

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Dep. Dir., Whitney Schlimbach, Counsel
Re: Rescue Doctrine and Property as discussed in
***Samolyk v. Berthe*, 251 N.J. 73 (2022)**
Date: September 05, 2022

MEMORANDUM

Project Summary

Although “[t]he rescue doctrine ‘has long been a part of [New Jersey’s] social fabric’”¹ it has not been codified.² The doctrine permits a civilian rescuer to recover damages for injuries they sustain because a culpable party placed themselves in a perilous position which invited rescue.³ In New Jersey, “[t]he Appellate Division has consistently applied the doctrine to cases where the rescuer is injured when trying to rescue another person.”⁴

The doctrine, however, has limits.⁵ It is based on the tort concepts of duty and foreseeability.⁶ Pursuant to the doctrine, an actor who created a danger for themselves is liable to the rescuer if, at the time of such conduct, the actor “*should reasonably anticipate* that others might attempt to rescue [the actor] from [the] self-created peril...” and the rescuer “sustain[ed] harm in doing so.”⁷

In *Samolyk v. Berthe*, the New Jersey Supreme Court was asked to consider the rescue doctrine in the context of “those who voluntarily choose to expose themselves to significant danger in an effort to safeguard the property of another.”⁸ In this case, the property in question was an animal. Although the Court declined to expand the rescue doctrine to include injuries sustained to protect property, it did recognize that an exception should be made “in settings in which the

¹ *Samolyk v. Berthe*, 251 N.J. 73 (2022) (quoting *Saltsman v. Corazo*, 371 N.J. Super. 237, 248 (App. Div. 1998) (noting that in New Jersey the doctrine has been historically used to address situations in which the rescuer sued the party whose negligence placed the victim in a position of imminent peril thereby necessitating the rescue)). See *Ruiz v. Mero*, 189 N.J. 525, 527 (marking the first time that the rescue doctrine was considered by the New Jersey Supreme Court which unanimously upheld the right of a police officer to rely on the doctrine to sue the owner of a bar for injuries sustained while suppressing a disturbance at the owner’s bar).

² E-mail from Comm’r Bernard W. Bell to Laura C. Tharney, Exec. Dir., N.J. Law Revision Comm’n (June 24, 2022) (on file with the NJLRC).

³ *Id.* See *Provenzo v. Sam*, 23 N.Y.2d 256, 296 (1968); *Saltsman*, 371 N.J. Super. at 249. (App. Div. 1995) (applying the doctrine to “situations where the rescuer... sues the rescued victim who is either completely, or partially, at fault for creating the peril that invited the rescue.”).

⁴ *Saltsman*, 371 N.J. Super. at 247; *Blackburn v. Broad St. Baptist Church*, 305 N.J. Super. 541, 544-46 (App. Div. 1997); *Tornatore v. Selective Ins. Co. of Am.*, 302 N.J. Super. 244, 252 (App. Div. 1997).

⁵ *Samolyk*, 251 N.J. at 80 (citing *Estate of Desir v. Vertus*, 214 N.J. 303, 321 (2013) (holding that a criminal defendant did not negligently create the danger caused to the individual who was shot while the defendant was fleeing from a business because the rescue doctrine is grounded upon essential tort concepts of duty and foreseeability.)).

⁶ *Estate of Desir*, 214 N.J. at 321.

⁷ *Samolyk*, 251 N.J. at 80 (quoting *Estate of Desir v. Vertus*, 214 N.J. at 321). See also RESTATEMENT (SECOND) OF TORTS § 445 cmt. D (AM. L. INST. 1965).

⁸ *Samolyk*, 251 N.J. at 80.

plaintiff has acted to shield human life.”⁹

In June of 2022, the *Samolyk* decision was brought to the attention of Commission Staff for potential consideration.¹⁰ In response, Staff examined case law to determine how animals are treated in other contexts.

