THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

No. 09-C-544

Ronald S. Randall

v.

David Hennessey

ORDER ON THE DEFENDANT'S MOTION FOR RECONSIDERATION

The plaintiff, Ronald S. Randall ("Randall"), brought suit against the defendant, David Hennessey ("Hennessey"), as "Owner of the Dog," under RSA 466:19 (2004), the dog bite/damages statute. The suit arises out of an incident that occurred on May 20, 2007, when Randall, a police officer, was bitten by Hennessey's dog on Interstate 93 in Londonderry, New Hampshire.[1]

Hennessey filed a Motion for Summary Judgment, arguing that the "fireman's rule," codified at RSA 507:8-h (1997) (Supp. 2009), barred the plaintiff's claim because, at the time of the incident, the plaintiff was on duty and acting in his official capacity as a police officer and his injuries arose from negligent conduct. He also averred that inasmuch as he did not have actual "custody or control" of the dog at the time of the incident, he lacked liability under the dog bite statute. Randall objected to the Motion for Summary Judgment, arguing particularly that the "fireman's rule" did not bar his strict liability cause of action, and that he had the option to sue either the owner or the individual who had actual control of the dog, and had chosen to pursue the owner.

[1] Randall originally also sued a Judith Gschwind ("Gschwind") as "Keeper of the Dog," but obtained a voluntary non-suit without prejudice on December 11, 2009. See Writ; see also Order dated December

Following a hearing on January 27, 2010, the Court denied Hennessey's Motion for Summary Judgment "for reasons expressed on the record." See Order dated January 27, 2010. Hennessey then filed a Motion for Reconsideration, contending that the Court erred in failing to properly apply New Hampshire's statutory "fireman's rule" to bar Randall's strict liability claim, and, further, had not squarely addressed the defendant's second argument, whether Hennessey bears any liability when he did not have any actual "control or custody" of the dog when the incident occurred. Randall has interposed his Objection.

After further review, and as explained below, the Court continues to decline to enter summary judgment in favor of Hennessey.

FACTS

On Friday, May 18, 2007, Hennessey entrusted his dog Bandit, a four-year-old Sheltie, to Gschwind, a member of Sheltie Rescue, because he and his wife were going on a vacation. See Ex. A to the Mot. for Summ. J. (Affidavit of David Hennessey, dated December 9, 2009) ("Hennessey's Affidavit"). That day, Hennessey, who resides in Pelham, New Hampshire, dropped the dog off at Gschwind's house at 21 Beacon Street, Derry, New Hampshire. Id.

On May 20, 2007, while doing day shift duty patrolling on the Route 102 overpass in Londonderry, New Hampshire, Randall, a full-time police officer for the Town of Londonderry, accompanied by a trainee, Jason Teufel, noticed vehicles skidding and swerving on Interstate 93 and observed a dog (Hennessey's dog, Bandit) "running in and out of traffic." See Deposition of Ronald S. Randall, taken October 21, 2009, at 18,

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11, 2009.

annexed to Randall's Obj. to the Mot. for Summ. J. ("Randall's Deposition"); see also Hennessey's Affidavit. Upon getting onto Interstate 93, Randall and Teufel succeeded in stopping traffic, and Randall sought to gain control of the dog who came to be positioned under a truck. See Randall's Deposition at 19-21. The dog first bit Randall on the right arm, and, later, as Randall sought to control it, on the left hand. Id. at 21-27.

Hennessey did not learn of the dog bite incident until later on May 20 when he received a phone call from the Londonderry Police Department requesting that he bring Bandit's rabies vaccination records to the Londonderry Police Department. See Hennessey Affidavit. Further, Hennessey avers that he "learned for the first time" on May 20 that "Geschwind [sic] may have asked someone named 'Pace' to watch Bandit over the weekend." Id.

The record does not disclose how Bandit "escaped" from whoever was supposed to be providing oversight and care, and how the dog came to be on Interstate 93. Hennessey does state that he only learned of the "escape" at about 5:00 pm on May 20, "that neither Ms. Geschwind [sic] nor Pace were aware of where [the dog] was until after the incident . . . [,]" and that "Ms. Gschwind did not contact [him] or attempt to [do so] regarding Bandit's escape." Id.

