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NEW YORK STATE
COURT OF APPEALS

MARSHA HEWITT,

Plaintiff/Appellant,

v.

PALMER VETERINARY CLINIC, PC,

Defendant/Respondent.

Third Department Appeal No. 526169

NOTICE OF MOTION FOR PERMISSION TO APPEAL FROM A DECISION OF THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

TO: Adam Hover, Esq.
Burke, Scolamiero & Hurd, LLP
Attorneys for Palmer Veterinary Clinic, PC
7 Washington Square
PO Box 15085
Albany, NY 12212-5085

PLEASE TAKE NOTICE that upon the Affirmation of Mark A. Schneider, the Memorandum of Law in support of this Motion, the Plaintiff's-Appellant's Appeal Brief, the Defendant's-Respondent's Appeal Brief, the Plaintiff's-Appellant's Reply Brief, the Amicus Curiae Brief, and the Record on Appeal, Plaintiff-Appellant Marsha Hewitt will make a motion at a Motion Term of this Court to be held in and for the Court of Appeals, 20 Eagle Street, Albany, New York 12207-1095 returnable on the 31st day of December, 2018, by submission of papers, for Permission to Appeal.

Dated: December 12, 2018

Mark Schneider
Schneider & Palcsik

Attorney for Marsha Hewitt
57 Court Street
Plattsburgh, NY 12901
(518) 566-6666

AFFIRMATION OF SERVICE

I, Mark Schneider, affirm that I have served two copies of the Notice of Motion, the Affirmation in Support of Motion, and Brief in Support of Motion upon Adam Hover, Esq., Burke, Scolamiero & Hurd, LLP, PO Box 15085, Albany, NY 12212-5085 by First Class mail on this 12th day of December, 2018.

Mark Schneider

NEW YORK STATE
COURT OF APPEALS

MARSHA HEWITT,

Plaintiff/Appellant,

v.

PALMER VETERINARY CLINIC, PC,

Defendant/Respondent.

Third Department Appeal No. 526169

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

I, Mark Schneider, affirm as follows in support of Plaintiff's-Appellant's Motion for Leave to Appeal:

1) I am the attorney for Plaintiff-Appellant Marsha Hewitt, and have represented her at summary judgment and at the Appeal of this action in the Third Department.

2) It is uncontroverted that Vanilla, a pit bull dog owned by Ann Hemingway, attacked and injured Plaintiff-Appellant Marsha Hewitt in the waiting room of the Palmer Veterinary Clinic on April 16, 2014 (R: 157).

Introduction

3) This is a case of first impression for this Court. It presents the question of whether the harsh and anomalous rule from Bard v. Jahnke, 6 N.Y.3d 592, 599 (2006) - that *owners* of dogs that attack people are only liable under strict liability (and not negligence) if they had prior knowledge of the animal's vicious propensities – should

be extended to negligent veterinarians or other property owners who do not also own the vicious dog.

Procedural history

4) In a three to one split decision, the Third Department upheld the trial court decision that the Palmer Veterinary Clinic, who does not own the vicious dog, cannot be held liable for its own negligence when a customer's vicious dog that has been surgically treated then attacked Mrs. Hewitt, another customer, in the waiting room (relying upon Bernstein v. Penny Whistle Toys, Inc., 10 N.Y.3d 787 (2008)). It followed decisions of the other three Appellate Divisions.

5) The majority decision ambiguously stated:

> 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.

6) In his well-reasoned dissent, Justice Egan opined that the instant appeal is distinguishable from Bernstein v. Penny Whistle, because Defendant/Appellant Palmer Veterinary Clinic did not own the dog in question. He stated:

> 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.

7) The Third Department entered its Decision on December 6, 2018 (copy of Decision attached as Exh. A).

Argument

8) It is black letter law in New York that the *owner* of a dog is only liable for an attack in strict liability if he had prior knowledge of the dog's vicious propensities. 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).

