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SUPREME COURT, STATE OF COLORADO
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

OPINION BY THE COLORADO COURT OF APPEALS
Judges Márquez and Fox; Judge Vogt, concurring in part and dissenting in part.
Case No. 14CA2494

Appeal from Adams County District Court
The Honorable Mark D. Warner, Judge
Case No. 13CV32771

Petitioner:

MARIA LOPEZ, individually and as mother and next friend to N.M. a minor child,

v.

Respondent:

ALEXANDER S. TRUJILLO.

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Case Number: 2016SC388

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PETITIONER'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

This Brief complies with C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

☒ It contains 9,095 words, exclusive of the Caption, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service and signature block, according to the word count of MS Word 2016.

☒ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

☒ I acknowledge that the Petition may be stricken if it fails to comply with C.A.R. 28 and C.A.R. 32, as provided by C.A.R. 57.

By: */s/ James H. Chalat*
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I. ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred by holding that a dog owner does not owe a duty of care to a child pedestrian who, frightened by the owner's dogs, ran into the street and sustained injuries from a passing vehicle.

II. STATEMENT OF THE CASE

A. Nature of the Case

This is a dog "no-bite" case. Ms. Lopez made fact-specific allegations in her Amended Complaint. She specifically alleged that two vicious and dangerous pit bull dogs, owned by the Respondent Alexander S. Trujillo, charged at and menaced her 8-year old son, N.M., while he was walking on the public sidewalk in front of Mr. Trujillo's house to a nearby elementary school playground. Trujillo's dogs charged at N.M. and jumped up on the 4-foot high chain link fence that ran adjacent to the sidewalk on which N.M. was walking. The dogs got up on the fence, rattled it and barked loudly at N.M. Thinking the dogs would continue and jump over the fence and physically hurt him, N.M. ran away from the dogs into the street and was struck and severely injured by a passing service van.

A sharp debate unfolded below within the panel of the Court of Appeals. The majority opinion of the divided panel of the Court of Appeals held that:

> Here, N.M., scared by the pit bulls, "darted from the sidewalk out into [the street]" and was struck by a service van. While the injuries were

> tragic, their likelihood was not foreseeable . . . We conclude it was not foreseeable to defendant that a passerby, startled by the dogs that were confined, would run out into the street into the path of moving vehicles. *Lopez v. Trujillo*, 2016 COA 53, ---P.3d---, 2016 WL 1385610 (April 7, 2016) ¶ 17, 19. (Appendix Exhibit 1)

Judge Vogt, dissenting, concluded:

> [I]t was eminently foreseeable that a child on his way to the elementary school across the street would be frightened when two 'large, vicious, loud-barking pit bulls' rushed up to and jumped up on the chain-link fence next to the sidewalk, and that the child would run into the street to get away from them.
> *Lopez*, ¶ 46.

This case presents a question of first impression in Colorado with respect to that issue of foreseeability and involves important policy issues of child, pedestrian and public safety regarding dangerous and vicious dogs in an urban setting. It also presents an opportunity to clarify the contours of Colorado law in such cases that arise under common law, rather than the strict liability provisions of the dog bite statute. C.R.S. § 13-21-124(6a). *Cf., Robinson v. Legro*, 2014 CO 40, ¶ 20. *See* CJI-Civ. 4th 13:1 (April 2016 Update) Notes on Use 3. ("There is some uncertainty as to the elements necessary to establish liability for injuries caused by a domestic animal with dangerous or vicious propensities.") *See also, Barger v. Jimerson*, 276 P.2d 744 (Colo. 1954).

The case pivots on the "foreseeability" issue. It controls the judicial determination of whether Trujillo owed a duty of care to protect pedestrians, on the

sidewalk adjacent to his yard, from his pit bulls. Colorado's existing framework for establishment of a duty in tort, and its well-established animal liability law, clearly support the conclusion reached in the dissent below. Petitioners ask the Court to hold that the reasoning and rationale of the dissent controls here.

B. Relevant Facts and Procedural History

On December 2, 2013, Maria Lopez sued Jeffrey W. Daniels and his employer, FMH Material Handling Solutions, Inc. (R. Court File, p. 8–13). The Complaint alleged that on August 5, 2013 Daniels was driving a 2010 Ford F-350 service van owned by FMH. He was southbound on the 7900 block of Kimberly Street in Adams County. The Dupont Elementary School is situated at the SE corner of 80th Avenue and Kimberly. It is a residential neighborhood. Owing to the nearby school and playground, Kimberly Street was clearly marked with a reduced speed limit of 20 MPH when children were present. As an employee who was dispatched to job sites, Daniels was permitted by FMH to drive its van to and from home. Mr. Daniels lived at 7911 Kimberly. (CF, p. 9, ¶ 7–13).

The Complaint further alleged that Ms. Lopez's son, N.M. (born October 25, 2004 in Adams County, CO) had run out onto Kimberly Street from between parked vehicles. Despite dry roads, good visibility, the speed limit sign allowing only 20 MPH when children are present, and the obvious presence of children in the

neighborhood, the Daniels/FMH van negligently struck N.M., after he ran out onto Kimberly Street.

The Complaint alleged that Daniels caused the accident by carelessness, failure to maintain a lookout, and/or excessive speed. (CF, 9–12).

Thus, the original Complaint framed a classic "dart-out" case. *See e.g. Pence v. Chaudet*, 428 P.2d 705, 706 (Colo. 1967), *Herness v. Goodrich*, 483 P.2d 412 (Colo. App. 1971) *after remand* 509 P.2d 1279 (Colo. App. 1973, not selected for official publication); *McSpadden v. Minick*, 413 P.2d 463 (Colo. 1966). Nonetheless, the original Complaint also alleged that N.M. had been frightened into the street by "a large dog in the fenced, front yard of the house," which "ran at" N.M., frightened him, and caused N.M. to run from the dog into the street. (CF, p. 9 ¶'s 7–14). *See also*, Colorado State Patrol Traffic Accident Report and drawing. (CF, p. 139–140).

