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Judith Campbell Jackson v. Robert Mateus and Kris Mateus : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JUDITH CAMPBELL JACKSON,

Plaintiff/Appellant,

vs.

ROBERT MATEUS and KRIS MATEUS,

Defendants/Appellees,

Case No. 20010387-SC

Priority 15

BRIEF OF APPELLEES

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

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. JURISDICTION	1
II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW	1
A. ISSUES PRESENTED FOR REVIEW	1
B. STANDARD OF REVIEW	1
III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES	2
IV. STATEMENT OF THE CASE	3
V. STATEMENT OF FACTS	3
VI. SUMMARY OF ARGUMENT	5
VII. ARGUMENT	6
POINT I: BECAUSE PLAINTIFF COULD NOT ESTABLISH DEFENDANTS OWED A DUTY TO HER, SHE COULD NOT PROVE A <i>PRIMA FACIE</i> CASE OF NEGLIGENCE.	6
A. It Was Not Foreseeable That the Defendants' Cat Would Bite Anyone.	7
1. Other Relevant Factors Demonstrate No Duty Was Owed to Plaintiff.	8
POINT II: THIS COURT HAS RECENTLY REFUSED TO EXTEND THE STRICT LIABILITY DOG BITE STATUTE TO OTHER ANIMALS OR TO ADOPT THE NEGLIGENCE STANDARD IN RESTATEMENT (SECOND) OF TORTS § 518.	10

A.	Our “Dog Bite Statute” Is Limited to Dogs.	10
1.	Dog Bite Statutes Are the Trend, and Plaintiff Cannot Point to One Cat Statute from Any Jurisdiction.	12
B.	Restatement (Second) of Torts § 518 Is Not the Law in Utah, but Even Under That Standard Defendants Are Not Negligent.	15
1.	Defendants’ Cat Was Rightly at the Place Where the Injury Occurred.	18
POINT III:	THE SALT LAKE COUNTY ORDINANCES DO NOT APPLY TO DEFENDANTS.	20
VIII.	CONCLUSION	25
IX.	ADDENDUM E	28

TABLE OF AUTHORITIES

Page

CASES

<u>AMS Salt Industries, Inc. v. Magnesium Corp. of America</u> , 942 P.2d 315 (Utah 1997)	7, 9
<u>Boyer v. Seal</u> , 534 So.2d 30 (La. App. 1988), <u>cert. granted</u> , 538 So.2d 600, <u>affirmed</u> 553 So.2d 827	14
<u>Cruz v. Middlekauff Lincoln-Mercury</u> , 909 P.2d 1252 (Utah 1996)	7
<u>Dubroca and Marsalis v. La Salle</u> , 94 So.2d 120 (La. App. 1957)	14
<u>Fellers v. Carson</u> , 356 S.E.2d 658 (Ga. App. 1987)	13
<u>Ferree v. State of Utah</u> , 784 P.2d 149 (Utah 1989)	6
<u>Field v. Boyer Co., L.C.</u> , 952 P.2d 1078 (Utah 1998)	1
<u>Harris v. O'Higgins</u> , 2000 WL 306717, 3 (Mass. App. Div. 2000)	14
<u>Kolender v. Lawson</u> , 461 U.S. 352, 357 (1983)	23
<u>Lee v. Weaver</u> , 237 N.W.2d 149 (Neb. 1976)	13, 14
<u>Looney v. Bingham Dairy</u> , 70 Utah 398, 260 P. 855 (1927)	15, 18
<u>Murray City v. Hall</u> , 663 P.2d 1314 (Utah 1983)	22
<u>Neztsosie v. Meyer</u> , 883 P.2d 920 (Utah 1994)	12
<u>Pullan v. Steinmetz and Dimple Dell Ranchettes Owners Assoc.</u> , 2000 UT 103, 16 P.2d 1245	5, 10, 15, 16, 17, 18, 25
<u>S.H. By and Through Robinson v. Bistryski</u> , 923 P.2d 1376 (Utah 1996)	12
<u>Sharp v. Williams</u> , 915 P.2d 495 (Utah 1996)	12
<u>Shurtz v. BMW of North America, Inc.</u> , 814 P.2d 1108 (Utah 1991)	1

<u>Slisze v. Stanley-Bostitch</u> , 979 P.2d 317 (Utah 1999)	6
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	1
<u>Van Houten v. Pritchard</u> , 870 S.W.2d 377 (Ark 1994)	14

STATUTES

Utah Code Ann. § 4-25-1	20
Utah Code Ann. § 4-25-4	19
Utah Code Ann. § 10-8-64	19
Utah Code Ann. § 17-50-302(1)(b)	22
Utah Code Ann. § 18-1-1 (1971)	2, 10, 12
Utah Code Ann. § 18-1-3 (2000)	11
Utah Code Ann. § 78-2-2(3)(j)(1953, as amended)	1

ORDINANCES

Salt Lake County Ordinance § 8.04.210	21
Salt Lake County Ordinance § 8.24.010	20
Salt Lake County Ordinance § 8.24.030	21

MISCELLANEOUS

Cheryl M. Bailey, <u>Liability for Injuries Caused by Cat</u> , 68 ALR 4 th 823 (1989)	13
Restatement (Second) of Torts § 509 (1977)	11
Restatement (Second) of Torts § 518 (1976)	2, 5, 10, 15, 16, 17, 26, 28

I. JURISDICTION

This Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953, as amended).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

A. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly granted defendants summary judgment when plaintiff did not present a scintilla of evidence that defendants knew or should have known that their cat possessed vicious tendencies?

