2009

Alexis Waters v. Steven Powell and John Does : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALEXIS WATERS, Appellee, vs. STEVEN POWELL, and JOHN DOES, Appellant.	Case No. 20090143-CA

APPEAL FROM AN ORDER
OF THE HON. ROBERT ADKINS
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, WEST JORDAN DEPARTMENT
STATE OF UTAH

REPLY BRIEF OF APPELLANT

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I. THE TRIAL COURT ERRED IN FAILING TO RULE THAT WATERS WAS A STATUTORY "KEEPER" IN LIGHT OF THE UNDISPUTED FACTS.

While the parties' briefs essentially agree on the nature of the issue to be decided, a material difference in their characterization of that issue must be addressed. Defendant Powell has expressed the dispositive issue thus: "Whether the trial court erred in failing to rule on the undisputed facts that Waters was a "keeper" under Utah Code Ann. § 18-1-1?" Plaintiff Waters phrases the issue as: "Whether the trial court property decided that there was a material issue of fact whether Waters was a 'keeper' of a dog, within the meaning of U.C.A. § 18-1-1(1971)?"

Although the district court did state that an issue of fact existed as to whether Waters was a keeper, that is not a correct characterization of its ruling. The facts were undisputed on both sides. Application of a statute to undisputed facts is a pure question of law, not fact. *Hansen v. Hansen*, 958 P.2d 931, 933 (Utah Ct. App. 1998), and cases cited.

In this case, Waters' status as a keeper is conclusively established by her own testimony. Waters accuses Powell of seeking to define a statutory keeper as "anyone in temporary possession of a dog," but that is a misstatement of Powell's actual argument. As discussed in Powell's opening brief, this Court is not writing on a blank slate, because the Utah Supreme Court has already defined "keeper" for purposes of the dog bite statute:

> We hold that the term 'keeper,' as it is used in section 18-1-1, means more than merely checking to see if a dog has sufficient food and water for a limited time. It is difficult to frame a universal definition of keeper, but the assumption of custody, management, and control is intrinsic to the definition. The term implies the exercise of a substantial number of the incidents of ownership by one who, though not the owner, assumes to act in his stead. . . . One becomes the keeper of a dog only when

> he, either with or without the owner's permission, undertakes the manage, control, or care for it as dog owners in general are accustomed to.

See Brief of Appellant, p. 6, quoting *Neztsosie v. Meyer*, 883 P.2d 920, 921 (Utah 1994).

Applying the Utah Supreme Court's definition, Waters was a keeper as a matter of law. This was not someone who simply put out a bowl of water for a neighbor's dog. Waters was paid to assume custody, management, control, and care of Snoop. As kennel manager, she held herself out as having training and/or experience to assume these responsibilities.[1]

Waters argues that "she was there only to feed and water [Snoop], and keep a general eye on him." (Brief of Appellee, p. 4.) But she cannot make that argument, however, because the undisputed facts below – derived from her own deposition testimony – showed otherwise. According to Waters, her duties as kennel manager included feeding Snoop, cleaning up after him, ensuring his safety, breaking up fights between dogs, taking him for bathroom breaks, and exercising him. This is management, control, and/or care that goes well beyond the minimum incidents of ownership required by *Neztsosie*, and the uniform holdings of courts in other jurisdictions. *See* Brief of Appellant, pp. 7-9, and cases cited.

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[1] Waters' assertion that a kennel employee cannot be a keeper, because the "agreement" to take care of the dog would technically be between the dog's owner and the owner of the kennel (veterinarian clinic, dog training facility, etc.) is unsupported by any case law. Moreover, while the statute and definition of keeper do not require any "agreement," Waters' argument ignores the fact that an employee, and particularly a manager, agrees to undertake her duties voluntarily and for compensation, which duties Waters knew included management, control, and care of dogs placed in her custody.

Waters attempts to distinguish some of the cases adverse to her position by noting that a particular plaintiff might have worked in a veterinarian's office rather than a kennel, or a particular statute would also allow strict liability against someone who "harbored" a dog. Neither distinction is material. Neither the wording of Utah's statute, nor its purpose, provides any justification for applying the statute to a veterinarian but exempting a kennel manager, particularly when, as in this case, the manager's assumption of responsibility extends far beyond the mere provision of medical care at issue in the veterinarian cases.

Similarly, the fact that some states' statutes would allow strict liability against persons who "harbor" a dog is likewise immaterial. In the cases cited, the courts addressed a party's status as someone who assumed physical custody and the incidents of ownership of a dog (keeper), not merely someone who happened to have control over premises on which a dog was present (harborer). The case law on this issue is consistent, and uniformly supports a holding that Waters was a "keeper" under the undisputed facts.

II. AS SNOOP'S KEEPER, WATERS CANNOT SUE SNOOP'S OWNER UNDER THE STATUTE.[2]

Waters' brief does not dispute that, if Waters was the dog's keeper, she is barred from suing the dog's owner. That conclusion is self-evident. Courts have uniformly recognized that keepers are not within the class of persons intended to be protected by dog-

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[2] It must be recalled that Waters does not allege any negligence by Powell. For example, she does not claim that Powell failed to disclose known aggressive tendencies (and, in fact, claims that it was *she* who told Powell about Snoop's aggression toward other dogs). Waters' claim is premised solely upon strict liability under the dog-bite statute.

bite statutes, and that allowing owners and keepers to sue each other would lead to "bizarre" results. *See* Brief of Appellant, pp. 8-10.

CONCLUSION

For the reasons set forth above, defendant/appellant Steven Powell respectfully requests the Court reverse the trial court's denial of summary judgment, and remand with instructions for the trial court to enter judgment in favor of the defendant.

RESPECTFULLY SUBMITTED this 28th day of October, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on the 28th day of October, 2009, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, first-class postage prepaid, to:

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