

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

HASTINGS, ET AL.,

Appellants,

-against-

No. 78

SAUVE, ET AL.,

Respondents.

-----

BLOOMER,

Appellant,

-againgst-

No. 79

SHAUGER,

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
March 21, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

1           Appearances:

2                           MATTHEW H. MCARDLE, ESQ.  
3                   FISCHER, BESSETTE, MULDOWNNEY & HUNTER, LLP  
4                           Attorneys for Appellant Hastings  
5                           43 Golf Course Road  
6                           P.O. Box 420  
7                           Malone, NY 12953

8                           DANIELLE N. MEYERS, ESQ.  
9                   O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C.  
10                           Attorneys for Respondent Delarm  
11                           20 Corporate Woods Boulevard  
12                           Albany, NY 12211

13                           JOHN W. VANDENBURGH, ESQ.  
14                   NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP  
15                           Attorneys for Respondent Sauve  
16                           296 Washington Avenue Extension  
17                           Albany, NY 12203

18                           JOHN G. RUSK, ESQ.  
19                   RUSK, WADLIN, HEPPNER & MARTUSCELLO, LLP  
20                           Attorneys for Appellant Bloomer  
21                           255 Fair Street  
22                           P.O. Box 3356  
23                           Kingston, NY 12402

24                           P. DAVID TWITCHELL, ESQ.  
25                   LAW OFFICES OF THERESA J. PULEO  
Attorneys for Respondent Shauger  
441 S. Salina Street  
Suite 290  
Syracuse, NY 13202

David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 78 and 79, Hastings  
2 and Bloomer.

3 Counselor.

4 MR. MCARDLE: Good afternoon, Your Honors.  
5 May it please the court, Matthew McArdle on behalf of  
6 the plaintiffs/appellants, Karen Hastings and Bruce  
7 Hastings. Your Honor, I would ask an opportunity to  
8 reserve two minutes of my time for - - -

9 CHIEF JUDGE LIPPMAN: Two minutes. Sure.  
10 Go ahead.

11 MR. MCARDLE: - - - for rebuttal.

12 The issue in this case, the primary issue  
13 to be addressed by the court today, Your Honors, is  
14 whether or not a negligence claim is viable in an  
15 accident caused by a cow in a roadway or whether, if  
16 there is no negligence - - -

17 JUDGE SMITH: How - - - how - - -

18 MR. MCARDLE: claim to file, whether it's -  
19 - -

20 JUDGE SMITH: - - - why is a - - -

21 MR. MCARDLE: - - - limited to strict  
22 liability.

23 JUDGE SMITH: How is a cow in a road  
24 different from a bull in a barn?

25 MR. MCARDLE: Well, I believe you'd be

1 referring, Your Honor, to the Bard case which I  
2 believe is factually dissimilar from the present  
3 situation. The Bard case involved a bull that  
4 aggressively and viciously attacked the plaintiff by  
5 ramming him in the chest.

6 JUDGE READ: That's a - - - that's a - - -  
7 that's an animal reacting to a person. Is that your  
8 point?

9 MR. MCARDLE: I would agree with that, Your  
10 Honor. And the situation in this case is much  
11 different in that it is a cow doing what cows do.

12 CHIEF JUDGE LIPPMAN: Counselor - - -

13 MR. MCARDLE: It is a - - -

14 CHIEF JUDGE LIPPMAN: - - - are you asking  
15 us to - - - to make an exception to Bard for roaming  
16 cows or horses or whatever they are?

17 MR. MCARDLE: I am not, Your Honor. I am  
18 asking the court to - - -

19 CHIEF JUDGE LIPPMAN: You think it fits  
20 within our - - - our prior precedent?

21 MR. MCARDLE: I do, Your Honor. I think  
22 that - - -

23 CHIEF JUDGE LIPPMAN: How so?

24 MR. MCARDLE: Well, I - - - I think - - -

25 CHIEF JUDGE LIPPMAN: I mean, why is it - -

1 - why is it different, the same question that Judge  
2 Smith asked you, really? Because it's the  
3 interaction with a person as opposed to, as you say,  
4 cows just doing whatever they do?

5 MR. MCARDLE: I think that there's a  
6 distinction to be made between a natural propensity  
7 of an animal to do something - - - a cow to roam, a  
8 horse to roam - - - versus an abnormal - - -

9 JUDGE SMITH: Or - - - or a bull - - - or a  
10 bull to - - - a bull to - - - a breeding bull to  
11 attack? That's natural, too.

12 MR. MCARDLE: Well, I don't necessarily  
13 agree with that, Your Honor. I believe that a cow  
14 roaming - - - common sense would tell anybody that  
15 it's natural for a cow to roam. I don't believe that  
16 it would be natural for - - -

17 CHIEF JUDGE LIPPMAN: What about - - -  
18 haven't we, since Bard, kind of approved this same  
19 law in relation to dogs?

20 MR. MCARDLE: There are other cases, Your  
21 Honor, that - - -

22 CHIEF JUDGE LIPPMAN: And where are we  
23 going to draw the line? Is this a specific exception  
24 for cows and horses, because dogs apparently are in  
25 the same category as Bard, right - - -

1 MR. MCARDLE: I don't believe it is - - -

2 CHIEF JUDGE LIPPMAN: - - - under our

3 cases? No?

4 MR. MCARDLE: I don't believe it is an  
5 exception, Your Honor. The Unger case and as - - -

6 CHIEF JUDGE LIPPMAN: Well, the dogs are  
7 the same as Bard, right?

8 MR. MCARDLE: I believe - - -

9 CHIEF JUDGE LIPPMAN: We have cases that  
10 say that.

11 MR. MCARDLE: I believe that dogs, you  
12 know, they were addressed in Bard and its progeny,  
13 and, you know, I think that they would be in a  
14 different category. Well, depending on the - - - the  
15 action that the dog takes. I mean, if a dog bites,  
16 then I think it would fall under that law in the  
17 cases.