ANALYSIS

RSA 466:19 imposes strict liability upon, among others, dog owners for damages occasioned by their dogs. The statute provides, in pertinent part, "[a]ny person to whom . . . damage may be occasioned by a dog not owned or kept by him shall be entitled to recover damages from the person who owns, keeps, or possesses the dog, unless the

damage was occasioned to a person who was engaged in the commission of a trespass or other tort." RSA 466:19. The New Hampshire Supreme Court has recognized that this statute makes a dog owner strictly liable for harm caused by a dog's "vicious or mischievous acts." See Allgeyer v. Lincoln, 125 N.H. 503, 506 (1984).

The statute broadly protects all members of the public, and by not explicitly excluding any specific group of people, it implicitly includes police officers. The statute also recognizes only two situations in which liability would not exist: first, when the person injured is committing a trespass, and second, when the person injured is committing another tort. In this case, Hennessey does not claim, nor can he, that Randall was committing a trespass or another tort when the incident occurred. Rather, it is clear that Randall was acting in his official capacity as a police officer at the time of the incident, and was not trespassing on Hennessey's, or another's, property.

Although RSA 466:19 thus imposes strict liability in a manner that would allow "persons," to include police officers like Randall, to obtain recovery, Hennessey argues that he cannot be held liable because Randall is barred by the "fireman's rule" from bringing this cause of action. The New Hampshire "fireman's rule" is codified at RSA 507:8-h, and states, in pertinent part:

> [P]olice officers . . . shall have no cause of action for injuries **arising from negligent conduct which created the particular occasion for the officer's official engagement.** However, this section does not affect such officer's causes of action for unrelated negligent conduct occurring during the officer's official engagement, or for other negligent conduct, or for reckless, wanton, or willful acts of misconduct.

RSA 507:8-h (emphasis added).

This rule does not expressly deal with strict liability claims, and the parties have

cited no New Hampshire case applying the rule to a strict liability claim. Its language, with associated case law, establishes that the rule operates, in "a narrow but enlightened" manner, to disallow police officers, among other officials, from having causes of action against those whose negligent conduct particularly caused them to be at the scene in their official capacity and come to be injured, but to allow such officers still to sue others for unrelated negligence occurring during the officer's official engagement, other negligence, or for reckless, wanton or willful acts of misconduct. See id.; see also Matarese v. Nationwide Mut. Ins. Co., 141 N.H. 311, 313 (1996); Gould v. George Brox, Inc., 137 N.H. 85, 89 (1993); Akerley v. Hartford Ins. Group, 136 N.H. 433, 437-38 (1992); Migdal v. Stamp, 132 N.H. 171, 175 (1989); England v. Tasker, 129 N.H. 467, 471-72 (1987). Here, the claim against Hennessey is not itself a cause of action predicated on any negligence.

A strict liability claim is not the same as a negligence action. "In order to recover for negligence, a plaintiff must show that there exists a duty whose breach by the defendant causes the injury for which the plaintiff seeks to recover." Goodwin v. James, 134 N.H. 579, 583 (1991) (quotations and citation omitted). Negligence is to be proved by the plaintiff by a preponderance of the evidence. Strict liability, on the other hand, "is available only 'where the Legislature has provided for it . . . or [in] those situations where the common law of this state has imposed such liability and the Legislature has not seen fit to change it.'" Anglin v. Kleeman, 140 N.H. 257, 261 (1995) (quoting Moulton v. Groveton Papers Co., 112 N.H. 50, 53 (1972)). The legislature has imposed strict liability on dog owners for the injuries their dogs may cause to any person, and

Hennessey's liability under RSA 466:19 in this case and to Randall arises not from any negligent conduct that Hennessey committed that prompted Randall's official engagement, but from the dog-bite occurrence itself, and his ownership of the dog.[2]

The New Hampshire Supreme Court has advanced two public policy considerations to support the "fireman's rule." As restated in Matarese, 141 N.H. at 313, these are:

> [I]t is fundamentally unfair to ask the citizen to compensate a public safety officer, already engaged at taxpayer expense, a second time for injuries sustained while performing the very service which he is paid to undertake for the citizen's benefit . . . [and]
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> [F]irefighters and police officers are likely to enter at unforeseeable times, upon unusual parts of the premises, and under circumstances of emergency, where care in preparation for their visit cannot reasonably be expected.

