To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this order,
with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JHERI CIACCIO,

Plaintiff,

- against -

MAMARONECK VETERINARY HOSPITAL, P.C. and
RAPHAEL Z. GILBERT, DVM,

Defendants.

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DECISION AND ORDER

INDEX NO. 63470/2016
Sequence No. 3

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 74 through 94 were read in connection with defendants' motion for summary judgment:

This is an action for injuries from a dog bite. Plaintiff left her dog "Max" with defendants for veterinary services, including grooming. When plaintiff returned later to pick up Max, an employee of defendants returned the wrong dog ("Biscuit") to plaintiff. Apparently, Biscuit and Max were the same color and breed. Plaintiff did not notice that she was handed the wrong dog, since Max would look different after a grooming, and the dog was handed to her backwards in a blanket. As plaintiff was outside, Biscuit bit plaintiff's hand and ran away. After chasing the dog through the neighborhood and bringing him back to defendants, she realized that she was given the wrong dog. Plaintiff underwent hand surgery to repair the injuries caused by the dog bite. Plaintiff commenced this action seeking damages for her injuries resulting from the dog bite.

Now, upon the foregoing papers, the motion is decided as follows:

As noted by the Second Department, New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal (Coffey v McAleer, 112 AD3d 907 [2d Dept 2013]; Egan v Hom, 74 AD3d 1133, 1134; Roche v Bryant, 81 AD3d 707, 708 [2d Dept 2011]). However, once the plaintiff demonstrates vicious propensities of the dog, recovery is permitted on a theory of strict liability. The standard to recover upon a theory of strict liability in tort for a dog bite or attack, is that a plaintiff must demonstrate that the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities (Henry v Higgins, 117 AD3d 796 [2d Dept 2014]; (Roche v Bryant, 81 AD3d 707, 708 [2d Dept 2011]). An animal's propensity to cause injury may be proven by something other than prior comparably vicious acts. As a result, "a common shorthand name for our traditional rule—the "one-bite rule"—is a misnomer" (Bard v Jahnke, 6 NY3d 592, 599 [2006]). "Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained [the fact that the dog was kept as a guard dog], and a proclivity to act in a way that puts others at risk of harm" (Henry v Higgins, 117 AD3d 796 [2d Dept 2014]).

In support of their motion, defendants argue that plaintiff will be unable to come forward with any admissible evidence establishing that Biscuit had any vicious propensities or that defendants had knowledge that "Biscuit" had known aggressive behavior. Defendant Dr. Gilbert is the owner of Mamaroneck Veterinary Hospital. Dr. Gilbert is also the veterinarian that examined "Max"on the accident date, Max arrived to the facility on December 22, 2014. Dr. Gilbert argues that he was precluded by both the Education Law and the Board of Regents rules that govern his practice of veterinary medicine, from answering any questions at his deposition about another client in the absence of that client's written consent or a court order. His refusal to answer questions at the

deposition was merely his complying with the law and protecting the rights of a non-party.

In opposition, plaintiff urges this court to analyze this matter as not in the traditional sense of a typical dog bite case, since the alleged negligible party is a commercial enterprise, and is not against a protected class of people such as pet owners. Plaintiff also points to Hastings v Sauve, 21 NY3d 122 [2013], where the Court of Appeals carved out an exception from the vicious propensity rule where the owner was negligent. That case involved a domesticated farm animals wandering off the property, allowing an ordinary claim of true negligence to support liability where a domesticated farm animal was negligently released into the public causing harm.

Plaintiff points out that defendant testified that following the grooming process, his staff failed to look at the name tag on the Shih Tzu prior to placing the dog into plaintiff's arms. Defendants in this matter, as the commercial defendants were not members of the protected class of pet owner, but they negligently released Biscuit from their custody to the wrong person. The commercial defendant's affirmative conduct of negligently releasing and ceding control over a strange dog directly into the arms of plaintiff caused or triggered that dog's reflexive territorial instincts and aggression.

Plaintiff also offers the expert affidavit of Robert Brandau, CAO, who is an Canine Behavioral Expert, a court qualified expert on Canine Behavior and New Jersey State Animal Control Officer. He attests that he has personally trained and examined thousands of dogs, and is very familiar, in particular, with the Shih Tzu breed. Shih Tzus are typically timid and shy with strangers. Because this breed of dog (considered a toy dog) tend to develop extreme separation anxiety from being away from their owners, they do not tolerate handling by strangers very well. Biscuit displayed confrontational behavior and aggression while trying to escape capture. Dogs that display these type of aggression usually have a past history of biting and attacking and are prone to

becoming dangerous if placed in a fearful situation that stresses the dog, like occurred here. In conclusion, the expert opines that defendant's failure to identify the dog correctly before handling it to plaintiff is a direct cause of the injury sustained to plaintiff's hand. Moreover, plaintiff argues that if this were a bailment situation, liability for returning the wrong chattel would be obvious. The dog was being "dognapped" by a stranger and fought back to free itself through aggression.

Such analysis is not necessary here, as defendants have not met their initial burden on summary judgment of establishing that they did not know of any vicious propensities on the part of the subject dog (owner was not liable for injuries suffered by eight-year old customer at owner's toy store who was bitten by owner's dog, absent evidence that owner had any knowledge of dog's vicious propensities (Bernstein ex rel. Bernstein v Penny Whistle Toys, Inc., 10 NY3d 787 [2008]).

Strict liability for damages arising from the vicious propensities and vicious acts of a dog can be established where the defendant "owned, possessed, harbored, or exercised dominion and control over the dog" (Powell v Wohlleben, 256 AD2d 396, 396 [2d Dept 1998]).

To establish their prima facie entitlement to judgment dismissing the strict liability cause of action, defendants were required to demonstrate, as a matter of law, (1) that they did not harbor, or exercise dominion and control over the dogs, and (2) that they were not aware, nor should they have been aware, of the vicious propensities of the dogs (Matthew H. v Cty. of Nassau, 131 AD3d 135, 144, [2d Dept 2015]). "[I]t is not material in actions of this character whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he [or she] keeps the dog, and...harboring a dog about one's premises, or allowing it to be or resort there, is a sufficient keeping to support the action" (Matthew H. v Cty. of Nassau, 131 AD3d 135, 145 [2d Dept 2015]).

Taking into consideration the parties' arguments, defendants failed to eliminate all triable issues of fact as to whether they knew or should have known of the vicious propensities of the dog

(Matthew H. v Cty. of Nassau, 131 AD3d 135, 148 [2d Dept 2015]). From the evidence before this court, the evidence submitted raises questions as to whether defendants were not aware, nor should they have been aware, that this dog had ever bitten anyone or exhibited any aggressive behavior Notably, defendant' veterinarian, Dr. Gilbert refused, on the advice of counsel, to answer any questions concerning his knowledge of Biscuit's propensity for violence or friskiness.

Finally, this court joins the chorus line of other jurists (most notably Court of Appeals Judges R.S. Smith, Rosenblatt, and G.B. Smith) in voicing frustration and displeasure at the fundamental unfairness of ignoring blatant negligence, which is overwhelming in this case (see Bard v Jahnke, 6 NY3d 592, 602. In any event, this case bears more in common with the exception in Hastings v. Suave than the rule in Bard v Jahnke.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied; and it is further

ORDERED, that the parties are directed to appear at a conference on 3/19, 2019 at 9:15 a.m. in Courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601.

Any other relief requested and not decided herein is denied. The foregoing shall constitute the Decision and Order of this Court.

Dated: White Plains, New York
February 25, 2019

HON. CHARLES D. WOOD, J.S.C.

To: All Parties by NYSCEF