18 CHIEF JUDGE LIPPMAN: So it's - - - so it's  
19 - - - it's what Judge Read said. It's - - - the  
20 difference is that if it - - - if it - - - if it's a  
21 direct interaction with a human being, it's different  
22 than - - - than when you're - - - you're wandering,  
23 even if - - - even if eventually there is some  
24 interaction with a human being or - - -

25 MR. MCARDLE: Yeah. I had not considered

1 it - - -

2 CHIEF JUDGE LIPPMAN: - - - like with the  
3 cow?

4 MR. MCARDLE: Yeah, I had not considered it  
5 in those specific terms, Your Honor, but in - - -

6 JUDGE SMITH: But what - - - what about a  
7 dog that chases a car?

8 MR. MCARDLE: And causes an accident - - -

9 JUDGE SMITH: Yeah.

10 MR. MCARDLE: - - - with that car?

11 JUDGE SMITH: Yep, or gets hit by it?

12 MR. MCARDLE: Well, I - - - I think there's  
13 a distinction to be made between cows and horses,  
14 which are large animals, and this is as described in  
15 the Third Department's - - -

16 JUDGE SMITH: So - - -

17 MR. MCARDLE: - - - decision in this case.

18 JUDGE SMITH: So under your - - - under  
19 your rule, if I don't fence in my cow and it - - -  
20 and it gets hit by a car and the - - - and the driver  
21 of the car is injured, the driver has a cause of  
22 action, but if I let my - - - but if I fail to keep  
23 my dog on a leash and the dog chases the car and - -  
24 - and the car hits dog and the - - - the driver is  
25 injured, the - - - the plaintiff - - - the driver has

1 no claim?

2 MR. MCARDLE: I'm not sure what the answer  
3 to - - - to that is, Your Honor, and I'm not sure  
4 that that's the issue before the courts - - -

5 CHIEF JUDGE LIPPMAN: But, counselor, I  
6 think - - -

7 MR. MCARDLE: - - - in this case.

8 CHIEF JUDGE LIPPMAN: I think we have to  
9 have a rule that's going to apply broadly and what -  
10 - - do we actually measure the size of the animal to  
11 - - - to get the difference? That's the point.  
12 What's - - - what's the rule - - - that's why I asked  
13 you. Are you specifically talking about cows and  
14 horses that sort of are a carve-out from this rule  
15 that emanates from - - - from Bard or - - - or is  
16 there some other test that you're saying; is it the  
17 exact size of the animal? Where - - - where is the -  
18 - - are the lines drawn here?

19 MR. MCARDLE: Well, as it relates to this  
20 case, Your Honor - - -

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. MCARDLE: - - - which is the case that  
23 I'm concerned about, I believe that all I need is a  
24 distinction to be drawn with regard to cows because  
25 it was a cow in the roadway that caused this

1 accident.

2 JUDGE SMITH: The - - - the - - -

3 JUDGE GRAFFEO: Do you want us to say that  
4 that's not a domestic animal covered by the Bard  
5 rule? Because domestic animals - - - cows and horses  
6 are defined as domestic animals by statute. They're  
7 in Section 108 of the AG and Markets Law.

8 MR. MCARDLE: That - - - that's true, Your  
9 Honor. And I - - - I - - - I believe - - - my  
10 argument is that there's a line of cases that dates  
11 back to the 1800s that was affirmed most recently in  
12 Young in 1990, and there are other Third Department  
13 cases that address the fact that cows and horses,  
14 cows particularly, are in a different category than  
15 other animals.

16 JUDGE PIGOTT: Well, if you look at it in  
17 the fl - - -

18 MR. MCARDLE: And if there is a cow in a  
19 roadway, there is a - - - a negligence claim, and not  
20 only that, a presumption that there was negligence.

21 JUDGE PIGOTT: If you look at it the other  
22 way, the way the law seems to be reading right now,  
23 you can - - - you can graze your cows in your front  
24 yard.

25 MR. MCARDLE: Well, and that's it, without

1 a fence.

2 JUDGE PIGOTT: That's right. And - - -  
3 and, you know, that's okay to do, and, you know, if  
4 you got a herd of about twenty-seven, you better have  
5 some tall grass, but other than that, you're fine.  
6 And the worst thing you got to worry about is the cow  
7 pies because if somebody slips and falls in those,  
8 you're probably going to be responsible.

9 MR. MCARDLE: That's a good point, Your  
10 Honor. But the point that you make is a good one in  
11 that - - -

12 JUDGE SMITH: Suppose - - - suppose - - -  
13 suppose this has been a breeding bull in the road.  
14 Breeding bull charges out of the - - - the low - - -  
15 the low barn area of somebody's - - - somebody's barn  
16 and charges across the - - - the road and gets hit by  
17 a car. So can the driver sue?

18 MR. MCARDLE: I believe they - - - for a  
19 negligence claim, I believe that they - - - they can.

20 JUDGE SMITH: But if he hits somebody on  
21 the way out of the barn, well, that's Bard, so you  
22 got two - - - the same bull hits two people and one  
23 person can sue and the other can't?

24 MR. MCARDLE: Well, they may be the  
25 consequence of the rule, but I believe, as with

1 regard to your first set of facts, Your Honor, that  
2 under those circumstances, and as was just pointed  
3 out, allowing this rule as the Third Department  
4 understood it, as articulated by this court and as  
5 Judge Demarest understood it, would allow and permit  
6 a farmer to have a field full of cows, have thirty,  
7 fifty cows with no fence at all, and if a cow  
8 happened to get into a road and caused an accident,  
9 there would be no negligence claim by the plaintiff  
10 despite the fact that - - -

11 JUDGE GRAFFEO: I - - - I'm trying to - - -

12 MR. MCARDLE: - - - there's gross  
13 negligence on the part of the - - - the property - -  
14 - the farmer.

15 JUDGE GRAFFEO: I'm trying to understand  
16 why - - - why you're proposing a rule just for cows  
17 or cows and horses because a sheep or goat can come  
18 out of the pen just as easily, and they can cause an  
19 accident in the roadway.

20 MR. MCARDLE: Sure.

21 JUDGE GRAFFEO: I'm trying to understand  
22 what the greater rule is here.

23 MR. MCARDLE: I - - - I - - - I guess - - -

24 JUDGE GRAFFEO: I mean, somebody can try -  
25 - -

1 MR. MCARDLE: - - - my response to that,  
2 Your Honor - - -

3 JUDGE GRAFFEO: Somebody can try to avoid  
4 heating - - - hitting a sheep and end up hitting a  
5 tree and killing themselves. What's - - - what's the  
6 difference? Why is the nature of the animal the  
7 determining factor, I guess?

