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Comment: Tort Liability Unleashed: Solesky v. Tracey and Landlord Duty to Third Parties

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COMMENT

TORT LIABILITY UNLEASHED: *SOLESKY V. TRACEY* AND LANDLORD DUTY TO THIRD PARTIES

By: Errin K. Roby

I. INTRODUCTION

In Maryland, over 800,000 households own a dog.[1] Although data indicating the exact percentage of renters who own dogs in Maryland is not currently available,[2] issues surrounding dog ownership can dramatically affect the overall quality of landlord/tenant relationships. A key issue capturing public attention in Maryland is the high number of recent severe dog attacks.[3] As a landlord, allowing pet ownership by tenants creates possible tort liability for injuries.[4] A vital legal question is involved when a tenant's pet injures a third party, such as a passerby, should the landlord face tort liability for a tenant's pet that injures a third party. In other words, how far does the landlord's duty extend?

A current news article highlights the naming of both the landlord of the building and the tenant who owned the dog as co-defendants in a three million dollar negligence suit stemming from a dog bite.[5] The boy injured by the dog bite was not on the tenant's property at the time of the attack.[6] Nevertheless, the complaint argues that the landlords are liable for damages from the attack because they knew or should have known

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[1] *U.S. Pet Ownership Calculator*, AM. VETERINARY MED. ASS'N, http://www3.avma.org/reference/marketstats/ownership_calculator.asp (last visited Nov. 18, 2011). When using this calculator, the number entered in the "What is your community population?" field was 5,773,552. This figure represents the population of the state of Maryland in 2010. U.S. Dep't. of Commerce, *State & County Quickfacts Maryland*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/24000.html (last revised Sept. 18, 2012, 4:41 PM).

[2] Telephone interview with Adam Skolnik, Executive Director, Maryland Multi-Housing Ass'n, Inc. (Jan. 26, 2012).

[3] *See, e.g.*, Jonathan Bor, *Biting the Hand that Feeds Them*, BALT. SUN, Apr. 18, 1999, at 1A, *available at* 1999 WLNR 1128619 (highlighting the prevalence of dog bite injuries and describing a nation-wide trend suggesting dog attacks have increased over time); Heather Dewar, *Infant's Death Stirs Officials to Reconsider Canine Laws*, BALT. SUN, Aug. 12, 2003, at 1B, *available at* 2003 WLNR 2045475 (describing the Baltimore City Council's response to a fatal dog attack); Jean Marbella, *Pit Bull Attack Upsets Neighborhood*, BALT. SUN, June 8, 2011, at 2A, *available at* 2011 WLNR 11433201.

[4] Andrea F. Siegel, *Landlord Held Responsible for Dangerous Animal Kept by Tenant in Apartment*, BALT. SUN, Oct. 8, 1998, at 2B, *available at* 1998 WLNR 1104091.

[5] Andy Marso, *$3M Sought for Child Mauled by Pit Bull*, DAILY REC. (Balt., Md.), Sept. 29, 2011, at 1A.

[6] *Id.* at 6A.

that the tenant was keeping a dangerous dog on the property, and that the cage used to hold the dog was defective.[7] This argument for landlord liability to a third party reflects the impact of the decision made by the Court of Special Appeals of Maryland in *Solesky v. Tracey*.[8]

This comment will analyze how *Solesky v. Tracey* represents a new development in Maryland law through its expansion of a landlord's duty. Part I discusses the background of a landlord's duty to third persons in general and reviews Maryland's case law up to the instant case. Part II explains how *Solesky v. Tracey* represents a new development in Maryland law relating to a landlord's duty to a third person. Part III proposes possible solutions focusing on how landlords could reduce their vulnerability to negligence suits from third parties.

II. BACKGROUND AND HISTORICAL DEVELOPMENT

A. General Principles - Landlord's Liability for Third Person Injuries

In general, a lessor is liable for physical harm to third parties outside the leased property caused by the actions of the lessee if, but only if, the lessor consented to the tenant's activity or knew that activity would occur on the land.[9] The consent can be oral or implied by granting a lease with full knowledge of the lessee's activity.[10] Additionally, the lessor must have known, or had reason to know, that the activity of the lessee would involve unreasonable risk.[11] The requirement of consent is critical, as the lessor is not liable for activities that occur without his consent.[12] If consent is not obtained, the requirement of knowledge must be present in order for the lessor to be liable for damages from the lessee's activity.[13] The issue of the lessor's consent or knowledge is emphasized when the activities of the lessee could potentially cause a public or private nuisance.[14] The scope of the lessor's liability based on knowledge is narrow – the lessor is not required to protect against unpredictable nuisance actions based on the careless behavior of the lessee on the leased property.[15] However, if the activity itself has an intrinsically harmful nature that interferes with "the rights of the public," then the lessor's

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[7] *Id.*
[8] 198 Md. App. 292, 17 A.3d 718 (2011).
[9] RESTATEMENT (SECOND) OF TORTS § 379A (1965).
[10] *Id.* at cmt. b.
[11] RESTATEMENT (SECOND) OF TORTS § 379A (1965).
[12] *Id.* at cmt. c.
[13] *Id.*
[14] RESTATEMENT (SECOND) OF TORTS § 837 (1965).
[15] *Id.* at cmt. i.

consent or knowledge of the activity will leave him vulnerable to tort liability.[16] The principles identified above apply with equal force to landlord-tenant relationships.

A landlord is subject to the same consent and knowledge requirements as a lessor, and these requirements are stated in nearly identical language.[17] In addition to tort liability for activities involving unreasonable risk, landlords also face liability if they know, or have reason to know, that their tenants are not taking the necessary safety precautions while participating in activities that could contribute to public or private nuisance.[18]

The safety issues surrounding the ownership of animals, including dogs, are directly addressed through the concept of strict liability.[19] As a group, landlords are generally exempted from the strict liability standard for an injury caused by tenants who own dogs.[20] Merely renting one's property to a tenant owning a dog does not give the landlord the knowledge of that dog's specific dangerous behavior that is required under the strict liability standard.[21] When applied to incidents of third party injury, a landlord's liability varies depending on how courts in a specific jurisdiction apply general negligence concepts to the landlord-tenant relationship.[22] The next section will present a general multi-state overview of landlord liability for physical injury to a third party.

B. Landlord's Duty to a Third Party – Multi-State Overview

Various jurisdictions support the general proposition outlined above: landlords are not vicariously liable for injuries caused by tenants' dogs to third parties.[23] When discussing the liability of landlords to third parties,

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[16] *Id.*

[17] RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 18.4 (1977) (stating that the landlord is liable for physical harm to third parties by the actions of the tenant only if, the landlord 1. consented to the activity of the tenant or knew it would occur, and 2. the landlord knew or had reason to know that the activity of the tenant would involve unreasonable risk).

[18] *Id.*

[19] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 23 (2010) (identifying strict liability as the negligence standard for physical harm caused by an animal who exhibits abnormally "dangerous tendencies." The owner or possessor of that animal must know, or have reason to know, of the animal's high risk of dangerous behavior).

[20] *Id.* at cmt. f.

[21] *Id.*

[22] *Id.*

[23] *See, e.g.*, Boots *ex. rel.* Boots v. Winters, 179 P.3d 352, 358-59 (Idaho Ct. App. 2008) (holding that the landlord was not liable for injuries to a third party from a dog attack on the premises); Bruce v. Durney, 534 S.E.2d 720, 725 (S.C. Ct. App. 2000) (enunciating a statewide standard for South Carolina that a landlord is not liable for damages caused by a tenant's pet to a third party); Gilbert v. Miller, 586 S.E.2d 861, 865 (S.C. Ct. App. 2003)

courts center their analysis on the question of the landlord's duty to the third party.[24] This is critical because without the existence of a legal duty, the landlord cannot be held liable to the third party for damages.[25] Determining the duty of care owed by a landlord to a third party is therefore dependent on how the facts of the individual case implicate the existence of a legal duty under general negligence principles.[26]

When analyzing a landlord's duty under general negligence principles, some jurisdictions have moved away from the common law view that landlords do not owe a legal duty to third parties.[27] When assigning a legal duty to a landlord for a third party injury, the landlord must know of the animal's vicious behavior before liability arises.[28] The degree of knowledge required is significant, as the landlord must possess actual knowledge of the animal's vicious behavior.[29] In addition to actual knowledge, the landlord must also have control over the rental premises through leasing provisions or other regulations before a duty to a third party will arise.[30] The argument for finding a legal duty attached to a landlord may become stronger with a statutory basis for liability.[31]

In *Uccello v. Laudenslayer*, the court analyzed the text of Civil Code § 1714 and determined that the statute imposed the duty of ordinary care to the landlord.[32] In a similar analysis, the Alaskan Supreme Court found that a residential landlord company owed a duty of ordinary care to an injured third party based on the landlord's failure to enforce its own

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(reiterating the common law rule that "a landlord is not liable to a third party for injuries caused by a tenant's dog").

