Case 120015 CLERK OF THE APPELLATE COURTS Filed 2018 Nov 05 PM 6:42

Case No. 18-120015-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TERESA WILKE,
Plaintiff/Appellant

vs.

RON ASH,
Defendant/Appellee

BRIEF OF APPELLANT

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

William J. Skepnek, KBN 10149
Skepnek Law Firm, PA
One Westwood Road
Lawrence, KS 66044
Ph: 785-856-3100
Fx: 785-856-3099
bskepnek@skepneklaw.com

Table of Contents

Table of Contents 2

I. Statement of the Nature of the Case 3

II. Statement of the Issues to be Decided in the Appeal 6

III. Statement of the Facts that are Material to Determining the Issues to be Decided in the Appeal 6

IV. Argument and Authorities 8

A. Standard of Review 8

***Netahla v. Netahla.*, 301 Kan. 693, 346 P.3d 1079 (Kan. 2015)**

B. There is no Additional Element of Viciousness that Applies to Negligence Cases Involving Domestic Animals 8

***Henkel v. Jordan*, 7 Kan.App.2d 561, 644 P.2d 1348 (Ct. App. 1982)**

***Berry v. Kegans*, 196 Kan. 388, 41 P.2d 707 (1966)**

***McKinney v. Cochran*, 197 Kan. 524, 419 P.2d 931 (1966)**

***McComas v. Sanders*, 153 Kan. 253, 109 P.2d 482 (1941)**

***Bertram v. Burton*, 129 Kan. 31, 281 P. 892 (1929)**

V. Conclusion 17

Certificate of Service 20

Appendix to Brief of Appellant 21

I. Statement of the Nature of the Case

This is a negligence case in which the Plaintiff was severely injured when she was run into by Defendant/owner's 100-pound Bouvier de Flanders dog while the dog was running free in an off-leash dog park. The Defendant filed a Motion for Summary Judgment in which he argued that Plaintiff could not prove that the dog had "dangerous or vicious propensities." (R. Vol. 1, pp. 45-46.) Plaintiff responded arguing that the dog was dangerous and the harm to Plaintiff was foreseeable because Defendant had knowledge of the risk of injury to others. (R. Vol. 1, pp. 76-102.)

In denying summary judgment the District Court found that Plaintiff had shown material issues of fact making foreseeability of danger a question of fact for resolution by a jury. The District Court wrote:

> [M]aterial issues of fact exist relating to foreseeability [], and [] Defendant is not entitled to judgement as a matter of law.

(R. Vol. 1, page 216.)

The case proceeded to trial as scheduled. In the Agreed Pre-Trial Order (R. Vol. 1, pp. 301-307), Plaintiff's statement of legal theories reflected that she intended to prove the dog was dangerous, and that the Defendant had failed to act reasonably to control his dog in light of Defendant's knowledge "that his physically powerful dog could be difficult to control, and that due to its strength, size and the characteristics of its breed, it was capable of causing injury to others." (R. Vol. 1, page 302.)

In her Proposed Jury Instructions Plaintiff set-forth her claims as follows:

> The plaintiff claims:

> That she was injured due to Defendant Ash's negligence in the following respects:
> - Defendant failed to exercise ordinary care when he released his dog to run free at the dog park;
> - Defendant released his dog from the leash when Defendant knew that when allowed to run free in the dog park his dog would not respond to Defendant's voice commands.

(R. Vol. 1, page 294.)

Plaintiff submitted a PIK 4th 103.01 standard negligence instruction, (R. Vol. 1, page 294), and an instruction concerning the responsibility of an owner for injuries caused by domestic animals based upon *Bertram v. Burton*, 129 Kan. 31, 281 P. 892 (1929) that read:

> The owner of a domestic animal is bound to take notice of the general propensities and characteristics of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that some act causing injury will be committed if the opportunity therefor is afforded.

(R. Vol. 1, page 297.)

