*To be argued by:*
Mark Schneider
*Time Requested: 30 Minutes*

**NEW YORK STATE**
**COURT OF APPEALS**

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**MARSHA HEWITT,**

**Plaintiff-Appellant,**

**v.**

**PALMER VETERINARY CLINIC, PC,**

**Defendant-Respondent.**

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**APL-2019-00050**
**Clinton County Clerk's Index No. 2014-1311**

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# BRIEF FOR PLAINTIFF-APPELLANT

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## Rule 500.13 Notice

There is no related litigation as of the date this Brief was submitted.

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## PRILIMINARY STATEMENT

The Third Department held that Mrs. Hewitt does not have an action against Palmer Veterinary Clinic, PC in negligence because the veterinarian did not know that the pitbull that attacked her in its waiting room had vicious propensities. That Decision is contradicted by the decisions of this Court in Strunk v. Zoltanski, and Bernstein v. Penny Whistle Toy, Inc. Those cases provide that a property owner, who does not own the dog that injures another person, can be liable for their own negligence that causes the dog to injure a plaintiff.

The Third Department erred by extending the Collier/Bard rule even though the owner of veterinary clinic did not own the dog that injured Mrs. Hewitt in its waiting room. It was the clear negligence of Palmer Veterinary Clinic that caused the dog attack. Plaintiff Marsha Hewitt is asking this Court to reverse the Decision of the Third Department as a matter of law and of sound public policy. This Court should follow the well-reasoned dissent of Justice Egan and rule that such an individual or corporate entity can be liable for their own negligence for failing to maintain a safe premises.

## JURISDICTION

This Court has jurisdiction under CPLR 5602 because it granted Mrs. Hewitt's Motion for Permission to Appeal (A: 1). Mrs. Hewitt argued below that Palmer Veterinary Clinic, PC was liable to her for causing a pitbull to attack and

injure her in its waiting room. (Third Department Decision, A: 4-7). The Appellate Division's order disposed of all issues in the proceedings within the meaning of CPLR 5611.

## QUESTIONS PRESENTED

I. Under New York law, is a veterinarian liable for an injury caused by a dog in their waiting room because of their own negligence?

II. Does good public policy dictate that a veterinarian should be liable for injuries caused by their own negligence.

III. Did the courts below err in not granting partial summary judgment to Mrs. Hewitt on the question of liability?

IV. Does an injury caused by a dog to a person in a veterinary waiting room sound in negligence or veterinary malpractice?

V. Can a veterinarian raise an affirmative defense of apportionment under Article 16 of the CPLR for its own negligence in failing to provide a safe waiting room?

## STATEMENT OF THE CASE

### *PROCEDURAL HISTORY*

On April 16, 2014, a pitbull dog owned by another patron, attacked Plaintiff-Appellant Marsha Hewitt ("Mrs. Hewitt") while she was in the waiting room of Defendant Palmer Veterinary Clinic, PC ("Palmer VC")(Complaint, Record "R":

196, Appendix "A": 30). Her Complaint [1] contained claims against Palmer VC for negligence and premises liability. It did not contain a strict liability claim against Palmer VC. Palmer VC categorically denied the allegations and filed an affirmative defense for contribution by other persons liable for Plaintiff's injuries, pursuant to CPLR Article 16 (Answer, A: 35).

Mrs. Hewitt moved to strike the affirmative defense of apportionment under CPLR Article 16 and for permission to amend the Complaint. On September 25, 2017, the trial court denied these motions and partially granted Palmer VC's cross-motion to strike the Supplemental Bill of Particulars and held:

> "In that medical malpractice is simply a form of negligence, no rigid analytical line separates the two.... Conduct may be deemed malpractice, rather than negligence, when it `constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' "(Scott v. Uljanov, 74 N.Y.2d 673, 674-675 1989], citing Bleiler v. Bodnar, 65 N.Y.2d 65, 72 [1985]).
>
> Here, the Court finds that Plaintiff's specific additions to the Verified Bill of Particulars that "Palmer Veterinary Clinic was negligent in not giving an effective pain medication and/or anesthesia to the dog", and "Palmer Veterinary Clinic was negligent in not following the standard of care of dogs after surgery" are impermissible. These allegations, sounding in veterinary malpractice, expand the theory for recovery based on the medical care that Palmer VC rendered to the dog, for which there was no notice in the Complaint.

[1] Ann Hemingway, the owner of the dog, was originally named as a plaintiff. The parties dismissed her because of her bankruptcy discharge (R: 23, A: 45). Also, there is no evidence that Ms. Hemingway knew of any vicious propensities of her dog prior to the attack in the waiting room. Wherefore, there is no cause of action against Ms. Hemingway under strict liability. As the owner, she cannot be held liable for negligence.

(Decision, R: 12, A: 16). [2]

On September 18, 2017, Palmer VC filed its Motion for Summary Judgment (R: 301). Mrs. Hewitt opposed that Motion and file her Cross-Motion for Partial Summary Judgment on the issue of liability (R: 533, A: 60). On October 13, 2017, the trial court granted Palmer VC's Motion and dismissed Mrs. Hewitt's Complaint. The trial court held:

> Palmer VC, however, argues to the extent the Court of Appeals cases do not address the situation before this Court, the Fourth Department's holding in Hargro v. Ross, (134 A.D.3d 1461, 1462 [4th Dept. 2015]) is directly on point and is binding on this Court. . . .
>
> The Fourth Department's ruling in Hargro, which extends the limitation to recovery in strict liability to situations where the defendant is not the owner of dog, is both directly on point, and binding on the Court. . . . [3]

(R: 5.2, A: 9).

On October 20, 2017, Mrs. Hewitt filed her Notice of Appeal of the final Order of Dismissal (R: 2.1, A: 2). On December 6, 2018, the Third Department entered its Memorandum and Order in Hewitt v. Palmer Veterinary Clinic, P.C., 167 A.D.3d 1120, 1122 (3d Dept. 2018):

> Even though the Court of Appeals in Bernstein v Penny Whistle Toys, Inc. (10 N.Y.3d 787 . . . [2008], supra) did not explicitly speak on the issue presented here, in our view, it is nonetheless persuasive. Indeed,

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[2] The Complaint explicitly alleged: "The [veterinarian] noted that they did not give anesthesia to the dog" Complaint, ¶ 14 (R: 198, A: 31).

[3] It is interesting to note that the trial court stated that it was bound to follow Hargro. It did not say that it approved of that decision.

> since the Court of Appeals decided Bernstein, the other Appellate Divisions have cited it and likewise applied the strict liability rule in cases where the plaintiff seeks to recover from a defendant who maintained the premises where the injury occurred, but did not own the dog (see Easley v. Animal Med. Ctr., 161 A.D.3d 525, 525 . . . [1st Dept. 2018], lv. denied 32 N.Y.3d 908, . . . [2018]; Hargro v. Ross, 134 A.D.3d 1461, 1462 . . . [4th Dept. 2015]; Christian v. Petco Animal Supplies Stores, Inc., 54 A.D.3d 707, 708 . . . [2d Dept. 2008]). Accordingly, we hold that for defendant to be liable for the personal injuries allegedly sustained due to the dog attack that occurred in the waiting room, plaintiff must establish that defendant knew or should have known about the dog's vicious propensities.

(A: 5). The Third Department denied Mrs. Hewitt's Cross-Motion for Summary Judgment and also upheld the decision of the trial court striking her supplemental bill of particulars alleging that Palmer Veterinary Clinic was negligent by not giving the dog effective pain medication and by not following the standard of care of dogs following surgery. [4] It also denied Mrs. Hewitt Cross-Motion to strike Palmer VC's affirmative defense of contribution under CPLR Article 16.

Justice Egan dissented in part from this Order:

> … I respectfully dissent from that portion of the majority's decision that affirms Supreme Court's grant of summary judgment to defendant Palmer Veterinary Clinic, PC (hereinafter defendant). Although it is indeed the law in New York "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held [strictly] liable for the harm the animal causes as a result of those propensities". . . defendant in this case is

[4] Actually, the trial court struck those claims because it found that they "sound in veterinary malpractice, expand the theory for recovery based on the medical care that Palmer VC rendered to the dog, for which there was no notice in the Complaint" (Decision and Order, September 25, 2017, R: 12, A: 22).

not the subject animal's owner.