[24] *See generally Boots*, 179 P.3d at 356-59 (discussing the landlord's possible legal duty to the injured third party under several theories, including premises liability, general duty to exercise ordinary care, and assumption of duty by landlord. In each case, the court determined that the landlord did not owe a legal duty to the injured third party).

[25] *See generally* PROSSER AND KEETON ON THE LAW OF TORTS 164 (W. Page Keeton et al. eds., 5th ed. 1984) (listing duty as the first required element of a negligence cause of action).

[26] *See Boots*, 179 P.3d at 356-57 (discussing the general negligence principle of the duty to exercise ordinary care).

[27] *See* Batra v. Clark, 110 S.W.3d 126, 130 (Tex. Ct. App. 2003) (holding that a landlord owed a duty of ordinary care to third parties who are injured by a tenant's animal if the landlord had actual knowledge of the danger posed by the animal and if the landlord had the ability to control the animal's presence on the property).

[28] *See* Uccello v. Laudenslayer, 118 Cal. Rptr. 741, 747-48 (Cal. Ct. App. 1975) (advancing a moral justification for landlord liability to a third party by holding that a landlord was liable for failing to remove an animal from the premises if the landlord had actual knowledge of the animal's vicious temperament).

[29] *Batra*, 110 S.W.3d at 130.

[30] *Id.*

[31] *Uccello*, 118 Cal. Rptr. at 745 (citing Cal. Civ. Code § 1714 (West 2012) as the basis for landlord liability. Civil Code 1714 states "every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person.").

[32] *Uccello*, 118 Cal. Rptr. at 746.

written rules and regulations addressing dangerous pets.[33] Another argument has been made that landlords might assume a duty to a third party that did not previously exist by creating lease terms that specify the size of dog that the tenant can keep.[34]

C. Landlord's Duty to a Third Party – Maryland Case Law

In Maryland, there is a trend moving away from the common law theory shielding landlords from liability. The courts have found that landlords may owe a legal duty for injuries sustained by a third party.[35] In *Shields v. Wagman* and *Matthews v. Amberwood Associates*, the Court of Appeals of Maryland analyzed the circumstances under which landlords could owe a duty to a third party injured in an animal attack.[36]

Kimberley Shields and M. Bernard Johnson were both injured by a pit bull named Trouble, who was kept by David Thomas, a tenant in the commercial strip mall where the attacks occurred.[37] The lawsuit brought by Shields and Johnson argued that the landlord of the commercial strip mall, Joint Venture, was liable for their injuries.[38] The Circuit Court for Prince George's County held that Joint Venture did not owe a duty to Shields or Johnson, despite their status as invitees onto the leased property.[39] The Court of Special Appeals of Maryland affirmed that holding.[40] The Court of Appeals of Maryland reversed the holdings of the trial court and the Court of Special Appeals of Maryland.[41]

Reversing both decisions, the Court of Appeals of Maryland devised the criteria for determining when a commercial landlord has a duty to a third party injured in the common area of the leased premises.[42] According to the court, one basis for tort liability may be found in the relationship between the property owner and the third party.[43] In general, a property owner owes a duty of ordinary care to an invitee on the

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[33] Alaskan Vill., Inc. v. Smalley, 720 P.2d 945, 948 (Alaska 1986).
[34] *Boots*, 179 P.3d at 358.
[35] *See* Shields v. Wagman, 350 Md. 666, 690-91, 714 A.2d 881, 892-93 (1998) (holding that a landlord was liable for injuries sustained by a third party invitee to a commercial property); Matthews v. Amberwood Assocs., 351 Md. 544, 570, 719 A.2d 119, 131-32 (1998) (holding that the jury was justified in finding that the landlord of a residential property owed a duty of reasonable care to a tenant's social guest).
[36] *Shields*, 350 Md. at 668-69, 714 A.2d at 882; *Matthews*, 351 Md. at 548, 719 A.2d at 120.
[37] *Shields*, 350 Md. at 669-71, 714 A.2d at 882-83.
[38] *Id.* at 669-72, 714 A.2d at 882-83.
[39] *Id.* at 672, 714 A.2d at 883.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 672, 681, 714 A.2d at 883, 888.
[43] *Shields*, 350 Md. at 673, 714 A.2d at 884.

property, whereas a property owner does not owe such a duty to a trespasser.[44] Normally, a tenant assumes a duty of ordinary care when leasing property from a landlord, because the landlord has relinquished control of the property to the tenant.[45] In considering the liability of the landlord, rather than the tenant, the *Shields* court determined that because Joint Venture maintained control of the common area where the injury occurred and had reason to know of the danger posed by the tenant's pit bull, it may have owed a duty of ordinary care to Shields and Johnson.[46]

In Maryland, the twin elements of control and knowledge must both be present for the landlord to owe a duty to third parties injured in common areas.[47] The two elements are closely linked. For example, the control element can be satisfied by demonstrating that the landlord knows or has reason to know that there is a dangerous condition (i.e. a vicious animal) in the common area managed by the landlord.[48] The control element can also be independently established by considering the landlord's control over the presence of the dangerous animal via a refusal to renew the lease unless the dangerous animal is removed.[49] As for the knowledge element, the landlord must possess specific knowledge of the animal's dangerous behavior in order for a duty of ordinary care to apply.[50] The court stated that testimony regarding the actual knowledge possessed by the landlord regarding Trouble's behavior was therefore appropriate evidence that could have been presented to the jury for consideration.[51] In determining that the landlord, Joint Venture, was liable to Shields and Johnson for their injuries, the court expressly limited its holding to injuries sustained by third parties in common areas.[52]

Matthews v. Amberwood Associates added to Maryland's analysis of third party injury by addressing the duty owed by a residential landlord to a social guest who is injured by a tenant's dog inside the tenant's apartment.[53] While visiting Shelly Morton, Shanita Matthews's son, Tevin Williams, was injured by a pit bull named Rampage.[54] Rampage was kept by Morton in her apartment, which was owned by Amberwood

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[44] *Id.* (citing Bramble v. Thompson, 264 Md. 518, 521-22, 287 A.2d 265, 267 (1972)).
[45] *Shields*, 350 Md. at 673, 714 A.2d at 884 (citing Marshall v. Price, 162 Md. 687, 689, 161 A. 172, 172 (1932)).
[46] *Shields*, 350 Md. at 690, 714 A.2d at 893.
[47] *Id.* at 681, 714 A.2d at 888.
[48] *Id.*
[49] *Id.* at 682, 714 A.2d at 888; *see infra* note 138 for the statutory definition of dangerous dog.
[50] *Shields*, 350 Md. at 684, 714 A.2d at 890.
[51] *Id.* at 688-89, 714 A.2d at 892.
[52] *Id.* at 690, 714 A.2d at 893.
[53] 351 Md. at 548, 719 A.2d at 120.
[54] *Id.* at 550, 719 A.2d at 121-22.

