AVMLA NEWS

Spring 2011

THE AVMLA HAS MOVED!

PLEASE NOTE OUR NEW INFORMATION

American Veterinary Medical Law Association

www.avmla.org

1666 K. Street, NW, Ste. 260

Washington, DC 20006

202.449.3818 p 202.449.8560 f

Andrea Ball, AVMLA Executive Director

admin@avmla.org

AVMLA Office Relocates To Washington, DC

The AVMLA entered a new era in February after the resignation of Executive Director, Julia Fullerton, JD who had managed the association since 2007. We wish Julia the best of luck in her future endeavors and new opportunity.

PlanIt World llc. a Washington DC-based Association Management Company, has been selected by the AVMLA to provide full service management services to the association.

Andrea Ball, principal at PlanIt World, will serve as the Executive Director of AVMLA and assist with annual meeting planning, the AVMLA Newsletter and other association programs.

"We are thrilled to be recognized by those in the AVMLA as the best management choice for their association," says Ball. "We are excited about providing exceptional service for the AVMLA membership." Ball has experience in the veterinary industry, in addition to a successful track record in association management for multiple clients since 1999.

The AVMLA search committee felt that the team approach to client service offered by PlanIt World would provide added benefits and service for AVMLA members and the new offices in the heart of the Washington, DC business district will help showcase the important role the AVMLA fulfills.

Please note the new address and contact information of the AVMLA for your records.

> *"We are excited about providing exceptional service for the AVMLA"*
>
> Andrea Ball, AVMLA Executive Director

AVMLA MISSION STATEMENT

The AVMLA was incorporated in 1994 as a nonprofit organization with the following objectives:

- Provide information to members regarding pertinent issues in the field of veterinary medical law.
- Increase public awareness and understanding of the impact of law on all aspects of veterinary medicine.
- Facilitate interactions among organizations, regulatory agencies, and the courts for the benefit of society.

The diverse membership of the AVMLA provides a unique forum for discussion of issues and the dissemination of information. This is accomplished through conferences, newsletters, and interaction among individual members.

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AVMLA MEMBER NEWS

Dr. Marty Greer Joins AVMLA Board

Dr. Marty Greer

Dr. Marty Greer joins the AVMLA board of directors representing District III. A JD and a DVM, Dr. Greer will be an excellent addition to the AVMLA board of directors. Dr. Greer received her Bachelor of Science in 1978 and her DVM in 1981 from Iowa State University in Ames, Iowa. She established the Small Animal Clinic in Brownsville in 1982 and moved the practice to Lomira in 1988. In December of 2010, she completed her legal education at Marquette University Law School.

Dr. Greer has a special interest in Pediatrics and Reproduction. In 2002, she opened a Canine Semen Freezing Center, International Canine Semen Bank - Wisconsin (ICSB-WI) and became Penn-Hip Certified. She has contributed to pharmaceutical and nutritional research as an investigator for Abbott Laboratory, Deprenyl Animal Health and Hill's Pet Food Corporation. She has also been featured in articles in Veterinary Economics.

Dr. Greer and her husband, Dr. Daniel Griffiths, have two children, Katy and Karl. In addition, they raise and show Pembroke Welsh corgis and Bernese Mountain Dogs. They also have cats, rescue dogs, a horse, 4H dairy heifers, llamas and sheep. Her family has raised five five puppies for Canine Companions for Independence, a service dog organization. In her free time, Dr. Greer loves spending time with her family, knitting, photography, and takes Classic French Cooking classes using organic products. She is active in the community, holding offices with the Wisconsin Veterinary Medical Association and the Lomira Public Library. She has been appointed by Governor Jim Doyle to a position on the Veterinary Examining Board of the Department of Regulation and Licensing. She is also a member of the AVMA, NEWVMA, ASVBP, APDT, AAFP, SVME, ACSMA, The Society for Theriogenology, the Fond du Lac Kennel Club, the Pembroke Welsh Corgi Club of America, Lakeshore Pembroke Welsh Corgi Kennel Club, and the Lomira Area Chamber of Commerce.

Dr. Smith Presents Nationally

Dr. Carin Smith's 2011 presentations were/are at the MN VMA in Minneapolis (Feb); WVC in Las Vegas (Feb); AAHA/OVMA in Toronto (March); the AVMA in St Louis (July); and the NY State Veterinary Conference (late Sept.) Topics include performance improvement; how systems affect people at work; managing friendships and family relationships at work; women and leadership; gender and generation at work; growing your career by growing your practice; career prep and career choices; talking to clients about money; and presenting "value" to clients. For more information, Contact: Carin Smith, DVM Smith Veterinary Consulting www.smithvet.com

Newton v. North American Specialty Insurance Company, 08-522-JBC, 2010 U.S. Dist. LEXIS 101137, (USDC, ED Ky. Sep. 24, 2010).

***Summary**: The Plaintiff's horse was diagnosed with ataxia, and it was eventually euthanized. Subsequently, the Plaintiff sought to collect on the life insurance policy covering the horse, which had been issued by the Defendant. The Court dismissed the claim on a Motion for Summary Judgment, after it was determined the Plaintiff failed to present evidence that he had complied with the provisions of the Policy.*

The Plaintiff, Philip Newton ("Newton"), was the owner of a racehorse, named "Marco Polo", which was covered by a $400,000 life insurance policy ("Policy") issued by the Defendant, North American Specialty Insurance Company. The horse was diagnosed with a neurological disorder, known as Ataxia. During the period of treatment, Newton was advised that the medical condition of the horse was not covered by the Policy, since the horse was not found to have a rating of "3" for a "level of ataxia", under the terms of the Policy. Newton continued treatment of the horse, including one treatment identified as "Navigator". Unfortunately, the horse did not improve, and was eventually euthanized, and the Plaintiff presented an insurance claim to the Defendant, which was denied.

Suit was filed, and early in the litigation, the insurer filed a motion for summary judgment, which was analyzed in this opinion. The plaintiff asserted multiple arguments, based on the facts and the language of the Policy, in support of the position that the insurer should be estopped from denying coverage. First, the Plaintiff argued the "Navigator" treatment was induced, at the request of the insurer, and its failure should bar the insurer from denying coverage. Second, the Plaintiff argued the insurer recommended use of "Navigator" with the intent to "improve the condition of the horse quote just enough that he [would not] qualify for coverage." Finally, the Plaintiff argued the Policy allowed for euthanizing of the horse, under certain conditions, which were met.

After analyzing the Plaintiff's arguments, the court found there was no genuine issue of material fact, and the Motion for Summary Judgment should be granted. Specifically, the court noted that the Policy had clear language regarding coverage of the horse, if it is diagnosed with ataxia. Under the Policy language, if the horse was diagnosed with a rating of "3", as a scale for the severity of ataxia, which is defined in the Policy, only then would the horse be covered. Furthermore, the Policy did provide a general humane destruction provision ("GHD provision"), which allowed for euthanasia under certain general conditions, but the GHD provision did not apply, because of the application of the specific provisions of the Policy for a horse diagnosed with ataxia. Additionally, even under the GHD provision, it only applied after the insurer is given the opportunity to have an independent veterinarian determine the need for euthanasia. In the facts presented to the Court, the Plaintiff never allowed the insurer the opportunity to name a veterinarian. Therefore the plaintiff failed to comply with the requirements of the GHD provision of the language of the Policy. The motion for summary judgment was granted, and the claim was dismissed. ■

AVMLA President's Message

Dear AVMLA Member,

Our organization has navigated significant changes in the past several months. Following a lengthy national search, we have engaged Andrea Ball, an association management professional, as our new executive director and to organize our affairs. Her office, located in Washington, DC, will serve as the headquarters of the AVMLA. Our engagement of Andrea follows the unexpected resignation of our long-time executive director, Julia Fullerton, JD as she develops her career. We will miss Julia and her untiring efforts. We appreciate your patience as we transition duties to Andrea.

If you have not already marked your calendar, we hope you attend the AVMLA annual meeting on July 16, 2011 and CE conference on July 17, 2011, both in St. Louis. This year, we are returning to coordinating our annual meeting and conference with the AVMA's annual meeting. The AVMLA's CE conference and Annual Meeting will provide educational updates on important topics and hot button issues. Visit www.avmla.org for the details. In addition, your board of directors has authorized further enhancement of the AVMLA's website with the goal of adding flexibility and content. The enhanced website is planned to be on-line in the next couple of months. Finally, after the lapse while we searched for our new executive director, we are resuming our quarterly webinars. On behalf of the AVMLA Board of Directors, I thank all of the AVMLA members for continuing to support the association with the timely submission of their membership dues.
I look forward to seeing you in St. Louis.

Sincerely,
Thomas Chandler AVMLA President

Swanstrom v. Seadler et al., 2010-CA-000059-MR, 2010 Ky. App. Unpub. LEXIS 859, (Ky. App. 10/29/2010).

Summary: *The Plaintiff, a veterinarian injured after a barn stall door collapsed, appealed the decision of the trial court, which had granted the Defendants' Motion for Summary Judgment, relying on the Kentucky Farm Animal Activities Act. The trial court found the Defendants had no duty to warn the veterinarian of the inherent risk of farm animal activities; however, the appellate court noted the same statute specifically provided that it did not limit liability for injuries sustained as a result of a dangerous latent condition which was known or should have been known by the facilities owner.*

This matter arises out of an incident in which the Plaintiff, Oscar Swanstrom ("Swanstrom"), a veterinarian, was injured after he administered a sedative to the horse owned by the Defendants, John and Michelle Seadler. The Defendants' horse was in a barn stall, which had been built by John Seadler, 14 years earlier. After the Plaintiff administered the sedative, the horse began to stagger in the barn stall, and the veterinarian exited the stall and latched the door. Subsequently, the horse fell into the stall door, causing it to collapse on the Plaintiff. The veterinarian was injured in the process. The Plaintiff filed suit alleging latent defects in the stall door. In support of his claim, a contractor presented evidence that it was his opinion the "stall door collapsed because of the inappropriate materials and designs used in its construction."

At the trial court, the Defendants filed a Motion for Summary Judgment under the Kentucky statute, which barred claims caused by farm animal activities. Relying on the statutory language, the trial court granted the Motion for Summary Judgment. The statute, KRS 247.402, states in, pertinent part, that: "farm animal activity sponsors, farm animal professionals, or other persons are deemed to have the duty to reasonably warn participants in farm animal activities of the inherent risks of the farm animal activities but not the duty to reduce or eliminate the inherent risk of farm animal activities."

The appellate court reversed the decision of the trial court, and remanded the matter back to the trial court. The appellate court decision was based on the subsections of the same statute, KRS 247.402(2)(c), which provides, in pertinent part, that "this section shall not prevent or limit the liability of a farm animal activities sponsor, farm animal activity professional, or other person if [a claimant sustains] injuries because of a dangerous latent condition which was known or should have been known to the farm animal activities sponsor, farm animal professional, or person and for which warning signs have not been speculatively posted." The appellate court found it improper for the trial court to grant the Defendants' Motion for Summary Judgment. ■

Veterinary Radiation Therapy Clinic v. Commissioner of Revenue, 7906-R, 2010 Minn. Tax LEXIS 35, (Minn Tax Ct. 11/29/2010).

