To be argued by:
Peter Balouskas
Time Requested: 20 minutes

NEW YORK STATE
COURT OF APPEALS

MARSHA HEWITT,

Plaintiff-Appellant,

v.

PALMER VETERINARY CLINIC, P.C.

Defendant-Respondent.

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

BRIEF FOR DEFENDANT-RESPONDENT

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Disclosure statement. Respondent-Defendant Palmer Veterinary Clinic, P.C. has no parent companies, subsidiaries and/or affiliates.

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to CPLR Article 16 between itself and other tortfeasors for whose liability it is not answerable, proper?

PRELIMINARY STATEMENT

Appellant-Plaintiff Marsha Hewitt appeals from the Appellate Division, Third Department Memorandum and Order Decided and Entered on December 6, 2018, affirming the Decision and Order of the Supreme Court, County of Clinton dated October 17, 2017, awarding summary judgment to Respondent-Defendant, Palmer Veterinary Clinic, P.C. ("Palmer Vet Clinic"), and denying Appellant-Plaintiff's cross-motion for partial summary judgment, on the ground that Palmer Vet Clinic could not be held liable for the actions of a dog owned by another where there was no evidence that the domestic animal exhibited vicious propensities prior to the incident.

The Appellate Division's Memorandum and Order and the Decision and the Order of the Supreme Court, County of Clinton dated October 17, 2017, each recognized that Appellant-Plaintiff was not asserting a claim for strict liability against Palmer Vet Clinic. (A 2-15) Rather, the claims being made by Appellant-Plaintiff against Palmer Vet Clinic were/are limited to negligence and premises liability only.(A 5; 14; Appellant-Plaintiff's Brief at p. 3) The Appellate Division and Supreme Court properly held that for Respondent-Defendant to be held liable for alleged personal injuries sustained from a dog attack in its waiting room, Appellant-Plaintiff must establish that Respondent-Defendant knew or should have

known about the dog's vicious propensities but that the record disclosed that Respondent-Defendant had no such notice. (A 3-15)

STATEMENT OF FACTS

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. The dog had been perfectly well-behaved earlier in the examination room (R.A. 80; 84-86).

After the dog had been treated in the exam room, the dog was then held on a leash by her owner Ann Hemingway while in the waiting room of the clinic (the claim against Ms. Hemmingway was previously discharged in bankruptcy A. 45) (A. 67-68). Appellant-Plaintiff Marsha Hewitt had been sitting in the waiting room with her cat. She then took her cat carrier and went to the front desk to hand the cat carrier over the counter. The dog apparently saw Appellant-Plaintiff's cat (that was in the cat carrier), and allegedly jumped up and grabbed the Appellant-Plaintiff's hair (A. 78). Appellant-Plaintiff believed that the dog mistook her white hair for her cat's white fur (R. 78). The incident lasted less than two minutes and the dog was immediately removed from the Respondent-Defendant's Vet Clinic (R. A. 16; 21).

Appellant-Plaintiff has conceded that the dog's owner, Ann Hemingway had no knowledge of the dog's vicious propensity. (Appellant-Plaintiff's Brief at p. 3). Appellant-Plaintiff has also consistently conceded that she is not maintaining a claim

for strict liability against Respondent-Defendant Palmer Vet Clinic (Appellant Brief p 3, fn. 1 and R. A. 94). The record demonstrates that Respondent-Defendant had no knowledge of the dog's vicious propensities (R. A. 90-91).

SUMMARY OF ARGUMENTS

New York State does not recognize a cause of action sounding in common law negligence or premises liability arising from a dog bite. Rather, a defendant may only be held liable under a theory of strict liability which requires that the defendant knew or should have known of the animal's vicious propensity (Doerr v. Goldsmith, 25 NY3d 1114 (2015). The Supreme Court's Decision and Order and the Appellate Division, Third Department's Memorandum and Order are in adherence with the precedent of this State, as established by this Court, and is in conformity with decisions of all Appellate Divisions throughout New York State. Doerr v. Goldsmith, 25 NY3d 1114 (2015); Bard v. Jahnke, 6 N.Y.3d 592 (2006); Collier v. Zambito, 1 N.Y.3d 444 (2004); Petrone v. Fernandez, 12 NY3d 546 (2009); Bernstein v. Penny Whistle Toys, 40 AD3d 224 (1st Dept., 2007).

Thus, where Appellant-Plaintiff concedes that she is not maintaining a strict liability claim against Respondent-Defendant, and further, the record demonstrates that Respondent-Defendant had no knowledge of the dog's vicious propensities, (R. A. 90-91) the decision granting Respondent-Defendant summary judgment as

affirmed by the Appellate Division, Third Department must be affirmed by this Court.

