PUT DOWN THAT DRINK, GET OUT AND SHOVEL, AND MUZZLE YOUR MUTT!
Special Issues in Premises Liability Including Dram Shop, Natural Accumulation and Animal Liability

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2012 not only marks Gallagher Sharp's 100 year anniversary, it is also the 100th birthday of the Cuyahoga County Courthouse (the "old court house"). In its inaugural year, the Cuyahoga County Courthouse heard 24 civil cases. Of those cases, four dealt with animal issues – the sale of the plumage of the migratory white heron, a runaway horse that collided with a street car, a suit resulting from a collision between a wagon drawn by a horse and car, and a case involving a conflict between Ohio's animal cruelty statute and a federal statute mandating 28 hour livestock resting and feeding. And one of those twenty-four cases addressed an issue on the sale of alcohol – whether the Mayor of Cleveland could allow the sale of alcohol in an area that had been declared dry.

A century later, our fair state is still wrestling with a number of the same issues. This outline references three unique subcategories of premises liability law in Ohio: the Dram Shop Statute; animal liability, including the Dog Bite Statute and state and federal responses to the alarming rise in incidents involving wild animals housed in inappropriate settings; and finally, the law regarding a premises owner's duties concerning the natural accumulation of snow and ice.

I. DRAM SHOP LIABILITY

A. Common Law

1. At common law in Ohio, liquor permit holders were not liable for injuries caused by intoxicated persons. *Lesnau v. Andate Enters.*, 93 Ohio St. 3d 467 (2001).

2. This longstanding tradition was codified in Ohio's Dram Shop Statute with specific limited exceptions.

B. Ohio's Dram Shop Statute (See Appendix)

1. Application of the Law to Owners vs. Renters

a. Generally – The owners of premises on which alcoholic beverages are served are jointly and severally liable with the lessees of said premises for all damages sustained due to sale of intoxicating beverages in violation of the law. (O.R.C. §4399.02)

b. However, the Dram Shop Statute exempts property owners from dram shop liability unless the owner is also the liquor permit holder. (O.R.C. §4399.18)

2. Ohio's Dram Shop Statute provides two causes of action: (1) injuries or death occurring on the liquor permit holders' premises or parking lot; and (2) injuries or death outside of the area controlled by the permit holder.

3. A permit holder is liable for the injuries sustained by or death of an innocent third party if:

a. **On Permit Holder's Property** – The innocent third party was injured or died on the permit holders' premises as a result of the tortious conduct of a patron of the permit holder's establishment who was served alcohol in a negligent manner by the permit holder.

i. Thus, pursuant to R.C. 4399.18, if an injury occurs on the premises of or in a parking lot controlled by a liquor permit holder, the injured party has a cause of action if he alleges that the permit holder was negligent and that such negligence proximately caused the injury. Ohio Courts have held that a restaurant/bar does not have control over a parking lot that is for the benefit of all occupants of a shopping center and their business invitees. *Cummins v. Rubio*, 87 Ohio App.3d 516, 522 (2nd Dist. 1993).

b. **Off Permit Holder's Property** – The innocent third party was injured or died at a location other than the premises of the permit holder by the tortious conduct of a patron of the permit holder's establishment who was either: (1) knowingly served alcohol by the permit holder at a point in time where the patron was "noticeably intoxicated" in violation of §4301.22; or (2) under the age of 21 in violation of §4301.69 and the patron's intoxication was the proximate cause of the injury in question.

4. The Sale of Intoxicating Beverages to Persons Under 21

a. The Supreme Court of Ohio has explained that actual knowledge that a patron is a minor is not the standard. Instead, liability for injury proximately caused by the intoxication of a person under 21 attaches so long as the liquor permit holder or his employee knew

or had reason to know that the person being served was under 21. *Lesnau*, supra.

i. In *Lesnau*, Eric Amerson, an eighteen year old male, was sold beer by liquor permit holder Superior Drive-Thru. Upon purchase Mr. Amerson told the clerk working at Superior Drive-Thru that he was 21 but did not produce any form of identification. Mr. Amerson consumed the beer and later caused a motor vehicle accident in which Janice Lesnau was killed.

ii. The trial court granted summary judgment in favor of defendant Superior Drive-Thru on the basis that the plaintiff had failed to plead or prove that defendant's employee "knowingly" sold an intoxicating beverage to a minor.

iii. The Court of Appeals reversed this decision, holding that the word knowingly in the statute only referred to the sale of the alcohol not to the status of the purchaser because the Ohio statute prohibiting the sale of alcohol to persons under 21 is a strict liability statute.

iv. The Supreme Court of Ohio disagreed with the reasoning of the Court of Appeals but affirmed their decision to reverse summary judgment and remand the matter to the trial court because the Court found that the standard of knowledge required under the statute prohibiting the sale of alcohol to persons under 21 was not so strict as to require actual knowledge but also encompassed the "had reason to know" standard.

v. The Court explained its rationale thusly: "The circumstances surrounding the sale of liquor to one who is noticeably intoxicated differ from those where the permit holder or its employee sells to an underage person. A determination of whether a person is intoxicated requires the use of judgment and subjectivity. This involves a number of factors that may be derived from various sources, such as the employee's experience, or his or her knowledge of and/or familiarity with the patron's habits and capacities. However, whether a patron is of legal age to purchase beer or alcohol is an easily verifiable fact that may be determined in many instances from a driver's license or photo identification card."

