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Court Clarifies Vicious Propensities in Dog Behaviors

Whether in upstate New York or downtown Manhattan, dog bite litigation remains omnipresent. In New York state, it is well settled that the owner of a domesticated animal will only be held strictly liable for personal injuries caused by that animal where a plaintiff can demonstrate that the owner knew or should have known of the animal's vicious propensities.[1]

Despite the longstanding reliance on this general rule, New York's appellate divisions have, absent a prior biting incident, been unable to settle on a uniform criteria for determining what constitutes notice of "vicious propensities." The absence of a stronger guidance has created numerous vicious propensity standards weighing different factors.

The recent Court of Appeals decision of *Collier v. Zambito*, 2004 WL 303116, has defined certain behaviors that should be considered by lower courts in determining whether a dog has previously displayed vicious propensities. *Collier* should provide guidance in these fact specific and discretionary matters. However, the criteria set forth by the Court is illustrative, rather than comprehensive and complete. We believe the Court's decision not to create an all-encompassing list of factors will perpetuate further litigation, rather than limit it.

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Plaintiff must set forth specific evidence showing that defendant owner had known or should have known of the threat posed by her dog.

Background

In *Collier*, the 12-year-old plaintiff was bitten by defendant Zambito's dog while he was an overnight guest at Zambito's home. The beagle-collie-rottweiler breed named Cecil was usually confined in the defendant's kitchen, behind a gate, and would bark at guests but not act in a threatening manner.

As plaintiff emerged from the bathroom, he was told to have Cecil smell him while the dog was restrained by Ms. Zambito. As plaintiff approached, without provocation, the dog lunged at him and bit his face. Apparently, the dog had not bitten anyone before nor served as a guard dog. Plaintiff testified that although the dog was "wild," he also stated that the dog was generally "friendly."

Based on these facts, the Supreme Court of Cayuga County denied both defendant's motion for summary judgment and plaintiff's cross-motion for the same relief, finding an issue of fact regarding vicious propensities because the defendant's restricted Cecil to their kitchen.

The Appellate Division, Fourth Department, with two justices dissenting, reversed, concluding that the defendants were without notice of Cecil's dangerous propensity.[2]

The Court of Appeals sustained the Fourth Department's holding.

By way of background, *Collier* provides that, "[v]icious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation."

Obviously, such a broad definition leaves significant room for interpre-

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tation. In situations where a dog has previously bitten someone, an affirmative finding of vicious propensities can be easily made. Absent a previous bite, the determination of whether an owner had notice of vicious propensities is less certain. However, it has long been settled that dog owners are not entitled to "one free bite" and strict liability can be imposed absent a prior bite.

The *Collier* Court concluded that where no prior attack has occurred, vicious propensities may be inferred through presentation of evidence.

Four Factors

The Court specifically looked at four certain factors that could create the inference: (1) If the dog was "known to growl, snap or bare its teeth"; (2) If the dog was restrained, how it was restrained, and the reason for the restraint; (3) If it was a guard dog, or; (4) If the dog "reflects a proclivity to act in a way that puts others at risk of harm."

The Court limited these provisions by stating that the chaining or barking of a dog alone is insufficient to establish the necessary propensity. Also, the court stated that "barking and running around — are consistent with normal canine behavior. Barking and running around are what dogs do."

In sum, the Court found that Cecil's behavior did not furnish the defendants with notice of his vicious propensities.

Based on this criteria, plaintiff must set forth specific evidence showing that defendant owner had known or should have known of the threat posed by her dog. Should such evidence be circumstantial, as with the dog being restrained or barking, additional evidence is required.

In *Collier*, plaintiff was unable to meet this evidentiary threshold. Apparently, Cecil had not previously displayed any threatening behavior and he was not a guard dog. Additionally, while the dog was restrained, it was not because the owners feared he would injure their guests, merely that he would bark at guests. Therefore, plaintiff could not establish liability under these categories.

Under the final catchall provision, the Court found that Cecil's wild and energetic behavior was insufficient to provide defendants with notice of his dangerousness.

The Dissent

A vigorous dissent was written by Judge George Bundy Smith, who argued that plaintiff should be required to meet a lower evidentiary standard. Judge Smith asserted that many instances of growling and barking, even in a playful context, may reveal vicious propensities.[3]

Judge Smith also argues that certain factors were omitted by the majority opinion, which could have been considered, including: (1) the nature and severity of the attack; (2) that a stronger inference of dangerousness should be derived from the defendants' restraint of the dog in the presence of guests, and; (3) the victim's age, as "[w]hen a child is involved, a dog's potential danger increases and an owner needs to be more careful."

Judge Smith's desire to impose a greater duty upon dog owners in the presence of children is supported by decisions in both the First and Second departments.[4] The application of negligence principles to dog bite cases began when landlords were held liable for failing to exercise reasonable care in preventing dog attacks.[5]

Indicative of this trend is *Collarusso v. Dunne*, 732 NYS2d 424, 426 (2001), where the Appellate Division, Second Department, found that a daycare provider should be held to a heighten standard of care when the provider's dog, which had not previously displayed any vicious propensities, attacked an infant plaintiff. Despite this support for a lowered standard in dog bite cases, many courts still oppose the weakening of the vicious propensity doctrine.