ARGUMENTS

I. PALMER VETERINARY CLINIC CANNOT BE HELD LIABLE FOR APPELLANT-PLAINTIFF'S ALLEGED INJURIES WHERE APPELLANT-PLAINTIFF IS NOT MAINTAINING A STRICT LIABILTY CLAIM AND THERE WAS NO NOTICE OF THE DOG'S VICIOUS PROPENSITIES

It is settled law that strict liability is the only theory of liability that a plaintiff may assert against a dog owner to recover for harm caused by a dog. (Doerr v. Goldsmith, 25 NY3d 1114 (2015); Hastings v. Sauve, 21 NY3d 122 (2013); Petrone v. Fernandez, 12 NY3d 546 (2009). Each of the four Departments of the Appellate Division have also held that the exclusive strict liability rule is not limited to just dog owners, but also applies to persons in control of the premises where the dog was located. Easley v. Animal Medical Center, 161 AD3d 525 (1st Dept. 2018) *leave denied* 32 N.Y.3d 906 (Oct. 2018) (holding that because the dog that bit plaintiff had no known vicious propensities, no liability will attach to either of the defendant dog owners *or* defendant Animal Medical Center, the veterinary hospital where the dog bite occurred); Christian v. Petco Animal Supplies Stores, Inc. 54 AD3d 707 (2nd Dept., 2008); Claps v. Animal Haven, Inc., 34 AD3d 715 (2nd Dept. 2006); Coffey v. McAleer, 112 AD3d 907 (2nd 2013); Hargro v. Ross, 134 Ad 3d 1461 (4th Dept., 2015); Hewitt v. Palmer Veterinary Clinic, P.C., 167 AD3d 1120 (3rd Dept. 2018).

Appellant-Plaintiff concedes that she is not maintaining a strict liability claim against Respondent-Defendant, the non-dog owner entity in control of the premises where the dog was located at the time of the incident. (R. A. 95). While conceding that it is settled law that the only cause of action permitted against a dog owner for a dog bite injury is under strict liability, Appellant-Plaintiff urges this Court to depart from the strict liability rule and permit recovery against a non-dog owner such as Respondent-Defendant for alleged common law negligence or premises liability.

Appellant-Plaintiff attempts to draw an arbitrary distinction between cases against dog owners from those against non-dog-owners and urges a departure from established precedent. However, there is no legal rational that would justify having different rules of law establishing liability against dog owners and non-dog owners. If the Appellant-Plaintiff's nonsensical approach were adopted, it would lead to absurd and inequitable results without any legal justification whereby dog owners would be immunized from liability in those dog bite cases where there was no notice of a dog's vicious propensities while still subjecting non-dog owners to liability under a negligence cause of action.

For instance, if a dog owner and non-dog owner are playing fetch with the dog owner's dog, who had no prior history of vicious propensities, while the dog is off leash, and the dog ended up attacking or running into an approaching bystander causing injury, under the rule of law advocated for by Appellate-Plaintiff, only the

non-dog owner would be subjected to liability pursuant to a negligence claim. Whereas, the dog owner would be completely insulated from any liability because there was no notice of any vicious propensity and thus no basis for strict liability which is the only cause of action permitted against dog owners. Petrone v. Fernandez, 12 NY3d 546 (2009).

Another absurd scenario would present where an off-leash dog, with no history of vicious propensity, was permitted on residential property before it bit an approaching bystander. Under this scenario, using Appellant-Plaintiff's twisted approach, liability would turn on whether the property owner was also the dog owner. If the residential property owner was not the dog owner, a cause of action for negligence may lie against the property owner. However, under the exact same circumstances, if the property owner also happened to own the dog, the property owner/dog-owner could not be subjected to liability for negligence and would thus be insulated from liability because there was no notice of any vicious propensity and therefore no basis for a strict liability finding which is the only cause of action permitted against dog owners. Bernstein v Penny Whistle Toys, Inc., 40 AD3d 224, 224 [1st Dept. 2007], *aff'd* 10 NY3d 787 [2008]; Collier v. Zambito, 1 NY3d 444 (2004). No legal justification exists for applying different standards to dog owners and non-dog owners under these circumstances which would lead to inconsistent and inequitable results.

In essence Appellant-Plaintiff advocates for an unjustified and more demanding standard of care for non-dog-owners [the Respondent-Defendant] than that which is applied under New York law to the very owner of the dog. Rather, than this nonsensical and inequity approach that also defies precedent, in conformity with the strict liability rule as applied to dog owners, and consistent with each of the Departments of the Appellate Division, the exclusive strict liability rule is, and should continue to be adhered to, as the only theory of liability that a plaintiff may assert against any defendant [dog owners and non-dog owners alike] to recover for harm caused by a dog. Carter v. Metro North Associates, 255 AD2d 251 (1st Dept. 1998); Christian v. Petco Animal Supplies Stores, Inc. 54 AD3d 707 (2nd Dept., 2008); Claps v. Animal Haven, Inc., 34 AD3d 715 (2nd Dept. 2006); Coffey v. McAleer, 112 AD3d 907 (2nd 2013); Hargro v. Ross, 134 Ad 3d 1461 (4th Dept., 2015); Hewitt v. Palmer Veterinary Clinic, P.C., 167 AD3d 1120 (3rd Dept. 2018).