B. STANDARD OF REVIEW

Because all issues in this appeal involve questions of law, this Court reviews the trial court's conclusions for correctness. Field v. Boyer Co., L.C., 952 P.2d 1078, 1079 (Utah 1998); State v. Pena, 869 P.2d 932, 936 (Utah 1994); Shurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991).

Salt Lake County Third Judicial District Court Judge Tyrone E. Medley entered judgment for defendants on their Motion for Summary Judgment on April 2, 2001. (R. at 529-531). Plaintiff filed a timely Notice of Appeal from this judgment. (R. at 533).

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

1. Utah Code Ann. § 18-1-1 (1971) Liability of owners – Scienter –

Dogs used in law enforcement.

Every person owning or keeping a dog shall be liable in damages for injury committed by such dog, and it shall not be necessary in any action brought therefor to allege or prove that such dog was of a vicious or mischievous disposition or that the owner or keeper thereof knew that it was vicious or mischievous; but neither the state nor any county, city or town in the state nor any peace officer employed by any of them shall be liable in damages for injury committed by a dog when: (1) The dog has been trained to assist in law enforcement, and (2) the injury occurs while the dog is reasonably and carefully being used in the apprehension, arrest, or location of a suspected offender or in maintaining or controlling the public order.

2. Restatement (Second) of Torts § 518 (1976). Liability for Harm

Done by Domestic Animals That Are Not Abnormally Dangerous.

Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

- (a) he intentionally causes the animal to do the harm, or
- (b) he is negligent in failing to prevent the harm.

IV. STATEMENT OF THE CASE

This is a cat bite case in which the plaintiff argued below that the owner of a house cat should be liable for the cat's first bite, even though the cat showed no propensity for viciousness and the harm to plaintiff was not foreseeable.

V. STATEMENT OF FACTS

1. On January 15, 1996, plaintiff Judith Jackson observed a yellow tabby house cat sitting outside her home, at the top of the stairs leading to the second-story deck just off of her living room. (R. at 1, 142).

2. Plaintiff owned four cats and would occasionally see cats in her yard. (R. at 347, 6:6; at 356, 41:10-18; at 357 44:4-10).

3. Plaintiff mistook this cat for her own cat and opened the sliding glass door, calling the cat to come to her. (R. at 143).

4. As the cat came toward her, she recognized that it was not her cat but proceeded to pet it anyway. (R. at 350, 16:17-25).

5. She petted the cat on its head and ears, and it appeared friendly and purred. (R. at 350, 17:1-9).

6. Then, for no apparent reason, the cat bit her right hand.¹ (R. at 350, 17:10-12).

¹ Although defendants affirmatively denied it was their cat that bit plaintiff, they assumed for purposes of the summary judgment motion that it was. (R. at 6-7, 130).

7. The cat left the second-story deck of plaintiff's home, and plaintiff does not know where it went after that. (R. at 142).

8. Defendants Robert and Kris Mateus have had their cat since it was a kitten and, until the incident alleged by plaintiff, their cat had never exhibited any vicious tendencies and had never bitten or acted aggressively toward anyone. (R. at 145-46).

9. For ten years, defendants' cat had exhibited a good disposition and provided them with comfort and companionship. (R. at 145-46).

10. Both plaintiff and defendants are unaware of any time that the defendants' cat bit anyone before the incident alleged by plaintiff in her complaint. (R. at 142, 145-46).

11. Surprisingly, plaintiff sustained a serious injury from this cat bite with commensurate medical expenses. (R. at 2).

12. Plaintiff filed a lawsuit against defendants alleging they were negligent in failing to restrain and control their cat; plaintiff did not allege defendants were strictly liable. (R. at 1-2).

13. Defendants filed a Motion for Summary Judgment arguing that, since this cat bite was unforeseeable, they did not owe a duty of care to plaintiff (R. at 128); Judge Tyrone E. Medley granted this motion. (R. at 529-531).

VI. SUMMARY OF ARGUMENT

As a matter of law, the defendants did not owe a duty of care to plaintiff since her cat bite was not foreseeable. Defendants have had their cat since it was a kitten, and it has always had a good disposition and never displayed any tendency toward violence until the time alleged by plaintiff. Plaintiff could not produce any evidence to demonstrate that defendants knew or should have known their cat might bite or act aggressively toward anyone.

This Court, *en banc*, recently decided Pullan v. Steinmetz and Dimple Dell Ranchettes Owners Assoc., wherein it would not extend Utah's strict liability dog bite statute to horse owners and it declined to adopt the more inclusive definition of negligence contained in the Restatement (Second) of Torts § 518.

Looking at the reasons our dog bite statute was enacted, Pullan noted that dogs are considered predatory animals, capable of harming poultry, sheep, and goats. Unlike dogs, cats typically only pose a threat to other cats, small birds, and rodents. Because of their mild temperament, we do not have leash laws for cats. No state in the country has a cat bite statute, and no court imposes strict liability on a cat owner for its first unsuspected bite.

