NOTE

IN THE LINE OF FIRE: *BROWN v. MUHLENBERG TOWNSHIP* AND THE REALITY OF POLICE SEIZURES OF COMPANION ANIMALS

By
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This article addresses companion animal owners' rights under current law to bring and maintain an action for the unreasonable seizure of their companion animal by an officer as well as an action for the intentional infliction of emotional distress in light of the Third Circuit's recent decision in Brown v. Muhlenberg Township. *Applying various legal doctrines, the article also explores potential legal arguments for future litigation stemming from an officer's execution of a companion animal.*

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I. INTRODUCTION

> The things that I heard—the first thing was, I heard a woman starting to shout and she was shouting, *Don't shoot, don't shoot* . . . I really couldn't see anything there. But then I heard—I heard her say, *That's my dog, that's my dog, don't shoot*. So all of a sudden, right after that there were five shots that just—they went bang, bang, bang, bang, bang.[1]

David and Kim Brown's neighbor heard the above on the day that Muhlenberg Township, Pennsylvania, Police Officer Robert Eberly

[1] *Brown v. Muhlenberg Township*, 269 F.3d 205, 212 (3d Cir. 2001) (emphasis added).

("Officer Eberly") shot and killed Immi, the Browns' three-year-old Rottweiler.[2] Unfortunately, an officer's use of deadly force on a companion animal is not uncommon.[3] Referred to as the seizure of a companion animal, this type of force is statutorily regulated.[4]

In the wake of dog maulings, dangerous dog hearings, and more restrictive regulations for dogs in public spaces, some officers abuse their state police power authority to seize a companion animal.[5] When this happens, the companion animal's owner will often file suit against the officer and the officer's employer. Typically, the owner asserts two claims: (1) intentional infliction of emotional distress for the officer's outrageous behavior and (2) unreasonable seizure under the Fourth Amendment of the United States Constitution.[6] While the majority of officers do not abuse their authority to seize companion animals, a glaring minority of officers create a problem that society cannot ignore.

The Humane Society of the United States (HSUS) has responded to this abuse of authority by creating a program that will train officers to recognize dogs' behavioral signs.[7] The program, which HSUS is finalizing, will provide officers with the skills to recognize whether a dog

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[2] *Id*. at 208.

[3] *See generally* Animal Leg. Def. Fund, *Issues, Tragedy in Tennessee* <http://www.aldf.org/article.asp?cid=24> (accessed Mar. 28, 2003). The most recent example of an officer's use of deadly force on a companion animal to draw media attention occurred on January 1, 2003. MSNBC and Wire Rpts., *Family Pursuing Legal Action after Police Shoot Their Dog During Mistaken Stop* <http://www.msnbc.com/local/rtmem/familypurafa.asp> (accessed Feb. 26, 2003). The Tennessee Highway Patrol mistakenly stopped the Smoak family on their way home from vacation because the officers believed the family was involved in a robbery. The family's dogs were in the vehicle, including a bulldog-boxer mix named Patton. The Tennessee Highway Patrol vehicle videorecording device caught this incident on tape. The tape showed Patton jumping from the car, running towards officer Eric Hall. Patton appeared to be wagging his tail. The tape also showed officer Hall stepping back from Patton and firing his shotgun at him, killing him. The Smoaks are pursuing legal action but have been advised not to discuss the case at this time. *Id*.

[4] *E.g.* Pa. Stat. Ann. tit. 3 § 459-302(a) (West 1996) (general rules regarding the seizure and detention of dogs).

[5] *See Amons v. District of Columbia*, 231 F. Supp. 2d 109 (D.D.C. 2002) (civil rights action wherein plaintiff alleged that officer intentionally shot and killed his dog without provocation); *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001) (plaintiff alleged that police officer shot and killed her dog after her dog interacted with the officer's dog and was returning to plaintiff with his back to the officer).

[6] U.S. Const. amend. IV. *See e.g. Fuller v. Vines*, 36 F.3d 65 (9th Cir. 1994), *cert. denied*, *sub nom. City of Richmond v. Fuller*, 514 U.S. 1017 (1995), *remanded to* 1996 WL 143899 (N.D. Cal. 1996), *rev'd*, 117 F.3d 1425 (9th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998), *overruled on other grounds sub. nom. Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002); *see also City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963) (affirming award of mental suffering damages to dog owner after the dog was shot and killed by policemen who came onto the owner's property without the owner's permission).

[7] Humane Socy. of the U.S., *Tennessee Dog Shooting Leaves Anger, Confusion in its Wake* <http://www.hsus.org/ace/16100.htm> (accessed Feb. 26, 2003).

is excited, fearful, protective, truly dangerous, aggressive, or posing a danger.[8]

This Note addresses the rights a companion animal owner has under current law to bring and maintain an action for the unreasonable seizure of a companion animal that has been killed by a police officer. It also addresses actions for intentional infliction of emotional distress in light of the Third Circuit's recent decision in *Brown v. Muhlenberg Township*.[9] Section II discusses the factual and procedural background of *Brown*. Section III provides background on the various legal concepts considered in *Brown*. Specifically, Section III focuses on five legal concepts: (1) the property status of companion animals; (2) Fourth Amendment seizures; (3) Section 1983 of Title 42 of the United States Code ("42 U.S.C. § 1983" or "Section 1983") Federal Civil Rights Act actions; (4) an officer's ability to rely on qualified immunity for a discretionary act; and (5) intentional infliction of emotional distress claims. The Note discusses each legal concept addressed in Section III in light of the seizure of a companion animal.

Section IV discusses the Third Circuit's analysis in *Brown*. Section V focuses on qualified immunity and intentional infliction of emotional distress from the standpoint of the facts in *Brown* and discusses the potential for future cases under the same or similar circumstances. Finally, Section VI concludes that the Third Circuit's decision in *Brown* will have lasting positive effects on a companion animal owner's ability to bring, maintain, and ultimately succeed on causes of action related to an officer's execution or seizure of a companion animal.

II. FACTUAL AND PROCEDURAL HISTORY OF *BROWN*

On the morning of April 28, 1998, the Browns were packing for a move.[10] Kim Brown was upstairs at home while her husband, David Brown, loaded the car. Their three-year-old Rottweiler, Immi, was in the fenced backyard. Immi had lived with the Browns and their preschool-aged children for most of her three years.[11] During her lifetime, Immi never displayed any violent or aggressive tendencies towards any person. On this particular morning, Immi was wearing her bright pink, one-inch-wide collar with the following tags attached: a current rabies tag, a microchip tag for identification purposes, a guardian angel tag, an identification tag with the Browns' address and telephone

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[8] *Id*.

[9] *Brown*, 269 F.3d 205. In *Brown*, the Third Circuit considered whether the Eastern District of Pennsylvania erred in entering summary judgment in favor of all defendants on all of the plaintiffs' causes of action. *Id.* at 209. The defendants included Officer Eberly, Muhlenberg Township, Muhlenberg Township Board of Supervisors, Muhlenberg Township Police Chief Flanagan, and Muhlenberg Township Police Chief Smith. *Id*.

[10] *Id*. at 208. The Browns' house was in a residential section of Redding, Pennsylvania. *Id*.

[11] *Id.* at 209.

number, and the Brown's prior Rottweiler's lifetime license. Unbeknownst to the Browns, the gate latch on the backyard fence had failed. Immi wandered into the adjacent parking lot just beyond the fence and proceeded to casually sniff and walk near the fence for a period of three to four minutes. Immi then approached the sidewalk along the street adjacent to the Brown's residence.

Officer Eberly was passing by in his patrol car when he noticed Immi.[12] He pulled over, parked across the street, and approached Immi, clapping his hands and calling out to the dog. Immi barked, retreated into the parking lot, and circled a vehicle approximately twenty feet from the sidewalk. Eberly crossed the street, entered the parking lot, and walked within ten to twelve feet of Immi. Immi stood still, and she did not growl or bark.

Ms. Brown, looking out from an open, screened window not more than fifty feet away, saw Eberly approach Immi then reach for his gun. She screamed as loudly as she could, "That's my dog, *don't shoot*!"[13] Mr. Brown heard his wife and ran from the back of the house. Eberly hesitated for only a few seconds before pointing his gun at Immi and firing five shots into her. The first shot hit Immi, but Eberly continued firing at her as she tried to crawl away. One of the bullets hit her right mid-neck region; three to four others entered her hind end. Immi died from Officer Eberly's shots.[14] A stranger who witnessed the incident from a parked car in the parking lot testified that Immi "did not display any aggressive behavior towards [Officer Eberly] and never tried to attack him."[15]

The Browns filed a civil rights action for Immi's death pursuant to 42 U.S.C. § 1983, asserting Fourth and Fourteenth Amendment violations.[16] They also asserted a state law claim of intentional infliction of emotional distress, identifying Officer Eberly as the primary tortfeasor.[17] Officer Eberly argued that he was enforcing Pennsylvania law in the course of his duty as an officer for Muhlenberg Township when he encountered Immi running free without a leash, and he considered her to be "abandoned property."[18] The Eastern District of Pennsylvania granted summary judgment in favor of the defendants on all claims.

The Browns appealed the decision to the Third Circuit of Appeals, and the Third Circuit granted review on all issues. On appeal, the Third Circuit considered whether a constitutional violation had occurred when Officer Eberly shot and killed Immi. The court considered

[12] *Id*.
[13] *Id.* (emphasis added).
[14] *Id.* at 210.
[15] *Id*. at 209.
[16] *Id.*
[17] *Id.* at 217.
[18] *Id*. at 210.

whether all defendants shared responsibility for any alleged constitutional violations, and it also considered the Browns' state law claim.[19]

Relying on the summary judgment standard, the Third Circuit reviewed the facts in the light most favorable to the Browns and drew every reasonable inference in the Browns' favor. Accordingly, the Third Circuit concluded that, if the facts as presented were indeed true, Officer Eberly had intentionally and repeatedly shot Immi without provocation and with knowledge that Immi belonged to the Browns, who lived in the house adjacent to the lot and were available to take custody of Immi.[20]

III. BACKGROUND

A. Animals as Property

> Humans are entitled under the laws of property to convey or sell their animals, consume or kill them, use them as collateral, obtain their natural dividends, and exclude others from interfering with an owner's exercise of dominion and control over them. A property owner's treatment of an animal may ostensibly be limited by anticruelty laws, but property rights are paramount in determining the ambit of protection accorded to animals by law.[21]

This statement by Gary Francione, Professor of Law and Katzenbach Scholar of Law and Philosophy at Rutgers University, summarily describes the current legal state of animals. As early as 1805, United States courts identified animals as being the property of humans.[22] In doing so, courts also drew an important distinction between certain types of animals. Courts generally treat domestic animals as chattel or property over which people have complete dominion.[23] A person, however, generally acquires property rights over a wild animal only when the person actually possesses the animal or owns the land upon which the animal exists.[24]

Ancient common law also established distinctions between animal types; for example, it gave dogs less protection than it did other types of domestic animals.[25] Because people could not derive as much economic benefit from dogs as they could from other types of animals,

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[19] *Id*.

[20] *Id*. at 209.

[21] Gary L. Francione, *Animals, Property and the Law* 24 (Temple U. Press 1995).

[22] *See e.g. Pierson v. Post*, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805) (holding that property rights in a wild fox, *ferae naturae*, are acquired by occupancy only).

[23] *See e.g. Oppenheimer Indus. v. Johnson Cattle Co*., 112 Idaho 423 (Idaho 1986); *Greives v. Greenwood*, 550 N.E.2d 334 (Ind. App. 1990); *Helsel v. Fletcher*, 225 P. 514 (Okla. 1924).

[24] *See e.g. State v. Shaw*, 67 Ohio St. 157 (Ohio 1902); *Hughes v. Reese*, 144 Miss. 304 (Miss. 1926).

[25] *See e.g. Thiele v. Denver*, 312 P.2d 786, 789 (Colo. 1957) (rights of the owner often referred to as "qualified property rights").

dogs were considered inferior.[26] This view, however, has changed significantly over the course of time through promulgation of statutes and developments in case law.[27] Today, dogs generally receive the same degree of property protection as other domestic animals, such as cattle and horses.[28] Nonetheless, a state legislature may in its discretion recognize a dog as an individual's personal property.[29] For example, one state statute designated a dog as property for purposes of requiring a vehicle operator to stop when the vehicle operator damaged property.[30] Another historic state case upheld a dog's property status in providing constitutional protection when a property taking occurred without due process of law.[31]

As of 2002, all fifty states recognize dogs as personal property,[32] as do federal statutes and case law.[33] As a result, dogs lack the general rights that human individuals have.[34] Thus, "Legal relations in our law exist only between persons, [t]here cannot be a legal relationship between a person and a thing or between two things."[35] Under current law, a dog is a thing and therefore has no legal relationship with a person. A dog, like any other thing, only has protection pursuant to the

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[26] *See e.g. Dickerman v. Consol. Ry.*, 79 Conn. 427 (Conn. 1907); *Ohio v. Lymus*, 26 Ohio St. 400 (Ohio 1875).

[27] *See e.g. Jankoski v. Preiser Animal Hosp*., 157 Ill. App. 3d 818, 820 (Ill. App. 1987) (holding that a dog is the personal property of an individual).

[28] Domestic animals are generally defined by statute. *See* Pamela D. Frasch et al., *Animal Law: Cases and Materials* 41–43 (2d ed., Carolina Academic Press 2002). The statutory definition of *animal* varies from state to state. For example, Pennsylvania defines a domestic animal as "any dog, cat, equine animal, bovine animal, sheep, goat or porcine animal." Pa. Stat. Ann. tit. 18 § 5511(Q) (West 2002). On the other hand, South Dakota defines a domestic animal as "any animal that through long association with man, has been bred to a degree which has resulted in genetic changes affecting the temperament, color, conformation or other attributes of the species to an extent that makes it unique and different from wild individuals of its kind." S.D. Codified Laws § 40-1-1(5) (2002).

[29] *Sentell v. New Orleans & C. R. Co*., 166 U.S. 698, 701–702 (1897).

[30] *See e.g. Devincenzi v. Faulkner*, 344 P.2d 322, 325 (Cal. Dist. App. 1959) (finding that although a dog was property under the California vehicle code, not all property damage was equal).

[31] *See e.g. Jenkins v. Ballantyne*, 30 P. 760, 760–761 (Utah 1892) (finding that a city ordinance requiring licensing and collaring of dogs, along with the destruction of unlicensed and uncollared dogs, fit within due process).

[32] *Frasch* et al., *supra* n. 28, at 91.

[33] *See e.g.* 10 U.S.C. § 2583 (2000) (Chapter 153 of Armed Forces Subtitle A, titled "Exchange of Material and Disposal of Obsolete, Surplus, or Unclaimed Property," addressing the adoption process for military working dogs).

[34] Francione, *supra* n. 21, at 4–5. A dog cannot possess rights. Dogs are "objects of the exercise of human property rights." Under the law of property, a thing designated as property cannot have "rights" against its legal owner or against other humans. *Id*.

[35] Gary L. Francione, *Animals as Property*, 2 Animal L. i, ii (1996) (quoting C. Reinold Noyes, *The Institution of Private Property* 290 n. 13 (1936)).

laws of property, and these property protections are for the owner's benefit, not for the benefit of the dog itself.[36]

B. Fourth Amendment Seizure

The Fourth Amendment[37] of the United States Constitution governs all seizures conducted by state and federal agents, including seizures of personal property.[38] Because American jurisprudence deems dogs property, the Fourth Amendment covers the seizure of a person's dog.

Seizure of a person's property occurs when a governmental intrusion meaningfully interferes with a person's possessory interest in that property.[39] A meaningful interference with a possessory interest is established when a temporary deprivation becomes permanent through the destruction of the property in question.[40] Thus, the destruction of an owner's dog may constitute a permanent deprivation of the owner's possessory interest.

Generally, a warrant must issue prior to any seizure.[41] The warrant must state with particularity the items the governmental agent shall seize.[42] In the absence of a warrant, the seizure generally must

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[36] Courts are nonetheless willing to acknowledge that a companion animal such as a dog is very different from a sofa or a lamp. For example, in *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001), the court stated:

> We are uncomfortable with the law's cold characterization of a dog . . . as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.

[37] U.S. Const. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[38] U.S. Const. amend. XIV. Through the Fourteenth Amendment, the privacy rights guaranteed by the Fourth Amendment are applicable and enforceable against the states. *See e.g. Mich. v. Summers*, 452 U.S. 692, 696 (1981).

[39] *See Ariz. v. Hicks*, 480 U.S. 321, 324–325 (1987) (no seizure when police recorded the serial numbers of stereo equipment because there was no meaningful interference with the defendant's possessory interest in the numbers recorded or in the stereo); *see also Siebert v. Severino*, 256 F.3d 648, 656 (7th Cir. 2001) (Department of Agriculture's removal of horses from another's property without a warrant was a Fourth Amendment seizure); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) (officer's shooting and killing of the defendant's dog could constitute a seizure under the Fourth Amendment).

[40] *U.S. v. Jacobsen*, 466 U.S. 109, 124–125 (1984) (referring to the conversion of a quantity of powder during a field test that resulted in the powder's destruction).

[41] *See e.g. Katz v. U.S.*, 389 U.S. 347, 357 (1967); *Johnson v. U.S.*, 333 U.S. 10, 14–15 (1948) (the Fourth Amendment requires a warrant for a seizure unless a preexisting exception applies).

[42] U.S. Const. amend. IV. *Compare Marron v. U.S.*, 275 U.S. 192, 196 (1927) ("[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a

be both premised on probable cause and be reasonable.[43] Probable cause for a warrantless seizure exists when at the time of the seizure, the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, are sufficient to warrant a prudent person to believe that the suspect committed or was committing an offense.[44]

While probable cause and a warrant are generally required for a reasonable seizure, the Supreme Court has developed exceptions for certain general or individual circumstances.[45] These circumstances include special law enforcement needs, diminished expectations of privacy, and minimal intrusions.[46] For example, if an officer were to seize a dog running at large that had attacked or was attacking another person, this would constitute an exception to the warrant requirement.[47] If the officer seized the companion animal on site by tranquilizing or killing it, such a warrantless seizure might be reasonable under the Fourth Amendment.[48]

Regardless of whether a warrant authorized the seizure, the seizure must be reasonable. To determine reasonableness, a court "balance[s] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[49] A compelling governmental interest likely exists where the interest is important enough to justify the particular seizure in light of other factors showing the seizure was relatively intrusive upon a genuine expectation of privacy.[50] A substantial risk to public safety, however, may render a

warrant describing another") *with* Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.4(f), 161 (2d ed., West 1992) ("[I]t is more accurate to say that the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty.").

