Appellate Court No. 18-120015-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TERESA WILKE
Plaintiff-Appellant

vs.

RONALD ASH
Defendant-Appellee

BRIEF OF APPELLEE

Appeal from the District Court of Douglas County, Kansas
Honorable Amy Hanley, District Court Judge
District Court Case No. 2016-CV-000130

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NATURE OF THE CASE

The underlying civil lawsuit arose out of an incident occurring on April 7, 2014 at the "Mutt Run Off-Leash Dog Park" in Lawrence, Douglas County, Kansas, at which time both plaintiff's dog and defendant's dog were running and chasing each other, wherein plaintiff and defendant's dog crossed paths. (R. I, p. 55 at ¶¶ 3-4). Defendant's dog made contact with plaintiff, and she fell and sustained injuries. (R. I, p. 56 at ¶ 5).

Plaintiff alleges that "[w]hile at Mutt Run, Defendant's dog, while engaging in its bred activity of herding, ran into Plaintiff from behind, and injured Plaintiff's leg." (R. I, p. 56 at ¶ 5). Plaintiff further alleged that "The Bouvier dog breed [defendant's dog] was bred as a herding animal that instinctually chases at the heels of animals, including people, when surrendering to its instincts." (R. I, p. 56 at ¶ 8).

Plaintiff testified at her deposition that the purpose of an off-leash dog park is to give dogs the opportunity to freely move and run around, off of their leash and outside the confines of the city. (R. I, p. 59 at 50:21-51:20). Plaintiff further testified that at the subject off-leash dog park, plaintiff's dog "doesn't mind other dogs and they will often play a chasing sort of game[,]" and on the date of the incident, plaintiff's dog and defendant's dog "were no exception, they became involved in a game of chase." (R. I, p. 60 at 54:1-8). Contrary to the allegations in her Petition, plaintiff testified that it is not her opinion that a Bouvier dog, such as defendant's dog, instinctively chases at the heels of people. (R. I, p. 61 at 57:2-5).

Similarly, plaintiff's purported dog expert, Richard Tom Brenneman, testified that he had never seen defendant's dog, that defendant's dog was not herding plaintiff on the date of the incident, and he further testified that although each breed of dog has certain characteristics, without the prerequisite "drive" of any given dog to be trained to act on those characteristics, such as herding, the dog will not engage in activities involving said characteristics. (R. I, pp. 201-203 at 67:24 – 68:4; 69:9 – 70:7; 85:12 – 86:13). Mr. Brenneman also testified that there was no doubt that the dogs were chasing each other back and forth on the date of the incident. (R. I, p. 197 at 46:23 – 47:4).

Regarding foreseeability, Mr. Brenneman testified that in regard to his background and experience with dogs and dog parks, "[t]he unknown can happen so quick that it is improbable for someone to stop the unknown from happening." (R. I, p. 198 at 54:8-21). The affidavit submitted on behalf of Mr. Brenneman, which was drafted solely by plaintiff's counsel, runs directly contrary to the testimony elicited at his deposition. (R. I, pp. 196-197 at 41:5 – 42:4; 47:5-22; R. I, p. 198 at 54:8-21; R. I, p. 202 at 67:24 – 68:4; 69:9 – 70:7; R. 2, pp. 11-13).

Defendant testified on examination by plaintiff's counsel that after his yellow Lab passed away of old age, he and his wife ultimately agreed to get another dog, at which time they came across two very friendly "Bouviers," and the owner of these two dogs highly recommended the Bouvier breed to defendant and his wife. (R. I, p. 64 at 13:14-14:3). Defendant further testified that he was interested in the Bouvier breed because they are friendly, mellow, do not get agitated like smaller dogs, as well as the fact that he

and his wife wanted a dog with good disposition for their grandchildren. (R. I, pp. 64-65 at 16:15-17:11).

When asked directly whether defendant's dog had ever used his body to nudge, bump, or otherwise participate in a herding maneuver, defendant testified that his dog had never done that. (R. I, p. 66 at 22:22-23:9). The record on appeal establishes not only the absence of any vicious propensities, but it also establishes that defendant's dog had never bitten, attacked, or harmed anyone, which rules out any allegation that the underlying incident was reasonably foreseeable. Lastly, plaintiff conceded that she "has no evidence of 'vicious' propensities of the Defendant's dog." (R. I, p. 310).

STATEMENT OF THE ISSUES

I. Plaintiff invited and lead the District Court into the alleged error when she requested that the District Court reconsider and grant Defendant's Motion for Summary Judgment, such that the alleged error for which plaintiff complains on appeal is verboten and improper under Kansas law and the invited error doctrine.

II. Plaintiff conceded that she was unable to meet her burden of proof on an essential element to her cause of action – specifically, plaintiff conceded that she had no evidence of any vicious propensities of defendant's dog – such that summary judgment was proper and the District Court's ruling constitutes a negative factual finding.

III. The District Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment, nor did the District Court commit any error in its application of Kansas law.

STATEMENT OF THE FACTS

Plaintiff filed her original Petition against defendant alleging negligence on March 30, 2016. (R. I, pp. 12-14). After written discovery had been exchanged, depositions of the parties were conducted on October 6, 2016. (R. I, p. 38). The lawsuit remained stagnant until defendant filed his Motion for Summary Judgment on January 23, 2017. (R. I, pp. 42-67, *see also generally*, R. I).

Contrary to the allegations of plaintiff set forth in the Brief of Appellant, it is important to note that the basis for Defendant's Motion for Summary has always been that, in cases involving incidents where a dog has directly inflicted physical injury to a plaintiff, "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 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)." (R. I, pp. 45-46) (emphasis added).

On March 15, 2017, plaintiff filed her Response in Opposition to Defendant's Motion for Summary Judgment, which included an affidavit from her purported dog expert, Richard Tom Brenneman, which was submitted in an effort to defeat summary judgment. (R. I, pp. 76-102; R. II, pp. 11-13). Defendant ultimately deposed Mr. Brenneman, who testified inconsistent to the affidavit, which was drafted solely by

plaintiff's counsel. (R. I, pp. 196-197 at 41:5 – 42:4; 47:5-22; R. I, p. 198 at 54:8-21; R. I, p. 202 at 67:24 – 68:4; 69:9 – 70:7; R. 2, pp. 11-13).

Five days after plaintiff filed her Response, and during the pendency of Defendant's Motion for Summary Judgment, on March 20, 2017, plaintiff filed a Motion for Leave to File First Amended Petition to assert a second cause of action for breach of contract. (R. I, pp. 103-112). In her First Amended Petition, plaintiff alleged that an implied agreement arose from the conduct of the parties on the date of the incident, based on the general rules and regulations of the "Mutt Run Off-Leash Dog Park," which are not codified in Kansas law, and which would create an imposition of strict liability. (R. I, pp. 109-110).

