

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

(FILED: April 15, 2016)

**JAYME DEMELLO, Mother and Next** :  
**Friend of JADE CORREIA, a Minor,** :  
**BRIAN SULLIVAN, Father and Next** :  
**Friend of ALEXIS SULLIVAN, a Minor,** :  
**KRYSTAL CORDEIRO, Individually,** :  
**KRYSTAL CORDEIRO, Mother and Next** :  
**Friend of LILLIAN DEPOY, a Minor,** :  
**DEREK GOSSELIN, Father and Next** :  
**Friend of BRODY GOSSELIN, a Minor,** :  
**DEREK GOSSELIN, Father and Next** :  
**Friend of EMMA GOSSELIN, a Minor,** :  
**WILLIAM P. CORREIA, Father and Next** :  
**Friend of WILLIAM J. CORREIA, a Minor,** :  
**ANDREA MEDEIROS, Mother and Next** :  
**Friend of LAUREN MEDEIROS, a Minor,** :  
**KELLY MAURICIO, Mother and Next** :  
**Friend of RACHEL MAURICIO, a Minor,** :  
**SARAH MAURICIO, Individually and** :  
**JAMES STANLEY, Individually,** :  
**LYZABETH SMITH, DAVID HOBSON,** :  
**Father and Next Friend of STELLA** :  
**HOBSON, a Minor, and LAUREN** :  
**LENNAHAN, Mother and Next Friend of** :  
**MARGARET LENNAHAN, a Minor,** :  
**SHARON GARNER, Mother and Next** :  
**Friend of CHARLOTTE STRUNK, a** :  
**Minor, AVA MASTROSTEFANO,** :  
**Individually, SARAH MACEDO, Mother** :  
**and Next Friend of MILES MACEDO, a** :  
**Minor, CHRISTINE BOTELHO,** :  
**Individually, GEORGE BOTELHO,** :  
**Individually, and GEORGE BOTELHO,** :  
**Father and Next Friend of IAN** :  
**BOTELHO, a Minor,** :  
*Plaintiffs,* :

C.A. No.: NC-2014-0022

VS.

**MARILYN BETTENCOURT and DENISE** :  
**G. SAURETTE, as Town Treasurer of the** :

<b>TOWN OF TIVERTON,</b>	:
<i>Defendants.</i>	:
<b>MARILYN BETTENCOURT</b>	:
<i>Third-Party Plaintiff,</i>	:
<b>VS.</b>	:
<b>GRAY’S ICE CREAM, INC.,</b>	:
<i>Third-Party Defendant.</i>	:

**DECISION**

**STONE, J.** Currently before the Court is Defendant Marilyn Bettencourt’s (Bettencourt) Motion for Summary Judgment against Co-Defendant Town of Tiverton (Tiverton or the Town) and all of the Plaintiffs. On February 8, 2016, Bettencourt filed the present Motion for Summary Judgment forwarding two primary arguments: 1) that the Town’s alleged negligence was an intervening cause that relieved any of her liability; and 2) that the Plaintiffs could not establish that she acted negligently. Both the Town and Plaintiffs filed timely objections to Bettencourt’s motion.<sup>1</sup> On April 6, 2016, the Court held a hearing and heard arguments from the parties on the Motion. At the close of the hearing, the Court indicated that it would issue a written Decision. Jurisdiction in this Court is pursuant to G.L. 1956 § 8-2-14 and Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure. Decision is herein rendered in favor of the Town and Plaintiffs, and, accordingly, Bettencourt’s Motion is denied.

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<sup>1</sup> Bettencourt filed a Reply Memorandum to both parties on March 31, 2016—leaving only one full business day before the Motion was originally scheduled to be heard. As that Memorandum incorporated new arguments that the Town and Plaintiffs did not have a chance to prepare to argue against, the Court will not consider it in undertaking the current Decision. However, the Court further notes that even if it had considered it, the outcome would nonetheless remain the same.

