IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 2011

DOROTHY M. TRACEY

Appellant,

v.

ANTHONY K. SOLESKY and IRENE SOLESKY, as the Parents, Guardians and Next Friends of DOMINIC SOLESKY, a Minor

Appellees.

BRIEF OF *AMICUS CURIAE* THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

Jonathan Lovvorn
jlovvorn@humanesociety.org
Kimberly Ockene
kockene@humanesociety.org
Mila Zain
mzain@humanesociety.org
Akisha Townsend
atownsend@humanesociety.org
THE HUMANE SOCIETY
OF THE UNITED STATES
2100 L Street, NW
Washington, DC 20037
Phone: (202) 955-3669

James R. Barrett
james.barrett@lw.com
Paul T. Crane
paul.crane@lw.com
Jessica R. Munitz
jessica.munitz@lw.com
Amy E. Gaither*
amy.gaither@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Phone: (202) 637-2200
Fax: (202) 637-2201

*Licensed to practice law in California; all work supervised by a member of the District of Columbia Bar.

Counsel for The Humane Society of the United States

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Humane Society of the United States ("HSUS") is the nation's largest animal protection organization with more than 11 million members and constituents. HSUS's mission is to protect animals through legislation, litigation, investigation, education, science, advocacy and field work. HSUS regularly assists in animal rescue operations around the country and provides emergency and ongoing care for animals in emergency shelters and clinics.

INTRODUCTION

The Court's opinion in this case departs from a century's worth of precedent and settled expectations. Prior to the Court's decision, liability for injuries caused by pit bull type dogs was determined the same way liability has always been determined for any dog: on a fact-specific, case-by-case, dog-by-dog basis. As the Court explained in *Bachman v. Clark*, 128 Md. 245, 247, 97 A. 440, 441 (1916): "At common law, the owner of a dog is not liable for injuries caused by it, unless it has a vicious propensity, and notice of that fact is brought home to him." That approach was expressly reaffirmed in two separate cases in 1998. *See Matthews v. Amberwood Assocs. Ltd. P'ship, Inc.*, 351 Md. 544, 570, 719 A.2d 119, 131 (1998) (liability exists only "where a landlord retain[s] control over the matter of animals in the tenant's apartment, coupled with the knowledge of past vicious behavior by the animal"); *Shields v. Wagman*, 350 Md. 666, 669-707, 14 A.2d 881, 882-83 (1998) (same).

According to the Court's opinion in this case, however, that is no longer the law with respect to pit bull type dogs. Instead, a defendant may be held strictly liable for injuries caused by a pit bull type dog if it is established that he knew or should have known the dog was a pit bull type dog, or any dog deemed to be a "mix" with a pit bull type dog; the plaintiff need not show that that the defendant knew or should have known that the specific dog involved was dangerous. This sharp break from longstanding precedent was based on the Court's sweeping

determination that all "pit bulls and cross-bred pit bulls are inherently dangerous." *Tracey v. Solesky*, No. 53, slip. op. at 8 (Apr. 26, 2012). That dramatic and far-reaching decision was not based on new and conclusive scientific evidence regarding pit bull type dogs. It was not based on extensive public hearings and comprehensive expert testimony. And it was not based on the expressed will of Maryland voters seeking to treat pit bull type dogs differently than any other canine. Rather, the Court charts a new course based merely on its own policy judgment—a judgment grounded in disputed studies, *id.* at 16-17,[1] and anecdotal evidence, *id.* at 1.[2]

HSUS does not dispute the Court's authority to establish and modify common law rules. These sorts of policy judgments, however, are best—and most appropriately—made by state and local legislatures, not this Court. Legislatures enjoy several institutional advantages courts do not. In particular, legislatures can actively and broadly acquire all potentially relevant information through public hearings and expert submissions. In addition, legislatures can publicly debate competing policy considerations and ensure that all points of view are heard and studied.

