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COURT OF APPEALS

STATE OF NEW YORK

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MARSHA HEWITT,

Appellant,

-against-

NO. 28

PALMER VETERINARY CLINIC, P.C.,

Respondent.

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20 Eagle Street  
Albany, New York  
September 10, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on today's  
2 calendar is appeal number 28, Hewitt v. Palmer Veterinary  
3 Clinic. We'll wait until Counsel leaves the table. Just a  
4 moment.

5 MR. SCHNEIDER: Good - - - good morning, Your  
6 Honors. My name is Mark Schneider, and I represent the  
7 plaintiff-appellant, Marsha Hewitt.

8 In this case - - -

9 CHIEF JUDGE DIFIORE: Counsel, may I interrupt?  
10 Would you care to reserve rebuttal time?

11 MR. SCHNEIDER: I'm sorry?

12 CHIEF JUDGE DIFIORE: Would you care to reserve -  
13 - -

14 MR. SCHNEIDER: Yes.

15 CHIEF JUDGE DIFIORE: - - - rebuttal?

16 MR. SCHNEIDER: Two minutes, please.

17 CHIEF JUDGE DIFIORE: Yes.

18 MR. SCHNEIDER: Thank you.

19 CHIEF JUDGE DIFIORE: Um-hum.

20 MR. SCHNEIDER: In this case, the Third  
21 Department held that Palmer Veterinary Clinic cannot be  
22 liable for its own negligence in causing the dog attack on  
23 my client, Mrs. Hewitt. It held that the only claim  
24 against the property owner is for strict liability.

25 In 1984, in Strunk v. Zoltanski, this court held



1 that a property owner or landlord is required to use due  
 2 care to prevent dog attacks on their property. This court  
 3 held that a landlord is not strictly liable for a dog bite  
 4 on their property, even if they had prior knowledge of the  
 5 dog's vicious propensity. Rather the Strunk court held  
 6 that landowner is only liable if their negligence causes  
 7 the dog bite.

8 Now, Strunk is still the law of New York State,  
 9 even though all four Appellate Divisions have now held a  
 10 property owner who does not own the dog is only liable in  
 11 strict liability. But there's no reason to change the  
 12 established law as set forth in Strunk. I have found no  
 13 cases where a property owner was held strictly liable  
 14 merely because he knew of the vicious propensity of the  
 15 animal that caused the injury on their property without  
 16 further negligence.

17 So - - -

18 JUDGE RIVERA: So what about the anomaly that the  
 19 dog owner may not be held liable, right, under - - - under  
 20 the existing rule?

21 MR. SCHNEIDER: Yeah, that - - - that is the - -  
 22 -

23 JUDGE RIVERA: But - - - but the property owner  
 24 may?

25 MR. SCHNEIDER: Well, that - - - that's an



1 exception to the rule under Bard that every other property  
2 owner has to use due care to prevent a foreseeable injury.  
3 And because the state favors dog ownership, and the dog  
4 owner knows their animal, they have made a very narrow  
5 exception for an owner of a dog, that once they know their  
6 dog has vicious propensities or even dangerous propensities  
7 - - - it's a propensity - - -

8 JUDGE RIVERA: No, no, no, the state favors  
9 property ownership too.

10 MR. SCHNEIDER: I'm sorry?

11 JUDGE RIVERA: The state favors property  
12 ownership too. There are many protections for property  
13 owners - - - real property owners.

14 MR. SCHNEIDER: Well, not - - - not in this case.  
15 We have the long-established law of negligence. And the  
16 purpose of negligence is to make sure that the - - - the  
17 tortfeasor pays for damage they cause. It's to deter  
18 further negligent conduct, and to ensure that the - - - the  
19 victim - - - the person bitten, gets paid for their injury.

20 JUDGE FEINMAN: Let me ask you this. If this - -  
21 - you're correct, and there's a negligence case permitted  
22 to be pursued against the - - - the vet clinic here, the  
23 land owner, or the premises owner - - -

24 MR. SCHNEIDER: Um-hum.

25 JUDGE FEINMAN: - - - or maybe he rents it, I



1 don't know - - - could he then ask, on the verdict sheet,  
2 to have an allocation made vis-a-vis the dog owner - - -

3 MR. SCHNEIDER: Um-hum.

4 JUDGE FEINMAN: - - - here? Because this is one  
5 of those cases where the owner and the landowner or the  
6 premises owner are not the same - - -

7 MR. SCHNEIDER: Yeah.

8 JUDGE FEINMAN: - - - even if that party is not  
9 present in the lawsuit? Because here, for example - - -

10 MR. SCHNEIDER: Sure.

11 JUDGE FEINMAN: - - - I think she was discharged  
12 in bankruptcy.

13 MR. SCHNEIDER: You could, under the  
14 apportionment law, if that person was legally liable. And  
15 there are cases where unless you fail in process to get  
16 that person joined, they're still liable.