In the Agreed Pre-Trial Order (R. Vol. 1, pp. 301-307) Defendant revised the legal argument he had made at summary judgment, where he had argued that Plaintiff must prove Defendant's dog had "dangerous or vicious propensities" (R. Vol. 1, pp. 45-46), to an argument that proof of "dangerousness" would not satisfy Plaintiff's burden and that Plaintiff was required to prove "viciousness."

This change is reflected in Defendant's statement of legal theories where he stated:

> With regard to cases involving dog bites and other incidents where an animal has directly inflicted physical injury, Kansas courts have held that the plaintiff has the burden of proving two essential elements: (1) that the animal

> had vicious propensities; and (2) that the owner had knowledge of these vicious characteristics. No such evidence exists in relation to the defendant's dog.

(R. Vol. 1, pp. 302-303.)

During an instruction conference the District Court recognized this change in Defendant's legal argument, stating:

> After further argument on the remaining issues of law and submission of proposed jury instructions by both parties, the Court re-examines the Defendant's Motion for Summary Judgment… The Court previously held a hearing on this matter and…denied summary judgment on Count 1, negligence. In his motion for summary judgment [] and his trial brief [] the Defendant argued that Kansas' law on negligence required the dog have "vicious/dangerous" and "dangerous or vicious" propensities. The Defendant now clarifies his argument, stating that "vicious propensities" is the correct statement of the law, focusing on the word "vicious." The Defendant's clarification of his argument prompts the Court to re-examine his motion for summary judgment.

(R. Vol. 1, page 308.)

During the conference the Court confirmed with Counsel for Plaintiff that Plaintiff would not offer proof of viciousness, but only of the foreseeable risk of danger to others. Upon this basis the District Court re-considered her ruling on the summary judgment motion, changed her ruling, and ruled as a matter of law that plaintiff must prove as an additional element, that the dog was "vicious."

> 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 Bouvier dog breed instinctively herd, and the Defendant should have foreseen an injury to the Plaintiff because of the Defendant's dog's breed and size, absent any knowledge of vicious propensities… The Court does not find any evidence sufficient to establish the required element of viciousness.

(R. Vol. 1, page 310.)

II. Statement of the Issues to be Decided in the Appeal

The sole issue to be decided in this appeal is the legal question whether 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.

III. Statement of the Facts that are Material to Determining the Issues to be Decided in the Appeal.

1. On April 7, 2014 both the Plaintiff and the Defendant brought their dogs to the dog park in Lawrence, KS. (R. Vol. 1, page 44.)
2. The Defendant's dog began to chase the Plaintiff's dog. (R. Vol. 1, page 44.)
3. While chasing Plaintiff's dog Defendant's dog ran into Plaintiff. (R. Vol. 1, pp. 44-45.)
4. Defendant was aware that his dog would likely chase other dogs and cats. (R. Vol. 1, page 80.)[1]
5. Defendant was aware that while his dog was chasing other dogs and cats Defendant was unable to control his dog because his dog was not trained to "stay" or to "come" on command. (R. Vol. 1, page 80.)

[1] The Exhibits supporting Plaintiff's factual statements in her opposition to the Motion for Summary Judgment (R. Vol. 1, pp. 80-82) are not found immediately following Plaintiff's brief, but in Vol. 2, pp. 1-16 of the Record on appeal.

6. Defendant was also aware that his dog weighed 100 pounds and was less than one year old. (R. Vol. 1, page 80.)
7. The Bouvier de Flanders is well understood to be a high-energy working dog that was specifically bred to her animals, such as cows, to haul farm carts and to act as law enforcement dogs. (R. Vol. 1, page 81.)
8. It is well understood that the breeding characteristics of working animals, such as a Bouvier de Flanders, will control the animal's behavior when it is put into an open field, such as a dog park. When placed in such a setting it can be expected that the Bouvier de Flanders, in particular one that has not received animal control training, will attempt to herd the animals that it encounters, including both other dogs and human beings. (R. Vol. 1, page 81.)
9. It is well understood that herding animals such as a Bouvier de Flandres can be taught to obey commands and can be brought under the control of its owner or master. (R. Vol. 1, page 82.)
10. When an untrained powerful herding animal, such as a Bouvier de Flanders, is allowed to run freely in an open dog park it is well understood that it will be prone to chase other animals, including both dogs and humans, and it is also well understood that there is a danger created by taking a large and powerful animal that the owner knows he cannot control into a dog park where other dogs are running free among people. (R. Vol. 1, page 82.)

