**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

**JOHN A. PARKINS, JR.**
***JUDGE***

**NEW CASTLE COUNTY COURTHOUSE**
**500 NORTH KING STREET, SUITE 10400**
**WILMINGTON, DELAWARE 19801-3733**
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**Re: James Smiley v. Elizabeth Taylor, Cheryl Paloni, and Steven Huovinen**
**C.A. No. 06C-07-133 JAP**

Submitted: December 4, 2008
Decided: December 10, 2008

On Defendant Paloni's Motion for Summary Judgment
**GRANTED.**

Dear Counsel:

This is a story of three people whose compassion for Toots, a stray dog, led them to become defendants in a lawsuit after Toots allegedly bit the

plaintiff. Defendant Cheryl Paloni, a technician at a local veterinary hospital, contends that the undisputed facts show that she was neither the owner of Toots, nor did she have control of her at the time of the bite. Indeed, she contends she last saw Toots three months before the bite. The Court agrees with Ms. Paloni, and therefore her motion for summary judgment is **GRANTED**.

## I. FACTS AND PROCEDURAL BACKGROUND

In January or February 2004, Defendant Elizabeth Taylor, a Wilmington firefighter, found Toots while responding to a gas leak emergency. Ms. Taylor took Toots under her wing, and it is obvious Toots began to flourish; according to records at her vet, Toots gained nearly 14 pounds during her first three months with Ms. Taylor. Around April 30, 2004, Toots jumped out of the back of Ms. Taylor's jeep and broke her leg. Ms. Taylor took Toots to Windcrest Animal Hospital ("Windcrest"), where Ms. Taylor was told that Toots's leg was badly fractured and required surgery. Unable to afford the surgery, Ms. Taylor requested that Windcrest euthanize Toots. Somehow Toots's dire straits were brought to the attention of Defendant Cheryl Paloni, an employee of Windcrest. Ms. Paloni offered to register Toots under her name in order to obtain an employee discount on

the surgery so that Toots would not have to be euthanized. Thereafter, Toots was registered at Windcrest under Ms. Paloni's name and underwent successful surgery.

After a few days of post-operative recuperation, Toots was ready to return home. Ms. Paloni returned Toots to Ms. Taylor's house. There is some dispute as to whether Ms. Taylor, or her then boyfriend (and now husband) Defendant Steven Huovinen accepted Toots at the house, but it is undisputed that one of them was at the house and took the dog from Ms. Paloni. The parties agree there is no evidence that Ms. Paloni had any further contact with Toots after leaving her at Ms. Taylor's house.

On or about August 9, 2004, Toots allegedly bit Plaintiff James Smiley when Mr. Smiley was visiting a friend in Mr. Huovinen's neighborhood. Thereafter, Mr. Smiley filed this suit against Ms. Taylor and Ms. Paloni seeking compensatory and punative damages for his alleged injuries resulting from the bite. After arbitration in this case, Mr. Huovinen was added as a defendant.

## II. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] If, however, material issues of fact exist or if a court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, the court will not grant summary judgment.[2]

Although the moving party has the burden of demonstrating that no material issues of fact are in dispute and it is entitled to judgment as a matter of law, the facts must be viewed "in the light most favorable to the nonmoving party."[3] Furthermore, "[f]rom those accepted facts the court will draw all rational inferences which favor the non-moving party."[4]

## III. DISCUSSION

The complaint alleges that Ms. Paloni (1) was negligent per se pursuant to 7 *Del. C.* § 1705, (2) was otherwise negligent or grossly negligent, and/or (3) is strictly liable for Mr. Smiley's injuries pursuant to 7 *Del. C.* § 1711.

[1] Super. Ct. Civ. R. 56(c)
[2] *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 936 (Del. 2004).
[3] *Mason v. United Servs. Auto. Ass'n*, 697 A.2d 388, 392 (Del .1997).
[4] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del.1992).

### A. Ms. Paloni did not violate 7 *Del. C.* § 1705

Section 1705 of title 7 of the Delaware Code imposes penalties upon the "owner, custodian, possessor or harborer of any dog that while running at large and without provocation, bites a person."[5] The parties concede that Ms. Paloni was not the custodian, possessor, or harborer of Toots when Toots allegedly bit Mr. Smiley. Therefore, in order to be potentially liable under § 1705, Ms. Paloni must have been the owner of Toots at the time of the bite.

