Supreme Court of the State of Connecticut

S.C. No. 18949

ANTHONY VENDRELLA, ET AL.

v.

ASTRIAB FAMILY LIMITED PARTNERSHIP, ET AL.

BRIEF FOR AMICI CURIAE
CONNECTICUT FARM BUREAU ASSOCIATION AND
CONNECTICUT HORSE COUNCIL, INC.

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STATEMENT OF THE ISSUE BEFORE THE COURT

Did the Appellate Court properly conclude that a horse belongs to a species so naturally inclined to do mischief or be vicious to human beings that the minor plaintiff's injuries were reasonably foreseeable, regardless of whether the particular horse has shown a prior vicious disposition known to the keeper?

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STATEMENT OF INTEREST

Connecticut Farm Bureau Association ("CFBA") is a non-profit, grassroots membership organization dedicated to farming and the future of Connecticut agriculture. Pursuant to Connecticut General Statutes § 1-1(q), "farming" and "agriculture" include the "the raising...feeding, caring for, training and management of livestock, including horses...." CFBA advocates and educates on issues that keep farm families producing by focusing on issues such as economic viability, land use, labor, taxation and the protection of farmland.

The Connecticut Horse Council, Inc. ("CHC") is a member-supported organization of individuals and organizations representing every facet of the horse industry in Connecticut from owners, breeders, veterinarians, farriers, breed organizations and horsemen's associations to commercial suppliers and town horse councils.

CFBA and the CHC represent horse farms, horse owners, horse professionals, and horse-related business across Connecticut. Both have an interest in protecting the ability of their members to continue engaging in their equine agricultural and business pursuits. A decision by this Court that drastically alters the long-standing law regarding the keeping of horses in Connecticut would seriously restrict the ability of the organizations' members to continue operating their equine-related pursuits and businesses as they have for generations.

Thus, CFBA and CHC have a strong interest in this case's outcome.

STATEMENT OF RELEVANT FACTS AND INTRODUCTION[1]

This Court certified the issue of whether "the Appellate Court properly conclude[d] that a horse belongs to a species so naturally inclined to do mischief or be vicious to human beings that the minor plaintiff's injuries were reasonably foreseeable, regardless of whether the particular horse has shown a prior vicious disposition known to the keeper." A1. The Appellate Court's holding, that "a party...may establish the requisite notice [*i.e.*, notice of an animal's vicious disposition (*see* A7)], in a negligence action against the owner or keeper of a domestic animal, by proof of the natural propensities of that species" (*id.*), and its accompanying finding that "the evidence before [it] indicate[d] that a genuine issue of material fact existed as to whether horses as a class possess a natural tendency to bite, possibly causing great physical damage to a person, even if a particular horse had not previously displayed that propensity" (A14),[2] raise two questions for the Court's consideration: (1) whether a plaintiff may establish the defendant's notice of the animal's vicious propensities solely by proof of the natural propensities of its species;[3] and (2) if the first question is answered in the affirmative, whether Vendrella presented an evidentiary foundation to demonstrate the existence of a genuine issue of material fact as to whether

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[1] This brief was written by counsel for the amici curiae Doug Dubitsky, Esq. (Lisa Solomon, Esq. *of Counsel*). Only the amici curiae contributed to the cost of the brief.

[2] The Appellate Court's later statement that "...a genuine issue of material fact exists as to whether the defendants had notice that Scuppy belonged to a class of domestic animal that possessed a natural propensity to bite, thereby endangering customers such as the plaintiffs invited onto their property" (*id.*) must be read in conjunction with its earlier statements.

[3] Using this Court's terminology, this question can be rephrased as whether, in a negligence action against the owner or keeper of a domestic animal, a party may establish the defendant's notice of the animal's vicious propensities solely by proof that it belongs to a species so naturally inclined to do mischief or be vicious to human beings that the plaintiff's injuries were reasonably foreseeable."

horses, as a species, have a natural propensity to bite when being petted.[4] Even if the Court were to find a plaintiff may establish the defendant's notice of an animal's vicious propensities solely by proof of the propensities of its species, Vendrella did not demonstrate the existence of a genuine issue of material fact concerning whether horses, as a species, are naturally prone to bite. The Court can thus determine this appeal on the basis of well-established summary judgment jurisprudence without reaching the first question.