11. The injuries suffered by Plaintiff as a result of being run into by Defendant's dog were foreseeable under the circumstances of this case. (R. Vol. 1, page 82.)
12. The District Court found that material issues of fact existed relating to the foreseeability by Defendant of the risk of harm his dog posed to other people. (R. Vol. 1, page 216.)
13. There is no finding by the District Court that Plaintiff had not offered sufficient evidence to prove that the risk of harm was known by Defendant and foreseeable prior to the time he released his dog to run free in the dog park. (R. Vol. 1, pp. 215-217; R. Vol. 1, pp. 308-310.)
14. The sole basis for the District Court's dismissal of Plaintiff's claim is the Court's legal ruling that proof of "viciousness" is a necessary element of any negligence claim against the owner of a dog. (R. Vol. 1, pp. 308-310.)

IV. Argument and authorities

A. Standard of Review

The District Court ruled, as a matter of law, that proof of "viciousness" is a necessary element of a negligence claim involving injuries caused by Defendant's dog. (R. Vol. 1, page 310.) An appeal of a district court's ruling on a motion for summary judgment is de novo as a question of law, granting no deference to the district court's judgment. *Netahla v. Netahla.*, 301 Kan. 693, 346 P.3d 1079 (Kan. 2015).

B. There is no Special Rule in Negligence Cases Involving Domesticated Animals that Requires the Plaintiff to Prove that Defendant's Dog was Vicious

General principles of negligence apply equally to cases involving injuries caused by dogs and Kansas law has not created an additional element of "viciousness." The District Court erred when it ruled that *Henkel v. Jordan*, 7 Kan.App.2d 561, 644 P.2d 1348 (Ct. App. 1982), *Berry v. Kegans*, 196 Kan. 388, 41 P.2d 707 (1966), *McKinney v. Cochran*, 197 Kan. 524, 419 P.2d 931 (1966), and *McComas v. Sanders*, 153 Kan. 253, 109 P.2d 482 (1941) "require proof the dog is 'vicious.'" (R. Vol. 1, pp. 309-310.) We believe the court erred because there is no special rule for dogs, or for that matter, for any domesticated animal. The question at the end of the day is whether in light of the owner's knowledge of his animal and the risks it presents to people with whom it will come into contact the owner has acted reasonably to prevent foreseeable injuries. *Henkel* and *Berry* involved dogs, while *Berry* and *McKinney* involved horses, and the fifth case we will discuss, *Bertram v. Burton*, 129 Kan. 31, 281 P. 892 (1929) involved cattle, but the application of negligence law, which is based upon foreseeability of the risk of injury to others, and whether the owner acted reasonably in light of his knowledge of that danger does not change. There is simply no reason to carve out a different rule for dogs from the rules for other domesticated animals, or for that reason, any other conduct covered by the theory of negligence.

The District Court's error is also reflected in its ruling that the Supreme Court's decision in *Bertram* does not apply to this case, and that the elements of negligence as set forth in PIK 4th 103.01 do not adequately instruct concerning the law of Kansas concerning injuries caused by dogs or by other domesticated animals.

Nothing in *Henkel* can be read to require proof that a dog that inflicted an injury was vicious. Instead, the opinion relies upon a straightforward foreseeability analysis. In *Henkel* the court described the case as "a 'dog fright' as opposed to a 'dog bite' case." Id P.2d at 1349. A child frightened by a dog lost control of and fell from his bicycle. Syllabus, Id, P.2d at 1349. Following a jury verdict for the plaintiff, the defendant appealed arguing "that liability could only arise if their dog was vicious and they knew it, and the dog bit or otherwise came into physical contact with plaintiff." Id P.2d at 1349.

