2017 IL App (2d) 151040-U
No. 2-15-1040
Order filed February 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SEAN SCHMIT, Plaintiff-Appellant, v. MARCY METCALF and MICHELLE R. SCHNABEL, d/b/a/ A Walk in the Park Pet Sitters; LANCE R. SMALARZ; and JACQUELYN E. SMALARZ, Defendants-Appellees (Lance R. Smalarz and Jacquelyn E. Smalarz, Defendants-Third-Party Plaintiffs; The Pooper Scoopers Inc., Third-Party Defendant).	)	Appeal from the Circuit Court of Kendall County. No. 13-L-30 Honorable Stephen L. Krentz, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Hudson concurred in the judgment.
Justice McLaren specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court erred in granting defendants summary judgment on plaintiff's complaint under the Animal Control Act and for negligence related to a dog-related injury, as there were questions of fact as to whether plaintiff assumed the risk, whether the defendant homeowners exercised control of the dogs such that they could be liable under the Act, and whether defendants knew of the dogs' dangerous propensities for purposes of negligence.

¶ 2 Plaintiff, Sean Schmit, appeals the trial court's order granting summary judgment in favor of defendants, Lance R. Smalarz and Jacquelyn E. Smalarz (the homeowners) and Marcy Metcalf and Michelle R. Schnabel, d/b/a A Walk in the Park Pet Sitters (the dog walkers). Plaintiff was injured when one of the dog walkers let the homeowners' dogs outside while he was performing services for his employer and third-party defendant, The Pooper Scoopers, Inc. (Pooper Scoopers). The court determined that plaintiff assumed the risk, that the homeowners were not "owners" of the dog for purposes of the Animal Control Act (the Act) (510 ILCS 5/16 (West 2010)), and that plaintiff failed to plead knowledge of the dogs' dangerous propensities for purposes of common-law negligence. We find that there are issues of material fact as to whether plaintiff assumed the risk, whether the homeowners exercised care, custody, or control of the dogs at the time of the injury such that they could be liable under the Act, and whether defendants knew of the dogs' dangerous propensities. Accordingly, we reverse and remand for further proceedings.[1]

¶ 3 I. BACKGROUND

[1] After we filed our initial judgment and issued our mandate in this case, Metcalf and Schnabel moved to recall the mandate and to spread of record the facts that on September 8, 2016, Schnabel filed a petition for bankruptcy and that on December 6, 2016, the bankruptcy court entered an order discharging Schnabel from the claims of her creditors, including plaintiff. We hereby grant that motion and enter this judgment, reissuing our mandate immediately. We observe that, because we are not here imposing any liability on Schnabel, but instead are simply remanding the cause for plaintiff's claims to go forward, we need not enter any further order at this time. Metcalf and Schnabel may make any other appropriate motion in the trial court on remand.

¶ 4 Plaintiff was injured when, while working for Pooper Scoopers at the homeowners' residence, one of the dog walkers let the homeowners' dogs outside. Plaintiff ran from the dogs and hurt his knee as he attempted to escape over a fence. Plaintiff filed suit alleging causes of action under the Act and for negligence. In regard to negligence, the complaint alleged defendants failed to warn plaintiff of the dogs' dangerous propensities. However, it did not allege specific facts as to acts that would give rise to knowledge of dangerous propensities. Defendants moved for summary judgment, alleging that plaintiff assumed the risk and that he did not show their knowledge of dangerous propensities. The homeowners also alleged that they were not "owners" of the dogs for purposes of the Act when they were not at home and the dogs were in the care, custody, or control of the dog walkers.

¶ 5 Evidence from discovery showed that, at the time of the injury, the homeowners owned two pit bulls, a cane corso, and a sheltie. The dogs had been taken to obedience training. The homeowners denied that the dogs were aggressive and stated that the dogs had never bitten, nipped, snapped at, charged at, or jumped on another person. The dogs were described by both the homeowners and the dog walkers as well behaved. No neighbors had ever complained about the dogs. However, the homeowners admitted that the dogs were protective of their property and that at least three of the dogs would growl, bark, and run at any person who came by the fence. They also stated that the dogs could scare or intimidate a stranger. The homeowners had a fenced yard and also had an electric fence outside of the physical one. Two collars for the electric fence were rotated among the pit bulls and the cane corso. The fence had a sign stating "Dogs—No Trespassing" posted on each of the gates leading into the yard. Inside of the home, a gate kept the dogs from approaching people who came to the front door. One of the dogs had previously been

documented as aggressive by a veterinarian, which the homeowners stated was due to the dog's fear of that person.

¶ 6 The homeowners hired the dog walkers to come twice each day to feed the dogs and let them outside into the yard. When meeting with the dog walkers, the homeowners did not report any aggressive behavior or other behavior problems. The homeowners typically were not home when the dog walkers came. They provided all of the items used to care for the dogs and provided instructions for their care such as what to feed the dogs, vitamins that should be given, and where the dogs should be kenneled. They also would normally advise the dog walkers if someone was expected to be at the home.

¶ 7 The homeowners did not specifically instruct the dog walkers to check the backyard for people before letting the dogs out. However, they told the dog walkers and Pooper Scoopers about each other and had told the dog walkers and Pooper Scoopers that they had to work together. One of the homeowners stated that, for safety reasons, she instructed Pooper Scoopers that she wanted its employees to present themselves before they went into the yard, so that they could make sure that the dogs were not in the yard with them. She thought, based on this request, that a procedure had been in place in which the Pooper Scoopers employee would ring the doorbell when he arrived. The homeowners also believed that Pooper Scoopers was told to look for the dog walkers' car. One of the homeowners stated that she thought she had been told by the dog walkers that the companies had spoken and reached an agreement. There also was an understanding that the dog walkers would not let the dogs out when the lawn service was at the home. The homeowners had the ability to designate the schedule that the companies used.

¶ 8 The dog walkers encountered employees from Pooper Scoopers a number of times through the years. If there was a Pooper Scoopers employee at the home when they arrived, the dogs

would be held in the house until the employee left. The dog walkers did not know when or if a Pooper Scoopers employee would be in the yard on any given day. The dog walkers did not recall being given specific instructions about Pooper Scoopers, but they were instructed not to let the dogs out when other people were at the home. They were unsure if that was for safety reasons.

¶ 9 Plaintiff was hired by Pooper Scoopers to go to homes to remove dog waste from the yards. He had been taking care of the homeowners' yard every Monday for at least a year. He said that, according to his training, he was supposed to make loud noises by hitting his bucket with his spade, clapping, or whistling, to check if dogs were present before entering the yard. If none were present, he would enter the yard. If the dogs were outside, he would ring the doorbell to ask that the dogs be brought inside. The instruction sheet for the home stated "Aggressive—Do Not Ever Enter Yard With Dogs!," but it did not state that plaintiff should ring the bell, and ringing the bell was not the normal company policy absent a specific instruction to do so. Plaintiff stated that, on one occasion, he banged his bucket, and the dogs came to the fence and scared plaintiff's friend who was with him. Plaintiff then went to the door and asked that the dogs be brought inside. He formed the opinion that the dogs were aggressive based on that incident.

