Torts II
Spring 2015

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Reading Assignments

The required text for the course is **Henderson, et al., The Torts Process (8th ed. 2012).** All page references are to this text. Assignments labeled "Handout" will be distributed ahead of time in class and on the course website. Handouts 1, 2 and 3 are attached to this syllabus. Principle cases with starting page numbers (or "h1," "h2," etc. to indicate the Handout) are noted for your reference. However, you are responsible for all material within the listed pages of the week's assignment.

WEEK	TOPICS	ASSIGNMENT	CASES
1	Trespass and Nuisance	411-419, Handout #1, Handout #2,	*Friendship Farms v. Parson (h1)* *Prah v. Maretti (h2)*
	Strict Liability (wild animals)	451-455, Handout #3	*Tracey v. Solesky (h3)*
2	Strict Liability Abnormally Dangerous Conditions	458-478	*Turner v. Big Lake Oil (458)* *Siegler v. Kuhlman (461)* *PSI Energy, Inc. v. Roberts (467)* *Foster v. Preston Mill (475)*
3	Products Liability Negligence theory Warranty theory	479-492	*MacPherson v. Buick Motor Co. (481)* *Henningsen v. Bloomfield Motors (486)*
4	Products Liability Strict Liability theory	227-230, 492-503	*Escola v. Coca Cola Bottling (227* *Vandemark v. Ford Motor Co. (493)*
5	Products Liability Design Defects	524-526, 545-556, 533-536 (top)	*Heaton v. Ford Motor Co. (545)* *Soule v. General Motors (549)* *Troja v. Black & Decker (533)*
6	Products Liability Design Defects	536-542, Handout #4	*Parish v. JumpKing (538)* *Tincher v. Omega Flex (h4)*

7	Products Liability Warning Defects	532 (notes), 560-578	*Sheckells v. AGV Corp. (561)* *Gray v. Badger Mining (567)* *MacDonald V. Ortho Pharmaceuticals (notes, p. 525-6)*
8	Products Liability Proximate Cause Comparative Negligence Midterm Review	509-524	*Union Pump v. Allbritton (511)* *Murray v. Fairbanks Morse (517)*
9	Midterm		
10	Defamation	765-792, 795-803 Handouts #5, #6	*Gertz v. Robert Welch, Inc. (796)* *Dun & Bradstreet v. Greenmoss (h5)* *Wells v. Liddy (h6)*
11	Defamation Post-Midterm Review	803-809	*Milkovich v. Lorain Journal Co. (803)*
12	Invasion of Privacy: 1. Intrusion	813-827	*Hamberger v. Eastman (817)* *Shulman v. Group W (821)*
13	Invasion of Privacy: 2. Disclosure 3. False Light	827-836, 846-851	*Diaz v. Oakland Tribune (827)* *Godbehere v. Phoenix Newspapers (846)*
14	Invasion of Privacy: 4. Appropriation/ Publicity Final Exam Review	851-859	*ETW Corporation v. Jireh (853)*

Handout 1

Friendship Farms Camps, Inc. and Ronald Gabbard v. Leo Parson, Dorothy Parson, Max Combs and Lena Combs

Court of Appeals of Indiana, First District

172 Ind. App. 73; 359 N.E.2d 280; 1977 Ind. App. LEXIS 738
February 3, 1977, Filed

OPINION:

Defendants-appellants Friendship Farms Camps, Inc. (Friendship) is appealing the awarding of damages to each of the plaintiffs-appellees, Parsons and Combs, as well as the trial court's granting of an injunction designed to abate a nuisance.

• * *

We affirm the trial court's judgment.

The record shows that Ronald Gabbard, his wife, and parents orally leased their 80 acres of rural property to Friendship Farms Camps, Inc. for use as a campground. Friendship Farms Camps, Inc. was organized and incorporated by Ronald Gabbard, his wife, and another primarily for the purpose of providing camping facilities on the Gabbard property.

Prior to 1972, youth day camps were held on the property, but beginning in 1972, a number of weekly high school marching band camps were held. The bands would arrive on Sunday afternoon and stay until Friday evening during which time they would practice both marching and playing music. During 1973 and 1974, the band camps use increased, and Friendship proposed to extend the 1975 program to include weekend band camps during football season.

