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COURT OF APPEALS
STATE OF NEW YORK

FLANDERS,

Appellant,

-against-

GOODFELLOW,

Respondent.

NO. 29

92 Court Street
Binghamton, New York 13901
March 12, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Brandon Deshawn
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Flanders v. Goodfellow.

3 (Pause)

4 CHIEF JUDGE WILSON: Go ahead, Counsel.

5 MR. KAISER: Good morning, Your Honors. Matt
6 Kaiser and Duane Schoonmaker of William Mattar, PC, on
7 behalf of the appellant, Rebecca Flanders. It's an immense
8 honor to appear before this court this morning. I would
9 like to reserve three minutes for rebuttal.

10 CHIEF JUDGE WILSON: Yes.

11 MR. KAISER: Thank you, Judge. We raised two
12 main points in our principal brief. I'd like to begin my
13 argument this morning by focusing on the first point, which
14 is the strict liability claim. The Appellate Division
15 erred on the law when it held, in effect, that a domestic
16 animal owner's notice of vicious propensities must be
17 actual in nature as opposed to constructive. Long standing
18 precedent from this court allows the fact finder to infer
19 notice based on the circumstances, including the duration,
20 frequency, and conspicuousness of the animal's menacing and
21 vicious behavior.

22 JUDGE HALLIGAN: So - - -

23 MR. KAISER: This - - -

24 JUDGE HALLIGAN: So what specifically do you
25 argue here gives rise to constructive notice?



1 MR. KAISER: We have, in this case, conspicuous
2 behavior on - - - on 288 occasions over a three-year
3 period.

4 JUDGE HALLIGAN: But - - - but what about - - - I
5 - - - I thought that the owner testified that - - - in
6 deposition that he had not seen this behavior by the dogs.
7 I assume you're referring to the postal workers'
8 statements; is that right?

9 MR. KAISER: Well, yes. I'm referring to Eugene
10 Yugovic's and - - -

11 JUDGE HALLIGAN: Right.

12 MR. KAISER: - - - Brian Harp's statements,
13 correct.

14 JUDGE HALLIGAN: Right. Right. But - - - but
15 what do we make of the fact that - - - I believe, correct
16 me if I'm wrong, that the owner said that he had not
17 witnessed this himself?

18 MR. KAISER: Right. And that was Stephen
19 Goodfellow's testimony.

20 JUDGE HALLIGAN: Uh-huh.

21 MR. KAISER: However, if - - - if - - -

22 JUDGE CANNATARO: And that's uncontroverted,
23 right?

24 MR. KAISER: That Stephen Goodfellow testified -
25 - -

1 JUDGE CANNATARO: His - - -

2 MR. KAISER: - - - that he - - -

3 JUDGE CANNATARO: His statement that - - - that
4 he'd never seen the dog exhibit any of these aggressive
5 behaviors is not controverted in the record.

6 MR. KAISER: Well, what - - - what we do have is
7 we have admissions from the defendants that this dog, which
8 is a seventy-five-pound dog that can stand five-foot on its
9 hind legs, was something less than a gentle giant before
10 this incident. That's - - -

11 JUDGE CANNATARO: That's what the postal workers
12 saw?

13 MR. KAISER: No. No, Your Honor. That's
14 actually coming from Michelle Goodfellow's Facebook posts
15 support admission.

16 JUDGE HALLIGAN: What specifically are you - - -
17 are you referring to? She says he's not a gentle giant?

18 MR. KAISER: After the training by - - - by
19 Gregory Gorman in August, a couple months before this
20 incident, there was a Facebook post to the effect of, we
21 have our gentle - - - we finally have a gentle giant, or
22 something along those lines. The - - - the inference
23 being, this dog was something less than a gentle giant
24 before the training. We - - - and we also have an
25 awareness of the need to confine and restrain this dog.

1 JUDGE HALLIGAN: I'm not sure I read the
2 statement as - - - as you suggest. I mean, I think this is
3 Michelle Goodfellow's statement that you're referencing; is
4 that right?

5 MR. KAISER: Correct.

6 JUDGE HALLIGAN: Okay. So - - - so why should we
7 read that as her saying that we kept people out of the
8 house so that they didn't have access to the dog as opposed
9 to saying, we don't let strangers in our house because we
10 choose not to do that, and therefore, the dog has not had
11 access to strangers?

12 MR. KAISER: Right. And so that's at pages 209
13 through 210 of the record, where she says pretty much that.
14 She says that unfamiliar people would not have access to
15 this dog. Unfamiliar people - - -

16 JUDGE HALLIGAN: That might be because they - - -
17 they choose, for whatever reasons, not to have strangers in
18 their home, perhaps for reasons that have nothing to do
19 with the dog.

20 MR. KAISER: Well, actually, she says around the
21 same point in her testimony that if it was someone
22 familiar, the dog would jump in a friendly way, you - - -
23 you know, in sort of welcoming way. But she testified very
24 clearly that this dog was kept away from unfamiliar people.
25 And I think if you couple that with her statement - - -

1 JUDGE HALLIGAN: Well, kept away maybe is where
2 I'm - - - I'm not sure that the testimony is quite so
3 clear. Didn't have - - - didn't have exposure to other
4 strangers, I think that's - - - that's what she's saying.
5 But why - - - why should we read it that she was
6 deliberately keeping the dog away from strangers?

7 MR. KAISER: Because she said that they took the
8 precaution of separating this dog from unfamiliar people.
9 This dog, which she said in a Facebook post, was something
10 less than a gentle giant. The opposite of gentle is rough;
11 a big, rough dog being kept away from - - - from people who
12 are unfamiliar.