Background

On the evening of July 13, 2017, Ann Samolyk (“Plaintiff”) heard someone calling for help to rescue a dog that had fallen into a canal.¹¹ In response to the plea for help she dove into the canal to rescue the dog from drowning.¹² The dog was owned by her neighbors, Illona and Robert DeStefanis.¹³ The dog was ultimately rescued by the neighbor’s son and a friend of that family.¹⁴ Ann was found unconscious on a floating dock.¹⁵ As a result of her rescue attempt, she “sustained neurological and cognitive injuries.”¹⁶

The Plaintiff, by and through her guardian ad litem, filed suit against Defendants.¹⁷ The civil action alleged that the Defendants were “liable under the rescue doctrine by negligently allowing their dog to fall or jump into the canal that borders their property.”¹⁸ The parties filed dispositive motions addressing whether the Plaintiff raised a cognizable claim under the rescue doctrine.¹⁹

The Plaintiff maintained that the Defendants “invited the rescue because the dog was in peril, ... [and Ann] would not [have] jump[ed] in the lagoon and [nearly] drown[ed] but for the dog being in there and people screaming about having to rescue the dog.”²⁰ The Defendants argued that “no court in this State had extended the rescue doctrine to apply to the protection of property.”²¹ The trial court stated that it was not “empowered to start defining what level of property is worth risking human life.”²² The Plaintiff appealed the trial court’s decision.²³

⁹ *Id.* at 82.

¹⁰ See sources cited *supra* note 2.

¹¹ *Samolyk*, 251 N.J. at 76.

¹² *Id.*

¹³ *Id.* at 75-76. The complaint, as originally filed “also named Dorothy Berthe III as a defendant, without any description of the alleged role she played in the litigation. Plaintiff subsequently entered a stipulation of dismissal without prejudice as to Berthe.” *Samolyk v. Berthe*, No. A-3431-19, 2021 WL 2222600 n.1 (N.J. Super. Ct. App. Div. June 2, 2021), *aff’d*, 251 N.J. 73 (2022).

¹⁴ *Id.* at 76.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 77.

²¹ *Id.*

²² *Id.*

²³ *Id.*

The Appellate Division acknowledged that the *Restatement (Second) of Torts* has extended the rescue doctrine to the protection of property.²⁴ In addition, the Court noted that some sister states follow the Restatement approach.²⁵ The Appellate Division, however, stated that, “no reported case from any New Jersey court has applied the rescue doctrine to support a cause of action brought by the rescuer of real or personal property against a defendant who, through [their] negligence, placed the property in peril.”²⁶ Citing its role as an intermediate appellate court, the Court declined to expand the scope of the rescue doctrine.²⁷

The New Jersey Supreme Court “granted plaintiffs’ petition for certification to determine whether the rescue doctrine extends to property.”²⁸

Analysis

In New Jersey, the rescue doctrine has consistently applied to cases in which the rescuer is injured when trying to rescue a person who is either completely, or partially, at fault for creating the peril that invited the rescue.²⁹ The *Samolyk* Court considered, as a matter of first impression, the expansion of the rescue doctrine to include “those who voluntarily choose to expose themselves to significant danger in an effort to safeguard the property of another.”³⁰

Like the Appellate Division, the Supreme Court acknowledged that the *Restatement (Second) of Torts (Restatement)* extends the rescue doctrine to real and personal property.³¹ The Court noted that the *Restatement* provides that

[i]t is not contributory negligence for a plaintiff to expose himself to danger in an effort to save himself or a third person, or the land or chattels of the plaintiff or a third person, from harm, unless the effort itself is an unreasonable one, or the plaintiff acts unreasonably in the course of it.³²

The Court noted that the *Restatement* acknowledges that “a plaintiff may run a greater risk to his own personal safety in a reasonable effort to save [a] life than he could run ... to save the animate or inanimate chattels of his neighbor or even himself.”³³

²⁴ *Id.* RESTATEMENT (SECOND) OF TORTS § 445 cmt. D (AM. L. INST. 1965). *But see* 65A C.J.S. Negligence § 267 (providing that “[a] person is not relieved of duty to exercise ordinary care for the person’s own safety by the fact that his or her own or another’s property is in imminent danger of loss or injury arising from the negligence of a third person.”). *Contra Wiggins v. Bottger*, 518 N.Y.S.2d 936, 938 (Sup. Ct. 1987) (finding that a plaintiff is not entitled to recovery where he puts himself in a dangerous position for the purpose of rescuing a person’s property).

