

Docket No.: A-000061-23

Appellant Brief

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Superior Court of New Jersey  
Appellate Division  
Docket No.: A-000061-23

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STATE OF NEW JERSEY,

Appellee,

vs.

DEEPA RAO,

Appellant.

Civil Action

On Appeal of an Order of the  
Superior Court of New Jersey,  
Law Division-Criminal Part,  
Somerset County  
Dated August 21, 2023

DOCKET NO. MA-23-11  
Docket No.: A-000061-23

SAT BELOW:  
HON. JULIE M. MARINO, J.S.C.

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LEGAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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February 26, 2024

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**LIST OF PARTIES**

Party Name	Appellate Party Designation	Trial Court Role
DEEPA RAO	APPELLANT	DEFENDANT
STATE OF NEW JERSEY	RESPONDENT	PLAINTIFF

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**PRELIMINARY STATEMENT**

Deepa Rao ("Deepa" or "Defendant") appeals a *de novo* order affirming a Municipal Court ruling that her German Shepherd Dog Koda, is potentially dangerous.

**A Parable: "Dogs will be Dogs"**

Consider a parable of two dogs. Each one chases and bites a stranger who is operating a chain saw on the owner's property. The first stranger is a serial killer and the second is a landscaper, lawfully there to trim the trees. Is the first dog a hero and the second a villain? No. Both dogs are doing their jobs, instinctively protecting the family from intruders.

The purpose of the Potentially Dangerous Dog Act is not to punish all dogs for exercising their protective instincts, nor for a scuffle with another dog. It is to protect the public from "certain dogs" who engage in unprovoked attacks. N.J.S.A. 4:19-17. A dog can't distinguish between a lawful invitee and a criminal, and dogs get into fights with other dogs. But the trial judge held Koda to a human standard. Analogizing to a burglary, he disregarded Koda's training and disposition, noting that evidence of a person's good acts wouldn't mitigate the "one time they robbed the house." 2T87:22-25. Unlike 2C offenses, N.J.S.A. 4:19-23 requires consideration of a dog's disposition. Koda is a well-behaved pet who should not have been declared potentially dangerous under the evidence in this case.

**PROCEDURAL HISTORY**

Following an incident on September 12, 2022, Warren Township Animal Control Officer Alyson Hensley ("ACO" or "Hensley") issued two summonses to Defendant. Summons #1820 SC-7244 cited a violation of Ordinance 6-5 (dog at large). Da14. The ACO wrote only the following on Summons #1820 SC-6993: "Potentially Dangerous Dog," "N.J.S.A. 4:19-23," and "September 12, 2022." Da15. The Summons failed to describe the factual basis of the offense, nor did it specify whether section 4:19-23a.(1) or 4:19-23a.(2) applied.

The potential consequences of a guilty plea were explored in a pretrial hearing on January 3, 2023. 1T4:21-1T8:1. On January 13, 2023, counsel submitted to the court a witness list and proposed evidence. (Da16).

Trial was held before Hon. Francesco Taddeo, J.M.C. in Warren Municipal Court on February 7, March 7, and March 14, 2023<sup>1</sup>. On March 14, 2023, the court found Defendant guilty of B.O. 6-5 and that Koda is potentially dangerous. 4T65-89. The ruling was memorialized in an order dated March 24, 2023, (Da113) and an amended order on April 4, 2023, allowing a Humane Law Enforcement Officer to inspect Defendant's property because the ACO declined to do so. Da123. The Court also mandated that Koda be tattooed with the P.D.D. registration number "in a prominent location" as

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<sup>1</sup>The transcript of the pretrial hearing on January 3, 2023 is 1T; Transcripts of the three trial dates are 2T (2/7), 3T (3/7), and 4T (3/14). Transcript of the trial de novo on August 3, 2023 is 5T.



per N.J.S.A. 4:19-24. Da123. He denied Defendant's motion to stay the tattoo provision pending appeal. Da123, 4T84:7-9.

Judge Taddeo also ordered that Koda undergo temperament testing as a condition of being released from impound "to make sure that the dog hasn't run itself nuts in six months" and that Koda must "have a clean bill of health from a psychological standpoint for a dog." 4T89:1-14. See also, Da 116, Da126. The parties agreed to use Adrienne Carson of Hubert's Animal Welfare. She rendered a written report on March 27, 2023. Da117.

Defendant filed a Notice of Appeal with the Superior Court, Criminal Division, on or about March 17, 2023. Da87. She also filed an Order to Show Cause to stay the tattoo pending appeal. Da92. By Order dated April 3, 2023, Judge Marino issued a temporary stay of the tattoo, but ordered that the Township be named in Koda's microchip registration. Da119. After all conditions were met, Koda was released on April 6, 2023. (Not in record)

The *de novo* appeal was argued on August 3, 2023. 5T. On August 21, 2023, Judge Marino affirmed the Trial Court's rulings, vacated the April 14, 2023, stay, and required Defendant to "make a genuine effort" to tattoo Koda by September 21, 2023. Da1.

On September 17, 2023, Defendant filed a motion<sup>2</sup> to vacate the tattoo requirement as well as an OTSC to stay the tattoo

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<sup>2</sup>The motion argued that Defendant had substantially complied with the order by making a genuine effort and that she should be relieved from the mandate.

pending appeal. Da147. Judge Tober ordered a temporary stay on September 21, 2023. Da175. By Order dated November 16, 2023, Judge Marino denied the remainder of Defendant's motion, finding that jurisdiction lay exclusively with the Appellate Court. Da177.

Defendant filed a Notice of Appeal, Request for Transcript and C.I.S. on September 10, 2023 (Da129), which were corrected and amended on September 18 and September 19, 2023. Da165-174.

Defendant was unable to retrieve the original trial exhibits from Sussex County, although the municipal court had sent them original exhibits to the Criminal Division Manager on March 31, 2023, (Da180, email from Lisa Reuter, Da181, email from Sussex County) The Appendix contains only illegible black & white photocopies of Exhibits D3 through D27, retrieved from the Municipal Court. D1 and D2 were missing, true copies have been inserted into the Appendix, and more legible color copies have been inserted after each black and white photograph.

#### **STATEMENT OF FACTS**

##### **The Evidence.**

Before trial and off the record, Judge Taddeo viewed relevant excerpts from two police body-cam videos dated September 14, 2022. Twenty-seven Defense exhibits were stipulated in evidence including the CD's. Da19-Da86; 2T5:2-10.3

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Defendant reserves the right to renew that motion in the appellate court at the appropriate time if necessary.

The following people testified for the State:

- Kilen Roche ("Roche"), who worked for Bottle Republic and was delivering wine to 19 Raspberry Trail but brought it to 17 Raspberry Trail by mistake. 2T14.
- P.O. Bergman, who responded on September 12, 2023. 2T44.
- Saifullah Siddiqi ("Siddiqi"), who sprayed pesticide at 17 Raspberry Trail on July 27, 2022. 2T57
- Shilpa Solanki ("Solanki") of 22 Strawberry Lane, owner of a mini-Golden-doodle named Coco. 2T90
- Sgt. Ferreira, regarding the July 27, 2022 event. 2T101.
- Kelly Palaia (2T104) and James Palaia (2T125), hereafter "Kelly" and "Jimmy," 12 Raspberry Trail, whose dog Bella died after the incident.

The following people testified for the defense:

- ACO Hensley. 2T142
- Sri (3T3) and Deepa (3T66), owners of Koda.
- Jessica Quintana ("Jessica"), Defendant's adjacent neighbor at 15 Raspberry Trail, who observed Koda. 3T39
- Ashish Vengsarkar ("Ashish") a friend who was at Defendant's home 10-20 times to visit or dog-sit. 3T53
- Diana Gaspar ("Diana"), a friend who also visited and observed Bella off property and taunting Koda. 4T3.

The State introduced no documentary or video evidence.

This Court is also asked to consider two exhibits that were filed in Superior Court but not at the Municipal Court trial:

1. Report of Adrienne Carson, St. Hubert's Animal Welfare, produced March 27, 2023, by order of the trial court (after trial). Da117.
2. A U.S. Postal Service public service message, submitted to Judge Marino by email on June 15, 2023. Da127-128.

**Deepa, Sri, Koda and Maya; and their neighborhood**

Raspberry Trail and Strawberry Lane form a loop in a hilly neighborhood of large houses with deep setbacks. 2T91:21, Da20. Deepa and Sri bought their home in January 2016. 3T4:16-20. The house sits at the top of a hill and is surrounded by a six-foot metal fence with gates on two sides. 3T4:20-24. The right gate is perpendicular to an oversized garage with three bay doors and one exit door. See Exhibits D-22 (Da79) and D-24 (Da82). Palaiia's property (#12 Raspberry) is across the street and slopes down from the curb. D-21, Da77-78, D-22, Da79, and D-23, Da81. The front yard of #12 is not visible from the top of Deepa's driveway due to the steep slope. 3T105, 12-17.

Deepa and Sri are experienced dog owners 3T66:18-21 and long-time volunteers and fosters with Garden State German Shepherd Dog ("GSD") Rescue, 3T4:11-13, they are familiar with dogs' body language, and they are trained to conduct temperament tests for

the purpose of evaluating and placing foster dogs in adoptive homes. 3T6:14-25 and 3T6:24-3T7:1 (Sri) and 3T67:2-10 (Deepa).

They adopted Koda in 2018 at ten months old. 3T4:4-9. First, Sri and Deepa each administered temperament tests to Koda at his foster home. He performed "extremely well." 3T6:24-25; 3T7:1-16. Before the final decision to adopt Koda, Sri and Deepa brought him to their house two or three times to introduce him to their three cats and make sure they would all get along. 3T8:16-22. Koda exhibited no prey drive or tendency to chase them at any time. 3T8:3-12. Sri explained what prey drive means.

A We had three cats in the house. We wanted to see whether he had prey drive -- prey drive and we didn't want dogs to act very strong to them.

Q And does -- does Koda have a prey drive?

A No, he does not.

Q Did (sic: Would) you explain to the Court where (what) is a prey drive?

A Yeah. When there are small animals, joggers or runners the dogs sense to chase them. We didn't want a dog that would chase [the cats] or go after them if they're moving. So we wanted a dog without a prey drive or no drive.

3T8:3-11

Koda was gentle with Maya, a 9-week-old Belgian Malinois puppy Sri and Deepa acquired in 2021. 3T18:3-9. Koda has had play dates with other small dogs and puppies. 3T71:22-3T72:10. Exhibits D-15 through D-18 are photographs of Koda relaxing with cats and small dogs. Da63 - Da70. Exhibit D-14 shows Koda relaxing on a bed with

a 5-year-old child. Da61. Although the child was handling Koda's tail, Koda licked him and gave him kisses. 3T71:4-25.

Sri and Deepa hired a dog trainer and reinforced Koda's training daily at home. 3T12:11 - 3T13-6. Koda responds to hand signals and voice commands in both English and Tamil, their native language<sup>3</sup>. 3T14:5-10; 3T70:17-25. Thus, Koda responds to commands from Sri and Deepa's mothers, who don't speak English. 3T14:1-8.

Ashish has walked and played with Koda at Defendant's home at least 20 times. 3T57:14-16. He has owned and fostered Garden State GSD rescue dogs. 3T55:3-19. He said Koda is "very good" with cats and small dogs and responds to his commands. 3T57:17-24.

Q Are you familiar with dog behavior?

A I am an observer. I have done dog analysis. I do observe dog behavior and, yes, I feel I'm a good source of dog behavior.

The COURT: ... Are you trained to observe dog behavior or is this just your lay opinion?

A: I'm not professionally trained but I work with folks who have been professionally trained, so I've gleaned much of experience and information from them. But I'm not an expert. 3T56:23-57:10.

Ashish observed that Koda did not chase squirrels and other small animals and has no prey drive:

Q Did you ever observe him in the backyard when small animals such as squirrels or rabbits came through?

A Yes.

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<sup>3</sup>Transcript says "Thumper" but it should read "Tamil."

