COMMISSION ON COMMON OWNERSHIP COMMUNITIES
OFFICE OF CONSUMER PROTECTION
MONTGOMERY COUNTY MARYLAND

www.montgomerycountymd.gov/ccoc
email: ccoc@montgomerycountymd.gov

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CCOC COMMUNICATOR

Maryland Court Holds Landowners Liable for Injuries Caused by Pit Bulls

By Mitchell Alkon, Esq.

In an important recent decision, the Maryland Court of Appeals (the State's highest court) has ruled that when a landowner (such as a landlord) knows or should know that a pit bull dog is residing on the property, and the dog attacks another animal or person on the property, then the landowner can be held liable for the injuries the dog causes. This decision affects not only landlords whose tenants own pit bulls, but also common ownership communities whose members or residents own such dogs. The case is *Tracey v. Solesky*, revised opinion issued August 21, 2012.

The Court held that it was not necessary to show that the dog's owner or the land owner knew the dog was dangerous. The Court found that the aggressive and vicious nature of the pit bull breed, and its ability to inflict serious and sometimes deadly injuries, causes this breed to be "inherently dangerous." Thus, when it is proven that the dog involved in an attack is a pit bull, not only the dog's owner, but also any other person who has the right to control the pit bull's presence on the property and who knows or should know that the dog is a pit bull, is strictly liable for injuries caused by the dog's attack on or from the property.

In reaching its decision, the Court of Appeals reviewed the history of the pit bull in the reported decisions in Maryland and in other states. The

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CCOC's Annual Forum November 17

The CCOC will host its Annual Forum on Saturday, November 17, 2012, from 12:30 to 3:00 pm at the King Farm Community Center, 300 Saddle Ridge Circle, Rockville 20850. Guest speaker Delegate James Gilchrist will discuss how associations and their members can influence State legislation affecting their communities. The Forum will also feature an example of a "mock" CCOC hearing, followed by comments and advice from experienced homeowners and professionals alike, including hearing panel members, on how to present cases as effectively as possible. The CCOC welcomes all members of common ownership communities, and there is no charge to attend the Forum. More information and directions are available on the CCOC website.

The Enforcement of CCOC Decisions

Although this newsletter regularly reports on the decisions of the CCOC's hearing panels, it has not discussed in any detail how those decisions are enforced. Usually, the parties voluntarily obey the decisions, but sometimes they do not, and it becomes necessary to enforce them.

Section 10B-13(f) of the Montgomery County Code provides that the failure to obey a CCOC decision is a violation of the County Code, and further declares that such violations are "Class A", the most serious of all violations of the Code, which means that they are subject to fines of up to $500 per offense. (Each day the violation continues constitutes a separate offense.)

In order to enforce a CCOC decision, the staff will first send a warning letter to the party in violation. If that fails to get results, the staff will deliver a "civil citation" to the offending party. The citation notifies the party of the violation and gives that party the option of either paying a fine of $500 or of having a trial in the County's District Court to defend against the charge. The staff then sends the citation to the County Attorney who reviews it and files it with the Court. The Court then sets a trial date.

Since CCOC decisions are legally binding unless reversed on appeal to the Circuit Court, the only issues in the District Court in a civil citation action are: (1) did the offending party get a copy of the CCOC decision; (2) did the offending party obey the decision; and (3) was the offending party served with the civil citation. The District Court Judge will not allow argument on the merits or wisdom of the CCOC decision, because such issues can only be raised in an appeal to the Circuit Court, and if there was no appeal within 30 days after the CCOC issued its decision, as allowed by law, then the offending party has forever waived its right to challenge the decision. At the District Court trial, the County Attorney will prosecute the case and the CCOC staff and the prevailing party in the CCOC case will act as witnesses.

If the District Court rules in the County's favor (and the staff cannot recall any CCOC civil citation action which the County has lost), the Court will usually impose a fine and will usually issue an order requiring the offending party to "abate the violation" by complying with the CCOC order. If the offending party does not obey the Court's order, the stakes are raised, because the Court can enforce its order through the "contempt of court" process, which can include jailing the offender as well as the imposition of additional fines.

Of the 20 to 30 decisions issued each year by CCOC hearing panels, the staff must file 4 to 5 civil citations to obtain compliance. Sometimes, a party will comply after receiving the citation but in half the cases the matter must go to court. Usually, a court abatement order will finally resolve the matter, but not always.

