

2001

Judith Campbell Jackson v. Robert Mateus and Kris Mateus : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JUDITH CAMPBELL JACKSON,)

Plaintiff/Appellant,)

v.)

ROBERT MATEUS and)
KRIS MATEUS,)

Defendants/Appellees.)

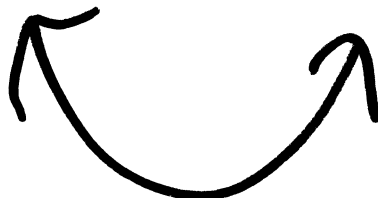
Case No: 20010387-SC

REPLY BRIEF OF APPELLANT JUDITH CAMPBELL JACKSON

**Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Tyrone E. Medley**

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**CLERK SUPREME COURT
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ARGUMENT

**POINT I. THE DISTRICT COURT ERRED IN DETERMINING
THAT THE MATEUSES OWED NO DUTY TO MRS.
JACKSON BY IMPROPERLY FOCUSING SOLELY
ON WHETHER THE CAT HAD BITTEN ANYONE
BEFORE.**

**a. Under Utah law, the Mateuses owed a duty to Mrs. Jackson to
prevent the cat attack.**

The Mateuses incorrectly argue that solely because they claim to have no knowledge of their cat biting another person prior to the attack inflicted on Mrs. Jackson, that they had no duty to Mrs. Jackson. The district court similarly erred in so ruling. This Court has ruled that whether a duty exists depends on several factors, of which foreseeability is only one element.¹ AMS Salt Indus. v. Magnesium Corp., 942 P.2d 315, 321 (Utah 1997). The other elements that must be taken into account in determining whether the Mateuses owed a duty to Mrs. Jackson include: 1) the likelihood of the injury, 2) the magnitude of the burden of guarding against it, 3) the consequences of placing that burden upon defendant, 4) voluntary conduct which increases the risk of harm, and 5) general policy considerations. Id. (citations omitted.) Each of these

¹ In AMS Salt Indus., 942 P.2d at 321, Justice Russon wrote that “[s]everal other factors may be relevant in ascertaining whether there is a duty. . . . foreseeability can be one of those factors. It is not, however, the only factor.”

applicable elements argues in favor of imposing a duty on the Mateuses requiring them to control their cat and holding them liable for their failure to do so.

i. The likelihood of injury.

In this case, there was only one piece of evidence before the district court regarding the likelihood of cats to attack and injure human beings. That evidence came in the form of deposition testimony from a medical professional, Dr. Eric Vanderhoof, who has experience treating cat bites:

Q. Just curious. This is my first case I've dealt with a cat bite.

A. **They're not uncommon.** Cat bites are pretty virulent. Human bites and cat bites are pretty bad. The problem with cat bites is that they have such sharp little teeth that when they bite, the bacteria — because their mouths are filthy — gets lodged inside there and has no way to get out. When you have a dog bite you sort of lay the thing open and you have a big open wound. That way the pus can't stay trapped and it can get out. If you're not draining pus from your body, oftentimes that's not a big problem. But when it gets trapped underneath, that's when you get into trouble. So cat bites tend to be more problematic than a lot of animal bites.

(R. 166.)

The evidence from Dr. Vanderhoof is that cat bites are common, or, in other words, that the likelihood of a cat biting someone is high. The defendants have presented only unsupported argument in their brief asserting that tabby cats are not prone to have vicious tendencies, or that cats do not harm humans. Those assertions are not only unsupported, but are refuted by the evidence of record. The evidence in this case shows

that cat bites are common and dangerous to humans. Therefore, the unrefuted evidence in this case shows that there is a likelihood of injury if a cat is not controlled by its owner.

ii. The magnitude of guarding against cat bites.

The magnitude of guarding against cat bites by an owner is minimal, and by the same token, if cat bites are guarded against, innocent persons will be saved a great deal of pain and suffering as well as potentially devastating financial consequences. Contrary to the Mateuses' unsupported assertions, reasonable cat owners do not simply allow their animals out of their control. Mrs. Jackson owns four cats that are kept inside her house where they can be properly controlled and where the Jacksons can ensure that the animals do not come into contact with other persons and other animals in an uncontrolled or unsupervised situation.

