

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

**NEW YORK STATE
COURT OF APPEALS**

MARSHA HEWITT,

Plaintiff-Appellant,

v.

PALMER VETERINARY CLINIC, PC,

Defendant-Respondent.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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June 19, 2019

Rule 500.13 Notice

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

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FACTS

At page 4 of its Brief, Palmer Veterinary Clinic states: “On April 16, 2014, a dog owned by another client of Palmer Vet Clinic *allegedly* attacked Appellant-Plaintiff while in the clinic’s waiting room.” (emphasis added). This is not accurate – it is uncontroverted that the pit bull *did* attack Marsha Hewitt in the Palmer waiting room. The veterinary doctor who had performed surgery on the dog, Sarah McCarter, DVM, stated in her notes:

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. . . . (A: 83).

During her deposition, Dr. McCarter admitted that they do not routinely check and adjust collars on dogs before bringing them back from surgery to the waiting room (A: 84). Regarding the surgery, Dr. McCarter’s notes state: “Recheck - no better. Was doing better on Vetprofen- but once finished started limping again. Some granulation tissue present @ nail base. Splash blocked lidocain @ nailbase. Removed split nail piece, cleaned w/ betadine & bandaged.” (R: 144, SA: 4).¹

Palmer’s *version* of the acknowledged attack was recorded by its insurance adjustor:

Called, and spoke to insured contact person/office manager Bob, he advised that on loss date the dog's owner, Ann Hemingway, brought her pit bull in to get checked because he was having *diarrhea issues* and in addition getting the dog check out because *she just adopted the dog a few day earlier*. He advised when the dog exited the examination with

¹ “SA:” refers to Appellant’s Supplemental Appendix.

the owner and leashed that the dog apparently saw a cat in a kennel at the 4 foot reception desk and went wild and was out of control. He advised that the dog broke free from the owner's leash and was running around the waiting room area and jumping on people. He advised that the owner could not get the dog under control so one of their technician [sic] put a clinical lasso/leash on the dog and brought it under control and gave the dog to its owner. *He advised that this is the first time that they had seen the dog and was not aware of any behavioral issues with the dog. . . . He advised that the owner had only had the pitbull for a few days.* He advised he asked everyone in the waiting area if they were bitten by the dog and only claimant advised that her hear [sic] was pulled or tugged by the dogs [sic] leg or leash and she sustained a whiplash injury. He advised that claimant is a nurse. He advised that he did not witness the initial incident but did see the dog running out of control. He advised that he did not see what caused claimant's injury. . . . *He advised tat [sic] their procedure is that the dog is escorted in and out of the examination room by its owner. . . .* He advised that they saw the dog again on 4/19/14 and later at the request of the owner, because she felt she could not control the animal, put the dog down.

(A: 92).² Some of these statements made by Palmer to its adjuster are belied by the veterinary treatment records for the dog Vanilla. Vanilla's records indicate that they treated him on May 30, 2013, August 5, 2013, August 30, 2013, December 4, 2013, April 7, 2014, and April 16, 2014 (the day of the attack). On April 17, 2014, Palmer did euthanize Vanilla (R: 141-144, SA: 1-4).

Palmer also states that the dog was being held on its leash in the waiting room by the owner. They agree that Mrs. Hewitt had been sitting in the waiting room with her cat. At page 4 of its Brief, Palmer VC then alleges: "She [Marsha Hewitt] then took her cat carrier and went to the front desk to hand the cat carrier over the counter.

² The high lited sections are contradicted by the rest of the record.

The dog apparently saw Appellant-Plaintiff's cat (that was in the cat carrier) and allegedly jumped up and grabbed the Appellant's-Plaintiff's hair (A: 78)." Palmer Brief, p. 4. This sounds like Mrs. Hewitt was carrying the cat carrier to the front desk *before* the dog slipped its leash and attacked her. It is a very misleading portrayal of the evidence. In her deposition, on June 16, 2015, Mrs. Hewitt testified about the events leading up to being attacked by the dog:

Q [defense counsel]: About how long were you in the waiting room before the dog entered?

