Case No. 18-120015-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TERESA WILKE,
Plaintiff/Appellant

vs.

RON ASH,
Defendant/Appellee

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Douglas County,
Honorable Amy Hanley, Judge,
District Court Case No. 2016-CV-130;

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REPLY BRIEF OF APPELLANT

This Reply Brief is authorized by Rule 6.05 to enable Appellant to respond to new arguments in Appellee's Brief which were not raised in Appellant's Brief and therefore have not been previously addressed.

Appellant framed a single issue for resolution by this Court:

> [W]hether the District Court erred when it ruled that "dangerousness" is not enough, that there is a "required element of viciousness" that must be proven in all negligence cases involving injuries caused by domesticated animals.

(Appellant's Brief, p. 6.)

Appellant framed this issue using the words of the District Court when it granted summary judgment. (R. Vol. 1, page 310; the District Court ruled that "viciousness" was a required element of the tort and "Plaintiff has no evidence of 'vicious' propensities of Defendant's dog.") Obviously, if Appellee is arguing that the District Court's ruling was correct, then Appellee need only have responded with authorities to support that ruling. But, instead of responding directly to this single issue, in an apparent effort at avoidance, Appellee frames three (3) entirely new issues.

First, Appellee argues that review of the merits can be avoided because he says Plaintiff "invited and lead the District Court into the alleged error…" (Appellee's Brief, p. 3.)

Second, Appellee says review of the legal issue can be avoided because Plaintiff "conceded that she was unable to meet her burden of proof…and the District Court's ruling constitutes a negative factual finding" that is entitled to deferential review. (Appellee's Brief, p. 3.)

And, *third*, in a terribly confusing mélange of arguments Appellee says he is entitled retain his summary judgment ruling because: "the District Court did not abuse its discretion in granting [] Summary Judgment…" (Appellee's Brief, p. 3.)

In support of these new "issues" Appellee cites 22 additional case authorities to which we respond below. As we will demonstrate, none of these arguments have merit.

I. Appellee's Statement That Plaintiff Invited Error by Requesting Reconsideration of the Summary Judgment Ruling is Unsupported by the Record

Central to Appellee's first argument is his incorrect statement that it was Appellant who asked the District Court to reverse its prior ruling in which the District Court had denied Appellee's motion for summary judgment. (Appellee's Brief, p. 9, citing the Memorandum Opinion found at R. Vol. 1, pp. 308-310.) Appellee states: "[O]n August 2, 2018, *pursuant to the request of plaintiff's counsel*, the parties appeared for another telephone conference.") (Appellee's Brief, p. 9.) [Emphasis added.]

But from a review of the record there is nothing that supports Appellee's claim that Appellant requested anything. The record which Appellee cites is to the District Court's Memorandum Decision in which it granted summary judgment that merely recites that the District Court made its decision following a "phone conference regarding proposed jury instructions." (R. Vol. 1, page 310.) The Memorandum Decision does not reflect who requested the telephone conference, nor is the instigator of the telephone conference reflected elsewhere in the record.

Moreover, we do not understand the significance of whether it was one counsel or another, or for that matter the Court itself, that requested the telephone conference. The undersigned counsel remembers the request as having been jointly made by the parties

but that memory is not a part of the record, and in any event we do not believe it matters who requested the hearing, plaintiff, defendant, or the court. What matters is what the District Court did, and its basis for doing what it did. The substance of that is found in the District Court's Memorandum Decision at R. Vol. 1, pp. 308-310.

II. There is No Invited Error Here

On the basis of the foregoing record Appellee argues that Appellant cannot now complain of error that she invited. We are confused by this argument, and by Appellee's citation of State v. Hankins, 372 P.3d 1124, 1128 (Kan. 2016). *Hankins* is not even remotely helpful to this Court's analysis. Appellee has a habit of string-citing cases without any factual analysis or any effort to relate these cases to the facts of this case. Nor is Brown v. Beckerdite, 254 P.2d 308, 312 (Kan. 1953) helpful, where the Court wrote: "Certainly defendants should not in this court assume an attitude inconsistent with that taken by them at the trial." Here, from the face of the record, the District Court on its own motion reconsidered its prior summary judgment ruling and reversed itself. (R. Vol. 1, pp. 308-310.) We are simply mystified as to how Appellee can make this argument.