The Parsons and the Combs, whose residences were located across the road from Friendship, brought an action against Friendship to abate an alleged nuisance and for damages. The essence of their testimony at trial was that during the summer months loud band music and electronically amplified voices could be heard from 7:00 or 8:00 A.M. until 9:00 or 10:00 P.M. which interfered with their sleep and use of their property during the evening hours. They had complained to Gabbard and asked that the band music be confined to an earlier hour. Gabbard made an effort to enforce quiet hours. However, the evening noise continued for the reason that the cooler period of the day was better for practice time.

The trial court awarded Parsons and Combs $600 each in damages and permanently enjoined Friendship from permitting music or the use of bull horns on its property between 500 P.M. and 8:00 A.M. on weekdays and any time during weekends.

Friendship first contends that the judgment is not supported by sufficient evidence in that the evidence fails to show that the Parsons and the Combs were reasonable people of ordinary sensibilities, tastes, and habits and that no actual injury or sickness resulted from the alleged nuisance.

In determining the sufficiency of the evidence, this Court will look only to that evidence most favorable to the appellee and the reasonable inferences to be drawn therefrom. * * *

Friendship's contention that actual physical sickness or illness must result before a nuisance may be found is without merit. This court has repeatedly stated that the essence of a private nuisance is the fact that one party is using his property to the detriment of the use and enjoyment of others. While injury to health is a factor to be considered in

determining if one's propery is being detrimentally used, it is not the only factor to be considered for our legislature has defined a nuisance as:

> "Whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." IC 1971, 34-1-52-1 (Burns Code Ed.).

It is settled that noise, in and of itself, may constitute a nuisance if such noise is unreasonable in its degree. Reasonableness is a question for the trier of fact.

The evidence at trial shows that the proximity of the band music and amplified voices aggravated existing illnesses of Dr. Parsons and Mrs. Combs. Additionally, the noise interfered with sleep, required windows and doors to be kept closed on summer evenings, prohibited hearing television or conversing with another person in the same room, and made sitting outside unpleasant and visiting with others virtually impossible.

We are of the opinion that there is an adequate evidentiary foundation for the trial court's judgment.

* * *

Friendship argues that the trial court's decision is contrary to law because . . . the net effect of the injunction was to destroy the operation of a lawful and useful business.

* * *

As to whether the operation of a lawful and useful business is being destroyed, we agree that curtailment exists, but not its destruction.

It is the law in Indiana that a lawful and useful business is not to be destroyed unless the necessity for doing so be strong, clear, and urgent. In the present case, the injunction granted by the trial court will not destroy Friendship's business operation. The evidence shows Friendship Farms may continue to conduct band camps during the week-days within the specified time periods. Furthermore, the camping facilities operated by Friendship were shown to be amenable for uses other than band camps.

Friendship next contends that the trial court committed reversible error in refusing to permit defendant's witness, Stanley Barkley, to testify as to the general economic conditions of the community surrounding Friendship Farms.

At trial, Mr. Barkley was asked to describe the general economic conditions of the area. An objection was made on the grounds of relevancy, and it was sustained. He was then asked if the camping facility operated by Friendship had any effect upon the community. The same objection was made, and the court sustained the objection over defendants' offer to prove.

Friendship argues that the trial court's action prevented it from showing that the operation of its business promoted the interests of the surrounding area to an extent outweighing the private inconvenience resulting therefrom. Friendship relies upon *Northern Indiana Public Service Co.* v. *W.J. & M.S. Vesey* (1936), 210 Ind. 338, 200 N.E. 620, for the proposition that it is a defense to an action to enjoin a nuisance that the act promotes the public convenience and interest to such an extent as to outweigh the private inconvenience. In *Northern Indiana Public Service Co.*, our Supreme Court refused to abate the operation of a gas plant because of the overriding public interest to be served by the continued production of gas for the community's use. While refusing to enjoin the gas plant, the court did award permanent damages.

We feel that in certain circumstances the continued operation of a nuisance creating business is necessary for the benefit and convenience of the community. In these limited situations less injury would be occasioned by the continued operation of the nuisance than by enjoining it. However, the private injury suffered must be compensated by an award of permanent damages if appropriate.