5. The Sale of Intoxicating Beverages to Noticeably Intoxicated Patrons

   a. The injured party must first show that the permit holder knowingly served an intoxicating beverage to a noticeably intoxicated person.

   b. Unlike the standard for serving persons under 21, the type of knowledge required in this situation is actual knowledge. In discussing how actual knowledge is achieved, the Supreme Court of Ohio has stated:

      i. Knowledge of a patron's intoxication may be obtained from many sources and in many ways, and is furnished or obtained by a variety of circumstances. Generally speaking, a person has knowledge of an existing condition when his relation to it, his association with it, his control over it, or his direction of it are such as to give him actual personal information concerning it. *Gressman v. McClain*, 40 Ohio St.3d 359, 363 (1988).

      ii. The court further noted that constructive knowledge of intoxication is not the appropriate standard because such a standard would expose permit holders to "ruinous liability" every time they served alcoholic beverages.

   c. Additionally, under Ohio law, evidence as to the **amount** a person has had to drink raises only a question of **constructive knowledge**. *Caplinger v. Korrzan Rest. Mgmt.*, 12 Dist. No. CA2011-06-099, 2011-Ohio-6020; see also *Tillett v. Tropicana Lounge & Restaurant, Inc.*, 81 Ohio App. 3d 46 (9th Dist. 1991) (evidence that patron consumed 15 cans of beer raised only question of constructive knowledge which was rebutted by uncontested accounts that the person appeared sober).

   d. Furthermore, BAC alone is insufficient to demonstrate that an establishment knowingly served alcohol to a noticeably intoxicated person. *Caplinger*; *Rockwell v. Ullom*, 8th Dist. No. 73961, 1998 Ohio App. LEXIS 4101 (Sept. 3, 1998)

   e. A good example of how this statute and its legal standards are applied is the varying results reached in a recent case out of Butler County – *Caplinger v. Korrzan Rest. Mgmt.*, 12 Dist. No. CA2011-06-099, 2011-Ohio-6020 (affirming summary judgment in favor of the permit holder where bartender testified that patron did not appear drunk); and a recent case out of Trumbull County – *Studer v. VFW Post 3767*, 185 Ohio App. 3d 691, 2009-Ohio-7002 (11th Dist.) (reversing summary judgment in favor of permit holder

based on circumstantial evidence that patron had consumed thirteen beers).

i. In *Caplinger*, after consuming two 16-ounce beers and three 4-ounce shots of Jägermeister at the bar, the patron left the bar to pick up his son from the mother's house. After doing so, the patron passed out at the wheel and slammed into the concrete foundation of an overpass, causing serious injury to the son. The court held that the trial court properly dismissed appellants' suit on summary judgment as there were no genuine issues of material fact to be litigated regarding whether the bar knowingly served a noticeably-intoxicated patron or had "actual knowledge" that the patron was intoxicated at the time he was served intoxicating beverages. The bar presented the testimony of its general manager, who testified that she spoke to the patron as he drank at the bar on the day of the accident and that the patron seemed "normal" during her interaction with him. Additionally, the bartender testified that the patron was not drunk when she served him on the day of the accident. Appellants did not offer any evidence to rebut this testimony. Any evidence of constructive knowledge was not sufficient to sustain a claim under the Act.

   (a) While this may seem like a significant amount of alcohol, the testimony of the bartender that he did not appear drunk coupled with evidence found at the scene of the accident, were sufficient to avoid liability.

      (1) The statute requires actual knowledge – the bartender who served him the drinks said he did not appear drunk.

      (2) The accident happened 45 minutes after he left the bar.

      (3) Although his BAC taken at the scene of the accident was .182, more than twice the legal limit for operating a motor vehicle, there were broken beer bottles inside the car.

      (4) Caplinger also tested positive for Vicodin and Cocaine.

ii. In *Studer*, William Demidovich, a patron of the VFW, struck and killed a 14 year old girl after consuming nine

beers at the VFW hall. Evidence presented demonstrated that prior to arriving at the VFW Hall, Demidovich had consumed an additional four beers at another establishment making his total consumption of thirteen beers on that evening.

(a) When police arrested Demidovich, he was visibly intoxicated having slurred speech and trouble standing.

(b) At least one other patron at the bar told police that she had witnessed Demidovich at the VFW and that he appeared intoxicated.

(c) Demidovich's BAC was .189.

(d) The essential difference in *Studer*, is the court's holding that "the element of 'knowingly' in the statute can be proven by circumstantial evidence." Using this line of reasoning the court seems to rely heavily on the number of drinks that the patron imbibed. While Ohio law is clear that the number of drinks a person has only creates a question of constructive knowledge, it appears that this constructive knowledge coupled with the testimony of a fellow patron that Demidovich appeared intoxicated was enough to create a genuine issue of fact to overcome summary judgment.

(e) Of particular note was the following observation by the Court: "it is logical to presume that a liquor permit holder, or its employee(s), may never make the admission that they continued to serve a person after that person exhibited signs of intoxication. For a liquor permit holder to make such an admission would be to concede liability on his behalf. Thus, the only way for a third party injured by an intoxicated person to substantiate his claim against the liquor permit holder would be by use of circumstantial evidence." (citing *Bickel v. Moyer*, 3d Dist. No. 5-94-14, 1994 Ohio App. LEXIS 4416 (Sep. 29, 1994).)