9) However, this Court has *never* held that this harsh principle should be extended to negligent owners of property where the dog attack occurred *if the property owner does not also own the dog in question.*

10) The Third Department misconstrued the controlling law of this Court regarding the liability of veterinarians for their own negligence that cause a dog attack in their own waiting room.

11) In Bernstein v. Penny Whistle Toys, Inc., 10 N.Y.3d 787 (2008), this Court dismissed the complaint against the *owner* of the dog that bit the plaintiff because the *owner* had no knowledge of the animal vicious propensities. It did not hold that a veterinarian (or any other property owner who does not own the vicious dog) cannot liable in negligence or premises liability.

12) In Bernstein, at 788, this Court *suggested* that a third-party defendant could be liable for negligence if there was *evidence of such negligence*. It dismissed the claim against the mother of the friend of the child who had been bitten because "there is no evidence that third-party defendant was negligent."

13) This Court did not adopt or even mention the statement from the First Department in Bernstein v. Penny Whistle Toys, Inc., 40 A.D.3d 224 (1st Dept. 2007), that a

property owner can only be held liable under strict liability for a dog bite if he also owns the dog.

14) No other state immunizes veterinarians from their own negligence when a human customer is injured on their property. See, Amicus Brief of the New York State Trial Lawyers.

15) There is no public policy argument to support such a rule.

16) Rather, there is a strong public policy that a person in a veterinarian waiting room should be reasonably safe from attacks by other dogs.

17) Veterinarians are well-aware of the risks presented by an animal coming out of surgery.

18) The issue presented here is of public importance and presents a conflict with the prior decisions of this Court.

19) The Decision of the Third Department is an injustice to Plaintiff because is left with no legal remedy for her serious injuries caused by Palmer Veterinary Clinic.

20) Although this Court is bound to follow the harsh rule of Bard where it applies because of *stare decisis*, it is not bound to extend it to situations where the property owner does not own the vicious dog.

21) This Motion has been served in a timely manner, pursuant to CPLR § 5513.

Facts

22) It is uncontroverted that Mrs. Hewitt was injured in the attack by the pit bull in the Palmer VC waiting room (R: 157).

23) 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 (R: 139).

24) 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 the owner of the pit bull. Veterinarian Dr. McCarter brought the dog out from the exam room to the waiting room on a leash and gave the leash to the owner. The dog was very agitated. It was going around in circles. It was very anxious like it had been in pain (R: 71-74).

25) Dr. McCarter told Ann Hemingway that they had held the dog down and had not given anesthesia. She mentioned a few people were holding the dog down while operating on the pad of the dog (R: 76). Dr. McCarter then went back into office area (R: 81).

26) The pit bull dog then slipped its leash and attacked Mrs. Hewitt (R: 83). It jumped on her back and grabbed on to her ponytail, pulling her backward. The dog ripped some hair out of her scalp (R: 85-91).

27) 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). 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 get loose in the waiting room. He opines that it was dangerous to bring an agitated pit bull 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 pit bull.

Conclusion

28) The decision of the Third Department presents a conflict with the prior decisions of this Court.

29) This Honorable Court should grant leave for Plaintiff-Appellant Marsha Hewitt to appeal this case so that it can explicitly address these important facts and legal issues.

30) Further factual and legal bases for this Motion are presented in Plaintiff's-Appellant's attached Brief in Support of this Motion, Plaintiff's-Appellant's Appeal Brief (with citations to the Record), Plaintiff's-Appellant's Reply, and the Amicus Curiae Brief of the New York State Trial Lawyers Association.

WHEREFORE, this Honorable Court should grant Plaintiff-Respondent Marsha Hewitt permission to appeal.

I, Mark Schneider, affirm that the facts contained in this Affirmation are true and correct to the best of my knowledge. Signed on this 12th day of December, 2018.

Mark Schneider
Schneider & Palcsik
Attorney for Marsha Hewitt
57 Court Street
Plattsburgh, NY 12901
(518) 566-6666

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 6, 2018 526169

MARSHA HEWITT,
Appellant,
v

PALMER VETERINARY CLINIC, PC,
Respondent,
et al.,
Defendant.