We believe the trial court was correct in finding that this case does not present a situation where the social utility of the Friendship business greatly outweighed the private harm to the adjoining land owners. Therefore, no error existed in the trial court's ruling. * * *

Handout 2

Glenn Prah, Plaintiff-Appellant, v. Richard D. Maretti, Defendant-Respondent

No. 81-193

Supreme Court of Wisconsin

108 Wis. 2d 223; 321 N.W.2d 182; 1982 Wisc. LEXIS 2741; 29 A.L.R.4th 324; 12 ELR 21125

March 29, 1982, Argued
July 2, 1982, Decided

JUDGES:

Shirley S. Abrahamson, J. Ceci, J., took no part. William G. Callow, J. *(dissenting).*

OPINIONBY:

ABRAHAMSON

OPINION:

[*224] [**184] This appeal from a judgment of the circuit court for Waukesha county, Max Raskin, circuit judge, was certified to this court by the court of appeals, sec. (Rule) 809.61, Stats. 1979-80, as presenting an issue of first impression, namely, whether an owner of a solar-heated residence states a claim upon which relief can be granted when he asserts that his neighbor's proposed construction of a residence (which conforms to existing deed restrictions and local ordinances) interferes with his access to an unobstructed path for sunlight across the neighbor's property. This case thus involves a conflict between one landowner (Glenn Prah, the plaintiff) interested in unobstructed access to sunlight across adjoining property as a natural source of energy and an adjoining landowner (Richard D. Maretti, [*225] the defendant) interested in the development of his land.

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I.

According to the complaint, the plaintiff is the owner of a residence which was constructed during the years 1978-1979. The complaint alleges that the residence has a solar system which includes collectors on the roof to supply energy for heat and hot water and that after the plaintiff built his solar-heated house, the defendant purchased the lot adjacent to and immediately to the south of the plaintiff's lot and commenced planning construction of a home. The complaint further states that when the plaintiff learned of defendant's plans to build the house he advised the defendant that if the house were built at the proposed location, defendant's house would substantially and adversely affect the integrity of plaintiff's solar system and could cause plaintiff other damage. Nevertheless, the defendant began construction. The complaint further alleges that the plaintiff is entitled to "unrestricted use of the sun and its solar power" and demands judgment for injunctive relief and damages.

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Plaintiff's home was the first residence built in the subdivision, and although plaintiff did not build his house in the center of the lot it was built in accordance with applicable restrictions. Plaintiff advised defendant that if

the defendant's home were built at the proposed site it would cause a shadowing effect on the solar collectors which would reduce the efficiency of the system and possibly damage the system. To avoid these adverse effects, plaintiff requested defendant to locate his home an additional several feet away from the plaintiff's lot line, the exact number being disputed. Plaintiff and defendant failed to reach an agreement on the location of defendant's home before defendant started construction.

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[**187] We consider first whether the complaint states a claim for relief based on common law private nuisance. This state has long recognized that an owner of land does not have an absolute or unlimited right to use the land in a way which injures the rights of others. The rights of neighboring landowners are relative; the uses by one must not unreasonably impair the uses or enjoyment of the other. When one landowner's use of his or her property unreasonably interferes with another's enjoyment of his or her property, that use is said to be a private nuisance.

The private nuisance doctrine has traditionally been employed in this state to balance the conflicting rights of landowners, and this court has recently adopted the analysis of private nuisance set forth in the Restatement (Second) of Torts. *CEW Mgmt. Corp. v. First Federal Savings & Loan Association,* 88 Wis. 2d 631, 633, 277 N.W.2d 766 (1979). The Restatement defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement [*232] (Second) of Torts Sec. 821D (1977). The phrase "interest in the private use and enjoyment of land" as used in sec. 821D is broadly defined to include any disturbance of the enjoyment of property.

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Although the defendant's obstruction of the plaintiff's access to sunlight appears to fall within the Restatement's broad concept of a private nuisance as a nontrespassory invasion of another's interest in the private [**188] use and enjoyment of land, [***14] the defendant asserts that he has a right to develop his property in compliance with statutes, ordinances and private covenants without regard to the effect of such development upon the plaintiff's access to sunlight. In essence, the defendant is asking this court to hold that the private nuisance doctrine is not applicable in the instant case and that his right to develop his land is a right which is *per se* superior to his neighbor's interest in access to sunlight. [*233]

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Many jurisdictions in this country have protected a landowner from malicious obstruction of access to light (the spite fence cases) under the common law private nuisance doctrine. If an activity is motivated by malice it lacks utility and the harm it causes others outweighs any social values.