Alternatively, other decisions have flatly rejected the imposition of a lowered standard in dog bite cases, such as in *Shaw v. Burgess*, 756 NYS2d 362 (2003), where the Third Department stated that, "[a]lthough the First and Second Departments permit the recovery on broader theories of negligence involving enhanced duties on the part of property owners, this Court has consistently held that absent a showing of vicious propensities, a plaintiff may not recover for injuries sustained in an attack by a dog."

Although not directly addressed by the majority in *Collier*, it is obvious that there is substantial disagreement between the appellate divisions regarding the application of a negligence standard to dog bite cases. Clearly, support for Judge Smith's negligence proposition is limited.

When compared with the majority opinion, the dissent seeks to both lower the required evidentiary threshold for demonstrating dangerousness and expand the variety of evidence, which could be used to show vicious propensities. In further support of this contention, Judge Smith, in a footnote, cited to several states that have eliminated the vicious propensity standard and adopted a

strict liability approach.[6]

While the dissent did go as far as to advocate that New York move to the minority strict liability standard, Judge Smith's opinion leans more towards that approach.

Recent Developments

While *Collier* provides a general framework for assessing vicious propensities, the decision did not include a discussion of every factor weighed by the appellate divisions in determining vicious propensities. The nature of the attack and the breed of the dog are other prominent factors the appellate divisions have relied on in the vicious propensity analysis.

In *Collier*, the Court states that plaintiff was bitten on the face, but unlike the dissent, the majority does not utilize this information to infer vicious propensities. However, certain appellate departments have considered the severity of the dog's attack and of plaintiff's wounds in their analysis. It is unclear if the majority's failure to mention attack severity permits further consideration of this factor.

Despite this omission, the nature of the attack and bite severity are frequently considered throughout New York in assessing an owner's notice of vicious propensities.[7]

Indicative of this principle is *Wilson v. Livingston*, 762 NYS2d 408, 410 (2001), a Second Department decision that held, "[t]here was sufficient evidence in the record for the jury to find that Livingston knew or should have known of the dog's vicious propensities based on the nature of the attack, which was 'plainly unprovoked and quite severe.' "

Despite the frequent utilization of this factor, contrary opinions exist.

This becomes obvious when viewing the decision in *Sers v. Manasia*, 720 NYS2d 192 (2001),[8] also a Second Department decision, which held that "[t]he nature and severity of the attack does not demonstrate knowledge of the dog's alleged vicious propensities."

Despite this conflict, both decisions are continually relied upon. Clearly, should the *Collier* decision permit further consideration of bite severity, such polarized differences must be resolved by the Court of Appeals.

Another controversial area of dog bite litigation not addressed in the *Collier* decision is whether a court may infer vicious propensities based on a dog's bread.

Rulings in the Third Department, either directly or in dicta, have consistently held that viciousness can be implied from a dog's bread, such as when a pitbull or German shepherd has committed the attack.[9]

Nonetheless, these rulings have been consistently rejected by the other appellate divisions. The leading case in this area is *Carter v. Metro North Associates*, 680 NYS2d 239 (1998), a First Department case that has been repeatedly cited in opposition to the courts taking notice of the viciousness of a dog based on its breed.

While this factor is not considered at all in the *Collier* opinion, possibly because the subject dog was a beagle-collie-rottweiler mix, such disparate holdings need to be resolved by a higher judicial authority.

Conclusion

Based on the fact specific and discretionary nature of a vicious propensities analysis, it is difficult for any judicial opinion to encompass all possible variables that a court might consider in rendering a decision.

In *Collier*, the Court of Appeals provided some guidance as to which factors are dispositive for putting an owner on notice of their dog's vicious propensities. However, this opinion contains no language that precludes the consideration of additional factors, such as severity of the attack or assumed propensity based on breed.

These issues have yielded drastically different law within and between the respective appellate divisions. While *Collier* does provide a framework for future vicious propensity decisions, ultimately its illustrative list of factors, rather than a comprehensive analysis, will require further review before the courts.

1. *Hosmer v. Carney*, 228 N.Y. 73, 75.

2. *Collier v. Zambito*, 750 N.Y.S.2d 249 (4th Dept. 2002).

3. *Strunk v. Zoltanski*, 479 N.Y.S.2d 175 (1984).

4. See *Goldberg v. LoRusso*, 733 N.Y.S.2d 117 (2nd Dept. 2001); *Diamond-Fisher v. Greto*, 714 N.Y.S.2d 296 (1st Dept. 2000).

5. *Strunk*, 479 N.Y.S.2d 175.

6. See Arizona Stat. '11-1025; California Civil Code '3342; Florida Stat. '767.04; Iowa Code Ann. '351.28; Michigan Compiled Laws Ann '287.351; Minnesota Stat. Ann. '347.22; Montana Code '27-1-715; Nebraska Rev. Stat. '54-601; New Jersey Stat. Ann. '4:19-16.

7. See *Calabro v. Bennett*, 737 N.Y.S.2d 406 (3rd Dept. 2002); *Sers v. Manasia*, 720 N.Y.S.2d 192 (2nd Dept. 2001).

8. See also *Plennert v. Abel*, 706 N.Y.S.2d (3rd Dept. 2000).

9. *Mulhern v. Chai Management*, 765 N.Y.S.2d 694 (3rd Dept. 2003).