Appellee cites Butler County Rural Water Dist. No. 8 v. Yates, 64 P.3d 357, 362 (Kan. 2003) in which the appellant sought to overturn a jury verdict by making an argument that was opposed to the argument he made to the jury. In this case it is clear that there was never any inconsistency in Plaintiff's legal argument. Throughout, as she argues here, Plaintiff has argued that viciousness was not a required element of her negligence claim.

Appellee cites Grimm v. Pallesen, 527 P.2d 978, 983 (Kan. 1974) in which the appellant took inconsistent positions before the District Court and on appeal. Not surprisingly, the Supreme Court wrote:

> Plaintiff cannot now urge on appeal a claim for relief which was not only not urged below but was expressly withdrawn from the trial court's consideration. 'Where a party procures a court to proceed in a particular way and invites a particular ruling, he is precluded from assailing such proceeding and ruling on appellate review.'

Even if it was Appellant who initiated the telephone conference with the District Court in this case, it cannot be said that in doing so she invited whatever error the District Court might commit during or following that telephone conference.

Appellee also cites Manley v. Wichita Bus. College, 701 P.2d 893, 901 (Kan. 1985) in which the Appellant argued that the District Court erred by admitting into evidence what "was elicited on cross-examination by appellant's counsel." Not surprisingly the Supreme Court ruled "a party may not invite error and then complain of that error on appeal." *Manly* is obviously not applicable to this case where Appellant makes the same arguments here that she made to the District Court.

Next Appellee cites Popp v. Popp, 461 P.2d 816, 819 (Kan. 1969) in which the appellant argued that the District Court had erred in submitting the case to the jury as had been agreed. The Supreme Court wrote:

> It is evident that in this appeal the plaintiff seeks to mend his hold. Having agreed to submit the question of assumption of risk to the jury and having been defeated on the point, the plaintiff may not now complain.

Id P.2d at 819. Nowhere does the record demonstrate that Appellant ever agreed that viciousness was an element of her tort claim. Indeed, the record demonstrates otherwise. Appellee also cites Manhattan Bible College v. Stritesky, 387 P.2d 225, 228 (Kan. 1963)

in which the Court wrote: "where a party induces the trial court to try an action upon his own theory he is not in a position to complain on review that such theory was erroneous." The case obviously has no application here. Likewise is Gilliland v. Kansas Soya Products Co., 370 P.2d 78, 82 (Kan. 1962) in which the Supreme Court held that the appellant's complaint that the District Court had erred by considering workman's comp benefits had been injected into the case by the appellant saying: "it was invited error on the part of the defendant."

Next, saying it presents a similar issue, Appellee cites Underhill v. Thompson, 158 P.3d 987, 994–95 (Kan. App. 2007) in which the appellant had argued the District Court had erred by considering deposition testimony in resolving the case after he had agreed the court should do so. The Court of Appeals wrote:

> Underhill cannot accept or encourage the trial court to decide the issue on the basis of deposition testimony and then turn around on appeal and maintain that the court erred when it decided that issue on the basis of deposition testimony.

How it is that *Underhill* is similar cannot be understood. Appellant does not complain that the District Court erred by considering deposition testimony. She argues that the District Court erred as a matter of law when she ruled that Kansas law required Appellant to prove the dog was vicious. *Underhill* is not at all similar.

In another example of mis-citing caselaw, Appellee cites Cott v. Peppermint Twist Mgt. Co., Inc., 856 P.2d 906, 913 (Kan. 1993), in which that Court quoted Mitchell, Trustee v. Moon, 206 Kan. 213, Syl. ¶3, 478 P.2d 203 (1970):

> A defendant may not complain of rulings or matters to which he has consented, or take advantage of error upon appellate review which he invited, or in which he participated.