Summary: *The Appellant administratively appealed the notice for sales and use tax for purchases of Iodine 131, arguing a violation of the Equal Protection Clause of the Minnesota Constitution and the U.S. Constitution, since the University of Minnesota Veterinary Medical Center was exempted from the same tax. The court found no constitutional violation.*

The Appellant, Veterinary Radiation Therapy Clinic (the "Clinic"), administratively appealed the notice, which had been issued by the Minnesota State Department of Revenue, regarding sales and use tax for purchases of Iodine 131 (the "Product"). The Clinic, which used the Product for treatment of domestic cats suffering from feline hyperthyroidism, challenged the taxation, since the University of Minnesota Veterinary Medical Center ("University"), which used the same Product, had been exempted from the tax.

The Clinic, which claimed that the University was its only competitor in the area, alleged the tax violated the Equal Protection Clauses of the Minnesota Constitution and the U.S. Constitution, or violated the Uniformity Clause of the Minnesota Constitution. The Appellee argued the tax exemption is not a violation of the Minnesota Constitution or the U.S. Constitution, since the University is a veterinary teaching clinic/hospital, and the exemption is rationally related to the purpose of the exemption, which is to support the state interest in education and research.

In response to the claims by the Commissioner, the Clinic argued that taxing it, and not the University, was unfair as its services to the community in treating cats were the same as the University's services. Further, the Clinic alleged that the tax was applied to it based on an arbitrary classification. Finally, the Appellant stated that taxing one member of the class and not the other was unfair and stifles competition.

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Michigan Court of Appeals Affirms Denial of County Commissioner's Motion for Summary Disposition on the Issue of Whether He Tortiously Interfered with Plaintiff's Employment as Animal Control Director

Lentz v. Isabella County, No. 292237 (Mich. Ct. App. 2010).

Summary: *Patricia Lentz was appointed Animal Control Director for Isabella County and in this position was in charge of the county's animal shelter. As a result of her subsequent termination, she filed a lawsuit alleging that David Ling, a county commissioner, tortiously interfered with her business relationship with the county. Ling was a member of the county committee which reviewed Lentz's job performance. Ling was also a member of Humane Animal Treatment Society, an advocacy group that allegedly disagreed with Lentz on the issue of euthanasia of shelter animals. Ling filed a motion for summary disposition, arguing that he was a party to the employment relationship (as a member of the committee that reviews Lentz's performance) and therefore could not have tortiously interfered with it. The trial court denied the motion. The Michigan Court of Appeals affirmed this ruling, finding that Ling was not immune from suit because he may have been acting outside the scope of his authority and may have acted unethically or tortiously. The court found that a question of fact existed regarding Ling's scope of authority.*

In 1992, Patricia Lentz ("Lentz") was appointed Animal Control Director for Isabella County. As Animal Control Director, Lentz was in charge of the county's animal shelter. On January 26, 2007, the County Controller and Administrator terminated her employment. David Ling ("Ling"), a member of the Isabella County Board of Commissioners, was also a member of the county's Criminal Justice and County Affairs Committee and Humane Animal Treatment Society ("HATS"). HATS allegedly demanded that the animal shelter be put under its management, partly because the organization disagreed with Lentz's beliefs regarding euthanasia of shelter animals. Ling allegedly sent e-mails to HATS members who made defamatory statements to Lentz's employer.

Lentz sued Isabella County, the animal shelter, Ling, and others as a result of her termination. The only issue on appeal was the claim that Ling tortiously interfered with her business relationship with the county. Ling filed a motion for summary disposition, arguing that he could not have tortiously interfered with Lentz's employment relationship because he was a member of the Criminal Justice and County Affairs Committee (which reviewed her job performance) so he was a party to the employment relationship. The trial court denied his motion and Ling then appealed to the Michigan Court of Appeals.

The Court of Appeals agreed with the trial court that a person can be liable for tortiously interfering with an employment relationship if he/she is responsible for exercising independent judgment in evaluating job performance and acts out of personal motive.[1] The court reasoned that under Michigan's governmental tort liability act, Ling was not necessarily immune from suit because he may have been acting outside the scope of his authority.[2] The court held that a question of fact existed regarding whether Ling acted with tortious intent outside the scope of his authority. The court decided that Ling's participation in HATS created a potential conflict of interest, which could lead to the factual conclusion that Ling acted unethically and that he was acting outside the scope of his authority as county commissioner. Therefore, the court affirmed the trial court's denial of Ling's motion for summary disposition. ■

[1] Feaheny v. Caldwell, *437 N.W.2d 358 (Mich. Ct. App. 1989), overruled on other grounds by* Health Call v. Atrium Home & Health Care Servs Inc *706 N.W.2d 843 (Mich. Ct. App. 2005). Mich.Comp. Laws §691.1407(5).*

Veterinary Radiation Therapy Clinic v. Commissioner of Revenue cont'd...

The Court rejected the arguments of the Clinic. In its findings, the Court noted that Clinic failed to present any evidence that its competition was being stifled. Further, the Court opined that competition between governmental entities and private business is not *per se* unconstitutional. Finally, the Court noted that the Minnesota Supreme Court had previously held that an entity under the University of Minnesota's control is exempt from sales and use tax, even when it sells items that would otherwise be available at private stores[1]. The Appellate's rights under the Minnesota Constitution and the U.S. Constitution were not violated by the grant of a tax exemption to the University.

[1] See MSA Services Co. v. Commissioner of Revenue, Docket No. 2656, 1981 Minn. Tax LEXIS 75 (Minn. Tax Ct. June 25 1981).

McCarthy v. State Farm Fire and Casualty Company, et al., CV-10-334-ST, 2010 U.S. Dist. LEXIS 107114, (USDC, D.Or. Oct. 5, 2010).

This matter arises out of a claim filed by Timothy McCarthy ("Plaintiff"), who is a practicing veterinarian in the state of Oregon, against the insurers, State Farm Fire and Casualty Insurance Company ("State Farm") and Zürich American Insurance Company ("Zürich").

Prior to the litigation, the Plaintiff sold his veterinary practice, through a stock purchase agreement, to the veterinary hospital corporation, VCA Antech (the "Purchaser"). In addition to the sale of his business, the Plaintiff entered into a five-year employment agreement with the Purchaser, which included a noncompete agreement. The agreements, executed by the parties, also included arbitration provisions, wherein all disputes arising out of the agreements would be decided by a panel of three arbitrators, which would not be subject to an appeal.

The Purchaser and Plaintiff closed their agreements on April 9, 2008. It was alleged that in September 2008, the Plaintiff left his employment on medical leave and refused to return to work. On August 10, 2009, the Purchaser filed a complaint with the American Arbitration Association against the Plaintiff alleging breaches of the purchase and employment agreements, the implied covenant of good faith and fair dealing, negligent misrepresentation and securities fraud. The final version of the complaint listed the following conduct in support of the allegations: a) repeatedly questioning the action of the staff, veterinary doctors and management, b) acting in a threatening manner towards staff, c) making unreasonable demands of staff, veterinary doctors and management, d) making unsubstantiated and inaccurate allegations about the medical competency of staff and veterinary doctors, and e) failure to perform medical service responsibilities in a competent and professional manner.

Subsequent to the filing of the arbitration, the Plaintiff tendered the claim to State Farm, which had issued a "business policy" to "Surgical Specialty Clinic", an assumed business name for the Plaintiff. Initially, State Farm defended the claim, under reservation of rights, but later terminated its representation. The Plaintiff then tendered defense to Zürich, which had issued a professional liability policy to the Plaintiff, but the insurer declined the defense.

Initially, the Plaintiff filed a state court action against both insurers alleging breach of their insurance contracts in violation of their duties of good faith and fair dealing by refusing to defend him in the arbitration proceedings. Zürich removed the claim to federal court, and, subsequently, State Farm joined in the matter. The instant matter was before the court on motions for summary judgment filed by all three parties. The motions were addressed, separately, by the court.

In the State Farm motion, the court briefly commented on the status of the Plaintiff as an "insured" under the policy, since the named insured, "Surgical Specialty Clinic for Animals", was acquired by the Purchaser, through the stock purchase agreement. However, since the court ultimately decided the matter on other substantive grounds, it declined to give a ruling on the provisions of the named insured.

State Farm's primary argument was that the business liability coverage provision did not provide insurance coverage for the claims alleged in the arbitration. The Plaintiff responded by stating that State Farm breached its duty to provide coverage for an "advertising injury", which applied to occurrences "committed in the course of advertising your goods, products or services." In support of his position, the Plaintiff alleged that the arbitration claim that he "made unsubstantiated and inaccurate allegations" may be interpreted as a claim of defamation and that may be considered an "advertising injury". The court rejected the Plaintiff's argument finding that there was no allegation of the publication of any defamatory statements to third parties, which was required under the policy and jurisprudence. Accordingly, the arbitration complaint did not trigger coverage under the State Farm policy.

Zürich's primary argument was that it had no duty to defend, under the professional liability policy, since the claims in the arbitration were not based on a "veterinary incident", as defined under the policy, which required "a claim arising out of the course of furnishing professional veterinary services". The policy defined "professional veterinary services" as "those services normally performed by a licensed veterinarian in good standing." In response, the Plaintiff argued that any allegations of misconduct while he was "in the process of operating a veterinary clinic and providing veterinary services… falls

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McCarthy v. State Farm Fire and Casualty Company cont'd.

squarely within his professional obligations as a veterinary." The court rejected the Plaintiff's argument finding that "services normally performed by a licensed veterinarian to provide medical services to animals" is different from "engaging in conduct that may in some way relate to the business aspects of operating a veterinary practice or to performance under the integrated agreements". Further, the court noted the Zürich policy excluded claims "arising out of an alleged breach of an employment contract or agreement." Therefore, the allegations in the arbitration complaint did not trigger coverage under the Zürich policy.

The Plaintiff also filed a motion for summary judgment arguing an "implied duty of good faith and fair dealing" by State Farm, which initially undertook the defense in the arbitration. The court noted that State Farm withdrew its defense only two weeks after accepting the matter under a reservation of rights. For the reasons that the insurers motions were granted, the court denied the motion for summary judgment filed on behalf of the Plaintiff. Thus, the claims against State Farm and Zürich were dismissed. ■

AVMLA's Copyright Policy

AVMLA Advertisements

The *AVMLA Newsletter* solicits advertisements, subject to approval of the Executive Director. Advertisements reach a responsive audience. The AVMLA membership consists of veterinarians, attorneys, dual licensed professionals, practice managers and various state and national veterinary organizations throughout the United States and Canada.

Rates: Quarter page $75; half page $150; full page $250. Contact the Executive Director for more information.

Judge dismisses emotional distress claims after pets' deaths

UTICA, New York — A year and a day after a Rome, New York family lost their two dogs to a fire, a federal judge Tuesday dismissed the couple's claims for emotional distress in a related civil lawsuit.

Bruce and Lisa Entelisano lost their dogs, Kimmy and Trevor, when a fire caused by a faulty kitchen stove destroyed their Massena Avenue home on Feb. 14, 2010. The couple later sued Sears Hardware and Electrolux Home Products for $150,000 on each of five causes of action – three related to actual damages and two related to the emotional distress caused by the death of their pets.

On Tuesday, U.S. District Judge David Hurd granted the defendants' motions to dismiss the claims for negligent infliction of emotional distress and loss of companionship on the basis that state law does not consider pets to be companions.

"While the loss of a pet can be an extremely sad event, it does not support a cause of action for accompanying emotional distress," Hurd wrote in his decision. "Defendants properly point out, and plaintiffs tacitly concede that New York case law categorizes pets as personal property and not members of the family."

Bruce Entelisano previously had said he hoped the judge would use the case to set a new precedent about the relationship between pets and their owners. The couple is moving forward with the remainder of their lawsuit. ■

www.uticaod.com/news/x624985882/Judge-dismisses-emotional-distress-claims-after-pets-deaths

AVMLA SPRING WEBINAR

WENDESDAY, APRIL 27, 2011 AT NOON (CDT)

JOIN GREG DENNIS FOR A PRESENTATION.

