DATE FILED: February 2, 2017 3:36 PM
FILING ID: 646932D0EAD22
CASE NUMBER: 2016SC388

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.

▲COURT USE ONLY ▲

Case Number: 2016SC388

Attorneys for Petitioners
James H. Chalat, # 8037
Russell R. Hatten, # 30399
CHALAT HATTEN & BANKER, PC
1600 Broadway, Suite 1920
Denver, CO 80202
Phone: 303.861.1042
Fax: 303.861.0506
Email: jchalat@chalatlaw.com
rhatten@chalatlaw.com
Attorneys for the Petitioners

PETITIONER'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

This Brief complies with C.A.R. 28(a)(1)–(3) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

☒ It contains 4,751 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.

☒ We acknowledge that this Reply Brief 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*
James H. Chalat
Russell R. Hatten

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Jury Instructions

Rules

Other Authorities

I. INTRODUCTION

The Petitioner, Maria Lopez, by counsel, herewith files her Reply Brief. This Reply Brief also responds to the *amici* briefs filed by the Colorado Civil Justice League (CCJL) and the Colorado Defense Lawyers Association (CDLA).

Ms. Lopez asks this Court to reverse and remand the case for disclosure, discovery, and trial. The allegations of the Amended Complaint sufficiently set out specific facts from which the Court may find that a duty was owed by the Respondent, Alexander S. Trujillo, to N.M. N.M. was an 8-year-old child pedestrian who was frightened by Mr. Trujillo's pit bulls and ran away from them, into the street, only to be hit by a passing vehicle. The dissent found that Mr. Trujillo's pit bulls presented a reasonably foreseeable risk of harm to the children walking along the sidewalk adjacent to Mr. Trujillo's fenced yard. Moreover, the risk-cost-benefit policy issues, also to be considered in the duty analysis, weigh in favor of N.M.'s safety rather than in favor of a doctrine of unfettered animal ownership rights no matter the risk of foreseeable harm to passersby.

We ask this Court to follow the rule of law set out in *Taco Bell, HealthONE,* and *Westin v. Groh.* These cases established that, in the duty analysis, foreseeability need only to be shown to the extent that some injury will likely result as a consequence of the tortfeasor's negligent acts.

The jury instruction used by our district courts in animal liability cases is CJI 4th – Civil 13:1. It leaves the question of specific foreseeability to the jury. The jury must find whether the Defendant used "reasonable care to prevent injuries or damages that could have reasonably been anticipated to be caused by the dangerous or destructive tendencies of [the animals]." 13:1(4). This, and the other elements of the instruction, are fact intensive questions. They are best left for a jury.

We urge the Court to hold that 13:1 properly instructs a jury on the elements of Colorado's animal liability law.

II. THE AMENDED COMPLAINT STATES A CLAIM.

A. Respondent and his *amici* attempt to alter stubborn facts set out in the well-pled allegations.

Mr. Trujillo describes the violent and threatening behavior of the pit bulls merely as "running, barking, and putting paws on their own fence." Mr. Trujillo's dogs' behavior is described as "basic dog behavior." Ans. Bf. 12. The *Amicus Curiae* CDLA's brief even suggests that it is "normal canine behavior" for two large pit bulls without provocation, to charge at and menace two children. CDLA argues that it is "typical" for the dogs to charge at child pedestrians on a public sidewalk, get up on a fence, rattle it, and act in such a threatening manner as to cause the children to think that the dogs would come over the fence and physically bite them. *Amicus* Bf. of CDLA p. 8–9. Growling, barking, and slamming against a fence are behaviors

which show animals to be vicious and dangerous. *Wilson v. Marchiondo*, 124 P.3d 837, 839 (Colo. App. 2005).

> A 'vicious propensity' of a dog is not confined to a disposition to attack every person but includes as well a natural fierceness or disposition to mischief as might occasionally lead him to attack human beings without provocation. There is no evidence in this case that the dog in question had ever bitten anyone before, but its ferocious and violent nature as daily exhibited to many people, especially the neighbors, was such as to put prudent people on guard to prevent a possibility of attack on human beings.
>
> *Barger v. Jimerson*, 276 P.2d 744, 745–46 (Colo. 1954)

"A dangerous or vicious tendency of a domestic animal includes not only a disposition to attack every person, but also a natural mischievous disposition that may on occasion lead it to attack without provocation." *Dubois v. Myers*, 684 P.2d 940, 942 (Colo.App. 1984) See also, *Green v. Wilson*, 773 S.E.2d 872, 873 (Ga. Ct. App. 2015), *reconsideration denied* (July 30, 2015), *cert. granted* (Jan. 11, 2016) ("the dog's acts could be construed as attempts to move toward a person in an aggressive manner.")

