

ANIMAL OWNERS IN PENNSYLVANIA ARE NOT AFFORDED AN  
ABSOLUTE RIGHT TO KILL THEIR HEALTHY ANIMAL:  
*COMMONWEALTH V. KNELLER*

ANIMAL LAW – CRUELTY TO ANIMALS – DEADLY WEAPON ENHANCEMENT – The Pennsylvania Superior Court ultimately determined that the owner of an animal is not afforded the absolute right to kill the animal and that a deadly weapons sentencing enhancement was an appropriate addition to the conviction since a firearm was used in the animal's death.

*Commonwealth v. Kneller*, 999 A.2d 608 (Pa. Super. Ct. 2010).

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I. THE *KNELLER* DECISION

On March 24, 2006, a group of teenagers watched as Randy Miller (“Miller”) led a dog into the woods, beat the dog repeatedly with a shovel, and then shot the dog with a gun.<sup>1</sup> Miller and the Appellant, Wendy Colleen Kneller (“Kneller”), were brought before the trial court facing criminal charges.<sup>2</sup> Miller was charged with Terroristic Threats and Cruelty to Animals and Kneller with Criminal Conspiracy to commit Cruelty to Animals for providing the gun and asking Miller to shoot her dog, Bouta.<sup>3</sup> Kneller raised two defenses to the charges against her.<sup>4</sup>

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1. Brief for Commonwealth-Appellee at \*2-4, *Commonwealth v. Kneller*, 971 A.2d 495 (Pa. Super. Ct. 2009) (No. 1016) 2008 WL 6041552.

2. Brief for Commonwealth-Appellee at \*2-4.

3. *Id.* Criminal Conspiracy is defined in 18 PA. CONS. STAT. § 903(a) (2010):

A person is guilty of conspiracy with another person . . . to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person . . . that they . . . will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person . . . in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

§ 903(a). Cruelty to animals is defined in 18 PA. CONS. STAT. § 5511(a)(2.1)(i)(A), (iii) (2010). The relevant sections of the statute states:

A person commits a misdemeanor of the first degree if he willfully and maliciously: (A) Kills, maims, mutilates, tortures or disfigures any dog or cat, whether belonging to himself or otherwise.

First, she argued that the killing of Bouta was not malicious because it was in accordance with the Animal Destruction Method Authorization Law (“Animal Destruction Law”).<sup>5</sup> Second, Kneller maintained that Bouta was killed in accordance with the Dog Law<sup>6</sup> because the dog had bitten her child.<sup>7</sup>

On September 15, 2006, a jury convicted Kneller of Criminal Conspiracy to commit Cruelty to Animals for asking Miller to kill Bouta and providing him with the gun.<sup>8</sup> Subsequently, on October 23, 2006, Kneller was sentenced to serve a term of imprisonment from six to twelve months, arising from a deadly weapons sentencing enhancement on the crime.<sup>9</sup>

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(iii) The killing of a dog or cat by the owner of that animal is not malicious if it is accompanied in accordance with the act of December 22, 1983 (P.L. 303, No. 83), referred to as the Animal Destruction Method Authorization Law.

§ 5511(a)(2.1)(i)(A), (iii).

4. *Id.*

5. Brief for Kneller-Appellant at \*9, *Commonwealth v. Kneller*, 971 A.2d 495 (Pa. Super. Ct. 2009) (No. 1016) 2008 WL 6041551. The relevant sections of the Animal Destruction Law are found at 3 PA. CONS. STAT. §§ 325, 328.2(b) (2010). Section 325 states:

Any policeman or constable . . . or any agent of any duly incorporated society or association for the prevention of cruelty to animals, is hereby authorized to destroy, or cause to be destroyed, any animal or animals in his charge, when, in the judgment of such policeman, constable, or agent, and by the written certificate of two reputable citizens called to view such animal or animals in his presence,--one of whom may be selected by the owner of the said animal or animals, if he shall so request,--such animal or animals appears to be injured, disabled, diseased past recovery, or unfit for any useful purpose.

§ 325.

Section 328.2(b) states “[n]othing in this act shall prevent a person or humane society organization from destroying a pet animal by means of firearms.”

6. 3 PA. CONS. STAT. § 459-501(a) (2010). This section states “[a]ny person may kill any dog which he sees in the act of . . . pursuing, wounding or attacking human beings . . . . There shall be no liability on such persons in damages or otherwise for such killing.” *Id.* Additionally, section 5511(o.1) of the Cruelty to Animals statute states that “[t]he provisions of this section shall not supersede the act of December 7, 1982 (P.L. 784, No. 225), known as the Dog Law.” 18 PA. CONS. STAT. § 5511(o.1) (2010).

7. *Commonwealth v. Kneller*, 971 A.2d 495, 496 (Pa. Super. Ct. 2009) [hereinafter *Kneller I*]. It is disputed whether the dog actually bit Kneller’s child. *Kneller I*, 971 A.2d at 499 n.7 (Cleland, J., concurring). The child was not taken to a hospital and the Pennsylvania State Trooper, who met with Kneller, did not observe the child. *Commonwealth v. Kneller*, 999 A.2d 608, 611 (Pa. Super. Ct. 2010) [hereinafter *Kneller II*].

8. *Kneller II*, 999 A.2d at 609.