---

[1] One of the studies relied on by the Court is a report published in the Journal of the American Veterinary Medical Association. *See Tracey*, No. 53, slip op. at 16 (citing Jeffrey Sacks et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, 217 JAVMA 836 (2000)). The Court's opinion does not take into account the full context of that report, especially its explanation that data about dog bites are at best incomplete and at worst misleading. *See* Sacks, *supra*, at 838-39 (explaining that dog bite data "may be biased" for several reasons and that accurate data "requires reliable breed-specific population data [and,] [u]nfortunately, such data are not currently available"). The report also cautions that "it is imperative to keep in mind that even if breed-specific bite rates could be accurately calculated, they do not factor in owner-related issues." *Id.* at 839.

[2] In fact, there is substantial evidence that pit bull type dogs are no more "inherently" dangerous than any other dog. *See, e.g.*, Sacks, *supra* note 1, at 839 (explaining that "[s]everal interacting factors affect a dog's propensity to bite" and that "[b]reed-specific legislation does not address the fact that a dog of any breed can become dangerous when bred or trained to be aggressive"). Put simply, the basic premise underlying the Court's decision—that pit bull type dogs are singularly vicious—is highly contested, if not flat out wrong.

The immediate response to the Court's opinion in this case graphically demonstrates the pitfalls of courts wading into the realm of legislative policy judgments. The Court's decision has, and will continue to have, far-reaching negative consequences across the State—adversely affecting citizens who own loving pit bull type dogs as pets, damaging businesses that provide animal services, paralyzing local governments responsible for enforcing animal control laws and operating animal shelters, and potentially increasing the risk that pit bull type dogs will be turned loose in Maryland communities. Accordingly, HSUS respectfully requests that the Court grant Appellant's motion for reconsideration.

ARGUMENT

I. THE DECISION TO IMPOSE STRICT LIABILITY BASED ON A DOG'S PARTICULAR BREED HAS, WITHOUT EXCEPTION IN THE UNITED STATES, BEEN LEFT TO STATE AND LOCAL LEGISLATIVE BODIES

A. Imposition Of Breed-Specific Strict Liability By A Court Is Unprecedented

Until this Court's opinion, the decision to impose breed-specific laws had consistently been left to—and made by—state and local legislatures. Indeed, this Court is the first in the United States to unilaterally adopt breed-specific strict liability. Although the Court cites several cases where courts have enforced breed-specific strict liability standards, *see Tracey,* No. 53, slip op. at 18-23, all of those cases involved breed-wide determinations that had been made by legislative bodies.[3] Accordingly, those cases merely confirm that such laws are a permissible

---

[3] In *City of Toledo v. Tellings*, 871 N.E.2d 1152 (Ohio 2007), the Supreme Court of Ohio upheld provisions of the Toledo Municipal Code and the Ohio Revised Code which included pit bulls in the definition of "vicious dog" to limit pit bull ownership to one per household and require owners to abide by certain restrictions. In *Bess v. Bracken County Fiscal Court*, 210 S.W. 3d 177 (Ky. Ct. App. 2006), the Court of Appeals of Kentucky upheld a Bracken County ordinance deeming pit bulls inherently dangerous and banning ownership and keeping of pit bulls in the county. In *McNeely v. United States*, 874 A.2d 371 (D.C. 2005), the District of Columbia Court of Appeals upheld the district's Pit Bull and Rottweiler Dangerous Dog Designation Emergency Amendment Act of 1996, which temporarily added pit bulls to the

exercise of the *legislature*'s police powers; they say nothing about the wisdom of a court adopting similar liability rules pursuant to its own common law responsibilities.[4]

The Court similarly relies on the fact that thirteen states have "some form of strict liability statute in which the finding of dangerousness of the particular attacking dog is not necessary to establish the elements of negligence." *Tracey*, No. 53, slip op. at 23. The Court also notes that some counties—like Prince George's County—have adopted breed-specific animal control laws. *Id.*; *see* Prince George's County Code § 3-185.01 (2012) (ordinance banning persons from owning or harboring pit bulls within the county). But this again simply confirms that decisions to impose breed-specific restrictions have, without exception in the United States, been made by state and local legislative bodies, not the courts.[5]

District of Columbia Code's definition of "dangerous dog" in order to require owners to specially register pit bulls as dangerous dogs and fulfill special responsibilities. In *Colorado Dog Fanciers, Inc. v. City & County of Denver*, 820 P.2d 644 (Colo. 1991) (en banc), the Supreme Court of Colorado upheld a Denver ordinance making it unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell any pit bull within city limits.

