Circuit Court for Baltimore City
Case # 94272040/CL186725

IN THE COURT OF APPEALS OF MARYLAND

No. 74

September Term, 1997

SHANITA L. MATTHEWS et al.

v.

AMBERWOOD ASSOCIATES LIMITED PARTNERSHIP, INC. et al.

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell

JJ.

Dissenting Opinion by Chasanow, J.
in which Cathell, J., joins

Filed:

Tragic cases may have tragic consequences when sympathy for a plaintiff interferes with a court's ability to analyze the facts and apply the law. Sympathy for the victim of a tragedy should not serve as a substitute for evidence of duty, culpability, and proximate cause. The legal issue in this case is whether a landlord should have to pay over five million dollars solely because the landlord did not make a futile attempt to evict a tenant whose dog barked and growled at maintenance men trying to enter the dog's residence when its owner was not home.

Ms. Matthews suffered a grievous loss as a result of her son playing with a pit bull in a friend's apartment where she and her son were weekly social guests. The effect of affirming this five million dollar judgment in favor of Ms. Matthews may ultimately have severe repercussions for lessees with dogs. Landlords wishing to avoid multimillion dollar lawsuits may be forced to initiate eviction proceedings to terminate leases whenever a tenant's dog acts aggressively toward maintenance personnel who attempt to enter the tenant's dwelling when the tenants are not home, and I doubt very many dogs would not bark and growl at a stranger trying to enter a dwelling when the dog's owner is absent. The case will certainly have tragic consequences for pit bulls because the majority opinion, in effect, makes ownership of a pit bull per se negligence, and the Court seems to advocate that the entire breed should be eradicated. Perhaps the worst tragedy is the implication that rich landlords and sympathetic victims are judged by totally different standards. Ms. Matthews knew this pit bull and its temperament far, far better than the landlord; yet, under the majority's ruling, the landlord was negligent for not safeguarding Ms. Matthews' son from

the dog, and Ms. Matthews was neither contributorily negligent for not safeguarding her son nor an intervening superseding cause for allowing her son to play with the dog. On that same issue, the majority discusses at great length the widespread general knowledge that pit bulls are extremely dangerous, but apparently only the landlord, not Ms. Matthews, could be chargeable with that knowledge since her contributory negligence is held not to be an issue to be submitted to the jury. Under the majority's reasoning, the young child's injury by the dog was foreseeable by the landlord, but not by his mother. The landlord was a cause of the child's injuries because it did not make a futile attempt to evict the dog's caretaker, but Ms. Matthews could not be found to be an intervening superseding cause even though she brought her young child to the dog's home and permitted the infant's unsupervised play with the dog. It does not seem as if the rules of the law of negligence are being applied equally.

ADDITIONAL FACTS

In holding that there was insufficient evidence to permit a jury to find Ms. Matthews was contributorily negligent or that her actions were an intervening superseding cause, the majority may be losing sight of its obligation to look at the facts in the light most favorable to the landlord. These facts indicate Ms. Matthews had far, far greater knowledge of Rampage and his temperament than the landlord, and if the landlord could be found negligent for not evicting the dog, how could Ms. Matthews not also be negligent for letting her infant son play throughout this two-bedroom apartment with this dog? On the issue of superseding

cause, it seems a reasonable conclusion that 16-month-old Tevin did something to enrage Rampage. On this occasion, while Ms. Matthews was working on a puzzle, the two children were playing in Darnelle's room, the hallway, and the living room along with the dog. It is reasonable to assume Tevin unwittingly did something that injured or tormented Rampage. Rampage's hostility was only directed at young Tevin, and even after the dog was repeatedly stabbed, it continued to attack Tevin. Keeping in mind that this was the first time Rampage had bitten anyone, if the landlord was a cause of the injuries for not evicting the tenant, could not a reasonable jury find that Ms. Matthews was a superseding cause for letting a 16-month-old child play throughout the apartment with the dog?

Ms. Matthews knew Rampage better than anyone except the dog's owner. She and her child had visited with the dog on dozens and dozens of occasions, at least weekly, for the entire time her friend was caring for the dog. Even if the landlord's negligence was an issue for the jury, the jury also should have been permitted to consider whether Ms. Matthews' own conduct in failing to safeguard her infant son from the dog, which is what she claims the landlord did, as well as that her conduct in permitting this 16-month-old child's unsupervised play throughout a two bedroom apartment with and around the dog could be an intervening, superseding cause or contributory negligence as to her cause of action.

The majority seems to place great emphasis on the assumption that Rampage is a pit bull. This too is inaccurate. Plaintiff's interrogatory "Answer No. 14" filed in the "Joint Record Extract" identifies Rampage's breed as "Staffordshire bull terrier." In addition, a "Plaintiff's Trial Brief" is part of the record, and it identifies Rampage as a Staffordshire bull

dog. The American Pit Bull Terrier has been a separately recognized breed since the early 1970's, as has the Staffordshire bull terrier, although the two did have a common ancestry. JACQUELINE O'NEIL, THE ULTIMATE AMERICAN PIT BULL TERRIER, at 21 (1995). If the majority is going to make ownership of pit bulls evidence of negligence, it should define its terms. Perhaps the reason why Rampage is sometimes referred to in the briefs and by the majority as a pit bull is that "[i]n recent years, the media have misused the term *Pit Bull*, calling practically every dog that gets into trouble by that name — including all manner of mongrels and mixed-bred dogs." JACQUELINE O'NEIL, THE ULTIMATE AMERICAN PIT BULL TERRIER, at vi (1995).

The majority makes an appellate fact finding that Rampage is "highly dangerous" and was "an extremely dangerous instrumentality," ___ Md. ___, ___, ___ A.2d ___, ___ (1998)(Majority Op. at 1,16), and these assumptions seem to be an important part of its rationale. This is improper appellate fact finding, improper not only procedurally, but substantively. Ms. Matthews knew Rampage much better than anyone who testified in the case. She visited the dog not less than once a week for over a year, and she did not see any evidence that Rampage was dangerous to people. She testified she would have heard if Rampage bit anyone, and she had never heard of him injuring anyone. There was other evidence that there were no reports to the Bureau of Animal Control that Rampage had attacked anyone. The primary evidence of Rampage's aggressiveness was his behavior when maintenance people tried to enter the apartment when no one was home. What dog would not behave aggressively toward a stranger trying to invade its home? Rampage's behavior

while chained outside the apartment was generally placid unless he perceived someone's approach as a danger. A maintenance supervisor, William Wenger, called by the plaintiff, testified that he would have heard if Rampage had attacked any maintenance personnel and to his knowledge the dog never attacked anyone. Another of the plaintiff's witnesses, David Jones, described Rampage's behavior while chained outside of the apartment as follows: "Not vicious. I mean, most of the time he was just laying there. He might have been walking to and fro, but not like an attack dog. Just like a normal dog would act." Both the landlord and Ms. Matthews may have had some reason to be cautious around Rampage, but he was not known to be "highly dangerous." If the assumption that Rampage was extremely dangerous or highly dangerous is as significant to the majority's decision as it appears to be, this is a factual finding for the jury, not for an appellate court, and the jury certainly did not find Rampage was "highly dangerous" or "extremely dangerous."