The rationale behind the "vicious propensity rule" is that an animal owner is in a unique position, from day-to-day familiarity, to observe his or her animal's personality and demeanor and act accordingly based on that knowledge. Thus, the animal owner who is surprised for the first time by his or her animal's injurious behavior is not civilly liable. However, the owner who, because of past observation, is not surprised by his or her animal's injurious behavior is held strictly liable. It seems to me that, given the rationale underpinning this rule, it does not fit the situation where, as here, the defendant is not the animal's owner, but only the owner of the property on which the animal's injurious behavior occurred and, therefore, typically has no knowledge, one way or the other, of the animal's propensities. In such a case, it is my opinion that general principles of negligence and premises liability should apply (see generally Basso v. Miller, 40 N.Y.2d 233, 241 . . . [1976]; see also Moorehead v. Alexander, 28 A.D.3d 361, 361-362 . . . [2006] [evidence that the defendant permitted a guest's animal to remain on his property after it demonstrated certain aggressive behavior raised an issue of fact as to whether the defendant was negligent in maintaining his property in a reasonably safe condition]; cf. Hastings v. Sauve, 21 N.Y.3d 122, 125-126, . . . [2013]; Carey v. Schwab, 122 A.D.3d 1142, 1144-1145 . . . [2014], lv. dismissed 25 N.Y.3d 1062 . . . [2015]; Williams v. City of New York, 306 A.D.2d 203, 205-206 . . . [2003]; Colarusso v. Dunne, 286 A.D.2d 37, 39-41 . . . [2001]; Schwartz v. Armand Erpf Estate, 255 A.D.2d 35, 38-40 [1999], lv. dismissed 94 N.Y.2d 796 . . . [1999]). [footnote 2]

> [footnote 2] The duty of a property owner to maintain his or her premises in a reasonably safe condition includes a duty to minimize foreseeable dangers on that property and extends to the obligation to supervise the conduct of invited guests when the property owner has "the opportunity to control such persons and [is] reasonably aware of the need for such control" . . .

While I am cognizant that the First, Second and Fourth Departments have extended the vicious propensity rule in certain situations to third-party property owners, despite the property owners not having any ownership of the animal (see Easley v. Animal Med. Ctr., 161 A.D.3d 525, 525 . . . [2018], lv. denied 32 N.Y.3d 906 . . . [2018]; Hargro v. Ross, 134 A.D.3d 1461, 1462 . . . [2015]; Christian v. Petco Animal

> Supplies Stores, Inc., 54 A.D.3d 707, 708 . . . [2008]), this Court is not bound by those decisions (see Matter of County of St. Lawrence v. Daines, 81 A.D.3d 212, 219 . . . [2011], lv. denied 17 N.Y.3d 703, . . . [2011]), and I would decline to extend the vicious propensity rule in such a manner. Similarly, I do not believe that the First Department's case in Bernstein v. Penny Whistle Toys, Inc. (40 A.D.3d 224, 224 . . . [2007], affd 10 N.Y.3d 787 . . . [2008]) is dispositive of this matter, as it is plainly distinguishable from the facts of the present case; unlike here, the defendant in Bernstein was both the owner of the animal who caused the injury as well as the owner of the toy store where the incident occurred and, in rendering its decision, the First Department did not differentiate between the defendant's liability as the animal's owner versus its liability as the owner of the store. Accordingly, under the present circumstances, I would deny defendant's motion for summary judgment dismissing the complaint and set the matter down for a trial as to whether, under the circumstances, defendant maintained its premises in a reasonably safe condition and/or adequately exercised control over the subject animal.

Hewitt v. Palmer Veterinary Clinic, P.C., 167 A.D.3d 1120, 1123-1125 (3d Dept. 2018)(A: 3, 6-7, some citations omitted).

Mrs. Hewitt filed her timely Motion for Permission to Appeal with this Court on December 12, 2018. On March 26, 2019, this Court granted that Motion (A: 1). On March 28, 2019, she filed her Preliminary Appeal Statement. She is now perfecting that Appeal.

*FACTS*

It is uncontroverted that Vanilla, a pitbull dog owned by Ann Hemingway, attacked Plaintiff Marsha Hewitt in the waiting room of the Palmer Veterinary Clinic on April 16, 2014 (Insurance Notes, R: 157, A: 92). It is also uncontroverted

that Mrs. Hewitt was injured in this attack (Insurance Notes, R: 157, A: 92). She missed about a month of work from her job as an operating room assistant after the attack and eventually had to leave her job because of her arm, neck, and hand injuries (Hewitt Affidavit, ¶¶51 – 57, R: 139- 140, A: 90-91).

In her deposition testimony, veterinarian Dr. Sarah McCarter, employee of Palmer VC, read from her notes regarding her treatment of Vanilla, the dog that attacked Mrs. Hewitt:

> The presenting complaint was for a re-check. No better. The history that was verbally discussed with the owner was that *the patient* was doing better on the Vetprofen, which is the anti-inflammatory medication, but once finished, she starting [*sic*] limping again. The next piece says there is some granulation tissue that was present at the nail base, and then the procedure that was performed, splash blocked with Lidocaine at the nail base. Removed split nail piece, cleaned with Betadine and bandaged. She was again prescribed medication, she was given Cephalepsin, which is an antibiotic, with the directions for one capsule by mouth twice daily for seven days, and she was prescribed Vetprofen, again for seven days, half of a tablet by mouth, twice daily for the seven days. . . .
>
> After the appointment, while in the waiting room waiting to be discharged, *the patient* went after several people, did grab one woman by her hair and pulled her head back. . . .
>
> At 4:30 p.m., phone call with owner, discussed options, behavior, training, euthanasia.

(McCarter Depo. pp: 24-26, R: 380-382, A: 81-83, emphasis added).

Marsha Hewitt brought her cat to Palmer Veterinary Clinic on the morning of April 16, 2014 for a checkup. Her cat was in hard plastic cat carrier. She sat at a small horseshoe shaped bench across from Ann Hemingway. Dr. McCarter brought

the pitbull out from the exam room to the waiting room on a leash and gave the leash to Ann Hemingway. The dog was very agitated. It was going around in circles. It was very anxious, like it had been in pain (Hewitt Depo. 27-30, R: 71-74, A: 66-69). Dr. McCarter told Ann Hemingway that they had held the dog down and had *not* given anesthesia to it. She mentioned that a few people were holding the dog down while she was operating on the pad of the dog (Hewitt depo. 32, R: 76, A: 71). Mrs. Hewitt testified: "The dog was going around in circles and I believe she was panting. It was very anxious like it had been in pain. You know how dogs act when they're in pain? They just kind of walk around and pant and don't know whether to sit down or stand up or lick their paws. The dog was just all over the place" (R: 74, A: 69). "When the vet was looking at the dog as she was also speaking with Ann, you could just see by the way that the dog was acting that it was just not—it was an out of control dog. . ." (R: 77, A: 72). Palmer VC's attorney asked Mrs. Hewitt: "What do you mean by 'out of control"? She responded: "Because of the moving around and the tongue out and the behavior of the dog. It was just an aggressive-type dog and they had known the dog" (R: 77, A: 72). Dr. McCarter then went back into the office area (Hewitt Depo. 37, R: 81, A: 73).

The pitbull dog then slipped its leash and attacked Mrs. Hewitt (R: 83, A: 75). It jumped on her back and grabbed on to her ponytail, pulling her backward.

The dog ripped some hair out of her scalp (Hewitt Depo. pp. 41-47, R: 85-91, A: 77-79).

There was a woman with a two-week old baby in the waiting room when the dog started to attack Mrs. Hewitt (Hewitt Depo. 22, 36, 39, R: 66, 80, 83, A: 65, 72.1, 75). The mother started screaming "Oh, my baby," and "This dog better not hurt my baby" (Hewitt Depo. p. 39, R: 83, A: 75). Mrs. Hewitt heroically walked around the counter and grabbed the baby and took it and handed it to the secretaries on the other side of the desk (Hewitt Depo. p. 40, R: 84, A: 76).

Plaintiff's veterinary expert, Dr. Nicholas Dodman, opines that Palmer VC did not use due care in bringing the dog back into the waiting room after surgery (Dodman Affidavit, R: 164-166, A: 93-94; Dodman CV, R: 167, A: 96-124). He opines that Palmer VC did not use due care in failing to use anesthesia or the proper pain medication in operating on the dog's paw. He opines that the dog should not have been brought into the waiting room in an agitated state. He opines that the veterinarian should have tightened the dog's collar so that it could not get loose in the waiting room. He opines that it was dangerous to bring an agitated pitbull a few feet away from a cat in the waiting room. He opines that Palmer VC did not follow safe practices in bringing the dog back into the waiting room. He ultimately opines that Palmer VC failed to use due care to protect human and animal clients and patients from injury by the pitbull.