Pullan declined to adopt Restatement (Second) of Torts § 518 and noted that even under its relaxed standard plaintiff there could not establish negligence against the defendants because there was no evidence that the harm to her was foreseeable. This

is the case here. Without knowledge of their cat's vicious propensities, defendants were not negligent in failing to restrain or confine their cat. Defendants' cat was properly roaming about the neighborhood since it had never displayed dangerous tendencies.

Salt Lake County Ordinances provide that an owner of a vicious animal who does not keep the animal muzzled or restrained is a hazard to public safety. Plaintiff construes these ordinances to mean that an owner is liable for its animal's bite even if the owner did not know of its vicious propensities. This narrow interpretation would not be in harmony with Utah's animal statutes, would be against public policy, and would render the ordinances unconstitutional since it would create an unreasonable, arbitrary standard on unwitting animal owners.

VII. ARGUMENT

POINT I

BECAUSE PLAINTIFF COULD NOT ESTABLISH DEFENDANTS OWED A DUTY TO HER, SHE COULD NOT PROVE A *PRIMA FACIE* CASE OF NEGLIGENCE.

The plaintiff's only cause of action in this matter is for negligence. "One essential element of a negligence action is a duty of reasonable care owed to the plaintiff by [the] defendant. Absent a showing of duty, [the plaintiff] cannot recover." Slisze v. Stanley-Bostitch, 979 P.2d 317, 319 (Utah 1999). A duty has been described as "a question of whether the defendant is under any obligation for the benefit of a particular plaintiff." Ferree v. State of Utah, 784 P.2d 149, 151 (Utah 1989) (quotation omitted).

The question of whether a duty exists is ordinarily a question of law, and as such is properly resolved by the trial court rather than by a jury. See AMS Salt Industries, Inc. v. Magnesium Corp. of America, 942 P.2d 315, 319 (Utah 1997) (citations omitted).

The relevant factors in determining whether a duty exists in a negligence action include the following: the foreseeability of harm to others resulting from the actor's actions; the likelihood of injury; the magnitude of the burden of guarding against injury; the consequences of placing that burden on defendant; whether one's voluntary conduct increases the risk of harm; and whether general policy considerations exist. See id. at 321.

A. It Was Not Foreseeable That the Defendants' Cat Would Bite Anyone.

“The existence of a duty of reasonable care depends in part on the extent to which a reasonable person can foresee that his acts may create a significant likelihood of causing harm to others.” AMS Salt Industries, 942 P.2d at 319 (citing Cruz v. Middlekauff Lincoln-Mercury, 909 P.2d 1252, 1258 (Utah 1996)). Defendants had absolutely no knowledge that their cat of ten years would have any propensity to cause harm to anyone. Their cat had never bitten anyone in the past or exhibited any violent tendency which would have forewarned them that their cat might bite someone. Since they had no knowledge of any inclination of their cat to bite, they cannot be held liable for the plaintiff's alleged injuries. Not until the moment of that bite could defendants have foreseen that their cat, if it was their cat, would cause harm to anyone. Defendants

had no notice that they should screen their cat from the public generally or from the plaintiff specifically—if putting such controls on a cat’s outdoor activities were even possible.²

Defendants did nothing any differently than any other cat owner in America. They permitted their cat to go outside and behave as a cat, confident it would engage in typical cat-like behavior. As a nearly universal proposition, cat owners do not keep their cats locked indoors or screened from the public or on a leash. Plaintiff cannot show any duty on the part of the defendants that is different from any other cat owner’s duty. Nor can she demonstrate how defendants failed to exercise reasonable care. To survive summary judgment plaintiff had to produce at least a scintilla of evidence to imply that the defendants had any idea their cat might cause harm to someone. Without any evidence of knowledge that could be imputed to the defendants, plaintiff cannot prove that a duty arose which would make the defendants legally liable for their cat’s bite.

1. Other Relevant Factors Demonstrate No Duty Was Owed to Plaintiff.

In addition to foreseeability, several other factors are relevant in determining whether a duty exists in a negligence action. Other factors include: 1) the

² Plaintiff states that the defendants’ cat also “attacked” her husband. (See Appellant’s Brief at 5-6, 10). However, as is clear from his deposition testimony, this alleged attack happened *after* the bite incident involving plaintiff. (R. at 406, 14:11-13).

likelihood of injury, 2) the magnitude or the burden of guarding against it, 3) the consequences of placing that burden on a defendant, 4) whether voluntary conduct increases the risk of harm, and 5) whether any general policy considerations exist. AMS Salt Industries, 942 P.2d at 320. These factors also illustrate that the defendants did not owe plaintiff a duty of care.

The defendants cannot have divined that their cat possessed tendencies that were likely to cause injury to anyone. Their cat was a typical tabby cat, not one of a dangerous breed. To ask our cat-friendly society to guard against every potential cat bite would be a demand of enormous proportions that would place too great a burden on the cat owner population. To require that the public keep their cats confined and out of their natural habitat calls for more than our society is prepared to do to prevent cat bites and it expects too much from the unsuspecting defendants here. By voluntarily outstretching her arm to any animal, including a cat, plaintiff increases the risk of harm to her, even though she had no reason to expect this cat would bite her. Nonetheless, one has to assume some risk by intentionally placing a hand by an animal's mouth. Finally, general public policy dictates that cats be left to themselves and be permitted to roam at large for the benefit of society. No factors that courts consider when imposing a duty can be construed to create a duty for the defendants here.