8 MR. MCARDLE: Well, I'm not sure it is.  
9 It's a determining factor for me, Your Honor, because  
10 I have a - - - in this - - - my case, I have a cow.  
11 If there was a case where a sh - - -

12 JUDGE GRAFFEO: But we're - - - we're not -  
13 - - we can't write a rule for only one case. That's  
14 our problem. I think that's why the chief judge  
15 keeps asking you what - - - what the rule is.

16 MR. MCARDLE: Right. Well, I - - - I would  
17 - - - I would say in response to that, that I believe  
18 that if a - - - I'm not a sheep farmer, but I think  
19 it would be fair to say that there would be a  
20 tendency for sheep to roam just like cows and horses  
21 and the types of animals we're talking about today,  
22 and if an accident were - - -

23 JUDGE PIGOTT: Unless you've been a good  
24 shepherd.

25 MR. MCARDLE: That's true. If an accident

1 was caused as a result of a sheep getting into a  
2 roadway because of either no fence at all or a  
3 dilapidated fence, as is the case in my case, then I  
4 think there - - - there should be a negligence claim  
5 under those circumstances.

6 JUDGE READ: The sheep didn't attack - - -  
7 I mean the cow didn't attack the car.

8 MR. MCARDLE: Exactly, Your Honor. It  
9 ended up in the road because it wandered, which is  
10 what cows do.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. MCARDLE: Thank you.

13 CHIEF JUDGE LIPPMAN: Thanks, counselor.

14 MR. VANDENBURGH: May it please the court,  
15 John VanDenburgh for respondent Sauve. And I would  
16 add, I think the court has a rule to work with and it  
17 is the rule that was established in Bard and then has  
18 been reaffirmed; and that is, in domestic animal  
19 cases, there is no negligence cause of action; there  
20 is a strict liability cause of action.

21 JUDGE SMITH: So - - - so you - - - so you  
22 can graze your cows in your front yard?

23 MR. VANDENBURGH: I suppose that you can,  
24 Your Honor, except that you are not without remedy.  
25 There is still a strict liability cause of action

1           that - - - that survives.

2                   JUDGE SMITH:  If the cow has a vicious  
3           propensity.

4                   JUDGE READ:  How does that make any sense  
5           in this context?

6                   MR. VANDENBURGH:  Well, if you look back  
7           through all of the court cases, then you can say how  
8           does it make any sense that a dog who is unrestrained  
9           or unleashed runs into traffic - - - dogs have a  
10          natural propensity to run into traffic.

11                  JUDGE PIGOTT:  Some do, some don't.  But  
12          you're - - - that's right.

13                  MR. VANDENBURGH:  And I would say the same  
14          perhaps is true for cows.  I think - - - I think what  
15          - - - what the - - -

16                  JUDGE PIGOTT:  Well, our rule seems - - -  
17          our rule seems to say that unless they can prove that  
18          this cow was jaywalking intentionally that there's no  
19          cause of action, and I just don't get that.  I get  
20          where - - - and this isn't your problem because you  
21          don't own the cow and you didn't maintain the fence,  
22          but wouldn't it make sense that if somebody doesn't  
23          maintain a fence when they know their cows are going  
24          to get out in the middle of a road and somebody's  
25          going to get hurt in the middle of the night, that

1           they should be responsible?

2                       MR. VANDENBURGH: Well, I think they can  
3 be, Your Honor, because you don't just have to show a  
4 vicious propensity; you also, the court have - - -  
5 has held, if you show a proclivity of a conduct that  
6 could cause harm. Now, I don't really know and one  
7 of the concerns, I think, that there is in trying to  
8 expand this and find - - - and move away from the  
9 workable rule that you have now, and maybe that rule  
10 is best left - - -

11                      JUDGE PIGOTT: Well, there's no vicious - -  
12 -

13                      MR. VANDENBURGH: - - - to the legislature  
14 to decide - - -

15                      JUDGE PIGOTT: - - - there's no vicious  
16 cows. There's a mad cow disease, I guess, but  
17 there's no vicious cows, and the idea that cows can  
18 do anything they want - - - if this had been a school  
19 bunch - - - bus full of kids and - - - and we lost  
20 some small children, I think everybody would be  
21 scrambling to say farmers have to curb their cows,  
22 you've got to keep them in the pasture. But now we  
23 want to say they've got to be vicious and we got to -  
24 - - and it just makes no sense to me.

25                      JUDGE READ: I guess the question is - - -

1 MR. MCARDLE: Well, maybe, Your Honor, that  
2 is a legislative decision to do that, to decide and  
3 impose that type of strict or absolute liability - -  
4 -

5 JUDGE READ: Well, why isn't this just a  
6 run-of-the-mill, plain-vanilla premises liability  
7 case?

8 MR. VANDENBURGH: Well, first of all, it's  
9 not a - - - an injury that happened on somebody's  
10 premises; it happened outside somebody's premises.  
11 Historically, this court has never made a distinction  
12 between animals. Fred, the cow - - - Fred, the bull,  
13 was also the owner of the property as well.  
14 Historically, there has never been that distinction  
15 made. And again, once you start to go down the path  
16 and adopt some type of natural propensity theory,  
17 that's going to apply to all domestic animals. I  
18 don't see how you make a separation that's so - - -

19 JUDGE PIGOTT: Well, propensity may be  
20 going too far, but don't most states hold people  
21 responsible for their animals? I - - - we - - - I  
22 think the Third Department was kind of implying that  
23 we're alone in the nation in saying that until you  
24 can prove a cow or a horse is vicious, you can't - -  
25 - you don't - - - you don't have a cause of action.

1                   MR. MCARDLE: Well, it's not just vicious;  
2                   it is a proclivity to cause harm. Now, what that  
3                   standard of proof is - - - is going to be we don't  
4                   really know, but it is kind of interesting - - -

5                   JUDGE SMITH: How - - - how would you - - -  
6                   how would you prove that - - - that a cow had such a  
7                   proclivity?