A [Marsha Hewitt]: At least ten minutes maybe.

Q: At the time that the dog comes into the waiting room, the woman that you described as Ann Hemingway was also in the waiting room; correct?

A: Correct.

...

Q: Why don't you tell me what happens next? . . .

A: They brought the dog in off to my left side to face Ann and this dog was very agitated. Its tail was just everywhere and it was spinning. It was very, very agitated. I believe it was the veterinarian that brought the dog out on a leash.

...

A: At one point I did reach out, because the dog's tail was just slapping all over the place and it was slapping at my legs. I did reach out to move the dog away. I talked to Ann about what had happened to the dog and she had mentioned that her dog had tore up its paws trying to get underneath a fence and they were there to fix the paws, because she had tore the pads. She said that they had been in there -- I don't know how many times before, but that wasn't the first time. that they went in to fix its pads.

Q: When you were having this conversation with Ann, was the dog in the waiting room?

A: Yes.

Q: Was the woman that brought the dog out walking the dog on a leash?

A: The dog was on a leash.
Q: And she walked the dog to Ann?
A: Correct.
Q: At that time when you were having the conversation with Ann about the paws, did this veterinarian have the dog's leash or did Ann have the dog's leash?
A: I'm not remembering when she gave the leash over to Ann.
Q: Was the veterinarian there when you had the conversation with Ann about what the dog was there for?
A: . . . Ann had told me about the paws while the dog was in there, but when the vet came out, she then had a conversation with Ann.
Q: Was your conversation with Ann before the vet came out or before the vet had the conversation with Ann?
A: The dog was in the room when I was speaking to Ann about the dog. The vet I believe had stood to leave and was leaving. The vet had already spoken with Ann and then Ann was telling me the story.
...
Q: At some point previously you had mentioned that the dog had come out and was agitated; is that correct?
A: That's correct.
Q: Can you explain to me what you meant by that?
A: 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.
Q: Can you describe the dog for me?
A: It was a darker dog. It had some brown and some black. I want to say it was about two foot. I would call it a medium size dog (indicating). I'm showing you with my hand again, I'm sorry. It was a medium size to a larger dog. It took up the space that we were in.
Q: You showed with your hands I believe the height of the dog. Did you give a measurement with that?
A: I said about two feet
...
Q: Had you ever seen this dog before?
A: Never.

Q: And you said that you had never seen Ann Hemingway before; correct?

A: Correct.

...

Q: Approximately how long did the conversation between the vet and Ms. Hemingway last; if you recall?

A: I would probably say up to five minutes.

...

Q: Can you tell me what that conversation was about?

A: Ann was asking if they had hurt her dog, how he had behaved, if they had given anesthesia, what kind of anesthesia had they given it, was he a good boy, did he act okay? She kept calling him a good boy. Was he a good boy?

Q: Was there a response when she asked if they had hurt the dog?

A: *They had said that they had held the dog down and not given anesthesia. She had mentioned a few people holding the dog down while they did whatever they did to the pad of the dog.*

Q: You stated that Ann had asked if the dog behaved. Was there a response to that question?

A: *Yes, and it was that he was acting his usual or his -- I don't want to say aggressive. They didn't use the word aggressive. She had mentioned that it took people to hold him down to do the procedure.*

...

A: Just that I noticed that the vet knew that the dog was not a friendly dog and had spoken about it being in there before.

Q: What do you mean by you noticed the vet knew?

A: When the vet was also speaking with Ann, you could see by the way that the dog was acting that it was just not -- it was an out of control dog.

Q: What do you mean by "out of control"?

A: 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.

Q: *You're saying that you noticed these things. Did the vet say any of these things or is this just what you noticed while you were in the waiting room?*

A: *Because of the vet saying that it took so many to hold the dog down.*

Q: Is there anything else regarding that conversation or anything that you noticed from the vet or from having the conversation with Ann that we haven't talked about?

A: No, just the dog running around in circles.

Q: At the time that the dog was doing that, where was the dog in relation to you?

A: In front of me.

...

Q: When the vet came out with the dog, Ann Hemingway was sitting down; correct?

A: Correct.