POINT II

THIS COURT HAS RECENTLY REFUSED TO EXTEND THE STRICT LIABILITY DOG BITE STATUTE TO OTHER ANIMALS OR TO ADOPT THE NEGLIGENCE STANDARD IN RESTATEMENT (SECOND) OF TORTS § 518.

In a recent case before this Court, Pullan v. Steinmetz and Dimple Dell Ranchettes Owners Assoc., 2000 UT 103, 16 P.3d 1245, a 12-year-old girl was bitten by a horse while she was feeding it in its stable, and her hand was disfigured. She sued the horse owner and keeper, alleging theories of strict liability, negligence, and attractive nuisance; the trial court granted summary judgment to the defendants on all theories. Affirming this judgment, the Utah Supreme Court, *en banc*, refused to extend our strict liability dog bite statute to horse owners and declined to adopt the more inclusive definition of negligence contained in the Restatement (Second) of Torts § 518 (1976).

A. Our “Dog Bite Statute” Is Limited to Dogs.

The plaintiff in Pullan argued that when horses are kept as hobbies and pets and are not used as necessities, their owners should be strictly liable for injuries caused by them. This court declined plaintiff’s invitation to extend the strict liability statute for dog owners³ to horse owners. See Pullan, 16 P.3d at 1247. This court noted that the

³ Utah Code Ann. § 18-1-1 (1971) reads in pertinent part:

Every person owning or keeping a dog shall be liable in damages for injury committed by such dog, and it shall not be necessary in any action brought therefor to allege or prove that such dog was of a vicious or mischievous disposition or that the owner or keeper thereof knew that it was vicious or

legislature imposed strict liability on dog owners for reasons that would not support extending it to horse owners, even when horses are kept for recreational purposes. For example, dogs are considered predatory animals, capable of harming poultry, sheep, and goats, and our laws permit a dog to be shot if it attacks animals of commercial value.⁴ The court also found support in Restatement (Second) of Torts § 509 (1977), which does not attach strict liability on a pet owner unless the owner has reason to know the animal has “dangerous propensities abnormal to its class.” *Id.*

Dogs that roam without a leash pose a greater threat to the public than a cat does. Typical cats that roam neighborhoods pose a threat only to other cats, small birds, and rodents; they do not pose a threat to animals of commercial value, to the vast majority of dogs, or to humans. Because of cats’ normally mild temperament, our legislature has not created leash laws for cats. In addition, dogs can be confined by devices such as fences; such reasonable confinement techniques are not possible with cats.

mischievous. . . .

⁴ Utah Code Ann. § 18-1-3 (2000) reads:

Any person may injure or kill a dog while it is attacking, chasing, or worrying any domestic animal having a commercial value, any assistance animal as defined in Section 78-20-101, or any species of hoofed protected wildlife, while attacking domestic fowls, or while the dog is being pursued hereafter.

1. Dog Bite Statutes Are the Trend, and Plaintiff Cannot Point to One Cat Bite Statute from Any Jurisdiction.

Plaintiff relies on Utah Code Ann. § 18-1-1, commonly known as the “dog bite statute,” and other states dog bite statutes to demonstrate that the one free bite rule is falling into disfavor in our country. (See Appellant’s Brief at 8, 25-29). A diligent search of other courts across the country shows that *no* state imposes liability on a cat owner for his or her cat’s first bite *unless* the owner had prior knowledge of the cat’s vicious propensity. All the cases cited by the plaintiff that impose liability on the owner involve *dog* bites. Obviously, no court in America is willing to impose strict liability on a cat owner for a cat’s first unsuspected bite. Because of a cat’s usually docile nature, it does not make sense to keep it away from the public unless it displays a violent disposition. Significantly, Utah courts have applied the dog bite statute only to dogs, not to other animals, and have never imposed strict liability on a cat owner. See S.H. By and Through Robinson v. Bistryski, 923 P.2d 1376 (Utah 1996); Sharp v. Williams, 915 P.2d 495 (Utah 1996); Neztsosie v. Meyer, 883 P.2d 920 (Utah 1994).

Cats are different from dogs. Unlike some dogs, cats are not aggressive by nature and cat owners cannot be expected to anticipate that their cats might act in a vicious manner. This is demonstrated by virtue of the fact that numerous states have enacted statutes specifically addressing dog bites, but not cat bites. The enactment of our dog bite statute does not show any legislative intent to apply the same standard to incidents involving any other animal. “[M]ost statutes eliminating the necessity of

proving scienter specifically apply to dogs, and at least one court has rejected the view that such a statute extends by implication to owners or keepers of cats....” Cheryl M. Bailey, Liability for Injuries Caused by Cat, 68 ALR4th 823, 830 (1989).

American courts have consistently adhered to the common law position that cats are “domesticated animal[s] which are not naturally dangerous,” and cat owners do not owe a duty to others when their cats bite someone, unless they had notice of the animal’s tendency to be vicious:

Tradition, based on the experience that cats are so unlikely to do harm if left to themselves and so incapable of constant control if they are to serve as mousers, has permitted cats to run at large, while recognizing at the same time that there are circumstances under which it is negligent to allow them to do so.

Id. at 829. This position is based on the understanding that cats are not inherently dangerous as are other animals, like certain dogs.