Precedent is not cast aside unless it has become unworkable, increasingly irrational and/or increasing unjust over time. People v. Peque, 22 NY3d 168, 194 (2013); Policano v. Herbert, 7 NY3d 588, 604 (2006). The strict liability rule continues to provide an easy-to-apply bright-line rule that is applied consistently to bar negligence claims. There is no evidence that the harm occasioned by this rule has increased over time by its application. Accordingly, this Court should affirm summary judgment for Respondent-Defendant.

II. THE STRICT LIABILITY RULE IS GROUNDED UPON SOUND PUBLIC POLICY FIRMLY ROOTED IN PRECEDENT AND FUNCTIONS AS A COMMON NOTICE REQUIREMENT

The strict liability rule as the sole viable theory of liability arising from domestic animal-related injuries is firmly rooted in New York law. Kennet v. Sossnitz, 260 App. Div. 759 (1st Dept. 1940), aff'd 286 NY 623 (1941); Brown v. Willard, 278 App. Div. 728 (3rd Dept. 1951) aff'd 303 NY 727 (1951). More recently, this Court has consistently adhered to the prohibition against negligence actions arising from harms caused by domestic animals. Bloomer v. Shauger, 21 NY3d 917 (2013); Smith v. Reilly, 17 NY3d 895 (2011); Petrone v. Fernandez, 12 NY3d 546 (2009); Bernstein v Penny Whistle Toys, Inc., 10 NY3d 787 (2008).

The rational underlying the strict liability rule related to dog-related injuries is based upon a dog's volitional behavior which creates the harm. As aptly stated by Judge Abdus-Salaam, in her concurring opinion in Doerr v. Goldsmith, 25 NY 3d 1114, 1131 (2015):

> ...When a person tosses a ball, the object has no will of its own, and hence the object's nonexistent volitional behavior cannot cause any injury. The ball can do nothing but obey the laws of physics, and the ball must move if the human actors carry out their wish for it to do so. While the individuals hurling a ball may not know the exact path it will follow, they are liable in negligence so long as it is reasonably foreseeable that the ball's travel through the air might place it on a collision course with another person. By contrast, dogs may deem their masters' commands considerably less compelling that the forces of acceleration and gravity. A dog owner's call may prompt the dog not to move at all, much less collide with someone, and therefore negligence cannot lie based on the owner's order. This inability to predict or

> control how a dog will interpret, react, and respond to its surroundings is why negligence cannot lie based on the owner's order alone....

Judge Abdus-Salaam further soundly reasoned that "[b]ecause *Bard* [6 N.Y.3d 592 (2006)] does not impose a duty on a pet owner to exercise reasonable care in the control of a pet that has no known vicious propensities, the owner's failure to exercise such care, whether by act or omission, does not furnish a basis for liability." Id. at 1132. Because there is no way to know why a dog did what it did, there is no principled basis on which to impose negligence liability. Id. at 1133.

Even in the dissenting opinion of Chief Judge Lippman in Doerr, 25 NY 3d 1114, 1140 (2015), Judge Lippman stated he would have continued to adhere to the vicious propensities rule where it appropriately applies, which would appear to be the great majority of cases involving injuries caused by domestic animals. "The rule reflects a policy decision that a pet owner is not required to anticipate and take steps to prevent aberrational, dangerous behavior from an apparently benign animal. For example, an owner will not be liable the first time a rambunctious dog welcoming a guest knocks him down the steps." Id. Notably, the record in this case demonstrates that the dog had no known vicious propensities.

The rational underlying the strict liability rule as the sole viable theory of liability arising from a dog-related injuries against dog-owners which requires notice of vicious propensities because of a dog's volitional behavior and unpredictable actions absent a known vicious propensity applies equally to non-dog owners alike.

However, Appellant-Plaintiff advocates that a different rule be adopted by this Court that allows for a negligence theory of liability against defendant veterinarians uniquely with no justification for the exception.

Contrary to Appellant-Plaintiff's position, veterinarians are not so uniquely situated that a different rule of law allowing for negligence liability should apply to them exclusively. Essentially, Appellant-Plaintiff maintains that a negligence theory should be permitted against only veterinarians because their care and treatment of a dog may have set an instrumentality of harm in motion and because their experience with animals places them in a better position to guard against risks posed by dogs.

The instrumentality of harm theory espoused by Appellate-Plaintiff is not unique to veterinarians. This position has been considered and rejected by this Court in dog-related injury cases. Doerr v. Goldsmith, 25 NY3d 1114 (2105), involved defendant Julie Smith, who owned the dog, and her boyfriend, defendant Daniel Goldsmith, who did not keep Smith's dog on a leash in the park in the section of the park that included a bicycle loop road. Defendants Smith and Goldsmith were outside the roadway on opposite sides of the road, and Goldsmith was kneeling down and holding the dog in his arms, as if hugging it. Smith bent down and clapped her hands on her knees, and she allegedly called the dog over to her. Plaintiff commenced a personal injury action asserting a negligence cause of action against Smith and Goldsmith based upon their having negligently controlled and directed

Smith's dog into the path of the plaintiff. Plaintiff Doerr did not set forth any strict liability cause of action or allege that the dog had a vicious propensity. This Court's majority held that under the circumstances of the case, and in light of the arguments advanced by the parties, Bard v. Jahnke (6 NY3d 592 [2006]), it was constrained to reject plaintiffs' negligence causes of action against defendants arising from injuries caused by the dog. The majority declined to overrule this Court's recently affirmed precedent citing Bloomer, 21 NY3d at 918; Petrone, 12 NY3d at 547-551.

