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Court of Appeals

STATE OF NEW YORK

MARSHA HEWITT,

Plaintiff-Appellant,

-against-

PALMER VETERINARY CLINIC, PC,

Defendant-Respondent,

New York Supreme Court Appellate Division Third Department
Appeal No. 526169

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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Date Completed: December 31, 2018

PRELIMINARY STATEMENT

Plaintiff/Appellant, Marsha Hewitt appealed from a Decision and Order of the Supreme Court, County of Clinton dated October 17, 2017, awarding summary judgment to Defendant/Respondent, Palmer Veterinary Clinic, PC ("Defendant" or "Palmer"), on the ground that Palmer could not be held liable for the actions of a domestic animal where there was no evidence that the animal exhibited a vicious propensity prior to the incident at issue (R. 5.1).[1]

On December 6, 2018, the Appellate Division, Third Department upheld the Supreme Court's decision, dismissing the Plaintiff's complaint against Defendant Palmer Veterinary Clinic. Specifically, the Appellate Division held that "for defendant to be held 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." The Appellate Division further found that plaintiff conceded she was not asserting a claim for strict liability against defendant and in any event, even if a strict liability could be extrapolated the record establishes that defendant did not have notice of the dog's vicious propensities prior to the April 2014 incident at issue." (Plaintiff's Affirmation for Permission to Appeal, Exhibit "A").

[1] Citations Labeled "R" will refer to the original Record on Appeal filed by Plaintiff with the Appellate Division, Third Department.

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As set forth more fully below, the record clearly establishes that the Supreme Court's Decision and Order and the Appellate Division, Third Department's Memorandum and Order are in line 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. Contrary to Plaintiff, Marsha Hewitt's contention, the Appellate Division, Third Department's December 6, 2018 Decision and Order is not of public importance and there is no conflict with the prior decisions of this Court, nor any other Appellate Division's in this State (see, 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)).

New York State does not recognize a cause of action sounding in common-law negligence arising out of a dog bite. A defendant can only be liable under strict liability where they knew or should have known of the animals vicious propensity (Doerr v. Goldsmith, 25 NY3d 1114 (2015). Thus, Plaintiff's request for leave to appeal should be denied in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

The incident in question occurred on April 16, 2014. The dog at issue was owned by another client of Palmer Veterinary Clinic and was being seen for a check-up by Veterinarian Sarah McCarter and her assistant Jessica Gagnon for granulation at the base of one of her toe nails. The dog was perfectly well-behaved throughout the procedure and when she left the examination room (R. 375; 413-415).

Plaintiff, Marsha Hewitt was sitting in the waiting room with her cat. Following the procedure, the dog was being held on her leash by her owner Ann Hemingway (the claim against Ms. Hemmingway was previously discharged in bankruptcy R.23) in the waiting room (R.72-73). Plaintiff took her cat carrier and went to the front desk to hand the cat carrier over the counter. The dog saw Plaintiff's cat (that was in the cat carrier), allegedly jumped up and grabbed the Plaintiff's hair (R. 86). Plaintiff testified that she believed the dog mistook her [Plaintiff, Marsh Hewitt's] white hair for the cats white fur (R. 86). The incident lasted less than two minutes and was immediately removed from the Respondent's Veterinary Clinic (R. 87; 92).

Plaintiff concedes throughout her Brief, just as she had in opposition to Respondent's motion for summary judgment below, that the dog's owner, Ann Hemingway had no knowledge of the dog's vicious propensity. Plaintiff also

concedes that she is not maintaining a cause of action for strict liability against Ms. Hemingway or the Respondent Palmer Veterinary Clinic (Appellant Brief pp. "1 fn.1"; "14 fn. 8" and R. 535). The record clearly demonstrates Respondent had no knowledge of a prior vicious propensity (R. 447-448). Accordingly, the trial court properly granted Respondent's motion for summary judgement as a matter of law and the Appellate Division, Third Department aptly affirmed.

LEGAL ARGUMENT

PLAINTIFF'S MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE IT FAILS TO RAISE ANY ISSUE WHICH MERITS THIS COURT'S REVIEW.

THE APPELLATE DIVISION PROPERLY DETERMINED THAT ABSENT KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES, DEFENDANT PALMER VETERINARY CLINIC COULD NOT BE HELD LIABLE FOR PLAINTIFF'S INJURIES AS A MATTER OF LAW.

In the present case, although Defendant Palmer disputes many of the claimed facts set forth in Plaintiff's Motion for Leave to Appeal to this Court, the record is clear as to the facts and circumstances as to the pertinent legal issue involved and thus will not be disputed in these papers. Of importance for this Motion in Opposition, it is well settled law in the State of New York that strict liability is the sole theory that a plaintiff can assert to recover for harm caused by a domestic animal such as a dog, where the harm involved aggressive or threatening behavior by the animal, such as the circumstances alleged in the present action. (Doerr v. Goldsmith, 25 NY3d 1114 (2015); Hasting v. Sauve, 21 NY3d 122 (2013); Petrone v. Fernandez, 12 NY3d 546 (2009)).

Plaintiff urges this Court to depart from the rule of law applied to dog owners limiting claims to strict liability only, and seeks to permit recovery against a non-dog owner such as Defendant for alleged negligence in a dog bite case. The

plaintiff's position is flawed and has been properly rejected. In keeping with the precedence established by this Court.