In opposing Mrs. Hewitt's Cross-Motion for Summary Judgment, Palmer VC only submitted the affidavit of Dr. George W. Palmer, majority owner of Palmer VC. Dr. Palmer swore as follows:

1. I received a B.S. Degree from Union College. I graduated from Cornell University; NYS College of Veterinary Medicine in 1979. I have been a Veterinarian for over 30 years.
2. I am a Veterinarian and majority owner of Palmer Veterinary Clinic, located at 6721 State Route 2, Plattsburgh, New York 12901.
3. On July 17, 2017 I was deposed in regards to this matter. I have reviewed the veterinary file of the dog at issue in this case, Vanilla. I have also spoken with Dr. Sarah McCarter who treated Vanilla on April 16, 2014, as well as other staff who were present.
4. Palmer Veterinary Clinic and its employee's treatment and discharge of Vanilla, including the use of the waiting room as configured on April 14, 2014 did not deviate front the accepted standards of veterinary practice. Further it was reasonable for Defendant to have a single common waiting room for their patrons.
5. It is also my opinion that Dr. McCarter's treatment and discharge of Vanilla on April 14, 2014 did not deviate from the accepted standard of care for veterinary medicine. Further nothing Palmer Veterinary Clinic did, or did not caused or contributed to plaintiff's alleged injuries.

(R: 559-560, A: 125-125).

## DISCUSSION

**I. This Court consistently and categorically holds that an *owner* of a dog cannot be held liable in negligence for injuries caused by that dog. However, the Court of Appeals has *never* held that a *veterinarian* cannot be held liable *for his or her own negligence* when a dog injures a human customer at his or her clinic. Based upon the law, this Court should not extend the harsh Collier/Bard rule to injuries caused by the negligence of veterinarians and their failure to provide a safe waiting area.**

It is uncontroverted that the Palmer Veterinary Clinic did not own the dog that attacked Mrs. Hewitt. Rather, the dog was on its premises for veterinary treatment. The trial court correctly cited New York law regarding the liability of *owners* of dogs that injure people:

> Over the past thirteen years, the Court of Appeals has taken up a series of cases establishing the rule that the *owner* of a dog may only be held legally responsible for injuries inflicted by such animal based upon a theory of strict liability and that a negligence claim does not lie (see Doerr v. Goldsmith, 25 N.Y.3d 1114 [2015]; Petrone v. Fernandez, 12 N.Y.3d 546 [2009]; Bard v. Jahnke, 6 N.Y.3d 592, 599 [2006]; Collier v. Zambito, 1 N.Y.3d 444, 446 [2004]). To recover in *strict liability* for a dog attack, a plaintiff must prove that the dog had vicious propensities and that the *owner* of the dog, knew or should have known, of such propensities (see Bard v. Jahnke, supra).

(R: 5.2; A: 9, emphasis added). The Court of Appeals' decisions cited by the trial court are all explicitly limited to claims for injuries against the *owners* of the dogs.[5] The Court of Appeals has never extended the harsh and anomalous

[5] See, "Should the 'Vicious Propensities' Rule Allow a Property Owner to Escape Liability for Injuries Caused by a Domestic Animal Owned by a Third Party?" Hon. George M. Heymann and Matthew Kaiser, Esq., N.Y.L.J., May 9, 2019, p. 4.

rule [6] to veterinarians or other owners of property where a third person's dog injures the plaintiff.

The trial court acknowledged that these Court of Appeals cases all solely concerned the liability of the *owner* of the dog. In Collier, the attack occurred in the home of the dog's owner. This Court emphasized that there is only strict liability if the *owner* of the dog knew or should have known of the animal's vicious propensities. There was no mention of negligence in the decision.

In upholding the trial court's decision that Mrs. Hewitt has no claim under negligence or premises liability against the owner of the property who did not own the dog that injured her, the Third Department in this case erroneously relied upon Bernstein v. Penny Whistle Toys, Inc., 40 A.D.3d 224 (1st Dept. 2007), affirmed,

[6] In Bard v. Jahnke, supra, the Court of Appeals barely upheld the controversial Collier rule in a 4 to 3 decision. The dissent by Justice Robert S. Smith stated: "Under the Restatement (Second) of Torts, the owner of a domestic animal who does not know or have reason to know that the animal is more dangerous than others of its class may still be liable for negligently failing to prevent the animal from inflicting an injury. This Court today becomes the first state court of last resort to reject the Restatement rule. I think that is a mistake. It leaves New York with an archaic, rigid rule, contrary to fairness and common sense, that will probably be eroded by *ad hoc* exceptions." See also, Ciaccio v. Mamaroneck Veterinary Hospital, P.C., 2019 Misc.LEXIS 1254, *7, 2019 N.Y.Slip.Op. 30735(U)(S.Ct. Westchester Co. 2019)(In a dog bite claim against a veterinarian, the judge denied the vet's summary judgment motion because there was no evidence that the veterinarian did *not* know of the animal's vicious propensities. The judge stated: "Finally, this court joins the chorus line of other jurists (most notably Court of Appeals Judges R.S. Smith, Rosenblatt, and G.B. Smith) in voicing frustration and displeasure at the fundamental unfairness of *ignoring blatant negligence*, which is overwhelming in this case (see Bard v. Jahnke, 6 N.Y.3d 592 . . . In any event, this case bears more in common with the exception in Hastings v. Suave than the rule in Bard v Jahnke;" emphasis added).

10 N.Y.3d 787 (2008). In that case, the eight-year old plaintiff was taken to a toy store by a friend's mother, Carol Axel Weiner. The *owner* of the toy store, Juan Mendez, had his dog there. The dog bit the little girl. She sued Mr. Mendez, the owner of the dog (who owned the store), [7] for premises liability and the friend's mother for negligence (for allowing the child to pet the dog). In a three to two decision, the First Department dismissed the claims against Mr. Mendez and Penny Whistle Toys, Inc. because there was no evidence that animal had exhibited vicious propensities prior to this incident:

> The dissent would circumvent the clear meaning of the Court of Appeals' rulings by constructing a theory grounded in premises liability, the practical impact of which is to profoundly increase the exposure faced by individuals who *own* a domestic animal where that animal has shown no propensity for being vicious. The reality is that a significant number of these types of cases, including Collier and Bard, involve situations where domestic animals injured individuals *on premises either owned or operated by the person who also owns the animal.* In our view, such an expansion is impermissible in light of the clear and unequivocal language contained within both Collier and Bard.

Bernstein, 40 A.D.3d 224, 224 (1st Dept. 2007)(emphasis added). This decision did not in any way expand the limitation against negligence actions to owners of

[7] Neither the First Department nor the Court of Appeals noted that the toy store was actually owned by a corporation, Penny Whistle Toys, Inc., not by the dog owner, Mr. Mendez. This fact did not enter into the courts' conclusions that the owner of the dog (who also owned the toy store) and the corporate owner of the store were not liable in strict liability because they had no prior knowledge of the dog's vicious propensities. Strict application of corporate law should dictate that Penny Whistle Toys, Inc., a separate entity from Juan Mendez, would be liable unless the corporation owned the dog.

property who also did not also own the dog in question. Rather, it was explicitly limited to owners of dogs who also owned the property where the attack occurred.

The Court of Appeals affirmed the decision of the First Department. This Court unanimously and unambiguously held:

> We held in Collier v. Zambito (1 N.Y.3d 444, 447 . . . [2004]) that a plaintiff bitten by a dog could not recover because he was unable to show that the dog's *owner* knew or should have known of the dog's "vicious propensities." In Bard v. Jahnke (6 N.Y.3d 592, 599 . . . [2006]), we held that "when harm is caused by a domestic animal, its *owner's* liability is determined solely by application of the rule articulated in Collier."
>
> Since there is no evidence in this case that the *dog's owner* had any knowledge of its vicious propensities, the Appellate Division was correct in affirming the dismissal of the complaint against defendants. Plaintiff's claims against *third-party defendant* were also properly dismissed, *because there is no evidence that third-party defendant was negligent.*

Bernstein, 10 N.Y.3d 787, 788 (2008)(emphasis added). This Court did not in any way limit the liability of property owners (or other third parties) for negligence in this holding. This Court dismissed plaintiff's claims against the third-party defendant (Carol Axel Weiner, the mother of the victim's friend) because "*there is no evidence that third-party defendant was negligent*." Id., at 788. This *dicta* strongly suggests that, with sufficient evidence, there can be a negligence claim against a third-party defendant (e.g., not the owner of the dog) involved in dog bite case.