The Amended Complaint did not allege that these dogs merely ran to the fence and put their paws on it. To the contrary, it alleged that the dogs "charged at" two eight-year-old boys. It alleged these were pit bulls and that they "jumped *up on* and rattled the *four-foot high* chain link fence." It also alleged that the boys thought "the dogs were going to *jump over the fence* and physically bite them."

The Amended Complaint clearly alleged that the location of the Mr. Trujillo property where the dogs were kept was directly across the street from an elementary school. Thus, it was foreseeable that children would walk passed the home on the sidewalk right next to Mr. Trujillo's fence.

The Amended Complaint further described the pit-bulls as demonstrating: "threatening, frightening, and attack-like behaviors." (CF, 42–50, ¶'s 8–19, 46, 49).

B. Two other facts which pertain to the vicious and dangerous propensities of Mr. Trujillo's dogs are consistently ignored by the Respondent and his *amici*.

First, these dogs were pit bulls, which can be known as a "dangerous breed" for their propensity to violence. *Colorado Dog Fanciers, Inc. v. City & County of Denver By & Through City Council*, 820 P.2d 644, 650 (Colo. 1991); *Compare, Dias v. City & County of Denver*, 567 F.3d 1169 (10th Cir. 2009)(considering there is a lack of evidence that pit bulls as a breed pose a threat to public safety); *Hearn v. City of Overland Park*, 772 P.2d 758 (Kan. 1989). *See generally*, "Validity And Construction Of Statute, Ordinance, Or Regulation Applying To Specific Dog Breeds, Such As "Pit Bulls" Or "Bull Terriers." 80 A.L.R.4th 70 (Originally published in 1990). The behavior of Mr. Trujillo's pit bulls is the reason so many communities have declared "all members of that breed to be inherently vicious." *Bess v. Bracken Cty. Fiscal Court*, 210 S.W.3d 177, 181 (Ky. Ct. App. 2006).

Sallyanne K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional*, 13 U. DAYTON L. REV. 279, 283 (1988). The Amended Complaint clearly alleged that Mr. Trujillo's dogs were pit bulls, and such alleged facts must be weighed in the foreseeability analysis.

Secondly, the Amended Complaint alleged that *two* pit bulls charged at the boys, barked loudly and jumped up on and rattled the chain link fence that was right up against the sidewalk. *See*, *Olier v. Bailey*, 164 So. 3d 982 (Miss. 2015). In *Olier* the court found that a jury could reasonably conclude that a gaggle of "attack geese" had dangerous propensities and that the plaintiff's injury was foreseeable under the totality of circumstances. In its findings, the court discussed the added terror which is known to come from the presence of more than one animal.

> [W]hen analyzing the behavior of any grouping of nonhuman creatures with a dangerous propensity collectively, it is unnecessary and counterintuitive to analyze the unique history of each and every creature in the unit. This has been a truth accepted by mankind since we drew on cave walls. We fear not the wolf, but the pack; not the bee, but the swarm; not the buffalo, but the herd.
>
> *Olier v. Bailey*, 164 So. 3d 982, 996 (Miss. 2015)

The alleged number, breed, size, and behavior of the dogs support the reasonableness of the children's perception that one or both of the dogs would come over the fence and bite them. It is foreseeable that children would run in fear from

these animals, into the street and be harmed if an owner's animals are so threatening as to cause the children to fear that the dogs will come over the fence.

C. "Vicious or Dangerous Tendencies," are common everyday words, not legal conclusions.

Whether the dogs had vicious or dangerous tendencies and whether Mr. Trujillo had notice thereof, were questions for a jury. *Sandoval v. Birx*, 767 P.2d 759 (Colo.App. 1988). The allegations of the Amended Complaint set out the facts upon which these children, clearly frightened for their safety, would foreseeably run away from the pit bulls.

The terms "vicious or dangerous" are not technical or complicated words which ordinary people could not understand or interpret. When a term, word, or phrase in a jury instruction is one with which reasonable persons of common intelligence would be familiar, and their meanings are not so technical or mysterious as to create confusion in jurors' minds as to its meaning, an instruction defining the words is not required. *Day v. Johnson*, 255 P.3d 1064, 1070 (Colo. 2011).