Once again, *Cott*, like the other cited cases does not apply. There the appellant argued that the trial court had erred by lumping past and future damages into one award. But the Supreme Court found that the Appellant had "consented" to the court's action and could not change his position on appeal.

The record shows that Appellant participated in a telephone conference with the Court, and during that conference the Court announced its legal ruling that Appellant would be required to prove that Appellee's dog was vicious and queried whether Appellant would offer proof of viciousness at trial. When Appellant's counsel candidly informed the court that Appellant would rely upon evidence of foreseeable dangerousness, as stated in the pre-trial order (R. Vol. 1, pp. 301-307), but would not be offering proof that the dog was vicious the Court reversed her prior ruling and entered summary judgment. In this appeal the Appellant argues that the District Court erred by requiring proof of viciousness, a position entirely consistent with that which she took before the District Court.

III. The Standard of Review for Negative Factual Findings by Courts While Acting as the Finder of Fact Does not Apply to This Appeal from the District Court's Determination of Law in a Summary Judgment Setting

In this difficult to follow argument Appellee says the District Court's ruling that viciousness is an element of Appellant's tort claim should be given deferential review as a "negative factual finding." Reading it, one is left with the suspicion that Appellee's counsel are simply confused by a process that they do not fully understand.

Appellee begins with Hall v. Dillon Companies, Inc., 189 P.3d 508, 512 (Kan. 2008) which was an appeal from a Workers Compensation court's determination that the

appellant had not proved an element of her claim. Of course, as such, the appeal was from a finding of fact by the fact finder. In all such cases findings of fact by judges acting as fact finders, or juries as fact finders, or the Workers Comp court acting as a fact finder, are entitled to deference and are not subjected to plenary review. In this case the appeal is from the decision of the District Court on an issue of law in summary judgment, for which there is plenary review. We are somewhat amazed that a lawyer admitted to practice before this Court would have so slight an understanding of the process as to make this argument.

Further highlighting Appellee's counsel's obvious lack of understanding of the nature of this proceeding is his reliance upon Gragg v. Rhoney, 884 P.2d 443, 447 (Kan. App. 1994) which involved a trial to the court in which the District Court found insufficient evidence of fraud in a trademark case. Not surprisingly, the Court of Appeals held that an arbitrariness standard applied to a review of a factfinder's findings of fact. Citing this case in a summary judgment context, particularly concerning a District Court's ruling as to the law, is simply irresponsible.

Appellee's next irresponsible cite is to Mohr v. State Bank of Stanley, 770 P.2d 466, 476 (Kan. 1989) in which the appeal was from a bench trial and the Supreme Court predictably wrote: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." That standard is not applicable to this appeal from a decision of the District Court concerning Kansas law.

The next case irresponsibly cited by Appellee regarding this issue is Boldridge v. Natl. City Bank, 313 P.3d 837 (Kan. App. 2013) which followed a bench trial with the

district court concluding that the Boldridges "had failed to meet their burden of proof and that the actions they complained of did not rise to the level of fraud on the court." Id at 837. Not surprisingly the Court of Appeals applied a deferential standard of review. Citation of this case by Appellee cannot be justified, nor can the failure of Appellee to recognize that *Boldridge* is unpublished and reported pursuant to Supreme Court Rule 7.04(f).

IV. The District Court's Error in Ruling that Appellant was Required to Prove that Appellee's Dog was Vicious is Not Subjected to a Deferrential Standard of Review

As difficult as the last argument was to follow, this argument borders upon the bizarre. Having re-read the argument several times we remain unsure of its meaning. In the heading to the argument Appellee states the "District Court did not abuse its discretion." Then citing David v. Hett, 293, Kan. 679, 682, 270 P. 3d 1102 (2011) Appellee inconsistently cites a "de novo" standard, but then in the next paragraph citing Slaymaker v. Westgate State Bank, 241 Kan. 525, Syl. Para. 1, 739 P.2d 444 (1987) references a failure to "come forward with something of evidentiary value to establish a material dispute of fact." (Appellee's Brief, page 20.)