In his well-supported dissent in the instant Appeal, Justice Egan correctly noted that the present case is plainly distinguishable from Bernstein v. Penny Whistle Toys, Inc. He noted that the general principles of negligence and premises liability should apply. He cited to several cases where the owner of property was liable for negligence for injuries caused by another person's dog: Moorehead v. Alexander, 28 A.D.3d 361, 361-362 (1st Dept. 2006); [8] Williams v. City of New York, 306 A.D.2 203, 205-206 (1st Dept. 2003); and Schwartz v. Erpf Estate, 255 A.D.2d 35, 38-40 (1st Dept. 1999), lv. dismissed 94 N.Y.2d 796 (1999).

In Strunk v. Zoltanski, 62 N.Y.2d 572 (1984), this Court suggests that a landowner is not absolved from its nondelegable duty of care just because the plaintiff was injured by a domestic animal. In that case, the landowner-landlord "created" a dangerous condition on the property by renting out the unit to a tenant who owned a dog who had "bark[ed] very loudly, jumping up and down, growling and acting ferocious." Id. at 574. In other words, it was the act of renting out the unit to the tenant with the dangerous dog that formed the basis for liability--creating the dangerous condition on the property--not the vicious propensities of the dog. See id. at 575 ("The aspect peculiar to the present case is the circumstance that here the jury might find, although she herself denies it, that at the time she leased the premises to Carl Kenyon, Mrs. Zoltanski knew that her prospective

[8] Moorehead was decided two years after Collier and a few weeks before Bard.

tenant had a vicious German Shepherd dog which he intended to keep on the leased premises. Notwithstanding this prior knowledge, at a time when she had complete control of the premises she leased them to the tenant, permitted him to keep the dog on the premises, and, so far as appears on this motion, took no measures by pertinent provisions in the lease or otherwise to protect third persons who might be on the premises from being attacked by the dog."); id. at 576 (landowner "as others must exercise reasonable care not to expose third persons to an unreasonable risk of harm"); id. at 577 ("imposition . . . of a duty. . . to take reasonable precautions for the protection of third persons…"); id. ("*Liability* . . . *will depend on whether at trial the jury finds . . . that . . . she took reasonable care in her arrangements . . . to protect third persons from injury*." emphasis added).

Strunk stands for the proposition that a landowner who creates a dangerous condition on the property (even where that dangerous condition entails a domestic animal under the Ag & Markets Law), that landowner can be held liable under a negligence theory, but not under a strict liability theory:

> We do not intend to suggest that the landlord would be subject to the same strict liability to which a tenant as harborer of the dog would be subject, but landlords as others must exercise reasonable care not to expose third parties to an unreasonable risk of harm.

Strunk, at 576-577. In other words, *the landlord is liable to a victim of a dog bite in negligence* only. To be negligent, the landlord must *first* have knowledge of the

dog's vicious propensities. A plaintiff still has to prove negligence after meeting this threshold test.

In the instant case, analogously, the Palmer VC treating veterinarian, Dr. McCarter, brought the pitbull into the waiting area immediately after surgery without anesthesia, exposing third persons to it. Palmer VC knew that the pitbull was in pain, was agitated, was pacing threateningly when Dr. McCarter brought the dog next to Mrs. Hewitt and her cat. Palmer VC knew that dogs have a tendency to attack cats. Palmer VC knew that dogs can slip out of loose collar. These actions by Dr. McCarter violated Palmer VC's duty to use reasonable care to protect Mrs. Hewitt (and others in the waiting room, including the small baby) from harm. It violated its duty to provide a safe waiting room.

There is no good argument why the duty of reasonable care imposed in Strunk should be confined to landlords, and not to other property owners. That is an arbitrary distinction; a landlord is a landowner.

The standard for premises liability was articulated by the Court of Appeals in Basso v. Miller, 40 N.Y.2d 233, 241(1976):

> A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.

The existence and scope of this duty is, in the first instance, a legal question for the courts to determine by analyzing the relationship of the parties, whether the

plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks . . . "(t)he risk reasonably to be perceived defines the duty to be obeyed". Powers v. 31 E. 31, LLC, 24 N.Y. 84, 94 (2014). In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff. *A critical consideration in determining whether a duty exists is whether "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.*" Davis v. South Nassau Community Hospitals, 26 N.Y.3d 563, 572 (2015)(emphasis added). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she *did not create the defective condition*. Franks v. G H Real Estate Holding Corp., 16 A.D.3d 619 (2d Dept. 2005); Mokszki v. Pratt, 13 A.D.3d 709, 711 (3d Dept. 2004).

In a pre-Collier decision, DeCurtis-Slifkin v. Kolbert, 248 A.D.2d 428 (2d Dept. 1998), the plaintiff's dog was neutered by the defendant veterinarian. Later that evening, the dog bit the owner, injuring her face. The plaintiff alleged that the defendant was negligent for discharging dog while still affected by the anesthesia administered during the surgery. The court dismissed the claim because the veterinarian submitted an affidavit from an expert that the treatment of the dog was consistent with accepted veterinary practice and that the effects of the anesthesia

would have sufficiently dissipated to permit safe discharge of the dog to the owners. The plaintiff's conclusory allegation of malpractice was unsupported by competent evidence. The Second Department did not hold that there was not a cause of action against the veterinarian. Rather, there simply was not sufficient evidence to support a negligence claim.

In Lieberman v. Powers, 873 N.E.2d 803 (Mass. App. 2007), a child was attacked by a cat in a "cat lounge" at an animal shelter. This was a small room where people could interact with cats before adopting them. The Appeals Court of Massachusetts held:

> The common-law rule, which generally applies to pet owners, is inapplicable to this case, however, as the plaintiff here does not allege that the cat was inherently vicious, *but rather that the conditions created by the defendants' negligently designed and operated cat lounge caused an otherwise docile animal to behave viciously*.
>
> Thus, the question to be decided is whether a finder of fact could reasonably conclude that, "in view of all the circumstances, an ordinarily prudent person in the defendant's position would have taken steps, not taken [here] by the defendant[s], to prevent the accident that occurred."

The plaintiff's veterinary expert stated:

> . . . Noah's injury was caused by an aggressive cat that "was held in a room that was too small and that had other significant inadequacies, including the lack of direct supervision by trained staff." His affidavit further states that, in his experience, the cat lounge was overcrowded and too small, and the cats were not adequately screened.

> Accordingly, Dr. Dodman [9] explains: "These factors created a situation where an attack such as the one on Noah Lieberman was foreseeable, particularly so because the defendants did not provide adequate supervision in the lounge which they filled with minimally assessed cats."

Lieberman, at 807 (emphasis added).

In the instant case, Mrs. Hewitt has claims against Palmer VC for negligence and premises liability. Palmer VC had a duty to have a safe waiting room for its human (and animal) customers. Palmer VC caused the dangerous condition by not correctly anesthetizing the dog, by not checking his collar, and by bringing the agitated animal back into the waiting room where Mrs. Hewitt was sitting with her cat. No one else had the ability to protect Mrs. Hewitt from this attack. [10] Palmer VC had the ability to prevent this situation if it took some very simple and basic precautions. As a veterinarian, it knew that animals in pain after surgery might act unpredictably and aggressively. Palmer VC had a duty to Mrs. Hewitt and failed to act reasonably in bringing the agitated dog directly back into the waiting very close to her and her cat. Wherefore, it is liable to her for its negligence and failure to provide a safe premises.

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[9] Dr. Dodman is Mrs. Hewitt's veterinary and dog behavior expert in the instant case. He is one of the pre-eminent dog behaviorists in the United States. His resume is in the Record (R: 167 – 194, A: 96-124).

[10] There is *no* evidence that Ann Hemingway, the owner of the dog, had *any* knowledge that it had vicious propensities.

