

from testifying.

II. Plaintiffs' motion *in limine* to prevent introduction of the testimony of Ronald Traenkle

Plaintiffs argue that defendant violated Rule 26(a) of the Federal Rules of Civil Procedure because he did not supply plaintiff with Captain Traenkle's expert report and qualifications at least ninety days before the date the case was to be ready for trial. Defendant faxed the report of Captain Traenkle to plaintiffs' attorney on August 2, 2002. Thus, plaintiffs had the expert report sixty-six days before the trial was originally scheduled to take place and one hundred eight days before the trial is now scheduled to take place. I will not exclude Captain Traenkle from testifying.

III. Defendant's motion to preclude all testimony and exhibits that seek to attribute human qualities or attributes to plaintiff's dog

The issue to be tried is whether defendant's actions on April 8, 1998, violated plaintiffs' constitutional and state law rights. Evidence that would seek to attribute human characteristics to the dog is not relevant and will be excluded.

The pictures attached to defendant's motion must be examined under a Rule 403 analysis. The first picture, of the parking lot at the location of the incident, is clearly admissible. The picture of the dog and the child on the couch with the child thinking "we're best buddies" is excluded under Rule 403. The third picture attached to the motion shows one of plaintiffs' children leaning on the dog, who is laying on the floor. It is admissible because it is evidence of how well behaved the dog was with people and is not unfairly prejudicial to the defendant. The fourth picture shows the dog by herself wearing a large bow around her neck. Unless the dog

was wearing this collar when shot on April 8, 1998, the picture is excluded under Rule 403.

IV. Defendant's motion *in limine* to preclude all character testimony related to plaintiff's dog

Plaintiffs seek to introduce testimony establishing the friendly nature of their dog in an attempt to refute defendant's claim that she lunged at him. Defendant argues that such testimony is inadmissible character evidence under Federal Rule of Evidence 404.

We have not found any Pennsylvania or Third Circuit cases addressing whether evidence of past behavior of an animal should be excluded under Rule 404, however, the highest courts of several states have admitted such evidence. See Hood v. Hagler, 606 P.2d 548, 551-52 (Okla. 1979); Forsythe v. Kluckhohn, 142 N.W. 225, 271 (Iowa 1913); Stone v. Pendleton, 43 A. 643, 643-44 (R.I. 1899); see also 1A **Wigmore, Evidence** § 68a (Tillers rev. 1983). I will not exclude evidence concerning Immi's disposition as inadmissible character evidence.

Defendant also argues that the testimony of plaintiffs' witnesses will confuse the jury because it concerns encounters with the dog in controlled environments rather than in the street where defendant found her. This is no reason to exclude the evidence, however, because defendant is free on direct examination of defendant and on cross-examination of plaintiffs' witnesses to make the jury aware of the differences between defendant's encounter with the dog and those that will be recounted by the plaintiffs' witnesses.

V. Defendant's motion *in limine* to preclude testimony concerning prior dog shootings by defendant

The evidence that defendant has shot and killed four dogs in the past is evidence of

another crime or wrong and cannot be used to show that defendant is more likely to have committed the violations of law cited by plaintiffs. **Fed. R. Evid.** 404(b).

The Court of Appeals said that evidence about three of the prior dog shootings should be excluded under Federal Rule of Evidence 403. Brown v. Muhlenberg Township, 269 F.3d 205, 217 (3d Cir. 2001). If that statement is binding upon me, I will follow it. Even if it is not binding on me, however, I reach the same conclusion on the same record. The three incidents involved situations dissimilar to this case, and therefore, their probative value is very low. It is clearly substantially outweighed by the danger that the evidence will unfairly prejudice the jury against defendant and the evidence is excluded.

The only shooting of a dog that might be relevant to this case occurred in 1988. Plaintiffs suggest that the prior shooting is evidence of defendant's intent, motive or absence of mistake. Because defendant has not pleaded mistake as a defense, I will only address the propriety of the evidence as proof of intent or motive.

