Queens BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

January 2021 | Volume 88, No. 4

Happy New Year To Our Membership

By Clifford M. Welden

I think that it is pretty safe to say that this past New Year's the word HOPE was in everyone's thoughts and prayers. We hoped for a vaccine soon. We hoped that our families will be ok. We hoped that we don't have another year like the one that just passed. The hope for a better year extended to our offices, the courts and our professional organizations as well but in reflection I believe that there was some good that came to our profession in 2020 as this was the year that brought our antiquated court system – rooted in foundations laid in the 19th century - up to date and set a footing for the virtual practice of law as our past President Paul Kerson had mentioned in one of his articles this year in the Bulletin. The opportunity to change arose and our Court Administrative Judges are to be commended for their attempts to create a virtual court system. Some of our long-time sponsors have also met the challenge of continuing and assisting our membership in this difficult time. Title companies like Larry Litwack's BIG APPLE ABSTRACT and Jim Agoglia's RAM ABSTRACT have held information sessions and sent out updates to our members, Court Reporting agencies like LEXITAS held numerous "how-to" sessions on conducting depositions on virtual platforms for us as did arbitration and mediation sponsors NAM and THE JANSEN GROUP. I urge all of our membership to consider using our sponsors whenever possible as they have been loyal to us during this past year and offer fine services.

Going forward it is anticipated that most practitioners will never again have to commute to and from courthouses in rush hour traffic and then wait for two or three hours in order to conduct a 15-minute conference with either a judge, Assistant D.A. or a law secretary. Often, we made appearances over the years only to be told that we needed to return for another appearance in 8 weeks where the same thing took place. On the Civil side, motion calendar days were sometimes the worst where appearances were required on basic motions to consolidate cases, on uncontested matrimonial calendars and various other matters. Personally, I love the idea of conducting basic depositions and arbitrations on these virtual platforms as they allow me to schedule my time efficiently and conduct additional matters during the day.

A number of years ago I sat in a corporate planning session with a regional VP where we discussed how we were going to handle the tsunami of cases brought in the Civil Courts due to changes in Insurance regulations. My office caseload increased to over 2,400 appearances per week. As the conversation made its way around the conference table one of those present made a comment that he hoped that they would be able to train new staff so that they could address the incoming claims timely. The VP remarked that "hope is not a plan". Those words stayed with me over the years and as soon as we entered the lockdown and realized that in-person events were no longer a choice our Board and committee chairs began working on plans to bring our Bar Association to a virtual social media platform. We rolled those first sessions out in mid-March and as of this week, we have held 22 virtual CLE programs with nearly 1,000 people in attendance. In addition to the CLE programs, our Civil, Supreme, Criminal, Family and Matrimonial Court committees have routinely held information sessions with our Administrative Judges in attendance to familiarize membership

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

JANUARY 2021

Friday, January 1	New Year's Day - Office Closed
Tuesday, January 12	CLE: LGBTQ+ & Immigration Seminar
Wednesday, January 13	Medicaid Updates & New Eligibility Rules: Protecting Assets to Plan for Long-term Care Needs
Monday, January 18	Martin Luther King, Jr. Day - Office Closed
Tuesday, January 19	Academy of Law Committee Mtg - 1:00 pm
Saturday, January 23	Zoom Memorial for Hon. Mary Ellen Fitzmaurice - 4:00 pm https://zoom.us/j/98294633666, Meeting ID: 982 9463 3666
Tuesday, January 26	LGBTQ+ Committee Mtg - 1:05 pm - https://us04web.zoom.us/j/79111042313?pwd=cjRzMGROS3pLek9NRDNDRElJOVcxUT09, Meeting ID: 791 1104 2313, Passcode: 3yEMex
Wednesday, January 27	Civil, Supreme & Torts Section Comms Mtg - 1:00 pm https://us02web.zoom.us/j/85004884445?pwd=WTBCb2FWZDJCazBTQkU2elRlejYwdz09, Meeting ID: 850 0488 4445, Passcode: 153867
Thursday, January 28	Appellate Practice Comm Mtg - 1:00 pm https://us02web.zoom.us/j/89998924968?pwd=dXlaVTFUS1NuNm5xL0NMUUFjRDVndz09, Meeting ID: 899 9892 4968, Passcode: 766680

FEBRUARY 2021

Tuesday, February 2	CLE: Remote Depositions-Reflections on What Works & What Does Not - 1:00 pm
Wednesday, February 10	Elder Law Committee Mtg - 2:30 pm
Friday, February 12	Lincoln's Birthday - Office Closed
Monday, February 15	President's Day - Office Closed
Tuesday, February 16	Academy of Law Comm Mtg - 1:00 pm

Upcoming Seminars
Guardianship Training

New Members

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Linda M. Dardis
Dale I. Frederick
Michael A. Fritz
Rina Gurung
Terence Kemp
Neil Siskind
Zachary Zayas