If the Court nevertheless reaches the first question, neutral principles of *stare decisis* as applied to tort law mandate that the Court refrain from, in essence, creating a new cause of action by creating a species-specific standard of care in derogation of the common law. Finally, if the Court addresses the certified question as posed, the differences in individual animals demonstrates that horses, as a species, are not so naturally inclined to bite human beings that it is likely that a horse that has shown no prior vicious disposition will bite a person who is petting it.

ARGUMENT

I. Vendrella failed to provide an evidentiary foundation to demonstrate the existence of a genuine issue of fact as to whether horses, as a species, are likely to bite when being petted.

To defeat summary judgment, a non-movant must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. *See* Practice Book §§17-44, 17-45. Under Vendrella's theory of liability, the critical material fact is whether "a bite was likely" (Vendrella Brief, p.15). Vendrella sought to prove this fact by demonstrating that

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[4] Both issues are within the scope of the certified question; even if either or both are outside the scope of the certified question, this Court can review them in the interest of judicial economy because both parties extensively briefed them. *E.g.*, *Montoya v. Montoya*, 280 Conn. 605, 616, n.11 (2006).

horses, as a species, "have a propensity to bite" (*id.*) when being petted.[5] However, as more fully discussed in Astriab's opening brief (at pp.22-27), Vendrella did not submit any evidence that horses, as a species, are likely to bite humans so frequently that biting is probable, rather than merely possible. Thus, even if this Court accepts the theoretical viability of Vendrella's theory of liability, settled principles of summary judgment jurisprudence require the Court to grant Astriab's summary judgment motion based on this failure of proof. *See Riccio v. Harbour Village Condo. Ass'n*, 281 Conn. 160, 165 (2006) (declining to consider plaintiff's request to change premises liability law to eliminate specific notice requirement because, even if Court modified current law, plaintiff presented insufficient evidence to support her theory that notice of general conditions that caused injury was sufficient to prove notice of defect; therefore trial court properly granted motion for directed verdict).

II. This Court should not modify the common law rule that the propensity of any domesticated animal for mischief or viciousness is judged on an individual basis (except in cases involving trespass by large animals).

As Astriab argues, under common law in Connecticut (as expressed in *Baldwin v. Ensign*, 49 Conn. 113 (1881)) and elsewhere, the "propensity" of any domesticated animal (including horses) for mischief (including biting) or viciousness is judged on an individual, not a species-wide, basis, except in cases involving trespass by large animals. Opening

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[5] Although *Black's Law Dictionary* does not separately define the word "propensity," it defines "vicious propensity" as "[a]n animal's tendency to endanger the safety of persons or property." *Black's Law Dictionary* (9th ed. 2009), available at WestlawNext BLACKS. Although *Black's* does not define "tendency," the most illuminating definition of the term in the *American Heritage Dictionary of the English Language* is "[a] characteristic likelihood." *American Heritage Dictionary of the English Language* (2009), available online at http://education.yahoo.com/reference/dictionary/entry/tendency.

Brief, pp.6-7, 11.[6] Holding that a party may establish notice of an animal's vicious propensities solely by proof of the natural propensities of its species is equivalent, for analytical purposes, to taking judicial notice that the species is inherently dangerous. Taking such judicial notice with respect to horses would, in effect, create a new cause of action by imposing strict liability upon horse owners. *See Ferrara ex rel. Com. of Mass. Dep't of Social Servs. v. Marra*, 823 A.2d 1134, 1137 (R.I. 2003) (so observing in response to request to take judicial notice that pit bulls, as a breed, are inherently dangerous). However, courts and scholars have widely recognized that a court should depart from *stare decisis* only when the factual or legal basis for a law has been substantially altered so as to render its underlying public policy obsolete. Victor E. Schwartz, Cary Silverman & Phil Goldberg, *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317, 327 (Winter 2006) (hereinafter "*Neutral Principles*").

Ten neutral principles of *stare decisis* in common law—seven principles of change and three of stability—affect tort outcomes. *Id.* at 328. "The principles of stability...should be given particularly heavy weight in the *stare decisis* calculus. *Id.* at 319.