D. The Opening Brief alleged no "New Facts."

The Answer Brief contends that the Opening Brief included new allegations of facts not included in the pleadings. This is untrue. The First Amended Complaint alleged:

> 18. According to Ordinance 6, Defendant Trujillo's pit bulls are considered "vicious or dangerous pet animals" since they demonstrated tendencies that would cause a reasonable person to believe the dogs may inflict bodily injury.
>
> 19. Upon information and belief, at the time of the incident Defendant 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; Appendix to Petitioner's Opening Brief, Exhibit 2, P. 3, emphasis supplied).

Allegations upon information and belief are permitted. C.R.C.P. 8(e)(1) provides that "[w]hen a pleader is without direct knowledge, allegations may be made upon information and belief." The allegations quoted above refer to prior tendencies and incidents. These are fact-specific allegations which form a plausible basis for our argument that the dogs habitually charged at pedestrians walking on the sidewalk, jumped up on the fence, rattled it, barked loudly, and frightened pedestrians.

"[P]leading based on information and belief may, in fact, be useful where the facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Warne v. Hall*, 2016 CO 50, ¶ 2.

The Amended Complaint contains fact-specific allegations from which a plausible inference can be made that the dogs *habitually menaced pedestrians* walking along Kimberly on the sidewalk adjacent to Mr. Trujillo's fence line.

The majority below reached its conclusion that there was no duty without regard to whether the pit bulls had "habitually" frightened other pedestrians. The majority did not hold that Ms. Lopez had failed to allege facts upon which to base the allegation that Mr. Trujillo's pit bulls were vicious and dangerous. To the contrary, the majority accepted that the pit bulls were vicious and dangerous. It held, however, that the dogs' propensities did not matter because "the dogs in this case were appropriately confined by a fence." *Lopez v. Trujillo*, 2016 COA 53, ¶ 30, 2016 WL 1385610 (April 7, 2016). Whether the dogs were appropriately confined by a fence, particularly when the boys thought one or both of the dogs were going to come over the fence and bite them, is a question for the jury. It would need to be resolved after hearing evidence, if any, as to prior conduct, the exact height of the fence, the size of the dogs, etc. The Answer Brief cynically states that "N.M. cannot allege firsthand knowledge that the two dogs had previously been aggressive towards passersby." Ans. Bf., p. 12, fn 1. True, but we can make allegations upon "information and belief," which should be accepted as true; particularly when we presented sworn testimony from the neighbor, co-defendant Mr. Daniels, who

testified to the pit bulls' aggressive behavior to everyone who would walk by Mr. Trujillo's home.

Under Mr. Trujillo's reasoning, "[i]t may also be conceded that he has the same right to keep a tiger." *Melsheimer v. Sullivan*, 27 P. 17, 18 (Colo. Ct. App. 1891) *citing, Laverone v. Mangianti*, 41 Cal. 138, 139 (1871). The Court in *Melsheimer* continued with the following:

> [T]he gist of the action is in the keeping of the animal after knowledge of its mischievous disposition. The law imposes a stringent responsibility upon a man who knowingly keeps a vicious and dangerous animal. He is liable to any person who, without contributory negligence on his part, is injured by such animal, and he cannot exonerate himself by showing that he used care in keeping and restraining the animal. He takes the risk of being able to keep him safely so that he shall not injure others. The owner's negligence is in keeping the animal knowing that it is dangerous.
>
> *Melsheimer v. Sullivan*, 27 P. 17, 18 (Colo. Ct. App. 1891) (internal citation and quotation marks omitted)

Here, the allegations make it clear that these pit bulls were "vicious or dangerous." The mere fact that Mr. Trujillo had the dogs behind a four-foot high fence, the top of which the dogs could reach, does not—as a bright line rule—mean that it is unforeseeable that a pedestrian would become frightened and run away from the dogs into the street.

III. THE CASE SURVIVES RULE 12 SCRUTINY UNDER *WARNE*.

A. Reference to portions of Daniels' deposition is unnecessary for the Amended Complaint to pass muster under *Warne*.

As we argued in our Opening Brief, Colorado courts have previously noted in *dicta* that evidence that a dog which barks loudly, charges at people, and aggressively slams into the fence—may be considered as proof that the dog has vicious and dangerous tendencies. Op. Bf., p. 35–36. *Cf., Wilson v. Marchiondo*, 124 P.3d 837, 839 (Colo. App. 2005) (large dogs growling, barking, and slamming against the fence).