Q And did he display any prey drive?

A No.

Q Can you tell the judge what prey drive is in your opinion?

A Yes. It is in my opinion it is the behavior of a dog to treat any small object as a prey and go towards it aggressively in an attack mode. What I observed from Koda was he would get slightly distracted by the moving object and it would take a quick command for recall saying, Koda, back, and he would come back.

3T58:20-25; 59:1-8.

The Court disregarded this as opinion testimony. 3T60, 3-6.

Diana, a 20-year volunteer and former officer with Garden State GSD Rescue, testified that Koda was a "sweet dog" who behaved well with people and other animals. 4T10:7-11. She noted that Koda "doesn't just respond to his owners with his training. He listens to me very well. So, his, you know, his commands aren't specific to a person, if you will." 4T10:7-11.

Koda walks at heel and understands many words including sit, down, stay, come, heel, fetch, back off; he knows directions such as left, right, straight, and back. 3T14:18-19.

To obtain his AKC Good Citizen Certificate, Koda passed an independent evaluation with 100% performance of ten skills. 3T69:13-23; D-11(Da56); D-12. Da57. Koda also has independent certification as a Therapy Dog, qualifying him to visit hospitals and nursing homes to comfort patients. 3T68:17 - 69:12. Exhibit D-13 Da58. When Sri's elderly mother had hip surgery, Koda would

stay by her side. D-2, Da21. He also guided her up and down the stairs. 3T9:16-25; 3T10:1-6.

The back yard of #17 is fully enclosed by a six-foot-high metal fence with gates at each side. D-4 (Da28), D-7A (Da34), D-7B (Da36), D-8 (Da40), D-23 (Da80), and D-24, Da82. After the September 12, 2023, incident, but before the trial began, Sri and Deepa voluntarily reinforced the fencing and the gates to prevent unwanted intruders. D-4 through D-8; 3T28-33. They added a second line of fencing within their property on sections where the existing fence was owned by a neighbor. 3T31:24-3T32:6. They also created a double-fail-safe system of two locked gates on each side of the property to enter the back yard. Da8G, 3T32:11-19, 3T29:24-3T30:12. D-6A Da32. They spent about \$36,000.00 on these improvements. 3T34:23-25. Jessica described the yard as "a big fortress." 3T49:14. Sri identified Exhibits D-8a through D-8h, Da34-55, photographs of the new double gates and perimeter fencing. Da8a-8f, 3T30:13-15.

**Habit evidence and Impoundment**

Koda takes long walks every morning, usually with Sri but also Deepa if Sri is not home. 3T14:20 - 3T15,1. When they were away, their friend Ashish stayed at the house to dog sit, and walked Koda daily. 3T14:20-3T15:1. Sri, Deepa and Ashish testified that they always use the following routine after affixing a non-retractable leash to Koda's metal prong collar: Holding the leash,



they go into the kitchen and open a child-safety gate into the adjacent mudroom. From the mudroom, they open a door to the garage, go downstairs into and through the garage, and out a door to the driveway. 3T16:19-3T17:24 (Sri) and 3T80:10-19 (Deepa). Ashish saw them follow this routine "100%" of the time. 3T61:18-21. Ashish did the same when he walked Koda. 3T61:2-17.

Sri and Deepa never allow Koda in the back yard unsupervised because he has a medical condition that requires him to be wiped clean as soon as he eliminates. 3T15:13-24. They don't use the front door of their house. 2T16:1-11. On the rare occasion when a stranger rings the front bell, they put the dogs in an office and close the door before answering. 3T16:14-18. Thus, their good habits guarded against the dogs escaping from the front or the back. 2T16:11-18.

Koda was well-behaved and calm when he was impounded on September 14<sup>th</sup>, despite the noise and commotion of police vehicles, the ACO's van, and officers with radios. 3T35:10-23, D-9 and D-10 (DVDs). During the six months that Koda was impounded, there were no reports of negative incidents. 3T37:20-24

Jimmy, Jessica and Ashish all observed Koda walking at heel on the street without pulling or other aggressive behavior; he was always under control and well behaved, reacting well to people and other dogs. See e.g, 2T135:18-21 (Jimmy); 3T61:22-62:13 (Jessica); 3T61:22-3T62:13 (Ashish). Jessica testified that Koda did not

react whenever her large, aggressive dog barked at him through the fence. 3T41:18-42:2.

In conclusion, by all accounts from the witnesses who knew Koda, including some of the State's witnesses, Koda is an exceptionally well-trained dog with a calm, gentle and friendly demeanor. He has no prey drive. He was not habitually distracted or disturbed by other dogs, with one unfortunate exception: Bella.

**BACKGROUND: Bella's history of aggression toward Koda**

Nobody could deny that the Palaia family suffered a tragedy losing their beloved Bella. Unfortunately, Bella's four-year history of aggressive behavior towards Koda likely triggered the incident. Six witnesses (Sri, Deepa, Diana, Solanki, Kelly and Jimmy) testified that Bella was outside on the Palaia's driveway almost daily. She often escaped from the invisible fence on her property, which worked only when she wore a transponder collar. Even Jimmy admitted that Bella got off property "three or four" times. 2T134:23-25. Solanki testified:

Q Did you ever see her off her property?

. . .

A Once in a while 2T99-19:22.

Q All right. Did you see Bella off their property off leash?

A Once in a while, yes.

2T100-5:9

Several people, including the State's witnesses, described Bella's excursions. Deepa found Bella on the street near the

driveway of #12 in 2016. 3T93:12-21. She returned her to Kelly, but Bella was back out there within a few minutes. 3T94:4-16.

Every time Sri and Koda walked past #12, Bella charged out of the garage and ran up her driveway toward the street, barking and menacing Koda. Often, Bella caught up to Koda and nipped at his feet. 3T20:13-22. Koda would react, but Sri always controlled him with a tug on the leash, averting a confrontation. 3T22:1-11.

Jimmy admitted he apologized to Sri because "Bella gets out into the street...while he must have been walking the German Shepherd." 2T136:16-25. However, he shrugged it off because, "she has small teeth and can't bite."<sup>4</sup> 3T23:23. When Jimmy suggested the dogs get together for a play date, Sri replied that after "so much antagonism" and "constant confrontation all the time," Koda would never warm up to Bella. 3T22:12-23:5; 3T23:1-4; 3T24:5-6. Despite the size differential, Bella was the aggressor.

Deepa also testified that Bella chased Koda and came onto their property, urinating on their mailbox "between five and ten times." 3T98:11-25. Bella defecated on their property more than once. 3T99:12-15. In the winter prior to the incident, Bella nipped Koda on the feet and defecated on Defendant's lawn in front of Koda. 3T99:1-13. 3T99:14-15. While Jimmy cleaned up the mess, he told Deepa not to worry and offered to get the dogs together "to

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<sup>4</sup>The Transcript erroneously says, "She does not pee so she bites"

meet" for a play date. 3T99:16-22. Deepa politely declined. 3T99:23-25.

Jessica testified that she saw Bella outside every day. Once when she was walking her large, "dog-aggressive" Presa Canario dog, Bella "started running," causing her to become "nervous" and run back to her property fearing a confrontation. 3T47:18-48:8.

In 2016, Diana found Bella in the road near the intersection of Mountain Trail. 4T:2-7. This was about a quarter mile from the Palaia property. See D-27. She delivered Bella to "the wife" [Kelly], who thanked her. 4T7:9-21.

Diana also witnessed "repeated incidents" of Bella barking outside or otherwise antagonizing Koda. 4T11:15-20. In April 2022, when Diana was in the back yard playing fetch with Koda, Koda didn't return the ball but instead ran to the gate. From the gate, Diana saw Bella standing in the middle of the Defendant's front yard. Bella was not barking at the time, which was unusual for Bella. Yet, Koda was instantly alerted to her presence. 4T7:9-21. The Court discounted Diana's testimony as "remote" although this happened only five months before the incident. 4T7:9-21.

Jimmy admitted Bella was regularly outdoors on the lawn without supervision and that she ran toward people and dogs who passed his driveway, but only in a "friendly" manner. 2T1362-9. Although he denied that Bella ever bit, harassed or annoyed Koda, he admitted to offering Sri a bottle of wine for his trouble.

2T138:9-19. There would be no reason for this peace offering if Bella had only greeted Koda "in a friendly manner."

**September 12, 2022 incident**

At around 6:00 p.m. on September 12, 2022, Deepa was playing and exercising Koda and Maya in the fenced back yard. 3T101:9-18.

Deepa had heard Bella barking on and off from 3:00 p.m. until "when the incident happened" [3T100:23-24] and she described the sound as "very close...to our driveway or the street." 3T105:21. No witness visually observed Bella's actual location between 3:00 p.m. and 6:20 p.m. that day.

Roche pulled his delivery van up the driveway of #17 at about 6:20 p.m. and emerged with a box of wine. 3T:19-23. Deepa was suspicious because she had not ordered any wine. 3T103:3-12. In fact, it was intended for the house next door. 2T22:15-20.

Deepa met Roche at the gate with Koda and Maya at her side. 3T102:4-12. From behind the fence, she told Roche where to put the box. 3T103:12-21. Koda was pawing at the gate, which Deepa presumed had been securely shut. 3T105:24-3T106:8. Koda somehow opened the gate and escaped, ran up to Roche, and bit him on the back of his right thigh. 2T18:15-16. Deepa called Koda who responded immediately and released Roche. 3T105:22-106:13. Roche admitted Koda released after a few seconds and ran down the driveway toward #12. Deepa could not see Bella when Koda took off; the hill and the van blocked her view of the Palaia property. 3T105:12-17.

Deepa followed Koda while Roche backed his van down the driveway "right into the front of the house across from it" [2T20:20-21] and "seen (*sic*) a German Shepherd with another dog in the mouth of the German Shepherd." 2T21:5-6. By the time Deepa arrived at the Palaia front lawn, Koda was on the lawn and had Bella pinned down with his mouth around her body:

THE COURT: He was on Palaia's lawn. What was the dog doing?

A He was pinning down Bella.

Q Pinning.

A Pinning.

. . .

Q With what part of his body?

A With -- with Koda's body? His snout, yes.

THE COURT: He was biting the dog; right?

THE WITNESS: He was biting the dog, yeah.

Q Well, was he repeatedly -- was he opening and closing his jaw?

A No.

Q And what was Bella doing?

A So Bella was turning around and trying to bite back Koda.

3T109:4-25. Deepa did not see Koda grab Bella:

Q. When you first saw . . . Bella - what was Koda doing?

A Koda was pinning her -- her down.

Q He was already on her?

A Already on her, pinning her down.

Q So did you see him grab her?

A I -- no.

3T159:9-13, 17-25.

Deepa lay on the ground and inserted her left hand into Koda's mouth to pry open his jaws. 3T110:1-13. Bella was trying to bite Koda and in fact twisted backwards and bit Deepa on the right arm.

3T112:14-20. Photographs show several lacerations on Deepa's right arm with Bella's fur stuck to it [3T111:14-20] and a puncture wound on her middle-left finger from Koda's tooth, consistent with Deepa's description of how she was hurt. D-25, Da84. 3T111:2-7; 17-18. P.O. Bergman also observed Deepa's injuries. 2T49:5-15.

Deepa was screaming for help for a few minutes before Jimmy opened his front door. 3T112:12-18. Bella was alive, bleeding from a half-inch gash on her side. 2T128:1-2; 2T130:13-14.

After trying unsuccessfully to get Bella medical attention at the scene, Jimmy drove 18-20 minutes to the animal hospital, where Bella died. 2T133:17. The State did not introduce any veterinary records or call the treating vet as witness as to cause of death.

P.O. Bergman testified that Roche sustained a "laceration and bruising" on the back of his leg and was bleeding "only slightly, if at all." 2T51:1-4. 2T50:25-51:1-4. After the incident, Sri received a letter from Roche's attorney giving notice of a claim for personal injury. 3T27:18-3T28:4.