A. None of the principles favoring change in tort law justify departing from the individual propensity rule.

The principles favoring change in tort law counsel against change here:

Principle 1: A significant shift in the legal foundation underlying a rule may warrant a departure from stare decisis. Id. at 328. One example of this principle is the impact on defenses and damage assessments of the shift from contributory negligence to comparative fault: once that shift occurs, many rules designed to ameliorate the harshness of the contributory negligence rule are unnecessary. *Id.* at 329-32. Here, there has been no

[6] For the sake of brevity, this will be referred to as the "individual propensity rule."

shift in the legal foundation underlying the individual propensity rule that affects the social utility of that rule.

Principle 2: A tort law rule that is no longer compatible with the realities of modern society may need to shift to meet changing times. Id. at 328. Here, no societal change makes the individual propensity rule incompatible with today's realities. To the contrary, Connecticut public policy—which supports the preservation of farmland and open space in order to (among other things) "conserve the state's natural resources and...provide for the welfare and happiness of [Connecticut residents]" (Conn. Gen. Stat. §12-107a)—discourages changes in the way people live. If this Court finds that horses are likely to bite when being petted, other Connecticut horse-bite plaintiffs will argue that judicial notice of that fact is appropriate. Taking judicial notice of that fact will have a disastrous effect on both private horse ownership[7] and the continued operation of horse-related businesses[8] because insurers either will no longer write insurance covering injuries caused by horses or will charge premiums that are larger than those zoos pay to cover injuries caused by wild animals.[9] This, in turn, will lead to the likely subdivision and sale of land for development,

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[7] A recent University of Connecticut study conservatively estimated that there are 43,059 horses in the state, of which 38,065 are privately owned. Jennifer Nadeau & Farhed Shah, *Horses in Connecticut: Size and Value of the Industry* 11 (2006) (hereinafter "*Horses in Connecticut*"). The annual income of half of Connecticut horse owners is in the $50,000-$99,999 range. *Id.* at 6. At the same time, horse owners' average total expenses are $12,375 per year. *Id.* at 7. Fifty-three percent of owners keep their horses on privately-owned land (an average of 13 acres per owner, 7 of which are owned). *Id.* at 6.

[8] There are approximately 550 horse-related businesses in Connecticut, with the average annual profits per business estimated at only a "modest income" of $70,840. *Id.* at 8, 10, 11.

[9] Generally, in zoos, only employees are allowed to come into direct contact with most animals. By contrast, 59% of Connecticut horse-related businesses are based on allowing people—especially children—to feed, ride, train and otherwise handle horses, *See* Jennifer Nadeau, *et al*, *Connecticut Horsepower*; available online at

because: (1) former private owners will have less incentive to keep their land in its natural state; and (2) land owned by horse-related businesses that close, which was entitled to preferential tax treatment as farmland or open space under Conn. Gen. Stat. §12-107a, *et seq.* while owned by those businesses, may lose its entitlement to such treatment.[10]

Furthermore, the horse industry is vital to Connecticut's economy: the state's horse-related businesses employ 1,137 full-time equivalent employees and produce $38,962,000 in annual income.[11] *Horses in Connecticut*, *supra* at 10. Thus, a loss of horse-related businesses will have a substantial negative effect on the state's economy.

Principle 3: Changes in the nature of modern tort litigation may require alteration of a tort law rule. Neutral Principles, *supra* at 328. At least since *Baldwin*, the individual propensity rule has been applied in Connecticut negligence actions that are typically between one or two plaintiffs and one or two defendants. Here only one plaintiff was injured and the plaintiffs seek to hold only two defendants (an individual and his corporate entity) liable. Thus, changes in the nature of modern tort litigation (such as the advent of mass tort litigation [*see id.* at 338-9]) do not favor departing from the individual propensity rule.

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http://www.canr.uconn.edu/ansci/cthorsepower/HorsePowerBrochure.pdf (25% boarding; 19% training/lessons; 6% riding club; 6% show organizer; 2% carriage/hayrides).

[10] Under Conn. Gen. Stat. §1-1(q), "agriculture" and "farming" include the raising, feeding, caring for, training and management of livestock, including horses.