On the same date, defendant filed his Suggestions in Opposition to Plaintiff's Motion for Leave, arguing that he would be prejudiced because "plaintiff's proposed First Amended Petition includes not only a new cause of action (breach of contract), but additional allegations of fact/conclusions of law to the original cause of action (negligence), at an apparent attempt to defeat Defendant's Motion for Summary Judgment." (R. I, p. 114 at ¶ 7). Defendant further argued: "Though it is not an uncommon tactic for a plaintiff to amend her Petition during the pendency of a dispositive motion by adding a new cause of action – and not before such the dispositive motion is filed – it is prejudicial to alter the original cause of action for which Defendant's Motion for Summary Judgment is based." (R. I, p. 114 at ¶ 8).

The District Court granted Plaintiff's Motion for Leave to File First Amended Petition. (R. I, pp. 215-216).

Thereafter, on May 4, 2017, defendant filed his Reply in Support of Summary Judgment. (R. I, pp. 152-204). On June 13, 2017, the District Court heard oral arguments on Defendant's Motion for Summary Judgment and initially denied summary judgment as to Count I – Negligence, but granted summary judgment as to Count II – Breach of Contract. (R. I, pp. 215-216).

As one of the main bases for defendant's position that plaintiff's appeal should be denied, defendant offers the following procedural history for this Court's unbridled determination on the issues before this Court, which evidences that plaintiff invited and lead the District Court into the alleged error on the eve of trial, in lieu of proceeding toward a trial on the merits, whereas plaintiff now complains of the District Court's alleged error on appeal.

On May 26, 2017, plaintiff filed her Motion for Extension of Time to Declare Future Damages Expert. (R. I, pp. 212-214). The District Court entered a Journal Entry of June 16, 2017 granting plaintiff's Motion, holding that "Plaintiff must declare his expert by July 13, 2017 (30 days from decision [on Defendant's Motion for Summary Judgment]), and must produce such expert for deposition by the defense within 30 days of such declaration." (R. I, pp. 215-217). Plaintiff never declared an expert regarding future damages. (*See generally*, R. I).

On November 15, 2017, defendant filed his Motion to Strike any Future Damages Expert of Plaintiff and any Claim for Future Damages, on the bases that plaintiff failed to timely designate an expert regarding future damages in noncompliance with (1) the District Court's initial Scheduling Order; (2) the District Court's extension of time

specifically for plaintiff to designate an expert regarding future damages; (3) K.S.A. § 60-226; and, (4) plaintiff's ongoing duty to timely supplement discovery regarding experts. (R. I, pp. 229-233). On November 15, defendant also filed his Motions in Limine, as well as a Trial Brief on the Controlling Kansas Law in this Lawsuit. (R. I, pp. 234-252).

In particular, Defendant's Trial Brief set forth the very same legal standard set forth in Defendant's Motion for Summary Judgment:

> **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.** *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 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).

(R. I, p. 248) (emphasis in original).

On November 27, 2017, the District Court granted Defendant's Motion to Strike any Future Damages Expert of Plaintiff and any Claim for Future Damages. (R. I, pp. 253-255). Plaintiff filed a Motion to Reconsider RE Future Damages on December 20, 2017, which was denied by the District Court on January 4, 2018. (R. I, pp. 274-277, 289-291).

On June 29, 2018, defendant filed his proposed jury instructions, which further recited the controlling law in Kansas as it pertains to incidents where a dog has directly inflicted physical injury to a plaintiff. (R. I, p. 309). Specifically, defendant's proposed jury instruction on the controlling Kansas law including the following:

> Under Kansas law and the facts of this case, in order for plaintiff to prove that defendant was at fault and caused her injuries, plaintiff must prove **(1) that defendant's dog had vicious propensities; and (2) that defendant had knowledge of these vicious propensities.** *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 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).

(R. I, p. 309).

The comparable PIK instruction, PIK Civ. 4th 126.91, which was confirmed as "an accurate statement of Kansas law" in *Hopkins v. McCollam*, 300 P.3d 115 (Kan. Ct. App. 2013), citing to *Henkel v. Jordan*, 7 Kan. App. 2d 561, 563, 644 P.2d 1348 (1982), is as follows:

> **We turn next to the legal test we must apply to these facts. The traditional test is well stated in a Kansas pattern jury instruction:**
>
> "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.
>
> **The pattern instruction is an accurate statement of Kansas law.** See *Carl, Administratrix v. Ackard*, 114 Kan. 640, Syl. ¶ 3, 220 P. 515 (1923); *Henkel v. Jordan*, 7 Kan. App. 2d 561, 562-63, 644 P.2d 1348, rev. denied 231 Kan. 800 (1982); *Ellis v. Blaich*, No. 92-1427-PFK, 1993 U.S. Dist. LEXIS 9699, 1993 WL 246041, at *2-3 (D. Kan. 1993) (unpublished opinion).

Hopkins v. McCollam, 300 P.3d 115 (Kan. Ct. App. 2013) (emphasis added).

To rebut defendant's theory of the "legal test," "traditional test," and "accurate statement of Kansas law," as held in *Hopkins*, on July 2, 2018, plaintiff filed her proposed jury instruction requesting that the trial court instruct the jury on her Count 1,

Negligence in the following manner, which is a quote from a case involving a defendant's large, trespassing bull that killed a plaintiff's steer:

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

On July 3, 2018, the parties submitted an Agreed Pretrial Order to the District Court, wherein defendant further set forth the legal standard previously cited:

> 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 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. I, pp. 302-303) (emphasis added).

The parties appeared for an initial telephone conference, at which time the District Court took up the parties' proposed jury instructions and Defendant's Trial Brief on the Controlling Kansas Law, whereas the District Court later found that the controlling Kansas law was set forth in Defendant's Trial Brief and defendant's proposed jury instruction. Subsequently, on August 2, 2018, pursuant to the request of plaintiff's counsel, the parties appeared for another telephone conference. (R. I, pp. 308-310).

Pursuant to the request of plaintiff's counsel, the District Court took up the issue of whether Defendant's Motion for Summary Judgment – originally filed on January 23, 2017 and originally denied as to Count 1, Negligence, on June 13, 2017 – should be

reconsidered and granted, due to the District Court's findings as to the controlling law in Kansas. (R. I, pp. 308-310). On the telephone conference, as set forth in the District Court's Memorandum Decision of August 3, 2018, plaintiff conceded that she had no evidence of any vicious propensities of defendant's dog. (R. I, p. 310). As a result, the District Court did not find any evidence sufficient to establish the requisite element of viciousness under Kansas law. (R. I, p. 310).

In accordance with the District Court's Memorandum Decision of August 3, 2018, the District Court held that "[t]he facts of the case are now fully developed and the Court finds the only questions presented are questions of law, specifically the issue of the controlling law in Kansas on negligence." (R. I, p. 309). With regard to defendant's proposed jury instructions as set forth above, and with further regard to the controlling law in Kansas on negligence in the underlying matter, the District Court held as follows: "The Court finds the proposed instruction [of plaintiff] is not an accurate statement of the controlling law on negligence in Kansas[]" and "The Court agrees the Defendant's proposed instruction is an accurate statement of current Kansas law." (R. I, pp. 309-310).