SOCIAL GUESTS

At the time of Tevin's tragic accident, Ms. Matthews and Tevin were social guests. The duty owed to a social guest is explained by this Court in *Paquin v. McGinnis*, 246 Md. 569, 229 A.2d 86 (1967). Judge Marbury wrote:

> "A social guest who enters a premises at the express or implied invitation of the host is not an invitee in a legal sense even though he enters the premises upon the basis of the invitation. A social guest enters the premises of his host for his own benefit and convenience, and the hospitality the guest receives is bestowed gratuitously. The use of the premises is extended to him merely as a personal favor to him. As a sign

> of hospitality the host often treats the guest as 'one of the family' to whom is offered the first serving or the most comfortable chair. The legal duty owed to a social guest by a host is to take the same care of the guest that the host takes of himself and other members of his family."

Paquin, 246 Md. at 572, 229 A.2d at 88.

He further quoted from the RESTATEMENT (SECOND) OF TORTS § 342, which the Court adopted.

> "The Restatement (Second), *Torts*, Section 342, imposes liability upon a host for physical harm caused to guests by a condition on the premises if, but only if, (1) the host knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such guests, and should expect that they will not discover or realize the danger, and (2) the host fails to exercise reasonable care to make the condition safe, or to warn the guests of the condition and the risk involved, and (3) the guests do not know or have reason to know of the condition and the risk involved."

Paquin, 246 Md. at 572, 229 A.2d at 88.

Emphasizing the very limited duty, even to warn of dangers or defects, Judge Marbury pointed out that there is not even that duty where the host had no knowledge or means of knowledge of the danger or defect. Furthermore, if the condition "should be obvious" to the guest, the host need not warn him. *Id*. Ms. Matthews had more knowledge of this dog and its temperament than the landlord, and the landlord owed her no duty to warn her about the dog. Surely the majority is not suggesting that, when a tenant's social guest is invited inside of the leased dwelling, the landlord owes the social guest a greater duty than the tenant who extended the invitation. It would be unreasonable for many reasons to hold that the landlord

owes a higher duty than the tenant to the tenant's social guests while they are in the leased residence. One primary reason is that the landlord could not seek indemnification from the tenant who created and controlled the dangerous condition in the leased dwelling, if the tenant does not owe the same duty to the injured social guest as the landlord. Perhaps the majority has the landlord's duty toward someone within the common areas confused with the landlord's duty to someone within the leased portion of the premises. The higher duty the landlord owes to all people in the common areas is based on the landlord's exclusive control over and exclusive duty to maintain the common areas, as well as the relationship between the common areas and the landlord's business of leasing the individual units. When a tenant and the tenant's guests are in the common areas, they are in effect business invitees of the landlord, but when the tenant and the tenant's guests go into an apartment rented by the tenant, they are no longer in an area maintained or controlled by the landlord.

> "When different parts of a building, such as an office building or an apartment house, are leased to several tenants, the approaches and common passageways normally do not pass to the tenant, but remain in the possession and control of the landlord. The tenants are permitted to make use of them but do not occupy them, and the responsibility for their condition remains upon the lessor. His position is closely analogous to that of a possessor who permits visitors to enter for a purpose of his own; and those who come in the course of the expected use may be considered his invitees, as a good many courts have held. He is therefore under an affirmative obligation to exercise reasonable care to inspect and repair such parts of the premises for the protection of the lessee; tenant's family, his employees, his invitees, his guests, and others on the land in the right of the tenant, since their presence is a part of the normal use of the premises for which the lessor holds them open.

* * *

> It may even extend into the portion of the premises leased to the tenant, provided that the landlord has retained control over that aspect of the premises responsible for the injury." (Footnotes omitted).

PROSSER AND KEETON ON LAW OF TORTS § 63, at 440, 442 (W. Page Keeton et al. eds., 5th ed. 1984).

Maryland law imposes no higher duty on the landlord than is imposed on the tenant to safeguard social guests of the tenant within the tenant's residence. *Sherwood Brothers, Inc. v. Eckard*, 204 Md. 485, 493, 105 A.2d 207, 209 (1954) is directly on point. In that case, a filling station was leased and both the landlord and tenant knew that a car lift in a greasing room not open to the general public was in an unsafe condition. Plaintiff, who was feeling ill, was invited into the greasing room by the tenant while the tenant was greasing a car. Plaintiff was injured when an automobile rolled off the unsafe lift. Plaintiff sued and recovered a judgment against the landlord, and this Court reversed the judgment. We held that plaintiff was an invitee of the tenant into the non-public area, so the plaintiff was, in effect, a bare licensee, and therefore, the landlord was only liable for defects the landlord knew about and did not inform the tenant about. We said:

> "The condition of the lift at the time of the lease, and thereafter, was as fully known to the tenant as it was to the landlord, and this being so, under the general rule, the landlord owed the tenant no duty in respect of it, *and as a consequence, owed no duty to an invitee of the tenant.*" (Emphasis added).

Sherwood Brothers, 204 Md. at 492, 105 A.2d at 210. We did note that, had plaintiff's

injuries been sustained in a portion of the premises that the landlord knew would be open to the general public, the result may have been different, but because plaintiff was injured in a portion of the premises not open to the public, even though he was an invitee of the tenant and even though the landlord knew of the dangerous condition, the landlord was not liable. That holding is directly on point and should control the disposition in the instant case.

The majority's holding seems to be that a pit bull like Rampage constitutes a dangerous nuisance and the landlord had a duty to abate the nuisance by evicting the tenant for violation of the "no pets" clause. That is contrary to hundreds of years of Maryland law. Judge Sonner, writing for the Court of Special Appeals, succinctly summed up the law on landlord's liability in Maryland. He wrote:

> "In Maryland, the settled law is that when the owner has parted control of the premises, the tenant has the burden of keeping the premises properly, in the *absence of an agreement to the contrary*. *Marshall v. Price*, 162 Md. 687, 689, 161 A. 172[, 172] (1932)(emphasis supplied). The landlord is not responsible for any nuisance created by the tenants. *Id*. In *Marshall v. Price*, the tenant had dug a pit on land that was leased to him. A guest visiting the tenant fell into the pit, injured herself, and sued the landlord. The Court stated '[i]t does not follow that because the defendants are the owners of the lot that they are liable for all the nuisances that may be created thereon, no matter by whom.' *Id*. at 689, 161 A. 172 [quoting *Maenner v. Carrol*, 46 Md. 193, 215 (1877)]."

Amberwood v. Matthews, 115 Md. App. 510, 519-20, 694 A.2d 131, 136 (1997).

In *State v. Feldstein*, 207 Md. 20, 113 A.2d 100 (1955), the Court held that the landlord was not liable for the death of his tenant's family by asphyxiation due to the tenant's faulty installation of a gas heater. It held:

> "'If a landlord demise[s] premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if the latter should think it proper to do so.'"