[43] *See e.g. Carroll v. U.S.*, 267 U.S. 132, 155–156 (1925) (warrantless search and seizure standard is reasonableness for probable cause); *Hill v. Cal*., 401 U.S. 797, 804 (1971) (touchstone of reasonableness under the Fourth Amendment is sufficient probability, not certainty).

[44] *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

[45] *See Ill. v. McArthur*, 531 U.S. 326, 330 (2001) (explaining that while ordinarily a personal property seizure accomplished without a warrant is unreasonable, there are exceptions (citing *U.S. v. Place*, 462 U.S. 696, 701 (1983)).

[46] *Id*. at 330–331 (citing *Pa. v. Labron*, 518 U.S. 938, 940–941 (1996); *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444, 455 (1990); *Mich. v. Summers*, 452 U.S. 692, 702–705 (1981); *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

[47] *Knoller v. City & County of San Francisco*, 2001 WL 1295407, at *1 (Cal. App. Oct. 25, 2001) (This unpublished case is an extreme example of a situation that constitutes an exception to the warrant requirement for a companion animal seizure.).

[48] *Id*.

[49] *Place*, 462 U.S. at 703.

[50] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–653 (1995).

suspicionless seizure reasonable.[51] Therefore, if a dog has attacked an individual, even a suspicionless seizure may be reasonable.[52]

Seizure of personal property may violate an individual's Fourth Amendment rights. A court considers a number of factors to determine whether the seizure is unreasonable as defined by the Fourth Amendment.[53] Ultimately, the court's goal is to determine whether a governmental intrusion meaningfully interferes with a person's possessory property interest.[54] If such an interference exists, the court will hold the seizure unreasonable, establishing a person's deprivation of due process.[55] When the destruction of a dog establishes a meaningful interference with the owner's possessory interest, it follows that the owner will establish a deprivation of due process.

1. State Law & Seizure

Each state has the power to develop its own rules governing seizures.[56] This allows the states to meet the practical local demands of law enforcement personnel and criminal investigatory techniques.[57] State rules cannot, however, violate the Fourth Amendment's proscription against unreasonable seizure. Therefore, any state law that authorizes law enforcement to infringe upon an individual's Fourth Amendment rights, regardless of how the state labels such conduct, violates the Fourteenth Amendment's due process clause.[58]

In some cases, a warrantless seizure will not violate an individual's Fourth Amendment rights. In Pennsylvania, where *Brown* occurred, "warrantless searches and seizures are therefore unreasonable per se, unless conducted pursuant to a specifically established and *well-delineated exception to the warrant requirement*."[59] Moreover, Pennsylvania acknowledges that the general prohibition against warrantless searches is not to be dispensed with lightly.[60] Specifically, Pennsylvania places the burden of proof for the reasonableness of a warrantless seizure on the individual seeking exemption from the war-

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[51] *Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable . . . .'").

[52] *Id.*

[53] For example, factors the courts will consider include seizure as a result of search incident to arrest, seizure as a result of the "plain view" doctrine, and seizure as a result of exigent circumstances. LaFave & Israel, *supra* n. 42, at §§ 3.5–3.7.

[54] *Place*, 462 U.S. at 704.

[55] *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).

[56] *See e.g. Cal. v. Greenwood*, 486 U.S. 35 (1988).

[57] *Beck v. Ohio*, 379 U.S. 89, 92 (1964).

[58] *Sibron v. N.Y.*, 392 U.S. 40, 61 (1968).

[59] *Commonwealth v. Key*, 789 A.2d 282, 287 (Pa. Super. 2001) (emphasis added) (referring to the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution, which protects citizens from unreasonable searches and seizures) (citations omitted).

[60] *Commonwealth v. Germann*, 621 A.2d 589, 591 (Pa. Super. 1993).

rant requirement, who must show the exemption is necessary.[61] In some cases, statutory provisions will establish the reasonableness of a warrantless seizure.[62] Accordingly, for a seizure of a dog, a state statute may establish that the officer's destruction of the dog on-site was reasonable.[63]

2. State Law & Companion Animal Destruction

While dogs have attained property status equal to those animals referred to as "beasts of burden," there are still instances where a dog's status as property is qualified.[64] Qualified status results when the state applies a different standard of police power to a dog than they would towards other types of personal property.[65] In some cases involving police power application to dogs, dogs are subject to peculiar and drastic police regulations.[66] State police powers subject dogs to the most intense regulation and control of all companion animals.[67] The most severe example is a provision allowing the summary destruction of a dog.[68]

A majority of courts have found statutes providing for the summary destruction of a dog valid,[69] concluding the statutes did not violate due process of law.[70] Historically, courts rarely found dog destruction statutes invalid based on deprivation of due process. Instead, they found support for the statutes based on a need for community protection.[71] For example, in a 1934 Louisiana appellate court decision, *Jeane v. Johnson*,[72] the court upheld a state statute authorizing a citizen or an officer to kill any dangerous or vicious dog, or any dog not registered as required by law.[73] The court quoted with approval the following rule: assuming "dogs are property in the fullest sense of the word, they would still be subject to the police power of the

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61 *Id*.

62 *See e.g.* Pa. Stat. Ann. tit. 3 § 459–302(a) (West 2002) (establishing general rules regarding the seizure and detention of dogs).

63 *Id*.

64 *See e.g. Thiele v. Denver*, 312 P.2d 786, 789–790 (Colo. 1957). Here, the Court used the term "qualified" to designate a dog as property "because a dog as property is subject to a different application of the state's police power than most other kinds of personal property." This designation of qualified property stemmed from "the nature of dogs and the problems confronting society in how to establish a *modus vivendi* therewith." *Id*.

65 *Id*.

66 *See Jane Y. v. Joseph Y.*, 474 N.Y.S.2d 681 (1984) (ordering authorities to remove the dog from the family home because he was prone to attack certain family members).

67 *See Nicchia v. N.Y.*, 254 U.S. 228 (1920) (upholding a state law requiring dog owners to pay license fees).

68 *See e.g.* Ky. Rev. Stat. Ann. § 258.235 (1998).

69 *E.g*. *Thiele*, 312 P.2d at 786.

70 *Id.* at 792.

71 *Id.*

72 154 So. 757 (La. App. 1934).

73 *Id*. at 758.

state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens."[74]

While the overwhelming majority of historic cases failed to acknowledge a deprivation of due process for a dog's destruction, a few cases did. One of the earliest such cases was the 1894 Texas Criminal Court of Appeals case of *Lynn v. State*.[75] In *Lynn*, the court struck down an ordinance that instructed city marshals and officers to shoot all dogs not muzzled found on any street, alley, sidewalk, or other public highway within the city limits, holding that the ordinance offended the due process clause of the Texas Constitution.[76] The court went on to say "it would certainly be violative of every principle of law, justice, and right, to hold an ordinance valid which would authorize the [officers] of cities to destroy such property without process of law."[77]

Courts generally recognize that to avoid an unconstitutional deprivation of due process, at a minimum, a person is entitled to a hearing concerning the destruction of that person's dog.[78] Some courts even require that the individual receive notice and a hearing prior to a proposed destruction.[79] Most often, however, courts will find no deprivation of due process so long as a hearing occurs, even if the hearing occurs after the dog is destroyed.[80]

Pennsylvania promulgated a statute authorizing officers to detain a dog found running at large.[81] The statute gives an officer the authority to *humanely kill* such dog if the dog constitutes a threat to the public health and welfare.[82] Specifically, the statute provides:

> It shall be the duty of every police officer, State dog warden, employee of the department or animal control officer to seize and detain any dog which is found running at large, either upon the public streets or highways of the Commonwealth, or upon the property of a person other than the owner of such dog, and unaccompanied by the owner or keeper. Every police officer, State dog warden, employee of the department or animal control officer may humanely kill any dog which is found running at large and is deemed after due consideration by the police officer, State dog warden, employee of the department or animal control officer to constitute a threat to the public health and welfare.[83]

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[74] *Id*. at 757–758.

[75] 25 S.W. 779 (Tex. Crim. App. 1894) (holding dog destruction regulation invalid because it violated due process of law).

[76] *Id*. at 780–781.

[77] *Id*. at 780.

[78] *See e.g. Brown v. Muhlenberg Township*, 269 F.3d 205, 213–214 (3d Cir. 2001).

[79] *See e.g. City of Pierre v. Blackwell*, 635 N.W.2d 581 (S.D. 2001) (surrendering a dog to the pound as a "dangerous animal" deprived the dog's owner of a protected property interest and therefore, absent exigent circumstances, the owner was entitled to notice and a hearing by the city and a proper criminal adjudication by a judicial officer).

[80] *See e.g. Brown*, 269 F.3d at 213.

[81] Pa. Stat. Ann. tit. 3 § 459-302(a) (West 2002).

[82] *Id*.

[83] *Id*.