Specifically, the District Court held the following in granting summary judgment: "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 does not find any evidence sufficient to establish the required element of viciousness." (R. I, p. 310). Plaintiff now appeals the District Court's entry of summary judgment.

ARGUMENTS AND AUTHORITIES

I. Plaintiff invited and lead the District Court into the alleged error when she requested that the District Court reconsider and grant Defendant's Motion for Summary Judgment, such that the alleged error for which plaintiff complains on appeal is verboten and improper under Kansas law and the invited error doctrine.

STANDARD OF REVIEW:

"Whether the invited error doctrine applies is a question of law over which this court has unlimited review." *State v. Hankins*, 304 Kan. 226, 230, 372 P.3d 1124 (2016).

ANALYSIS:

It is apparent from the record on appeal that plaintiff acquiesced in the District Court taking the case from the jury and entering judgment in favor of defendant, such that plaintiff cannot now complain of an error for which she summoned. *Brown v. Beckerdite*, 174 Kan. 153, 158, 254 P.2d 308 (1953).

Under the guidance of the Kansas Supreme Court, "A party may not invite and lead a trial court into error and then complain of the trial court's error on appeal." *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003) (see also, *Grimm v. Pallesen*, 215 Kan. 660, Syl. para. 3, 527 P.2d 978 (1974); *Manley v. Wichita Business College*, 237 Kan. 427, 438, 701 P.2d 893 (1985)).

The procedural posture taken by plaintiff in the underling litigation constitutes an in invited error, and the appeal should be dismissed accordingly. Although the District Court initially denied Defendant's Motion for Summary Judgment against defendant, when the District Court decided to follow the controlling Kansas law set forth by defendant throughout the record, the District Court reconsidered and granted Defendant's

Motion for Summary Judgment on the eve of trial, at which time summary judgment was ultimately entered against plaintiff, but at the behest of plaintiff's counsel. (R. I, pp. 308-310).

Plaintiff argues on appeal that "[w]hen Defendant shifted the argument from 'dangerousness or viciousness' to 'viciousness' alone, he led the District Court into error." Defendant concedes that within his Motion for Summary Judgment, defendant made references to both, vicious and dangerous propensities; however, defendant never wavered from the legal standard set forth above in *Henkel v. Jordan*, 7 Kan. App. 2d 561, 562-563, 644 P.2d 1348, 1350 (Kan. Ct. App. 1982) and other Kansas cases previously cited.

Any use of the term "dangerous" by defendant was used as a non-legal adjective to describe the lack of evidence of not only vicious propensities of the dog, but also the lack of evidence of dangerous, aggressive, violent, etc. propensities of the dog. It is a misrepresentation to this Court that it was defendant who led the District Court into the alleged error by "shifting its argument from 'dangerousness or viciousness' to 'viciousness' alone" as the exact same legal standard has been cited by defendant throughout the entirety of the underlying litigation, which again, is supported by the record on appeal.

Regardless, the general use of the term "dangerous" by defendant is of no consequence. A fatal flaw of plaintiff's appeal is that there is no law in Kansas cited by plaintiff, whatsoever, which sets forth any legal standard requiring "dangerous propensities." Hence, when plaintiff contends that "[t]he 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[,]" there is no substantive basis for plaintiff's appeal, given that "dangerousness" is not an element in Kansas for any legal standard in this case.

The record on appeal shows that defendant routinely set forth the same legal standard in all filings with the District Court in regard to the controlling law in Kansas for a negligence cause of action where animals, such as dogs, have inflicted injury to a plaintiff. (R. I, pp. 45-46; 248; 302-303; 309). Accordingly, in the face of the District Court's Memorandum Decision of August 3, 2018, following a telephone conference at the request of plaintiff's counsel, the District Court held that:

> The facts of the case are now fully developed and the Court finds the only questions presented are questions of law, specifically the issue of the controlling law in Kansas on negligence. . . . **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 does not find any evidence sufficient to establish the required element of viciousness. Therefore, the Court finds the Plaintiff does not state a cause of action and summary judgment should be granted in favor of the Defendant on Count 1, Negligence."

(R. I, pp. 308-310).

Pursuant to the law of Kansas, plaintiff is precluded from challenging an invited error by this well-settled principle of law. *Popp v. Popp*, 204 Kan. 329, 332, 461 P.2d 816 (1969). In *Popp*, the Kansas Supreme Court succinctly set forth this principle of law,

holding that "[w]here 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. *Id.* (citing, *Manhattan Bible College v. Stritesky*, 192 Kan. 287, 387 P. 2d 225.)

In the same manner, the Kansas Supreme Court in *Gilliland v. Kansas Soya Products Co.* held the following in pertinent part, which is instructive on the issue before this Court:

> **Where counsel for one party causes or invites a particular ruling, such party cannot later argue that such ruling was erroneous. It is elementary that a litigant cannot take contrary positions, one in which he has sought and procured an order, ruling or judgment in the trial court and another in the supreme court in which he complains of such order, ruling or judgment; moreover, a litigant will not be heard on an appeal to complain of any order, ruling or judgment of the trial court which he suffered the trial court to make without objection. One who by his own act invites and leads the court into erroneous action cannot complain of it nor take advantage of the ruling.** For other citations see West's Kansas Digest, Appeal and Error, § 882 (1); 1 Hatcher's Kansas Digest [Rev. Ed.], Appeal and Error, § 440.

189 Kan. 446, 451-52, 370 P.2d 78 (1962) (internal citation omitted).

Pursuant to plaintiff's request for the District Court to reconsider and grant Defendant's Motion for Summary Judgment, for which it previously denied, the District Court had no alternative but to render judgment in favor of defendant, once plaintiff conceded to the lack of evidence sufficient to establish the required elements of viciousness under Kansas law. It would be a misrepresentation of the procedural posture taken by plaintiff to content that plaintiff's counsel did not request a telephone conference with the District Court to reconsider Defendant's Motion for Summary Judgment. Plaintiff found the District Court's decision to apply the law set forth by

defendant for trial purposes to cause the District Court to reconsider Defendant's Motion for Summary Judgment, due to plaintiff's lack of evidence to support her cause of action.

Consequently, plaintiff invited the District Court to grant summary judgment in favor of defendant, such that plaintiff cannot later argue that such ruling was erroneous. *Id.* Pursuant to Kansas law, it is an elementary concept that plaintiff should not be allowed to take contrary positions, one in which she sought and procured a judgment by the District Court, and another before this Court in which he complains of such judgment. *Id.* Plaintiff should not be heard on appeal to complain of the judgment of the District Court which she lead the District Court to enter without objection. *Id.* "One who by his own act invites and leads the court into erroneous action cannot complain of it nor take advantage of the ruling." *Id.*

In other words, when the District Court found the controlling law in Kansas to include the required element of viciousness, and when plaintiff conceded that she had no evidence of vicious propensities, plaintiff invited and led the District Court into granting Defendant's Motion for Summary Judgment. Consequently, under Kansas law, plaintiff cannot now complain of the District Court's ruling, nor take advantage of the ruling.