6. Exclusions: Dram Shop Liability does not apply to:

a. Causes of action brought by the intoxicated patron for injuries he caused to himself or derivative causes of action brought by the

family of an intoxicated patron for injuries proximately caused by the patron's own intoxication. *Smith v. The 10th Inning, Inc.*, 49 Ohio St. 3d 289 (1990); *Klever v. Canton Sachsenheim,* Inc., 86 Ohio St. 3d 419 (1999). This remains true whether or not the intoxicated person is over 21.

i. In *Smith,* an adult over 21 was injured in a motor vehicle accident after being served at defendant's bar. The court found that Ohio law does not provide a cause of action where a person's injuries are caused by their own intoxication.

ii. In *Klever*, Jeffrey Klever, 19, was a guest at a wedding reception held at the Sachsenheim Club in Canton, Ohio. Mr. Klever was served alcohol despite his age and died in a single car accident on his way home from the reception. Klever's mother brought a wrongful death action against the club. The Supreme Court of Ohio held that although Mr. Klever was not 21, he was indistinguishable from the deceased adult in *Smith* and therefore the court extended its holding from *Smith* that voluntarily intoxicated persons have no cause of action against liquor permit holders for injuries that they cause to themselves after being served alcohol by the permit holder.

iii. Principles of comparative negligence do not apply to dram shop liability. *Smith v. The 10th Inning*, supra:

> "Some might suggest that this court permit a cause of action by the intoxicated patron and allow the court or jury to determine the comparative negligence of the permit holder and the intoxicated patron. While this alternative seems attractive, we decline such a course for several reasons. Basically, comparing the negligence of the parties in this context presents a classic "chicken or egg" question: Is the permit holder who admittedly has experience in knowing the predilections and capacities of his or her customers more negligent or blameworthy than the intoxicated patron who is clever enough to mask his or her own intoxication in order to be served another drink. In any event, we find that one of the strongest reasons compelling rejection of such a cause of action by the intoxicated patron against

> the permit holder is one grounded firmly in common sense public policy; namely, that an adult who is permitted to drink alcohol must be the one who is primarily responsible for his or her own behavior and resulting voluntary actions. Clearly, permitting the intoxicated patron a cause of action in this context would simply send the wrong message to all our citizens, because such a message would essentially state that a patron who has purchased alcoholic beverages from a permit holder may drink such alcohol with unbridled, unfettered impunity and with full knowledge that the permit holder will be ultimately responsible for any harm caused by the patron's intoxication. In our opinion, such a message should never be countenanced by this court."

II. ANIMAL LIABILITY

A. The Numbers

- There are currently 74.8 million dogs in America.[1]

- The most recent data available suggests that approximately 4.5 million Americans are bitten by dogs each year (2,581 of them are letter carriers). [2] Of those bites approximately 800,000 are severe enough to require medical attention.[3]

- In 2003, dog bites accounted for about one quarter of all homeowner's insurance liability claims, costing roughly $321.6 million, down slightly from about $345.5 million the previous year.[4]

- In 2007, dog bites accounted for one-third of all homeowner's insurance liability claims, costing roughly $356.2 million, up 10.5% from 2006.[5]

- In 2010, dog bite claims were up to $412 million.

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[1] American Pet Products Manufacturers Association 2007-2008 National Pet Owners Survey
[2] Sacks JJ, Kresnow M., "Dog Bites: Still a Problem?" *Injury Prevention* 2008
[3] Weiss HB, Freidman D. Colben JH., "Incidence of Dog Bite Injuries Treated in Emergency Departments," *JAMA* 1998
[4]" Dog Bite Liability Law: Election of Remedies," *Ohio Trial* (Spring 2005)
[5]" Home Insurers Bitten by $350M in Dog Claims; Average Claim Tops $24K," *Insurance Journal* (June 2008)

- Over 4.5 million people are bitten by dogs each year of which 1 in requires medical attention.[6] Of these more than 50% occur on the dog owner's property. [7]

- "While the number of dog bite claims has remained about the same in the last three years, the average cost per claim continues to rise because of increased medical costs as well as the size of settlements, judgments and jury awards which have risen well above inflation in recent years," said Loretta Worters, Vice President of the Insurance Information Institute.[8]

- Pit Bulls, Rottweilers, Presa Canarios, and their mixes are responsible for 74% of attacks.[9]

- According to a 2011 survey by the American Pet Products Association approximately 62% of U.S. households own a pet.

- Males are more likely than females to be bitten.

- In 2010, the average claim for a dog bite is just over $26,166.[10]

- A 1998 Study by State Farm estimated that dog attack victims in the U.S. suffer over $1 billion in monetary losses each year.[11]

- In the past 21 years, incidents involving privately kept large cats have been a significant problem as well: there have been 254 escapes, 143 big cat deaths, 131 confiscations, 21 human deaths, and 246 maulings[12]

- It is estimated that there are between 10,000 and 20,000 big cats currently held in private ownership in the United States. The term big cats includes large animals such as lions, tigers, cougars, etc.[13]

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[6]Center for Disease Control: http://www.cdc.gov/HomeandRecreationalSafety/Dog-Bites/biteprevention.html
[7]" Home Insurers Bitten by $350M in Dog Claims; Average Claim Tops $24K," *Insurance Journal* (June 2008)
[8] "Home Insurers Bitten by $350M in Dog Claims; Average Claim Tops $24K," *Insurance Journal* (June 2008)
[9] Clifton, Dog Attack Deaths and Maimings, U.S. & Canada, September 1982 to November 2006
[10] Insurance Information Institute, "Dog Bite Liability"
[11] "Take the bite out of man's best friend." *State Farm Times*, 1998
[12] "Tiger and Cougar Leave Ashland for Wildcat Sanctuary in Minn.," *The Plain Dealer*, March 30, 2012
[13] http://www.prnewswire.com – "Bipartisan Bill Prohibiting Private Possession of Big Cats introduced in House, with Senate Bill to Follow"

B. The Law

1. Terminology

   a. Harborer – someone who has possession and control of the premises where the dog lives and silently acquiesces to the dog's presence. *Bowman v. Stott*, 9th Dist. No. 21568, 2003-Ohio-7182.