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This court's reluctance in the nineteenth and early part of the twentieth century to provide broader protection for a landowner's access to sunlight was premised on three policy considerations. First, the right of landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor, was jealously guarded. *Metzger v. Hochrein,* 107 Wis. 267, 272, 83 N.W. 308 (1900).

Second, sunlight was valued only for aesthetic enjoyment or as illumination. Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance which was given little, if any, weight by society.

Third, society had a significant interest in not restricting or impeding land development. *Dillman v. Hoffman,* 38 Wis. 559, 574 (1875).

This court repeatedly emphasized that in the growth period of the nineteenth and early twentieth centuries change is to be expected and is essential [***19] to property and that recognition of a right to sunlight would hinder property development.

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Considering these three policies, this court concluded that in the absence of an express agreement granting access to sunlight, a landowner's obstruction of another's access to sunlight was not actionable. *Miller v. Hoeschler, supra,* 126 Wis. at 271; *Depner v. United States National Bank, supra,* 202 Wis. at 410. These [***20] three policies are no longer fully accepted or applicable. They reflect factual circumstances and social priorities that are now obsolete.

First, society has increasingly regulated the use of land by the landowner for the general welfare. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Just v. Marinette,* 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

Second, access to sunlight has taken on a new significance in recent years. In this case the plaintiff seeks to protect access to sunlight, not for aesthetic reasons or as a source of illumination but as a source of energy. Access to sunlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy.

Third, the policy of favoring unhindered private development in an expanding economy is no longer in harmony with the realities of our society. *State v. Deetz,* 66 Wis. 2d 1, 224 N.W.2d 407 (1974). The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly.

Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners' disputes about property development in the 1980's than is a rigid rule which does not recognize a landowner's interest in access to sunlight. As we said in *Ballstadt v. Pagel,* 202 Wis. 484, 489, 232 N.W. 862 (1930), "What is regarded in law as constituting a nuisance in modern times would no doubt have been tolerated without question in former times." We read *State v. Deetz,* 66 Wis. 2d 1, 224 N.W.2d 407 (1974), as an endorsement of the application of common law nuisance to situations involving the conflicting interests of landowners and as rejecting *per se* exclusions to the nuisance law reasonable use doctrine. [***22]

In *Deetz* the court abandoned the rigid common law common enemy rule with respect to surface water and adopted the private nuisance reasonable use rule, namely that the landowner is subject to liability if his or her interference with the flow of surface waters unreasonably invades a neighbor's interest in the use and enjoyment of land. Restatement (Second) of Torts, sec. 822, 826, 829 (1977). This court concluded that the common enemy rule which served society "well in the days of burgeoning national expansion of the mid-nineteenth and [*238] early-twentieth centuries" should be abandoned because it was no longer "in harmony with the realities of our society." *Deetz, supra,* 66 Wis. 2d at 14-15. We recognized in *Deetz* that common law rules adapt to changing social values and conditions.

Yet the defendant would have us ignore the flexible private nuisance law as a means of resolving the dispute between the landowners in this case and would have us adopt an approach, already abandoned in *Deetz,* of favoring the unrestricted development of land and of applying a rigid and inflexible rule protecting his right to build on his land and disregarding any interest of the plaintiff in the

use and enjoyment of his land. This we refuse to do.

Private nuisance law, the law traditionally used to adjudicate conflicts between private landowners, has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land. Private nuisance law is better suited to regulate access to sunlight in modern society and is more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land.

[*240] We therefore hold that private nuisance law, that is, the reasonable use doctrine as set forth in the Restatement, is applicable to the instant case.

Handout #3

50 A.3d 1075 (2012)
427 Md. 627

Dorothy M. TRACEY
v.
Anthony K. SOLESKY and Irene Solesky, as the Parents, Guardians and Next Friends of Dominic Solesky, a Minor.

Court of Appeals of Maryland.

April 26, 2012.
As Amended on Reconsideration August 21, 2012.

DALE R. CATHELL, (Retired, Specially Assigned), J.

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Over the last thirteen years, there have been no less than seven instances of serious maulings by pit bulls upon Maryland residents resulting in either serious injuries or death that have reached the appellate courts of this State, including the two boys attacked by the pit bull in the present case. Five of the pit bull attacks in Maryland have been brought to the attention of this Court, and two have reached the Court of Special Appeals.