8                   MR. VANDENBURGH: Well, I - - - I think  
9                   certainly you can have the testimony of the people  
10                  involved. In this case, significantly, one of the  
11                  items of proof, the appellants took photographs  
12                  identifying the cow but then lost or destroyed or  
13                  misplaced the photographs so we don't even - - -

14                  JUDGE SMITH: I'm - - - I'm still - - - I'm  
15                  just having trouble - - -

16                  MR. VANDENBURGH: - - - have the ability to  
17                  do that.

18                  JUDGE SMITH: - - - I think the same  
19                  trouble Judge Pigott is having is of identifying this  
20                  dangerous cow, the cow with the - - - with the  
21                  proclivity to cause harm. What sort of cow are we  
22                  talking about?

23                  MR. VANDENBURGH: Well, I don't know. You  
24                  - - - you - - - once - - - once cows who are in an  
25                  unfenced area, I assume, start to walk toward the

1 roadway, maybe they do have to walk into the roadway,  
2 and I'm not saying that the standard that there is is  
3 not without difficulty but - - -

4 JUDGE PIGOTT: Cows aren't bright. We  
5 could - - - we could take judicial notice of that,  
6 couldn't we?

7 MR. VANDENBURGH: But you - - - but you can  
8 also have, again, dogs, chickens - - - anybody who's  
9 ever driven rurally knows that there's chickens in  
10 the roadway. Any domestic animal who has a natural  
11 propensity to do what it does, which is wander or  
12 bite, how can you - - - how can you say that dogs - -  
13 -

14 JUDGE SMITH: But - - - but why should we -  
15 - - should we have a rule - - - admitted I have some  
16 problem where it comes from, but should we just adopt  
17 a rule that people who own domestic animals have to  
18 keep them out of the road?

19 MR. VANDENBURGH: Well, I - - - I don't  
20 know that that's for the court to adopt. Perhaps  
21 that's for the legislature to adopt, to look at those  
22 concerns and say, under the present state of the law  
23 as interpreted, this is the way it is; this is the  
24 rule. We want to pass a law that imposes upon cow  
25 owners an absolute liability - - -

1 JUDGE PIGOTT: Well, we're a common - - -

2 MR. VANDENBURGH: - - - to keep their cows  
3 out of the - - -

4 JUDGE PIGOTT: - - - law state and - - -

5 MR. VANDENBURGH: - - - out of the - - -

6 JUDGE PIGOTT: - - - I think we have that  
7 rule. But you're - - - to get back to your client,  
8 though, you - - - you don't own the cow, don't mend  
9 the fence; you lease the land, you have no interest  
10 in animal whatsoever?

11 MR. VANDENBURGH: Correct. It's not our -  
12 - - it's not our - - - our - - - our cow and - - -  
13 and - - - and the obligation to repair the fence was  
14 on Mr. Williams - - -

15 JUDGE PIGOTT: Williams admitted that,  
16 yeah. He said that was - - -

17 MR. VANDENBURGH: - - -and that - - -  
18 that's something that he did acknowledge. But, you  
19 know, again, going back to the issue of negligence,  
20 if you choose to enforce a negligence standard, I  
21 don't believe that we have any actual or constructive  
22 notice of any - - - of any issue in this particular  
23 case and - - -

24 JUDGE READ: So you don't have any actual  
25 constructive notice that there was a problem with the

1 fence?

2 MR. VANDENBURGH: Well, the - - - the  
3 evidence indicates that there are hoof tracks going  
4 through a culvert with an area of fence that was  
5 found to be in disrepair. Mr. Williams testified  
6 that that fence was not in disrepair earlier that  
7 summer; that's really what the proof is. And there  
8 is no proof that if - - - if there was an area of  
9 other dilapidated fence that we were aware of that or  
10 that cows got out.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.  
12 Thanks.

13 MR. VANDENBURGH: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor.

15 MS. MEYERS: May it please the court,  
16 Danielle Meyers on behalf of respondent William  
17 Delarm.

18 CHIEF JUDGE LIPPMAN: So why are you still  
19 in this case, counselor?

20 MS. MEYERS: That - - - that's a good  
21 question. My client didn't own - - - own the cow and  
22 wasn't responsible for maintaining the pasture and  
23 didn't own the land.

24 CHIEF JUDGE LIPPMAN: So as far as you're  
25 concerned, you don't care what test we use; you don't

1 think your - - - you belong in this case, right?

2 MS. MEYERS: I don't believe I belong in  
3 this case, but in - - - in - - -

4 JUDGE PIGOTT: Unless there's a question of  
5 fact as to what the color of the tag was on the - - -  
6 on the cow's ear.

7 MS. MEYERS: That's correct.

8 CHIEF JUDGE LIPPMAN: What color was your  
9 tag again?

10 MS. MEYERS: They were either white or  
11 cardboard.

12 CHIEF JUDGE LIPPMAN: And the - - - and the  
13 - - - the - - - the cow in particular that wound up  
14 on the roadway?

15 MS. MEYERS: Orange.

16 CHIEF JUDGE LIPPMAN: Orange. Okay. So  
17 you don't think that's an issue either?

18 MS. MEYERS: No, that is - - -

19 CHIEF JUDGE LIPPMAN: So what else do you  
20 have to tell us, counselor?

21 MS. MEYERS: Well, I think what has become  
22 clear is that the court would - - - would have a  
23 problem if there was an exception created to Bard in  
24 creating a rule that makes sense that applies to cows  
25 and horses and sheep and goats but also applies to

1 dogs. There's no - - - there's no rule that can be  
2 created that applies to - - - to those type of  
3 animals except for the strict liability rule. The  
4 strict liability rule is a predictable rule.

5 CHIEF JUDGE LIPPMAN: So you're advocating  
6 for the rule even though in your case it wasn't your  
7 cow and you don't think you have any liability  
8 anyway?

9 MS. MEYERS: That's right- - -

10 JUDGE SMITH: Is - - - isn't there - - -

11 MS. MEYERS: - - - because if it was my  
12 cow, it would be - - -

13 JUDGE SMITH: Isn't there evidence that it  
14 was your cow? Didn't somebody testify somebody hit  
15 one of my - - - that you - - - you - - - your guy  
16 said somebody hit one of my cows last night?