The Plaintiff/Appellant concedes that she has no cause of action against the dog's owner Ms. Hemingway for strict liability and that as the owner, she cannot be held liable for negligence (Appellant Brief to the Appellant Division, Third Department at pp. "1 fn. 1" and p."14 fn. 8"). The Appellant also concedes that she does not have a strict liability claim against Respondent (R. 535). Rather, the Appellant erroneously attempts to distinguish cases involving dog owners from those involving an owner of a premises. There is simply no rational legal justification for having different rules of law for establishing liability against dog owners and a premises owners in dog bit cases. If the Plaintiff's position were adopted, it in essence would provide a dog owner with immunity from a negligence cause of action in a dog bite case but not a premises owner. The Appellant advocates for an unjustified and more demanding standard of care for non-dog-owners [the Defendant] than that which is applied under New York law to the very owner of the dog. If this were adopted, it would lead to the absurd situation where the Respondent in this action would be treated differently under the law had the subject dog belonged to it rather than a client/patron of the clinic.

In New York it is well settled that strict liability is the standard in cases involving dog bites and is supported by over a century of cases. Notably, including

cases where a plaintiff seeks to recover from the owner of a premises where the dog bite occurred, the strict liability rule still applies. In Bernstein v. Penny Whistle Toys, 40 A.D.3d 224 (1st Dept 2007), a case involving a dog bite in a store, the Appellate Division, First Department majority held that there must be a showing of vicious propensity to establish liability. The First Department went on to state in part that:

> "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." See Bernstein v. Penny Whistle Toys, Id.

In Petrone v. Fernandez, 12 NY3d 456, the Court of Appeals held in part:

> "[W]hen harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in Collier " (Bard v. Jahnke, 6 N.Y.3d 592, 599, 815 N.Y.S.2d 16, 848 N.E.2d 463 [2006] [emphasis added])—i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities (see Collier, 1 N.Y.3d at 446–447, 775 N.Y.S.2d 205, 807 N.E.2d 254; see also Bard, 6 N.Y.3d at 601, 815 N.Y.S.2d 16, 848 N.E.2d 463 [R.S. Smith, J., dissenting] [objecting to "the rule ... 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"]

Contrary to plaintiff's contentions there are numerous cases, from all four Appellate Departments, which are in conformity with the rule in this State and the precedent of this Court, demonstrating that strict liability is not limited solely to dog owners, but also premises owners. See. Carter v. Metro North Associates, 255 AD2d 251 (1st Dept.), 1998); Christian v. Petco Animal Supplies Stores, Inc. 54 AD3d 707 (2nd Dept., 2008); Hargro v. Ross, 134 Ad 3d 1461 (4th Dept., 2015); Shaw v. Burgess, 303 A.D.2d 857 (3rd Dept. 2003).

Further, this Court need not look any further than the recent case of Easley v. Animal Medical Center, 161 AD3d 525, decided by the Appellate Division, First Department and entered on May 15, 2018, and holding that "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, 25 N.Y.3d 1114, 14 N.Y.S.3d 726, 35 N.E.3d 796 [2015]; Collier v. Zambito, 1 N.Y.3d 444, 775 N.Y.S.2d 205, 807 N.E.2d 254 [2004]), *or* defendant Animal Medical Center, the veterinary hospital where the dog bite occurred. Id. The Easley case is virtually identical circumstances to the present case, wherein Plaintiff sought to hold the Animal Medical Center liable for a dog bit that occurred in their waiting room under a common-law negligence theory (failure to maintain its premises in a safe condition). Which was rejected.

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Just like in the present case, Plaintiff in Easley, also sought leave to Appeal to this Court, which was denied by decision dated October 16, 2018. (Easley v. Animal Medical Center, 32 N.Y.3d 906, Motion No: 2018-720.

The sole question before this Court is not one of owner versus premises (non-owner) but rather, is there a recognized cause of action in New York in dog bite cases absent a showing of prior knowledge of a vicious propensity and the answer has uniformly been a resounding "no." (Bard v. Jahnke, 6 N.Y.3d 592 [2006]; Doerr v. Goldsmith, 25 N.Y. 3d 1114 (2015); Shaw v. Burgess, 303 A.D.2d 857 (3rd Dept. 2003); Claps v. Animal Haven, Inc., 34 A.D.3d 715 (2d Dept. 2006); Christian v. Petco Animal Supplies Stores, Inc., 54 A.D.3d 707 (2d Dept 2008) Hargro v. Ross, 134 Ad 3d 1461 (4th Dept 2015); Easley v. Animal Medical Center, 32 N.Y.3d 906 (1st Dept. 2018).

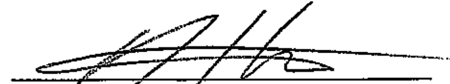
The law across New York is uniformly settled that those defendants that are in control of a premise, as well as dog owners, may only be held liable if they had knowledge of a dog's vicious propensity. The record in this case is unequivocal and Plaintiff agrees, that there was no such knowledge of a vicious propensity by the Defendant. As such the Supreme Court and the Appellate Division, Third Department properly granted and affirmed summary judgment and Plaintiff's current motion should be denied because it fails to raise any issue which merits this Court's review.

CONCLUSION

Based upon the foregoing, this Court should deny the motion for leave to appeal in its entirety, with costs and disbursements.

Dated: Albany, New York
December 31, 2018

Respectfully Submitted,



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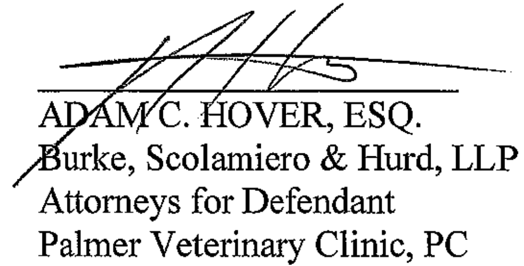
Certification Pursuant to 22 NYCRR Part 500.1 (f)

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



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