In cases where the CCOC has ordered a homeowner to make specific repairs to his property, the staff will ask the court to issue an abatement order that says that if the homeowner does not make the repairs, then the association can enter the property and make the repairs at the owner's costs. This can be a very useful tool because the CCOC itself does not have the funds to make repairs to private property.

This option was recently used to enforce a CCOC order in the case of *Castle Gate HOA v. Greenfield.* Greenfield installed a white vinyl deck on his townhome without permission. By itself, the white deck blended in well with the house, but it was clearly at odds with all the other decks in that row of townhomes, which were made of natural wood (see photo, below left). The HOA complained to the CCOC, and after a hearing the CCOC ordered Greenfield to remove deck because it was constructed without permission and was not compatible with the overall design of the community.

Greenfield appealed the decision to the Circuit Court and then to the Court of Special Appeals; he lost in both courts, but he still refused to remove the deck. The CCOC staff then filed a civil citation action against him; he did not appear to defend himself, and the District Court issued an order requiring him to remove the deck and further ordering that the association could remove the deck at Greenfield's cost if he did not do so himself. Greenfield persisted in his obstinacy, and earlier this year, the HOA hired a contractor (and an off-duty policewoman) and, after due notice to Greenfield, removed the entire structure and added the bill (over $3000) to the assessments due on the property. (See photo at right).

Most civil citation actions follow default judgments. The responding party is usually a homeowner who has failed to maintain his property in good condition or has made changes without permission and who has ignored not only the notices from his own association but from the CCOC as well. The party's failure or refusal to respond does not prevent the CCOC from proceeding to decide the case, and the District Court will enforce the CCOC's default judgments if there is proof that the party was sent the appropriate notices. However, the CCOC has also gone to court to enforce orders against associations to hold elections and to repair defects in the common areas.

The authority to enforce the CCOC's decisions through the civil citation process means that its decisions have weight and must be taken seriously. A party that ignores the decisions will find its liability greatly increased because it can be subject to substantial fines on top of whatever duty the CCOC itself imposed, and it also runs the risk of other costs being added to its bill. The legal action to enforce the decision is performed by the County at no expense to the prevailing party in the case.

CCOC COMPLAINT STATISTICS: Who Uses the CCOC and How Do They Fare?

The CCOC staff receives an average of 80 complaints every year, and responds to an average of 800 requests for help and information.

In 2011, it received 56 complaints and resolved 67. Of the 67 closed cases, 29 were resolved in mediations arranged by the staff. Forty cases could not be settled and were referred to the CCOC for a decisions whether to dismiss them or to accept them and refer them to hearing panels for further action. Twelve of those cases were settled before hearings. The CCOC's hearing panels held 11 hearings, and issued 15 decisions. (Some of these figures include cases filed before 2011.)

A staff survey of 221 closed cases sent to County Archives in 2010 and 2011 shows that 25% of them were filed by associations against their members, and 75% were filed by members against their associations.

Over half of all the complaints (53%) were settled without hearings. However, associations settled 2/3rds (65%) of the complaints they filed but homeowners settled less than 1/3rd (32%) of their complaints.

Forty-two percent of all cases filed were referred by the staff to the CCOC. This means that when a case cannot be settled, the staff refers it to the full CCOC, which must decide whether it has legal authority over the complaint itself. For example, if the complaint is against a manager, the CCOC must reject it because the CCOC only has jurisdiction over the official actions of the association, and a manager is only an employee of the association. The CCOC rejected jurisdiction of 16% of all complaints filed. Of the complaints rejected by the CCOC for lack of jurisdiction, 91% were filed by members; the remaining 9% were filed by associations.

The CCOC's hearing panels had to decide 57 of these cases, which is one-quarter (26%) of all complaints filed. The CCOC ruled in favor of associations in 68% of its decisions, and ruled in favor of homeowners in the remaining 32%.

Some important facts jump out. First of all, homeowners file three times as many complaints as associations do, but associations are more likely to be successful. Indeed, if a "favorable" result is defined to include both voluntary settlements as well as positive rulings from CCOC hearing panels, then 87% of all complaints filed by associations end favorably but only 60% of homeowner complaints do.