[4] Other courts have declined the invitation to impose breed-specific strict liability through their common law, deferring instead to their state legislatures. *See, e.g.*, *Ferrara v. Marra*, 823 A.2d 1134, 1137-38 (R.I. 2003) ("[P]laintiff invited the trial justice to take judicial notice that pitbull terriers are inherently dangerous by virtue of their breed. That would have, in effect, created a new cause of action by imposing strict liability upon pitbull owners. The hearing justice properly declined to accept the invitation, because the creation of a new cause of action should be left to the Legislature. Although we recognize that some states and municipalities successfully regulate certain breeds of dogs such as pit bulls, our Legislature has not, as yet, chosen to create a species specific standard of care.") (internal citations and quotation marks omitted).

[5] Notably, the Court does not acknowledge that 12 states have passed laws *prohibiting* the passage of breed-specific legislation by local governments. *See* Dana M. Campbell, *Pit Bull Bans: The State of Breed-Specific Legislation*, 26 GPSolo 36, 38 (2009). The Court also ignores the fact that no state in the country currently specifies a breed in its state-wide dangerous animal statutes; breed-specific restrictions currently exist solely at the local level.

B. Legislative Bodies Are The Appropriate Forum For Considering And Ultimately Imposing Dog Liability Standards

Any sweeping departure from longstanding liability rules should be accomplished through the legislative process and all its attendant benefits. As an institutional matter, legislatures are better equipped to make breed-specific decisions. Legislatures are able to hold public hearings, actively gather all available evidence, consider competing policy concerns, and make decisions based on all potentially relevant facts—not just those presented in a limited appellate record concerning a single case.

For example, the Denver "Pit Bulls Prohibited" ordinance, upheld in *Colorado Dog Fanciers* and cited by this Court in its opinion, was the subject of four separate meetings in the Denver City Council's Committee on Health, Housing, and Human Services and a public hearing during a regular session of the Denver City Council.[6] The ordinance was eventually enacted by a Council vote, accompanied by specific factual findings set out in the preamble of the ordinance. Another example is the Ohio state law upheld in *Tellings*, also cited by the Court, which was recently the subject of extensive state legislature committee hearings and debate.[7] After such debate, the Ohio General Assembly passed a new statute removing pit bulls from the definition of "vicious dog" in the state code.[8]

---

[6] Kory A. Nelson, *Denver's Pit Bull Ordinance: A Review of Its History and Judicial Rulings*, CaliforniaPoliceChiefs.org (Apr. 15, 2005), http://californiapolicechiefs.org/wp-content/uploads/2012/01/denvers_pit_bull_ordinance.pdf.

[7] *See, e.g.*, Senate Session – January 31, 2012, The Ohio Channel, http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=134307&startTime=2781&autoStart=True; House Session – February 8, 2012, The Ohio Channel, http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=134389&startTime=1579&autoStart=True.

[8] *See* Sub. H.B. 14, 129th General Assembly (Ohio 2012), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_14_EN_N.pdf; Andrea Holmes, Ohio Legislative Service Commission, Final Analysis, Sub. H.B. 14, 129th General Assembly (May 22, 2012), *available at* http://www.lsc.state.oh.us/analyses129/12-hb14-129.pdf.

As the experiences in Colorado and Ohio indicate, the question of breed-specific dog regulation is a complex and contested one. Given the informational and institutional advantages enjoyed by legislatures, it is no coincidence that the difficult decision of determining whether an entire class of animals deserves special treatment has heretofore been made by legislatures. In this case, however, the Court lacked the benefit of public hearings and the general fact-gathering powers of a legislature. Rather than rely on expert testimony, the Court instead based its decision on a handful of disputed studies and anecdotal evidence about attacks from the last 13 years.