Associates.[55] Tevin's injuries were fatal, and Matthews filed a lawsuit in the Circuit Court for Baltimore City against Amberwood Associates alleging negligence.[56] The jury found Amberwood Associates negligent and awarded damages for the wrongful death count and the survival action brought by Matthews.[57] Upon appeal, the Court of Special Appeals of Maryland reversed the judgment in favor of Matthews, and held that Amberwood Associates did not owe a duty to Tevin, based on his status as a social invitee of Morton.[58] The Court of Appeals of Maryland granted Matthews's petition for a writ of certiorari in order to determine whether Amberwood Associates owed a duty of ordinary care towards Tevin.[59]

In its analysis, the *Matthews* court reiterated the element of control discussed in the *Shields* case.[60] Although the *Shields* case limited the landlord's duty to injuries occurring in common areas under control of the landlord, the *Matthews* court took a broader view by arguing that a landlord's control could extend beyond the common areas and apply to conditions inside a tenant's leased apartment.[61] The court supported this wider view of the landlord's duty based on the language of the lease, which had a clear "no pets" clause.[62] In this manner, the court argued that Amberwood Associates retained control over the interior of Morton's apartment by forbidding pets of any kind.[63] Acknowledging that the "no pets" clause alone was not sufficient to impose a duty of ordinary care upon Amberwood Associates, the court presented a balancing test to determine whether a duty is owed by a landlord to the guest of a tenant.[64]

In *Matthews*, the court also added another factor to the discussion of imposing a duty onto to the landlord: the foreseeability of the harm presented by the tenant's animal.[65] The court determined that the harm caused by Rampage was foreseeable, based on testimony of Rampage's previous attacks.[66] By identifying pit bulls as "extremely dangerous," the

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[55] *Id.* at 548, 719 A.2d at 121.
[56] *Id.* at 551, 719 A.2d at 122.
[57] *Id.* at 552, 719 A.2d at 122.
[58] *Id.* at 552, 719 A.2d at 123 (citing Amberwood v. Matthews, 155 Md. App. 510, 513, 694 A.2d 131, 133 (1997)).
[59] *Matthews*, 351 Md. at 552-53, 719 A.2d at 123.
[60] *Id.* at 556, 719 A.2d at 124-25.
[61] *Id.* at 556, 719 A.2d at 125.
[62] *Id.* at 558, 719 A.2d at 125.
[63] *Id.* at 558, 719 A.2d at 125-26; *see infra* note 147 and accompanying text.
[64] *Matthews*, 351 Md. at 565-66, 719 A.2d at 129 (the factors weighed by the court included the tenant's control of the rental home, the public safety concerns of the tenant keeping a dangerous animal, and the landlord's control and knowledge of the dangerous animal).
[65] *Id.* at 560, 719 A.2d at 127.
[66] *Id.* at 561, 719 A.2d at 127.

court also considered the breed of dog a relevant factor in its discussion of foreseeability.[67] Following the precedent of *Shields*, the *Matthews* court held that the jury was justified in finding that Amberwood Associates owed a duty to Tevin as a social guest.[68]

The dissenting opinion in *Matthews* directly addressed the duty element as applied to the landlord, arguing that the landlord did not owe a duty to Tevin because the landlord had no knowledge of Rampage's temperament.[69] Without this specific knowledge, the landlord would be held to a higher duty to social guests than the tenant who invited them, which Maryland law does not support.[70] The *Shields* case is distinguishable by its common area limitation, and a narrow view of the control element is presented for the *Matthews* case.[71] Because the animal attack occurred inside the tenant's apartment in *Matthews*, the dissent argued that the landlord no longer had control over the area.[72] The dissent also rejected the majority's analysis that the "no pets" clause imposed a duty onto the landlord to remove Rampage from the premises. The dissent also argued that the tenant, by bringing Rampage into the apartment, had the duty to protect the third party from any injury that could occur.[73] In addition, the landlord could not control the removal of Rampage by evicting his owner because the landlord had waived his right of eviction by accepting rental payments after he discovered that Rampage was in the apartment.[74] Throughout its analysis, the dissent referred to the common law principles of landlord liability.[75] The tension between the majority's expanded view of landlord duty and the traditional view of landlord duty presented by the dissent provided an opportunity for legal analysis.

The *Matthews* case signaled a trend towards increasing landlord liability beyond the common area and a move away from the common law principle of landlord immunity from injuries occurring in a private area.[76] It also was the first time that the Court of Appeals of Maryland held a landlord liable for injuries caused by a dangerous animal within the

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[67] *Id.* at 561-62, 719 A.2d at 127.
[68] *Id.* at 570, 719 A.2d at 131-32.
[69] *Id.* at 588, 719 A.2d at 140-41 (Chasanow, J., dissenting).
[70] *Matthews*, 351 Md. at 590, 719 A.2d at 141.
[71] *Id.* at 588, 719 A.2d at 140-41.
[72] *Id.* at 589, 719 A.2d at 141.
[73] *Id.* at 590-91, 719 A.2d at 141-42.
[74] *Id.* at 608, 719 A.2d at 150.
[75] *Id.* at 596, 719 A.2d at 144 (stating that because the landlord was not the owner or keeper of Rampage, the landlord should not face liability for the third party's injury).
[76] Wade B. Wilson, Recent Decisions, *Landlord's Duty Extended to Protect Tenant's Guest from Vicious Dogs Within the Leased Premises*, 59 MD. L. REV. 1254, 1257, 1260 (2000).

tenant's premises.[77] By using the "no pets" clause as the basis of landlord liability, the *Matthews* court wandered too far from the provision's central purpose, which was the prevention of property damage.[78] Additionally, the fact that Rampage's attack occurred inside a closed apartment, where the landlord had no knowledge of Rampage's behavior towards invited guests weakened the foreseeability argument for landlord liability.[79] In summary, the *Matthews* case left residential landlords unable to protect themselves from negligence lawsuits through leasing provisions.[80] The most recent case in Maryland to address landlord liability to a third party, *Solesky v. Tracey*, dramatically increased the landlord's vulnerability to negligence lawsuits.

III. ISSUE

The *Solesky* case represented a new development in Maryland tort law by expanding the landlord's duty of ordinary care from persons invited onto the premises to third parties unknown to the tenant or the landlord.[81] A pit bull injured Dominic Solesky in an alley adjacent to the rental property where the dog's owners, Thomas C. O'Halloran and Erin Cesky, lived.[82] Dominic Solesky's parents filed a negligence suit in the Circuit Court for Baltimore County against the dog's owners as well as Dorothy Tracey, the landlord of the rental property.[83] At the close of the Soleskys' case, the Circuit Court for Baltimore County granted the landlord's motion for judgment and ruled that there was insufficient evidence that Tracey knew of the pit bull's dangerous behavior or had control over the rental premises.[84] The Soleskys appealed, and the Court of Special Appeals of Maryland evaluated the evidence presented during the trial to determine if that evidence was legally sufficient to support the jury's finding that the elements for negligence were satisfied in regards to Tracey.[85]

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[77] *Id.* at 1266-67.
[78] *Id.* at 1268.
[79] *Id.* at 1272.
[80] *Id.* at 1273.
[81] *Solesky*, 198 Md. App. at 331, 17 A.3d at 741.
[82] *Id.* at 295, 17 A.3d at 720.
[83] *Id.* at 295-96, 17 A.3d at 720.
[84] *Id.* at 296, 17 A.3d at 720.
[85] *Id.* at 296-97, 17 A.3d at 720-21.

A. Landlord's Duty to a Third Party – Required Elements

The *Solesky* court identified the duty element as the key issue in the plaintiff's appeal, and consequently followed the precedent established in *Shields* and *Matthews* by framing its analysis of landlord duty with the elements of knowledge and control.[86] In addition, this court gave great weight to the factor of foreseeability, as it is used to extend the landlord's liability to a third person injured off the rental property.[87] A landlord would face possible liability for a dog attack beyond the rental property if a jury determines that the dog's escape from the property was foreseeable by the landlord.[88] The *Solesky* court further added to previous Maryland case law by analyzing the sufficiency of evidence required to extend landlord liability to a third party.[89]

B. Evidence Required to Support a Landlord's Duty to a Third Party

Because the landlord motioned for judgment at the trial court, the Court of Special Appeals of Maryland explained that it was required to consider all the evidence presented at trial in a light most favorable to the non-moving party, which would be the Soleskys.[90] Analyzing the knowledge element, the court began by establishing Tracey's knowledge of the pit bull living at the tenants' residence through written lease terms along with direct trial testimony.[91] Tracey fulfilled a prerequisite of the knowledge element by testifying that she was aware that two pit bulls, a male and female, were being kept on the rental property because she saw them during her inspection of the premises.[92] However, there was no direct evidence that Tracey knew that either pit bull kept on the rental property presented a danger to anyone, as she did not witness any aggressive behavior.[93] The court stated that direct evidence was not required to prove Tracey's knowledge,[94] and affirmed that circumstantial evidence was sufficient to determine Tracey's level of knowledge

