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Torts: Smith v. Ruidoso: Tightening the Leash on New Mexico's Dogs

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TORTS: *Smith v. Ruidoso*: Tightening the Leash on New Mexico's Dogs

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I. INTRODUCTION

In *Smith v. Village of Ruidoso*,[1] the New Mexico Court of Appeals held that plaintiffs in dog-bite liability suits are entitled to assert tort claims based on a negligence theory. Prior to the *Smith* decision, all dog-bite injury suits were tried under a common law strict liability theory, which is expressed in Uniform Jury Instruction 13-506.[2] In contrast, section 41-4-6 of the New Mexico Tort Claims Act[3] provides a limited waiver of sovereign immunity in cases where injury results from the negligence of public employees who are acting within the scope of their duties.[4] As a result, in cases where a plaintiff brought suit against the state for dog-bite related injuries, the disagreement between the strict-liability and negligence standards left plaintiff without relief. By holding that negligence claims are appropriate in many dog-bite cases,[5] *Smith* effectively removes the barriers to recovery imposed by the conflict between the strict-liability nature of UJI 13-506 and the negligence standard required by Section 41-4-6 of the Tort Claims Act. Following is an examination of the historical context of the *Smith* case, along with an analysis of the rationale of the Court of Appeals and the implications of its

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1. 128 N.M. 470, 994 P.2d 50 (Ct. App. 1999).

2. UJI 13-506 states the following:

> 13-506: Liability of Dog Owner
>
> An owner of a dog is liable for damages proximately caused if the owner knew, or should have known, that the dog was vicious or had a tendency or natural inclination to be vicious.
>
> [The owner of such a dog is not liable to the person injured, if the injured person had knowledge of the propensities of the dog and wantonly excited it or voluntarily and unnecessarily put himself in the way of the dog.]

UNIFORM JURY INSTRUCTION 13-506, N.M.R.A. (1999) (brackets in original).

3. N.M. STAT. ANN. § 41-4-1 to § 41-4-29 1978 (Repl. Pamp.1996). In 1975 the New Mexico Supreme Court abrogated the doctrine of sovereign immunity when it published its opinion in *Hicks v. State*, 88 N.M. 588, 592, 544 P.2d 1153, 1157 (1975). This pivotal opinion cleared the way for the passage of the New Mexico Tort Claims Act, which provides the means for plaintiffs to bring tort actions against the State of New Mexico under statutorily defined conditions. For detailed analysis of the history of sovereign immunity in New Mexico and New Mexico Tort Claims Act, see Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. REV. 249 (1976), Jocelyn M. Torres, Note, *Torts—Government Immunity Under the New Mexico Tort Claims Act*, 11 N.M. L. REV. 475 (1981).

4. Section 41-4-6 of the New Mexico Tort Claims Act states the following:

> 41-4-6 Liability; buildings, public parks, machinery, equipment and furnishings.
>
> The immunity granted pursuant to Subsection A of Section 41-1-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death, or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

N.M. STAT. ANN. § 41-4-6 1978 (Repl. Pamp. 1996).

5. *Smith*, 128 N.M. at 477, 994 P.2d at 57. The court concludes that negligence is the proper theory in situations where the dog owner "lacks knowledge of the dog's vicious propensities and ineffectively controls the animal 'in a situation where it would reasonably be expected that injury could occur.'" (quoting Arnold v. Laird, 621 P.2d 128,141 (1980)).

decision to expand the theories of recovery beyond the traditional strict liability model.

II. STATEMENT OF THE CASE

Plaintiff-Appellee Deborah Smith, individually and as the next best friend of her minor daughter, Kristyn Smith, sued the Village of Ruidoso for dog-bite injuries Kristyn suffered as a result of an attack by a dog owned by the Village Police Department.[6] Kristyn was walking home from school when the dog mauled her, leaving her with facial lacerations serious enough to require stitches, scar revision, and dermabrasion treatments.[7] Even after this medical attention, Kristyn remained physically scarred at the time of trial.[8] The offending canine was Fanta, a narcotics-detecting German Shepard Dog owned by the Ruidoso Police Department.[9] While not on duty, Fanta lived with her "human partner," Police Officer Robert D. Layher.[10] Prior to the attack, Fanta was apparently the pride of the Ruidoso law enforcement community. She even was introduced to the Village as a "commissioned member of the Department."[11]

On November 16, 1993,[12] when Officer Layher was preparing to go to work with Fanta, Layher asked his wife to put the dog in the police cruiser.[13] Hearing the word "car," Fanta enthusiastically leapt for the front door, eluded Mrs. Layher's grasp, and escaped onto the street. Fanta then attacked Kristyn, who was walking past the Layher home.[14] At the time of the incident, a fence enclosing the Layher's front yard was marked with a sign that read "Caution/Police Dog."[15]

After the melee, Officer Layher notified Kristyn's mother, Deborah, who then took Kristyn to the hospital.[16] At the hospital, Police Chief Richard Swenor[17] indicated to both Deborah and a hospital administrator that the Department would pay Kristyn's medical bills.[18] The Chief, in a written report detailing the incident and also in a letter to a third party, repeated the proposal that the Department would assume the costs of Kristyn's treatment.[19] In the end, the Department paid for Kristyn's initial treatment and medications but did not provide for any of her subsequent medical bills.[20]

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6. *Smith*, 128 N.M. at 470, 994 P.2d at 50.
7. *Id.* at 473, 994 P.2d at 53.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Appellant's Brief-in-Chief at 3, Smith v. Village of Ruidoso, 128 N.M. 470, 994 P.2d 50 (Ct. App. 1999) (No. 19,476).
13. *Smith*, 128 N.M. at 473, 994 P.2 at 53.
14. *Id.*
15. *Id.*
16. *Id.*
17. Appellant's Brief-in-Chief at 3, Smith v. Village of Ruidoso, 128 N.M. 470, 994 P.2d 50 (Ct. App. 1999) (No. 19,476).
18. *Smith*, 128 N.M. at 473, 994 P.2d at 53.
19. *Id.*
20. *Id.* The purpose of this Note is to provide analysis of the changes in dog-bite liability that resulted from the *Smith* opinion. As such, no additional analysis of the contract claim will be provided herein.