This Court's majority decision in Doerr compels denial of Appellant-Plaintiff's erroneous position that a negligence cause of action may be permitted against veterinarians on the basis that veterinarians alone are somehow uniquely capable of launching an instrumentality of harm with regard to dog-related injuries. The same negligence theory of liability was raised in the context of Doerr, albeit in a different setting and under different circumstances, based upon the alleged actions of the dog-owner and her boyfriend in calling and releasing a dog into the path of the plaintiff bicyclist and was rejected by this Court's majority decision. Thus, such claims involve launching an instrumentality of harm are not unique to veterinarians like Respondent-Defendant, and the same rule of law should therefore consistently be applied limiting the theory of liability against them to strict liability only.

At its heart, the strict liability exclusivity rule regarding dog-related injuries is a rule of notice. Absent awareness of a domestic animal's previously

demonstrated tendency to harm others, a defendant whether dog-owner or not, should not bear the costs of the dog's instinctive decisions. Notice requirements such as notice of a vicious propensity, is hardly oppressive or alien to the rule of law in New York and permit parties to manage their affairs based on the known risks of daily life.

Appellant-Plaintiff's position that a veterinarian's experience with dogs somehow places them in a unique position to anticipate and take steps to prevent aberrational, dangerous behavior from an apparently benign animal which should subject them only to negligence liability is speculative and fanciful. As Chief Judge Lippman recognized in Doerr, 25 NY 3d 1114, 1140 (2015), the vicious propensities rule reflects a policy decision that a dog's volitional aggressive behavior is unpredictable absent notice of vicious propensity. Moreover, a veterinarian is no more able to anticipate a dog's actions than the dog's owner who has had the benefit of daily experience with his or her dog and its everyday reactions to its environment. Further, a dog's volitional behavior by its very nature remains unpredictable.

The mere presence of a domestic dog, is not, and should not, constitute notice of a dangerous condition under the law absent notice of a vicious propensity. Unlike inanimate objects which by their mere nature and presence may constitute a dangerous condition based upon the risk posed by it, a dog is uniquely situated. It is not until any defendant has knowledge of a dog's vicious propensities that it is on

notice of the dog as a dangerous condition. Thus, the absence of knowledge of a dog's vicious propensity by a defendant amounts to lack of notice of a dangerous condition.

There is no justification absent awareness of a dog's previously demonstrated tendency to harm others, that a veterinarian, exclusively, should bear the cost of the dog's unpredictable and instinctive decisions. Surely, a veterinarian is in no better position to anticipate any dog's actions than the defendant dog owner was in Doerr, 25 NY 3d 1114, who bent down and clapped her hands on her knees, and allegedly called the dog over to her. Yet, this Court's majority reversed and granted the dog owner summary judgment. Id. at 1158. It is for the same reasons that this Court must apply the strict liability exclusivity rule in this matter.

Delineation of limits of liability in tort actions is usually determined on the basis of considerations of public policy. Bovsun v. Sanperi, 61 NY2d 219, 228 (1984). The benefits of a bright-line rule limiting recovery to a theory of strict liability continues to outweigh the concern of those few cases for which the application of the rule may seem unsatisfactory. That determination still remains reasonable because there are legitimate policy reasons to retain the strict liability exclusivity rule including its ability to keep liability within manageable limits, its bright-line guidance and its consistency in application and societal expectations.

Abandoning or eroding the bright-line strict liability exclusivity rule regarding dog-related injuries would harm pet owners and owners of premises where dogs are permitted and create uncertainty in the case law. Pet owners and owners of premises where dogs are permitted and their respective insurers are entitled to rely on the strict liability exclusivity rule to plan their future conduct and their insurance needs. Changing or altering the rule now, would risk unfairly disrupting their expectations.

Moreover, this Court is charged with creating a coherent body of settled law by which members of society may order their affairs. This mission reflects the policy choices of predecessor judges that decide an issue and thereby create precedent. The bright-line strict liability exclusivity rule regarding dog-related injuries is settled law. Accordingly, summary judgment awarded to Respondent-Defendant must be affirmed by this Court and affirm the denial of partially summary judgment to Appellant-Plaintiff.