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[86] *Id.* at 310, 17 A.3d at 728-29; *see supra* notes 47-50 and accompanying text.
[87] *Solesky*, 198 Md. App. at 330, 17 A.3d at 741.
[88] *Id.* at 329-30, 17 A.3d at 740-41 (citing RESTATEMENT (SECOND) OF TORTS § 379A; RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 18.4).
[89] *Solesky*, 198 Md. App. at 318-19, 17 A.3d at 734.
[90] *Id.* at 324, 17 A.3d at 737.
[91] *Id.* at 317-18, 17 A.3d at 733 (establishing that the lease terms created by Tracey specifically allowed pit bulls to be kept on the rental property).
[92] *Id.*
[93] *Id.* at 318, 17 A.3d at 734.
[94] *See infra* Part III.C.

regarding the danger posed by the two pit bulls.[95] The court also referenced the *Shields* case as an example where circumstantial evidence allowed the jury to rationally find that the landlord had knowledge of the vicious behavior of the pit bull (Trouble) prior to the attack in the common area.[96] Additional Maryland cases have also held that circumstantial evidence relating to a dog owner's knowledge of that dog's dangerous tendencies would allow a plaintiff to survive summary judgment.[97] Finally, the court determined that the jury could use the neighbors' observations of the male pit bull's behavior to make a rational inference regarding Tracey's knowledge.[98]

The court addressed the control element briefly, holding that the jury could consider the renewal of the lease by Tracey as an opportunity to exert control over the presence of the pit bulls at the rental property.[99] The evidence supporting the control element was direct, as it was based on the lease renewal terms expressly written by the landlord.[100] The court also found that the control element was established by the inaction of the landlord — Tracey did not require the owners of the pit bulls to take additional measures to keep the dogs safely on the property besides the containment pen already in place.[101] By affirming the element of knowledge through circumstantial evidence, and vacating the trial court's motion of judgment in favor of Tracey, the Court of Special Appeals of Maryland presented a new standard by which to judge the duty owed by a landlord to a third party who is injured off the property.

The dissenting opinion in *Solesky* questioned the majority's holding by making the distinction between circumstantial evidence and "*legally sufficient* evidence of negligence."[102] In order for the latter standard to be met, the court must verify that any inferences drawn from circumstantial evidence are based on "reasonable probability, rather than speculation, surmise, or conjecture."[103] The dissent viewed the lack of any direct evidence of any violent tendencies exhibited by either pit bull kept on the

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[95] *Solesky*, 198 Md. App. at 318-19, 17 A.3d at 734.
[96] *Id.*
[97] *Id.* at 321-23, 17 A.3d at 735-36 (citing Mazur v. Scavone, 37 Md. App. 695, 378 A.2d 1355 (1977); Moura v. Randall, 119 Md. App. 632, 705 A.2d 334 (1998)).
[98] *Solesky*, 198 Md. App. at 325, 17 A.3d at 738.
[99] *Id.* at 328-29, 17 A.3d at 740.
[100] *Id.* at 328, 17 A.3d at 739 (describing the key terms in the renewed lease, including the provision that the tenants pay for whatever damage the dogs may cause while expressly stating that the landlord would not be responsible for any damage caused by the dogs).
[101] *Id.* at 328-29, 17 A.3d at 740.
[102] *Id.* at 331, 17 A.3d at 741 (Rubin, J., dissenting) (emphasis in original).
[103] *Id.* at 332, 17 A.3d at 742 (quoting Ward v. Hartley, 168 Md. App. 209, 218, 895 A.2d 1111, 1116 (2006)).

property as fatal to the plaintiff's negligence claim against Tracey.[104] In addition, there was no direct evidence that Tracey knew of any prior attacks or injuries caused by the male pit bull that attacked Dominic Solesky.[105] Without Tracey's specific knowledge of that pit bull's dangerous behavior, a necessary element in establishing Tracey's duty to Dominic Solesky was absent.[106]

The testimony forming the basis of the jury's inference of Tracey's assumed knowledge of the male dog's dangerous behavior was also analyzed.[107] The neighbors observed both pit bulls in the containment pen barking and jumping as they walked by the backyard of the rental property, but such a response towards strangers is not enough to prove the dogs' hostility.[108] In fact, it could be considered typical behavior by a dog of any disposition.[109] Furthermore, the plaintiffs could not demonstrate that Tracey knew that there was a possibility that the pit bulls could escape from their confinement pen.[110] Reasoning that the evidence of the landlord's knowledge was insufficient, the dissent argued that the trial court's ruling in favor of Tracey should have been upheld.[111]

The Court of Appeals of Maryland granted both Tracey's petition for appeal and Solesky's cross-petition in order to consider the issue of liability.[112] The court established a strict liability standard that would prospectively apply to anyone who owns or harbors pit bulls involved in an attack.[113] By doing so, the court placed pit bull attacks in a special category by explicitly modifying the existing common law liability standard.[114] The court further held that pit bulls are "inherently dangerous."[115] The impact of this holding is significant: a landlord will now be held strictly liable for damages to a third party if a plaintiff can prove that the landlord knew, or should have known, that the dog kept by the tenant was a pit bull.[116]

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[104] *Solesky*, 198 Md. App. at 332-33, 17 A.3d at 742.
[105] *Id.*
[106] *Id.* at 333, 17 A.3d at 742 (citing Matthews v. Amberwood Assocs., 351 Md. 544, 570, 719 A.2d 119, 131-32 (1998)).
[107] *Solesky*, 198 Md. App. at 334, 17 A.3d at 743.
[108] *Id.*
[109] *Id.* (citing Plowman v. Pratt, 684 N.W.2d 28, 32 (Neb. 2004)).
[110] *Solesky*, 198 Md. App. at 335, 17 A.3d at 744 (Rubin, J., dissenting).
[111] *Id.* at 336, 17 A.3d at 744.
[112] Tracey v. Solesky, No. 53 Sept. Term 2011, 2012 WL 3759036, at *3 (Md. Apr. 26, 2012) (citing Tracey v. Solesky, 421 Md. 192, 24 A.3d 1025 (2011)).
[113] *Tracey*, 2012 WL 3759036, at *3
[114] *Id.* at *4.
[115] *Id.*
[116] *Id.* at *12.

The dissent in *Tracey* specifically addressed the possible repercussions of the majority's change to the common law standard.[117] In the dissent's view, the majority has "transform[ed] a clear factual question into a legal one."[118] The majority's holding is the first time in Maryland that a theory of strict liability has been based upon the breed of the animal that caused the injury.[119] The dissent further stated that, under the principle of stare decisis, the facts of this case did not warrant a change to the existing common law standard.[120]

In ruling on Tracey's motion for reconsideration, the Court of Appeals of Maryland clarified that the strict liability standard announced in *Tracey* applied only to pure breed pit bulls.[121] The court ordered that any reference to cross-bred pit bulls be stricken from the *Tracey* opinion filed on April 26, 2012.[122]

C. Support for Extension of Landlord's Duty beyond the Rental Property

Viewing the *Solesky* case in a broader context, there are public policy arguments that support holding landlords liable for damages caused by a tenant's dog.[123] In addition, various jurisdictions have determined that a landlord's duty to a third party can extend beyond the boundaries of the leased property.[124] The nature of the relationship between the landlord and tenant has been considered one source of tort liability.[125] When considering the nature of a landlord's responsibility to a third party,