Marsha Hewitt's veterinary expert, Dr. Dodman, opines that Palmer VC did not use due care in treating the dog that attacked her. It also did not use due care in failing to tighten the dog's collar after surgery and in bringing the agitated dog to the waiting room (and leaving it next to Mrs. Hewitt and her cat). He opined that the attack was clearly foreseeable and avoidable and was caused by the actions of Palmer VC. These facts and opinions support Plaintiff's *prima facie* claims under negligence and premises liability.

The Bernstein decision strongly implied that a third-party can be sued for their own negligence that causes a dog attack. The cases cited by Justice Egan above also support a claim against a veterinarian (or other property owner) for their own negligence. The Strunk decision holds that a land owner is liable under negligence for an injury caused by another person's dog if the landowner did not use due care. This Court should hold that a veterinarian (or other owner of property where a dog bite occurs) can be sued for their own negligence and for premises liability in causing an injury to a customer. There is nothing in any of the Court of Appeals cases that indicates an intention to immunize veterinarians (or other property owners) from their own negligence involving someone else's dog.

Mrs. Hewitt does not make a claim against Defendant Palmer Veterinary Clinic for strict liability. She does not have to show that Palmer VC had notice of the dog's vicious propensities. Consistent with New York black letter law, this

Court should not extend the harsh and anomalous rule from Collier and Bard, supra and their progeny to owners of property who do not own dog. Rather, it should follow the *dicta* in Bernstein and the holding in Strunk and determine that there can be a claim for negligence against an owner of a premises who does not also own the dog. This Court should reverse the dismissal of Mrs. Hewitt's negligence claims and remand for trial.

## II. It is against good public policy to exempt veterinarians from liability for their own negligence.

In Sprinzen v. Nomberg, 46 N.Y.2d 623, 628 (1979)(emphasis added), the Court of Appeals discussed the importance of public policy considerations in determining legal issues:

> *Controversies involving questions of public policy can rarely, if ever, be resolved by the blind application of sedentary legal principles.* The very nature of the concept of public policy itself militates against any attempt to define its ingredients in a manner which would allow one to become complacent in the thought that those precepts which society so steadfastly embraces today will continue to serve as the foundation upon which society will function tomorrow. Public policy, like society, is continually evolving and those entrusted with its implementation must respond to its everchanging demands.

In its Amicus Curiae Brief to the Third Department (Amicus Brief), [11] the New York State Trial Lawyers review the many public policy arguments for allowing

[11] On file with the Clerk of this Court.

negligence and premises liability against veterinarians. Among these arguments are:

1) There is a strong public policy consideration to compensate innocent parties, shifting the loss to responsible parties, and to deter wrongful behavior. Amicus Brief, p. 7;
2) There is a strong public policy consideration to encourage veterinarians to exercise reasonable care over animals in their care. Amicus Brief, p. 7;
3) There is no public policy argument for shielding a veterinarian arising from her own negligence. Generally, they have a duty to use reasonable care in providing a safe waiting room for their human and animal customers, whether or not they have notice of vicious propensities of a particular animal. Amicus Brief, pp. 7 – 8;
4) There are certain foreseeable risks that are easily prevented with due care. Veterinarians are well-aware of the risks presented by an animal coming out of surgery, the risks of having dogs in close proximity to cats, and the risks of a riled-up dog slipping its lease. Amicus Brief, p. 8;
5) A person in a veterinarian waiting room should be reasonably safe from attacks from other dogs, whether or not the veterinarian had prior notice of the animal's vicious propensities. Amicus Brief, p. 8;

6) Veterinarians owe a duty to exercise reasonable care for the safety of other humans around the premises, particularly if a human client is bitten or scratched in the waiting room. Amicus Brief, p. 8;

7) Limiting the veterinarian's liability to strict liability – which only attaches if the veterinarian had prior experience with the dog, and the dog happens to display aggressive tendencies on that prior occasion - is contrary to simple fairness. Amicus Brief, p. 10;

8) Applying the dog owner cases to veterinarians, would be giving them a free pass to avoid liability for their own negligence. Amicus Brief, p. 11;

9) While a dog owner is in the company of the dog on a daily basis, a veterinarian is not, and the veterinarian should not be protected from liability merely as a result of this unfamiliarity. Amicus Brief, p. 11; and

10) Courts should take a more balanced approach by permitting negligence claims against property owners, based upon their own negligence, even if the instrument happens to be a dog, in accordance with the principles generally set forth in the Restatement of Torts (Second) § 518. Amicus Brief, p. 12.

See also, "Should the 'Vicious Propensities' Rule Allow a Property Owner to Escape Liability for Injuries Caused by a Domestic Animal Owned by a Third Party?" supra (for a good review of public policy considerations against exempting

veterinarians and other property owners from liability for negligence that causes a dog attack).

Based upon the facts of this case, Mrs. Hewitt is not asking this Court to *necessarily* allow negligence claims against *all* owners of premises (who do not own the vicious dog). It is just asking to permit actions against a veterinarian if s/he is negligent because of the inherent risks presented in its waiting room.

New York endorses a public policy encouraging ownership pets and domestic animals. There is no public policy encouraging veterinarians not to use reasonable care to protect their human customers from the dogs that they are treating. Because of these public policy concerns, this Court should not exempt veterinarians for liability for their own negligence that causes an injury to their human customers.

## III. This Court should grant Mrs. Hewitt's Cross-Motion for Partial Summary Judgment because there is *not* substantial evidence that Palmer VC was *not* negligent or did maintain its property in a safe condition.

Mrs. Hewitt supports her claims for negligence and premises liability with the Affidavit of expert Dr. Nicholas Dodman (R: 164-166, A: 93-95). Dr. Dodman stated:

> I have the following comments to make having been informed of details of the incident, reading the affidavit of Marsha Hewitt, and reading the veterinary case notes:

1. Ms. Hewitt was in the waiting room with her cat, which was in a plastic carrier, waiting for her appointment with the veterinarian.
2. The owner of the pitbull, Ms. Hemmingway, was seated nearby waiting for her dog to be brought out of an examination/treatment room.
3. When the veterinarian brought the dog out from the examination room, it was clearly agitated and disturbed, having been forcibly restrained to undergo a painful procedure to remove a [sliver] of fractured toenail under "splash blocked" * local anesthetic.
4. The veterinarian gave the leash and dog back to the owner and exited the waiting room area. The vet did not escort this agitated dog and its owner outside of the clinic.
5. The dog was reportedly "very aggressive" during the surgical procedure according to the veterinarian's verbal report to Ms. Hemmingway (as reported by Ms. Hewitt in her testimony).
6. The dog had a history of being "vicious" according to the practice manager, Mr. Walker. [12]
7. The veterinarian left this dog in the waiting room under the control of the owner, near where Ms. Hewitt and her cat were seated.
8. The dog slipped its collar and lunged at Ms. Hewitt. Ms. Hemmingway could not physically control the unleashed dog, though she tried. The office staff observed but did nothing.
9. The dog then saw the cat and Ms. Hewitt realized the cat was in danger so turned to hand the cat in its carrier across the front desk to safety.
10. The dog jumped up, putting both paws on Ms. Hewitt's back and grabbed her ponytail in its jaws. This caused her head to whiplash backward and her to nearly fall over.
11. Some of her hair was pulled out and her scalp was bleeding.
12. Another client in the waiting room with her new baby felt endangered too and yelled out.
13. Four people tried to get the pitbull off Ms. Hewitt and eventually succeeded – but not before severe damage was done.
14. Ms. Hewitt was incapacitated by whiplash injury to her neck and was forced to retire early because of the injuries she sustained.

Conclusions:

1. This incident was clearly foreseeable and avoidable.

[12] In his deposition testimony, Mr. Walker denied this allegation made by Mrs. Hewitt.