III. THIS COURT SHOUD AFFIRM THE DENIAL OF APPELLANT-PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT WHERE RESPONDENT-DEFENDANT DID NOT HAVE NOTICE OF A VICIOUS PROPENSITY AND APPELLANT-PLAINTIFF FAILED TO MEET HER BURDEN EVEN UNDER AN IMPERMISSIBLE CAUSE OF ACTION FOR NEGLIGENCE

The record and Appellant-Plaintiff's concession demonstrate that neither the dog owner Ann Hemingway nor Respondent Palmer Veterinary Clinic had

knowledge of the dog's vicious propensity. Thus, the Respondent-Defendant cannot be held liable for a dog bite in this State as a matter of law.

Appellant-Plaintiff's cross-motion for partial summary judgment was not only properly denied because it asserts a theory of liability based on negligence which is not recognized in this State for dog-related injuries, but Appellant-Plaintiff's arguments are also unsupported by the record. They are based upon an Affidavit of Nicholas Dodman, DVM, (hereinafter "Dodman") (A. 93) who relied only on Appellant-Plaintiff's contradictory Affidavit (A. 87-91) and the veterinarian notes (A. 93). He did not review any of the depositions taken in this matter, including the appellant's deposition, veterinarian Dr. McCarter, the dog's owner Ann Hemmingway or any of the other witnesses (A. 93). In opposition to Appellant's motion below, Respondent-Defendant established through the Affidavit of George Palmer, DVM, that it was in conformance with the Standards of care for Veterinarian practice (A. 125-126).

Appellant-Plaintiff erroneously claims that Respondent ("Palmer VC") does not deny the essential facts contained in the Dodman Affidavit (Appellant Brief p. 29). Inexplicably, Dodman states in his Affidavit that he bases his opinions solely on (1) the Affidavit of Appellant Marsha Hewitt (dated 7/17/17) (A. 87-91) and (2) the Veterinary case notes (A. 93).

Dodman's opinions are deficient and without probative value. Based upon his Affidavit the only things he basis his opinion on is the Appellant-Plaintiff's Affidavit (dated 7/17/17- after the Appellant's deposition taken on June 16, 2015 (R.A. 1) and several veterinary notes (A. 93). Dodman did not review the pleadings (A. 30-44), Bill of Particulars (R. A. 57), any of the 10 depositions in this matter including the deposition of the Appellant taken on 6/16/15 (R.A. 1). His Affidavit states that he was "informed of the details of the incident, [read] the affidavit of Marsha Hewitt, and [read] the veterinary case notes" in providing his "comments" on this matter (A. 93). Notably, Dodman relies upon Appellant's contradictory Affidavit – A. 87-91) and not her complete deposition which she gave more than 2 years prior (R.A. 1; A. 93). His opinions are not based upon the various deposition testimony in the record. He was not provided Appellant-Plaintiff's own deposition testimony; nor the veterinarian, Dr. McCarter who treated the dog at issue; the owner of the dog, Ann Hemmingway; or any of the witnesses to this incident that also gave deposition testimony in this matter.

Where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment. Diaz v New York Downtown Hosp., 99 N.Y.2d 542 (2002).

Further, Appellant-Plaintiff's affidavit that is the sole document Dodman relied upon regarding the circumstances that occurred, was provided (as opposed to any other deposition transcripts, including Appellant-Plaintiff's) in an attempt to create feigned issues and obtain a favorable opinion from him. For instance, the contradictory Affidavit of Appellant-Plaintiff states that the dog was "very aggressive" during the procedure (as reported by the veterinarian) (A 88; 94). This is simply not true, to the contrary the dog was "perfectly behaved" as testified to by those in the room (R. A. 80; 84-85). In fact at Appellant-Plaintiff's deposition (more than 2 years before her "Affidavit" was drafted and provided to Dodman) Appellant-Plaintiff specifically testified, that the dog was not acting "aggressive" (A. 71). Notably, Appellant-Plaintiff executed a sworn Errata Sheet on August 6, 2015 (2 years prior to her affidavit), and made no changes to her testimony in this regard (R. A. 98).

It is well settled that testimony may not be altered by a contradictory Affidavit submitted in opposition to a defendant's motion in an attempt to create a feigned issue of fact. Martin v Savage, 299 A.D.2d 903 (4th Dept. 2002); Ruzycki v. Baker, 301 A.D.2d 48 (4th 2002). Furthermore, an "Expert's" opinions based upon such self-serving contradictions should not be given any weight. Appellant-Plaintiff's expert's (Dodman), affidavit states that he only reviewed Appellant-Plaintiff's Affidavit and veterinary notes (A. 93). As such he did not review the Appellant-

Plaintiff's own deposition transcript (R.A. 1), nor did he review the transcripts of the dog's owner and one in control of the dog at the time of this incident Ann Hemingway (R. A. 92), Dr. Sarah McCarter (who treated Vanilla)(R. A. 78), Dr. George Palmer (R. A. 29), Jessica Gagnon (assisted Dr. McCarter in the treatment of Vanilla)(R. A. 82), or any witnesses including Robert Walker (R. A. 87), Wendy Schwanck, Janet Caulkins, April Miller or Jessica McCormick. His Affidavit clearly states that his "comments" are based on Appellant-Plaintiff's Affidavit and some veterinary notes (A. 93).