²⁵ *Id.* at 77.

²⁶ *Id.* RESTATEMENT (SECOND) OF TORTS § 445 cmt. D (AM. L. INST. 1965).

²⁷ *Id.*

²⁸ *Samolyk v. Berthe*, 248 N.J. 518 (2021).

²⁹ *Samolyk*, 251 N.J. at 79. For a thoughtful history of the evolution of the rescue doctrine *see id.* at 78-80.

³⁰ *Id.* at 80.

³¹ *Id.* at 80.

³² *Id.* quoting RESTATEMENT (SECOND) OF TORTS § 472. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 32, cmt. b (AM. L. INST. 2010) (noting that a rescuer of imperiled property, whether owned by another or the rescuer, may seek recovery for physical and emotional harm).

³³ *Id.* quoting RESTATEMENT (SECOND) OF TORTS § 472 cmt. a.

While the majority of states follow the *Restatement* treatment of the rescue doctrine as it pertains to property,³⁴ other states have declined to do so. The *Samolyk Court* noted that in *Welch v. Hesston, Corp.*, the Missouri Eastern District Court of Appeals declined to extend the rescue doctrine to protect personal property.³⁵ The *Welch Court* reasoned that the “high regard in which the law holds human life and limb” provided the underlying reason to distinguish the treatment of those who rescue persons and those who rescue property.³⁶

Ultimately, the *Samolyk Court*, “declin[ed] to expand the rescue doctrine to include injuries sustained to protect property except in settings in which the plaintiff ... acted to shield human life.”³⁷ The Court stated that “sound public policy cannot sanction expanding the rescue doctrine to imbue property with the same status and dignity uniquely conferred upon human life.”³⁸ The Court determined that the Plaintiff’s actions were based solely on her perception of danger to an animal and affirmed the dismissal of her complaint.³⁹

• *Property in Other Contexts*

Animals that are domesticated pets are consistently described by New Jersey courts as property, albeit a special form of property, in varying contexts. The New Jersey Supreme Court addressed the status of animals, and pets particularly, in *McDougall v. Lamm*.⁴⁰ In that case, the Court explained that, although “[a]nimals have traditionally been treated by the law as property,” appellate courts in New Jersey have “recognized that pets are a special variety of personal property.”⁴¹ The Court explained that this special status is an acknowledgment “that pets have a value in excess of that which would ordinarily attach to property, because . . . they are not fungible.”⁴²

³⁴ *Id. citing Estate of Newton v. McNew*, 698 P.2d 835, 837 (Colo. App. 1984) (holding that the doctrine to “one who tries to rescue the property of another”); *Neff v. Woodmen of the World Life Ins. Soc’y*, 529 P.2d 294, 296 (N.M. Ct. App. 1974) (noting that “[t]he majority of courts ... have extended [the doctrine] to include situations where property is in danger of being severely damaged or destroyed”); *Henjum v. Bok*, 110 N.W.2d 461, 463 (1961) (holding that the doctrine is applicable “where an attempt is being made to save human life or property”).

³⁵ *Samolyk v. Berthe*, 251 N.J. at 81.

³⁶ *Id. citing Welch v. Hesston Corp.*, 540 S.W.2d 127, 129-130 (Mo. Ct. App. 1976).

³⁷ *Id.* at 82.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *McDougall v. Lamm*, 211 N.J. 203 (2012) (plaintiff made a claim for emotional distress after her dog was killed by another dog on a walk).