Claiming that the Village of Ruidoso was negligent in the maintenance and operation of police equipment as per the standard set forth in Section 41-4-6 of the Tort Claims Act, Smith sued the Village for medical expenses as well as for damages consequent to Kristyn's disfigurement and future pain and suffering.[21] The Plaintiff asserted that Ruidoso was liable because the Village had been negligent in the training, handling, controlling, and storing of Fanta.[22] The plaintiff also brought two other claims, one for breach of contract and the other for misrepresentation.[23] Smith's tort claim was based exclusively on the theory that the Village knew or should have known that Fanta was vicious or dangerous.[24] Testimony regarding Fanta's alleged territoriality toward the police cruiser she rode in was offered to support the plaintiff's assertion that the defendant Village was in fact aware of Fanta's vicious tendencies.[25] Additionally, Smith pointed out that caution signs were posted on the fence surrounding Officer Layher's property and on the squad car itself.[26] Responding to this evidence, the Village offered video footage that showed Fanta growling and barking when contained in the police car, but then running off, presumably in a carefree manner, once released from her confinement.[27] Officer Layher also testified that Fanta lived in his home with children and that the dog had never previously acted viciously toward humans.[28]

The trial court granted summary judgment to the Village on the misrepresentation claim but denied the same motion on the contract and negligence claims.[29] While the trial court gave the "Liability of Dog Owner" Uniform Jury Instruction 13-506 along with an instruction on ordinary care, it did not provide a specific instruction on negligence.[30] Plaintiff Smith was ultimately awarded a general verdict of $50,000.[31] Smith then filed a motion to recover costs, including expenses associated with a voluntary, pretrial mediation.[32] Despite objection by the Village, the trial court also awarded an additional $708.91 for the pretrial mediation costs.[33] The Village then appealed.[34]

The New Mexico Court of Appeals found the Village immune from the claim Smith asserted under the strict liability theory that is operative in UJI 13-506.[35] Despite this, the court held that Smith was also entitled to assert a claim sounding in negligence. This change in the standard of liability made Smith's claim consonant with the negligence standard required by Section 41-4-6 of the Tort Claims Act.[36]

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21. *Id.*
22. *Id.*
23. *Id.*
24. Appellant's Brief-in-Chief at 4, Smith v. Village of Ruidoso, 128 N.M. 470, 994 P.2d 50 (Ct. App. 1999) (No. 19,476).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 475, 994 P.2d at 55.
36. *Id.*

On the contract issue, the court found that the verbal and written statements by the Chief did not constitute an enforceable contract and, as such, the award of damages on the contact claim was in error.[37] Finally, ruling on the question of recoverable costs, the Court of Appeals found that the trial court misused its discretionary power when it awarded pretrial mediation expenses to the plaintiff.[38]

Of the issues examined in *Smith*, this Note will focus on the implications of the decision by the Court of Appeals to enable plaintiffs to pursue dog-bite claims under a negligence theory of liability. Through its analysis of the common law strict liability standard and its ultimate adoption of negligence as another viable theory of recovery in dog-bite liability cases, the court removed the scienter requirement previously necessary to establish liability in dog-bite claims. This decision not only allowed the plaintiff in this case to recover against the Village under the Tort Claims Act, but also fundamentally alters the nature of potential liability for dog owners in New Mexico.

III. BACKGROUND

In 1952, the New Mexico Supreme Court addressed the question of common law of dog-bite liability in *Torres v. Rosenbaum*.[39] Plaintiff Torres was a housemaid employed by defendant Rosenbaum. While on an errand to buy eggs from a neighbor, Mrs. Anderson, Torres was attacked by the Andersons' collie.[40] Just before the assault, Torres told her employer that she was reluctant approach the Anderson residence. Apparently, Torres feared entering the neighbors' property because she had had a previous altercation with the dog.[41] Rosenbaum reassured Torres that the animal would not hurt her, but as Torres made her way up the driveway to the Anderson's house, the dog bit her on the left leg.[42] Torres's doctor asserted in court that the plaintiff developed osteomylitis and appendicitis as a result of an infection that developed from a dog bite.[43]

Torres's suit was against her employer, Rosenbaum, for negligent conduct when she sent Torres to a place where her safety would be jeopardized as a result of contact with the Andersons' vicious dog.[44] When the case was heard by the New Mexico Supreme Court, the issue on appeal focused on testimony by a third party describing Mrs. Anderson's assertion that the her dog "disliked Spanish people."[45] In the process of expounding on this issue, the court also examined the nature of liability for dog bites.[46] Sketching the contours of the strict liability theory later operative in UJI 13-506, the *Torres* court stated that "it must be shown the defendants had either actual or constructive knowledge of the vicious propensities

37. *Id.* at 479, 994 P.2d at 59.
38. *Id.* at 480, 994 P.2d at 60.
39. 56 N.M. 663, 248 P.2d 662 (1952).
40. *Id.* at 664, 248 P.2d at 662-63.
41. *Id.* at 664, 248 P.2d at 663.
42. *Id.*
43. *Id.* at 665, 248 P.2d at 663.
44. *Id.*
45. *Id.*
46. *Id.* at 666, 248 P.2d at 664.

of the dog which injured plaintiff."[47] Further, the court held that proving a defendant's knowledge of his or her dog's viciousness could be accomplished by establishing "the general reputation of the dog in the community."[48]