We are not sure what it all means. Then Appellee goes on to argue concerning the issue in this appeal, as stated by Appellant, *i.e.*, *whether the District Court erroneously required proof of viciousness*, saying that the District Court "never ruled that 'dangerousness is not enough.'" (Appellee's Brief, p. 21.) This makes unsure whether Appellee is now conceding that such a ruling would be error and is shifting to an argument that no such ruling was ever made. But, of course, the District Court did precisely so rule. In her Memorandum Decision the District Court found clearly found

that dangerousness is not enough, that a plaintiff must prove the dog was "vicious," writing:

> The Defendant's proposed jury instructions request the following instruction on negligence: "(1) that defendant's dog had vicious propensities; and (2) that the owner had knowledge of these vicious propensities." The Defendant's proposed instruction is based on numerous Kansas cases that require proof the dog is "vicious." [Citations omitted.] The Court agrees the Defendant's proposed instruction is an accurate statement of current Kansas law.
>
> The Court finds the Plaintiff has no evidence of "vicious" propensities of the Defendant's dog. During a phone conference regarding proposed jury instructions, the Plaintiff concedes he has no evidence of "vicious" propensities. The Court finds the Plaintiff alleges only that the…Defendant should have foreseen an injury to Plaintiff because of the Defendant's dog's breed, size, absent any knowledge of vicious propensities.

(R. Vol. 1, pp. 309-310.)

Thus, we cannot truly discern from Appellee's Brief whether he is now arguing that "viciousness" is or is not an element of Appellant's tort claim. We have shown in Appellant's brief that negligence can be established without proof of viciousness. We believe the issue has been adequately addressed in Appellant's Brief. Bertram v. Burton, 129 Kan. 31, 281 P. 892 (1929); Henkel v. Jordan, 7 Kan. App. 2d 561, 644 P.2d 1348 (Kan. Ct. App. 1982); McKinney v. Cochran, 197 Kan. 524, 419 P. 2d 931 (1966); Gardner v. Koenig, 188 Kan. 135, 360 P.2d 1107 (1961); McComas v. Sanders, 153 Kan. 253, 109 P.2d 482 (1941) are all addressed in Appellant's Brief and will not be discussed here. However, Appellee does cite several cases which are new and upon which we will comment.

First is Carl v. Ackard, 220 P. 515, 516 (Kan. 1923) in which the court was presented with evidence of viciousness, writing:

> There was evidence which tended to show that the defendant owned a breachy mule which could not be confined by fences; that the mule was vicious toward young animals, and had attacked and killed them…

The case stands for the proposition that evidence of viciousness provides a sufficient basis for asserting liability, but nowhere does the opinion make viciousness a requirement for tort liability, as the District Court did here.

Indeed, this holding is entirely consistent with PIK 4th 126.91 concerning liability for injuries caused by "vicious" animals. Certainly, when an owner knows his animal is vicious he has an recognized duty of care. But like the caselaw upon which it is based, nothing in PIK, or specifically in PIK 4th 126.91 can be viewed as a basis for limiting liability for domestic animals solely to those that are vicious. PIK 4th provides:

> An owner who knows, or in the exercise of reasonable care should know, that an animal is vicious should confine it and see that it does no injury. The owner is bound to use that care necessary to prevent injury.

PIK Civ. 4th 126.91. This is an accurate statement of Kansas law, but it does not require proof of viciousness in all cases.