Necrology

Malcolm S. Babel
J. Robert Birnhak
Jeffrey Nathan Boyar
Hon. Mary Ellen Fitzmaurice
Bertram Herman
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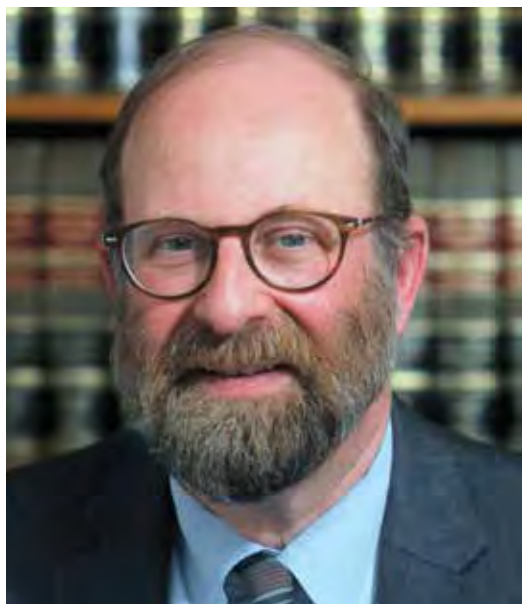

Editor's Note

Remembering Our Past Distinguished Members

Your Editor has now been a Member of the QCBA for 45 years. It seems like less than 10. Along the way, a great deal of practical wisdom was learned by listening to the older QCBA members talk about their experiences. These elders are now gone, so I thought I would try to write down the lessons learned. This list is by no means inclusive, so I invite all readers to send in their own memories of our departed members, and what was learned from them. Responses will be published next month.

Leading the list is the late Jimmy Richman, who maintained his general practice "opp. Boro Hall" in Kew Gardens as it said on his business card. He started his career as an Internal Revenue agent, and it showed. His office had green partitions, with frosted plexiglass above waist level, just as you would find in an IRS or other government office of the time.

After service with the IRS, Jimmy opened his own law office in downtown Brooklyn. In the beginning in the 1920s, now nearly 100 years ago, he was asked how it was going. "Pretty well," he said, "I've got two $25 cases and a small one."

Then there was his sage advice on building a law practice: "With any luck, any case can become three cases: (1) the case itself, (2) the suit over the legal fee, and (3) the defense of the resulting complaint to the Grievance Committee."

Lessons learned: No matter how modest the beginning, do not lose faith in yourself. Do a good job for each client, and more cases will show up. And do not sue over legal fees. There will always be more clients on whom it is better to spend your time and energy.

Moe Tandler was loud, strong, and absolutely committed to the rights of oppressed people. His office was in St. Albans, on Farmers Blvd. and he specialized in rebuilding broken homes at the Queens County Family Court when it was located in the old Central Queens Borough Public Library building on Parsons Blvd. He could be seen there almost every business day, loudly lecturing Mothers and Fathers on their responsibilities to their own children.

He proudly served as Chair of our QCBA Bar Panels Committee, charged with the critical task of appointing lawyers to the Assigned Counsel Plan (County Law Article 18-B Panel). If you did not share Moe's dedication to the lives of the most troubled among us, you did not get on the Panel.

Moe's most memorable lesson: He leaned in very close to me and said with intensity: "You're a lawyer. That means something."

Lesson learned: Clients look to you for much more than representation in a courthouse. You are to provide guidance as to how to live better lives.

Lenny Herman had been Judge Jacob Fuchsberg's law clerk in his law office before Judge Fuchsberg joined the New York State Court of Appeals. But Lenny did not take that credential too seriously. Lenny loved to play the piano, and he did so in numerous nightclubs throughout his legal career.

During the work day, he contented himself with fighting traffic tickets before Administrative Law Judges at the New York State Department of Motor Vehicles Traffic Violations Bureau (DMV-TVB).

When asked why he would want to trade a position at the top of the system for one near the bottom, Lenny was very philosophical: TVB was by no means the bottom. If the client is a bus, truck, limousine or taxicab driver, the third TVB conviction often meant loss of a job. He viewed his specialty as keeping professional drivers employed, and thereby keeping their families fed and healthy.

Numerous members of the QCBA followed Lenny into the traffic law specialty. He created a whole new field of law, and a very profitable one at that. The invention of personal computers enabled Lenny and his associates to trade traffic tickets among themselves, so each traffic lawyer could stay in one DMV TVB building each day, greatly enhancing efficiency and profitablility.

Lenny probably kept more professional drivers on the road than anyone before him, and through his teachings, dozens of traffic lawyers have followed his example.

Lesson learned: There is no such thing as a small case. To the client, his or her matter is the most important case in the world.

Sylvester Garamella would sing the National Anthem at our Annual Dinner every year at Terrace on the Park in Flushing Meadow Park. Somehow that meant a great deal to listeners. It signified that we were collectively doing something very important – making the law accessible and meaningful to every Queens County resident who came in contact with our court system.

Lesson learned: Our annual dinners keep us inspired and working together to make justice happen for the people of Queens County.

Paul Goldblum carried himself with great dignity and spoke with impeccable precision. He had gone to Harvard, and specialized in representing insurance carriers on appeal in the Appellate Division. He knew our court facilities in Queens County were inadequate for a population that was far greater than the official statistics. He spent the better part of his career carrying that message to every City and State bureaucrat and elected official who would listen.

The result was our "new" Civil Court building on Sutphin Blvd., now 23 years old. Imagine where we would be without it these last 23 years! It was largely the work of one man, Paul Goldblum, who persuaded the City and State Governments to finally do their duty.

Lesson learned: We must collectively push for the physical facilities where justice is done. Government will not act without us.