13 JUDGE RIVERA: Why - - - why - - - why isn't this
14 just a credibility issue?

15 MR. KAISER: It is, Your Honor. Exactly. It is
16 a credibility issue.

17 JUDGE RIVERA: They've - - - they've said certain
18 things that the - - - the trier of fact might infer exactly
19 what you're trying to infer.

20 MR. KAISER: I - - - I agree with that, Your
21 Honor. In fact, I would refer this court to its decision
22 in Baisi v. Gonzalez in 2002. It was a - - - a reversal of
23 a Second Department decision, which is a 2-3 decision at
24 the Second Department. And if you look at the - - - the
25 evidence that the plaintiff submitted in Baisi and compare

1 it to what Rebecca Flanders submitted in this case, Rebecca
2 Flanders' evidence was much more factually explicit, much
3 more robust. The Baisi - - -

4 JUDGE GARCIA: But Counsel, you don't really - -
5 - not suggesting you would have a credibility issue because
6 the jury could choose not to believe someone, right? If
7 this person came in and said, I never heard anything about
8 this dog. This dog was so gentle, and you didn't have any
9 evidence on the other side, this isn't a credibility issue,
10 right?

11 MR. KAISER: No. I - - -

12 JUDGE GARCIA: It doesn't go to the jury and they
13 can not believe that person on - - -

14 MR. KAISER: Well - - -

15 JUDGE GARCIA: - - - credibility issue, right?

16 MR. KAISER: I think if the testimony is - - - is
17 viewed in the context of other evidence, including in this
18 case where we've got 288 instances over a three-year
19 period, it does become a credibility issue.

20 JUDGE GARCIA: Right. But you need some - - -
21 and that's the issue here, right? Is - - - is there enough
22 proof on that side to create this credibility issue, not
23 that a jury can choose not to believe somebody when they
24 say something.

25 MR. KAISER: Right. I mean, I - - - I think what

1 it comes down to is the record in the - - - the record
2 evidence in its totality creates a situation where a fact
3 finder could connect the dots and say, a reasonably prudent
4 landowner would know what happens six to eight times per
5 month when they receive packages at the front door.

6 JUDGE HALLIGAN: Do you think that you could - -
7 - if - - - if the case were to proceed, could you lose on
8 strict liability but prevail on negligence if a negligence
9 claim were available?

10 MR. KAISER: Yes, Your Honor. Yes.

11 JUDGE HALLIGAN: And - - - and - - - - and how
12 would that happen?

13 MR. KAISER: That would happen because the
14 negligence cause of action is sort of a - - - it would - -
15 - it would apply if the fact finder were to find that this
16 dog was not abnormally dangerous and that the defendants
17 did not have actual constructive notice of the abnormally
18 dangerous nature of the dog. So - - -

19 JUDGE HALLIGAN: But - - -

20 MR. KAISER: - - - it's a fallback.

21 JUDGE HALLIGAN: But what - - - but then what
22 would the facts be that would give rise to negligence
23 liability and not strict liability?

24 MR. KAISER: And so that's - - - it's - - - it's
25 a great question. And so the - - - the issue is, strict

1 liability is premised on what the owner knows about the
2 dog. There's no consideration of what's going around and
3 you're certain - - -

4 JUDGE HALLIGAN: So what would the negligent
5 conduct be here given the allegations that you've
6 presented?

7 MR. KAISER: The negligent conduct here would be
8 failing to restrain a dog when you know the dog is a big
9 dog, a rough dog, who is previously restrained and - - -
10 and - - -

11 JUDGE HALLIGAN: So you could lose on
12 constructive notice, and therefore, strict liability, but
13 you think there would still be a path to prevail on a
14 negligence - - -

15 MR. KAISER: Right.

16 JUDGE HALLIGAN: - - - claim - - -

17 MR. KAISER: And - - - and - - -

18 JUDGE HALLIGAN: - - - if it was available?

19 MR. KAISER: And the line of reasoning would be,
20 okay, we're going to fully credit the defendant's testimony
21 that this dog was - - - was an angel. This dog had no
22 problems before this incident, fully crediting that
23 testimony. You did send the dog away for - - -

24 JUDGE RIVERA: So aren't you fully crediting that
25 that is what they - - - that was their view of the dog, not

1 the actual conduct of the dog?

2 MR. KAISER: I'm just saying hypothetically.

3 JUDGE RIVERA: Okay.

4 MR. KAISER: Hypothetically, if a fact finder
5 were to fully credit the defendant's testimony and say,
6 this dog was not abnormally dangerous. This was a normal
7 dog. The fact finder could also find, under this court's
8 precedent, which existed for 140 years, in which finds - -
9 - its foundation in the English common law in the 1670s
10 that reasonable care could have prevented this foreseeable
11 injury.

12 JUDGE GARCIA: Couldn't you have it the other
13 way? Could you have a finding of negligence - - - could
14 you have a finding of strict liability but not negligence?

15 MR. KAISER: Yes. Absolutely, Your Honor.

16 JUDGE CANNATARO: Can we - - -

17 JUDGE GARCIA: How so?

18 MR. KAISER: Well - - - well, because strict
19 liability more or less nullifies the negligence. If - - -
20 if you are strictly liable, then no matter what degree of
21 care - - -

22 JUDGE GARCIA: But let's - - - let's say you find
23 strict liability in a case, could you ever not find
24 negligence?

25 MR. KAISER: Well, I would say - - - and - - -



1 and I - - - I think that's - - - it makes a good point.
2 Because the strict liability cause of action clearly says,
3 no matter how much care you exercise, you're liable. You
4 could - - - you know, utmost care. You could be policing
5 the dog, hovering over the dog at all times to make sure it
6 doesn't hurt anyone. Once you know you have an abnormally
7 dangerous dog, it's a public nuisance. And if it hurts
8 someone, you're responsible. So once - - - once you have
9 strict liability, negligence is out the door.