## I

### Facts and Travel

Bettencourt is a resident of Tiverton, Rhode Island. She operates a dairy farm at her primary residence—230 Bettencourt Lane, Tiverton, Rhode Island—and also is the owner of Gray’s Ice Cream, Inc. (Gray’s Ice Cream or Gray’s), located at 16 East Road, Tiverton, Rhode Island. The Plaintiffs<sup>2</sup> are a group of thirty-one individuals who represent minors who came into contact with calves located on Gray’s Ice Cream’s property—their parents, as the child’s next friend—or other individuals who came into contact with the calves. The Town is the municipality wherein the underlying facts of the Complaint took place and, as a result, its Animal Control Officer (ACO) was responsible for coordinating the quarantine process.

Sometime around May 2013, Bettencourt decided to relocate three young calves from the dairy farm at 230 Bettencourt Lane to Gray’s Ice Cream. There was an enclosure on Gray’s Ice Cream’s property that the calves could live in. It was surrounded by a fence that was labeled as an electric fence, but, due to the calves’ young age, it was not electrified during the pertinent time period.

Sometime thereafter, a series of events occurred which gave rise to the present litigation. At some point, one of the three calves passed away—from what was presumed to be natural causes. Then, on July 15, 2013, an anonymous Massachusetts resident contacted Massachusetts Public Health authorities and claimed that Oreo, one of the remaining calves, had attempted to bite a Gray’s patron. Massachusetts authorities promptly informed the Rhode Island Department of Environmental Management (RI DEM), and, subsequently, on July 16, 2013, Rhode Island

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<sup>2</sup> The Plaintiffs are all either residents of Rhode Island or Massachusetts.

State Veterinarian Scott Marshall, DVM (Dr. Marshall) instructed Tiverton Animal Control Officer Paul Bell (Officer Bell) to place Oreo under a rabies quarantine.

Officer Bell relayed RI DEM's quarantine order to Bettencourt and helped her construct a suitable enclosure for Oreo to live in for the remainder of the quarantine. The quarantine was set to last for ten days, with Bettencourt immediately notifying officials if the calf died to allow brain tissue to be harvested for testing, the only way to reliably test for rabies contamination. Officer Bell informed Bettencourt that if she perceived any other changes in Oreo's condition she should contact either the Tiverton Police Department (Tiverton PD) or the RI DEM if she could not reach anyone at the Tiverton PD. Additionally, he provided Bettencourt with the contact information for the RI DEM.

Oreo died prior to the expiration of the quarantine period, and Bettencourt found the dead calf on Sunday, July 21, 2013. She proceeded to call Officer Bell and leave him several voicemails.<sup>3</sup> Next, she contacted the Tiverton PD. The Officer she spoke with incorrectly informed her that Officer Bell did not work on weekends, but he advised her to cover up the calf's corpse. Bettencourt did so and covered the calf's body in a tarp. Over the next two days, she continued to call Officer Bell to no avail. However, on July 23, 2013, Bettencourt sought advice from a Department of Health official who was conducting an annual inspection of Gray's. That individual provided her with the telephone number for Dr. Marshall, who Bettencourt placed a call to that afternoon.

The following day, Dr. Marshall arrived at the Gray's property to take a sample of the calf's brain tissue for testing, but, by the time he got there, Oreo's body had decomposed to a

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<sup>3</sup> Plaintiffs alleged that these voicemails were vague and did not identify the fact that Oreo had perished. Rather, Plaintiffs maintain that the voicemails merely stated that Bettencourt needed to speak with Officer Bell.

state which rendered it impossible for any tissue to be harvested to conduct the requisite testing. Dr. Marshall later expressed concern over the fact that the calf had died under quarantine and that no testing could be conducted. He further noted that the animal had probably been touched by hundreds of people, exasperating his concerns. Finally, he opined that the Town's officials had "dropped the ball" on the matter.

