APL-2019-00050

Clinton County Clerk's Index No. 2014-1311

Court of Appeals

STATE OF NEW YORK

MARSHA HEWITT,

Plaintiff-Appellant,

against

PALMER VETERINARY CLINIC, P.C.,

Defendant-Respondent.

AMICUS CURIAE BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

As is more fully set forth below, were plaintiff's position to be accepted, landowners would be exposed to a higher standard of liability than the owner of the domestic animal.

Here, it is undisputed that the owner had no notice of any vicious propensities on the part of the dog. That being the case, no such notice could reasonably be imputed to the defendant herein. We submit that to do so would be illogical and inequitable.

Further, as is more fully set forth below, there is no sound reason to depart from the well-settled rule which governs liability for the actions of domestic animals.

Accordingly, we submit that the decision and order of the Appellate Division should be affirmed.

STATEMENT OF FACTS

The facts of this case have been extensively discussed in the briefs already on file with this Court. They need not be repeated here.

However, we wish to stress that, in her brief to this Court, plaintiff-appellant has repeatedly conceded that the dog which was owned by Ann Hemingway never exhibited any vicious propensities prior to the date of the incident. See, page 3, note 1 of plaintiff's brief, where it is stated that "there is no evidence that Ms. Hemingway knew of any vicious propensities of her dog prior to the attack in the waiting room." See, also, page 39 where plaintiff indicates that "there is no evidence that [Ms. Hemingway] knew of any vicious propensities of her dog prior to the attack in the waiting room."

Accordingly, no notice of any vicious propensities can be imputed to defendant herein.

POINT I

THE APPELLATE DIVISION'S DECISION IS SOLIDLY SUPPORTED BY SOUND AND LONG-STANDING PRECEDENT; THAT BEING THE CASE, ITS DETERMINATION SHOULD BE AFFIRMED

On this appeal involving a dog bite, Plaintiff seeks to expose landowners to greater liability than the animal owners despite the animal owners having superior knowledge of the creatures' dispositions and behaviors. In advancing this argument, plaintiff claims that she and all potentially injured parties in this State are prejudiced by being limited to claims for strict liability as opposed to ordinary negligence. DANY submits there is no justification for abandoning centuries of precedent and asks this Court to affirm the Third Department's ruling.

Contrary to the intimated arguments of plaintiff, New York is not a lawless outpost where injured parties have no recourse when the matter involves a domestic animal such as a dog. Plaintiff claims she was injured by a dog that she alleged exhibited vicious or dangerous propensities. Liability in cases involving claims of vicious propensity cases is strict. See, Arbegast v. Board of Ed. of South New

Berlin Cent. Sch., 65 N.Y.2d 161 (1985). Negligence is not a basis for imposing liability where the harm caused by a domestic animal's aggressive or threatening behavior. See, Hastings v. Sauve, 21 N.Y.3d 122 (2013).

Strict liability means "liability that does not depend upon actual negligence or intent to harm." See, Garner, A Dictionary of Modern Legal Usage, 2d ed. p. 838 (1995). This largely comports with the definition found in Black's Law Dictionary as "liability without fault." Black's Law Dictionary, 6th ed., p. 1422 (1990). This Court has held that in cases involving injuries caused by dogs biting or attacking individuals, liability is not dependent upon proof of negligence in the manner of keeping the animal. Molloy v. Starin, 191 N.Y. 21 (1908). Further, the owner will not be relieved of liability by showing negligence on the part of the injured person. See, Lynch v. McNally, 73 N.Y. 347 (1878).

New York is not, nor has it ever been, a jurisdiction where a dog was entitled to a "free bite"; rather, an animal's dangerous or vicious propensity may be proven by other evidence, including a dog's tendency to bark, growl, and jump angrily at people. See, Perrotta v. Picciano, 186 App. Div. 781 (1st Dep't 1919) (holding that the popular

theory that every dog is entitled to one bite finds no support in the decisions of our State).

For over 200 years, this State has held 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. See, Vrooman v. Lawyer, 13 Johns 339 (1816) and Hosmer v. Carney, 228 N.Y. 73, 75 (1920). Vicious propensities include the "propensity to do any act that might endanger the safety of the persons and property of others in a given situation." Dockson v. McCoy, 39 N.Y. 400, 403 (1868). Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice. See, Benoit v. Troy & Lansingburgh R.R. Co., 154 N.Y. 223, 225 (1897). A plaintiff may also raise an issue of fact as to notice of a dog's vicious propensities by evidence that it had been known to growl, snap, or bare its teeth; as well as whether the owner chose to restrain the dog, and the manner in which the dog was restrained. See, Hahnke v. Friederich, 140 N.Y. 224, 226 (1893) and Rider v. White, 65 N.Y. 54, 55-6 (1875). Even keeping a dog as a guard dog may give rise to an inference that an owner had knowledge of the

dog's vicious propensities. See, Hahnke, supra, 140 N.Y. at 227.

Thus, strict liability is the sole theory that a plaintiff can assert to recover for harm caused by a domestic animal's aggressive or threatening behavior. See, Hastings, supra. But this does not preclude a plaintiff from asserting a cause of action for negligence on the "fundamentally distinct" claim that, through the negligence of the owner of the property, the owner of the animal, or both, a farm animal was permitted to wander off the property where it was kept, causing harm. See, Hain v. Jamison, 28 N.Y.3d 524 (2016).