10 JUDGE GARCIA: Right.

11 JUDGE HALLIGAN: Well, but - - -

12 JUDGE CANNATARO: Can I just go back to - - -

13 MR. KAISER: And just - - - just to clarify, at
14 trial, not at the summary judgment stage because we're
15 talking about inferences and - - - and findings of fact.

16 JUDGE GARCIA: My question really is going to, if
17 we were to overrule Bard, right, and if we were going on a
18 negligent standard, why would we keep strict liability?

19 MR. KAISER: It serves two distinct public policy
20 purposes. The strict liability rule is based on the
21 premise that you're serving no salutary public purpose to
22 have an abnormally dangerous dog. It's a public nuisance.

23 JUDGE GARCIA: But now we're all in a comparative
24 negligence world, right? That's what you're asking for.
25 So why wouldn't it just be a comparative negligence

1 calculation? I mean, you could be negligent in approaching
2 someone's vicious dog, right? Big sign, vicious dog. You
3 go and you - - - why isn't that a - - - why aren't we just
4 in a pure comparative negligence world at this point if we
5 get rid of Bard.

6 MR. KAISER: I think that for - - - CPLR 1411,
7 the comparative - - - comparative negligence statute would
8 - - - could apply very, very easily if - - - if Bard were
9 overruled. I - - - I think that would be - - -

10 JUDGE GARCIA: But why wouldn't it just apply to
11 any dog issue? You're - - - dog bite. You're injured by a
12 dog. Okay. Let's see what - - - who's negligent, how
13 much. Dog has vicious propensities, goes into the
14 calculation. You approach a dog with vicious propensities
15 in a way you shouldn't, it goes into the calculation. Why
16 isn't that the world we live in post-Bard?

17 MR. KAISER: So because under Bard, we have this
18 sort of strange situation where dog owners owe no duty of
19 care whatsoever.

20 JUDGE GARCIA: Let's say we get rid of Bard.
21 That's what you're asking for, right?

22 MR. KAISER: Right.

23 JUDGE GARCIA: No more Bard. Why aren't we in a
24 negligence world with comparative negligence for everyone?

25 MR. KAISER: I think that's very workable.

1 JUDGE HALLIGAN: Well, my understanding is that
2 the restatement, as it currently exists, has separate
3 actions. I think it's 509 for strict liability and 518 for
4 negligence. And it does seem to me to - - - to the point I
5 take Judge Garcia to be making that there's a fair amount
6 of overlap, and that's especially so because the comments
7 to 518 task an owner with knowledge of the normal
8 characteristics of the breed and - - - and so forth.

9 MR. KAISER: Right.

10 JUDGE HALLIGAN: But - - - but it looks to me
11 like - - - like the restatement at least sees a world in
12 which it's useful to have two separate causes of action.
13 Do you know what other courts have done in that regard, and
14 whether or not they have, for example, found - - - you
15 explained how you might find negligence, but not strict
16 liability. It goes to whether you have actual constructive
17 notice of the - - - the, you know, vicious propensities,
18 right? But what about the other way around? Do you know
19 if other states have found strict liability, but not
20 negligence, or have they just not proceeded to the
21 negligence claim?

22 MR. KAISER: Well, virtually every other state
23 has - - - has recognized that these are dual causes of
24 action - - -

25 JUDGE HALLIGAN: And - - - right.

1 MR. KAISER: - - - that could be parallel - - -

2 JUDGE HALLIGAN: But - - - but in actual cases,
3 right? I'm - - - I'm wondering if you know how that has
4 played out. So when someone brings both a strict liability
5 and a negligence claim and the court finds that strict
6 liability lies because the owner had actual constructive
7 notice of the vicious propensities, what happens to the
8 negligence claim? Does it still get - - - get considered?
9 Could you find strict liability but not find negligence?
10 Does it matter?

11 MR. KAISER: Yes. Yes. And - - - and that goes
12 back to kind of what I was - - - the point I was making,
13 Judge Garcia, is that basically, strict liability - - - if
14 - - - if a jury were to find strict liability, negligence
15 is irrelevant.

16 JUDGE HALLIGAN: Because liability exists in any
17 event, and you just don't need to proceed to consider it.
18 Is that why?

19 MR. KAISER: Exactly. Exactly.

20 JUDGE RIVERA: And in that case, there's no
21 apportionment of liability?

22 MR. KAISER: Correct.

23 JUDGE RIVERA: No apportionment based on the
24 culpability of either party?

25 MR. KAISER: Correct. Yes. Yes, Your Honor.



1 JUDGE RIVERA: So are these - - - are these then,
2 in your view, alternative bases for liability? That is to
3 say, if there's strict liability, you don't even move on to
4 the negligence claim?

5 MR. KAISER: Correct. At - - - at - - - at
6 trial.

7 JUDGE RIVERA: You only move on to the negligence
8 claim if - - - if the trier of fact decides - - -

9 MR. KAISER: Right.

10 JUDGE RIVERA: - - - against the plaintiff on
11 strict liability?

12 MR. KAISER: Exactly. The - - - the - - - once
13 the trier of fact determines that there's strict liability
14 as was noted by this court and as - - - as was noted by the
15 Second Department in Colarusso v. Dunne, it's irrelevant.
16 Comparative fault is irrelevant. And - - - and what the
17 defendant did or didn't do is out the window because the -
18 - - the wrongful act is the keeping. The wrongful act is
19 the keeping of the animal, nothing with respect to the
20 animal, vis-a-vis society. And so you know - - - and I
21 would - - - I would just refer this court now that we're -
22 - - we're talking about negligence, it really creates a
23 situation where every negligence analysis in New York State
24 begins with the question, what was the instrumentality of
25 harm. If it's a domestic animal and it didn't wander from