Q: Did the vet sit down with Ann or did she hold the conversation while standing?

A: The vet was sitting down.

Q: Where was the vet sitting down in relation to you and Ann? Was she in between you two or on the other side of Ann?

A: Right straight across from me.

Q: Is it fair to say in describing the horseshoe bench that we talked about that each of you were sitting in a separate section?

A: Correct.

Q: At some point did the vet hand the leash to Ann?

A: She had to, yes.

...

Q: Do you know approximately how long the leash was from where the person was holding it to where it connected to the dog?

A: I would say it was either a 3-foot or 4-foot leash. . . .

Q: . . . What I'm getting at is: I'm trying to see if the vet let the dog have full use of the leash or if the vet was holding the dog close if you recall?

A: The dog was in front of the vet.

...

Q: You had said that at some point the vet got up to leave and you had a discussion with Ann; correct?

A: Yes.

Q: And at that point, Ann is holding onto the dog?

A: Yes.

Q: And you still have your cat by your side?

A: Correct.

Q: Is Ann sitting down?

A: Yes.

Q: Is the other woman with the infant or child in the waiting room still?

A: Yes.

...

Q: She explains to you that he tore up his paws digging under a fence or something to that effect?

A: Digging, yes.

...

Q: How long was it from the time the vet leaves the waiting area and you're talking to Ann until the incident we are going to talk about? How long until that incident occurs?

A: A matter of minutes. The dog turned and looked at me and the carrier.

Q: At the time the dog does this, are the same people we just discussed the only one in the waiting room: you and the cat, Ann and the dog and the woman with her child?

A: The woman with her child was -- there is another little area and I believe either she was in that area or she was at the desk -- she was. She was standing in front of the desk with her baby in the carrier.

...

Q: At the time that this incident occurs, was there anyone from Palmer Veterinary Clinic in the waiting room?

A: In the waiting room, no, she had walked away.

Q: Were the secretaries still at the desk?

A: Yes.

Q: But on the other side of the desk?

A: Yes.

Q: How many were there; if you recall?

A: I believe there was two.

...

Q: After you have the conversation with Ms. Hemingway, at some point you say the dog turned and looked at you; correct?

A: Correct.

Q: Can you tell me what happened after that?

A: That's when all hell broke loose. The dog backed right out of its collar, it was growling and I said to myself: This is not going to be good. Ann jumped up, she straddled -- no, first she screamed: No, no, no. Then she jumped up and straddles her

dog and the dog is still staring my way. Ann has the dog straddled, she keeps yelling: No, no. I reached over and grabbed my cat's carrier by the handle, turn right away from them and all I can think of was to get my cat out of harm's way. I take my cat away and all I could think of is to pass it over the counter to the secretary. By now the secretary --the older woman -- is out and around from behind the desk and yelling: Lady, lady come over here. Lady come over here. I got to the desk and I feel this dog after me. I go to hand my cat over the counter when this dog jumped up and grabbed me by my hair and yanked me backwards as I'm giving my cat over the counter. The younger person took my cat, this dog was hanging on me and everybody was screaming except for me and the cat. The young girl was screaming: Oh, my baby.

(A: 71-83, SA: 11-12; emphasis added).

Jessica McCormick, the mother of the infant in the waiting room, stated in her Affidavit:

- 2) On April 16, 2014, I was at the Palmer Veterinary Clinic with my infant daughter to set up a payment plan for my dog. . . .
- 3) . . .
- 4) I noticed a few other people in the waiting room. Some of the other people were talking to each other.
- 5) I was sitting in the waiting room with my infant daughter. She was very tiny. She was less than three weeks old at the time.
- 6) Two people brought the dog out into the waiting room. I'm not sure who was holding the leash. At least one of the people was an employee of Palmers.
- 7) I recall that it was a woman, between the age of 20 and 40, with her hair in a ponytail. I do not know whether it was the veterinarian or an assistant.
- 8) As soon as the dog, a pitbull, entered the waiting area, I could see that it was very agitated and excited.
- 9) The dog was not under control when the two people brought it into the waiting room.