Manny Herman believed in the rights of injured people with the same intensity that Moe Tandler showered on oppressed people. In Manny's world view, all insurance carriers were run by insensitive louts who could not feel their insured's pain.

He pursued defendants' insurance policies with a sense of purpose and humanity. He would chase down witnesses to accidents long after other lawyers gave up. He would push insurance adjusters as far as he could, calling them on the telephone to talk about baseball, and then gently lead into the client's ongoing pain.

Lesson learned: Insurance carriers are just like government agencies. They will sit on their hands unless we push them.

Guy Vitacco, Sr. cared deeply about the QCBA. For years, he ran our Speakers' Bureau, sending members to community groups, religious organizations, and Queens Borough Public Library branches to speak about the law and the legal system. To the eternal gratitude of us all, he taught and recommended Arthur Terranova to serve as our Executive Director

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QUEENS COUNTY BAR ASSOCIATION

90-35 148th Street, Jamaica, NY 11435 • Tel 718-291-4500 • Fax 718-657-1789 • www.QCBA.org • CLE@QCBA.ORG

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The Supreme Court Committee Presents

REMOTE DEPOSITIONS:
Reflections on What Works and What Does Not

Tuesday, February 2, 2021
1:00 pm - 2:00 pm

LEXITAS™

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Mark Hoorwitz, *Lexitas*

Michael D. Abneri, Esq., ***Moderator***
Co-Chair, Supreme Court & Torts Committees

CLE Credit: 1.0 in Skills
Transitional Course – Valid for All Attorneys
ACCREDITATION: QCBA has been certified by the NYS CLE Board as an Accredited CLE Provider in NYS, 10/2019 - 10/2022.

Via Zoom

FEE:
QCBA Member - Free
Non-QCBA Member - $35.00

Must Register & Pay by February 1st to Receive ZOOM Meeting ID **EMAIL: CLE@QCBA.ORG**

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President Trump Extends His Proclamation Suspending Visa Issuance to Some Immigrant and Non-Immigrant Visa Applicants!

Background

On June 22, 2020, President Trump signed a proclamation continuing Proclamation 10014 issued on April 22, 2020, (effective immediately) and suspending the entry of certain nonimmigrants and Immigrant Visas that took effect and was to remain in effect at least until December 31, 2020. Then on December 31st, 2020, Outgoing President Trump, in his infinite wisdom decided to extend the proclamation again through March 31, 2021, which is more than two months after he is to leave office and a new President will be inaugurated. President-Elect Joe Biden will likely make several changes to the immigration policies of the current President.

First, off, the proclamation applies to all family based and employment based immigrant visas which are subject to the Department of State's Visa Bulletin. This means that people who are outside the United States and awaiting issuance of Permanent Resident Visas (Immigrant Visas), will be stuck waiting for additional weeks, possibly months, until this proclamation can expire, or the new President withdraws the proclamation. This order does not apply to people that are in the United States already.

The order also applies to temporary/non-immigrant visa categories such as H-1B visas, H-2B visas, H-4 visas, L-1 visas and certain J-1 visas. This is President Trump's way of marking his signature on immigration matters as he makes a not-so-peaceful exit.

H-1B visas are used for skilled workers and are common in the tech industry and is the largest visa program of those included in Monday's order as its recipients can stay for multiple years.

H-2B visas apply to seasonal workers.

H-4 visas are given to spouses of H-1B and H-2B visa holders.

J-1 visas are given to researchers, scholars and other specialized categories such as au pairs. Roughly 300,000 J-1 visa recipients come to the U.S. every year.

L-1 visas are used for executives, managers, or those with Specialized Knowledge within the company transferring to the United States to the US affiliate, from positions abroad with the same employer.

As stated above, the order does not apply to those already in the United States. And Foreign Nationals applying for visas to provide labor "essential to the United States food supply chain" are exempt. And those people "whose entry would be in the national interests" as determined by the federal government are exempt as well.

Canadians Are Not Subject to the Proclamation

Canadians entering as H, L or J nonimmigrants are exempt from the Presidential Proclamation. Guidance has been provided to local CBP ports on this issue. However, it has been clear that the information has not totally been received by CBP offices, so applicants for entry should be ready to defend their position or have an attorney to assist.

Individuals with Valid Visas Prior to Proclamation's Effective Date Are Not Subject to the Proclamation Regardless of Previous Entry

Those with valid visas issued prior to the effective date of the Proclamation will be allowed entry regardless of whether they have come in before or not on that visa.

If you have any questions on the direction or state of our country on immigration issues, please do reach out to and consult with an experienced Immigration Attorney.

AND DEV B. VISWANATH, ESQ.

Happy New Year To Our Membership

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on new filing guidelines and Court Administration directives. The best part is that you never had to leave your office to attend these meetings. Every week we are holding Zoom events and you are all invited to attend. Please check your email for our continuing updates as well as the QUEENS EAGLE and if you haven't been receiving any of these it is probably because we do not have your current email address so contact Sasha or Janice in our office and update your mailer! None of our media platform events would have taken place without Sasha, Janice and Arthur who run out power plant operations center.

Finally, at our last meeting the Board of Managers voted to delay our annual dinner scheduled for this May at Terrace on the Park and try for a date in the Fall. The decision to delay this event for a second year was a hard one to make but in light of the current issues that the State is having getting the vaccines out to the public it was one that we had no other choice but to make. I hope to see you at some of our meetings this month.