Feldstein, 207 Md. at 34, 113 A.2d at 106 (quoting *Maenner*, 46 Md. at 216). *See also Petrushansky v. State*, 182 Md. 164, 173-74, 32 A.2d 696, 700 (1943)(quoting the same language from *Maenner, supra*); *Miller v. Fisher*, 111 Md. 91, 93, 73 A. 891, 892 (1909)(A tenant in possession must keep the premises in proper condition, and he, not the landlord, is responsible for injury from a nuisance on the land, unless resulting from defective construction of the premises when they were leased.).

CASES FROM OTHER JURISDICTIONS

Many of the courts in other jurisdictions have noted that a landlord may be held liable for injuries caused by a tenant's animal, which the landlord knew was vicious and was maintained on the premises, where the injuries occurred on publicly open portions or common areas of the leased premises. *See, e.g.*, *Bailey v. DeSanti*, 414 A.2d 1187, 1188 (Conn. Super. Ct. 1980); *Lidster v. Jones*, 336 S.E.2d 287, 288 (Ga. Ct. App. 1985), *cert. dismissed sub nom. Pine Terrace Associates, Ltd. v. Lidster*, 341 S.E.2d 8 (Ga. 1986); *McDonald v. Talbott*, 447 S.W.2d 84, 85-86 (Ky. Ct. App. 1969); *Siegel v. 1536-46 St. John's Place Corporation*, 57 N.Y.S.2d 473, 474 (N.Y. City Ct. 1945); *Baker v. Pennoak Properties, Ltd.*, 874 S.W.2d 274, 277 (Tex. Ct. App. 1994); *see also Castillo v. Santa Fe*

County, 755 P.2d 48, 51 (N.M. 1988)("As landlord, [the operator of county-owned public housing] was under a duty to maintain safely those areas expressly reserved for the use in common of the different tenants.").

These courts generally emphasize the control that the landlord retains over common areas. For example, in *Linebaugh v. Hyndman*, 516 A.2d 638 (N.J. Super. Ct. App. Div. 1986), *aff'd*, 524 A.2d 1255 (N.J. 1987), the plaintiff sued the landlord for injuries her daughter sustained when she was attacked by a dog owned by one tenant while another tenant was babysitting the plaintiff's daughter. 516 A.2d at 639. Significantly, the attack occurred in a common backyard reserved for the use of the two tenants who lived in separate units in a two-family house. *Id.* There was evidence that the nonresident, defendant-landlords were aware of the dog and its vicious propensities. *Id.* Reversing summary judgment which had been granted in favor of the landlord, the Superior Court of New Jersey emphasized that "[w]here a dwelling contains two or more apartments which are rented to separate tenants and the landlord provides certain facilities for their common use or benefit, possession and control of such portions are deemed to be retained by him," and thus, a duty is imposed on the landlord to exercise reasonable care in maintaining these common areas. *Linebaugh*, 516 A.2d at 640. The court held that a landlord's obligation "to exercise reasonable care in the maintenance of common facilities under his control" encompasses a duty owed to the invitees of the landlord's tenants to prevent injury from a vicious animal kept on the premises. *Id.*

In a similar case, *Baker, supra*, the Court of Appeals of Texas noted that "a lessor

retaining control over premises used in common by different occupants of his property has a duty to exercise reasonable care to keep those common areas reasonably safe for the use of tenants and their guests." 874 S.W.2d at 275. There, the plaintiff sued the landlord of her apartment complex after she was injured by another tenant's dog in a common area where she and that tenant were each walking their respective dogs. *Id.* The court noted that "a landlord has [a] duty to keep the common areas of his property reasonably safe, including protecting tenants from known vicious dogs." *Baker*, 874 S.W.2d at 277. Refusing to reverse the summary judgment which had been granted in favor of the defendant-landlord, the court concluded that the plaintiff failed to meet her burden of proof regarding the landlord's knowledge of the dog's dangerous propensities. *Id.* The court set forth a two-part test: "(1) the injury must have occurred in a common area under the control of the landlord; and (2) the landlord must have had actual or imputed knowledge of the particular dog's vicious propensities." *Id*.

In the case *sub judice*, however, unlike in *Linebaugh* and *Baker*, the injury did not occur in the common area, but rather entirely within Morton's apartment where Tevin was playing. Importantly, where injuries have resulted from a dog attack occurring on portions of the premises where the tenant, not the landlord, had exclusive control, several cases have indicated that a landlord may not be held liable. *See, e.g., Goddard by Goddard v. Weaver*, 558 N.E.2d 853, 854-55 (Ind. Ct. App. 1990); *Zwinge v. Love*, 325 N.Y.S.2d 107, 109 (N.Y. App. Div. 1971)(holding that mother/owner of home in which attack occurred was not liable for attack by dog owned by son/tenant where there was no evidence that she exercised

dominion and control over the dog); *Denagy v. Doscher*, 243 N.Y.S.2d 575, 576 (N.Y. Sup. Ct. 1963) (dismissing complaint against landlord where there was "no allegation that the landlord had any control of the property or any part thereof where the dog was kept"). For example, in *Goddard*, the court refused to impose a duty on Weaver, the landlord, where the attack occurred in the yard of premises Weaver had leased to the dog's owners, the Maybriers. 558 N.E.2d at 854. Weaver and the Maybriers had entered into an oral agreement whereby the Maybriers could "use as yard what they chose to maintain." *Id.* The attack occurred on part of the land that the Maybriers maintained. *Id.* Acknowledging that generally landlords have a duty to maintain common areas, the court emphasized that the landlord "did not have control over the property where the attack occurred." *Id.*

The instant case is more analogous to those cases where an attack occurs outside, off the premises owned by the landlord. In such cases, courts have been reluctant to impose liability. *See, e.g.*, *Gibbons v. Chavez*, 770 P.2d 377 (Ariz. Ct. App. 1988); *Ward v. Young*, 504 So.2d 528 (Fla. Dist. Ct. App. 1987); *Allen v. Enslow*, 423 So.2d 616 (Fla. Dist. Ct. App. 1982); *Fernandez v. Marks*, 642 P.2d 542 (Haw. Ct. App. 1982); *Feister v. Bosack*, 497 N.W.2d 522 (Mich. Ct. App. 1993); *Wright v. Schum*, 781 P.2d 1142 (Nev. 1989). For example, in *Fernandez*, a Hawaii court held that a landlord could not be held liable when the tenant's vicious dog attacked plaintiffs off of the landlord's premises. 642 P.2d at 544. The court reasoned that to make a landlord liable in such a situation where the landlord was not the owner or keeper of the dog and the injury occurred off the premises would have the effect of "making a landlord ... an insurer of the public against injuries, off the premises, by dogs

domiciled by tenants on the landlord's premises." *Id*. In other words, to place liability on the landlord where the landlord retains no control would make the landlord in essence an insurer. As with areas off the premises, the landlord does not retain control within the leased premises. Thus, to place liability on the landlord for injuries occurring within the leased premises over which the landlord has given up control to the tenant is to make the landlord an insurer.