Further, Dodman's comments in regards to what he deems "Best Practice" is supported by a website (*http.//icatcare.org/catfriendlyclinic*) (A. 95) which is clearly not an applicable standard of care/liability, nor an authoritative source. Importantly, nothing in his Affidavit (A. 93) provides any opinions establishing proximate cause. Dodman's Affidavit is based on Appellant-Plaintiff's affidavit that contradicts her testimony from 2 years prior and is contrary to the record in regards to the dog's treatment (R. A. 80; 84-85) and "state" (of mind/actions) (A. 93) while in the waiting room being held by its owner Ann Hemingway. Inexplicably he states that this dog was aggressive towards people "through history" (A. 94), an assertion that is wholly unsupported by the record and has also been refuted repeatedly by Appellant-Plaintiff herself, as there is no prior history or knowledge of a vicious propensity (Appellant Brief p 3. fn. 1; R. A. 95).

Dodman's Affidavit is deficient as to any proximate cause basis. In fact his Affidavit asserts (consistent with Appellant-Plaintiff herself – R.A. 17) that it is quite possible that this dog was attempting to go after Appellant's white cat, due to a natural prey drive as opposed to any other speculative factor (A. 94; R. A. 17). For these reasons, Dodman's Affidavit is deficient and insufficient as a matter of law, should be given no probative force Diaz v New York Downtown Hosp. 99 N.Y.2d 542 (2002).

In addition, George Palmer, DVM, who is familiar with the incident and is a Veterinarian and majority owner of Palmer Veterinary Clinic, P.C., indicated that Respondent-Defendant did not deviate from accepted standards of Veterinary practice. (A. 125). Therefore, the denial of Appellant-Plaintiff's cross-motion for partial summary judgment motion should be affirmed by this Court.

IV. APPELLANT-PLAINTIFF'S MOTION TO AMEND HER PLEADINGS TO ASSERT NEGLIGENCE WAS PROPERLY DENIED WHERE NEGLIGENCE IS NOT A RECOGINIZED CAUSE OF ACTION IN IN DOG BITE CASES AND WAS ATTEMPTED TO BE RAISED FOR THE FIRST TIME AFTER THE STATUTE OF LIMITATIONS HAD RUN

On October 1, 2014, Appellant-Plaintiff served her Bill of Particulars (R. A. 38; 57). In response to the demand for "an itemized and detailed statement specifying in detail the acts or omission constituting the negligence claimed." (R. A. 38; 57), Appellant-Plaintiff set forth an alleged account of the incident at issue, and with regards to negligence set forth only that:

> "...On information and belief, Defendant Palmer Veterinary Clinic *knew of the dog's vicious propensities*. On information and belief, Ann Hemingway *was aware of her dog's vicious propensities*. On information and belief, the pit bull has previously attacked animals or people."
> (R. 238; 336).

Appellant-Plaintiff's initial Bill of Particulars sets forth the sole cause of action for liability to be premised upon the dog owner Ann Hemingway and Respondent-Defendant's alleged knowledge of a prior vicious propensity (R. A. 38). Despite her original pleadings being solely based on this alleged knowledge of a vicious propensity (A.30; R. A. 38; 57), Appellant-Plaintiff since conceded and affirmed that the facts and record in this matter prove that Respondent-Defendant and the dog's owner (Ann Hemingway) had no knowledge of a prior vicious propensity (Appellant's Brief p. 3; R. A. 95). As such, Appellant-Plaintiff's motion was properly denied.

On July 26, 2017 (more than 3 years after the incident at issue- April 16, 2014) Defendant Palmer received, Appellant-Plaintiff's Supplemental Verified Bill of Particulars (R. A. 63; 69). In addition to numerous other changes to Appellant-Plaintiff's Bill of Particulars, including for the first time that Appellant-Plaintiff now has been unable to work since October 24, 2014 at R. A. 63; and 69 ¶ 8; new allegations regarding the procedure at ¶ 5; new claims of loss wages at ¶ 15, Appellant also sets forth the following allegations at paragraph 3:

> "...*Defendant Palmer Veterinary Clinic knew of the dog's vicious propensities. Defendant Palmer Veterinary clinic failed to maintain a safe premises in its waiting room. Palmer Veterinary Clinic was negligent in not giving an effective pain medication and/or anesthesia to the dog. Palmer Veterinary Clinic was negligent in bringing an agitated/aggressive dog into the waiting room. Palmer Veterinary Clinic was negligent in not adjusting the collar of the dog after surgery to prevent its getting loose in the waiting room. Palmer Veterinary Clinic was negligent in bringing the pit bull into the waiting room just a few feet from Mrs. Hewitt and her cat. Palmer Veterinary Clinic was negligent in not following the standard of care of dogs after surgery. Palmer Veterinary Clinic was negligent for failing to use due care.*"
>
> (R. A. 63; 69 at ¶ 3)