Statutes like this are not uncommon. Most states have statutes specifically allowing governmental officials to destroy dogs.[84] These statutes range from one authorizing a governmental official to destroy a dog that is not displaying valid rabies tags[85] to one authorizing a governmental official to destroy a dog that bites.[86]

C. 42 U.S.C. § 1983 Claims

Originally passed in 1871 as the Ku Klux Klan Act and codified in 1988, 42 U.S.C. § 1983 is one of the Federal Civil Rights Acts.[87] Section 1983 provides remedies to individuals for the violation of their constitutionally protected rights, but does not provide substantive rights.[88] To bring a successful Section 1983 action, the complainant must allege that (1) the conduct complained of was that of a person acting "under color of state law," and (2) the complainant suffered a deprivation of rights, privileges, or immunities secured by the constitution and laws of the United States.[89] In the context of dog and owner, the owner must allege that a federal or state officer carried out the action that deprived the owner of his Fourth or Fourteenth Amendment rights.[90]

In addition, a successful action must allege an injury that results from a tort of constitutional dimension.[91] This means that the official must have engaged in outrageous behavior or an abuse of official power.[92] Thus, a dog owner would allege either needless destruction of

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[84] *See e.g.* Cal. Govt. Code Ann. § 53074 (West 1997); Conn. Gen. Stat. § 22-358 (2001); Haw. Rev. Stat. § 143-8 (1983); Iowa Code § 351.26 (2002); Ky. Rev. Stat. Ann. § 258.235 (1998); La. Stat. Ann. § 102.16 (2001); 7 Me. Rev. Stat. Ann. § 3952 (2002); Md. Code Ann. Art. 24 § 11-510 (2002); Mass. Gen. Laws ch. 272, § 91 (2000).

[85] Iowa Code § 351.26 (2002) ("It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions unless such jurisdiction shall have otherwise provided for the seizure and impoundment of dogs, to kill any dog for which a rabies vaccination tag is required, when the dog is not wearing a collar with rabies vaccination tag attached.").

[86] Ky. Rev. Stat. Ann. § 258.235 (1998).

[87] *Ku Klux Klan Act of 1871*, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2000)).

[88] *Id.*; *see also e.g. Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001); *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001).

[89] 42 U.S.C. § 1983 (2000) (providing that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, is liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

[90] *See e.g. Fuller v. Vines*, 36 F.3d 65, 68–70 (9th Cir. 1994); *Hogan v. City of Houston*, 819 F.2d 604, 605 (5th Cir. 1987) (complainant failed to allege abuse of governmental power, which would have raised an ordinary tort to the level of a constitutional violation).

[91] *See e.g. Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (the complainant alleged an unreasonable seizure amounting to a constitutional deprivation, when individuals acting under color of law placed roadblocks in a manner likely to cause death).

[92] *See e.g. Davidson v. Cannon*, 474 U.S. 344, 347–348 (1986).

the dog or destruction of the dog by a person lacking necessary authority.[93]

D. Qualified Immunity for Governmental Officials

For nearly thirty years, the Supreme Court has struggled with the appropriate standard for determining whether a governmental official is entitled to qualified immunity for engaging in certain discretionary conduct.[94] In 1974, the Court defined those individuals to whom qualified immunity is available and the discretionary conduct for which qualified immunity applies.[95]

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[96]

The qualified immunity doctrine has evolved into a fairly concise and succinct two-part sequential analysis.[97] The first inquiry is "whether plaintiff's allegations, if true, establish a constitutional violation."[98] The second inquiry is whether the state of the law at the time of the incident gave the governmental official fair warning that his actions were unconstitutional.[99] If both inquiries result in an affirmative response, qualified immunity is unavailable to the governmental official for his or her discretionary conduct.[100] Accordingly, in a situation where a companion animal owner brings a Section 1983 action against a government official for the destruction of a companion animal, affirmative responses are imperative to prevail on the underlying claim.

E. Intentional Infliction of Emotional Distress

In a case involving harm to a companion animal, a plaintiff may bring a claim for intentional infliction of emotional distress. A plaintiff

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93 *See infra* pt. IV(A)(2) (discussing the Third Circuit's qualified immunity analysis).

94 *See e.g. Wood v. Strickland*, 420 U.S. 308 (1975); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Saucier v. Katz*, 533 U.S. 194 (2001).

95 *Wood*, 420 U.S. at 318 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 247–248 (1974)).

96 *Id*.

97 *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

98 *Id.* at 2513 (citing *Saucier*, 533 U.S. at 201). An inmate brought suit against prison guards, alleging that his Eighth and Fourteenth Amendment rights were violated when he was handcuffed to hitching posts on two occasions, one of which lasted for seven hours without regular water or bathroom breaks. The Supreme Court determined that officials can be on notice that their conduct violates established law even in novel factual circumstances for purposes of qualified immunity.

99 *Id*. at 2516, 2519 ("Nothing in our decision forecloses any defense other than qualified immunity.").

100 *Id*. at 2516.

must satisfy three requirements to establish a prima facie case:[101] (1) defendant's act is intentional or reckless, (2) defendant's conduct is extreme and outrageous, and (3) defendant's intentional or reckless conduct is the cause of severe emotional distress.[102] The pivotal inquiry is whether the conduct is *extreme and outrageous*.[103]

The term "outrageous" does not objectively describe an act; it represents an evaluation of behavior. Outrageous conduct is so outrageous in character and so extreme in degree that it goes beyond all bounds of decency; it is atrocious and utterly intolerable in a civilized community.[104] Specifically, the conduct is such that it would cause an average member of the community to exclaim "outrageous!"[105]

The owner of a companion animal claiming intentional infliction of emotional distress should pay close attention to the key considerations establishing conduct as "outrageous." *Brown* provides an example of conduct that would likely qualify as outrageous for purposes of establishing a prima facie case of intentional infliction of emotional distress, because the officer executed a dog in front of the dog's owner with knowledge that the dog belonged to the family who lived in the adjacent house and was available to take custody.[106]

IV. THE THIRD CIRCUIT'S ANALYSIS OF BROWN

The Third Circuit granted review of *Brown* to determine whether the Eastern District of Pennsylvania erred in granting summary judgment to each of the defendants.[107] The threshold issue on appeal was

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101 *Restatement (Second) of Torts* § 46 (1965).

102 *Id*.

103 *Id*. Conduct that is a result of inattention is insufficient to establish liability under this tort.

104 *Id*.

105 *Id*. Courts are required to determine if the defendant behaved in an immoral and uncivilized manner. The *Restatement* provides some guidelines for the courts. For example, comment (e) suggests that outrageous conduct may arise from an abuse by the actor of a position, or a relation with the other, that gives him "actual or apparent authority over the other, or power to affect his interests." But comment (e) cautions that "[e]ven in such cases . . . the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous." Similarly, comment (f) suggests that "the actor's knowledge that the other is peculiarly susceptible to emotional distress" is relevant to an evaluation of the outrageousness of conduct. But again, comment (f) cautions that "the major outrage is essential to the tort; and the mere fact that the actor knows that other will regard the conduct as insulting, or will have his feelings hurt, is not enough." Finally, comment (i) suggests that the intentional infliction of emotional distress exists only where the actor desires to inflict severe emotional distress. Furthermore, according to comment (i), the actor must know that severe emotional distress is certain or substantially certain to result from his conduct.

106 *Brown v. Muhlenberg Township*, 269 F.3d 205, 209 (3d Cir. 2001).

107 *Id.* at 208. In reviewing an order granting summary judgment, the Third Circuit is bound by: (1) the requirements of the Federal Rules of Civil Procedure, Rule 56; (2) United States Supreme Court precedent concerning summary judgment; and (3) the circuit's own summary judgment interpretations. *See e.g.* Fed. R. Civ. P. 56(c) (2002); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n. 6 (3rd Cir. 2001).

whether Officer Eberly violated the Browns' constitutional rights when he intentionally and repeatedly shot Immi.[108] The Third Circuit also considered whether Officer Eberly's employer, Muhlenberg Township, Muhlenberg Township Board of Supervisors, and Muhlenberg Township's two chiefs of police were responsible for any violation of the Browns' constitutional rights.[109] In addition to the potential constitutional violations, the Third Circuit also considered the Browns' state law claim of intentional infliction of emotional distress.[110]

The Third Circuit concluded, based on the facts and reasonable inferences drawn from the facts, that Officer Eberly intentionally and repeatedly shot Immi without provocation and with knowledge that Immi belonged to the Browns.[111] Accordingly, the Third Circuit reversed the Eastern District of Pennsylvania's holding as to Officer Eberly on all but the procedural and substantive due process claims and remanded for further proceedings consistent with its opinion.[112] The Third Circuit did, however, affirm the Eastern District of Pennsylvania's holding as to all other defendants.[113]

A. Officer Eberly

The Third Circuit focused on the Browns' Fourth Amendment interests and their Fourteenth Amendment right to procedural due process.[114] The Third Circuit analyzed the Browns' Fourth Amendment interests by applying the balancing test provided by the Supreme Court in *United States v. Place*[115] to determine whether a warrantless seizure was valid.[116] The Third Circuit also considered Officer Eberly's legal ability to claim qualified immunity, and Pennsylvania's law allowing redress for violations of an individual's due process rights.[117] Specifically, the Third Circuit focused on the Browns' *predeprivation* and *postdeprivation* process rights available under Pennsylvania law.[118]

1. Unreasonable Seizure

To determine whether a warrantless seizure is valid under the Fourth Amendment, a court relies on the Supreme Court's balancing test set forth in *Place*. In *Place*, the Court balanced "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the alleged governmental interests al-