¶ 10 On the day of the injury, plaintiff arrived and did not see another car at the residence. He banged his bucket and heard the dogs barking inside of the home. Once he confirmed that the dogs were not in the yard, he entered and began performing his job. While he was in the yard, one of the dog walkers let the dogs out. The two pit bulls and the cane corso growled and charged at plaintiff. Plaintiff ran to the fence and tried to jump over it. His foot caught in the top of the fence and he injured his knee. The dog walker came out, apologized, and took the dogs back in the house. The homeowners were not home at the time of the injury. The dog walker stated that plaintiff was not there when she arrived. After the injury, the parties instituted a rule requiring

Pooper Scoopers employees to ring the doorbell or leave a note on the door. One of the homeowners later sent an e-mail to Pooper Scoopers expressing concern that it was not being followed. She stated that she saw the employee and that, had she not known who it was, she might have let the dogs out thinking that there was a stranger in the yard. She also wrote that, had they been out, it would have been scary.

¶ 11 The trial court granted the motions for summary judgment. As to all parties, the court found that plaintiff assumed the risk of injury as a matter of law because he agreed to provide service relative to the care of the animals and because he did so knowing that "he would be required to render those services within the animals' confined spaces." As to the homeowners, the court further found that, under *Hayes v. Adams*, 2013 IL App (2d) 120681, they were not "owners" of the dogs for purposes of the Act, because they relinquished total control of the dogs to the dog walkers. In regard to negligence, the court found that plaintiff failed to plead sufficient facts to demonstrate that defendants had knowledge of vicious propensities of the dogs. Plaintiff appeals.

¶ 12 II. ANALYSIS

¶ 13 Plaintiff contends that he did not assume the risk when he specifically took care to ensure that the dogs were not in the yard. He also contends that the homeowners were "owners" under the Act because they had continuing care, custody, or control of the dogs. Finally, he argues that there are issues of material fact as to whether defendants had knowledge of the dogs' vicious propensities.

¶ 14 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter

of law. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In reviewing a grant of summary judgment, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Lake County Grading Co. v. Village of Antioch*, 2013 IL App (2d) 120474, ¶ 12. "Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Id*. Whether the entry of summary judgment was appropriate is a matter that we review *de novo*. *Williams*, 228 Ill. 2d at 417.

¶ 15 A. The Homeowners as "Owners" under the Act

¶ 16 Plaintiff contends that the trial court erred when it determined that, under this court's decision in *Hayes*, the homeowners were not "owners" for purposes of the Act because they relinquished control of the dogs to the dog walkers.

¶ 17 Section 16 of the Act provides:

> "If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby." 510 ILCS 5/16 (West 2010).

¶ 18 In order to recover under the Act, the plaintiff must prove four elements: " '(1) an injury caused by an animal owned by the defendant; (2) lack of provocation; (3) the peaceable conduct of the injured person; and (4) the presence of the injured person in a place where he has a legal right to be.' " *Beggs v. Griffith*, 393 Ill. App. 3d 1050, 1054 (2009) (quoting *Meyer v.*

Naperville Manner, Inc., 262 Ill. App. 3d 141, 147 (1994)). Here, the only element at issue is ownership of the dogs under the Act.

¶ 19 Section 2.16 of the Act defines an "owner" as "any person having a right of property in a an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her." 510 ILCS 5/2.16 (West 2010). Questions of ownership under the Act are generally for the trier of fact. However, in appropriate cases, summary judgment is proper. *Hayes*, 2013 IL App (2d) 120681, ¶ 8.

¶ 20 "Although on its face the Act would appear to hold any legal owner of a dog strictly liable for injuries, and 'the [Act] is not negligence-based and does not require an injured party to prove that the "owner" is negligent, the Act also does not impose strict liability upon the owner.' " *Id*. ¶ 12 (quoting *Beggs*, 393 Ill. App. 3d at 1054). " 'At common law, a person injured by an animal could not recover unless the injured party could prove that the animal had dangerous propensities, in that the animal had attacked someone before.' " *Id*. (quoting *Beggs*, 393 Ill. App. 3d. at 1053-54). " 'One of the reasons that [the Act] became law was to eliminate the requirement that an injured party must plead and prove that the animal owner knew or should have known about the animal's dangerous propensities.' " *Id*. (quoting *Beggs*, 393 Ill. App. 3d at 1054). "The Act, however, has been held not to repeal the common-law action." *Id*.

¶ 21 The Act's purpose is to encourage tight control of animals so as to protect the public from harm. *Id*. ¶ 13. " 'Because liability is mandated under the Act, the existence of the law serves as an incentive to keep one's animals from harming others.' " *Id*. (quoting *Beggs*, 393 Ill. App. 3d at 1054). "Since the overriding purpose of the Act is the protection of the public from harm, the Act imposes penalties against both the owner of the animal and anyone 'who places himself

in a position of control akin to an owner.' " *Beggs*, 393 Ill. App. 3d at 1054 (quoting *Wilcoxen v. Paige*, 174 Ill. App. 3d 541, 543 (1988)). However, we do not interpret the Act to impose strict liability as a pure penalty for dog ownership. *Hayes*, 2013 IL App (2d) 120681, ¶ 13. Rather, there must be "a factual or reasonable basis for liability." *Id*. As a result, despite the fact that the express language of the Act appears to be absolute, it has been held not to impose liability based on mere legal ownership. See *id*. Thus, the term "owner" has been consistently construed to involve some amount of care, custody, or control of the animal. *Severson v. Ring*, 244 Ill. App. 3d 453, 457 (1993).

¶ 22 In *Hayes*, the defendant took her dog to an animal clinic for a surgical procedure. The dog had never chased or bitten anyone. When the defendant dropped off the dog, she removed its collar and chain, which the clinic replaced with a rope. The clinic had a practice of walking dogs before surgery, and the dog got loose and ran away. A child tried to pick up the dog and was bitten. The trial court granted the defendant summary judgment, finding that the defendant was not strictly liable solely because of her ownership of the dog, and we affirmed. We noted cases holding that ownership contemplates some level of care, custody, or control so as to place the burden on the parties who are in the best position to prevent the animal from causing harm. *Hayes*, 2013 IL App (2d) 120681, ¶ 18 (quoting *Papesh v. Matesevac*, 223 Ill. App. 3d 189, 192 (1991)). Because the defendant, having relinquished care, custody, and control to the clinic, was not in a position to control the dog or prevent the injury, and because there was no reason for the defendant to believe that the clinic would allow the dog to escape or that it would bite someone, the defendant was not liable under the Act. *Id*. ¶ 20.

¶ 23 Likewise, a mother was not liable under the Act when she purchased a dog for her son and gave basic instructions on how to care for a dog, but the son had moved to his father's home

by the time of the injuries. *Papesh*, 223 Ill. App. 3d at 191. The care instructions given were general instructions of the kind any parent would give a child to teach responsibility and were not evidence of care or control over the dog. *Id*. at 191-92.

¶ 24 In comparison, ownership for purposes of the Act was found when the defendant in a case involving injury by her horse was riding alongside the plaintiff. *Carl v. Resnick*, 306 Ill. App. 3d 453, 463-64 (1999). There, the defendant's presence at the time of the injury, in conjunction with legal ownership, clearly established that she maintained care, custody, and control of the horse, thus bringing her within the definition of an "owner" under the Act. *Id*. at 464. The owner of horses was also found to be an "owner" under the Act when a person was injured while touring the owner's property, though the owner was not along on the tour. *Beggs*, 393 Ill. App. 3d at 1052. There, the owner was not just present and in legal control of the property; he also maintained the ability to control the animals at the precise time of the injury but chose not to. *Id*. at 1056.

¶ 25 A municipality was also found to be an "owner" for purposes of the Act when a police dog, owned by the city, bit a person. *Wilson v. City of Decatur*, 389 Ill. App. 3d 555, 556-57 (2009). We distinguished that case in *Hayes* because, there, an employee of the city was handling the dog, so the city still had care, custody, and control via its agent. *Hayes*, 2013 IL App (2d) 120681, ¶ 19.