VISIT WWW.AVMLA.ORG FOR MORE DETAILS!

Veterinary Hospital Not Obligated to Compensate Employee for Gratuitous Services

Helsley v. Williams, 2010 Cal. App. LEXIS 9109, Case No. E048796, (Cal. Ct. App. Nov. 17, 2010). UNPUBLISHED

Summary: *Joyce Helsley worked as "practice manager" for Michael Williams, DVM in his equine veterinary practice. In this position, she was responsible for various administrative tasks. In addition to her other duties, Helsley began volunteering to screen clients' after-hours telephone calls to the veterinary practice. According to Helsley, she entered into an oral agreement with Williams whereby she would screen emergency calls, but would not be paid for these overtime hours until the business improved. From August 2005 to August 2006, Helsley claimed she had spent over 980 hours of unpaid on-call overtime. Williams terminated Helsley's employment in August 2006. Helsley filed a claim against Williams with the California Labor Commission. When her claim was denied, she filed an action for de novo review and the court ruled in favor of Williams. Helsley appealed the judgment and the California Court of Appeals affirmed the ruling.*

Joyce Helsley ("Hensley") worked for Michael Williams, DVM ("Williams") in his equine veterinary practice from 2002 through 2006 as the "practice manager." In her position, she was responsible for various administrative tasks including administering staff payroll and maintaining staff hours. Helsley generally worked 10 hours per day and divided her payroll hours between "straight time" and "regular overtime." In January or February of 2005, Helsley began volunteering to provide screening of after hours telephone calls from the veterinary practice clients. By May of 2005, the business was not doing well financially. According to Helsley, she agreed with Williams that she would continue to screen the emergency calls, but would not ask to be paid for the on-call overtime hours until the business improved. Between August 2005 and August 2006 Helsley claimed she had spent over 980 hours of unpaid on-call overtime. Williams terminated her employment in August 2006.

In 2008 Helsley filed her claim for unpaid overtime, but the California Labor Commission denied the claim because she did not have the necessary documentation showing the hours worked. Helsley then filed suit in the trial court, seeking de novo review of her labor claim. At the trial, Williams testified and denied there was ever an oral agreement for compensation, but that Helsley had volunteered to take on the on-call duties. Helsley's roommate testified that she overheard Williams say that he "didn't know how he would ever repay her." The trial court ruled that there was not an enforceable contract because the parties did not agree to an amount of compensation for the overtime or dates for the payment. Helsley appealed, arguing that the trial court erred in failing to apply quasi contract principles to her case.

Even where there is no express oral contract, the doctrine of quasi contract or unjust enrichment can apply to require compensation to the aggrieved party. Unjust enrichment is a common law obligation and is not based on a contractual obligation. The court explained that under quasi contract principles, payment may be required if one party is unjustly enriched by receiving a benefit from another ***and*** it is unjust for him to retain it. The court therefore analyzed whether the circumstances were such that it was unjust for Williams to retain the benefits that were conferred by Helsley's services. The court examined the testimony of both parties from the trial court as evidence that Helsley had agreed to serve as a volunteer. The court, in evaluating all of the circumstances, noted that both parties did not understand that compensation was contemplated, there was no documentation of what services had been performed, and Helsley was a family friend of Williams. The court also noted that where a person acts in protection or improvement of his own property, any incidental benefit conferred on another is not unjust enrichment. Here, Helsley was acting in her own interest to protect her job because if she had not performed the on-call services, it is likely that Williams would have had to close the business. The court determined that under these circumstances, it was not unjust for Williams to retain the benefit of her services. Therefore, the court decided that Helsley's services were voluntary and affirmed the trial court's judgment denying Helsley's claim for restitution in quasi contract for her on-call services. ■

Expert Testimony Against Veterinarian for Negligence was Excluded and Motion for Summary Judgment Granted for Veterinarian

Toni's Alpacas, Inc. v. Evans, No. 09-cv-02045-REB-CBS, 2010 U.S. Dist. LEXIS 97038 (D. Colo. Sept. 16, 2010).

***Summary**: When Dr. Toni Cotton relocated her alpacas, Norman Evans recommended that she double the amount of a supplement she was feeding to the alpacas called Fiber Nutrients. Subsequently, nine of the alpacas died and others suffered from various health problems. Cotton claimed that the problems with the alpacas resulted from a dangerously high level of fat in their diet caused by the Fiber Nutrients. Cotton alleged that Evans knew or should have known that Fiber Nutrients would be dangerous and brought an action against Evans for professional negligence. Cotton put forth expert testimony providing the opinion of two experts that the deaths and other problems were related to excessive fat in their diet. Evans filed a motion for summary judgment and a motion to exclude the expert testimony offered by Cotton. Both experts acknowledged that there was a lack of scientific studies regarding the effects of diet on the health of alpacas and that they therefore relied on anecdotal evidence. The court decided the testimony was not scientifically sound and that it was unreliable. Therefore, the court excluded Cotton's expert testimony from the trial. The court also granted Evans' motion for summary judgment because Cotton could not establish the applicable standard of care without the expert testimony.*

Dr. Toni Cotton ("Cotton") relocated her alpaca herd from Ohio to Colorado in mid-2006. Norman Evans ("Evans") recommended that she double the amount of Fiber Nutrients she was feeding to the alpacas since the change in climate and altitude would dry out the animals' fleece. The combination of Fiber Nutrients with their regular feed, Pac-a-Nutrition, allegedly increased the fat in the alpacas' diet to a dangerous level. Cotton alleged that the high fat diet caused the death of nine alpacas and caused health problems for others, such as fiber loss and pregnancy toxemia. Cotton sued Evans for professional negligence. To prove Evans' negligence, Cotton provided the expert testimony of Dr. Robert Van Saun and Dr. LaRue Johnson (collectively, the "Expert Testimony"). Evans filed a motion to exclude the Expert Testimony and a motion for summary judgment.

The testimony of experts implicates Rule 702 of the Federal Rules of Evidence. The U.S. Supreme Court has interpreted Rule 702 to require that an expert's testimony be both reliable and relevant.[1] Under *Daubert*, an expert opinion is reliable if it is based on scientific knowledge. Expert testimony is required for a claim of professional negligence in order to demonstrate that the defendant breached the applicable standard of care.[2]

The Expert Testimony concluded that the problems with Cotton's alpaca herd were related to excessive fat in their diets from the combination of Fiber Nutrients and Pac-a-Nutrition. However, the court identified several problems with the Expert Testimony. First, the Expert Testimony was premised on the assumption that there was a change in the amount of flax in Pac-a-Nutrition immediately prior to the herd experiencing problems. Second, because there is a lack of scientifically valid studies regarding the effect of diet on alpaca health, the experts relied on anecdotal evidence and extrapolated from existing data on the effect of a high fat diet on dairy cows. The court recognized that although extrapolation from existing animal studies to other species is not impermissible, the extrapolation must be scientifically warranted.[3] Because Cotton failed to prove the extrapolation was warranted, the court decided that the Expert Testimony was not sufficiently reliable. The court concluded that the opinions regarding the standard of care and causation were based on the experts' personal opinions and refused to admit the Expert Testimony in the trial. Cotton would be unable to establish or prove up the applicable standard of care for professional negligence without the Expert Testimony. Therefore, the court granted Evans' motion for summary judgment and dismissed Cotton's claim against Evans. ■

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2795-96 (1993).
[2] *Hamilton v. Thompson*, 23 P.3d 114, 115 (Colo. 2001); *Williams v. Boyle*, 72 P.3d 392, 397 (Colo. App. 2003).
[3] *See. Quinton v. Farmland Industries, Inc.,* 928 F.2d 335, 337 (10th Cir. 1991); *In re Silicone Gel Breast Implants Products Liability Litigation*, 318 F. Supp. 2d 879, 891 (C.D. Cal. 2004) (citing cases).

U.S. District Court for the District of Massachusetts Denies Veterinary Hospital's Motion to Dismiss Employment Discrimination Claim Brought by Veterinarian

Mahoney v. Morgan, 2010 U.S. Dist. LEXIS 97224, No. 08-10879-MBB (Dist. Mass. Sept. 16, 2010).

***Summary**: Louise Morgan, VMD operated Brewster Veterinary Hospital as a sole proprietorship. Sally A. Mahoney worked as a veterinarian for BVH from May 1997 until March 2004 when she was terminated by Morgan. Mahoney informed Morgan that she had multiple sclerosis and therefore had to work a part time schedule. Morgan claimed that Mahoney's termination was a business decision based on Mahoney's job performance, but Mahoney claimed her termination was based on her disability. Mahoney filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") and the United States Equal Employment Opportunity Commission ("EEOC"). MCAD and the EEOC dismissed the complaint for lack of probable cause. Mahoney filed a complaint in the U.S. District Court for the District of Massachusetts claiming that Morgan and BVH violated the Americans with Disabilities Act ("ADA").*

Louise Morgan, VMD ("Morgan") opened Brewster Veterinary Hospital ("BVH") in 1992 as a sole proprietorship and Sally A. Mahoney ("Mahoney") worked as a veterinarian for BVH on a part time basis. When Mahoney was hired, she informed Morgan that she had multiple sclerosis. She explained that her symptoms were exacerbated by warm temperatures. Mahoney requested air conditioning in the examination rooms to alleviate her symptoms, but Morgan refused to allow the air conditioning. Mahoney was terminated in March 2004 along with another part-time veterinarian with no known disability. According to Morgan, the termination was a business decision, but Mahoney alleged the termination was an act of retaliation based on her disability. Of the total employees of BVH, several were paid as independent contractors and three family members of Morgan's performed work at BVH. Morgan's husband performed maintenance work during 2004. Morgan's two stepdaughters performed volunteer work, including feeding and exercising the animals during 2004. Joan Goffi also worked at BVH part time during 2004 and requested to be paid as an independent contractor, but performed work on the premises and used BVH equipment. Karen Hickey also worked as a part time veterinarian at BVH and was paid as an independent contractor. Karen Hickey worked on the premises performing veterinary services at BVH.

After her termination, Mahoney filed a complaint with MCAD and the EEOC alleging employment discrimination in January 2005. The MCAD and the EEOC found a lack of probable cause and dismissed the complaint. Mahoney filed a complaint in the U.S. District Court of the District of Massachusetts claiming that BVH and Morgan (collectively, the "Defendants") violated the ADA. Defendants filed a motion for summary judgment, arguing that they were not covered employers under the ADA because they did not meet the ADA's definition of an "employer", as they did not employ the required number of employees.

Under the ADA, the threshold number of employees to qualify as an employer is "15 or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year."[1] The court recognized that the ADA's definition of "employee" is unhelpful and instead looked to "the common law test" which consists of 13 non-exclusive factors endorsed by the First Circuit to define employees and employers.[2] The most important factor is the hiring party's right to control the manner and means by which the product is accomplished, but the court must examine all factors and the totality of the circumstances.[3] Based on examining the circumstances of the various employment relationships in light of the factors in "the common law test", the court analyzed whether several individuals who worked at BVH could qualify as an "employee" of BVH. The court decided that genuine issues of material fact exist which allow a reasonable jury to classify Morgan's family members as "employees." The court also decided that Karen Hickey and Joan Goffi could be classified as "employees" due to the nature of their work and level of control by Morgan. Therefore, the court found that a reasonable jury could find that BVH employed the requisite number of people in the months of January, February, March, July and August 2004, meeting the ADA requirement. Because BVH could be characterized as an employer for 2004, summary judgment was not appropriate and the Defendants' motion for summary judgment was denied. ■

[1] 42 U.S.C. § 12111(5)(A).
[2] *See, Lopez v. Massachusetts*, 588 F.3d 69, 83 (1st Cir. 2009). *Id.* at 84-85.