On March 24, 2014, Mr. Daniels gave his deposition. He testified that on the afternoon of August 5, 2013 he was headed to his home at 7911 Kimberly Street. Daniels testified that he knew that "Alex" (Respondent, Mr. Alexander S. Trujillo) lived at 7920 Kimberly and that Mr. Trujillo owned two pit bulls which he kept in his yard. Daniels had previously seen the dogs jump on the four-foot fence, rattle it, and bark loudly at pedestrians as they walked past Trujillo's home.

Q. [by Mr. Hatten] And can you describe that dog for me?
A. [by Mr. Daniels] It's white, kind of looks like a pit bull

sort of dog. White with black spots, I think. And then there's a brown one. He owns two dogs.
Q. Okay.
A. There's like a brown one that looks like a pit bull also type of dog.
Q. And describe the brown one, the size.
A. Probably about -- they're medium-sized dogs. About -- I don't know. I want to say 3 feet tall, maybe. 2, 2 or 3, somewhere in there.

19

Q. Have you ever seen the dogs come and jump on the fence?
A. Yes.
Q. And had you seen those dogs do that prior to August 5, 2013.
A. Yes.

20

Q. Are you able to hear those dogs barking from your house?
A. Yes.

21

Q. And what about your observation of the brown dog?
A. It's the same. It just barks.
Q. At passersby?
A. Yes.
Q. And how long have those dogs been at that property, to your knowledge?
A. The whole time that they've been there, Alex has lived there.
Q. And how long has Alex lived there?
A. A couple years.
Q. So sometime in 2012?
A. Yeah.

14 Q. And do the dogs typically bark at every
15 one who passes by?
16 A. Yeah.

48

13 Q. Would the dogs jump up on the fence --
14 A. Yes.
15 Q. -- and bark?
16 A. Yes.
17 Q. And when they would jump up to the fence,
18 how high could they reach? Could they reach the top?
19 A. Yes.
20 Q. The railing?
21 A. Yes.
22 Q. Both dogs?
23 A. Yes.
24 Q. Would the fence rattle?
25 A. Yes.
(CF, p. 37–39, 141–142)

Armed with that good-faith basis—that the dogs would "typically bark at every one who passes by… jump up on the fence … reach the top… railing [and] rattle" the fence—Lopez moved without opposition on February 12, 2014 to amend her complaint and add Trujillo as a defendant. (CF, p. 42–51).

The trial court granted Lopez's motion to amend the complaint on April 24, 2014. (CF, p. 52).

The *Twombly*[1]*/Iqbal*[2] "plausibility standard" was adopted by this Court in *Warne v. Hall*, 2016 CO 50, ¶ 24, 373 P. 3d 588, 594 (June 27, 2016). *Warne* suggests that the new standard applies retroactively. *Semler v. Hellerstein*, 2016 COA 143, ¶ 26. The Amended Complaint and Jury Demand (hereinafter: Amended Complaint) passes muster under *Warne*, (CF, p. 42–51, the Amended Complaint is attached as Appendix Exhibit 2).

Ms. Lopez's Amended Complaint alleged the following: Trujillo owned two vicious and dangerous pit bulls. (Amended Complaint, CF, p. 42–51, ¶'s 12, 18 & 37). The pit bulls rushed across Trujillo's front yard *at* N.M. *Id.* at ¶ 12. the dogs jumped onto the 4-foot fence immediately adjacent to the sidewalk. *Id.* They barked at N.M. and rattled the fence. *Id. N.M. thought the dogs would jump over the fence and injure him*. *Id. at* ¶ 13. Thus, the root cause of the accident, as alleged in the Amended Complaint, was that the dogs had charged at N.M., gotten up on the fence, and due to their aggressive and menacing behavior, N.M. had run into the street out of fear for his safety. Amended Complaint, *passim.* Lopez further alleged that Trujillo knew or should have known that his dogs were dangerous and vicious. *Id.* at ¶'s 12, 18 & 37, and that he knew or should have known that children walked

[1] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, (2007)
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)

along the public sidewalk in front of his house to access the playground across the street at Dupont Elementary School. *Id.* at ¶ 38.

The Amended Complaint further alleged that Mr. Trujillo had a duty to exercise reasonable care to control his vicious and dangerous pit bulls so as not to frighten, threaten or harm others or cause others to harm themselves while attempting to flee from the charging pit bulls. Trujillo breached his duty to exercise reasonable care to prevent his dogs from threatening and frightening pedestrians walking in front of his house. (*Id.* at ¶ 37–39).

Mr. Trujillo filed a C.R.C.P. 12(b)(5) motion to dismiss. (CF, p. 64–74, 88–99). Lopez objected. (CF, p. 46, 108–143).

C. Judgment and Ruling Under Review

On July 24, 2014, the district court granted Trujillo's motion to dismiss. (CF, p. 152–160). The district court concluded that Trujillo owed no duty to N.M. because: "Trujillo could not reasonably foresee that his dogs' barking or lunging at his fence would cause [N.M.] to be so frightened that he would run into the street and get hit by a car." (CF, p. 156).

On December 16, 2014, following probate court approval, Lopez settled with Daniels and FMH, and, with a final judgment in hand, timely appealed the dismissal of her and N.M.'s claims against Trujillo. (CF, p. 173–178).

A divided panel of the Court of Appeals affirmed dismissal of the negligence claims against Trujillo. *Lopez, supra*.

A timely Petition for Certiorari was filed on May 18, 2016. The Petition was granted on October 3, 2016.

III. SUMMARY OF ARGUMENT

The court below misapplied Colorado law on determination of duty, which is that:

> In determining whether the law imposes a duty on a particular defendant, many factors are to be considered. These factors may include, for example, "the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the [defendant's] conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the [defendant]. *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987) (citations omitted).

Duty is "'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection.'" *Westin Operator, LLC v. Groh*, 2015 CO 25, at ¶ 25, quoting, *Univ. of Denver v. Whitlock*, 744 P.2d 54, at 57 (Colo. 1987).

The majority below misapplied the role of foreseeability as an element of the duty analysis. *Taco Bell*, 744 P. 2d at 46. *Westin* at ¶ 38–39. Specifically, the majority deviated from the doctrine which expressly distinguishes foreseeability in the duty analysis from causation. Foreseeability in the duty analysis only requires

that harm be foreseeable. The fact-specific proximate cause determination is reserved for the jury. *Westin*, at ¶¶ 38–39. The court below also misapplied the social utility and cost-benefit factors set out in *Taco Bell.*

Second, the trial court dismissed Lopez's claims against Trujillo on a motion under Rule 12(b)(5). The court below erred when it affirmed the dismissal. The Amended Complaint passed the retroactive fact-specific/plausibility test under *Warne*.