The burden to a cat owner of guarding against cat bites is slight. With animal ownership comes a level of responsibility to control the animal and protect others from that animal. However, the Mateuses decline to accept any responsibility to control their animal, and, in fact, argue that it is impossible for a cat owner to control the animal. The Mateuses argue that everyone around them, other than themselves, must accept the responsibility for dealing with their animals, and the injuries they inflict, because they are unwilling to do so.

However, the Mateuses' argument contravenes the most basic principles of tort law. The Mateuses created the potentially injurious condition by acquiring the animal. They, as the animal's owners, are in a position to best control the animal and prevent it from harming or coming into contact with other persons. They are also best able to train the animal so as to prevent it from becoming aggressive. However, the Mateuses now deny any responsibility to control their animal or prevent it from harming others. Because the Mateuses did not take any steps to control their animal they can and should be held liable for failure to do so.

iii. The consequence of imposing a burden of controlling an animal will result in less animal bites and will place liability on the persons most able to prevent animal attacks.

The Mateuses do not discuss the consequences that would follow should this Court impose a duty on animal owners to control their pets. If animal owners are required to control their pets and are held liable when their pet attacks another person and causes injury, animal owners will be more likely to control their animals and take steps to prevent attacks. The rule advocated by the Mateuses seeks to maintain the *status quo* in an environment where cat bites are common and where those injured by cat bites are required to bear the potentially devastating financial and physical burden of the animal attacks. The position asserted by the Mateuses is unjust.

The Mateuses argue that, if controlled or supervised properly by their owners, cats' effectiveness as mousers may become diminished. The Mateuses presented only unsupported evidence to the district court in their summary judgment motion and on appeal that controlling cats will diminish their effectiveness as mousers. In this modern age, it is speculative, at best, to argue that cats are even used primarily as mousers. With the advent of traps, poisons and exterminators it may be that most cat owners do not rely on their animals to control the rodent population. Moreover, there is no evidence that the Mateuses allowed their animal to roam about their neighborhood uncontrolled so that it could act as a mouser. Therefore, the Mateuses' argument should be rejected.

Mrs. Jackson argues that cat owners must be required to control their animals in order to prevent attacks and damages such as she has had to endure. In complete disregard for the extreme injuries and damages which their animal has inflicted in Mrs. Jackson, the Mateuses argue that cats must be left alone and allowed to wander around in order to kill rodents. However, without evidence of any rodent problem in the Salt Lake Valley, considerations involving human safety and prevention of animal attacks must take precedence over the Mateuses' unwillingness to control or supervise their animals, even if it is disguised under the pretense of letting their cat roam about for the public good.

The Court is being asked to determine which of the parties' considerations should be given more weight. Certainly, matters regarding human safety and prevention of

injuries by animals should be given great weight by the Court.² Cat's alleged duties as mousers must be given much less weight in comparison to the value of human safety and welfare.

iv. *Voluntary conduct which increases the risk of harm.*

The Mateuses mistakenly assume that this category addresses Mrs. Jackson's actions of outstretching her hand to their cat. (See, p. 9 of Appellees' Brief, "By voluntarily outstretching her arm to any animal, including a cat, plaintiff increased the risk of harm to her....") However, it is clear from the context which this category is used in AMS Salt Indus., 942 P.2d at 320, that it refers only to the tortfeasor's voluntary actions which may act to create a duty to another, and not to the voluntary actions of the injured claimant. This category is inapplicable to the facts of this case. Mateuses did not perform some voluntary conduct which increased the risk of harm to Mrs. Jackson. The Mateuses had a legal duty to control their cat and the exercise of that control was not a

² See e.g., Bunnell v. Railway Co., 44 P. 927, 930 (Utah 1896), where the plaintiff had turned his cattle upon the highway in the vicinity of a railway track, unattended, and one of them was killed by a passing train, and this Court said: "A proper regard for the safety of humanity and of property forbids that a person, should turn his beasts, which can neither reason nor appreciate danger, out upon the highway, without a keeper, in the vicinity of a railway crossing; and especially is this true where such person knows that they must cross the track to get to the pasture where their instinct leads them. **The sacredness of human life, and common sense, alike dictate this rule.**" (Emphasis added.)

voluntary act that the Mateuses could ignore without legal consequences. Therefore, this issue is addressed only to clarify what appears to be a misapplication of the category by the Mateuses.