Without the invited error doctrine, any plaintiff in Kansas could simply concede to the lack of evidence to support its cause of action, just to avoid trial for one reason or another (whether it be an unfavorable ruling on the controlling law or on the inability to submit a claim for future damages), then take the matter up on appeal, which equates to nothing more than a waste of judicial economy at every level.

Moreover, the Kansas Supreme Court in *Underhill v. Thompson* was faced with a

similar issue concerning a summary judgment and an invited error. 37 Kan. App. 2d 870, 158 P.3d 987 (2007). In *Underhill*, the trial court scheduled an evidentiary hearing to resolve the case, and the parties asked the court to determine the defendant's motion to dismiss on the basis of deposition testimony. *Id.* at 878-79. The Kansas Supreme Court held that "even if [the plaintiff] had a right to a jury trial, she waived this right by asking the court to decide the issue based on deposition testimony." *Id.* at 879. The plaintiff "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." *Id.* "To further consider this issue would be improper because [the plaintiff] actively contributed to what she now maintains was trial court error." *Id.*

Analogous to the trial court proceedings in *Underhill*, plaintiff in the present matter waived her right to a jury trial when she requested that the District Court to rule on Defendant's Motion for Summary Judgment based on the undisputed lack of evidence to establish her claim of negligence as a matter of law. Hence, plaintiff can neither accept nor encourage the District Court to decide whether plaintiff's case of action fails in conjunction with her own concessions, just to "then turn around on appeal and maintain that the court erred." *Id.*

In conclusion, plaintiff actively contributed to the District Court's granting of Defendant's Motion for Summary Judgment by requesting the Court to reconsider the dispositive motion under the law the District Court found to be controlling. Plaintiff further actively contributed to the Defendant's Motion for Summary Judgment by

conceding that she was unable to make a submissible claim under the prevailing law. Thus, plaintiff deliberately implored the District Court to grant Defendant's Motion for Summary Judgment so she could complain of the ruling on appeal rather than proceed to a jury trial on the merits.

If there was any error in the underlying litigation – which defendant denies – plaintiff, through the actions of her counsel, cannot take advantage of error upon appellate review which plaintiff's counsel invited. *Cott v. Peppermint Twist Management Co.*, 253 Kan. 452, 459, 856 P.2d 906 (1993). This Court should not allow plaintiff to challenge on appeal a claim for relief on a judgment plaintiff procured the District Court to enter, pursuant to the invited error doctrine, which precludes plaintiff from assailing the District Court's ruling on appellate review. *Grimm v. Pallesen*, 215 Kan. 660, 665-66, 527 P.2d 978 (1974). Under Kansas law, it would be improper to further consider this appeal because plaintiff actively contributed to what she now maintains was an error of the District Court. *Underhill,* 37 Kan. App. 2d at 879.

Therefore, the Brief of Appellant must be denied as frivolous under the invited error doctrine, for which this Court has unlimited review.

II. Plaintiff conceded that she was unable to meet her burden of proof on an essential element to her cause of action – specifically, plaintiff conceded that she had no evidence of any vicious propensities of defendant's dog – such that summary judgment was proper and the District Court's ruling constitutes a negative factual finding.

STANDARD OF REVIEW:

"The appellate court's standard of review for a negative finding of fact is that 'the party challenging the finding must prove arbitrary disregard of undisputed evidence or

must prove some extrinsic consideration such as bias, passion, or prejudice.'" *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008) (citation omitted).

A negative finding narrows the appellate court's review, whereas the appellate court cannot nullify a trial judge's disbelief of evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed. *Gragg v. Rhoney*, 20 Kan. App. 2d 123, 884 P.2d 443, 447 (1994) (citing, *Mohr v. State Bank of Stanley*, 244 Kan. 555, 567-68, 770 P.2d 466 (1989)). Further, where a district court makes a negative finding that a plaintiff failed to meet their burden of proof, the appellate court must be highly deferential to the district court's factual findings. *Boldridge v. Nat'l City Bank*, 313 P.3d 837 (Kan. Ct. App. 2013).

ANALYSIS:

When plaintiff conceded that she was unable to meet her burden of proof on an essential element to her cause of action, the District Court's granting of summary judgment constitutes a negative factual finding. In further reference to the District Court's Memorandum Decision of August 3, 2018, the District Court stated that:

> The facts of the case are now fully developed and the Court finds the only questions presented are questions of law, specifically the issue of the controlling law in Kansas on negligence.
>
> ...
>
> **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."**

(R. I, pp. 308-310).

Pursuant to the record on appeal, there is certainly no evidence or allegation that the District Court granted summary judgment based on an arbitrary disregard of undisputed evidence. There is also no evidence or allegation that the District Court entered summary judgment as a result of any bias, passion, or prejudice. Consequently, plaintiff cannot establish the requirements set forth under this Court's standard of review to reverse the District Court's negative factual finding.

In summation, on review of the District Court's negative factual finding that the plaintiff has no evidence of vicious propensities of defendant's dog, whereby plaintiff conceded that she he has no evidence to establish the required elements of viciousness, this Court has a limited scope of review and must be highly deferential to the District Court's factual findings. *Boldridge*, 313 P.3d 837. Under Kansas law, this Court cannot nullify a trial judge's disbelief of evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed. *Gragg*, 20 Kan. App. 2d 123, 884 P.2d 443, 447 (citing, *Mohr*, 244 Kan. 555, 567-68, 770 P.2d 466).

The District Court's finding that plaintiff did not meet her burden of proof, based on her own concession and the District Court's review of the record, constitutes a negative factual finding that should not be disturbed on appeal where the record on appeal is devoid of any arbitrary disregard of undisputed evidence, bias, passion, or prejudice of the District Court. *Hall*, 286 Kan. 777, 781, 189 P.3d 508.

Therefore, the Brief of Appellant must be further denied for the reason that there is no error as to the District Court's negative factual finding and subsequent granting of Defendant's Motion for Summary Judgment.

III. The District Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment, nor did the District Court commit any error in its application of Kansas law.

STANDARD OF REVIEW:

"Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo." *David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

"To oppose a motion for summary judgment, a party must actively come forward with something of evidentiary value to establish a material dispute of fact. It is not for the court to seek out, but for counsel to designate, that which supports a party's position. A party whose lack of diligence frustrates the trial court's ability to determine if factual issues are controverted falls squarely within the sanctions of Supreme Court Rule 141 [1989 Kan. Ct. R. Annot. 94]." *Slaymaker v. Westgate State Bank*, 241 Kan. 525, Syl. para. 1, 739 P.2d 444 (1987).

ANALYSIS:

For clarity purposes, plaintiff is appealing the District Court's entry of summary judgment in favor of defendant, even though it may appear that plaintiff is using her appeal as a disguised claim of instructional error. Because there was no trial on the merits, or a final jury instruction conference, any claim of an instructional error was not preserved for appeal and is not before this Court.