In these proceedings, alleged *evidentiary facts* (as distinguished from ultimate facts or legal conclusions) must be accepted as true. *Warne* at ¶ *27.* The non-moving party, even under *Twombly/Iqbal,* is still entitled to the benefit of reasonable inferences from the fact-specific allegations.

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing/negligence, etc.] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."
>
> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, (2007); *Robbins v. Oklahoma*, 519 F. 3d 1242, 1247–1248 (10th Circ. 2008).

To support its order of dismissal, the majority below improperly drew adverse inferences against Lopez. These inferences concerned: whether the dogs were

appropriately confined; whether N.M. should have stepped away from the dogs instead of running into the street; and, whether the pit bulls' behavior was common for all dogs.

Third, the majority opinion erred by disregarding Colorado's long-standing liability elements under the "vicious and dangerous" animal doctrine as articulated by CJI-Civ. 4th 13:1 2013. The allegations as to the propensities of Trujillo's dogs, and his knowledge thereof, were clearly alleged in the Amended Complaint. (CF, p. 44 ¶ 19). "The danger to mankind and the injury, if any is suffered, comes from . . . the ferocity of the animal." *Melsheimer v. Sullivan*, 27 P. 17, 18 (Colo. Ct. App. 1891) *citing*, *Laverone v. Mangianti*, 41 Cal. 138, 139 (1871).

The vicious and dangerous animal doctrine has particular vitality in "no-bite" cases, because it falls outside the parameters of the dog bite statute. C.R.S. § 13-21-124(6a). People can be hurt just as badly in a no-bite case as they would be if they were bitten; and this case is an excellent example of that simple fact. N.M. could have suffered equally devastating injuries if he had "stood his ground" at the 4-foot fence, only to have the dogs come over it and onto him. Instruction 13:1 remains good law. *Fishman v. Kotts*, 179 P.3d 232 (Colo. App. 2007).

IV. ARGUMENT

A. The court below erred in its finding that Trujillo owed no duty to N.M. The heart of the error lay in the misapplication of the foreseeability of harm test which governs Colorado's law of duty. The court below also erred in its analysis of the social utility and cost-benefit factors in the *Taco Bell* duty analysis.

1. Standard of Review

Whether a defendant owes a legal duty to a plaintiff is an issue of law. *Westin,* at ¶18, 347 P.3d 606, 611 (2015); *University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987).

This Court reviews "a dismissal for failure to state a claim under C.R.C.P. 12(b)(5) *de novo* and applies the same standards as the trial court." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 16 (*citing*, *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010)).

What in the Amended Complaint should a court look to in its review under *Taco Bell* and *Westin*? "It is said that ultimate fact is a conclusion by reasoning on evidentiary facts, and that evidentiary fact is acquired by the senses, i.e., sight, hearing, taste, etc." *Warne* at ¶ 22. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and second, "only a complaint that states a plausible claim for relief survives a motion to dismiss," *Warne* at ¶ 9.

Warne did not dilute the doctrine that in proceedings on a motion to dismiss the allegations of evidentiary facts must be accepted as true. The Court must disregard naked legal conclusions or allegations of unsupported ultimate facts. "It is particularly important in such circumstances that the complaint makes clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her." *Robbins v. Oklahoma*, 519 F.3d 1250.

But still, in "assessing a C.R.C.P. 12(b)(5) motion to dismiss, courts liberally construe the pleadings and resolve all doubts in favor of the pleader." *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 859 (Colo. App. 2007). *Accord*, *Robbins*, *supra* at 1251.

2. Preservation of the Issue

On May 30, 2014, Trujillo moved to dismiss Lopez's Amended Complaint pursuant to C.R.C.P. 12(b)(5). (CF, p. 64–74). Trujillo specifically moved to dismiss Lopez's claims for negligence because "Trujillo owed no duty to Plaintiffs." (CF, p. 69).

On July 10, 2014, N.M. responded. (CF, p. 108–142).

The District Court granted Trujillo's Motion to Dismiss on July 24, 2014. (CF, p. 152–160.). The trial court found that "Trujillo owes no duty to plaintiff [N.M.] as a matter of law" and dismissed the negligence claim. (CF, p. 157).

Lopez appealed this ruling, and the Court of Appeals affirmed, holding: "the trial court did not err in concluding that defendant did not owe N.M. a duty of care as plaintiffs alleged." *Lopez* at ¶ 31. No party argued, at any stage of the proceedings, the *Warne* standard. The fundamental question of the dismissal was resolved on duty.

3. Analysis

a. To establish a duty, the plaintiff need only show, from the evidentiary facts alleged, that harm was foreseeable. It is not necessary to show that the entire chain of events would be foreseeable to the defendant.

"Where damage is to be foreseen, there is a duty to act so as to avoid it." *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980).

The majority opinion concluded "that the Taco Bell factors do not support a determination that defendant owed a duty to N.M." *Lopez* at ¶ 15. Its core ruling hinged on the finding that "[w]hile the injuries were tragic, their likelihood was unforeseeable." *Lopez* at ¶17. Here was the error. The majority below erroneously held that the defendant would be required to anticipate the entire chain of events: "it was not foreseeable to defendant that a passerby, startled by the dogs that were

confined, would run out into the street into the path of moving vehicles." *Lopez* at ¶ 19.

To the contrary, however, to establish a duty, it is not necessary that the tortfeasor foresee the exact nature and extent of the injuries or the precise way the injuries occur, but only that some injury will likely result in some manner because of his negligent actions or inactions.

> To establish that an incident is foreseeable, it is not necessary that [a tortfeasor] be able to ascertain precisely when or how an incident will occur. Rather, foreseeability "includes whatever is likely enough in the setting in modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."
> *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002) *quoting Taco Bell v. Lannon*, 744 P.2d 43, 48 (Colo. 1987) and 3 Fowler Harper et al., *The Law of Torts* § 18.2, at 658–59 (2d ed.1986).

In *HealthONE,* the chain of events was much more complex and involved many more variables and obstacles than the comparatively simple accident here. In *HealthONE,* an anesthesiologist (Dr. Ogin) left a partially used vial of phenol, wrapped in aluminum foil in a plastic bag labeled with the previous patient's name and the date, and secured the vial in a *locked* compartment in the nerve block cart. This was in disregard of *HeatlhONE*'s "single-dose policy" requiring doctors to discard any medication remaining after administration. Three weeks later, when Mr. Rodriguez was admitted for a nerve block procedure, the same cart was brought to the procedure room and the partially used vial of phenol was removed from the

locked compartment, removed from the plastic bag, unwrapped, and placed on top of the cart to be at hand in the procedure room. Then, an anesthesiologist (Dr. Barton), intending to inject guanethidine into Mr. Rodriguez, instead picked up the partially used vial of phenol and, without reading the label first, injected Mr. Rodriguez with phenol, which caused severe injuries to Mr. Rodriguez. *HealthONE*, at 885.

Rodriguez sued Dr. Ogin who argued that the chain of events was so attenuated and unforeseeable that he had no duty to Rodriguez. Nonetheless, this Court held that:

> [I]n order for an injury to be a foreseeable consequence of a negligent act, it is not necessary that the tortfeasor be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur, but only that some injury will likely result in some manner as a consequence of his negligent acts.
>
> *HealthONE, 50 P.3d* at 889.

Likewise, in *Westin,* the chain of events leading up to the injuries was far more remote in time and involved events significantly more attenuated from the Westin hotel employees to whom this Court attached the duty. There, the hotel guests were evicted from the hotel because of their rowdy, drunken behavior. They overloaded a car, failed to buckle up, drove while intoxicated onto I-25, and then crashed into another vehicle that was also arguably driving negligently. *Westin Operator, LLC v.*

Groh, 2015 CO 25, 347 P.3d 606 (2015) *affirming Groh v. Westin Operator LLC*, 2013 COA 39, 352 P.3d 472 (2013).

In *Westin*, the court was dealing with the full record on summary judgment. This included numerous depositions, video tapes, documents, and electronic evidence. Nonetheless, the court boiled down the foreseeability question to: "[a] reasonable person could foresee that a group of intoxicated individuals evicted from a hotel might be involved in a drunk driving accident that causes injuries." *Westin*, 2015 CO 25 at ¶ 35.

In the case before the Court, the process is much simpler, and instantaneous, than the chain of events in either *HealthONE* or *Westin*. Two vicious dogs startled a child who, in fear for his physical safety, ran away and was injured in the process. In her dissent, Judge Vogt accurately noted:

> [I]t was eminently foreseeable that a child on his way to the elementary school across the street would be frightened when two 'large, vicious, loud-barking pit bulls' rushed up to and jumped up on the chain-link fence next to the sidewalk, and that the child would run into the street to get away from them. *Lopez*, ¶ 46.

To support its conclusion, the dissent noted that similar cases have occurred in which a child was frightened into the street by a dog:

> Similar fact patterns have been described in cases from other jurisdictions. *See Brandeis v. Felcher*, 211 So. 2d 606, 606-09 (Fla. Dist. Ct. App. 1968) (children walking on sidewalk abutted by four-foot chain-link fence became frightened when two German Shepherds

> barked, ran at fence, and one dog put paws and head over fence; one child darted into street and was killed when struck by an oncoming car); *Marchand v. York*, 624 So. 2d 440 (La. Ct. App. 1993) (twelve-year-old girl, frightened by dogs who barked at her, ran into street where she was hit by car); *Moore v. Myers*, 868 A.2d 954, 969 (Md. Ct. Spec. App. 2005) ("Monica's flight from a barking and advancing pit bull was foreseeable. That she fled into the street and into the path of an on-coming car was a foreseeable consequence of her fright. That Jaton may not have foreseen the specific nature of the harm that befell Monica is inconsequential."); *Neulist v. Victor*, 209 N.E.2d 494 (Ohio Ct. App. 1965) (two dogs frightened eight-year-old girl riding her bicycle on public sidewalk, causing her to run into the path of an automobile which struck and injured her). Although these cases may involve different theories of liability and are otherwise distinguishable, the fact that they all involve situations where children frightened by dogs have run into the street and been hit by cars supports a conclusion that such injury is in fact foreseeable. *Lopez* at ¶ 46 (Vogt, J., concurring in part, dissenting in part); *Compare*, ¶ 25–29 (Op. by Marquez, J., Fox, J., concurring).

Judge Vogt's point was that there are other cases in which children, frightened by dogs and trying to get away from the threat of harm, have gotten into a street and been hit by cars. The precise mechanism of the harm that befalls the frightened child is not a core issue in the duty analysis but is for the jury as a matter of proximate cause. *See also*, *Farrior v. Payton*, 57 Hawaii 620, 562 P.2d 779 (1977) (A dog chased the plaintiff off a cliff, the court held negligence and causation were for the jury). *Chambliss v. Gorelik*, 191 N.W. 2d 34, 34 (Wis. 1971) (Fourteen-year old boy was struck by a car when he ran into a street to escape the pursuit of a dog). *See e.g*., *McCrackin v. McKinney*, 183 S.E. 831 (Ga.App., 1936) (wrongful death of a 6-year

old "greatly frightened" by a dog "darted off the edge of the sidewalk directly into the path of the automobile.") *Henkel v. Jordan*, 644 P.2d 1348, (Kan.App., 1982) (self-identifies itself as a "dog-fright" case, where a dog menaced a bicyclist and caused him to fall). *See, Liability of Dog Owner For Injuries Sustained By Person Frightened By Dog*, 30 A.L.R.4th 986 (Originally published in 1984).