In rejecting the appeal the Court wrote:

> Defendants' liability argument is based on dog bite and other cases, where an animal has directly inflicted physical injury. McKinney v. Cochran, 197 Kan. 524, 419 P.2d 931 (1966); Berry v. Kegans, 196 Kan. 388, 411 P.2d 707 (1966); Gardner v. Koenig, 188 Kan. 135, 360 P.2d 1107 (1961); McComas v. Sanders, 153 Kan. 253, 109 P.2d 482 (1941). Under such cases, they argue, the plaintiff had the burden of proving two essential elements: (1) that the dog had vicious propensities; and (2) that the owners had knowledge of these vicious characteristics.
>
> We have no quarrel with those cases, or with defendants' thesis drawn from them. Liability in animal cases, as in all negligence cases, is based on the "fault" of the animal owner. If the animal is not vicious, or is not known to be vicious, its owner cannot reasonably be found blameworthy if the animal unexpectedly injures someone. Foreseeability of injury is an essential ingredient of negligence.

Id, P.2d at 1350.

Finding that the defendant's dog had previously demonstrated aggressive behavior sufficient to have placed the defendant upon notice of the danger posed by the conduct of his dog, the Court wrote:

> Here, however, we are dealing with physical injury directly resulting from fright, albeit induced by an animal. In assessing "fault" in such a case foreseeability is again the key.

Id, P.2d at 1350–51.

In assessing that factor the Court of Appeals considered the specific conduct of the dog that was the source of the danger to others. Finding that because the defendant knew that his dog would run toward people snarling, even though it had never bitten anyone, defendant was "put on notice" of the danger.

> Here, Peanut was known to run toward people, snarling and growling, though he had never bitten anyone. The defendants were put on notice by numerous individuals that the dog had frightened people who passed along the street. In their brief defendants review the testimony on notice and, attempting to minimize their knowledge, conclude: "Taken together, this evidence might prove that the Jordans knew their dog had a menacing behavior toward people walking near their yard." Although such knowledge might be insufficient to impose liability for a bite, in this case it was Peanut's "menacing behavior" which caused the injury. Defendants were concededly aware of this propensity of their dog. Whether they should have foreseen that it would cause injury and have taken steps to prevent such injury were fact questions, properly submitted to the jury.

Id, P.2d at 1352.

The court's analysis fits precisely here. The court in *Henkel* said nothing that would justify a conclusion that viciousness is a necessary element in dog cases. There is certainly no finding that viciousness was an element in that case where the court engaged in a standard foreseeability analysis. Indeed, the court was asked to review the instructions

given in the trial below, none of which included a viciousness element. One of the instructions reviewed and approved by the court is directly on point, and nowhere does it include a "vicious" element.

> **No. 4**
> Dogs have from time immemorial been regarded as friends and companions of man. The great majority of dogs are harmless, and dogs have been traditionally regarded as unlikely to do substantial harm if allowed to run at large, so that their keepers are not required to keep them under constant control. *If, however, the owner of a dog knows or has reason to know that if a dog is not kept under constant control it is likely to cause substantial harm to others, the owner has a duty to keep his dog confined.* [Emphasis Added.]

Id, P.2d at 1353.

The italicized portion of the approved instruction makes the court's ruling clear. If the owner has reason to know that if his dog is not kept under control it is likely to cause substantial harm to others the owner has a duty to keep his dog confined. There is simply no requirement that the injured plaintiff prove the dog was vicious.

To highlight the District Court's misunderstanding of the law in this case, the instruction offered by Plaintiff concerning negligence in the control of domestic animals, that the District Court specifically rejected, is substantially the same as the instruction approved by the Court of Appeals in *Henkel* that is set forth immediately above. Plaintiff offered the following instruction:

> The owner of a domestic animal is bound to take notice of the general propensities and characteristics of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that some act causing injury will be committed if the opportunity therefor is afforded. – *Bertram v. Burton*, 129 Kan. 31, 281 P. 892 (1929).

(R. Vol. 1, page 297.)

Of this proposed instruction the District Court said: "The Court finds this proposed instruction is not an accurate statement of the controlling law on negligence in Kansas." (R. Vol. 1, page 309.) In this the District Court erred.