⁴¹ *Id.* at 223, citing *Hyland v. Borrás*, 316 N.J. Super. 22, 25 (App. Div. 1998) and *Houseman v. Dare*, 405 N.J. Super. 538, 543 (App. Div. 2009) (finding specific performance was an appropriate remedy in case where couple orally agreed that plaintiff would keep their dog because pets have “special subjective value,” similar to “heirlooms, family treasures and works of art that induce a strong sentimental attachment”).

⁴² *Id.* at 225; *see also Harabes v. Barkery, Inc.*, 348 N.J. Super. 366, 373 (Law. Div. 2001) (finding “no authority in [New Jersey] for allowing plaintiffs to recover non-economic damages resulting from defendants’ alleged negligence [in causing dog’s death and that.] various public policy concerns mitigate against permitting such claims” but acknowledging that “labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog [and] inadequately and inaccurately describes the relationship between a human and a dog”) (internal quotations omitted); *see also Hyland v. Borrás*, 316 N.J. Super. 22, 25 (App. Div. 1998) (holding that plaintiff was entitled to the “repair” cost rather than the “replacement” cost of her dog because “a household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness”); *see*

In *McDougall*, the Court determined that a claim for non-economic loss does not extend to the death of a pet for several reasons, including that “recognizing the cause of action would conflict with the Legislature’s statutory scheme for regulating dog owners and for addressing dangerous dogs.”⁴³ Given that the rescue doctrine requires that a negligent act give rise to the situation requiring a rescuer,⁴⁴ the risk of conflict identified in *McDougall* is also relevant here. For instance, Title 4 of the New Jersey statutes addresses a variety of issues related to domesticated animals and pets. The statutes in Chapter 19 govern licensing and liability for injuries caused by domesticated animals,⁴⁵ and Chapter 22 provides criminal and civil penalties for animal cruelty.⁴⁶

In the context of animal cruelty, two statutes provide for increased penalties for harming or interfering with law enforcement⁴⁷ and service animals.⁴⁸ These statutes were enacted following highly publicized attacks on police and service dogs.⁴⁹ The Statement accompanying the 1983 bill, subsequently enacted as N.J.S. 2C:29-3.1, explained the statute was intended “to offer protection to police officers who use police animals in the performance of law enforcement duties.”⁵⁰ The Sponsor’s Statement implies that the heightened protection afforded to law enforcement animals is related to their role as a law enforcement tool.⁵¹

Similarly, the service animal statute, N.J.S. 2C:29-3.2, provides for restitution for the “value of the guide dog; replacement and training or retraining expenses . . . ; veterinary and other

Timmins v. Boyle, 2021 WL 2255014, at *6 (App. Div. June 3, 2021) (“[i]n addition to the animal's value, pet owners may recover the cost of medical treatment and damages based on the pet's intrinsic value.”), *cert. denied*, 249 N.J. 464 (2022).

⁴³ *Id.* at 228.

⁴⁴ *Samolyk v. Berthe*, 251 N.J. 73, 78 (2022), quoting *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 180 (1921) (“The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.”).

⁴⁵ N.J. STAT. ANN. §§ 4:19-1 to -43 (West 2022).

⁴⁶ N.J. STAT. ANN. §§ 4:22-15 to -61 (West 2022).

⁴⁷ N.J. STAT. ANN. § 2C:29-3.1 (West 2022).

⁴⁸ N.J. STAT. ANN. § 2C:29-3.2 (West 2022).

⁴⁹ §25:02. Offenses Against Animals—Harming an Animal Used in Law Enforcement—(N.J.S.A. 2C:29-3.1), 33A N.J. Prac., Criminal Law § 25:02 (5th ed.) (“N.J.S.A. 2C:29-3.1 was initially enacted into law in 1983 following the highly publicized story of a police dog from the Trenton Police Department that was stabbed by a criminal suspect during a chase. The outrage this incident aroused in the local print media apparently convinced the Legislature at the time that this type of activity needed to be deterred and severely punished.”); §25:07. Offenses Against Animals—Service Animals or Guide Dogs—(N.J.S.A. 2C:29-3.2), 33A N.J. Prac., Criminal Law § 25:07 (5th ed.) (“N.J.S.A. 2C:29-3.2 was assigned the popular name of ‘Dusty's Law’ in honor of a puppy that was in training to be a guide dog and was savagely attacked and injured by another canine. The puppy survived the 2010 attack but was too traumatized to complete his training. The widespread publicity surrounding the event prompted the Legislature to enact this law three years later.”).