¶ 26 Here, the facts are close to those in *Hayes*, but with a key distinction. In *Hayes*, the legal owner left the dog at the animal clinic, thus retaining no control over the dog. Here, by contrast, the dogs stayed, at all relevant times, on the homeowners' property. By arranging for the dogs to stay in the house or the fenced-in yard, the homeowners exerted at least some degree of control over the dogs, at least insofar as they restrained the dogs' movement. Indeed, no one

would deny that, when the dog walkers were *not* onsite, the homeowners, though absent, were keeping the dogs at least partially controlled; the dogs obviously were not staying put of their own accord. Given that the dog walkers' visits took place within those same confines—and pursuant to the homeowners' specific instructions—those same controls remained in effect. To be sure, the dog walkers exhibited more *direct* or *immediate* control over the dogs, but we are aware of no authority that establishes control as an all-or-nothing proposition. That the dog walkers perhaps had *more* control does not establish that the homeowners had none. See *Carl*, 306 Ill. App. 3d at 463 (rejecting proposition that "at any given time there can be only one 'owner' of an animal for liability purposes under the Animal Control Act").

¶ 27 Further, as the owners of the property, the homeowners also controlled the human traffic to which the dogs could be exposed. The homeowners hired the dog walkers to release the dogs into the yard, while also having hired Pooper Scoopers to go into the yard to pick up waste. Although the homeowners saw the obvious risk, and although they encouraged those agencies to work together to avoid any interaction, the fact remains that, by controlling the flow of strangers to whom the dogs could react, the homeowners also, at least to some extent, controlled the dogs' interaction with third parties. Moreover, there is no indication that the homeowners ever followed up to make sure the agencies had steps in place to avoid interaction. Thus, in this context, the homeowners were not mere legal owners of the dogs, in no position to prevent injury; to the contrary, as we review the factors that contributed to this injury, we see that the homeowners brought them together. The homeowners engaged both agencies to come to their property, while fully aware of the risk of the agencies' interaction. Having knowingly created that risk, the homeowners cannot rely on their mere absence from the property to avoid liability as a matter of law.

¶ 28 The dissent asserts that our focus is "skewed," in that we should be "addressing the owners' control over the *dog walkers* and not over the dogs." (Emphasis in original.) *Infra* ¶ 61. From this premise, the dissent posits that, because the dog walkers were independent contractors, the homeowners cannot be subject to liability. The dissent notes that, " '[g]enerally, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor.' " *Infra* ¶ 71 (quoting *Moiseyev v. Rot's Building & Development Inc.*, 369 Ill. App. 3d 338, 344 (2006)). However, the dissent does not acknowledge the *exceptions* to the general rule, one of which demonstrates that, even under the dissent's focus, the homeowners are arguably subject to liability.

¶ 29 "If one employs [an independent contractor] to do work which he should recognize as involving some peculiar risk to others unless special precautions are taken, the one doing the employing will remain liable if harm results because these precautions are not taken." *Bear v. Power Air, Inc.*, 230 Ill. App. 3d 403, 409 (1992).[2] " '[T]he proper test to be applied concerning the liability of an owner for the act of negligence of an independent contractor is whether there was sufficient evidence presented so that the trier of fact could determine that the work to be done was a probable and foreseeable source of injury to a party such as plaintiff unless proper precautions were taken.' " *Id.* (quoting *Donovan v. Raschke*, 106 Ill. App. 2d 366, 370 (1969)).

[2] This exception is commonly known as the " 'inherently dangerous activity' exception." *Bear*, 230 Ill. App. 3d at 409. However, and importantly here, the exception applies not only to " 'highly dangerous' activities" but to *any* work that "involves a risk, recognizable in advance, that the danger inherent in such work, or in the ordinary or prescribed way of performing it, may cause harm to others." *Id.* at 410.

¶ 30 Here, plaintiff presented sufficient evidence to support that conclusion. Indeed, the evidence indicated that the homeowners specifically foresaw that the dog walkers' release of the dogs into the yard might cause injury to a Pooper Scoopers employee who happened to be there. Thus, the homeowners urged the two agencies to take the "proper precautions" of working together to avoid interaction. Having seen the need for those precautions, however, the homeowners arguably were not entitled to delegate the duty to take them. See *id.*

¶ 31 This is precisely the "factual or reasonable basis for liability" that the evidence here could sustain. See *Hayes*, 2013 IL App (2d) 120681, ¶ 13. Although the dog walkers were the ones who let the dogs into the yard while plaintiff was there, the homeowners foresaw the risk and arguably could have averted it. It is that ability—that "control"—which ultimately matters. See *Beggs*, 393 Ill. App. 3d at 1056 ("Griffith clearly maintained the ability to keep the horses away from the prospective buyers but chose not to do so."). Under these circumstances, the fact that the homeowners purported to convey that control to independent contractors does not necessarily relieve them of their failure to exercise it themselves.

¶ 32 That said, we stress that, contrary to the dissent's characterization, we have not "assessed liability" (*infra* ¶ 85), strict or otherwise. We reiterate that ownership under the Act is generally a question of fact. *Hayes*, 2013 IL App (2d) 120681, ¶ 8. We further note that "[s]ummary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Under the unique circumstances of this case, we hold only that there is an issue of material fact as to whether the homeowners retained "some measure of care, custody, or control"[3] of the dogs, such that they

[3] Although the dissent chides us for failing to define "[h]ow much of *some*" is required (*infra* ¶ 78), there is no bright-line legal threshold. In general, and certainly here, the trier of fact

were "owners" subject to liability under the Act. *Steinberg v. Petta*, 114 Ill. 2d 496, 501 (1986). Thus, the homeowners were not entitled to summary judgment on this ground.

¶ 33 B. Assumption of the Risk

¶ 34 Plaintiff next contends that the trial court erred in determining that he assumed the risk as a matter of law, because he specifically took care to ensure that the dogs were not in the yard and he could not assume a risk created by defendants' negligence.

¶ 35 The parties present the issue as one of primary implied assumption of the risk as opposed to secondary implied assumption of the risk. "Primary implied assumption of risk is an affirmative defense that arises where the plaintiff's conduct indicates that he 'has implicitly consented to encounter an inherent and known risk, thereby excusing another from a legal duty which would otherwise exist.' " *Edwards v. Lombardi*, 2013 IL App (3d) 120518, ¶ 18 (quoting *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007)). The basis of the defense is that a plaintiff will not be heard to complain of a risk encountered voluntarily or brought upon himself with full knowledge and appreciation of the danger. *Id.* "Assumption of the risk is particularly applicable when the parties are in a contractual relationship with each other." *Id.* It applies when a plaintiff voluntarily enters into some relationship with the defendant and has given consent to relieve the defendant of an obligation of conduct toward him and to take his chances of injury from a known risk arising from the defendant's acts or inaction. See *Clark v. Rogers*, 137 Ill. App. 3d 591, 594-95 (1985).

¶ 36 Unlike secondary implied assumption of the risk, the doctrine of primary assumption of the risk operates as a complete defense to a negligence action because the defendant is said not to owe any duty to the plaintiff. *Edwards*, 2013 IL App (3d) 120518, ¶ 18; see also *Clark*, 137 Ill.

---

must answer that question.

App. 3d 594-95 (unlike a case where assumption of the risk requires a comparison of fault between the plaintiff and defendant, primary assumption of the risk remains as a complete defense to a negligence action); *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 434 (1985) (describing the abolishment of secondary implied assumption of the risk by the rule of comparative negligence). It also applies as a complete defense under the Act. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 535 (2008).