One year later, in 1953, the Supreme Court of New Mexico decided *Perkins v. Drury*.[49] Until the decision in *Smith v. Ruidoso*, this opinion served as the foundation for dog-bite liability law in New Mexico. The incident that precipitated the *Perkins* lawsuit involved an altercation between a cocker spaniel and a toddler named Sharon Louise.[50] At the time of the accident, Sharon Louise was with her parents at an auto repair shop, the premises of which were owned by the defendant, Drury.[51] Two cocker spaniels lived on the property and one of them attacked the girl, who was knocked to the ground and received a cut to her face that required nineteen stitches.[52] Sharon Louise was left with a permanent scar as a result of the altercation.[53]

The Supreme Court of New Mexico was faced with the question of whether or not there was sufficient evidence to support plaintiff's assertion that the defendant knew of the dog's vicious propensities. In response, the court opted to do away with the common law "one bite" doctrine.[54] This doctrine required that in order for a dog owner to be held liable for a dog-caused injury, the plaintiff must prove that the dog in question had bitten or attacked a person in the past.[55] Stating that the owner of a dog may "observe manifestations of danger from [the dog] to human beings from other traits than viciousness alone," the *Perkins* court concluded that the defendant was liable for Sharon Louise's injuries.[56] In support of its conclusion, the court noted, among other things, the fact that the defendant had instructed others to keep children away from his dogs.[57] Apparently, the defendant was concerned about preventing children from being bitten while his two cocker spaniels indulged in one of their frequent fights.[58] The *Perkins* opinion expanded the range of events that could serve to inform an owner of a dog's viciousness; now, in addition to attacks on humans, an owner's awareness of other behaviors, such as dog-on-dog aggression, could satisfy the scienter requirement of dog-bite liability.[59]

Two of the five justices on the court did not agree with the *Perkins* majority. The primary issue identified by Justices McGhee and Lujan was whether or not knowing that a dog is likely to fight another dog because of its "jealous" nature is sufficient to create dog-bite liability in the keeper of said canine.[60] Ultimately, these two justices found that in this case, the "notice of dangerous propensities and those of

47. *Id.* at 666, 248 P.2d at 663-64.
48. *Id.* at 666, 248 P.2d at 664.
49. 57 N.M. 269, 258 P.2d 379 (1953).
50. *Id.* at 270, 272, 258 P.2d at 379, 381.
51. *Id.* at 270, 258 P.2d at 380.
52. *Id.* at 271, 258 P.2d at 380.
53. *Id.*
54. *Id.* at 274, 258 P.2d at 382.
55. *Id.* at 276, 258 P.2d at 384.
56. *Id.* at 274, 258 P.2d at 382.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 278, 258 P.2d at 384.

[the] actual injury were so divergent" so as to preclude a finding of liability.[61] The dissenting justices expressed the opinion that broadening the standard of liability was best left to the legislature.[62]

The exact nature of a defendant's "knowledge" of a dog's vicious propensities was further examined by the Court of Appeals in *Mallard v. Zink*.[63] Mr. and Mrs. Zink owned a dog that attacked John Daniel Mallard, who was just shy of three years old at the time of the incident. Mallard and the Zink's dog crossed paths when the boy was playing on a slide at a public park.[64] After Mallard tumbled down the slide and landed between the Zink's dog and an unknown female dog in heat, the Zink's dog attacked the boy. Mallard was left with injuries to the face and head as a result of the incident.[65]

The issue facing the Court of Appeals was whether or not one spouse's knowledge of a dog's vicious propensities constitutes sufficient "notice" to create liability in the other spouse.[66] While the majority asserted that because Mr. and Mrs. Zink were joint owners of the dog, they should be treated as "one unit, merged for the purposes of John's claim,"[67] the dissent disagreed. Noting that the facts presented to the district court could in fact lead reasonable minds to different conclusions about whether Mrs. Zink was personally aware of the dog's past viciousness, the dissent focused on Mrs. Zink's apparent lack of contact with and knowledge of the dog. Testimony described Mrs. Zink as someone who was not fond of animals, and as a result was unfamiliar with the details of the dog's life.[68] Mr. Zink, perhaps anticipating his wife's ambivalence toward pets, failed to tell Mrs. Zink that the dog had once been identified as the perpetrator of a bite to another two-and-a-half-year old.[69] Judge Hendley, in his dissent, concluded that the trial court had erred as a matter of law.[70]

In 1988, New Mexico's position on dog-bite liability was further refined by *Castillo v. County of Santa Fe*.[71] Virginia Castillo brought suit against the county to recover damages for injuries suffered by her three-year-old son, Daniel, when a free-roaming dog on the grounds of a public housing project bit him.[72] Since the offending dog in *Castillo* had no identifiable owner, the court focused on whether or not the grounds of a publicly maintained housing project could be included within the scope of the New Mexico Tort Claims Act.[73] Despite the obvious factual differences, the *Castillo* decision presages the position taken by the Court of Appeals in *Smith*. By examining the equities of the case and the legislative history of the Tort Claims Act, the New Mexico Supreme Court ultimately concluded that

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61. *Id.* at 280, 258 P.2d at 386.
62. *Id.*
63. 94 N.M. 94, 607 P.2d 632 (Ct. App. 1979).
64. *Id.* at 95, 607 P.2d at 633.
65. *Id.* at 94-95, 607 P.2d at 632-33.
66. *Id.* at 95, 607 P.2d at 633.
67. *Id.*
68. *Id.* at 95, 97, 607 P.2d at 633, 635.
69. *Id.* at 97, 607 P.2d at 635.
70. *Id.* at 96-97, 607 P.2d at 634-35.
71. 107 N.M. 204, 755 P.2d 48 (1988).
72. *Id.* at 205, 755 P.2d at 49.
73. *Id.*

the state did in fact owe Daniel Castillo a duty of care to prevent attacks by loose dogs on property it is charged with managing.[74]