[11] This figure does not take into account the industry's broader linkages with the economy and resulting multiplier effects. *Horses in Connecticut*, *supra* at 11.

A 2005 study estimated that the horse industry (defined as "activities directly contributing to the production of horses or to the production of entertainment and recreation services that utilize horses") contributes an estimated $39.2 billion annually to the U.S. gross domestic product. American Horse Council Foundation, *The Economic Impact of the Horse Industry on the United States* 8, 16 (2005). Based on the study's estimate that 51,968 of the country's 9,222,847 horses are in Connecticut (*id.* at 10), the horse industry contributes an estimated $220.9 million annually to Connecticut's GDP.

Principle 4: Advances in science or technology may require extending or invalidating an earlier tort law doctrine. Id. at 328. Scientific or technological advances may favor departing from *stare decisis* when, for example, they affect the reliability of evidence, the ability to show causation or the ability to detect injury. *Id.* at 342-6. None of these types of advances (or any analogous advances) impact this case.

Principle 5: Previous decisions that have so chipped away at a tort law rule to render it superfluous may support abandonment of the rule in its entirety. Id. at 328. Here, no Connecticut case involving biting by any large domestic animal that was on its owner's or keeper's property has departed from the individual propensity rule. Thus, this principle does not support departing from it here.

Principle 6: Unintended consequences of previous departures from precedent may require revisiting and correcting earlier rulings. Id. at 328. Principle 6 is inapplicable here.

Principle 7: A preference for uniformity and consistency in tort law may favor abandoning tort law doctrines that persist in some jurisdictions, despite their near universal abandonment in sister states. Id. at 328. As demonstrated in Astriab's opening brief (at pp.19-22), many sibling states refused to abandon the individual propensity rule. Therefore, departing from the rule in this case does not advance uniformity and consistency in tort law.

B. **The three principles favoring stability in tort law mandate adherence to the individual propensity rule.**

All three principles favoring stability in tort law counsel against change here:

Principle 8: Individuals, nonprofit organizations, and businesses may significantly rely on a tort law rule in structuring their affairs and deciding where and how to do business. Neutral Principles, supra at 328. "Reliance interests are...particularly important when a court considers whether to create a tort duty, expand an existing duty, or otherwise

increase potential liability." *Id.* at 362. Furthermore, "[t]he status of tort law may have significant implications for the cost of insurance premiums or anticipated annual legal costs in defending against lawsuits that may not be viable in other states." *Id.* Because abandoning the individual propensity rule will make it impossible (or nearly so) to obtain insurance for most horse-related activities, this principle favors adhering to the rule.

Principle 9: Prudential concerns may favor awaiting legislative intervention where the court finds that policymakers are better suited to alter or replace a tort law rule. Id. at 328. As discussed in Astriab's opening brief (at pp.12-13), legislatures in 35 states—including Connecticut—have altered the individual propensity rule with respect to dogs, demonstrating that prudential concerns favor awaiting a legislative determination as to whether to modify the individual propensity rule with respect to any (or all) other domestic animals. *See Ferrara*, 823 A.2d at 1138 (creation of a new cause of action, by creating a species-specific standard of care in derogation of common law, is properly legislature's role, not court's); *Nutt v. Florio*, 914 N.E.2d 963, 968 fn.6 (Mass. App. 2009) (same, in *dicta*).

Principle 10: Departures from precedent should be incremental and must respect fundamental principles of tort law. Neutral Principles, supra at 328. The individual propensity rule is consistent with the fundamental principle of tort law that liability should be imposed only against a defendant with actual or constructive notice of a specific condition likely to cause injury. *See, e.g., Monahan v. Montgomery*, 153 Conn. 386, 390 (1996) (in premises liability action, relevant issue is defendant's knowledge of specific condition causing injury, which cannot be found to exist from knowledge of general or overall conditions, even if those conditions subsequently produced the specific condition). Departing from the individual propensity rule does not respect that fundamental principle.

III. Differences in individual animals demonstrate that horses, as a species, cannot be said to be "likely" to be mischievous or vicious to people.