The issue at hand is whether defendant was entitled to judgment as a matter of law, where the District Court found based on its review of the record, coupled with the concessions of plaintiff, that plaintiff was unable to provide evidence establishing the two

essential elements concerning the dog's vicious propensities, as required by the prevailing law in Kansas.

Setting aside the argument that plaintiff invited the alleged error when her counsel requested the District Court to enter summary judgment in favor of defendant, and the argument that this Court should apply the standard of review based on a negative factual finding, the District Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment, nor did the District Court error in its application of Kansas law.

Once again, according to plaintiff, "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."

The record on appeal does not substantiate plaintiff's statement of the issue to be decided on appeal, as the District Court never made any findings regarding "all negligence cases involving injuries caused by domesticated animals." Likewise, the District Court never ruled that "'dangerousness' is not enough[]" as it pertains to the underlying negligence claim involving defendant's dog.

Under Kansas law, "dangerousness" has never been enough, nor has it been a requisite element in a negligence cause of action under the facts in the present case. But now, on appeal, plaintiff argues that, "domesticated animals, including dogs, viciousness is not an element, dangerousness is." In doing so, plaintiff is not only asking this Court to disregard longstanding law in Kansas and PIK Civ. 4th 126.91, but also to create new law and a new PIK instruction by requiring an additional element of "dangerousness."

As stated previously, a fatal flaw of plaintiff's appeal is that there is no law in Kansas cited by plaintiff, whatsoever, which sets forth any legal standard requiring "dangerous propensities." Instead, plaintiff submitted the following proposed jury instruction, for which she relies on for her appeal:

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

Clearly, this proposed jury instruction submitted by plaintiff, contains no language, whatsoever, regarding "danger," "dangerousness," or "dangerous propensities," even though the basis of plaintiff's appeal is that the District Court erred by not including this term as a potential instruction or in reconsidering Defendant's Motion for Summary Judgment. Although the legal standard proposed by plaintiff consists of many problems, the legal standard proposed by defendant is steadfast, and contrary to the allegations of plaintiff, it has been unequivocally cited throughout this litigation in Defendant's Motion for Summary Judgment, Defendant's Trial Brief, Defendant's Legal Theories in the Agreed Pretrial Order, and defendant's proposed jury instructions. (R. I, pp. 45-46; 248; 302-303; 309). Defendant cites to the appellate court in *Henkel v. Jordan*, 7 Kan. App. 2d 561, 562-563, 644 P.2d 1348, 1350 (Kan. Ct. App. 1982), whereby Kansas law mandates that 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 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)."

(R. I, pp. 45-46; 248; 302-303; 309).

Plaintiff conceded that she has no evidence of any vicious propensities of defendant's dog, and the District Court granted summary judgment in accordance with plaintiff's concession. Pursuant to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, plaintiff also conceded that:

> **Defendant's motion correctly cites Henkel v. Jordan , 7 Kan.App.2d 561, 562-563, 644 P.2d 1348, 1350 (1982) for the proposition that in order to prove liability in a case involving viciousness a plaintiff must show that "(1) that the dog had vicious propensities; and (2) that the owners had knowledge of these vicious characteristics."**

(R. I, p. 83).

This legal standard is not a "special rule" that the District Court created, or "carved out" as plaintiff requests this Court to believe. This legal standard has been routinely followed in Kansas well before and after *Henkel*. (R. I, pp. 45-46; 248; 302-303; 309). As set forth above, the comparable PIK instruction, PIK Civ. 4th 126.91, which was confirmed as "an accurate statement of Kansas law" in *Hopkins v. McCollam*, directly cites to *Henkel* for this affirmation, as follows:

> **We turn next to the legal test we must apply to these facts. The traditional test is well stated in a Kansas pattern jury instruction:**
>
> "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.

> **The pattern instruction is an accurate statement of Kansas law.** See *Carl, Administratrix v. Ackard*, 114 Kan. 640, Syl. ¶ 3, 220 P. 515 (1923); *Henkel v. Jordan*, 7 Kan. App. 2d 561, 562-63, 644 P.2d 1348, rev. denied 231 Kan. 800 (1982); *Ellis v. Blaich*, No. 92-1427-PFK, 1993 U.S. Dist. LEXIS 9699, 1993 WL 246041, at *2-3 (D. Kan. 1993) (unpublished opinion).

Hopkins v. McCollam, 300 P.3d 115 (Kan. Ct. App. 2013) (emphasis added). Based on even a cursory review of PIK Civ. 4th 126.91, it is clear that "viciousness" of an animal must be considered by Kansas Courts in negligence cases similar to the present matter.

Looking further, the *Hopkins* Court applies what it refers to as "the legal test" and "the traditional test" requiring that an animal be "vicious" to prove negligence in a comparable case involving the defendant's dog who had caused injury by biting the plaintiff. *Id.* The district court in *Hopkins* entered summary judgment in favor of the defendant, ruling that based on the evidence before it, the defendant had no reason to foresee that his dog (a Rottweiler) would bite someone, such that the defendant could not be negligent nor liable for the injuries the plaintiff suffered in the encounter. *Id.* The *Hopkins* Court cited to the district court reasoning for its decision as follows:

> **The judge concluded that even if [the defendant's dog] had chased [a nearby neighbor] while he was jogging, that didn't indicate the dog was vicious: "[P]eople run, children run, dogs chase them. I see it every day. And that, as far as I'm concerned, doesn't establish the dog is vicious or aggressive."**

Id. (emphasis added).

On appeal in *Hopkins*, the plaintiff argued that there was sufficient evidence to support a negligence claim against the defendant, though the plaintiff "recognized the general rule in which a dog's owner must have some prior notice of the dog's vicious

tendencies for the owner to be found negligent[.]" *Id.* Not dissimilar from the present appeal, the plaintiff in *Hopkins* argued "that the district court's approach was too restrictive as to what may be foreseeable to a dog owner." *Id.* Notwithstanding, the district court's entry of summary judgment was affirmed, and the Supreme Court of Kansas denied review of the affirmation of summary judgment decided by the Court of Appeal of Kansas. *Hopkins v. McCollam*, No. 12-108330-A, 2013 Kan. LEXIS 1006, at *1 (Aug. 29, 2013).

In reviewing the district court's summary judgment ruling in *Hopkins*, the appellate court gave no deference to the district court and reviewed the record in the light most favorable to the plaintiff. *Id.* The facts before the *Hopkins* Court showed that the defendant's dog had actually bit the plaintiff, after the defendant's dog had trespassed in the plaintiff's own backyard. *Id.* The facts also demonstrated that the defendant's dog was a Rottweiler, who had once chased a jogger. *Id.* Taking these facts into consideration, the *Hopkins* Court held the following in pertinent part:

> We must determine, then, whether [the defendant] should have known that [his dog] had vicious tendencies from these facts. **We agree with the district court that [the defendant] couldn't reasonably have foreseen from these facts that [his dog] would have a tendency to bite people. And that's true even if [the defendant] had been aware that [his dog] had once chased a jogger, something that wasn't directly shown in the evidence [the plaintiff] submitted to the district court. The district court properly noted that there's no reason to believe that a dog that chases—whether the dog is chasing a rabbit, a squirrel, or even a person—is especially prone to be a dog that also bites people.** See Ellis, 1993 U.S. Dist. LEXIS 9699, 1993 WL 246041, at *4 (citing cases for the proposition that barking, running, chasing, and jumping are common traits of dogs and not evidence of vicious tendencies).

