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COURT OF APPEALS

STATE OF NEW YORK

DOERR,

Respondent,

-against-

No. 17

GOLDSMITH, et al.,

Appellants.

DOBINSKI,

Appellant,

-against-

No. 66

LOCKHART, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
March 26, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

1 CHIEF JUDGE LIPPMAN: Number 17 and number
2 66, Doerr and Dobinski.

3 Counsel, would you like any rebuttal time?

4 MR. HORN: Yes, Your Honor, two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Okay, go ahead. This
7 is Doerr, right?

8 MR. HORN: That's correct, Your Honor.
9 Good afternoon. May it please the court, my name is
10 Scott Horn, counsel representing the defendant-
11 appellant Julie Smith.

12 Appellant contends in accord with some 200
13 years of jurisprudence in this state that the
14 Appellate Division erred in affirming the denial of
15 defendant's motion for summary judgment. Less than
16 ten years ago, in Bard v. Jahnke - - -

17 JUDGE READ: Well, is this really - - -

18 MR. HORN: - - - this court - - -

19 JUDGE READ: Is this really a Bard case?

20 Because that line of cases, Collier, Bard, Penny
21 Whistle - - - I guess, it was Penny Whistle, Petrone,
22 those are all cases in which injuries were - - - were
23 allegedly - - - were caused by an allegedly
24 unprovoked action by an animal with no history of
25 such actions. Is that what happened here?

1 MR. HORN: No, Your Honor, that - - -
2 that's not what happened here, but the - - - the
3 Collier, Bard, Smith, Bernstein, Petrone, and the
4 entire line of case law does stand for the
5 proposition that the jurisprudence in this state does
6 not recognize the common law negligence cause of
7 action in - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but what - - -
9 but what actually happened here? What - - - you
10 know, there's the dog, and - - - and one person is
11 saying to the other, okay, come to me. The dog comes
12 and you have an accident.

13 MR. HORN: Right.

14 CHIEF JUDGE LIPPMAN: Why - - - why is that
15 different if - - - if there's a baby carriage in the
16 way that you put into motion and - - - and that's
17 what happens or if it's a - - - it's a dog? Why - -
18 - why isn't this not such an unusual case that is a
19 negligence action? What's - - - what's the great
20 mystery here?

21 MR. HORN: Well - - -

22 JUDGE READ: She called the dog, right?

23 MR. HORN: Well, yes, Your Honor. I think
24 there are several salient facts that are important
25 with regard to what happened here.

1 CHIEF JUDGE LIPPMAN: But - - - but I'm
2 asking a specific question. What's the difference as
3 to whether she called the dog, the dog comes and
4 bingo there's the accident, or - - -

5 MR. HORN: Or - - -

6 CHIEF JUDGE LIPPMAN: - - - one of the
7 parents has a baby carriage, and they put it in the -
8 - - in the - - - in motion to the other, you know,
9 side of the - - - the walkway or whatever it is, and
10 there's an accident? Why are those two situations
11 different?

12 MR. HORN: Well, I - - -

13 CHIEF JUDGE LIPPMAN: The - - - the - - -
14 allegedly the defendant puts it into motion, you
15 know, and it causes an accident, and we have a
16 negligence case.

17 MR. HORN: Well, I - - - I don't know if
18 the baby carriage scenario is analogous as if it's -
19 - -

20 CHIEF JUDGE LIPPMAN: Why not?

21 MR. HORN: - - - a small child. If it's a
22 small child that's being called over. There's no
23 such thing as a common law cause of action for
24 negligent supervision of a child in this state. The
25 reason why is because these are animate objects. A

1 dog is animate entity as a small child is. The - - -

2 CHIEF JUDGE LIPPMAN: You think - - -

3 MR. HORN: - - - a dog that - - -

4 CHIEF JUDGE LIPPMAN: You think you're

5 excluded from - - - from liability where you caused

6 the accident? You know, let's assume it's the worst

7 possible situation. You see the person coming and

8 you see them coming, and you say, okay, great, let

9 them just get out of the way, come on over here.

10 What - - - why - - - why are you excluded?

11 MR. HORN: Well, that - - -

12 CHIEF JUDGE LIPPMAN: What's the logic of
13 that?

14 MR. HORN: That - - - that's not the
15 scenario that's here, Your Honor.

16 CHIEF JUDGE LIPPMAN: It's - - - it's - - -
17 it's in the ballpark as to what's the scenario. Why
18 - - - why is that not a typical negligence situation?

19 MR. HORN: Well, again, because we have a
20 situation where you have a - - - a household pet, the
21 common law negligence cause of action is - - -

22 CHIEF JUDGE LIPPMAN: But you put it into
23 motion. You put it into motion. You see the person
24 coming - - - let's assume, you see the person coming
25 and you see that they're getting close, and you turn

1 and say, oh, great, I'm going to have the dog come
2 over here; this guy is going to have to get out of
3 the way. Why in that sit - - - in that hypothetical,
4 let's say, even if you say that's not your situation,
5 why is that not just a typical case that - - -

6 MR. HORN: Well, again - - -

7 CHIEF JUDGE LIPPMAN: - - - we have to
8 decide whether you're negligent in doing it?

9 MR. HORN: Because again, we're dealing
10 with a dog, a household pet, an animate object. It's
11 not as simple as throwing a ball across - - - across
12 the roadway. If the dog had stopped because it saw a
13 butterfly or it stopped because it saw another dog,
14 would that be actionable or nonactionable under that
15 scenario?

16 JUDGE READ: Yeah, but there was - - -
17 there was - - -

18 MR. HORN: There are so many enumerable
19 situations.

20 JUDGE READ: There was a - - - a human
21 being who did something here, okay? And the question
22 is, she - - - she called the dog, and - - - and why
23 isn't that just straight vanilla negligence?

24 MR. HORN: Well, because it's never been
25 recognized in this state.

1 CHIEF JUDGE LIPPMAN: But - - - but why
2 shouldn't we recognize it? Assume you're right, why
3 wouldn't you recognize it - - -

4 MR. HORN: Well - - -

5 CHIEF JUDGE LIPPMAN: - - - in that
6 situation assuming the hypothetical I gave you: you
7 see the person coming, and you say, hey, great, come
8 on over dog, and this guy, ha, ha - - - you know, the
9 guy may fall; I don't care. Why couldn't that be
10 negligence from a policy perspective and under our
11 law?

12 MR. HORN: Well, that was precisely what I
13 was going to say.

14 CHIEF JUDGE LIPPMAN: Because it's a dog,
15 it doesn't matter?

16 MR. HORN: No - - - no, Your Honor, because
17 from a policy perspective, Your Honor, it's never
18 going to be just that one scenario. You're - - -

19 JUDGE PIGOTT: Well, let me ask you about
20 that. You mentioned before that negligent
21 supervision of a child is not an actionable - - - if
22 - - - if we find - - - if we - - - if we find
23 opposite of what you're suggesting, does that mean
24 that in the future, that's what - - - that will be
25 the case? That lo - - - logically it would follow

1 that negligent supervision would be a cause of
2 action?

3 MR. HORN: There - - - negligent
4 supervision of a child or of a pet?

5 JUDGE PIGOTT: I - - - I'm say - - - asking
6 you what would the ramifications be if we said that -
7 - - that negligent supervision of a pet is a cause of
8 action.

9 MR. HORN: Yeah.

10 JUDGE PIGOTT: What - - - what do you think
11 follows from that point of view?

12 MR. HORN: Well, that's - - - that's
13 precisely the point I was just going to make. The -
14 - - the - - - the scenarios for which you could fit
15 in this type of reasonable person - - -

16 CHIEF JUDGE LIPPMAN: Does it have it to -
17 - - Judge Pigott's question is does it have to
18 follow?

19 MR. HORN: Of course it does. If you're
20 imposing a reasonable person standard, this court
21 cannot anenunciate a rule that only applies when
22 somebody calls a dog across a roadway knowing that
23 somebody is co - - - on its way there and doesn't
24 care, and says you have to move out of the way.
25 That's not the way the law operates.

1 JUDGE PIGOTT: So - - - so what else would
2 follow?

3 MR. HORN: There could be - - - it would be
4 any number - - - a myriad of context. Whether a
5 leash is too long, whether a - - - a ball is thrown
6 too close to someone, whether - - -

7 JUDGE PIGOTT: No, that's too - - - that's
8 - - - you didn't - - - I - - - I was struck by the
9 fact that you mentioned that if - - - if - - - if we
10 found for the plaintiff here, that that would also
11 mean that someone failing to supervise their child
12 would be responsible, and that's never been the law
13 in this state. And I was wondering if there were
14 other examples of that that you could say.

15 MR. HORN: Well, no, Your Honor. I - - - I
16 don't - - - I don't have other examples that I can
17 cite to you. The negligent supervision of a - - - of
18 a child is simply a scenario that I was responding to
19 the Judge's question why is it un - - - why - - - why
20 can't we do this? And what I'm suggesting is that -
21 - -

22 JUDGE ABDUS-SALAAM: Counsel - - -

23 MR. HORN: - - - with a child, we've
24 already said we can't do this.

25 CHIEF JUDGE LIPPMAN: But the - - - but the

1 issue is you set it in motion. That's what I - - -
2 that's what I'm having trouble with.

3 MR. HORN: But when - - -

4 CHIEF JUDGE LIPPMAN: Whether you push the
5 baby carriage in front of the oncoming runner,
6 whether you said come over here, dog, and you - - -
7 you - - - you set it in motion. Why should you not
8 be responsible - - -

9 MR. HORN: It's an unworkable sta - - -

10 CHIEF JUDGE LIPPMAN: - - - or possibly be
11 responsible?

12 MR. HORN: It's an unworkable standard,
13 Your Honor. You set in motion when you put a leash
14 on your dog. You set in motion when you throw a
15 ball. You set a motion when he rel - - - when you
16 take him outside to relieve himself on the sidewalk -
17 - -

18 JUDGE FAHEY: Well, I - - - I - - -

19 MR. HORN: - - - or to give him a treat.
20 All these things are set in motion by you, but they
21 involve human interaction with the household pet.

22 JUDGE RIVERA: You're saying that the
23 possibility of opening up this can of litigation,
24 because of the nature of these domestic pets that are
25 all around us at all times.

1 MR. HORN: Particularly in a place like
2 City of New York, particularly in a place like
3 Central Park. It's a shared public space. That's
4 precisely right, Your Honor. There's no way if you
5 start - - -

6 JUDGE ABDUS-SALAAM: Counsel, would calling
7 the dog or throwing something at the dog to come
8 towards you, would that be intentional or would that
9 be negligent?

10 MR. HORN: Well, negligent, right? I mean,
11 if you're driving your car, but you do so in a
12 negligent fashion, you're intentionally driving your
13 car, but you're doing so in a negligent fashion. It
14 would be the same thing in any of these numerous
15 hypotheticals that I'm offering to you today and
16 those are just a few. Any - - -

17 JUDGE ABDUS-SALAAM: Well, could it be - -
18 - could it be intentional? Could it be - - - if you
19 saw the - - - the bike - - - the bike rider coming up
20 the path and you wanted to do so - - - I mean, you
21 don't know in this instance, whether the person
22 wanted to do something; we're assuming it's
23 negligent, but could it be intentional?

24 MR. HORN: I would submit that yes, there
25 are instance where you can have an intentional tort

1 where you use the animal as the instrumentality of
2 that tort. I think the law provides for that. The
3 law also provides for recovery in situations - - -

4 CHIEF JUDGE LIPPMAN: But don't we have to
5 look at - - -

6 MR. HORN: - - - of strict liability.

7 CHIEF JUDGE LIPPMAN: Don't we have to look
8 at each of these situations? We - - - we do all
9 kinds of variations on negligence actions. And here
10 you have a situation that at least, hypothetically,
11 could be a serious act of negligence, or - - - or
12 worse as Judge Abdus-Salaam says, that - - - but why
13 do we exclude - - - again, from a policy perspective
14 - - - why do we exclude - - - and I understand your
15 answer.

16 It's said oh, because this is a dog and you
17 can't - - - you can't - - - you can't have gradations
18 of what might happen. It's too difficult to have
19 these kinds of cases, but it certainly doesn't seem
20 from the perspective of the plaintiff to be fair that
21 you get seriously hurt - - - whether it's a bicycle
22 or a runner or whatever it is - - - you get seriously
23 hurt; you have no recourse.

24 MR. HORN: Your Honor, every time this
25 court demarcates a boundary on a - - - on a scope of

1 duty or anenunciating a new duty or establishing a
2 new channel of liability or not establishing a new
3 channel of liability, that's precisely the calculus
4 that the court has to undertake. It doesn't look to
5 say, well, there's a handful of plaintiffs here and
6 it's unfair to them. Every case that involves - - -

7 CHIEF JUDGE LIPPMAN: No, no, we're do - -
8 - we're - - - we're looking at that calculus right
9 now.

10 MR. HORN: That's right. That's right. So
11 it's - - - it's - - - it's not a situation where
12 there are negligence and claims that are just all
13 over that are being not responded to. You have
14 strict liability theory which has been in - - - in
15 effect for several hundred years in this - - - in
16 this state, and you have dangerous propensity which
17 responds to that and specifically deals with that,
18 which is somewhat akin to the negligent supervision
19 of a child, I might add. In a - - - in a child
20 situation, there's no such thing as negligent
21 supervision of the child, however, there's negligent
22 entrustment if you know about - - -

23 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

24 MR. HORN: - - - a dangerous propensity.

25 CHIEF JUDGE LIPPMAN: - - - let's - - -

1 let's hear from your - - -

2 MR. HORN: Same concept.

3 CHIEF JUDGE LIPPMAN: Let's hear from your
4 adversary.

5 JUDGE FAHEY: Could I just ask one
6 question.

7 CHIEF JUDGE LIPPMAN: Yes, sure, Judge
8 Fahey.

9 JUDGE FAHEY: So then you're contrasting
10 that to - - - to the dissent in Bard where Judge
11 Smith outlined basically an application of the
12 restatement rule and the reasonableness rule to these
13 situations, right?

14 MR. HORN: That seems to be what's being
15 called for by the Appellate Division as well as by
16 the respondent.

17 JUDGE FAHEY: Now Hastings drew - - - drew
18 a distinction. Didn't Hastings draw an exception to
19 it?

20 MR. HORN: Hastings was extremely
21 circumspect in - - - in its holding, and to the
22 extent that it held that there can be a negligence
23 claim rooted in premises liability where the - - -
24 the farm animal was allowed to stray from the
25 property as a consequence of - - -

1 JUDGE FAHEY: Right, you - - -

2 MR. HORN: - - - an overgrown and broken
3 fence, that we'll - - - we'll allow recovery under
4 the theory of premises liability.

5 JUDGE FAHEY: Right. It's the theory of
6 premises liability or the theory of strict liability;
7 so why, as a policy matter - - - why - - - why
8 doesn't it make sense to just apply the basic rules
9 of negligence and reasonableness here?

10 MR. HORN: Because you're opening up an
11 entirely new channel of liability for literally
12 millions upon millions of dog owners, A - - -

13 JUDGE FAHEY: Well, would you say - - -

14 MR. HORN: - - - or tens of millions of pet
15 holders.

16 JUDGE FAHEY: Every homeowner then - - -
17 every homeowner in New York State would have to go
18 out and change their policies. The insurance
19 companies have to rewrite them all. We'd be in an
20 entirely different situation with animals and in
21 keeping them in your home, and the potential
22 liability if we did that, if we - - -

23 MR. HORN: I think that's precisely the
24 scenario that you may be looking at if you open up
25 this new channel of liability in such a - - - in such

1 an open-ended manner.

2 CHIEF JUDGE LIPPMAN: So from a policy
3 perspective, it would be wrong to extend Hastings to
4 your case?

5 MR. HORN: I think there's no question
6 about that, Your Honor. That's our position.

7 CHIEF JUDGE LIPPMAN: Okay, let's see - - -
8 let's see what your adversary thinks.

9 MR. HORN: Thank you, Your Honor.

10 CHIEF JUDGE LIPPMAN: Thank you.

11 MS. WARREN: Good afternoon, Your Honor,
12 Dara Warren for the respondent.

13 CHIEF JUDGE LIPPMAN: What - - - what
14 happened here? Is this a typical negligence case?
15 Is this a reasonable standard?

16 MS. WARREN: This is a - - -

17 CHIEF JUDGE LIPPMAN: And is this a change
18 in our law?

19 MS. WARREN: I don't believe it's - - -
20 well, I mean, to a - - - to allow a negligence action
21 would be a change in law, but I think it's a - - -
22 it's a straight negligent action. It's holding the
23 owners of the pet responsible for their own actions.

24 JUDGE STEIN: Are you making a distinction
25 between an --- a - - a - a - a - - - an action and an

1 omission?

2 MS. WARREN: In this particular case? Yes.

3 JUDGE STEIN: Yeah, but as - - - as far as
4 the rule that you want us to set, are you making that
5 distinction? And have we ever distinguished between
6 an act and an - - - and a failure to act under our
7 negligence laws?

8 MS. WARREN: I'm making a - - - I think
9 that - - - that liability in this case should be
10 permitted with respect to dogs for - - - for both and
11 - - -

12 JUDGE STEIN: Well, I - - - I don't want to
13 go there yet.

14 MS. WARREN: Okay.

15 JUDGE STEIN: I'd like to know if you can
16 answer my question, which is, are we - - - if we do
17 this, are we making a new type of distinction under
18 our laws of negligence in this state?

19 MS. WARREN: I think that you can go there
20 with respect to this. I think you can - - -

21 JUDGE STEIN: And that's what you're asking
22 us to do?

23 MS. WARREN: I think you can opt to have a
24 more limited holding.

25 JUDGE STEIN: Okay, what would that holding

1 be?

2 MS. WARREN: In this case, these
3 individuals affirmatively created - - - their actions
4 affirmatively created a hazardous situation.

5 JUDGE PIGOTT: Okay, so - - - so up until
6 now the owner of the gas station who has the dog that
7 he - - - that - - - that is his - - - his night
8 watchdog who, as far as anybody can say, has never
9 done anything vicious in its life. Nevertheless,
10 now, under your scenario, if that dog does anything,
11 there's a question - - - you know, there should be a
12 lawsuit against the gas station owner, because the
13 dog, you know, either pushed somebody down or barked
14 at somebody and scared them, or something of that
15 nature, right?

16 MS. WARREN: That's not what happened in
17 this scenario there.

18 JUDGE PIGOTT: I understand that. I - - -
19 I - - - we were talking about expansion of the - - -
20 of the - - - of the area of liability. I want to
21 take it out of your case - - -

22 MS. WARREN: Fro - - - for a pol - - -

23 JUDGE PIGOTT: - - - and put it - - - and -

24 - -

25 MS. WARREN: - - - from a policy

1 perspective, Your Honor?

2 JUDGE PIGOTT: - - - right, and put it in
3 the gas station.

4 MS. WARREN: Absolutely. I - - - from a
5 policy perspective, presently, the vast majority of
6 states in this country allow - - -

7 JUDGE PIGOTT: I understand that. What I'm
8 asking you - - - I - - - I want to ask you
9 specifically. Let's do this. You got your neighbor
10 and he's got that great invisible fence, because he's
11 training his dog to stay on - - - to stay in the
12 yard. What the eight-year-old doesn't know, when
13 he's going down the sidewalk with his scooter, is the
14 dog is going to pull up really sharply, when he hits
15 the invisible fence, but right now, he's charging at
16 the kid, and all of a sudden, the kid gets scared and
17 runs into the - - - runs into the street. Now, is
18 the homeowner liable because of what the dog did to
19 the kid leading to the auto accident?

20 MS. WARREN: With the respect to the Doerr
21 case, no, no. This - - - what I meant - - -

22 JUDGE READ: No, with respect to that - - -
23 with respect to that case?

24 JUDGE PIGOTT: Yeah.

25 MS. WARREN: I guess - - -

1 JUDGE READ: Can you distinguish that case
2 from your case?

3 MS. WARREN: I can distinguish that case
4 from this case - - -

5 JUDGE READ: All right. Well, what's the
6 answer to - - -

7 MS. WARREN: - - - which in - - -

8 JUDGE READ: - - - Judge Pigott's question
9 with respect to that case?

10 MS. WARREN: - - - which in that case, the
11 dog is reacting in a manner of - - - in his own
12 instinctive - - -

13 JUDGE PIGOTT: Foreseeably.

14 MS. WARREN: Yes. In - - - in this case -
15 - -

16 JUDGE PIGOTT: Causing damage.

17 MS. WARREN: - - - and the - - - and the
18 difference is that the - - - the defendants in this
19 case were in control of their animal - - -

20 CHIEF JUDGE LIPPMAN: Is that the defendant
21 sets in motion what happens? Is that your
22 distinction?

23 MS. WARREN: That is my distinction.

24 JUDGE PIGOTT: So if - - - so if she hadn't
25 summoned the dog, if the dog just ran across the

1 road, no problem?

2 JUDGE READ: That would be a different
3 case?

4 MS. WARREN: That's a different case, yeah.
5 That's a different case - - -

6 JUDGE RIVERA: So it's - - -

7 MS. WARREN: - - - that - - - that may be
8 more towards the Dobinski~~s~~ - - -

9 JUDGE RIVERA: So she's walking the dog off
10 the leash, and the dog just runs into that particular
11 area where the bikes are going through.

12 MS. WARREN: In that case - - -

13 JUDGE RIVERA: Under yourmy rule - - -

14 MS. WARREN: Under my rule?? ~~That dog~~

15 -

16 JUDGE RIVERA: Under your rule, is she
17 negligent? Is she liable?

18 MS. WARREN: ~~That dog~~ - - - Under this
19 rule, no.

20 JUDGE RIVERA: The - - - the rule you're
21 proposing?

22 MS. WARREN: The - - - the rule I'm
23 proposing?

24 JUDGE RIVERA: Yes.

25 MS. WARREN: No.

1 JUDGE STEIN: What - - -

2 JUDGE RIVERA: Because why?

3 MS. WARREN: Because in that case, the
4 distinction, again, is that here they were in control
5 of their animal, and the animal was not - - - this
6 animal was responding and acting as - - -

7 JUDGE RIVERA: So she's just standing
8 across the road, not squatting down, hitting her
9 legs, saying come here, come here, whatever the name
10 of the dog is. But the dog, of course, seeing the
11 owner, and the owner realizing a dog seeing the owner
12 might actually jump out of someone else's arms and -
13 - - and to them. Is that - - -

14 MS. WARREN: That's a dif - - -

15 JUDGE RIVERA: - - - is that trying to
16 encourage the dog?

17 MS. WARREN: That's a different scenario.
18 I think the per - - -

19 JUDGE RIVERA: I know it is. I'm asking
20 you - - -

21 MS. WARREN: I - - -

22 JUDGE RIVERA: - - - is that person liable
23 under your rule?

24 MS. WARREN: Under my more limited rule?

25 JUDGE RIVERA: Proposed rule, yes.

1 MS. WARREN: No.

2 JUDGE RIVERA: She - - -

3 CHIEF JUDGE LIPPMAN: What about - - - what
4 about the baby carriage situation? Is there a
5 difference between the dog and the baby carriage?

6 MS. WARREN: No, because - - -

7 CHIEF JUDGE LIPPMAN: If you set it - - -
8 if it's the same situation and one says give me the
9 baby carriage, and the other one pushes it in front
10 of the bicycle or the runner or whatever.

11 MS. WARREN: If - - - if the dog in this
12 scenario can be substituted - - -

13 CHIEF JUDGE LIPPMAN: Does it matter that
14 it's a dog that's different than - - - than

15 MS. WARREN: No, and - - - and I think that
16 that's what Justice Mazzairelli was saying - - -

17 CHIEF JUDGE LIPPMAN: The same analogy?
18 Baby carriage and the dog is the same? Sim - - -

19 MS. WARREN: If you can substitute the dog
20 for an inanimate object, then - - -

21 CHIEF JUDGE LIPPMAN: Be - - - because it's
22 in your control?

23 MS. WARREN: Yes.

24 CHIEF JUDGE LIPPMAN: And - - - and you set
25 in motion, let's say, the - - - the - - -

1 negligently, that's - - - that's your - - -

2 MS. WARREN: Right. The - - - the
3 difference is because this accident happened purely
4 because of my negligent actions, as opposed to the
5 dog acting of its own volition.

6 JUDGE ABDUS-SALAAM: What if it had been a
7 child? What if it had been a child that the woman
8 had summoned across the road and instead of the - - -
9 the cyclist hitting the child, the cyclist pulls up
10 and then falls off his bike, because he doesn't want
11 to hit the child. Would the - - - the mother be
12 liable there?

13 MS. WARREN: This - - - this wasn't and
14 isn't - - -

15 JUDGE ABDUS-SALAAM: With the dog.

16 MS. WARREN: - - - equivalent to a
17 negligent supervision case.

18 JUDGE PIGOTT: No, but is - - - I know you
19 want to stick to your specific case, but your
20 opponent makes the argument. If you want to - - -
21 you want to say this about animals, then you're going
22 to be saying it about children.

23 MS. WARREN: No, because A, I think there's
24 a distinction between children, but - - - but this
25 isn't negligent supervision. This was an actual,

1 affirmative creation of a hazardous condition - - -

2 JUDGE PIGOTT: Well, Judge - - - Judge
3 Rivera is out in the park with her dog and it's - - -
4 and it's a day when you can have your dog off the
5 leash. Now, is she in control, in your view, if that
6 same dog does what happened in your case?

7 MS. WARREN: If the dog decided to chase a
8 bunny rabbit or another dog?

9 JUDGE PIGOTT: No, it just - - - it just
10 stopped there, and for some reason the dog wanders
11 onto the path, and your - - - your client's going
12 down the path?

13 MS. WARREN: That's not the - - - that's
14 not the standard that I'm asking.

15 JUDGE PIGOTT: You have a very, very, very
16 narrow rule you want here.

17 MS. WARREN: I - - - I don't think that
18 that should be the ruling. I actually think the
19 ruling could be broader.

20 CHIEF JUDGE LIPPMAN: Your rule, though, is
21 there's no difference between the dog and the baby
22 carriage?

23 MS. WARREN: Correct.

24 JUDGE STEIN: Wait, what about if the - - -

25 CHIEF JUDGE LIPPMAN: ~~So it's~~It's just

1 negligence.?

2 MS. WARREN: Correct.

3 JUDGE STEIN: What about if a - - - if a
4 child comes to play with another child and - - - and
5 they're in the defendant's home and they have a dog,
6 and mom calls the dog over to where the kids are
7 playing, and all of a sudden the dog attacks - - -
8 attacks the - - - the visiting child, and - - - and
9 causes injuries. So, there, there's an affirmative
10 act by the mother: she called the dog over. And is
11 - - - is that - - - does that come in within your
12 rule here?

13 MS. WARREN: I think that situation would
14 come within this rule.

15 JUDGE RIVERA: How about - - - how about -
16 - - how about we're back - - -

17 JUDGE READ: I'm sorry. What was your
18 answer to that?

19 CHIEF JUDGE LIPPMAN: It would.

20 MS. WARREN: I think it would come within
21 the rule.

22 JUDGE READ: Okay.

23 JUDGE RIVERA: How about - - - how about -
24 - - let's stay with this same scenario - - -

25 MS. WARREN: Okay.

1 JUDGE RIVERA: - - - except they do see the
2 bicyclist and she's calling at the dog, stay, stay,
3 stay. But the dog jumps across the road; does the
4 exact same action. Covered under your rule or not?

5 MS. WARREN: No.

6 JUDGE RIVERA: Why not?

7 MS. WARREN: Because that dog - - -

8 JUDGE RIVERA: Uh-hum

9 MS. WARREN: - - - as Justice Mazzaelli
10 pointed out, is acting of its own volition and acting
11 with its own - - -

12 JUDGE RIVERA: Well, it's responding to a
13 command that it may - - -

14 MS. WARREN: - - - animal instincts.

15 JUDGE RIVERA: - - - have interpreted
16 differently than the owner intended. That the owner
17 is intending stay, don't move, and the dog acts a
18 different way.

19 MS. WARREN: But - - -

20 JUDGE RIVERA: But if she had not said
21 anything, the dog might not do anything. And in that
22 case, she's trying to avoid the accident, right?

23 MS. WARREN: Correct.

24 JUDGE FAHEY: It's a dumb dog problem.

25 MS. WARREN: It's a dumb dog problem.

1 JUDGE FAHEY: Irish setters. You know, the
2 Irish setters, they're tough; they're brutal, you
3 know.

4 JUDGE RIVERA: A dog without good hearing.

5 JUDGE FAHEY: Yeah.

6 JUDGE RIVERA: An unusual breed.

7 JUDGE ABDUS-SALAAM: You see, counsel - - -
8 don't you see we're - - - we're coming up just in
9 this few minutes with almost a - - - you know, an
10 unworkable number of hypotheticals, which is what
11 worries me that if we adopt a rule, even your narrow
12 rule, we're going to be, in the future, trying to
13 come up with, you know, whether this one fits in,
14 whether that one fits in.

15 MS. WARREN: In the forty-six other states
16 that allow this, the sky hasn't fallen.

17 JUDGE PIGOTT: No, as long as you agree.
18 You see, you don't seem to be agreeing with us.
19 Every time we come up with a - - - with a - - - with
20 a possibility that maybe would have - - - would be a
21 cause of action in forty-six other states, you're
22 saying it wouldn't be - - - it wouldn't be under my
23 rule.

24 MS. WARREN: What - - - what I'm saying is,
25 coun - - -

1 JUDGE FAHEY: You got to follow the logic
2 of your argument, though. We have three alternatives
3 here. One, we leave it alone; we don't change the
4 law at all; you're out. The second option is we
5 redefine the duty under the restatement. You're in;
6 you're clear and - - - and the duty's changed and it
7 has substantial effect on the insurance industry, and
8 the way liability insurance is done on homeowners and
9 - - - and people's responsibility for their animals.

10 And the third option is to extend the
11 Hastings exception that we have to cover this mild
12 scenario. Because every scenario that my colleagues
13 are coming up with, kind of, punctures holes in - - -
14 in -- in - in - - - in the just leaving it a little
15 bit alone, so we're kind of left then from the three
16 down to the two. And that's what we're trying to pin
17 you down to. Where are you? What do you say? Do
18 you agree with that?

19 MS. WARREN: I agree with your statement,
20 but I - - - but

21 CHIEF JUDGE LIPPMAN: You want a wider
22 variation, but you'll take the narrower - - -

23 MS. WARREN: Exactly.

24 CHIEF JUDGE LIPPMAN: - - - right? Is that
25 your argument?

1 MS. WARREN: That is - - -

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. WARREN: That is exactly right.

4 JUDGE FAHEY: All right.

5 CHIEF JUDGE LIPPMAN: All right. So we - -

6 -

7 MS. WARREN: That is exactly my argument.

8 JUDGE FAHEY: It's a fair response. That's
9 a fair response. Sure. I understand.

10 JUDGE READ: She wants her client to win.

11 CHIEF JUDGE LIPPMAN: You want your client
12 - - - we - - - we get it. Good counsel. Let's hear
13 the rebuttal - - -

14 MS. WARREN: Thank you.

15 CHIEF JUDGE LIPPMAN: - - - of your
16 adversary. He wants no opening of the spigot, you
17 know?

18 MR. HORN: Ve - - - very briefly, Your
19 Honor. I think the questioning to the respondent
20 clearly points out how many situations - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but - - - yeah,
22 but let's say - - -

23 MR. HORN: - - - this could arise in.

24 CHIEF JUDGE LIPPMAN: - - - let's say, for
25 the sake argument, that you could do that narrow

1 extension of Hastings to Doerr. Would the world come
2 to an end? Especially when, as your adversary says,
3 in forty-six other states, or whatever it is, they
4 seem to survive with a test of reasonableness. Why -
5 - - why would we not survive, if - - - if we chose to
6 do a narrow extension of Hastings?

7 MR. HORN: Well, that's the point - - -

8 CHIEF JUDGE LIPPMAN: Why would that be
9 such a just unconscionable act?

10 MR. HORN: But this is the point that I'm
11 making. There is no narrow extension from Hastings
12 back to Doerr.

13 CHIEF JUDGE LIPPMAN: So maybe we should
14 open it the whole - - - do you - - -

15 MR. HORN: It's a quantum leap.

16 CHIEF JUDGE LIPPMAN: So maybe we should do
17 what the forty-six other states do. Would that be so
18 terrible?

19 MR. HORN: Well, I'm a - - -

20 CHIEF JUDGE LIPPMAN: They seem to - - -
21 their systems of justice seem to survive that
22 particular position.

23 MR. HORN: That's true as has our system of
24 justice.

25 CHIEF JUDGE LIPPMAN: So why couldn't - - -

1 why couldn't it survive in New York?

2 MR. HORN: Well, I'm not suggesting that it
3 couldn't, but I think as Justice Fahey points out,
4 we're looking at new channels of liability, insurance
5 companies writing pets out of policies, as they've
6 already started.

7 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -
8 but you're not dealing with the fact that almost
9 every other state in the country does it and it
10 works.

11 MR. HORN: Well, that may be true, Your
12 Honor, but they do not have the sort of unique
13 characteristics that we have in this state with New
14 York City - - -

15 CHIEF JUDGE LIPPMAN: What are the unique -
16 - - what are the unique characteristics?

17 MR. HORN: Well, you have a difference
18 between New York City - - -

19 CHIEF JUDGE LIPPMAN: We have a different
20 system of justice than everybody?

21 MR. HORN: No, no, certainly not, Your
22 Honor, but you do have the - - - the tremendous
23 amount of people that live in close proximity to one
24 another in Manhattan, as juxtaposed to 110-acre farm
25 in the Dobinski - - -

1 JUDGE RIVERA: All the states have - - -
2 all the states have urban areas with people who have
3 domesticated animals living all around them - - -

4 MR. HORN: That's true, Your Honor.

5 JUDGE RIVERA: - - - and they - - - and
6 again, as the Chief Judge and others have said, they
7 - - - they seem to survive.

8 MR. HORN: Well, it - - - it's not a
9 question if the sky is falling in one way or another.

10 JUDGE RIVERA: The dogs and the - - - and
11 the humans.

12 MR. HORN: The question is whether or not
13 we're opening up a rule here and opening up a
14 Pandora's Box that perhaps shouldn't be opened,
15 particularly in Doerr. Doerr is not a narrow, small
16 step from - - - from Hastings. Hastings is grounded
17 in premises liability. Hastings is - - - is grounded
18 in the concept that a farm animal, not even a
19 household pet - - -

20 JUDGE STEIN: Well, Hastings - - -
21 Hastings also said that - - -

22 MR. HORN: - - - but a farm animal needs to
23 be taken care of.

24 JUDGE STEIN: - - - that - - - that it was
25 fundamentally different from - - - from Bard because

1 it didn't involve aggressive or threatening behavior.
2 So, is it - - -

3 MR. HORN: That's true.

4 JUDGE STEIN: - - - does - - - isn't this a
5 case also that doesn't involve aggressive or
6 threatening behavior?

7 MR. HORN: That's - - - that's a truth,
8 yes. But I would submit that with - - -

9 JUDGE READ: And didn't those - - - and
10 didn't those other cases like Collier, Bard, Smith,
11 Penny Whistle, Petrone, they all did, didn't they? I
12 would say also un - - - allegedly unprovoked - - -

13 MR. HORN: That they all involved - - -

14 JUDGE READ: - - - threatening and
15 aggressive behavior.

16 MR. HORN: - - - animals acting either in
17 furtherance of a vicious propensity or an alleged
18 vicious propensity, yes - - -

19 JUDGE READ: So they were - - -

20 MR. HORN: - - - that is absolutely
21 correct.

22 JUDGE READ: Yeah, and is - - - isn't that
23 why - - - why isn't your case fundamentally
24 different?

25 MR. HORN: Well, again, because what we're

1 talking about is recognizing a common law cause of
2 action rooted in a theory of negligence that has
3 never been recognized in this state.

4 CHIEF JUDGE LIPPMAN: We get that, but
5 we've been talking about that maybe it should be
6 either narrowly or in a more broad context based on
7 the rest of the United States America - - - of
8 America, which New York is not necessarily, you know,
9 distant from.

10 MR. HORN: I think the questioning that has
11 come up today during this session proves that it's
12 almost impossible to narrowly tailor it, because then
13 what you're going to have, is you're going to have an
14 ad hoc system where - - -

15 CHIEF JUDGE LIPPMAN: So again, then we ask
16 you the obvious question, so if you don't want it
17 narrow, let's make - - - let's go with the other
18 forty-some-odd states and make it wider. They've
19 been able to do it; we - - - we probably can too.

20 MR. HORN: Well, I think we would be
21 looking at dramatic changes in - - - in New York
22 jurisprudence - - -

23 CHIEF JUDGE LIPPMAN: Okay, we get it. We
24 get it all - - -

25 MR. HORN: - - - and in the legal system in

1 this state.

2 CHIEF JUDGE LIPPMAN: - - - both of your
3 arguments. Thanks so much.

4 MR. HORN: Thank you, Your Honors.

5 CHIEF JUDGE LIPPMAN: Appreciate it.

6 Okay, let's do Dobinski.

7 MR. BISCHOF: May it please the court,
8 Dennis Bischof for Cheryl Dobinski.

9 CHIEF JUDGE LIPPMAN: What's - - - what's
10 the difference between Dobinski and what we've been
11 discussing in - - - in Doerr or however it's
12 pronounced?

13 MR. BISCHOF: The Dobinski case involved my
14 client, Cheryl Dobinski, she's on her bicycle. She's
15 bicycling on a public roadway next to the defendant's
16 house. The dogs - - - two dogs come rushing - - -

17 CHIEF JUDGE LIPPMAN: Are you alleging
18 violent propensity or you're - - - are you alleging
19 simple negligence?

20 MR. BISCHOF: We had alleged both, Your
21 Honor. And the case was dismissed because we failed
22 to prove vicious propensity. The Fourth Department
23 never addressed our issues - - -

24 JUDGE READ: How does your case differ from
25 Smith v. Reilly?

1 MR. BISCHOF: The Smith case, I believe,
2 was - - - I addressed that in my brief, Your Honor,
3 and I think - - -

4 JUDGE READ: No, I - - -

5 MR. BISCHOF: - - - the Smith case had the
6 - - - the electric fence or the Invisible Fence and -
7 - -

8 JUDGE READ: But that was - - - I guess we
9 talked about a propensity to interfere with traffic
10 there.

11 MR. BISCHOF: Right. Our case focuses on -
12 - - and what we're requesting from the court - - - is
13 an extension of the Hastings rule to dogs in this
14 circumstance. I think the thing to focus on, Your
15 Honor, is that we're dealing with the owners'
16 actions. We're not talking so much about the dog's
17 actions in this case. We're talking about the
18 owners' actions in this case, and that's really - - -

19 CHIEF JUDGE LIPPMAN: But there's no
20 different - - - does it matter whether it's a farm
21 animal or a domesticated animal?

22 MR. BISCHOF: I don't think it should. And
23 it's somewhat ironic, because if you had the
24 defendants backing their vehicle out into the
25 roadway, striking my client, there's no question

1 she's got a case. Under the Hastings rule, if you're
2 talking about a car - - - a cow going into the
3 roadway and striking my client and she's injured, I
4 still have a case. So it doesn't make sense when you
5 have a dog knocking my client over and injuring her -
6 - -

7 JUDGE READ: Well, in the Hastings case,
8 though, wasn't - - - I mean, the cow wandered in the
9 road, as cows will - - -

10 MR. BISCHOF: Correct.

11 JUDGE READ: - - - tend to do if they're
12 not properly fenced. It didn't attack the car.

13 MR. BISCHOF: Correct.

14 JUDGE READ: Well, isn't that a little bit
15 different from what happened in your case?

16 MR. BISCHOF: It is somewhat different,
17 Your Honor, but I would add that our case involves a
18 leash-law violation, that these dogs violated the
19 leash law, and that's important that the owners - - -
20 again, the owners' failure - - - their failure to
21 keep the dogs on a leash.

22 JUDGE STEIN: Well, that's some evidence of
23 negligence, but doesn't that bear - - -

24 MR. BISCHOF: Correct.

25 JUDGE STEIN: - - - you know, avoid the

1 question of whether we should allow a negligence
2 claim in the first place?

3 MR. BISCHOF: It doesn't beg the question,
4 Your Honor. I mean, and we talk - - - there's a
5 worry that it's going to open the floodgates of
6 litigation. But we have the negligence - - - common
7 law negligence, New York State's - - -

8 CHIEF JUDGE LIPPMAN: Counsel, let me stop
9 you for a second. Do you want any rebuttal time?

10 MR. BISCHOF: No, thank you.

11 CHIEF JUDGE LIPPMAN: None. Go ahead.
12 Keep going.

13 JUDGE STEIN: Do you agree - - - do you
14 agree that this case is different from the Doerr
15 case?

16 MR. BISCHOF: It is a little different in
17 that we have a leash law violation in this case. We
18 have the - - -

19 JUDGE STEIN: Was there a - - - was there
20 an act of the owner that - - - that set this in
21 motion? Was there an affirmative act?

22 MR. BISCHOF: There were acts on the part
23 of the owners in this case, where they trained their
24 dogs to chase vehicles and we - - -

25 JUDGE STEIN: Yeah, but - - - but that - -

1 -

2 MR. BISCHOF: - - - address that in our
3 papers.

4 JUDGE STEIN: - - - but even if - - - even
5 assuming that it's true, that - - - that didn't
6 happen in the moment of - - - of this incident.

7 MR. BISCHOF: Well, it - - - they trained
8 the dogs in leading to the moment of the incident
9 where the dogs chased the vehicle and also the - - -
10 they failed. There was an act and an omission - - -
11 an omission to failure to have the dogs on a leash.

12 JUDGE READ: But what if - - -

13 JUDGE STEIN: If we ex - - - sorry, go
14 ahead.

15 JUDGE READ: No, go ahead.

16 JUDGE STEIN: If we extend Hastings to this
17 case, aren't we completely opening up the door,
18 because you can always find some affirmative act on -
19 - - on the part of the owner that at some point in
20 time, led it to a series of events that - - - that
21 led to the injury?

22 MR. BISCHOF: No, no, Your Honor, I don't
23 think you're completely opening the door, because
24 you're focusing on the case. Does - - - should
25 common law negligence apply to the negligence of an

1 owner of a dog? And I think the answer should be
2 yes. Should - - - just because a dog is involved, is
3 - - - is that like an immunity idol - - -

4 JUDGE READ: Well, we - - - we do have a
5 line of case - - -

6 MR. BISCHOF: - - - for the defendants?

7 JUDGE READ: - - - we do have a line of
8 cases that talk about animals and talk about the
9 notion of unprovoked - - - allegedly unprovoked
10 actions that cause injuries and we - - - we rejected
11 - - - we rejected the negligence standard - - - quite
12 a few cases in which we did that.

13 MR. BISCHOF: In the Bard and its progeny,
14 and I think those cases - - -

15 JUDGE READ: Well, Collier and its progeny.

16 MR. BISCHOF: Collier. Collier and Bard
17 and Collier - - - and that focuses on again the dog -
18 - - a dog bite, for example, an attack on the part of
19 the dog. Again, the distinction there is that that's
20 more of the actions on the part of the dog. Here we
21 have acts and omissions on the part of the owners
22 which is different than the dogs.

23 JUDGE PIGOTT: Yeah, we asked Mr. Horn - -

24 -

25 MR. BISCHOF: So - - -

1 JUDGE PIGOTT: I'm sorry, Mr. Bischof. We
2 asked Mr. Horn about, does this mean that if - - - if
3 it was a child instead of a dog, that - - - that the
4 parents are going to be liable?

5 MR. BISCHOF: I think that New York
6 distinguishes between - - - I think there's a legal
7 difference between a dog and a child.

8 JUDGE PIGOTT: You can argue with the
9 parents about that, but - - -

10 MR. BISCHOF: And under New York law there
11 should be, and - - - and - - - and our position is
12 that common law negligence should apply to this
13 scenario - - - does apply to this scenario, and
14 there's no reason to have it not apply other than the
15 fact that you have Collier and the decision in Bard.
16 And just because a dog's involved, the - - - the
17 negligence on - - - on the part of - - -

18 JUDGE FAHEY: Wouldn't - - - wouldn't you
19 be - - - wouldn't you be better off then, Mr. Bischof
20 - - -

21 MR. BISCHOF: - - - these dog owners
22 shouldn't be ignored.

23 JUDGE FAHEY: - - - just extending Hastings
24 to say, listen, there's no difference between a cow
25 straying and a dog straying.

1 MR. BISCHOF: Right.

2 JUDGE FAHEY: You know, and so - - - and
3 that would be an extension of Hastings, rather than
4 arguing that the restatement has to apply and the
5 reasonableness rule should - - - should - - -

6 MR. BISCHOF: That's correct. Our position
7 is that Hastings should apply to this case, and
8 that's what we put in our brief.