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The present case involves an attack by a pit bull named Clifford. Notwithstanding his relatively benign name, Clifford possessed the aggressive and vicious characteristics of [the pit bull dogs in previous cases]. He escaped twice from an obviously inadequate small pen and attacked at least two boys at different times on the same day. The second young boy was Dominic Solesky. As a result of his mauling by Clifford, Dominic initially sustained life threatening injuries and underwent five hours of surgery at Johns Hopkins Hospital to address his injuries, including surgery to repair his femoral artery. He spent seventeen days in the hospital, during which time he underwent additional surgeries, and then spent a year in rehabilitation.[9]

Here, the trial court granted a judgment for the defendant landlord at the close of the Plaintiff's case on the grounds that, according to the trial judge, the evidence was insufficient to permit the issue of common law negligence to be presented to the jury. On the state of the common law relating to dog attacks in existence at that time, the trial court was correct The plaintiff took an appeal to the Court of Special Appeals and that court reversed the trial court, finding that the evidence had been sufficient to create a valid jury issue as to the extent of the landlord's knowledge as to Clifford's dangerousness in respect to the then common law standards in dog attack negligence cases.

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We … establish in this case, and prospectively, a strict liability standard in respect to the owning, harboring or control of pit bulls and cross-bred pit bulls in lieu of the traditional common law liability principles that were previously applicable to attacks by such dogs. We shall direct the Court of Special Appeals to reverse the trial court and send this case back to that court….. With the standard we establish today (which is to be applied in this case on remand), when an owner or a landlord is proven to have knowledge of the presence of a pit bull or cross-bred pit bull (as both the owner and landlord did in this case) or should have had such knowledge, a *prima facie* case is established. It is not necessary that the landlord (or the pit bull's owner) have actual knowledge that the specific pit bull involved is dangerous. Because of its aggressive and vicious nature and its capability to inflict serious and sometimes fatal injuries, pit bulls and cross-bred pit bulls are inherently dangerous.

The Old Common Law

In *Bachman v. Clark, supra*, we stated the then common law standard in relation to dog attacks:

At common law, the owner of a dog is not liable for injuries caused by it, unless it has a vicious propensity and notice of that fact is brought home to him. But when it is once established that the dog is of a vicious nature, and that the person owning or keeping it has knowledge of that fact, the same responsibility attaches to the owner to keep it from doing mischief as the keeper of an animal naturally ferocious would be subject to, and proof of negligence on the part of the owner is unnecessary. This is the recognized and well settled law of this state [citation omitted].

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Modifying the Common Law

In *Ireland v. State*, 310 Md. 328, 331-332, 529 A.2d 365, 365-366 (1987) we discussed the basic framework of the Court's role in establishing and modifying common law rules:

> The determination of the nature of the common law as it existed in England in 1776, and as it then prevailed in Maryland either practically or potentially, and the determination of what part of the common law is consistent with the spirit of Maryland's Constitution and her political institutions, are to be made by this Court.
> "Whether particular parts of the common law are applicable to our local circumstances and situation, and our general code of laws and jurisprudence, is a question that comes within the province of the Courts of Justice, and is to be decided by them. The common law, like our Acts of Assembly, are subject to control and modification of the Legislature, and may be abrogated, or changed as the General Assembly may think most conducive to the general welfare; so that no great inconvenience, if any, can result from the power deposited with the judiciary to decide what the common law is, and its applicability to the circumstances of the State, and what has become obsolete from non-user or other cause.*State v. Buchanan,* 5 H. & J. 317, 365-66 (1821)."
> Because of the inherent dynamism of the common law, we have consistently held that it is subject to judicial modification in the light of modern circumstances or increased knowledge....
>
> ***

Strict Liability Standards in Pit Bull Attack Cases

We began our modification of the old common-law rule with respect to dog attack cases with our strong dicta in *Matthews, supra*, highlighting the particular characteristics of pit bulls and cross-bred pit bulls. There we explained the difference between pit bulls and other breeds of dogs when we noted:

> Thus, the foreseeability of harm in the present case was clear. The extreme dangerousness of this breed, as it has evolved today, is well recognized. `Pit bulls as a breed are known to be extremely aggressive and have been bred as attack animals.' *Giaculli v. Bright*, 584 So.2d 187, 189 (Fla.App.1991). Indeed, it has been judicially noted that pit bull dogs `bite to kill without signal' (*Starkey v. Township of Chester,* 628 F.Supp. 196, 197 (E.D.Pa.1986), are selectively bred to have powerful jaws, high insensitivity to pain, extreme aggressiveness, a natural tendency to refuse to terminate an attack, and a greater propensity to bite humans than other breeds. The "Pit Bull's massive canine jaws can crush a victim with up to two thousand pounds (2,000) of pressure per square inch — three times that of a German Sheppard or Doberman Pinscher."1084*1084 *State v. Peters*, 534 So.2d 760, 764 (Fla. App.1988) *review denied*,542 So.2d 1334 (Fla.1989). *See also Hearn v. City of Overland Park*,244 Kan. 638, 650, 647, 722 [772] P.2d 758, 768, 765, *cert. denied* 493 U.S. 976, 110 S.Ct. 500, 107 L.Ed.2d 503 (1989) (`pit bull dogs represent a unique health hazard ... [possessing] both the capacity for extraordinarily savage behavior ... [a] capacity for uniquely vicious attacks ... coupled with an unpredictable nature" ... and that "of the 32 known human deaths in the United States due to dog attacks ... [in the period between July 1983 and April 1989], 23 were caused by attacks by

> pit bull dogs." Pit bull dogs have even been considered as weapons.*See* State v. Livingston, 420 N.W.2d 230 [223] (Minn.App.1998) (for the purpose of first degree murder); *People v. Garraway*, 187 A.D.2d 761, 589 N.Y.S.2d 942 (1992) (upholding conviction of pit bull's owner of criminal weapon in the third degree).
> * * *
> .... And the Albuquerque Humane Society reported that no other breed of dog has "ever caused the kinds of injuries or exhibited the aggressive behavior shown by American Pit Bull Terriers... [and the humane society does not] adopt out pit bull dogs because of their potential for attacks on other animals and people"); [some citations in this paragraph omitted].
> ***

Because the issue of strict liability was not expressly raised on appeal, we decided*Matthews* on regular common law negligence requirements. However, the language of that case clearly forecasted the direction the Court might take in the proper case. This is that case.

***

The sources and discussions above [omitted], coupled with our extensive dicta in ***Matthews*, *supra***, and the numerous instances of serious and often fatal attacks by pit bulls throughout the country, and especially in Maryland, persuades us that the common law needs to be changed in order that a strict liability standard be established in relation to attacks by pit bull and cross-bred pit bull mixes.

CONCLUSION

We hold that upon a plaintiff's sufficient proof that a dog involved in an attack is a pit bull or a pit bull mix, and that the owner, or other person(s) who has the right to control the pit bull's presence on the subject premises (including a landlord who has the right and/or opportunity to prohibit such dogs on leased premises as in this case) knows, or has reason to know, that the dog is a pit bull or cross-bred pit bull mix, that person is strictly liable for the damages caused to a plaintiff who is attacked by the dog on or from the owner's or lessor's premises. This holding is prospective and applies to this case and causes of action accruing after the date of the filing of this opinion. Upon remand to the trial court, it shall apply in this case the modifications to the common law herein created.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED FOR THE REASONS HEREIN STATED; THAT COURT IS DIRECTED TO REMAND THE CASE TO THE TRIAL COURT FOR A RETRIAL CONSISTENT WITH THE NEW COMMON LAW PRINCIPLES HEREIN ADOPTED; COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE APPELLANT.

HARRELL, GREENE, and BARBERA, JJ., dissent.

GREENE, J., dissenting, in which HARRELL and BARBERA, JJ., join.

I respectfully dissent:

Today, the majority holds that a pit bull or any dog with a trace of pit bull ancestry (determined by what means the majority opinion leaves us entirely in the dark) shall be deemed hence forth vicious and inherently dangerous as a matter of law. Thus, an owner, keeper, or landlord with control over a tenant's premises can be held strictly liable for harm a pit bull or mixed-breed pit bull causes to third parties. According to the majority:

> [W]e are modifying one of the elements that must be proven in cases involving pit bull attacks from knowledge that a particular dog is dangerous to knowledge that the particular dog involved is a pit bull. If it is a pit bull the danger is inherent in that particular breed of dog and the knowledge element of *scienter* is met by knowledge that the dog is of that breed.