MEMORANDUM AND ORDER

Calendar Date: September 13, 2018

Before: Egan Jr., J.P., Clark, Mulvey, Aarons and Pritzker, JJ.

Schneider & Palcsik, Plattsburgh (Mark Schneider of counsel), for appellant.

Burke, Scolamiero & Hurd, LLP, Albany (Adam Hover of counsel), for respondent.

Aarons, J.

Appeal from an order of the Supreme Court (Ellis, J.), entered October 18, 2017 in Clinton County, which, among other things, granted a motion by defendant Palmer Veterinary Clinic, PC for summary judgment dismissing the complaint against it.

The facts of this case are set forth more fully in a prior decision of this Court (145 AD3d 1415, 1415 [2016]). Briefly, in April 2014, a pit bull owned by defendant Ann Hemingway attacked plaintiff in the waiting room of a veterinary clinic

Exhibit A

owned by defendant Palmer Veterinary Clinic, PC (hereinafter defendant). As a consequence of this incident, plaintiff, in August 2014, commenced this negligence action against defendant and Hemingway.[1] In the bill of particulars, dated October 1, 2014, plaintiff alleged, among other things, that defendant "knew of the dog's vicious propensities," had "notice that the dog that attacked [her] was dangerous" and that defendant's office manager had "told [her] that the dog had a history of being vicious." In July 2017, plaintiff served a supplemental bill of particulars, in which she alleged, as relevant here, that defendant was "negligent in not giving an effective pain medication and/or anesthesia to the dog" and "negligent in not following the standard of care of dogs after surgery." In August 2017, plaintiff moved to, among other things, strike defendant's affirmative defense of apportionment under CPLR 1601 on the basis that defendant violated its nondelegable duty to provide a safe waiting room. Defendant opposed and cross-moved to preclude and dismiss the alternative theories raised in plaintiff's supplemental bill of particulars. Plaintiff opposed defendant's cross motion and, in so doing, moved to amend the complaint to plead an exception to CPLR 1601. In a September 2017 order, Supreme Court, among other things, denied plaintiff's motion to strike defendant's affirmative defense and motion to amend the complaint and granted defendant's cross motion to the extent of striking from the supplemental bill of particulars the claims alleging that defendant was negligent in not giving effective pain medication/anesthesia to the dog and in failing to follow the applicable standard of care of dogs following a surgery.

Defendant thereafter moved for summary judgment seeking dismissal of the complaint. Plaintiff opposed and cross-moved for partial summary judgment on the issue of liability. In an October 2017 order, Supreme Court granted defendant's motion and denied plaintiff's cross motion. Plaintiff now appeals from the October 2017 order. We affirm.

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[1] The action was discontinued against Hemingway in August 2017.

The Court of Appeals has generally held that when a domestic animal causes injury to another, the owner of the domestic animal is liable only under a theory of strict liability, which requires that the injured person demonstrate that the owner had notice of the animal's vicious propensities (see Doerr v Goldsmith, 25 NY3d 1114, 1116 [2015]; Petrone v Fernandez, 12 NY3d 546, 550 [2009]; Bernstein v Penny Whistle Toys, Inc., 10 NY3d 787, 788 [2008]; Bard v Jahnke, 6 NY3d 592, 599 [2006]; Collier v Zambito, 1 NY3d 444, 446-447 [2004]). Although we are cognizant that the strict liability rule has not escaped criticism (see Doerr v Goldsmith, 25 NY3d at 1154-1155 [Fahey, J., dissenting]; Bard v Jahnke, 6 NY3d at 601-602 [Smith, J., dissenting]; Scavetta v Wechsler, 149 AD3d 202, 211-212 [2017]), we have likewise applied this strict liability rule in actions against a dog owner involving injuries allegedly caused by his or her dog (see e.g. Olsen v Campbell, 150 AD3d 1460, 1461 [2017]; Clark v Heaps, 121 AD3d 1384, 1384 [2014]; Bloom v Van Lenten, 106 AD3d 1319, 1320 [2013]; Gordon v Davidson, 87 AD3d 769, 769 [2011]; Miletich v Kopp, 70 AD3d 1095, 1095 [2010]; Rose v Heaton, 39 AD3d 937, 938 [2007]). Plaintiff, however, contends that this strict liability rule does not apply because defendant did not own the dog who attacked her. More specifically, plaintiff argues that defendant, as a premises owner, breached its duty to provide a reasonably safe waiting room and, therefore, can be liable under a negligence theory. We disagree.