108 *Brown*, 269 F.3d at 209.
109 *Id*. at 208.
110 *Id*.
111 *Id.* at 209.
112 *Id*. at 209–14.
113 *Id.* at 214–17.
114 *Id*. at 213–214.
115 *U.S. v. Place*, 462 U.S. 696 (1983).
116 *Brown*, 269 F.3d at 210.
117 *Id*.
118 *Id*.

leged to justify the intrusion."[119] In *Brown*, the Third Circuit balanced Officer Eberly's execution of Immi against Pennsylvania's interest in restraining a dog found at large.[120] The court explained that,

> [where] the state's interest may . . . justify the extreme intrusion occasioned by the destruction of the pet in the owner's presence . . . [it] does not mean . . . that the state may, consistent with the Fourth Amendment, destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.[121]

Because the dog was not threatening anybody and the owners were nearby, the Third Circuit concluded that Officer Eberly's execution of Immi "could be found to be an unreasonable seizure within the meaning of the Fourth Amendment."[122]

2. Qualified Immunity

The Third Circuit also considered Officer Eberly's ability to rely on qualified immunity to defend his conduct.[123] It explained that if Officer Eberly could "show that a reasonable officer with the information he possessed at the time could have believed his conduct lawful in light of the law that was clearly established on April 28, 1998," Officer Eberly would be absolved from civil liability and the burden of defending the suit.[124] To determine whether the law was "clearly established," the Third Circuit explained that the "contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right."[125]

Under Pennsylvania law, a dog is considered the personal property of its owner.[126] Based on this statute, the Third Circuit concluded that a reasonable officer would have realized that a person's dog was personal property.[127] The Third Circuit further determined that "a reasonable officer would have understood that it was unlawful for him to destroy a citizen's personal property in the absence of a substantial public interest."[128] The court concluded that "a reasonable officer in Officer Eberly's position *could not* have applied these well established principles to the situation before him and . . . [conclude] that he could lawfully destroy a pet who posed no imminent danger and whose owners were known, available and desirous of assuming custody."[129]

Accepting the record evidence in the light most favorable to the Browns and drawing all reasonable inferences in the Browns' favor,

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119 *Place*, 462 U.S. at 703.
120 *Brown,* 269 F.3d at 210.
121 *Id*.
122 *Id*. at 211.
123 *Id.*
124 *Id*.
125 *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).
126 *Id.*; *see also* Pa. Stat. Ann. tit. 3 § 459–601 (West 1996).
127 *Brown*, 269 F.3d at 211.
128 *Id*. (*relying on U.S. v. Place*, 462 U.S. 696, 705 (1983)).
129 *Id*. (emphasis added).

the Third Circuit concluded that Officer Eberly failed to establish his entitlement to qualified immunity.[130] Because it would have been apparent to a reasonable officer that executing Immi would be an unlawful act under Pennsylvania law, the Third Circuit did not absolve Officer Eberly from the alleged civil liability or from defending his suit.[131]

3. Procedural Due Process

Property deprivation includes the destruction of property, and under Pennsylvania law, Immi was the Brown's personal property.[132] Thus, the Third Circuit concluded that Officer Eberly deprived the Browns of their property by destroying Immi.[133] Therefore, the Browns were entitled to due process.[134]

a. Predeprivation Process v. Postdeprivation *Process*

Because Immi was already dead, predeprivation review was unavailable to the Browns, but the Third Circuit explained that predeprivation review was not constitutionally required even though Officer Eberly could have provided such review.[135] The Third Circuit stated that whether Officer Eberly himself was able to foresee a deprivation was of no consequence, the controlling inquiry was whether Pennsylvania was in a position to provide for a predeprivation process.[136] Thus, where predeprivation review was unavailable, postdeprivation process was necessary.[137]

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[130] *Brown*, 269 F.3d at 212. Evidence regarding Immi's disposition prior to her death was conflicting. Officer Eberly alleged that Immi acted aggressively, justifying her execution. Kim Brown's testimony supports a lack of provocation for Immi's execution. Additionally, testimony of a disinterested observer in the parking lot supports Ms. Brown's testimony. And a neighbor provided testimony that he heard Ms. Brown yell, "Don't shoot. . .that's my dog!" before Officer Eberly shot Immi. *Id.*

[131] *Id*.

[132] *Id.* at 213 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)).

[133] *Id*.

[134] *Id*.

[135] *Brown*, 269 F.3d at 213 (citing *Hudson v. Palmer*, 468 U.S. 517 (1984)). *Hudson* involved a prison guard's alleged intentional destruction of a prisoner's personal property while conducting an authorized "shakedown." *Hudson*, 468 U.S. at 530. The Supreme Court held that no predeprivation process was required and that the state's provision of a postdeprivation remedy in the form of a suit for damages provided all the process that was due. The Court explained that because the guard's destruction of the property was random and unauthorized conduct of a state employee, predeprivation procedures were simply impracticable. *Id*. at 533.

[136] *Brown*, 269 F.3d at 214.

[137] *Id*. at 213.

b. Pennsylvania Law: Postdeprivation Process

Pennsylvania law provided the Browns with a judicial remedy for the loss of Immi—a civil action for conversion.[138] Pennsylvania law denies immunity to any public employee when the court finds that his or her conduct constitutes, among other things, "willful misconduct."[139] Therefore, postdeprivation process was available to the Browns.[140] The Third Circuit concluded that the Browns were afforded appropriate postdeprivation judicial process under Pennsylvania law and affirmed the district court's summary judgment in favor of Officer Eberly on this claim.[141]

4. Substantive Due Process

The Browns also asserted that Officer Eberly's conduct violated their substantive due process rights. The Third Circuit, however, explained that because the Browns' substantive due process violation assertion was cursory and conclusory, it was not properly before the court. Nonetheless, the Third Circuit stated that even if it were to assume that a substantive due process violation had occurred, Officer Eberly would be entitled to qualified immunity.[142]

B. Muhlenberg Township & Township Supervisors

The Third Circuit applied the standard articulated in *City of Canton v. Harris*[143] to determine whether Muhlenberg Township or Muhlenberg Township Board of Supervisors were liable for any of the Browns' constitutional deprivations. In doing so, the Third Circuit relied on its determinations regarding Officer Eberly's execution of Immi.[144]

1. Municipal Liability & Constitutional Deprivations: Standards

The Third Circuit concluded that Muhlenberg Township and its supervisors could only be liable to the Browns if "there [was] a direct causal link between the municipal policy or custom and the alleged

138 *Id*. Conversion is defined under Pennsylvania law as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *Stevenson v. Econ. Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964); *Bank of Landisburg v. Burruss*, 524 A.2d 896 (Pa. 1987). Moreover, while the exercise of control over the property or chattel must be intentional, the tort of conversion does not rest on proof of specific intent to commit a wrong. *Norriton E. Realty Corp. v. C.Penn Natl. Bank*, 254 A.2d 637, 638 (Pa. 1969).

139 *Brown*, 269 F.3d at 214 (citing Pa. Pol. Subdivision Tort Claim Act § 8550 (1999)); *Delate v. Kolle,* 667 A.2d 1218 (Pa. Cmmw. 1995); *Kuzel v. Krause,* 658 A.2d 856 (Pa. Cmmw. 1995)).

140 Pa. Pol. Subdivision Tort Claim Act § 8550.

141 *Id.*

142 *Brown,* 269 F.3d at 214.

143 489 U.S. 378 (1989).

144 *Brown*, 269 F.3d at 215 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

constitutional deprivation."[145] A direct causal link can exist in one of two ways.[146] First, Muhlenberg Township and its Board of Supervisors could be liable to the Browns "if it [was] alleged to have caused a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[147] Second, the Browns could "establish the requisite causal link between the constitutional deprivation and a custom, 'even though such a custom has not received formal approval through the body's official decision-making channels.'"[148]

Regardless of how the Browns showed the direct causal link, the Third Circuit explained that liability exists only when the municipality itself actually was responsible for the acts.[149] The Third Circuit further stated that "only those municipal officials who have 'final policymaking' authority may, by their actions, subject the government to Section 1983 liability."[150] Municipality training of police officers based on official policy or adopted policy may subject the municipality to Section 1983 liability, but only "where [it] reflects a 'deliberate' or 'conscious' choice by [the] municipality."[151]

2. Municipal Liability & Constitutional Deprivations: Not Established

The Third Circuit concluded that the Browns failed to satisfy the burden necessary for their claims against Muhlenberg Township and its supervisors.[152] Examining the township's training of Officer Eberly, the Third Circuit explained that the township policy relating to use of force used against animals was inconsistent with Officer Eberly's conduct. Specifically, the Third Circuit pointed out that Muhlenberg Township's training for its officers was only the "degree of

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145 *Id*.

146 *Id*.

147 *Id*. (citing *City of Saint Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (internal citations omitted)).

148 *Id.* (citing *Monell v. Dept. of Soc. Serv*., 436 U.S. 658, 690–91 (1978)).

149 *Id.* (citing *Praprotnik*, 485 U.S. at 123).

150 *Id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).

151 *Id*. (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Supreme Court cases define "a deliberate and conscious choice by the municipality" as a policy. Municipal liability requires "deliberate indifference to the rights of persons with whom the police come into contact." The "failure to train" scope, as defined by the Supreme Court, is narrow. *Id*.