Now, it appears, the issue of whether a dog is harmless, or the owner or landlord has any reason to know that the dog is dangerous, is irrelevant to the standard of strict liability. In the words of the majority, the owner or landlord will be held strictly liable for any harm the dog causes if the owner or landlord had "knowledge of the presence of a pit bull or cross-bred pit bull ... or [the owner or landlord] should have had such knowledge[.]" Maj. op. at 636, 50 A.3d at 1079. By virtue of this new rule, grounded ultimately upon perceptions of a majority of this Court about a *particular breed* of dog, rather than upon adjudicated facts showing that the responsible party possessed the requisite knowledge of the animal's inclination to do harm, the majority transforms a clear factual question into a legal one in an effort to create liability. If the majority believes that it has not transformed the relevant inquiry from a factual determination into a legal one, in the present case, then I pose this question: What expert testimony or factual predicate is contained within this record to support a factual finding that pit bulls and mixed-breed pit bulls are inherently dangerous? I have considered the record and found no such factual predicate. Further, if the majority believes it is taking judicial notice of such facts — why, pray tell, is an appellate court willing to take judicial notice of facts about the breed of particular dogs, and characteristics allegedly associated with that breed, when the trial judge was not willing to do so? Moreover, and more problematically, why should appellate courts even consider taking judicial notice of facts relating to dog bite statistics that are clearly in dispute?

***

Until today, the common law in Maryland was that the owner or keeper of a dog or other domestic animal would be held strictly liable for injuries caused by that animal, provided the plaintiff could show that the owner or keeper "had knowledge of [the animal's] disposition to commit such injury[.]" *Twigg v. Ryland*, 62 Md. 380, 385 (1884) (noting that "[t]he gist of the [strict liability] action is the keeping [of] the animal after knowledge of its mischievous propensities"). Likewise, until today, a landlord would be held liable to a third party for an attack by a tenant's animal where the landlord had knowledge of the animal's presence on the leased premises and knowledge of its vicious propensities, and the landlord maintained control over the leased premises.

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With regard to this theory of strict liability, the mere fact that a dog is kept in an enclosure or is otherwise restrained is not sufficient to show the owner or keeper's knowledge of the animal's vicious propensities or inclination to bite people. *McDonald v. Burgess*, 254 Md. 452, 458, 255 A.2d 299, 302 (1969); *see Ward v. Hartley*, 168 Md.App. 209, 218, 895 A.2d 1111, 1116 (2006), *cert. denied*, 394 Md. 310, 905 A.2d 844 (2006). Furthermore, in accordance with the well-settled common law standard of strict liability, the breed of the dog, standing alone, has never been considered a sufficient substitute for proof that a *particular* dog was dangerous or had a violent nature. *See McDonald*, 254 Md. at 460, 255 A.2d at 303; *Slack*, 59 Md.App. at 476, 476 A.2d at 234. Specifically, in *McDonald*, we held that the mere fact that the dog in question belonged to a specific breed, which "can and often does behave in a very vicious manner," was insufficient to hold the owner legally responsible for his German shepherd attacking another person. *McDonald*, 254 Md. at 460-61, 255 A.2d at 303. In that case, "[t]here [wa]s nothing in the record to demonstrate that the particular dog alleged to have caused the injury ... was of a violent or oppressive nature" and that the defendant had the requisite *scienter*. *Id.* Thus, in order to hold the owner or keeper of a dog strictly liable, there must be a showing that the *particular*dog, in that case a German shepherd, was of a violent nature and that the owner or keeper of the dog knew, or by the exercise of ordinary care should have known, of the dog's inclination or propensity to do the particular mischief that was the cause of the harm. *McDonald*, 254 Md. at 456-60, 255 A.2d at 301-03.

Furthermore, until today, this Court has never announced a theory of strict liability predicated upon the alleged knowledge of the owner, keeper, or landlord of the premises, based upon assumptions about a particular breed of an animal, where a dog of that breed caused an injury to another human being.

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Although this Court has authority to alter the common law, we have been reluctant to do so because of the principle of *stare decisis*, which we have confirmed "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." … Consistent with our precedent, there is no good reason to modify the common law in this case. Modern

circumstances and knowledge gleaned from the literature regarding "pit bulls" have not substantially changed since 1998 when we decided *Matthews* and *Shields.* ….