- 10) There was an older woman also in the waiting room with a catbox. I assume that there was a cat in the box, but I could not see or hear the cat.
- 11) Almost immediately, the pitbull went after the cat in the catbox. It got off the leash.
- 12) It was running around in the waiting room.
- 13) I do not remember whether the owner or the Palmer employee was holding the dog when it went after the catbox. I was not paying close attention at that point.
- 14) I was very scared that this out of control dog would attack my infant. I held her up in the car seat to get her away from the dog.
- 15) I was very scared and totally focused on the safety of my child. I did not think I could protect her from the dog.
- 16) I quickly moved to the reception counter. There were two Palmer employee's [*sic*] behind the counter.
- ~~17) These two employees stayed behind the counter and did nothing to help me and my infant.~~
- 18) As I was lifting up my baby to pass her over the counter, the older woman helped me.
- 19) She comforted me and asked if the baby and I were ok. She was very upset also.
- 20) A male employee and a woman employee somehow got the dog under control.
- 21) I did not see what happened to the older woman. I was facing the counter with my baby and totally focused on my baby's safety.
- 22) I remember seeing the dog holding the older woman who helped me [].

(R: 145, SA: 5).

DISCUSSION

I. Under New York law, the owner of property is liable for his or her own negligence if it is the proximate cause of an injury caused by another person's dog.

In Bard, Doerr, and Bernstein this Court held that *owners* of dog are *strictly liable* to person's injured by the dog if they had prior notice of the animal's vicious propensities.

Strict liability has been defined as "liability without fault. A case is one of 'strict liability, when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save defendant" (Black's Law Dictionary—Revised Fourth Edition; see also Prosser—Torts 3d ed., pp. 510, 527).

N. Town Roosevelt Assoc. v. Muller, 1980 N.Y.Misc.LEXIS 2989, * 4 (1st Dept. 1980). These cases hold that *dog owners* cannot be held liable for injuries caused by their own negligence. The exclusive remedy is strict liability. This rule cuts both ways – once an animal owner knows of their pet's vicious propensities, they are liable for injuries even if they otherwise acted with care or good faith. This Court has *never* held that property owners are *strictly liable* for injuries caused by another person's animal even if they know of that animal's vicious propensities. *And, this Court has never held that a property owner is not liable for his or her own negligence for an injury caused by another person's animal on their property.*

In Strunk v. Zoltanski, 62 N.Y.2d 572, 575-576 (1984)(emphasis added), this Court held that a landlord (or other property owner) can be liable *in negligence* for failure to use due care in preventing a dog bite on his or her premises:

The principle with respect to the liability of a landlord whose tenant comes into possession of the animal after the premises have been leased (that to establish liability it must be shown that the landlord had knowledge of the vicious propensities of the dog and had control of the premises or other capability to remove or confine the animal [Landlord's Liability to Third Person for Injury Resulting from Attack by Dangerous or Vicious Animal Kept by Tenant, Ann., 81 ALR3d 638]) likewise is not determinative here. *The present is a situation in which the landlord, by leasing the premises to the owner of the dog, could be found affirmatively to have created the very risk which was reasonably foreseeable and which operated to injure plaintiff.* On the basis of the evidence tendered on the motion for summary judgment, the jury could find that, having created this risk, Mrs. Zoltanski took no steps reasonably calculated to protect this plaintiff from the injuries which he suffered. *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 (see Restatement, Torts 2d, § 509), but landlords as others must exercise reasonable care not to expose third persons to an unreasonable risk of harm (cf. Uccello v. Laudenslayer, 44 Cal. App. 3d 504).*

See, Bernstein v. Penny Whistle Toys, Inc., 10 N.Y.3d 787 (2008)(this Court affirmed the dismissal of the dog bite claim against the mother of the victim's friend because "there is no evidence that the third-party defendant was negligent.")

In the instant case, the Third Department held:

Even though the Court of Appeals in Bernstein v. Penny Whistle Toys, Inc. . . . *did not explicitly speak on the issue presented here, in our view, it is nonetheless persuasive.*

Hewitt, at 1122. The Appellate Division did not explain how the failure of the Court

of Appeals to discuss the issue of negligence by property owners in dog bite cases could be persuasive. That other Appellate Division have *miscited* Bernstein on this issue does not make it controlling. The other citations to Appellate Division decisions by the Third Department provide the anatomy of the erroneous legal holding in Hewitt.