17 MS. MEYERS: Yes, there was testimony that  
18 the son and - - - and the father of the plaintiff  
19 testified to that, but I would submit that their  
20 hearsay statements without any other evidence is - -  
21 -

22 JUDGE SMITH: Hearsay? A statement by your  
23 client?

24 MS. MEYERS: Well, yes, it's a statement of  
25 my client; whether it'd be admissible at trial as an

1 admission - - -

2 JUDGE SMITH: Well, how - - - how could - -  
3 - how is a statement by your client that it was his  
4 cow not admissible at trial?

5 MS. MEYERS: I'm not suggesting that it  
6 would not be admissible at trial, but there are case  
7 - - - cases to suggest that if that's the sole  
8 evidence, particularly in a case such as this where  
9 you have somebody that comes forward and says, hey,  
10 that's my cow, I was there that night, I - - -

11 JUDGE SMITH: But could a - - - could a - -  
12 -

13 MS. MEYERS: - - - identified it as my cow.

14 JUDGE SMITH: Could a cynic think that they  
15 got together and decided that the guy who had no  
16 money would say it was his cow?

17 MS. MEYERS: I - - - I guess somebody could  
18 assume that, but at 2:30 in the morning when he's the  
19 only one there, I don't think, in this particular  
20 case, they would have that finding.

21 But in any event, in terms of answering  
22 your question on whether or not that hearsay  
23 statement would be enough, without further evidence  
24 that it was my client's cow, I would submit that it's  
25 not enough, and I think there's case law to support



1 saying overrule Bard?

2 MR. MCARDLE: Well, I - - - I'm pointing  
3 out that - - - counsel made a comment that that's the  
4 only standard that, in her estimation, makes sense.  
5 I would submit that there is another standard - - -

6 CHIEF JUDGE LIPPMAN: Counselor, but are  
7 you saying - - - I go back to - - -

8 MR. MCARDLE: - - - which, as a  
9 consequence, would overrule Bard.

10 CHIEF JUDGE LIPPMAN: - - - what I asked  
11 you initially. Are you asking to overrule Bard? Are  
12 you asking us to create a narrower exception to - - -  
13 to Restatement 518 that has to do with maybe cows and  
14 horses? Which is it? Do you want to - - - do you  
15 think we have to overrule Bard - - -

16 MR. MCARDLE: I don't think you - - -

17 CHIEF JUDGE LIPPMAN: - - - or can we find  
18 for you without overruling Bard but maybe carving out  
19 some kind of a - - -

20 MR. MCARDLE: I think that you can rule for  
21 me without overruling Bard and its progeny, Your  
22 Honor. As I indicated before, the Unger decision and  
23 the Young decision and the other decisions from the  
24 Third Department provide a rule that I think makes  
25 sense - - -

1 JUDGE SMITH: Let me - - - let me - - -

2 MR. MCARDLE: - - - and would constitute -

3 - -

4 JUDGE SMITH: Let me see if I can focus on  
5 what you say the distinction is between this case and  
6 Bard. It's not between a horse and a bull - - - not  
7 between a cow and a bull, I assume; it's between the  
8 presence in the road and the presence in the barn?  
9 Is that really the distinction?

10 MR. MCARDLE: I would agree with that, and  
11 I would ha - - - I guess I would say that it would be  
12 the conduct of the animal. If it is an abnormal act  
13 and a vicious act, like a dog biting, then maybe a  
14 strict liability rule would apply - - -

15 CHIEF JUDGE LIPPMAN: And that's Bard.

16 MR. MCARDLE: - - - but that's not what we  
17 have. We have - - -

18 JUDGE SMITH: So - - - well, is that - - -  
19 does that suggest that it might be a different rule  
20 from the dog who's chasing the car and the dog who's  
21 just wandering into the road?

22 MR. MCARDLE: I - - - I would agree with  
23 that.

24 CHIEF JUDGE LIPPMAN: So the carve-out  
25 would not be for - - - for cows or horses; it would

1 be for the kind of conduct - - -

2 MR. MCARDLE: Correct.

3 CHIEF JUDGE LIPPMAN: - - - the wandering  
4 conduct?

5 MR. MCARDLE: Yes, yes, Your Honor. And  
6 again, normal tendencies of animals to do - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. MCARDLE: - - - what those types of  
9 animals do.

10 And Your Honor, you made a point about the  
11 school bus analogy. I will tell you, Your Honors,  
12 that I have received phone calls from many attorneys  
13 across the state that this rule will impact; one call  
14 I received was from an attorney who represents the  
15 family of a motorcyclist who hit a cow in a roadway  
16 and died. So your point is well taken, Your Honor,  
17 and - - -

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. MCARDLE: - - - if there are any other  
20 questions, I appreciate your time.

21 CHIEF JUDGE LIPPMAN: Thank you.

22 Okay. Now we're going to have Bloomer,  
23 counselor?

24 MR. RUSK: Yes. Thank you, Your Honor.

25 Good afternoon. My name is John Rusk, and

1 I represent the appellant/plaintiff Robert Bloomer.

2 CHIEF JUDGE LIPPMAN: You want any rebuttal  
3 time, counselor?

4 MR. RUSK: Yes, Your Honor. I would ask  
5 for two minutes rebuttal time.

6 CHIEF JUDGE LIPPMAN: Two minutes. Sure.  
7 Go ahead. Where does Bloomer fit into this equation?

8 MR. RUSK: Well, Your Honor, our position  
9 is that this court could find for the  
10 plaintiff/appellant by using the vicious propensity  
11 rule that's already in place; however, it's our  
12 contention that the Appellate Division, when they  
13 applied the vicious propensity rule, applied it too  
14 narrowly, that instead of looking at the same - - -  
15 or they focused on whether or not there was the same  
16 conduct instead of whether there was similar conduct  
17 as is described in the Collier case and in the Bard  
18 case.

