IN THE COURT OF APPEALS
OF MARYLAND

No. 53

September Term, 2011

ON MOTION FOR RECONSIDERATION

DOROTHY M. TRACEY

v.

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

Bell, C.J.,
Harrell
Greene
Adkins
Barbera
Wilner, Alan M. (Retired, Specially Assigned)
Cathell, Dale R. (Retired, Specially Assigned)

JJ.

Opinion by Wilner, J., which Adkins, J., joins.
Harrell, Greene, and Barbera, JJ., join in part and
dissent in part.
Bell, C.J., and Cathell, J., dissent.

Filed: August 21, 2012

On April 26, 2012, the Court filed an Opinion in this case holding, by a four-to-three vote, 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" (bolding added). Notwithstanding a dissent by Judge Greene, joined in by Judges Harrell and Barbera, I joined the majority Opinion, authored by Judge Cathell.

On May 25, 2012, the petitioner, Dorothy Tracey filed a motion for reconsideration, complaining that the imposition of a "new duty" on landlords was fundamentally unfair and unconstitutional as applied to her. An answer to the motion was filed by the respondents. As to the Court's holding with respect to pit bulls, I would deny the motion. For the reasons stated in Judge Cathell's Opinion, I do not believe that a "new duty" was created or that there is anything unconstitutional or unfair about holding Ms. Tracey liable for the gruesome damage done to Dominic Solesky by a pit bull that she knowingly, and with obvious reservations, allowed her tenant to keep on her property.

The Opinion is not as dramatic and pervasive as the motion claims. It does not prohibit the ownership or breeding of pit bulls; it does not require that persons who own

such dogs get rid of them. By imposing long-standing principles of common law strict liability for what is now clearly foreseeable damage done by those dogs, it simply requires that those who possess them or permit them to be on their property take reasonable steps to assure that they do not run loose or otherwise are in a position to injure other people.

That said, having re-read the briefs, relevant portions of the record extract, and the dissent, I am now convinced that, on the record before us, the application of the Court's holding of strict liability to cross-bred pit bulls was both gratuitous and erroneous. I would grant the motion for reconsideration, in part, to delete any reference to cross-bred pit bulls (*i.e.*, part pit bull and part some other breed of domestic dog), so that the Court's holding would apply only to pit bulls that are not cross-breds. There are two reasons for my change in position. First, there was never any assertion, suggestion, or finding in this case that the dog was a cross-bred – was anything other than a pit bull. Second, it is not at all clear what "cross-bred" really means – whether it is limited to the offspring of two pure-bred dogs of different breed, so that the offspring is, in effect, half of one and half of the other, or includes succeeding generations bred from cross-bred parents.

The complaint filed in the Circuit Court alleged that the dog that mauled young Dominic was a "pit bull terrier." The lease allowed the tenant to keep "2 pit bull dogs." Although Ms. Tracey's answer to the complaint is not in the record extract, it does not appear that she ever contested that the dog was a pit bull terrier or asserted that it was a cross-bred. The case proceeded on the premise that dog was a pit bull terrier and not a cross-bred. Unlike the situation in *Ward v. Hartley*, 168 Md. App. 209, 220 (2006), there

was not even a suggestion that the dog *might* be a cross-bred. The acknowledgment that the dog was a "pit bull" or "pit bull terrier" remained at the appellate level. Throughout Ms. Tracey's brief, the dog is referred to as a pit bull. The prior cases cited in the majority Opinion all involved pit bulls. There is no suggestion in any of them (except a brief reference in *Wade v. Hartley*) that the dog in question was or might have been a cross-bred.

In short, the question of whether strict liability should apply to cross-breds was never in the case – was never asserted or argued. By gratuitously including them, the Court has opined on an issue that was never raised or argued.

Because the cross-bred issue was never raised, there is no discussion about what the term includes. It appears that some dog-breeding organizations treat cross-breds as synonymous with hybrids.[1] Some recognize as a cross-bred, or a hybrid, only the offspring of pure-bred parents. Others, while claiming that the intended benefits of cross-breeding accrue only to the first generation, acknowledge what is a matter of common knowledge anyway – that it is not uncommon for cross-breds to mate with pure-breds or with other cross-breds, creating dogs that may have elements of several breeds in varying proportions. In imposing strict liability for cross-breds, some greater certainty is required. Is it intended that a dog be classified as a cross-bred pit bull if only one of its grandparents

[1]Lexicographers also regard "cross-breed" or "cross-bred" and "hybrid" as synonymous. *See Roget's International Thesaurus* (3rd. Ed.), §§ 44.14 and 44.16; also Merrian-Webster's Collegiate Dictionary (11th ed.), p. 298.

(or great-grandparents, or great-great grandparents) was a pure-bred pit bull?[2]

A motion for reconsideration gives each judge of the Court an opportunity to take another look at the issue and to rethink the position formerly asserted. Because of the care that each judge, individually and collaboratively with his or her colleagues, takes before reaching a conclusion, it is rare that a motion for reconsideration will be found persuasive, and so they are rarely granted. On reflection, however, I am now convinced that the majority (of which I was a part) erred in gratuitously applying strict liability to cross-breds, when that issue was never in the case, and, through this opinion on the motion for reconsideration, I disassociate myself with that aspect of the majority Opinion. Any extension of strict liability to cross-breds (or to any other breed of dog), other than by legislative action, should await a case in which that issue is fairly raised

I am authorized to state that Judges Harrell, Greene, Adkins, and Barbera join in this Opinion on reconsideration, with the caveat that Judges Harrell, Greene, and Barbera maintain their dissent to the extension of strict liability to the owners of pit bulls and to the owners of property who permit tenants to keep pit bulls on their property. Chief Judge

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[2] I would note that the General Assembly has itself wandered into that thicket. Maryland Code, § 10-621(b) of the Criminal Law Article, makes it a criminal offense to possess a "hybrid" of a member of the dog family and a domestic dog. There is no statutory definition of "hybrid," however, leaving open the prospect that one who possesses an animal that is one-sixteenth wolf or coyote and fifteen-sixteenth poodle would be subject to criminal penalties. Perhaps the Legislature acted on evidence that such an animal was sufficiently dangerous to make its mere possession criminal. Evidence of that kind regarding cross-bred pit bulls is not in this record, however, so there is no reason for us, at this point, to follow the legislative lead.

Bell and Judge Cathell would deny the motion for reconsideration.

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ORDER

Filed: August 21, 2012

For the reasons stated in Judge Wilner's Opinion on Reconsideration, it is, by the Court of Appeals of Maryland this 21st day of August 2012, ORDERED:

1. That the motion for reconsideration is granted in part and denied in part; and

2. That the Opinions filed April 26, 2012 are amended to delete any reference to cross-breds, pit bull mix, or cross-bred pit bull mix.

/s/ Robert M. Bell
Chief Judge

No. 53
September Term, 2011

TRACEY

V.

SOLESKY

The Opinions filed April 26, 2012, to which this Opinion On Motion for Reconsideration refers, can be accessed at the following URL:

http://mdcourts.gov/opinions/coa/2012/53a11.pdf