152 *Id*. The Browns provided no evidence of any official policy endorsing Officer Eberly's conduct. The Browns also failed to establish the existence of an unconstitutional governmental custom. *Id*. at 216. The Browns also asserted a "failure to train" claim, but the Third Circuit found this claim lacking, stating that "while it is true that Muhlenberg police officers received no formal training specifically directed to handling dogs, they did have the guidance of the policy manual, and [the court] believe[s] a reasonable trier of fact could not conclude that the need for further guidance was so obvious as to indicate deliberate indifference on the part of the Board to the Browns' constitutional rights." *Id*.

force . . . dependent upon the facts surrounding the situation the officer faces."[153] The Third Circuit further explained that

> the policy specifically addressed the use of firearms against animals: an officer may use a firearm to kill a dangerous animal . . . whenever possible, the owner of the animal to be destroyed shall be contacted and written permission obtained . . . [i]n any case, whenever the shooting of an animal is necessary, the shooting must be done cautiously to protect . . . nearby persons or property.[154]

The Third Circuit concluded that the record simply would not support an inference that Muhlenberg Township demonstrated a pattern of "employing excessive force in the handling of dogs at large."[155]

C. Police Chiefs Flanagan & Smith

The Third Circuit focused on the Browns' allegation that Chief Flanagan and Chief Smith were responsible for Officer Eberly's constitutional torts because of inadequate supervision. Looking at the Browns' two attempts to establish a supervisor liability claim, the Third Circuit affirmed the Eastern District of Pennsylvania's grant of summary judgment in favor of Chiefs Flanagan and Smith.[156]

To succeed on their supervisory liability claim, the Browns would have had to satisfy five requirements:[157] (1) identify specific supervisory practices or procedures that Chiefs Flanagan and Smith had failed to employ; (2) show that "the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk" of Immi's death; (3) show that Chiefs Flanagan and Smith were aware that this unreasonable risk existed; (4) show that Chiefs Flanagan and Smith were indifferent to the risk; and (5) show that Officer Eberly's constitutional torts resulted from Chiefs Flanagan's and Smith's "failure to employ that supervisory practice or procedure."[158]

The Third Circuit stated "that it [was] not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the supervisor had done more than he or she did."[159] Instead, the Browns had to identify "specific acts or omissions of the supervisor that evidence[d] deliberate indifference and persuade the court that there is a relationship between the identified deficiency and the ultimate injury."[160]

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153 *Id*. at 215.

154 *Id.* at 215–16.

155 *Id*. at 216.

156 *Id*. at 217.

157 *Id*. at 216 (citing *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989) (former inmate brought civil rights action against commissioner of corrections and senior records official to recover for violation of civil rights that occurred when he was detained after expiration of his sentence)).

158 *Id*.

159 *Id*. (internal quotations omitted).

160 *Id*. (internal quotations omitted).

The Browns' claim against Chief Smith failed because the Browns did not offer any explanation as to how Chief Smith, who had retired two years prior to the shooting, might be responsible for Officer Eberly's conduct.[161] Similarly, the Browns failed in their argument that Chief Flanagan had failed to employ two supervisory practices. The first allegedly omitted practice failed because at the time Officer Eberly executed Immi, the police department had a policy regarding officer destruction of dogs. A reasonable trier of fact could not conclude that the failure to provide more formal training evidenced deliberate indifference. The second allegedly omitted practice failed because the Browns presented no evidence that Chief Flanagan had knowledge or should have had knowledge of any prior excessive use of force on animals by Officer Eberly. The four instances when Officer Eberly conceded he had killed dogs had drawn only one complaint, and that was ten years prior to Officer Eberly's execution of Immi and some eight years before Chief Flanagan took office.[162] Thus, the Third Circuit affirmed the Eastern District of Pennsylvania's finding of summary judgment in favor of defendants Chief Smith and Chief Flanagan.

D. Pennsylvania State Claim

The Browns claimed intentional infliction of emotional distress under Pennsylvania state law.[163] The Third Circuit relied on the *Restatement* and existing case law addressing recovery for intentional infliction of emotional distress for the destruction of a pet.[164] However, the court only addressed the claim against Officer Eberly because the Browns failed to indicate on appeal which state tort claim against Chiefs Flanagan and Smith was improperly rejected by the Eastern District of Pennsylvania.[165]

1. The Browns: Intentional Infliction of Emotional Distress

The Browns relied on two points to support their claim for the intentional infliction of emotional distress.[166] First, the Browns claimed that "a reasonable trier of fact could conclude that Officer Eberly shot Immi five times in front of her owner" without any justification and deliberately ignored the owner's screaming protest and pleas for him

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161 *Id.* at 217.

162 *Id.*

163 *Id*.

164 *Restatement (Second) of Torts* § 46 (1965); *Brown*, 269 F.3d at 217–219. In *Williams v. Guzzardi*, 875 F.2d 46 (3d Cir. 1989), the Third Circuit had predicted that the Pennsylvania Supreme Court would recognize the tort of intentional infliction of emotional distress as described in *Restatement (Second) of Torts* § 46. *Brown*, 269 F.3d at 217. The Third Circuit was unable to find any subsequent case law to contradict its conclusion. Therefore, it applied § 46 to the Browns' claim for intentional infliction of emotional distress. *Id*.

165 *Brown*, 269 F.3d at 217.

166 *Id*.

not to shoot.[167] Second, the Browns claimed that Kim Brown's observation of Immi's execution had exacerbated her existing post-traumatic stress disorder.[168]

To prevail, the Browns had to show that Officer Eberly's conduct was extreme and outrageous, that it caused Ms. Brown severe emotional distress, and that Officer Eberly acted intentionally to cause her severe emotional distress. The Third Circuit quickly concluded that there was clear support in the record to show that Officer Eberly intended to inflict or knew he would inflict severe emotional distress on Ms. Brown. Further, Officer Eberly did not challenge the sufficiency of the Browns' evidence for severe emotional distress. Consequently, the primary inquiry focused on whether Pennsylvania courts "would permit a trier of fact to conclude that Officer Eberly's conduct was extreme and outrageous."[169]

2. Officer Eberly: Pet Killing Neither Extreme Nor Outrageous

Officer Eberly argued that Pennsylvania courts would not recognize the killing of any pet under any circumstances as "extreme or outrageous," relying on two Pennsylvania state cases to support his argument.[170] The Third Circuit, however, found Officer Eberly's argument unpersuasive, holding that the killing of pets may, in some cases, amount to "extreme or outrageous" conduct.[171]

a. Pennsylvania's Interpretation of Extreme or Outrageous

The Third Circuit dismissed Officer Eberly's contention that the Pennsylvania courts would not under any circumstances recognize the killing of a pet as extreme or outrageous.[172] The court stated that "[g]iven the strength of community sentiment against at least extreme forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets, we would not expect the Supreme Court of Pennsylvania to rule out all liability predicated on the killing of a pet."[173] The court even went so far as to predict that, based upon the evidence in the record, the Pennsylvania courts would permit the trier of fact to return a verdict for the plaintiff in this instance.[174]

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167 *Id*.

168 *Id*.

169 *Id*.

170 *Id.* at 219. The cases Eberly relied on were *Daughen v. Fox,* 539 A.2d 858 (Pa. Super. 1988) (holding that a veterinarian's negligent operation on a pet, without more, was not extreme and outrageous conduct), and *Miller v. Peraino,* 626 A.2d 637 (Pa. Super. 1993) (holding that the plaintiffs failed to allege or produce evidence that the defendant's acts were performed with the intention of inflicting severe emotional distress on the dog's owner).

171 *Brown,* 269 F.3d at 218.

172 *Id*.

173 *Id*.

174 *Id*. The Third Circuit referred to the facts in the record: "where it is shown that a police officer's attention was called to the severe emotional distress of the pet's owner;

The Third Circuit explained that Officer Eberly's behavior was "directed to the owner as well as to the pet, with the potential for serious emotional injury to the owner being readily apparent," citing a number of cases within other jurisdictions that had reached similar conclusions.[175]

b. Improper Interpretation of Pennsylvania State Law

The Third Circuit disagreed with Officer Eberly's attempt to rely on two state cases, *Daughen v. Fox*[176] and *Miller v. Peraino*,[177] both of which denied recovery to pet owners for intentional infliction of emotional distress.[178] Specifically, the Third Circuit disagreed with Officer Eberly's interpretation of *Miller.*[179] Unlike *Miller,* where the plaintiffs had failed to produce any evidence, "the Browns produced evidence from which a reasonable trier of fact could conclude that Officer Eberly shot Immi either intending to cause Ms. Brown severe emotional distress or with the knowledge that the infliction of such distress on her would be virtually certain."[180]

3. The Third Circuit: Intentional Infliction of Emotional Distress Available

The Third Circuit concluded that the Browns could bring an action for the intentional infliction of emotional distress for Officer Eberly's execution of Immi in Ms. Brown's presence.[181] Similarly, the Third Circuit concluded that, based on the record, sovereign immunity did not protect Officer Eberly from the intentional infliction of emotional distress claim. Accordingly, it reversed summary judgment in favor of Officer Eberly as to Ms. Brown. However, it affirmed the entry of summary judgment in favor of Officer Eberly as to David Brown because, based on the record, Mr. Brown had not witnessed the shooting, and there was nothing to suggest that Officer Eberly even knew of his presence in the vicinity.[182]

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he hesitated before shooting; and he then attempted to fire five bullets into the pet within the owner's view and without justification." *Id*.