19 JUDGE PIGOTT: But this horse wasn't  
20 vicious.

21 MR. RUSK: On this particular day, this  
22 horse was dangerous - - -

23 JUDGE PIGOTT: How's that?

24 MR. RUSK: - - - due to the circumstances  
25 that - - - that it faced.

1 JUDGE SMITH: You're - - - you're - - -  
2 you're saying vicious doesn't really mean vicious.

3 MR. RUSK: Vicious in - - - in - - - in the  
4 way that it's used in vicious propensity cases  
5 doesn't mean necessarily attacking that we normally -  
6 - -

7 CHIEF JUDGE LIPPMAN: But - - -

8 MR. RUSK: - - - believe it to be - - -

9 CHIEF JUDGE LIPPMAN: - - - but there's - -  
10 -

11 MR. RUSK: - - - in dog cases.

12 CHIEF JUDGE LIPPMAN: - - - testimony that  
13 this is normal behavior by a horse, right, this  
14 pulling away when you try and put the leash on?

15 JUDGE READ: And that was - - - that was  
16 the distinction that the Third Department made, I  
17 think.

18 MR. RUSK: That was a distinction that the  
19 Third Department made, but, quite frankly, Your  
20 Honor, there's differing testimony or proof that was  
21 submitted in this case with regard to what this  
22 horse's conduct was typically, because the  
23 defendant's testimony was that this horse had never  
24 pulled its head back before - - - that was her  
25 testimony - - - but that the horse had always avoided

1 the lead line and - - - which would require her to  
2 hide it.

3 JUDGE PIGOTT: But isn't that the opposite  
4 of being vicious; in other words, he was - - - it was  
5 a cowardly horse?

6 MR. RUSK: No, Your Honor, because under  
7 the circumstances that it was - - - it was in on this  
8 particular day, under these circumstances, and the  
9 differing proof that was presented - - - the  
10 veterinarian expert that the defendant put forth said  
11 that it's normal horse behavior for the horse to pull  
12 its head back when hands approach its face or neck if  
13 that's complete - - -

14 JUDGE PIGOTT: No, I was - - - I was saying  
15 cowardly as - - - as the setting it off against - - -  
16 this was not an attacking animal, this was not an an  
17 - - - an aggressive animal; this was an animal that  
18 was trying to move away.

19 MR. RUSK: That's correct.

20 JUDGE PIGOTT: All right.

21 MR. RUSK: And that's why it really falls  
22 under the category of proclivity - - -

23 JUDGE PIGOTT: Right.

24 MR. RUSK: - - - that there was a - - - an  
25 action performed by this horse which necessarily is

1 not dangerous in and of itself but becomes dangerous,  
2 really, because of the type of animal that it is.

3 CHIEF JUDGE LIPPMAN: So you think you fit  
4 into the existing case law?

5 MR. RUSK: Yes.

6 CHIEF JUDGE LIPPMAN: That's what you're  
7 saying?

8 MR. RUSK: I think we do, Your Honor.

9 CHIEF JUDGE LIPPMAN: Under the proclivity  
10 - - -

11 MR. RUSK: Under the proclivity and under  
12 the - - - the references that are made both in  
13 Collier and in Bard where the court says there is no  
14 one-bite rule, so you - - - the plaintiff, you can  
15 look at similar conduct. If all go - - -

16 JUDGE SMITH: If - - - if you're - - - if  
17 you're right, do you get summary judgment? I mean, I  
18 realize you didn't move for it, but this is strict  
19 liability, right?

20 MR. RUSK: Yes, it is, Your Honor. Now - -  
21 -

22 JUDGE SMITH: So - - - so if - - - so if  
23 you're - - - if you're right that this - - - this  
24 tendency to - - - to - - - to avoid the lead or maybe  
25 a tendency to get upset when it's not - - - when its



1 CHIEF JUDGE LIPPMAN: Okay. Thank you,  
2 counselor.

3 MR. TWITCHELL: If it please the court,  
4 Your Honor, I'm Dave Twitchell. I represent the  
5 respondent in the Bloomer case, Christine Shauger,  
6 the owner of the cowardly horse.

7 I - - - as to the strict liability claim, I  
8 believe the Appellate Division did a very thorough  
9 analysis of the existing law and - - - and the facts  
10 of the case and reached the proper conclusion.  
11 Neither my client or the plaintiff had any prior  
12 knowledge that the horse would act in this fashion.

13 Now, Mr. Rusk's argument is - - -

14 CHIEF JUDGE LIPPMAN: What do you - - -  
15 what - - - you know, in the most general way, putting  
16 aside Bard and everything else, wouldn't it stand to  
17 reason in this case that - - - that there was going  
18 to be some kind of reaction in putting the - - - the  
19 companion horse in the ground in front of the other  
20 horse given their very close relationship?

21 MR. TWITCHELL: I su - - - I suppose with  
22 the benefit of hindsight there - - - it wasn't the  
23 best - - -

24 CHIEF JUDGE LIPPMAN: Not to - - - not the  
25 best approach?

1 MR. TWITCHELL: - - - best scenario.

2 Perhaps there was no other pen involved - - -

3 CHIEF JUDGE LIPPMAN: I don't know.

4 MR. TWITCHELL: - - - available for the

5 horse. In any event - - -

6 JUDGE SMITH: Why - - - why - - - why isn't

7 a tendency to be - - - we - - - we do know that this

8 horse had a tendency to become agitated when she was

9 separated from her companion.