In Bernstein v Penny Whistle Toys, Inc. (40 AD3d 224, 224 [2007], affd 10 NY3d 787 [2008]), a case where an infant was bitten by a dog in a toy store, the First Department affirmed the dismissal of the entire complaint and held that the plaintiff therein was limited to a strict liability claim against the defendant dog owner and the defendant toy store. The dissent did not quarrel with the dismissal of the strict liability claim, but would have reinstated the negligence cause of action insofar as asserted against the dog owner and toy store (id. at 226). In the dissent's view, the dog owner and the toy store, in their capacity as proprietors of a business, owed an additional duty to the plaintiff to keep the premises in a reasonably safe condition (id.). The Court of Appeals, in a

memorandum opinion, applied the strict liability rule and summarily held that the dismissal of the complaint against both the dog owner and toy store was correct "[s]ince there [was] no evidence . . . that the dog's owner had any knowledge of its vicious propensities" (Bernstein v Penny Whistle Toys, Inc., 10 NY3d at 787).

Even though the Court of Appeals in Bernstein v Penny Whistle Toys, Inc. (10 NY3d 787 [2008], supra) did not explicitly speak on the issue presented here, in our view, it is nonetheless persuasive. Indeed, 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 AD3d 525, 525 [1st Dept 2018], lv denied 32 NY3d 908 [2018]; Hargro v Ross, 134 AD3d 1461, 1462 [4th Dept 2015]; Christian v Petco Animal Supplies Stores, Inc., 54 AD3d 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.

That said, plaintiff acknowledges in her appellate brief that she is not asserting a claim for strict liability against defendant and that her claims against it are grounded in negligence and premises liability. In her opposition to defendant's summary judgment motion, plaintiff likewise conceded that she did not have a strict liability claim against defendant. In any event, even if a strict liability claim could be extrapolated from plaintiff's pleadings (cf. Scoyni v Chabowski, 72 AD3d 792, 793 [2010]), the record discloses that defendant did not have notice of the dog's vicious propensities prior to the April 2014 incident at issue (see Clark v Heaps, 121 AD3d at 1385; Illian v Butler, 66 AD3d 1312, 1313-1314 [2009]). As such, Supreme Court correctly granted defendant's motion for summary judgment and denied plaintiff's cross motion for partial summary judgment (see Filer v Adams, 106 AD3d 1417, 1419-1420 [2013]).

Plaintiff also contends that Supreme Court erred in striking allegations from the July 2017 supplemental bill of particulars claiming that defendant was "negligent in not giving effective pain medication and/or anesthesia to the dog" and "negligent in not following the standard of care of dogs after surgery." As an initial matter, we note that this argument centers on the relief granted to defendant in the September 2017 order, from which no appeal was taken by plaintiff. Notwithstanding the absence of a notice of appeal from the September 2017 order and, contrary to defendant's assertion, the September 2017 order is reviewable. In this regard, the October 2017 order, which plaintiff appealed from, is a final order inasmuch as it disposed of all causes of action and left nothing for further judicial action (see Burke v Crosson, 85 NY2d 10, 13 [1995]). Furthermore, under the circumstances of this case, the September 2017 order necessarily affects the October 2017 order given that, if Supreme Court had denied defendant's cross motion to dismiss the allegations at issue, a different theory of liability against defendant would have been injected into the action (see Oakes v Patel, 20 NY3d 633, 644-645 [2013]). Accordingly, plaintiff's appeal from the October 2017 order brings up for review the September 2017 order (see CPLR 5501 [a] [1]; Architectural Bldrs. Inc. v Pollard, 267 AD2d 704, 705 [1999]; Hurd v Lis, 126 AD2d 163, 166 [1987], lv dismissed 70 NY2d 872 [1987]).

