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APRIL 1, 2019

VIA E-FILING DELIVERY
The Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th Ave.
Topeka, KS 66612-1507

Re: Letter of Additional Authority; *Teresa Wilke – Plaintiff/Appellee v. Ron Ash – Defendant/Appellant,* Case No. 120,015.

To the Clerk of the Appellate Courts:

Pursuant to Supreme Court Rule 6.09, the Plaintiff-Appellant, Teresa Wilke, by and through her counsel, hereby submits the following significant relevant authority that has come to her attention since the filing of her brief:

1. PIK 4th 126.92, "Animals – Ordinarily Gentile" ("One who keeps an animal possessing only those dangerous propensities that are normal to the members of its class is required to know its normal habits and tendencies. That person is required to know that even ordinarily gentle animals are likely to become dangerous under particular circumstances, and to exercise reasonable care to prevent foreseeable harm.")

2. Restatement (First) of Torts § 518(1), "Liability for Harm Done by Domestic Animals Which Are Not Abnormally Dangerous" ("(1) Except as stated in Subsection (2) and §§ 504- 5, one who possesses or harbors a domestic animal, which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal if, but only if, (a) he fails to exercise reasonable care to confine or otherwise control it, and (b) the harm is of a sort which it is normal for animals of its class to do.")

3. Restatement (First) of Torts § 518, comment g ("*Animals dangerous under particular circumstances*. One who keeps a domestic animal which possesses only those dangerous propensities which are normal to its class is required to know its normal habits and tendencies. He is, therefore, required to realize that even

ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm.")

4. *Gardner v. Koenig*, 188 Kan. 135, 138, 360 P.2d 1107, 1109 (1961) (adopting Restatement [First] of Torts § 518, comment g).

5. Restatement (Second) of Torts § 518 ("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.")

6. Restatement (Second) of Torts § 518, comment h ("*Animals dangerous under particular circumstances*. One who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm.")

7. *Mercer v. Fritts*, 9 Kan. App. 2d 232, 236, 676 P.2d 150, *aff'd* 236 Kan. 73, 689 P.2d 774 (1984) (Adopting and applying Restatement [Second] of Torts § 518 to reverse summary judgment granted for defendant and holding that owner of domestic animal is subject to liability if he or she knows or has reason to know of its dangerous propensities, or if the owner or possessor does not know or have reason to know of an animal's dangerous propensities, but (1) he or she intentionally causes the animal to do harm; or (2) he or she is negligent in failing to prevent the harm.)

8. *White v. Singleton*, Case No. 90,550, 2004 WL 48884, at *1-2 (Kan. Ct. App. 2004) (Applying *Mercer* and Restatement [Second] § 518 to reverse summary judgment granted in favor of defendant where fact questions remained regarding owner's knowledge of dangerousness). See Attached Unpublished Opinion pursuant to Rule 7.04(g)(2).

Appellant cites the additional authority in items 1-8 in support of Section IV(B) of her Brief of Appellant (pgs. 8-16) and Section IV of her Reply Brief (pgs. 11-15).

Sincerely,
FORBES LAW GROUP

/s/ Keynen J. Wall
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Co-counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify a copy of this Response was served electronically on April 1, 2019, via Notice of Electronic Filing, which is deemed an acceptable form of service by electronic means pursuant to Supreme Court Rule 1.11, on the following counsel of record:

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81 P.3d 1276 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Matt and Michelle WHITE, Appellants,
v.
Richard SINGLETON, Appellee.

No. 90,550.
|
Jan. 9, 2004.

Synopsis

Background: Parents of children who were injured after being thrown from horse filed petition for damages asserting that owner of horse was negligent. The Johnson District Court, Larry McClain, J., entered summary judgment in favor of horse owner, and parents appealed.

Holding: The Court of Appeals held that genuine issue of material fact as to whether owner had knowledge of horse's dangerous tendencies prior to accident precluded summary judgment.

Reversed and remanded.

West Headnotes (1)

[1] Judgment
Tort Cases in General

Genuine issue of material fact as to whether owner had knowledge of horse's dangerous tendencies prior to accident in which children who were injured after being thrown from horse precluded summary judgment for owner in negligence action brought by parents.

Cases that cite this headnote

Appeal from Johnson District Court; Larry McClain, judge. Opinion filed January 9, 2004. Reversed and remanded with directions.