Over the next couple of days, officials at the RI DEM and the Department of Health began to prepare a response to the unfolding situation at Gray's. Pertinent to this litigation are two aspects of that response: 1) that State officials questioned whether the Town's officials acted in full accord with the applicable rules and regulations in place; and 2) that a press release was issued to the public. In an internal e-mail, a member of the RI DEM noted that the situation presented an opportunity to remind municipal officials of exactly what their reporting duties are.<sup>4</sup> Further, because of the possibility of exposure to the rabies virus, officials felt the need to notify the public. Although rabies was not considered to be a likely cause of death, Oreo still died under quarantine which dictated an official response. Accordingly, a press release was issued warning members of the public who may have had contact with Oreo's saliva from July 5, 2013 through July 21, 2013 that they were potentially at risk for being exposed to rabies and further recommending that they be evaluated for post-exposure vaccination by public health authorities.<sup>5</sup> The press release prompted roughly seventy calls to health officials regarding Oreo. Those callers were instructed to undergo a series of preventative rabies shots.

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<sup>4</sup> The underlying facts prompted an internal investigation by the Town. As a result, the Officer that Bettencourt spoke with when she called the Tiverton PD received a two-day suspension for failing to act in accordance with the Town's policies and procedures.

<sup>5</sup> See, e.g., Thomas J. Morgan, Rabies exposure feared for 'large number' of Gray's Ice Cream Customers in Tiverton, Providence Journal (July 25, 2013).

Subsequently, the last of the three calves—Mocha—was euthanized a few days after Oreo’s death. Dr. Marshall was able to perform rabies testing on Mocha’s tissue, which revealed that the calf did not have rabies. Rather, Mocha was apparently infected with nematode parasites which caused the calf to experience malnutrition. Dr. Marshall stated that these types of infections can frequently be spread amongst cows located in close proximity with one another. Indeed, he stated that he would expect that the other two calves also had been exposed to the parasites.

On January 13, 2014, Plaintiffs filed the instant action. Namely, in the Complaint, Plaintiffs forwarded various negligence claims against Bettencourt, Gray’s, and the Town. Thereafter, on February 8, 2016, Bettencourt filed the instant Motion for Summary Judgment with the Court.<sup>6</sup> In it, Bettencourt seeks summary judgment against both the Town and the Plaintiffs, both of whom filed timely objections. On April 6, 2016, the Court heard oral argument from all interested parties.<sup>7</sup> After a lengthy colloquy with the parties, the Court indicated that it would issue a written Decision on the matter. After carefully examining the parties’ memoranda, taking into consideration the arguments forwarded at the hearing, and for the reasoning set forth in further detail below, Bettencourt’s Motion for Summary Judgment is denied.

## II

### Standard of Review

The procedure by which a trial justice reviews a motion seeking summary judgment has been well documented by our Supreme Court and need not be exhaustively discussed here. See,

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<sup>6</sup> An identical motion was filed on October 28, 2015, but, in order to account for later-added Plaintiffs, the motion was refiled in February.

<sup>7</sup> Additionally, counsel for Gray’s was present at the hearing.

e.g., Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008). Summary judgment “is a harsh remedy and must be applied cautiously.” Mallette v. Children’s Friend and Serv., 661 A.2d 67, 69 (R.I. 1995); see also McPhillips v. Zayre Corp., 582 A.2d 747, 749 (R.I. 1990). “A hearing justice who passes on a motion for summary judgment ‘must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.’” Estate of Giuliano, 949 A.2d at 391 (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)). Furthermore, “[t]he hearing justice may grant the motion for summary judgment only if, after conducting that required analysis, he or she determines that ‘no issues of material fact appear and the moving party is entitled to judgment as a matter of law . . . .’” Id. (quoting Steinberg, 427 A.2d at 340). Therefore, the only task of a trial justice reviewing a motion for summary judgment is whether there is any genuine issue concerning a material fact. See Gliottone v. Ethier, 870 A.2d 1022, 1027 (R.I. 2005) (“[I]f no issues of material fact appear and the moving party is entitled to judgment as a matter of law, the trial justice may enter an order for summary judgment.” (Internal quotation marks omitted.)).