As to the merits, Supreme Court correctly found that the new allegations in the July 2017 supplemental bill of particulars improperly expanded the theory of liability against defendant. As discussed, the theory of liability set forth in the complaint and in the October 2014 bill of particulars was premised on the notion that defendant was aware of the dog's vicious propensities. In July 2017, over three years after the dog attack, plaintiff alleged for the first time in the supplemental bill of particulars that defendant was negligent by not giving the dog effective pain medication and by not following the standard of care of dogs following a surgery. Assuming, without deciding, that the allegations at issue constituted a viable theory of recovery against defendant, these

claims alleged a new theory of liability not previously asserted or discernable from the complaint and, therefore, were properly stricken (see Gagnon v City of Saratoga Springs, 51 AD3d 1096, 1099 [2008], lv denied 11 NY3d 706 [2008]; Cippitelli v Town of Niskayuna, 203 AD2d 632, 634 [1994]).

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 NY2d 42, 47-48 [2001]).

Mulvey and Pritzker, JJ., concur; Clark, J., not taking part.

Egan Jr., J.P. (concurring in part and dissenting in part).

I concur with the majority's decision to affirm Supreme Court's denial of plaintiff's cross motion for partial summary judgment. However, 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" (Collier v Zambito, 1 NY3d 444, 446 [2004]; see Doerr v Goldsmith, 25 NY3d 1114, 1116 [2015]; Petrone v Fernandez, 12 NY3d 546, 550 [2009]; Bard v Jahnke, 6 NY3d 592, 596-597 [2006]; see also Vrooman v Lawyer, 13 Johns 339, 339 [1816]), defendant in this case is 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 NY2d 233, 241 [1976]; see also Moorehead v Alexander, 28 AD3d 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 NY3d 122, 125-126 [2013]; Carey v Schwab, 122 AD3d 1142, 1144-1145 [2014], lv dismissed 25 NY3d 1062 [2015]; Williams v City of New York, 306 AD2d 203, 205-206 [2003]; Colarusso v Dunne, 286 AD2d 37, 39-41 [2001]; Schwartz v Armand Erpf Estate, 255 AD2d 35, 38-40 [1999], lv dismissed 94 NY2d 796 [1999]).[1]

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 AD3d 525, 525 [2018], lv denied 32 NY3d 906 [2018]; Hargro v Ross, 134 AD3d 1461, 1462 [2015]; Christian v Petco Animal Supplies Stores, Inc., 54 AD3d 707, 708 [2008]), this Court is not bound by those decisions (see Matter of County

[1] 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" (Pink v Rome Youth Hockey Assn., Inc., 28 NY3d 994, 997-998 [2016] [internal quotation marks and citation omitted]; see generally Lathers v Denero, 155 AD3d 1174, 1175 [2017]; Ahlers v Wildermuth, 70 AD3d 1154, 1154-1155 [2010]).

of St. Lawrence v Daines, 81 AD3d 212, 219 [2011], lv denied 17 NY3d 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 AD3d 224, 224 [2007], affd 10 NY3d 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.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D Mayberger

Robert D. Mayberger
Clerk of the Court

NEW YORK STATE
COURT OF APPEALS

MARSHA HEWITT,

Plaintiff/Appellant,

v.

PALMER VETERINARY CLINIC, PC,

Defendant/Respondent.

Third Department Appeal No. 526169

BRIEF IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

PROCEDURAL HISTORY

On April 16, 2014, a pit bull dog owned by another customer attacked Plaintiff-Appellant Marsha Hewitt while she was in the waiting room of Defendant-Respondent Palmer Veterinary Clinic, PC ("Palmer VC")(Complaint, R: 196). Her Complaint contained claims against Palmer VC for negligence and premises liability. It did not include a claim for strict liability against Palmer VC (R: 196).