2. The Common Law

   a. At common law, the keeper of a vicious dog could not be liable for personal injury caused by the dog unless that person knew of the dog's vicious propensities. *Bora v. Kerchelich*, 2 Ohio St.3d 146, 147 (1983); *Hayes v. Smith*, 62 Ohio St. 161 (1900).

   b. Thus, in a common law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness.

   c. Punitive Damages may be awarded. *McIntosh v. Doddy*, 81 Ohio App. 351, 359 (1947).

3. Ohio Revised Code §955.28 (B) (See Appendix)

   a. In an action for damages under the statute there is no requirement that the owner have knowledge of the vicious nature of the dog. Instead a plaintiff must prove (1) that the defendant is the owner, keeper, or harborer of the dog, (2) that the dog's actions were the proximate cause of the injury and (3) the monetary amount damages

   b. Affirmative Defenses: Dog owners are liable for any injury that their dog causes except (1) injury to a person committing a criminal offense on the dog owner's property at the time the bite occurs (2) injury to persons committing a criminal offense against any person on the owner's property at the time the bite occurs, (3) injury to persons who were teasing, tormenting, or abusing the dog on the owner's property.

      i. Criminal Trespass – *Mota v. Gruszczynski*, 8th Dist. No. 97089, 2012-Ohio-275.

         (a) Plaintiff-Appellant, Thomas Mota, is a licensed bounty hunter. On the date of injury he was acting on a tip that his bounty, the homeowner's son, was

at the homeowner's address. Although the son did not live with his parents, he was house sitting and taking care of their dog. After Mota flashed his badge, the son ran into the home and Mota chased him through the home and onto the back porch. Upon arriving on the back porch Mota was attacked by the homeowner's dog, which had recently delivered puppies.

(b) The homeowners asserted the defense that the bounty hunter was engaging in a criminal trespass at the time he was attacked, and the court agreed.

(c) The bounty hunter in turn attempted to assert the statutory bounty hunter privilege to defeat the homeowner's trespass privilege, but the court was not convinced. The court explained that Ohio law prohibits any person from using a privilege as both a sword and a shield and held that the bounty hunters' privilege, while an effective shield against prosecution for criminal trespass is not also a sword to defeat the homeowner's privilege.

i. Assumption of the Risk is not a recognized affirmative defense against a dog bite claim. See *Pulley v. Malek*, 25 Ohio St. 3d 95 (1986).

(a) In *Pulley*, a dog was stricken by a car and appellee called her neighbor, appellant, for the number of their veterinarian. The neighbor responded by voluntarily picking up the injured animal and carrying it into his neighbor's home. Subsequently, the neighbor, again voluntarily, picked up the dog to carry it to his neighbor's car when the dog bit him on the cheek. He sued for the cost of the stitches he received and the time he missed from work (approximately $3,000).

(b) Among the many defenses asserted by appellants in this matter was that appellee voluntarily assumed the risk of his injury by carrying the dog without being asked and against their wishes. The Supreme Court affirmed the holding of the lower courts that assumption of the risk is not among those defenses enumerated in the statute and therefore cannot be asserted in a dog bite case.

(c) However, the Court held that in picking up the injured animal, the would-be Good Samaritan tormented the dog. Tormenting is an enumerated defense in the statute, thus proving no good deed goes unpunished.

c. The statute specifically imposes liability on the dog owner when his dog bites any person engaged in door-to-door solicitation on his property.

d. Punitive Damages may not be awarded.

4. Interesting Cases

a. In order for a landlord to be considered the harborer of a dog, it must be established that the landlord permitted or acquiesced in the tenant's dog being kept in the common areas or areas shared by the landlord and the tenant.

i. *Stuper v. Young*, 9th Dist. No. 20900, 2002-Ohio-2327, P13.

(a) In *Stuper*, Ms. Young owned three adjacent parcels of land. On one parcel was a residence leased by Ms. Young to the dog owner. Located on the adjacent parcel was an establishment named the Winding Bar that was owned and operated by Ms. Young. Plaintiff was injured when she was knocked to the ground by the tenant's Great Dane while she was on the Winding Bar property delivering fresh linens to the Winding Bar. Plaintiff sued the dog owner, the tenant, and the landlord, Ms. Young.

(b) The trial court granted summary judgment in favor of the landlord finding that there was no issue of material fact as to whether Ms. Young acquiesced to the dog's presence on Winding Bar property.

(c) The appellate court affirmed, holding that evidence presented before the trial court established that the dog was kept behind a fence on the tenant's property and that the dog was only allowed on Winding Bar property when accompanied by its owner. As appellants were unable to produce any evidence to the contrary, there were no facts on which to base a finding that Ms. Young had acquiesced to the presence of the dog on her

property and therefore she could not be considered a harborer of the dog.

i. See *Kovacks v. Lewis*, 5th Dist. No. 2010-AP-01-0001, 2010-Ohio-3230.