It is also clear that not only are associations far more likely to settle their complaints than are homeowners, they are also much more likely to win their cases if they go to hearings. And member complaints are more likely to be dismissed for lack of jurisdiction as well, never even reaching the hearing stage.

What do the statistics mean? At first glance, it may seem that the CCOC is biased in favor of associations and managers. But the staff does not believe this to be the case. It is important to remember that all CCOC hearing panels include both residents of common ownership communities as well as professionals who work for such communities, and they have equal votes. Almost all CCOC decisions (over 99%) in the last 20 years have been unanimous. In addition, many of the CCOC lawyers who chair the hearing panels are also residents of such communities.

Rather than bias, more complicated factors are at work. First of all, the types of complaints filed by associations are markedly different from those filed by members. In almost all cases, associations file complaints for lack of maintenance or over changes made by homeowners to their homes without permission. Such complaints are almost always easy to prove—all that is really needed is a photograph of the violation and a copy of the architectural or other rules. But homeowner complaints are more complicated. They often involve conduct going on for years, they frequently involve not just one issue but many issues; they cannot be described with photographs, and they are generally much harder to prove.

Secondly, associations tend to have the benefit of professional advice from lawyers and experienced managers on their operations and are frequently represented by attorneys in the CCOC process. A well-managed association is less likely to make serious mistakes. They have often been in court or before the CCOC before and understand what the procedures are and what they must do. By contrast, most homeowners have never prosecuted a complaint in the legal system before and simply don't know how to prove their claims, and few of them are represented by attorneys.

A third and profound reason why homeowners are handicapped in legal proceeding is the law itself. Common ownership law is in great part derived from the law of corporations and other business entities. The standard that the courts and the CCOC must apply is generally called the "business judgment rule." While there are some variations on this rule, in very general terms it means that the courts (and the CCOC) *must* uphold the decisions of an association's board of directors if the board follows the proper rules for making decisions, acts within its authority, and has a good reason for its decision.

Homeowners tend to be unaware of the business judgment rule, and do not understand it even when aware of it. But the effect of the rule is to make it very difficult for a homeowner to prevail. It is not enough for the homeowner to show that he has a good reason for what he does or even a better reason than the board has. He must show that either the board did not follow proper procedures in making its decision, that it acted outside of its legal authority, or that it had no justification at all for what it decided. This is a tough standard to meet.

The result is that member complaints tend to be complex, difficult to prove, subject to a high legal standard, and filed by people who have little relevant training or experience. Association complaints, on the other hand, tend to be simple, easy to prove, protected by the business judgment rule, and filed by groups that tend to have professional and legal assistance. Which group is more likely to win?

What should be done to level the playing field? The staff believes it would be wrong for the CCOC to decide that more cases should be decided in the favor of homeowners simply for the sake of changing these figures Nonetheless, the statistics suggest that there is, at the very least, a knowledge gap, and the CCOC has taken steps to deal with it.

One step has been to amend Chapter 10B to clarify and expand the CCOC's jurisdiction. For example, in the past, it was not clear if the CCOC had any authority over complaints about the use of or conditions of the common elements, and recent amendments made clear that

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Court Holds Landowners Liable for Injuries Caused by Pit Bulls

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Court noted the first reported appellate case involving the "mauling of young children by pit bulls" occurred as early as 1916, and that no fewer than 7 cases of serious maulings by pit bulls had reached Maryland's appellate courts in the last 13 years. The Court gave details of the reported cases, describing the viciousness of the attacks, the severity of the injuries suffered, and the innocent acts in which the victims had been engaged immediately prior to the attacks. Included in the descriptions were the facts of the *Tracey* case, in which a pit bull named "Clifford" escaped from his pen and attacked at least two different boys at different times on the same day, causing the second boy, Domenic Solesky, to suffer life-threatening injuries and to undergo several surgeries in 17 days at Johns Hopkins Hospital. Although the trial court initially ruled that there was too little evidence showing that the landlord, Ms. Tracey, was negligent, the appellate court reversed and sent the case back for a trial based on the principle that the landlord could be held strictly liable if she knew her tenant owned a pit bull.