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[117] *Id.* at *13 (Greene, J., dissenting).
[118] *Id.*
[119] *Tracey*, 2012 WL 3759036, at *16 (Greene, J., dissenting).
[120] *Id.*
[121] Tracey v. Solesky, No. 53, Sept. Term 2011, 2012 WL 3568308, at *1 (Md. Aug. 21, 2012).
[122] *Id.* at *3.
[123] Ramona C. Rains, Comment, *Clemmons v. Fidler: Is Man's Best Friend a Landlord's Worst Enemy?*, 19 AM. J. TRIAL ADVOC. 197, 208-09 (1995) (presenting two conventional arguments in favor of landlord liability: 1. landlords should not be able to avoid responsibility for damages based on the timing of an attack, and 2. an outsider observer such as a landlord may have a more objective view of the animal's behavior than the animal's owner).
[124] *See* Champ-Dorian v. Lewis, 892 N.Y.S.2d 665, 667 (N.Y. App. Div. 2010) (holding that a landlord could be held liable for breaching a duty of care to passersby if it was foreseeable that they would be injured by the tenant's dog); Park v. Hoffard, 847 P.2d 852, 855 (Or. 1993) (holding that a landlord may be liable to injuries caused off the rental property by the tenant's dog if the landlord knew or had reason to know that the dog posed an unavoidable danger to persons off the property).
[125] *Park*, 847 P.2d at 854 (arguing that the relationship between the landlord and tenant gives the landlord a degree of control over the tenant's actions which supports the extension of tort liability to the landlord).

evidence of foreseeability can extend the landlord's liability to injuries occurring off the rental property.[126] As in *Solesky*, the elements of knowledge and control are cited as prerequisites for the existence of the landlord's legal duty to the third party.[127]

D. Current Maryland Law Cannot Shield Landlords from Third Party Negligence Suits

One issue in the *Solesky* case centered around the language in the lease stating that the landlord disclaimed any responsibility for any damage caused by the two pit bulls.[128] The presence of that clause directly impacted the majority's analysis of the control element.[129] The dissent gave no weight to the clause, characterizing it as a standard requirement in a residential lease.[130] Traditionally, landlords shield themselves from liability caused by tenant's actions through indemnity clauses.[131] In Maryland, indemnity clauses are generally allowed based on the freedom to contract, which allows parties to construct agreements without interference.[132] However, an exception to this general rule directly applies to landlords.[133]

In *Eastern Ave. Corp. v. Hughes*, the Court of Appeals of Maryland held that an exculpatory clause shielding the landlord from injuries sustained by a tenant in the common parking lot did not violate public policy.[134] In response to that case, the Maryland General Assembly passed a statute that declared exculpatory clauses within landlord and tenant contracts to be void and against public policy.[135] Therefore, any lease provisions that serve to protect landlords from liability claims will

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[126] *Id.* at 855-56 (landlord's knowledge of a sign posted on the door of the rental property warning of a dangerous dog could demonstrate that the attack off the rental premises by the tenant's dog was foreseeable).

[127] *Id.* at 853 (citing Park v. Hoffard, 826 P.2d 79 (Or. 1992)); *Lewis*, 892 N.Y.S.2d at 666.

[128] *Solesky*, 198 Md. App. at 328, 17 A.3d at 739.

[129] *Id.*

[130] *Id.* at 336, 17 A.3d at 743-44 (Rubin, J., dissenting).

[131] *See generally* John D. Perovich, Annotation, *Validity of Exculpatory Clause in Lease Exempting Lessor from Liability*, 49 A.L.R.3d 321 (1973).

[132] *See* Scott A. Conwell, Recent Decisions, *Exculpatory Clause Requires Statement of Specific Intent*, 57 MD. L. REV. 706, 709 (1998).

[133] *Id.* at 710 ("exculpatory clauses produced by grossly unequal bargaining power").

[134] 228 Md. 477, 479-80, 180 A.2d 486, 488 (1962).

[135] Conwell, *supra* note 132, at 711. *See also* MD. CODE ANN., REAL PROP. § 8-105 (West 2012) (stating "[i]f the effect of any provision of a lease is to indemnify the landlord, hold the landlord harmless, or preclude or exonerate the landlord from any liability to the tenant, or to any other person, for any injury, loss, damage, or liability arising from any omission, fault, negligence, or other misconduct of the landlord on or about the leased premises . . . , the provision is considered to be against public policy and void.").

be held invalided.[136] Without written protections in the lease, landlords must consider whether the current Maryland law regulating dog ownership does enough to shift the burden of tort liability onto the tenants.

Maryland law currently prohibits a dog owner from keeping a dangerous dog unattended on his property unless the dog is securely kept indoors or otherwise restrained.[137] A dangerous dog is defined as one who has demonstrably bitten a person or has attacked a person or other animal without provocation.[138] Additionally, a dangerous dog may not leave the owner's property without specified restraints, such as a muzzle.[139] At the municipal level, one Maryland county bans the ownership of pit bull dogs.[140] Another county expressly holds the owner of a dog liable for any damages it causes to a person, with limited exceptions.[141] Although these statutes place responsibility for the dog's behavior onto the owners, they address criminal liability, rather than the civil liability at issue in *Solesky*.[142] In Maryland, criminal liability is distinct from civil liability because criminal liability is characterized by "a wanton or reckless disregard for human life."[143] The legal standard used to evaluate civil liability is completely different.[144] The current absence of Maryland law addressing civil liability of the dog's owner reveals a critical need to look at all methods that allow landlords to reduce their vulnerability to lawsuits from third parties.

IV. SOLUTION

A. Actions Landlords Can Take Today

When initially drafting a lease, a landlord could attempt to limit liability by including a "no pets" clause that prohibits a tenant from

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[136] *See* Cornell v. Council of Unit Owners Hawaiian Vill. Condo., Inc., 983 F. Supp. 640, 648 (D. Md. 1997) (citing Wolf v. Ford, 335 Md. 525, 531, 644 A.2d 522, 526 (1994)).

[137] MD. CODE ANN., CRIM. LAW § 10-619(d)(1) (West 2002).

[138] CRIM. LAW § 10-619(a)(2).

[139] CRIM. LAW § 10-619(d)(2).

[140] PRINCE GEORGE'S CNTY, MD., CODE § 3-185.01(a) (2007).

[141] BALTIMORE CNTY, MD., CODE § 12-3-104 (2011) (clarifying that the dog owner is not liable if the person harmed was committing a tort or was taunting the dog prior to the attack).

[142] *See* CRIM. LAW § 10-619(f) (stating that a violation is classified as a misdemeanor); PRINCE GEORGE'S CNTY, MD., CODE § 3-116.01(a) (highlighting criminal penalties for owning a pit bull, including the possibility of imprisonment).

[143] Ruffin v. State, 10 Md. App. 102, 106, 268 A.2d 494, 497 (1970) (quoting 65A C.J.S. *Negligence* § 306, p. 1075).

[144] *Solesky*, 198 Md. App. at 309-10, 17 A.3d at 728.(identifying duty, breach, actual damages, and causation as required elements of civil negligence).

keeping a dog on the rental property.[145] In *Matthews*, however, the failure to enforce a "no pets" clause when the tenant was in clear violation was a key factor in the court's determination that the landlord did in fact owe a duty to the third party.[146] More specifically, landlords may choose to protect themselves via lease provisions that restrict the size or number of pets.[147] Landlords could also insert a lease provision allowing a right of inspection in order to ensure tenants comply with any pet restrictions written into the lease.[148]

Lease provisions relating to animals can also be drafted with a focus on the landlord's benefit rather than the tenant's protection from harm.[149] For example, in *Gilbert v. Miller*, the court determined that the language of the lease provision aimed at pet ownership by tenants was solely designed to prevent property damage.[150] Because the intent of the provision was to protect the landlord from pets damaging the landlord's property or making the rented unit less habitable, the court held that the plain language of the lease provision would not support the plaintiff's argument in favor of imposing a legal duty onto the landlord that would require the landlord to protect tenants and third parties from injuries inflicted by tenants' pets.[151] In its analysis, the court also emphasized that the leasing provision explicitly provided that control over the pet was the responsibility of the tenant, not the landlord.[152] Landlords also have the power to terminate a lease if the tenant does not fulfill its terms.[153]

In its analysis of the control element, the *Solesky* court offered two methods that landlords could use to reduce the likelihood of a negligence lawsuit from a third party: 1) imposing conditions on a tenant's lease renewal, and 2) refusing to re-let the premises to the tenant.[154] These steps, however, rely upon the premise that the landlord is aware of the danger posed by the dogs at the time of lease renewal or tenant eviction.[155] In order to safeguard themselves from liability altogether,

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[145] Quinlan, *Landlords Should Take Precautions to Limit Liability for Tenants' Dogs*, 30 LANDLORD TENANT L. BULL. 1 (Jan. 2009), *available at* Westlaw 30 No. 1 QNLNLTL 6.