The *Castillo* decision marks an initial departure by the New Mexico courts from strict construction of the Tort Claims Act in the context of dog-bite cases. This departure is explored more deeply in the *Smith* opinion. The *Castillo* position was not without its detractors, for the dissent challenged the majority reading of the legislative intent of the Act and asserted that the waiver of sovereign immunity was limited to "eight classes of activities which are specifically set out as exemptions in the Tort Claims Act."[75] Noting that the opinion in *Wittkowski v. State*[76] interpreted Section 41-4-6 as limiting liability in a similar situation in which there was a defect in a building, Justice Stowers also called for a plain-meaning reading of the statute.[77]

IV. RATIONALE

In reaching the conclusion that plaintiffs should be entitled to employ a negligence theory in dog-bite injury cases, the *Smith* court first examined UJI 13-506 to determine whether or not the instruction could be used in a negligence context. Holding that UJI 13-506 incorporates elements of both strict liability and negligence, the court nevertheless concluded that the instruction was inappropriate for use in a negligence context.[78] The fact that the instruction imposes liability on dog owners regardless of whether or not they exercised ordinary care in the prevention of harm to the victim suggested to the court that the instruction is of the strict liability type.[79] This said, UJI 13-506 also requires proof of owner knowledge of the animal's vicious propensities, thus incorporating an element of the negligence standard.[80]

The court emphasized the strict liability nature of UJI 13-506 when it pointed out that the *Smith* jury had been given an additional instruction describing the ordinary care standard.[81] Both parties' reliance on *Perkins v. Drury*[82] led the court to note that *Perkins* conflates ordinary care and strict liability.[83] In light of this precedent, the court concluded that the jury was charged with deciding the issue of dog-bite liability under a standard that was made up of UJI 13-506 coupled with a separate instruction on ordinary care.[84] Due to the fact that UJI 13-506 was paired with an additional ordinary care instruction in the *Smith* case, the Court of Appeals concluded that the dog-bite liability instruction on its own did not contain a negligence aspect.[85]

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74. *Id.* at 206-07, 755 P.2d at 50-51.

75. *Id.* at 207, 755 P.2d at 51.

76. 103 N.M. 526, 710 P.2d 93 (Ct. App. 1985), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985), *overruled on other grounds by* Silva v. State, 106 N.M. 472, 745 P.2d 380 (1987).

77. *Smith*, 128 N.M. at 473, 755 P.2d at 53.

78. *Id.* at 474-75, 994 P.2d at 54-55.

79. *Id.* at 474, 994 P.2d at 54.

80. *Id.*

81. *Id.* at 474, 994 P.2d at 53.

82. 57 N.M. 269, 258 P.2d 379 (1953).

83. 128 N.M. at 474, 994 P.2d at 54.

84. *Id.*

85. *Id.* at 55, 994 P.2d 50 at 55 (citing De Robertis v. Randazzo, 462 A.2d 1260, 1266-67 (N.J. Sup. Ct. 1983); Westberry v. Balckwell, 577 P.2d 75, 76 (Or. 1978) (en banc); Arnold v. Laird, 621 P.2d 138, 140 (Wash.

Examining the stance taken by other courts on similar issues, the Court of Appeals found that other jurisdictions have characterized dog-bite instructions that require owner knowledge of the dog's vicious propensities as strict-liability instructions.[86] Section 509 of the *Restatement (Second) of Torts* further strengthened this position.[87] A liability standard with "language essentially the same as our UJI 13-506" was analyzed in the *Restatement*.[88] This similar liability standard, according to the *Restatement*, imposes strict liability.[89]

At the center of the court's characterization of UJI 13-506 as a strict liability instruction is the fact that it contains no language that could be construed to impose an "ordinary care" standard.[90] To illustrate this, the court examines the definitions of "negligence" as they appear in other New Mexico jury instructions.[91] Referring specifically to two instructions, UJI 13-908 and UJI 13-1601, the court points out that both instructions incorporate the phrase "ordinary care."[92] In contrast, UJI 13-506 provides no particular duty of care, and it does not require the jury to be instructed on ordinary care.[93] The fact that UJI 13-506 does not integrate any ordinary care language was enough to convince the court that this instruction is not viable for use under a negligence theory of recovery. Explaining the nature of the instruction, the court held that UJI 13-506 "imposes strict liability once knowledge has been proven."[94]

The New Mexico Tort Claims Act only allows for recovery under negligence claims.[95] With this in mind, the *Smith* opinion concluded that the trial court erred when it allowed the jury to find the Village negligent based on the strict liability theory expressed in UJI 13-506.[96] Since, at the time of the *Smith* trial, there was no negligence-based theory for recovery of damages in dog-bite cases, the Village was entitled to a directed verdict in its favor.[97] Under the Tort Claims Act, there simply is no waiver of immunity where a claim is based on a strict liability theory.[98] This said, the court ultimately concluded that dog-bite liability may rightfully be pursued under a negligence theory, and it used one case, *Aragon v. Brown*,[99] to support its position.[100]

1980) (en banc); Kyle v. Commonwealth, No. 9201635, 1994 WL 879700 (Mass. Super. Ct. June 10, 1994)).

86. *Castillo* at 475, 994 P.2d at 55.

87. *Id.*

88. *Id.* Section 509(l) of RESTATEMENT (SECOND) OF TORTS states that the "possessor of a domestic animal that he knows or had reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm." RESTATEMENT (SECOND) OF TORTS § 509(1) (1977).

89. *Castillo* at 475, 994 P.2d at 55.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* at 475, 994 P.2d at 55.

95. *Id.* at 472, 994 P.2d at 52.

96. *Id.* at 475, 994 P.2d at 55.

97. *Id.*

98. *Id.*

99. 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979).

100. *Smith*, 128 N.M. at 475-76, 994 P.2d at 55-56.