9. *Id.* at 613 n.4, 614 n.5. The deadly weapons sentencing enhancement statute is found at 204 Pa. Code § 303.10(a)(2), (i) (2010). The relevant section states:

When the court determines that the offender used a deadly weapon during the commission of the current conviction offense, the court shall consider the DWE/Used Matrix (§ 303.18). An offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual:

(i) Any firearm, (as defined in 42 Pa.C.S. § 9712) whether loaded or unloaded[.]

The trial court, by reading all three statutes together, concluded that an owner does not have an absolute right to kill his or her own dog.<sup>10</sup> Moreover, the court determined that Kneller's defense under the Dog Law failed because Bouta was not killed while in the act of biting her child.<sup>11</sup> The Animal Destruction Law defense also failed because Bouta was not injured or disabled at the time of his death.<sup>12</sup>

Kneller appealed to the Pennsylvania Superior Court raising the issue of whether an owner has an absolute right to kill a dog by using a firearm, even if the dog is healthy.<sup>13</sup> Hearing the case *en banc* on January 30, 2009, the court concluded that the relevant statutes do not prohibit an owner from killing his or her dog, regardless of the reason he or she may have for doing so.<sup>14</sup> Kneller's conviction was reversed on the grounds that both the Animal Destruction Law and the Dog Law, when read in conjunction with the Cruelty to Animals statute, were ambiguous and confusing.<sup>15</sup> The majority found that one section of the Animal Destruction Law allows an owner to kill a dog through use of a firearm,<sup>16</sup> thereby negating the malicious conduct requirement in the Cruelty to Animals statute.<sup>17</sup> Yet a plain reading of another section allows only police officers or agents of the state to kill an animal if the animal is first deemed injured or unfit for any purpose.<sup>18</sup> Moreover, another section of the Animal Destruction Law authorizes

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§ 303.10(a)(2), (i).

10. Brief for Kneller-Appellant at \*7 (citing Trial Court Opinion at 08/14/07 p.15, Carbon County, No. 267 of 2006).

11. Brief for Commonwealth-Appellee at \*5 (citing Notes of Trial Testimony at 09/15/06 pp.232-234, Carbon County, No. 267 of 2006).

12. *Id.* at \*7.

13. *Kneller 1*, 971 A.2d at 496.

14. *Id.*

15. *Id.* at 495. The court noted in a previous decision that ambiguities in a statute “should be interpreted in a light most favorable to the criminally accused.” *Commonwealth v. Ryan*, 909 A.2d 839, 842 (Pa. Super. Ct. 2006).

16. 3 PA. CONS. STAT. § 328.2(b) (2010).

17. 18 PA. CONS. STAT. § 5511(2.1)(iii). (2010).

18. 3 PA. CONS. STAT. § 325 (2010).

humane societies to dispose of unwanted animals, even if they are healthy.<sup>19</sup> With respect to this section, the majority rejected the Commonwealth's argument that the Animal Destruction Law, as a whole, only applies to sick and injured animals.<sup>20</sup> Because humane societies can dispose of unwanted dogs legally through statutory provisions,<sup>21</sup> the majority reasoned that it is equally plausible that the legislature intended that owners can also kill their unwanted dogs, as long as the killing is not malicious.<sup>22</sup>

In reference to the ambiguous nature of the Dog Law, the superior court recognized that the plain language of the statute allows an owner to kill a dog with violent propensities.<sup>23</sup> The majority concluded, absent express language in the statute, that violence is only one reason that an owner can kill a healthy dog, thus giving the Dog Law multiple interpretations and making it ambiguous to the lay reader and the courts.<sup>24</sup>

Judge Cleland, with Judge Musmanno and Judge Gantman joining, filed a concurring opinion declaring that while Kneller's conviction should be reversed, it should not be because the laws are ambiguous.<sup>25</sup> Judge Cleland asserted that the Animal Destruction Law authorizes the method to kill a dog in accordance with the Cruelty to Animals statute, while the Dog Law discloses the reasons an owner may kill a dog.<sup>26</sup> Rejecting the majority view, Judge Cleland

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19. § 328.6(a). The text of this section reads:

On and after the effective date of this act, a humane society organization or an animal control organization may apply to the Pennsylvania State Board of Pharmacy for registration pursuant to the applicable law for the sole purpose of being authorized to purchase, possess and administer sodium pentobarbital to destroy injured, sick, homeless or unwanted domestic pet animals. *Id.*

20. *Kneller I*, 971 A.2d at 498.

21. § 328.6(a). *See also* 3 PA. CONS. STAT. § 459-102 (2010) (giving definition of "dog control").

22. *Kneller I*, 971 A.2d at 497.

23. *Id.* (citing § 459-501(a)).

24. *Id.* Although the court recognized that there can be other reasons for an owner to kill a healthy dog, it did not elaborate on what those reasons may be. *Id.*

25. *Id.* at 499 (Cleland, J., concurring).