Public knowledge and the hysteria regarding pit bulls is no more prevalent now than it was in 1998 when *Matthews* and *Shields* were decided.

According to some experts, there are more than twenty-five breeds of dogs commonly mistaken for pit bulls. Hussain, *supra,* at 2870. Notwithstanding this empirical evidence, the majority relies upon the assumption that all pit bulls are inherently dangerous. In this record, there is no evidence from expert witnesses to support the proposition that pit bulls or pit bull mixed-breeds are inherently dangerous. It appears that the media has demonized pit bulls as gruesome fighting dogs and has not revealed the long history of pit bulls as family dogs with passive behaviors. .. The majority also assumes that breed-specific rules, as opposed to behavior modification rules, are a better approach to controlling the problem of dog bites caused by pit bulls and mixed-breed pit bulls that attack humans. Again, the empirical evidence is in dispute. Some experts conclude that breed-specific liability rules provide a superficial sense of security because many factors completely unrelated to the breed or appearance of dogs affect their tendency toward aggression, including early experience, socialization, training, size, sex, and reproductive status. *See* Sacks et al., *supra,* at 839-40.

In those states referenced by the majority as examples of jurisdictions where the strict liability standard has been applied in the manner the majority announces today, it was clearly the legislatures of those states that enacted specific legislation to address the problem of harm caused by pit bulls and mixed-breed pit bulls. …

Given the nature of the extensive social problem of regulating pit bulls and mixed-breed pit bulls, the majority elects to focus on the breed of the dog involved, rather than on the behavior of the dog, the owner, and the landlord. The issues raised involving breed-specific regulation are not appropriate for judicial resolution; rather, those issues are best resolved by the Maryland General Assembly, as that branch of government is better equipped to address the various issues associated with regulation of pit bulls and mixed-breed pit bulls. For example, some experts indicate that the term "pit bull" does not describe any one particular breed of dog; instead, it is a generic category encompassing the American Staffordshire Terrier, the Staffordshire Bull Terrier, and the American Pit Bull Terrier. *See* Hussain, *supra,* at 2851-52. Neither the American Kennel Club nor the United Kennel Club recognizes all three breeds, and the breed descriptions and standards provided by the two organizations differ. *Id.* It is difficult for courts, therefore, both to determine whether a particular dog should be categorized as a pit bull and to differentiate between pit bulls and other breeds. Hussain, *supra,* at 2852; Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?,*Comment, 27 Nova L.Rev. 415, 432 (2003) (positing that "the evidentiary method for determining when a dog is a pit bull or pit bull mix can be confusing and difficult"). In addition, the connection between a dog's appearance and the actual breed is tenuous, according to some experts. *See* Victoria L. Voith, *Shelter Medicine: A Comparison of Visual and DNA Identification of Breeds of Dogs,* Proceedings of Annual AVMA Convention (July 11-14, 2009), http://www.nathanwinograd.com/linked/misbreed.pdf (finding that there is discrepancy between breed determination based on physical attributes and scientific determinations). Taking into consideration the lack of evidence in the record of this case with regard to the landlord's knowledge of the vicious propensities of the dog, the conflicting studies about how best to control the dog bite "epidemic" mentioned herein, and the problems inherent in defining what constitutes a "mixed-breed" pit bull, the matter of creating a new standard of liability is fraught with problems and is beyond the sphere of resolution by any appellate court.

Judges HARRELL and BARBERA have authorized me to state that they join in the views expressed in this dissenting opinion.

Editor's notes:

1. Upon rehearing, the majority agreed to amend the opinion "to delete any reference to cross-breds, pit bull mix, or cross-bred pit bull mix."

2. In January 2014, the Maryland Legislature passed (and the Governor signed) HB 73, explicitly overruling *Tracey v. Solesky*:

(A) (1) In an action against an owner of a dog for damages for personal injury or death caused by the dog, evidence that the dog caused the personal injury or death creates a rebuttable presumption that the owner knew or should have known that the Dog had vicious or dangerous propensities.

(2) Notwithstanding any other law or rule, in a jury trial, the judge may not rule as a matter of law that the presumption has been rebutted before the jury returns a verdict.

(B) in an action against a person other than an owner of a dog for damages for personal injury or death caused by the dog, the common law of liability relating to attacks by dogs against humans that existed on April 1, 2012, is retained as to the person without regard to the breed or heritage of the dog.