[146] *See Matthews*, 351 Md. at 558, 719 A.2d at 125.

[147] Angela S. Robinson, *Pets & Community Housing*, 40 MD. B.J. 28, (Sept.-Oct. 2007).

[148] *Id.*

[149] Gilbert v. Miller, 586 S.E.2d 861, 864-65 (S.C. Ct. App. 2003).

[150] *Id.* at 864.

[151] *Id.* ("It is clear the language of the lease did not intend to make Gilbert, either as a tenant or guest, a third party beneficiary by imposing a *duty in tort* on the landlord to prevent a tenant's dog from injuring another. The lease provision cannot be construed as being for the protection of other tenants or guests") (emphasis added).

[152] *Id.* at 865.

[153] *See* Park v. Hoffard, 847 P.2d 853, 855 (Or. 1993).

[154] *Solesky*, 198 Md. App. at 327, 17 A.3d at 739.

[155] *See Park*, 847 P.2d at 855.

landlords may choose to simply stop leasing to pet owners as a group.[156] Before taking that drastic step, other ideas must be considered and evaluated.

B. New Laws Addressing Dog Ownership and Liability Should be Created

1. Statewide Regulations Outlawing Pit Bull Ownership

The *Solesky* dissent acknowledges the power of the Maryland General Assembly to regulate or ban pit bulls statewide.[157] Forbidding the ownership of pit bulls as a breed might be an efficient way to shift responsibility for third party attacks from the landlord back to the tenant. One Maryland county has already taken the step to ban pit bull ownership, as noted above.[158] In the wake of the dog attack that resulted in the *Solesky* case, a Baltimore County councilman proposed legislative regulations requiring pit bulls to be muzzled in public and caged at home.[159]

Looking at jurisdictions outside Maryland, some courts have upheld municipal breed specific bans regarding pit bull ownership.[160] In *Garcia v. Village of Tijeras*, the court listed aggression, viciousness, and unpredictability as inherent dangerous qualities of pit bulls.[161] Previous instances of property damage and personal injuries directly attributable to pit bulls in that specific municipality were also used to justify the total ban of the breed.[162] The regulation at issue in *City of Toledo v. Tellings* was actually more permissive, as it allowed a resident to own one pit bull, although it did not permit more than one pit bull in a household.[163] In upholding the regulation, the court determined that the city had a legitimate interest in protecting its residents from the significant danger posed by pit bulls.[164] Other jurisdictions consider a pit bull ban a permissible exercise of the government's police power.[165] Although pit

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[156] Wilson, *supra* note 76, at 1273.

[157] *Solesky*, 198 Md. App. at 336, 17 A.3d at 744.

[158] *See* PRINCE GEORGE'S CNTY, MD., CODE § 3-185.01(a) (2007).

[159] *See* Josh Mitchell, *Proposal Takes Aim at Pit Bull Maulings but Balto. County Bill Meets Criticism*, BALT. SUN, Oct. 8, 2007, at 1A, *available at* 2007 WLNR 19703777.

[160] *Accord* Garcia v. Village of Tijeras, 767 P.2d 355, 363 (N.M. Ct. App. 1988) (upholding a municipal ordinance banning pit bulls); City of Toledo v. Tellings, 871 N.E.2d 1152, 1159 (Ohio 2007) (declaring ban of pit bulls constitutional).

[161] 767 P.2d at 359.

[162] *Id.* at 360.

[163] 871 N.E.2d at 1154.

[164] *Id.* at 1157.

[165] *See* Holt v. City of Maumelle, 817 S.W.2d 208, 210 (Ark. 1991).

bull regulations may survive judicial scrutiny, there are serious public policy concerns that cannot be ignored.

The first problem is identifying which dogs would be the subjects of a breed specific ban, as the term "pit bull" refers to more than one breed of dog.[166] Without a uniform term to describe the breed of dog at issue, it can be difficult to determine if a particular dog falls into the banned category of ownership.[167] A broad pit bull ban will unnecessarily penalize gentle pit bulls who have no history of violence, while simultaneously failing to control aggressive dogs that fall outside the pit bull breed.[168] Furthermore, the vicious behavior of an individual pit bull is not definitively inherent to the breed, as many pit bulls are trained to be aggressive and forced to participate in illegal dog fights.[169] Dog fighting is a significant problem in Maryland, and pit bulls carry a strong stigma from their association with that activity.[170] A statewide ban would only contribute to that perception.[171]

Even if the public image of pit bulls could be rehabilitated, the economic cost of a statewide ban may be prohibitive. Enforcing a statewide ban requires increasing the number of animal control employees who can capture dogs that are owned in violation of the law, as well as additional holding facilities for dogs whose breed is in question.[172] There could be an increased strain on judicial resources, as owners may choose to appeal their individual dog's classification as a pit bull.[173] In 2001, the Baltimore City Council rejected a proposed pit bull ban, determining that the associated economic costs of the ban would

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[166] Safia Gray Hussain, Note, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 FORDHAM L. REV. 2847, 2851 (2006) (explaining that the general term pit bull can refer to the American Staffordshire Terrier, the Staffordshire Bull Terrier, and/or the American Pit Bull Terrier); *see also* Kristen E. Swann, Note, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839, 840 (2010).

[167] *Id.* at 2852.

[168] *Id.* at 2863-64.

[169] Karyn Grey. Note and Comment, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVA. L. REV. 415, 437 (2003); *see also* Amy Argetsinger, *Many are Fighting Mad at Pit Bull Proposal*, WASH. POST, Oct. 22, 1998, at M01, *available at* 1998 WLNR 8127226 (highlighting the link between dog fighting in Annapolis, Maryland and a proposed city-wide pit bull ban).

[170] *See* Arthur Hirsch, *Abused Pit Bulls Face a Difficult Transition*, BALT. SUN, Dec. 10, 2011, at 1A, *available at* 2011 WLNR 25671424.

[171] *See Breed-Specific Legislation*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, http://www.aspca.org/fight-animal-cruelty/advocacy-center/animal-laws-about-the-issues/breed-specific-legislation.aspx (last visited Jan. 14, 2012).

[172] Hussain, *supra* note 166, at 2871.

[173] *Id.*

exceed the funds allocated to the Baltimore Bureau of Animal Control.[174] Although a pit bull ban in Prince George's County, Maryland currently remains in force, a 2003 task force recommended repealing the county wide pit bull ban, citing the high cost of enforcement relative to the ban's effectiveness.[175] Overall, the task force deemed the ban inefficient, as the high administrative costs involved in decreasing the number of pit bulls in the county could not produce a quantifiable benefit in terms of public safety.[176] With the economic constraints and enforcement issues identified above at the municipal level, the obstacles facing a statewide ban may be too great.

Most importantly, even if a statewide pit bull ban were put into place, there is no guarantee that its subsequent enforcement would protect landlords from negligence lawsuits from third parties. Even if a landlord could prove that a tenant kept a pit bull in violation of the statute, this fact standing alone would not be sufficient to shift liability completely to the tenant.[177] The fact that a dog is a pit bull is not acceptable evidence that the dog is dangerous.[178] Accordingly, mere ownership of a pit bull is not sufficient to impose tort liability onto a dog owner - additional evidence demonstrating that pit bull's specific dangerous behavior is required.[179] Rather than banning ownership of a single breed, different legislative reform is needed.

2. Maryland Statute Defining Scope of Landlord Tort Liability

Landlord vulnerability to third party negligence suits could be reduced by codifying the common law principle that landlords are not responsible for the actions of the tenant on the leased property.[180] Some states adhere to the rule that at the moment the landlord transfers possession to the tenant via a lease, he is not responsible for any subsequent dangerous

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[174] Allison Klein & M. Dion Thompson, *City Council Rejects Ban on Breeds of Attack Dog*, BALT. SUN, May 15, 2001, at 1A, *available at* 2001 WLNR 1035250.

[175] Hussain, *supra* note 166, at 2872 (comparing the fees collected from pit bull registrations over two years ($38,000) against the costs incurred by the Animal Control Division in enforcing the ban over the same time period ($560,000)); *see also Punish the Deed, Not the Breed: Task Force Report from Prince George [sic] County Maryland...* [sic], UNDERSTAND-A-BULL, http://www.understand-a-bull.com/BSL/Research/PGCMD/PGCMTOC1.htm, 6 (last visited Jan. 15, 2012) [*hereinafter* Task Force Report].