Cat owners are entitled to summary judgment where they “put into the record positive evidence that they had no knowledge of the animal ever biting anyone before [and] the plaintiff [has] no evidence to the contrary.” Fellers v. Carson, 356 S.E.2d 658, 659 (Ga. App. 1987) (cat owner entitled to summary judgment where neighbor was bitten by cat as she attempted to remove cat from her own yard). Even if a cat has bitten someone before, it does not necessarily follow that the cat is a vicious animal. In Lee v. Weaver, 237 N.W.2d 149, 150-51 (Neb. 1976), a domestic worker brought an action against the owner of a cat to recover for injuries sustained from a cat

bite. That court held (1) knowledge of a cat's vicious or dangerous propensities is indispensable to liability on the part of the owner, and (2) evidence of a bite by a house cat on some prior occasion is not sufficient, by itself, to sustain a finding that the cat is vicious or dangerous, and factors such as provocation, or that the cat was engaged in play when the prior bite occurred, ought to be considered. Id.

In a case with similar facts to this one, Van Houten v. Pritchard, 870 S.W.2d 377, 380 (Ark. 1994), plaintiff was bit by a cat and underwent four surgeries and incurred \$39,000 in medical bills, but he failed to prove the cat had a propensity toward violence or that defendants violated any leash law. The court held that "the owner of a domestic cat may permit his cat to run at large unless it has shown a propensity toward violence, or unless an ordinance or statute provides otherwise". See also, Harris v. O'Higgins, 2000 WL 306717, 3 (Mass. App. Div. 2000) (cat owner not liable to plaintiff bitten in an unprovoked attack on her back porch since she did not advance a scintilla of evidence that cat had vicious propensities of which defendants should have been aware); Dubroca and Marsalis v. La Salle, 94 So.2d 120, 123 (La. App. 1957) (cat owner not liable for cat bite since cat never exhibited vicious traits before); Boyer v. Seal, 534 So.2d 30 (La. App. 1988), cert. granted, 538 So.2d 600, affirmed 553 So.2d 827 (cat owner not liable to injured plaintiff who fell after cat brushed up against her because plaintiff could not show cat was aggressive or inherently dangerous).

Here, there is no evidence that the defendants' house cat had any dangerous or vicious propensities or that it had bitten anyone before. Plaintiff does not allege a previous bite had occurred, and defendants affirmatively state that their cat has never bitten anyone before plaintiff received her bite. The defendants should not be held liable for the unanticipated behavior of their cat--even if it can be shown that it was actually their cat that did the biting, which they strongly dispute--because they could not have guessed that it would bite anyone in the first place.

B. Restatement (Second) of Torts § 518 Is Not the Law in Utah, but Even Under That Standard Defendants Are Not Negligent.

Analyzing plaintiff's negligence theory in Pullan, the court first noted that the test in Utah for imposing liability on a domestic animal owner was last expressed sometime ago. In Looney v. Bingham Dairy, 70 Utah 398, 260 P. 855, 857 (1927), the court held that "when a domestic animal is rightly at the place where the injury occurs, the owner is not liable unless the viciousness of the animal and knowledge of such fact on the part of the owner are shown." Pullan, 16 P.3d at 1247 (*citing Looney*, 260 P2d at 857). The plaintiff in Pullan urged the court to relax the Looney test and adopt the negligence standard contained in Restatement (Second) of Torts § 518, which sets out when an owner of a domestic animal that is not known to be abnormally dangerous can be held liable:

§ 518. Liability for Harm Done by Domestic Animals That
Are Not Abnormally Dangerous

Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

...
(b) *he is negligent in failing to prevent the harm.*

Restatement (Second) of Torts § 518 (emphasis added).⁵

The only way that plaintiff can point to any liability on the part of the defendants is if she can show that they somehow were negligent in failing to prevent the harm allegedly suffered by her. The plaintiff in Pullan pointed to comment h of § 518 for the proposition that “even normally gentle animals are likely to be dangerous under particular circumstances.” 16 P.3d at 1248. The plaintiff here points to the same proposition and alleges that defendants “should have been aware that their cat would come into contact with other persons” and that such “contact could result in an attack and harm to innocent persons.” (See Appellant’s Brief at 15). However, it would be highly speculative for a cat owner to believe that, since his or her cat could get in close proximity to a human being, the cat would therefore bite or harm that person. Although a cat’s coming into contact with a human is likely, it is highly improbable that a cat would harm someone.

In the case at bar, the cat was in a typical place where no extenuating circumstances would have suggested that it would behave aggressively. Plaintiff invited

⁵ Restatement (Second) of Torts § 518, with comments, is attached hereto as Addendum E.

the cat to come toward her so she could pet it. She did nothing to provoke or worry the cat, and its bite was as much a surprise to her as it was to defendants. Defendants had no reason to know they should keep it at home or keep it off plaintiff's property. This was a fluke incident that defendants could not have anticipated.

The comments to Restatement (Second) of Torts § 518 further illustrate that defendants are not negligent under that standard. Since plaintiff can bring forth no evidence to show that defendants should have taken precautions to confine or leash their cat or otherwise keep it under constant control (as indicated by comment e); since the amount of care that the defendants exercised was commensurate with that of their breed of cat (as suggested by comment f); since defendants possessed knowledge of their cat's normal characteristics (as required by comment g); and since their animal was not dangerous under the particular circumstances here of roaming at large (comment h); they cannot be held to have been negligent in failing to prevent any harm to anyone. Therefore, plaintiff's reliance on the Restatement still cannot impose liability on defendants.