It is well settled law that an action to recover damages for personal injury must be commenced within three (3) years (CPLR § 214). Appellant-Plaintiff's injuries are alleged to have occurred on April 16, 2014 (A. 30). Appellant-Plaintiff's new claims set forth in the Supplemental Bill of Particulars for: Negligence in not giving an effective pain medication and/or anesthesia to the dog and Negligence in not following the standard of care of dogs after surgery and failing to use due care (R. A. 63; 69 ¶ 3) are explicitly time barred by the three statute of limitations having only now been alleged in Appellant-Plaintiff's Verified Supplemental Bill of Particulars dated July 24, 2017 Appellant-Plaintiff's Second Verified Supplemental Bill of Particulars (R. A. 63; 69). A bill of particulars may not be supplemented to assert new or changed theories of recovery if the time to assert such claims has run Calamari v. Panos, 131 A.D.3d 1088 (2nd Dept. 2015); Robinson v. New York City

Hous. Auth., 89 A.D.3d 497 (1st Dept. 2011); Hyacinthe v. Edwards, 10 A.D.3d 629 (2nd Dept. 2004). The Supreme Court properly held that Appellant-Plaintiff's additions to the Verified Bill of Particulars that "Palmer Veterinary Clinic was negligent in not giving 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 not recognized negligence causes of action in New York State in dog bite cases (A. 13).

Based upon the above, the Supreme Court properly denied Appellant-Plaintiff's motion to amend the pleadings as to these allegations and must be affirmed.

V. APPELLANT-PLAINTIFF'S MOTION TO STRIKE RESPONDENT-DEFENDANT'S CPLR ARTICLE 16 AFFIRMATIVE DEFENSE WAS PROPERLY DENIED AS A MATTER OF LAW AND MUST BE AFFIRMED

As this Court held in Smith v. Sarkisian, 63 AD2d 780 (3d Dept 1978) where a plaintiff has been guilty of an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and one of merit should be submitted in support of the motion Walter v. Le Cesse Corp., 54 A.D.2d 1136 (4th Dept 1976); Boehm Development Corp. v. State of New York, 42 A.D.2d 1018 (3d Dept 1973). Moreover, leave to amend is correctly denied on the ground of laches where plaintiff has been for a long period of time aware of the facts of the proposed cause of action. Saturno v. Yanow, 50 A.D.2d 1097 (4th Dept 1975).

Further, Judicial discretion to grant an amendment of a pleading "should be exercised with caution where a case has been certified as ready for trial." Dougherty v. Wade Lupe Constr. Co., 98 A.D.2d 868 (3d Dept 1983); see also, Kopel v. Chiulli, 175 A.D.2d 102 (2d Dept 1991), 103, 571 N.Y.S.2d 806; Alexander v. Seligman, 131 A.D.2d 528 (2d Dept 1987). Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay. Reape v. City of New York, 272 A.D.2d 533 (2d Dept 2000); Schwab v. Russell, 231 A.D.2d 820 (3d Dept 1996); Volpe v. Good Samaritan Hosp., 213 A.D.2d 398, 398–399 (2d Dept 1995). Which has never been provided by Appellant.

Further, Respondent served their Answer to Appellant's Complaint (A. 35-44) asserting the Affirmative Defense of Article 16. Pursuant to CPLR § 1603, Appellant-Plaitniff has the obligation to plead any claimed exception to CPLR § 1601 but failed to do so (A. 30-34). On August 22, 2017, approximately 3 years after Respondent's Answer was served asserting the Affirmative Defense of Article 16, Appellant-Plaintiff attempted to amend her pleadings to now plead the exception simultaneously with the filing of their Note of Issue (R. A. 75).

Notwithstanding the lack of a reasonable excuse for the delay and the fact that the amendment was being sought only *after* Appellant-Plaintiff had moved to strike Respondent-Defendant's Affirmative Defense, the Supreme Court correctly denied

Appellant-Plaintiff's motion as she failed to make any evidentiary showing that the proposed amendment had merit. Smith v. Sarkisian, 63 AD2d 780 (3d Dept 1978).

In Faragiano ex rel. Faragiano v. Town of Concord, 96 N.Y.2d 776 (2001), the Court of Appeals case involving a plaintiff who was involved in a motor vehicle accident commenced an action against, among others, the driver of the Jeep, the owner of a camper, the contractor that resurfaced the road and the Town of Concord. Plaintiffs alleged that the Town negligently constructed and maintained its road and that its contractor, defendant Midland Asphalt, negligently permitted a build-up of oil or tar on the road. The Town asserted, as an affirmative defense, that its liability for any noneconomic losses should be apportioned among the other tortfeasors pursuant to CPLR Article 16. Similar to Appellant in the present action, the plaintiff in Faragiano moved to amend their pleadings to allege that CPLR 1602(2)(iv) precluded apportionment. The Town then cross-moved for partial summary judgment on its article 16 defense, arguing that CPLR 1602(2)(iv) is not an exception to apportionment under article 16, *but a savings provision* that preserves vicarious liability. The Supreme Court incorrectly granted plaintiffs' motion to amend their pleadings and denied the Town's cross motion for partial summary judgment. The Supreme Court concluded that because the Town's liability arose from a breach of a non-delegable duty, it could not invoke limited liability under CPLR article 16. The Appellate Division in Faragiano incorrectly affirmed and held that CPLR

1602(2)(iv) bars a defendant from seeking apportionment under article 16 where liability is based on a non-delegable duty or respondeat superior (272 A.D.2d 975, 976). The Appellate Division then granted the Town leave to appeal and certified the following question to the Court of Appeals: "Was the order of this Court entered May 10, 2000 properly made?"