Palmer VC filed its Motion for Summary Judgment (R: 301). The trial court granted the Motion and dismissed Mrs. Hewitt's Complaint. The trial court held that it was bound to follow Hargro v. Ross (134 A.D.3d 1461, 1462 (4th Dept. 2015). "The Fourth Department's ruling in Hargro, which extends the limitation to recovery in strict liability to situations where the [property owner] defendant is not the owner of dog, is both directly on point, and binding on the Court. . . ." (R: 5.2).

On October 20, 2017, Mrs. Hewitt appealed to the Third Department. The Third Department entered its Decision on December 6, 2018 (copy of Decision attached as Exh. A). In a three to one split decision, the Third Department held that a veterinarian, who does not own the dog, cannot be held liable for his own negligence when a customer's dog that has been treated then attacks another customer in the waiting room (relying upon Bernstein v. Penny Whistle Toys, Inc., 10 N.Y.3d 787 (2008)). [1]

In his well-reasoned dissent, Justice Egan opined that the instant appeal is distinguishable from Bernstein v. Penny Whistle, because Defendant/Appellant Palmer Veterinary Clinic did not own the dog in question. He stated:

> 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, 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 [20151; 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 1]

[1] As noted below, this Court in Bernstein did not hold that a property owner cannot be held liable in negligence for a dog bit. Rather, it suggested that a non-dog owner, third-party, can be liable for their own negligence in a dog bite case.

> [footnote] 1 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" (Pink v. Rome Youth Hockey Assn., Inc., 28 N.Y.3d 994, 997-998 [2016] [internal quotation marks and citation omitted]; see generally Lathers v. Denero, 155 A.D.3d 1174, 1175 [2017]; Alders v. Wildermuth, 70 A.D.3d 1154, 1154-1155 [2010]).

Now, Mrs. Hewitt is asking this Court for permission to appeal. She does not have an automatic right to appeal because only one justice of the Third Department dissented.

FACTS

It is uncontroverted that Vanilla, a dog owned by Ann Hemingway, [2] attacked Plaintiff Marsha Hewitt in the waiting room of the Palmer Veterinary Clinic on April 16, 2014 (R: 157). It is also uncontroverted that Mrs. Hewitt was injured in this attack (R: 157).

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 the owner of the dog.

After performing surgery on the dog's injured paw, Veterinarian Dr. McCarter brought the dog out from the exam room to the waiting room on a leash and gave the leash to its owner. The dog was very agitated. It was going around in circles. It was very anxious like it had been in pain (R: 71-74). Dr. McCarter told the owner that they had held the dog down and had not given anesthesia. She mentioned a few people were holding the dog down while operating on the pad of the dog (R: 76). Dr. McCarter then went back into office area (R: 81).

The pit bull dog then slipped its leash and attacked Mrs. Hewitt (R: 83). It jumped on her back and grabbed on to her ponytail, pulling her backward. The dog ripped some hair out of her

scalp (R: 85-91). She had to leave her job as an operating room technician because of her injuries.

There was a woman with a two-week old baby in the waiting room when the dog started to attack Mrs. Hewitt (R: 66, 80, 83). The mother started screaming "Oh, my baby," and "This dog better not hurt my baby" (R: 83). Mrs. Hewitt 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). This brave action may have saved the baby's life.

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 (R: 167). 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 get loose in the waiting room. He opines that it was dangerous to bring an agitated pit bull 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 pit bull (R: 164-166).

DISCUSSION

In Bard, the Court of Appeals held that an *owner* of a dog cannot be held liable in negligence for injuries caused by that dog. However, this Court 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. This Court should grant permission to appeal and determine that Bard does not insulate a veterinarian from its own clear negligence.