[176] Task Force Report, *supra* note 175, at 10.

[177] See Rivers v. Hagner Mgmt. Corp., 182 Md. App. 632, 654, 959 A.2d 110, 123 (2007) (describing the Maryland standard treating the violation of a statute as evidence of negligence, rather than negligence per se).

[178] Ward v. Hartley, 168 Md. App. 209, 220 n.7, 895 A.2d 1111, 1117 (2006).

[179] *Id.*

[180] *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 18.4 (1977).

conditions brought onto the property by the tenant.[181] When applied to animals brought onto the premises by a tenant, this division of liability is strongly supported by the fact that the landlord is not the owner or keeper of the animal.[182] Another justification is derived from the theory that because the tenant enjoys the benefit and use of the animal, he should bear the costs of any damage caused by the animal.[183] In this way, the landlord would not be forced to insure against the potential bad acts of the tenant.[184]

In light of the *Solesky* court's extension of the duty element, a new statute may be necessary to reduce the number of negligence suits brought by third parties against landlords. The Maryland General Assembly could model a new statute after a current Georgia law providing that "[h]aving fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from . . . negligence . . . by the tenant."[185] As applied, the Georgia statute has been interpreted to limit the liability of landlords to third parties who are injured by tenants' animals.[186] Passing a statute with similar language would not be a completely novel step, as the Court of Appeals of Maryland previously determined that a landlord was not liable to a third party based on the rationale that the landlord has parted with control and therefore was not responsible for the nuisance created by the tenant's animal.[187]

C. Existing Maryland Rules Regarding Opinion Testimony Should be Applied to Cases like Solesky

The Maryland Rules of Evidence were designed to assist the court system in determining the truth during trial.[188] In applying these rules, a critical distinction is made between lay testimony and expert

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[181] *See* Gibbons v. Chavez, 770 P.2d 377, 380 (Ariz. Ct. App. 1988) (quoting PROSSER & KEETON ON TORTS § 63 at 434 (5th. ed., 1984)); Stokes v. Lyddy, 815 A.2d 263, 271 (Conn. App. Ct. 2003).

[182] Rains, *supra* note 123, at 206; *see also* Fernandez v. Marks, 642 P.2d 542, 543 (Haw. Ct. App. 1982).

[183] Rains, *supra* note 123, at 207.

[184] Rains, *supra* note 123 at 206-07; *see also Stokes*, 815 A.2d at 277 (Conn. App. Ct. 2003) (arguing against a rule of landlord liability that would place landlords in the position of becoming the "insurers of the general public.").

[185] GA. CODE ANN. § 44-7-14 (1982).

[186] *See* Webb v. Danforth, 505 S.E.2d 860, 861 (Ga. Ct. App. 1998); Ranwez v. Roberts, 601 S.E.2d 449, 451 (Ga. Ct. App 2004).

[187] Ward v. Hartley, 168 Md. App. 209, 216, 895 A.2d 1111, 1115 (2006) (quoting Marshall v. Price, 162 Md. 687, 689, 161 A. 172, 172 (1932)).

[188] MD. RULE 5-102 (West 2011).

testimony.[189] Maryland Rule 5-701 permits opinion testimony from lay witnesses to be admitted at trial if that opinion is "rationally based on the perception of the witness, and helpful to . . . the determination of a fact in issue."[190] Maryland Rule 5-702 states "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue."[191] The trial court has an obligation to carefully scrutinize the legitimacy of any expert witness.[192] Before expert testimony will be admitted, the scientific foundation underlying the testimony must be verified as reliable.[193] Questions regarding the admissibility of expert testimony often arise in criminal cases.[194] However, in *Schultz v. Bank of America*, Maryland Rule 5-702 governing expert testimony was applied to a negligence case.[195]

Ordinarily, expert testimony is not required when the alleged act of negligence is so apparent that the trier of fact can understand the applicable standard of care without the aid of expert testimony.[196] In *Solesky*, the dissent specifically referred to this rule when questioning the legal sufficiency of the circumstantial evidence presented by the plaintiff, and advocated a more stringent standard.[197] Because a required element for landlord liability is demonstrating the landlord's knowledge of the specific dog's dangerous behavior, expert testimony should be used when a plaintiff cannot produce direct evidence of the landlord's knowledge.

Other jurisdictions have considered expert testimony in negligence cases in which evaluating the disposition and behavior of the dog in question is necessary to determine the validity of a claim or defense.[198] In *Sinclair v. Okata*, the defendants were sued under a strict liability

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[189] *See* Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis, and Critique*, 54 MD. L. REV. 1032, 1062-63 (1995).

[190] MD. RULE 5-701 (West 2011).

[191] MD. RULE 5-702 (West 2011).

[192] *See* Blackwell v. Wyeth, 408 Md. 575, 591, 971 A.2d 235, 245 (2009) (affirming the trial court's function as a gatekeeper regarding the admissibility of expert testimony).

[193] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-90 (1993) (establishing the trial court's duty to ensure that scientific testimony admitted into evidence meets the heightened standard of reliability derived from the scientific method); Reed v. State, 283 Md. 374, 380-81, 391 A.2d 364, 367-68 (1978); *Blackwell*, 408 Md. at 585, 971 A.2d at 241.

[194] *See generally* Gutierrez v. State, 423 Md. 476, 32 A.3d 2 (2011); Morton v. State, 200 Md. App. 529, 28 A.3d 98 (2011).

[195] 413 Md. 15, 28, 990 A.2d 1078, 1086 (2010) (holding that expert testimony is generally required to establish the standard of care owed to a layperson by a professional).

[196] *Id.* at 29, 990 A.2d at 1086-87.

[197] *Solesky*, 198 Md. App. at 334, 17 A.3d at 743 (Rubin, J., dissenting).

[198] *See* Sinclair v. Okata, 874 F. Supp. 1051 (D. Alaska 1994); Henning v. City of Fort Wayne, No. 1:08-CV-00180, 2009 WL 2905482 (N.D. Ind. Sept. 8, 2009).

theory of negligence relating to an incident where their dog, Anchor, injured a young boy.[199] In order to prevail under their strict liability claim, the plaintiffs were required to prove that Anchor's behavior was "abnormally dangerous."[200] The defendants were able to successfully challenge that element by offering expert testimony that characterized Anchor's behavior as "natural."[201] In *Henning v. City of Fort Wayne*, expert testimony was used to evaluate the conduct of a dog named Misty who was shot by police officers during an investigation of the Henning's residence.[202] Henning brought suit against the police officers alleging the shooting of Misty constituted a violation of his Fourth Amendment right against unreasonable seizure of property.[203] The officers argued that Misty's aggressive behavior left no choice but to use extreme force, and presented expert testimony in support of that argument.[204] The court determined that the witness testifying to Misty's behavior was qualified as an expert in dog behavior and training.[205] Furthermore, the admissible testimony related to territorial aggression would enable the trier of fact to understand facts or issues raised by the defense.[206] An examination of *Moura v. Randall* will uncover similar principles at work in the Maryland court system.[207]

In *Moura*, the parents of a child injured by an unleashed dog named Diesel brought suit against the dog's owner based on strict liability and negligence theories.[208] In the Circuit Court for Montgomery County, the defendant moved for summary judgment, arguing that there were no genuine issues of material fact.[209] In the affidavit supporting his motion, the defendant stated that he had never observed any aggressive behavior by Diesel towards people prior to the date of the attack.[210] In response, the plaintiffs submitted a copy of the expert testimony given by Mark Lipsitt, a dog trainer who personally evaluated Diesel after the attack, and determined he was dangerous.[211] The trial court ultimately granted the motion for summary judgment.[212]

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[199] *Sinclair*, 874 F. Supp. at 1053-54.
[200] *Id.* at 1058.
[201] *Id.* at 1058-59.
[202] 2009 WL 2905482 at *1.
[203] *Id.*
[204] *Id.*
[205] *Id.* at *6 n.2.
[206] *Id.* at *4.
[207] *See* Moura v. Randall, 119 Md. App. 632, 705 A.2d 334 (1998).
[208] *Id.* at 636, 705 A.2d at 336.
[209] *Id.*
[210] *Id.* at 637, 705 A.2d at 336-37.
[211] *Id.* at 638, 705 A.2d at 337.
[212] *Id.* at 636, 705 A.2d at 336.