Stay safe & wear a mask.

SINCERELY YOURS,
CLIFFORD M. WELDEN | PRESIDENT

Remembering Our Past Distinguished Members

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these last 34 years.

Lesson learned: Dedication to the QCBA is perhaps the most important lesson of all. Who else keeps government and insurance carriers working at all?

Michael Dikman was the unrivaled Dean of the Matrimonial Bar, not just in Queens County, but in the entire Metropolitan area. Michael knew that reconstructing families was a much more complex task than reconstructive surgery after a tragic accident. While he was a vigorous litigator if need be, he would work diligently to achieve a fair minded settlement first.

I will never forget the matrimonial case I had with Michael where the family had significant tax problems and potential exposure because of the way the tax liabilities were mishandled. On the eve of trial, at the 11th hour right before the trial was to start, we stood together in the hallway of The Capital of the Known Universe (our courthouse at 88-11 Sutphin Blvd., Jamaica) and lectured the warring clients.

Together we assured them that their testimony under these circumstances could prove ruinous for their family for years to come, and we did not stop our double-teaming of them until they agreed to a fair-minded settlement, thereby avoiding a self-destructive trial.

The great comedian, Lenny Bruce is reported to have said, "In the halls of justice, most of the justice is in the halls."

No one knew that better than Michael Dikman. His hobby was as an amateur magician. He could pull a rabbit out of a hat. He could also pull a fair-minded settlement out of intense bitterness and anger.

Lesson learned: Don't give up. Every case can be settled if the lawyers on all sides work together.

Dear Readers: Please send me your memories of the lessons learned from our departed members. If we don't write it all down, it will be lost.

BY PAUL E. KERSON, ESQ
EDITOR

The "Vicious Propensities" Rule And Property Owner Liability II

BY HON. GEORGE HEYMANN

In my earlier published article on this subject, "The 'Vicious Propensities' Rule and Property Owner Liability", NYLJ, 5/19/19, p.4, which I co-authored with Matthew J. Kaiser, Esq., we provided a detailed analysis of the then-recent appellate case Hewitt v. Palmer Veterinary Clinic, PC, 167 AD3d 1120 (3rd Dept, 2018). That decision stirred a great deal of interest in this area of personal injury law because it effectively held that a landowner could be absolved from its nondelegable duty of care if the instrumentality of harm was the domestic animal owned by another.

Based on the sole dissent, we posited the query as to whether liability should attach to such property owner on a theory of negligence for not exercising proper care to a third party on the property, notwithstanding the issue of vicious propensities.

With only one dissent, leave to appeal to the Court of Appeals was not automatic and had to be applied for by the plaintiff, which was granted. Our article was cited by the plaintiff Hewitt in her brief, as well as an amicus brief by the New York State Trial Lawyers Association.

On October 22, 2020, the Court issued what may be considered, at first blush, a groundbreaking departure from Bard. Denying summary judgment in favor of the defendant clinic, the Court of Appeals held that the action against the property/landowner for negligence was viable regardless of the lack of notice of vicious propensities. Hewitt v. Palmer Veterinary Clinic, PC, __NY3d__, 2020 NY Slip Op 05975

THE STRICT LIABILITY – VICIOUS PROPENSITIES RULE

The concept of bringing suit for injuries caused by animals under one of two legal theories or both, (i.e., vicious propensities of the animal where the owner had knowledge of such propensities and/or for his or her negligence in the handling of such animal) was well established in NY jurisprudence for over a century. (see, Benoit v. Troy & Lansingburg R.R. Co., 154 NY 223 (1897), where a jury had to determine whether the driver of horses pulling a stoneboat [flat sledge for transporting heavy articles such as stones] had knowledge that they would run away and whether he was negligent in the "management" of them after they began to run. If the jury found in the affirmative under either theory, the plaintiff was entitled to a verdict.)

In other instances, as where a landlord knowingly allows a vicious animal owned by a tenant to remain on its property, the strict liability rule would extend to him or her as well and liability could attach to the landlord if warranted by the evidence. As the Court of Appeals held in Strunk v. Zoltanski, 62 NY2d 572 (1984), by leasing to a tenant with knowledge that it harbored a vicious dog, the landlord/property owner could be found to have "affirmatively [ ] created the very risk which was reasonably foreseeable and which operated to injure the plaintiff. (Id. at 575) Here "the liability, if any, of the landlord would be predicated on a jury finding that, at the time of the initial leasing of the premises to the tenant, the landlord knew both of the prospective presence of the dog and of its vicious propensities". (Id. at 577)

Both Benoit and Strunk were predicated upon knowledge of an animal's vicious propensities but did not preclude other legal theories such as a claim of negligence as an available avenue of recourse under the law at the time.

Suddenly, changing course one hundred and nine years after Benoit, the Court of Appeals in the seminal case of Bard v. Jahnke, 6 NY3d 592 (2006), citing Collier v. Zambito, 1 NY3d 444 (2004) [the law of this state has been that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities], solidified New York's position that no action for negligence would lie when an injury was caused by a domestic animal. Thus, a new legal roadblock was firmly established preventing litigants from seeking recovery under the theory of negligence for such injuries and placed New York in the minority of states as an "outlier" in this area of tort law. (see, Kaiser, "A 'Unique Outlier': Liability of Pet Owners in New York State", New York State Bar Journal, July/August 2017, Vol. 89, No.6).