Of all the no-bite, or "dog-fright" cases, the one most on point is *Machacado v. City of New York*, 80 Misc.2d 889, 365 N.Y.S.2d 974 (N.Y.Sup.Ct.1975). In *Machacado*, the plaintiff's case hung on the question of duty:

> The plaintiff was walking on a sidewalk adjacent to the property owned by the defendant which was separated from the public way by a cyclone fence. The walk was covered with snow, a storm having abated several hours earlier. Suddenly there emerged a German Shepherd dog from behind a brick wall within the property where moments before it had been concealed, silent and unnoticed. Charging furiously the dog hurled itself at the fence, snarling and barking angrily at the plaintiff. Startled and terrified, the plaintiff moved back instinctively to avoid what she believed to be an imminent attack by a ferocious animal. Fortunately, the fence contained the growling dog thereby preventing physical contact with the frightened plaintiff. In her sudden and quick move, however, she fell and injured herself. She now brings suit against the defendant-owner of the dog and The City of New York.
>
> *Machacado v. City of New York*, 365 N.Y.S.2d at 975–976.

Machacado addressed the same contentions made by Trujillo: foreseeability, no contact by the dog, that a fence restrained the dog. The New York court, nevertheless, held that "[e]xperience and common sense dictate that a person,

believing [him or] herself to be in imminent danger of attack by a feral animal, will take immediate and precipitous action to avoid injury." *Machacado* at 976.

Foreseeability is an integral element of duty. Foreseeability is also a "touchstone" of proximate cause. The former is a question of law for the court; but the second is a question of fact for the jury. *Westin*, ¶ 15–19. The Court of Appeals incorrectly employed a foreseeability analysis as if it were undertaking a proximate cause determination, and therefore required Trujillo to foresee the precise mechanics of the accident—that N.M., startled by the dogs, would run into the street, rather than stepping away from the dogs or recognizing that the fence protected him. Foreseeability, in the context of a duty analysis, requires only that harm be foreseeable. The precise mechanics of whether it was foreseeable for N.M. to suffer any particular harm is a proximate cause issue for the jury.

Directly on point here, the majority opinion suggests that if N.M. had but stepped back and had tripped or fallen, as was the case in *Machacado*, N.M.'s accident would have been foreseeable. *Lopez* ¶ 18–19. This is a nuanced fact question for the jury. As the Court found in *Westin*, it was for the jury to consider whether the chain of causation was broken when Groh walked by two cabs, got into a car without seats for all passengers, failed to buckle up and allowed an intoxicated companion to drive; and as in *HealthONE* it was left to a jury whether Dr. Ogin's

negligent failure to dispose of the vial of Phenol was, three weeks later, a cause of harm to Mr. Rodriguez.

The Court of Appeals incorrectly fused the distinct legal applications of foreseeability into an unprecedented single analysis.

"In a highly fact-specific case like this one, the appropriate means of addressing limits on liability lie not in the articulation of the duty that exists, but in the application of causation principles." *Westin* at ¶ 38–39. It was error for the Court to conflate the foreseeability analyses as to both duty and proximate cause, and thus usurp a quintessential jury issue—causation.

b. Colorado employs a five-part standard for determining whether a duty exists. Foreseeability is the major factor, but the court must also consider four other social-utility elements in its analysis. The court misapplied the foreseeability analysis, and it also erred in finding the other elements favored the defendant.

Although foreseeability is a critical factor in the duty determination, the court must also consider other factors. These other social/policy considerations assist the Court with the question of whether a duty should be imposed in a case and in the Court's determination of whether a duty will be imposed based upon the overarching mandate to effect fairness under contemporary standards. *Taco Bell*, 744 P. 2d at 46.

In addition to the element of foreseeability, discussed above, the Court should consider: 1) the risk involved in the activity, 2) the likelihood of injury as weighed against the social utility of the defendant's conduct, 3) the magnitude of the burden of guarding against injury or harm and 4) the consequences of placing the burden upon the defendant. *Id*. The list of considerations (including foreseeability) was not intended to be exhaustive and no one of them was supposed to control. GRUND & MILLER, 7 COLO. PRAC., PERSONAL INJURY TORTS AND INSURANCE § 10:5 (3d ed.). *See also,* RESTATEMENT (SECOND) OF TORTS, Ch. 12, Topic 3 B., "Factors Important in Determination of Standard of Reasonable Conduct," §'s 289–293 (1965).

The majority and dissent both analyzed these policy considerations and came to diametrically opposed conclusions. *Lopez*, ¶15–¶31, ¶42–¶52.

The majority wrongly concluded that the risk of Mr. Trujillo's pit bulls to pedestrians on the sidewalk was minimal because the dogs were "appropriately confined by a fence". *Lopez,* ¶ 30. Although the majority noted that the fence was a "four-foot-high chain-link fence," the majority did not consider that Trujillo's home was across the street from an elementary school playground. And, the majority failed to consider the Amended Complaint's allegations the pit bulls charged *at* N.M., that the dogs would habitually run to the fence, jump on and rattle it, and bark at passersby, and that N.M. thought the dogs would come over it and cause him

physical harm. Kimberly Street at this location is a residential neighborhood with busy traffic. Given the evidentiary fact-specific allegations, which must be taken as true, it is a highly plausible risk that these animals would cause some type of harm.

"Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." RESTATEMENT (SECOND) OF TORTS § 291 (1965). This element requires the court to weigh the "magnitude" of the risk. This is the equivalent of the severity of the harm, or the cost to the victim. Another element requires that the severity of the risk be measured against the magnitude of the burden to the defendant. It is the same analysis, only framed from a different perspective. Nonetheless, the Restatement requires, and this Court should consider, how badly someone may be hurt as an element of the consideration of just how much risk of harm can be tolerated. *Westin*, ¶ 35; *Taco Bell* 744 P.2d at 49 (explaining that "[a]s the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.").