⁵⁰ Sponsor’s Statement, A.B. 1605, 200th Leg., 1982 Sess. (Jun. 14, 1982), later enacted as L. 1983, c.261, eff. Jul. 7, 1983.

⁵¹ *See e.g. Dye v. Wargo*, 253 F.3d 296, 299 (7th Cir. 2001) (removing as a defendant the police dog the plaintiff sued pursuant to 42 U.S.C. § 1983 on the basis that “the words ‘person’ and ‘whoever’ [in the Dictionary Act in 1 U.S.C. § 1] include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals, but dogs are not on this list”); *see* N.J. Stat. Ann. § 1:1-2 (West 2022) (“person includes corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals . . . and . . . this State, the United States, any other State of the United States as defined infra and any foreign country or government lawfully owning or possessing property within this State,” but not dogs).

. . . expenses for the guide dog [and] handler; and lost wages or income.”⁵² This provision also seems to imply that a service animal is property, while acknowledging its increased value stemming from the handler’s investment in its training and the animal’s purpose as an assistive device.

- *Other Considerations*

The refusal of the *Samolyk* Court to extend the rescue doctrine to the protection of property raises three issues. Despite being part of New Jersey’s social fabric, the doctrine has never been codified.⁵³ Consistent with the modern trend in torts toward loosening or eliminating doctrines that bar recovery, the majority of states have adopted the *Second and Third Restatement’s* expansion of the rescue doctrine to include situations that involve the rescue of property.⁵⁴ The *Samolyk* decision adopted the minority position. Finally, although the Court declined to expand the rescue doctrine to include injuries sustained protecting property, it created an exception for instances in which the plaintiff acted to protect a human life.⁵⁵ This exception, however, is not well-defined.⁵⁶

In light of the recency of the *Samolyk*, the New Jersey judiciary may further define the exception and the treatment of the “no liability” rule.⁵⁷ Given the “varied and *sui generis*” nature of the claims in this area of law, it is not clear whether codification of the rule or the exception is appropriate at this time⁵⁸

Pending Bills

To this time, no bills have been introduced in New Jersey’s 2022-2023 legislative session to codify the rescue doctrine as it pertains to real or personal property.⁵⁹

Conclusion

Staff seeks the direction of the Commission regarding the necessity for additional research and outreach to determine whether: the rescue doctrine should be codified and expanded to include injuries sustained to protect property; the development of this doctrine should be left to the common law; or whether the Commission wishes to bring the issue to the attention of the Legislature for such action as it deems appropriate.

⁵² Sponsor’s Statement, A.B. 4105 (identical to S.B. 1907), 215th Leg., 2013 Sess. (May 6, 2013), later enacted as L. 2013, c.205, eff. Jan. 17, 2014.

⁵³ E-mail from Comm’r Bernard W. Bell to Laura C. Tharney, Exec. Dir., N.J. Law Revision Comm’n (June 24, 2022) (on file with the NJLRC).

⁵⁴ *Id.*

⁵⁵ *Samolyk*, 251 N.J. at 82.

⁵⁶ *See* source cited *supra* note 53.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Compare* A.B. 199, 2022 Leg., 220th Sess. (N.J. 2022) (requiring exempting law enforcement officers and certain other emergency personnel from liability for breaking into motor vehicle to rescue animal under certain circumstances); A.B. 737, 2022 Leg., 220th Sess. (N.J. 2022) (providing immunity from civil liability for persons performing animal rescue); and A.B. 2821, 2022 Leg., 220th Sess. (N.J. 2022) (providing immunity from civil and criminal liability for rescue of animal from motor vehicle under inhumane conditions).