http://nationalcanineresearchcouncil.com/publications/suggested-reading/> (citing Victoria Voith et al., *Comparison of adoption agency identification and DNA breed identification of dogs*, J. APPLIED ANIMAL WELFARE SCI. 253 (2009)).

Interactions, and other researchers all note that data collection related to bite by breed is fraught with multiple potential sources of error, including inaccurate visual determinations of breed.³

Neither the disparity between visual and DNA assessments of breed, nor the general inaccuracy in visual breed assessments of biting dogs, is surprising given the seminal work over forty years earlier by Scott and Fuller, who observed that even the first and second generation progeny of two purebred dogs of different breeds did not resemble the breed of either parent or grandparent.⁴ The outward appearance of “outcrossed” dogs (the progeny of dogs of different breeds) will quickly diverge from that of their ancestors. This explains the wide variety of types of mixed breed or “mutt” dogs in shelters, highlights the extreme difficulty in connecting appearance to any behavioral traits, and renders unreliable any effort to visually assess breed or breed origin.

The tenuous connection between a dog’s appearance and actual breed is supported by the science of genetics. A 2003 study comparing eighty dog breeds, feral dogs, and wolves found that a large number of their physical characteristics – body weight and size, skull shape and size, leg length, ear position, coat type – are determined by a very small number of “large effect” genes. Thus, while a dog may bear a strong resemblance to a particular breed, this breed may actually constitute only a small proportion of the dog’s genetic makeup.⁵

³ Jeffrey Sacks et al., *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, J. AM. VETERINARY MED. ASS’N 836, 838 (2000); American Veterinary Medical Association (AVMA) Task Force on Canine Aggression and Human-Canine Interactions, *A community approach to dog bite prevention*, J. AM. VETERINARY MED. ASS’N 1732, 1733 (2001) (“Dog Bite Prevention”); Stephen Collier, *Breed-specific legislation and the Pit Bull Terrier: Are the laws justified?* J. VETERINARY BEHAV. 17, 18 (2006).

⁴ Victoria Voith, *A Comparison of Visual and DNA Identification of Breeds of Dogs* (Proceedings of Annual AVMA Convention, Seattle, July 11-14, 2009), available at <http://nationalcanineresearchcouncil.com/publications/suggested-reading/> (citing J.P. SCOTT & J.L. FULLER, GENETICS AND THE SOCIAL BEHAVIOR OF THE DOG (1965)).

⁵ JANICE BRADLEY, THE RELEVANCE OF BREED IN SELECTING A COMPANION DOG 6 (2011) (citing Adam R. Boyko, et al., *A Simple Genetic Architecture Underlies Morphological Variation in Dogs*, PLOS BIOLOGY 1, 8 (2010)).

Because it is so difficult to identify breed, and because even experienced individuals often are unable to evaluate a dog's breed, there is simply no accurate data on the number of incidents involving a specific breed. As a logical and scientific matter, this makes breed an entirely inappropriate proxy for dangerousness -- and mere appearance an even faultier indicator. There is simply no good data on how many dogs who fit in the pit bull variety there are, or, most importantly, the concomitant risk of danger that they pose.⁶ Given the unreliability of reporting data, and the lack of any accurate population science, dependence on breed to determine dangerousness is a reckless proposition rife with error.

C. Many Factors Other Than Breed Are Better Indicators of Aggressive Tendencies.

Breed-specific liability rules rest on a false foundation because many factors completely unrelated to the breed or appearance of dogs affects their tendency toward aggression, including, as set out below, early experience, socialization, training, size, sex, and reproductive status. For example, male dogs who are not sterilized constitute 80 percent of all dogs presented to veterinary behaviorists for "dominance aggression" (*i.e.*, a dog's assertion of dominance over other people or dogs), are involved in roughly three-quarters of reported dog bite incidents, and are 2.6 times more likely to bite than neutered dogs. Unsterilized female dogs contribute to aggressive situations because they "attract free-roaming males, which increases bite risk to people through increased exposure to unfamiliar dogs," and "contribute to the population of unwanted" and potentially aggressive dogs.⁷

⁶ Sacks et al., *supra* note 3, at 838; *Dog Bite Prevention*, *supra* note 3, at 1733; Collier, *supra* note 3, at 18.

⁷ Kenneth Gershman, *Which dogs bite: A case control study of risk factors*, *PEDIATRICS* 913, 916 (1994); Sacks et al., *supra* note 3, at 839 (citing *id.*); *Dog Bite Prevention*, *supra* note 3, at 1733.