### III

#### Analysis

Bettencourt’s instant Motion asks the Court to enter judgment in her favor against both the Plaintiffs and the Town. As it relates to the Town, Bettencourt claims that the Town’s alleged intervening negligence—by failing to fulfill its reporting duties—severed the causal chain, thereby rendering her alleged negligence too remote to incur liability. With regard to the Plaintiffs’ claims, Bettencourt argues that she did not commit any negligent acts because she acted reasonably under the circumstances. Specifically, she forwards three main arguments in

this vein: 1) she was not negligent because the industry standard is not to vaccinate calves until they are three months old; 2) she did not need to post signage because the RI DEM's Rules and Regulations regarding potentially rabid animals did not apply to her; and 3) she acted reasonably because none of the calves showed any symptoms of carrying rabies. Both the Plaintiffs and the Town objected to the Motion maintaining that multiple genuine issues of material fact remain to be decided by a jury and not the Court at this stage in litigation.

“[S]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.” DeMaio v. Ciccone, 59 A.3d 125, 129 (R.I. 2013) (quoting Estate of Giuliano, 949 A.2d at 390) (internal quotation marks omitted). The Court “must refrain from weighing the evidence or passing upon issues of credibility.” Doe v. Gelineau, 732 A.2d 43, 48 (R.I. 1999). Indeed, “issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner.” DeMaio, 59 A.3d at 130 (citing Gliottone, 870 A.2d at 1028). “In Rhode Island the general rule is that negligence is a question for the jury unless the facts warrant only one conclusion.” DeNardo v. Fairmount Foundries Cranston, Inc., 121 R.I. 440, 448, 399 A.2d 1229, 1234 (1979); see also DeMaio, 59 A.3d at 130. As Bettencourt's Motion set forth different theories as to the Town and the Plaintiffs, they will each be addressed separately below.

## A

### **The Town**

Bettencourt asks the Court to find that Tiverton's failure to properly respond to Oreo's death was the sole cause of the Plaintiffs' alleged injuries. In support, Bettencourt relies on Walsh v. Israel Couture Post, No 2274 V.F.W., 542 A.2d 1094, 1097 (R.I. 1988) for the proposition that a second actor's negligence can relieve an initial actor's negligence if the second

actor becomes the sole proximate cause of the plaintiff's injuries. In particular, she argues that the Town's failure to react to her calls is an intervening cause that absolves her of any liability for Plaintiffs' claims. In turn, Tiverton counters that Bettencourt's initial negligence was not rendered remote by the Town's alleged actions and that Walsh is inapplicable because Bettencourt did not exhaust the options available to her in reporting Oreo's death.

In Walsh, the Rhode Island Supreme Court held that the owner of a truck—which had struck a building and caused some damage—was not liable to a person injured as a result of that damage due to the building owner's inaction. 542 A.2d at 1097. The Court found that the “total lack of activity by the [building owner] relative to the dangerous condition on the premises over which it had sole control for a period of nine days serve[d] as an independent intervening cause, sufficient to relieve [the owner of the truck] of all liability for plaintiff's injuries.” Id. The Court expressly noted that the owner of the truck “could do no more than to bring notice of the damage done to the premises to the attention of the [building owner].” Id. (emphasis supplied).