Regarding the social utility of Mr. Trujillo's ownership of two dangerous and vicious pit bulls, the majority relied upon the proposition that keeping a pet dog is a "cherished" property right. *Lopez* at ¶ 21. "That position may be conceded, and it

may also be conceded that he has the same right to keep a tiger." *Melsheimer v. Sullivan*, 1. Colo. App. 22, 26 (1891) (internal quotation marks and citation omitted). However, to reach this conclusion the majority overlooked the allegations in the Amended Complaint relating to the temperament of the dogs. The dissent correctly pointed out that once the evidentiary fact allegations underpinning the conclusory fact that the dogs were vicious and dangerous is taken as true, the Amended Complaint invoked the dangerous and vicious dog doctrine of strict liability. The dissent and the majority reviewed statutory and municipal enactments concerning vicious dogs in general, and pit bulls in particular. *Lopez*, ¶ 30. Convincingly, however, the dissent pinpointed the social policy to consider when undertaking a duty analysis. "Dangerous dogs are a serious and widespread threat to the safety and welfare of citizens." *Lopez* ¶ 48 *citing*, C.R.S. § 18-9-204.5(1)(a); Adams County Ordinance No. 6, Art. V, § 5–7. Ownership of a dog does not implicate fundamental rights such as speech or association. *Colorado Dog Fanciers, Inc. v. City & Cty. of Denver By & Through City Council*, 820 P.2d 644, 651 (Colo. 1991) (Denver's "pit bull" ordinance held constitutional with certain portions severed and modified.)

Moreover, the majority disregarded the potential magnitude of the injuries which N.M. potentially could, and did, suffer. *Lopez* ¶ 22, 30. *See e.g., Westin* ¶ 34. N.M. sustained grievous injuries including a complex and extensive degloving injury

of his left leg, multiple fractures to his left leg and left arm, a closed head injury, and internal injuries. N.M. underwent multiple operative treatments for irrigation and debridement of his left leg injuries and numerous surgical procedures; his original hospitalization at The Children's Hospital lasted 24 days. (CF p. 44 ¶ 20).

The overall gravity of the harm which can and in this case, did result from a child running away from Trujillo's pit bulls, certainly outweighs the social utility of owning these dogs. A jury could find that a higher fence, over which N.M. would have no fear that a dog could jump would certainly be less costly than the medical care and permanent injuries sustained by N.M. Surely, the harm in this case outweighs whatever social utility can be had from gratifying a "cherished right" to own a dog.

This element is closely tied to the third and fourth elements, which concern 3) the magnitude of the burden of guarding against injury or harm and 4) the consequences of placing the burden upon the defendant. We are not suggesting that Trujillo place "armed guards" at his property. *Taco Bell* 744 P. 2d at 46. Simply tethering his dogs or muzzling them or keeping them inside would be easy ways for a jury to conclude that Trujillo could have prevented the pit bulls from frightening children. But these arguments are best left to the finder of fact rather than making presumptions based solely on evidentiary allegations of the complaint. Based upon

the allegations, especially the vicious and dangerous tendencies of these animals, the cost and burden is certainly minimal to protect from being menaced those children who are lawfully walking on the sidewalk to a nearby school.

Thus, in addition to the foreseeability of harm in the case, the social utility factors weigh in favor of Lopez and N.M. A duty of care was owed by Trujillo to the plaintiffs.

B. The Evidentiary Allegations of the Amended Complaint and all Reasonable Inferences therefrom must be taken in *favor* of the plaintiffs

1. Standard of Review

This Court reviews "a dismissal for failure to state a claim under C.R.C.P. 12(b)(5) *de novo*, and applies the same standards as the Trial Court." Colorado *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In federal practice, the rule is the same, "In reviewing the complaint, we accept all facts pleaded by the non-moving party as true and grant all reasonable inferences from the pleadings in favor of the same," *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (citations omitted). "Our version of Rule 12(b)(1) is identical to Fed.R.Civ.P. 12(b)(1), and C.R.C.P. 12(b)(5) is identical to Fed.R.Civ.P. 12(b)(6). Accordingly, we look to federal authorities for guidance in construing our rules."

Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 924 (Colo. 1993) *citing*, *Lucas v. District Court*, 140 Colo. 510, 517, 345 P.2d 1064, 1067 (1959).

In federal court, the complaint must not contain "[d]etailed factual allegations." However, Fed.R.Civ.P. 12(b)(6) does call for sufficient factual matter, accepted as true, to "state a claim to *relief that is plausible on its face*," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In *Warne* at ¶ 5(emphasis supplied).

Warne ruled that Colorado state court practice would henceforth depart from the so-called "no set of facts" standard set by *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. Legal conclusions can provide the complaint's framework, but must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, *supra. Twombly*, *supra.*

2. Preservation

Warne had not been decided at the time of the proceedings below. However, the Amended Complaint, Motion to Dismiss, and particularly the Order entered by the District Court to dismiss Lopez's negligence claims are nonetheless detailed enough to be reviewed under the "plausibility standard." Trujillo essentially invoked the plausibility standard by arguing to the District Court that it should apply its experience and common sense: "A reasonable person would not recognize Trujillo had a duty to the pedestrian Plaintiffs to prevent his dogs from running, jumping, or putting their paws up on the fence in their own securely fenced yard—from essentially just being dogs." (CF, p. 95). Of course, Lopez argued that her well-pleaded Amended Complaint alleged specifically that the Trujillo pit bulls did not appear to be "securely" fenced in, that they did not merely run and jump and put their paws on the fence. (CF, p. 115). The District Court concluded that the Amended Complaint should be dismissed, not because of a lack of plausibility, but because the well-pleaded facts did not support a duty. (CF, p. 152–160). However, the District Court did note that it "is not required to accept as true legal conclusions couched as factual allegations." (CF, p. 153). Both the majority and the dissent below applied the "no set of facts to sustain the claim" standard. "While motions to dismiss for failure to state a claim are viewed with disfavor, they may properly be granted where

it appears beyond doubt that the plaintiff can prove no set of facts to sustain the claim." *Lopez*, ¶ 6, 42. *Citing*, *Hewitt v. Rice,* 119 P.3d 541, 544 (Colo. App. 2004), *aff'd*, 154 P.3d 408 (Colo. 2007).

3. Analysis

Although this Court has "jettisoned," the "no set of facts" standard in the determination of the dismissal of a complaint, in favor of the "plausibility on its face" standard, the Amended Complaint stands up to scrutiny under the modern rule articulated by *Warne*, "[w]hether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. This "common sense" test works hand in hand with the duty analysis which requires a court to determine whether to impose a duty comports with judicial notions of "fairness under contemporary standards." *Taco Bell* 744 P. 2d at 46.