For purposes of making a judgment about the dangerousness of an entire class of dogs, the evidence relied on by the Court was woefully inadequate. Moreover, it vividly underscores why legislatures are better suited for making these fact-heavy, policy-laden determinations.

II. IMPOSITION OF A STRICT LIABILITY STANDARD REGARDING PIT BULL TYPE DOGS HAS, AND WILL CONTINUE TO HAVE, FAR-REACHING, NEGATIVE CONSEQUENCES

A. The Court's Decision Will Disproportionately Impact Renters

The Court's decision substantially alters landlords' potential liability and, in doing so, places significant burdens on renters. In Maryland, approximately 1.7 million people, or 30% of the state population, occupy a rented living space.[9] As landlords attempt to address the new pit bull strict liability rule, some have adopted blanket prohibitions on tenants owning or keeping pit bull type dogs. HSUS is already aware of instances where landlords, in light of the Court's holding, have started the process to remove tenants who wish to keep pit bull type dogs that have no history of dangerousness. These tenants will be forced to decide whether to give up their beloved pets, on the one hand, or risk eviction or inability to find new homes, on the other. In

---

[9] U.S. Census Bureau, 2010 Census Interactive Population Search: Maryland, http://2010.census.gov/2010census/popmap/ipmtext.php?fl=24.

contrast, homeowners who own or keep pit bull type dogs will not be forced to choose between their dogs and their homes. Accordingly, the renter population of Maryland will be unfairly forced to bear the brunt of the Court's decision.[10]

B. The Court's Decision Will Burden Persons Who Provide Animal Services

While landlords impose blanket bans on pit bull type dogs in rented housing, it is also likely that groomers, professional dog walkers, short-term boarding facilities, and other such small businesses (even possibly including veterinarians), will refuse to accept pit bull type dogs rather than expose themselves to strict liability under the new rule. Because the Court's decision imposes strict liability on anyone with ownership *or control* of a pit bull type dog, these entities are exposed to potential liability any time—as they often do—take control of dogs in the course of their services. Put simply, the Court's opinion will fundamentally alter how canine service providers conduct their businesses, and potentially impose significant financial losses on Maryland's business community.[11]

---

[10] In addition to the burden now shouldered by Maryland renters, the Court's decision will also have a considerable adverse impact on state and local budgets. Pet-friendly landlords enjoy a competitive advantage in the rental marketplaces. As landlords become less pet-friendly in light of the Court's decision, they will lose that market advantage and, therefore, have to reduce their rental rates. "This will, in turn, negatively affect state and local business tax revenues, income tax revenues, and property tax revenues, by as much as $30,190,946." Memorandum from Doug Mackey to Ledy Vankvage, *Economic Impact and Tax Implications of Tracey v. Solesky* (May 18, 2012), *available at* http://www.bestfriends.org/pdfs/MarylandImpactTraceyv Solesky5-18-2012second.pdf.

[11] The impact of the Court's decision is not limited to businesses that primarily cater to animals. Restaurants and other public accommodations may also decide to bar pit bull type dogs from their premises rather than risk liability under the Court's new strict liability rule. Such prohibitions undermine recent legislation passed by the General Assembly that sought to encourage patrons dining out with their dogs. *See* Dining Out Growth Act of 2011, codified at Md. Health-General Code § 21-304.2.

C. The Court's Decision Will Greatly Burden Animal Shelters Already Suffering From Limited Resources

Another derivative consequence of the Court's decision will be an increased rate of pit bull owners relinquishing their dogs to avoid eviction, added expense and inconvenience, increased litigation exposure, or other risks. This is no mere hypothetical concern. HSUS is already aware of pit bull type dogs being given up by their owners because of the Court's ruling. Indeed, HSUS is aware of at least one owner simply turning two pit bull type dogs loose on the streets when he was threatened with eviction. There is no reason to think this will be an isolated occurrence.