Pullan rejected adopting as the law of Utah the standards of liability contained in § 518 saying that, even under the Restatement standard, the plaintiff could not establish a *prima facie* case of negligence against the defendants *because there was no evidence that the harm to the plaintiff was foreseeable*. See Pullan, 16 P.3d at 1247 (emphasis added). This Court pointed out that defendants had no prior knowledge that a

potential hazard existed to children who entered the stables and fed the horses without permission. “Without knowing that or having reason to know that, a jury could not find defendants negligent.” Id.

What mattered in Pullan is what matters in this case: whether a defendant animal owner can foresee that the animal will cause harm to others. Without knowledge of his or her animal's potential for viciousness, an owner cannot be charged with negligence for allowing it to behave as other animals similarly situated. Just as in Pullan, the defendants here had no knowledge that their housecat had any vicious propensity. Without this knowledge, the law in Utah is that a cat owner cannot be held liable for his or her cat's first unforeseeable bite. Without the ability to foresee and prevent harm, there is no duty on a cat owner to keep a house cat confined. Since plaintiff could not establish a *prima facie* case of negligence against defendants, summary judgment was appropriate.

1. Defendants’ Cat Was Rightly at the Place Where the Injury Occurred.

In the Pullan and Looney horse bite cases, the courts noted that, when an animal is “rightly at the place where the injury occurs,” the owner is not liable for any harm unless the owner had knowledge of the animal’s propensity for viciousness. Pullan, 16 P.3d at 1248 (*citing* Looney, 260 P. at 857). Plaintiff alleges that defendants’ cat was not rightly on defendants’ property when the injury occurred and that, therefore, defendants need not have had any knowledge of their cat’s propensity for viciousness for liability to attach to them for the attack. (See Appellant’s Brief, at 16).

Although defendants' cat may not have been specifically invited to enter the outside boundaries of plaintiff's property, it was never prevented from doing so and was free to roam about because it had no known dangerous tendencies. Once the cat was inside her property line and on her deck, plaintiff actually summoned the cat to pet it, indicating that she had no objection to its presence. Plaintiff does not allege that she did not allow cats (including defendants' cat) on her property. In fact, since plaintiff herself owns cats, she should have expected other cats might be attracted to her home. Her own cat may have been outside roaming, or had been on occasion, because she initially thought this was her own cat. Once a cat is roaming outside, its owner has about as much control over it as does any other person. Cats are by their nature very independent, and our society has come to allow them easy access to almost any outdoor venue.

To say that the cat was an "unwelcome trespasser" (see Appellant's Brief at 17) is inaccurate since it did not become unwelcome until after it bit plaintiff's hand. This cat had never displayed any fierce, vicious, or dangerous behavior that would have suggested to defendants that they needed to restrain it. Plaintiff cannot point to one ordinance or statute that prohibits a cat with unknown vicious tendencies from freely roaming.

For support of the proposition that defendants' cat was trespassing, plaintiff cites Utah Code Ann. § 10-8-64, which deals with livestock that run at large; and Utah Code Ann. § 4-25-4 deals with agricultural estrays, such as sheep, cattle, horses, mules,

and swine (as defined in U.C.A. § 4-25-1). These statutes are inapposite since they were obviously enacted to protect from harm caused by farm animals that do not freely roam our communities. Agricultural animals are difficult to manage because of their size and dispositions. Cats do not pose these risks.

POINT III

THE SALT LAKE COUNTY ORDINANCES DO NOT APPLY TO DEFENDANTS.

Plaintiff states that defendants violated Salt Lake County Ordinances and that this is “evidence of negligence” on the part of defendants. Salt Lake County Ordinance § 8.24.010, which imposes liability in some circumstances on an animal owner for an animal bite, reads in pertinent part:

- A. Any owner or person having charge, care, custody or control of an animal or animals *causing a nuisance*, as defined below, shall be in violation of this title and subject to the penalties provided in this title.
- B. The following shall be deemed *a nuisance*:
 - 1. Any animal which:
 - ...
 - b. Is a *vicious animal* as defined in this title *and* kept contrary to Section 8.24.030 below.

(Emphasis added.)

A "vicious animal" is defined as:

- A. Any animal which, in a vicious and terrorizing manner approaches any person in apparent attitude of attack

upon the streets, sidewalks, or any public grounds or places;

- B. Any animal with a *known* propensity, tendency or disposition to attack or to cause injury or otherwise endanger the safety of human beings or animals; or
- C. *Any animal which bites*, inflicts injury, assaults, or otherwise attacks a human being or domestic animal on public or private property.

Salt Lake County Ordinance § 8.04.210 (emphasis added).

Salt Lake County Ordinance § 8.24.030 addresses the proper method of keeping and restraining a vicious animal from the public. It reads:

It is unlawful for the owner of any fierce, dangerous or vicious animal to permit such animal to go or be off the premises of the owner *unless such animal is under restraint and properly muzzled* so as to prevent it from injuring any person or property. Every animal so vicious and dangerous that it cannot be controlled by reasonable restraints, *and every dangerous and vicious animal not effectively controlled by its owner or person having charge, care or control of such animal, so that it shall not injure any person or property, is a hazard to public safety*, and the director of animal services shall seek a court order pursuant to Section 8.40.010 for destruction of or muzzling of the animal.

(Emphasis added.)