17 But here the - - - the owner of the dog is not a  
18 tortfeasor. She's not liable at all, because as the owner,  
19 she would have had to known the dog had vicious  
20 propensities. So there is nobody to allocate with.

21 And in any event, I believe - - -

22 JUDGE FAHEY: Just let me ask - - - ask you a  
23 question, just so I'm clear on your claim. Your claim is  
24 sim - - - simply, before us, is a comparative negligence  
25 claim? You aren't arguing strict liability?



1 MR. SCHNEIDER: Yeah, I'm not arguing strict  
2 liability, because I think it would be hard to prove. But  
3 I think there could be - - -

4 JUDGE FAHEY: I just wanted - - -

5 MR. SCHNEIDER: Yes.

6 JUDGE FAHEY: - - - to get the procedural posture  
7 correct.

8 MR. SCHNEIDER: Yes.

9 JUDGE FAHEY: I under - - - I understand your  
10 rationale.

11 MR. SCHNEIDER: Yes.

12 JUDGE FAHEY: Your procedural posture, I'm right,  
13 you're just - - - you're asking us to say this is a  
14 comparative negligence situation?

15 MR. SCHNEIDER: Well, not comparative negligence.

16 JUDGE FAHEY: No?

17 MR. SCHNEIDER: My client is not negligent at  
18 all. It's negligence against the person who knew there was  
19 a foreseeable risk and failed to take due care to prevent  
20 it.

21 And the vet, in this case, was the only person  
22 who had the ability to protect my client, because as a vet,  
23 they - - - they knew that a dog coming out of surgery with  
24 no anesthesia could be in pain. They knew that you're  
25 supposed to snug down the collar.



1 JUDGE STEIN: But - - - but are you arguing that  
2 - - - that you should be allowed to assert both strict  
3 liability and negligence causes of action?

4 MR. SCHNEIDER: No. Against - - - no, no. I  
5 think - - -

6 JUDGE STEIN: That - - - that - - - that - - -

7 MR. SCHNEIDER: Well, you know, it's - - -

8 JUDGE STEIN: That plaintiff - - - a plaintiff.

9 MR. SCHNEIDER: - - - it's interesting, because  
10 under Strunk, if - - - if the vet knew the dog had vicious  
11 propensities, then we would have to prove further  
12 negligence. So with a landlord, the foreseeable risk is  
13 they know the dog is vicious.

14 And then further, they have to do something to  
15 prevent it, like have - - -

16 JUDGE STEIN: So actually, it's - - - it's - - -  
17 in some ways, it's a more difficult standard to meet.

18 MR. SCHNEIDER: Negligence - - -

19 JUDGE STEIN: It - - - it seems to me that the  
20 difference is, is with strict liability you have to show  
21 that either - - - the vicious propensities. But once you  
22 do that - - -

23 MR. SCHNEIDER: Um-hum.

24 JUDGE STEIN: - - - it doesn't matter what due  
25 care you take to prevent it; if you know it - - -



1 MR. SCHNEIDER: Yes.

2 JUDGE STEIN: - - - then you're liable. Whereas  
3 the negligence requires, arguably - - -

4 MR. SCHNEIDER: Yeah.

5 JUDGE STEIN: - - - either that you know of the  
6 vicious propensities or you do something else, and you - -  
7 - and you don't use due care. Do you agree with me on  
8 that?

9 MR. SCHNEIDER: Yeah, absolutely.

10 JUDGE STEIN: Okay. And - - -

11 MR. SCHNEIDER: That's what Strunk says.

12 JUDGE STEIN: - - - and in this situation, would  
13 you agree with me that - - - you know, when we talk about  
14 making - - - a duty to act as a reasonable person to keep  
15 the property in a reasonably safe condition, as a  
16 veterinary clinic - - -

17 MR. SCHNEIDER: Um-hum.

18 JUDGE STEIN: - - - would it be enough to require  
19 that all dogs be on leashes at all times, and all cats be  
20 in carriers, and that owners generally control their - - -  
21 their animals?

22 MR. SCHNEIDER: Yeah.

23 JUDGE STEIN: That would be enough?

24 MR. SCHNEIDER: Yeah. I mean, otherwise, if you  
25 had vets only liable in strict liability, they could know



1 that the dog was vicious - - - many vets probably treat  
2 vicious dogs. And if that dog broke out of a cage and did  
3 every - - - even though the vet was reasonable, if he broke  
4 out of an exam room and attacked somebody, they would be  
5 strictly liable.