As more and more owners abandon their pit bull type dogs, animal shelters already stretched thin will be forced to carry the added weight. Although each county in Maryland has an animal control authority that works with a municipally-run or municipally-contracted shelter, these shelters have limited resources, and many depend, in large part, on donations and volunteers to stay in operation. Most other non-municipal animal rescue organizations and shelters are nonprofit entities, fully dependent on donations for funding. An increase in unwanted pit bull type dogs will greatly burden an already strained system. Municipal shelters and nonprofit animal organizations may be forced to discontinue other important services, such as community outreach and free rabies clinics (along with basic services for all other animals), in order to dedicate the resources necessary to address the increase in abandoned pit bull type dogs. HSUS is already aware of some shelters that have been forced to request help from other organizations to take in extra pit bull type dogs, a situation that will only exacerbate as more and more dogs are abandoned because of the Court's decision.

D. The Court's Decision Will Result In Confusion Regarding The Proper Interpretation Of State And County "Dangerous Animal" Laws

All county animal control laws in Maryland contain "dangerous animal" or "dangerous dog" provisions. Under these laws, the county animal control authority must make an affirmative determination that an individual animal is dangerous based on specifically enumerated findings before restricting, impounding, euthanizing or taking other measures with regard to the animal.[12] The State of Maryland similarly defines the term "dangerous dog" (for purposes of imposing certain prohibitions in the penal code) as a dog that has exhibited certain behaviors, including killing or inflicting severe injury to a person, biting a person, killing or inflicting severe injury on a domestic animal, and attacking without provocation. Md. Code Ann. Crim. Law § 10-619 (2012). Despite these laws' animal-specific requirements, state or county officials may believe that the Court's declaration that pit bull type dogs are "inherently dangerous" requires a similar determination that all pit bull type dogs are "dangerous animals" or "dangerous dogs" under applicable law. This determination would require counties to take the

---

[12] *See, e.g.*, Queen Anne's County Code § 9-23 ("In this section, 'vicious or dangerous animal' means any animal that: (a) Has inflicted injury on a human being without provocation; (b) Has injured or killed a domestic animal without provocation; or (c) Is owned or harbored primarily or in part for the purpose of animal fighting, or any animal trained for animal fighting; . . . Any animal exhibiting behavior of a vicious and/or dangerous animal . . . may be deemed a vicious or dangerous animal by the Director of the Department of Animal Control or his designee and impounded. The Director or his designee may set conditions for the animal to be returned to the owner or have the animal euthanized. No animal that is deemed vicious or dangerous may be adopted under any circumstances."). *See also* Allegany County Code § 225-1; Anne Arundel County Code § 12-4-101; Baltimore County Code § 12-8-101; Health Code of Baltimore City § 10-702; Calvert County Code § 7-9-101; Caroline County Code § 78-12; Carroll County Code § 81-8; Cecil County Code § 209-10; Charles County Code § 230-12.5; Dorchester County Code § 78-5; Frederick County Code § 1-5-22; Garrett County Code § 91.01; Harford County Code § 64-11; Howard County Code § 17.303; Kent County Code § 64-1; Montgomery County Code § 5-202; Prince George's County Code § 3-136; Somerset County Dog Control Ordinance 924, Art. II; St. Mary's County Code § 212.12; Talbot County Code § 15-2; Washington County Animal Control Ordinance § 36; Wicomico County Code § 133-7; Worcester County Code § PS 2-101.

same action against all pit bull type dogs (regardless of their actual dispositions) that the county currently takes against individual dogs that have a documented history of dangerousness, and it would impose criminal liability on pit bull owners that fail to abide by the State penal code's prohibitions. Some Maryland county officials appear to have already made this determination: HSUS is aware of some municipal shelters refusing to permit any pit bull adoptions based on this Court's ruling.