**Prior Incidents involving Koda which Should Have Been Inadmissible**

Summons #6993 had no information except the date and the offense, "N.J.S.A. 4:19-23 Potentially Dangerous Dog." Da15 There was no indication that the basis of the charge was the injury to Roche, the death of Bella or both. The Court allowed the State to present evidence of two irrelevant incidents prior to September 12, 2022, even though the Township brought no charges against Koda.

Moreover, Koda wouldn't have been deemed potentially dangerous under the facts even if he had been charged.

**August 4, 2020 incident "Coco"**

On August 4, 2020, there was a minor altercation at the base of Deepa's driveway between Koda and Solanki's miniature Golden Doodle Coco. Solanki didn't report this to the police for two years until September 18, 2022, after Kelly told her what had happened to Bella. 2T99:3-8. Solanki had known Kelly for four years because their daughters went to high school together. 2T100:11-14.

Solanki admitted that Coco was walking ahead of her on a six-foot retractable leash, as she "pulls pretty much." 2T97:2-5. Deepa was walking with Koda down the driveway on a leash and saw Solanki coming down Raspberry Trail from the left. 3T82: 19-25. She saw Solanki but not Coco, because the view was blocked by high ornamental grass and a Verizon junction box. 3T83:1-4. See Exhibit D-20, Da73, marked with an "S and C" for Solanki and Coco, and D-21, Da75, showing that from Solanki's point of view, a person on the driveway behind the bushes would be obscured from the waist down. Coco and Koda simultaneously cleared the landscaping at the mouth of the driveway, erupting in barking and biting. 3T84:1-8. Deepa pulled Koda back and Solanki grabbed Coco. 3T124:7-125:6.

Solanki walked home and returned in a car with her husband and Coco to get proof that Koda was up to date on rabies. 3T86:9-21. Coco was not seriously injured; Solanki took her to the vet



who treated bite marks and released her. 2T95-25:96-1:2. Solanki declined Deepa's and Sri's offer to pay the vet bills. 3T87:6-9.

There are some conflicts in the witnesses' accounts. Deepa said that Solanki was talking on a cellphone. 3T82:24-25. Solanki denied it. 2T97:6-7. Solanki claimed that Koda "came out of nowhere" and that he was not on a leash. 2T92:16-17. She admitted that she "did not see the dog coming" 2T94:3 and only speculated that he escaped from the back yard: "So the dog came out of, I believe, from a fence in the backyard." 2T93:19-20.

**July 27, 2022 incident "Siddiqi".**

On July 27, 2022, Koda bit Siddiqi, an employee of Greenix Exterminators with whom Defendant had a comprehensive pest control services contract. At about 1:20 p.m. that day, Deepa received a text message that Greenix would arrive "soon". 3T73:5-10. She knew that animals and people should not have contact with the treated area for several hours after spraying, so she brought the dogs out into the yard to "go potty." 3T73:14-20. Siddiqi admitted that Greenix policy prohibits employees from spraying a yard if animals or people are present. 2T73:12-14.

Deepa saw Siddiqi approaching from outside the fence, carrying a fogger, while the dogs were still outside. 3T74:1-6. She came within five feet of the gate, held up the palm of her hand in a "stop" gesture, and told him to wait until she put the dogs in the house. 3T74:16-25. Siddiqi admitted that he saw the

dogs in the back yard with Deepa, made eye contact and saw her make a hand gesture and point at the dog. 2T75:16; 2T62:16-22. He couldn't hear her over the loud fogging machine which resembled a leaf blower. 2T75:9-11; 3T79:6-12. Siddiqi waited a few minutes, reached inside the gate, and opened the latch himself, rather than waiting for Deepa to return and let him in the yard. Ibid.

Deepa testified that she had just finished getting Maya back into the house through the sliding doors on the deck and Koda was halfway inside when Siddiqi entered the yard. 3T75:15-25; 3T76:1-6. Koda turned to chase him away but as he caught up to him, Deepa commanded him to come back. Koda responded immediately and remained by her side through the rest of the encounter. 3T76:8-14. Siddiqi dropped the fogger on the paved walkway and escaped the yard; later, he returned through the still-open gate to get the fogger. 3T76:15-25, 3T77:1-2, and 3T77:18-25. Deepa did not see Koda bite Siddiqi, but noticed his pants leg was torn. 3T79:9-10. Siddiqi refused to show her the injury or let her take a photograph. 3T 27:10-15 (Deepa); 2T68:22-23 (Siddiqi).

Siddiqi's testimony was inconsistent and, at times, fanciful. At 2T56:6, he said he waited two or three minutes; at 2T76:9, he doubled it to three to four minutes. He first said his right leg was injured [2T67:5-9], then his left. 2T69:23-25; 2T70:1-3. He said first the dog was a Rottweiler then a German Shepherd Dog:

Then the Rottweiler came after me and then he went straight for my leg. 2T67:1-2

barking -- both of them came, barked at me. The Rottweiler -- I said, the Rottweiler -- German Shepherd, after he barked he literally went for my right -- yes, my right leg and he started to bite at it. 2T67:5-9

Siddiqi stated that there were two dogs running at him. 2T65:9-10. Deepa was certain that she had already put Maya in the house. She had no reason to fabricate this detail.

Sgt. Ferreiro notified the Health Department about the incident after Siddiqi notified the police. 2T103:2-3. The Township brought no charges even though Koda had injured a person, which infers that the ACO had no reason to believe that it was "an unprovoked attack." See N.J.S.A. 4:19-19, requiring impound if a dog injures a human in an unprovoked attack. Siddiqi did not show the Court any mark or scar on his leg; no photographs of the injury or medical records were introduced in evidence.

**Impound on September 14, 2022.**

Sri testified that Koda went into the van without any struggle and that he was always under control. 3T37:3-6. The video shows Koda greeting the officers in a friendly way. D-9 and D-10.

**LEGAL ARGUMENT**

**POINT ONE:**

**SUMMARY OF STATUTES, STANDARD OF REVIEW, AND CREDIBILITY**  
**(Da3; Da5; 5T4:9-5T5:4; 2T:85:13-2T88:12)**

The relevant portion of the statute reads as follows:

4:19-23 Dog declared potentially dangerous;  
conditions.

a. The Municipal Court shall declare a dog to be potentially dangerous if it finds by clear and convincing evidence that the dog:

(1) caused bodily injury to a person during an unprovoked attack, and poses a serious threat of serious bodily injury or death to a person;

(2) caused serious bodily injury to another domestic animal or killed another domestic animal, and

(a) poses a serious threat of serious bodily injury or death to a person, or

(b) poses a serious threat of death to another domestic animal; or

(3) (Deleted by amendment, P.L.2019, c.82).

b. A dog shall not be declared potentially dangerous for:

(1) causing bodily injury to a person if the dog was provoked;

(2) causing serious bodily injury to, or killing, a domestic animal if the domestic animal was the aggressor;

. . .

(c) For the purposes of paragraph (1) of this subsection, the municipality shall bear the burden of proof to demonstrate that the dog was not provoked.

The word "serious" is underlined above to highlight that it was added to the statute in May 2019. See P.L. 2019, Ch. 82. Da182. Both judges below omitted the word "serious", calling into question whether either court below applied the correct standard.

Bodily injury, is defined as follows:

c. As used in this section, "bodily injury" means bodily injury as defined in subsection a. of N.J.S.2C:11-1; and "serious bodily injury" means serious bodily injury as defined in subsection b. of N.J.S.2C:11-1. L.1989, c.307, s.7; amended 1994, c.187, s.4; 2002, c.24; 2019, c.82, s.2.

N.J.S.A. 2C:11-2 defines serious bodily injury as injury that "creates a substantial risk of death, or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

Defendant was also found guilty of violating Ordinance 6-5:

Running at Large:

No person keeping, owning, or harboring a dog shall permit the dog to be upon the private premises of another without his permission, or upon any street or other public place in the Township unless such dog is securely confined upon an adequate leash not more than 6 feet long and under the control of a responsible person.

A dog will not be impounded for killing a domestic animal, but an ACO has discretion whether to impound if a human is injured. N.J.S.A. 4:19-19 provides in relevant part that an ACO:

shall seize and impound a dog when the officer has reasonable cause to believe that the dog:

- a. attacked a person and caused death or serious bodily injury as defined in N.J.S.2C:11-1(b) to that person;
- b. caused bodily injury as defined in N.J.S.2C:11-1(a) to a person during an unprovoked attack and poses a serious threat of harm to persons or domestic animals;

. . .

L.1989, c.307, s.3.

Hensley's discretionary decision not to impound Koda on September 12<sup>th</sup> was overruled after her employer had a conference call with the Warren Township Chief of Police, Lt. Eric Yaccarino, and the Business Administrator. 2T145:11-24. These Township officials overstepped the statutory scheme of 4:19-19, which gives sole authority to an ACO bring P.D.D. charges. Hensley impounded Koda on September 14, 2022, and brought him to All Pets Veterinary in Branchville where he was held for over six months pursuant to N.J.S.A. 4:19-19 at Defendant's expense until April 6, 2023.

The Superior Court conducted a trial de novo on the record pursuant to Rule 3:23-8(a)(2):

At a trial de novo, the court makes its own findings of fact and conclusions of law but defers to the Municipal Court's credibility findings. See State v. Ross, 189 N.J. Super. 67, 75, 458 A .2d 1299 (App. Div.), certif. denied, 95 N.J. 197, 470 A .2d 419 (1983). It is well-settled that the trial judge "giv[es] due, although not necessarily controlling, regard to the opportunity of the" Municipal Court judge to assess "the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 157, 199 A .2d 809 (1964).

State v. Robertson, 228 N.J. 138, 147-148, 155 A.3d 571 (2017), emphasis added.

Judge Marino accepted Judge Taddeo's credibility findings and affirmed his decision without making any independent factual findings or considering the possibility that he had already decided the case before trial.

On January 3, 2023, Defendant requested a hearing to explore the potential sentence in the event of a guilty plea on Summons #6993. The Court warned that "there's some serious ramifications including putting the dog down." 1T6:17-19. The Court would not modify his erroneous statement even after correction by counsel.

Ms. Calogero: The charges are...potentially dangerous. Euthanasia is not a remedy under potentially dangerous.

The Court: I disagree with you, Ms. Calogero because if there's a dog that keeps attacking other dogs I don't think that it's that farfetched for public safety to rule as far as euthanasia goes, so I disagree with you. 1T7:18-8:1

The trial Court also showed bias by applying a double standard to the evidence. He allowed the State to call Siddiqi and Solanki about events up to two years before trial, but Koda's trainer and foster family were stricken from Defendant's witness list. A XX The rest of Defendant's witnesses were limited in their testimony about Koda's training and demeanor. Moreover, the Siddiqi and Coco incidents were not set forth in Summons #6993 and were not relevant to the charges. By the first day of trial, Judge Taddeo already had made certain assumptions:

THE COURT: [T]here's three instances of -- at least two that we've now documented through testimony and potentially a third of a dog not acting well. 2T87:16-22

If you want to call those people, I'll limit them to a certain amount of testimony that they can provide saying how great the dog was. But it's a much different case when you have a pattern of what a dog has done in the past. 2T88:5-7.

The standard of review on appeal is a sufficiency of the evidence standard. State v Ugrovics, 410 N.J. Super. 482, 487-488 (App. Div. 2009) holding as follows:

Ordinarily, we review a judgment of the Law Division under a sufficiency of the evidence standard. That is, in conducting the review required under Rule 3:23-8(a), the Law Division's judgment must be supported by sufficient credible evidence in the record. State v. Segars, 172 N.J. 481, 488, 799 A.2d 541 (2002). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" on appeal. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995).

The uncontradicted stories of the State's witnesses were insufficient to prove by clear and convincing evidence that Koda was unprovoked on September 12, 2022. As to whether Koda poses a "serious threat" of serious bodily injury or death to a human or "serious threat" of death to a companion animal the State presented no evidence at all.