As the District Court recognized when it ruled on the summary judgment motion, there was sufficient evidence that the Defendant knew of the danger his large powerful and aggressive dog would pose in chasing other animals while running free in the dog park. Defendant he knew he had no ability to control his untrained dog, who would not obey commands. From these facts Defendant should have foreseen a risk of harm to other people. In its initial ruling on summary judgment the District Court correctly used the standard of "dangerousness" but erred when it reconsidered and ruled that a Plaintiff must prove that the animal was vicious.

The second case the District Court cited is *Berry v. Kegans*, 196 Kan. 388, 391, 411 P.2d 707 (1966) which was an appeal from a jury verdict in favor of the defendant. The District Court had given an instruction, without objection, that the owner should not be held liable for his dog's bite "unless the owner has reason to know that it is likely to do so, and this knowledge was prior to the incident." Id, P.2d at 710. *Berry*, was decided sixteen years prior to *Henkel*, was cited by *Henkel*, and adds nothing to the analysis. Like *Henkel*, *Berry's* focus is upon foreseeability. Just like Henkel, there is no mechanistic reliance upon a particular action by the dog, nor was the word "vicious" even used in the instructions given to the jury. Like *Henkel* the key question is whether the prior conduct of the animal would have alerted the owner to the risk of harm to others. Here, on summary judgment the court found there was such evidence.

> The court finds material issues of fact relating to foreseeability as more fully expressed in the transcript of the proceedings, and that Defendant is not entitled to judgement as a matter of law.

R. Vol 1, page 216

The District Court's later ruling that Kansas law also requires that the Plaintiff must show viciousness cannot be supported by the language or the reasoning in either *Henkel* or *Berry*. Foreseeability of danger to others, as the Court initially ruled, is the correct standard.

The third case the District Court cited supporting its ruling that a plaintiff must prove viciousness was *McKinney v. Cochran*, 197 Kan. 524, 419 P.2d 931 (1966). *McKinney* did not involve a dog, but a horse, and was an appeal from a directed verdict in favor of the defendant/owner following a jury trial. The plaintiff had fallen while riding the defendant's horse when the horse had slipped on frozen ground. The negligence claims were:

> (1) in assuring plaintiff that the riding area near his farm home provided secure footing and contained no hidden hazards; (2) in failing to warn plaintiff that the horse was awkward and untrained and at least 12 years old and incapable of making the quick turning movements that are expected of stock horses; (3) in failing to inspect his farm premises for concealed hazards prior to inviting plaintiff to ride the horse, and (4) in failing to select a proper area on his farm for testing the riding qualities of the horse.

Id, P.2d at 933.

From the evidence the District Court found that the Plaintiff was an expert horseman "with superior knowledge," while the Defendant was a "novice." In affirming the judgment of the District Court, the Supreme Court wrote:

> In an action for damages based on negligence, where no showing is made of any act or omission from which negligence can be inferred by reasonable minds, there is no submissible issue for the jury and in such cases it becomes the duty of the court to remove the issue from the jury.

Id, P.2d at 935.

Like the other cases discussed above, *McKinney* turns upon an analysis of whether the defendant/owner failed to take reasonable action to protect the plaintiff from a foreseeable harm. Nothing in the *McKinney* opinion suggests that viciousness is a required element of a claim involving a domesticated animal.

The final case cited by the District Court in support of its ruling that an element of a negligence claim involving a domesticated animal is proof of viciousness is *McComas v. Sanders*, 153 Kan. 253, 255, 109 P.2d 482 (1941), which also involved injuries caused by a horse. *McComas* specifically references and follows *Bertram.* In affirming the District Court's action dismissing the plaintiff's case the Supreme Court wrote:

> Insofar as the petition before us is concerned, there is no allegation the defendants owned the horse; the inference is to the contrary. There is no direct allegation the animal was not broke to lead with a halter, or that it was any different in character than any other young horse, or if so that the defendants knew thereof. If the adjectives used to describe the horse are sufficient to charge it was a vicious animal, there is no allegation the defendants knew of the viciousness. If we disregard those adjectives as charging viciousness and consider them only in the sense that it was meant to charge that rearing and plunging is a natural propensity of a colt or young horse, then we have to consider whether the manner of handling it was negligent. As stated in 3 C.J.S., Animals, § 149, 1253, the rule is that to avoid being negligent, the owner of the animal must use that degree of care to restrain that an ordinarily prudent person would have used.

Id. P.2d at 484.

Nothing in *McComas* justifies a requirement that a plaintiff is required to prove anything more than the elements of negligence, and certainly, there is no requirement that a plaintiff prove the animal was vicious. Indeed, in the foregoing analysis the Supreme Court clearly distinguishes viciousness as one of the characteristics of an animal that would make the animal dangerous. But whatever is meant by viciousness, and it is not defined, nothing in the opinion can reasonably lead to the conclusion that all dangerous animals must also be vicious.

In ruling that viciousness is an element of a claim of negligence in the handling of a domestic animal the District Court erroneously distinguished and failed to apply *Bertram,* supra. In *Bertram* the plaintiff lost a steer when a bull that was being driven along the road by defendant attacked it. He sued the owner of the bull for his damages. Following a jury trial the District Court directed a verdict for the defendant. The plaintiff appealed and the Supreme Court reversed, saying:

> The owner of a domestic animal is bound to take notice of the general propensities and characteristics of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that some act causing injury will be committed if opportunity therefor is afforded. 3 C. J. 89, 93, 95; 1 R. C. L. 1099.
> *See also*, Hartman v. Railway Co., 94 Kan. 184, 146 P. 335, L. R. A. 1915D, 563, and Carl v. Ackard, 114 Kan. 640, 220 P. 515, as having some bearing on the question. The facts in those cases, of course, are quite different than here; but the action in each case was predicated upon negligence. Here there was evidence to the effect that when kept at home with milk cows the bull was not vicious particularly towards persons in the cow lot, but the disposition of a bull being driven along a highway to go to a herd of cattle near by is so commonly known that defendant should have anticipated it.

Id, P. at 894.

Thus, like *Henkel*, *Berry*, *McKinney*, and *McComas, Bertram* applies a standard negligence analysis. Was the defendant's conduct reasonable in light of the circumstances? As stated in PIK 4th 103.01:

> Negligence is the lack of ordinary care. It is the failure of a person to do something that an ordinary person would do, or the act of a person in doing something that an ordinary person would not do, measured by the circumstances then existing.

There is no other element of the tort. Concerning domesticated animals, including dogs, viciousness is not an element, dangerousness is. Did the Defendant's dog pose a foreseeable danger to others? That is a question that the jury should be allowed to resolve.

V. Conclusion

Language in this line of cases recites an obvious truism; that men and domesticated animals, particularly dogs, have long histories of living in harmony together. The reasoning goes that for such animals, that are not known to be vicious, for an owner to be legally responsible for an injury caused by the animal the plaintiff must prove that the danger was foreseeable. This is simply standard negligence analysis. These cases have held that there must be proof that the owner had reason to believe his animal posed a risk of danger to others.

Thus, in *Henkel*, though the dog, Peanuts, had never bitten anyone, the owner was held liable because he knew Peanuts had a habit of charging passersby who were walking in the street. Based upon this knowledge, the court held that a jury could find that Peanuts posed a danger to others. And the court reasoned that

Peanut's owners could be held liable for injuries caused to a child who was frightened into falling from his bicycle. It cannot be said that Peanuts, who had never actually come into contact with the child, or anyone else, and had never bitten a person was actually "vicious." But the danger presented by her behavior was known to her owners. The jury was never instructed that they must find Peanuts vicious, and no court, neither the District Court or the Court of Appeals ever so found. But the danger was foreseeable and the jury found that the owners were liable because they had not acted reasonably, and that verdict was affirmed on appeal.

In this case, as the District Court initially found, Defendant's large and powerful dog was aggressive by nature and breeding, that Defendant knew that when his dog was off leash it would chase other dogs, that he knew he had not trained his dog, and he knew he was not able to control his dog with voice commands. The initial ruling on summary judgment was that a jury could reasonably find that this large powerful aggressive uncontrollable dog running free posed a danger to others. A jury could reasonably find that Defendant was required to train his dog to be safe, or, as it was put by the instruction in Henkel "to keep his dog confined." *Henkel*, supra, P.2d at 1353. As the Court in *Bertram* put it, the owner "must anticipate and guard against [the risks created by his animal] if of a nature to cause injury." *Bertram*, supra, P.2d at 894.

Defendant started out with the correct reasoning in his motion for summary judgment. He correctly argued that Plaintiff must prove "dangerousness or viciousness."

Thus, the proper issue to be decided was whether there was a foreseeable risk of harm to others and whether the Defendant took reasonable precautions in response to that risk. And applying the correct standard, the District Court answered the question correctly, finding:

> The court finds material issues of fact relating to foreseeability as more fully expressed in the transcript of the proceedings, and that Defendant is not entitled to judgement as a matter of law.

(R. Vol 1, page 216.)

When Defendant shifted the argument from "dangerousness or viciousness" to "viciousness" alone, he led the District Court into error. A vicious dog is certainly a dangerous dog, as is a large, powerful and aggressive dog that is left to run free beyond the control of his master. That large and powerful dog may or may not be vicious, but whether vicious or not he can be dangerous, or so a jury can decide. The District Court erred by limiting the reach of dangerousness to the narrow definition of viciousness in a way unsupported by the logic of the law, or by any authority. This Court should reverse and remand the District Court's judgment with directions that the case should proceed to trial.

Respectfully submitted,

The Skepnek Law Firm, P.A.

/s/William J. Skepnek
William J. Skepnek #10149
1 Westwood Rd.
Lawrence, KS 66044
Phone 785.856.3100
Fax 785.856.3099
bskepnek@skepneklaw.com
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **Brief of Appellant** was filed via the Kansas e-file website and electronically delivered, this 4th day of November 2018 to:

Anthony M. Knipp
Ian M. Bartalos
McCAUSLAND BARRETT & BARTALOS, P.C.
9233 Ward Parkway, Ste. 270
Kansas City, MO 64114
ibartalos@mbblawfirmkc.com
aknipp@mbblawfirmkc.com

Attorneys for Defendant/Appellee

/s/William J. Skepnek
William J. Skepnek

Appendix to Brief of Appellant
Case No. 18-120015-A

Volume I

Petition	R. Vol. 1, pp. 12-14
Answer	R. Vol. 1, pp. 23-27
Motion for Summary Judgment	R. Vol. 1, pp. 42-54
Ex A Petition	R. Vol. 1, pp. 55-57
Ex B Wilke dep. Excerpts	R. Vol. 1, pp. 58-62
Ex C Ash dep. Excerpts	R. Vol. 1, pp. 63-67
Plaintiff's Response to Motion for Summary Judgment	R. Vol. 1, pp. 76-102
[supporting exhibits found @ R. Vol. 2, pp. 1-16]	
Plaintiff's First Amended Petition	R. Vol. 1, pp. 106-112
Scheduling Order	R. Vol. 1, pp. 129-131
Designation of Expert Witness	R. Vol. 1, pp. 137-139
Report of Expert Witness	R. Vol. 1, pp. 140-147
Defendant Reply in Support of Motion for Summary Judgment	R. Vol. 1, pp. 152-175
Ex A Petition	R. Vol. 1, pp. 176-178
Ex B Wilke dep. Excerpts	R. Vol. 1, pp. 180-185
Ex C Wilke dep. Excerpts	R. Vol. 1, pp. 187-192
Ex D Brenneman dep Excerpts	R. Vol. 1, pp. 194-204
Journal Entry granting Motion to file First Amended Petition, Denying Summary Judgment on Negligence	

R. Vol. 1, pp. 215-217

"The court finds material issues of fact relating to foreseeability as more fully expressed in the transcript of the proceedings, and that Defendant is not entitled to judgement as a matter of law."

R. Vol 1, page 216

Plaintiff's First Amended Petition R. Vol. 1, pp. 218-223

Defendant's Answer to FAP R. Vol. 1, pp. 224-228

Defendant's Trial Brief R. Vol. 1, pp. 247-252

"Kansas courts have held that the plaintiff has the burden of proving two essential elements: (1) that the animal had vicious propensities; and (2) that the owner had knowledge of these vicious characteristics. Henkel v. Jordan, 7 Kan. App. 2d 561, 562-563, 644 P.2d 1348, 1350 (Kan. Ct. App. 1982); McKinney v. Cochran, 197 Kan. 524, 419 P.2d 913 (1966); Berry v. Kegans, 196 Kan. 388, 411 P.2d 707 (1966); Gardner v. Koenig, 188 Kan. 135, 360 P.2d 1107 (1961); McComas v. Sanders, 153 Kan. 253, 109 P.2d 482 (1941)."

R. Vol. 1, p. 248

Plaintiff's Proposed Jury Instructions

R. Vol. 1, pp. 293-299

The plaintiff claims:
That she was injured due to Defendant Ash's negligence in the following respects:

- Defendant failed to exercise ordinary care when he released his dog to run free at the dog park;
- Defendant released his dog from the leash when Defendant knew that when allowed to run free in the dog park his dog would not respond to Defendant's voice commands.

R. Vol. 1, page 294

Negligence is the lack of ordinary care. It is the failure of a person to do something that an ordinary person would do, or the act of a person in doing something that an ordinary person would not do, measured by the circumstances then existing. PIK 4th 103.01

R. Vol. 1, page 296

"The owner of a domestic animal is bound to take notice of the general propensities and characteristics of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that some act causing injury will be committed if the opportunity therefor is afforded." *Bertram v. Burton*, 129 Kan. 31, 281 P. 892 (1929)

R. Vol. 1, page 297

Agreed Pre-Trial Order R. Vol. 1, pp. 301-307

Plaintiff's Legal Theories:

The owner of a domestic animal is bound to take notice of the general propensities and characteristics of the class to which it belongs and must anticipate and guard against them if of a nature to cause injury, for he necessarily knows that some act causing injury will be committed if opportunity therefor is afforded. A failure to do so is a lack of ordinary care, which is negligence.

Defendant had a duty to know and knew the general propensities and characteristics of his dog. He knew that his physically powerful dog could be difficult to control, and that due to its strength, size and the characteristics of its breed, it was capable of causing injury to others. When Defendant took is dog to the dog park he had a duty to Plaintiff and others to exercise ordinary care to protect against foreseeable harm. Defendant failed to exercise ordinary care when he took his one year old 100 pound dog to the Lawrence dog park and allowed him to run free off-leash though he knew that his dog had been bred to herd cattle and sheep, knew his dog would chase and "play tag" with other animals, and knew that when running free his dog would not respond to Defendant's voice commands. Defendant knew or should have known that in this condition his dog posed a risk of danger to other persons who were using the dog park.

R. Vol. 1, page 302

Defendant's Legal Theories:

The defendant contends that he has no legal liability for his dog coming into contact with the plaintiff at the subject dog park, causing her injury. With regard to case involving dog bites and other incidents where an animal has directly inflicted physical injury, Kansas courts have held that the plaintiff has the burden of proving two essential elements: (1) that the animal had vicious propensities; and (2) that the owner had knowledge of these vicious characteristics. No such evidence exists in relation to the defendant's dog.

R. Vol. 1, pp. 302-303

Issues of Law:

The burden of proof of the plaintiff in regard to the alleged negligence of the defendant.

R. Vol. 1, page 304

The defendant's dispositive motion has previously been ruled upon by this court.

R. Vol. 1, page 305

MEMORANDUM DECISION R. Vol. 1, pp. 308-310

Volume 2

Exhibit A – Defendant Ash deposition excerpts

R. Vol. 2, pp. 1-6

Exhibit B – Plaintiff Wilke deposition excerpts

R. Vol. 2, pp. 7-10

Exhibit C – Affidavit of Brenneman R. Vol. 2, pp. 11-15

Exhibit D – Dog Park Sign R. Vol. 2, page 16