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[2] Ms. Hemingway was originally named as a defendant. She was dismissed after receiving a discharge in bankruptcy. In any event, there was no evidence that she knew of any vicious propensities of the dog.

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

> The Court of Appeals has generally held that when a domestic animal causes injury to another, the owner of the domestic animal is liable only under a theory of strict liability, which requires that the injured person demonstrate that the owner had notice of the animal's vicious propensities (see Doerr v. Goldsmith, 25 N.Y.3d 1114, 1116 [2015]; Petrone v. Fernandez, 12 N.Y.3d 546, 550 [2009]; Bernstein v. Penny Whistle Toys. Inc., 10 N.Y.3d 787, 788 [2008]; Bard v Jahnke, 6 N.Y.3d 592, 599 [20061; Collier v. Zambito, 1 N.Y.3d 444, 446-447 [2004]).

These Court of Appeals' decisions are all explicitly limited to claims for injuries against the *owners* of the dogs. The Court of Appeals has never extended the harsh and anomalous rule [3] to veterinarians or other owners of property where a third person's dog injures the plaintiff.

In Collier, the attack occurred in the home of the dog's owner. The 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 a negligence in the decision.

In Bard, the plaintiff was attacked by a bull on a dairy farm. The farmer did not have any knowledge of any vicious propensities by that particular bull. The plaintiff asked the Court of Appeals to find negligence under Restatement (Second) of Torts § 518. In a four to three

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[3] 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."

decision, this Court held: "In sum, when harm is caused by a domestic animal, its *owner's* liability is determined solely by application of the rule articulated in Collier." Bard, at 599 (emphasis added). *The decision did not discuss liability in negligence by a person who did not own the vicious animal.* There was a well-reasoned dissent by Justice Robert S. Smith (joined by Justices G.B. Smith and Rosenblatt). He noted that the Court of Appeals was the first state court of last resort to reject the Restatement rule. He stated:

> No opinion of our Court before today announced the rule, now adopted by the majority, that the strict liability involved in Collier is the only kind of liability the *owner* of a domestic animal may face--that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned.

Bard (dissent), at 601 (emphasis added). Finally, Justice R.S. Smith argued:

> For all the faults of modern tort law, and they are many, I do not think that this attempt to cling to the certainties of a distant era will work out well. The rule the majority adopts is contrary to simple fairness. Why should a person who is negligent in managing an automobile or a child be subject to liability, and not one who is negligent in managing a horse or bull? Why should a person hit by a subway train be able to recover and one hit by a breeding bull be left without a remedy? I think there are no good answers to these questions, and it is possible to imagine future cases that will put the rule adopted by the majority under strain. Suppose, for example, a variation on the facts of Collier: What if defendant there had encouraged a child to play not with a grown dog, but with a litter of puppies, thus predictably provoking an otherwise gentle mother dog to rage? Or suppose facts like those in (Duren v Kunkel (814 S.W.2d 935 [Mo. 1991] [Holstein, J.]), where a bull was stirred to attack because his owner negligently caused him to be driven through an area where fresh blood was on the ground? In such a case, we could either deny recovery to a deserving plaintiff, despite negligence more blatant than what Jahnke is accused of here, or we could invent a "mother dog" exception or a "fresh blood" exception to the rule adopted in this case. I think it would be wiser to follow the Restatement rule, as has almost every other state that has considered the question.

Bard (dissent), at 602-603.

The next Court of Appeals case concerning negligence actions against owners of animals was Bernstein v. Penny Whistle Toys, Inc., 40 A.D.3d 224 (1st Dept. 2007), affirmed, 10 N.Y.3d 87 (2008). The eight-year old plaintiff was taken to a toy store by a friend's mother. The owner

of the toy store had his dog there. The dog bit the little girl. She sued the owner of the dog for premises liability and the friend's mother for negligence. The First Department refused to *extend* premises liability to cover the owner of the dog in his role as a store owner. It held that the dog owner was not liable under Bard and Collier. [4]

The Court of Appeals dismissed the complaint against the *owner* of the dog that bit the plaintiff because the *owner* had no knowledge of the animal vicious propensities. The holding of this Court was unambiguous:

> We held in Collier v. Zambito (1 N.Y.3d 444, 447, 807 NE2d 254, 775 NYS2d 205 [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, 848 NE2d 463, 815 NYS2d 16 [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.