A. OTHER BASES FOR FINDING LANDLORD LIABILITY

Other bases for finding a landlord liable are similarly inapplicable. For example, this Court has found that a landlord may be liable where the landlord has contracted to repair the tenant's premises but fails to do so. *Sacks v. Pleasant*, 253 Md. 40, 45-46, 251 A.2d 858, 862 (1969)(upholding jury verdict finding landlord liable for failure to make repairs where the landlord had on numerous occasions, in response to tenant's requests and threats to move, promised to repair tenant's toilet seat); *see also McKenzie v. Egge*, 207 Md. 1, 6-7, 113 A.2d 95, 97 (1955)(noting that landlord could be held liable for failure to use reasonable care to make repairs where the following conditions are met: "there [is] a contractual undertaking to make repairs, notice of the particular defect, and a reasonable opportunity to correct it"); *Miller v. Howard*, 206 Md. 148, 154, 110 A.2d 683, 685-86 (1955). Likewise, we have held that such a duty may be imposed by statute.

Here, however, there is no statute that imposes a duty on the landlord to remove the pit bull from the leased premises, nor has the landlord contracted to remove vicious dogs.

I do not believe that the lease in this case which prohibited tenants from keeping pets on the premises was equivalent to a promise on the part of the landlord to keep the premises free from pets. Even if it did, however, jurisdictions imposing liability for a promise look to whether reliance on the promise caused the injury to the plaintiff. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 379. Obviously, Ms. Matthews and Tevin did not act in reliance on that "promise." Moreover, it is clear that Ms. Matthews and Tevin knew of this pit bull and were aware of its presence in the apartment at the time of their visit as they had visited the apartment before when the pit bull was present.

The landlord was the owner of the premises and did not harbor Rampage. Several courts have used this same fact to refuse to impose liability on a landlord for injuries resulting from an attack by a tenant's dog. For example, in *Zwinge, supra*, the court stated:

> "Although the owner of a dog, which he knows or has reason to know has a vicious propensity, is liable for injuries caused by it, as well as the harborer or keeper of such an animal, such a rule of liability has not been extended to a landlord who merely leases the realty to the owner of the dog." (Citations omitted).

325 N.Y.S.2d at 108. In *Allison by Fox v. Page*, 545 N.W.2d 281 (Iowa 1996), the Supreme Court of Iowa reviewed several other cases so holding:

> "A landlord who is not even in possession of the land, but merely owns the property on which a tenant keeps animals, is ... not liable for injuries caused by the tenant's animals. *See Bryant v. Putnam*, 322 Ark. 284, 908 S.W.2d 338, 339 (1995)(landlord, who was not owner or keeper of dogs owned by tenant, was not liable to injured third party); *Mathes v. Nolan*, 904 S.W. 2d 353, 356 (Mo. App.)(same), *application to transfer denied*, 904 S.W.2d 353 (1995); *Barnett [by Barnett]*

> *v. Rowlette*, 879 S.W.2d 543, 544 (Mo. App.)(landlord not liable for tenant's dog because landlord did not own, possess or harbor the dog, even though landlord knew dog was vicious and allowed dog to remain on the leased premises), *application to transfer denied*, 879 S.W.2d 543 (1994); *Gonzales v. Wilkinson*, 68 Wis.2d 154, 227 N.W.2d 907, 910 (1975)(landlord, who was not the keeper or owner of the tenant's dog and who had no control over the animal, had no duty to protect third persons). We adhere to these principles and reject the opportunity to extend the common law."

545 N.W.2d at 284. A similar holding was fashioned by the Washington Court of Appeals in *Clemmons v. Fidler*, 791 P.2d 257 (Wash. Ct. App.), *review denied*, 802 P.2d 125 (Wash. 1990):

> "[T]he common law rule applies: only the owner, keeper, or harborer of the dog is liable for such harm.
>
> * * *
>
> The common law rule, which is the settled law of Washington, is clear: only the owner, keeper or harborer of such a dog is liable. The landlord of an owner, keeper or harborer is not."

791 P.2d at 259.

These cases are consistent with the approach taken by the RESTATEMENT (SECOND) OF TORTS. According to the RESTATEMENT (SECOND) OF TORTS § 513 (1977), one who possesses "an abnormally dangerous domestic animal who keeps it upon land in his possession[] is subject to strict liability to persons coming upon the land in the exercise of a privilege whether derived from his consent to their entry or otherwise." It is clear in this case, however, that Respondents were not in possession of Rampage. Rather, owned by Morton's boyfriend, Rampage was in Morton's possession. The RESTATEMENT (SECOND)

OF TORTS § 514 extends the same liability to "[o]ne who, although not in possession, harbors ... an abnormally dangerous domestic animal." Comment a to § 514, however, clarifies that the mere "possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harborer of the animal." *See also, e.g., Barnett by Barnett v. Rowlette*, 879 S.W.2d 543, 544 (Mo. Ct. App. 1994).

Respondents did not "harbor" Rampage. A harborer of an animal is one who "afford[s] lodging to, to shelter, to give a refuge to." *See Hancock v. Finch*, 9 A.2d 811, 811 (Conn. 1939). Here, Respondents did not give lodging or shelter to Rampage, but rather merely owned the property on which Morton gave Rampage shelter. As discussed above, this mere ownership of property is not enough to conclude that the landlord was the harborer of Rampage. Additionally, in this case, Respondent did not give permission for Rampage to be on the premises and in fact expressly prohibited Rampage's presence through the provisions of the lease. Thus, Respondents did not harbor Rampage and therefore could not be liable as an owner or harborer of an abnormally dangerous domestic animal.

Finally it is noteworthy that the lease in this case was for a private dwelling, and it is clear that the premises were not leased for public or quasi-public purposes. *Cf. Austin v. Buettner*, 211 Md. 61, 74-75, 124 A.2d 793, 800-01 (1956)(recognizing a landlord's duty for injuries sustained on leased premises where the landlord is aware that the premises are leased with intent to admit the public).

THE LEASE AS A SOURCE OF LANDLORD CONTROL

Uccello v. Laudenslayer, 118 Cal. Rptr. 741 (Cal. Ct. App. 1975), is perhaps the most compelling case with respect to Petitioners' argument. In *Uccello*, an intermediate appellate court in California held "that a duty of care arises when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to remove the animal by retaking possession of the premises." 118 Cal. Rptr. at 743. There, the landlord gave a month-to-month tenant permission to keep a dog on the premises. The plaintiff, a five-year-old child, was attacked by the dog while playing on the kitchen floor with the tenant's daughter in the tenant's apartment. The plaintiff sued the landlord. *Uccello*, 118 Cal. Rptr. at 743-44.