26. *Id.* at 501. Judge Cleland concluded that the Animal Destruction Law does not establish *who* can kill a dog but rather *how* the dog can be killed. *Id.*

stated that the main issue of this case is whether Bouta was killed maliciously.<sup>27</sup> When reading all three statutes in conjunction, the Animal Destruction Law authorizes the use of a firearm to kill a dog<sup>28</sup> and the plain language of the Dog Law authorizes an owner to destroy a dog due to its vicious propensities.<sup>29</sup> As a result, Judge Cleland concluded that the death of Bouta was not malicious and Kneller's conviction of Criminal Conspiracy to commit Cruelty to Animals should be reversed.<sup>30</sup>

Judge Stevens dissented to the majority's decision to reverse Kneller's conviction but agreed with Judge Cleland that the statutes are not ambiguous.<sup>31</sup> Judge Stevens stated that Bouta was maliciously killed because his death was not in accordance with the Animal Destruction Law.<sup>32</sup> Judge Stevens interpreted the Animal Destruction Law differently, stating that sections 325 and 328.2(a) should be read in conjunction to show that once a dog is deemed unfit for a purpose, injured, or disabled, an appropriate method to kill the dog is through use of a firearm.<sup>33</sup> During the trial, Kneller failed to provide any evidence that Bouta met one of these requirements.<sup>34</sup> Furthermore, Judge Stevens noted that the Dog Law cannot serve as a defense for Kneller because her case does not fit into any of the instances described in the law.<sup>35</sup> He also explained that clear examples are provided in both the Animal Destruction Law and the Dog

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27. *Kneller I*, 971 A.2d at 501. Judge Cleland called the majority's comparison of a humane society's right to kill a dog and an owner's right to kill a dog confusing. *Id.* In addition, Judge Cleland accepts that Bouta did actually bite Kneller's child because the Commonwealth offered no proof to dispute Kneller's testimony. *Id.* at 499.

28. 3 PA. CONS. STAT. § 328.2(b).

29. § 459-501(a).

30. *Kneller I*, 971 A.2d at 501 (Cleland, J., concurring).

31. *Id.* at 502 (Stevens, J., dissenting). Judge Stevens is now the President Judge of the Pennsylvania Superior Court. *Judges of the Superior Court*, WWW.SUPERIOR.COURT.STATE.PA.US, <http://www.superior.court.state.pa.us/bios.htm> (last visited Mar. 8, 2011).

32. *Id.* at 503. At the time of Bouta's death, he was not injured or unfit for a purpose as demonstrated in § 325. *Id.*

33. *Id.*

34. *Id.* at 502.

35. *Kneller I*, 971 A.2d at 503 (Stevens J., dissenting) (citing § 459-501(a)). Judge Stevens stated that Judge's Cleland's concurring opinion presumes that Bouta actually bit Kneller's child. *Id.* at 502 n.18. However, there was only Kneller and her co-defendant's "self-serving testimony" to support that Bouta actually bit the child. *Id.* at 504. In finding Kneller guilty, the jury in the trial court denounced Kneller's credibility in this regard. *Id.*

Law, and therefore, neither is ambiguous.<sup>36</sup> Judge Stevens concluded his opinion by stating that Kneller violated the Cruelty to Animals statute and that her actions could neither negate malice in the Animal Destruction Law nor provide her a defense under the Dog Law.<sup>37</sup>

Following the superior court's majority decision, the Commonwealth filed a petition for allowance of appeal to the Pennsylvania Supreme Court.<sup>38</sup> In a *per curiam* order on December 31, 2009, the court granted the appeal, vacated the superior court's order and remanded the case to the superior court pursuant to Judge Stevens' dissenting opinion.<sup>39</sup>

On July 14, 2010, on remand to the Pennsylvania Superior Court, Judge Stevens submitted his dissenting opinion as the new majority opinion.<sup>40</sup> Additionally, the court addressed two procedural issues not yet heard on appeal.<sup>41</sup> First, Kneller argued that the trial judge committed error by not instructing the jurors that an owner of an animal has a greater right to destroy the animal.<sup>42</sup> However, Kneller neglected to cite to any authority or present any argument supporting such an instruction, and the court concluded Kneller waived her claim to this issue.<sup>43</sup>

On the second procedural claim, Kneller assigned error to the trial judge's application of

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36. *Id.* at 503-04.

37. *Id.* at 504.

38. *Commonwealth v. Kneller*, 987 A.2d 716 (Pa. 2009) [hereinafter *Kneller III*].

39. *Id.* The court determined that the facts showed no immediate need to kill Bouta, that Kneller directed Miller to shoot the dog, that Miller maliciously beat the dog before shooting it and that there was sufficient evidence to support Kneller's conviction of Criminal Conspiracy to commit Cruelty to Animals. Citing *Commonwealth v. Drumheller*, 808 A.2d 893, 907-08 (Pa. 2002), the court noted that because the Commonwealth originally won the verdict, it was "entitled to have the facts reviewed in the light most favorable to it." *Id.*

40. *Kneller II*, 999 A.2d at 609-12. The new opinion summarized both the majority's opinion and Judge Cleland's concurring opinion. *Id.* at 609-11 (citing *Kneller I*, 971 A.2d at 495-96; 499-500 (Cleland, J., concurring)). He then provided the language from his dissenting opinion. *Id.* at 610-12 (citing *Kneller I*, 971 A.2d at 503-05 (Stevens, J., dissenting)).

41. *Id.* at 612.