Id.

On the present appeal, the focus of this Court is whether, in the sum of defendant's experience with his dog, defendant had any knowledge or reason to believe that his dog was vicious, to show that it was reasonably foresee that his dog could have injured someone at the off-leash dog park. Aside from the fact that plaintiff conceded that she "has no evidence of 'vicious' propensities of the Defendant's dog[]" (R. I, p. 310), the record on appeal establishes not only the absence of any vicious propensities, but it also establishes that defendant's dog had never bitten, attacked, or harmed anyone. Specifically, there is no evidence that defendant knew or should have known that his dog could cause harm to others if he allowed his dog to run freely at the off-leash dog park. Certainly, defendant's dog was not in plaintiff's back yard in this case, and even if that were true, plaintiff's cause of action would still fail under *Hopkins*.

Here, in accordance with Plaintiff's Petition, plaintiff alleged that "[w]hile at Mutt Run, Defendant's dog, while engaging in its bred activity of herding, ran into Plaintiff from behind, and injured Plaintiff's leg." (R. I, p. 56 at ¶ 5). Plaintiff further alleged that "The Bouvier dog breed was bred as a herding animal that instinctually chases at the heel of animals, including people, when surrendering to its instincts." (R. I, p. 56 at ¶ 8).

The mere allegation that the Bouvier dog breed instinctively herds and chases at the heels of animals ("including people"), without any evidence to show that defendant's dog was herding or chasing plaintiff, followed by the unsupported legal conclusion that defendant should have foreseen an injury to plaintiff because of the dog's breed and size, absent any knowledge of vicious propensities, is not the law in Kansas and falls exceedingly short of plaintiff's burden of proof in this case.

As the district judge in *Hopkin*s succinctly stated: "[P]eople run, children run, dogs chase them. I see it every day. And that, as far as I'm concerned, doesn't establish the dog is vicious or aggressive." *Id.* Common sense suggests that it would be unreasonable to impose a requirement on every dog owner to prohibit dogs from running at an off-leash dog park. In this case, there is no evidence that defendant's dog exhibited or engaged in any activity, either before or on the date of the incident, extending beyond common traits of dogs, that would rise to the level of viciousness, or any other characteristic that would put defendant on notice that it was reasonably foreseeable that his dog would injure someone at the off-leash dog park.

Even though defendant did not cite *Hopkins* or PIK Civ. 4th 126.91 previously, if this Court chooses to review this case de novo, this Court should consider these authorities, and even still, "a trial court's reason for its decision is immaterial if the ruling is correct for any reason[.]" *Hesler v. Osawatomie State Hosp.*, 266 Kan. 616, 636-37, 971 P.2d 1169 (1999) (citations omitted).

Furthermore, with regard to the issue of foreseeability, plaintiff states on appeal: "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 [sic] the owner has acted reasonable to prevent foreseeable injuries." Here, the question posed by plaintiff was previously answered by plaintiff's own expert.

Mr. Brenneman, testified with regard to his background and experience with dogs and dog parks that "[t]he unknown can happen so quick that it is improbable for someone to stop the unknown from happening." (R. I, p. 198 at 54:8-21). Mr. Brenneman

categorically provides the definition of un-foreseeability in this case. Thus, the allegation that defendant is negligent because it was reasonably foreseeable that defendant's dog would injure others while engaging in its natural canine behavior (running/chasing) at the off-leash dog park is not supported by Kansas law or the facts of this case.

When the District Court initially denied Defendant's Motion for Summary Judgment, the District Court provided the following: "Summary Judgement is Denied as to Count 1, Negligence. 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."

However, in spite of the District Court's initial ruling regarding foreseeability, plaintiff is not appealing the initial ruling regarding foreseeability. Instead, plaintiff is appealing the District Court's later ruling wherein Defendant's Motion for Summary Judgment was ultimately granted based on plaintiff's concessions that directly support the District Court's own findings and ultimate decision. In fact, plaintiff improperly argues that the District Court recognized certain issues regarding dangerousness and foreseeability at the original hearing on Defendant's Motion for Summary Judgment, which defendant disputes, but more importantly, those issues are not before this Court given that plaintiff did not preserve a record on appeal.

"The party asserting the district court has abused its discretion bears the burden of showing such abuse of discretion." *Hattan v. Schoenhofer*, 214 P.3d 1226 (Kan. Ct. App. 2009) (citing, *Vorhees v. Baltazar,*283 Kan. 389, 394, 153 P.3d 1227 (2007)). "An appellant has the burden to designate a record sufficient to establish the claimed error.

Without an adequate record, the claim of alleged error fails." *Butler v. HCA Health Servs. of Kan, Inc.*, 27 Kan. App. 2d 403, 428 (1999) (citing, *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994)). "A point not presented to the trial court simply cannot be raised for the first time on appeal." *Winn v. Barton*, 771 P.2d 949 (Kan. Ct. App. 1989) (citing, *Kansas Dept. of Revenue v. Coca Cola Co., 240 Kan.* 548, 552, 731 P.2d 273 (1987)).

Here, plaintiff did not request the transcript of the original hearing on Defendant's Motion for Summary Judgment, at which time the District Court denied the motion, such that the hearing is not part of the record on appeal. Additionally, there was no formal hearing when the District Court arranged a telephone conference call at the request of plaintiff to discuss proposed jury instructions, Defendant's Trial Brief, and to ultimately reconsider its decision on Defendant's Motion for Summary Judgment.

Additionally, it is important to note that the *Hopkins* Court referenced, but dismissed applying, the legal standard proposed by plaintiff in the present appeal, wherein the plaintiff relies on *Bertram*. As stated by the *Hopkins* Court, an important change took place in Kansas law in 1986, when our legislature enacted a statute that which provides that there is no strict liability when a domestic animal, like a dog or cat, strays onto another's property and trespasses.

As in our case, defendant's liability is based on reasonable foreseeability, and the facts in our case do not make it reasonably foreseeable that defendant's dog would cause harm to anyone at the off-leash dog park, for which the dog was not trespassing nor running at large as defined by the legislature in Kansas.

To address the legal standard routinely set forth by defendant, it is necessary to discuss *Henkel v. Jordan*, 7 Kan. App. 2d 561, 644 P.2d 1348, 1350 (Kan. Ct. App. 1982), which correctly recites the prevailing law in Kansas with regard to dogs that have inflicted an injury.