Veterinarian Breached Non-compete Clause in Veterinary Practice Sale Contract, but Plaintiff Failed To Prove Damages Caused by the Breach

Phelps v. Gilbraith, 2010 Ariz. App. LEXIS 201, Case No. 2 CA-CV 2010-0052, (Ariz. Ct. App. Oct. 29, 2010). UNPUBLISHED

Summary: *Audrey J. Wystrach sold J.A. Phelps her veterinary practice. The sales contract included a covenant not to compete. Nelson Farms, a breeder, boarder, and trainer of show horses, used Wystrach's services after the signing of the sale agreement. Phelps sued Wystrach and brought a declaratory judgment and breach of contract action, alleging violation of the non-compete clause in the sales contract. The trial court decided the non-compete clause was valid and binding and Wystrach had breached it by providing services to Nelson Farms, but the trial court found Phelps failed to prove damages. The court, therefore, awarded Phelps nominal damages of $100, but denied his request for attorney fees. Phelps appealed the judgment arguing that the trial court erred in denying his motion for a new trial and in declining to award attorney fees. The court of appeals decided that the trial court did not err in its conclusion that Phelps failed to meet his burden of proving that Wystrach's breach damaged him and affirmed the award of nominal damages. However, the Court of Appeals decided that the trial court may not have considered all of the relevant factors in making its attorney fee determination and vacated the judgment and remanded for consideration of the attorney fee issue.*

On August 16, 2004, Audrey Wystrach ("Wystrach") sold J.A. Phelps ("Phelps") her Sonoita-based veterinary practice. The sales contract included a covenant not to compete. The covenant not to compete included the following provisions: (i) Wystrach could not practice veterinary medicine for five years within a forty-mile radius of Sonoita, (ii) Wystrach could not provide veterinary services to former customers, and (iii) Wystrach had to recommend Phelps to existing customers as her successor. Nelson Farms, a show horse boarder and trainer in Tucson, used several veterinarians in Tucson. After signing the sales agreement, Wystrach provided veterinary services to Nelson Farms. According to Nelson Farms' principal, it would not have used Phelps for veterinary services had Wystrach been unavailable.

Phelps sued Wystrach asserting claims for declaratory judgment and breach of contract. The trial court decided that the covenant not to compete was valid and binding and that Wystrach violated it by providing services to Nelson Farms. The trial court awarded Phelps $100 in nominal damages because he failed to prove damages caused by the breach. The trial court denied Phelps' request for attorney fees because Phelps prevailed on one issue and Wystrach prevailed on the other issue so each party was partially successful and partially unsuccessful. Phelps appealed, arguing the trial court erred in denying his motion for a new trial and in declining to award him attorney fees.

The Court of Appeals agreed with the trial court that Phelps failed to prove damages caused by Wystrach's breach of the covenant not to compete. Phelps is required to meet his burden of proving he was damaged by Wystrach's breach of the contract.[1] There was evidence that Nelson Farms would not have used Phelps even if Wystrach was unavailable. The court decided that the evidence that Nelson Farms would not have used Phelps for veterinary services is relevant to whether Wystrach's breach caused Phelps to sustain lost profits and that the trial court properly considered that evidence. There was no evidence showing that Phelps would have earned additional profits but for the breach by Wystrach. Therefore, the court concluded that the nominal damages award was appropriate because Phelps failed to meet his burden of proving that the breach damaged him. The court affirmed the trial court's denial of Phelps's new trial motion and the award of nominal damages. Pursuant to A.R.S. § 12-341.01, a trial court may award attorney fees to the successful party in a contested action. The Arizona Supreme Court has identified a number of factors in determining whether to award fees.[2] The Court of Appeals determined that Phelps may be entitled to an award of attorney fees even though he was unsuccessful in proving monetary damages. The court therefore remanded the attorney fee issue to the trial court for reconsideration of all relevant factors. ■

[1] *See, Home Indem. Co. v. Bush* , 513 P.2d 145, 150 (Ariz. 1973).

[2] *See, Orfaly v. Tucson Symphony Society*, 99 P.3d 1030, 1035-36 (Ariz. Ct. App. 2004).

In an ERISA retaliation case, Court excludes evidence of front pay damages and compensatory and consequential damages, permits evidence of back pay damages, and excludes evidence of proffered self-employment as a required mitigation tactic

DeFelice v. Heritage Anim. Hosp., 2010 U.S. Dist. LEXIS 103075 (E.D. Mich., Sept. 29, 2010); 49 Employee Benefits Cas. (BNA) 2617; 31 I.E.R. Cas. (BNA) 524.

Summary: *Nicole DeFelice was a licensed veterinary technician hired by Heritage Animal Hospital ("HAH") in July 2006. She was terminated from the position at HAH in 2008 and in less than two months hired by Advanced Veterinary Care Group ("Advanced"). DeFelice was terminated in July 2009 at which time Advanced offered her a Rehab Business Proposal, a self-employment option, which she declined. DeFelice brought suit against HAH, claiming she had been terminated in retaliation for going to authorities regarding her employers' ERISA violations. The court heard motions to exclude evidence.*

Evidence of front pay damages was excluded because Nicole DeFelice ("DeFelice") found comparable, alternative employment within two months; front pay damages are not permissible for subsequent periods of unemployment, as following her termination from Advanced. The court held back pay damages accrue through judgment, less salary earned in the interim, and denied defendants' motion to limit evidence of back pay damages. Compensatory and consequential damages are not available under ERISA claims, nor are they generally available for contract disputes. Michigan law allows only very narrow exceptions to permit damages for anguish following a breach of contract and that the anxiety experienced by DeFelice does not rise to that level. Evidence of compensatory and consequential damages was excluded. The court found that self-employment is not a required mitigation tactic. Evidence relating to the Business Rehab Proposal was excluded.

Nicole DeFelice was a licensed veterinary technician and Certified Canine Rehabilitation Practitioner. She was hired by Heritage Animal Hospital ("HAH"), owned by Earl and Cheryl Cornprobst, in July 2006. She was terminated from the position at HAH in 2008. In less than two months she was hired by Advanced Veterinary Care Group ("Advanced") in what the plaintiff has described as "comparable, alternative employment" whereby she had fewer hours but a two dollar per hour pay increase and better benefits. She was terminated from Advanced in July 2009. At that time Advanced offered DeFelice a Rehab Business Proposal wherein she would operate independently from Advanced, paying them rent and other fees. DeFelice declined this proposal and in several months began nursing school.

DeFelice brought suit against HAH and the Cornprobsts, claiming she had been terminated in retaliation for going to authorities regarding her employers' Employee Retirement Income Security Act (ERISA) violations. The defendants moved for summary judgment.[1] Here, the court is hearing defendants' motions to exclude evidence of compensatory and consequential damages under ERISA, front pay and back pay damages, and plaintiff's motion to exclude evidence relating to the Rehab Business Proposal. Noting that reinstatement in this case was not an agreeable resolution for either party, the court cited the role of front pay damages in securing compensation until the employee finds comparable employment. Here, DeFelice found comparable employment within two months at Advanced, and front pay damages are not permissible for subsequent periods of unemployment, as following her termination from Advanced. Evidence of front pay damages is excluded.

DeFelice claimed back pay damages should be awarded through judgment in the current proceedings and that her employment at Advanced resulted in lower overall earnings than at HAH. Defendants argued that back pay should be limited to the duration of time until the employee finds comparable employment. The court held that Sixth Circuit precedent allows back pay to accrue through judgment, less salary earned in the interim, and denied defendants' motion to limit evidence of back pay damages.

Both parties agreed that compensatory and consequential damages are not available under ERISA claims, nor are they generally available for contract disputes. However, DeFelice claims that because her employment contract was of such a personal nature, the defendants should have known that mental anguish would have been a reasonably anticipated consequence of a breach. The court held that Michigan law allows only very narrow exceptions to permit damages for anguish following a breach of contract and that the anxiety experienced by DeFelice does not rise to that level. Evidence of compensatory and consequential damages was excluded.

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Disagreement by experts over the validity of breed-specific ordinances overcomes defendant city's motion for summary judgment; plaintiff has standing by showing she altered her behaviors to her detriment to avoid violating the ordinance

Dias v Denver Dias v. The City and Co. of Denver, Colo., 2010 U.S. Dist. LEXIS 103814 (D. Colo. Sept. 29, 2010).

Summary: *Plaintiff Sonya Dias and two other brought suit against the City and County of Denver as well as the Mayor and several administrative officials, over the municipal ordinance prohibiting pit-bull type dogs. The trial court granted the defendants' motion to dismiss but the appeals court remanded to examine the plaintiffs' substantive due process claims. Using the rational basis test, to prove substantive due process violations the plaintiffs had the burden to show the ordinance is not rationally related to a legitimate government purpose. Here, the legitimate government purpose is animal control and the protection of the health and safety of the public. Each side provided expert opinion as to the validity of studies showing proclivity of certain breeds to show dangerous behaviors. As the experts disagreed, the courts found that there were genuine issues in dispute as to material facts and denied the defendants' motion for summary judgment. The court here found that Dias had standing to bring the suit even though her dog had not been seized under the ordinance. Dias showed that she had suffered injury in fact because she changed her behaviors to her detriment so as not to run afoul of the ordinance.*

Plaintiff Sonya Dias ("Dias") and two other similarly situated individuals brought suit against the City and County of Denver as well as the Mayor and several administrative officials, over the municipal ordinance prohibiting pit-bull type dogs. Enacted in 1989, the ordinance states, "It shall be unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the city any pit bull." Denver Rev. Mun. Code (Colo.) § 8-55(a) (current through Feb. 2011).

Their original suit, brought in 2007, alleged Fifth and Fourteenth Amendment procedural due process violations, claimed the ordinance was unconstitutionally vague, and alleged Fourteenth Amendment equal protection and substantive due process violations. The court granted the defendants' motion to dismiss all claims. On appeal, the Tenth Circuit court remanded the case to examine the substantive due process claims for retrospective relief only, applying the rational basis test.

Defendants filed a motion for summary judgment claiming no material facts at issue, that Dias lacks standing, and individual defendants have no liability.

Using the rational basis test, to prove substantive due process violations the plaintiffs have the burden to show the ordinance is not rationally related to a legitimate government purpose. Here, the legitimate government purpose as recognized by the Tenth Circuit court is animal control and the protection of the health and safety of the public.[2] In their briefs, both parties submitted expert opinion evidence regarding genetics as a predictor of biting behavior by dogs and statistics used to support or contradict the increased frequency of bites by pit-bull type dogs. As the experts disagreed, and the plaintiffs' experts assertions suggest there would be no rational basis for a breed-specific ordinance, the court found that there were genuine issues in dispute as to material facts and denied the defendants' motion for summary judgment.

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DeFelice v. Heritage Summary cont'd.

DeFelice argued that evidence relating to the Business Rehab Proposal should be excluded because it was not a viable work opportunity due to the expenses and risks she would incur. The court found that there was no case precedent supporting self-employment opportunities as a required mitigation tactic. Evidence relating to the Business Rehab Proposal was excluded. ■

[1] DeFelice v. Heritage Anim. Hosp., Civil No. 08-14734 (E.D. Mich., Sept. 29, 2010). Defendants motion for summary judgment denied with respect to retaliation and breach of contract claims, granted with respect to state Whistleblower Protection Act, personal liability, and interference claims.