Reversing a judgment of nonsuit, the court noted that the landlord in that case could have abated the harboring of the dog by terminating the month-to-month tenancy. *Uccello*, 118 Cal. Rptr. at 746-47. The court emphasized that the general rule "preclude[s] a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession." *Uccello*, 118 Cal. Rptr. at 745. The court, however, noted that several exceptions had been carved out of this general rule, such as (1) where the landlord covenants to repair, (2) where the landlord has actual knowledge of a hidden defect and fails to disclose the defect, (3) where a nuisance exists when the landlord leases or renews a lease, (4) when a safety law has been violated, and (5) where the injury occurs in a common area. *Uccello*, 118 Cal. Rptr. at 746 (citations omitted). The court reasoned that these exceptions were premised on

the landlord's retention of "a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury." *Uccello*, 118 Cal. Rptr. at 746. Based on what it called "enlightened public policy," the court concluded that the landlord retains sufficient control where the landlord has the right to terminate a lease and thus obviate the presence of the vicious animal. *Uccello*, 118 Cal. Rptr. at 746-47. Thus, although the landlord had leased the entire premises to the tenant, the California intermediate appellate court found that the landlord gave express permission to keep the dog as well as retained control or power to eliminate the danger at issue in the case through the landlord's right to evict the tenant unless the tenant got rid of the dog.

The opinions of some other courts suggest support for this view. *See, e.g., Gallick v. Barto*, 828 F. Supp. 1168, 1175 (M.D. Pa. 1993)(concluding that "No Pets" clause in lease gave landlord control over premises and thus landlord "'stepped into the shoes' of the tenants concerning liability" for injuries sustained as result of an attack by a pet ferret kept by tenant); *McCullough v. Bozarth*, 442 N.W.2d 201, 208 (Neb. 1989)(affirming summary judgment for the landlord because plaintiff failed to allege that the landlord had "sufficient control over the premises" and no evidence was presented of the terms of the lease, but noting that a landlord may be liable if he knew of "the dangerous propensities of the dog and where the landlord ..., by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power"); *Cronin v. Chrosniak*, 536 N.Y.S.2d 287, 287-88 (N.Y. App. Div. 1988)(reversing trial court's grant of summary judgment for the landlord and noting that while "[a] landlord not in possession of the

premises is usually not liable for injuries inflicted by an animal owned or harbored by a tenant, ... if during the term of the leasehold a landlord becomes aware of the fact that his tenant is harboring an animal with vicious propensities, he owes a duty to protect third persons from injury only if he 'had control of the premises or other capability to remove or confine the animal'")(quoting *Strunk v. Zoltanski*, 479 N.Y.S.2d 175, 177 (1984)); *Palermo v. Nails*, 483 A.2d 871, 873 (Pa. Super. Ct. 1984)(specifically adopting the *Uccello* approach and holding landlord liable where landlord had ability to eject tenant who was landlord's nephew and whose tenancy was "nothing more than a tenancy at sufferance"). Many other courts, however, have rejected the *Uccello* approach. *See, e.g.*, *Feister*, 497 N.W.2d at 525; *Wright*, 781 P.2d at 1143; *Clemmons*, 791 P.2d at 260; *cf. Frobig v. Gordon*, 881 P.2d 226, 227, 231 (Wash. 1994)(refusing to impose a duty on landlord of commercial premises where third party was attacked by a tiger owned by tenant who ran a business providing wild and domestic animals for demonstrations, films, and videos; specifically rejecting *Uccello*'s framing of the issue as a question of morality).

I am unpersuaded by the *Uccello* line of cases and agree with the courts that hold sound public policy dictates a rejection of the *Uccello* approach.[1] In *Clemmons*, the Court

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[1]Even in cases where landlord liability has been premised on the ability of the landlord to evict the tenant for harboring the animal that caused the injuries, there must have been sufficient time to evict between the point in time when the landlord became aware of the dog and its viciousness and the attack. *See, e.g.*, *Fernandez v. Marks*, 642 P.2d 542, 544 (Haw. Ct. App. 1982)(noting that 28-day notice requirement would have prevented landlord from evicting the dogs' owner prior to the dog-biting incidents in question); *Feister v. Bosack*, 497 N.W.2d 522, 525-26 (Mich. Ct. App. 1993)(noting that, even if the ability to evict was equivalent to control, there was insufficient time for the landlord to have evicted

of Appeals of Washington specifically rejected the *Uccello* approach, noting that the rule rejecting *Uccello* "promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability." 791 P.2d at 260. The Supreme Court of Washington reiterated Washington's rejection of the *Uccello* approach in the analogous case of *Frobig*. In that case, the court held that the landlord had "no duty to protect third parties from a tenant's lawfully owned but dangerous animals." *Frobig*, 881 P.2d at 231. The court specifically rejected the *Uccello* court's framing of the issue as a question of morality. *Id.* I would agree because as we have said "[a] tort duty does not always coexist with a moral duty." *Jacques v. First Nat'l Bank*, 307 Md. 527, 534, 515 A.2d 756, 759 (1986).

Also specifically rejecting the *Uccello* approach, a Michigan court, in *Feister*, 497

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because the event giving rise to notice occurred a "scant two days" before the plaintiff was injured and thus the landlord would have been unable to evict under Michigan law which requires a minimum of 30 days notice); *Roy v. Neibauer*, 623 P.2d 555, 556 (Mont. 1981) (holding that landlord was not liable where dog injured child nine days after landlord-tenant relationship was established and where the lease called for 30 days notice before it could be terminated); *Meyers v. Haskins*, 528 N.Y.S.2d 738, 739 (N.Y. App. Div. 1988)(affirming denial of summary judgment for landlord and noting that landlord could be liable for injuries resulting from attack by tenant's dog where the dog's presence was visible and apparent and existed long enough before the injury to permit the landlord to remedy the defect); *Shafer v. Beyers*, 613 P.2d 554, 557 (Wash. Ct. App. 1980)(noting that two or three-day period between notice and the plaintiff's injury was insufficient to evict). *But see Giaculli v. Bright*, 584 So.2d 187, 189 (Fla. Dist. Ct. App. 1991)(determining that question of whether the owners had "a legally sufficient time in which they could have taken reasonable measures to address the problem is properly one for the jury" and that a jury could reasonably have concluded that two days were sufficient), and cases cited therein. I note that it is unclear from the record in this case whether sufficient time had passed in which the landlord could have evicted Morton.

N.W.2d at 525, affirmed a grant of summary judgment for a landlord following the reasoning expressed by the Supreme Court of Nevada in *Wright*: "[H]olding landlords liable for the actions of their tenants' vicious dogs by requiring them to evict tenants with dangerous dogs would merely result in the tenants' moving off to another location with their still dangerous animals.... [T]his approach [is like the case of] a 'Typhoid Mary,' who was outcast from one place only to continue her deadly disease-spreading activity at another place." *Wright*, 781 P.2d at 1143. I believe that this reasoning is applicable here. In the instant case, the record indicates that Petitioners were close personal friends with Morton and that they had visited her at her previous residence. Thus, not only is it possible that if Morton were evicted others would have been exposed to the danger of Rampage, but it is also likely that Petitioners themselves would have been exposed to the same danger. In other words, even if the landlord had taken steps to terminate the tenancy, there is no reason to believe that this would have prevented Tevin's death.