The origin for this erroneous line of Appellate Division cases is Claps v. Animal Haven, Inc, 34 A.D.3d 715 (2d Dept. 2006). The plaintiff was allegedly attacked by a dog, owned by Animal Haven, Inc., being shown for adoption on the sidewalk outside of a Petco store. Neither of the defendants had knowledge of any vicious propensities of the animal. Inaccurately relying upon Bard, the Second Department, without any explanation, holds that the plaintiff could not recover against the *defendants* (the dog owner *and* the property owner) under common law negligence.

In Christian v. Petco Animal Supplies Stores, Inc., 54 A.D.3d 707 (2d Dept. 2008), the plaintiff was bitten by a dog owned by defendant Kenneth Coughlin in a Petco Store. The Second Department dismissed the strict liability claim because there was no notice of vicious propensities, citing Claps and Bernstein. It did not mention negligence by the store owner in the decision.

Next, in Hargro v. Ross, 134 A.D.3d 1461, 1462 (4th Dept. 2015), the defendant was the owner of a restaurant where a customer's dog bit the plaintiff. The

Fourth Department made the fatal legal leap and held:

Plaintiff cannot recover for her alleged injuries based upon the alleged negligence of defendant in failing to maintain a safe premises, and may recover only under a theory of strict liability.

It wrongly relied upon Bernstein (and Claps) for this unprecedented decision.

In Easley v. Animal Medical Center, 161 A.D.3d 525, 525 (1st Dept. 2018),

the First Department compounded the error by holding:

Because the dog that bit plaintiff had no known vicious propensities, no liability will attach to either of the defendant dog owners (see Doerr v Goldsmith . . . ; Collier v Zambito . . . , or defendant Animal Medical Center, the veterinary hospital where the dog bite occurred (Petrone v Fernandez . . . ; Bernstein v Penny Whistle Toys, Inc.; Christian v. Petco Animal Supplies Stores, Inc. . . .)

The evolution of the unprecedented and unsupported holding that a veterinarian (or other property owner) is not liable under premises liability and failing to use due care to was then completed by the Third Department in this action, Hewitt v. Palmer Veterinary Clinic, P.C.

None of the Court of Appeals decisions cited in the above cases held, or even implied in *dicta*, that a property owner who does not own the dog in question is immunized from his or her own negligence in failing to provide a safe premises for customers or other visitors. Rather, in Strunk and Bernstein this Court has recognized that a property owner *is* liable for his or her negligence that causes an injury by a dog.

This Court is not bound to follow the erroneous Appellate Division decisions.

The black letter law provides:

Precedents are established by appellate courts, the controlling effect of whose decisions depend upon the relative position of the court in question in the judicial hierarchy. In the absence of any change in statutory law or regulations, common-law precedent principles require all lower trial courts to view applicable appellate court decisions as binding unless or until there is any conflicting authority.

Decisions of the court of appeals which have not been invalidated by changes in statute, decisional law, or constitutional requirements must be followed by that court, by all lower appellate courts, such as the appellate division and the appellate term," and by all courts of original jurisdiction. Where there is a conflict between decisional law of the court of appeals and that of an intermediate federal appellate court, the ruling by the state court of appeals should be followed by a lower New York court. Similarly, if there is a conflict between the lower federal courts and the court of appeals, the appellate division is bound by the ruling of the state's highest court.

28 N.Y.Jur.2d, Courts and Judges, § 220, p. 240 (2010)(footnotes omitted, emphasis added).

Palmer Veterinary Clinic contorts logic by arguing that it is unfair to hold veterinarians liable for their own negligence when dog owners are only liable in strict liability for a dog bite. This is a comparison between apples (strict liability) and oranges (negligence). It appears that Palmer is acknowledging that if a veterinarian had prior knowledge of a dog's vicious propensities, he or she should be held absolutely liable, even without any negligence.³ There is no logical, legal,

³ On information and belief, this would cause more uncertainty for insurance companies than if veterinarians were only liable for proven negligence. In the instant case, the office manager of

or policy reason why a property owner should not be liable for an injury caused by a dog if the plaintiff can prove that the property owner was negligent.