¶ 37 When assumption of the risk is applied under the Act, the analysis generally looks at whether there is a duty based on the plaintiff's status as a person protected by the Act. Generally, liability under the Act is found when the plaintiff is an innocent bystander. *Allendorf v. Redfearn*, 2011 IL App (2d) 110130, ¶ 32. In cases involving animals, the relationship between the plaintiff and the injury-causing animal, as opposed to the relationship between the plaintiff and the defendant, is the overriding factor. See *id*. When the plaintiff can be viewed as having taken control or custody of the animal prior to being injured, thereby making the plaintiff an "owner" of the animal under the Act, the plaintiff would then no longer be a member of the class of people protected by the Act. *Carl*, 306 Ill. App. 3d at 460. When the plaintiff's relationship to the owner and to the animal itself objectively excludes the plaintiff as an innocent bystander, the plaintiff cannot recover. See *Meyer*, 262 Ill. App. 3d at 148.

¶ 38 Most of the case law involves circumstances in which a plaintiff assumed the risk by taking actions related to the actual handling or direct care of the animal. For example, in *Edwards*, a farmhand who contracted to care for animals assumed the risk when he entered a barn and was injured by a llama that had been aggressive toward him in the past and that he knew would be free to roam. Since the plaintiff entered the barn knowing that the llama was

inside, he assumed the risk that the llama would attack him in a similar manner as it had before. *Edwards*, 2013 IL App (3d) 120518, ¶ 20.

¶ 39 Likewise, assumption of the risk was applied when a professional horseshoer was kicked by the defendant's stallion while placing a shoe on the horse; the horseshoer admitted that he had been kicked twice before under similar circumstances and that it was known within his profession that horses sometimes kick while being shod. *Vanderlei v. Heideman*, 83 Ill. App. 3d 158, 163 (1980). A professional horse trainer also assumed the risk of being bucked off a stallion when she knew that the stallion could become excitable. *Clark*, 137 Ill. App. 3d at 595. Assumption of the risk was also applied when a plaintiff voluntarily accepted responsibility for controlling the defendant's dog (*Wilcoxen*, 174 Ill. App. 3d at 543), when a plaintiff voluntarily agreed to walk the defendant's dog (*Hassell v. Wenglinski*, 243 Ill. App. 3d 398, 399 (1993)), and when a person fell from a horse at a riding school (*Meyer*, 262 Ill. App. 3d at 150).

¶ 40 On the other end of the scale, when it is clear that the plaintiff was an innocent bystander, assumption of the risk will not apply. *Beggs*, 393 Ill. App. 3d at 1058. Thus, a plaintiff injured by a horse while inspecting a barn did not assume the risk when, despite her prior experience with horses, she was not employed in an occupation pertaining to the horse, was not riding the horse, and did not have a contractual relationship involving use of the horse. *Id*. Likewise, assumption of the risk was not applicable when a plaintiff was riding her horse on a trail and was kicked by the defendant's horse, because the plaintiff never exercised care, control, or custody of the horse that kicked her. *Carl*, 306 Ill. App. 3d at 462.

¶ 41 There is little case law involving circumstances, such as those in the instant case, where the plaintiff had a connection to the animal's owner, yet did not directly care for the animal. However, it has been said that, while a plaintiff assumes the risks that are inherent in the nature

of the activity itself, he does not assume risks created by the defendant's negligence. *Edwards*, 2013 IL App (3d) 120518, ¶ 18 (citing *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 560 (2004)). This concept is reflected in a rather old, but well reasoned, New York case where the plaintiff, acting as an employee of the owner, did not assume the risk of injury from a guard dog when the owner was to inform the plaintiff when the dog was loose and failed to do so. *Muller v. McKesson*, 73 N.Y. 195, 204 (1878). There, the court noted that an employee assumes the risk incident to the business in which he engages. *Id*. Under the terms of his employment, at most the plaintiff assumed the risk associated with a ferocious dog that was kept fastened. Beyond that, the plaintiff was entitled to the same protection as other people. *Id*. at 204-05; see also *Prays v. Perryman*, 262 Cal. Rptr. 180, 182 (Cal. Ct. App. 1989) ("the defense of assumption of the risk extends only to the danger which the injured person has *knowingly* assumed" (emphasis in original)). As *Muller* makes clear, a plaintiff assumes only a known risk, not a speculative one.

¶ 42 Here, the trial court found that plaintiff assumed the risk as a matter of law because he agreed to provide services relative to the care of the animals and because "he would be required to render those services within the animals' confined spaces." However, while plaintiff did engage in employment for a company that would regularly place him in yards of homes that harbored dogs, he did not undertake care, custody, or control of the dogs and could not reasonably be considered an "owner" under the Act such that he was removed from the Act's protection as a matter of law. Further, as noted, the defense extends only to the risks that plaintiff knowingly assumed. Plaintiff did not provide any service that required contact with the dogs and he did not knowingly enter the yard with the dogs present. Instead, there is evidence that he did just the opposite by taking steps to ensure that he heard the dogs inside of

the house so that he would not encounter them. The record indicates some disagreement as to whether plaintiff did everything required to ensure that the dogs were not in the yard when he arrived or whether he should have known that the dog walkers were there or might arrive and let the dogs out without checking the yard first. Thus there is some question as to whether there was a known risk that the dog walkers would let the dogs out into the yard. However, plaintiff did not assume the risk as a matter of law merely because he worked in a business that involved proximity to confined animals. Thus, we reverse the entry of summary judgment on this ground.

¶ 43 C. Negligence

¶ 44 Finally, plaintiff argues that the trial court erred when it granted summary judgment in favor of defendants on his common-law negligence claim. Defendants approached this claim before the trial court as a matter of plaintiff's failure to show an issue of material fact as to defendants' knowledge of the dogs' dangerous propensities, particularly when the dogs had not previously injured a person. They still approach it in that manner on appeal.[4] However, the trial court stated that plaintiff failed to plead sufficient facts as to knowledge. It did not address the evidence gathered during discovery.

[4] The dog walkers alternatively posit that they did not owe plaintiff a legal duty to "look for [plaintiff] prior to releasing the dogs into the yard." However, the analysis that they undertake is "a highly fact-specific inquiry into whether a particular act or omission is actionable in a particular set of circumstances." *Stearns v. Ridge Ambulance Service, Inc.*, 2015 IL App (2d) 140908, ¶ 11. Such analyses of whether a defendant "has a duty to perform or refrain from performing particular acts improperly conflate the concepts of duty and breach." *Id.* ¶ 13 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 443 (2006)). Thus, we do not address this argument.

¶ 45 A motion for summary judgment assumes that a cause of action has been stated. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 315 (2007). Thus, the court's entry of summary judgment on the basis that the complaint was insufficient was in error. However, we may affirm an entry of summary judgment on other grounds. *Federal Insurance Co. v. Turner Construction Co.*, 277 Ill. App. 3d 262, 266 (1995). Accordingly, we address the parties' contentions.

¶ 46 "It is presumed that a dog is tame, docile, and harmless absent evidence that the dog has demonstrated vicious propensities." *Goennenwein v. Rasof*, 296 Ill. App. 3d 650, 654 (1998). Thus, to impose a duty in a claim for common-law negligence in connection with an injury caused by a dog, the plaintiff must establish that the defendant knew or had reason to know that the animal would be dangerous. See *id*. Proof may be made by evidence of facts and circumstances giving rise to an inference of knowledge. *Steichman v. Hurst*, 2 Ill. App. 3d 415, 417 (1971). "[T]he owner of a dog that has shown a disposition to bite or attack can no longer rely on the dog's being harmless; and it is not the law that an owner must have notice of an unjustifiable biting if he has knowledge of attacks upon persons without actual biting, sufficient to put him upon notice of a dog's vicious propensities." (Internal citations omitted.) *Id*. at 417-18. It is also not necessary that the owner knew that the dog previously inflicted the same injury. *Domm v. Hollenbeck*, 259 Ill. 382, 386 (1913). It is sufficient that he knew that the dog would be likely to inflict an injury similar to the one complained of. *Id*. Extra care taken by an owner to confine a dog could establish knowledge. See generally, *Chicago & Alton R.R Co. v. Kuckkuck*, 98 Ill. App. 252, 257 (1901). However, it is not dispositive, especially where the owner equally confined nonaggressive dogs. See *Goennenwein*, 296 Ill. App. 3d at 655. Breed or type of dog is irrelevant to the inquiry. See *id*.

¶ 47 Here, the homeowners admitted that they were aware of the dogs' likelihood to charge at a stranger. Accordingly, they installed two fences and warning signs. Further, they specifically instructed the dog walkers to keep the dogs away from strangers. Moreover, as previously mentioned, the owners knew one of the dogs had previously been documented as aggressive by a veterinarian. These facts give rise to an inference of defendants' knowledge of the dogs' dangerous propensities. Knowledge of a specific previous attack was not required. See *Steichman*, 2 Ill. App. 3d at 418. Thus, we reverse the trial court's entry of summary judgment.

¶ 48 III. CONCLUSION

¶ 49 There are issues of material fact as to whether plaintiff assumed the risk, whether the homeowners exercised care, custody, or control of the dogs at the time of the injury such that they could be liable under the Act, and whether defendants were aware of the dogs' dangerous propensities. Accordingly, the judgment of the circuit court of Kendall County is reversed and the cause is remanded for further proceedings.

¶ 50 Reversed and remanded.

¶ 51 Justice McLaren, specially concurring in part and dissenting in part.

¶ 52 I concur that there is a material issue of fact relative to the issue of plaintiff's assumption of risk. However, as the majority posits, there appears to be a substantial amount of evidence that would suggest that plaintiff was contributorily negligent for failing to ring the doorbell and inform the custodian that he would be in the yard working (and his employer as well, for not requiring him to do so). Plaintiff's instruction sheet for defendant's house related that the animals were aggressive. Assuming, *arguendo*, that that is true, the failure to ring the bell or leave a note on the door (in the event the custodian came to the house while plaintiff was in the yard) indicates

substantial contributory negligence on the part of the plaintiff. Nevertheless, there is a material issue of fact as to whether the negligence of the custodian was more or less than the plaintiff's contributory negligence.

¶ 53 I also concur that the trial court incorrectly analyzed the summary judgment motion as a motion to dismiss for failure to state or plead a cause of action. However, I distance myself from the remainder of the majority analysis.

¶ 54 I dissent from the portion of the majority disposition reversing the grant of judgment regarding the Animal Control Act. The majority determines that there are material issues of fact that precluded the trial court's grant of summary judgment. The majority posits that there is a material distinction between this case and *Hayes*, 2013 IL App (2d) 120681, in that the legal owner in *Hayes* "left the dog at the animal clinic, thus retaining no control over the dog," while, in this case, "the dogs stayed, at all relevant times, on the homeowners' property." *Supra* ¶ 26. I submit that this is a distinction without a difference. Unfortunately, in determining that there is a material issue of fact because the dogs were kept on the owners' premises, the majority imposes strict liability on the owners.

¶ 55 It is puzzling why the majority does not cite to the established standard of review in a case where, as here, the defendant moves for summary judgment:

> "To survive a motion for summary judgment, the nonmoving party must present a factual basis that would *arguably entitle her to a judgment in her favor*. [Citation]. If a plaintiff cannot establish an element of her cause of action, summary judgment is proper. [Citation]. *While a plaintiff need not prove her case at the summary judgment stage, she must present enough evidence to create a genuine issue of fact*. [Citation]." (Emphases added.) *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007).

¶ 56 In cases like this, it is not an all-or-nothing proposition. (Though the majority declares this to be the case (see *supra* ¶ 26), its actions belie its words.) It is properly a question of satisfying a minimum threshold standard of proof. The plaintiff must establish a minimally sufficient level of proof to preclude the entry of summary judgment against him. "However, where the evidence presented is insufficient to create a factual question regarding whether the employer retained sufficient control to give rise to a duty, the question may be decided as a matter of law on a summary judgment motion." *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 249 (2001).

¶ 57 The majority has neither cited to this established principle of law regarding a threshold level of evidence required nor utilized the principle in its analysis. That alone is procedural error. Although the majority claims it is not an all or nothing proposition, it proceeds as if it were. In paragraph 26 *supra*, the majority relates:

> "To be sure, the dog walkers exhibited more direct or immediate control over the dogs, but we are aware of no authority that establishes control as an all-or-nothing proposition. That the dog walkers perhaps had more control does not establish that the homeowners had none."

The majority is using an all-or-nothing analysis with that conclusion. Were it not an all-or-nothing proposition, the majority would be analyzing the issue thusly: "The dog walkers had actual custody and control and were independent contractors; did the plaintiff present sufficient evidence that the owners retained sufficient control over the dog walkers' work to arguably support a judgment in his favor?" The fact that the dog walkers had virtually all the control is beside the point. This is not a zero sum situation. If the owner's liability arises from the acts of the custodian/independent contractor, it must be based upon a sufficient level of control of the

work of the custodian/independent contractor by the owner. If not, then any liability imposed on the owner will be strict liability.

¶ 58 The majority has altered the burden of proof from a sufficient level of control to a scintilla of control. The majority does not analyze the threshold level of control needed. It merely cites matters which it deems are evidence of control. Unfortunately, it claims there are "specific instructions" that are evidence of control. See *supra* ¶ 26. Additionally, it equates *ownership* of the premises with *control* of the premises but does not quantify it or determine if it meets the threshold requirement concerning control of the work or the dogs. These "specific instructions" are neither specific nor instructions, at least not in regard to what the plaintiff calls "supervisory control" or what the law calls "control of the work". I shall return to further address the defects in the majority disposition after relating what the trial court determined in granting judgment for the defendants.

¶ 59 The trial court based its grant of summary judgment on the following uncontroverted material facts:

> "1) the Smalarzes had employed the Dog Walkers to provide the care, custody, and control of the animals in question at the time of the occurrence, 2) the Dog Walkers were at that time solely responsible for making the decision to release the animals into the yard, which decision allegedly resulted in Plaintiff's injuries, and 3) the Smalarzes were not at home at the time of the occurrence and were therefore not in a position to control the animals or prevent the injuries."

¶ 60 Plaintiff asserts reversible error in the findings above and claims that, although the dog walkers had actual control of the dogs, the Smalarzes had "supervisory control" of the dogs. Plaintiff cites to *Hayes* generally. That is the only authority cited for this claim of "supervisory

control." However, the term "supervisory control" is *not* contained in *Hayes*. Thus, there is no properly cited authority for the plaintiff's claim that "supervisory control" is a valid element of control of the dogs or a factor in assessing liability. Plaintiff lists, *seriatim*, the facts that establish "supervisory control" over the dogs. In the listing, there is no claim that control of the premises constitutes supervisory control of the dogs, nor is there a claim that owners should be punished simply because their dogs are on the owner's premises.