I would point out that in some cases where landlords were held liable it was because the leases contained a clause that prohibited tenants from keeping vicious dogs and annoying pets; the theory of recovery was that the landlords had undertaken a specific duty to protect others from tenants' vicious pets. *See, e.g., Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 948 (Alaska 1986). The rationale is that although generally, in the absence of an agreement to the contrary, a landlord does not have a duty to make repairs, once the landlord has undertaken to make the repairs, the landlord may be liable if he or she acts negligently in making those repairs. *Miller*, 206 Md. at 154-55, 110 A.2d at 685-86.

In *Alaskan Village*, the Supreme Court of Alaska affirmed a jury verdict against Alaskan Village, the owner of a trailer park, for injuries sustained by Monica Smalley, who was attacked by two dogs belonging to Henry Scepurek, one of the residents of the trailer park. 720 P.2d at 946. The lease between Alaskan Village and Scepurek contained a clause prohibiting tenants from keeping "vicious dogs." *Id.* Scepurek had two small dogs for which he obtained permits from Alaskan Village to keep on the premises. *Id.* The permit, however, included a promise by Scepurek "to remove the pets from the premises immediately upon notice that they annoyed other tenants." *Id.* Sometime before the attack on Smalley, Scepurek obtained two more dogs, both pit bulls. *Alaskan Village*, 720 P.2d at 947. These two pit bulls were the ones that eventually attacked Smalley. *Id*. Smalley argued "that [Alaskan] Village had a duty to use reasonable care to enforce its rules, and a duty to exercise reasonable care under these circumstances." *Id*. Relying in part on the RESTATEMENT (SECOND) OF TORTS § 323 (1965),[2] the court agreed. The court found that,

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[2]The RESTATEMENT (SECOND) OF TORTS § 323 (1965) states:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

by prohibiting tenants from keeping vicious dogs and further requiring Scepurek to promise to remove annoying pets, the landlord undertook the obligation to control vicious dogs in its trailer park, *i.e.*, keep the premises free from vicious dogs. *Alaskan Village*, 720 P.2d at 948. Significantly, the court also noted that "evidence that the undertaking is for the plaintiff's benefit is a prerequisite to liability; a plaintiff who does not produce such evidence is not entitled to a jury instruction on this theory." *Alaskan Village*, 720 P.2d at 947; *see also Goddard by Goddard*, 558 N.E.2d at 854-55 (holding landlord was not liable because landlord had relinquished control despite landlord's distribution of notices to residents telling them to keep their dogs "tied or inside" because evidence suggested that the reason for notice was that landlord had received complaints about barking and trash removal and not to protect others).

The instant case, however, is distinguishable from *Alaskan Village* in that Respondents' lease with Morton prohibited all pets, not just vicious ones. It appears that Alaskan Village's agreements with its residents were intended to protect other tenants from being bothered physically or otherwise by the pets of other residents. No such conclusion can be made regarding Respondents' agreements with their residents. The *Alaskan Village* lease specified no *vicious* dogs, whereas in the present case, the lease prohibits *all pets*. This presumably could include even goldfish. Thus, the *Alaskan Village* lease could much more reasonably be found to be intended to keep tenants safe; whereas the lease in the present case could just as likely be intended to protect the landlord's property.

Moreover, unlike in the instant case, the plaintiffs in *Alaskan Village* were tenants

and, thus, more likely to be the intended beneficiaries of the lease provision. Finally, it is noted that the "no pets" clause in the instant case appeared in a laundry list of other prohibitions, many of which cannot be construed as being for the protection of other tenants. The lease included, among other things, a requirement that the tenant "provide management with names, addresses, telephone numbers and relationships of persons to be notified in case of emergency." The lease also prohibits tenants from "install[ing] carpeting in the apartment without written permission from management," using "venetian blinds, shades, awnings, or window guards, except as permitted in writing by the owners" and "plac[ing], erect[ing] or expos[ing] any sign, advertisement, illumination, aerial or other projection on the window, roof or other part of the building." Thus, unlike the lease and agreement in *Alaskan Village*, the lease in the instant case cannot be the premise for finding that the landlord retained sufficient control over the premises to form the basis of liability.

CONTROL BY THE LANDLORD

Even if we disregard the prior cases holding the landlord has no duty toward people injured by dangerous conditions created by the tenant inside non-public leased premises, and even if the Court wanted to join the minority of courts that follow *Uccello*, there should still be no liability because the landlord had no control over Rampage. In the instant case the landlord had no control over what happened inside the tenant's residence because, contrary to the assertion of the majority, the landlord had no right to evict the tenant for keeping a dog. Ms. Matthews' theory of recovery is that the landlord had control over the dog and

could have prevented her child's injuries by evicting her friend for violating the "no pets" clause in the friend's lease, but under this lease the landlord could not have evicted the tenant for violation of the "no pets" clausefor two separate and distinct reasons. First, the lease did not provide that the landlord could repossess the premises for a breach of the "no pets" clause. Second, even if the lease had so provided, the landlord had waived the right to terminate the lease for violations of the "no pets" clause as to this tenant and probably for all of the tenants in the development.

The relevant statutory provision on termination of leases for breaches other than for failure to pay rent is Maryland Code (1974, 1996 Repl. Vol., 1997 Supp.), Real Property Article, § 8-402.1, which "vests authority in the District Court, under certain circumstances, to order the eviction of a tenant for breach of the tenant's lease." *Saundra Brown v. Housing Opportunities Commission of Montgomery County*, ___ Md. ___, ___, ___ A.2d ___, ___ (1998)(Slip Op. No. 131, 1997 Term at 1). That statute provides in pertinent part:

> "**§ 8-402.1. Breach of lease.**
>
> (a) *Complaint to District Court; summons to appear; notice; continuance.* — <u>When a lease provides that the landlord may repossess the premises if the tenant breaches the lease</u>, and the landlord has given the tenant 1 month's written notice that the tenant is in violation of the lease and the landlord desires to repossess the premises, and if the tenant or person in actual possession refuses to comply, the landlord may make complaint in writing to the District Court of the county where the premises is located. * * *
>
> (b) *Judgment of District Court; appeal.* — If the court determines that the tenant breached the terms of the lease and that the breach was substantial and warrants an eviction, the

> court shall give judgment for the restitution of the possession of the premises and issue its warrant to the sheriff or a constable commanding him to deliver possession to the landlord in as full and ample manner as the landlord was possessed of the same at the time when the lease was entered into." (Emphasis added).

Md. Code (1974, 1996 Repl. Vol., 1997 Supp.), Real Property Art., § 8-402.1. *See also* DOUGLAS M. BREGMAN & GARY G. EVERNGAM, MARYLAND LANDLORD-TENANT LAW PRACTICE AND PROCEDURE, at 92 (2d ed. 1994)("Section 8-402.1 permits an action for repossession in the event of a breach of a lease which contains a provision allowing the landlord to repossess in the event of a breach."). The lease at issue in the instant case contained a "no pets" clause but does not contain any provision permitting the landlord to repossess in the event of a breach, and therefore, the landlord had no way to evict a tenant with a dog until the lease period ended. *Cf. Kimberly Shields v. Arthur Wagman*, ___ Md. ___, ___ A.2d ___ (1998)(Slip Op. No. 109, 1997 Term at 2), where the lease period had ended and the tenant was a month-to-month tenant.