9 JUDGE FAHEY: That's - - - that's how I
10 understood your argument. Okay, all right.

11 JUDGE RIVERA: But, of course, dog owners
12 are much more able to train their dog not to stray
13 than they are to train a cow not to stray.

14 MR. BISCHOF: We have rules like leash
15 laws. And we ask that people please follow those
16 rules.

17 JUDGE RIVERA: So then doesn't it all boil
18 down to keeping your domesticated animal inside?

19 MR. BISCHOF: It doesn't - - -

20 JUDGE RIVERA: Or otherwise on a leash that
21 you're always watching them - - -

22 MR. BISCHOF: You have to control - - -

23 JUDGE RIVERA: - - - which is not the way
24 humans and domesticated animals function in our
25 modern world?

1 MR. BISCHOF: Again, if you apply the
2 reasonable prudent stan - - - pru - - - reasonable
3 prudent person standard, common law negligence can be
4 applied to that scenario and then you also you have
5 the proximate cause standard as to whether it was a
6 substantial factor in bringing about the harm. So
7 the - - - the tools are there. The - - - the toolbox
8 is there. New York has the rules. They have the
9 law. And they should simply apply it to this case.

10 JUDGE RIVERA: So in your case, if it - - -
11 just - - - the dog's off the leash - - -

12 MR. BISCHOF: Yes.

13 JUDGE RIVERA: - - - but they had not been
14 trained to chase the vehicles.

15 MR. BISCHOF: Correct.

16 JUDGE RIVERA: Liable or not liable?

17 MR. BISCHOF: I think off the leash,
18 because again, you have - - - is it reasonable for
19 someone not to follow the leash law? It should at
20 least go to the jury as to whether or not - - - to
21 factually determine whether or not it was - - -
22 whether they breached the reasonable prudent person
23 standard in the common law negligence. Just because
24 it was a dog involved, and not a cow, that - - - the
25 dog should not immunize the defendants in this case

1 from liability. That's our point.

2 JUDGE RIVERA: I open - - - I open my front
3 door and my dog sneaks right out.

4 MR. BISCHOF: Yes. And injures somebody?

5 JUDGE RIVERA: Liable - - - and then causes
6 an injury. Liable or not liable? I wasn't trying to
7 let the dog out.

8 MR. BISCHOF: There - - -

9 JUDGE RIVERA: Small little thing.

10 MR. BISCHOF: There may be an issue of fact
11 as to whether or not you were negligent under the
12 circumstances. The jury would listen to the facts -
13 - -

14 JUDGE RIVERA: In my own home, my dog is
15 off the leash.

16 MR. BISCHOF: In - - - inside the home, I
17 think the dog's controlled, because you have doors
18 and walls. You could al - - -

19 JUDGE RIVERA: But I'm saying, I open the
20 door; someone rang the door, and the dog runs out.

21 MR. BISCHOF: And it sneaks out.

22 JUDGE RIVERA: Right.

23 MR. BISCHOF: Okay, so then it - - - what -
24 - - what happens with the dog? I mean, is it - - -
25 how much time is involved? What does the dog do?

1 Where is your house located?

2 JUDGE RIVERA: Runs out into the road and a
3 biker hits the dog and gets injured.

4 MR. BISCHOF: Okay, so not - - - and you
5 haven't trained the dog to chase vehicles?

6 JUDGE RIVERA: Never.

7 MR. BISCHOF: But - - - so it's a momentary
8 lapse - - -

9 JUDGE RIVERA: This is a hypothetical, of
10 course.

11 MR. BISCHOF: I think that maybe you could
12 find - - - find the negligence standard. The jury
13 could listen to that fact - - - those fact patterns
14 and say that you - - - the reasonable prudent person,
15 you didn't violate that standard under those
16 circumstances, because it was only a momentary thing
17 under the circumstance.

18 CHIEF JUDGE LIPPMAN: Okay, what el - - -
19 anything else, counsel?

20 MR. BISCHOF: No, Judge.

21 CHIEF JUDGE LIPPMAN: Okay, thank you,
22 counselor.

23 Counselor?

24 MR. DELLA POSTA: May it please the court,
25 Mark Della Posta on behalf of the defendant.

1 JUDGE PIGOTT: Why - - - why would someone
2 train dogs to chase cars? That doesn't sound like a
3 fair fight.

4 MR. DELLA POSTA: Well, that - - - that's
5 not what happened here, Your Honor, if that's your
6 question. The - - - the - - - the allegation is a
7 red herring. It's - - - it's - - - these dogs went
8 out for an exercise. From time to time, it would be
9 - - -

10 CHIEF JUDGE LIPPMAN: But previously there
11 had been problems with one of the dogs and - - - and
12 cars, and the dog was killed, wasn't it?

13 MR. DELLA POSTA: Not one of these dogs,
14 Your Honor.

15 CHIEF JUDGE LIPPMAN: No, obviously.

16 MR. DELLA POSTA: Yeah.

17 CHIEF JUDGE LIPPMAN: But - - -

18 MR. DELLA POSTA: But I mean, these dogs
19 had - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but doesn't
21 that matter, that you know this is what's going to
22 happen.

23 MR. DELLA POSTA: No, I - - - I - - - this
24 court and other holdings have been pretty clear that
25 you focus on the conduct of that particular dog. And

1 - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but if we're
3 doing a negligence standard?

4 MR. DELLA POSTA: Well, I'm, of course,
5 saying you shouldn't do a negligence standard.

6 CHIEF JUDGE LIPPMAN: I know that, but I'm
7 asking you, it would matter if you were doing a
8 negligence standard. Were you reasonable like the
9 hypothetical that Judge Rivera just raised? In this
10 case - - - it's not even a hypothetical - - - a
11 previous dog had been killed running - - - you know,
12 trying - - - chasing the cars, and now you keep
13 letting the dogs go out.

14 What does that say about the reasonableness
15 of what you've done? You're saying, I gather, that
16 it doesn't matter whether it's reasonable or not; no
17 way there can be liability.

18 MR. DELLA POSTA: No, I - - - I don't - - -
19 I don't think so, Your Honor. It's - - - even if you
20 apply it to a negligence standard - - -

21 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

22 MR. DELLA POSTA: - - - I don't - - - I
23 don't think you can look at all dogs and what all
24 dogs do; you focus on these two dogs.

25 CHIEF JUDGE LIPPMAN: No, no, but your

1 dogs, not all dogs.

2 MR. DELLA POSTA: Well, but our - - - these
3 are different breeds, different types, different
4 ages. These are German shepherds.

5 CHIEF JUDGE LIPPMAN: You keep letting them
6 out until one of them doesn't get killed? I mean,
7 what's the standard here?

8 MR. DELLA POSTA: Well, no, I mean - - -
9 the standard here - - - I'm - - - I'm - - - I'm not
10 understanding what the public policy reason is that
11 this court should consider changing the standard.

12 CHIEF JUDGE LIPPMAN: What's the policy
13 reason to decide for you?

14 MR. DELLA POSTA: The public policy reason
15 to decide for us is that A, it's been the law for 200
16 years - - -

17 CHIEF JUDGE LIPPMAN: No, no, put that
18 aside.

19 MR. DELLA POSTA: I understand that.

20 CHIEF JUDGE LIPPMAN: What is the policy
21 reason?

22 MR. DELLA POSTA: It's - - - it gives both
23 parties, plaintiff and defendant, a bright-line
24 standard in terms of what is acceptable, this prior
25 vicious propensities. So at - - - at - - - if it - -

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CHIEF JUDGE LIPPMAN: Put aside violent vicious prop - - - propensities. The dog goes out, gets hit, because you keep letting - - - let's say - - - keep letting dogs out. They keep getting hit, and maybe it caused an accident and somebody gets hurt.