1 a farm, the Hastings exception from 2012, go no further.
2 You can act as abjectly unreasonable as you want. And I -
3 - - I see that my - - - my time is up, so I will sit down.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. PERLEY: Before I begin my remarks and
6 address this case, I want to take the opportunity to thank
7 this court and counsel for allowing me the honor of seeing
8 my son-in-law promoted to colonel. With that, Michael
9 Perley from Hurwitz Fine. We are appellate counsel for the
10 Goodfellows. First of all, I want to address the fact that
11 this case, two lower courts have decided that the strict
12 liability cause of action doesn't lie because there's no
13 constructive notice. And it is clear on this record - - -

14 JUDGE RIVERA: Well, why isn't there a question
15 of fact?

16 MR. PERLEY: Because, Your Honor, the affidavits,
17 for whatever they might say, are - - - are an attempt to
18 backfill constructive notice. They have to be measured in
19 regard to what the responsibility of a postal employee is
20 during the time that they're making deliveries. And if
21 they had actually seen and identified a dangerous animal,
22 they owed it to their employer and their colleagues and
23 their coworkers - - -

24 JUDGE HALLIGAN: Doesn't that go to credibility?

25 MR. PERLEY: - - - to have that notice.



1 JUDGE HALLIGAN: I mean, is - - - isn't that a
2 question of whether or not a fact finder should believe the
3 - - - the statements in those affidavits - - -

4 MR. PERLEY: Well - - -

5 JUDGE HALLIGAN: - - - and - - - and thus maybe,
6 you know, deepens the question of fact but doesn't
7 eliminate it?

8 MR. PERLEY: I - - - I - - - I don't believe it
9 raises enough issues, Your Honor, to create a question of
10 fact.

11 JUDGE CANNATARO: But aren't those really, to
12 repeat the question, credibility issues? You're saying
13 because they didn't report it to anyone else, they didn't
14 tell the supervisor or give a notice to the property owner
15 that, you know, a vicious dog notice or whatever they call
16 it, that somehow it's incredible as a matter of law. Isn't
17 that really what you're just saying?

18 MR. PERLEY: I think - - - not - - - not as a
19 matter of law, but they have to be looked at with the
20 jaundiced eye, but they don't fulfill their purpose.

21 JUDGE HALLIGAN: But - - - but jaundiced eye, I
22 think is - - - is really about evaluating credibility.

23 MR. PERLEY: They don't fulfill the - - - I - - -
24 that may well be if they fulfill their purpose. They did
25 not fulfill their purpose - - -

1 JUDGE HALLIGAN: And why did they not do that?

2 MR. PERLEY: - - - of imputing constructive
3 notice onto the dog owner.

4 JUDGE HALLIGAN: Why not?

5 MR. PERLEY: Because they never told him. All
6 they did is observe.

7 JUDGE HALLIGAN: But - - - but if - - - if you
8 credit the statements in the affidavits, right? And I
9 understand that - - - that you would surely argue that you
10 shouldn't for some of the reasons you just identified. But
11 - - - but if you credit them, the dog was exceedingly
12 aggressive with strangers, and you know, it stands to
13 reason that perhaps a fact finder could conclude that if
14 those statements are taken as true, that there's a very,
15 very high likelihood that the owners would have witnessed
16 that behavior at some other point in time and therefore be
17 willing to decide there was constructive notice.

18 MR. PERLEY: Your Honor, the uncontroverted
19 testimony of the - - - of the - - - my - - - our clients
20 observing the dog doesn't justify that, right? They know
21 what they know. They know what they have seen. Now, I
22 could see constructive notice had somehow or other - - -
23 those folks who, apparently, were - - - you know, were so
24 worried that they didn't bother to tell their co-employees
25 - - -



1 CHIEF JUDGE WILSON: Well, let me - - - let me -
2 - -

3 MR. PERLEY: - - - had told - - -

4 CHIEF JUDGE WILSON: - - - let me change - - -

5 MR. PERLEY: - - - had told the Goodfellows.

6 CHIEF JUDGE WILSON: Let me change the facts
7 then. Suppose the postal workers had, as was required by
8 postal regulations, reported to the supervisors, this dog
9 is throwing itself against the window every time we come.
10 That would have created a question of fact despite the
11 affidavits of the owners saying we never saw this?

12 MR. PERLEY: I'm not convinced that it gets there
13 either, Judge.

14 CHIEF JUDGE WILSON: Well, so then the fact - - -

15 MR. PERLEY: But it is - - -

16 CHIEF JUDGE WILSON: - - - that they signed
17 doesn't really matter, that they didn't report, I mean?

18 MR. PERLEY: What it shows is a lack of concern
19 on their part for what they observed - - -

20 JUDGE CANNATARO: How is that?

21 MR. PERLEY: - - - in my view.

22 JUDGE CANNATARO: How is that?

23 MR. PERLEY: Well, if you are really concerned
24 about that and you knew that you weren't the only - - - the
25 only postal employee or mail carrier on this route, you



1 would tell your colleagues.

2 JUDGE CANNATARO: Okay. You know, I think you've
3 gotten questions from several judges that this may be not a
4 - - - not perfect compliance with regulations, but how does
5 that affect the truth of the matter asserted, which is
6 simply that they've observed this dog on multiple occasions
7 - - - hundreds of occasions, if you - - - if you believe
8 the affidavits, exhibit vicious behaviors, and that may be
9 imputable to the property owner.

10 MR. PERLEY: Your Honor, I - - - I can't cross-
11 examine an affidavit. So you would - - -

12 JUDGE HALLIGAN: Yeah. But a fact finder can - -
13 -

14 MR. PERLEY: Potentially. But it's - - -

15 JUDGE RIVERA: But let - - - let - - - let - - -
16 let me just - - - I'm having a little bit of confusion as
17 to why your - - - your - - - this argument about - - - that
18 doesn't raise a question of fact, given the standard, of
19 course, benefits the nonmovant - - - not the movant. But
20 they don't just say the - - - the dog is barking and looks
21 vicious. They're saying, it slams itself against the
22 window, bites the window, leaves saliva on the window,
23 right? Doesn't - - - doesn't that, at a minimum, get you
24 to a question of fact of constructive notice even if the
25 homeowners were not home for any of this? Grant that to



1 you. Again, I think the - - - the standard may work
2 against you on that. But let's go with that for one
3 moment. You walk in, you've got dog's saliva all over the
4 window - - -

5 MR. PERLEY: Yeah. Well, there was - - -

6 JUDGE RIVERA: - - - on numerous occasions.

7 MR. PERLEY: There was no testimony from our
8 clients of this type of activity, and there was no - - -

9 JUDGE TROUTMAN: I know. But Mr. Perley - - -

10 MR. PERLEY: - - - basis for them to conclude
11 that.

12 JUDGE TROUTMAN: - - - the - - - there may not
13 have been that testimony from your clients - - -

14 MR. PERLEY: Right.

15 JUDGE TROUTMAN: - - - but it was offered through
16 the affidavits that that conduct occurred. And again, as
17 to my colleagues' asking a question of fact, in the very
18 least being arisen, whether or not they reported it to the
19 postal authorities.

20 MR. PERLEY: Your Honor - - -

21 JUDGE TROUTMAN: Why - - - why isn't there a
22 question of fact then?

23 MR. PERLEY: Because of the knowledge - - - in
24 our view, the knowledge isn't imputed to the Goodfellows,
25 and two courts have already agreed with us. And I know

1 that this court makes its own decisions, but once again,
2 this is after the fact. It doesn't impute knowledge before
3 the incident.

4 CHIEF JUDGE WILSON: Speaking of - - -

5 JUDGE SINGAS: Can I ask you - - -

6 CHIEF JUDGE WILSON: I'm sorry. Go ahead.

7 JUDGE SINGAS: I'm sorry.

8 CHIEF JUDGE WILSON: Go ahead.

9 JUDGE SINGAS: If we could just move on from this
10 line of questioning.

11 CHIEF JUDGE WILSON: That's where I was going
12 too.

13 JUDGE SINGAS: Yeah.

14 CHIEF JUDGE WILSON: Go right ahead.

15 JUDGE SINGAS: And just - - - what's your
16 strongest argument for us retaining Bard?

17 MR. PERLEY: Yeah. The strongest argument for
18 retaining Bard, actually, Your Honor, is that I think Bard
19 is a little unusual in one sense, that if it were going to
20 be reconsidered, it would only be reconsidered in the
21 context of farm animals. Dogs are treated differently in
22 New York than domestic animals. You read the Agriculture
23 and Markets Law, dogs are, I think, subsection 5 and
24 domestic animals, farm animals are 7. And they are treated
25 differently in the Ag and Markets Law because they are

1 socialized to human beings, so - - -

2 JUDGE HALLIGAN: But why does that mean that a
3 negligence cause of action shouldn't lie?

4 MR. PERLEY: Well, Your Honor, I think there's a
5 number of reasons. And I would appreciate the opportunity
6 to articulate them. First of all, interactions with - - -
7 with dogs - - - interactions with dogs in the street, on a
8 leash, in a home, wherever, are dynamic events. They are
9 events where there are moving people. There's a dog owner,
10 the dog, and the unfortunate individual - - -

11 JUDGE HALLIGAN: But isn't that true - - - it
12 seems to me that - - - that New York stands alone in having
13 adopted this - - - this rule. And there are surely
14 significant concerns of stare decisis. But if we focus for
15 a minute on the merits of the rule, I would have guessed
16 that - - - that if the nature of the interaction between
17 humans and dogs merited a rule that's - - - that's
18 different from traditional negligence principle, so
19 different that you can't have a negligence claim at all,
20 that some of the other forty-nine states would have
21 identified that concern and perhaps reach the same
22 conclusion. So what should we make of that?

23 MR. PERLEY: Your Honor, I - - - I - - - it might
24 be right for other states. I submit that it's not right
25 for New York based upon its jurisprudence. And - - - and

1 thank you for anticipating part of my argument, which is,
2 this has been the long standing rule in New York. And - -
3 - and it - - -

4 JUDGE HALLIGAN: Well, since 2000 and - - -

5 MR. PERLEY: - - - it has worked well.

6 JUDGE HALLIGAN: I think Bard is - - - is about
7 twenty years ago, right? So - - -

8 JUDGE TROUTMAN: When you say it's worked well -
9 - -

10 MR. PERLEY: Yeah.

11 JUDGE TROUTMAN: - - - what about in instances
12 where there is conduct that's put in motion by the owner
13 and a person seriously injured with no means of recovery,
14 why - - - why is that working well?

15 MR. PERLEY: Well, perhaps you're - - - you're
16 thinking of the one case where maybe the owner threw the
17 ball and maybe that's on the owner, not on the dog.

18 CHIEF JUDGE WILSON: Well, we're suing the - - -
19 I mean, we're suing - - -

20 JUDGE TROUTMAN: We sue the owner.

21 CHIEF JUDGE WILSON: - - - the owner, not the
22 dog.

23 MR. PERLEY: You're suing the owner.

24 CHIEF JUDGE WILSON: Let me ask you about your
25 distinction between farm animals and domestic animals and

1 the point that the domestic animals are socialized by us
2 and so on. Why doesn't that cut the other way? That is,
3 for animals that we care for and we train and we keep in
4 our homes, we actually have some ability to control them,
5 and therefore, should be responsible in negligence - - -
6 plain negligence for our actions; whereas farm animals and
7 so on that are - - - we don't have that kind of
8 relationship with or responsibility for, are less - - - out
9 of our control, and we should therefore be less responsible
10 for them.

11 MR. PERLEY: Well, Your Honor, negligence is
12 defined by duty.

13 CHIEF JUDGE WILSON: Right.

14 MR. PERLEY: Right. So we have - - -

15 CHIEF JUDGE WILSON: Might we have a greater duty
16 for animals that we keep in our homes and train and
17 domesticate and socialize than ones that we don't?

18 MR. PERLEY: While - - - while we can look at
19 plaintiff's recovery, every dog owner needs to know or
20 should know, the way every driver of an automobile knows,
21 what their duty is especially in dynamic situations. We
22 have four or five articles in the vehicle and traffic law
23 to tell drivers how they should act.

24 JUDGE HALLIGAN: Well, presumably, if we were to
25 change the rule, then - - - then there would be that - - -

1 that notice. I guess here's what I'm struggling with, and
2 maybe you can - - - you can help me. It seems to me that
3 even the - - - the most well-trained dog inevitably, it's
4 still an animal, and it has instincts and may behave in
5 ways that - - - that cause harm to other people. And under
6 Bard, the person that bears the cost of that if the owner
7 has not acted with due care, assuming the owner doesn't
8 know about vicious propensity, so there's no strict
9 liability, is the victim. And usually, and I think in
10 every other circumstance, right, we don't require the
11 victim to bear the cost when someone acts without - - -
12 without due care. So why should it be different for
13 domestic pets than - - - than everything else I - - - I
14 think that - - - that comes into play in our interactions
15 with other people?

16 MR. PERLEY: Well, Your Honor, I would like to
17 start that answer by saying Collier at - - - at some level
18 addresses that when it talks about proclivities of dogs
19 that are not necessarily inherently dangerous. Second of
20 all, Your Honor, is where you draw the line. I mean, if a
21 dog is on a fifteen-foot leash and there's an unfortunate
22 interaction, should it have been on a ten-foot leash?

23 JUDGE HALLIGAN: Well, but wouldn't that be
24 something that a jury would sort out, and presumably, you
25 would have comparative fault as well. So for example, when

1 someone comes up to a dog unsolicited and is nipped as a
2 result, you know, perhaps that would be taken into account.
3 But I guess, I'm - - - I'm still grappling with the
4 question of why - - - why dogs should be treated
5 differently than - - - than everything else.

6 MR. PERLEY: Well, Your Honor - - -

7 JUDGE HALLIGAN: And maybe cats too, I guess they
8 would qualify, but - - -

9 MR. PERLEY: As you talk about - - - you're
10 talking about a bite. But there are other interactions
11 where a dog could trip somebody on a leash or whatever.

12 JUDGE CANNATARO: Counsel, there are thousands of
13 potential interactions. I think what's being suggested to
14 you is, we've had negligence, due care exercised by a
15 reasonable person around in New York for a couple hundred
16 years now in a lot of different areas. Why can't we just
17 apply the same standard we apply to everyone else and say,
18 under these circumstances, was - - - was this what a
19 reasonable person would do with their domestic animal?
20 Same way we do it for cars and - - - and - - - and our
21 premises and - - - and everything else. New Yorkers
22 understand the negligence cost.

23 MR. PERLEY: Right. Well, I'm glad you brought
24 up cars again, Your Honor, because we've defined those
25 rules. How does the - - - what does a dog owner know what

1 his or her duty is to the general public? The reason that
2 the system we have now works is - - -

3 CHIEF JUDGE WILSON: Well, there are rules - - -

4 MR. PERLEY: - - - the notice defines the duty.

5 CHIEF JUDGE WILSON: There are rules like - - -
6 there are rules like the vehicle rules that apply to dogs.
7 For example, you have to have a license for your dog in New
8 York City. If you're going to walk your dog in a park, it
9 has to be on a leash, except certain areas that are
10 designated as dog runs or Central Park before 9 in the
11 morning. There are rules like the vehicle rules.

12 MR. PERLEY: Well, statewide, Your Honor, there
13 are two rules. You have to register the dog and get a
14 rabies shot, statewide.

15 CHIEF JUDGE WILSON: Yeah.

16 MR. PERLEY: And we're not - - -

17 CHIEF JUDGE WILSON: But localities can create
18 their own rules.

19 MR. PERLEY: Absolutely. And you know, it's
20 clear that - - - that they can. And that's - - - that's
21 fine from - - - for certain areas, larger cities. New York
22 is a classic example. What about everywhere else where - -
23 - the rule is you have to register your dog and get a
24 rabies shot. That's your duty.

25 JUDGE TROUTMAN: What - - - what about everywhere

1 else? Now, there's a proliferation of animals being in
2 places where non-pet owners would not necessarily expect
3 them to be. Why wouldn't we want people to have recourse
4 if they are injured because of an irresponsible owner?

5 MR. PERLEY: Right. The way you pose the
6 question, Your Honor, it's hard to argue with it. But an
7 individual has a dog on a leash, and that dog on the leash
8 runs to a point where somebody trips over it. That is an
9 irresponsible owner --

10 JUDGE RIVERA: So we're talking about vicious - -
11 -

12 JUDGE TROUTMAN: No.

13 JUDGE RIVERA: - - - propensities.

14 MR. PERLEY: - - - because the leash was too
15 long?

16 JUDGE RIVERA: We're talking about vicious
17 propensities. But under your - - -

18 MR. PERLEY: Yeah.

19 JUDGE RIVERA: - - - rule, as you continue to
20 apply Bard because we're talking about Bard, on Monday, the
21 dog can go bite someone, okay? No notice of vicious
22 propensities, they're not liable. On Tuesday, the dog
23 bites someone else. Now they're liable. Where is the
24 logic in that?