Bettencourt attempts to analogize her position with that of the truck owner in Walsh, alleging that the Town's failure to act was akin to that of the building owner's. However, the Court noted that the building owner in that case “had sole control” of the premises, and, as a result, the truck owner—or the original tortfeasor—“could do no more” than merely notify the owner of the damages. Id. Here, notifying the Town was not the only avenue available to Bettencourt. Bettencourt acknowledged that the ACO provided her the RI DEM's contact information and told her to contact the agency if she could not reach him.<sup>8</sup> However, it is undisputed that she did not contact the RI DEM, through Dr. Marshall, until July 23, 2013. Nonetheless, she asks the Court to relieve her of liability because she “could do no more,” like

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<sup>8</sup> See Bettencourt's Mem. of Law in Supp. of Def. Marilyn Bettencourt's Mot. for Summ. J., 3.

the truck owner in Walsh. 542 A.2d at 1097. Clearly, Bettencourt still had at least one option available to her, in calling the RI DEM. Accordingly, the Court cannot say that, as a matter of law, Bettencourt did all she could to enable the timely testing of Oreo’s brain tissue, thereby relieving her of any liability to the Plaintiffs.

The Court remains keenly aware that in making a decision on a motion for summary judgment, the proper procedural lens dictates “viewing the facts and all reasonable inferences therefrom in the light most favorable to” the nonmoving party or parties. Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). Therefore, as there remain genuine issues of material fact relating to the relative culpability of Bettencourt and the Town, Bettencourt’s Motion for Summary Judgment is denied.

## **B**

### **Plaintiffs’ Claims**

Bettencourt further claims that she was not negligent by keeping calves on Gray’s property because she did not breach any duty of care owed to the Plaintiffs in this case. Bettencourt identifies three arguments to support that claim: 1) she was not negligent because the industry standard is not to vaccinate calves until they are three months old; 2) she did not need to post signage because the RI DEM’s Rules and Regulations regarding potentially rabid animals did not apply to her; and 3) she acted reasonably because none of the calves showed any symptoms of carrying rabies.<sup>9</sup> In response, Plaintiffs argue that Bettencourt’s failure to inoculate

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<sup>9</sup> In her Reply Memorandum, which the Court is ignoring for the present purposes, Bettencourt claimed to be exempt from liability because Gray’s Ice Cream’s property is located over a mile away from her residence. However, even had the Court considered this argument, it would have found it to be unpersuasive. The calves were still owned by Bettencourt and it was her choice to place them on the Gray’s property in such close proximity with the general public. In this case, the location of the calves is unavailing to Bettencourt because—regardless of location—the calves were still her property, over which she always had control, and chose to place at Gray’s.

the calves or her decision to place untreatable calves in such close proximity with the public are sufficient bases on which she can be found to be negligent.

The Court pauses to reiterate that “issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner.” DeMaio, 59 A.3d at 130 (citing Gliottone, 870 A.2d at 1028). Indeed, Rhode Island Courts adhere the general principle “that negligence is a question for the jury unless the facts warrant only one conclusion.” DeNardo, 121 R.I. at 448, 399 A.2d at 1234.

Turning to Bettencourt’s first argument, the fact that the industry standard is not to vaccinate calves until they reach at least three months of age does not necessitate a finding that she acted reasonably under these circumstances. Rather, the fact that Bettencourt was aware that the calves could not be vaccinated could facilitate a finding that she should have waited until they could receive treatment to place them in a position where they may come into contact with the general public on a regular basis. Where it is just as likely that a jury could reach either conclusion, summary judgment is not an appropriate disposition of the case. See DeNardo, 121 R.I. at 448, 399 A.2d at 1234. As such, the Court rejects this argument.

Next, Bettencourt argues that the RI DEM’s “Rules and Regulations Governing the Prevention, Control and Suppression of Rabies within the State of Rhode Island” should be read so as not to apply to her. The reasoning underlying her position is two-fold: 1) she did not operate a facility subject to regulation pursuant to § 5.04; and 2) signage was not required because a United States Department of Agriculture (USDA) approved rabies vaccine existed for the calves. Plaintiffs allege that Bettencourt was operating a de facto petting zoo which falls within the purview of § 5.04. See id. (“Facilities subject to this regulation shall include but not be limited to the following: show, petting zoos, zoos, nature centers, fairs, exhibitions, or