42. *Id.* at 612-13 (citing Brief for Kneller-Appellant at \*10, *Kneller I*, 971 A.2d 495 (No. 1016)). The lower court also refused Kneller's request for a specific conspiracy instruction. *Id.*

43. *Id.* at 613. *See Commonwealth v. Brougher*, 978 A.2d 373 (Pa. Super. Ct. 2009) (claim is waived when the appellant provides no citation to authority).

the deadly weapons sentencing enhancement for her crime.<sup>44</sup> A challenge to the deadly weapons enhancement invokes a discretionary review of sentencing.<sup>45</sup> Although Kneller failed to submit a separate concise statement in her brief regarding the error, the court recognized that a substantial question existed regarding the deadly weapons enhancement and allowed this claim to proceed on appeal.<sup>46</sup>

In reviewing the sentence, the court relied on the Pennsylvania Supreme Court's decision in *Commonwealth v. Hackenberger*, which upheld the deadly weapons enhancement in an animal cruelty case because the crime was not excepted under section 303.10(a)(3) of the Pennsylvania Code and the appellant admitted to using a rifle to kill the dog.<sup>47</sup> Kneller maintained that her case was distinguishable from *Hackenberger* in that the dog killed in *Hackenberger* was not owned by the shooter, whereas she and Miller were the owners of Bouta.<sup>48</sup> The superior court found no merit in this argument given the clear statutory language of the crime.<sup>49</sup> It also stated that Kneller's argument was based on her faulty interpretation of the Animal Destruction Law

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44. *Id.* Kneller agrees with the Commonwealth that the deadly weapons enhancement can apply to the sentence for a conviction of cruelty to animals, but she maintains that it is not applicable when an *owner* of the animal uses a deadly weapon to kill the animal. *Id.* (emphasis added).

45. *Kneller II*, 999 A.2d at 613. In *Commonwealth v. Martin*, 611 A.2d 731, 735 (Pa. Super. Ct. 1992), this court stated that challenges of sentences are not automatically granted to an appellant. Rather, the appellant must satisfy four requirements which are:

(1) whether appellant has filed a timely notice of appeal . . . (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence . . . (3) whether appellant's brief has a fatal defect . . . and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 PA. CONS. STAT. § 9781(b).

*Id.* (most internal citations omitted). In order for Kneller to satisfy the fourth requirement, she had to submit a concise statement in her appellate brief demonstrating that there is a substantial question for the court to answer. *Kneller II*, 999 A.2d at 614. In *Commonwealth v. Phillips*, the court found that a substantial question can be raised when an appellant argues that her sentence is excessive because of a deadly weapons enhancement. 946 A.2d 103, 112 (Pa. Super. Ct. 2008).

46. *Id.* at 614. Under a discretionary review, the standard is abuse of discretion, where the sentence will not be overturned unless it was "manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Id.* at 614 (citing *Brougher*, 978 A.2d at 376).

47. *Id.* at 614-15 (citing *Commonwealth v. Hackenberger*, 836 A.2d 2, 4-5 (Pa. 2003), where the appellant used a firearm "in furtherance of the [cruelty to animals] crime" and cruelty to animals was not an explicit exception under § 303.10(a)(3)).

48. *Id.* at 615.

49. *Id.* The court referred to section 5511(a)(2.1)(i)(A), which refers to the killing of an animal "belonging to himself or otherwise." *Id.*

and the Dog Law, as she believed that she had an absolute right to kill her dog because she was its owner.<sup>50</sup> As a result, the superior court affirmed the trial court's application of the deadly weapon enhancement to Kneller's sentence.<sup>51</sup>

Judge Cleland filed a concurring opinion, in which Judge Bowes joined, warning of the policy implications of this new decision.<sup>52</sup> Judge Cleland cautioned that this decision would put an owner at risk of prosecution, under the Cruelty to Animals statute, when the owner euthanizes a dog that presents a risk to society.<sup>53</sup> Judge Cleland concluded the opinion by urging the legislature to take action to revise the Cruelty to Animals statute, the Animal Destruction Law, and the Dog Law so that all three can be read clearly and in conjunction with one another.<sup>54</sup>

## II. THE HISTORY BEHIND THE *KNELLER* DECISION

The animal cruelty laws have developed through common sense.<sup>55</sup> But regardless of their apparent plain meanings, sections to the Cruelty to Animals statute have been challenged as being vague, ambiguous, or overbroad.<sup>56</sup> However, section 5511(a)(2.1) of the Cruelty to Animals statute, as well pertinent sections of the Animal Destruction Law and the Dog Law, have remained unchallenged until now.<sup>57</sup>

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50. *Kneller II*, 999 A.2d at 615.

51. *Id.*

52. *Id.* (Cleland, J., concurring).

53. *Id.*

54. *Id.* at 615-16.

55. Debbie Jugan, *What the General Practitioner Needs to Know About Pennsylvania Animal Law: Animal Cruelty*, 77 PA. B. ASS'N Q. 80, 80 (2006).

56. See *Commonwealth v. Craven*, 817 A.2d 451 (Pa. 2003) (holding that section 5511(h.1)(6) was not vague or overbroad as to the meaning of a dog fighting spectator); *Commonwealth v. Balog*, 672 A.2d 319 (Pa. 1996) (holding that section 5511(h.1)(3) was not unconstitutionally vague or overbroad as to owning, selling, training, or purchasing any animal for animal fighting purposes); *Commonwealth v. Barnes*, 629 A.2d 123 (Pa. Super. Ct. 1993) (holding that Section 5511(c) was not unconstitutionally vague as to the neglect of horses and possible exceptions); *Commonwealth v. Gonzalez*, 588 A.2d 528 (Pa. Super. Ct. 1991) (holding that section 5511(h.1) was not unconstitutionally vague with as to the meaning of "animal fighting").

57. *Kneller II*, 999 A.2d 608.