NLRB sets aside election for union representation, employee confusion over what union would represent them was not dissipated by agents for the union

The Humane Society for Seattle/King County and Animal Control Officers Guild, 2010 NLRB LEXIS 436; 2010-11 NLRB Dec. (CCH) P15,357; 356 NLRB No. 13 (October 28, 2010).

Summary: *The petitioner filed an appeal to the National Labor Relations Board (NLRB) after a hearing officer a challenged ballot for unionization. In 2009, the employees at The Humane Society for Seattle (SHS) (also, Employer) were approached by the Animal Control Officers Guild (ACOG) to discuss union representation. ACOG was the representative of like employees at King County Animal Care and Control Center. Over several meetings in August and September, there was conflicting information presented to the SHS employees as to whether their vote for unionization would result in their being represented by ACOG or have an independent SHS union. The election resulted in fifteen votes for, and fourteen votes against, union representation. The hearing officer found, and the NLRB agreed, that employees were in fact confused as to what union would represent them, and that confusion was engendered and not adequately dissipated by ACOG agents. The NLRB set aside the election results.*

The matter at issue here is an appeal to the National Labor Relations Board (NLRB) from a hearing officer's finding to sustain a challenge to a ballot for unionization. In 2009, the employees at The Humane Society for Seattle (SHS) (also, "Employer") were approached by the Animal Control Officers Guild (ACOG) to discuss union representation. ACOG was the representative of like employees at King County Animal Care and Control Center (KCACC), rumored to be closing with animals and staff to be merged with SHS.

At two meetings, on August 25 and September 11, ACOG president John Diel ("Diel") allegedly represented to SHS employees that they would form their own union, separate from and with no involvement by ACOG, other than legal and financial assistance in the union formation. Traci Garcia ("Garcia"), an employee and an agent for ACOG, reiterated these points. These representations were reflected in the minutes of the meetings distributed by email and placed in the employee lounge.

At a meeting held with just the employees, there was discussion as to what union they would be voting for to represent them. SHS Human Resources Director Tina Leader explained the difference between having separate bargaining units under one union (ACOG), however employees Maria Tcruz and Peter Brodkin stated adamantly that they would belong to a separate union.

In the third meeting on September 17, a poster-sized ballot was shown to attendees, which apparently showed the employees that they would be voting for representation by ACOG. Employees Tcruz and Brodkin stated that the ballot was wrong. Leader informed the attendees that based on conversation with the NLRB, they would be voting to be represented by ACOG, though with a separate bargaining unit from KCACC. At a final meeting on September 23, Diel allegedly explained that ACOG would be the union representing a separate bargaining unit of SHS employees. On September 15, 22, and 24 Leader sent employees emails stating that a vote for the union would mean representation by ACOG. However, on September 25 Garcia sent out an email stating that ACOG would not be involved with an independent SHS union.

The election on September 29 resulted in fifteen votes for, and fourteen votes against, union representation. The Employer filed objections to the conduct of the election. A hearing officer for the NLRB found that there was employee confusion as to whether they were voting for ACOG or a separate SHS union representation and that some employees in fact thought they were voting for an independent SHS union. Further, the confusion was not adequately dissipated by ACOG. The hearing officer recommended to sustain the Employer's objections.

The NLRB agreed with the hearing officer's recommendations. The hearing testimony showed that the confusion was engendered by ACOG representatives during the meetings. Diel testified that the terms "union" and "bargaining unit" were not used properly in the minutes. Although reasonable persons might have understood that the ensuing communications clarified that they were voting for ACOG representation, it still appears clear that there was confusion in fact among employees at the time of the vote. The employees were concerned with which union was to represent them. They were

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Dias v Denver con'td.

The court here found that Dias had standing to bring the suit even though her dog had not been seized under the ordinance. Dias showed that she had suffered injury in fact because she moved out of Denver in order to keep her dogs and could not bring her dogs into or through Denver, thereby changing her behaviors to her detriment so as not to run afoul of the ordinance.

The court dismissed the claims against the named individual defendants because plaintiffs failed to allege a basis for their claims. Even had they done so, the court found that the named individuals had no personal participation in conduct that violated the plaintiffs' rights. ■

[1] *Dias v. City & County of Denver, 567 F.3d 1169, 2009 U.S. App. LEXIS 11163 (10th Cir. Colo., 2009).*

[2] *Id*. at 1183.

The Humane Society for Seattle/King County and Animal Control Officers Guild, cont'd.

outspoken in not wanting to be involved with KCACC employees. ACOG, as the union representing KCACC, stood to benefit from SHS employees' mistaken belief they were voting for an SHS union. The NLRB believed the confusion likely resulted in the close election result. The NLRB set aside the election result.[1]

The NLRB distinguished this decision from *Nevada Security*,[2] where the election results were not set aside following potential interference and confusion caused by a third party, rather than the confusion caused by the petitioning representative itself as we see here. ■

[1] Interestingly, the direction by the NLRB is as follows: "It is directed that the Regional Director for Region 19 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of employees Ashley Heller and Christy Thomson [two uncounted ballots]. The Regional Director shall then serve on the parties a revised tally of ballots, including the count of the ballots named above. *If the revised tally shows that the Petitioner received a majority of the valid votes cast, the Regional Director is directed to set aside the election and order a new election,* at such time as the Regional Director deems appropriate. *If the revised tally shows that the Petitioner did not receive a majority of the valid votes cast, the Regional Director shall issue a certification of results of election.*" [emphasis added]

[2] *Nevada Security Innovations*, 337 NLRB 1108 (2002).

Veterinary Practitioner's Registration was Cancelled by the Administrative Decisions Tribunal of New South Wales for Professional Misconduct and Unsatisfactory Professional Conduct

Veterinary Practitioners Board of New South Wales v. Johnson, [2010] NSWADT 308 (Dec. 30, 2010).

Summary*: Dr. Terrence Johnson has been a veterinary practitioner for about twenty-four years, mainly as a sole practitioner. In August 2008, Johnson diagnosed a cat patient of his with diabetes. The cat was not doing well and Johnson administered dexamethasone, an inadvisable treatment for such a condition. Johnson was warned by nurses in the hospital that the cat was not doing well, but Johnson did not attend to the cat and it died after he left the hospital. Johnson did not inform the cat's owner it had died until four days after the death and was untruthful about the circumstances of the death. Johnson later fabricated daily veterinary medical records indicating that the cat was still alive after it had died. Johnson diagnosed a different cat with a malignant tumor and recommended euthanasia. After the cat was euthanized, Johnson mistakenly disposed of the body in the landfill and misrepresented to the cat's owner that the cat had been cremated. Both of the cats' owners complained to the Veterinary Practitioners Board of New South Wales. The Board investigated the complaints and took evidence from several of Johnson's employees. The Board imposed a condition on Johnson's registration which he refused to comply with. The Board applied to the New South Wales Administrative Decisions Tribunal (the "Tribunal") for a disciplinary finding that Johnson is guilty of professional misconduct and/or unsatisfactory professional conduct under the Veterinary Practice Act 2008 (the "Act"). The Tribunal ordered that Johnson's veterinary practitioner's registration be cancelled and that Johnson is not able to re-apply for registration for at least four years from the date of the decision, December 30, 2010. Johnson was also ordered to pay the costs of the Board.*

Dr. Terry Johnson ("Johnson") has been a veterinary practitioner since May 1986 and practiced mainly as a sole practitioner at the Hawke Drive Veterinary Hospital. On August 18, 2008, Johnson performed tests on a

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Court uses nine-factor test to determine horse breeding and training enterprise was operated with a for-profit motive

Dennis v. Commr., 100 T.C.M. (CCH) 308 (2010), 2010 Tax Ct. Memo LEXIS 248.

Summary: *This case requires the tax court to determine if a married couple had a horse enterprise as a hobby or if they had a for-profit business motive. The tax courts use a nine factor test to distinguish a hobby from a business operation. The sum of the factors, and not any one, determine if an operation has a business motive that permits taxpayers to take deductions on losses. Using this test, the court determined that the couple had the requisite profit motive and they should be permitted to deduct business losses for the tax years in question. The principal factors showing a for profit motive were: the taxpayer effected the activity in a business-like manner, the taxpayer developed expertise and had advisors with expertise in the activity, the absence of substantial personal pleasure or recreation derived from the activity, the time and effort expended in the activity, and the taxpayer's overall financial status was impacted by the activity.*

This case requires the tax court to determine if a married couple had a horse enterprise as a hobby or if they had a for-profit business motive. Johnny L. Dennis, Jr. ("Mr. Dennis") and Jennie Dennis ("Mrs. Dennis") bought a 30 acre plot in Texas in 1991 and added a contiguous 30 acre plot around 1997. They used that land for recreational purposes up until 1995 when it became their primary residence; Mr. Dennis began to build structures and fencing and cultivated the land for pasture. In 1999 they decided to start a horse breeding, training, and sales operation. At this point, Mr. Dennis had no other employment and Mrs. Dennis was proprietor of a cosmetology business. Mr. Dennis, with no prior substantial experience, prepared for the horse enterprise by reading, studying pedigrees, consulting with experienced horse trainers, albeit those with different types of operations then he intended, and learning common medical practices from veterinarians. With the horse breeding operation not expected to show profits for several years due to the gestation length and years needed for the young to mature and be trained, the Dennis' operation posted losses beginning in1999, with the tax years of 2001 through 2003 at issue in this case. They ended their business in 2003 due to ongoing losses, aggravated by a drought which forced them to buy more feed than expected and attempting a failed hay-making business meant to improve finances and aid the horse operation.

The tax courts use a nine factor test to distinguish a hobby from a business operation. The sum of the factors, and not any one, determine if an operation has a business motive that permits taxpayers to take deductions on losses. Using this test, the court determined that the Dennis' had the requisite profit motive and they should be permitted to deduct business losses for the tax years in question.

(1) The manner in which the taxpayer carried on the activity: Mr. Dennis effected a business strategy despite the absence of a formal business plan. The Dennis' used accounting software to track the horse enterprise and maintained separate accounts for each of their businesses and personal expenses. The profit objective was supported by their advertising strategies and implementation of changes based on specific loss categories. Overall, the court believed this factor showed Mr. Dennis had a profit motive for the activity.

(2) The expertise of the taxpayer or his advisors: The taxpayer is expected to carry out some sort of investigation into factors affecting profit. Mr. Dennis had several advisors who helped only with the horse-side of the activity. However one advisor did provide business information. In addition, Mr. Dennis learned veterinary procedures so that he could provide some of his own medical care in order to decrease losses. This factor supported a profit motive.

(3) The presence of personal pleasure or recreation: Here, the court observed the time and effort involved in caring for the horses and the farm, the lack of recreational use of the horses, and the medical decisions made based on economics. The court did not deem the Dennis' love for animals to contradict these other factors in proving a profit motive.

(4) The time and effort expended by the taxpayer in carrying on the activity: The court again noted the daily strenuous activities necessary to carry on the horse breeding and training activity and found this factor supported Mr. Dennis' profit motive.

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Federal court finds subject matter jurisdiction when amount in controversty is under $75,000 when plaintiff has a reasonable belief that interest and costs will be awarded

Merial Ltd. v. Rasnic., 2010 U.S. Dist. LEXIS 96538 (W.D. Va., Sept. 15, 2010).