Vendrella, attempts to conflate the terms "breed" and "species" to argue that the Court should judge the entire *species* of horses, while admitting to differences in the propensities of different *breeds* of given domestic species. Opening Brief, at pp. 12-14. Just as Vendrella admits that different breeds of dog (pit bull) and cat (Siamese), and cattle of different sexes (bull v. cow) tend to have vastly different propensities (*id.* at 16-17), so too the propensities of different ages, breeds and sexes (*i.e.*, "classes") of horse are different and must be individually judged. Vendrella assumes, without basis, that "breed," "class" and "species" all mean the same thing. They do not. *Restatement (Second) of Torts* §518, Comment g (1977) specifically recognizes that stallions are of a different "class" than geldings. Comment g then specifically states that "the characteristics that are normal to [the animal's] *class* are decisive," not its *species*. Thus, §518 acknowledges that a defendant may be charged only with knowledge of the propensities of a given "class" of domestic animal, not an entire species. *See, e.g.*, *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. 1991) (discussing propensities of a mature (age) Limousin (breed) bull (sex), not of cattle as a species); *Restatement (Second) of Torts* §518 Comment h ("Thus the keeper of even a gentle bull must take into account the tendencies of *bulls as class...*," not *cattle as a species*) (emphasis supplied). Even if a given horse could be judged by its *class*, it cannot be judged by its *species*. Here, there was no evidence that Scuppy was of a specific class of horse with a widely known propensity to cause mischief or be vicious.

Experts in horse behavior agree that multiple factors affect the likelihood that any particular horse will engage in any particular behavior. Generally, while genetic factors (breed and bloodline) may induce a certain "susceptibility" to engage in particular

behaviors, that susceptibility may be increased or decreased according to environmental factors such as age, management from an early age, housing, food, human interaction, social environment and training. M. Hausberger & M.A. Richard-Yris, *Individual Differences in the Domestic Horse, Origins, Development and Stability*, *in* The Domestic Horse: The Evolution, Development and Management of its Behaviour 47, 48 (Daniel Mills & Sue McDonnell eds. 2005);[12] *see also* Sue McDonnell, PhD, *Understanding Horse Behavior: Your Guide to Horse Health Care and Management* 31 (2002) (critical factors in most aspects of horse behavior are management, environment and interaction with people).

The fact that human interaction and training can alter or eliminate biting behavior (*e.g.*, Leslie Bayley & Richard Maxwell, *Understanding Your Horse* 72 (1996) [correction of biting during grooming]; McDonnell, *supra* at 49 [correction of "welcome" biting]) demonstrates that external factors, not species, determine the likelihood (*i.e.*, propensity) of any particular horse to bite. Similarly, biological factors resulting from how a horse is managed also influence horses' trainability, temperament and behavior. *See* McDonnell, *supra* at 30 (easier to train a gelding not to bite than a stallion). Because the likelihood that any given horse will bite a person petting it depends on a variety of factors specific to each individual horse, the Court should not depart from the individual propensity rule in horse-bite cases.

CONCLUSION

For all the above reasons, the Court should reverse the Appellate Court's order and direct the Superior Court to enter an order granting summary judgment in Astriab's favor.

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[12] This book is based largely around the talks presented at a 2002 conference the editors describe as "probably the greatest gathering in recent times of equine behavior and welfare scientists." Daniel Mills & Sue McDonnell, *Preface*, The Domestic Horse: The Evolution, Development and Management of its Behaviour, at xi (Daniel Mills & Sue McDonnell eds. 2005).

Respectfully submitted,

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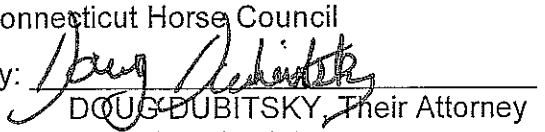
Connecticut Farm Bureau and
Connecticut Horse Council

By: 

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CERTIFICATION

In accordance with Practice Book Sections 62-7, 66-2, 66-3, 67-2, 67-3 and 67-4, I hereby certify that this document complies with said rules. I further certify that it is being served in accordance with Sections 62-7 and a copy of the above was sent via U.S. Mail on December 5, 2012 to all counsel of record, self-represented parties of interest and the trial judge.

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