The Court noted that at least since 1882, in the case of *Goode v. Martin,* Maryland had followed the old English principle that the owner of a dog would not be held liable to a person bitten by the dog unless it was proven that the dog was fierce and the dog's owner knew it. Lawyers call this the "one free bite" rule, and say that every dog is entitled to at least one bite. Later, in the 1916 case of *Bachman v. Clark,* the Court ruled that when a dog owner knows that his pet is vicious, he has a duty to keep the dog from "doing mischief" and that proof of the owner's negligence in such a case was not necessary. This standard has continued to this day: that one keeps dangerous animals at his own risk, and it is not a defense that the animal's owner took reasonable care to control the animal or to prevent its escape. This standard can be contrasted with the one applied to dogs that are not of a vicious nature, where the general rule is that the animal's owner must be proven to be negligent, and the "one free bite" rule still applies.

The Court went on to note that common law "is subject to judicial modification in the light of modern circumstances or increased knowledge." The Court considered numerous resources, including studies by the Journal of the American Veterinary Medical Association, and article in the *Annals of Surgery* on "Mortality, Mauling and Maiming by Vicious Dogs," the Center for Disease Control, and court cases from other jurisdictions, and concluded that Maryland's common law should be changed so that a standard of strict liability applied to all attacks by pit bulls. (The Court originally applied this standard to cross-bred pit bull mixes, but on reconsideration it deleted all references to mixed-breed pit bulls.) It also applied the strict liability standard not only to the dog's owner but to the owner of the property on which the dog lived, so that a person injured by the dog will not have to prove that the landowner knew the dog was dangerous, but only that the landowner knew the dog was a pit bull.

Although the Court's ruling involved the liability of a landlord, the result clearly affects common ownership communities as well. The issue for the Court was a landowner's right to control the presence of a vicious animal on his or her property. Just as a landlord can, through the lease, prohibit the tenants from bringing pit bulls onto the property, so a common ownership community can, through its governing documents, rules and regulations, restrict the rights of the members and residents as to the types of animals they can bring into the community. And not only should associations prohibit the presence of such animals, but they have a duty to inspect their properties to ensure that no such animals are present and to take immediate action if they discover a violation if they wish to avoid being held liable for any injuries caused by the animals.

The Court's language that imposes strict liability "in respect to the owning, harboring, or control" of pit bulls is expansive, and it can easily be argued that any association that does not prohibit pit bulls is "harboring" them. If an association does not currently ban pit bulls then I recommend that it take steps immediately to review and if necessary revise its governing documents to do so. In this respect, I should point out that Montgomery County law allows a homeowners association (but not a condominium or cooperative housing association) to amend its bylaws on a simple majority vote even if the bylaws themselves call for a larger majority.

This issue is a developing one. The General Assembly held a special session in August to consider bills to regulate the liability of landlords and other property owners for injuries caused by pit bulls, but was unable to reach any agreement on them. It is likely that it will take up the issue again when it meets in regular session in January, 2013.

(Mitchell Alkon is an attorney in private practice, and a member of the CCOC and co-chair of its Legislative Committee. He has chaired several CCOC hearing panels.)

Attorney General Fines Condominium Association

Most members of common ownership communities are not aware that both the Maryland Homeowners Associations and the Condominium Acts are enforceable by the Office of the Attorney General (OAG). While the OAG attempts to resolve most of its complaints through mediation, it can take legal action when necessary, and recently did so for the first time.

The OAG received a complaint from members of the Queen's Landing Condominium Association that the board of directors was holding closed meetings, withholding documents, and refusing to allow members to distribute materials, in violation of the Condominium Act. The OAG's investigation verified the claims. The association denied the allegations, but agreed to pay a fine of $2000. Payment of the fine was waived, provided that the board complies with the law for the next two years.

A TABLE OF LAWS AND REGULATIONS APPLICABLE TO COMMON OWNERSHIP COMMUNITIES IN MONTGOMERY COUNTY

By Charles Fleischer, Esq.