Summary: *Merial Limited sued veterinarian Timothy Rasnic for $74,139.29 plus interest and attorney fees in federal court. The amount in controversy did not meet the required minimum of $75,000 exclusive of interests and costs. State statute did not permit interest and attorneys fees to be included in the amount in controversy. Merial argued that the statements on its invoices regarding interest and collection fees for overdue accounts became additional terms of the contractual agreement with Rasnic. The court found Merial had presented enough evidence showing it could reasonably expect to recover the total sum requested, and thus meet the minimum amount in controversy. The court held that it had subject matter jurisdiction in this case.*

Merial Limited ("Merial") sued veterinarian Timothy Rasnic ("Rasnic") for $74,139.29 for cost of goods, plus interest and attorney fees in federal court. Rasnic filed this motion to dismiss on the grounds that the court does not have subject matter jurisdiction.

Merial is a Delaware corporation with its main business operation in Georgia, selling veterinary products. Rasnic has a veterinary practice in Virginia. There is no controversy that the federal court has jurisdiction based on diversity of citizenship. However, the amount in controversy does not meet the required minimum of $75,000 exclusive of interests and costs. 28 U.S.C. § 1332(a)(1)and (b)(current as of February 1, 2011). Merial contends that the 12% annual interest since 2008 and attorneys fees of $2500 should be included in the amount owed by Rasnic.

The court discussed interest "as such," for example that which is accrued due to late payment, that is incidental to the principal sum and thereby excluded from the amount in controversy.[1] However, state statute may impose such interest by law and thus include it as the basis for amount in controversy. Virginia's UCC states, "[w]hen the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages. . ., the price . . . of goods accepted." Va. Code Ann. § 8.2-709. Further, incidental damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." Va. Code Ann. §8.2-210. Thus, the judge found that Virginia statute does not permit interest costs to be included in the amount in controversy.

However, Merial further argues that under the Virginia Code, the invoices shipping with products stating fees and interest would accrue served as additional terms of their contractual agreement. These terms were thus accepted by Rasnic when he took receipt of the products. Va. Code Ann. §8.2-207. In its brief, Merial presented copies of the fronts of the invoices, and described the terms and conditions on the back of the invoices making the defendant responsible for all collection costs and legal fees if the account goes into collections. Though there was no precedent that terms and conditions on an invoice absolutely become part of the contract, the court found that Merial had presented enough evidence showing it could reasonably expect to recover the sum requested, and thus meet the minimum amount in controversy. This reasonable belief on Merial's part overcomes the legal certainty test: "[T]he legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim."[2]

The minimum amount in controversy generally also does not include attorney's fees unless they are authorized by statute or are included in the contractual agreement. Under Va. Code Ann. §8.2-210 cited above, attorney's fees are not authorized by statute. Merial presented evidence showing attorney's fees became part of the contractual agreement with the invoices sent to Rasnic. Under the legal certainty test as above with interest fees, the court found that Merial has a reasonable belief these fees will be recovered. Further, the court found that the $2500 attorney's fee seemed reasonable.

Rasnic's motion to dismiss was denied and the court held that it had subject matter jurisdiction in this case. ■

[1] Brown v. Webster, 156 U.S. 328, 329, 15 S. Ct. 377, 39 L. Ed. 440 (1895)

[2] Wiggins v. N. Am. Equitable Life Assurance Co., 644 F.2d 1014, 1017 (4th Cir. 1981) (quoting McDonald v. Patton, 240 F.2d 424, 426 (4th Cir. 1957)).

Plaintiff complaint that parts of state animal cruelty statute excluding certain husbandry and recreational activities violate state and U.S. constitutions; court holds that plaintiff fails to plead a justiciable claim

Northwest Animal. Rights Network v. State of Washington and Kings County, No. 64415-7-I (Wash. App. Div. One, Oct. 25, 2010).

Summary: *The Northwest Animal Rights Network filed a complaint for injunctive and declaratory relief against the State of Washington and Kings County. Network claimed exclusions in the act permitting certain husbandry, veterinary, and recreational activities with animals violate the nondelegation doctrine in the U.S. and Washington state constitutions. The trial court held, and the appeals court affirmed, that the plaintiffs failed to plead a justiciable claim because they failed to join indispensable parties, and because their claim raised a political issue. The indispensable parties to the action would be those whose livelihoods and recreational activities depend upon the practices at issue and would be adversely affected by the requested declaratory relief. Furthermore, plaintiffs raise a political question because the legislature has the responsibility, and not the courts, to determine what acts are deemed criminal and to balance public policy interests, as they have done here in determining criminal animal cruelty so as not to infringe on occupations and activities important to citizens of the state.*

The Northwest Animal Rights Network ("Network"), member Rachel Bjork, and both on behalf of similarly situated taxpayers, filed a complaint for injunctive and declaratory relief against the State of Washington and Kings County in Washington. Network claimed that parts of The Prevention of Cruelty to Animals legislation, Chapter 16.52 of the Washington Revised Code (RCW) violate the nondelegation doctrine in the U.S. and Washington state constitutions.

Chapter 16.52 RCW enumerates general and specific acts defining animal cruelty and neglect. At issue here, exclusions include acts falling under the game laws, use of animals for food, sport, and recreation, animal experimentation, accepted husbandry practices, and veterinary procedures. Wash. Rev. Code § 16.52.180, .185, .205 (January 3, 2011). Their amended complaint also alleged that by the passage of the law and selective non-enforcement of the law, the state permits activities constituting animal cruelty, which thereby cause aesthetic, emotional, and financial injury to members of the Network. The trial court dismissed the case, holding that the plaintiffs failed to plead a justiciable claim.

The Court of Appeals affirmed the trial court's decision. The complaint fails as a justiciable claim because the plaintiff failed to join indispensable parties and raised a political question. State statute reads, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Wash. Rev. Code § 7.24.110 (January 3, 2011). The court cited prior case precedent in *N.W. Greyhound*, where it held that plaintiffs failed to join indispensable parties, participants in the horse racing industry, in their claim that the state horse racing act was unconstitutional.[2] Here, the plaintiffs are asking the state to criminalize certain practices involving animals. Doing so would harm those whose livelihoods and recreational activities depend upon these practices. The court held they are indispensable parties because declaratory relief would affect their interests.

Furthermore, the court determined that the relief sought here raises political questions. The legislature has the responsibility to determine what acts are deemed criminal and to balance public policy interests. The role of the courts is not to make public policy decisions or to perform its own balancing test.[3] Here, the legislature determined certain acts involving animals are not criminal animal cruelty so as not to infringe on occupations and activities important to citizens of the state. Affecting the law via influencing the legislature would be the appropriate route for relief by the plaintiffs.

Finally, the court determined that the trial court did not err by disallowing the plaintiffs to amend their complaint. The intended amendments would not have cured the justiciability issues. The trial court had also determined that the Network did not have taxpayer standing under Chapter 7.24 of the RCW. ■

[1]SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations. Wash. Const. art. I, § 12. BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed. Wash. Const. art. I, § 23.

Virginia Supreme Court Affirms Conviction of Fern Leigh Equine Foundation, Inc.'s President And Executive Director On Animal Cruelty Charges

Terry Lynn Sullivan v. Commonwealth of Virginia, (Supreme Court of Virginia, November 4, 2010) 2010 Va LEXIS 266

Summary: *After a protracted period of suffering led to the cruel death of a 20 year old horse, Terry Lynn Sullivan, the President and Executive Director of the Fern Leigh Equine Foundation, Inc., was charged with violation of Virginia Code § 3.1-796.66, which provided, in pertinent part, that "[a]ny person who . . . (ii) deprives any animal of necessary food, drink, shelter or emergency veterinary treatment . . . shall be guilty of a Class I misdemeanor." Former Code § 3.1-796.66 further provided: "'Emergency veterinary treatment' means veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression." The same definition appears in the replacement statute, Code § 3.2-6500.*

Ms. Sullivan was charged by warrant and later tried and convicted in the general district court. She appealed her conviction to the Circuit Court of August County, and at a bench trial she was found guilty and sentenced to 12 months in jail with six months suspended on conditions of good behavior and "no possession of horses" for 24 months. Ms. Sullivan appealed to the Court of Appeals, which affirmed the conviction, and then appealed to the Virginia Supreme Court. On November 4, 2010, the Virginia Supreme Court concluded that there was ample evidence to support a finding that Ms. Sullivan deprived Dip of necessary emergency veterinary treatment. The Court affirmed the judgment of the Court of Appeals and Ms. Sullivan's conviction stands.

In this appeal from a conviction of misdemeanor animal cruelty, the sole question put before the Supreme Court of Virginia was whether the evidence against Ms. Terry Lynn Sullivan was sufficient to support the conviction of her on animal cruelty charges. The Virginia Supreme Court concluded that the evidence against Ms. Sullivan sufficiently supported the conviction and, thus, affirmed it.

At approximately noon on April 10, 2008, Brigette Berbes, who was experienced in the care of horses, observed a horse lying in a pasture near Interstate 81. The horse was covered with a purple blanket and Ms. Barbes thought that was unusual because the temperature was in the upper 70s at the time. The horse, the subject of this legal proceeding, was a mare named "Dip" who was approximately 20 years of age.

At the time of Ms. Berbes's discovery, Ms. Sullivan was the President and Executive Director of the Fern Leigh Equine Foundation, Inc. ("FLEF"), a not-for-profit organization with a mission of caring for homeless horses kept on Ms. Sullivan's farm until homes could be found for them. FLEF was supported by donations and occasional proceeds from the sale of horses. At the time of trial, approximately 35 horses were living on the Sullivan property.

Approximately seven hours after first noticing that Dip was lying in the field, Ms. Berbes returned to the scene to find that Dip had not moved. Ms. Berbes testified that she found the horse to be extremely thin and so weak that Dip could not lift her head off the ground. Dip was unable to reach a supply of hay, grain and a small pan of water that had been placed on

the ground behind her. Augusta County Animal Control Officer Gary Webb responded to a telephone report of the downed horse and met with Ms. Sullivan and Ms. Berbes in the field beside Dip. Officer Webb testified that the horse had been "down for about 30 hours." Ms. Berbes asked Ms. Sullivan to give Dip to her so that she could care for her. Ms. Sullivan said that she would do so if Ms. Berbes would assume responsibility for any veterinary bills. Officer Webb prepared a document entitled "Surrender Statement by Owner" that Ms. Sullivan signed. It provided that Ms. Sullivan did "[r]elinquish property rights to Brigette Berbes who will be responsible for vet bills and will vacate property when the vet leaves."

Ms. Berbes then called Dr. Scott R. Reiners, a veterinarian at the Mountain View Equine Hospital. He examined the horse and later testified that the horse was "nonresponsive to any stimuli, very dehydrated and emaciated." Because Dip was unable to raise her head to drink from a bucket, Dr. Reiners administered 22 liters of intravenous fluids in the field, placed her on a continuous intravenous drip, transported her to his hospital, but Dip died later that night. Dr. Reiners expressed the opinion that the horse was in need of emergency care long before his arrival and that the condition in which he found her

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was not of sudden onset.

Two other veterinarians testified. Dr. David W. Brown, Laboratory Director and Veterinary Diagnostician at the Harrisonburg Regional Animal Health Laboratory, performed a postmortem examination of Dip. He found Dip to be emaciated and said her ribs were prominent. He opined that this condition had developed over a considerable period of time, "probably weeks." He found several disease processes affecting the intestines, liver, kidneys, lungs and heart, as well as infestation by intestinal parasites. These had rendered Dip unable to absorb sufficient nutrition, leading to Dip's progressive emaciation and weakness. Dr. Brown opined that the immediate cause of Dip's death was cardiac fibrosis and colitis.