Dogs who are regularly kept isolated on a chain or tether are at greater risk of biting people.⁸ Dog aggression has also been correlated with a dog's size, but the counterintuitive finding has been that *smaller* dogs are more likely to attack people than larger dogs.⁹ Other factors implicated in dog aggression are the selective breeding and raising of dogs for such behaviors, whether for protection, dog fighting, social status or financial gain¹⁰; abuse and neglect¹¹; and inadequate obedience training and supervision.¹²

The ASPCA's Dr. Randy Lockwood, an internationally-known expert on dog bite issues, has emphasized the multiplicity of factors that can contribute to the worst cases:

A fatal dog attack is not just a dog bite by a big or aggressive dog. . . It is usually a perfect storm of bad human-canine interactions – the wrong dog, the wrong background, the wrong history in the hands of the wrong person in the wrong environmental situation. I've been involved in many legal cases involving fatal dog attacks, and, certainly, it's my impression that these are generally cases where everyone is to blame. You've got the unsupervised three year-old child wandering in the neighborhood killed by a starved, abused dog owned by the dogfighting boyfriend of some woman who doesn't know where her child is. It's not old Shep sleeping by the fire who suddenly goes bonkers. Usually there are all kinds of other warning signs.¹³

The experts also agree that the best predictor of a dog's behavior comes from an evaluation of individual adult dogs – not a selection based on breed. The “practice of searching for a promising working dog [for such things as police protection and search and rescue work] among adult dogs, rather than relying on breeding programs, is becoming more and more

⁸ Gershman, *supra* note 7, at 916; Sacks et al., *supra* note 3, at 839.

⁹ Angela Gonzalez Martinez, et al., *Risk factors associated with behavioral problems in dogs*, J. VETERINARY BEHAV. 225, 228 (2011).

¹⁰ JANICE BRADLEY, *DOG BITES: PROBLEMS AND SOLUTIONS* 10 (2006).

¹¹ Karen Delise, *Research and Investigation Methodology* 3, available at http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Delise%20Research%20&%20Investigation%20Methodology.pdf.

¹² Carrie M. Shuler, et al., 2008. *Canine and human factors related to dog bite injuries*, J. AM. VETERINARY MED. ASS'N 542, 545 (2008).

¹³ Malcolm Gladwell, *Troublemakers*, THE NEW YORKER, http://www.newyorker.com/archive/2006/02/06/060206fa_fact (last visited Sept. 19, 2011).

common today” given the comparative expense and unpredictability of breeding programs.¹⁴

The complexity and difficulty of ensuring specific behaviors through breeding “explains how so many of the so-called game-bred dogs from fight busts (like the ones rescued from Michael Vick’s fighting operation) have gone on to live companionably with other dogs as relative couch potatoes in normal homes.”¹⁵

Both the constellation of factors that can contribute to dog aggression, as well as predictive prior behavior on the part of the aggressing dog, were readily observable in the cases relied on by the Special Court of Appeals. In *Matthews v. Amberwood*, a male dog named Rampage was frequently chained and/or unsupervised and repeatedly allowed to engage in unchecked aggressive behavior. Although Rampage’s owner knew that he became violently aggressive in her absence, she nevertheless left him alone with her friend’s son, whom he killed. Similarly, in *Shields v. Wagman*, which also informed this Court’s opinion in *Amberwood*, the dog Trouble – despite severely injuring petitioner Kimberly Shields and repeated expressions of concern to his owner about his “vicious” behavior – was not supervised at night, was regularly chained to a truck or kept in a flimsy cage, and at other times was allowed to run loose in public spaces. Both dogs were placed in positions where another tragic incident was probably inevitable, and their dangerous natures were a function of the circumstances in which they were placed, not their breeds. See, e.g., *Shields*, 350 Md. at 670, 689. The likelihood of their engaging in future misconduct could have been evaluated fully and appropriately without any consideration of their assumed breed.

The same conclusions were reached by Spanish researchers who evaluated dogs to identify risk factors associated with aggression and other behavior problems in connection with

¹⁴ BRADLEY, *supra* note 5, at 27.

¹⁵ Janice Bradley, *Breeds and Behavior: They’re Not Like Other Dogs – or Are They?* BARK (2011), available at <http://www.thebark.com/content/apr-may-2011-issue-64>.