(a) In *Kovacks*, Appellants' minor son was bitten by a dog while visiting a home owned by appellees and rented to their daughter and son-in-law.

(b) The facts indicate that the appellees were not in possession or control of the property that they rented to their daughter. Furthermore, even though one of the appellees had co-signed a loan that was used to purchase the dog, there was no indication that the appellee owned the dog.

(c) The court noted that generally speaking, lease contracts provide that landlords grant possession and control of the premises to the tenants. Because of this principle, "[i]f the tenant's dog is confined only to the tenant's premises, the landlord cannot be said to have possession and control of the premises on which the dog is kept."

(d) Absent such control, the court held that the landlords in this matter could not be considered harborers of the dog in question and therefore could not be liable for the injuries sustained by appellants' minor son.

b. Damages for injury caused to a dog by another dog

i. *Saratte v. Schroeder*, 7th Dist. No. 08-BE-18, 2009-Ohio-1176.

(a) In this case, appellant was walking her dog on a leash when the dog saw Appellee's dog, broke free of its leash, and attacked appellee's dog causing severe injuries.

(b) The owner of a dog that injures or kills another dog can be liable for the difference between the fair market value of the dog before and after the attack because under §955.03, dogs are considered personal property.

(c) However, in this case, the court awarded not just the value of the dog that was killed but also the cost of veterinary bills associated with trying to save the dog before it was ultimately put down.

(d) Although the vet recommended putting the dog down, the owner opted for surgical intervention. The surgery was ultimately unsuccessful.

(e) The trial court found that the dog had a fair market value of $200, but also awarded $2,063 in vet bills.

(f) In affirming this award, the appellate court held that the award of the vet bills was not an abuse of discretion. The court stated that the vet did not tell the owner that putting the dog to sleep was the only option and therefore the owner acted reasonably in attempting to save her dog/personal property.

5. Election of remedies

a. For some time in Ohio there was a debate within the courts as to whether plaintiffs had to choose between either recovery under the common law or recovery under the Ohio Dog Bite Statute.

b. That debate was settled in 2010 by the Supreme Court of Ohio in *Beckett v. Warren*, 124 Ohio St. 3d 256, 2010-Ohio-4. In *Beckett*, the Court clarified that plaintiffs do not have to choose between pursuing recovery under either the common law or the Dog Bite Statute because the remedies available to the plaintiff under either cause of action are neither repugnant nor inconsistent with each other. The Court further explained that a judge can easily instruct the jury that if the plaintiff fails to prove knowledge and negligence he is entitled only to compensatory damages under the statute, but if he has proven those additional elements he may be awarded punitive damages as well.

C. Recent Developments

1. <u>Columbus Pit Bull Incident (May 2010)</u>

a. A 12 year old boy in Columbus was attacked by a pit bull that broke free from his leash.

b. The boy was scratched on the face and bitten on his neck and back.

c. The boy was saved by a neighbor who intervened by stabbing the dog.

d. The owner of this animal pled guilty to felonious assault and was sentenced to 180 days in jail. He faced up to 11 years in prison.

2. Lorain County Incident (2010)

a. Sam Mazzola owned and operated the "Smokey Bear Sanctuary" where he kept five black bears, a coyote, three raccoons, two red foxes, a skunk, several wolves, two tigers and a lion

b. In 2010 a black bear named Cherokee mauled to death Brent Kandra, an employee of the sanctuary, who was attempting to feed the bear.

3. The Zanesville Incident (October 18, 2011)

a. 48 wild animals, including endangered Bengal tigers, were killed by local law enforcement after their owner, Terry Thompson, set them all free shortly before committing suicide.

4. Legislative Responses

a. House Bill 14 (See Appendix)

i. No longer considers pit bulls inherently vicious.

(a) Divides animals into 3 categories:

(1) Vicious – dogs that killed or seriously injured a human without provocation.

(2) Dangerous – dogs that have injured a human without provocation or killed another dog.

i. Owners of a dangerous dog, or any dog owner that has three convictions for failing to properly confine a dog, must obtain **liability insurance.**

(3) Nuisance – dogs that have chased, menaced, or tried to bite a human.

b. Senate Bill 310 (See Appendix)

i. State Senator Troy Balderson has proposed new legislation that would ban the ownership in Ohio of lions, bears, and other "exotic animals."

ii. If passed, the new law would grandfather in current owners of exotic animals provided they met strict new guidelines.

iii. The law would also exempt zoos, circuses, sanctuaries, and research facilities.

iv. Reactions

(a) The Plain Dealer reports that a 10 year old cougar named Tasha and a 7 year old white tiger named Nikita have been relocated from their former home in Ashland to a wild cat sanctuary in Sandstone, Minnesota.

(1) Their most recent owner explained that she would be unable to comply with the safety and care standards Ohio legislators are poised to impose with SB 310.

(2) Interestingly, Nikita, the tiger, was previously owned by Sam Mazzola of the Smokey Bear Sanctuary.

(3) It was also reported that Tasha, the cougar, had previously been kept in a garage for nine years and at one point had escaped the garage for a period of days before eventually returning. No one was harmed and the incident went unreported at the time.