Section 5511(a)(2.1) was added to the Cruelty to Animals statute in 1995 and has undergone only a few amendments since taking effect.<sup>58</sup> Before the addition of this subsection, the statute included a section that made it a crime to kill or injure only another person's domestic animal.<sup>59</sup> This particular section was at issue in *Commonwealth v. Tapper*.<sup>60</sup> In that case, the appellant, Jason Tapper ("Tapper"), asserted that he could not be guilty under section 5511(a)(1)(i) because he was the owner of the deceased animal.<sup>61</sup> The appellant allowed his friend's Dalmatian, Duke, to stay at his house for a night in anticipation that he would become Duke's new owner when the friend moved away.<sup>62</sup> While Duke was in Tapper's possession, Tapper allowed his own pit bull to attack Duke, and then he himself cut off Duke's ears and tail.<sup>63</sup> Although the appellant maintained possession of Duke for a night, the court found that he was not Duke's true owner, and therefore, he could still be guilty of Cruelty to Animals.<sup>64</sup>

*Tapper* was first decided in the Pennsylvania Court of Common Pleas a few months before section 5511(a)(2.1) took effect.<sup>65</sup> As a direct result of this case, the Pennsylvania legislature added this section to the Cruelty to Animals statute to impose strict provisions for pets, particularly dogs and cats.<sup>66</sup> This section indicates that ownership of the animal is

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58. S. 729, 179th Gen. Assemb., Reg. Sess. (Pa. 1995). In 2000, the General Assembly amended section 5511(2.1)(i) to read "[a] person commits a misdemeanor of the first degree if he willfully and maliciously:" changing the charge from a misdemeanor of the second degree. S. 1109, 184th Gen. Assemb., Reg. Sess. (Pa. 2000).

59. 18 PA. CONS. STAT. § 5511(a)(1)(i) (2010). This section reads, "[a] person commits a misdemeanor of the second degree if he willfully and maliciously: (i) Kills, maims, or disfigures any domestic animal of another person[.]" *Id.* (emphasis added). "Domestic animal" includes dogs and cats. § 5511(q) (2010).

60. 675 A.2d 740 (Pa. Super. Ct. 1996).

61. *Tapper*, 675 A.2d at 743.

62. *Id.* at 741.

63. *Id.* There was also evidence that the appellant tied Duke to a tree and taped his mouth shut while the pit bull attacked him. *Id.*

64. *Id.* at 743.

65. Pa. S. 729. The bill was enacted on July 6, 1995 but effective 60 days after. *Id.* Tapper was convicted in the Bucks County Court of Common Pleas on January 11, 1995 but sentenced on September 8, 1995. *Commonwealth v. Tapper*, 29 Pa. D. & C.4th 25, 26 (Pa. Com. Pl. 1995), *aff'd*, 675 A.2d 740 (Pa. Super. Ct. 1996).

66. Jugan, *supra* note 53, at 81. See E-mail from Gregg Warner, Counsel, S. Judiciary Comm. to Erika Farkas, *Duquesne Criminal Law Journal* (Sept. 15, 2010, 10:28 EST) (on file with author) (stating that

immaterial as to whether a crime is committed, and it also does not require a duty of care to the abused animal.<sup>67</sup>

Section 5511(a)(2.1)(iii) references the Animal Destruction Law as a defense to malicious conduct.<sup>68</sup> Specifically, section 328.2 of the Animal Destruction Law was enacted in 1983 and has not been amended since it came into effect.<sup>69</sup> Within this section, subsection (b) authorizes any person to use a firearm to kill an animal.<sup>70</sup> The superior court, however, in the ultimate decision of *Kneller's* case, concluded that section 328.2(b) should be read in conjunction with section 325, thereby demonstrating that malicious conduct could not be negated by following only section 328.2(b).<sup>71</sup> As a result, the *Kneller* court was the first to interpret these sections of the Animal Destruction Law.<sup>72</sup>

Furthermore, courts have never interpreted section 459-501(a) of the Dog Law, which was relevant to the alleged vicious propensities of Bouta in *Kneller*.<sup>73</sup> This section was added when the Dog Law was first created in 1983<sup>74</sup> and enumerates a defense for killing a dog by

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Senator Greenleaf and Representative Bruce, both of Bucks County, introduced the addition to the statute following the national media attention received from the *Tapper* case).

67. 18 PA. CONS. STAT. § 5511(a)(2.1)(i)(A) (2010). In contrast, section 5511(c) specifically states “[a] person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a *duty of care*, whether belonging to himself or otherwise[.]” § 5511(c)(1) (emphasis added).

68. § 5511(a)(2.1)(iii).

69. H.R. 350, 167th Gen Assemb., Reg. Sess. (Pa. 1983).

70. 3 PA. CONS. STAT. § 328.2(b) (2010).

71. *Kneller II*, 999 A.2d at 610. *See* § 325 (2010) (authorizing a police officer to make a determination as to whether an animal is injured, diseased, or unfit for its purpose before killing it). Judge Stevens, on behalf of the majority, interpreted these sections together, saying that first a police officer had to make the determination that the animal was disabled or unfit for its purpose, and then any person may kill the animal by firearm, negating the malicious conduct under the Cruelty to Animals statute. *Kneller II*, 999 A.2d at 610.

72. *Id.*; § 328.2(b).

73. § 459-501(a).