Reviewing the plaintiff's appeal, the Court of Special Appeals of Maryland analyzed the admissibility and scope of Lipsitt's expert testimony in the context of the plaintiff's negligence claim.[213] The appellate court determined that a trier of fact would be permitted to use Lipsitt's testimony as a basis to draw a permissible inference concerning Diesel's behavior at the time of the attack.[214] Perhaps even more crucial, the expert testimony could also apply to the question whether Diesel's owner knew of his dog's dangerous behavior.[215] This holding has important implications for the future of landlord liability after the *Solesky* decision.

One strong argument against the use of expert testimony in negligence cases such as those similar to *Solesky* involves the subject matter at issue — dog behavior. Expert testimony is not admitted into evidence if the jury is able to understand and analyze the facts of the case without the assistance of expert testimony.[216] Additionally, the court will also exclude expert testimony if the subject matter falls into the category of common knowledge.[217] Expert testimony may still have a role in dog bite cases, as Maryland courts have been very explicit that general knowledge that a dog belongs to a certain breed cannot form an adequate basis for judging the behavior of an individual dog.[218] Despite that holding, landlords may not be completely protected by scientific witnesses who can offer testimony that is based on general principles of animal behavior outside the facts of a particular case.[219] This is due to an important limitation of expert testimony — the trial judge has the discretion to admit such testimony in whole or in part.[220] In order to compensate for possible gaps in expert testimony, opinion testimony offered by lay witnesses under Maryland Rule 5-701 should also be examined to determine whether a plaintiff has adequately demonstrated the elements of knowledge and control necessary to create a legal duty.

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[213] *Moura*, 119 Md. App. at 643, 705 A.2d at 340.

[214] *Id.*

[215] *Id.* at 644, 705 A.2d at 340.

[216] *See* Christ v. Wempe, 219 Md. 627, 633, 150 A.2d 918, 921 (1959).

[217] Carter v. Shoppers Food Warehouse MD Corp., 126 Md. App. 147, 155, 727 A.2d 958, 962-63 (1999) (quoting Hartford Accident and Indem. Co. v. Scarlett Harbor Assocs., 109 Md. App. 217, 257, 674 A.2d 106, 125-26 (1996)).

[218] *See Ward*, 168 Md. App. at 220 n.7, 895 A.2d at 1117; *see also Moura*, 119 Md. App. at 653, 705 A.2d at 344.

[219] *See generally* MCLAIN, MARYLAND EVIDENCE, § 702:1(b) (2001) (explaining that witnesses who give expert testimony are not required to have firsthand knowledge of the underlying facts of a specific case before offering their opinion).

[220] *Henning*, 2009 WL 2905482 at *2.

Under Maryland Rule 5-701, a lay witness's opinions or inferences are admissible only if grounded in first-hand knowledge.[221] Applying this standard to landlord liability, a plaintiff bringing a negligence action could use this type of testimony to establish the degree of danger posed by the dog causing the injury.[222] In *Slack v. Villari*, the Court of Special Appeals of Maryland reversed a judgment holding the Slacks liable for injuries sustained by the Villaris during their interaction with the Slacks' dog, a Doberman pincher named Gideon.[223] As the Villaris were passing in front of the Slacks' driveway, Gideon ran toward them and began growling.[224] Mrs. Villari suffered personal injuries trying to avoid Gideon.[225] Under a negligence theory of liability, the Slacks were charged with failing to control their dog as required by the county ordinance.[226] Mrs. Slack testified that she issued a verbal command when she saw Gideon walk away from her, and he returned immediately.[227] She was not aware of Gideon's encounter with the Villaris.[228] The court determined that there could not be a statutory violation as there was no proof of negligent behavior by Mrs. Slack.[229] The court stated that Mrs. Slack had exercised reasonable care in controlling the dog throughout the incident, and therefore she was not liable to the Villaris under a negligence theory.[230]

In evaluating the Villaris' strict liability claim against the Slacks, the court turned its attention to the behavior exhibited by Gideon.[231] In order for the Slacks to be liable under this theory, the evidence must demonstrate that they knew or should have known that Gideon would be likely to growl and charge towards the Villaris as they walked by the Slacks' house.[232] A neighbor testified that Gideon had not caused any previous problems in the neighborhood.[233] The Slacks' direct testimony indicated that Gideon had a calm disposition and had never bitten anyone.[234] Based on this record of past behavior, the court determined

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[221] *See* MD. RULE 5-701 (West 2011); *see also* Goren v. U. S. Fire Ins. Co., 113 Md. App. 674, 685, 688 A.2d 941, 947 (quoting Waddell v. State, 85 Md. App. 54, 66, 582 A.2d 260, 266 (1990)).
[222] *Solesky*, 198 Md. App. at 335, 17 A.3d at 744 (Rubin, J., dissenting).
[223] 59 Md. App. 462, 477, 476 A.2d 227, 235 (1984).
[224] *Id.* at 466, 476 A.2d at 229.
[225] *Id.*
[226] *Id.* at 471, 476 A.2d at 231.
[227] *Id.* at 472, 476 A.2d at 232.
[228] *Id.*
[229] *Slack*, 59 Md. App. at 472, 476 A.2d at 232.
[230] *Id.* at 472, 476 A.2d at 232.
[231] *Id.* at 473-74, 476 A.2d at 233.
[232] *Id.*
[233] *Id.* at 468, 476 A.2d at 230.
[234] *Id.*

that Gideon's aggressive reaction to the Villaris was unexpected, and the Slacks could not have reasonably known or predicted that he would behave in that manner.[235] Without this knowledge element, the Slacks could not be held liable under a strict liability theory.[236]

As demonstrated in *Slack*, the specific behavior of the dog that caused the injury was a vital component in the court's analysis of the dog owner's potential liability. Because a landlord does not have the same interaction with the dog as the owner would, the testimony required to establish the level of danger posed by a specific dog should be gathered from multiple sources.[237] Gathering evidence of the dog's temperament is especially critical since landlord liability may extend beyond the bounds of the rental property if the dog poses an unavoidable risk of harm.[238] When applied to landlord liability cases, the rules governing opinion testimony from both expert witnesses and lay witnesses can ensure that the duty element is met.

V. CONCLUSION

Landlords have many responsibilities to their tenants. When a tenant's dog injures a third party, the role of the landlord is not immediately clear. At common law, landlords were not responsible for the damage caused by the animals brought onto the premises by a tenant. As Maryland case law progressed from *Shields v. Wagman* to *Solesky v. Tracey*, the pendulum has swung too far in the opposite direction. In the wake of *Solesky*, landlords may have a legal duty to third parties injured off the rental property. More importantly, this duty can now be established by a plaintiff without direct evidence of the landlord's knowledge or control over the tenant's pet. In order to counteract this expansion of the landlord's duty, legislative reform is necessary. A breed-specific ban targeting pit bulls is one option, but there are legitimate concerns about the ban's scope and effectiveness that must be addressed. Legislation clearly stating that landlords are not responsible to third parties for the negligent acts of tenants may effectively protect landlords from negligence lawsuits in the future, but current landlords still face liability.

Today, the best protection for landlords is found in the Maryland Rules of Evidence that regulate the admissibility of both expert testimony

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[235] *Slack*, 59 Md. App. at 477, 476 A.2d at 234.

[236] *Id.* at 477, 467 A.2d at 234-35.

[237] *See Solesky*, 198 Md. App. at 336, 17 A.3d at 744(Rubin, J., dissenting) (identifying police officers and animal control officers as potential witnesses that could testify to the dog's behavior post-attack).

[238] *See supra* note 17.

and lay witness testimony. Consistent application of these rules is required to make sure that a landlord will only be held liable for negligence in situations when his knowledge and control of the tenant's pet is sufficient to create a legal duty to a third party who is injured by that animal.

By carefully scrutinizing the burden of proof necessary to establish the elements of knowledge and control in negligence lawsuits, the Maryland court system can ensure that only the party truly responsible for an injury to a third party will bear the legal and financial costs of a trial judgment.