

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
3 New York, on the 11th day of March, two thousand twenty-two.
4

5 **PRESENT:**

1 **PIERRE N. LEVAL,**
2 **MICHAEL H. PARK,**
3 **MYRNA PÉREZ,**
4 *Circuit Judges.*

1 _____
2
3 **T.B., by his father and natural guardian,**
4 **DUSTIN BAIN,**

5
6 *Plaintiff-Appellant,*

7
8 v.

21-522

9
10 **TOWN OF HEMPSTEAD ANIMAL SHELTER**
11 **and TOWN OF HEMPSTEAD,**

12
13 *Defendants-Appellees.**

14
15 **FOR PLAINTIFF-APPELLANT**

Adam J. Roth, Law Offices of Adam J.
Roth, New York, NY.

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18 **FOR DEFENDANTS-APPELLEES**

Joseph E. Macy and Daniel J. Evers,
Berkman, Henoch, Peterson, Peddy &
Fenchel, P.C., Garden City, NY.

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

1 Appeal from a judgment of the United States District Court for the Eastern District of New
2 York (Tomlinson, *M.J.*).

3 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
4 **DECREED** that the judgment of the district court is **AFFIRMED**.

5 This diversity action stems from injuries sustained by Plaintiff T.B., a nine-year-old child,
6 from a dog attack. Plaintiff’s grandparents adopted the bulldog “Monte” from a Pennsylvania
7 animal-rescue organization, A Furr-Ever Home, Inc. (“Furr-Ever Home”). Rather than file suit
8 against Furr-Ever Home, Plaintiff brought this action against two New York municipal entities—
9 the Town of Hempstead and the Town of Hempstead Animal Shelter (the “Animal Shelter”)—
10 who had received Monte from his original owner before transferring him to Furr-Ever Home.
11 Plaintiff asserted claims of negligence and strict liability against the Animal Shelter, arguing that
12 the Animal Shelter contributed to his injury by failing to inform Plaintiff’s grandparents or Furr-
13 Ever Home that Monte had previously bit a child.

14 After the close of discovery, the district court granted summary judgment to Defendants
15 on all claims. It held that Plaintiff could not hold the Animal Shelter liable under a theory of strict
16 liability because it did not own Monte at the time of the incident. As to the negligence claim, the
17 court concluded that Plaintiff failed to show that the Animal Shelter owed Plaintiff a duty of care
18 aside from its general duty to the public. Plaintiff appealed, contending that the district court erred
19 in dismissing his negligence claim. We assume the parties’ familiarity with the underlying facts,
20 the procedural history of the case, and the issues on appeal.

21 “We review a district court’s decision to grant summary judgment *de novo* . . . draw[ing]
22 all factual inferences and resolv[ing] all ambiguities in favor of the non-moving party.” *Coyle v.*
23 *United States*, 954 F.3d 146, 148 (2d Cir. 2020).

1 The parties first dispute whether a plaintiff injured by a domestic animal may sue a party
2 other than the owner of the animal for negligence. Defendants claim that any such action must
3 proceed under strict liability rather than ordinary principles of negligence. They rely on New
4 York’s rule that a plaintiff suing the *owner* of a domestic animal for harm caused by that animal
5 may proceed only under a theory of strict liability. *See Bard v. Jahnke*, 6 N.Y.3d 592, 599 (2006).

6 Plaintiff is not limited to strict liability in pursuing claims against the Animal Shelter
7 because it did not own Monte at the time of the incident. Defendants’ reliance on *Bard* is
8 misplaced, as New York courts have not extended its holding to claims against non-owners of
9 domestic animals. To the contrary, New York has permitted negligence claims against various
10 defendants who did not own the animal that injured the plaintiff. *See Hewitt v. Palmer Veterinary*
11 *Clinic, PC*, 35 N.Y.3d 541, 549 (2020) (veterinary clinic); *Bernstein v. Penny Whistle Toys, Inc.*,
12 10 N.Y.3d 787, 788 (2008) (third-party defendant that allowed child to interact with dog); *see also*
13 *Hewitt*, 35 N.Y.3d at 554 (Wilson, *J.*, concurring) (noting New York’s “longstanding, settled
14 precedent, undisturbed by *Bard*, [that] a person injured by an animal may, under ordinary rules of
15 negligence, sue a person other than the animal’s owner”).