6 And I have not found a single case where any  
7 court has ever said that for a property owner. It would be  
8 - - - strict liability would mean if you know your  
9 neighbor's dog is vicious, and the dog comes onto your  
10 property and bites somebody, you are strictly liable, even  
11 though you - - - you didn't do any - - - you used  
12 reasonable care.

13 JUDGE RIVERA: Yeah. So that's what I - - - I  
14 just want to clarify, based on something Judge Stein was  
15 asking you about.

16 While strict liability does relieve the proponent  
17 of that theory from proving some other aspects of  
18 traditional negligence elements, nevertheless, it - - - it  
19 is a difficult standard to satisfy, is it not, because of  
20 the intent requirement? Just in your example there.

21 MR. SCHNEIDER: No, strict liability is the  
22 lowest standard. Once you have knowledge, even if you do  
23 everything right, you are liable - - -

24 JUDGE RIVERA: But that's what I'm talking about.

25 MR. SCHNEIDER: Yeah.



1 JUDGE RIVERA: That burden itself - - - the  
2 burden you just described is not an easy one - - -

3 MR. SCHNEIDER: Is very low.

4 JUDGE RIVERA: - - - necessarily to satisfy.  
5 That's why a lot of dog owners don't necessarily end up  
6 being strictly liable.

7 MR. SCHNEIDER: Yeah, strict liability is the  
8 lowest standard, and negligence is a much more difficult  
9 standard.

10 JUDGE RIVERA: No, I understand - - -

11 MR. SCHNEIDER: Yes.

12 JUDGE RIVERA: - - - that there are more  
13 elements. I'm not disagreeing with you about that.

14 MR. SCHNEIDER: Okay.

15 JUDGE RIVERA: But in terms of the actual proof  
16 of that intent?

17 MR. SCHNEIDER: Yeah. And you know, the problem  
18 with - - - with - - - on the dog case, of strict liability  
19 based on knowledge is that everybody denies knowledge, and  
20 that's - - - you end up having to use private detectives  
21 and people - - - and what's vicious? You know. Is it - -  
22 - is a dog barking and jumping vicious, or does it have to  
23 bite somebody?

24 So I think this is a very clear - - -

25 JUDGE FAHEY: So - - - so - - - just so I'm clear



1 on what the rule is. You're asking the court to say that  
2 the rule in Colliers - - - right - - - in Collier, where  
3 the owner's liability is determined solely on the basis of  
4 strict liability - - -

5 MR. SCHNEIDER: Um-hum.

6 JUDGE FAHEY: - - - and the vicious propensity  
7 rule, you're saying that that rule should not apply here,  
8 number one, because it's not an owner - - -

9 MR. SCHNEIDER: Yes.

10 JUDGE FAHEY: - - - and number two, that the  
11 normal Restatement rule of - - - of ordinary negligence  
12 should be used the way Judge Klein outlined it.

13 MR. SCHNEIDER: Yeah.

14 JUDGE FAHEY: I'm sorry, Judge Stein.

15 MR. SCHNEIDER: Yeah, it always has - - -

16 JUDGE FAHEY: Right. No, I - - -

17 MR. SCHNEIDER: - - - until - - -

18 JUDGE FAHEY: - - - no, I - - -

19 MR. SCHNEIDER: Yes.

20 JUDGE FAHEY: Is that what you're asking the  
21 court - - -

22 MR. SCHNEIDER: Yes.

23 JUDGE FAHEY: - - - to do?

24 MR. SCHNEIDER: Yes.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



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Counsel?

MS. AUMAND: Yes, thank you, Your Honor. May it please the court, my name is Judith Aumand; Burke, Scolamiero & Hurd, for defendant-respondent, in this matter.

Quite frankly, what plaintiff-appellant is advocating for is an unworkable standard. When you're addressing animals - - -

JUDGE RIVERA: Why isn't it workable to just say that the rule with respect to - - - to owners of animals is limited to those owners, it doesn't - - - it doesn't go beyond that category of potential defendants, and that traditional rules otherwise apply to everyone else?

MS. AUMAND: Because when you're talk - - -

JUDGE RIVERA: What - - - what's unworkable about that?

MS. AUMAND: Because when you're talking about the traditional rules of negligence for premises owners, it's a foreseeable risk. So it's the puddle on the floor of aisle 6 of the Price Chopper. Everyone can look at that puddle and agree that if somebody walks by that, they could - - -

JUDGE FEINMAN: So if - - - if my nephew brings his dog to my house, and I know that that dog is a snapper and a - - - you know, nips at the heels of - - - of little

1 children, I have no responsibility when somebody brings  
2 their kid in?