Aragon held that jury instructions ought to be limited to dog-bite doctrine, a position that effectively made strict liability the only theory available to victims of dog-inflicted injuries in New Mexico.[101] This decision was made in response to the trial court's allowance, at the defendant's behest, of additional instructions on negligence, contributory negligence, and trespass.[102] The *Smith* court, apparently disturbed by the fact that *Aragon* leaves those pursuing claims against government entities without relief, held that *Aragon* is not binding on the facts in *Smith*.[103] Distinguishing the procedural requirements in *Aragon* from the case at hand, the court pointed out that the New Mexico prohibition on the addition of theories of liability applies only where a *defendant* seeks the negligence instruction.[104] Moreover, since the law of negligence at the time of the *Aragon* decision was based on a contributory, and not comparative model, the *Aragon* holding was no longer binding according to the *Smith* court.[105]

Offering additional support to the court's finding that the strict liability requirement expressed in *Aragon* is no longer binding was the fact that other jurisdictions have adopted negligence standards in dog-bite cases.[106] These new standards are labeled "common law ordinary negligence" or "negligence in the control and confinement of domestic animals."[107] Additionally, some jurisdictions that once utilized a common law dog-bite doctrine have adopted Section 518 of the *Restatement (Second) of Torts*, which acknowledges that a dog owner can be held liable in negligence for damages even if the owner had no reason to know that the dog had vicious tendencies.[108] Taking these examples into consideration, the *Smith* court ultimately held that a dog owner in New Mexico may be held liable in negligence for injuries caused by the dog, as long the owner failed to control the dog in circumstances where the owner could reasonably expect that injury could occur, regardless of the owner's awareness of the dog's vicious propensities.[109]

V. ANALYSIS

In deciding that dog-bite victims in New Mexico should have the prerogative to choose between strict liability and negligence theories of recovery, the Court of Appeals has participated in a gradual trend toward favoring victims of such attacks. Moreover, by clearly separating out negligence as an entirely distinct cause of action

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101. *Aragon*, 93 N.M. at 647, 603 P.2d at 1104.
102. *Smith*, 128 N.M. at 476, 994 P.2d at 56.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 477, 994 P.2d at 57.
107. *Id.* at 477, 994 P.2d at 57 (citing Williams v. Johnson, 781 P.2d 922, 923 (Wyo. 1989); Beeler v. Hickman, 750 P.2d 1282, 1286 (Wash. Ct. App.1988); Chambliss v. Gorelik, 191 N.W.2d 34, 37 (Wis. Ct. App.1971)).
108. Section 518 of the RESTATEMENT (SECOND) OF TORTS reads:

> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal, if, but only if,
> (a) he intentionally causes the animal to do the harm, or
> (b) he is negligent in failing to prevent the harm.

RESTATEMENT (SECOND) OF TORTS § 518 (1977).
109. *Smith*, 128 N.M. at 477, 994 P.2d 50 at 57.

in dog-bite cases, the *Smith* opinion effectively disentangles the legal thicket created by earlier case law. Dating back to the *Torres v. Rosenbaum* opinion in the 1950s, negligence and strict liability have been intertwined with one another in the questions presented and the holdings of the New Mexico courts.[110]

Torres approached the question of employer liability by reference to the common law rule for dog owners.[111] The court stated that employers could be held to have acted negligently toward their employee for causing her to be exposed to a dangerous dog owned by a third party who was not a party to the lawsuit.[112] For a duty to exist between the employer and employee, the plaintiff had to adequately demonstrate that the employer "had either actual or constructive knowledge of the vicious propensities of the dog which injured [the employee]."[113] By structuring the logic behind the employer's liability in a way that blends the duty of care that is central to negligence claims with the common law strict liability dog-bite standard, the court further confused the New Mexico standard of liability in dog-bite claims. It was not long before the *Torres* decision was revisited by the *Perkins* court. In *Perkins*, the court faced a relatively simple claim for damages against the owner of a dog for injuries caused by a renegade cocker spaniel.[114] The opinion quoted the trial court's findings of fact when it concluded that the defendant dog owner "knew the dog was vicious and dangerous to children,"[115]. In language that the *Smith* court described as "conflat[ing] ordinary care and strict liability,"[116] the *Perkins* opinion reiterated the trial court's position that "the defendant had actual knowledge, or in the exercise of reasonable care as an ordinarily prudent person, he should have known of the propensity toward viciousness on the part of the animal."[117] While the strict liability standard for dog-bite claims survived the trial court's melding of these theories of liability, the *Perkins* opinion certainly did not clarify matters.

The outlook for dog-bitten plaintiffs seeking damages from dog owners began to look more hopeful after the *Mallard v. Zink* [118] opinion was handed down in 1979. In its decision to give legal legitimacy to a spouse's constructive knowledge of a dog's vicious propensities, the court of appeals initiated a trend that continues in *Smith*.[119] The *Mallard* opinion made it easier for plaintiffs to pursue damages against a larger pool of defendants, effectively broadening the scope of liability among those people who are, in some way, responsible for the conduct of a dog. Under earlier case law, it was clear that the owner of a dog needed to be actually or constructively aware of the potential ferocity of his canine in order for a plaintiff to recover against him. After *Mallard*, one may be liable to a plaintiff simply by virtue of a spouse's "knowledge."

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110. *See Torres*, 56 N.M. 663, 248 P.2d 662.
111. *Id.* at 666, 248 P.2d at 664.
112. *Id.*
113. *Id.*
114. *Perkins*, 57 N.M. at 270, 258 P.2d at 379-80.
115. *Id.* at 273, 258 P.2d at 381.
116. *Smith*, 128 N.M. at 474, 994 P.2d at 54.
117. *Perkins*, 57 N.M. at 272, 258 P.2d at 380 (quoting the trial court's findings of fact).
118. 94 N.M. 94, 607 P.2d 632 (Ct. App. 1979).
119. *See Mallard*, 94 N.M. at 96, 607 P.2d at 634.