“To establish entitlement to summary judgment [in a premises liability claim], defendants were " 'required to establish as a matter of law that they maintained the property in question in a reasonably safe condition and that they neither *created* the allegedly dangerous condition existing thereon *nor had actual or constructive notice thereof*'.” Brown v. Haylor, Freyer & Coon, Inc., 60 A.D.3d 1188, 1189 (3d Dept. 2009). In the instant case, Palmer Veterinary Clinic caused or created the dangerous condition by failing to properly anesthetize the dog during surgery, failing to check the loose collar, and then bringing the agitated animal into the waiting (next to Mrs. Hewitt and her cat). This is similar to Strunk. There, this Court held that the issue was whether the defendant landlord was negligent by creating the dangerous condition by renting to a tenant with a known vicious dog.⁴

Allowing Mrs. Hewitt to recover for the dangerous condition caused by Palmer VC, will not affect the rights and obligations of property owners (who do not own the dog) who do not *cause* a dog to attack a person by their own negligence. An

Palmer VC, Bob Walker, actually told Mrs. Hewitt that they knew that the dog was vicious (A: 90). However, he now denies this and Mrs. Hewitt does not think she could prove it at trial. It is interesting to note that Walker told the adjuster that the attack occurred during the dog’s first visit to the clinic (R: 157, SA: 7). The veterinary notes show that the dog had been there on at least six prior occasions (R: 141-144, SA: 1-4).

⁴ A landlord could also be negligent if she learns that a current tenant obtains a dog with vicious propensities and does not remedy the situation after having notice.

otherwise blameless property owner, who does not have notice of a dog's vicious propensities, will still not be liable to a victim of a bite because there is no negligence.

In rejecting Restatement of Torts § 518, Bard and Doerr are anomalies, and have not been followed by the highest court of *any* other state.⁵ The four to three decision in Bard was solely predicated on the principal of *stare decisis*. It would now equally offend the principal of *stare decisis* to overrule Strunk and extend these extraordinary exceptions to the common law to non-owners of dogs who are negligent in *causing* the dog to injure a person.

II. The Affidavit of Dr. Dodman is sufficient to show the negligence of Palmer Veterinary Clinic.

Dr. Dodman is one of leading veterinarians, veterinary anesthesiologists, and dog behaviorists in the world. As noted in Mrs. Hewitt's Brief, he has been recognized as an expert in numerous published cases. He has published hundreds of books, scientific papers and/or articles.

Palmer Veterinary Clinic argues that Dr. Dodman's opinions are deficient because he relied upon the facts as set forth in Mrs. Hewitt's deposition and in Palmer's veterinary notes for the dog. The facts upon which he relied are set forth in his Affidavit (A: 93-95; Hewitt Brief p. 27-29). In its Brief, Palmer VC challenges

⁵ According to Justice R.S. Smith in his dissent in Bard. A recent check in Shepard's shows no change since that dissent.

the following “fact” recited by Dr. Dodman - that the dog was “very aggressive” *during the procedure*.⁶ This fact was based upon Mrs. Hewitt’s stating in her Affidavit that she heard Dr. McCarter say this to the dog’s owner just prior to the attack (A: 88; 94). She acknowledged during her deposition, that this statement in the Verified Complaint was not totally accurate.

Palmer does not cite any major inconsistent or contradictory testimony by Mrs. Hewitt between her deposition testimony and her subsequent Affidavit. In her Verified Complaint, sworn to on August 27, 2014, Mrs. Hewitt stated:

- 7) An employee of the Palmer Veterinary Clinic brought in to the waiting room a pit bull dog with a bandage on its paw.
- 8) The dog was on a leash.
- 9) The dog was agitated and disturbed.
- 10) The owner of the dog, asked the employee if they had hurt the dog.
- 11) The employee responded “yes.”
- 12) The dog would not calm down. It still continued to act in an extremely agitated manner.
- 13) The employee sat down and talked to the owner about the treatment of the dog and the operation.
- 14) The employee noted that they did not give anesthesia to dog. Rather, she explained that they were holding the dog down and changed the bandage.
- 15) *The employee stated to the owner: “He was very aggressive.”*
- 16) The employee stood up to leave.
- 17) Plaintiff asked the owner what was wrong.
- 18) The owner told Plaintiff that the dog ripped off its paw pad digging in the ground.