3 MS. AUMAND: No, because you've just described  
4 vicious propensity. You've just described a dog that is  
5 known to you to snap at children.

6 JUDGE FEINMAN: So - - - so your rule would be  
7 that even the reasonable - - - you can start taking away  
8 some of those facts from that hypothetical - - -

9 MS. AUMAND: Um-hum.

10 JUDGE FEINMAN: - - - so your rule would be that  
11 as part of negligence as the landowner, you have to know  
12 vicious - - - that there are vicious propensities?

13 MS. AUMAND: Respectfully, that's what the courts  
14 have held so far. And - - - and in terms of the cases of  
15 Claps and - - -

16 JUDGE RIVERA: I don't understand what's  
17 unworkable about where you were going. You haven't  
18 explained to me what's unworkable. It seems to me you  
19 wanted to argue it's because of this requirement of  
20 foreseeability.

21 Courts and juries make those decisions all the  
22 time. What's unworkable - - -

23 MS. AUMAND: Thank you.

24 JUDGE RIVERA: - - - what am I missing?

25 MS. AUMAND: Thank you for letting me come back



1 to this point.

2 Your Honor, just to your point, quickly, I'd  
3 refer you to the cases of Claps and Christian, that were  
4 decided by the Second Department in 2008 and 2006. And  
5 they're in our briefs as well.

6 And Your Honor, to come back to your point in  
7 terms of what's unworkable, I'd refer you to the words of  
8 your esteemed colleague, Justice Abdul-Salaam (sic), and  
9 her concurrence in Doerr, who explained when you've got a  
10 baseball, and you throw a baseball, you may not know  
11 exactly where it's going, but the laws of physics apply,  
12 and you can have an understanding of what is foreseeable of  
13 what's going to happen.

14 You cannot do that with a dog. You could line up  
15 - - -

16 JUDGE WILSON: But that sounds like - - - that  
17 sounds like a fact question, right? That is, is it  
18 reasonable for a vet who puts the dog through the procedure  
19 that Vanilla went through, to foresee that the dog might  
20 react in - - - in a way that would injure somebody? And  
21 would it be reasonable to have the dog restrained or to not  
22 have other people in the room when the dog is - - - those  
23 are fact questions.

24 MS. AUMAND: Well, first of all, I'd submit to  
25 you that the dog was properly restrained. But - - -



1 JUDGE WILSON: That's a fact question.

2 MS. AUMAND: - - - but other than that - - -

3 JUDGE WILSON: Right, that - - -

4 MS. AUMAND: - - - Your Honor, what I would say  
5 to this point as well is that you could have twenty  
6 different dogs go through the same procedure, and cannot  
7 say with any level of predictability or foreseeability, how  
8 each dog is going to respond.

9 JUDGE WILSON: Well, doesn't that - - -

10 JUDGE STEIN: Well, but that's not - - -

11 JUDGE WILSON: - - - sound exactly like what your  
12 expert ought to say at a trial? Because how do we know  
13 that what you just said is true?

14 MS. AUMAND: Well, I - - -

15 JUDGE FAHEY: You see, what your argument has  
16 done, I think, is from a jurisprudence point of view, is  
17 creating - - - has created a state of - - - of confusion.  
18 And a perfect example of the state of confusion I think  
19 that the court suffers from is *Hastings v. Sauve*, the loose  
20 - - - that's the loose cow in the road case.

21 MS. AUMAND: Certainly.

22 JUDGE FAHEY: You guys are familiar with it.

23 MS. AUMAND: Certainly.

24 JUDGE FAHEY: Usually I have to think of the fact  
25 pattern to remember the case. So this is a loose cow on



1 the road case. And that case, of course, cut back a little  
2 bit on the Bard rule and said that a suit for negligence  
3 was allowed when a farm animal has been allowed to stray  
4 from property where kept, because it's something that farm  
5 owner should know what they've got to do.

6 That's the same argument that - - - that - - -  
7 for ordinary negligence here. And - - - and so - - - and  
8 Judge Abdus-Salaam's concurrence was very thoughtful. And  
9 I know because I wrote the dissent in that case. And - - -  
10 and it was always challenging to disagree with Judge Abdus-  
11 Salaam.

12 But - - - but I did, because the confusion that's  
13 been created by the application of inconsistent rules  
14 creates a situation where neither the parties, the  
15 insurance carriers, the injured person, no one knows what  
16 exactly the rules are and when a specific fact pattern can  
17 result in a difference.

18 Now, this - - - this would be, I think, a minor  
19 change, not a sea-change, because it deals with a non-owner  
20 of an animal. But it - - - it does seem more rational than  
21 us carving out particular exceptions to the Bard rule, as  
22 we did in Hastings.

23 MS. AUMAND: So respectfully, Your Honor, I would  
24 disagree with you on this point and say that it is not a  
25 confusing standard, because it is one standard when it

1           pertains to domestic animals.

2                   JUDGE FAHEY: This is - - - this is the only  
3 state in the county that has such a rule. Is that fair?

4                   MS. AUMAND: I - - - New York has had a rich  
5 tradition of - - -

6                   JUDGE FAHEY: I do. I do know. And it is - - -  
7 it is the only state in the country that has such a  
8 Kafkaesque series of rules that govern liability for the  
9 acts of animals.

10                  JUDGE STEIN: Does - - - doesn't it also present  
11 some public policy problems? For example, if we just focus  
12 on this case and - - - and this veterinarian, with a - - -  
13 with a strict liability rule, what veterinarian is ever  
14 going to want to treat an animal that the veterinarian  
15 knows to have vicious propensities, if there's nothing that  
16 that veterinarian can do that is going to make them not  
17 responsible if the animal hurts somebody else?

18                   It - - - it - - - that - - - it doesn't make  
19 sense to me.

20                  MS. AUMAND: Well, respectfully, I would turn  
21 that question on its head. If instead, the court is going  
22 to apply negligence and a due care standard, then what - -  
23 - what veterinarian is going to treat any dog, because at  
24 any point, any dog, without warning, might bite or attack  
25 someone?



1 JUDGE STEIN: Well, how about keeping dogs in - -  
2 - dogs on leashes - - - on short leashes, or muzzled, or - -  
3 - - you know, there are any number of things that - - -  
4 that are pretty simple, I would think, for - - - for a  
5 veterinarian clinic to say these are the rules of our  
6 clinic. If you don't do this, then you - - - then you  
7 can't come in.

8 MS. AUMAND: So - - -

9 JUDGE WILSON: So let me give you - - - let me  
10 give you - - -

11 JUDGE RIVERA: Frankly, when I'm taking a dog to  
12 the vet, they sometimes have other exits where you can - -  
13 - or other entries/exits that you can take the animal  
14 through if, indeed, there is a concern or after an  
15 operation, not usually walking through the main area.  
16 You're walking through some other area with the pet or  
17 there's some down time.

18 So the - - - veterinary medicine is actually much  
19 more advanced than I think you're suggesting, knowing how  
20 to deal with the kinds of concerns about how to not only  
21 protect everyone who's in the space, but the animals  
22 themselves.

23 And as Judge Wilson has said, those raise perhaps  
24 questions of fact.

25 MS. AUMAND: But again, I come back to the



1 problem here. In terms of dealing with dogs specifically,  
2 it's the issue of foreseeability. And - - - and that, I  
3 think, really is the issue here, because if you - - - if  
4 you have these rules in place, as - - - as was in place in  
5 this case, and you have an attack by a dog, you would hold  
6 this veterinary - - - veterinarian potentially liable, and  
7 let the dog owner, who said this - - - this is an anomaly;  
8 this - - -

9 JUDGE FAHEY: But no - - - no, you wouldn't.

10 MS. AUMAND: - - - never happened previously - -  
11 -

12 JUDGE FAHEY: What you would - - - what you would  
13 do - - -

14 MS. AUMAND: - - - get away with it.

15 JUDGE FAHEY: That - - - that's incorrect. What  
16 would happen is, is you would say: did the veterinarian  
17 act as a reasonably responsible veterinarian in its  
18 procedures that it used, just - - - just like it was  
19 outlined by Judge Stein.

20 What's going to happen is, everybody - - - you've  
21 got a lot of dog owners up here. All of our dogs are going  
22 to - - - sure, a lot of us. And - - - and what's going to  
23 happen is when you take your vet - - - your dog in for  
24 surgery, when they come out of surgery, they're all going  
25 to have some kind of a muzzle on, when they're brought out,



1 and that's going to be the standard procedure.

2 That seems like a perfectly reasonable response.

3 MS. AUMAND: So that - - -

4 JUDGE FAHEY: And if - - - so if the vet takes  
5 those reasonable reactions - - - reasonable actions, then  
6 he's not in a situation where he's subject to liability.

7 MS. AUMAND: So then if I may please, switch,  
8 then in terms of part of where this appeal is and part of  
9 what the motion was, that even if this court is to apply a  
10 negligence standard to this fact-specific pattern, we do  
11 not have someone who failed to exercise reasonable care and  
12 reasonable duty in this matter.

13 JUDGE STEIN: Well, why isn't there a question of  
14 fact about that?

15 MS. AUMAND: Because the only information that  
16 plaintiff has - - - appellant has offered in opposition is  
17 an expert affidavit that's based on a singular affidavit  
18 and case notes. No - - - the affidavit from the plaintiff  
19 herself is self-serving. He does not look at any of the  
20 ten-plus depositions that were done in this case.

21 And the case notes are devoid of any reference of  
22 any aggressive behavior of this dog whatsoever. Instead -  
23 - -

24 JUDGE FAHEY: So what - - - so what you're saying  
25 is there wasn't - - - there wasn't notice?



1 MS. AUMAND: Correct.

2 JUDGE FAHEY: Right.

3 MS. AUMAND: Even if this court is going to - - -

4 JUDGE FAHEY: Right, and without notice there's  
5 not foreseeability, and so there wasn't a duty that  
6 existed.

7 MS. AUMAND: I - - -

8 JUDGE FAHEY: We understand that argument. But  
9 that doesn't mitigate against creation of an ordinary  
10 negligence rule. What it means is that you just apply  
11 those rules just as you outlined them.

12 MS. AUMAND: So - - -

13 JUDGE FAHEY: And you don't need to say - - - we  
14 don't need to go to strict liability to apply those  
15 ordinary negligence rules.

16 MS. AUMAND: I believe the court understands my  
17 position in terms of why strict liabilities and vicious  
18 propensity should continue as to dog owners and non-dog  
19 owners. So I will table that and - - - and address in  
20 terms of the negligence standard.

21 If that is the direction of this court, it is the  
22 wrong case to do it for, because at the end of the day,  
23 it's still the defendant-respondent who prevails in this  
24 particular case, because there is no evidence that  
25 plaintiff has submitted that there was any deviation from a



1 standard, that there was any foreseeable risk, that there  
2 was anything that the defendant did to put itself in a  
3 position of liability, even under a negligence standard.

4 So should this court decide that it does want to  
5 take up the issue of drawing this delineation between pet  
6 owners and non-pet owners, I submit to you, this is not the  
7 case to do it.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MS. AUMAND: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel.

11 MR. SCHNEIDER: Yeah. And I respectfully  
12 disagree. I think this is the perfect case. We have an  
13 affidavit - - -

14 JUDGE GARCIA: Counsel, I'm sorry, and I - - -  
15 I'll let you do your - - - your marshalling of proof. But  
16 to get to that - - - the type of case this is, and to go  
17 back to Judge Feinman's hypothetical, if we adopt this rule  
18 in this case, there's no dog owner here, so we would be  
19 adopting a homeowner or a vet rule.

20 MR. SCHNEIDER: Um-hum.

21 JUDGE GARCIA: And in Judge Feinman's  
22 hypothetical, a neighbor comes over with a dog. The dog  
23 owner and the homeowner don't know enough to get to a  
24 vicious propensity - - -

25 MR. SCHNEIDER: Um-hum.



1 JUDGE GARCIA: - - - strict liability. But it's  
2 close. The dog owner, under this new rule, would be off,  
3 because it's strict or nothing. But the homeowner, who  
4 took this dog in on a visit - - -

5 MR. SCHNEIDER: Um-hum.

6 JUDGE GARCIA: - - - would have to show they took  
7 reasonable steps, otherwise they're liable under a  
8 negligence theory. What's the logic in that?

9 MR. SCHNEIDER: That gets back to Strunk again,  
10 that the - - -

11 JUDGE GARCIA: But that was an out-of-possession  
12 landlord, if I'm remembering.

13 MR. SCHNEIDER: But it's still similar that first  
14 you have to show the foreseeability of a risk. And so if  
15 the prop - - -

16 JUDGE GARCIA: But I know those things that  
17 almost make this dog vicious, but not enough to give the  
18 dog owner strict liability. So - - -

19 MR. SCHNEIDER: If it's - - -

20 JUDGE GARCIA: - - - the dog owner, see you; I'm  
21 gone. Homeowner, what steps did I take? Did I try to  
22 muzzle the dog? Did I have it in a pen? Did I not let  
23 people come over? What's fair about that scheme?

24 MR. SCHNEIDER: If there's not enough for strict  
25 liability against the dog owner, I don't think there's



1 enough for negligence against the property owner.