(4) The organization involved in this rescue, The International Fund for Animal Welfare also participated in the relocation of two lions and four tigers from a small facility in Gambier, Ohio in 2007.

c. Governor Kasich put together a task force to put forth recommendations. This task force has recommended restrictions greater than those proposed by State Senator Balderson. Under the plan backed by the task force there would be a complete ban on private ownership of exotic animals by 2014.

d. H.R. 4122 – The Big Cat and Public Safety Protection Act (See Appendix)

i. Introduced by Representatives Howard "Buck" McKeon (R-CA) and Loretta Sanchez (D-CA).

ii. This legislation, if passed, would prohibit all private possession of big cats except highly qualified facilities like zoos.

iii. In 2003, Congress passed the "Captive Wildlife Safety Act" which prohibited interstate trade of big cats, but this ban only applied to use of these animals as pets. The majority of privately held big cats are held by licensed exhibitors.

III. NATURAL ACCUMULATION OF ICE AND SNOW

A. <u>The Basics</u>

1. <u>No Duty</u> – In Ohio, it is well established that an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow.

2. The rationale for this general rule is that the dangers associated with ice and snow are open and obvious.

   i. "An occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968).

   ii. "The dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that an occupier of premises may reasonably expect that a business invitee on his premises will discover those dangers and protect himself against them."

3. Because the hazard posed by these conditions is obvious, a land owner's failure to remove ice and snow is by itself not negligent.

   i. "The mere fact standing alone that the owner or occupier has failed to remove natural accumulations of snow and ice from private walks on his business premises for an unreasonable time does not

give rise to an action by a business invitee who claims damages for injuries occasioned by a fall thereon." *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 40, 227 N.E.2d 603.

B. Your Options

1. Leave it – Ohio law imposes no duty on property owners to remove natural accumulations of snow and ice**.**

    a. *Brinkman v. Ross*, 68 Ohio St. 3d 82 (1993).

        i. Defendants were a couple who invited several friends, including plaintiff, to visit their home as social guests. Defendants were aware that the sidewalk leading from their driveway to the door to their residence had become hazardous due to the natural accumulation of ice and snow but they took no steps to address this hazard or to warn their guests.

        ii. The trial court granted summary judgment under long held Ohio precedent that land owners owe no duty to remove natural accumulations of ice and snow. However, the Tenth District reversed the trial court finding that because the defendants were aware of the hazard posed by the ice and snow covered sidewalk and invited guests to their home despite this knowledge, they owed those guests a duty to remove the hazard and to warn the guests.

        iii. The Supreme Court of Ohio, however, reversed the decision of the Tenth District declining to affirm the duty which the appellate court's ruling would have created. In so doing, the Court reasoned "Perhaps appellants should have shoveled and salted the sidewalk as a matter of courtesy to their guests. However, we find that Ohio law imposed no such obligation upon appellants."

        iv. Although the defendants in *Brinkman* were homeowners, Ohio courts have confirmed that the holding applies equally to business owners.

    a. *Baldwin v. L & K Motels*, 4th Dist. No. 94CA06, 1994 Ohio App. LEXIS 6103 (Dec. 30, 1994).

        i. Plaintiff was a guest at defendant's motel who slipped and fell on a patch of ice in defendant's parking lot. The trial court granted summary judgment in favor of the motel

owners citing the Supreme Court of Ohio's decision in *Brinkman*. On appeal, appellants argued that the trial court erred in relying on *Brinkman* because the facts of that case were limited to residential homeowners. However, the Fourth District explicitly held that *Brinkman*'s holding was broad and encompassed business owners as well.

ii. In affirming summary judgment in favor of the motel owner, the court noted: "A business owner had no duty to remove natural accumulations of snow and ice from its premises where such accumulations were not substantially more dangerous than invitees could have anticipated by reason of their knowledge of conditions prevailing generally in the area. Although the parking lot had not been plowed for several days, the presence of natural accumulations of ice and snow on the premises for an unreasonable amount of time did not make the owner liable, even if other nearby businesses had plowed their parking lots."

2. Plow it – Under Ohio law, the mere act of removing snow does not expose a landowner to liability unless his actions substantially increase the risk associated with ice and snow.

a. *Gober v. Thomas & King, Inc.*, 2nd Dist. No. 16248, 1997 Ohio App. LEXIS 3564 (June 27, 1997).

i. Following heavy snow, defendant restaurant had the snow in its parking lot plowed into piles. Evidence presented by plaintiff demonstrated that snow from the piles melted into water, ran across the steps leading to the restaurant entrance, and refroze in depressions in the surface of the steps. The trial court granted summary judgment in favor of the restaurant citing the natural accumulation rule, however the appellate court reversed holding that plaintiff had demonstrated a genuine issue of fact as to whether defendant's actions had caused the area to be more hazardous than should be reasonably expected by patrons.

b. *Royce v. Yardmaster*, 11th Dist. No. 2207-L-080, 2008-Ohio-1030.

i. Plaintiff was injured when he slipped on ice in the parking lot on his way to work. Defendant was a private contractor hired to plow the parking lot in which plaintiff fell. Plaintiff sued claiming that defendant had failed to properly maintain the parking lot. The trial court granted summary

judgment and the appellate court affirmed holding that "When a duty to remove ice and snow was voluntarily assumed, that duty was satisfied when the actor exercised ordinary care to render the premises reasonably safe."

ii. As a general rule, an independent contractor who contracts with a landowner to remove ice and snow from the owner's parking lot for the benefit of the owner's invitees may be liable to an invitee who slips and falls due to the contractor's failure to properly remove ice and snow.