The first sign of a possible passageway through this legal obstruction came in 2013 when the Court of Appeals in Hastings v. Suave, 21 NY3d 122 (2013) allowed for a suit in negligence but limited its scope only in situations where "a farm animal has been allowed to stray from the property where it is kept." (Id. at 124) Here, the Court held that a contrary rule "would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property." (Id. at 125) The question of whether this exception "appli[ed] to dogs, cats or other household pets" had to "await a different case." (Id.) (see, Heymann, "Is the 'Vicious Propensities' Rule Losing its Bite?", NYLJ, 2/18/15 at 4)

Two years later, that different case, Doerr v. Goldsmith, 25 NY3d 1114 (2015) (Fahey, J., dissenting), finally reached the Court of Appeals after being litigated twice in the Appellate Division, First Department. In the first decision, pre-Hastings, the appellate court, adhering to Bard and its progeny, reversed the trial court's denial of defendant's motion for summary judgment and dismissed the complaint. The opinion contained a vigorous dissent on the ground that it was the defendants' negligent behavior that caused the accident to happen not the conduct of their dog, by allowing the dog to run across a bike path causing the plaintiff/cyclist to collide with the dog, thus being thrown from his bike and sustaining injury. (Doerr v. Goldsmith, 105 AD3d 534 [AD1st Dept, 2013]) Subsequent to the Court of Appeal's decision in Hastings, the Appellate Division recalled and vacated its earlier decision and rendered a new one, this time following the reasoning of the initial dissent, affirming the Supreme Court's denial of the motion for summary judgment. (Doerr v. Goldsmith, 105 AD3d 534 [AD1st Dept, 2013]) Unfortunately, the Court of Appeals felt "constrained" to follow its prior holdings in denying relief to the plaintiff. It determined that because household pets are not "farm animals subject to an owner's duty to prevent such animals from wandering unsupervised off the farm," no negligence claim would lie. (Doerr v. Goldsmith, 25 NY3d 1114, 1116, citing Bard, 6 NY3d at 592)

Thus, the case law remains that without knowledge of vicious propensities, the owner of a domestic pet owes no duty of care to prevent foreseeable injuries caused by that pet. In his dissent, Judge Fahey expressed frustration that New York continues to be "a unique outlier" among the states in this regard. (Doerr v. Goldsmith, 25 NY3d at 1149) With only one year remaining in his term, due to mandatory retirement in December 2021, it is uncertain whether another opportunity will present itself to the Court for Judge Fahey to convince his colleagues to accept his point of view on this issue.

HEWITT V. PALMER VETERINARY CLINIC PC __ NY3d__, 2020 NY Slip Op 05975 [Decided 10/22/20]

SUMMARY OF FACTS

The plaintiff took her cat to be examined at the defendant's veterinary clinic. While sitting in the waiting area, she was attacked by a pit bull named Vanilla who had just undergone surgery. The dog had not been sufficiently sedated when brought into the waiting area and upon seeing the cat slipped from its leash, jumped on the plaintiff, closed its mouth on her ponytail, and pulled her backward, ripping hair from her scalp.

The plaintiff did not bring any action against the owner of the dog, nor did she commence a strict liability-vicious propensities claim against the clinic, asserting instead that this matter was "grounded in negligence and premises liability." The plaintiff argued that the strict liability rule did not apply because despite the pit bull being on the property of the clinic, it did not own the animal. The record further disclosed that the clinic did not have notice that Vanilla had vicious pro-

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The "Vicious Propensities" Rule And Property Owner Liability II

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pensities. The plaintiff submitted proof that the clinic did not use reasonable care when it brought the agitated pit bull into the waiting area without a secured collar, anesthesia or proper pain medication.

APPELLATE DIVISION DECISION
167 AD3d 1120 (AD3rd Dept, 2018)

Although "cognizant that the strict liability rule has not escaped criticism" in commentaries (see, Heymann, "On Constraint", the "Vicious Propensities" Rule Continues, N.Y.L.J., 6/13/17, p.4) and from other appellate judges, including three from the Court of Appeals (Judge R.S. Smith: "For all the faults of modern tort law, and they are many, I do not think that this attempt to cling to the certainties of a distant era will work out well." Bard v. Jahnke, 6 NY3d at 601-602; Judge Eugene F. Pigott: "[I]t was wrong to reject negligence altogether as a basis for the liability of an animal owner." Petrone v Fernandez, 12 NY3d 546, 552 (2009); and, as noted above, Judge Eugene M. Fahey: "We should return to the basic principle that the owner of an animal may be liable for failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." Doerr v. Goldsmith, 25 NY3d at 1142-1143)), the majority began its the analysis with a recognition that in New York "when a domestic animal causes injury to another, the owner of the domestic animal is liable only under a theory of strict liability, which requires that the injured person demonstrate that the owner had notice of the animal's vicious propensities" (emphasis added; citations omitted).

The issue before the Hewitt court was not whether a negligence cause of action would lie against the owner of the pit bull but whether the clinic, as owner of the property, failed to "adequately exercise[] control" over the pit bull under the theory of negligence and duty of reasonable care which the majority rejected.

