DeSena & Sweeney, Esqs.
1383 Veterans Memorial Highway
Hauppauge, NY 11788
(631) 360-7333

Case Review /Legal Alert ***June 2009***

Petrone[1] (*violation of a leash law giving grounds for a viable action for injuries result from a domestic animal*) is overturned by the Court of Appeals

The Court of Appeals issued its decision reversing the Second Department decision that allowed a dog inflicted injury case to proceed because of an alleged violation of a local leash law or ordinance and the dog's behavior even though the dog has not displayed any prior vicious propensity. (Petrone v Fernandez, 53 AD 3rd 221, 222 (2d Dept , 2008)). Prior to the 2006 decision of the Court of Appeals in *Bard v Jahnke* (6 NY3d 592 [2006]), the law was well-settled in this Judicial Department that a dog owner could be held liable for negligence, including leash-law violations, that proximately caused a plaintiff's injuries, even in the absence of evidence that{**53 AD3d at 225} the dog's owner had knowledge of the animal's vicious propensities (*see Scotto v Marra*, 23 AD3d 543, 544 [2005]; *Faller v Schwartz*, 303 AD2d 624, 625 [2003]; *McCullough v Maurer*, 268 AD2d 569, 570 [2000]; *Lisi v MRP Holdings*, 238 AD2d 316, 317 [1997]; *Silva v Micelli*, 178 AD2d 521 [1991]). Strict liability for an animal's vicious propensities, and common-law negligence proximately causing injuries, were recognized as two separate and independent theories of liability (*see McCullough v Maurer*, 268

[1] 2009 NY Slip Op 4694; 2009 N.Y. LEXIS 2035 (June 9, 2009)

AD2d at 570). In *Bard*[2], the Court of Appeals reiterated the well-worn rule that owners of domestic animals could be held strictly liable for harm caused by an animal, where it is established that the owner knew or should have known of the animal's vicious propensities and harm is caused as a result of those propensities (*see Bard*, 6 NY3d at 596; *see also Collier v Zambito*, 1 NY3d 444, 446 [2004]).

The Court of Appeals reiterated its prior opinion of Collier v Zambito, 1 NY3rd 444 (2004) by stating:

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[2] The dissenting opinion in *Bard* exposed a long-standing and significant difference that had [*4]existed between the two downstate Judicial Departments on the one hand, and the two upstate Judicial Departments on the other, concerning the question of whether owners of animals could be held liable for injuries under common-law negligence principles in the absence of evidence of the animal's prior vicious propensities. Prior to the Court of Appeals' pronouncement in *Bard*, the First and Second Departments traditionally recognized common-law liability independent of an animal's vicious propensities (*see Evans v Craig*, 25 AD3d 582 [2d Dept 2006]; *Clifford v Turkel*, 7 AD3d 251 [1st Dept 2004]; *Espejo v Reuven Holding*, 308 AD2d 373 [1st Dept 2003]; *Goldberg v LoRusso*, 288 AD2d 257, 259 [2d Dept 2001]; *Colarusso v Dunne*, 286 AD2d 37, 39 [2d Dept 2001]; *St. Germain v Dutchess County Agric. Socy*., 274 AD2d 146, 150 [2d Dept 2000]; *Schwartz v Armand Erpf Estate*, 255 AD2d 35, 38 [1st Dept 1999]). Some of the cases that had recognized common-law liability involved property owners who arguably breached their duty of care in failing to keep their premises safe for persons whose presence was reasonably foreseeable, by allowing animal-related dangers to exist, albeit without vicious propensities on the part of the animals upon the property (*see e.g. Evans v Craig*, 25 AD3d at 582-583; *Espejo v Reuven Holding*, 308 AD2d at 373-374; *Goldberg v LoRusso*, 288 AD2d at 259; *St. Germain v Dutchess County Agric. Socy*., 274 AD2d at 149-150; *Schwartz v Armand Erpf Estate*, 255 AD2d at 38-40). Other cases involved the animal owner's violation of a specific leash ordinance as a partial predicate for liability (*see e.g. Arbanil v Flannery*, 31 AD3d 588, 589 [2006]; *Scotto v Marra*, 23 AD3d at 544; *Faller v Schwartz*, 303 AD2d at 624-625; *McCullough v Maurer*, 268 AD2d at 570), as the violation of a municipal regulation or ordinance is some evidence of negligence that may be considered by the trier of fact (*see Bauer{**53 AD3d at 227} v Female Academy of Sacred Heart*, 97 NY2d 445, 453 [2002]; *Elliott v City of New York*, 95 NY2d 730 [2001]; *Watral & Sons, Inc. v OC Riverhead 58, LLC*, 34 AD3d 560, 567 [2006]).

In contrast, the Third and Fourth Departments generally have not recognized liability for animal-induced injuries absent evidence of the animal's vicious propensities (*see Morse v Colombo*, 31 AD3d 916, 917 [3d Dept 2006]; *Shaw v Burgess*, 303 AD2d 857 [3d Dept 2003]; *Roupp v Conrad*, 287 AD2d 937, 938 [3d Dept 2001]; *Plennert v Abel*, 269 AD2d 796 [4th Dept 2000]; *Smith v Farner*, 229 AD2d 1017 [4th Dept 1996]). In the view of those Courts, liability of the owner, if any, is derived not from the manner of keeping or confining the animal, but from keeping the animal despite the owner having knowledge of the animal's vicious propensities (*see Provorse v Curtis*, 288 AD2d 832 [2001]; *Fazio v Martin*, 227 AD2d 809, 810 [1996]; *Lynch v Nacewicz*, 126 AD2d 708, 709 [1987]). In other words, an animal owner's liability may not, by definition of the Third and Fourth Departments, be divorced from the issue of vicious propensities, as there is no recognition of the common-law duty of property owners maintaining domestic animals upon their properties akin to the general duties of property owners discussed in *Basso v Miller* (40 NY2d 233 [1976]). While one reported case from the Fourth Department, *Amado v Estrich* (182 AD2d 1109 [1992]), held that a leash-law violation would constitute evidence of negligence, the Court later held that a leash-law violation, standing alone, is insufficient for proving vicious propensities (*see Elmore v Wukovits*, 288 AD2d 875 [2001]).

> "[W]hen harm is caused by a domestic animal its owner's liability is determined solely by application of the rule articulated in Collier" (emphasis added {in the court's decision])—i.e. the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animals vicious propensities… Just last year we unanimously affirmed the Appellate Division decision rejecting the notion that a negligence cause of action survives Collier and Bard (see, Bernstein v Penny Whistle Toys Inc., 10 NY 3d 787 (2008). Here, defendant's violation of the local leash law is irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability after Collier and Bard."

In recent decision, the Second Department held in Palumbo v Nikirk, 2009 NY Slip Op 1454; 59 A.D.3d 691; 874 N.Y.S.2d 222 (2009), the Court held the findings of a "Beware of Dog sign, the dog's breed and the fact that the dog had to be on a leash were all insufficient to show that the dog had vicious propensities or that the dog exhibited any fierce or hostile tendencies, which the defendant knew of should have known.

At this stage, a case involving an injury allegedly caused by a dog would be viable only where a vicious propensity can be shown. It is important to note that throughout the decision in both Petrone , Bard and Bernstein the Court reminds us that a finding of vicious propensity equates to strict liability.