v. *General Policy Considerations.*

The Mateuses' policy argument that cats must be left alone to roam at large for the benefit of society is without merit. There is no evidence in this case that leaving cats alone to roam about would benefit society in general. Utah statutory law and ordinances cited by Mrs. Jackson reveals a contrary policy of restraining animals and prohibiting them from inflicting injury and damages upon others.³ Moreover, as stated above safety and human welfare must take priority over a cat owners' alleged need to allow their cat to wander about unrestrained.

b. **Under the standards set out in Pullan v. Steinmetz, the cat bite was foreseeable even though the cat had not bitten anyone previously.**

It was erroneous for the district court to accept the Mateuses' argument that because the cat allegedly had not bitten anyone before it attacked Mrs. Jackson, that an attack was unforeseeable. This fact is revealed by the warning contained in the Restatement (Second) of Torts § 518, comment h, which provides as follows:

See, fn. 2, *supra*.

Animals dangerous under particular circumstances. One who keeps a domestic animal that possesses only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. **He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm. . . .**

This Court made it clear, in Pullan v. Steinmetz, 2000 UT 103, 16 P.3d 1245, that foreseeability of an animal attack does not depend on whether the animal has attacked a person on a prior occasion (although if there were a prior attack, that would impact the issue of whether another attack was foreseeable). The Court addressed whether the horse's bite was foreseeable in Pullan, and stated in its opinion as follows:

Plaintiff does not contend that either defendant had any knowledge that she or other children from families that did not belong to the Association were entering the stables and feeding the horses without permission. Without knowing that or having reason to know that, a jury could not find defendants negligent. According to Rachel, Steinmetz had allowed her to ride Rocky on two occasions and had seen her feed Rocky, although it is not clear whether Rachel was feeding him out of her hands on those occasions. Steinmetz raised no objection to Rachel's feeding Rocky nor warned her of any danger. However, Rachel's family was a member of the Association, and Rachel had a right to frequent the stables. But, **there is no evidence that Steinmetz knew that plaintiff or any other child whose family did not belong to the Association was accompanying Rachel to the stables and hand feeding the horses without permission or supervision. Simply maintaining a horse in a stable in a residential subdivision without any knowledge or any reason to know that a child from outside the Association was frequenting the stables and hand feeding the horses without permission or supervision is an insufficient basis on which to predicate negligence on the part of either defendant.**

Id., at ¶ 13. 16 P.3d at 1248-49 (Emphasis added.) The Court did not discuss whether “Rocky” had bitten any other child, and did not address the temperament of the horse species in order to determine whether the horse bite was foreseeable. Rather, the focus on the issue of foreseeability was properly on whether the defendants knew that the plaintiff or other children were entering the stables and feeding the horse, and thereby coming into contact with the horse in situations where the owners were not there to prevent the harm. In other words, the focus was on whether the horse’s owners and keepers had foreknowledge that the animal was coming into contact with others in uncontrolled situations.

In the present case, the determining factor for deciding the foreseeability of the Mateuses’ cat’s attack is not whether the cat has bitten anyone before, but rather whether the defendants, by their actions or inactions, negligently allowed their cat to come into contact with other persons, thereby creating a situation where the Mateuses could not prevent an attack because they were not there to supervise or control their animal. The undisputed facts before district court were that cats attack people and that cat bites are common. The Mateuses admit that they did not control their animal or take any steps to prevent the attack, and therefore, it is foreseeable, under the reasoning articulated in Pullan v. Steinmetz, that the Mateuses’ cat would attack or injure someone, and the Mateuses should have not been granted summary judgment. Moreover, the question of

whether the cat attack was foreseeable involves a question of fact⁴ that could not have been properly resolved with a summary judgment motion. but should have been left for a jury to resolve. Under this Court's ruling in Pullen v. Steinmetz, the district court should not have ruled, as a matter of law, that the cat bite was unforeseeable. and the district court's judgment should be reversed.

- c. Under Utah law as set out in Looney v. Bingham Dairy, or the Restatement (Second) of Torts § 518, the Mateuses owed and breached their duty to Mrs. Jackson.**

Under both Utah law and the law set out in section 518 of the Restatement (Second) of Torts, the Mateuses should be held liable for failing to control their cat and for failing to prevent their cat's attack on Mrs. Jackson. Since the facts show that cat bites are not uncommon, a cat owner should know that they should take steps to prevent their animals from coming into contact with strangers in uncontrolled situations, and the Mateuses' argument that only speculation could lead them to believe that their cat could harm another fails to recognize the realities of animal ownership, and once again displays their uncaring attitude about the damages their animal has caused.