2. This dog would have benefitted from sedation, analgesia (e.g. with Hydrocodone), or even general anesthesia (with a short acting anesthetic like Propofol). The splash block was at best minimally effective technique and the physical restraint subsequently required likely caused the dog to become highly aroused and behaviorally volatile.
3. The dog should never have been allowed to remain in the waiting room in its agitated state. Instead it should have been given time to calm down and then be discharged directly to a waiting vehicle preferably through a side or back door (not the waiting room with other clients and their animals in it).
4. The dog's collar should have been snugged down so that it could not break out of control. Aggression or escape through open doors is possible if collars are fitted so loosely as to allow dogs to back out of them.
5. Pitbulls can be aggressive to people, though on average they are no more likely to be aggressive to people than other breeds. However, when they are aggressive to people, as this one clearly was (through history and the current experience), they tend to bite and hang on (as this one did).
6. Pitbulls are more likely to be aggressive to other dogs than other breeds.
7. Pitbulls have high prey drive and are likely go after other small animals, including cats.
8. It is dangerous to have an agitated pitbull a few feet from a cat in a waiting room.
9. It is best practice to have a separate cat and dog waiting room as many dogs, not just pitbulls, are aggressive to cats. https://icatcare.org/catfriendlyclinic/vets/waiting-room
10. It is unwise and unsafe to bring an agitated or aggressive dog into a waiting room where other clients and their animals are waiting.
11. Palmer Veterinary Clinic and its employees did not follow safe practices in bringing the dog in question back to the waiting room in an agitated state after painful or stressful treatment.
12. Palmer Veterinary Clinic failed to use due care to protect its human and animal clients and patients from injury by the pitbull.

* A splash block refers to direct application of a local anesthetic to the site of interest, most commonly the body wall upon closure of the abdomen, the peritoneum intraoperatively, or the

> ovarian ligaments during an ovariohysterectomy. It is not a good technique for providing analgesia of the skin/nail bed, as lidocaine, the local anesthetic normally employed, does not pass through the skin to any extent. It the pitbull in question had a part of a broken nail removed under "splash block" analgesia it likely felt considerable pain and acted out accordingly. This concurs with what Ms. Hewitt reports she heard the veterinarian say, that a) the procedure performed on the dog was a painful, b) the dog had to be forcibly restrained, and c) the dog was extremely agitated afterwards.
>
> REFERENCE: Guidelines for keeping pets and people safe in the waiting room are provided in this article published in PETMD. http://www.petmd.com/blogs/dailyvet/2009/June/11-4244
> Note: amongst other things, it says "[the veterinary waiting room] is a strange environment in which pets don't always act the way you expect them to. Moreover, in a veterinary hospital the onus is on us to keep your dogs safe. Legally, we're liable if your dogs fight."

(A: 93-95).

Palmer VC does not deny or contest the essential facts contained in the Dodman Affidavit. The veterinary case notes written by Dr. McCarter indicated that she pulled out a broken toe nail from the dog's paw. The notes indicate that she did not use anesthesia or a pain medication. Rather, she just sprayed on a splash block (Dr. McCarter depo, p. 20, 24-26, R: 376, 380-382, A: 80- 83; Jessica Gagnon Depo, p. 12, R: 414, A: 86). Dr. McCarter noted that she does not routinely adjust the collar of a dog before it leaves the exam room (McCarter Depo. 34, R: 390, A: 84). She admitted that it was possible that she was the person who brought the dog back into the waiting room (McCarter Depo. 37, R: 393, A: 85). Plaintiff Marsha Hewitt swears that it was the veterinarian, Dr. McCarter, who

brought the dog back into the waiting room (Hewitt Affidavit, p. 8, R: 136, A: 87). It is uncontroverted that Mrs. Hewitt and her cat (in a cat box) were seated close by Ms. Hemingway when dog was brought back to the waiting area. It is uncontroverted that the dog then slipped its leash, being held by the owner Ann Hemingway, and attacked and injured Mrs. Hewitt.

Dr. Dodman relied upon these facts in giving his opinions that Palmer VC did not follow safe practices in bringing the dog directly back into the waiting area, near a waiting customer and her cat. He also opined that it did not use due care to protect its human and animal clients from injury by the pitbull. This is sufficient to support a claim for negligence and premises liability.

On the other hand, the Palmer VC only offered the Affidavit of Dr. George Palmer, the majority owner of Defendant Palmer Veterinary Clinic, PC, in opposition. It is black letter law that the conclusory assertions by a defendant doctor that he did not deviate from accepted medical practices is not sufficient to support summary judgment. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). In Olinsky-Paul v. Jaffe, 105 A.D.3d 1181, 1183 (3d Dept. 2013), the court held that the expert physician's affidavit "must be detailed, specific, and factual in nature" and may not simply assert in conclusory fashion that a defendant complied with the standard of care without relating the contention to the particular facts at issue." It held:

> In the absence of any factual discussion of the delay, Feiner's general assertion that NDH "acted at all times in a prompt, timely, and reasonable manner" lacks specificity. Accordingly, NDH failed to establish its prima facie entitlement to summary judgment, and it is unnecessary to address the sufficiency of plaintiffs' opposing papers.

Id., at 1183.

In LaFountain v. Champlain Val. Physicians Hosp. Med. Ctr., 97 A.D.3d 1060, 1061 (3d Dept. 2012), the defendant anesthesiologist gave his own "expert" affidavit providing that he did not depart from accepted standards of medical practice. The Third Department held that this conclusory affidavit was not sufficient to support defendant's motion for summary judgment:

> While the affidavit of a defendant physician may, in a given circumstance, suffice to establish entitlement to summary judgment, such an affidavit must be "detailed, specific and factual in nature" (Toomey v. Adirondack Surgical Assoc., 280 A.D.2d 754, 755 . . . [2001]; accord Amodio v. Wolpert, 52 A.D.3d 1078, 1079, . . . [2008]; Suib v. Keller, 6 A.D.3d 805, 806 . . . [2004]). Further, "affidavits which [do] no more than simply state, in conclusory fashion, that [the physician has] acted in conformity with the appropriate standard of care . . . [or] bare conclusory assertions . . . that [the physician] did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle [the movant] to summary judgment" (Machac v. Anderson, 261 A.D.2d 811, 812-813 . . . [1999] [internal quotation marks and citations omitted]; see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 325-326 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 . . . [1985]).

In Assenza v. Horowitz, 26 Misc. 3d 356 (Sup.Ct. Richmond Co. 2009)(some footnotes omitted), the court well-summarized the law of a physician

being his own expert. It denied the defendant's motion for summary judgment, holding:

> This court concedes to precedent suggesting a physician defendant may offer a self-serving affidavit as an expert opinion *in lieu* of the opinion of a disinterested nonparty expert.
>
> Here, Dr. Horowitz's self-serving affidavit is set against plaintiffs' expert opinion offered as being impartial. Ideally, an impartial expert opinion should be countered by an opposing disinterested expert opinion. Expert opinions should assist the court and its factfinders, and not be mere partisan exhortations. The Court of Appeals has held that in medical malpractice, "expert testimony of a medical nature will be required to assist the jury in understanding." nt. 29 The Appellate Division, Second Department requires opposing expert opinions in suits founded upon medical malpractice, nt. 30 and accepted a defendant doctor's affidavit, accompanied by an independent expert's opinion. nt. 31 Other courts have followed this precedent, nt. 32 but Dr. Horowitz presents only his own affidavit, nt. 33 without additional supporting impartial expert testimony.
>
> Impartiality should be the touchstone of an expert opinion. To assume that an expert witness would be partial would do "gross injustice" to the expert and the expert's integrity. nt. 34 A court may appoint an impartial expert to assist its determinations. nt. 35 At least one court has disregarded expert advice when it appeared to be biased. nt. 36 Despite a line of cases that accept self-serving "expert" opinions, the Appellate Division, Third Department has also extolled the impartial expert. "The opinions of the impartial specialist . . . provide substantial evidence to support [a] decision." [nt. 37 – Matter of Garrio v. Donovan, 290 A.D.2d 913, 914 (3d Dept. 2002); see also Matter of Mayers v. Kings County Hosp., 29 A.D.3d 1239, 1240 (3d Dept. 2006)]. The Appellate Division, Second Department affirmed the underlying principle when it said, "self-serving statements are insufficient to support the expert's opinion," [nt. 38- Leonard v. Kinney Sys., 199 A.D.2d 470, 476 (2d Dept. 1993)] and found that a close relationship between a party and the expert may prevent a fair and impartial hearing. nt. 39 In medical malpractice the moving party must present something other than "[c]onclusory, self-serving statements with no expert . . . evidence which would tend to establish,

> *prima facie*, that they did not depart from the requisite standard of care." [nt. 40- Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, 259 A.D. 2d 282, 284 (1st Dept. 1999)]. It has been long held that there is need for expert testimony in actions based on alleged medical malpractice unless the trier of fact may make a determination based solely on common knowledge. [nt. 41- Pike v. Honsinger, 155 N.Y. 201, 210-211 (1898); Tighe v. Ginsberg, 146 A.D.2d 268, 269-270 (4th Dept. 1989)].