The Superior Court gave deference to the trial judge's credibility findings; specifically, that he found Roche, Siddiqi and Solanki credible, but not Deepa. However, neither Court clearly articulated which testimony was, or was not credible. If Deepa was lying, what was she lying about? Moreover, was there any probative value to the immaterial variations in her testimony?

Most of the facts were uncontested. Deepa told virtually the same story as Solanki, Siddiqi and Roche:

- Koda bit Coco in a scuffle at the end of the driveway.



- Koda bit Siddiqi after Siddiqi opened the gate and let himself into the fenced yard without permission.
- Koda bit Roche who was delivering a box to the wrong address.
- Koda pinned down Bella who later died.

The minor variations between Deepa's story and the other witnesses are not material to the elements of the statute.

**Kilen Roche.**

The trial court determined "I find the State through Mr. Roche to prove that (*sic*) by clear and convincing evidence that both he was attacked and bit and Bella was killed on the front lawn by Koda." Deepa did not deny that Koda injured Roche or that Bella was killed. Roche did not contradict Deepa's story that she found Koda on the Palaia's front lawn, with his jaws around Bella. But nobody - not Roche, nor the Palaia's, nor the Defendant - saw where Bella was or what she was doing before Koda caught up with her. Thus, the State failed to prove that Bella was not the aggressor, as she had been so many times in the past.

It is irrelevant whether Deepa struck Koda with a stick or merely commanded him to stop. Koda released Roche without inflicting more than laceration and bruising. The extent of Roche's injuries is not even at issue, because serious injury is not an element of the potentially dangerous dog statute. Nonetheless, Roche has an obvious motive to exaggerate the nature of his

injuries and maximize his alleged pain and suffering - he is suing Defendant for damages. 3T27:18-3T28:4.

It is also irrelevant to the element of provocation whether Roche followed Deepa's instructions on where to put the box. The dog's perception of Roche as an intruder is what counts, not Roche's legal status as an invitee or trespasser. See Emmons v Stevane, 64 A. 1014, 73 N.J. L. 349, 351-352 (1906) holding that a dog should be lauded for protecting its property.

**Saifullah Siddiqi**

Defendant and Siddiqi told similar stories. Deepa held up her hand to stop and he saw her do so. They made eye contact. She told him to wait until she put the dogs away and although he couldn't hear her, he admitted he saw her point to a dog. He waited between 2-4 minutes and then entered, assuming he had permission. Common sense dictates he should have stayed outside the fence until knowing the dogs were in the house and getting express permission from Deepa to enter. Moreover, Greenix policy expressly prohibits spraying property if dogs or people are present. Although the court stated that Siddiqi had "zero motive to lie" [4T67:110-12], there is at least one reason: he violated Greenix policy. 2T62:5-14.

Siddiqi's testimony was inconsistent. Was it two minutes or four? A Rottweiler or German Shepherd? Left leg or right? His story was also illogical and made no sense, especially the claim that he "hopped over" a 6-foot fence. What made less sense is that Judge

Taddeo believed him. 4T45:25-46:1. And why did the Court conclude that Deepa "didn't see him leave"? 4T58:16. She testified:

Q Okay. He said that he leaped over the fence. Did he do that?

A He couldn't possibly have...

THE COURT: You didn't see him leave?

A I saw him leave, not leap. Okay.

THE COURT: Did you see him exit your yard?

THE WITNESS: I did, through the fence gate.

THE COURT: Okay.

Q The way he came in?

A The way he came in.

3T75-15:25:76-1:25:77-1:5:77-18:25:78-6:25:79-1:15.

Exhibit D-19 is a photograph of the area behind the fence, showing that it was "impossible" as well as illogical for Siddiqi to jump over it. While fleeing a large dog, why would he take a circuitous route through bushes, jump on top of an air conditioning compressor and hoist himself over a high fence, rather than simply going back out through the open gate? More curiously, why did the court jump through hoops to find Siddiqi credible?

The Court's credibility finding should be discounted because it was based on a "very obvious and exceptional showing of error." State v Locurto 157 N.J. 463, 467 (1999).

Even if Siddiqi had told the truth, the resulting legal conclusions were erroneous. The Court found the incident was unprovoked because Siddiqi was an invitee to the property by virtue of the Greenix maintenance contract, as opposed to trespassing in disregard of company policy and Deepa's instructions to wait. The

Court concluded that Siddiqi entered the fenced-in property only after he "did everything that he could possibly have done, thought the property was clear," and that the bite was "unprovoked" because Siddiqi was "merely there to do a job." 4T67:8-12; also, 4T67:4.

Both courts below failed to consider a dog's perception of an intruder entering his fenced yard with a large, noisy apparatus. These are legal issues, not credibility issues. The trial Court attributed human reasoning to a dog, expecting Koda to read a pest control contract and to distinguish between a weapon and a fogger. Township officials apparently understood that this was not an "unprovoked" attack, as no charges were brought against Koda. For this reason, the Siddiqi incident should not have been in evidence.

**Shilpa Solanki (2T85:13-2T88:12)**

Like the Siddiqi incident, the August 2020 incident should not have been allowed in evidence. It was not listed in the summons as a basis for the charge. It was remote in time. And because Koda did not "cause serious bodily injury" to Coco, no charges could have been brought under the Act. Therefore, the event is not probative of whether Koda is potentially dangerous. N.J.S.A. 4:19-23.a.(2). Even the trial Court conceded that the event was "remote" and less relevant to his determination of the facts in this case. Yet, it still factored into his decision and was improperly admitted into evidence. 2T:85:13 - 2T88:12.

The only issue was whether Koda was leashed or running loose. The record abounds with evidence that Koda was always leashed. However, whether leashed or not is irrelevant since i) Deepa admits that Koda bit Coco; ii) it was not a serious injury; iii) no violation was issued; and iv) no violation could have been issued because none of the criteria in Section 4:19-23a. were satisfied.

**POINT TWO:**  
**THE STATE DID NOT PROVE**  
**BY CLEAR AND CONVINCING EVIDENCE**  
**THAT KODA IS POTENTIALLY DANGEROUS (Da7-8)**

The State did not meet its burden of proof by clear and convincing evidence for each separate element of the statute. N.J.S.A. 4:19-23, Locurto, supra. The State must prove that there was no provocation and that Koda poses a serious threat to people and/or other domestic animals.

**A. The State did not prove by clear and convincing evidence that Koda poses a serious threat of serious bodily injury or death to human or a serious threat of death to another domestic animal. (Da7-8; 5T8:15-5T10:15).**

1. There was no evidence that Koda poses a serious threat to persons or animals.

When a dog injures a person, the State must prove by clear and convincing evidence not only that the attack was unprovoked, but also that the dog poses a "serious threat of death or serious bodily injury to a human." N.J.S.A. 4:19-23.a.(1), (emphasis added). When a dog kills a domestic animal, the State must prove by clear and convincing evidence either that the dog:

- (a) poses a serious threat of serious bodily injury or death to a person, or
- (b) poses a serious threat of death to another domestic animal.

N.J.S.A. 4:23.a.(2) (a) and (b) (emphasis added).

Proof of the serious threat is an independent element of the statute to be established with separate proofs. If it could be proved simply with evidence that a dog injured a person or killed a domestic animal, it would render the second part of the statute superfluous and render the statute absurd. See, State v. Thompson, 250 N.J. 556, 275 A.3d 412 (2022), in which the Supreme Court held that it would be absurd to interpret a law in such a way that "would render the second half of the provision superfluous." Thompson, 250 N.J. at 560, 275 A.3d at 415.

The trial Court's ruling about "serious threat" was intertwined with his findings about provocation, often omitting the modifier "serious":

poses **a threat** -- serious threat of bodily injury or death to a person or 2, severely injured or killed another domestic animal. And A, poses **a threat** of serious bodily injury to a death -- or death to a person or B, poses **a threat** of death to another domestic animal as set forth in the statute. 4T64:19-24(emphasis added)

. . .

I do also find that in addition that Koda does pose **a threat** of seriously - serious bodily injury to death - or death to a person or pose **a threat** of death to another domestic animal based upon the prior acts being the incident with Siddiqi, the incident with Mr. Roche and incident to Bella. And

if the Court wanted to go further even the Coco incident where the dog was merely walking unprovoked and was attacked by Koda merely walking on the street. 4T67:17-25 (emphasis added).

The State's summation proposed that Koda's behavior over two years "escalated" and "got worse and worse." 4T38:5-13. The State argued that by applying "common sense" the Court could conclude that since Koda had injured a human and another dog in the past, Koda will seriously injure humans and kill companion animals in the future. 4T38:19-23:

And poses the serious threat of serious bodily injury death of the person. And we've talked about that. This escalated. 4T38:2-5.

Koda started, escalated and it got worse and worse and worse to the point she (*sic*) now poses that danger 4T38:14-15.

Use your common sense and determine that a dog that continues to escalate their behavior into the time where they'd kill another dog and seriously injure a human is going to do that again. 4T38:19-23.

Siddiqi and Roche weren't seriously injured. There was and is no evidence of a serious threat of serious bodily injury to any person.

2. Defense evidence and a court-ordered evaluation establish that Koda poses no threat.

The State has the burden to prove serious threat. The defense need not prove the opposite. Nonetheless, Defendant presented ample, undisputed evidence that Koda poses no threat of an unprovoked attack on people or animals, let alone a serious threat.

All people who know Koda described him as highly trained, friendly, calm and gentle with people, children, and other animals, including small dogs, puppies, cats and frail, elderly ladies.

The Court found that Koda is highly trained, responds to hand signals and voice commands in two languages, he is certified as an AKC Good Canine and as a Therapy Dog. Despite finding Koda's training was "meticulous," the Court still concluded that Koda is potentially dangerous. 4T69:9-14.4T69:9-14.

I do find that Koda was a trained dog for the most part. There was numerous certifications that were taken into consideration by the Court. Canine certification's Good Boy<sup>5</sup>, I think, were certifications and things of that nature and that it was highly trained 4T69-9:14.

The principal objective "of statutory interpretation is to determine and give meaning to the Legislature's intent." State v. Carter, 247 N.J. 488, 513, 255 A.3d 1139 (2021). Thompson, *supra*, 250 N.J. at 572. The legislature's purpose as expressed in N.J.S.A 4:19-17 is to protect the public from "certain dogs" whose actions "are in part attributable to the failure of owners to confine and properly train and control these dogs." Thus, the court's findings of Koda's meticulous training negated that Koda is potentially dangerous. Moreover, Defendant voluntarily spent \$36,000 on improvements to the fence, creating a locked double-gate entry system. Koda lives in a virtual "fortress," demonstrating that

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<sup>5</sup> The Court likely meant to say AKC "Canine Good Citizen," not "good boy."



Deepa is a responsible dog owner. She has taken extraordinary measures to confine her dogs and prevent intruders from coming in. Similar incidents are not likely to happen.

The Court gave insufficient weight to the overwhelming evidence of Koda's good behavior. The Court's verdict was based on speculation over what might happen, rather than clear and convincing evidence that it is likely to happen. The Court did not find a "serious threat" but "could not take a chance" and tried to prevent "all injuries." T70-1:2. That is the wrong standard; the law is intended to prevent a serious risk of "serious bodily injury" or death.

The only real-time evaluation of Koda by an independent, court-ordered expert concludes that he is not aggressive.

3. A post-judgment temperament evaluation ordered by the trial court establishes that Koda poses no threat to humans or other domestic animals.

Koda did exceptionally well on an independent evaluation by Adrienne Carson of St. Hubert's Animal Welfare, ordered by the court to protect public safety. Her March 27, 2023 report concludes that Koda is not aggressive. Da117-118

Defendant argued in the *de novo* appeal that Carson's report proved Koda is not potentially dangerous. However, Judge Marino's decision mischaracterized Defendant's argument as taking "issue with" the testing requirement. Da4. The Court concluded that

reversal was not warranted because the Defendant did not "point to any prejudice" from the temperament test. To the contrary: the temperament test helped the Defendant because it disproved that Koda poses a serious threat to animals and people.