iii. In this case, the only evidence presented to demonstrate that Yardmaster had breached its duty of ordinary care was that at the time the plaintiff fell there was some snow on the ground. The court found that this evidence was insufficient to prove a breach of care because to find liability on such evidence would essentially hold the contractor to a strict liability standard. The court explained that Ohio law does not hold either property owners or contractors to such a strict standard.

b. *Dunbar v. Denny's Rest.*, 8th Dist. No. 86385, 2006-Ohio-1248.

i. Plaintiffs were an elderly couple in their 80's who were attempting to enter a Denny's restaurant when they encountered a six inch high pile of snow blocking a handicapped entrance ramp. The couple fell while trying to step over the pile. In affirming summary judgment the Court cited several noteworthy propositions of Ohio law. First, the open and obvious doctrine applies to piles of snow. The court notes in multiple places in the opinion that the couple was aware of the pile and intentionally attempted to go over it instead of around it. Furthermore, the court noted that to establish liability based upon negligent plowing in a commercial lot, an appellant must prove that negligent plowing <u>created or aggravated a hazardous condition</u>. Persons who plow or shovel snow are not negligent merely because ice remains after snow is cleared. In order to show that ice and snow were cleared negligently, a plaintiff must present evidence that the risk of injury was substantially increased from the risk normally associated with those conditions that create accumulations of ice and snow in the winter in Ohio. When snow and ice are piled up by plowing or shoveling and then thaw and refreeze, the resulting ice is a natural accumulation. The court held that plaintiffs had failed to demonstrate that any

actions by Denny's had substantially increased the risks normally associated with winter life in Ohio.

C. Other Considerations

1. What is "unnatural accumulation?"

   a. An unnatural accumulation of ice and snow is an accumulation that is the product of human activity that causes an increased risk to those who encounter it.

   b. A business owner may have a duty to remove "unnatural" or "improper" accumulations of snow and ice, which exist when the accumulation creates a hazard "substantially more dangerous to a business invitee than that normally associated with snow." *Community Ins. Co. v. McDonalds Restaurants of Ohio, Inc.*, 2nd Dist. Nos. 17051, 17053, 1998 Ohio App. LEXIS 5878 (Dec. 11, 1998).

   c. Note: However, whether ice was a natural accumulation is an issue bearing on proximate cause. *Scholz v. Revco Discount Drug Center, Inc.*, 2nd Dist. No. 20825, 2005-Ohio-5916, P16. Regardless of whether the accumulation was natural or unnatural, if the hazard is open and obvious, no duty of care exists. *Id.*

2. Cases

   a. *Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2d Dist. Clark No.2010 CA 4, 2010-Ohio-4761, ¶ 18 (snow piled on median near drain not an unnatural accumulation).

      i. Plaintiff was a patron of a McDonald's restaurant. Plaintiff parked his car, walked across a median in the parking lot, through the drive-thru lane and into the store. While returning to his car along the same route, plaintiff slipped stepping from the median to the concrete next to his car. Plaintiff alleged that McDonald's had created an unnatural accumulation of ice due to its plowing activities.

      ii. In attempting to prove that the ice on which he slipped constituted an unnatural accumulation, plaintiff made the following argument:

> "Murphy argues that the manner in which McDonald's instructed that its premises be plowed was an intervening negligent act which, combined with other circumstances,

> created an "improper" accumulation of ice that was substantially more dangerous than that normally associated with natural run-off from melting and refreezing snow. Murphy contends that McDonald's should have known that there would be a greater flow of water near where Murphy parked due to the presence of a surface drain in the parking space next to where Murphy parked, a curb cut-out for water to drain from the drive-thru lane, and a greater grade in the parking area near the drain. Murphy argues that the snow could have been deposited on the periphery of the property where, Murphy argues, it would pose "virtually no hazard for the vast majority of its customers attempting to ingress/egress out of their restaurant."

iii. The court responded:

> "The accumulation of ice and snow is a condition created by the elements, a natural hazard faced by anyone who would venture about the streets while such conditions exist. Snow cannot be removed from the sidewalks without being put somewhere. A certain natural run-off of water is to be expected. Water freezes if the temperature drops too low. The removal of snow is not an act of negligence, per se, but an act of consideration for the safety of the public, generally, and of one's customers, in particular. To create liability it must appear that negligence intervened, that the snow was disposed of in a negligent manner, or that the removal was negligently done, but it also must appear that the resulting risk of injury was substantially increased or a violation of the duty of due care, if not proximate cause, is not established."

b. *McDonald v. Koger*, 150 Ohio App.3d 191, 2002-Ohio-6195 (various snow piles in parking lot not unnatural accumulation).

i. After a substantial snow fall, defendant restaurant plowed its parking lot and piled the snow in several piles along the

periphery of its parking lot. The weather warmed causing some of the snow to melt and then refreeze creating patches of ice in the parking lot. Plaintiff slipped on one such patch and broke her ankle.

ii. The Court, citing precedent from across the State of Ohio, noted that the thawing and refreezing of snow into ice is a natural phenomenon. Thus when a parking lot is plowed but some of the snow melts and forms an icy patch later in the day, the formed ice is considered a natural accumulation.

c. *Hill v. Monday Villas Prop. Owners Ass'n*, 2nd Dist. No. 24714, 2012-Ohio-836.