¶ 61 The majority draft appears to adopt the list of facts cited by plaintiff and calls them "specific instructions." *Supra* ¶ 26. I submit these are not "specific instructions;" these are the general terms of the service contract. Additionally, even were they instructions, they did not impose controls on how the dog walkers were to control and service the dogs.[5] More importantly, the focus is skewed, as plaintiff should be addressing the owners' control over *the dog walkers* and not over the dogs—more specifically, the owners' control over the dog walkers' work. In order for liability to attach, "[t]here must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414, Comment c (1965). See also *Carney v. Union Pacific Railroad Company*, 2016 IL 118984, ¶ 48; *Moiseyev v. Rot's Bldg. & Development. Inc.*, 369 Ill. App. 3d 338, 348 (2006).

¶ 62 Plaintiff's list that the majority adopts as the "specific instructions" that allegedly constitute "undeniable" "supervisory control" is as follows: "The Smalarzes: 1) hired the dog walkers; 2) made the rules that the dog walkers must follow; 3) decided what equipment to use; 4) decided what food to use; 5) decided where and when to walk *or* release the dogs to relieve

[5] On this record it is oxymoronic to suggest that defendants would exercise supervisory control over the dog walkers when the contract between plaintiff and defendants contemplated that the dog walkers would be doing their work only while the owners were not on the premises.

themselves; 6) decided where and when to kennel them; 7) hired, coordinated, and scheduled other various household services; and 8) communicated (or failed to communicate) with the dog walkers about when and what workers were coming to the home." (Citations omitted.) (Emphasis added.) (Plaintiff's reply brief, page 3.)

¶ 63 The first fact is not an instruction, let alone a specific instruction. It is the act of hiring. The act of hiring is not an instruction, nor is it control, supervisory or otherwise. It is simply entering into a contract.

¶ 64 The second fact is merely a listing of the things that the independent contractor agreed to do, *i.e.*, feed the dogs, watch the dogs, kennel the dogs, walk the dogs, or release the dogs. These are not instructions, especially instructions that order or command the independent contractor *how* to do these things. These are the things the contractor is supposed to do in order to comply with the contract and to be compensated therefore. These "rules" are *what* is to be done, not *how* it is to be done. Further, plaintiff cites to the deposition of Jacqueline Smalarz to support this allegation. However, Jacqueline's answer to almost every question on this page regarding rules to be followed was some variation on "I don't remember."

¶ 65 The third fact is what equipment to use on premises. It is unclear what equipment was necessary to let the dogs into the backyard, the only part of the dog walkers' work that is related to plaintiff's injury. Any equipment that the dog walkers used inside the house (kennels, bowls, can openers, etc.) would be irrelevant to the work that allegedly caused plaintiff's injury. Assuming, *arguendo*, that the equipment was provided by the owners, the independent contractor was allowed to use the equipment as it saw fit. This is not control, as it allows the independent contractor to act on its own in complying with the contract. The plaintiff does not argue or explain whether this fact is sufficient control of the work or an incidental aspect that constitutes control. See

Connaghan, 325 Ill.App.3d at 250 ("Plaintiff was free to use whatever tools he chose or to request or obtain additional tools or equipment. The fact that defendant provided plaintiff with an allegedly unsafe ladder and did not provide scaffolding is not enough to establish that defendant retained control over the 'incidental aspects' of plaintiff's work.").

¶ 66 The fourth fact was what food to feed the dogs. The plaintiff fails to indicate how this is a "specific instruction" as compared to what service was to be provided and, again, is irrelevant to the work that allegedly caused plaintiff's injury. I submit that if an independent contractor is required to feed the dogs, there is an ambiguity in the contract as to how often, how much, who is to supply the food, and with or without cost to the independent contractor. These are not "specific instructions" but the general provisions of the contract of service.

¶ 67 The fifth fact is the most relevant as it relates to the alleged negligent act of releasing the dogs into the yard. However, it is difficult to see how this "specific instruction" constitutes control over the work, supervisory control, or control. Again, this is the *what*, not the *how*. It is one of the terms of the service contract and cannot be a "specific instruction" for control, supervisory control, or control of the work. It is the service to be provided under the contract, not how the service is to be executed (Canis familiaris defecare).

¶ 68 The sixth fact regarding kenneling the dogs is immaterial in that, if the dogs were kenneled, they would not have been in the yard charging at plaintiff. To the extent of controlling the work, it is a term of the contract. It is what was supposed to be done, not how it was to be done.

¶ 69 The seventh fact is irrelevant, as it does not relate either to the incident or the supervision of the work of the dog walkers, upon which liability was to be premised.

¶ 70 The final fact is primarily failure to inform about 1) what to do if persons are in the yard, or 2) that persons may be coming to the property on a particular day. It does not appear that even the

Smalarzes knew at what time plaintiff would be arriving, so even if it were some indication of control, it would only be a condition, at best. However, failing to tell someone something is not a specific instruction. It should more accurately be called a nonspecific non-instruction. As such, it is difficult to see how it constitutes control, since attempts to control are typically worthwhile and real when they are communicated to the independent contractor. Simply put, failures to advise are not attempts at control. Furthermore, the Smalarzes' failure to advise as to the arrival did not cause the incident. The failure of the plaintiff to notify the dog walker that he was entering the yard, and the alleged failure of the dog walker to check the yard and see plaintiff before releasing the dogs, were the cause of the incident. The so-called failure to advise the independent contractor about not releasing the dogs when a person was in the yard was neither an indication of control nor a reasonable cause of the incident, as the independent contractor admitted that she knew it was something that she should not do. Failure to advise the independent contractor of the obvious established neither control nor a special knowledge or duty to advise that would constitute supervisory control.

¶ 71 The term "supervisory control" is a term used in assessing liability against the principal contractor for the negligent acts of an independent contractor. Plaintiff fails to mention that this contractual relationship is that of a general or principal contractor with an independent contractor. Further, plaintiff does not apply the law to the facts and argue whether or not the owners controlled the work to the extent that they should be held accountable. I am not aware of any case law or statute that *presumes* liability in similar situations where the plaintiff seeks relief from the general contractor for the negligence of the independent contractor. "Generally, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor." *Moiseye.*, 369 Ill. App. 3d at 344. In order to recover, the law requires more than the independent

contractor working on the premises of the general contractor. More importantly, liability of the general contractor is premised on control over the work. "Supervisory control" relates to control of the work, not control of the premises. See *Carney*, 2016 IL 118984, ¶ 62 ("Because the record contains no evidence that defendant retained *at least some degree of control over the manner in which Happ's performed the bridge removal work*, we hold that the trial court did not err in granting defendant summary judgment on plaintiff's retained-control theory of duty and liability.") (Emphasis added.) So it is both ironic and puzzling why the majority distinguishes *Hayes* and posits that there is a material distinction in that, here, the dogs are on the premises of the owner, rather than addressing control over the independent contractor.

¶ 72 Unfortunately, the majority's determination that what distinguishes *Hayes* from the case before us imposes strict liability on the owners. The majority relies on false logic when it relates:

> "Here, the facts are close to those in *Hayes*, but with a key distinction. In *Hayes*, the legal owner left the dog at the animal clinic, thus retaining no control over the dog. Here, by contrast, the dogs stayed, at all relevant times, on the homeowners' property. By arranging for the dogs to stay in the house or the fenced-in yard, the homeowners exerted at least some degree of control over the dogs, at least insofar as they restrained the dogs' movement. Indeed, no one would deny that, when the dog walkers were not onsite, the homeowners, though absent, were keeping the dogs at least partially controlled; the dogs obviously were not staying put of their own accord." *Supra* ¶ 26.