⁴"The care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and must be determined as a question of fact." DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983)(Emphasis added). See also Eaton v. Savage, 502 P.2d 564 (Utah 1972); Wheeler v. Jones, 431 P.2d 985, 988 (Utah 1967).

Under Looney v. Bingham Diary, 260 P.2d 855, 857 (Utah 1927), the Utah Supreme Court stated that a victim of an animal attack did not have to prove that an animal's owner knew of an animal's viciousness or prior attacks when the animal was not "rightly at the place where the injury occurred." This case presents a clear situation where the Mateuses' cat was not rightly at the place where the injury occurred. The Mateuses argue, perhaps disingenuously, that the cat was "in a typical place" while the facts show that the cat was on Mrs. Jackson's second story patio. Essentially, the Mateuses argue that their cat had more right to be on the Jackson's property than did the Jacksons. Their argument cannot be accepted. The attack occurred on Mrs. Jackson's property, on her second story porch, right outside her living room sliding-glass door. Mrs. Jackson called the cat only because she mistook it for her own cat, otherwise she would not have called the cat.⁵ The Mateuses cannot claim that their cat had any right to be on Mrs. Jackson's property. There is no evidence that Mrs. Jackson acquiesced to allow the cat to come on her property.

Under Restatement (Second) of Torts, § 518, an animal owner may be held liable for harm done by their animal if they were negligent in failing to prevent the harm. The

⁵ The Mateuses' argument that their cat was an unwelcome trespasser only after it attacked Mrs. Jackson is false. The facts before the lower court were that Mrs. Jackson mistook the Mateuses' cat for her own, and at the moment she realized that the cat was not hers, the cat attacked. The Mateuses' cat was always an unwelcome trespasser on the Jackson's property.

Mateuses argue that they cannot be held liable under that negligence standard. However, negligence cases should only rarely be resolved on summary judgment. Williams v. Melby, 699 P.2d 723 (Utah 1985), and then only in the most clear cut cases. It certainly should not have been used here when the evidence is conflicting regarding the likelihood of injury from cat bites, the impropriety of the Mateuses' allowing their cat to wonder about without any restraint or control, and whether the injury could have been prevented if the Mateuses had taken appropriate steps to control their cat.

**POINT II: BECAUSE CATS POSSESS PREDATORY TRAITS
SIMILAR TO THOSE POSSESSED BY DOGS, CATS
SHOULD NOT BE ALLOWED ONE FREE BITE
BEFORE LIABILITY IS IMPOSED ON THEIR
OWNERS.**

The Court's reasons in Pullan for not extending that "Dog Bite Statute" found in Utah Code Ann. § 18-1-1, while applicable to horses, do not withstand scrutiny when applied to other predatory animals such as cats. The Court set out its reasons for not extending the dog bite statute to horses as follows:

We eschew the invitation to extend strict liability to owners and keepers of horses. The legislature imposed strict liability on owners and keepers of dogs for important reasons that would not support extending strict liability to owners and keepers of horses. Most importantly, while **dogs are capable of injuring or killing poultry and small domestic livestock** such as sheep and goats, horses do not have that predatory trait. Additionally, when section 18-1-1 was originally enacted in 1898, **leash laws were not common and many dogs roamed at large without restraint**. Domestic horses have not usually been allowed to roam free, but customarily have been corralled and pastured. Section 18-1-1 and section 18-1-3, which

allows any person to kill a dog that is attacking, chasing, or worrying any domestic animal or fowl that has a commercial value, appear to have been enacted to protect the interests of those who raise poultry and livestock. Horses do not pose the same threat. **None of the reasons the legislature had for holding owners and keepers of dogs strictly liable would support our extending strict liability to owners and keepers of horses even when they are kept in a residential neighborhood for recreational purposes.**

Pullan, 16 P.3d at 1247.

Cats, like dogs, possess a predatory trait, and are naturally equipped to kill other small animals, and, as proved in this case, are well-equipped to cause considerable harm to human beings. Moreover, like dogs, (when the statute was first enacted), that roamed at large without restraint, some cats now roam at large and are not restrained. Cats, like dogs, pose a certain threat to people. They are capable of attacking and harming people, and the exact reasons given by the legislature for extending strict liability to dogs are applicable to cats as well.