The common law standard of liability in dog-bite claims is not the only element of the *Smith* case that has been developed through case law. Arguably, if it were not for the opinion in *Castillo v. County of Santa Fe*,[120] the *Smith* court could have had more difficulty reaching its conclusion. While *Castillo* does not explicitly state a pro-plaintiff, pro-recovery stance, its choice to expand the implications of the language used in Section 41-4-6 of the Tort Claims Act does. Gleaning legislative intent through a "plain reading" of the section, the court concluded that the lawmakers meant to "ensure the safety of the general public by imposing upon public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities."[121] In *Castillo*, the result was an expansion of the meaning of the word "buildings" to encompass "buildings and grounds."[122] Given the *Castillo* precedent, it was easy for the *Smith* court to include a police drug dog within the rubric of "equipment" as required by Section 41-4-6.

V. IMPLICATIONS

The decision of the *Smith* court to extend the right to pursue negligence-based claims against owners of injury-causing dogs has an unexpected consequence. Describing UJI 13-506 as a standard that "imposes strict liability once knowledge is proven,"[123] the Court of Appeals clarified the present state of dog-bite law in New Mexico. In general, strict liability, in any form, is a very desirable standard for most plaintiffs. This said, the *Smith* court's decision to offer plaintiffs the option to pursue dog-bite claims under a negligence standard could appear to have a very limited impact. On initial inspection, the disposition of the *Smith* case appears to show a court enabling recovery for a plaintiff who, from no fault of her own, happened to be bitten by a dog owned by a party who is insulated from strict-liability claims. By allowing plaintiff to present her case against the Village under a negligence theory, the court was not only preventing a potential inequity, but it also significantly expanded the possibility for recovery in cases involving injuries caused by dogs.

One reason that the *Smith* decision so enlarged the potential for recovery by plaintiffs in dog-bite cases is that the pre-*Smith* standard for liability was not as generous as the term "strict liability" implies. As noted by the court, the fact that UJI 13-506 "imposes liability on a dog owner without regard to the owner's exercise of ordinary care" makes the standard "resemble strict liability."[124] This said, plaintiffs first have to prove that the defendant "knew or should have known" that the dog was "vicious or had a natural inclination to be vicious" before receiving the benefit of the strict liability part of the instruction.[125] Adding on this preliminary requirement that plaintiffs must prove owner knowledge of a dog's vicious propensities makes the UJI 13-506 standard much less potent than the label "strict liability" implies.

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120. 107 N.M. 204, 755 P.2d (Ct. App. 1988).

121. *Castillo*, 107 N.M. at 206, 755 P.2d at 50.

122. *Id.*

123. *Smith*, 128 N.M. at 475, 994 P.2d at 55.

124. *Id.* at 474, 994 P.2d 48 at 54 (quoting Saiz v. Belen School Dist., 113 N.M. 387, 402, 827 P.2d 102, 117 (1992), the court noted that "[t]he feature of strict liability that distinguishes it from negligence is that the reasonableness of the acts or omissions of the party to be charged...is not a consideration").

125. UNIFORM JURY INSTRUCTION 13-506 N.M.R.A (2001).

Instead of being almost automatically eligible for recovery, dog-bite victims first had to convince the trier of fact that the dog owner should have been aware of the animal's tendency to bite or attack.

In contemporary American society, where neighbors frequently have limited social relations with one another, demonstrating an owner's knowledge of his dog's vicious propensities could be quite difficult. In cases where injury was caused by a dog that had committed a previously documented attack, the current standard would likely pose little threat to a plaintiff's chances for recovery. On the other hand, if the dog in question does not have the equivalent of a canine criminal record, an injured party may face considerable obstacles in pursuit of recovery against an owner who "should have known...that the dog...had a natural inclination to be vicious."[126] When household pets are kept confined in a fenced backyard or inside the house, the plaintiff's task of proving an owner's real or imputed knowledge of his dog's vicious propensities could be difficult indeed. Lacking evidence of an individual animal's reputation in the community, a plaintiff bitten by a dog kept in such a way could be left without sufficient evidence to satisfy the requirements of the jury instruction. In light of this type of scenario, arguing that a dog owner failed to exercise the due care required to prevent dog-on-human altercations may provide plaintiffs with a more viable theory of recovery.

By making strict liability and negligence causes of action available to New Mexico plaintiffs in dog-bite cases, the *Smith* decision has eliminated the potential inequity of some plaintiffs having to go without compensation if they happen to be bitten by a dog owned by a governmental entity. Whenever greater latitude is given to plaintiffs, something is usually taken away from defendants, and such is the case here. Under the *Smith* decision, all dog-bite victims may now employ a negligence theory of recovery in the event that they cannot prove an owner's knowledge of his dog's vicious propensities.[127] As a result, dog owners now face far greater exposure to liability. Not only may a dog owner be held responsible if the plaintiff can show that he knew or should have known of his pet's vicious propensities,[128] but he may also have to measure up against the reasonable person in a negligence claim. Now, even if a plaintiff cannot demonstrate that the defendant had the scienter required in the old common law strict liability standard, the same plaintiff can attempt to demonstrate that the defendant was "negligent in failing to prevent the harm."[129]

New Mexico is not alone in enabling plaintiffs to recover against owners of injury-causing dogs without requiring proof of the owner's knowledge of his dog's vicious propensities. The vast majority of states have replaced the common law of

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126. *Id.*

127. The Court of Appeals stated that "a negligence claim is appropriate where the dog owner lacks knowledge of the dog's vicious propensities and ineffectively controls the animal 'in a situation where its would reasonably be expected that injury could occur.'" *Smith*, 128 N.M. at 477, 994 P.2d at 55 *quoting* Arnold v. Laird, 621 P.2d 128, 141 (Wash. 1980), suggests that a dog-bite negligence claim may only be available if a plaintiff demonstrates that the defendant dog owner lacked knowledge of the dog's viciousness. If this is the case, plaintiffs may not have carte blanche in selecting their theory of recovery, since they may first have to establish that they cannot prove owner knowledge as required by UJI 13-506. Case law has yet to clarify this point.

128. Traditionally, a dog's "vicious propensities" could be proven by the fact that it had bitten a human being. This notion is commonly labeled the "one bite rule" and in essence it assumed that all dogs are not vicious until they prove that they are by attacking a person.