¶ 73 The majority appears to be postulating a new concept in Newtonian physics. The majority posits that a human being may actually be located in space and time in two places simultaneously. Otherwise, the dogs must be staying put of their own accord. I would like to

think that the majority is referring to *constructive possession* in the absence of a custodian on the premises. Nevertheless, such an analysis has no place in this case because it does not fit the facts.[6]

¶ 74 Further, the owner in *Hayes* exercised the same degree of control over her dog as the owners here. The dog owners in both cases were not present when the dogs caused injuries. Both owners determined where the dogs would be in their absence and who would be entrusted with the dogs' care. Just as the dogs here "obviously were not staying put of their own accord," neither was the dog in *Hayes*; further, that dog obviously did not transport itself to the veterinary clinic. The majority's attempt to distinguish *Hayes* based on the dogs' location is as fanciful and unreasoned as distinguishing it on the color of the dogs' fur.

¶ 75 The majority analysis incorrectly cites to "instructions" to create material issues of fact regarding control of the premises which, according to the majority, morphs into control of the dogs. The majority draft even goes so far as to suggest that control of the premises is control of the dogs. And how does one establish control of the premises? By "instructing" on food and feeding? Premises do not require food. Kenneling the dogs is relevant to control of the premises instead of control of the work? I submit that the "facts" analyzed by the majority are material only for purposes of determining whether or not the independent contractor has satisfied

[6] According to the deposition of Jacquelyn Smalarz, at the time of the incident, two of the dogs were crated while the owners were away, while the other two stayed in a room in the basement that was closed off by a door. Thus, even if the counterfactual conditional were relevant, the Smalarzes would be exonerated, as the injuries could not have occurred unless the dogs did not stay put and released themselves from confinement before letting themselves outside.

its part of the contract and is entitled to compensation. The majority has yet to implement the proper analysis. It is not controlling the *what* but controlling the *how* that determines liability. The facts in this case do not arguably establish sufficient control of the dog walkers' work that would cause liability to attach to the owners.

¶ 76 The quote above contains a counterfactual conditional and a *non sequitur*. It is a counterfactual conditional because, at all times relevant herein, the dog walkers were onsite, and had custody and control of the premises and the dogs. "In determining the 'control' required for the liability of a keeper or harborer of an animal, the focal point is the precise moment of the accident at issue—not whether or not the keeper or harborer maintained control at some other time." (Emphasis added.) *Beggs*, 393 Ill. App. 3d at 1053. It is a *non sequitur* because liability is not based upon a mere scintilla of control over the dogs, but on a level of control over the dog walker's work that limits the dog walker's discretion in how it does its work.

¶ 77 I submit that the level of control that the dog walkers exhibited does not relate to whether the owners controlled the work of the dog walkers. The majority is incorrectly analyzing control of the dogs rather than control of the independent contractor. The majority, while saying that control of the dogs is not an all-or-nothing proposition, analyzes the issue as if it were. It does not analyze the standard on review as a threshold burden to present sufficient evidence to arguably support a judgment in plaintiff's favor. See *Connaghan*, 325 Ill. App. 3d at 249. The proper analysis should be that, *regardless* of the level of control residing in the dog walkers, the plaintiff must arguably establish that the owners retained a sufficient amount of control over the dog walkers' work, not over the dogs. "The employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to

receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." *Moiseyev*, 369 Ill. App. 3d at 345.

¶ 78 Again, there is no analysis as to the minimal burden of proof required to avoid the entry of summary judgment. How much of some was it? Was it enough? Did the homeowner control the work of the custodian? I am not chiding the majority here (see *supra* n. 2); I am merely pointing out that a burden of proof must be sustained. The majority fails to accept that "some" evidence or "some" facts are not, as a matter of law, arguably sufficient to sustain a judgment in the plaintiff's favor. Therefore, to refer to "some" evidence is to reference an immaterial ambiguity. The majority has created an enthymeme where the unstated premise is that "some evidence" equals "sufficient evidence to arguably support a judgment". The threshold is not "some" but a "sufficient" amount, which the majority has yet to cite or acknowledge. Further, I must remind the majority that my question of "how much of some" relates to the threshold standard of proof required to avoid the entry of summary judgment, a question *not* usually answered by the trier of fact. See *supra* n. 2.

¶ 79 In paragraph 27, the majority applies the *coup de gras*:

> "Thus, in this context, the homeowners were not mere legal owners of the dogs, in no position to prevent injury; to the contrary, as we review the factors that contributed to this injury, we see that the homeowners brought them together."

If the homeowners' liability is to be based upon bringing their dogs together with a custodian and an *employee of another independent contractor* who is in some way injured, the majority has created strict liability based upon the metaphysical determination that the owners controlled the destinies of the dogs, the independent contractor, and plaintiff by keeping the dogs on premises.

¶ 80 The majority accuses me of not acknowledging the exceptions to the general rule regarding liability for the acts or omissions of an independent contractor. See *supra* ¶ 28. However, the majority fails to acknowledge the exception to its own "inherently dangerous activity" exception:

> "[t]his nondelegable duty, however, runs to third parties, not to employees of the independent contractor. *No Illinois case has imposed a nondelegable duty of care on a principal for injuries to the contractor's employee."* (Emphasis added.) *Apostal v. Oliveri Construction Co.*, 287 Ill. App. 3d 675, 681-82 (1997).

Apostal was recently cited as "guidance" in *Carney*, which found it "significant that the appellate court [in *Apostal*] held that the duty to 'others' under the Restatement ran only to persons such as passersby or adjacent property owners and not to employees of independent contractors." 2016 IL 118984 ¶ 87. As the majority has phrased the issue in this case, the risk arose because of the "interaction" of both independent contractors. See *supra* ¶ 27. There was no risk to plaintiff if Pooper Scoopers and the dog walkers had not been hired. Because the risk arose only in the context of this interaction, plaintiff is not a third party, as defined in *Apostal*, but is in reality an employee of the "combined independent contractor" that created the risk that otherwise would not have existed. Thus, the exception raised by the majority would not apply. Until the majority properly analyzes "control" as relating to both of the independent contractors' work, it has yet to properly analyze this appeal. Further, by incorrectly referencing the non-delegable duty, the majority has conjured up a new exception to an exception to the general rule.

¶ 81 I must also question the majority's allegation that this involves an "inherently dangerous activity."

> "The term 'inherently dangerous' means that type of danger which inheres in the instrumentality or condition itself *at all times*, thereby requiring special precautions to be

> taken with regard to it to prevent injury and does not mean danger which arises from mere casual or collateral negligence of others with respect to it *under particular circumstances*. Concisely stated, the term means, dangerous in its normal or nondefective state as for example, explosives and poisons." (Emphasis added.) *Watts v. Bacon & Buskirk Glass Co.*, 20 Ill. App. 2d 164, 168 (1958).

Such an activity is defined as one "that can be carried out only by the exercise of special skill and care and that involves a grave risk of serious harm if done unskillfully or carelessly." Black's Law Dictionary 798 (8th ed. 2004). According to the majority, harvesting *excrementum Canis familiaris* is an inherently dangerous activity, as is supervising *Canis familiaris defecare*. There is no citation to authority for such a categorization, and I am not aware of instances of poisoning or explosions as a result of this hazardous activity. Whatever the nature and extent of the hazard, the danger "inheres in the instrumentality or condition itself *at all times*." (Emphasis added.) *Watts*, 20 Ill. App. 2d at 168. I submit that, if these two services are inherently dangerous, then there is no such thing as *merely* dangerous, for all dangerous conditions have been subsumed into the category of "inherently dangerous" conditions. Nevertheless, the independent contractors and their employees cannot look to the principals/owners for their own negligence under the majority's conclusion because of the exception to the rule that the majority cited.