10 MR. RUSK: Correct.

11 JUDGE SMITH: Why is that not a so-called

12 vicious propensity within the meaning of Bard and

13 Collier?

14 MR. RUSK: And - - - and again, this fits

15 in with Mr. Rusk's argument. He says you don't have

16 to have knowledge of the exact act; you - - - you can

17 - - - you can satisfy the standard by having

18 knowledge of a similar act. And I submit that if you

19 look closely at Collier and Bard, that argument

20 applies to the part of vicious propensity that's

21 really vicious. In other words, if we're - - - if

22 we're talking about a dog - - -

23 JUDGE SMITH: That growls and snaps.

24 MR. TWITCHELL: - - - that bites, that can

25 - - - you can show the vicious propensity by showing

1 the growling, the snapping of teeth. You can show  
2 that type of - - -

3 CHIEF JUDGE LIPPMAN: So this is more  
4 benign?

5 MR. TWITCHELL: - - - propensity by  
6 muzzling or the fact that it's a guard dog. In this  
7 particular type of case, this is - - -

8 CHIEF JUDGE LIPPMAN: Benign contact? Is  
9 that what you're saying?

10 MR. TWITCHELL: This is the vicious  
11 propensity that's not necessarily dangerous or  
12 vicious, but - - - but - - -

13 CHIEF JUDGE LIPPMAN: What - - - describe  
14 the conduct that happens here when the - - -

15 MR. TWITCHELL: The conduct here - - -

16 CHIEF JUDGE LIPPMAN: Yeah.

17 MR. TWITCHELL: - - - and what the cases  
18 require in - - - in that category that - - - that is  
19 not vicious but is - - - nonetheless can be harmful  
20 is that the injury has to arise out of the very  
21 propensity that - - - that is claimed. In other  
22 words, there has to be a specific act of which the  
23 defendant is responsible under, as you put it - - -

24 CHIEF JUDGE LIPPMAN: So if they have a  
25 propensity to pull away, can that cause the injury?

1 MR. TWITCHELL: I'm sorry, Your Honor?

2 CHIEF JUDGE LIPPMAN: If they have a  
3 propensity to pull away and that causes the injury,  
4 that's not good enough?

5 MR. TWITCHELL: If - - - if this horse had  
6 jerked its head back - - -

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MR. TWITCHELL: - - - violently like - - -  
9 like happened here, then that, I submit, could be - -  
10 - could be a propensity. Here, all we have on the  
11 date of the occurrence when this horse was upset, and  
12 on past occurrences, was my client conceiving that  
13 the horse would avoid the lead line simply by walking  
14 away.

15 JUDGE PIGOTT: If the horse had avoided the  
16 lead line and stepped on him, would - - - would there  
17 be liability?

18 MR. TWITCHELL: Perhaps. Had - - - had the  
19 horse run into the - - - the plaintiff in the - - -  
20 in the course of being excited that day and running  
21 around and pacing, that might have been something the  
22 defendant knew about because she was there and - - -  
23 and - - -

24 CHIEF JUDGE LIPPMAN: But here - - -

25 MR. TWITCHELL: - - - may have some

1 liability.

2 CHIEF JUDGE LIPPMAN: - - - here, what do  
3 you say - - - here, what are you saying happened so  
4 it doesn't fit into - - - to Bard?

5 MR. TWITCHELL: The hor - - - the - - - the  
6 horse violently jerked its head back and that, as far  
7 as my client was concerned, was the first time that  
8 had ever happened.

9 JUDGE SMITH: So it's a question of which  
10 body part the horse moves?

11 MR. TWITCHELL: Not necessarily. It's the  
12 manner in which the horse reacts.

13 JUDGE SMITH: If the horse had jumped in -  
14 - - had jumped with its feet instead of pulling its  
15 head back, though, you think there could be  
16 liability?

17 MR. TWITCHELL: No, not unless the horse -  
18 - -

19 JUDGE SMITH: Not unless - - - not unless  
20 it had jumped before.

21 MR. TWITCHELL: - - - had done that before.  
22 And that - - - and that's the point. My client was  
23 aware that the horse would, in general, avoid a lead  
24 line by simply walking away. In this instance, the  
25 horse - - -

1                   JUDGE SMITH: Well, what - - - what - - -  
2                   what about the tendency - - - I - - - I was thinking  
3                   more of the tendency to become agitated in the  
4                   absence of - - - of her companion. Why isn't that a  
5                   so-called vicious propensity?

6                   MR. TWITCHELL: Well, had the - - - the  
7                   agitation manifested itself with the horse pacing  
8                   around and running around and had - - -

9                   JUDGE SMITH: So - - - so - - - but, I  
10                  mean, aren't we - - -

11                  MR. TWITCHELL: - - - and my client  
12                  certainly had knowledge of that.

13                  JUDGE SMITH: Doesn't this become  
14                  essentially a verbal game? You - - - you - - - it's  
15                  a question of how generically you describe it. You  
16                  can - - - if - - - if it's - - - if you say it's  
17                  becoming agitated, she's done it before. If you say  
18                  it's pulling the head back, well, she never pulled  
19                  the head back before. And there must be infinite  
20                  gradations in between, maybe pulling or pushing or  
21                  using your left leg or your right leg. You go crazy  
22                  with this.

23                  MR. TWITCHELL: I - - - I acknowledge that  
24                  there is - - - there is some picking at the facts  
25                  here, but - - - but that is the way my view of what

1 the courts have done, including this court, for  
2 example, the Smith case - - -

3 CHIEF JUDGE LIPPMAN: But - - - but - - -

4 JUDGE READ: Well, is that actually what  
5 the Third Department did? I thought I read the Third  
6 Department case as saying this is just a horse being  
7 a horse, jerking the head back. That's not any  
8 unusual behavior. It's not a vicious propensity.

9 MR. TWITCHELL: Yes, that was certainly  
10 part of it, but they go on - - -

11 JUDGE READ: But you don't agree - - - you  
12 don't agree with that?

13 MR. TWITCHELL: Oh, I - - - certainly I  
14 agree with that because that's supports my client's  
15 position that this was - - -

16 JUDGE READ: Yeah, but you're arguing  
17 something a little different, I gather.

18 MR. TWITCHELL: But - - - but I'm trying to  
19 eliminate all the possibilities. The Third  
20 Department went on to say, even though we think this  
21 is a - - - a natural behavior for the animal and  
22 therefore not actionable, they - - - they go on to  
23 say that - - - that even if it fit within the vicious  
24 propensity, that - - - that the act that caused the  
25 injury was not something that my client had any

1 knowledge of.

2 CHIEF JUDGE LIPPMAN: But - - - but - - -

3 JUDGE READ: So it's not something they  
4 could have predicted?

5 MR. TWITCHELL: Correct.

6 CHIEF JUDGE LIPPMAN: But going back to  
7 Judge Smith's question, if he got agitated based on  
8 the relationship with - - - with the other horse, and  
9 we've already - - - you've already acknowledged it  
10 probably wasn't the greatest thing in the world to be  
11 putting the horse - - - the other horse into the  
12 ground, why isn't that predictable, that the horse  
13 would become agitated?