In *Henkel*, the plaintiff (a sixty-two-year-old, not a "child" as stated in the Brief of Appellant) was riding his five-speed bicycle down the road to visit a friend. *Id.* at 562. The evidence in *Henkel* established that the defendants' dog "was permitted to run loose at times and acquired a reputation in the neighborhood as a pest – he routinely barked at passersby, dashing at them in a way taken by many to be menacing." *Id.* "Just three days before plaintiff's encounter, a young lady next door to the [defendants] had rescued a tearful little girl from the street where [the defendants' dog] had the child 'cornered.'" *Id.*

On the date in question, as the plaintiff in *Henkel* rode by the defendants' house, the defendants' dog ran up and began barking at the plaintiff, which caused the plaintiff to fall from his bicycle and sustain injuries. *Id.* The jury found the defendant dog owners mostly at fault and awarded damages to the plaintiff. *Id.* On appeal, the defendants argued that, (1) the facts did not establish a prima facie case of liability, (2) the court should have instructed the jury on the doctrine of "assumption of risk," and (3) the comparative negligence instruction was misleading or confusing. *Id.*

While citing to the very same cases cited by this defendant[1], the *Henkel* Court found no quarrel with the cases cited on appeal nor the defendants' thesis drawn therefrom that "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." *Id.* at 563. The *Henkel* Court further found that "[l]iability 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." *Id.*

Hence, it is a misstatement to this Court that "[t]he court in Henkel said nothing that would justify a conclusion that viciousness is a necessary element in dog cases[,]" given that dogs certainly qualify as animals. It is also a misstatement to this Court to suggest that "the District Court's misunderstanding of the law in this case" is highlighted by the District Court's decision not to follow plaintiff's proposed jury instruction, which is not "substantially the same as the instruction approved by the Court of Appeals in *Henkel*[.]"

Likewise, although the *Henkel* Court affirmed the judgment against the defendants in the plaintiff's negligence action for "dog fright" injuries, the issues on appeal before this Court are dissimilar. While affirming the judgement, the *Henkel* Court held that the jury instructions for assumption of risk and comparative negligence were proper. *Id.* at 565-566.

[1] *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).

As to the appeal before this Court, plaintiff did not provide the District Court with the opportunity to instruct the jury on anything, let alone negligence, such that there is no basis for plaintiff's appealing whether any jury instruction was proper. Certainly, if plaintiff wished to instruct the jury on foreseeability, it could have proposed a specific foreseeability instruction in advance of a jury trial, but plaintiff fails to recognize that she foreclosed that opportunity when she requested the District Court to reconsider and grant Defendant's Motion for Summary Judgment in lieu of proceeding to trial.

The *Henkel* Court further held that even though the defendants' dog did not make contact with the plaintiff, the same general legal principles apply in "dog fright" cases as in "dog bite" cases, such that the plaintiff had a viable cause of action. *Id.* at 564. In so finding, the defendants in *Henkel* were concededly aware of the very same pre-existing propensity ("menacing behavior") which caused the injury, supporting the judgment. *Id.*

In the present matter, there is no evidence that defendant had any knowledge of any propensity that caused the injury to plaintiff. Again, there is no evidence that defendant knew or should have known that his dog could cause harm to others if he allowed his dog to run freely at the off-leash dog park. The record on appeal establishes not only the absence of any vicious propensities, but also that defendant's dog had ever bitten, attacked, or harmed anyone.

In any event, although plaintiff attempted to distinguish *Henkel* from the underlying incident because there was never any contact between the dog and the plaintiff in response to Defendant's Motion for Summary Judgment, the legal standard still applies. Conversely, plaintiff heavily relies on the *Bertram* case, which again,

certainly did not involve a dog making contact with a plaintiff, rather, the *Bertram* case involved a large, trespassing bull injuring and killing a steer, causing only financial harm to the plaintiff. *Bertram v. Burton*, 129 Kan. 31, 281 P. 892.

In dicta provided by the *McComas* Court, as referenced above, the court discussed the holding in *Bertram*, which addresses the proposed legal theory heavily relied on by plaintiff on this appeal. It is imperative to note that this very same quotation was addressed in legal authority cited by defendant, *McComas v. Sanders*, 153 Kan. 253, 255, 109 P.2d 482 (1941). In *McComas*, the Kansas Supreme Court analyzed this quotation, specifically stating approximately twelve years after *Bertram*: "The quotation above is based on statements found in 3 C. J. 89. Reference to the cases cited in support of the text deal with the natural propensities of animals which are not vicious and not with the habits of vicious animals." *Id.*

To further cite secondary sources for this Court's determination of the issue on appeal, according to 1 Ruling Case Law p. 1089, S. 33: "The owner of an animal not naturally vicious is not answerable for an injury done by it when in a place where it has a right to be, unless it was in fact and to his knowledge vicious." "But the owner of a domestic animal is not liable, in the absence of a statutory provision, unless it is affirmatively shown either (1) that the animal was vicious and that the owner or keeper had knowledge of the fact also." 3 C. J. 89, S. 318, S. 329. "At common law the owner of a dog is not liable for injuries caused by it unless it is vicious and notice of that fact is brought home to him." P. *Id.* p. 97, S. 330. "The owner of a domestic animal is not, in general, liable for an injury committed by such animal unless it be shown that he had

notice of its vicious propensity." 2 Kent. Marginal p. 348 note. Cooley on Torts, p. 342. Addison on Torts, p. 22, 185; 1 Labat, Master and Servant, S. 206; 2 Sedgwick on Damages, p. 581, Marginal, p. 570; Shearman and Redfield, p. 218, S. 188; 1 Thompson, p. 52, Wharton, S. 917. All of these secondary sources support the legal standard maintained by defendant.

Notwithstanding, the *Bertram* case is distinguishable from the present case because the domestic animal at issue was a large, trespassing bull. *Bertram*, 129 Kan. at 32. On the day in question the defendant and his hired man, W. D. Pierce, were driving defendant's bull, an animal weighing 1,200 to 1,300 pounds, without horns, from one farm to the other along this road." *Id.* The large bull was ahead of the defendant (who was "driving" the bull while riding a horse) and when it came upon plaintiff's feed lot, the large bull left the road and went onto the land of plaintiff. *Id.* The large bull then jumped into the plaintiff's feed lot striking and lunging at plaintiff's livestock (steers). *Id.* One of the steers was found dead, due to a rupture in the left side in the flank. *Id.* at 33.

The issue before the *Bertram* Court was whether the defendant's large bull was running at large in violation of the herd law of 1872 (R. S. 47-301 et seq.), and whether the defendant was liable under tort law. *Id.* at 34. The Bertram Court ultimately held that the herd law did not apply as the defendant's large bull was not running at large, but that "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.* at 34-35.

Here, as argued on summary judgment by defendant, to make the comparison

between that of a large, trespassing bull (weighing 1,200 to 1,300 pounds) to that of defendant's dog would be to ask this Court to disregard common sense; these "domestic animals" are not comparable in the slightest. Even if, *arguendo*, this Court required defendant to take notice of a dog's general propensities and characteristics and to guard against them, defendant's dog did not engage in any conduct in the off-leash dog park uncommon from typical canine behavior that would rise to the level of behavior defendant would need to guard against in order to prevent a foreseeable injury.