Under these ordinances, an animal and its owner are a hazard to the public if the animal causes a nuisance by virtue of being 1) vicious and 2) not properly restrained. Plaintiff advocates construing these ordinances to mean that an owner is liable when its animal attacks a person, “even where an owner may not know of the

animal's vicious propensities.” (See Appellant's Brief at 22.) However, this narrow interpretation would seem to have the effect of imposing strict liability on owners of *any* house pet at the moment of its first bite.

Our counties have general powers to promote the safety and welfare of their inhabitants.⁶ When an ordinance and a statute could be read to be at odds with each other, the general rule of judicial interpretation is:

“Ordinances are to be construed in light of, and in harmony with, applicable provisions of charter, state law, constitution, and public policy. . . .an ordinance enacted pursuant to a statute should be construed by reading it with the statute, and if the language of both is in substance alike the presumption is indulged that the ordinance was designed to follow the statute.”

Murray City v. Hall, 663 P.2d 1314, 1317 (Utah 1993) (citations omitted). When construing an ordinance, “the primary responsibility of this Court is to give effect to the Legislature's underlying intent.” Id.

Plaintiff's interpretation of liability on any unwitting animal owner would be in contravention of what the county council intended and against public policy because it would result in an unreasonable standard that would necessitate the confinement of all animals, regardless of their harmless nature. It would be in disharmony with and improperly stretch our dog bite statute to other animals and render the ordinances

⁶ Utah Code Ann. § 17-50-302(1)(b) reads: “A county may...provide services, exercise powers, and perform functions that are reasonable related to the safety, health, morals, and welfare of their inhabitants, except as limited or prohibited by statute.”

unconstitutionally vague and arbitrary since unsuspecting animal owners would be liable for their animal's first bite. Any owner, regardless of the type of pet, would be in violation of the ordinances whether their pet had any vicious tendencies whatsoever, and the only way to enforce the ordinances would be after the fact.

Ordinances must define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and any manner that does not encourage arbitrary or discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). The ordinances here should be read in harmony with our statutes that require a vicious animal to be restrained from the public when its vicious propensities are known, or should be known, to the owner.⁷

Plaintiff implies defendants breached their duty to the public by not having their house cat properly muzzled, restrained, or confined. Most cat owners, like defendants, do not do this to their cats. Until their cat's first bite, defendants had no way of knowing they should treat their cat any differently than any other cat. Interpreted as plaintiff suggests, this would mean that every time a cat, rabbit, gerbil, hamster, bird, turtle, or guinea pig bites someone, its owner would be liable. This stretches the ordinances beyond what they were intended to do, which is sequester known vicious animals from the public.

⁷ The unconstitutionality of these ordinances was not considered by the court below. (R. at 531).

Utah does not have leash laws for cats and permits them to roam freely. No local ordinance or state statute restricts a house cat's movement until it is known to be a "vicious" animal. It would be against public policy to require all Utah cats to be leashed or caged. These animals not only assist in the control of rodents, but more importantly they are enjoyed by many Utahns because of their pleasant disposition and relatively low maintenance. By their nature, cats are animals that freely roam our neighborhoods and should only be prevented from doing so if they have dangerous propensities.

The defendants' cat was never known to bite or attack any person in any way. Nor has the animal ever acted in a threatening manner. Their cat has never been known to chase vehicles or attack other domestic animals. Until a cat exhibits aggressive behavior, it is simply not a vicious animal under Utah law, and the owners are not required to keep it restrained as such. The defendants have no obligation to restrain it any differently than do thousands of other cat owners who allow their cats to roam. Since they did not owe a duty to plaintiff, plaintiff could not meet an essential element of her negligence claim against the defendants.

A cat owner who has no notice that his/her cat has any vicious propensities cannot be expected to keep the cat locked in-doors at all times. Most cat owners cannot anticipate that their cats will act viciously and therefore often allow their cats to enter and exit their home at will. Indeed, it is reasonable for a cat owner to expect that his or her cat will not act viciously.

A cat owner simply cannot be on notice that the cat is vicious until after it has bitten or attacked someone or otherwise demonstrated vicious propensities.

Interpreting the statute otherwise would render every cat, and every other house pet for that matter, a “vicious” animal, thereby requiring that owners “lock up” non-vicious pets at all times. Surely the ordinances at issue were not intended to institute such cruel and paranoid measures.

VIII. CONCLUSION

Because experience has shown cats are so unlikely to do harm, courts across the country have consistently refused to hold cat owners liable when their cats bite people unless they had some prior notice of the cat’s vicious tendencies. Neither the county nor the state has required house cats to be leashed. Defendants’ cat has always had a good disposition and never displayed any tendency toward violence until the time alleged by plaintiff. Plaintiff could not produce a scintilla of evidence to demonstrate that defendants knew or should have known their cat might bite or act aggressively toward anyone.

This Court, *en banc*, in Pullan v. Steinmetz and Dimple Dell Ranchettes Owners Assoc., would not extend Utah’s strict liability dog bite statute to horse owners and should similarly decline plaintiff’s invitation to extend it to cat owners. We have leash laws for dogs, not for cats, because cats have mild temperaments and we permit them to roam freely. In Pullan, this Court also rejected adopting the more inclusive

definition of negligence contained in the Restatement (Second) of Torts § 518 since the plaintiff there could not establish negligence against the defendants when no evidence that the harm to her was foreseeable. This is the case here. Without knowledge of their cat's vicious propensities, defendants were not negligent in failing to restrain or confine their cat.