The *Twombley/Iqbal/Warne* standard did not however, jettison the rule that the non-moving party is entitled to all reasonable inferences from the evidentiary allegations made in the complaint. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, supra.*

Under this doctrine, the majority below erred when it characterized the conduct of N.M., the behavior of the dogs, and whether Trujillo acted reasonably. For instance, the majority found: "The dogs were *appropriately* confined by a fence." *Lopez* ¶ 30 (emphasis added). As to N.M.'s conduct, the majority found: "Here, *however, N.M. did not step back from the barking dogs but* ran off the sidewalk and into the street." *Lopez* ¶19 (emphasis added). And as to the dogs' behavior the majority concluded: "barking or jumping against the fence … such activities are *quite common* for a dog." *Lopez* ¶ 20, *citing Nava v. McMillan*, 176 Cal. Rptr. 473 at 476 (Cal. Ct. App. 1981) (emphasis added).

The fact-specific allegations of the Amended Complaint are, however, to the contrary. Ms. Lopez's Amended Complaint alleged that Trujillo's home is across the street from an elementary school; the dogs were large, vicious, and loud-barking pit bulls. The Amended Complaint alleged that the pit bulls rushed *at* N.M. without provocation and, that N.M. thought the dogs were going to jump over the fence and hurt him. These fact-specific allegations must be taken as true at this stage in the proceedings, and the inferences taken therefrom must be favorable to Lopez and N.M., not in favor Trujillo, or nuanced to fit a court's, albeit well-intentioned, findings. Again, from the dissent: "whether the dog owner in this case had a duty to do more than he did is a question for the jury." It would likewise be for the jury to

determine whether issues of contributory negligence or causation would reduce or preclude any recovery by plaintiffs in this case." *Lopez*, ¶ 52.

In *Taco Bell*, this Court held that the evidence of ten armed robberies at this particular Taco Bell restaurant in the three years prior to the incident at issue in this case sufficiently established that harm to customers as the result of criminal acts by third persons was foreseeable by Taco Bell. *Taco Bell* 744 P. 2d at 48.

Arguably, being able to foresee criminal acts by third persons would be more unpredictable (and therefore unforeseeable) than the conduct of one's own dogs whose temperament, history, and pre-disposition to bark and menace pedestrians were alleged to have been known to their owner.

We alleged Trujillo had actual knowledge of previous incidents in which his two pit bulls frightened others by rushing the fence, barking loudly in a threatening manner, and jumping up on and rattling the fence while Defendant Trujillo was present. (CF, p., 44, ¶ 19).

In *Taco Bell* the record showed that police officers testified that the store was in a "high crime area." The Court considered the evidence of prior robberies, the security practices among other nearby fast food restaurants, and evidence of the manager of the Taco Bell. *Taco Bell* 744 P. 2d at 44–45. Each of these elements has a factual corollary in the Amended Complaint's allegations in this case:

geography—a nearby school—and prior similar events as alleged upon a good faith basis supported by testimony from Mr. Daniels regarding the dogs habitual menacing of pedestrians.

Thus, the District Court's inference that the dogs "lunged," at N.M. should be accepted as true. (CF, p. 156). That N.M. thought that the dogs would get over the fence and hurt him should be accepted as true, particularly in view of the evidence of the dogs' size (2–3' tall per Mr. Daniels) (CF, p. 37–39, 141–142) and their vicious propensities. (CF, p. 43, ¶ 12) ("…jumped up on and rattled the four-foot-high chain link fence…").

Here, the case involves fact-specific allegations of Trujillo's knowledge of his dogs' vicious and dangerous propensities. The Amended Complaint was sufficient even under the more stringent test imposed by *Warne.* As the dissent noted, it was "eminently foreseeable," under the alleged facts that a child would be terrified of two charging pit bulls, and run away from the dogs into the street. *Lopez* ¶ 46.

C. CJI-Civ. 13:1 properly sets out the elements of liability in a claim against owners of vicious and dangerous dogs for injuries caused by their dogs' behavior.

1. Standard of Review

This Court should exercise *de novo* review of the conclusions of law reached by the Court below and its order to dismiss. *Kreft v. Adolf Coors Company*, 170 P.3d

854, 857 (Colo. App. 2007). *See also Legro v. Robinson*, 2012 COA 182, ¶ 9, *aff'd but criticized*, 2014 CO 40, ¶ 9; *Paris ex rel. Paris v. Dance*, 194 P.3d 404, 406 (Colo. App. 2008).

2. Preservation

CJI-Civ. 13:1 was considered in the District Court's order. (CF, p. 155). The Court of Appeals held that "pattern jury instructions are not law." *Lopez* ¶ 23–24. The dissent reasoned that 13:1 was instructive as it had been employed by a division of the Court of Appeals in a non-bite case. *Lopez* ¶ 44, Citing, *Fishman v. Kotts*, 179 P.3d 232 (Colo. App. 2007).

3. Analysis

"The responsibility of parties, by the keeping of an animal of that character, knowingly, for injuries inflicted, is so well established that the citation of authorities is unnecessary." *Hornbein v. Blanchard,* 35 P. 187, 188 (Colo. Ct. App. 1893).

A "dangerous dog" is defined by Colorado statute to be any dog that demonstrates "tendencies that would cause a reasonable person to believe that the dog may inflict bodily or serious bodily injury upon or cause the death of any person or domestic animal." C.R.S. § 18-9-204.5(II). *Roalstad v. City of Lafayette*, 2015 COA 146, ¶ 37.

"If there is any significant trend discernable, it is the extending of the definition of vicious propensity to include less offensive kinds of canine conduct." Robert B. Yegge, Note, *"Dog's Bill of Rights,"* 34 DICTA 178 at 181 (May–June 1957) Fn. 27 & 28.

In support of his finding, Dean Yegge cited a Pennsylvania and a Louisiana case.

> We think one instance may show such unmistakable evidence of a vicious propensity as to make the owner of the dog, with notice, liable for any subsequent act of a similar character. The gist of the action for the subsequent misconduct of the dog, is for keeping it after knowledge of its vicious propensity.
> *Darby v. Clare Food & Relish Co.*, 170 A. 387 (Pa. Super. Ct. 1934) *Darby, supra at* 539. Internal citations omitted.