Mrs. Jackson conceded that, in this case, she did not bring a cause of action for strict liability against the Mateuses. However, she asked the court to allow her to show that the Mateuses were negligent, by analogy, through use of the dog bite statute. Moreover, the statute is important to show the inherent injustice of the court's decision, in that, Mrs. Jackson not only suffers the grave physical and financial misfortune of dealing with the consequences of the attack, but also is denied any chance for recovery or restitution that she could have otherwise receive were she attacked and injured by a dog.

This Court must redress the injustice that has been done to Mrs. Jackson, and reverse the district court's decision.

**POINT III: THE SALT LAKE COUNTY ORDINANCES PROVIDE
EVIDENCE OF THE MATEUSES' NEGLIGENCE.**

Read together and according to their plain language, Salt Lake County Ordinances, §§ 8.04.210, 8.24.010, and 8.24.030 impose liability on the owner or keeper of an animal, which is not properly restrained, that bites, inflicts injury, assaults, or attacks a human being on public or private property. The Mateuses complain that these ordinances impose strict liability on them for their cat's actions. However, that argument misses the point as Mrs. Jackson only seeks to use the ordinances to show evidence of the Mateuses' negligence. See, Adkins v. Uncle Bart's, Inc., 1 P.3d 528 (Utah 2000)(stating that violation of a safety standard set by statute or ordinance constitutes prima facie evidence of negligence.)

The Mateuses argue that the plain interpretation of the ordinances, advocated by Mrs. Jackson, contravenes the legislative intent of the county council, but they provide no legislative history to support their claim. The ordinances are completely in harmony with the Dog Bite Statute and the Mateuses fail to explain how the ordinances and statute are in disharmony. The Dog Bite Statute imposes strict liability on dog owners when their dog injures someone, and the ordinances impose liability when other animals do the same. Essentially, the ordinances, without affecting the dog bite statute, eliminate the one

free bite rule, with regard to all other animals, just as the dog bite statute did in regard to dogs. The statute and ordinances are compatible, well-matched and further the interests of justice by eliminating unequal results under the law for victims of animal attacks.⁶

The purposes of the ordinances is to prevent animal attacks and to require animal owners to take steps to control their animals. If, as argued by the Mateuses, their purpose is only to require action on the part of an owner after an injurious incident, then the ordinances fail to protect persons, and fail to promote safety and well-being. Clearly, the Court should not interpret the ordinances in a manner which renders them useless or in a manner which is not expressly stated in their plain language. The intent of the ordinances, as expressed in their plain language, is to prevent such attacks, and not just to remedy situations after an attack and injury occur. Therefore, the Mateuses' interpretation should be rejected, and the Court should allow Mrs. Jackson to use the ordinances to show evidence of the Mateuses' negligence.

Cat owners can and should know that their animals can act viciously because cat bites are common, cats are predatory animals and they possess sharp teeth and claws. Moreover, cat owners should know that, if they allow their animals to wander about unsupervised, the animals will come into contact with other persons and that there is a

⁶ The Mateuses' constitutional arguments should be disregarded. No constitutional issues were appealed to this Court, and Judge Medley's order specifically stated that no decision was rendered regarding the Mateuses' constitutional arguments.

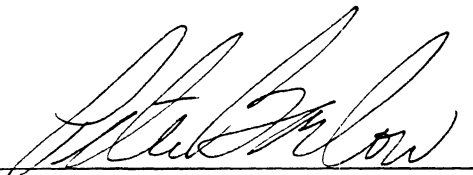
foreseeable possibility that the animal can attack and injure another person. Cat owners should be held responsible for allowing their animals to wander outside their homes uncontrolled and unsupervised, and the burden should not be placed on innocent third-parties to control the animals or deal with the financial consequences of an animal attack. Justice demands that the decision granting the Mateuses' summary judgment be reversed, and this case should be remanded for trial.

CONCLUSION

This Court should reverse the judgment of the district court which granted summary judgment for the Mateuses. The facts of this case show that the Mateuses were negligent in allowing their cat to come into contact with Mrs. Jackson, and that they had a duty to exercise reasonable care to properly control their animal. The facts show that they breached their duty and allowed their cat to cause Mrs. Jackson's injuries.

DATED this 7 day of January, 2002.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of January, 2002, a true and correct copy of the foregoing Reply Brief of Appellant Judith Campbell Jackson was mailed, first-class postage prepaid, to the following:

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