We additionally alleged that "Trujillo's pit bulls are considered 'vicious or dangerous pet animal' since they demonstrated tendencies that would cause a reasonable person to believe the dogs may inflict bodily injury." (CF, 44 ¶ 18). This is not simply an empty, conclusory allegation. It is supported by fact-specific allegations that the dogs charged *at* the boys and got up on the fence to bark *at* the boys and the boys thought the pit bulls would come over the fence and bite them. Such behavior was not just "dogs being dogs" or "man's best friend" but was the type of aggressive behavior that would cause a reasonable person to conclude that the pit bulls may inflict bodily injury.

B. Plausibility is context-specific.

A plausibility analysis is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). Ms. Lopez's allegations made upon information and belief have been tirelessly challenged, as has any consideration of the deposition excerpt included within the Motion to Amend. (CF, 37–41 ¶38–39)

In this and similar cases, a Colorado state court should at a minimum be permitted to consider, in its *Warne* plausibility analysis, the contents of specific and detailed pleadings related to the complaint. The Unopposed Motion for Leave to File First Amended Complaint (CF, 37–41, "Motion") is an excellent example. The Court should take the contents of the Motion into account in its plausibility analysis.

As the *Twombley/Iqbal* doctrine has matured, federal courts, including the 10th Circuit, have made findings based upon facts outside of the four-corners of a complaint. For instance, in a fraud case based on a promissory note, the Tenth Circuit found that the complaint passed the plausibility analysis, but that the note—attached to the complaint itself—totally contradicted the complaint's allegations. The court held: "Courts are permitted to review 'documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the

documents' authenticity.'" *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) citing *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). It is fair, then, for Ms. Lopez to argue, and for the Court to rely on, the Motion and its deposition quotations when considering the plausibility of the Amended Complaint in its duty analysis. It would work an injustice to N.M. to dismiss the case because Daniels' deposition excerpt appeared in the Motion, but not in the Amended Complaint.

IV. THE HARM WAS FORESEEABLE &THE POLICY CONSIDERATIONS WEIGH IN FAVOR OF N.M.

A. The dissent correctly found that it 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 upon the chain-link fence next to the sidewalk, and that the child would run into the street to get away from them." *Lopez,* ¶ 46

The Respondent readily concedes in his Answer Brief that the "*foreseeable* risk stemming from that behavior might be that a frightened pedestrian might step back and immediately stumble and fall." Ans. Bf. p. 21.

However, the Answer Brief contends, it would be unforeseeable for a child to be so frightened and fearful for his safety that he would dart into the street and get hit by a van. To narrowly distinguish the case at bar, Respondent adopts the incorrect

holding of the majority in the court below: that the foreseeability element of the duty analysis requires that the exact chain of events from conduct to harm be foreseeable.

To the contrary, it is not necessary that the tortfeasor be able to foresee the exact nature and extent of the injuries or predict 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 v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002)

To admit that some harm could befall a pedestrian frightened by Mr. Trujillo's pit bulls, but to deny that the tortfeasor could anticipate the specific harm which befell N.M., underscores the weaknesses in Respondent's arguments. All of the alleged facts, taken together, not individually or in separate arguments, should be considered in the foreseeability analysis implicit in determining if a duty was owed by Mr. Trujillo to N.M. The Court should not take the specific harm into consideration in its duty analysis. It may only take into consideration the general foreseeability that some injury will likely result because of the alleged tortfeasor's negligent actions or inactions.

B. The dissent correctly found that the policy considerations weigh in favor of finding a duty owed by the dog owner.

The majority opinion pointed out that the pit bulls were fenced inside a four-foot-high chain-link fence. However, N.M. and J.L. thought one or both of the pit

bulls were actually going to jump the fence and bite him. To make out a duty, the children should not have been required to stand and wait to see if the dogs did get over the fence to attack them.

The majority also weighed the foreseeability and likelihood of injury against the social utility of the Respondent's conduct. The majority wrote:

> It is an integral part of our whole system of private property that an owner or occupier of land has a privilege to use the land according to his own desires. Keeping a pet dog is undoubtedly one of the most cherished forms in which the constitutionally protected right to own personal property is exercised. To most people it is more than ownership of mere personal property… We conclude that the social utility of defendant's conduct outweighs the foreseeability and likelihood of injury. *Lopez*, ¶21 (internal citation omitted).