educational programs involving animals.” (Emphasis supplied.)). Bettencourt responds by claiming that the animals were merely there for patrons to observe. However, that admission is, in and of itself, sufficient to establish that her facility was subject to the RI DEM’s regulations. Indeed, the regulations include “exhibitions” as one of the facilities subject to its provisions. Although the regulation does not define that term, Merriam-Webster Dictionary defines an “exhibition” as “an event at which objects . . . are put out in a public space for people to look at : a public show of something” or “the act of showing something in public.”<sup>10</sup> Accordingly, by virtue of placing the calves at Gray’s Ice Cream for patrons to observe, Bettencourt was, minimally, operating an exhibition, and, thus, she was subject to the pertinent regulations.

Bettencourt further argues that, if she is subject to the regulations, the calves were not subject to § 5.04 because a USDA approved vaccine existed for them. This argument too must fail. Initially, the Court observes that § 5.02 of the regulations dictates that owners of animals for which a “rabies vaccine exists, and who uses such animals for show or exhibit purposes, or who allows such animals, to come into direct physical contact with the public shall keep such animals currently vaccinated against rabies.” (Emphasis supplied.) However, Bettencourt acknowledges that the calves were not inoculated, which she claims is the standard operating procedure in the industry. Accepting this industry standard, the Court cannot say as a matter of law that there was a rabies vaccine which could be readily administered to Oreo. Rather, based on the evidence before the Court, it would appear that it was too risky to administer the vaccine to a calf of that age. Therefore, Bettencourt was required to comply with § 5.04.<sup>11</sup> Whether

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<sup>10</sup> *Exhibition*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/exhibition> (last visited Apr. 13, 2016).

<sup>11</sup> The language of § 5.04 contains an apparent ambiguity. As presently drafted, the section mandates that an owner must “either” keep the animals separated “and” identify them as possible rabies carriers with appropriate signage. At this stage, the Court does not need to determine the

Bettencourt was in compliance is a question of fact for the jury and not one for the Court to answer at this time, but, as the regulations applied to Bettencourt's operations, her Motion is denied on those grounds.

Finally, Bettencourt asks the Court to enter judgment in her favor because she acted reasonably as none of the calves showed any symptoms of carrying rabies. Based on the foregoing paragraphs, there is clearly a question of fact as to whether she indeed acted reasonably under the circumstances, regardless of whether the calves were showing symptoms. Whether or not one acted reasonably is exactly the type of objective determination that "should be resolved by trial in the ordinary manner" and not summarily decided by the Court at this stage in the litigation. DeMaio, 59 A.3d at 130 (citing Gliottone, 870 A.2d at 1028). As a result, Bettencourt's Motion is denied on this ground as well.

In sum, there remain many factual questions which are ill-suited for summary disposition by the Court. Rather, these are the types of questions that the ultimate trier of fact shall decide at the close of a trial on the merits. Therefore, Bettencourt's Motion for Summary Judgment is denied as it relates to both the Town and the Plaintiffs.

#### **IV**

#### **Conclusion**

After viewing the facts and all reasonable inferences therefrom as to all of the Plaintiffs' claims in a light most favorable to the Plaintiffs, this Court denies Bettencourt's Motion for Summary Judgment in its entirety. Similarly, Bettencourt's Motion for Summary Judgment as it

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interplay between those two provisions but it does note the apparent incongruity contained therein.

relates to Co-Defendant Town of Tiverton is also denied. Counsel shall confer and submit to this Court forthwith for entry an order that is in conformity with this Decision.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Demello v. Bettencourt, et al.

**CASE NO:** NC-2014-0022

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** April 15, 2016

**JUSTICE/MAGISTRATE:** Stone, J.

**ATTORNEYS:**

**For Plaintiff:** Sharon D. Sybel, Esq.

**For Defendant:** Anthony J. Gianfrancesco, Esq.  
                          Marc Desisto, Esq.  
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