⁶ If Mrs. Hewitt could *prove* that the dog was acting aggressively during the surgery, she would have a strong case in strict liability. However, Dr. McCarter denies this and Mrs. Hewitt acknowledges that Dr. McCarter actually said that the dog had to be held down by several people during the surgery.

- 19) At that point, the pit turned, glared at Plaintiff, backed out of its collar, and lunged at Marsha Hewitt.
- 20) The owner straddled the dog, but could not restrain the dog.

(emphasis added). At her deposition, on June 15, 2015, Mrs. Hewitt described the events leading up to the attack at length she stated that the Dr. McCarter did not use the word “aggressive.” Rather the vet “*had mentioned that it took people to hold him down to do the procedure.*” (A: 70-72, emphasis). It is quite a stretch to characterize the differences between the Verified Complaint, the deposition testimony, and the Affidavit as contradictory. In any event, Dr. Dodman’s conclusion that “Palmer Veterinary Clinic failed to use due care to protect its human and animal clients and patients from injury by the pit bull” (A: 166), was not predicated on the fact that Mrs. Hewitt stated that the veterinarian had said it was “very aggressive” during the surgery. Rather, Dr. Dodman explained in a note that: “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” (A: 95).

Palmer does not contest the following material *facts* upon which Dr. Dodman relied:

- 1) The veterinarian surgically removed part of a broken nail under “splash block” analgesia;

- 2) The veterinarian did not check the collar of the dog to ensure that it was snug;
- 3) The veterinarian brought the dog directly from surgery into the waiting room, next to Mrs. Hewitt and her cat;
- 4) The dog was agitated when the vet brought it out and gave the leash to the owner; and
- 5) The dog slipped its leash after the vet left the waiting area and attacked Mrs. Hewitt.

Wherefore, the opinions and conclusions of Dr. Dodman are well-supported by the facts upon which he relies.

Relying upon Martin v. Savage, 299 A.D.2d 903 (4th Dept. 2002) and Ruzycki v. Baker, 301 A.D.2d 48 (4th Dept. 2002),⁷ Palmer argues that “testimony may not be altered by a contradictory Affidavit in opposition to defendant’s motion in an attempt to create a feigned issue of fact.” Palmer Brief, p. 19. There is no evidence of such action by Mrs. Hewitt. There is no feigned issue of fact. That the veterinarian said that they had to hold the dog down during the surgery, rather than that it was

⁷ Ruzycki does not mention contradictory statements by a party. Rather, it held: “Plaintiffs established that defendant was at fault for the accident, and defendant failed to raise a triable issue of fact. Plaintiffs are thus entitled to partial summary judgment on the issue of negligence, and the issue of serious injury remains to be determined at trial.” Ruzycki, at 52. This Court should follow that holding and determine that Palmer Veterinary Clinic is liable to Mrs. Hewitt on summary judgment.

“very aggressive,” is a distinction without substantive difference. It is certainly not a contradiction.

Even if it is possible that the agitated dog was attempting to “go after Appellant’s white cat, due to a natural prey drive,” (Palmer Brief, p. 21), it is still the negligence of Palmer Veterinary clinic that put the agitated dog next to the cat in the waiting room with a loose collar that was the proximate cause of Mrs. Hewitt’s injuries. The facts upon which Dr. Dodman relied in giving his expert opinions are well-supported by the evidence on the record and are uncontroverted.

III. The trial court erred by striking portions of Mrs. Hewitt’s Supplemental Bill of Particulars because those allegations “sound[ed] in veterinary malpractice.”