16 Nonetheless, the district court properly dismissed Plaintiff’s negligence claim. In New
17 York, a plaintiff asserting a negligence claim against a municipality “perform[ing] a governmental
18 function,” must “prov[e] that the municipality owed a ‘special duty’ to the injured party.” *Velez*
19 *v. City of New York*, 730 F.3d 128, 134–35 (2d Cir. 2013).¹ A plaintiff may establish a special
20 duty by showing that “(1) [he] belonged to a class for whose benefit a statute was enacted; (2) the

¹ Plaintiff does not contest the district court’s determination that he was required to show the existence of a special duty of care beyond the duty the Animal Shelter owed to the public at large. Thus, we assume for purposes of this appeal that a “special duty” framework applies to Plaintiff’s negligence claim.

1 government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public
2 generally; or (3) the municipality took positive control of a known and dangerous safety
3 condition.” *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 426 (2013).


4 Plaintiff relies on the third way of demonstrating a special duty, contending that the Animal
5 Shelter “assumed positive direction and control in the face of a known, blatant and dangerous
6 safety violation in harboring and transferring out Monte.” Appellant’s Br. at 13. Plaintiff argues
7 that the Animal Shelter “had notice that Monte had vicious propensities because . . . Monte had
8 previously bit a child, . . . was surrendered for euthanasia and . . . went after a shelter employee.”
9 *Id.* at 14. He thus contends that the Animal Shelter “affirmatively placed” him “in harm’s way”
10 by failing to notify either his grandparents or Furr-Ever Home about Monte’s propensities. *Id.*

11 We reject this argument. For the Animal Shelter to have “assume[d] positive direction and
12 control in the face of a known, blatant and dangerous safety violation,” *McLean v. City of New*
13 *York*, 12 N.Y.3d 194, 199 (2009) (citation omitted), it must have provided some “affirmative
14 assurances of safety on which the injured plaintiff relie[d],” *Abraham v. City of New York*, 828
15 N.Y.S.2d 502, 508 (App. Div. 2007); *see also Smullen v. City of New York*, 28 N.Y.2d 66, 69, 72
16 (1971) (finding a municipality liable when the city inspector assured plaintiff that a trench was
17 “pretty solid” and did not “need[] to be shored” before plaintiff descended into the trench and
18 perished when it collapsed); *Zurich Am. Ins. Co. v. City of New York*, 111 N.Y.S.3d 38, 40–41
19 (App. Div. 2019) (holding that the city owed a special duty to the plaintiff when the fire department
20 arrived at the scene, “assume[d] control over the ongoing fire, shut off the main water supply valve
21 to the warehouse’s sprinkler systems, then certified to warehouse employees that it was safe to
22 reenter the building when in fact the fire was still at risk of rekindling”). Here, the Animal Shelter
23 made no assurances to Plaintiff—or, for that matter, to Furr-Ever Home or Plaintiff’s

1 grandparents—about Monte’s temperament.² Plaintiff provided no facts demonstrating that he or
2 his grandparents relied on any representations made by the Animal Shelter. We conclude that the
3 district court properly dismissed Plaintiff’s negligence claim because Plaintiff failed to establish
4 that the Animal Shelter owed a special duty of care to him.³

5 We have considered the remainder of Plaintiff’s arguments and find them to be without
6 merit. Accordingly, we affirm the judgment of the district court.

7 FOR THE COURT:
8 Catherine O’Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is blue and white with the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom. There are two small stars on either side of the center text.

² To the contrary, Furr-Ever Home signed an agreement when it took possession of Monte from the Animal Shelter that specified “that the Town Of Hempstead Animal Shelter makes no guarantees whatsoever as to [Monte’s] . . . temperament, mental disposition or training.” App’x at 97.

³ We decline Plaintiff’s request in the alternative to certify to the New York Court of Appeals the question of whether a municipal animal shelter can be held liable under an ordinary negligence framework. *See* 2d Cir. R. 27.2(a); *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (explaining that this Court should not certify issues of state law where “sufficient precedents exist for us” to resolve the appeal (citation omitted)).

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: March 11, 2022
Docket #: 21-522cv
Short Title: Bain v. Town of Hempstead

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 17-cv-6554
DC Court: EDNY (CENTRAL
ISLIP)
DC Judge: Tomlinson

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

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DC Judge: Tomlinson

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature