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April 8, 2019

**VIA E-FILING DELIVERY**

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

Re: Rule 6.09(d) Response  
Teresa Wilke, Appellant v. Ronald Ash, Appellee, Case No. 120015

The Clerk of the Appellate Courts:

Rule 6.09(b) requires that the body of a letter must not exceed 350 words. Appellant's letter exceeds the word limitation and raises new issues of law. "Rule 6.09 was not intended to be, nor should it be, used as yet another briefing opportunity. The appellate courts will not consider those parts of a Rule 6.09 letter that fail to comply with the rule." *State v. Houston*, 289 Kan. 252, 277, 213 P.3d 728 (2009). Appellant's letter is improper and should not be considered. Appellee is prejudiced by Appellant's letter and cannot respond in compliance with Rule 6.09(d)(2).

Notwithstanding, in *Gardner v. Koenig*, 188 Kan. 135, 136 (1961), the plaintiff was injured at the defendant's livestock sales pavilion when the defendant's employee opened a gate and let a nervous, unruly cow into the ring. Under these narrow and dissimilar set of facts, the *Gardner* Court adopted Restatement §518.

In *Mercer v. Fritts*, 9 Kan. App. 2d 232, 237 (1984), the Court specifically found that the *Gardner* case was the first case "with a factual basis clearly calling for the application of the Restatement provision." The facts in *Mercer* are also dissimilar where the plaintiff was injured while riding a stallion that fell on her after the defendant excited the stallion with a mare. The issue on appeal was whether summary judgment was proper where the district court applied premises liability law. "Whether characterized as active negligence[,] premises liability or liability under animal law. . . the plaintiff must demonstrate that [the defendant] had some knowledge of a propensity to viciousness by her dog." *Ellis v. Blaich*, 1993 U.S. Dist. 9699, at \*7 (D. Kan. June 11, 1993).

Lastly, *White v. Singleton*, 2004 refers to *Mercer* merely because those parties referenced it in the appeal; however, the *White* case involved an appeal regarding hearsay evidence.

Here, the proper jury instruction is PIK 126.91, which sets forth the required element of viciousness in Kansas, and was confirmed as “the legal test,” “traditional test,” and “an accurate statement of Kansas law” in *Hopkins v. McCollam*, 300 P.3d 115 (Kan. Ct. App. 2013). See, *Ellis*.

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Word Count: 350

*Respectfully Submitted,*

**McCAUSLAND BARRETT & BARTALOS P.C.**

*/s/ Ian M. Bartalos*

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response was electronically filed this 8<sup>th</sup> day of April, 2019, and e-mailed to:

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