74. H.R. 1459, 166th Gen. Assemb., Reg. Sess. (Pa. 1982). Section 459-501(a) was amended in 1996 to include “pursuing, wounding” in relation of a dog attacking a human being. H.R. 397, 180th Gen. Assemb., Reg. Sess. (Pa. 1996).

providing examples of behavior that would warrant the lawful destruction of the animal.<sup>75</sup> Such information is not explicitly stated in the Cruelty to Animals statute.<sup>76</sup>

Although both the Animal Destruction Law and the Dog Law establish defenses to crimes contained within the Cruelty to Animals statute, using a firearm to kill a dog for any reason not excepted in these laws is a crime.<sup>77</sup> In instances where a firearm is used outside of the animal protection laws, the Pennsylvania Supreme Court has further punished the offender's conduct by applying a deadly weapons enhancement to the sentence of an animal cruelty conviction.<sup>78</sup> In *Commonwealth v. Hackenberger*, the appellant, Bradley Hackenberger ("Hackenberger"), fired five shots and killed a dog after he believed the animal was rabid and had attacked his own pet.<sup>79</sup> In convicting the appellant of Cruelty to Animals,<sup>80</sup> the trial court applied the deadly weapons enhancement to his sentence.<sup>81</sup> The superior court affirmed the conviction<sup>82</sup> and appellant appealed to the Pennsylvania Supreme Court, arguing that the deadly weapons sentencing enhancement cannot apply to cruelty to animal convictions.<sup>83</sup> On appeal, the court found that the deadly weapons enhancement provision can be used whenever the offender possesses a deadly weapon, including a firearm, during the commission of the crime.<sup>84</sup>

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75. § 459-501(a). The end of the section reads "There shall be no liability on such persons in damages or otherwise for such killing." *Id.* The Cruelty to Animals statute in section 5511(o.1) does not permit any provision of the statute to supersede any section of the Dog Law. 18 PA. CONS. STAT. § 5511(o.1) (2010).

76. § 5511.

77. § 5511(a)(2.1)(iii), (o.1).

78. *Commonwealth v. Hackenberger*, 836 A.2d 2, 5 (Pa. 2003).

79. *Hackenberger*, 836 A.2d at 3.

80. § 5511(a)(1)(i).

81. *Hackenberger*, 836 A.2d at 3. Hackenberger's conviction under section 5511(a)(1)(i) was a misdemeanor of the second degree which normally carried no jail time. *Id.* However, by applying the enhancement to the sentencing, Hackenberger received a prison sentence of six months to two years. *Id.*

82. *Id.* The court stated that the plain language of the deadly weapons enhancement provision allowed it to extend to cruelty to animal convictions because § 303.10(a)(2) states "[a]n offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another individual or in furtherance of the crime[.]" *Commonwealth v. Hackenberger*, 795 A.2d 1040, 1047 (Pa. Super. Ct. 2003) (emphasis added).

83. *Hackenberger*, 836 A.2d at 3.

84. *Id.* at 3-4. See 204 Pa. Code § 303.10(a)(2) (2010). The court specifically cited that the enhancement applied when the appellant used the firearm "in furtherance of the crime." *Id.* (citing § 303.10(a)(2)).

While the appellant maintained that the sentencing enhancement only applied to crimes against other persons, the court dismissed this argument through a plain reading of the exceptions listed in section 303.10(a)(3) of the Pennsylvania Code.<sup>85</sup> The court applied the deadly weapons sentencing enhancement because cruelty to animals was not listed as a specific exclusion and it affirmed the appellant's conviction and sentence.<sup>86</sup>

Justice Castille dissented from the majority opinion in *Hackenberger* by adopting the dissenting opinion of then President Judge Del Sole of the Pennsylvania Superior Court.<sup>87</sup> In his dissent, President Judge Del Sole stated that the plain language of the deadly weapons enhancement provision applies only to crimes against other persons; therefore, the provision should not have applied in a cruelty to animals conviction.<sup>88</sup> Subsequently, the legislature narrowed the applicability of the deadly weapons enhancement in 2005.<sup>89</sup>

### III. AN ANALYSIS OF THE *KNELLER* DECISION

As a result of the superior court's amended decision, an owner of a dog or cat does not have an absolute right to kill his or her pet.<sup>90</sup> Following *Commonwealth v. Tapper*, the legislature added section 5511(a)(2.1) to the Crimes Code to clarify that an owner can still be

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85. *Hackenberger*, 836 A.2d at 4. Under § 303.10(a)(3), specific exceptions are listed to show when the deadly weapons enhancement does not apply. 204 Pa. Code § 303.10(a)(3) (2010). Most of these exceptions include possession of a deadly weapon as an element of the convicted crime, but can also include simple and aggravated assaults. *Id.*

86. *Hackenberger*, 836 A.2d at 5.

87. *Id.* (Castille, J., dissenting). President Judge Del Sole retired from the Pennsylvania Superior Court in 2006. *P.J.E. Del Sole Retires from Bench*, WWW.SUPERIOR.COURT.STATE.PA.US, <http://www.superior.court.state.pa.us/CourtNews/PJE%20Retirement.pdf> (last visited Nov. 12, 2010).

88. *Id.* (citing *Commonwealth v. Hackenberger*, 795 A.2d 1040, 1048 (Pa. Super. Ct. 2002) (Del Sole, P.J., concurring and dissenting)). The language of the provision states “[a]n offender has used a deadly weapon if any of the following were employed by the offender in a way that threatened or injured another *individual* or in furtherance of the crime[.]” § 303.10(a)(2) (emphasis added).