In the instant case, Palmer VC has not disclosed any veterinary expert. Rather, it relied upon the perfunctory and conclusory Affidavit of Dr. Palmer, the majority owner of Defendant Palmer Veterinary Clinic, PC. This is "a day late and a dollar short." Dr. Palmer states:

1. I received a B.S. Degree from Union College. I graduated from Cornell University; NYS College of Veterinary Medicine in 1979. I have been a Veterinarian for over 30 years.
2. I am a Veterinarian and majority owner of Palmer Veterinary Clinic, located at 6721 State Route 2, Plattsburgh, New York 12901.
3. On July 17, 2017 I was deposed in regards to this matter. I have reviewed the veterinary file of the dog at issue in this case, Vanilla. I have also spoken with Dr. Sarah McCarter who treated Vanilla on April 16, 2014, as well as other staff who were present.
4. Palmer Veterinary Clinic and its employee's treatment and discharge of Vanilla, including the use of the waiting room as configured on April 14, 2014 did not deviate front the accepted standards of veterinary practice. Further it was reasonable for Defendant to have a single common waiting room for their patrons.
5. It is also my opinion that Dr. McCarter's treatment and discharge of Vanilla on April 14, 2014 did not deviate from the accepted standard of care for veterinary medicine. Further nothing Palmer Veterinary Clinic did, or did not caused or contributed to plaintiff's alleged injuries.

(R: 559-560, A: 125-126).

Palmer VC does not deny that it performed a procedure on the dog without using anesthesia. Palmer VC admits that it did not adjust the collar of the dog. Palmer VC does not deny that it brought the dog out into the waiting room after the procedure. Palmer VC does not deny that Mrs. Hewitt was sitting in the waiting room with her cat [in a box] when one of its employees brought the dog out to the owner who was sitting close to her and her cat. Palmer VC does not deny that the dog slipped its collar and attacked Mrs. Hewitt.

The self-serving, conclusory statement by Dr. Palmer is not sufficient to defeat Plaintiff's Motion for Partial Summary Judgment. Wherefore, based upon the uncontroverted facts, this Court should determine as a matter of law, that Defendant Palmer Veterinary Clinic was negligent in causing the injuries that Mrs. Palmer suffered in its waiting room on April 6, 2014. On remand, this action should then be tried by jury solely on the issue of damages.

## IV. The trial court erred in holding that Palmer VC's failure to use due care in treating the dog sounded in veterinary malpractice rather than negligence.

The trial court held that Mrs. Hewitt could not raise the failure of Palmer VC to use due care in performing surgery on the dog because she did not plead veterinary malpractice. The trial court cited Scott v. Uljanov, 74 N.Y.2d 673, 674-675 (1989) and Bleiler v. Bodnar, 65 N.Y.2d 65, 72 (1985) for the legal proposition that:

> Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.'

This is a correct, but incomplete, statement of the elements of malpractice. In both Scott and Blieler, the plaintiff was the human patient of the physician. It is black letter law that the plaintiff must be in a physician-patient relationship with the doctor being sued. Bell v. WSNCHS N., Inc., 153 A.D.3d 498, 499 (2d Dept. 2017); Giordano v. Scherz, 99 A.D.3d 968, 969 (2d Dept. 2012)(collecting cases); Miller v. Sullivan, 214 A.D.2d 822 (3d Dept. 1995). In Spatafora v. St. John's Episcopal Hosp., 209 A.D.2d 608, 609 (2d Dept. 1994), the court held that allegations sound in common law negligence when they are not premised on "incompetence . . . of a specialized medical nature, deriving from the physician-patient relationship. . . substantially related to medical diagnosis and treatment."

Appellant finds no New York cases where a non-patient (or their representative or spouse) can proceed in medical malpractice for injuries caused by the patient to the third party. See, Benisatto v. Sprain Brook Manor Nursing Home, LLC, 2016 N.Y.Misc.LEXIS 3889, 53 Misc. 3d 1209(A) (Sup.Ct. Westchester Co. 2016)(plaintiff states a cause of action for negligence, rather than medical malpractice, alleging that nursing home breached its duty to restrain another resident who attacked and injured the plaintiff).

There are numerous New York cases that discuss "veterinary malpractice." However, none of these cases actually set forth the elements of such a claim. The cases discussing veterinary malpractice all concern damage or injury to the animal being treated. The damages in these cases are limited to the value of the animal. The owner of the animal does not get damages for pain and suffering or other emotional distress. Plaintiff finds no New York cases where a person injured by an animal that had been treated by a veterinarian had to proceed on a veterinary malpractice theory rather than negligence or premises liability.

The trial court cited Kenny v. Lesser, 281 A.D.2d 853 (3d Dept. 2001) in support of its conclusion that Mrs. Hewitt was raising a claim of veterinary malpractice against Palmer VC because her expert, Dr. Dodman, opined that, in not correctly anesthetizing the dog, Palmer VC violated the duty of due care causing the attack in the waiting room. In Kenny, the veterinary malpractice claim was brought by the owners of the race horse that died during surgery. The damages were limited to the fair market value of the animal. [13]

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[13] Coincidentally, the plaintiff's expert veterinarian in Kenny was also Dr. Dodman. The Third Department stated:

> Defendants claim that the verdict must be reversed and the action dismissed because plaintiff failed to lay a proper foundation to establish that Dodman was familiar with the accepted standards of veterinary care for local veterinary practitioners such as Meddleton and Lesser.
>
> It was established during Dodman's testimony that he is a veterinarian, board certified in veterinary anesthesiology. He is also a professor at Tufts University School of Veterinary Medicine in Boston, Massachusetts. During his career--which spanned nearly 30 years as of the trial in this matter--he lectured all over

In "Valuation in Veterinary Malpractice," 35 Loy.U.Chi.L.J. 479, 501-502, Winter 2004, Rebecca J. Huss, it was noted:

> It is important to distinguish between claims of malpractice and negligence. If a veterinarian is acting in a manner outside of his or her professional capacity, a normal negligence standard will be used. An example of these types of actions relating to animals include veterinarians providing boarding facilities or transportation services. *Veterinarians also may be subject to claims of negligence if a client is injured (often bitten) while the veterinarian treats the client's animal. In addition, veterinarians can be subject to negligence claims not relating to animals, such as slip and fall actions on their property.*

(footnotes omitted; emphasis added). The author continued:

> [U]nless otherwise indicated, the discussion in this Article centers on the special type of negligence based on the professional medical skills of the veterinarian that result in *injury or harm to a patient*, [14] whether the standard is set by analogy to medical malpractice or as "professional negligence."
>
> Just as with other tort actions, the plaintiff will have the burden of proving the essential elements of the claim. In a malpractice action, the elements are as follows: (a) the veterinarian owed a duty of care *toward the animal*, (b) the veterinarian did not conform to the standard of conduct required by those in the profession, (c) such non-

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> the country on veterinary anesthesia and anesthetic drugs and authored hundreds of articles on the subject of veterinary anesthesia. Dodman himself has anesthetized some 2,000 horses undergoing surgery.
>
> Defendants contend that Dodman was unqualified to give an expert opinion on the standard of care because he practiced in a "university" setting, as opposed to this Albany County clinical setting. We disagree. Dodman's testimony, detailing impressive credentials in the very specific area of veterinary anesthesiology, sufficiently established his qualifications as an expert in this case, as well as his familiarity with the standard of care applicable to veterinarians administering anesthesia during surgery. The fact that Dodman did not practice in a clinical setting did not render his testimony inadmissible; rather, it affected the weight of that testimony. . .. To be sure, he was cross-examined on this very point.

(Kenny, at 854; citations omitted).

[14] The patient of a veterinarian is the animal, not the owner of the animal.

> conforming conduct is the proximate cause of the injury or harm, and (d) the injury or harm resulted in damages to the plaintiff. The damages that arise are due to either the injury or harm to the property of the client (the animal) or to the client as an individual.

(Id., at 503-504; footnotes omitted, emphasis added). In Countryman v. Lester, 183 N.E.2d 727 (Mass. 1962) and Branks v. Kern, 320 S.E.2d 780 (N.C. 1987), the owners of cats bitten by their own cats in veterinary offices were brought under negligence (not veterinary malpractice). However, in both cases the claims were dismissed because there was no negligence and the owners assumed the risk.