> [W]hen a domesticated animal suddenly and without previous warning of its vicious nature, commits injury, the owner or harborer of such an animal is not liable; but, if there be any occurrence, one or many, in the past history of the animal sufficient to place the owner or harborer of the animal on notice that it is vicious or dangerous, then he is liable for the animal's torts. *Peyronnin v. Riley*, 132 So. 235, 236 (La. Ct. App. 1931)

Support for Dean Yegge's observation can be found in *Barger v. Jimerson*, 130 Colo. 459, 276 P. 2d 744 (1954). There, the court noted specific evidence that a dog's behavior of barking and lunging on the fence was evidence of a dangerous and ferocious nature in a dog:

> At the trial before a jury many witnesses testified to the effect that the dog appeared to have a ferocious nature and when anyone appeared,

> would *commence barking and run to and lunge on the fence*. If anyone desired to enter the premises from the rear, it was necessary to call the owner who would come and hold the dog, as is illustrated by the calls of the meter reader who testified to that effect. Plaintiff testified that whenever she went into her back-yard, which was several times a day, the *dog always barked and would come tearing toward her and jump onto the fence*, even though she tried to calm it by talking to or appearing to be kind to it.
> *Barger v. Jimerson, supra at* 744 (emphasis added).

The Amended Complaint alleged that Trujillo's pit bulls were vicious and dangerous animals and that he had actual knowledge of prior instances that the dogs had frightened pedestrians. These were not loose ultimate fact allegations. To the contrary, the behavior of the dogs was alleged as evidentiary facts—they were pit bull dogs, they charged *at* N.M., they lunged at the fence, they got up on the fence and barked loudly at N.M., they rattled the fence, and that N.M. thought the dogs would come over the fence—are all evidentiary facts (sight, sound, contemporaneous mental thoughts).

More recently, in *Wilson v. Marchiondo,* 124 P.3d. 837 (Colo App. 2005) a dog-bite victim sued a landlord for the injuries caused by the tenant's dog. The court found that there was no evidence that the landlord knew of the tenants' dog's vicious tendencies *prior* to letting the property. However, in *dicta* the substantive evidence of the dog's viciousness which was discussed by the court concerned "neighbors"

complaints of the dog's *growling, barking, and slamming* against the fence." *Wilson v. Marchiondo*, 124 P.3d 837, 839 (Colo. App. 2005) (emphasis added).

In *Vigil By and Through Vigil v. Payne*, 725 P.2d 1155 (1986) the sole fact alleged to substantiate the defendant landlord's prior knowledge of the Chow dogs' vicious propensities consisted of a single instance when the "dogs *threatened* the landlords' two-year-old grandson." *Vigil By & Through Vigil v. Payne*, 725 P.2d 1155, 1156 (Colo. App. 1986) (emphasis added).

In this case, the majority distinguished *Vigil* by noting that N.M. was not "directly injured" by the dogs. *Lopez*, ¶ 13. However, another panel of the Court of Appeals has previously held that a direct injury is not essential to a claim for damages proximately caused by a dog. "Non-bite" dog cases are actionable. The standard is set out in CJI-Civ. 13:1, *Fishman v. Kotts*, 179 P.3d 232, 236 (2007) *cert. denied*, 2008 WL 698969 (March 17, 2008); CJI-Civ.4th, 13:1 Domestic Animals—Dangerous or Vicious Tendencies—Elements of Liability (Westlaw, April 2016 Update) (Appendix Exhibit 3).

CJI-Civ.13:1 leaves the question of causation to the jury. The final sentence of the jury instructions requires the jury to find whether "[t]he Defendant's negligence (or) the vicious or dangerous tendencies of (the dogs) was a cause of Plaintiff's (injuries)." No bite is required. The majority below reasoned that

causation could be taken away from the jury under its incorrect interpretation of foreseeability. Thus, the majority opinion in *Lopez* creates a conflict with the panel's decision in *Fishman, supra*.

The Colorado Jury Instructions, and its notes and comments, "do not trump case law" and "are not to be used if they do not reflect the prevailing law." *Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009). However, instruction 13:1 accurately summarizes prevailing law in a non-bite case. Grund, *et al*., "Domestic animals--common-law claims—Generally," 7A COLO. PRAC., PERSONAL INJURY TORTS AND INSURANCE § 36:2 (3d ed.). It is also consistent with the Restatement. "Harm Done by Abnormally Dangerous Domestic Animals," RESTATEMENT (SECOND) OF TORTS § 509 (1977, March 2016 update).

Under Colorado's prevailing law, for a non-bite case, it should be for a jury to "determine whether the owner had the duty to do other than erect the fence knowing that it bordered upon a sidewalk used by the public and that his dog had the propensity to charge at and frighten passing pedestrians." *Machacado,* 365 N.Y.S.2d at 979; *Accord, Farrior v. Payton,* 562 P.2d 787 (1977). CJI-Civ. 13:1 is in line with national case law from New York to Hawaii. The questions of negligence and causation in this non-bite case are for the jury.

V. CONCLUSION

The majority's opinion, if left as precedent, will have far-reaching consequences, not in accord with Colorado law, or the "common sense" values adopted by *Warne,* and not in accord with "contemporary standards of fairness."

Petitioners Maria Lopez and N.M. respectfully request that this Court reverse the Court of Appeals, and remand the case for further proceedings in the District Court.

DATED December 8, 2016.

Respectfully Submitted,

By: /s/ *James H. Chalat*
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CERTIFICATE OF SERVICE

I hereby certify that on this December 8, 2016 a true and accurate copy of the foregoing "Petitioners' Opening Brief" was e-filed and served via Colorado Courts E-Filing to the following parties of record:

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Pursuant to C.A.R. 25(e) & C.A.R. 30(a)(6), a printed copy of this document with original signatures is maintained by CHALAT HATTEN & BANKER, PC and will be made available for inspection by other parties or the Court upon request.

APPENDIX

Exhibit 1. *Lopez v. Trujillo*, 2016 COA 53 ---P.3d---, 2016 WL1385610 (April 7, 2016)

Exhibit 2. First Amended Complaint, *N.M. v. FMH et al*, Adams County District court, Case Number: 2016CV32771 (April 23, 2014)

Exhibit 3. CJI-Civ.4th, 13:1 Domestic Animals—Dangerous or Vicious Tendencies—Elements of Liability (Westlaw, April 2016 Update)