89. 35 Pa. Bull. 1508 (Feb. 9, 2005). The legislature removed the language “in furtherance of the crime” in § 303.10(a)(2), which the court relied upon in affirming the enhancement provision in *Hackenberger*. *Id.*; *See Hackenberger*, 836 A.2d at 4.

90. *Kneller II*, 999 A.2d at 612.

charged for killing his or her dog.<sup>91</sup> While the superior court's new decision is logical, its original analysis of the amalgamation of the relevant statutes was flawed. Section 5511(a)(2.1) of the Pennsylvania Crimes Code references the Animal Destruction Law as a way to negate the malicious conduct of cruelty to animals.<sup>92</sup> In addition, the Crimes Code references the Dog Law as superior authority to the Cruelty to Animals statute.<sup>93</sup> Thus, the Crimes Code indicates the proper cross-references to other relevant statutes, leaving the court's original analysis of the Animal Destruction Law and the Dog Law problematic.

Ultimately, the superior court properly concluded that none of the relevant statutes were ambiguous; however, the Animal Destruction Law is hardly clear. Indeed, the superior court initially struggled to find the logic in reading sections 325 and 328.2(b) together.<sup>94</sup> The court stated that it would be impossible to expect a layperson to conclude that these sections of the statute should be read together when there is no indication that the legislature intended this.<sup>95</sup> In fact, the court only speculates to the legislative intent of the statutes because these statutes were never previously contested.<sup>96</sup> Judge Cleland, in his original concurring opinion, indicated that it is ideal to read the Crimes Code, the Animal Destruction Law, and the Dog Law together.<sup>97</sup> But he failed to address which sections of the Animal Destruction Law should be read in conjunction

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91. See E-mail from Gregg Warner, Counsel, S. Judiciary Comm. to Erika Farkas, *Duquesne Criminal Law Journal* (Sept. 15, 2010, 10:28 EST) (on file with author) (stating that Senator Greenleaf and Representative Bruce, both of Bucks County, introduced the addition to the statute following the national media attention received from the *Tapper* case).

92. 18 PA. CONS. STAT. § 5511(a)(2.1)(iii) (2010).

93. § 5511(o.1).

94. *Kneller I*, 971 A.2d at 497. The Commonwealth argued that because section 325 comes before section 328.2 in the statute, they should be read in conjunction. Brief for the Commonwealth-Appellee, at \*7.

95. *Id.*

96. *Id.* See also 3 PA. CONS. STAT. § 328.2 (2010) (citing no previous case law or amendments explaining the statute).

97. *Id.* at 499 (Cleland, J., concurring).

with one another,<sup>98</sup> and he believed that section 325 gave an owner unlimited authority to kill his or her dog.<sup>99</sup>

The superior court's *en banc Kneller* opinion concluded that sections of the Animal Destruction Law can be read together.<sup>100</sup> Judge Stevens indicated that section 328.2(b) provides the way to kill a dog, while section 325 indicates when a person can kill a dog.<sup>101</sup> But the court struggled to address how a lay-person would be expected to know that these two sections are related and that they should be read in conjunction with one another.

Furthermore, the original majority's interpretation of the Dog Law was equally confusing. In its opinion, the majority concluded that the relevant sections of the Dog Law provide another possible interpretation of an owner's right to kill his or her dog.<sup>102</sup> When combining the relevant sections of the Dog Law with the relevant sections of the Animal Destruction Law, the majority concluded that there were too many possible interpretations to determine the legislative intent, and therefore, the statutes were both ambiguous.<sup>103</sup> However, Judge Stevens, in the new majority opinion, properly deciphered the previous majority's confusion. Judge Stevens concluded that the Animal Destruction Law contains one defense, which negates the malicious conduct of an owner when killing a dog that was determined to be injured or unfit for a purpose.<sup>104</sup> The Dog Law provides another defense by allowing an owner to kill a healthy dog only if the dog is found to have pursued or wounded another animal or a

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98. *Id.* at 501 (making no reference to the relation between sections 325 and 328.2).

99. *Kneller I*, 971 A.2d at 501 (Cleland, J., concurring).

100. *Kneller II*, 999 A.2d at 610.

101. *Id.* (citing §§ 325, 328.2(b)).

102. *Kneller I*, 971 A.2d at 497. The court stated that the Dog Law allows an owner to kill his or her dog if the animal "demonstrates vicious tendencies[.]" *Id.*

103. *Id.*

104. *Kneller II*, 999 A.2d at 610. Judge Stevens made this conclusion by reading sections 325 and 328.2(b) together. *Id.*

person.<sup>105</sup> The two statutes provided different defenses that could be used by a defendant depending on the facts of his or her case. Kneller raised both defenses when arguing her right to kill her dog.<sup>106</sup>

Judge Cleland, in his original concurring opinion, applied these separate defenses to reverse Kneller's conviction on the assumption that Bouta actually bit Kneller's child, giving her a reason under the Dog Law and a method to kill the dog under the Animal Destruction Law.<sup>107</sup> But the jury in the trial court ultimately determined that there was insufficient evidence that Bouta bit Kneller's child when they convicted Kneller.<sup>108</sup> Interestingly, if the jury had determined that Bouta did bite the child, it may have applied the Dog Law defense to Kneller, therefore finding her not guilty of the cruelty to animal charge and giving this case an entirely different interpretation. Even without this speculation, Judge Cleland correctly indicated that the statutes involving cruelty to animals need to be revised so that they may be properly understood by the public and applied by the courts.<sup>109</sup> The legislature cannot expect statutes to be read together when those statutes are difficult to interpret even when standing alone.