The probable reason why the lease did not provide that breach of the "no pets" clause would permit the landlord to repossess the premises becomes apparent when we examine that clause. The "no pets" clause was for the protection of the landlord, not for the protection of others; it did not bar only vicious pets or only dangerous pets, it barred all pets from even being on the premises. When the "no pets" clause is examined in context, it is obvious why the parties intended that violations of "House Rules" were not substantial breaches justifying repossession by the landlord. The lease provides: "Covenants *No. 1 to No. 30* which appear on the reverse side of this Lease Agreement and Covenants *No. 1 to No. 39* which

appear on Lease Agreement Exhibit B. are a part of this contract and Lessee acknowledges that he read and agreed to such covenants."

Covenants number 1 through 30 are on the last page of the lease and are headed "House Rules." The provision states: "The resident agrees to comply with the following rules and regulations which shall be deemed to be a part of the lease. Breach of these rules and regulations shall be deemed to be a default of the lease." Without setting forth all 30 of the covenants or house rules some examples of these rules include:

> "2. Not obstruct nor use any of the stairways and sidewalks for any other purpose than for ingress to, and egress from the demised premises;
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> 4. No baby carriages, bicycles, carts or hand trucks are to be left in the common areas or courts of the development;
>
> 6. Not place or hang anything from windows or place upon window sills;
>
> 7. Not shake or hang any tablecloths, bedding, clothing, curtains or rugs from any of the windows or doors;
>
> 9. Not use venetian blinds, shades, awnings, or window guards, except as permitted in writing by the owners;
>
> 10. Not make any alterations, additions or improvements to the apartments of the demised premises, including, but not limited to the painting thereof, the installation of wallpaper, T.V. or other antennas, screens or other enclosures;
>
> 15. Not to install carpeting in the apartment without written permission from management;
>
> 16. Not to store personal items outside of the apartment;

> 18. *Not to have any pets on the premises.*
>
> 30. Resident agrees to maintain the electric service to the apartment during the term of his/her tenancy." (Emphasis added)

Not only did the lease fail to provide that breach of any of the 30 "House Rules" or covenants would permit the landlord to repossess the premises, it is obvious that this was a deliberate omission and a tenant's violation of one or more of the "House Rules," although "defaults," were not substantial breaches and should not result in the tenant forfeiting the lease. The lease and relevant statutes are quite clear; the landlord could not have evicted Ms. Morton for violating the "no pets on the premises" clause.

There is another reason why the landlord could not evict Rampage's owner. The "no pets" clause was inserted by the landlord and could be waived by the landlord. Since the landlord found out about the tenant's dog in October and still accepted November's rent, December's rent, January's rent, and February's rent, even before the attack in February, the landlord had already lost any ability to evict the tenant. In *Chertkof v. Southland Corp.*, 280 Md. 1, 371 A.2d 124 (1977), we summed up the law on a landlord's waiver of breaches by the tenant and said:

> "Thus, we apply in Maryland the universal rule that a waiver of forfeiture may occur by acceptance of rent which accrues after the lessor is on notice that a breach has been committed by the lessee. *Ammendale Normal v. Schrom*, [264 Md. 617, 624, 288 A.2d 140, 143-44 (1972)]; *Morrison v. Smith*, 90 Md. 76, 83, 44 A. 1031[, 1032] (1899); *cf. In Re Hook*, 25 F.2d 498, 499 (D. Md. 1928)(distraint for rent, accruing after right to declare forfeiture, constituted waiver; '[t]he acceptance of rent, eo nomine, generally, if not always, has [the effect of waiving the forfeiture]'). The underlying rationale for the rule is simple enough: acceptance of rent accruing after the breach is an affirmation of the tenancy and a recognition of its continuation; in effect, the lessor elects

to continue the relationship of landlord and tenant."

280 Md. at 5-6, 371 A.2d at 127.

The landlord apparently recognized the inability to terminate leases for violation of the "no pets on the premises" clause because one of the plaintiff's witnesses testified that many of the tenants had dogs. For the indicated reasons, the landlord could not have evicted Ms. Matthews' friend, and therefore, the landlord had no control over Rampage's presence within the tenant's apartment until the tenant's lease expired. The tenant brought the dog into the apartment, and the tenant maintained and had sole control over the dog. Ms. Matthews' cause of action is against the tenant.

Requiring landlords to enforce "no pets" clauses will probably not make dog owners give up their pets; it will just make them more mobile, and probably would not have prevented the injury in the instant case. The Nevada Supreme Court, in *Wright v. Schum, supra*, held that landlords are not liable for injury to third persons caused by their tenants' pets, and one of the reasons it gave is particularly appropriate to the instant case.

> "[H]olding landlords liable for the actions of their tenants' vicious dogs by requiring them to evict tenants with dangerous dogs would merely result in the tenants' moving off to another location with their still dangerous animals."

781 P.2d at 1143.

In the instant case, Ms. Matthews and Ms. Morton were lifelong friends. Ever since they were children, Ms. Matthews visited her friend with the same frequency everywhere her friend lived. There is every reason to believe she would have continued to visit her friend

wherever she lived, even if the landlord had evicted her for keeping a dog.

The majority makes another inaccurate appellate factual finding when it states:

> "Even before bringing such an action, the landlord, when it first received notice of the dangerous incidents involving Rampage, could have informed Morton that harboring the pit bull was in violation of her lease, could have told her to get rid of the aggressive animal, and could have threatened legal action if she failed to do so."

___ Md. at ___, ___ A.2d at ___ (Majority Op. at 14). Rampage was owned by the father of Ms. Morton's son, and she was keeping Rampage while he was in prison. We cannot speculate that she would have or could have made other arrangements for the dog. In addition, to even suggest the landlord could fulfill its legal obligations by writing Ms. Morton to tell her of the terms of her own lease seems rather strange in light of the legal presumption that she knows the terms of the lease she entered into.

CONCLUSION

In the instant case, the tenant was in sole control of the premises where the injury occurred, and the tenant had the sole opportunity to protect her guests from the dog and failed to do so. Even if the landlord knew the dog had vicious tendencies, the landlord should be able to assume that when the dog was confined within the tenant's apartment that the tenant would take reasonable precautions to protect guests in her home. Moreover, there may be tenants who have a legitimate desire to keep watch dogs or guard dogs for the protection of their person or property, and this practice is not necessarily to be discouraged

if the tenant keeps the dog controlled whenever it is off the tenant's premises or confined to the tenant's premises.

Thus, for the reasons set forth above, I would conclude that under the circumstances of this case there was no special duty on the part of the landlord to act affirmatively to protect Tevin or other social guests of the tenant, and therefore, the landlord may not be held liable for failing to take measures to enforce the "no pets" clause in the lease.