Salt Lake County Ordinances provide that an owner of a vicious animal who does not keep the animal muzzled or restrained is a hazard to public safety. These ordinances should be read in harmony with our state's animal statutes that require animals, like dogs, to be separated from the public when they have known vicious propensities.

Utah should not render an owner of a house cat liable for his or her cat's first bite when the cat has shown no propensity for viciousness and the harm to someone is not foreseeable. Plaintiff did not present a scintilla of evidence to demonstrate that defendants knew or should have known that their cat possessed vicious tendencies. Without this showing, the trial court properly ruled as a matter of law that defendants did not owe her a duty of care and rightly granted defendants' motion for summary judgment.

DATED this 10th day of December, 2001.

RICHARDS, BRANDT, MILLER & NELSON

A handwritten signature in cursive script, appearing to read "Melinda Morgan", is written over a horizontal line.

LYNN S. DAVIES

MELINDA A. MORGAN

Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 10th day of December, 2001, to the following:

Roger H. Bullock
Peter H. Barlow
STRONG & HANNI
600 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111



6016-2025
372166

IX. ADDENDUM E

Restatement (Second) of Torts § 518 (1976). Liability for Harm Done by Domestic Animals That Are Not Abnormally Dangerous

Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

- (a) he intentionally causes the animal to do the harm, or
- (b) he is negligent in failing to prevent the harm.

Comment:

- a. Strict liability for the trespass of livestock is covered in ss 504 and 505.
- b. The term "domestic animal" is used in the sense defined in s 506. The liability of one who possesses or harbors a domestic animal that he has reason to know possesses dangerous propensities abnormal to its class is determined by the rule stated in s 509.
- c. The phrase "have reason to know" here as elsewhere in the Restatement means that the person in question knows or from facts known to him should know. (See s 12).
- d. The rule stated in this Section determines the liability of one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, for any type of harm done by it except during its intrusion upon the land of another.
- e. This Section is applicable to those domestic animals of a class that can be confined to the premises of their keepers or otherwise kept under constant control without seriously affecting their usefulness and which are not abnormally dangerous. Although the utility of these animals is sufficient to justify their being kept without risk of the strict liability stated in s 509, many of them are recognizably likely to do substantial harm while out of control and, therefore, their keepers are under a duty to exercise reasonable care to have them under a constant and effective control. Thus there is a likelihood that even a well-broken mare or gelding that had never shown a propensity to bite or kick may do so when running loose. This is sufficient to require its keeper to exercise reasonable care to keep it under constant control.

f. Amount of care required. The amount of care that the keeper of a domestic animal is required to exercise in its custody is commensurate with the character of the animal. The high temper normal to stud animals is so inseparable from their usefulness for breeding purposes that they are not kept at the risk of the liability stated in s 509. This quality, however, is enough to require greater precautions to confine the animals to the land on which they are kept and to keep them under effective control when taken off the premises.

g. Knowledge of normal characteristics. In determining the care that the keeper of a not abnormally dangerous domestic animal is required to exercise to keep it under control, the characteristics that are normal to its class are decisive, and one who keeps the animal is required to know the characteristics. Thus the keeper of a bull or stallion is required to take greater precautions to confine it to the land on which it is kept and to keep it under effective control when it is taken from the land than would be required of the keeper of a cow or gelding.

h. 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. Thus the keeper of even a gentle bull must take into account the tendencies of bulls as a class to attack moving objects and must exercise greater precautions to keep his bull under complete control if he drives it upon a public highway. So, too, the keeper of an ordinarily gentle bitch or cat is required to know that while caring for her puppies or kittens she is likely to attack other animals and human beings.

i. When the liability stated in this Section is based upon the negligence of the keeper of the animal, the person injured is barred by his contributory fault under the same conditions as in all other cases of negligence. (See ss 463-499).

j. Animals permitted to run at large. There are certain domestic animals so unlikely to do harm if left to themselves and so incapable of constant control if the purpose for which it is proper to keep them is to be satisfied, that they have traditionally been permitted to run at large. This class includes dogs, cats, bees, pigeons and similar birds and also poultry, in a locality in which by custom they are permitted to run at large, and therefore are not regarded as livestock for whose intrusion upon the land of another their possessor is strictly liable under the rule stated in s 504. It would be impossible to confine bees within the owner's premises without entirely destroying their usefulness as honey producing insects except at prohibitive expense. Although it is not impossible to confine dogs to the

premises of their keepers or to keep them under leash when taken into a public place, they have been traditionally regarded as unlikely to do substantial harm if allowed to run at large, so that their keepers are not required to keep them under constant control. The same is true of cats. However, although the possessor or harbinger of a dog or cat is privileged to allow it to run at large and therefore is not required to exercise care to keep it under constant control, he is liable if he sees his dog or cat about to attack a human being or animal or do harm to crops or chattels and does not exercise reasonable care to prevent it from doing so.

k. There may, however, be circumstances under which it will be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so and under other circumstances there would be no negligence. Thus if a horse is turned loose in a field that abuts upon a public highway, and there is no fence to keep him off the highway, it may reasonably be anticipated that he will wander onto it, and that, particularly in the night time, his presence there may constitute an unreasonable danger to traffic. In these cases there may be liability for negligence upon the same basis as in other negligence cases.