Bernstein, 10 N.Y.3d at 788.

The Court of Appeals also dismissed plaintiff's claims against the third-party defendant (the mother of her friend) because "there is no evidence that third-party defendant was negligent." Bernstein, 10 N.Y.3d at 788. This holding strongly suggests that, with sufficient

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[4] The First Department added: "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 at 224 (emphasis added). The First Department did not address the question of whether an owner of property who did not also own the dog could be held liable for negligence.

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. The Bernstein holding by this Court does not immunize the owner of a premises from liability for his own negligence by another person's dog. Nor, does it in any way shield a veterinarian from liability under negligence for her own conduct that proximately causes injury to a person on her premises.

Next in this line of cases was Hastings v. Suave, 21 N.Y. 3d 122, 125 (2013). In this unanimous decision, the Court of Appeals held that the Bard rule does not bar a suit for negligence when a farm animal has been allowed to stray from the property where it is kept. The Court of Appeals stated that it did not consider whether this rule would apply to household pets that strayed from the owner's property.

In Doerr v. Goldsmith, 25 N.Y.3d 1114, 1116 (2015), the Court of Appeals took up the question of whether the Hastings rule regarding straying farm animals would apply to dogs. In Doerr, an unrestrained dog ran into a bicyclist in the road injuring the bike rider. The Court held that it was "constrained" by Bard to reject negligence claims because the dogs' owners were not aware of any vicious propensities of the dogs. It distinguished the facts from those in Hastings, where the owners were subject to a duty to prevent *farm* animals from wandering unsupervised off the farm. The concurring opinion by Justice Abdus-Salaam explicitly stated: "Under our precedent, plaintiffs' negligence claims must fail because the particular exceptions to the Bard rule proposed by plaintiffs are incompatible with Bard and its progeny. Having been presented with no alternative theory of recovery, *I neither reject nor endorse any other potential legal theory or exception to the Bard rule not advanced by the parties in these cases.*" Doerr, at 1138-1139 (Abdus-Salaam concurring, emphasis added). The Doerr case did not involve the liability of non-dog owners for premises liability or their own negligence.

None of these Court of Appeals decisions addressed the liability of a property owner in negligence when they did *not own* the dog (or other non-farm animal) that injured the plaintiff. As in Hastings, the facts in the instant Appeal are fundamentally different from those in Collier, Bard, Bernstein, Petrone, and Doerr. In the instant case, Palmer VC did not own the dog that attacked and injured Mrs. Hewitt. Rather, it was negligent in its treatment of the pit bull, and then negligently brought the dog into the waiting room where it attacked Mrs. Hewitt. It violated its duty to provide a safe premises to Mrs. Hewitt. There is nothing in 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.

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.

In the instant case, Mrs. Hewitt has claims against Palmer Veterinary Clinic for negligence and premises liability. It 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. [5] 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

[5] There is no evidence that the owner of the dog had any knowledge that it had vicious propensities.

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.

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 claims under negligence and premises liability.

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.

The Bernstein decision strongly implied that a third-party can still be sued for their own negligence that causes a dog attack. This Court should grant permission to appeal so that it can address this issue in this case of first impression.

CONCLUSION

This case offers a clear opportunity for this Court to decline to extend Bard to property owners and to draw a much-needed distinction between the owner of the dog and the owner of the property where the dog is located when it attacks. While this Court is bound to follow Bard where it applies, it is not bound to extend Bard to veterinarians. The erroneous decision by the Third Department is both against public policy and against the holding of this Court in Bernstein v. Penny Whistle Toys, Inc. Wherefore, Mrs. Hewitt respectfully requests that this Honorable Court grant her permission to appeal.

Respectfully submitted,

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