¶ 82 Assuming, *arguendo*, that releasing the dogs into the yard is inherently dangerous, then the existence of this danger must be well-known to all of the parties, including plaintiff. It may even be considered an "open and obvious danger" that, in a negligence cause of action, relieves an owner of its general duty of care. See, *i.e.*, *Perez v. Heffron*, 2016 IL App (2d) 160015 ¶ 12 ("Owners and occupiers of land are not ordinarily required to foresee and protect against injuries

resulting from dangerous conditions that are open and obvious."). Indeed, plaintiff testified in his deposition that his instruction sheet for the home stated "Aggressive—Do Not Ever Enter Yard With Dogs!" and that he had formed the opinion, based on seeing the dogs loose in the yard, that the dogs were aggressive. Based on the "inherent danger" associated with *Canis familiaris defecare* and plaintiff's own actual knowledge of the aggressive natures of the dogs, plaintiff was at least contributorily complicit in his own injuries; even if the homeowners did not establish " 'proper precautions' " (see *supra* ¶ 30), plaintiff can hardly be given a free pass for disregarding "inherent," "open and obvious," and actually known, danger. Simply put, plaintiff cannot recover against the owners as an employee of an independent contractor that failed to take proper precautions. It is ironic that the plaintiff was aware of the negligence of his employer and his own negligence of failing to notify the dog walker that he was there to carry out this inherently dangerous service.

¶ 83 The majority states that the homeowners "urged the two agencies to take the 'proper precautions' of working together to avoid interaction" but "arguably were not entitled to delegate the duty to take them." *Supra* ¶ 30. How does one take any precautions, let alone "proper" precautions, when independent contractors, knowing what they are supposed to do, do not do it? Further, the majority also fails to establish what these "proper precautions" could be. I submit that there are no precautions that could be taken without the homeowners actually supervising the work. The homeowners could: 1) create detailed procedures that both independent contractors must follow in the course of fulfilling their duties; 2) be present in order to supervise the task (rather counter-productive, as the reason for the employment of the dog walkers in the first place is the homeowners' absence from the home); and/or 3) hire a third independent contractor to supervise the task. It is here that the majority's imposition of strict liability on the

homeowners clearly manifests itself. If the homeowners merely urge the independent contractors to take precautions, the homeowners are liable because they cannot delegate "the duty to take" the precautions. However, if they provide precise instructions on what to do or provide direct supervision (through themselves or a third party), they exercise "supervisory control" over the independent contractors' work and are, thus liable. Such a conclusion imposes strict liability on any owner in any situation, regardless of the precautions taken.

¶ 84 In any event, plaintiff did not allege that there was any "inherent danger" involved in this case. I must remind the majority that we do not search the record for reasons to reverse a trial court's decision. See *People v. Givens*, 237 Ill. 2d 311, 323 (2010); *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 648 (2007). "It is well-established that arguments not raised before the trial court are forfeited and cannot be raised for the first time on appeal." *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 25. Plaintiff did not choose to raise this issue, either in the trial court or here; this court should not raise it on appellant's behalf in order to reverse the judgment.

¶ 85 I submit that the purpose of the contracts between the owners and the dog walkers, and the owners and plaintiff's employer, was to service the dogs on premises. That is reasonable, logical, and practical. If the dogs were not serviced on premises, then someone would have to transport the dogs to alternate premises (unless the dogs decided to walk or transport themselves to the alternate location). And the majority, apparently unaware of the implications of its analysis, will impose strict liability because the owners, through these contracts, would control "them" unless the dogs decided to stay put. The majority is also imposing strict liability based on the non-delegable duty due to the inherently dangerous act of letting the dogs out while determining that, as a matter of law, liability now encompasses injuries to independent contractors' employees

that are negligent along with the independent contractor. Most telling is the determination that liability is now based upon "bringing things together" instead of "control of the work." The majority has assessed liability based upon matchmaking rather than the accepted legal principle that such liability must be based upon controlling the work. Ironically, the majority's suggestion that the owners failed to force the independent contractors to work things out is citing to a failure to exercise control of the contractors as if it were indicia of control. The majority is not only imposing strict liability, it is inventing it. The majority has made the owners strictly liable for the actions of an independent contractor that was not shown to have arguably been prevented from doing its work in its own way. And that is contrary to prior precedent. The majority then refuses to immunize the owners from liability on the basis that letting dogs out is an inherently dangerous act and refuses to acknowledge the non-liability for the negligence of plaintiff and his employer/independent contractor.

¶ 86 The majority has created a legal fiction not contemplated by any other case. That legal fiction is that, if an animal's owner owns the premises, there will always be a question of fact as to control (of the dogs, according to the majority); further, if the finder of fact decides that the animal's owner owns the premises where the occurrence took place, then the owner is liable because the owner owned the premises and must have controlled it and the animal. The majority has done this by claiming that ownership of the premises is a material issue of fact. I submit that the majority is incorrect. Ownership of the premises is only relevant under the Act in three instances: (1) if there is no custodian of the animals and premises, then the property owner is *constructively* in possession of the animals and premises, and may be liable under the Act; (2) the animal/premises owner *controls the work* of the custodian through specific instructions that actually control the manner and mode of work and preclude the independent contractor from doing

the work as he/she/it decides; and (3) if the custodian is an agent such that the principle of *respondeat superior* would apply, as in *Wilson*, 389 Ill. App. 3d 555. None of these three instances is apt.

¶ 87 In summation, plaintiff failed to address the law on point with citation to authority or cogent argument. The majority failed to use the correct standard of review, adopted much of the argument of the plaintiff, and cited to facts that are neither material nor tend to prove the point for which they were cited. The majority claimed that letting dogs out into a fenced-in yard is inherently dangerous such that the homeowners could not delegate their duty to take precautions to avoid injury (an argument, by the way, never raised by the appellant) but fails to address the exception to that rule regarding employees of independent contractors; it further compounds this error by failing to suggest what precautions the homeowners should have taken to avoid liability (probably because any such precautions would have involved such detail as to constitute "supervisory control" over the independent contractors' work and, thus, liability). The only precaution that the record suggests is both reasonable and plausible was that plaintiff should have notified the dog walkers of his presence before entering the yard. The failure of the owners to require the independent contractor or the plaintiff to do so is ironically disregarded by the majority in evaluating the evidence to determine if it was sufficient to support a judgment in plaintiff's favor.

¶ 88 The majority ignored that, in "determining the 'control' required for the liability of a keeper or harborer of an animal, the focal point is the precise moment of the accident at issue—not whether or not the keeper or harborer maintained control at some other time." *Beggs*, 393 Ill. App. 3d at 1053. In this case, at the time of the precise moment of the accident, there is no dispute that the homeowners were not present to maintain control. There is nothing in the record to

support the conclusion that the Smalarzes could physically control the dogs. If liability were to attach, it would have to be based upon controlling the work of the independent contractor. Plaintiff has listed many facts, none of which arguably establishes that the Smalarzes controlled how either of the independent contractors went about its work servicing the dogs.

¶ 89 I submit that the trial court was correct in granting summary judgment because the plaintiff failed to arguably establish sufficient control over the custodian's work that would allow liability to attach. As the trial court made the determination based upon the evidence in the record and the proper standards of review in accord with prior precedent, I also believe it was the correct decision.