i. Plaintiff was the owner of one of the units in the Monday Villas Condominium complex. She slipped and fell while trying to circumvent a large frozen puddle on the sidewalk leading to her unit.

ii. In her complaint, plaintiff alleged that the ice and snow upon which she fell constituted an unnatural accumulation because pooling in that area had been a problem for over five years and an attempt by the complex to repave the sidewalk had not fixed the problem.

iii. A property owner may have a duty to remove "unnatural" or "improper" accumulations of snow and ice, which exist when the accumulation creates a hazard substantially more dangerous than that normally associated with snow or ice.

iv. An accumulation of water or ice in a depression in a sidewalk or driveway, which subsequently froze due to cold weather, is not unnatural. Since the build-up of snow and ice during winter is regarded as a natural phenomenon, the law requires, at the very least, some evidence of an intervening act by a landlord (or a property owner) that perpetuates or aggravates the pre-existing, hazardous presence of ice and snow to establish an unnatural accumulation.

d. *Allen v. United States Parking Sys.*, 7th Dist. No. 10-MA-175, 2011-Ohio-6642.

i. The slope of the parking lot alone could not cause an unnatural accumulation.

ii. A natural accumulation of ice and/or snow is that which accumulates as a result of an act of nature. In comparison, an unnatural accumulation is one that has been created by causes and factors other than the inclement weather conditions of low temperature, strong winds and drifting snow. Therefore, for an accumulation to be labeled as unnatural, causes other than meteorological forces of nature must be responsible. Snow which melts and later refreezes into ice is considered a natural accumulation of ice caused by forces of nature. If a property owner voluntarily removes a natural accumulation of ice or snow, he may not create a dangerous or unnatural accumulation or be actively negligent in permitting one to exist. In cases involving an unnatural accumulation of ice as the cause of a fall, a plaintiff must show that: (1) the defendant created or aggravated the hazard; (2) the defendant knew or should have known of the hazard; and (3) the hazardous condition was substantially more dangerous than it would have been in the natural state

3. What about that City Ordinance?

a. *Lopatkovich v. Tiffin*, 28 Ohio St. 3d 204 (1986).

i. Plaintiff slipped and fell on a public sidewalk in front of a privately owned building on ice that had formed after snow had fallen, melted, and refrozen. Plaintiff sued the city of Tiffin, Ohio as well as the owner of the building and the tenant. The court provided the following description of plaintiff's claim:

ii. Plaintiff further argues that Tiffin Ordinance No. 521.06 1 compels owners and occupiers of property abutting public sidewalks to remove ice and snow from such sidewalks, and that when the violation of such ordinance by an occupier or owner results in injury to a pedestrian, a prima facie cause in negligence arises.

iii. The court found snow and ice to be part of wintertime life in Ohio and, therefore, the property owner and the jewelry store owed no duty to the pedestrian and were not subject to civil liability even in light of a local ordinance which required owners to keep abutting sidewalks free from snow and ice.

iv. The court explained their rationale as follows: "In our view, the rationale behind sidewalk snow removal statutes like the one *sub judice* is that it would be impossible for a city to clear snow and ice from all its sidewalks; and the duty imposed by such statutes is most likely a duty to assist the city in its responsibility to remove snow and ice from public sidewalks. This, however, does not raise a duty on owners and occupiers to the public at large, and such statutes should not, as a matter of public policy, be used to impose potential liability on owners and occupiers who have abutting public sidewalks."

v. The general rule governing natural accumulations of snow and ice on public sidewalks is that the owner owes no such duty and is not subject to civil liability even where an ordinance requires the owner or occupier to keep abutting sidewalks free from snow and ice.

vi. The court explained the general rule as follows: "Living in Ohio during the winter has its inherent dangers. Recognizing this, we have previously rejected the notion that a landowner owes a duty to the general public to remove natural accumulations of ice and snow from public sidewalks which abut the landowner's premises, even where a city ordinance requires the landowner to keep the sidewalks free of ice and snow."

4. Employers Beware: Ohio's Common-law Natural Accumulation Defense does **not** apply to Jones Act Cases.

a. A Brief Comment on the Jones Act

i. The Jones Act, 46 U.S.C. §30104, et seq. creates a cause of action for seaman against their employers if the seaman are injured during the course and scope of their employment.

b. *Rannals v. Diamond Jo Casino*, 265 F.3d 442 (6th Cir. Ohio 2001)

i. Plaintiff worked as a deckhand on defendant, Diamond Jo Casino's riverboat casino in Dubuque, Iowa. At the time of her injury, plaintiff was in Toledo, Ohio for a week long training course. While attendance at the training session was not per se mandatory, defendant paid plaintiff for her time during this week long training session and also paid for food, transportation, and lodging. Furthermore, completion of the training was a prerequisite for promotions.

ii. On the morning of plaintiff's injury, the temperature was below freezing and there had been freezing precipitation. At the end of the day on her way to her car, plaintiff stepped from the grass onto the parking lot, slipped and broke her ankle. Plaintiff sued her employer and also the training center on whose property she was injured.

iii. The District Court granted summary judgment in favor of the defendants applying Ohio's natural accumulation defense. However, the Sixth Circuit reversed summary judgment holding that the natural accumulation defense was inapplicable to Jones Act claims.

APPENDIX

1. Dram Shop Statute (O.R.C. §4399.18)
2. Ohio Dog Bite Statute (O.R.C. §955.28)
3. Ohio House Bill 14
4. Ohio Senate Bill 310
5. H.R. 4122