25 MR. PERLEY: The logic in that is that the - - -

1 that the owner of the dog - - -

2 JUDGE RIVERA: If - - - if they were held liable
3 the first time, perhaps they would have taken appropriate
4 care the second time.

5 MR. PERLEY: Well, Your Honor, perhaps, but - - -
6 but in - - - in that scenario where there was such a short
7 period of time - - -

8 JUDGE RIVERA: Well, you're trying to
9 incentivize, right? You're trying to incentivize people to
10 take appropriate care, be cautious.

11 MR. PERLEY: I think one improper action by a dog
12 creates sufficient incentive, or it should in any
13 reasonable person. And if a person doesn't - - - has no -
14 - -

15 JUDGE RIVERA: Well, a reasonable person wouldn't
16 have allowed for the first time.

17 MR. PERLEY: If a person had no basis on which to
18 understand that the dog would - - - would act in that
19 fashion.

20 JUDGE TROUTMAN: Well, what about just leaving
21 your dog outside while you go inside of the store - - -

22 MR. PERLEY: Right.

23 JUDGE TROUTMAN: - - - and it harms someone? You
24 loosely tie it to something, and it's - - - it's a huge
25 dog, and the dog gets loose because he's not properly being

1 supervised, and he bites someone. Because you didn't know
2 he didn't have vicious propensities and you left him
3 unattended, that is fair that the victim of the bite should
4 suffer without recourse? Why?

5 MR. PERLEY: The way you pose the question, Your
6 Honor, it's - - - it's very difficult to answer because I
7 don't know what the other person did and - - -

8 JUDGE TROUTMAN: The other person walked by.

9 MR. PERLEY: Right.

10 JUDGE TROUTMAN: This dog that appeared to be
11 tied was not tied, and chomped on the - - - the passerby's
12 leg because he was left unattended, not secured, or
13 supervised. Why is it that the person who is bitten would
14 have no recourse?

15 MR. PERLEY: Well - - -

16 JUDGE TROUTMAN: Because you didn't know your dog
17 had vicious propensities?

18 MR. PERLEY: I think the - - - I think you can
19 answer that question more broadly, which is, if the dog
20 wasn't properly tied, then it was responsibility of the
21 owner. Dog wouldn't even have to bite somebody, it could
22 trip somebody and hurt them. At that point - - - but
23 because the - - -

24 JUDGE TROUTMAN: But still there's no recovery -
25 - -

1 MR. PERLEY: - - - because it wasn't properly
2 controlled.

3 JUDGE TROUTMAN: - - - because there's no vicious
4 propensities, correct?

5 MR. PERLEY: Well, right. Well, no, there could
6 be liability on the owner because if the dog were
7 improperly - - - improperly leashed and got loose and did
8 something, then there would be an opportunity.

9 JUDGE CANNATARO: No, Counsel. This - - - this
10 hypothetical is not a trip and fall. It's - - - it's a dog
11 bite hypothetical. So - - - I mean, I think you have to
12 admit, under current standards, there would be no liability
13 in that situation, don't you?

14 MR. PERLEY: For the dog bite?

15 JUDGE CANNATARO: For the dog bite.

16 MR. PERLEY: You're right, Your Honor.

17 JUDGE GARCIA: Is there liability if someone
18 trips over the dog now on your rule?

19 MR. PERLEY: There could be.

20 JUDGE GARCIA: I thought we said there isn't.

21 CHIEF JUDGE WILSON: What about Door?

22 JUDGE GARCIA: Yeah.

23 MR. PERLEY: Well, there - - -

24 CHIEF JUDGE WILSON: There's no bite involved in
25 Door.

1 MR. PERLEY: I think it - - - it all depends on
2 circumstances, Your Honor. It all depends on
3 circumstances. But I do want to address one other issue
4 just briefly. Under the restatement for the negligence
5 cause of action, it does - - - the restatement requires
6 individuals to - - - to know the propensities of the animal
7 that they own. We have no provision in New York to do
8 that. And that is going to - - - if that were adopted,
9 that would inflict on residents of New York an incredible,
10 immediate burden that they did not anticipate.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. PERLEY: Thank you.

13 JUDGE GARCIA: Counsel, could I pick up on
14 something Judge Halligan asked? If we are in a post-Bard
15 world and I have a cat - - - and I'm not saying if I have a
16 cat or not, but if I had a cat and it got out and it ran
17 across the street and a car swerves and gets in an
18 accident, am I liable?

19 MR. KAISER: I - - - I think that there are - - -
20 there are cases which - - - which say that violation of a
21 leash law, which I - - - I guess it would depend on your
22 particular locality and - - - and whether it includes cats
23 and whether cats are required to be leashed. I don't think
24 the - - -

25 JUDGE GARCIA: There's no rules where - - - you



1 know, as far as I know, there's no rules. I have a door.
2 The cat goes out. Cat goes out once, right? So now my cat
3 runs, if I had one, in front of a car. What happens?

4 MR. KAISER: Well, I - - - I think we'd have to
5 have some more information about - - - because it - - - it
6 all stems from having notice. There is a notice element to
7 - - - to negligence. It's either - - -

8 JUDGE GARCIA: But I know the cat goes out. I
9 know it leaves the yard. What else do I need to know?

10 MR. KAISER: We need to know, has this cat done
11 that before? Has this cat done that before? Is there a
12 municipal ordinance that would require the cat to be
13 contained?