Koda was "immediately friendly" and darted between Carson and the kennel employee inside his dog run. When she walked him on a leash through the kennel, he "casually sniffed" small and large dogs and "demonstrated no signs of aggression." Koda exhibited none of the usual signs of kennel stress such as "lunging at other dogs" or "increased reactivity" toward them. She was "surprised to see how calmly he reacted to the other dogs given the length of his stay." He demonstrated friendly, social behavior toward her "right away" such as "galloping around...and bouncing...in a friendly manner." He allowed handling and gentle restraint. Carson concluded that Koda "is of sound temperament." She observed:

Despite being kenneled since mid-September, which can be frustrating for dogs, Koda was able to come straight out of his run, meet a stranger, and greet in a friendly manner. Not all dogs kenneled for a long time retain the ability to greet politely. Many will become mouthy and pounce on people due to kennel stress. Koda did not.

This high praise corroborates the Defendant's unrefuted evidence that Koda is calm and friendly.

Defendant urges the Court to consider the Carson report as relevant evidence that Koda does not pose a serious threat to people or animals.

4. The State's position required expert testimony.

The State's arguments that Koda's behavior "escalated" emanated from speculative conclusions emanating from prior, irrelevant, and remote events, not scientific analysis. N.J.R.E. 702 is not only permissive in nature, indicating when expert testimony can be admitted, but also when it is required; particularly regarding a subject matter that is "so esoteric that jurors of common judgment and experience cannot form a valid judgment." Butler v Acme Markets, Inc. 89 N.J. 270, 283 (1982). Davis v Brickman Landscaping, 219 N.J. 396, 98 A. 3d 1173 (2014), held that an expert in fire prevention engineering was required to assist the jury in assessing whether a sprinkler system had been properly inspected, because it "constitutes a complex process involving assessment of a myriad of factors" that "is beyond the ken of the average juror." 219 N.J. at 408, 98 A. 3d at 1170.

There was no expert testimony in this case to help the Court assess whether Roche's injury "escalated" from Siddiqi's, or whether Bella's injury "escalated" from Coco's: no medical records, no photographs, no expert witnesses. The Court accepted Siddiqi and Roche's subjective descriptions of their injuries. Siddiqi refused to show his injuries and Roche is suing the Defendant for pain and suffering. Indeed, Roche suffered only a "laceration and bruising" on the back of his leg and was bleeding "only slightly, if at all" according to the responding officer.

2T51:1-4. 2T50:25-51:1-4. Serious bodily injury is injury that “creates a substantial risk of death, or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” To determine that Koda poses this level of threat required expert testimony, as permanency is beyond the ken of the average juror.

Coco had eight puncture wounds, consistent with two bites. Bella had only a single, one-half-inch gash on her side. No veterinarian or animal behaviorist testified as to whether the two incidents are probative of Koda’s future behavior.

It is undisputed that Koda was pinning Bella down, in his mouth. It is also undisputed that Bella bit Deepa on the right arm while Deepa had her left hand in Koda’s mouth, giving credence to Deepa’s story that Bella was squirming and twisting backward. Bella’s treating veterinarian was not called to testify on cause of death: Was it solely from the wound? Was the wound exacerbated by Bella thrashing about? Would she have survived if not for the delays at the scene and another 20-minute drive to the veterinary hospital? [2T133:17] Was she euthanized?

Expert testimony was needed because the Court lacked the specialized knowledge to conclude that Koda’s behavior would escalate to serious bodily injury or death.

The State had ample opportunity to gather evidence whether Koda poses a serious threat to people or companion animals. The

dog was impounded under the auspices of the Warren Township Health Department for six months, but no agent of the Township visited Koda at the kennel or observed him. The State did not retain a behaviorist, trainer or other expert witness to examine or perform tests on Koda, despite ample opportunity to do so. There were no reported incidents of any troubling behavior at the kennel.

Ironically, the only time Koda was evaluated was after the verdict, by order of Judge Taddeo (see Subsection 2, supra), and Koda passed it with stellar performance.

**B. The State did not prove that Roche's injury was unprovoked.**

**(Da7; 5T8:15-5T10:15)**

The Potentially Dangerous Dog Act was first amended in 1994. In the previous version of N.J.S.A. 4:19.b.(1), a dog would not be considered potentially dangerous if it caused bodily injury to a person who was committing a crime or "if that person was tormenting or inflicting pain upon the dog in such an extreme manner that an attack of such nature could be considered provoked." Laws of 1994, ch 187. The present version states only that a dog will not be considered potentially dangerous "if the dog was provoked." N.J.S.A. 4:19-23.b. The amendment also added the language that "the municipality shall bear the burden of proof to demonstrate that the dog was not provoked." Ibid.

Because the prior definition of "provoked" was removed from the statute, the starting point is the plain meaning of the word.

The Oxford English Dictionary 5<sup>th</sup> Ed. defines "provoke" as to II: "Incite or urge (a person or animal) to or into some act, to do something, stimulate to action." Shorter Oxford English Dictionary, 5<sup>th</sup> Ed., Vol 2, Oxford University Press 2002, p 2384.

Sound case law holds that a dog is justified, even lauded, for the instinctual defense of his owner's property. Emmons v Stevane, supra, 73 N.J.L. at 351-352. Chief Justice Gummere recognized the natural instincts of a dog to protect his family and his property from a threat:

The affection of a dog for his master, and for the members of the household in which he dwells, is proverbial. Not only is he their friend, but often he is their protector. His resenting an intrusion by a stranger upon the premises of which he conceives himself to be the guardian is an evidence of his loyalty to those to whom he owes allegiance.

The U.S. Postal Service acknowledges that dogs consider it an act of aggression to deliver a package to its owner. In the 2023 campaign for National Dog Bite Awareness Week, the USPS warned: "Parents should remind their children and other family members not to take mail directly from carriers in the presence of the family pet, as the dog may view the person handing mail to a family member as a threatening gesture." Da128.

Koda was barking and pawing at the gate in reaction to Roche's intrusion on the property. At the same time, Koda's nemesis Bella was outside. She had been barking for over three hours before Roche arrived and possibly had ventured onto the Defendant's property at

some point. These factors combined to "incite" or provoke Koda to action, within the common meaning of the word.

Both courts concluded that since Roche was lawfully on the premises, he did not provoke Koda. Da7. But as the USPS acknowledges, a dog can't distinguish between a trespasser and an invitee - whether it be a mail carrier or mistaken delivery boy.

Deepa testified she recalled Koda as soon as she saw him escape the fence and run toward Roche. Tragically, Deepa did not realize the gate wasn't securely latched and she didn't react quickly enough to prevent Koda from catching up with Roche. Roche did not see how the dog opened the gate. 2T34:21-23; 2T35:6-9.

From the dog's point of view, Roche clearly was an intruder. Therefore, the State did not prove that Koda injured Roche in an unprovoked attack.

**C. The State did not prove the elements of 4:19-23a.(2) (Da4; Da7; 5T5:13 to 6:9, 5T8:21-5T10:13)**

The State must prove not only that Koda killed Bella, but also that she was not the aggressor. N.J.S.A. 4:19-23(a)(2).

No witness saw Bella before Koda escaped. When Koda got loose and took off running, Kelly and Jimmy were inside their house and Roche was at the top of Defendant's driveway at the garage doors. The steep slope of the driveway obscured his view of the Palaiia's front lawn. After he backed down the driveway, Roche saw only where

Koda and Bella ended up - on the Palaia's lawn - but not where Bella was or what she was doing before Koda arrived.

Deepa heard Bella barking on and off from 3:00 p.m. until 6:20 p.m. It sounded "close." Lying on the Palaia lawn with both dogs, Deepa clearly saw that Bella was not wearing the transponder collar that would have kept her inside the invisible fence.

Other witnesses testified that Bella was often wandering off her property, for example:

- Kelly admitted that Bella was allowed outside in the front yard without supervision.
- Jimmy admitted that on a couple of occasions Bella got off the property.
- Both Kelly and Jimmy admitted that the invisible fence did not always function correctly.
- Solanki saw Bella off her property off leash.
- Jessica Quintana saw Bella outside many times.
- Diana saw Bella come as far as halfway up Koda's front lawn, alerting Koda to Bella's presence even when she wasn't barking.
- Deepa found Bella on the street in 2016 and after returning her to Kelly, she was back on the street.
- In 2016, Diana found Bella in the middle of the road a quarter mile from Bella's home.

The State presented no evidence as to where Bella was before Koda started running. But there was ample evidence to infer that Bella had, once again, aggressively encroached on Defendant's



property on September 12, 2022, inciting Koda to take off after her. The State entered no evidence to refute this inference.

In contrast, the defense presented overwhelming evidence of Bella's four-year history of aggression and antagonistic behavior, both directly toward Koda and indirectly from invading and marking Defendant's property. Numerous witnesses testified to Bella's "constant confrontation" of Koda. She chased and nipped at him once a week. She often marked his territory with urine and feces.

Diana testified that when dog "behavior keeps repeating over and over again" it "becomes antagonistic." 4T10-24:25:11-1. The Court cut off this line of questioning and dismissed the testimony as "opinion" evidence to predict the future. 4T9:24 - 4T11:1-15. But Diana's personal knowledge and experience with Garden State GSD Rescue should have qualified her to testify to opinion as a lay person, because her opinion was "rationally based on the witness's perception" and would assist the court "in determining a fact in issue." See N.J.R.E. 701, supra.

Jimmy apologized to Deepa and Sri and offered them a bottle of wine for their trouble. What was he apologizing for, if not Bella's aggressive behavior and invasion of Koda's territory? Jimmy suggested the dogs get together to play and told Deepa and Sri not to worry because Bella had small teeth. But he missed the point: Bella's aggression and antagonistic behavior created a festering animosity between the two dogs that built up over four

and a half years until it tragically exploded. As Sri said when he declined the play date, the damage had already been done.

**D. Temperament evidence urges the opposite result of State v Herold. (Da4-5; 5T4:1-8; 5T13:25 to 5T14:25)**

The case at bar stands in contrast to a factually similar unreported decision. State v Herold, A-4329-17T4, is instructive because it was decided February 27, 2019, before the statute was amended to add the modifier "serious" to "threat" and "bodily injury." Da9-13. The lower Court's finding that Defendant's dog Dozier was potentially dangerous was affirmed by the Superior Court on *de novo* review and again by the Appellate Division.

Dozier was unsupervised and unrestrained on Defendant's porch when he seized Brooklyn, a small dog walking by on a leash. Brooklyn died from multiple bite wounds on the neck and chest according to the treating veterinarian. The defendant's expert in animal behavior hurt, rather than helped, Dozier's case.

Defendant had argued on appeal that the State presented insufficient evidence that Dozier posed "**a threat** of bodily injury to a human" or "**a threat** of death to a companion animal," largely because the State called no expert witness. The court disagreed, based on the following factual findings:

- Dozier was unsupervised and unrestrained on the front porch.
- Defendant said Dozier has "high prey drive with small dogs."

- Defendant's expert "tacitly admitted" that Dozier was "aggressive toward other, smaller, animals" and was "interested in chasing small animals."
- The Court found that the expert's testimony was "fraught with inconsistencies," negating his credibility.
- The ACO testified that the dog "stiffened at attention on seeing movement" (e.g., prey drive).
- There was no evidence that Brooklyn was the aggressor.
- The State presented medical evidence that Dozier killed Brooklyn with several bites to Brooklyn's neck and chest.

In contrast, the evidence in the case at bar was that:

- Koda's owners always supervised him in a fenced yard and walked him on a leash;
- Koda has no prey drive (three lay witnesses and an evaluator);
- Koda is gentle with cats, small dogs, puppies and children;
- Koda did not react to the neighbor's large dog;
- The trial court found that Koda's training and discipline was "meticulous";
- The ACO observed Koda acting "calm" when impounded;
- The ACO heard of no incidents in the 6-month impound;
- Bella was antagonistic and aggressive to Koda for years prior to the incident;

- There was no expert regarding Bella's cause of death, and no expert testimony regarding "escalation" of injuries;
- There was no factual or expert evidence of a serious threat to people or other domestic animals; and
- Defendant's yard is "like a big fortress;" of fencing and double, locked gates, preventing future incidents.

Even without the "serious threat" standard, the Herold court likely would have reached the opposite conclusion if it had been presented with the same evidence as Koda's case.

**POINT THREE:**  
**THE TATTOO REQUIREMENT IS UNCONSTITUTIONALLY VAGUE,**  
**ANTIQUATED, IMPOSSIBLE AND UNNECESSARY**  
**(Constitutional Vagueness not argued below;**  
**Antiquated and impossible at 4T80:10 to 4T84:9)**

The March 24, (Da114) and April 3, (Da124) orders required that Koda's P.D.D. registration number be "tattooed upon the dog ***in a prominent location.***" N.J.S.A.4:19-24(a) (1) [emphasis added.] See also Da1, affirming the tattoo order. The April 3, 2023 order stayed the tattoo and instead required that Koda's microchip include the Township as an additional contact. This was reiterated in the September 21, 2023 stay. As stated in her OTSC, Defendant could find no veterinarian who would tattoo Koda. Da147.

The purpose of the tattoo is to identify the dog. But the spirit of the law can be effectuated with the less intrusive method of a subcutaneous microchip, which was unheard-of when the statute was enacted in 1989. A "literal sense" of the tattoo requirement

should "give way to the spirit of the legislature," which is satisfied by the microchip. See Green v Continental Rentals, 68 A. 2d 759, 292 N.J. Super. 241 (App. Div. 1994), holding:

The intention of the legislature emerges from the principle and policy of the enactment, rather than from the literal sense of the particular terms standing alone. Literal terms give way to the spirit of the legislation and the words of the enactment may be expanded or contracted according to the manifest purpose of the statute. Caputo v. Best Foods, Inc. 17 N.J. 259, 264 11 A. 2d 261 (1955), Alexander v. NJP&L, 21 N.J. 373, 379, 122 A. 2d 339 (1956), Wright v. Vogt, 7 N.J. 1, 6-7, 80 A. 2d 108 (1951).

Moreover, the tattoo requirement should be void as unconstitutionally vague. "A statute 'is void if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" State v Lenihan, 219 N.J. 251, 98 A. 3d 533 (2013), citations omitted. N.J.S.A. 4:19-24(a)(1) provides that the tattoo be "in a prominent location" with no guidance as to its appearance or placement.

If the dog's owner violates an Order entered under §24, N.J.S.A. 4:19-29 dictates seizure and impoundment of a dog and a fine of \$1,000 per day. These dire consequences carry a potential for denial of due process if the tattoo is deemed inadequate by subjective standards. "Vagueness may create a denial of due process due to a failure to provide adequate and fair notice or warning." Karins v. Atlantic City, 152 N.J. 532, 544, 706 A.2d 706 (1998).

What person of ordinary intelligence would know where to place a tattoo? What color should it be? How big? Must it be visible with the naked eye or upon closer examination? In contrast, N.J.S.A. 4:19-24(a)(2) is specific as to signage "warning that a potentially dangerous dog is on the premises" in that "the sign shall be visible and legible from 50 feet of the enclosure." There is no question about the content or appearance of the required sign. But there is no such specificity in the tattoo mandate.

Depending on the breed, the potentially dangerous dog could be hairless or long-haired; white, black or any shade in between; ranging in size from tea-cup to giant. What tattoo could appear "prominently" on a large, black, long-haired Newfoundland dog? Where would a 7-digit tattoo fit on the body of a tea-cup size Yorkie? Penal laws "are subjected to sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine than civil enactments." State v. Lenihan, *Ibid.*, citing State v. Saunders, 302 N.J. Super. 509, 517, 695 A.2d 722 (App. Div.), certif. denied, 151 N.J. 470, 700 A.2d 881 (1997).

In State v Smith, 251 N.J. 244, 263-264, 276 A. 3<sup>rd</sup> 1114 (2022) the court stated that:

a statute must "give fair notice of conduct that is forbidden. A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary." Brown v. Newark, 113 N.J. 565, 577, 552 A.2d 125 (1989) (citations omitted) (quoting State v. Lee, 96 N.J. 156,

166, 475 A.2d 31 (1984)). That principle holds true for motor vehicle laws like N.J.S.A. 39:3-74, which, again, we presume to be written "in language that can be easily grasped by the public so that every motorist can obey the rules of the road." Scriven, 226 N.J. at 34, 140 A.3d 535.

The law is unconstitutionally vague because a person of ordinary intelligence must guess at the meaning of the word, "prominent."

In the event this Court overturns the verdict and finds that Koda is not potentially dangerous, the tattoo issue technically could become moot. Normally, due to the need to conserve judicial resources, courts are reluctant to render decisions in the abstract. Matter of J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104-05, 539 A.2d 1197, 1199 (1988). However, this Court has authority to resolve issues concerning "important matters of public interest," Reilly v. AAA Mid-Atl. Ins. Co. of N.J., 194 N.J. 474, 484, 946 A.2d 564 (2008), or matters that are "likely to reoccur but capable of evading review," Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330, 676 A.2d 1065 (1996). Zirger involved the enforceability of an arbitration clause and evading review because of a "reluctance by the industry or private litigants to press for resolution of the question." Ibid. See, also, Wisniewski v. Murphy, 454 N.J. Super. 508, 522, 186 A. 3d 321 (App. Div. 2018), a constitutional challenge to an agency's rulemaking. Also see, Division of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-

19, 576 A.2d 261 (1990), regarding the extent to which the press may be allowed access to proceedings charging child neglect.

The paucity of case law interpreting the P.D.D. Act is evidence that it is likely to evade review. There is but one reported decision, State v. Smith, 295 N.J. Super 399, 685 A 2d 73 (Law Div. 1996). The tattoo issue is a matter of substantial importance because of the constitutional challenge and the potential for denial of due process due to serious penalties to an owner who fails to comply with a final order.

This Court is urged to excise the tattoo and find the provision unconstitutional, even if the verdict below is summarily reversed on appeal.

**CONCLUSION**

Defendant urges that the decision be summarily reversed for insufficiency of the evidence, and that the tattoo requirement of N.J.S.A. 4:19-24(a) (1) be deemed unconstitutionally vague.

Respectfully submitted,

  
\_\_\_\_\_  
GINA A. CALOGERO  
ATTORNEY ID# 016461984



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*THE SUPERIOR COURT OF NEW JERSEY*  
*APPELLATE DIVISION*

DOCKET NO. A-000061-23

STATE OF NEW JERSEY  Plaintiff-Respondent  v.  Deepa Rao,  Defendant-Appellant	<u>Criminal Action</u>  On Appeal from an Order of the Superior Court of New Jersey, Law Division - Criminal Part, Somerset County  Dated: August 21, 2023
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Sat Below:  
Hon. Julie M. Marino, J.S.C.

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BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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SUBMITTED ON March 28, 2024

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**COUNTER-STATEMENT OF FACTS AND PROCEDURAL  
HISTORY**<sup>1</sup>

On September 12, 2022, Kilen Roche (“Roche”) was employed by Bottle Republic<sup>2</sup> and was delivering a case of wine to 17 Raspberry Lane, Warren, New Jersey. (2T:14-6 to 15-5).<sup>3</sup> When Roche placed the box on the ground near the garage door at 17 Raspberry Lane, he heard the rear gate to the backyard open and saw a German Shepard charging at him. (2T:18-6 to 10). When the German Shepard, later identified as “Koda,” reached Roche, it bit him in the back of his right thigh. (2T:18-15 to 16). After Koda bit Roche, Koda ran across the street onto the neighbor’s property and attacked their dog, “Bella,” in the neighbor’s front lawn. (2T:47-1 to 13). Bella was a 15-pound white Havanese. (2T:131-4 to 5).

James Palaia, Bella’s co-owner, was working in his basement when his wife alerted him that Bella was being attacked. (2T:126-3 to 11). When James ran outside, he saw the defendant holding Koda back, and saw that the defendant’s second German Shepard had also left her property. (2T:127-15 to

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<sup>1</sup> The Statement of Facts and Procedural History have been combined for the Court’s convenience.

<sup>2</sup> The transcript erroneously states “Botta Republic”

<sup>3</sup> “1T” shall refer to the January 3, 2023, pretrial hearing transcript.

“2T” shall refer to the February 7, 2023, trial transcript.

“3T” shall refer to the March 7, 2023, trial transcript.

“4T” shall refer to the March 14, 2023, trial transcript.

“5T” shall refer to the August 3, 2023, trial de novo transcript.

17). The defendant had suffered a “pretty big” puncture wound on her middle finger from attempting to stop Koda’s attack. (3T:111-2 to 7). When James made his way toward Bella, Koda “lunged” at him. (2T:127-23 to 25). James then saw Bella laying on the ground with a half inch deep hole in her side and blood “spitting out” every time she took a breath. (2T:128-1 to 4). James and his wife then took Bella to the animal hospital. (2T:132-15 to 25). In the car, James’s wife was holding Bella and applying pressure to the open wound. (2T:133-3 to 5). James stated that his wife’s shirt and pants were soaked with blood. (Id.). Bella survived the 18-20 minute car ride, but eventually succumbed to her injuries at the animal hospital. (2T:133-16 to 134-2).

Roche was treated on scene by paramedics. (2T:25-1 to 24). After Bottle Republic retrieved the delivery van from the scene, Roche’s father took him to the hospital for further treatment. (2T:27-3 to 7). Following the incident, Roche visited a “pain and bone doctor” due to continued pain. (2T:30-3 to 4). For approximately a month and a half after the incident, Roche utilized a walking cane due to difficulty maintaining power in his leg. (2T:30-11 to 18). At trial Roche testified:

“On a daily basis I have shooting pains going up and down my leg. It travels into my back. My toes, especially at night they get cold, a cold sensation. And my left [sic] gives out on me sometimes depending on how much pressure I put on it or randomly. I don’t have the same power in my leg as I used to before the

incident happened. And I used to play soccer until the incident and now I am not confident enough to get back into soccer because I don't believe I have the power in my leg to play soccer.”

(2T:31-9 to 19).

Prior to this incident, Koda was previously involved in two separate violent attacks. On August 4, 2020, Shilpa Solanki was walking her dog “Coco” down Raspberry Lane. (2T:91-12 to 23). Shilpa then saw Koda running from the defendant’s backyard toward them. (2T:93-19 to 24). Koda then attacked Coco from behind, biting her eight to ten times, hard enough to leave marks. (2T:94-7 to 22; 96-1 to 3).

The second incident occurred on July 27, 2022. Saifullah Siddiqi (“Siddiqi”) was working for Greenix Pest Control and arrived at defendant’s property to spray pesticides for ticks, fleas and mosquitos. (2T:58-22 to 24; 62-21 to 24). When Siddiqi first approached the backyard, he waited two or three minutes for the defendant to put her dogs back inside. (2T:63-16 to 25). Siddiqi then entered the backyard and began spraying pesticides when he noticed the two dogs running at full speed toward him. (2T:65-1 to 10). One dog stopped running and began barking, and the second dog, Koda, bit Siddiqi on his right leg. (2T:67-5 to 12). Siddiqi managed to escape from Koda and hopped over the defendant’s fence. (2T:67-23 to 24). When the defendant approached Siddiqi, she was not concerned about his injuries, but instead stated that it was his fault

and that he should have waited. (2T:68-1 to 7). Siddiqi was treated at the New Jersey Medical Center and received a rabies shot and a few stitches. (2T:69-3 to 13). Siddiqi testified that he still has teeth marks on his leg, and sporadically experiences muscle pain. (2T:67-15 to 17; 69-21 to 70-8).

As a result of the September 12, 2022, incident involving Bella, the Animal Control Officer of Warren Township issued Summons #1820 SC-6993 for a potentially dangerous dog in violation of N.J.S.A. 4:19-23 and SC7244; and “dog at large” in violation of Warren Township Ordinance 6-5. (4T:39-21 to 25). A trial was conducted before Judge Taddeo on February 7, 2023, March 7, 2023, and March 14, 2023. (2T to 4T). On March 14, 2023, Judge Taddeo issued his opinion finding that the State proved by clear and convincing evidence (and also beyond a reasonable doubt) that Koda is a potentially dangerous dog under N.J.S.A. 4:19-23 and also violated Warren Township Ordinance 6-5, dog at large. (4T:65-8 to 12; 70-13 to 71-3).

On March 17, 2023, defendant filed a Notice of Appeal with the Superior Court, Criminal Division. (Da87). Defendant also filed an Order to Show Cause to stay the tattoo requirement pending appeal. (Da92). On April 3, 2023, Judge Marino issued a temporary stay of the tattoo requirement. (Da119).

On August 3, 2023, the municipal appeal was argued before Judge Julie Marino, J.S.C. On August 21, 2023, the Court affirmed the municipal court,

vacated the stay on the tattoo requirement, and ordered defendant to make a genuine effort to tattoo Koda by September 21, 2023. (Da1). On September 10, 2023, defendant filed a notice of appeal in the Appellate Division.

On September 17, 2023, defendant filed a motion to vacate the tattoo requirement as well as an Order to Show Cause to stay the tattoo requirement pending appeal. (Da147). Judge Tober ordered a temporary stay on September 21, 2023. (Da175). On November 16, 2023, Judge Marino denied the remainder of defendant's motion, finding that jurisdiction laid exclusively with the Appellate Division.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THERE IS SUFFICIENT CREDIBLE EVIDENCE TO SUPPORT THE LAW DIVISION'S FINDINGS THAT KODA IS POTENTIALLY DANGEROUS BY CLEAR AND CONVINCING EVIDENCE**

Defendant contends that the Law Division erred in finding Koda potentially dangerous. Defendant argues that the court should have disregarded four separate unprovoked attacks - one which killed the neighbor's dog and left it spitting up blood, and one which left a man with a permanent leg injury. Instead, defendant contends that the court should have placed greater weight on the fact that Koda understands hand signals, voice commands (in two languages), and gets along with her elderly mother.



Defendant even argues that Koda’s attacks were provoked. Defendant attempts to paint a fanciful picture wherein Koda was the superhero K9 defending his home from an evil delivery man, while his “nemesis” Bella was across the street inciting the entire incident by barking. More ridiculous is the argument that Bella had been provoking the attack for years by pooping and peeing on Koda’s yard. All of defendant’s arguments are without merit and fail to show “a very obvious and exceptional showing of error” which would support setting aside concurrent findings of facts and credibility determinations of the Law Division and the Municipal Court. State v. Locurto, 157 N.J. 463, 474 (1999).

On appeal from a Municipal Court to the Law Division, the review is de novo on the record. R. 3:23-8(a). The Law Division judge must make independent findings of fact and conclusions of law based upon the evidentiary record of the Municipal Court and must give due regard to the opportunity of the Municipal Court judge to assess the credibility of the witnesses. State v. Johnson, 42 N.J. 146, 157 (1964). On appeal from a Law Division decision, the issue is whether there is “sufficient credible evidence present in the record” to uphold the findings of the Law Division. Id. at 162. The Appellate Division “do[es] not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.” State v. Barone, 147 N.J. 599, 615 (1997).

The reviewing court must “give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the ‘feel’ of the case.” State v. Locurto, 157 N.J. 463, 471 (1999); State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000). “Deference is especially appropriate ‘when the evidence is largely testimonial and involves questions of credibility.’” Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Moreover, “under the two-court rule,” only “a very obvious and exceptional showing of error” will support setting aside “concurrent findings of facts and credibility determinations made by” the Law Division and the Municipal Court. Locurto, 157 N.J. at 474.

In the present case, defendant was charged under the potentially dangerous dog statute. N.J.S.A. 4:19-23, Dog Declared Potentially Dangerous, states:

- a. The municipal court shall declare a dog to be potentially dangerous if it finds by clear and convincing evidence that the dog:
  - (1) caused bodily injury to a person during an unprovoked attack, and poses a serious threat of serious bodily injury or death to a person;
  - (2) caused serious bodily injury to another domestic animal or killed another domestic animal, and
    - (a) poses a serious threat of serious bodily injury or death to a person, or

- (b) poses a serious threat of death to another domestic animal; or
- (3) (Deleted by amendment, P.L.2019, c. 82).

b. A dog shall not be declared potentially dangerous for:

- (1) causing bodily injury to a person if the dog was provoked; . . .

c. As used in this section, “bodily injury” means bodily injury as defined in subsection a. of N.J.S.2C:11-1; and “serious bodily injury” means serious bodily injury as defined in subsection b. of N.J.S.2C:11-1.

Here, the Municipal Court and the Law Division found that the State satisfied both N.J.S.A. 4:19-23a(1) and (2). (4T:67-1 to 22; Da7). In regard to N.J.S.A. 4:19-23a(1), both courts found that Koda caused bodily injury to Roche during an unprovoked attack and poses a serious threat of serious bodily injury or death to a person. (4T:67-1 to 22; Da6). Likewise, in regard to N.J.S.A. 4:19-23a(2), both courts found Koda killed Bella, and poses a serious threat of serious bodily injury or death to a person, or serious threat of death to another domestic animal. (4T:66-8 to 67-22; Da7).

The courts found the State’s witnesses to be credible and found the testimony sufficient to support a finding that Koda is potentially dangerous. The arguments that defendant raises on appeal do not warrant reversal and are simply a disagreement on the weight given to the evidence. For the reasons stated

herein, the State submits that there is sufficient credible evidence to support a finding that Koda is potentially dangerous by clear and convincing evidence.

**A. *Serious Threat of Serious Bodily Injury/Death***

Defendant's first argument is that the State did not prove that Koda poses a serious threat of serious bodily injury or death to a human, or a serious risk of death to a companion animal. Defendant argues that the Municipal Court should not have considered any of Koda's prior attacks because they were somehow irrelevant. Instead, defendant contends that the court should have placed greater weight on the fact that Koda responds to hand signals, voice commands (in two languages), is certified as an AKC Good Canine, was a therapy dog, and even turned defendant's mother into a dog lover. The State contends that Koda's prior attacks are highly relevant and indicative of future behavior. Even if Koda is the most trained dog in the world and understands sign language, all of that training has failed to stop his behavior from escalating to the point that he has now killed a dog and permanently injured a second human being.

Defendant further asserts that an expert was required to assess the escalating nature of Koda's attacks. However, expert testimony is only required when the subject matter is "so esoteric that jurors of common judgment and experience cannot form a valid judgment." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). The State submits that Koda's escalating violent behavior is

not beyond the knowledge of an average juror and therefore does not require expert testimony. The State's position is straightforward – each attack has become more and more violent, with increasing injuries to the victims. The law simply does not require an expert for such an elementary fact pattern.

On March 27, 2023, Adrienne Carson, a dog behavior consultant, observed and evaluated Koda prior to his release from the kennel. Defendant also asserts that Carson's observation of Koda, and subsequent report, demonstrates that Koda does not pose a serious threat. However, the report was ordered by the Municipal Court to determine whether Koda can return home, not whether he poses a serious threat. In fact, Carson states that she never attempted an off-leash interaction with other dogs during the observation. It seems obvious that a truly illuminating behavioral assessment would include an assessment of how Koda behaves off-leash, around other dogs. Carson simply brought Koda outside and watched him run around. Carson's brief observation of Koda, and one page report, is not a reliable means to show that Koda is not a serious threat.

Instead, the courts correctly placed greater weight on the fact that Koda has a long history of attacking people and animals, completely unprovoked. Each victim was merely going about their day when they were attacked by Koda, a large German Shepard. Therefore, the court had ample evidence (four attacks)

to conclude that Koda poses a serious threat of bodily injury or death to a human, and risk of death to a companion animal.

Lastly, although the Law Division omitted the word “serious” from “serious threat” in its Analysis section, the court cited to the correct statute on page three of the decision. Further, it is clear the court considered all arguments and had ample evidence to support its decision and Order. “[A]ppeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion.” State v. Scott, 229 N.J. 469, 479 (2017) (quoting Do–Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001)). Therefore, the court’s omission does not provide sufficient grounds for reversal or remand.

**B. Provocation**

Defendant next argues that the State failed to prove that Roche’s injury was unprovoked. Defendant seeks to paint Roche as an intruder, and Koda as the guardian K9 who was simply defending his house and family. Defendant even goes so far as to suggest that Koda’s “nemesis,” Bella, was across the street and incited the entire incident by barking. (Db40). Equally as absurd, defendant suggests Bella has been provoking Koda for years by pooping and peeing on his yard. (Db13). This logic is fanciful and does not warrant the Court’s consideration.

The reality is that Roche was simply delivering a package when he was blind-sided by a German Shephard who violently attacked the back of his leg. Once the attack on Roche was over, Koda darted across the street and killed Bella - who was simply roaming her owner's yard. Defendant's argument requires a massive leap in logic and reasoning. Both courts rejected this reasoning and correctly found that Koda was unprovoked when he attacked both Roche and Bella.

***C. Bodily Injury***

Lastly, in regard to the injuries sustained, N.J.S.A. 4:19-23a(1) requires "bodily injury" to a person during an unprovoked attack. N.J.S.A. 2C:11-1 defines "bodily injury" as any physical pain, illness, or any impairment of physical condition. Here, Roche testified that on a daily basis he has shooting pains going up and down his leg. (2T:31-9 to 19). He also stated that he does not have the same power in his leg as he did before the attack. (*Ibid.*). Therefore, the court had ample evidence to find that Roche suffered a "bodily injury" as defined in N.J.S.A. 2C:11-1 from the unprovoked attack.

In sum, the Law Division had more than enough evidence to find that Koda was potentially dangerous by clear and convincing evidence. Koda was unprovoked and bit two different people: Kilen Roche on September 12, 2022, and Saifullah Siddiqi on July 27, 2022. Koda was also unprovoked and bit two

different dogs, killing one of them: Coco on August 4, 2022, and Bella on September 12, 2022. Despite Koda's certifications and training, it is clear he poses a serious threat of serious bodily injury or death to a person, and a serious threat of death to another domestic animal. Therefore, the Municipal Court and the Law Division were correct in finding that the State both N.J.S.A. 4:19-23a(1) and (2).

## **POINT II**

### **STATE V. HEROLD SUPPORTS FINDING KODA POTENTIALLY DANGEROUS**

Defendant argues that if the court in State v. Herold, No. A-4329-17T4, 2019 WL 980656 (App. Div. 2019), was presented with the facts of this case, Koda would not be found potentially dangerous. First, Herold is an unreported case from 2019 and is not controlling. Second, even if the court considers Herold, the facts in this case are more serious and involve more victims. Thus, the court would have undoubtedly found Koda to be potentially dangerous.

In Herold, defendant's dog, "Dozier," bolted off the porch and attacked a smaller dog named "Brooklyn." Id. at \*1. Brooklyn ultimately died due to puncture wounds on her chest and neck. Id. Defendant received a municipal summons requiring Dozier be impounded pursuant to the Vicious or Potentially Dangerous Dog Act. Ibid. The State requested a hearing in municipal court to determine if Dozier was a potentially dangerous dog under N.J.S.A. 4:19-23.



Ibid. The municipal court judge found for the State, deeming defendant's dog potentially dangerous because Dozier killed Brooklyn and posed a threat of death to another domestic animal. Id. at \*2.

On appeal, the Appellate Division affirmed, finding that (1) it was undisputed that Dozier killed Brooklyn, and (2) Dozier posed a threat of death to other domestic animals. Id. at \*3. The Court stated that Dozier bit another dog several months before the attack on Brooklyn, and Dozier had a high prey drive with small dogs. Id. at \*4. Based on this, the court found there was sufficient credible evidence that Dozier poses a threat of death to other domestic animals. Ibid.