Attorneys and Law Firms

Linda C. McFee and Robert L. Wehrman, of McDowell, Rice, Smith & Gaar, a professional corporation, of Kansas City, Missouri, and Bruce W. Beye, of Overland Park, for appellants.

Paul Hasty, Jr., of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, for appellee.

Before MARQUARDT, P.J., ELLIOTT, J., and PHILIP C. VIEUX, District Judge, assigned.

MEMORANDUM OPINION

PER CURIAM.

***1** Matt and Michelle White appeal the trial court's grant of summary judgment to Richard Singleton. We reverse and remand for a trial.

On April 21, 2000, the Whites' children were injured after being thrown from their grandfather's (Singleton's) horse. The Whites filed a petition for damages asserting that Singleton was negligent.

Singleton had his horse, Zip, for approximately 5 weeks prior to the accident. He stated that he had no problem with Zip and the children had ridden Zip approximately six times. Michelle testified that her mother, Lori Singleton, rode the horse and was bucked off prior to the children's accident. She also testified that Lori would not ride the horse until it was trained. Matt White, Michelle's husband, described the horse as "wild."

Lori signed an affidavit stating that she had never ridden Zip and had never witnessed the horse display any dangerous propensities prior to the accident.

Singleton filed a motion for summary judgment, which was granted.

The Whites timely appeal, contending that the trial court erred by granting Singleton's motion for summary judgment because there are genuine issues of material fact.

> " 'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted.]' " *Mitchell v.. City of Wichita,* 270 Kan. 56, 59, 12 P.3d 402 (2000).

There is conflicting testimony about Singleton's knowledge of the horse's demeanor and temperament. The parties agree that the law controlling these issues is animal law, not premises law. Both parties cite *Mercer v. Fritts,* 9 Kan.App.2d 232, 676 P.2d 150, *aff'd* 236 Kan. 73, 689 P.2d 774 (1984), in support of their positions. The *Mercer* court relied on 4 Am.Jur.2d, Animals § 104 and the Restatement (Second) of Torts § 518 (1976). The court held that an owner or possessor of a domestic animal is subject to liability if he or she knows or has reason to know of its dangerous propensities. Furthermore, if the owner or possessor does not know or have reason to know of an animal's dangerous propensities, he or she can still be subject to liability if (1) he or she intentionally causes the animal to do harm; or (2) he or she is negligent in failing to prevent the harm. *Mercer,* 9 Kan.App.2d at 236, 676 P.2d 150.

***2** The issue of material fact is whether Singleton had knowledge of Zip's dangerous tendencies prior to the accident. Singleton argues that Michelle's allegation is hearsay. In *Mastin v. Kansas Power & Light Co.,* 10 Kan.App.2d 620, 706 P.2d 476 (1985), this court recognized the principle that hearsay evidence can establish a genuine issue of material fact. Specifically, when one party repeated a statement made by another that the defendant had knowledge of a danger, but the defendant stated there was no prior knowledge, it was a question for a trier of fact. *Mastin,* 10 Kan.App.2d at 622-24, 706 P.2d 476.

In *Mastin,* the plaintiff appealed when his suit for damages was dismissed after Kansas Power and Light (KP & L) filed a motion for summary judgment. During Mastin's deposition, he stated that Stoll told Mastin he had notified KP & L of the dangerously low lines before Mastin's combine accident. However, after the accident, Stoll signed an affidavit saying that he had not reported the low lines to KP & L. KP & L contended that it was unaware of any problems with the lines. *Mastin,* 10 Kan.App.2d at 621, 706 P.2d 476.

The trial court granted KP & L's motion for summary judgment based on the pleadings, depositions, answers to interrogatories, and affidavits and concluded that Mastin had " 'brought forth no evidence of negligence on the part of [KP & L].' " *Mastin,* 10 Kan.App.2d at 622, 706 P.2d 476. However, this court reversed the trial court, noting that to determine which statements were truthful was to pass on credibility and to balance and weigh evidence, an "action that the trial judge and we must not engage in on summary judgment motions. [Citation omitted.]" *Mastin,* 10 Kan.App.2d at 624, 706 P.2d 476.

The conflicting statements of the parties here leave a genuine issue of material fact.

Reversed and remanded for trial.

All Citations

81 P.3d 1276 (Table), 2004 WL 48884