2 JUDGE GARCIA: How - - - but isn't that, as we've  
3 been saying, a question of fact?

4 MR. SCHNEIDER: Right.

5 JUDGE GARCIA: And then the owner of the home  
6 will have to come in - - -

7 MR. SCHNEIDER: Um-hum.

8 JUDGE GARCIA: - - - and defend against what I'm  
9 sure will be your list - - - like your list of things you  
10 didn't do.

11 JUDGE STEIN: But wouldn't there be that same  
12 question of fact as far as the dog owner was concerned,  
13 then?

14 MR. SCHNEIDER: I'm sorry, I didn't - - -

15 JUDGE STEIN: Wouldn't there be the same question  
16 of fact as - - -

17 MR. SCHNEIDER: Sure.

18 JUDGE STEIN: - - - as to the vicious propensity  
19 - - -

20 MR. SCHNEIDER: Yes, yes.

21 JUDGE STEIN: - - - as far as the dog owner?

22 So if there's no question of fact there, then  
23 there should be no question of fact in - - -

24 JUDGE GARCIA: That's not correct, in my  
25 hypothetical. In my hypothetical, you know this dog is



1 somewhat dangerous. Not vicious, not under our vicious  
2 propensity standard, but you have reason to know this might  
3 happen.

4 MR. SCHNEIDER: I - - - I think that then - - -

5 JUDGE GARCIA: It could never - - - that - - -  
6 then it would never be possible to not meet - - - you'd  
7 always need to show vicious propensity for a landowner to  
8 be liable under your rule.

9 MR. SCHNEIDER: I - - - I don't see that  
10 happening where a dog does not meet the vicious propensity  
11 test for the owner, but then could rise to the level of  
12 foreseeability, because foreseeability is part of the  
13 strict liability test.

14 JUDGE GARCIA: So you would need both a vicious  
15 propensity and then you didn't take the reasonable steps to  
16 - - -

17 MR. SCHNEIDER: Yeah.

18 JUDGE GARCIA: - - - address it?

19 MR. SCHNEIDER: Yeah, you know, let - - - let's  
20 say - - -

21 JUDGE GARCIA: But that, I thought, was not your  
22 rule before.

23 JUDGE FEINMAN: Yeah, so I'm a little confused  
24 now, too, because you're not - - - is whether or not the  
25 dog has vicious propensity part of the test for



1 establishing notice to the homeowner or premises owner - -  
2 -

3 MR. SCHNEIDER: Yeah.

4 JUDGE FEINMAN: - - - or is it merely just a  
5 factor to be considered in establishing notice?

6 MR. SCHNEIDER: Well, I could see another  
7 situation. Let's say your dog - - - your female dog is in  
8 heat, and there's a male dog just hanging outside your  
9 house for a couple of days, and you do nothing about it.  
10 You don't know this dog. It came from across town and is  
11 sitting there at your steps leading to your porch.

12 And then for - - - a little kid walks up the  
13 steps and the dog bites him. I think that could be  
14 foreseeability, if you do nothing - - - if you see that  
15 your dog's in heat, and there's another dog there panting  
16 and being eager, and it bites somebody.

17 But as far - - -

18 JUDGE GARCIA: But a homeowner, that would be  
19 liability, but not under our rule now, for the dog owner?

20 MR. SCHNEIDER: Right. That's right. So I  
21 think, you know, it's - - - it's like any negligence.  
22 You're going to have experts - - - what's foreseeable, what  
23 isn't. You're going to have fact patterns - - -

24 JUDGE RIVERA: So - - - so then is - - - is your  
25 point that really the - - - the concern implied or



1 expressed in - - - in Judge Garcia's questioning is  
2 inherent to the tort regime that we have.

3 MR. SCHNEIDER: Yeah.

4 JUDGE RIVERA: That is to say - - -

5 MR. SCHNEIDER: Um-hum.

6 JUDGE RIVERA: - - - that when an injury occurs,  
7 there may be the kinds of cases where society has already  
8 determined, the courts have already determined, tha,  
9 indeed, someone or some company or more than one, will be  
10 strictly liable for that injury, but others may only be  
11 liable if they fit within the ordinary negligence rules.

12 MR. SCHNEIDER: Yes.

13 JUDGE RIVERA: That that - - - that that is  
14 inherent in - - - in the tort system that we have adopted  
15 it - - -

16 MR. SCHNEIDER: Yes.

17 JUDGE RIVERA: - - - in New York - - -

18 MR. SCHNEIDER: Yes.

19 JUDGE RIVERA: - - - through the country.

20 MR. SCHNEIDER: Yes, yes.

21 JUDGE RIVERA: And so the question is here - - -

22 MR. SCHNEIDER: Um-hum.

23 JUDGE RIVERA: - - - whether or not - - - as I  
24 see it, the question is whether or not you have a premises  
25 owner liability, which we understand - - - we know what it



1 is; it's well-established. And then we have this rule  
2 regarding the liability of a dog - - - a pet owner, of an  
3 animal owner, and whether or not one cedes to the other.