MR. DELLA POSTA: Well - - -

CHIEF JUDGE LIPPMAN: Putting aside from negligence, why - - - why from a policy viewpoint shouldn't you - - - if every day, you let a dog out and some of the dogs get killed and people - - - you're aware of the - - - a hypothetical. You're aware of the fact that it may cause accidents. They have to swerve out of the way, whatever it is. Why, from a policy perspective, are you allowed to keep letting that dog out and someone gets really hurt? Why, from a policy perspective, shouldn't you be liable?

MR. DELLA POSTA: The law has been working fine for 200 years.

CHIEF JUDGE LIPPMAN: Ah, that's not what I'm asking you.

MR. DELLA POSTA: I - - -

CHIEF JUDGE LIPPMAN: I understand that

1 argument. I get it. Answer my question from a
2 policy perspective, what the hell are you doing - - -
3 in the hypothetical, not you - - -

4 MR. DELLA POSTA: Yeah.

5 CHIEF JUDGE LIPPMAN: - - - why - - - you
6 keep letting him out. They get hit. They chase the
7 cars. The cars are swerving. People, if they didn't
8 get hurt, you can see that they can get hurt. Why
9 shouldn't you be liable?

10 MR. DELLA POSTA: Well, I think you're - -
11 - because you're - - - you're - - - because of - - -
12 if you were to change the standard to allow any
13 negligence claims against any homeowners with their
14 pets, I think you're taking away what is now a very -
15 - -

16 JUDGE READ: Certain.

17 MR. DELLA POSTA: - - - rigid, bright-line
18 standard in terms of what - - -

19 CHIEF JUDGE LIPPMAN: Rigid, but maybe
20 unfair?

21 MR. DELLA POSTA: I don't know that - - - I
22 haven't seen any - - -

23 CHIEF JUDGE LIPPMAN: In the hypothetical I
24 gave you - - -

25 MR. DELLA POSTA: Right.

1 CHIEF JUDGE LIPPMAN: - - - is it unfair
2 that you shouldn't be held liable?

3 MR. DELLA POSTA: I - - - I - - - I think
4 you can find - - - you can dream up any specific
5 hypothetical - - -

6 CHIEF JUDGE LIPPMAN: No, no, I dreamed up
7 a specific thing that I asked you about.

8 MR. DELLA POSTA: I know. There are - - -
9 there are always going to be issues with a rule,
10 whether - - - whether the rule is here, here, or
11 here.

12 CHIEF JUDGE LIPPMAN: Okay, sometimes it's
13 fair and sometimes it's not fair.

14 MR. DELLA POSTA: Exactly.

15 CHIEF JUDGE LIPPMAN: Okay.

16 JUDGE RIVERA: But - - - but isn't society
17 benefited by finding a rule that encourages
18 responsible pet ownership?

19 MR. DELLA POSTA: And I think the present
20 system - - -

21 JUDGE RIVERA: Because that didn't work for
22 your client. Obviously, the dog's dying on the road
23 doesn't do it.

24 MR. DELLA POSTA: Well, I - - - the - - -
25 the present system had - - - it allows an owner of a

1 dog to know that dog, beware of that dog's
2 personality, know if he's going to run out into the
3 street, know if he's going to, you know, go and bite
4 somebody, and - - - and - - - and that's the way it's
5 set up now. If you change it, essentially you're
6 going to make any - - - it's like strict liability -
7 - -

8 JUDGE FAHEY: What - - - what you're saying
9 is - - -

10 MR. DELLA POSTA: - - - almost it's 240
11 liability - - -

12 JUDGE FAHEY: - - - what you're saying, Mr.
13 Della Posta, is that the duty itself will be
14 radically altered if we change this, the creation of
15 the duty, right?

16 MR. DELLA POSTA: Yes.

17 JUDGE FAHEY: Right now, every dog's
18 entitled to one bite. That will not be the rule
19 anymore, yes?

20 MR. DELLA POSTA: But it's not really one
21 bite, Your Honor. I mean, it's - - - it's not the
22 one-bite rule. It's a misnomer. But bearing teeth -
23 - -

24 JUDGE PIGOTT: Close to one bite.

25 JUDGE READ: Aggressive tendencies or - - -

1 JUDGE RIVERA: One growl.

2 JUDGE READ: Yeah.

3 JUDGE RIVERA: One growl.

4 MR. DELLA POSTA: Aggressive tendencies,
5 growls, whatever.

6 JUDGE READ: Aggressive tendencies.

7 MR. DELLA POSTA: I think now a plaintiff
8 can get summary judgment on a vicious propensity
9 issue and a defendant can get summary judgment. I
10 think you're going to open up all kinds of cases - -
11 -

12 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we're
13 not talking about vicious propensity. We're talking
14 about negligence.

15 MR. DELLA POSTA: But when I'm saying
16 vicious propensities, maybe I'm misspeaking, Your
17 Honor. Whether it's running towards the road,
18 jumping up on somebody, doing something that's - - -

19 CHIEF JUDGE LIPPMAN: You're - - - you're
20 saying that you - - - you insulate any of those
21 situations or the whole spectrum of, not bad conduct,
22 but all kinds of conduct that animals can get into.

23 MR. DELLA POSTA: Yes, you - - -

24 CHIEF JUDGE LIPPMAN: That's your posi - -
25 - okay.

1 MR. DELLA POSTA: You're going to go - - -
2 you're going to - - - ev - - -

3 CHIEF JUDGE LIPPMAN: Okay, I understand.

4 MR. DELLA POSTA: - - - every case is going
5 to go to trial - - -

6 JUDGE READ: And the - - -

7 MR. DELLA POSTA: - - - you're going to
8 burden the courts further.

9 JUDGE PIGOTT: Well, you got - - - you got
10 - - - this is an interesting box of cases, because
11 you've got Central Park where I - - - I hear rumors
12 there are more than seven or eight people, and
13 Franklinville, where I think that's the total
14 population - - -

15 JUDGE FAHEY: Seven or eight people; it's
16 small.

17 JUDGE PIGOTT: But you got the country.
18 And I think - - - I think our policy so far has been
19 people have pets. Pets can be unpredictable, unless
20 and until they show, you know, an aggressive tendency
21 or something, we all have to deal with what we have
22 to deal with. There's a lot more people around these
23 days then there were when all of this stuff was going
24 on, and I - - - it - - - it even reads, when you look
25 at these decisions, like the courts below are saying,

1 we still have to put up with, you know, and they'll
2 cite to Bard, or they'll cite to Collier, or they'll
3 cite to, you know - - - and - - - and it's almost
4 like they're pushing to say there ought to be a
5 better rule.

6 MR. DELLA POSTA: In - - - in Smith v.
7 Reilly, for instance, it's - - - this court, 2011
8 decision, totally reversed the - - - the Fourth
9 Department. And it - - - if you look at the - - -
10 the conduct in that case, this dog was in and around
11 the roadway on several occasions, running towards it.
12 There's all sort of testimony about that. And this
13 court still rejected that.

14 JUDGE READ: So you think - - - you don't
15 think this case is distinguishable from Smith?

16 MR. DELLA POSTA: I don't, Your Honor.

17 JUDGE READ: Okay.

18 MR. DELLA POSTA: I don't.

19 CHIEF JUDGE LIPPMAN: Okay, counsel,
20 anything else?

21 MR. DELLA POSTA: No, thank you.

22 CHIEF JUDGE LIPPMAN: Okay, thank you all.
23 Appreciate it.

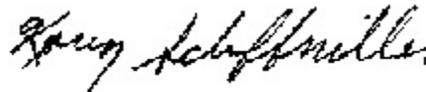
24 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Doerr v. Goldsmith, No. 17, and Dobinski v. Lockhart, No. 66, 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: April 3, 2015