Plaintiff laments the fact that in Bard v. Jahnke, 6 N.Y.3d 592 (2006), this Court refused to adopt the provisions of Restatement, Second, Torts § 518 that recommend imposition of liability for an owner's negligent failure to prevent harm where the owner did not know or have reason to know of a domestic animal's abnormal dangerousness. This Court clarified its decision in Bard and again addressed this issue in Petrone v. Fernandez, 12 N.Y.3d 546 (2009), ruling that only strict liability and not negligence is a valid basis for imposing liability for injuries resulting from encounters with domestic animals. Specifically adopting the analysis in Alia v. Fiorina, 39 A.D.3d 1068 (3rd Dep't 2007), this Court

held that violation of a leash law, which is merely "some evidence of negligence," was irrelevant and does not support a recovery in cases involving domestic-animal-related injuries. Id., 12 N.Y.3d at 550.

This Court carved out an exception to Bard in Hastings v. Sauve, supra. In Hastings, the plaintiff was driving her van and was injured when she struck the defendants' cow, which had wandered from the farm and onto a public road. This Court held that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108(7)—is negligently allowed to stray from the property on which the animal is kept." Id., 21 N.Y.3d at 125-26.

Hastings declined to pass on the question of whether a landowner or owner of a dog, cat, or other household pet could be held liable under common-law negligence principles if the animal is negligently allowed to stray from the property on which it is kept. Id. However, this Court answered the question in Doerr v. Goldsmith, 25 N.Y.3d 1114 (2015), where the plaintiff was injured by a dog while riding his bicycle in Central Park. The dog's owner called the dog from one side of the road, while her boyfriend released the

dog from the other side, and the dog ran into the plaintiff's way; the plaintiff struck the dog and fell from his bike, sustaining injuries. This Court, which vacated its original decision finding for the defendants and issued a new decision in light of Hastings, held that a negligence claim could lie "because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident." Id.

In all of the aforenoted cases, the focus was on the animal as opposed to a condition on the property. And, we submit, that this is where the focus should be. When the animal, through its behavior and instincts, is the instrumentality of harm, the rule espoused in Bard should be followed that plaintiffs can only recover under strict liability, not common-law negligence. The facts in this case do not involve an injury caused by a peculiar condition on the property, but the particular actions of an animal.

Succinctly, to accept Plaintiff's position would result in the logically inconsistent conclusion that in Bernstein v. Penny Whistle Toys, Inc., 40 A.D.3d 224 (1st Dep't 2007), aff'd, 10 N.Y.3d 787 (2008), despite the animal owner and property owner being one, plaintiff would have a lower burden of proof against the property owner. In Bernstein, an infant

was bitten by a dog in a toy store. The First Department affirmed the dismissal of the entire complaint and held that plaintiff was limited to a strict liability claim against the defendant dog owner *and* the defendant toy store. While the dissent would have reinstated the negligence cause of action against the dog owner and toy store, this Court applied the strict liability rule and 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. Id., 10 N.Y.3d at 787.

The First, Fourth, and Second Departments have rightly applied strict liability to property owners that did not own the allegedly offending dogs. See, Easley v. Animal Med. Ctr., 161 A.D.3d 525, 525 (1st Dep't 2018), lv. den., 32 N.Y.3d 906 (2018); Hargro v. Ross, 134 A.D.3d 1461, 1462 (4th Dep't 2015); and Christian v. Petco Animal Supplies Stores, Inc., 54 A.D.3d 707, 708 (2nd Dep't 2008).

Respectfully, plaintiff's arguments are unfounded. Plaintiff, and all potential plaintiffs in this State, can recover against a landowner if the property owner has notice of the animal's dangerous propensities. Indeed, this Court has long ruled that an owner's strict liability for damages

arising from the vicious propensities and vicious acts of a dog "extends to a person who harbors the animal although not its owner." Molloy v. Starin, 191 N.Y. 21, 28 (1908); see, also, Brice v. Bauer, 108 N.Y. 428, 431 (1888); Matthew H. v. County of Nassau, 131 A.D.3d 135, 144 (2nd Dep't 2015).

A person "harbors a dog by making it a part of his or her household," even if he or she does not assume control over the animal." Id., 131 A.D.3d at 145. Furthermore, Agriculture & Markets Law § 108(10) defines harboring as providing food or shelter to a dog. Id. While there can be no strict liability arising from the vicious propensities and vicious acts of a dog against a defendant who neither owned, harbored, nor exercised dominion and control over the animal, and did not permit it to be on or in his or her premises (Id.), a property owner that does harbor or permit the animal on its property can be exposed to liability.

"It is not material in actions of this character whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he [or she] keeps the dog; and . . . harboring a dog about one's premises, or allowing it to be or resort there, is a sufficient keeping to support the action." Quilty v. Battie, 135 N.Y. 201, 204 (1892) (finding that the husband's dog was harbored by his

wife when she permitted it to be kept in the house that she owned and where she resided).

This Court should not jettison precedent that the courts in this State have followed for two centuries. Employing the standard espoused by plaintiff would unreasonably expose a property owner to greater liability than the animal owner, who has more knowledge of the animal's proclivities.

As repeatedly conceded by plaintiff, the dog in this case never previously exhibited any vicious propensities. Accordingly, the defendant herein did not harbor a dangerous animal. That being the case, it is respectfully submitted that this Court affirm the Third Department's decision.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
December 20, 2019

Respectfully submitted,

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CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

I hereby certify pursuant to §500.13(c)(1) that the foregoing brief was prepared on a computer.

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