Lastly, to address the other cases cited by defendant in his Motion for Summary Judgment, defendant notes that the legal standard applied by the District Court in the underlying litigation was supported by *Berry v. Kegans*, as cited in *Henkel*. 196 Kan. 388, 411 P.2d 707 (1966). The *Berry* Court held that: "With regard to an animal not naturally vicious, the general rule, in the absence of statute, is that the owner of the animal is not answerable for injuries done by it when in a place where it had a right to be, unless it was, in fact and to the owner's knowledge, vicious or dangerous." *Id.* at 391.

The *Berry* Court cited to *McComas v. Sanders*, 153 Kan. 253, 255, 109 P.2d 482 (1941), which held: "The general rule is that the owner of a domestic animal not naturally vicious is not liable for injury done by it when it is in a place where it has a right to be, unless it is to his knowledge, vicious." The Court in *Gardner v. Koenig* also cited to *McComas* for this very same recitation of the general rule regarding viciousness. 188 Kan. 135, 136, 360 P.2d 1107 (1961). For this general rule, defendant, too, cites *McComa*s and *Gardner*.

In Defendant's Motion for Summary Judgment, defendant also cited two comparable cases out of Arizona and New York with significantly similar facts to the present case, likewise with a similar application of the elements applied under Kanas law where a dog has inflicted injury. (R. I, pp. 48-50).

In *Hamlin v. Sullivan*, 93 A.D.3d 1013, 1013, 939 N.Y.S.2d 770, 771, 2012 N.Y. App. Div. LEXIS 1835, *1, 2012 NY Slip Op 1854, 1, 2012 WL 850717 (N.Y. App. Div. 3d Dep't 2012), the plaintiff was in an area of a state park where dog owners regularly allowed their dogs to be off-leash. *Id.* The plaintiff stopped to chat with friends, and was introduced to the defendant. *Id.* At this time, the defendant's dog was running in a circular loop around two adjoining fields, chasing other dogs. *Id.* **The defendant's dog ran past the defendant, and within seconds, ran directly into the plaintiff, hitting her in the area of her knees and lower legs, knocking her legs out from under her and causing her to fall.** *Id.*

In New York, the law regarding domestic animals that cause physical injury is a hybrid of similar requirements under Kansas law and strict liability (given that there is no strict liability in Kansas): "'[T]he owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held [strictly] liable for the harm the animal causes as a result of those propensities.'" *Id.*

The *Hamlin* Court held that even though the plaintiff provided witness testimony that the defendant's dog was hyper, friendly, overly-friendly, and would frequently jump on people, the testimony regarding the defendant's dog's arguably rambunctious behavior, in general – particularly since it occurred at a dog park where dogs are expected

to run around – reveals only typical canine behavior, which is insufficient to establish vicious propensities. *Id.* at 1014.

Notably, the *Hamlin* Court held that the trial court erred in denying the defendant's motion for summary judgment, reversed the judgment of the trial court, granted the motion, awarded summary judgment to the defendant, and dismissed the plaintiff's complaint. *Id.* at 1015. Indeed, it was found to be error when the trial court denied summary judgment under facts similar to the present litigation. Although offered as persuasive authority to this Court, the facts in *Hamlin* and the application of the law are complementary to those before this Court. The ultimate decision handed down by the *Hamlin* Court provides guidance to this Court in reaching its decision in affirming the District Court's granting of Defendant's Motion for Summary Judgment.

In *Kaweske v. DeRosa*, 2016 U.S. Dist. LEXIS 82414, 2016 WL 3457898 (D. Ariz. June 24, 2016), the plaintiff and the defendant were conversing in a fenced-in dog park at Canyon Vistas RV. Resort while their dogs played in the dog park without leashes. The defendant's golden retriever bumped into plaintiff from behind, causing her to allegedly sustain injuries. Under Arizona common law, liability for injury by animals is imposed only if the owner knew or had reason to know the dangerous propensities of the animal. *Id.* at *3.

The plaintiff attempted to meet this standard by asserting that the defendant knew of his dog's dangerous propensities because of defendant's testimony that his dog "would occasionally run, jump around and bump into people without their consent at [the dog park]." *Id.* The *Kaweske* Court found that the dog's propensity to join the other dogs at

the dog park in gathering around people's legs and occasionally bumping into them does not rise to the level of a "dangerous" propensity, further stating that there was no evidence offered that the dog had ever bitten anyone or otherwise injured anyone other than the incident involving plaintiff. *Id.* at *4.

The *Kaweske* Court ultimately granted defendant's Motion for Summary Judgment, holding that plaintiff failed to establish that the defendant's dog had dangerous propensities, and thus, the defendant could not be liable for common law negligence for injuries the plaintiff allegedly sustained after the defendant's dog made contact with her. *Id.* at *8.

Here, the *Kaweske* Court contains very similar facts, and while the Arizona courts apply a "dangerous propensities" standard, the plaintiff still did not survive summary judgment because all evidence indicated that the defendant's dog had always behaved like a normal dog of his breed. *Id.* at *4. To that end, the Bouvier dog breed is no more dangerous than any other dog breed, and again, there is no evidence to prove that defendant's dog has behaved differently than any other Bouvier dog, or that defendant's dog had ever bitten, attacked, or harmed anyone.

In summation, the District Court's Memorandum Decision viewed as a whole illustrates that the District Court applied the prevailing law in Kansas concerning the underlying lawsuit, properly granting summary judgment due to plaintiff's inability to prove an essential element of her claim of negligence, for which plaintiff conceded. Therefore, and the Brief of Appellant must be further denied as the District Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment, nor did the

District Court commit any error in its application of Kansas law. The District Court's granting of Defendant's Motion for Summary Judgment must be affirmed.

CONCLUSION

When the District Court was requested to reconsider and grant Defendant's Motion for Summary Judgment, plaintiff did not oppose the summary judgment or come forward with evidence to establish a dispute as to a material fact, rather, plaintiff conceded to a negative factual finding. Once the District Court made its determination on the controlling law in Kansas, plaintiff failed to dispute any facts material to the conclusive issues in this case. Accordingly, the District Court had no other recourse but to grant summary judgment in favor defendant, a ruling that was invited by plaintiff.

Once the District Court struck plaintiff's claim for future damages, and once the Court chose to apply the legal standard routinely set forth by defendant, plaintiff invited and lead the District Court into the alleged error when she requested the District Court to reconsider and grant Defendant's Motion for Summary Judgment – which the District Court previously denied – in an effort to appeal the District Court's ruling rather than proceed to a jury trial on the merits.

Even if, *arguendo*, this Court does not find that the Brief of Appellant should be denied based on the doctrine of an invited error, or that the standard of review is based on a negative factual finding, the Brief of Appellant should be further denied because the District Court did not abuse its discretion in granting Defendant's Motion for Summary Judgment, nor did the District Court error in its application of the law in Kansas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of December, 2018, a PDF copy of the Brief of Appellee was electronically filed via the Kanas eFlex Portal, and a courtesy copy was sent via e-mail to:

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