The next case cited is Ellis by and through Ellis v. Blaich, 92-1427-PFK, 1993 WL 246041(D. Kan. June 14, 1993) in which Judge Kelly reviewed the law of Kansas concerning injuries caused by domestic animals, noting that cases relying upon a "vicious nature" were "of some antiquity." Id at *1. He goes on to write that the proper standard is the ordinary negligence standard of reasonable care and diligence:

> Whether characterized as an action under the active negligence exception to premises liability, or as an action under animal law, the standard is the same—whether the defendant failed to exercise reasonable care and diligence.

Id at *2.

The opinion in Hopkins v. McCollam, 300 P.3d 115 (Kan. App. 2013), which is unpublished and reported pursuant to Supreme Court Rule 7.04(f), does not create any different rule. In a case involving a person bitten by a Rottweiler, the issue was whether the evidence was sufficient to establish that the owner was negligent.

> So the facts before us show that Lucy bit Hopkins while in his back yard and that Lucy had once chased a jogger. We also know that Lucy is a Rottweiler, but we have no evidence before us that Rottweilers are any more likely to bite people than other breeds of dogs. We must determine whether this is sufficient evidence to show that McCollam was negligent by letting Lucy roam.

Hopkins, supra, *1 (Kan. App. 2013). Clearly *Hopkins* does not say that viciousness is an element in all cases involving injuries caused by domesticated animals. Applying *Hopkins'* analysis to our case, as the District Court recognized in her Memorandum Opinion (Tr. Vol. 1, pp. 308-310), Appellant had shown the particular foreseeable danger that was created by Appellee allowing his large and powerful dog to run free, without an ability to control it, in a dog park, but found that foreseeable danger was not enough, that a plaintiff was required to prove the dog was "vicious." But whatever *Hopkins* stands for, we must note that because the case was reported pursuant to Supreme Court Rule 7.04(f), the court did not intend that we should take too much from it, and it is certainly not appropriate to infer, as Appellee does, that the denial of review by the Supreme Court is in any way an endorsement of any change in Kansas law and *Hopkins* cannot be so viewed.

The Appellee's argument based upon Hesler v. Osawatomie State Hosp., 971 P.2d 1169 (Kan. 1999) is misplaced. There the Supreme Court merely held that facts in the record that support a District Court's decision, even if they were not explicitly relied

upon by the District Court, can be used by the appellate court as a basis for affirming the opinion. If Appellee means that this Court can rely upon *Hopkins* and PIK 4th 126.91 to affirm the District Court's decision, then the argument is misplaced because *Hopkins* and PIK 4th 126.91 do not reflect any change to established Kansas law. All they reflect is that though viciousness can be a basis for asserting liability, viciousness is not a required element of negligence relating to injuries caused by domestic animals.

Page 28 of Appellee's Brief argues that a "party asserting the district court has abused its discretion bears the burden of showing such abuse of discretion," citing Hattan v. Schoenhofer, 214 P.3d 1226 (Kan. App. 2009), another unpublished opinion, followed by a classic string-cite of five cases that are left completely undiscussed to apparently argue that Appellant's failure to obtain a transcript of the hearing on the motion for summary judgment is somehow fatal to her appeal. The argument fails to understand that the record for summary judgment is established by the pleadings and we are not left with an understanding as to why Appellee would want the transcript now. But, if for some reason he thought it was necessary, he was certainly free to request that it be made a part of the record. In any event he has not explained how the lack of that transcript has limited this Court's ability to review the purely legal issue of whether viciousness is always an element of claims involving injuries caused by domesticated animals.

Finally, Appellee cites three cases from other jurisdictions without demonstrating that Kansas law has not been sufficiently developed and that it is in any need of guidance in this area of the law. These cases were cited by Appellee to the District Court, who did not seem convinced that she should apply them here. Nor should this Court.

V. Conclusion

The District Court improperly ruled that viciousness must be proved in all cases involving injuries caused by domestic animals. In this the Court erred. The case should be reversed and remanded with instructions that it proceed to trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **Reply Brief of Appellant** was filed via the Kansas e-file website and electronically delivered, this 13th day of December 2018 to:

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