Spanish breed-specific law. Their studies specifically concluded that a dog's presumed or actual breed was *not* a risk factor, and that the dog breeds "classified as dangerous [by the Spanish Dangerous Animals Act] do not seem to be more aggressive than the rest."¹⁶ A large study in Germany concurred, resulting in the repeal of a breed-specific law after its authors found no significant difference in the behavior evaluations of dogs affected by the legislation (which included pit bulls) and a control group of golden retrievers.¹⁷ The German study suggested that "fear was the main cause of the behavior," not breed. They found that bite prevention efforts should consider the "emotions of the dog and effect of eliciting stimuli rather than affiliation with particular breeds."¹⁸ The authors noted that because of the qualification requirements for the tests, the golden retrievers had likely experienced less stress during the evaluation – but nevertheless were graded equally in terms of behavior.

D. Breed-Specific Rules Have Not Been Effective.

A law or legal doctrine that does not serve its purpose is unwarranted, and that is the case with breed-specific approaches to aggression. The pit bull ban in Prince George's County, Maryland is a good example. The head of the agency charged with administering the ban characterizes it as a law that compels the annual seizure of over 400 "nice, family dogs."¹⁹ In 2003, a county task force studied the ban and recommended its repeal, concluding that it was too costly and its benefits too minimal. The task force was not even sure the ban provided *any*

¹⁶ Martinez et al., *supra* note 9, at 228.

¹⁷ Stelanie A. Ott, et al., *Is there a difference? Comparison of golden retrievers and dogs affected by breed-specific legislation regarding aggressive behavior*, J. VETERINARY BEHAV. 134, 139 (2007).

¹⁹ Email from Rodney Taylor, Chief, Prince George's County Animal Management Div. to author (Oct. 20, 2009, 1:12 EST) (on file with author).

benefits because the marginal decrease in dog bites seen after the ban could not be attributed to its enactment.²⁰

British researchers and a second study looking at Spain's breed-specific law resulted in parallel results. Even prior to enactment of the law, they found that there was no significant correlation between a dog's breed and the likelihood of a biting incident. This finding was confirmed and emphasized by the fact that, after the ban was put in place, the number of biting incidents did not drop.²¹

In addition to being ineffective, breed bans negatively impact dogs outside the targeted breeds. The Prince George's County pit bull ban places significant pressure on the county shelter, which has limited space and yet must hold dogs identified as pit bulls during the pendency of lengthy legal proceedings. As a result, the shelter has had to euthanize hundreds of otherwise adoptable dogs of many different breeds for lack of space, and has suffered decreased adoption rates because there are so few dogs available.²² Thus, these rules do not serve their purpose, and cause further damage to innocent collateral victims, based on the consequences of the rules.

E. Breeds Targeted as Dangerous Are Valued Companion Animals.

While breed-specific rules (judicial or legislative) may be intended to improve community safety, the foregoing establishes that such a result cannot be expected, and they instead distract us from the real defining issues for dangerousness. Adding to the problems of

²⁰ PRINCE GEORGE'S COUNTY VICIOUS ANIMAL LEGIS. TASK FORCE, <http://www.understand-a-dog.com/BSL/Research/PGCMD/PGCMTOC1.htm> (last visited Sept. 18, 2011).

²¹ B. Klaassen, et al., Does the Dangerous Dogs Act protect against animal attacks: a prospective study of mammalian bites in the Accident and Emergency department, *INJURY* 89, 89-90 (1996); Belen Rosado, et al., Spanish Dangerous Animals Act: Effect on the epidemiology of dog bites, *J. VETERINARY BEHAV.* 166, 169 (2007).

²² Prince's conversation with Rodney Taylor, Chief, Prince George's County Animal Management Div. (March 10, 2004) (notes on file with author).

...families are the impacts they have on the individuals who live with tens of thousands of these dogs in peaceful harmony with their neighbors and community. The Court must take the status of pit bulls in Maryland into consideration when addressing a rule of liability that would directly impact the dogs, their owners, and the landlords whose liability is ultimately at issue. The Court should consider the severe consequences of such a breed-specific rule, based on the relationship between humans and companion animals, many of whom are pit bulls.

The Court can take judicial notice of the therapeutic and valued connection that many people establish with companion animals in Maryland. *Amicus* could present a thick bibliography of the scientific studies that show the well-established strength of the human-animal bond and prove the worth of human-canine companionship²³ Pit bulls are a common household pet and have been recognized as ideal family dogs and therapy dogs.²⁴ Any judicial rule that would mirror the misplaced efforts to ban dogs based on their breed would impact these animals and their families. Although the doctrine at issue in this case only directly affects landlords' liability for injuries from tenants' pit bulls, the obvious result will be a denial of available homes for families with pit bulls. And a judicial rule adopting a discriminatory policy based on a dog's breed could easily begin a pattern of similar judicial rules and legislative considerations along the same lines.

Breed-specific policies of any type cause hardship to responsible owners of properly supervised, friendly, well-socialized dogs, compelled to choose between compliance with

²³ See, e.g., Sean Wensley, *Animal welfare and the human-animal bond: Considerations for veterinary faculty, students and practitioners*, J. VETERINARY MED. EDUC. 532-39 (2008); *Dog Bite Prevention*, *supra* note 3, at 1733.

²⁴ See, e.g., Lynn Ready, *Pit-bull terrier therapy dogs provide great service to their community*, Best Friends Animal Society Pit Bull Terrier Initiatives (April 28, 2011), <http://www.bestfriends.org/initiatives/pitbulls/17100/news.aspx>; *Shelter for the Scarred: Rehabilitation Returned*, THE WASHINGTON POST, <http://www.washingtonpost.com/wp-srv/photo/galleries/vickdogs/>.

and restrictions or forfeiture of their beloved companions. As noted above, family dogs identified as pit bulls are regularly seized and killed pursuant to the Prince George's County pit bull ban.²⁵ In Ohio, due to a state law that classifies all pit bulls as "vicious" and imposes various requirements on their owners, pit bull owners have great difficulty locating housing or obtaining homeowners' or renters' liability insurance, and most Ohio shelters will not offer pit bulls for adoption. The consequences have been significant: in 1996, 101 Ohio animal control agencies reported handling 2,141 dogs deemed to be pit bulls, while in 2004, 68 agencies reported handling 8,834 such dogs, of whom 7,409 were killed.²⁶

There are an untold number of pit bulls living as companion animals in America today, and certainly tens of thousands in Maryland. Any rule – legislative or judicial – that serves to impact the individuals who live with and love these animals should be based on well-established scientific data, and not on anecdotal and unreliable suppositions about certain breeds of dogs.

F. A Judicial Rule of Liability Based On Breed Is Insupportable As a Matter of Fact, Law, or Public Policy.

Amicus has presented objective, scientific data demonstrating that breed-specific "dangerous dog" laws are based on unreliable and inaccurate beliefs about the targeted breeds. The instant case centers on a judicial doctrine in Maryland that would adopt the fallacy and turn it into a rule of liability insurance imposed on landlords who rent to tenants living with pit bulls for no other reason than that they are assumed to belong to a group of dogs that look like a generalized impression of a group of breeds known colloquially as pit bulls. The dogs identified in these laws represent mainly loving companions living in the homes of Maryland residents, and without

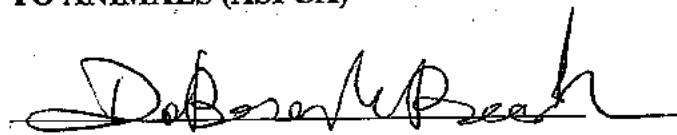
²⁵ Phone conversation with Rodney Taylor, Chief, Prince George's County Animal Management Div. (March 10, 2004) (notes on file with author).

²⁶ Linda K. Lord, et al., *Demographic trends for animal care and control agencies in Ohio from 1996 to 2004*, J. R. AM. VETERINARY MED. ASS'N 48, 51 (2006).

...the new rule would impact those citizens in an even more significant way than the
...themselves. In deciding whether to fashion and affirm a new rule of tort liability,
...believes the Court should consider the information provided here, the impact on tens of
...hundreds of Maryland residents and their families, and the unproven value of such a rule as a
...of equity.

Respectfully submitted,

**AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that copy of the foregoing Amicus Brief was sent by ordinary first class postage prepaid, this 21 day of September 2011 to **Richard Schimel**, **Richard Schimel, P.C.**, 7315 Wisconsin Ave., Suite 500 West -- Air Rights Center, Bethesda, MD 20814; **Clifford A. Robinson, H. Barritt Peterson, Jr. & Associates**, 1 West Pennsylvania Ave., Suite 500, Towson, MD 21204-5025; **Kevin A. Dunne and Matthew T. Vocci**, Ober, Kohn, Finnes & Shriver, P.C., 120 East Baltimore St., Baltimore, MD 21202.


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