Plaintiff and Defendant Huovinen contend that Windcrest's records—which continue to list Ms. Paloni as the owner[6]—create a dispute of fact requiring this Court to deny Ms. Paloni's motion for summary judgment. This argument overlooks the undisputed evidence that Ms. Paloni was listed as the "owner" in Windcrest's records solely for the purpose of receiving a discount on Toots's surgery. Perhaps more importantly, it is undisputed that Ms. Paloni promptly delivered Toots to Ms. Taylor's house after the surgery in May 2004 and had no further contact with Toots.[7] Although there is some disagreement as to whether Ms. Paloni returned Toots to Mr. Huovinen or Ms. Taylor, that fact is not a material to Ms. Taylor's

[5] 7 *Del. C.* § 1705.
[6] Toots never returned to Windcrest after her discharge following her surgery. Therefore, there was no reason to change the name of Toots's owner.
[7] *See* 4 Am. Jur. 2d *Animals* § 5 (stating that "ownership [of a dog] is presumed to be in the person who possesses it").

contention that she was not the owner of the dog at the time of the alleged bite. Given this evidence, the Windcrest records do not serve to defeat Mr. Paloni's motion. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury reasonably could find for the plaintiff."[8] The Court concludes here that, based upon the undisputed evidence, no reasonable jury could find that Ms. Paloni owned Toots at the time of the alleged bite.

### B. Ms. Paloni was not negligent or grossly negligent

Mr. Smiley alleges in the complaint that Ms. Paloni was negligent and/or grossly negligent because she knew of Toots's vicious propensities but failed to control her so at to prevent the bite, and because she failed to warn Mr. Smiley of Toots's vicious propensities. Ms. Paloni, however, had not seen Toots for three months before the alleged bite. At oral argument, Plaintiff conceded he was unaware of any evidence that Toots manifested any vicious propensities prior to the alleged bite.[9] It necessarily follows that the record is devoid of any evidence that Ms. Taylor was aware of any vicious propensities. Therefore, there is not sufficient evidence from which

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).
[9] *Smith v. Isaacs*, 1999 WL 1240833 (Del. Super.) (dismissing the plaintiff's negligence claim in a dog bite case where the record was "devoid of any evidence that Defendant knew of the [d]og's dangerous propensities").

a reasonable juror could find that Ms. Paloni was negligent or grossly negligent under the circumstances of this case.

### C. Ms. Paloni is not strictly liable pursuant to 7 *Del. C.* § 1711

Section 1711 of title 7 of the Delaware Code provides that:

> The owner of a dog is liable in damages for any injury, death or loss to a person that is caused by such dog, unless the injury, death or loss was caused to the body or property of a person who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting or abusing the dog.[10]

Accordingly, Ms. Paloni can only be strictly liable to Mr. Smiley pursuant to § 1711 if she was the owner of Toots at the time of the alleged bite. As discussed above, even considering all the facts in the light most favorable to Mr. Smiley, under these circumstances, Ms. Paloni could not be considered the owner of Toots at the time of the alleged bite.

### D. Ms. Paloni's motion for summary judgment is not premature

Mr. Huovinen opposes Ms. Paloni's motion for summary judgment on the grounds that the motion is premature because the deposition of Ms.

[10] 7 *Del. C.* § 1711.

Taylor (his wife) has not yet been taken.[11] If Mr. Huovinen believed that this deposition was necessary in order to oppose Ms. Paloni's motion, he was obligated to file an application and affidavit pursuant to Superior Court Civil Rule 56(f), which states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance of permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.[12]

Moreover, the trial scheduling order in this case provided that all discovery related to Ms. Paloni's motion for summary judgment had to be completed by October 31, 2008.[13] No motion to amend that scheduling order was ever filed.[14] Finally, although Ms. Taylor has not yet been deposed, her testimony at the arbitration hearing in this case gives no indication that her deposition would lead to any evidence suggesting that Ms. Paloni was the owner or otherwise had control of Toots in August 2004. Therefore, Ms. Paloni's motion is not premature.

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[11] Ms. Taylor takes no position with regard to this motion.
[12] Super. Ct. Civ. R. 56(f).
[13] Revised Trial Scheduling Order, D.I. 42.
[14] *See Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 528 (Del. 2006) ("Parties must be mindful that scheduling orders are not merely guidelines but have full force and effect as any other order of the Superior Court.").

## IV. CONCLUSION

After considering the facts and inferences in the light most favorable to the plaintiff, the Court finds that there is no genuine issue of material fact in dispute and that Ms. Paloni is entitled to judgment as a matter of law. Therefore, Ms. Paloni's motion for summary judgment is **GRANTED**.

**IT IS SO ORDERED.**

Very truly yours,

oc: Prothonotary