129. *Smith*, 128 N.M. at 477, 994 P.2d at 57 (quoting RESTATEMENT (SECOND) OF TORTS, § 518 (1977).

dog bites in their jurisdiction with statutes that outline the nature of a dog owner's liability.[130] Among those states that have codified their dog-related injury doctrine, most have chosen a standard that does not require the owner to know that the dog might pose a threat to others.[131] By writing their statutes in this way, these states have increased the chances for plaintiffs to recover against defendant dog owners in much the same way that New Mexico has in its common law.

A typical statute of this kind is Arizona's Section 11-1025.[132] Titled "Liability for dog bites," it clearly removes the common law "one bite" standard when it states in part A that

> [t]he owner of a dog which bites a person when the person is in or on a public place or lawfully in or on a private place, including the property of the owner of the dog, is liable for damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of its viciousness.[133]

Part B of Section 11-1025 qualifies this standard of liability when it disallows suits for damages against "any governmental agency" when the dog in question is being used in most aspects of "military or police work."[134] Putting aside the caveat for "on duty" police and military dogs, Section 11-1025 creates liability in dog owners where none previously existed, for the common law required actual or constructive knowledge of a dog's tendency to bite or attack people.

The Arizona statute above is representative of a modern rendition of the strict liability standard in dog-bite cases. As the *Smith* court notes, the "one bite rule," which is embodied in the language of UJI 13-506,[135] "imposes strict liability *once knowledge is proven.*"[136] Arizona, and other states that have enacted laws similar to Section 11-1025, has created strict liability without the scienter qualification. Consequently, dog owners in these jurisdictions should be on notice that the family dog could easily cost them much more than dog food and trips to the vet if he bites the wrong person.

The implications of the *Smith* decision are not quite as broad reaching as those of the new breed of strict liability dog-bite statutes. Concluding that a negligence claim is appropriate in situations where the dog owner did not know of his pet's vicious tendencies, the court created what amounts to a two-tier system for the evaluation of dog-bite claims.[137] Initially, a plaintiff must prove whether or not the

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130. In fact, New Mexico is one of a handful of states that do not have a dog-bite liability statute on the books. A survey of the fifty states and the District of Columbia revealed that only Alaska, Arkansas, Connecticut, Maryland, Missouri, Mississippi, Tennessee, Wyoming, and New Mexico rely exclusively on their common law to address such questions.

131. Alabama, Arizona, California, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and West Virginia each have statutes that remove the scienter requirement from their dog-bite statutes.

132. ARIZ. REV. STAT. ANN. § 11-1025 (West 2001).

133. *Id.*

134. ARIZ. REV.STAT. ANN. § 11-1025(B) (West 2001).

135. UJI 13-506 states that "[a]n owner of a dog is liable for damages proximately caused by the dog if the owner knew, or should have known, that the dog was vicious or had a tendency or natural inclination to be vicious." UNIFORM JURY INSTRUCTION 13-506 N.M.R.A. (2001).

136. *Smith*, 128 N.M. at 475, 994 P.2d at 55 (emphasis added).

137. *Id.* at 477, 994 P.2d at 57.

owner knew or had reason to know that the dog was vicious. In the event that there is insufficient evidence to prove the owner's knowledge—which precludes proceeding under the terms of UJI 13-506—a plaintiff may argue negligence.[138] To prove negligence, plaintiff must show that the owner or the dog "ineffectively control[led] the animal 'in a situation where it would reasonably be expected that injury would occur.'"[139] While this structure does not provide the injured plaintiff with quite the latitude available under a strict liability statute, it nevertheless significantly improves one's chances of recovering damages for dog bites suffered in New Mexico.

All signs to the contrary, though, the old common law "one bite" rule for determining an owner's liability for injuries caused by a "vicious" dog remains alive and well in the United States.[140] Numerous states have enacted "dangerous or vicious dog laws" that clearly define what such a canine is and what owners must do with them. Section 25-2805 of the Idaho Code is a succinct example of the typical definition of a legally "vicious" or "dangerous" dog: "Any dog which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing, is vicious."[141] Idaho's Section 25-2805 is notable for its simplicity, for comparable laws in other jurisdictions often incorporate many other requirements.[142] Motivated by what they seem to perceive as the "increasingly serious and widespread threat to the safety and welfare of the people...because of unprovoked attacks which cause injury to persons and domestic animals...,"[143] state legislatures in large numbers are codifying the old common law of dog-inflicted injuries.

One state has a law on its books that legally designates a certain type of dog as "vicious," regardless of its behavior. Ohio Code Section 955.11(A)(4)(a)(iii) appears to state that if a dog "belongs to a breed that is commonly known as a bit bull," such animal is considered a "vicious dog."[144] This particular section of the Ohio Code was enacted in 1987, but by 1991 that state's courts were struggling with the issue of whether or not the "commonly known as a pit bull" language was unconstitutionally void for vagueness.[145] Ultimately, the Supreme Court of Ohio concluded that "pit bull dogs are distinctive enough that the ordinary dog owner knows or can discover with reasonable effort whether he or she owns such a dog."[146] In cataloging the

138. *Id.*

139. *Id.* (quoting Arnold v. Laird, 621 P.2d 128 (Wash. 1980). The court also cites to De Robertis v. Randazzo, 462 A.2d 1260, 1266-67 (N.J. Sup. Ct. 1983); Griner v. Smith, 259 S.E.2d 383, 388 (N.C. App. 1979); and Westberry v. Balckwell, 577 P.2d 75, 76 (Or. 1978) (en banc)).

140. New Mexico discarded its version of the common law "one bite" doctrine in Perkins v. Drury, which described it as "the old doctrine of every dog being entitled to 'one bite.'" *Perkins*, 57 N.M. 269, 274, 258 P.2d at 384.