The use of the evidence of the 1988 dog shooting is governed by Becker v. Arco Chemical Co., 207 F.3d 176 (3d Cir. 2000). For the evidence to be admissible under Rule 404(b), plaintiffs must convince me that there is a chain of inferences that does not include the inference that defendant has the propensity to act in a certain way and that leads to the conclusion that defendant committed an unreasonable seizure of Immi. See id. at 191-92. Like the Court in Becker, I cannot conceive of how the prior shooting would be relevant without the inference that defendant is likely to be unreasonable in deciding the necessity of killing dogs and that he was similarly unreasonable in making the decision he did on April 8, 1998. See id. at 192. I will, therefore, exclude any evidence of that incident.

VI. Defendant's motion *in limine* to preclude the expert report of Richard W. Kobetz

Defendant challenges the testimony of Mr. Kobetz on four grounds: (1) the relevancy and prejudicial effect of his reference to prior shootings of dogs by defendant; (2) the support for one of his opinion statements; (3) the relevancy of his discussion of defendant's history as a police officer; and (4) his qualifications. Because Mr. Kobetz will be testifying as an expert witness, I will examine these issues under Daubert and its progeny in addition to the Federal Rules of Evidence.

As discussed earlier, any discussion of defendant's prior shootings of dogs is unfairly prejudicial and excluded under Rule 404. If Mr. Kobetz is permitted to testify, he will not be able to discuss, therefore, the prior shootings.

Defendant fails to specifically identify which part of Mr. Kobetz' report he is objecting to as "the history of Robert Eberly." The only reference to defendant's past on the page of the report that defendant cites in his objection is the sentence "[i]f the department had followed the history of Officer Eberly, perhaps this unfortunate incident would never have occurred." This is just another way to address the prior dog shootings by defendant and, therefore, will be excluded.

The other two objections raised by defendant - as to Mr. Kobetz's qualifications and the support for his conclusions - will be discussed at a Daubert hearing.

VII. Plaintiffs' cross-motion *in limine* to preclude the expert report and testimony of Ronald Traenkle

Plaintiffs bring this cross-motion in response to defendant's motion to preclude the testimony of Dr. Kobetz. It is denied.

VIII. Defendant's motion *in limine* to preclude the expert report of Andrew Bensing

Plaintiffs seek to have Andrew Bensing testify as an expert on the behavior of Rottweilers. He would testify to the behavior of female Rottweilers as a breed and the behavior of Immi in particular. Defendant challenges the testimony on three grounds: (1) that it would be inadmissible character evidence; (2) that Mr. Bensing's experience with the dog would be irrelevant because it ended over a year before the shooting; and (3) that it does not satisfy the prong of the Daubert analysis that requires a "fit" between the expert testimony and the facts of the case.

The objection to the testimony as inadmissible character evidence is taken care of by my ruling on character testimony in general. Testimony about Immi's past behavior is admissible.

That Mr. Bensing's frequent contact with the dog ended a year before the incident does not render his testimony irrelevant. Mr. Bensing had extended contact with Immi for over two years and then occasional contact with her until her death. Defendant may point out to the jury that Mr. Bensing's time with the dog was only occasional for a year before her death, but he cannot preclude his testimony entirely.

Defendant's argument about the "fit" step of the Daubert analysis will be considered at a Daubert hearing.

IX. Defendant's motion *in limine* to limit testimony regarding the valuation of plaintiff's dog

Under Pennsylvania law a dog is personal property. 3 P.S. § 459-601 (2002); Desanctis v. Pritchard, 803 A.2d 230, 232 (Pa. Super. 2002) 3 P.S. § 459-601 (2002). It is proper as regards the section 1983 claim, therefore, to limit testimony regarding the value of the dog to that

addressing its value as a piece of personal property. No testimony regarding the value of Immi to the plaintiffs in particular will be admitted as evidence regarding the valuation of the dog.

Traenkle is DENIED

- VIII. Defendant's motion *in limine* to preclude the expert report of Andrew Bensing is will be ruled on after a Daubert hearing
- IX. Defendant's motion *in limine* to limit testimony regarding the valuation of plaintiff's dog is GRANTED

THOMAS N. O'NEILL, JR., J.