The dissent correctly noted that:

> The complaint alleges that the dogs at issue here were "vicious." For purposes of ruling on a motion to dismiss, that allegation must be accepted as true. In Colorado, it has already been determined that the privilege to use private property as one wishes is subject to limitations when such use amounts to ownership of a vicious or dangerous pet animal. *Lopez*, ¶ 48

And, as to the majority's point that the social utility of the pit bulls' owner outweighs the foreseeability and likelihood of injury, the majority failed to make a distinction between "man's best friend" and what amounted to these boys' worst and most terrorizing enemy. The majority also failed to weigh the gravity of the harm presented by the pit bulls against the light burden of protecting child pedestrians.

Finally, the majority viewed the magnitude of the burden on dog owners of guarding against injury and the costs of placing any additional burdens on dog owners. The majority thought that the consequences upon the community of imposing such burdens would be unreasonable, causing the owner of a dog to keep his/her dog in a place where it could neither be seen nor heard by members of the public passing by. With respect to measures such as requiring the dog owner to erect a higher or sturdier fence, the court noted that such measures would place a significant financial burden on dog owners and would not alleviate the possibility that a passerby would be frightened by a suddenly barking dog.

The dissent disagreed with the notion that placing additional burdens on dog owners would be unreasonable. According to the dissent, such determinations are premature at the time a motion to dismiss is decided because no disclosures or discovery had taken place. As a result, there was no factual support to show whether the magnitude of the burden of guarding against injury or harm was high or low. The dissent went on to suggest that the evidence might show that the dog owner could have better guarded against the harm that occurred by, for example, moving the fence further from the sidewalk or erecting a higher fence.

Aime v. State Farm Mut. Ins. Co., 739 So.2d 110, 112 (Fla. Ct. App 1999) is instructive on defining the parameters of one's duty, "Where a defendant's conduct

creates a foreseeable zone of risk, the law will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Id*. Citing *Kaisner v. Kolb,* 543 So.2d 732 (Fla. 1989). Whether the dog owner exercised reasonable care is a question for the jury.

V. CCJL INCORRECTLY ARGUES THAT THE PLA BARS THE CASE.

The CCJL argues that the Colorado Premises Liability Act bars Ms. Lopez's negligence claim. CCJL *Amicus* Br., p. 3; C.R.S. §13-21-115 (PLA).

This is a new argument which was not before the district court or the Court of Appeals. The court below determined that Mr. Trujillo was not a landowner regarding the public sidewalk because he was not a "person in possession of real property' for PLA purposes." *Lopez* ¶*37*. The majority below relied heavily on *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 2015 CO 24, ¶ 38 in its determination that Mr. Trujillo was not in possession of the sidewalk where N.M. was walking and that Mr. Trujillo was not otherwise legally responsible for the condition of the sidewalk or for the activities conducted or circumstances existing there. We had argued that Mr. Trujillo's conduct regarding his dogs was similar to that in *Sill v. Lewis*, 140 Colo. 436, 437, 344 P.2d 972, 972 (1959) where water was discharged onto a public sidewalk, froze, and created a hazard. The court below

disagreed, holding that Mr. Trujillo did not in any way affect the public sidewalk in a manner which would invoke the PLA. *Lopez* ¶*39.*

Mr. Trujillo argued, and the Court of Appeals agreed, that this is not a premises liability case. Ms. Lopez's PLA claim was dismissed by the District Court and by the Court of Appeals. It was not included in our Petition. The case is before this court only on the theory of Mr. Trujillo's common law negligence. Neither the district court nor the Court of Appeals held that the negligence claim was barred by the PLA.

Mr. Trujillo was a dog owner, and his liability, if any, arises from his ownership of the pit bulls. If the Court accepts our vicious/dangerous allegation (CF 47, ¶ 37) (in context and supported by the facts) Mr. Trujillo was "bound to have [his dogs] so confined as to prevent [them] from doing mischief. *Melsheimer v. Sullivan*, 27 P. 17, 18 (Colo. Ct. App. 1891) citing *Brooks v. Taylor*, 31 N.W. 837, 838 (Mich. 1887) ("The keeping of the bull, with knowledge of his vicious propensities, is a sufficient allegation of negligence, under all the authorities, without any other direct averment of negligence.")

Ms. Lopez and N.M.'s common law negligence claim survives the exclusivity of the PLA. The Dog Bite Statute provides: "Nothing in this section shall be construed to:(a) Affect any other cause of action predicated on other *negligence*,

intentional tort, outrageous conduct, or other theories." C.R.S. § 13-21-124(6)(a) emphasis supplied.

Ms. Lopez and N.M.'s common law negligence claim is founded upon the well-recognized principles of Colorado's animal liability law. Owners owe a duty of due care in the confinement, maintenance, and management of their animals, particularly "vicious and dangerous" animals.