Dr. William S. Hunter, a practicing veterinarian, testified that Ms. Sullivan called him on April 10, 2008, and told him that she had a horse down. Dr. Hunter thought Ms. Sullivan said that Dip had been down for two days. That surprised him because most horse owners, he said, call a veterinarian immediately when a horse is found down. He testified that he had never known a horse to be "down a day or two and get up and live, [not e]ven with medical treatment."

Dr. Hunter testified that when Ms. Sullivan called him, she told him that she didn't know anything was wrong with Dip but when she removed her blanket she noticed Dip had "just wasted away." She asked him whether the horse should be euthanized. Dr. Hunter told her that its prognosis was poor but he could not recommend euthanasia unless he had first examined the horse. Although he was willing to come to the farm to see the horse, Ms. Sullivan did not ask him to do so, but instead told him, "Okay, we can handle this."

The only significant conflict in evidence was that Ms. Sullivan testified to a different conversation with Dr. Hunter. She said that she remembered that Dr. Hunter had advised her "to put [the horse] down." Ms. Sullivan claimed that she said, "[I]f you think you should come out . . . I want to give her every chance." Ms. Sullivan testified that Dr. Hunter replied, "No, no. It's pretty cut and dried." Ms. Sullivan testified that after her conversation with Dr. Hunter, she called a friend, Gary Meeks, to euthanize Dip. Meeks was unable to come to the farm that evening, but promised to come the following morning. Dip was moved to the hospital before he could arrive.

Ms. Sullivan was charged, by warrant, with a violation of Former Code § 3.1-796.122. She was tried and convicted in the general district court and appealed her conviction to the Circuit Court of Augusta County. At a bench trial, she was found guilty and sentenced to twelve months in jail, with six months suspended on conditions of good behavior and "no possession of horses" for 24 months. She appealed to the Court of Appeals, which affirmed the conviction in a memorandum opinion with one judge dissenting. *Sullivan v. Commonwealth, Record* No. 1886-08-3, 2010 Va. App. LEXIS 22 (Jan. 19, 2010).

On appellate review of a criminal conviction for sufficiency of the evidence to support the conviction, the relevant question is, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellate courts defer to the findings of fact made by a jury or a trial judge at a bench trial if there is evidence to support them and will not set a judgment aside unless it appears from the evidence that the judgment is plainly wrong. Code § 8.01-680.

That deference applies not only to findings of fact, but also to any reasonable and justified inferences the fact-finder may have drawn from the facts proved. *Johnson v. Commonwealth,* 163 S.E.2d 570, 574 (1968).

Former Code § 3.1-796.122 provided, in pertinent part, that "[a]ny person who . . . (ii) deprives any animal of necessary food, drink, shelter or emergency veterinary treatment . . . shall be guilty of a Class I misdemeanor." Former Code § 3.1-796.66 provided: "'Emergency veterinary treatment' means veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression." The same definition appears in the replacement statute, Code § 3.2-6500.

Applying that definition, the Supreme Court of Virginia agreed with the Court of Appeals' conclusion that there was ample evidence to support a finding that Ms. Sullivan deprived Dip of necessary emergency veterinary treatment. The circuit

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court could have readily inferred from the expert testimony that the horse was becoming progressively weaker and emaciated over a period of weeks before she went down.

The court could properly discard as incredible Ms. Sullivan's account that she was unaware that there was anything wrong with the horse until she found it down, removed the blanket and discovered that it had "just wasted away." The court could properly conclude from the evidence that it would have been apparent, over a considerable period of time, that the horse was in need of veterinary treatment to alleviate suffering and to prevent the progression of disease.

At the very least, the court could properly conclude that the horse was in such a condition during a period of 30 to 48 hours before its death that emergency veterinary care was immediately necessary to alleviate suffering, during which time no such treatment was provided.

For the reasons stated, the Supreme Court of Virginia affirmed the judgment of the Court of Appeals. ■

AVMA applauds efforts to end shortage of veterinarians in rural areas

The American Veterinary Medical Association (AVMA) today applauded U.S. Senators Tim Johnson, D-S.D., and Mike Crapo, R-Idaho, for introducing the Veterinary Medicine Loan Repayment Program Enhancement Act. The bipartisan legislation will help the country address a critical shortage of veterinarians serving our rural areas by making the Veterinary Medicine Loan Repayment Program (VMLRP) tax-exempt, thereby increasing the number of veterinarians who can participate in the program. The act would also apply to similar state programs that encourage veterinarians to practice in underserved communities.

Recent studies indicate that the supply of veterinarians working in food supply veterinary medicine will fall short by 4 to 5 percent annually through 2016. The Veterinary Medicine Loan Repayment Program Enhancement Act already has the support of 138 animal, agricultural and veterinary medicine organizations nationwide.

Court Denies Defendants' Motion to Dismiss After Chicago Police Officer Shoots Plaintiffs' Dog

Clintina Taylor, individually and as guardian for Nivea Taylor, a minor child, on behalf of themselves and others similarly situated, v. City of Chicago, Illinois and Chicago Police Officer James Regnier

United States District Court for the Northern District of Illinois, Eastern Division, November 23, 2010) 2010 U.S. Dist. LEXIS 124027

Summary: *On September 12, 2009, Plaintiffs' four-year old, friendly dog escaped from his yard and was then shot, in the presence of the dog's seven-year old owner and her family, by Chicago Police Officer James Regnier. Plaintiffs filed a ten-count complaint against the City of Chicago and Officer Regnier on a variety of federal and state claims. Defendants filed a motion to dismiss all claims, but on November 23, 2010, the United State District Court for the Northern District of Illinois, Eastern Division denied, in part, the motion to dismiss. The court allowed plaintiffs' federal claim of unreasonable seizure under the Fourth Amendment to remain. In addition, the court declined to find that Officer Regnier was entitled to qualified immunity. Although the court dismissed plaintiff's claim for use of excessive force, the court allowed the claim for negligence to stand. Finally,, plaintiffs' claim for violation of the Illinois Humane Care for Animals Act was also allowed to stand. Plaintiffs' substantive due process and excessive force claims were dismissed. Defendants were given until December 7, 2010 to answer the remaining counts of the complaint, and they met that deadline. A Scheduling Order was signed by the Honorable Joan H. Lefkow on January 27, 2011, and the case will continue to unfold.*

Clintina Taylor ("Clintina"), individually and as guardian for her daughter, Nivea Taylor ("Nivea") (collectively, "plaintiffs"), filed a ten-count complaint against the City of Chicago, Illinois (the "City") and Chicago Police Officer James Regnier ("Officer Regnier") (collectively, "defendants"). Plaintiffs' complaint consisted of claims for civil rights violations pursuant to 42 U.S.C. § 1983, in addition to various state law claims, all of which arose from Officer Regnier's non-fatal shooting of plaintiffs' dog, Brick. On November 23, 2010, the United States District Court for the Northern District of Illinois, Eastern Division, ruled on defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, defendants' motion was granted in part and denied in part.

On September 12, 2009, Clintina hosted a gathering in her backyard. Someone accidentally left the gate to the backyard open. Later that evening, Brick, plaintiffs' four-year-old, neutered dog left plaintiffs' property. Brick had no biting history and he had completed intermediate and advanced obedience classes prior to the date of the shooting. A neighbor informed Clintina that Brick was loose." Almost immediately or shortly thereafter, Officer Regnier responded to a 911 call pertaining to loose dogs and arrived on Taylor's block.

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When Officer Regnier arrived, he found Brick standing on the sidewalk near plaintiffs' home. Officer Regnier immediately drew his gun even though Brick was not biting, attacking, or threatening anyone and was, instead, just standing still and wagging his tail. Plaintiffs' neighbor asked Officer Regnier not to shoot, as Brick was friendly and his owners were on their way to retrieve him. A seven-year-old girl and her family had even approached Brick to retrieve him for plaintiffs. Officer Regnier ignored these and, in the presence of the Chicago Animal Care and Control worker, chose to shoot Brick instead. Plaintiffs, along with friends and neighbors, observed the shooting from across the street. Although Brick was not killed, plaintiffs claimed to have suffered "out-of-pocket veterinarian costs, diminished value to Brick, and other damages" as a result of the incident.

A motion to dismiss under Rule 12(b)(6) challenges a complaint for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, the court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *Dixon v. Page*, 291 F.3d 485, 486 (7th Cir. 2002). In order to survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of the claim's basis, but must also establish that the requested relief is plausible on its face. *Ashcroft v. Iqbal,* U.S. 129 S. Ct. 1937, 1949 (2009).

The Court considered plaintiffs' federal "Unreasonable Seizure Claim." The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Pets are "effects" for purposes of the Amendment. *Viilo v. Eyre*, 547 F. 3d 707, 710-11 (7th Cir. 2008). Defendants did not appear to dispute this but, instead, emphasized that the non-fatal shooting of a dog wandering loose through the neighborhood did not rise to the level of a Fourth Amendment violation.

A claim for a Fourth Amendment violation requires allegations of a "seizure" that was "unreasonable." *Belcher v. Norton*, 497 F.3d 742, 747 (7th Cir. 2007). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, (1984). The Seventh Circuit, along with five other circuits, has recognized that the killing of a dog constitutes a seizure. *Viilo*, 547 F. 3d at 711 ("[U]nnecessarily killing a person's pet offends the Fourth Amendment."). The temporary removal or taking of a domestic animal qualifies as a seizure for purposes of the Fourth Amendment. *Siebert v. Severino*, 256 F.3d 648, 656 (7th Cir. 2001) (horse); *Ferrell v. Soto*, 2008 U.S. Dist. LEXIS 8250, (dogs). Here, plaintiffs alleged a variation on these seizures, the non-fatal shooting of their dog that decreased his value to them and required them to make additional expenditures to care for his injuries. While plaintiffs did not allege that their property was destroyed, they essentially alleged that it was substantially damaged and lost value. Such devaluation may constitute a seizure. See *Pepper v. Village of Oak Park*, 430 F.3d 805, 809 (7th Cir. 2005) (a seizure occurred where plaintiff's couch was substantially damaged, although not permanently destroyed); *Brandon v. Vill. of Maywood*, 157 F. Supp. 2d 917, 930 (N.D. Ill. 2001) (plaintiff's claim for deprivation of due process based on injuries to her dog from a non-fatal shooting more appropriately characterized as a claim for unreasonable seizure of property). As defendants have not demonstrated that plaintiffs could not prevail on their claim as a matter of law, the court held that the mere novelty of the claim did not require dismissal.

Defendants argued that even if the shooting was considered a seizure, it could not be found to have been unreasonable. In determining whether a seizure was unreasonable, or in other words "more intrusive than necessary," *Florida v. Royer*, 460 U.S. 491, 504, (1983), "[t]he nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced "against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, 396, (1989) (citation omitted) (internal quotation marks omitted). "[C]ommon sense . . . counsel[s] that the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable." *Viilo,* 547 F.3d at 710. While "the bond between a dog owner and his pet can be strong and enduring," the state's interest may be heightened where the pet is at large and roaming unsupervised, "for at that point the [pet] ceases to become simply a personal effect and takes on the nature of a public nuisance." *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205-06 (4th Cir. 2003); *Brown, 269 F.3d at 210-11* ("[T]he state's interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger. In [that] case, the state's interest may even justify the

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extreme intrusion occasioned by the destruction of the pet in the owner's presence.").