14 MR. TWITCHELL: Well, becoming agitated and  
15 jerking its head back don't - - - don't really  
16 follow. It's like the dog in Smith that had a  
17 propensity to escape and run toward the road but had  
18 no propensity to interfere with traffic in the road.

19 CHIEF JUDGE LIPPMAN: So if the - - - if -  
20 - - as you say, if the horse jumped up and down and  
21 got crazy in that way, that - - - that would fit in,  
22 so it might have been predictable, but it's not  
23 predictable that the reaction to the - - - to the  
24 other horse is - - - is that he pulled back from the  
25 lead? Is that - - -

1 MR. TWITCHELL: I don't know that I would  
2 agree with that because I don't think - - -

3 CHIEF JUDGE LIPPMAN: But what are you  
4 saying?

5 MR. TWITCHELL: - - - there's any testimony  
6 that the - - - the horse did those types of things.  
7 The - - - the manifestation - - -

8 CHIEF JUDGE LIPPMAN: Part of it is the  
9 natural - - - what Judge Read mentioned - - -

10 MR. TWITCHELL: Right.

11 CHIEF JUDGE LIPPMAN: - - - the horse is  
12 being a horse, and what's the other part of this that  
13 you're trying to eliminate?

14 MR. TWITCHELL: The other - - - the other  
15 part of this is what - - - what was the act that  
16 caused the injury. I think the defendant has to be  
17 found to have actual or constructive knowledge of a  
18 propensity to perform the very act that caused the  
19 injury. And here, as a result of the horse's  
20 acknowledged agitation, we know the horse was running  
21 around, and if the accident arose out of the running  
22 around - - -

23 CHIEF JUDGE LIPPMAN: That would have been  
24 enough?

25 MR. TWITCHELL: That perhaps would have

1           been enough - - -

2                   CHIEF JUDGE LIPPMAN: I see.

3                   MR. TWITCHELL: - - - had it not been - - -

4                   CHIEF JUDGE LIPPMAN: Okay.

5                   MR. TWITCHELL: - - - a natural - - -

6           natural behavior for the horse.

7                   CHIEF JUDGE LIPPMAN: But the pulling back  
8           doesn't qualify?

9                   MR. TWITCHELL: Correct, because there was  
10          no actual or constructive notice of that.

11                  CHIEF JUDGE LIPPMAN: Okay. Thanks,  
12          counselor.

13                  MR. TWITCHELL: Thank you.

14                  CHIEF JUDGE LIPPMAN: Counselor.

15                  MR. RUSK: I just wanted to point out, one  
16          of the issues that was raised in the argument at the  
17          Appellate Division was exactly, Your Honor, what - -  
18          - what Your Honor, Judge Smith, pointed out is, the  
19          fact is under every circumstance there's going to be  
20          a situation where an animal may not act exactly the  
21          same way as it did to produce the injury to the  
22          plaintiff.

23                  In other words, if - - - if this horse had  
24          previously pulled its head back to the left and on  
25          this occasion it pulled its head back to the right,

1 under the defense argument they'd get out of this  
2 case because there was never any anticipation that  
3 that would happen, and - - - and there's going to  
4 constantly be events that occur - - -

5 JUDGE SMITH: But - - - but - - - but you  
6 got to pick some level of generality that's the right  
7 level.

8 MR. RUSK: That's correct, Your Honor. And  
9 I think that - - -

10 JUDGE SMITH: How do you do that?

11 MR. RUSK: - - - in Collier you - - - the  
12 court has said that, that it's same or similar  
13 conduct. And in this case, with the horse, knowing  
14 that this horse avoids a lead line, does it matter if  
15 the horse jumps up in the air, that it turns, walks  
16 away or that it pulls its head back?

17 JUDGE SMITH: But - - - but - - - but  
18 turning and walking away seems like it's normally  
19 harmless conduct. Isn't that - - - how can that be a  
20 vicious propensity?

21 MR. RUSK: But - - - but under the  
22 circumstances of this particular case, knowing - - -  
23 the defendant knowing that the horse is upset because  
24 its companion horse has passed away, knowing that the  
25 horse has - - - she's attempted to attach this lead

1 line to the harness on two or three prior occasions  
2 just before this happens, and she says in her  
3 testimony this horse gets more and more upset the  
4 more you try to attach the lead line. That's in her  
5 testimony.

6 JUDGE READ: Just a - - - just - - -

7 JUDGE SMITH: So is getting upset - - - I'm  
8 sorry.

9 JUDGE READ: Just as a matter of interest,  
10 I know that - - - not that it's relevant  
11 particularly, but these two individuals who were - -  
12 - who were - - - they were experienced handling  
13 horses?

14 MR. RUSK: Yes, yes, they were.

15 JUDGE SMITH: Is - - - is getting upset a  
16 vicious propensity or a propensity - - - maybe I  
17 shouldn't say vicious propensity, proclivity for  
18 harm? Is that too narrow or too broad a phrasing?

19 MR. RUSK: I think that's a difficult one,  
20 Your Honor. But certainly on this occasion under the  
21 - - - under the - - - the - - - the demeanor that the  
22 horse exhibited that day, I would say that that does  
23 fall in - - - of - - - as a vicious propensity  
24 because - - -

25 JUDGE SMITH: And - - -

1 MR. RUSK: - - - because that horse was  
2 dangerous that day within the paddock.

3 JUDGE SMITH: I mean, I see - - - I mean,  
4 am I understanding it right that there are two  
5 possible proclivities to do harm here, one, the  
6 proclivity to - - - to do something to avoid the lead  
7 line, and the other the proclivity to become agitated  
8 in the absence of its companion?

9 MR. RUSK: Yes.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. RUSK: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks.

13 Thank you, all.

14 MR. TWITCHELL: Thank you, Your Honor.

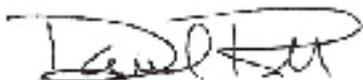
15 (Court is adjourned)

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Hastings v. Suave, No. 78, and Bloomer v. Shauger, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: March 26, 2013