4 MR. SCHNEIDER: Yeah.

5 JUDGE RIVERA: What makes sense in the case.

6 MR. SCHNEIDER: Yes.

7 JUDGE FAHEY: Yeah, the first - - - the first  
8 step is either was there actual or constructive notice.  
9 I'm sorry, Judge.

10 And it seems to me that - - - that that question  
11 is the beginning of the ordinary negligence regime. And  
12 that's different than a vicious propensity rule.

13 MR. SCHNEIDER: Well, and notice is of an  
14 existent - - - you know, the puddle on the floor - - -

15 JUDGE FAHEY: No, I understand what notice is.

16 MR. SCHNEIDER: - - - under the watermelons. But  
17 this is whether it's foreseeable to a vet - - - to a  
18 veterinarian that a dog not - - - that didn't have  
19 anesthesia, that had to be held down, that had a loose  
20 leash, and came out next to a cat, and was walking around  
21 panting and acting aggressive, whether that's foreseeable  
22 it could cause damage. And I would - - - I say yes.

23 But also, more important is Dr. Dodman our - - -  
24 our esteemed expert, explained why that's dangerous and why  
25 veterinarians shouldn't do it.



1                   And in fact, if - - - if you do decide that  
2 negligence applies, I think that you should find that  
3 summary judgment should be granted to my client on  
4 negligence.

5                   I had a very well-thought-out affidavit based on  
6 the uncontested facts. Whether it's based on an affidavit  
7 or depositions, it's uncontested what happened. We have  
8 the veterinarian's notes that the dog had a nail pulled out  
9 without anesthesia. We have in the veterinarian's own  
10 deposition, they didn't snug down the collar. And it's  
11 uncontested that the dog was walking around in an agitated  
12 state before it escaped by slipping its collar.

13                   So I think that - - - and they opposed it with  
14 Dr. Palmer saying he thought it was reasonable. That does  
15 not meet the standard for an affidavit to defeat summary  
16 judgment. So I'd ask this Court to find that Palmer is - -  
17 -

18                   JUDGE RIVERA: But well, let's say - - -

19                   MR. SCHNEIDER: - - - is liable.

20                   JUDGE RIVERA: - - - we agree with you on the  
21 standard, why not just send it back to make a determination  
22 with the correct understanding of the proper standard on  
23 the summary judgment, for - - - for plaintiff?

24                   MR. SCHNEIDER: I'm sorry, I didn't catch that,  
25 Judge.



1 JUDGE RIVERA: Okay. Let's say we agree with you  
2 on the standard - - -

3 MR. SCHNEIDER: Yeah.

4 JUDGE RIVERA: - - - on the legal standard.  
5 Ordinary rules of negligence apply - - -

6 MR. SCHNEIDER: Um-hum. Um-hum.

7 JUDGE RIVERA: - - - under these facts. Why not  
8 send it back and let the court then decide how to rule on a  
9 summary judgment for plaintiff, given the correct legal  
10 standard, as the court articulates it?

11 MR. SCHNEIDER: Well, because once you have that  
12 standard, as a matter of law, we have established  
13 foreseeability and they didn't use due care. What - - -  
14 what's there to decide?

15 There is no expert, no - - - nobody besides Dr.  
16 Palmer said no, we didn't do anything wrong. That - - -  
17 that's the extent of his affidavit.

18 And I also wanted to address the issue of  
19 malpractice versus negligence, that Judge Ellis found that  
20 the ineffective anesthesia and the post-surgery procedure  
21 sounded in veterinary malpractice. And that's just wrong,  
22 because malpractice is the - - - you malpractice on a  
23 patient, not on a third party.

24 And in - - - in our complaint, we stated all the  
25 facts that give rise to negligence, and we brought it in



1 negligence. So it's unreasonable to say that the defendant  
2 was surprised that we wanted to proceed on negligence. If  
3 you look at the complaint, that was stated in there.

4 And one last thing. Just on apportionment, I  
5 think there's a nondelegable duty. The - - - the  
6 veterinarian cannot delegate to his human clients the right  
7 to restrain a dog in this situation.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. SCHNEIDER: Thank you.

10 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Marsha Hewitt v. Palmer Veterinary Clinic, PC, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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