The instant case is controlled by the many Maryland cases that have held that if a landlord demises premises which are not in themselves a nuisance, but may become such according to the way in which they are used by the tenant, the landlord will not be liable for a nuisance created by the tenant. *See, e.g., Maenner*, 46 Md. at 216; *Marshall*, 162 Md. at 689, 161 A. at 172 (Landlord demising premises not nuisance in itself is not liable for nuisance created thereon by tenant.). The difference between the cited cases holding a landlord liable because of the landlord's affirmative actions and the instant case where the nuisance was created solely by the tenant, where we have consistently held the landlord is not liable, is explained by Prosser and Keeton:

> "In Heaven v. Pender, Brett, M.R., afterwards Lord Esher, made the first attempt to state a formula of duty. 'Whenever one person,' he said, 'is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' But this formula, which afterwards was rejected by Lord Esher himself, was soon recognized as far too broad. As a general proposition to be

> applied in the ordinary negligence case, where the defendant has taken some affirmative action such as driving an automobile, it holds good. That is to say, that whenever the automobile driver should, as a reasonable person, foresee that his conduct will involve an unreasonable risk of harm to other drivers or to pedestrians, he is then under a duty to them to exercise the care of a reasonable person as to what he does or does not do. There are, however, a good many defendants, and a good many situations, as to which there is no such duty. In other words, the defendant is under no legal obligation toward the particular plaintiff to act with the care of a reasonable man, and he is not liable even though his conduct falls short of that standard, and the other is injured as a result."

W. PAGE KEETON, PROSSER AND KEETON § 53 at 358 (5th ed. 1984).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Reversing the trial judge's judgment N.O.V. and reinstating a $350,000 jury verdict for intentional infliction of emotional distress is so contrary to our prior cases on that tort that it simply deserves no discussion, and to sustain a damage verdict on an improper intentional tort because the plaintiff might have been entitled to some damages on a proper negligence count is equally absurd. There is no need to go into the elements of intentional infliction of emotional distress because the majority seems to acknowledge that there was no basis for the jury determination that the landlord committed an intentional infliction of emotional distress. The jury awarded Ms. Matthews over one million dollars for intentional infliction of emotional distress. It is reasonable to assume that the improper finding of intentional conduct played some part in the jury's calculation of damages. It is unwarranted speculation to even suggest it would have awarded the same amount for any negligently inflicted

emotional injury she suffered during the attack and prior to the son's death. We never have and never should treat a jury award on an improper intentional tort count as interchangeable with an award on a negligence count.

CONTRIBUTORY NEGLIGENCE

Ms. Matthews and Tevin had both visited the apartment and Rampage on at least a weekly basis for months and months. Ms. Matthews had far, far greater knowledge of Rampage than did the landlord or any of the landlord's employees and she permitted her son to play throughout the apartment with and around the dog without direct supervision. The majority states: "The extreme dangerousness of [Rampage's] breed, as it has evolved today, is well recognized," ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 17), but is this well recognized knowledge about pit bulls confined to or chargeable only to landlords? Surely a jury ought to be permitted to determine whether Ms. Matthews was also negligent and, if so, whether her negligence was a contributing cause of her injuries. Allowing her infant son's unsupervised play in another room with this "extremely dangerous instrumentality," ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 16), could be found by a jury to be at least as negligent as the landlords negligence in not evicting the dog's owner. We have never before held that a parent's contributory negligence in the death of a child does not bar or at least reduce the parent's own recovery for the wrongful death of a child, and the majority cites no bases for its holding that Ms. Matthews' contributory negligence would not bar or reduce her portion of the wrongful death recovery. I recognize that contributory negligence

would not affect the survival action or Tevin's father's recovery. But even if the majority is correct on this aspect of contributory negligence, it would still be a defense to Ms. Matthews' recovery for the landlord's negligently inflicted emotional distress.

INTERVENING CAUSE

Even if we assume that the landlord was negligent, we must look at the cause or causes of the harm in the instant case. I am gratified that the Court is retreating from some loose language in a few prior opinions indicating that, if a party provides the judge with an instruction on an issue and the instruction is not an accurate statement of the law, the trial judge has some obligation to redraft the instruction if the issue is generated. I agree that the trial judge should not have this responsibility. In the instant case, however, the trial judge did not rule that the instruction was improperly drafted; the trial judge ruled that the issue was not generated. In addition, the majority does not tell us, and I do not see why the instruction on intervening superseding cause was erroneous. The instruction is an accurate statement of the law as expounded by this Court, and while it may not be correct or accurate for all cases, it seems appropriate in the instant case and should have been given. We have said: "[A]lthough an injury might not have occurred "but for" an antecedent act of the defendant, liability may not be imposed if for example the negligence of one person is merely passive and potential, while the negligence of another is the moving and effective cause of the injury...." *Hartford Ins. Co. v. Manor Inn*, 335 Md. 135, 156, 642 A.2d 219, 230 (1994)(quoting *Peterson v. Underwood*, 258 Md. 9, 16, 264 A.2d 851, 855

(1970)(citations omitted)). This certainly seems appropriate language for a jury instruction, and is almost identical to the instruction proposed in the instant case.

The only person Rampage ever bit was this 16-month-old child, and as previously noted, the jury could find that Rampage's sudden, focused attack on a frequent visitor like Tevin was caused by some provocation from this 16-month-old child. Contrary to the majority's assumption, a jury could reasonably conclude that a landlord might not foresee that parents would permit a very young child to play with and provoke this "pit bull." If this dog is so well recognized as highly dangerous, a jury could find that the landlord, in not evicting the tenant, was passive, but Ms. Matthews allowing a 16-month-old child to play throughout the apartment with this pit bull was the active cause of the injury. A jury should also be permitted to determine whether the landlord could reasonably assume that a parent would not permit a very young child to play with and around this dog that the majority claims is widely known to be highly dangerous. Under these reasonable fact findings, Ms. Matthews' act of permitting Tevin to play with Rampage throughout the apartment and out of her sight could constitute an intervening superseding cause.

In finding the landlord had a duty to safeguard Tevin, the majority seems to equate duty with the power to prevent; if so, Ms. Matthews could have successfully sued everyone who lived in the building. If, as the majority seems to hold, this dog's mere presence constituted a dangerous nuisance, then any neighbor could have brought an action to abate the nuisance. I trust the majority would hold their failure to abate the danger does not make *them* liable. A landlord has a duty to people in the common area under the control of the

landlord, and the landlord has a duty toward people that the landlord's active negligence may injure. Active negligence may include renting to a person possessing a vicious dog or even continuing a month-to-month tenancy with a person possessing a vicious dog. It would include negligently permitting a vicious dog in the common area, but it has never included failure to protect a tenant's social guests from things exclusively under the tenant's control within the tenant's dwelling. I respectfully dissent.

Judge Cathell has authorized me to state that he joins in the views expressed in this dissenting opinion.