In the instant case, the trial court erred in holding that Mrs. Hewitt should have brought a veterinary malpractice claim against Palmer VC for the improper treatment of the dog that attacked her. She did properly bring her claims under negligence and premises liability. This Court should hold that Mrs. Hewitt properly brought her claims against Palmer VC under negligence.

## V. The Third Department erred by not striking Palmer VC's affirmative defense of contribution under CPLR Article 16.

The Appellate Division held:

> Finally, in view of our determination, plaintiff's assertion that Supreme Court erred in denying her motion to strike defendant's affirmative defense under CPLR article 16 is academic. In any event, it is without merit (see Rangolan v. County of Nassau, 96 N.Y.2d 42, 47-48 . . . [2001]).

Hewitt v. Palmer Veterinary Clinic, P.C., supra at 1123 (A: 6).

CPLR § 1601 provides:

> Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action *involving two or more tortfeasors jointly liable* or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); . . .

(emphasis added). CPLR § 1602(2)(iv) then states:

> The limitations set forth in this article shall: (2) not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict . . . (iv) any liability *arising by reason of a non-delegable duty* or by reason of respondeat superior.

(emphasis added).

The owner of the dog, Ann Hemingway is not liable for Mrs. Hewitt's injuries because there is no evidence that she knew of any vicious propensities of her dog prior to the attack in the waiting room. She *cannot* be jointly liable with Palmer VC. As a matter of law, Palmer VC is 100 percent liable for all of Plaintiff's actual damages if it is negligent.

In any event, Article 16 does not apply in this case because Palmer VC had a non-delegable duty to have a safe premises. "Whenever the general public is invited into stores, office buildings and other places of public assembly, the owner

is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress. In general, his duty is to use reasonable care at all times and in all circumstances." Gallagher v. St. Raymond's Roman Catholic Church, 21 N.Y.2d 554, 557 (1968). Where members of the public frequent a location, a landowner owes a "nondelegable duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress." Thomassen v. J & K Diner, 152 A.D.2d 421, 424 (2d Dept. 1989)(emphasis added); see, Richardson v. David Schwager Assocs., 249 A.D.2d 531, 531-532 (2d Dept. 1998); Arabian v. Benenson, 284 A.D.2d 422, 422, 726 N.Y.S.2d 447 (2nd Dept. 2001); Reynolds v. Sead Development Group, 257 A.D.2d 940, 940, 684 N.Y.S.2d 361 (3rd Dept. 1999); June v. Bill Zikakis Chevrolet, Inc., 199 A.D.2d 907, 909, 606 N.Y.S.2d 390 (3rd Dept. 1993). Where a property owner has a nondelegable duty to keep the premises safe, the duty may not be delegated to agents, employees or independent contractors. See, Backiel v Citibank, N.A., 299 A.D.2d 504, 751 N.Y.S.2d 492 (2nd Dept. 2002). The property owner is in the best position to assume the risks associated with conditions existing on its property since it is consistent with the general responsibility of owners to maintain their premises in a reasonably safe condition under all circumstances. See Basso v. Miller, 40 N.Y.2d 233 (1976). This obligation owed to the general public

encompasses all persons who come upon the premises. See, Backiel, 299 A.D.2d at 507.

In Kleeman v. Rheingold, 81 N.Y.2d 270, 274-275 (1993), the Court of Appeals addressed "non-delegable duties:"

> The exception that concerns us here--the exception for nondelegable duties--has been defined as one that "requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted" . . . The exception is often invoked where the particular duty in question is that is imposed by regulation or statute . . . However, the class of duties considered "nondelegable" is not limited to statutorily imposed duties. To the contrary, examples of nondelegable common-law duties abound . . . .
>
> There are no clearly defined criteria for identifying duties that are nondelegable. Indeed, whether a particular duty is properly categorized as "nondelegable" necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations. . . .
>
> The most often cited formulation is that a duty will be deemed nondelegable when " *'the responsibility is so important to the community that the employer should not be permitted to transfer it to another' "* . . . This flexible formula recognizes that the "privilege to farm out [work] has its limits" and that those limits are best defined by reference to the gravity of the public policies that are implicated . . ..

(citations omitted; emphasis added). The Court of Appeals held that an attorney's duty to exercise care in service of process was non-delegable. It held the attorney liable for the failures of the process server. Id.

In Rangolan v. County of Nassau, 96 N.Y.2d 42 (2001), the Court of Appeals construed non-delegable duties as used in CPLR § 1602(2)(iv):

> Specifically, CPLR 1602 (2) (iv) is a savings provision that preserves principles of vicarious liability. It ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 is not construed to alter this liability (see, Alexander, Practice Commentaries, op. cit., at 616-617; see also, Kreindler, Rodriguez, Beekman & Cook, New York Law of Torts § 10.11, at 602-603 [14 West's NY Prac. Series 1997]). Thus, for example, a municipality that delegates a duty for which the municipality is legally responsible, such as the maintenance of its roads, to an independent contractor remains vicariously liable for the contractor's negligence, and cannot rely on CPLR 1601 (1) to apportion liability between itself and its contractor (see, Faragiano v. Town of Concord, 96 N.Y.2d 776 . . . ; see also, Kreindler, Rodriguez, Beekman & Cook, op. cit., at 602-603 [premises owner having a non-delegable duty]). Similarly, CPLR 1602 (2) (iv) prevents an employer from disclaiming respondeat superior liability under article 16 by arguing that the true tortfeasor was its employee. However, nothing in CPLR 1602 (2) (iv) precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors "for whose liability [it] is not answerable" (id., at 603). (emphasis added). See, Collins v. Smith 254 A.D. 774 (2d Dept. 1938)(landlord has a non-delegable duty to make sidewalk safe for the public); Dowling v. 257 Assocs., 652 N.Y.S.2d 736 (1st Dept. 1997). See also, Amerifirst Mortg. Corp. v. Green, 7 Misc.3d 1028(A), 2005 N.Y.Misc.LEXIS 1075 (D.Ct., 1st Dist., Nassau Co. 2005)(landlord has a non-delegable duty to provide working heating system that cannot be waived by a lease).

Dr. Dodman opines that the Palmer Veterinary Clinic was at fault for allowing the dog attack in its waiting room. It failed to use due care in taking the dog to the waiting room and leaving it there with the owner. The attack occurred in a building specifically open to the public. As such, Defendant Palmer owed a non-delegable duty to people such as Mrs. Hewitt to properly maintain the subject premises in a safe condition. That includes preventing attacks by dogs in the waiting room. Because its duty is non-delegable, it cannot point to any liability of

its customers and cannot request apportionment under Article 16. It is 100 percent liable for any fault of its customers if the injury was caused by its failure to provide a safe premises.

Palmer VC has the legal responsibility to maintain its property in a safe condition for the public. It has the right (and obligation) to control the behavior of animals in its waiting room. Analogously, under VTL § 388, the owner of a vehicle is liable for any negligence of the driver. The Legislature did this to ensure that the injured party be afforded a financially responsible insured person against whom to recover for damages. Plath v. Justus, 28 N.Y.2d 16, 20 (1971). CPLR § 1602(6) exempts owners of motor vehicles from apportionment under CPLR § 1601. The instant situation is similar – the veterinarian is liable for the acts of the customer's pitbull so that the injured party will have a financially responsible insured person against whom to recover damages. CPLR §1602(2)(iv) provides the same exemption to business owners who have a non-delegable duty to the public as Section §1602(6) does to owners of vehicles.

Article 16 is not applicable in this action because the owner of the dog is not jointly liable with Palmer VC for Mrs. Hewitt's injuries. In any event, Palmer VC had a non-delegable duty to Mrs. Hewitt to have a safe premises.

## CONCLUSION

Under the law and as a matter of good public policy, this Court should not extend the Collier/Bard rule to this case. This Court should hold that Mrs. Hewitt has valid claims for damages against Palmer VC for negligence and premises liability. This Court should grant Appellant's Motion for Partial Summary Judgment because Palmer VC did not come forth with sufficient evidence to show that it was not negligent and/or that it had a safe premises. This Court should determine that Mrs. Hewitt's claims against Palmer VC sound in negligence and premises liability, rather than veterinary malpractice. Finally, it should strike Palmer's affirmative defense of apportionment.

Respectfully submitted,

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## CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

I, Mark Schneider certify that this Brief contains 12,742 words and is in compliance with Rule 500.14(c)(1).

Mark Schneider