141. IDAHO CODE § 25-2805 (Michie 2000).

142. California, for example, requires that for a dog to be labeled legally "potentially dangerous" it must have "engag[ed] in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner or keeper of the dog" twice within a thirty-six-month period. CAL. FOOD & AGRIC. CODE § 31602 (West 2001).

143. Excerpted from Legislative Findings for FLA. STAT. ANN. § 767.10 (West 2000).

144. OHIO REV. CODE ANN. § 955.11(A)(4)(a)(iii) (West 1988).

145. *See* State v. Anderson, 556 N.E.2d 1224 (Ohio 1991); State v. Ferguson, 556 N.E.2d 1230 (Ohio 1991); State v. Ferguson, 603 N.E.2d 345 (Ohio Ct. App. 1991).

146. *Anderson*, 556 N.E.2d at 1227.

physical and behavioral traits commonly associated with the pit bull-type dogs, the court noted the breed's "unusual relentless ferocity"[147] and "exceptionally strong jaws"[148] and concluded that these, in combination with other commonly known attributes, are sufficient to enable the general public and law enforcement personnel to make accurate assessments of what canine might be considered a pit bull dog.[149]

Among American "dangerous dog" statutes, the Ohio version is an anomaly, but its extreme stance highlights what might be the motivation behind the codification of the common law dog-bite doctrine in other, more moderate jurisdictions. As noted above, legislators are keenly aware of the concern, if not hysteria, surrounding the issue of "killer" dogs. Laws that serve to protect the public from menacing canine individuals, or even breeds, create many more friends than enemies. Considering that many of these laws can be found in the statute compilations under titles like "Authority to Control Dangerous or Vicious Dogs,"[150] it appears that the legislative branches have been reacting to the collective fear of potentially harmful animals.

While the source of these "dangerous dog" laws is clearly in the old common law "one bite" rule, this newer application of the old legal principle has expanded well beyond the scope of defining an owner's liability. Today, the fact that a dog has bitten or attacked a person allows the law to classify the animal as a danger to society as a whole. This status brings the owner of such an animal much more than just notice of a dog's vicious propensities, since almost all of the dangerous dog statutes require owners to confine, restrain, and even insure these dogs.[151]

VI. CONCLUSION

The nationwide "dangerous dog law" phenomenon and the *Smith* opinion in New Mexico are examples of a trend toward providing increased protection for those who might someday become the victim of a renegade canine. Making recovery in dog-bite cases more likely for injured plaintiffs does come at some cost to the many "good dogs" and their good owners throughout the United States. In practically all jurisdictions, keeping your dog on a tight leash, both literally and figuratively, is absolutely essential if a dog owner wants to shield himself from injury claims. While perhaps little more than a nuisance to the average dog owner, this change in the texture of American law could seriously impact charitable activities involving dogs. For example, the risk of liability could endanger much-appreciated volunteer therapy dog programs, which have improved the quality of life for many infirm and elderly people.

But perhaps the stricter regulations serve a valid purpose. As this Note was being written, the news of January 26, 2001, reporting the death by mauling of a 33 year

147. *Id.* at 1228.

148. *Id.* at 1227.

149. *See Id.* at 1227-28.

150. VA. CODE ANN. § 3.1-796.93:1 (Michie 1994).

151. Typical of the requirements for possessing a legally dangerous dog are those described in Georgia's "Dangerous Dog Control" law. GA. CODE ANN. § 4-8-25 (Michie 1995). This section requires owners to have a "proper enclosure," a "clearly visible sign warning that there is a dangerous dog on the property," evidence of a "policy of insurance [for] at least $15,000" and a "surety bond in the amount of $15,000." In addition, the owner must inform a dog control officer if the dog is on the loose, and also when the dog owner moves to another district.

old San Francisco lacrosse coach, shocked the nation.[152] The animals involved in the incident have been variously described as "a mixed breed of mastiff and Canary Island dog"[153] and "Presa Canario"[154] and were estimated to weigh between 100 and 120 pounds each.[155] Apparently, the fact that the dogs were on-leash at the time of the fatal altercation did little to help the victim, Diane Whipple. On March 22, 2002, Marjorie Knoller, who co-owned the dogs with her husband and fellow attorney, Robert Noel, was convicted of second-degree murder in the death of Whipple.[156] Noel, who was not present at the time of the attack, was convicted of manslaughter.[157] According to the Associated Press, Knoller may be only the third person ever to be convicted of murder in a dog attack case.[158] The public and legislators appear to be losing patience with the combined danger of irresponsible dog owners who keep powerful and potentially lethal canines, making similar convictions increasingly likely.[159] While average dog owners do not have to concern themselves about the possibility of facing homicide charges, dog law is, for better or worse, becoming more victim- and plaintiff-friendly. For the meantime, keeping Fido on a short leash, both literally and figuratively, is probably the best approach for all concerned.

152. *See California Couple Accused of Homicide in Dog Attack* (Mar. 28, 2001), *available at* http://www.cnn.com/2001/LAW/03/28/dog.mauling.arrests.01/.

153. *Id.*

154. Associated Press, *Dog Owner Could Get Life in Prison* (Mar. 22, 2002), *available at* http:sacbee.com/24hour/nation/story/318834p-2717723c.html.

155. *California Couple Accused of Homicide in Dog Attack* (Mar. 28, 2001), *available at* http://www.cnn.com/2001/LAW/03/28/dog.mauling.arrests.01/.

156. Associated Press, *Dog Owner Could Get Life in Prison* (Mar. 22, 2002), *available at* http:sacbee.com/24hour/nation/story/318834p-2717723c.html.

157. *Id.*

158. *Id.*

159. While not dog-related per se, the enactment of Section 1714.01 of the California Civil Code, which enables domestic partners to pursue damage claims for negligent infliction of emotional distress, provides evidence of the degree to which the gruesome death of Diane Whipple stirred the emotions, and sympathies, of the public. *See* CAL. CIV. CODE § 1714.01 (West 2001).