The majority found guidance in Bernstein v Penny Whistle Toys, Inc. 40 AD3d 224, 224 (2007) affd 10 NY3d 787 (2008), where an infant was bitten by a dog in a toy store. The owner of the store was also the owner of the dog. To the extent the owner did not "kn[o]w or should have known" of the animal's vicious propensity, the Court of Appeals affirmed an order of dismissal. As the Bernstein holding did not explicitly address the issue of the property owner's liability, vicious propensities notwithstanding, it is clearly distinguishable from Hewitt.

(see, Easley v Animal Med. Ctr., 161 AD3d 525, 525 (1st Dept, 2018) [a dog bite occurred at a veterinary hospital and, because the dog "had no known vicious propensities," the veterinary hospital was not liable]; Hargro v Ross, 134 AD3d 1461 (4th Dept, 2015); Christian v Petco Animal Supplies Stores, Inc., 54 AD3d 707, 707 (2d Dept, 2008))

The Hewitt majority elected to follow the First, Second and Fourth departments in extending Bernstein—where, again, the landowner was the animal's owner—to the current situation where the landowner was not the animal's owner. Because the clinic "did not have notice of the dog's vicious propensities" an order of dismissal was affirmed.

The lone dissenter did not feel constrained by Bernstein and would have applied the "general principles of negligence and premises liability" and "set the matter down for a trial as to whether, under the circumstances, defendant maintained its premises in a reasonably safe condition and/or adequately exercised control over the subject animal."

"It seems to me that, given the rationale underpinning this [vicious propensity] rule, it does not fit the situation where, as here, the defendant is not the animal's owner, but only the owner of the property on which the animal's injurious behavior occurred and, therefore, typically has no knowledge, one way or the other, of the animal's propensities. In such a case, it is my opinion that general principles of negligence and premises liability should apply (citations omitted)."

The issue thus becomes one of proving that the person, or in this case the veterinary clinic, exercising control over an animal at the time of an attack "should have known" of the tendencies of that animal and be held accountable under the same strict liability as its owner (see, Strunk) or be subject to a claim of negligence as to whether reasonable care was extend to a third party injured by such animal on its premises.

COURT OF APPEALS DECISION
__NY3d__, 2020 NY Slip Op 05975

Modifying the Appellate Division's decision by denying the defendant's motion for summary judgment, the Court of Appeals rendered a split (4-3) decision with the majority opinion by Stein, J.[CJ DiFiore, Garcia and Feinman, JJ concur] and a concurring opinion by Wilson, J. [Rivera and Fahey, JJ concur]. Both opinions take different approaches to yield the same result.

Ironically, Bard and its steadfast strict liability-vicious propensity rule was not even a factor in this legal debate. Neither party sought to implicate it here as their focus was on the liability of a property owner who did not take reasonable care to protect a third party from being injured by an animal it did not own while on its property. Limiting its focus on the clinic, the majority noted that an animal in such environment "may experience various stressors" in addition to pain and the absence of its owner, which could "create circumstances that give rise to a substantial risk of aggressive behavior." Veterinary clinics acquire this knowledge and "are uniquely well equipped to anticipate and guard against the risk of aggressive animal behavior" and have "substantial control" to mitigate such risk.

The majority thus concluded that "Palmer does not need the protection afforded by the vicious propensities notice requirement, and the absence of such notice here does not warrant dismissal of plaintiff's claim." Here, "a negligence claim may lie despite Palmer's lack of notice of Vanilla's vicious propensities" as there was no suggestion that the defendant "would be subject to the same strict liability as the owner of a domestic animal (Strunk, 62 NY2d at 575-576)".

The concurring opinion starts off by opining that the former duality of theories upon which an individual injured by an animal could sue [ordinary negligence or strict liability] made sense (citing Benoit and Strunk). Judge Wilson notes, however, that the stringent holding of Bard as to owners of animals "did not disturb the viability of settled law allowing persons injured by animals to assert ordinary negligence claims against persons other than the animal's owner (citations omitted)." (Emphasis added)

The crux of the concurrence was stated as follows: "I concur separately to express why prudence and longstanding precedent dictate that Bard's strict liability rule – a rule that has rendered New York an outlier and confounded common sense and fairness in application – should not be extended to persons who are not the owner of the domestic animal causing injury." Judge Wilson, now the fourth Judge on the Court to describe Bard as an "outlier" further noted that "as the dissenters in Bard predicted, our application of Bard's rule to animal owners has run 'contrary to fairness and common sense,' compelling its 'ero[sion] by ad hoc exceptions (citation omitted)."

While reaching common ground in the outcome of this case, the majority's opinion is a narrower one focused only on the clinic and the fact that as a non-owner it did not need the "protection" of prior notice of the vicious propensities of the animals in its care, especially in view of the special training of its employees. The concurring opinion takes a broader view of the current status of the law and would allow for actions in negligence in all situations, not just veterinary clinics, where an individual is injured by a domestic animal on the property of another who is not the owner of said animal, regardless of whether he or she has knowledge of the animal's vicious propensities.

The journey of this subject remains to play out, but

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STATE OF NEW YORK
UNIFIED COURT SYSTEM
ELEVENTH JUDICIAL DISTRICT, SUPREME COURT
(OFFICE OF COURT ADMINISTRATION)
88-11 SUTPHIN BOULEVARD
JAMAICA, NEW YORK 11435
(718) 298-1100

LAWRENCE K. MARKS
Chief Administrative Judge

GEORGE J. SILVER
Deputy Chief Administrative Judge
New York City Courts

MARGUERITE A. GRAYS
Administrative Judge
Civil Term
Eleventh Judicial District
Supreme Court

December 30, 2020

Dear Bar President:

Re: Preliminary Notification of Intent to Request Expansion/Modification of the Mandatory E-filing Program in Queens County Supreme Court

Based on the successful mandatory e-filing program in Queens County Supreme Court, please be advised that we are specifically requesting expansion/modification of the current program to include **all civil actions in Queens County Supreme Court, except for the following:**

- CPLR Article 70 proceedings
- CPLR Article 78 proceedings
- Election Law proceedings
- Matrimonial matters
- Mental Hygiene Law matters
- Consumer Credit transactions as defined in CPLR 105(f)* (*except initial filing of commencement papers by a represented party, which is mandatory)

In addition, we are also requesting authorization to modify the existing consensual e-filing program to include the case types listed above that are not subject to mandatory e-filing and to include the e-filing of all subsequent documents in consumer credit transactions as defined in CPLR 105(f).

The implementation of the mandatory e-filing program in Queens County Supreme Court is tentatively scheduled for February 1, 2021.

In addition, this notice is to advise you that we will be submitting our request to implement this program to the Chief Administrative Judge, who is required by statute to post this proposal on the UCS website inviting comments from attorneys and all affected parties (http://www.nycourts.gov/rules/efiling).

This request and any public comment received will be presented for consultation purposes to an advisory committee. After the committee has reported its review of the proposal to the Chief Administrative Judge, he will consider our request and may issue an Order thereon.

The NYSCEF Resource Center training staff will offer free virtual CLE training for attorneys, as well as training to their staff and all other interested filers. (For further training information see www.nycourts.gov/efile). Additionally, please know, the staff at the Queens County Clerk's Office and the Supreme Court will work closely with the Bar to ensure the success of this important program.

Also, as you may be already be aware, by legislation and statute all unrepresented parties are exempt from participating in e-filing in any case. However, unrepresented parties may choose to e-file.

Please distribute this preliminary notice to your members in a manner you deem appropriate.

We look forward to your continued cooperation and thank you for your support.

Sincerely,

Hon. Marguerite A. Grays
Administrative Judge-Civil Term
11th Judicial District

Hon. Audrey I. Pheffer
County Clerk, Queens County

cc: Hon. George J. Silver, Deputy Chief Administrative Judge
John McConnell, Executive Director
Nancy Barry, Chief of Operations
Eileen D. Millett, Esq., OCA Counsel
Jeffrey Carucci, Director-Division of E-Filing
Tamara Kersh, Chief Clerk
Jessica M. Cherry, Esq.
Mindy Jeng, Esq.

The "Vicious Propensities" Rule And Property Owner Liability II

CONTINUED FROM PAGE 11

for the moment it appears that Bard is still the final word on actions against owners of animals with vicious propensities. No doubt Hewitt has put veterinary clinics on notice for their potential liability in negligence and it should act as a warning to property owners in other situations to be aware of potential liability if they create or have notice of a dangerous condition caused by a domestic animal.

HON. GEORGE M. HEYMANN
NYC Housing Court Judge (Ret); "of Counsel", Finz & Finz PC; Adjunct Professor of Law, Maurice A. Deane School of Law at Hofstra University

The Practice Page
Affidavits Versus Affirmations

There are circumstances in New York Practice when affidavits must be used, and others when affirmations may be used instead. The improper use of an affirmation can be fatal to an application or its defense. An affidavit signed by a fact witness should state facts, not legal arguments. Affirmations may properly be filed under penalties of perjury by attorneys to recount a case's procedural history and provide pleadings and other exhibits. Uniform Rule 202.8 instructs that legal arguments should not be included in affidavits but in a separate legal brief, though in practice, our state courts routinely accept legal argument contained within attorney affirmations.

Affirmations are more convenient to prepare than affidavits, if for no other reason than that a notary public or other acknowledging officer need not be enlisted to confirm the identity of the affirmant, administer an oath, and oversee the document's execution. When an attorney is also a party, the attorney should utilize the affidavit format to support or oppose factual matters, notwithstanding that person's status as an officer of the court. If an attorney serves process under CPLR 308 or other statute, or serves litigation paperwork in the normal course, the attorney is best advised to execute an affidavit of service, rather than an affirmation, as such conduct casts the attorney in the role of a fact witness to the task undertaken.

CPLR 2106[a] provides that affirmations may be used by non-party physicians, osteopaths, and dentists authorized to practice in the state. The provision caters to the convenience and time pressures of medical and dental professionals. By extension, persons authorized in those fields wholly outside of New York may not properly submit information by affirmation. The language of CPLR 2106 does not extend to chiropractors, engineers, architects, or other non-designated experts and professionals. If an affirmation is improperly used instead of an affidavit, the defect is waived unless the adversary party objects to it, though an objection may be cured by an oath taken by a notary public before the return date of the application.

Occasionally, a witness may have a sincere religious objection to swearing an oath to the Almighty. Any person who, for religious reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective, such an affirmation must still be taken before a notary public or other authorized official. This procedure is different than that used for physicians, osteopaths, and dentists as those professionals are within the expressed scope of CPLR 2106, whereas persons with religious reservations are not.

CPLR 2309(b) directs that affidavits and affirmations be executed "in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs." For this reason, the documents invoke the language of an oath. Affirmations are to be executed to reflect that their content is "affirmed...to be true under the penalties of perjury." A mistake in the form of a submission, or in the right to submit it, will not necessarily be lethal provided it is caught in time, and courts are lenient in allowing the correction of mistakes under the grace provisions of CPLR 2001. However, attorneys should not rely on the discretionary forgiveness of such defects because, absent the favorable exercise of that discretion, a non-compliant affirmation is rendered incompetent as proof of the facts asserted within it.

None of this is rocket science, which is all the more reason that documents should be submitted to courts in their proper forms.

BY HON. MARK C. DILLON
APPELLATE DIVISION, 2ND DEPT.

QUEENS COUNTY BAR ASSOCIATION
MEMBERSHIP APPLICATION

Please check the appropriate box below:

☐ **I wish to join the Queens County Bar Association.**
☐ **I wish to update my Membership Information and/or Committee listing (reverse side).**

ENROLLMENT INFORMATION

First Name_____

Last Name_____

Business Address _____

_____

City _____State _____Zip _____

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City _____State _____Zip _____

Office phone ( )_____

Home phone ( )_____

Cell phone ( )_____

Fax Number ( )_____

Email Address _____

Website_____

Contact via: _____ Email _____ Mail

Mailing Preference: _____ Business _____ Home

Date of Birth _____

College_____

Graduation Year_____Degree_____

Law School_____

Graduation Year_____Degree_____

Date of Admission to the NYS Bar_____

Judicial Department_____

DUES PAYMENT

☐ Check Enclosed ☐ MasterCard ☐ Visa ☐ Amex ☐ Discover

Credit Card #_____

Exp. Date _____ CSC/CVV# _____

Signature_____

Date of Application _____

ANNUAL MEMBERSHIP DUES

☐ Sustaining Membership $ 350.00
Member who voluntarily provides additional funds to further support the Association (Includes coupons for three free CLE credits to be used for any CLE program in the coming year)

☐ Combined Sustaining Membership $ 625.00
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☐ Attorney Admitted more than 10 years $ 300.00
☐ Attorney Admitted 5-9 years $ 225.00
☐ Attorney Admitted less than 5 years $ 135.00
☐ Admitted less than 1 year Free
☐ Law Student* Free
*(*Current Law School student OR recent graduate awaiting admission. Please include a copy of your school's official OR unofficial school transcripts.)*

GOVERNMENT SERVICE MEMBERSHIP: *Members who are in Government Service (Judges, Court Attorneys, Law Secretaries, Legal Aid Society, Queens Legal Services, District Attorneys, Queens Law Associates, Corporation Counsel, etc.) are eligible for a 30% dues reduction. Please inform us of which Government Service gives you this eligibility.*

☐ Government Sustaining Membership $ 245.00
☐ Government Attorney 10+ years $ 210.00
☐ Government Attorney 5-9 years $ 157.00
☐ Government Attorney less than 5 years $ 94.00

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☐ 18B Attorney 10+ years $ 240.00
☐ 18B Attorney 5-9 years $ 180.00
☐ 18B Attorney less than 5 years $ 108.00

Discounts are also available for members of other local (Queens) bar associations who have never belonged to the Queens County Bar Association.

Membership dues can be made in one payment or by installments.

QUEENS COUNTY BAR ASSOCIATION
90-35 148TH STREET
JAMAICA, NEW YORK 11435

TEL - 718-291-4500
FAX - 718-657-1789

WWW.QCBA.ORG
INFO@QCBA.ORG

7/2020-2021

QUEENS COUNTY BAR ASSOCIATION

LAWYER REFFERAL SERVICE

APPLICATION & REGISTRATION FORM

90-35 148th St.,
Jamaica, NY 11435
T: 718-291-4500
F: 718-657-1789

Name: _____ DOB: _____
First *Middle* *Last*

Firm Name: _____ Practice consists of: ___Trial work ___Office work

Address: _____

Telephone number(s): _____ E-Mail: _____

Date of Admission to the NYS Bar _____ Admission to Other Jurisdictions _____

List two attorneys or judges (*none of whom are my present partners and associates*) who have knowledge of professional work and ability:

_____

Languages other than English that you speak fluently: _____ or Office offers translation: _____

I will accept cases in the area(s) checked below (limit to five). I consider myself competent in such areas. Please indicate any specialties or exclusions within area of law.

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☐ Bankruptcy		
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☐ Elder/Guardianship Law		
☐ Criminal Law		
☐ Decedent's Estates, Wills & Trusts		
☐ Domestic Relations (Family Law)		
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The undersigned hereby applies for registration on the panel of the Lawyer Referral Service of the Queens County Bar Association **and is also a member in good standing.** He/she certifies that he/she is familiar with its procedures and that he/she will abide by all rules which may be promulgated by the Association and agrees to be bound thereby.

Date of Application: Signature of Applicant