The court ruled that whether the seizure was reasonable is a fact-bound inquiry inappropriate for a motion to dismiss. Plaintiffs sufficiently alleged facts that could establish that Officer Regnier's actions were unreasonable under the circumstances. While it is true that Brick was no longer on plaintiffs' property and someone had called 911 to report that a dog was wandering loose, plaintiffs pled facts that would overcome an argument that Brick posed an imminent danger. They have alleged that Brick had no biting history, was a social dog, and had completed advanced and intermediate professional obedience classes. At the time Officer Regnier prepared to shoot him, Brick had not strayed far from home and was standing still and wagging his tail. A seven-year-old girl was close to Brick, looking to retrieve him for plaintiffs. Although police have a "strong interest in not being injured by a dog with ... an unknown propensity for violence," *Brandon,* 157 F. Supp. 2d at 931, one of plaintiffs' neighbors had informed Officer Regnier that Brick was friendly and that plaintiffs were coming to get him. Plaintiffs were, in fact, just across the street at the time Officer Regnier shot Brick. Because plaintiffs have pleaded a plausible claim, the court at this stage declines to dismiss the *Fourth Amendment* count on the basis that it does not rise to the level of a constitutional violation.

Defendants argued that Officer Regnier was entitled to qualified immunity on plaintiffs' unreasonable seizure claim. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982). Taking the facts alleged in the complaint as true and drawing all reasonable inferences in plaintiffs' favor, the court could not conclude that qualified immunity shields Officer Regnier from liability at this stage. The unreasonableness of shooting and killing a pet that did not pose an immediate danger, and where the use of force was avoidable, was clearly established at the time of the incident. *Viilo*, 547 F.3d at 710-11. Because it was possible that the unlawfulness was apparent, the court declined to find that Officer Regnier is entitled to qualified immunity at this juncture.

As noted above, the court concluded that plaintiffs stated a Fourth Amendment claim. Although plaintiffs may not ultimately prevail on this claim, *Graham* counsels that plaintiffs' alternative theory that they were deprived of property in violation of the Fourteenth Amendment be dismissed, as it is more appropriately characterized as a claim for unreasonable seizure of plaintiffs' personal effects.

Similarly, the court dismissed plaintiffs' claim for the use of excessive force. The plaintiffs' complaint alleged that "Officer Regnier used excessive force against Brick, which endangered and damaged [Clintina] and her minor daughter Nivea." Plaintiffs recognized that they could not bring a claim of excessive force on behalf of Brick or for Brick's injuries. Instead, they claimed that Officer Regnier's use of force on Brick violated their Fourth Amendment rights to be free from the use of excessive force, as they witnessed the shooting and were damaged by it. Plaintiffs cited *Mendez v. Rutherford*, 655 F. Supp. 115 (N.D. Ill. 1986), as support for the proposition that witnesses to the use of excessive force may, in certain circumstances, have excessive force claims themselves. The court held that *Mendez* is distinguishable from this situation, however, because pursuant to the Due Process Clause of the Constitution, officers owe a special duty of care to minor children in an adult's custody "to avoid actions which through gross negligence or reckless disregard harm the children either emotionally or physically" when the officers have taken the adult into custody. *Mendez*. at 119. Such a situation was not present in this case. Plaintiffs did not present, and the court was unable to find, any case allowing a person to maintain a vicarious constitutional claim for witnessing the alleged excessive use of force on another or an allowing an owner to maintain a constitutional claim for the use of force on his or her property. [5] Thus, plaintiffs' excessive force claim must be dismissed.

Among their state law claims, plaintiffs contended that Officer Regnier acted negligently in shooting Brick, that Officer Regnier's actions caused plaintiffs emotional distress, and that the shooting of Brick constituted a trespass to plaintiffs' chattels. Defendants argue that these claims should be dismissed, as an officer is statutorily immune from claims of negligence while attempting to enforce or execute the law." A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 Ill. Comp. Stat. 10/2-202. For purposes of the Tort Immunity Act, willful and wanton conduct is "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."

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Defendants argued that it is clear from the complaint that Counts V, VI, and VIII deal only with the alleged negligent, and not willful or wanton, conduct of Officer Regnier in the scope of his duties as a police officer. Plaintiffs responded that the complaint alleges that Officer Regnier was not attempting to enforce or execute the law when he shot Brick, making the Tort Immunity Act inapplicable. "The question of whether a police officer is executing and enforcing the law is a factual determination which must be made in light of the circumstances involved in each case." *Hudson v. City of Chicago,* 881 N.E.2d 430, 443 (2007). Plaintiffs alleged that Officer Regnier was responding to a 911 call, an activity found to be an act of executing or enforcing the law. *See, e.g.*, *Bruecks v. County of Lake,* 658 N.E.2d 538, 539-40 (1995); *Morris v. City of Chicago,* 474 N.E.2d 1274, 1276 (1985). Whether this protection extends to Officer Regnier's actions after he arrived at the scene and observed Brick doing nothing harmful is open to question at this stage. Because the immunity determination is inherently factual and plaintiffs have not clearly pleaded themselves out of court, plaintiffs' claims sounding in negligence will not be dismissed.

Finally, plaintiffs brought a claim for violation of the Illinois Humane Care for Animals Act, which provides that "[n]o person may intentionally commit an act that causes a companion animal to suffer serious injury or death." 510 Ill. Comp. Stat. 70/3.02(a). Defendants sought to dismiss plaintiffs' claim, arguing that violations of criminal statutes do not provide a basis for civil actions. This is generally true. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316, (1979) and *Chapa v. Adams*, 168 F.3d 1036, 1038 (7th Cir. 1999). The Humane Care for Animals Act, however, is an exception to that rule and explicitly imposes civil liability on violators of the statute. 510 Ill. Comp. Stat. 70/16.3 ("Any person who has a right of ownership in an animal that is subjected to an act of aggravated cruelty under Section 3.02 ... may bring a civil action to recover the damages sustained by that owner."). Accordingly, plaintiffs were allowed to bring a claim for violation of the Illinois Humane Care for Animals Act.

For the foregoing reasons, defendants' motion to dismiss was granted in part and denied in part. Plaintiffs' substantive due process and excessive force claims were dismissed. Defendants were given until December 7, 2010 to answer the remaining counts of the complaint, and they met that deadline. A Scheduling Order was signed by the Honorable Joan H. Lefkow on January 27, 2011, and the case will continue to unfold. ■

Veterinary Practitioners Board of New South Wales v. Johnson, cont'd.

cat patient ("Cat 1"), and told the owner of Cat 1 ("Client 1") that Cat 1 had diabetes. Client 1 began giving Cat 1 insulin injections, but the cat was not doing well and Client 1 took the cat back to the hospital for a couple of days and returned home, but the cat remained unwell. Client 1 brought the cat back to the hospital on September 16, 2008 because the cat was not eating or drinking and the cat was admitted to the hospital. On several occasions in September, 2008, Johnson administered dexamethasone, knowing that Cat 1 was diabetic. Dexamethasone is contraindicated in a diabetic cat (based on expert testimony and documentary evidence). On September 19, 2008, Client 1 went to the hospital to pick up the cat, but Johnson told Client 1 that the cat had an enlarged kidney. That afternoon, the cat was deteriorating rapidly and experiencing seizures. Several nurses requested that Johnson check on the cat, but he failed to do so and left the hospital. Cat 1 died that evening after Johnson had left the hospital. The following day, Johnson called Client 1 and left a voice message (which indicated to Client 1 that the cat was doing fine), and did not inform Client 1 of the death of her cat until September 23, 2008, four days after the cat had died. Johnson untruthfully told Client 1 that he had euthanized the cat on September 21st because the cat's kidney had ruptured. On December 5, 2008, Client 1 complained to the Board about Johnson's treatment of Cat 1. Johnson wrote a letter to the Board responding to the complaint enclosing the hospital records related to Cat 1. Johnson fabricated the records that purported to establish that Cat 1 received treatment at least two days after she died. While investigating the complaint, the Board took evidence from several of Johnson's employees and relied on expert evidence from a veterinarian with 39 years experience. In late January 2009, Johnson diagnosed a malignant tumor in a second patient cat ("Cat 2"). Johnson recommended euthanasia to the owner of Cat 2 ("Client 2") and Client 2 agreed. Johnson told Client 2 that the cat's body would be kept at the hospital for at least one week so she could retrieve it. However, the body was mistakenly disposed of at the landfill before one week had passed. Johnson was dishonest about the disposal of the corpse and told Client 2 that the cat was taken to the crematorium, but that there was a delay in the return of the ashes because of problems at the crematorium. Johnson's

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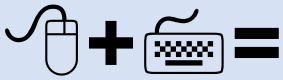
girlfriend went to the home of Client 2 in March 2009 and gave her a container falsely representing that it contained the ashes of Cat 2. On March 30, 2009, Client 2 complained to the Board about Johnson. After the complaint, Johnson's girlfriend threatened Client 2 at Johnson's direction that if she did not withdraw the complaint, Johnson would take Client 2 to court.

Beginning in April of 2008, several pharmaceutical companies ceased supplying pharmaceutical products to Johnson because of large debts he owed the companies. In January 2009, judgment was entered against Johnson by the District Court of NSW relating to money he owed to one company for pharmaceutical supplies. During the Board's investigation, it received evidence from staff members of Johnson's that he had limited pharmaceutical supplies and the Board required him to provide certain information. Johnson caused an untruthful letter to be sent to the Board denying that the pharmaceutical companies had refused to supply products to him. In June 2009, the Board imposed the condition on Johnson's registration that he must have another full-time veterinary practitioner working with him or he must only practice in a group practice. Johnson, however, deliberately breached the condition and continued to practice at the hospital without another full-time veterinary practitioner working at that practice.

The Board applied to the Tribunal for a disciplinary finding that Johnson is guilty of professional misconduct and/or unsatisfactory professional conduct under Sections 47(4) and 50 of the Act. The grounds of the Board's application were set forth in two applications and include the allegations that Johnson (i) deceived Client 1 about the circumstances of the cat's death; (ii) created false records in relation to the care of Cat 1; (iii) was dishonest in his representations to the Board about the circumstances of Cat 1's death; (iv) engaged in conduct that was likely to cause unnecessary suffering to an animal; (v); delayed informing Client 1 of her cat's death; (vi) has inadequate knowledge and skill as a veterinarian because he administered Dexason to a diabetic cat; (vii) improperly disposed of Cat 2 after she died; (viii) misrepresented the facts regarding his pharmaceutical supplies; and (ix) breached a condition of his registration imposed by the Board.

"Unsatisfactory professional conduct" and "professional misconduct" are defined in Section 35 of the Act. Professional misconduct is either serious unsatisfactory professional conduct or the breach of specified clauses of the Veterinary Practitioners Code of Professional Conduct (the "Code"). Under the Code Clauses 2, 3, 4, 6 and 8, it is professional misconduct if a veterinary practitioner (i) does not consider the welfare of animals; (ii) refuses to provide pain relief to an animal; (iii) does not maintain knowledge of current standards of practice; (iv) misleads or deceives in such a way to have an adverse effect on the veterinary profession; or (v) is not available for the ongoing care of an animal. Johnson admitted many of the alleged facts at the hearing. With regard to the facts denied by Johnson, the Board carried its burden of proof, which is satisfaction on the balance of probabilities.

Based on the Tribunal's factual findings, it found that Johnson was guilty of professional misconduct and unsatisfactory professional conduct. Having found Johnson guilty of professional misconduct, the Tribunal can make orders under the Act including reprimanding the practitioner, imposing a fine, and suspending or cancelling the practitioner's registration. The Tribunal ordered that Johnson's veterinary practitioner's registration be cancelled and that Johnson cannot reapply for registration for at least four years. Johnson was also ordered to pay the costs of the Board.



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