175 *Id*. at 219 (citing *Nelson v. Percy,* 540 A.2d 1035, 1036 (Vt. 1987); *Richardson v. Fairbanks N. Star Borough,* 705 P.2d 454, 456 (Alaska 1985); *LaPorte v. Associated Indeps., Inc*., 163 S.2d 267, 269 (Fla. 1964); *Katsaris v. Cook,* 225 Cal. Rptr. 531, 538 (1986); *Gill v. Brown,* 695 P.2d 1276, 1277–78 (Idaho App. 1985); *City of Garland v. White,* 368 S.W.2d 12, 17 (Tex. Civ. App. 1963)).

176 539 A.2d 858 (Pa. Super. 1988).

177 626 A.2d 637 (Pa. Super. 1993).

178 *Brown*, 269 F.3d at 219.

179 *Id.*

180 *Id*.

181 *Id*.

182 *Id*.

V. CRITIQUE

The Third Circuit's decision in *Brown* will have a significant impact on a companion animal owner's ability to bring and maintain an action for the unreasonable seizure of a companion animal. It also will impact an owner's ability to bring an action for intentional infliction of emotional distress for the unreasonable seizure of a companion animal. If a companion animal owner is to succeed, it is essential that a court determine that an officer may not rely on qualified immunity. As the Third Circuit explained:

> if the facts asserted by the Browns are found to be true, . . . a reasonable officer in Officer Eberly's position could not . . . have concluded that he could lawfully destroy a pet who posed no imminent danger and whose owners were known, available, and desirous of assuming custody; in other words, it would have been *apparent to a reasonable officer that shooting Immi would be unlawful*.[183]

Consequently, the Third Circuit's analysis provides owners of companion animals with persuasive precedent that an officer behaving as Officer Eberly did cannot rely on qualified immunity as a defense.[184]

A. The Third Circuit Summary Judgment Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[185] Material facts are those that may affect the outcome of the case.[186] A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party.[187] The nonmoving party's evidence must be believed and all justifiable inferences must be drawn in the nonmovant's favor.[188]

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[183] *Id.* at 211–212 (emphasis added). This conclusion relies on Pennsylvania's acknowledgment that a dog is the personal property of its owner and the well-established principles of the Fourth Amendment governing warrantless seizures. *Id*.

[184] As established by the Third Circuit in *Brown*, an officer could rely on qualified immunity to absolve him from civil liability and the burden of defending a suit against him if he could show "that a reasonable officer with the information he possessed at the time could have believed his conduct lawful in light of the law" clearly established on the date the officer's conduct was in dispute. *Brown*, 269 F.3d at 211 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[185] Fed. R. Civ. P. 56(c) (2002).

[186] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

[187] *Id*.

[188] *United Steelworkers of Am. v. Phelps Dodge Corp*., 865 F.2d 1539, 1542 (9th Cir. 1989) (citing *Liberty Lobby*, 477 U.S. at 255).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact."[189] Where the nonmoving party would bear the burden of proof at trial, the moving party must show the court there is an absence of evidence to support the nonmoving party's case.[190] A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."[191] The opposing party need not show that the issue will be resolved conclusively in its favor, but rather must only produce sufficient evidence of a material factual dispute that would require "a jury or judge to resolve the parties' differing versions of the truth at trial."[192]

The Third Circuit correctly concluded that a material factual dispute existed regarding whether Immi was dangerous. Thus, on remand, the Browns proceeded to trial regarding Officer Eberly's civil liability for executing Immi.[193]

B. The Significance of the Third Circuit's Qualified Immunity Analysis

Qualified immunity is available if the governmental official can "show that a reasonable officer with the information he possessed at the time could have believed his conduct lawful in light of the law that was clearly established" on the date of the disputed conduct.[194]

The Brown's claim must satisfy two conditions to preclude Officer Eberly's reliance on qualified immunity. These two conditions, which must be supported by sufficient admissible evidence, are: (1) a constitutional violation occurred when Officer Eberly shot and killed Immi and (2) a reasonable officer in Officer Eberly's place would have known based on clearly established law that he was violating the Browns' constitutional rights. The key phrase in such an inquiry is "clearly established law."

In the short months after the Third Circuit reversed the summary judgment in favor of Officer Eberly on his qualified immunity defense, the Supreme Court reviewed the case of *Hope v. Pelzer*,[195] regarding

189 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

190 *See id.* at 325.

191 Fed R. Civ. P. 56(e) (2002); *Liberty Lobby*, 477 U.S. at 250.

192 *Liberty Lobby*, 477 U.S. at 248–249.

193 On remand, the jury informed the court that it could not reach a verdict. U.S. District Court Web Pacer Docket Report, *Civil Docket for Case #:99-CV-1076 Brown, et al v. Muhlenberg Township, et al* <http://pacer.paed.uscourts.gov> (accessed Feb. 7, 2003). In response, the court delivered the Allen charge. Verdict was then delivered in favor of the defendant and against the plaintiff. *Id*.

194 *Brown v. Muhlenberg Township*, 269 F.3d 205, 211 (3d Cir. 2001).

195 122 S. Ct. 2508 (2002).

an officer's ability to rely on qualified immunity to absolve him of liability for his discretionary actions.[196] While *Hope* concerned a criminal action initiated against officers, pursuant to Section 242 of Title 18 of the United States Code ("42 U.S.C. § 242" or "Section 242") the case also discussed qualified immunity from the perspective of a Section 1983 civil action.[197]

1. Qualified Immunity: Comparing 42 U.S.C. § 1983 Actions to 18 U.S.C. § 242 Actions

Prior to *Hope,* in *United States v. Lanier*,[198] the Court had compared the Section 1983 and Section 242 actions and the necessary requirements for a governmental officer to successfully claim qualified immunity. The court compared the "fair warning" standard in a Section 242 action with the "clearly established" standard in a Section 1983 action. The *Lanier* Court concluded that "in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."[199] To require more, the Court stated, would call for something beyond fair warning.[200] Most significantly, the Court explained that

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.[201]

Most recently, in *Hope*, the Court once again confronted the controversial application of qualified immunity to governmental officials for discretionary actions.[202] The Court reviewed a number of cases addressing qualified immunity to clarify the concept.[203] As the Court explained, qualified immunity operates "to ensure that before [a governmental official] is subjected to suit, [the governmental official] is on notice their conduct is unlawful."[204] Referring to its decision in *Anderson*, the Court reiterated that

> for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is

196 *See id*. (Inmate brought suit against prison guards, alleging that his Eighth and Fourteenth Amendment rights were violated when he was handcuffed to hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks).

197 *Id*. at 2515.

198 520 U.S. 259 (1997).

199 *Id.* at 269.

200 *Id*. at 270–271.

201 *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

202 *Hope*, 122 S. Ct at 2515.

203 *Id*.

204 *Id*. (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (internal citations omitted)).

> doing violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[205]

The Court concluded that it is "clear that officials can still be on notice that their conduct violates established law even in *novel factual circumstances*."[206] Consequently, to prove "clearly established law," neither fundamentally similar cases nor materially similar cases are necessary.[207] The Court's acknowledgement that a novel factual circumstance may constitute clearly established law provides guidance for lower courts considering whether a governmental official violated a clearly established law.

The Court also supplied a more concise two-step inquiry to determine whether a governmental official is entitled to qualified immunity for a discretionary action. The first question is "whether plaintiff's allegations, if true, establish a constitutional violation."[208] An affirmative response to this inquiry, however, will not necessarily establish liability because even if a governmental official participated in a constitutionally impermissible activity, the official may nevertheless be shielded from liability for civil damages "if [the] actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[209] The second inquiry is whether the state of the law at the time of the incident gave the governmental official fair warning that his or her actions were unconstitutional.[210]

2. Qualified Immunity: Future Reliance on Supreme Court Law to Preclude Reliance on Qualified Immunity for the Execution of a Companion Animal

The Supreme Court's analysis in *Hope* may provide persuasive guidance for courts to apply in Section 1983 civil actions in companion animal cases. Specifically, companion animal owners may argue that the threshold for clearly established law is most similar to the Section 242 inquiry: whether the governmental official had fair knowledge and clear warning that the conduct engaged in amounted to unlawful conduct. A companion animal owner might refer to two clearly established laws: (1) a dog is property of the owner, and (2) it is unlawful to seize a person's personal property absent of serving a substantial public interest.[211] If a court were unwilling to establish that the execution of a dog invoked a clearly established law because the dog was personal prop-

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[205] *Id.*

[206] *Id*. at 2516 (emphasis added).

[207] *Id*. The Supreme Court expressly rejected such a requirement in *Lanier*.

[208] *Id.* at 2513 (citing *Saucier*, 533 U.S. at 201).

[209] *Id.* at 2515 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[210] *See id.* at 2516.

[211] *See generally U.S. v. Place*, 462 U.S. 696 (1983); Pa. Stat. Ann. tit. 3 § 459–302(a) (West 2002).

erty, it might find that the officer had fair and clear warning that such conduct would be unlawful. Subsequently, such an argument would provide additional bases to succeed on a claim otherwise defeated by qualified immunity.