Here, the facts are much worse than Herold. Not only did Koda attack and kill Bella, but he also bit Roche so hard that he continues to experience shooting pains in his leg. (2T:31-9 to 19). Roche stated that he utilized a walking cane for a month and half after the attack, and still has difficulty maintaining power in that leg. (2T:30-11 to 18). Further, there were two previous attacks before the underlying incident. Koda attacked Saifullah Siddiqi on July 27, 2022, and Coco on August 4, 2022. Siddiqi received stitches from Koda's attack (2T:69-3 to 13), still has teeth marks on his leg, and sporadically experiences muscle pain. (2T:67-15 to 17; 69-21 to 70-8). Coco was bitten eight to ten times by Koda - hard enough to leave bite marks. (2T:94-7 to 22; 96-1 to 3).

If the court in Herold found sufficient evidence of a threat, they would certainly find it here - even under the elevated “serious threat” standard. The facts in this case involve more victims and more significant injuries. Defendant’s comparison to Herold is damaging and does not support their position. If the Court considers Herold, it certainly weighs in favor of finding Koda potentially dangerous.

**POINT III**

**THE STATE DEFERS TO THE COURT’S  
JUDGEMENT REGARDING THE TATTOO  
REQUIREMENT**

The State respectfully defers to the Court’s discretion regarding whether defendant should be required to tattoo a registration number on Koda.

**CONCLUSION**

Based on the foregoing, the State respectfully requests this Court affirms the Law Division’s August 21, 2023 Order.

Very truly yours,

JOHN MCDONALD  
PROSECUTOR

By: /s/ Christopher Lyons  
Christopher Lyons  
Assistant Prosecutor  
NJ Attorney ID # 380772021

cc: Gina Calogero, Esq.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000061-23

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STATE OF NEW JERSEY,	Civil Action
Respondent,	On Appeal of Orders of the Superior Court of New Jersey, Law Division, Somerset County Dated August 21, 2023
vs.	DOCKET NO. MA-23-11 DOCKET NO. A-000061-23
DEEPA RAO,	SAT BELOW: HON. JULIE M. MARINO, J.S.C.
Appellee.	

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LETTER BRIEF OF DEFENDANT-APPELLANT

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June 2, 2024

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June 3, 2024

New Jersey Appellate Division  
Appellate Division Clerk  
25 W. Market St.  
Trenton NJ 08625  
Attn.: Pamela Marsh

**Re: State v Deepa Rao**  
**Docket No.: A-00061-23, MA-23-11**

Dear Honorable Court:

Please accept this letter brief on behalf of Deepa Rao in reply to the brief filed by Respondent the State (hereafter Respondent, brief referenced as Pb).

**Introductory Statement**

Respondent resorts to exaggerations and misrepresentations of the record in an attempt to plug up the holes in the State's case, summarized as follows:

- The Court below specifically found "serious threat." Pb6
- Koda bit Coco 8-10 times. Pb2
- Kilen Roche was permanently injured. Pb4, Pb7
- Bella was "spitting up blood." Pb4
- Adrienne Carson did not observe Koda's behavior with other dogs. Pb7-8.

Legal Argument:

Point One: Neither of the lower Courts found a "serious threat."

Simply stated, the State presented no evidence to support the second statutory element required to find a dog potentially dangerous: i.e. that the dog poses a "serious threat" of death or serious bodily injury to a human, or a "serious threat" of death to a companion animal. N.J.S.A. 4:19:23, generally.

A. Mischaracterizations of the courts' decisions below.

The State asserts at Pb6 that both courts below found that Koda poses a "serious threat" of death or serious bodily injury to a human as set forth in N.J.S.A. 4:19-23(a) (1) and (a) (2) (a), and that the dog poses a "serious threat" of death to a companion animal N.J.S.A. 4:19-23(a) (2) (b). Pb6. This is patently false.

Twice in the opinion attached to her August 21, 2023 order, Judge Marino reiterated these deficiencies. She never used the word "serous" to modify threat.

In making these findings the Lower Court did find that Koda poses **a threat** of serious bodily injury or death to a person, or bodily injury or death to a companion animal based upon the prior events.

See Da6 (emphasis added). Later in her opinion, Judge Marino repeated the error and compounded it by misstating the necessary findings for "serious threat:"

The Lower Court properly found that there is **a threat** of future bodily injury to people and future serious bodily

injury to domestic animals/pets, based on prior acts with Siddiqui and Coco. PA7.

See Da7, emphasis added.

Judge Marino's conclusion is wrong on two levels. As previously argued, she omitted the word "serious" from threat. That is no small omission but goes to the heart of the statutory requirements to find a dog potentially dangerous.

Moreover, the opinion misstates the risk analysis required. N.J.S.A. 4:19-23(a)(1) requires a finding of serious threat of death or "serious bodily injury" to a person. She found that the lower court found "a threat of future bodily injury." If Koda merely poses a threat of bodily injury to humans, that is not enough to adjudicate him potentially dangerous. After all, any German Shepherd Dog in good condition with a large, strong muzzle and sharp teeth has the capacity to injure a human, even in play. But the standard must be death or serious bodily injury, neither of which is mentioned in the court's opinion.

Second, Judge Marino misstated the risk standard regarding a dog that kills a companion animal: i.e., the court must find either a serious threat of death/serious bodily injury to a human [4:19-(b)(2)(a)] or a serious threat of death to a domestic animal 4:19-(b)(2)(b)]. Not "bodily injury or death" but "death." Period.

Although he uttered the word "serious" once in his opinion, Judge Taddeo was simply reading the statute, not rendering an

opinion. 4T64:19. In his continued recitation of N.J.S.A. 4:19-23, he omitted the word "serious" twice:

. . . and poses a threat - serious threat of bodily injury or death to a person or 2, severely injured or killed another domestic animal. And A poses a threat of serious bodily injury . . . or death to a person or B, poses a threat of death to another domestic animal.

4T74:19-23 (emphasis added). In his findings, where it counts, he never used the modifier "serious."

I do also find that in addition that Koda does poses **a threat** of seriously - serious bodily injury to death - or death to a person or poses **a threat** of death to another domestic animal based upon the prior acts . . ."

4T6718-20 (emphasis added).

In short, the State's brief misrepresents the lower court's ruling. Judge Taddeo never found serious risk. Neither did Judge Marino. Saying it was so does not make it so.

**Point Two: The State misrepresented facts in the record.**

The State also attempted to bolster its case with exaggeration, hyperbole and misrepresentation of the factual record below.

First, the State erroneously said Koda bit Coco the Golden Doodle "eight to ten times". Pb2. This is a gross exaggeration. Shilpa Solanki testified that Koda went after Coco twice, not eight to ten times. See 2T94:77-22, that Koda "attacked my dog," 2T94:4-8 and that he "attacked one more time." 2T94:15-16. She said that her veterinarian saw eight to ten bite marks, none of which was



serious enough to require stitches or hospitalization. 2T96:1. That is consistent with two bites, as it is common knowledge that GSD's have four canine teeth. One bite equals four puncture wounds; two bites equals eight. The other two could have been lacerations or indentations from other, smaller, teeth, but it does not constitute eight to ten bites. And because the State introduced no veterinary records, there was no support for the State's outrageous conclusion at Pb2.

Second, the State erroneously characterized Kilen Roche's injury as permanent. Pb7 and Pb7-8. The State did not cite a reference to Roche's testimony in the transcript, for the simple reason that he never said it. Putting aside the fact that permanency is too esoteric an issue to be established without expert testimony, Kilen Roche never said his injury was permanent. His subjective, uncorroborated testimony was that he walked with a cane for one and a half months, 2T30:17-18 and experienced pain and a cold sensation, 2T31:9-12, but that he was no longer seeking medical attention 2T29:23-25. In his opinion, "I don't believe I have the power in my leg to play soccer," there was no medical evidence to back up this statement. 2T31:14-19. Roche's pending personal injury lawsuit weakens his credibility, but even if he was believed, it established - at best - that he had symptoms in February less than five months after the September 12, 2022 incident. Five months is hardly "permanent." The State is

attempting to bootstrap the "serious risk" element with the lie that Roche suffered "serious bodily injury."

Moreover, since Roche's injury was the basis of a finding of the first part of the statute ("injured a human") it could not also be evidence of the second part ("serious risk"). As argued in the defendant's original brief, these two elements are in the conjunctive. Both must be proved, hence there must be independent evidence of the latter. And, it must be proof of a serious risk of death or serious bodily injury to a human. N.J.S.A.4:19-23(1) (a).

The State resorted to hyperbole and sensationalism as a smokescreen to the weaknesses in its case. For example, Rao was accused of being insensitive because she was "unconcerned" about Siddiqi's injury but instead admonished him for entering the gate without permission. Pb3. It is perfectly natural that she would be angry with him for such an outrageous trespass in violation of company policy never to enter and spray a yard with pets present. But more to the point, his trespass is the reason that this incident is irrelevant, and the court never should have considered it. This injury to a human was reported to and investigated by the Township Health Department, but Koda was neither impounded nor charged. Had there been a reasonable belief that the injury was unprovoked, Koda would have been impounded under N.J.S.A. 4:19-19. The inescapable conclusion is that the injury was provoked by Siddiqi's uninvited entry into the fenced back yard.

**Point Three: The prior incidents with Siddiqi and Coco are not probative of a "serious risk."**

Judge Marino concluded that Koda is potentially dangerous "based on the prior events." Da6. She reiterated this analysis and adopted the findings of Judge Taddeo by stating that "the lower court. . . found . . . a threat . . . based on prior acts with Siddiqi and Coco." Da7. Coco was not seriously injured; even if Solanki had reported the incident, Koda would not have been charged. The injury to Coco proves nothing, least of all that Koda "poses a serious threat of death" to another domestic animal. Siddiqi provoked his injury, as the Township concluded by not charging Koda. This also fails to prove that Koda "poses a serious threat of death or serious bodily injury to a human."

**Point Four: It is the State's burden to show Koda poses a serious threat, not the defendant's burden to prove the opposite.**

At Pb7-8, the State takes issue with Adrienne Carson's report because it was not a "truly illuminating" analysis of Koda's behavior and that, consequently, it is not reliable to show that Koda doesn't pose a serious threat to humans and domestic animals. The burden of proof is on the State, not the defendant.

Moreover, by pointing out what may be missing from Carson's analysis, the State emphasizes the flaws in its own case below. The trial record is devoid of any scientific evidence of risk, let alone a comprehensive behavioral analysis of which Carson's report

purportedly falls short. For six months while Koda was within the control of the Township of Warren, the State missed its chance to have Koda tested or even observed by a behaviorist, trainer, or veterinarian. They did not call an employee of the kennel or even ACO Hensley as a witness - it was the defendant who called her to the stand.

And, contrary to the State's characterization of the Carson report, she did observe Koda with other dogs. She walked him through the kennel on a leash past cages of various dogs, big and small. He noticed them but did not react. It would have been reckless to allow a dog accused of being potentially dangerous to interact off leash with other dogs, as the State suggested she should have done!

Carson's report is illuminating in other respects. She was a total stranger, unknown to Koda. Yet he greeted her in a friendly manner. She is an experienced dog trainer with St. Hubert's, a respected animal welfare organization that rescues and provides training for dogs. She was not afraid of Koda.

### **Conclusion**

The State failed to make its case below, presenting absolutely no evidence of the third and most critical element of the Statute: whether the dog poses a serious risk. The State's brief cannot plug up that hole with sheer fluff.

Thank you for the Court's attention to this matter.

Respectfully submitted,

A handwritten signature in blue ink that reads "Gina A. Calogero". The signature is written in a cursive, flowing style.

GINA A. CALOGERO, ESQ.

GAC/bms

cc: A.P. Christopher Lyons, Esq.  
Client