On September 25, 2017, the trial court held:

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. . .*

The Court has considered Palmer VC’s motion to strike the remaining alterations to response “3.” and finds that such relief must be denied. These allegations and claims are contemplated by the Complaint and original Verified Bill of Particulars and merely serve to amplify the pleadings.

(A: 21-23).

Mrs. Hewitt served her Verified Supplemental Bill of Particular on July 24, 2017 (RA: 50). She served her expert disclosure containing Dr. Dodman's opinions and conclusion on July 27, 2017 (R: 260-262, A: 8-10).

Judge Ellis explicitly states that he is only striking the statements in the Supplemental 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" because they sound in veterinary malpractice not in negligence.⁸ A veterinarian can only malpractice on the animal patient. Injuries to humans caused by the negligence of veterinarians sounds in negligence or premises liability.

Mrs. Hewitt's timely filed Verified Complaint unambiguously pleaded negligence and premises liability against Palmer Veterinary Clinic. Her deposition testimony adds more factual support to those claims. Her only claim for relief against Palmer Veterinary Clinic stated:

FIRST CLAIM FOR RELIEF
(Negligence and Premises Liability
against Palmer Veterinary Clinic, PC)

- 44) Defendant Palmer Veterinary Clinic, PC, has a duty to provide a safe waiting room for its customers.

⁸ He did not strike the rest of Mrs. Hewitt's negligence claims as set forth in her Supplemental Bill of Particulars (RA: 46). This includes negligence for bringing the dog into the waiting room, failure to maintain a safe waiting room, and failing to adjust the collar to keep the dog from escaping in the waiting room. He did not strike the supplemental allegation that Palmer Veterinary Clinic was negligent for the failure to use due care.

- 45) Defendant Palmer Veterinary Clinic, PC, violated that duty by bringing a deranged pit bull into the same waiting area as a cat.
- 46) Defendant Palmer Veterinary Clinic, PC, failed to use due care in bringing an agitated, distressed, and deranged pit bull into the waiting area with Plaintiff Marsha Hewitt.
- 47) On information and believe, Palmer Veterinary Clinic, PC, knew that the dog had a propensity to attack people (or animals).
- 48) Palmer Veterinary Clinic, PC knew that the pit bull was agitated and in an aggressive mood.
- 49) Plaintiff Marsha Hewitt was injured by the negligence of the Palmer Veterinary Clinic, PC.
- 50) Palmer Veterinary Clinic, PC is liable to Marsha Hewitt for her injuries because of their its negligence and premises liability, including, but not limited to actual damages, special damages, pain and suffering, and loss of enjoyment of life.

(A: 33).

Mrs. Hewitt set forth the essential facts giving rise to her claim against Palmer Veterinary Clinic for negligence. The trial court decision to strike "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" from the Supplemental Bill of Particulars because these allegations sound in veterinary malpractice is not supported by the law.

IV. As a matter of fact and law, there can be no apportionment under Article 16.

It is uncontroverted that the owner of the dog, Ann Hemingway, is not strictly liable for injuries caused by her dog because there is no evidence that she had prior

knowledge of its vicious propensities. Once she had such notice, the day after the attack, she had the dog anesthetized. Palmer Veterinary Clinic does not suggest anyone else who would be jointly liable with it. If this Court concludes that there is a cause of action against Palmer VC for negligence, it should clarify that it does not have an Article 16 apportionment defense.

CONCLUSION

The controlling precedents of this Court hold that a property owner (who does not own the dog) can be found liable in negligence for a dog attack. The contrary decisions of the respective Appellate Divisions wrongly interpreted Bard, Doerr, Bernstein and other Court of Appeals decisions.

Dr. Dodman's expert opinions are well-supported by the uncontroverted facts and other evidence on the record and are sufficient to determine that Palmer Veterinary Clinic is liable to Mrs. Hewitt for its own negligence. This Court should enter partial summary judgment against Palmer Veterinary Clinic and remand for a trial on the issue of damages.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 500.13(c)(1)

I, Mark Schneider certify that this Reply Brief contain 6,782 words and is in compliance with Rule 500.13(c)(1).

Mark Schneider