E. Taken Together, These Consequences Will Result In Unnecessary Euthanasia Of Non-Dangerous Dogs

The combined consequences of the Court's decision will inevitably result in many nonviolent dogs being unnecessarily euthanized when local shelters would have otherwise placed them with new owners or rescue organizations (or may not have even needed to take them in the first place). Whether based on a lack of space or funding to accommodate the dogs, or a fear of strict liability, the increase in unnecessary euthanasia directly contradicts the premise of local laws designed to foster the humane treatment of animals in the community.[13] Nevertheless, many counties may feel that the Court's decision binds their hands in this regard.

Further, all of these consequences, which are undoubtedly significant, will be magnified given the inherent difficulty in classifying pit bull type dogs and, especially, those dogs deemed to be a "mix" of a pit bull type dog. Pit bull is not a "breed" *per se*; rather the term refers to a type of dog that has certain physical characteristics. Definitive descriptions of the varying types of dogs referred to as pit bulls and pit-bull mixes are lacking, and several characteristic markers of pit bull type dogs (head shape being the most commonly "recognized") are shared by many breeds. Accordingly, there is a serious risk that scores of dogs who do not have any pit bull

---

[13] *See, e.g.*, Caroline County Code § 78-1 ("The purpose of this Act is to provide for the safety of the public, the humane care and treatment of animals, and to encourage responsible animal ownership.").

lineage will be mistaken for pit bull type dogs or pit bull mixes, causing the dogs and their owners to suffer the consequences that accompany that determination.[14]

* * *

These consequences are just a few of the many issues that a legislature may have considered—and adequately addressed—before reaching a conclusion on whether pit bull type dogs should be singled out for separate treatment. Given that the sorts of policy judgments underlying the Court's opinion are better—and more appropriately—handled by state and local legislatures, and given the far-reaching, negative fallout caused by the Court's decision, reconsideration is warranted.

CONCLUSION

HSUS does not dispute the Court's authority to establish and modify common law rules. HSUS also empathizes greatly with the horrible injuries suffered by the children in this case. But neither fact justified the Court's unprecedented decision here. In light of the widespread, negative consequences that follow from the Court's decision, HSUS respectfully requests that the Court grant Appellant's motion for reconsideration.

---

[14] *See* Victoria Lea Voith, *A Comparison of Visual and DNA Identification of Breeds of Dogs*, Proceedings of Annual American Veterinary Medical Association Convention (2009), http://www.animalfarmfoundation.org/files/Voith_AVMA_2009.pdf (explaining study results showing there is "low agreement between the identification of breeds of dogs by adoption agencies and DNA identification"); Sacks, *supra* note 1, at 839 ("[L]aw enforcement personnel have few means for positively determining a dog's breed . . . . [County ordinance] descriptions are usually vague, rely on subjective visual observation, and result in many more dogs than those of the specified breed being subject to the restrictions of the ordinance.").

Respectfully submitted,

_____

James R. Barrett
james.barrett@lw.com
Paul T. Crane
paul.crane@lw.com
Jessica R. Munitz
jessica.munitz@lw.com
Amy E. Gaither*
amy.gaither@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Phone: (202) 637-2200
Fax: (202) 637-2201

Jonathan Lovvorn
jlovvorn@humanesociety.org
Kimberly Ockene
kockene@humanesociety.org
Mila Zain
mzain@humanesociety.org
Akisha Townsend
atownsend@humanesociety.org
THE HUMANE SOCIETY
OF THE UNITED STATES
2100 L Street, NW
Washington, DC 20037
Phone: (202) 955-3669

*Licensed to practice law in California; all work supervised by a member of the District of Columbia Bar.

Counsel for The Humane Society of the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2012, two copies of the foregoing Brief of *Amicus Curiae* The Humane Society of the United States in Support of Appellant's Motion for Reconsideration were served on each of the following by first-class mail, postage prepaid:

Kevin A. Dunne
Matthew T. Vocci
Ober, Kaler, Grimes & Shriver, P.C.
120 East Baltimore Street
Baltimore, Maryland 21202

James L. Shea
Mitchell Y. Merviss
Michael J. De Vinne
Victoriya M. Shpigelman
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202

_____
Amy E. Gaither