14 JUDGE GARCIA: So let's say there isn't. There's
15 no ordinance that requires restraint of cat.

16 MR. KAISER: I would say no then, Your Honor. I
17 - - - I would say - - - I mean, Young v. Wyman, I think,
18 speaks to that situation where we've got a dog in the road.
19 This is 1990. This court analyzed that negligence claim
20 and said, really relying on the restatement, one of the
21 comments in the restatement saying that certain animals are
22 expected to romp freely. I would say, no, under those
23 facts, Your Honor.

24 JUDGE HALLIGAN: Wouldn't it be a question, as it
25 would with any negligence case, of whether or not, under

1 those circumstances, due care was being exercised?

2 MR. KAISER: Yes, Your Honor. And this is not -
3 - -

4 JUDGE HALLIGAN: Are there really broad - - - are
5 - - - are there very specific rules as opposed to fact?
6 You know - - -

7 MR. KAISER: Yes.

8 JUDGE HALLIGAN: - - - case-by-case consideration
9 of the facts?

10 MR. KAISER: And in - - - in writing our brief,
11 we were looking at other jurisdictions to try to illustrate
12 how workable a companion negligence claim would be. And we
13 found that, actually, the appellate courts of this state
14 have some of the most robust - - - you know, the - - - the
15 First Department and Second Department have - - -

16 JUDGE RIVERA: So - - - so Judge Halligan
17 referred to stare decisis. So let's just stay for one
18 moment on - - - on that issue. What - - - what would be
19 the basis now, other than perhaps there are, at a minimum,
20 four members of the court who think that Bard was - - -
21 that - - - that's not a good rule. It was wrongly decided.
22 What - - - what other grounds would we have to now decide
23 to overrule Bard - - -

24 MR. KAISER: Right. And there's - - -

25 JUDGE RIVERA: - - - and no longer apply that

1 rule?

2 MR. KAISER: Right. And I - - - I know that
3 opposing counsel mentioned that - - - that Bard is a long
4 standing rule. I would ask the court to expand the
5 temporal scope of the - - - the case law to - - - to look
6 at where Bard is, kind of in this timeline of, you know - -
7 - you know, we got an ungovernable horse in Lincoln's Inn
8 in - - - in England in 1674 all the way to Young v. Wyman
9 in 1990. Then all of a sudden this, respectfully,
10 aberration that is Bard, where we're going to stop
11 following this line of cases.

12 JUDGE RIVERA: So your position is that the - - -
13 that it was - - - it's an aberration, was wrongly decided
14 to begin with, and that is something that is not just a
15 decision now because, again, at least four members, perhaps
16 more, of the court, think it was wrongly decided?

17 MR. KAISER: Right, Your Honor. And I'd refer to
18 People v. Hobson, where this court said that if the
19 precedent is of an uncertain route and in collision with
20 prior doctrine, much more embracing in scope, which we
21 clearly have here, this is well - - - well settled, and
22 this was in the common law for centuries.

23 JUDGE GARCIA: Doesn't Hobson cut against that
24 argument, in a way, if we've made a fairly recent decision
25 to do something differently? Is it cut against your

1 argument that we would revisit it so quickly?

2 MR. KAISER: Well, my response there, Your Honor,
3 would be that the other plaintiffs who came before this
4 court were not asking this court to not give Bard stare
5 decisis treatment. They were seeking to say, Bard doesn't
6 reach our case. Bard is outside the scope of our case
7 where we want an exception. Plaintiffs shouldn't vie for
8 exceptions. They should just demonstrate - - -

9 JUDGE RIVERA: But if at one point there was a
10 court that said, well, we understand there are some
11 jurisdictions, or perhaps the majority of jurisdictions
12 don't like this rule, but - - - but we think there's
13 something good to this because it's strict liability. It
14 ensures that the owner will always be responsible. Here's
15 the one caveat, you've got to have notice. So - - - so now
16 some other members of the court think, well, I wouldn't
17 have picked that rule, and now I've got the numbers. I've
18 got the majority. That's not usually how stare decisis
19 works - - -

20 MR. KAISER: Well - - -

21 JUDGE RIVERA: - - - or how we end up overruling,
22 right? The - - -

23 MR. KAISER: And - - - and the mere fact that
24 Bard is precedent doesn't mean that it deserves stare
25 decisis treatment. Cases need to earn stare decisis

1 treatment - - -

2 JUDGE HALLIGAN: But generally, we do - - -

3 MR. KAISER: - - - by upholding the object and
4 purpose of the law.

5 JUDGE HALLIGAN: Generally, we do accord cases
6 stare decisis treatment, and you need a pretty good reason,
7 I think our cases say, including Hobson, to overrule a
8 prior case. So - - -

9 MR. KAISER: Yes.

10 JUDGE HALLIGAN: So you've said prior doctrine is
11 otherwise. You clearly think it's - - - it's incorrect.
12 But - - - but what other reasons are there for us to - - -
13 to take that step?

14 MR. KAISER: Well, it's - - - it's - - - it's
15 unfair because in this case, for instance, just to kind of
16 go back to the facts of this case, there should be a public
17 policy in favor of people acting reasonably at all times
18 regardless of the instrumentality of harm and regardless of
19 the precise manner in which the harm materializes. Here,
20 very slight, minimal degree of care would have prevented
21 Rebecca Flanders from being maimed. Close the door behind
22 you. Very slight degree of care. Our - - - our strict
23 liability regimen, it does not focus on what people do. It
24 focuses on what they know, and - - - and that is not a - -
25 - a fair state of the law.

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CHIEF JUDGE WILSON: Thank you.

MR. KAISER: Thank you, Judge.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Flanders v. Goodfellow, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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