To not apply the "fireman's rule" to bar Randall from suing Hennessey under RSA 466:19 does no real disservice to these purposes—so far as presently appears in the record, Hennessey was not directly involved, negligently or otherwise, in the "escape" of the dog, and the dog's appearance on Interstate 93, and his liability arises only from his status as the owner of a dog that bit, or injured, another.[3] Yet, to allow

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[2] To be sure, the term "arising from" has consistently been given, in many contexts, broad or expansive reach. See e.g. McNair v. McNair, 151 N.H. 343, 347 (2004) (construing New Hampshire's long arm statute, RSA 510:4, I (1997), as, "in the broadest legal sense," conferring personal jurisdiction over a non-inhabitant who pertinently acts, and becomes involved in a "cause of action arising from or growing out of the acts enumerated above"); Merrimack School Dist. v. Nat'l School Bus Serv., 140 N.H. 9, 13 (1995) (where the Supreme Court, in dealing with the phrase "arising out of" in a contract, stated that the phrase "has been interpreted as a 'very broad, general and comprehensive term[ ],' which [the court] has defined as meaning 'originating from or growing out of or flowing from.'" (quoting Carter v. Bergeron, 102 N.H. 464, 470-71 (1960)). Yet, as previously stated, the Court understands New Hampshire's "fireman's rule" to bar claims by police officers against those whose negligent conduct prompted their official engagement, not claims such as the strict liability one at bar. See also Gould, 137 N.H. at 89 ("Common sense tells us that it is the person whose conduct triggers the response who is immune from liability . . .").

[3] Contrary to Randall's suggestion, there is no evidence indicating that Hennessey acted recklessly or

suit here serves the purposes of RSA 466:19, which does not except police officers from its protective coverage. Cf. Wroniak v. Ayala, 1995 WL 371186 (Conn. Super. Ct. 1995).

The Court further observes that if the "fireman's rule" were to be applied here in such a way that Randall's "cause of action for injuries," against Hennessey, though based on RSA 466:19, may be deemed to have "[arisen] from negligent conduct which created the particular occasion for the officer's official engagement," see RSA 507:8-h., the record is presently insufficiently developed as to whether negligence had anything to do with Bandit's "escape," and appearance on Interstate 93. It is thus the case that even if the Court were to accept Hennessey's argument as to the breadth of coverage of the "fireman's rule," it may not, on the present record, conclude in favor of Hennessey on this matter.

As to the "custody or control" issue, the Court observes that it did address the question during the January 27 hearing. Nonetheless, it here provides further explanation as to its ruling on this point.

In Gagnon v. Martin, 116 N.H. 336, 337 (1976),[4] the New Hampshire Supreme Court held "that the [dog bite/damages] statute was designed to give the injured party a remedy against the '*person* who owns or keeps the dog,' but not against both an owner and a keeper." Further, the Court stated that "[i]f it had been the intent of the legislature to allow recovery as against both, it would have chosen more specific words to accomplish that result," and that the intent of the legislature in constructing the statute

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willfully. See Randall's Mem. of Law in Supp. of his Obj., dated January 12, 2010 at 2.

[4] The Court notes that while Gagnon was decided under a prior version of RSA 466:19, the current

was to deal with the often difficult issue of proving ownership of a dog. Gagnon, 116 N.H. at 337.

In this case, although Hennessey appears to not have had actual "custody or control" of the dog at the time of the incident, he admits to being the owner of the dog. Thus, Randall may choose to pursue him and not pursue Gschwind, the individual whom Randall had earlier sued as "Keeper of the Dog," but as to whom he has obtained a non-suit. Under Gagnon, he may sue either the owner, or the person who had custody or control of the dog, but not both. Here, the plaintiff has chosen to pursue the owner.

For the above stated reasons, the Court does not alter its prior ruling denying Hennessey's Motion for Summary Judgment.

SO ORDERED

Date: 4/15/10

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John M. Lewis
PRESIDING JUSTICE

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version does not change the holding in Gagnon.