Federal Law

1. Fair Housing Act, 42 U..S. Code Section 3601

2. Federal Communications Commission pre-emption of restrictions on TV antennas and satellite dishes, 47 Code of Federal Regulations Sections 1.4000, 25.104

3. Federal Housing Authority lending requirements affecting condominiums, 24 Code of Federal Regulations Part 203

Maryland Code

4. Condominium Associations Act, Real Property Article Title 11

5. Homeowner Associations Act, Real Property Article Title 11B

6. Cooperative Housing Corporations, Corporation & Associations Article, Title 5-6B

7. Corporations statutes applicable to HOAs, condominiums and cooperatives, Corporations & Associations Article, Sections 2-101 and following

8. Representation of associations by non-lawyers, Business Occupations & Professions Article, Section 10-206

9. Immunity of officers and directors, Real Property Article, Section 14-118; Courts & Judicial Proceedings Article, Section 5-422

10. Contract Lien Act, Real Property Article Section 14-201 and following

11. Right to Display U.S. flag, Real Property Article Section 14-128

12. Right to Install Solar Collectors, Real Property Section 2-119

13. Housing association exemption from sales tax on energy utilities, Taxes Section 11-207

14. Right to install clotheslines, Real Property Article, Section 14-130

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15. Administrative Procedures, Chapter 2A

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17. Homeowners Associations-right to amend bylaws on majority vote, Section 24B-7

18. Right to install renewable energy devices, Section 40-3A

19 Snow removal duties of homeowners, Section 49-17

20 Human rights, Chapter 27

21. Smoking in common areas, Resolution 17-210

22. Right to Class A Fire-rated roof materials, Section 22-98

23. Housing standards, Chapter 26

24 Motor Vehicle Towing from private property, Chapter 30C

Executive Regulations (COMCOR)

25 CCOC Dispute Resolution Procedures, COMCOR Chapter 10B.06.01

CCOC Procedures

26 Default Judgment Procedures

27 Exhaustion of Remedies

28 Panel Chair Guidelines

29. Witness seating

30. Motions to Lift Automatic Stay

(Charles Fleischer is an attorney in private practice, a CCOC Panel Chair and former Commissioner.)

Useful County Phone Numbers for Common Ownership Communities

Most County Government agencies may now be reached by phone by dialing "311" during ordinary business hours. The operator will then refer the caller to the proper agency. This service includes non-emergency Police services such as reporting abandoned cars and community outreach, Libraries, the Circuit Court, Landlord-Tenant Affairs, Housing Code Enforcement, the Office of the County Executive, Cable TV regulation, the Department of Permitting Services and the Department of Transportation.

Some County agencies may be called directly or through 311, including:

Office of Consumer Protection	240-777-3636	(email: ocp@montgomerycountymd.gov)
CCOC	240-777-3766	(email: ccoc@montgomerycountymd.gov)
County Council	240-777-7900	
Parks & Planning Commission		
Planning Board	301-495-4605	
Parks Headquarters	301-495-2595	

City of Rockville: residents should still call their City agencies directly.

Emergency services: 911

For more information on the 311 system or to search for agencies by computer, go to:

Http://www3.montgomerycountymd.gov/331/Home.asp

FY 2012 Commission Participants (as of October, 2012)

__Residents__ from Condominiums/Homeowner Associations:

Elizabeth Molloy, Chairperson
Jim Coyle
Allen Farrar
Jan Wilson
Bruce Fonoroff
Elayne Kabakoff
David Weinstein
Ken Zajic

__Professionals__ Associated with Common Ownership Communities:

Gwen Henderson, Vice-Chairperson
Helen Whelan
Mitchell Alkon
Richard Brandes
Ralph Caudle
Arthur Dubin
Thomas Stone

County Attorney's Office

Walter Wilson, Associate County Attorney

Volunteer Panel Chairs:

Christopher Hitchens, Esq.
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Commission on Common Ownership Communities

100 Maryland Avenue, Room 330

Rockville, Maryland 20850

Please deliver to:

CCOC Complaint Statistics

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it did. Other amendments defined the business judgment rule to make it more precise and easier to understand. The law was also changed to give residents a majority of members on the CCOC.

The CCOC thoroughly revised and expanded its brochure on *How to Prepare for Your CCOC Hearing* so that it explains for the first time how to gather and prepare evidence, what the procedures before the hearing are, and how to testify and to ask questions of the witnesses.

CCOC staff is in the process of posting all CCOC decisions online at its website, and will follow them with an index to make them easier to use. The index will also include explanations of some of the more important legal principles, including the business judgment rule.

The CCOC is also planning to produce more seminars and videos on proper association management and the rights of members.

While no single measure will dramatically change the complaint statistics, the CCOC is committed to keeping the process as fair as possible for both parties.

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https://ext01.montgomerycountymd.gov/entp/s1p/esubpublic/newsubscriber.do

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