Current law will preclude a governmental official from relying on qualified immunity when a constitutional violation is present and the state of the law at the time the violation occurred provided fair warning to the governmental official that his actions were unconstitutional.[212] Furthermore, as the Court explained in *Hope*, a governmental official may not claim that novel factual circumstances precluded him from knowing his activity was unconstitutional.[213]

The *Hope* case may help a plaintiff to prevail on a Section 1983 action against a governmental official for the execution of a companion animal. Plaintiffs now have a greater likelihood of establishing a Section 1983 action that would survive a defendant's attempt to shield himself with the qualified immunity doctrine.

C. The Significance of the Third Circuit's State Claim Analysis

The Third Circuit explained that "[g]iven the strength of community sentiment against . . . animal abuse and the substantial emotional investment that pet owners frequently make in their pets, we would not expect the Supreme Court of Pennsylvania to rule out all liability predicated on the killing of a pet."[214] To determine if an individual may recover for intentional infliction of emotional distress, the appropriate inquiry is whether the defendant either intended to cause the plaintiff severe emotional distress or the defendant possessed the knowledge that the infliction of severe emotional distress would be virtually certain.[215] Summary judgment is inappropriate in such circumstances.[216] Thus, the Third Circuit in *Brown* correctly concluded that the Browns' showing of a prima facie case of the intentional infliction of emotional distress precluded the court from upholding the Eastern District of Pennsylvania's entry of summary judgment.[217]

1. Enlightened View Evolves From Firmly Rooted Common Law Concepts

Restatement (Second) of Torts outlines four general goals for torts.[218] These goals include: (1) the compensation, indemnity, or restitution for harms; (2) a determination of rights; (3) punishment of wrongdoers while deterring future wrongful conduct; and (4) vindica-

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212 *See Hope,* 122 U.S. at 2516.
213 *Id*.
214 *Brown v. Muhlenberg Township*, 269 F.3d 205, 218 (3d Cir. 2001).
215 *Id*. at 219.
216 *Id*. at 218–219.
217 *Id*.
218 *Restatement (Second) of Torts* § 901 (1965).

tion of parties while deterring unlawful retaliatory actions.[219] To provide a remedy for the malicious, intentional, and unprovoked execution of Immi would provide a perfect example of the natural conclusion of these goals. Consequently, cases where other companion animals suffer the same or similar fate as Immi should also support an action for the intentional infliction of emotional distress.

Moreover, the *Restatement* points out that the cause of action for intentional infliction of emotional distress is constantly evolving—it is "clearly in a process of growth, the ultimate limits of which cannot as yet be determined."[220] The Third Circuit's decision in *Brown* serves as an example of this "growth process." The common law principles coupled with the Third Circuit's decision in *Brown* provide even more support that the courts should be willing to fashion a remedy for the intentional execution of a companion animal that results in emotional harm to the owner.

In 1963, the Texas Court of Civil Appeals affirmed a Dallas County District Court's ruling that the owner of a companion animal could recover for the "mental pain and suffering" resulting from the willful and wanton killing of the plaintiff's companion animal by an officer.[221] The court explained that the affection of an owner for his companion animal was a very real thing, such that the malicious destruction of the companion animal should result in recovery by the owner, irrespective of the value of the animal. In fashioning an appropriate remedy, the courts have acknowledged—and should continue to acknowledge—the role animals play in the lives of humans.[222] As the Animal Legal Defense Fund pointed out in its amicus curiae brief submitted in support of the Browns, "the evidence is overwhelming that the bond between many persons and their animal companions can be as strong as any bond with other family members."[223] Accordingly, the Third Circuit decision used an enlightened view of pet ownership when it refused to affirm summary judgment on the issue of the intentional infliction of emotional distress.

2. Future Litigation: Reliance on the Third Circuit's Reasoning

Between 1963 and 2001, society has increasingly accepted the bond humans share with companion animals. For example, a 1995 re-

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219 *Id*.; *see also* Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 79 N.Y.U. L. Rev. 1059, 1080 (1995).

220 *Restatement (Second) of Torts* § 46; W. Page Keeton et. al., *Prosser & Keeton on Torts* § 12, 55 (5th ed., West 1984).

221 *City of Garland v. White*, 368 S.W.2d 12, 17 (Tex. Civ. App. 1963).

222 Companion animals, particularly dogs, play significant roles in the lives of humans. Squires-Lee, *supra* n. 219, at 1064. As early as 6300 B.C., dogs have been a part of human domestic life. Archaeologists even uncovered a 12,000 year-old burial site that contained a human and a dog together, where "[t]he arm of the person was arranged on the dog's shoulder, 'as if to emphasize the bonds that existed between these two individuals during life.'" *Id*. (internal citation omitted).

223 Animal Leg. Def. Fund Amicus Curiae Br. Appellant 26 (n.d.).

port by the American Animal Hospital Association confirmed that seventy percent of individuals who currently or previously shared their lives with companion animals considered the animals their children.[224] Moreover, a 1999 survey conducted for a USA Today article reported that fifty percent of those surveyed said they would be "very likely" to risk their own lives to rescue their animal companions.[225] By 1998, owners grieving over the loss of their companion animal could turn to one of nine nationwide support hotlines.[226]

The Third Circuit's basis for the conclusion on the intentional infliction of emotional distress claim should be a guidepost for other circuits. The Court's acknowledgement of a companion animal as more than property indicates that the legal community is willing to provide protection to companion animals in some circumstances by allowing their owners (referred to as guardians in some states) to bring and maintain actions when companion animals are harmed.

While established legal doctrines constrained the Third Circuit's decision regarding the property status of companion animals, the Court nonetheless chose to reverse the Eastern District of Pennsylvania's entry of summary judgment. The ruling helps owners of companion animals nationwide. The decision is an example of the slow trend of the courts' willingness to embrace an enlightened view that companion animals, though legally considered property, deserve protection on levels similar to that of a recognized family member. The *Brown* decision will continue to serve as persuasive guidance in future litigation regarding intentional infliction of emotional distress for the loss of a companion animal. As the Third Circuit pointed out, "where the Browns have produced evidence from which a reasonable trier of fact . . . conclude[s] that Officer Eberly shot Immi either intending to cause Kim Brown severe emotional distress or with the knowledge that the infliction of such distress on her would be virtually certain," recovery is appropriate.[227]

VI. CONCLUSION

> *[T]he time will come when men such as I will look upon the murder of animals as they now look on the murder of men.*[228]

The Third Circuit's decision in Brown will have lasting effects on a companion animal owner's ability to bring, maintain, and ultimately succeed on claims related to an officer's execution of their companion

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[224] *Id.* at 19 (citing Carol Marie Cropper, *Strides in Pet Care Come at Price Owners Will Pay*, N.Y. Times 16 (Apr. 5, 1998)).

[225] *Id*. at 20 (citing Cindy Hall & Bob Laird, *Risking it All for Fido*, USA Today 10 (June 24, 1999)).

[226] *Id.* at 18 (citing Sandra B. Barker & Randolph T. Barker, *The Human-Canine Bond: Closer Than Family Ties?,* 10 J. Mental Health Counseling 46, 54 (Jan. 1988)).

[227] *Brown v. Muhlenberg Township*, 269 F.3d 205, 219 (3d Cir. 2001).

[228] Sentient Beings Organization, *Notable Quotables: Leonardo da Vinci* <http://www.sentientbeings.org/notables.htm> (accessed Mar. 2, 2003).

animal. Particularly, it will serve as persuasive guidance to hold an officer accountable for malicious conduct. Two particular causes of action likely to benefit most from *Brown* include: (1) an officer's ability to rely on qualified immunity for a discretionary act and (2) the plaintiff's ability to establish a prima facie case for the tort of intentional infliction of emotional distress.

Although the issue of qualified immunity for a discretionary act is far from resolved, the Third Circuit's reasoning suggests that courts will at least preclude summary judgment in favor of the officer to allow the issue to go to the trier of fact. Future litigation regarding an officer's execution of a companion animal will inevitably revolve around the officer's ability to rely on qualified immunity. Courts will likely consider two pivotal inquiries: (1) what is a clearly established law and (2) did a substantial public interest exist to execute the companion animal. Accordingly, a plaintiff's ability to draw comparisons between civil Section 1983 actions and criminal Section 242 actions will prove beneficial. The plaintiff's ability to analogize between various laws will offer valuable evidence that the unreasonable seizure of a companion animal violates a clearly established law.

Brown is significant because it is the first Federal circuit court case to conclude that the plaintiff established a prima facie case for intentional infliction of emotional distress for the execution of a companion animal. Implicitly, the Third Circuit acknowledged the depth of the bond between an owner and a companion animal. Such an acknowledgment provides persuasive guidance that courts cannot, and should not, compare the value of a companion animal to that of a sofa or a lamp.

Brown also provides persuasive guidance to courts nationwide on the issue of recovery for intentional infliction of emotional distress for the execution of a companion animal and an officer's ability to rely on qualified immunity to avoid liability for such malicious conduct. It may also serve as a catalyst to extend new protections to animals nationwide. Most importantly, *Brown* will serve as a legal incentive for officers to refrain from abusing police powers to unreasonably seize companion animals. When officers understand the extent of legal consequences and liabilities for killing a companion animal, the number of animals needlessly killed by officers will undoubtedly dwindle.