VI. CDLA IMPROPERLY ARGUES FACTS AND INSURANCE.

A. The CDLA *amicus* brief incorrectly argues that the pit bulls' behavior was "normal."

CDLA joins Mr. Trujillo in characterizing the pit bulls' behavior as "typical canine behavior." CDLA *Amicus* Br., p. 2. Neither the dogs nor their behavior were "typical" in this case. Common sense and experience show that pit bulls can be very dangerous, and their appearance, in close proximity, charging at, barking and getting up on a fence, could terrorize children, especially if the children think the dogs will get over the fence.

The American Veterinary Medical Association (AVMA) was established in 1863. It is the leading association in America for Veterinary medicine, academia, and representation, and has 89,000 veterinarians working in private and corporate practice, government, industry, academia, and uniformed services. https://www.avma.org/About/WhoWeAre/Pages/default.aspx.

Its authoritative, literature review titled "Dog Bite Risk and Prevention: The Role of Breed (May 15, 2014) states:

> It should also be considered that the incidence of pit bull-type dogs' involvement in severe and fatal attacks may represent high prevalence in neighborhoods that present high risk to the young children who are the most common victim of severe or fatal attacks.
>
> https://www.avma.org/KB/Resources/LiteratureReviews/Pages/The-Role-of-Breed-in-Dog-Bite-Risk-and-Prevention.aspx

The article shows, in tabular format, that the pit bull breed appears frequently in Table 1, Studies of Serious Dog Bite Injury by Breed.

In fairness, however, the article also states:

> The substantial within-breed variation…suggests that it is inappropriate to make predictions about a given dog's propensity for aggressive behavior based solely on its breed." While breed is a factor, the impact of other factors relating to the individual animal (such as training method, sex and neutering status), the target (e.g. owner versus stranger), and the context in which the dog is kept (e.g. urban versus rural) prevent breed from having significant predictive value in its own right. Also the nature of a breed has been shown to vary across time, geographically, and according to breed subtypes such as those raised for conformation showing versus field trials.
>
> *Id.*

Other studies show that pit bull-type dogs and Rottweilers were found to be involved in the highest rates of fatal human attacks by dogs. "Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998" Jeffrey J. Sacks, MD, MPH *et al.*, JOURNAL OF THE AMERICAN VETERINARY MEDICAL ASSOCIATION, September 15, 2000, Vol. 217, No. 6, Pages 836–840.

These studies show that Mr. Trujillo's pit bulls' behavior more closely resembled the violence associated with fatal human attacks than with the gentle behavior of man's best friend.

B. CDLA articulates a one-sided economic policy argument which fails to balance the liability insurer's interest against N.M.'s medical expenses.

It is no more appropriate to argue liability insurance as a policy matter than it is for Ms. Lopez to argue the policy benefit of shifting catastrophic medical expenses from health care providers and private or public insurers onto private liability carriers. The tort system has established a fault-based policy. This should be enforced without regard to the perceived cost to the liability insurers who wish to push the cost of the harm caused by Mr. Trujillo's dogs onto an 8-year-old child with crippling injuries.

VII. CONCLUSION

This case presents quintessential jury questions on the issues of breach, causation, and potentially shared liability. It should be remanded to the trial court for further proceedings.

Respectfully submitted on this 2nd day of February, 2017.

By: /s/ *James H. Chalat*
James H. Chalat
Russell R. Hatten
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this February 2, 2017 a true and accurate copy of the foregoing "**Petitioners' Reply Brief**" was e-filed and served via Colorado Courts E-Filing to the following parties of record:

Kristi A. Lush
Erica O. Payne
ZUPKUS & ANGELL, P.C.
The McCourt Mansion
555 East Eighth Avenue
Denver, CO 80203
klush@zalaw.com
epayne@zalaw.com
Attorneys for Defendant-Respondent Alexander Trujillo

Echo D. Ryan
William B. Ross
Montgomery Little & Soran, PC
5445 DTC Parkway, Suite 800
Greenwood Village, CO 80111
eryan@montgomerylittle.com
wross@montgomerylittle.com
Attorneys for Amicus Curiae Colorado Defense Lawyers Association

Lee Mickus
Margaret Boehmer
Taylor Anderson LLP
1670 Broadway, Suite 900
Denver, CO 80202
lmickus@talawfirm.com
mboehmer@talawfirm.com
Attorneys for Amicus Colorado Civil Justice League

/s/ Denise Ramirez
for CHALAT HATTEN & BANKER, PC

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.