Although Kneller's case was decided in a roundabout way, by reading the statutes in conjunction with one another, the superior court ultimately arrived at a decision that would not only safeguard animals, but would also protect society as a whole. Judge Stevens noted the ramifications of allowing an owner to kill his or her dog for any reason.<sup>110</sup> If the court were to grant owners of an animal such broad authority, it might allow such individuals to buy numerous

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105. *Id.* at 610-11. The last sentence of section 459-501(a) reads “[t]here should be no liability on such persons in damages or otherwise for such killing.” § 459-501(a). While “no liability” indicates a civil action for damages for the death of dog, the phrase “or otherwise” indicates this section can also be used as a defense in criminal actions as well.

106. *Id.* (citing from *Kneller I*, 971 A.2d at 503-04 (Stevens, J., dissenting)).

107. *Kneller I*, 971 A.2d at 499 (Cleland, J., concurring).

108. *Kneller II*, 999 A.2d at 611.

109. *Id.* at 615-16 (Cleland, J., concurring).

110. *Id.* at 612 (majority opinion).

dogs, take the dogs home, and instantly shoot and kill the dogs without suffering any criminal consequences.<sup>111</sup> It seems unlikely that the legislature or the court would want to encourage such action, especially when an owner of an animal can face criminal charges for neglect by simply failing to provide the animal with proper food and sufficient water.<sup>112</sup>

Even though the superior court properly found Kneller guilty of Criminal Conspiracy to commit Cruelty to Animals, the court faltered in its application of the deadly weapons sentencing enhancement to Kneller's sentence. *Commonwealth v. Hackenberger* was decided in 2003, almost seven years before Kneller's case.<sup>113</sup> The *Hackenberger* court relied upon section 303.10(a)(2), particularly the phrase "in furtherance of the crime" to apply the deadly weapons enhancement.<sup>114</sup> However, nearly five years before Kneller's case was decided, the Pennsylvania General Assembly removed "in furtherance of the crime" from the statute to limit the enhancement's applicability.<sup>115</sup> Without this phrase, the deadly weapons enhancement seems to only apply when an offender uses a deadly weapon to threaten or injure another person.

When the superior court addressed the deadly weapons enhancement in *Kneller*, it failed to even inquire into the statutory language of the provision. Instead, it relied solely on the Pennsylvania Supreme Court's decision in *Hackenberger*, even citing "in furtherance of the crime" as a basis for its analysis.<sup>116</sup> In fact, the court only looked at the *Hackenberger* majority opinion. It neglected to consider Justice Castille's dissenting opinion, which Chief Justice

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111. *Id.*

112. Brief for Commonwealth-Appellee, at \*8. *See also* 18 PA. CONS. STAT. § 5511(c)(1) (2010) (stating the necessary elements for a criminal charge of cruelty to animals when the owner neglects or abuses his or her pet).

113. *Hackenberger*, 836 A.2d at 2.

114. *Id.* at 4. At the time of sentencing, section 303.10(a)(2) stated that the offender used a deadly weapon if he or she "threatened or injured another individual or *in furtherance of the crime*["]. § 303.10(a)(2) (emphasis added). In *Hackenberger*, there was no threat to another individual for the cruelty to animals conviction, so the court had to rely on the "in furtherance of the crime" phrase to apply the deadly weapons enhancement. *Id.*

115. 35 Pa. Bull. 1508 (Feb. 9, 2005).

116. *Kneller II*, 999 A.2d at 614.



Cappy joined, and from which Justice Castille quoted President Judge Del Sole's dissenting opinion in the superior court.

In President Judge Del Sole's dissent, he argued that the enhancement provision can only apply when a deadly weapon is used against another person.<sup>117</sup> He makes this analysis at a time when the "in furtherance of the crime" phrase was still included in the provision. With the General Assembly's restriction on the enhancement a few years later, it is even more apparent that the provision should apply only when using a deadly weapon to threaten or harm another individual. Consequently, the superior court's decision to include a deadly weapons enhancement to Kneller's sentence was error.

In conclusion, without a significant overhaul of the cruelty to animal statutes, this case will likely be interpreted in many ways by Pennsylvania courts in the future. As the interpretation of the Animal Destruction Law stands now, an owner of an animal may only kill the animal with a firearm if the animal is deemed unfit or injured by a police officer or authoritative figure in society.<sup>118</sup> Moreover, the current interpretation of the Dog Law allows a person to kill a dog only if there is sufficient evidence showing that the dog previously attacked or wounded another person or animal.<sup>119</sup> Outside of these defenses, an owner or any other person can be charged with cruelty to animals for killing a dog. However, there may be circumstances that the legislature has not yet contemplated that will arise in the future and will challenge the laws as they currently stand. The addition of section 5511(a)(2.1) substantially limited an owner's discretion to do as he or she wishes with a pet. Further revisions to the statutes are necessary to ensure that readers understand the statutes' interrelatedness. The simple

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117. *Hackenberger*, 836 A.2d at 5 (Castille, J., dissenting).

118. *Kneller II*, 999 A.2d at 610 (indicating that sections 325 and 328.2(b) should be read in conjunction).

119. *Id.* at 611. *See also* 3 PA. CONS. STAT. § 459-501(a) (2010) (indicating the events that must occur before a person has a right to kill a healthy dog).

addition of cross references between and within the three statutes would both better inform pet owners of their rights and would provide additional justice for animals.

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