The Court of Appeals in Faragiano ex rel. Faragiano v. Town of Concord, 96 N.Y.2d 776 (2001) correctly held that based on their decision in Rangolan v. County of Nassau, 96 N.Y.2d 42 (2001), the Supreme Court and Appellate Divisions must be reversed. The Court of Appeals stated:

> "In *Rangolan*, we rejected the argument that CPLR 1602(2)(iv) bars apportionment of noneconomic damages among joint tortfeasors where liability arises from a breach of a non-delegable duty. Instead, we held that CPLR 1602(2)(iv) is a savings provision that ensures that a defendant under a non-delegable duty remains vicariously liable for the negligence of its *delegates or employees*. Thus, here, plaintiffs cannot rely on CPLR 1602(2)(iv) to preclude the Town from seeking apportionment between itself and other joint tortfeasors for whose liability it is not answerable. *Id.*

In Rangolan v. County of Nassau, 96 N.Y.2d 42 (2001), the Court of Appeals stated that the statutory provision stating that general scheme modifying common law rule of joint and several liability shall not be construed to restrict any liability arising by reason of a non-delegable duty, or by reason of the doctrine of *respondeat*

superior, is not an exception to limited liability, but a savings provision that preserves vicarious liability, and the county thus was *not* barred from seeking apportionment of non-economic damages between itself and fellow inmate. Id.

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. This Court has explicitly held that *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"* Rangolan v. County of Nassau, 96 NY2d 42 at 603 (2001).

No exception exists as a matter of law. After a complete and thorough analysis of the Article 16 exceptions and the legislative intent of the same, the Court of Appeals aptly held that CPLR 1602(2)(iv) was not intended to be and cannot be construed as creating a blanket non-delegable duty exception, and having given effect to "all the language employed by the particular legislation" Ferrin v. New York State Dept. of Correctional Servs., 71 N.Y.2d 42 (1987). The Court of Appeals concluded that CPLR 1602(2)(iv) *is not an exception to limited liability but a savings provision that preserves vicarious liability* see, Faragiano v. Town of Concord, 96 N.Y.2d 776 (2001); Rangolan v. County of Nassau, 96 NY2d 42 (2001).

Furthermore, the Court of Appeals in Rangolan addressed the question of whether CPLR 1602(2)(iv) precludes apportionment for noneconomic damages among joint tortfeasors where liability arises from a breach of a non-delegable duty and the Court of Appeals affirmatively held that, "that it does not." Id.

For these reasons it is apparent that Appellant-Plaintiff's alleged proposed exception has no merit as it pertains to the facts of the present case as the Court of Appeals has aptly rejected the notion that CPLR §1602(2)(iv) creates a non-delegable exception to Article 16 and has affirmatively stated that CPLR §1602(2)(iv) does not preclude apportionment for noneconomic damages among joint tortfeasors even where liability arises from a breach of a non-delegable duty. Id.

Notwithstanding Respondent-Defendant's opposition to Appellant-Plaintiff's unpersuasive "non-delegable duty" claims in this dog bite case, Respondent-Defendant is not answerable to the dog's owner and handler Ann Hemingway. It is undisputed that Ms. Hemingway is neither a delegate nor employee of Respondent-Defendant and any attempts to fit the facts and parties in this case to a *respondeat superior* provision are nothing more than a "grasp at straws" and can be given no merit. For these reasons the Supreme Court correctly and aptly denied Appellant-Plaintiff's motion(s) (R 10; 5.7) to amend her pleadings to allege an exception to the Article 16 affirmative defense, denial of Appellant's motion to strike Respondent's

Affirmative Defense of CPLR article 16 and her motion to reconsider (A. 16), as a matter of law. The Supreme Court's decisions must therefore, be affirmed.

CONCLUSION

Based upon the foregoing, Respondent-Defendant respectfully requests that this Court affirm the Appellate Division, Third Department Memorandum and Order Decided and Entered on December 6, 2018, affirming the Decision and Order of the Supreme Court, County of Clinton dated October 17, 2017, awarding summary judgment to Respondent-Defendant, Palmer Veterinary Clinic, P.C. ("Palmer Vet Clinic"), and denying Appellant-Plaintiff's cross-motion for partial summary judgment, and denying Appellant-Plaintiff's Appeal in all other respects.

Respectfully Submitted,

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CERTIFICATION PURSUANT TO RULE 500.13(C)(1)

I, Peter Balouskas certify that this Brief contains 7,658 words and is in compliance with Rule 500.13(c)(1).

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