

2001

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JUDITH CAMPBELL JACKSON,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
ROBERT MATEUS and	)	
KRIS MATEUS,	)	
Defendants/Appellees.)	)	Case No: 20010387-SC
	)	
	)	Priority No. 15

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BRIEF OF APPELLANT JUDITH CAMPBELL JACKSON

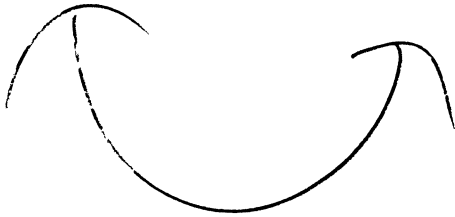
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Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
Honorable Tyrone E. Medley

---

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CLERK OF THE COURT

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## **PARTIES TO THE PROCEEDINGS**

The names of all parties to the proceedings in the lower court are set forth in the caption of the case on appeal.

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## **JURISDICTION**

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

## **STATEMENT OF THE ISSUES PRESENTED**

**Issue #1:** Whether on defendants' motion for summary judgment, the plaintiff presented sufficient evidence to make out a prima facie case of negligence against the Mateuses for their failure to control and/or restrain their cat so as to prevent the cat's attack on Mrs. Jackson.

**Standard of Review for Issue #1:** The Supreme Court reviews the trial court's summary judgment ruling for correctness. Kessler v. Mortenson, 16 P.3d 1225, 1226 (Utah 2000). The appellate court considers only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed. Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc., 970 P.2d 1273, 1277 (Utah 1998). This is the standard of review applied because summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

**Issue #2:** Whether the trial court erred in ruling, as a matter of law, that no

genuine issue of material exists regarding whether the Mateuses had any duty to control or restrain their cat, or to prevent their cat's attack.

**Standard of Review for Issue #2:** The issue of "whether a 'duty' exists is a question of law" which appellate courts review for correctness. Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986). Moreover, when deciding whether the trial court correctly found that there was no genuine issue of material fact, appellate courts review the facts and inferences to be drawn therefrom in the light most favorable to the losing party. See id. Additionally, because summary judgment is granted as a matter of law, appellate courts give the trial court's legal conclusions no deference and review the decision for correctness. See White v. Gary L. Deseelhorst, NP Ski Corp., 879 P.2d 1371, 1374 (Utah 1994).

**Issue #3:** Whether the trial court erred in ruling, as a matter of law, that there were no disputed material facts regarding whether the Mateuses' cat's attack on Mrs. Jackson was unforeseeable.

**Standard of Review for Issue #3:** See Standards of Review for Issue #2.

**Issue #4:** Whether the trial court erred in ruling as a matter of law that defendants did not violate Salt Lake County Ordinances, §§ 8.24.010, 8.04.210, and 8.24.030.

**Standard of Review for Issue #4:** An appellate court grants a trial court's construction of statutes or ordinances no deference, but reviews the decision for correctness. See Platts v. Parents Helping Parents, 947 P.2d 658, 661 (Utah 1997). Moreover, whether a statute applies to a particular set of facts is a question of law that an appellate court reviews de novo. See State v. Pena, 869 P.2d 932, 938 (Utah 1994); see also State v. Waite, 803 P.2d 1279, 1282 (Utah 1990).

**Issue #5:** Whether the trial court erred in ruling as a matter of law that the Mateuses' cat was lawfully on the Jackson's property when the attack occurred.

**Standard of Review for Issue #5:** See Standard of Review for Issue No. #1.

**Issue #6:** Whether the trial court erred in holding as a matter of law that a cat is allowed one free bite before its owners may be held liable for injuries inflicted by the cat.

**Standard of Review for Issue #6:** See Standard of Review for Issue No. #1.

### **STATUTES, ORDINANCES AND RULES**

Utah Code Ann. § 4-25-4

Utah Code Ann. § 10-8-64

Utah Code Ann. § 18-1-1 (1998)

Salt Lake County Ordinance § 8.24.010

Salt Lake County Ordinance § 8.24.030

Salt Lake County Ordinance § 8.04.210

Rule 56, Utah Rules of Civil Procedure

Rule 801, Utah Rules of Evidence

## **STATEMENT OF THE CASE**

### **Nature of the Case and Course of Proceedings**

On January 15, 1996, the Mateuses' cat attacked Judith Campbell Jackson, who was severely injured by the unprovoked attack. Mrs. Jackson brought an action in the Third District Court against the Mateuses for negligence in failing to restrain and control their pet. Mrs. Jackson appeals from the district court's grant of summary judgment for the Mateuses on all of Mrs. Jackson's claims.

### **Statement of Facts**

This case arises out of an unprovoked attack by the Mateuses' cat on Mrs. Jackson during the early morning hours of January 15, 1996. (R. 128). The attack occurred on Mrs. Jackson's own property, just outside of a sliding glass door which leads from the Jacksons' living room to a second story deck. (R. 128). Mrs. Jackson mistook the Mateuses' cat for her own cat, and opened the sliding glass door. (R. 129.) She called out the name of her cat, and extended her hand. (R. 129). The Mateuses' cat approached Mrs. Jackson, and she briefly petted the cat and then recognized that it was not hers. (R. 129). The Mateuses' cat suddenly attacked Mrs.

Jackson, inflicting severe bites and scratches to Mrs. Jackson's hand and arm. (R. 129, 160-61). At no time did Mrs. Jackson provoke the cat. (R. 160). At no time did the Jacksons ever grant authorization to the Mateuses to allow the cat on the Jacksons' property. (R. 163-66).

Mrs. Jackson identified the cat that attacked her as a "[y]ellow tiger tabby, wearing a collar, green, at least in part with a bell, well nourished, gender unknown." (R. 161). Richard Jackson, her husband, following directions of Salt Lake County animal control personnel, set traps soon after the attack, and trapped a cat exactly matching the description given by Mrs. Jackson. (R. 161). The trapped cat was taken to animal control, where the Jacksons encountered Robert Mateus, the Jacksons' neighbor. (R. 161-62.) Although the Mateuses have made some attempt to deny ownership of the cat that attacked and injured Mrs. Jackson, both Mrs. Jackson and her husband heard Mr. Mateus state that the cat that had been trapped was "clearly" his cat. (R. 161-62.) For purposes of their summary judgment motion, the Mateuses did not dispute ownership of the cat. (R. 130.)

After the Mateuses' cat attacked Mrs. Jackson, the cat was often seen in the Jacksons' yard. (R. 163). Mr. Jackson encountered the Mateuses' cat on his backyard deck near their patio door. (R. 163). He donned a pair of heavy leather gloves and proceeded to scratch the cat under the chin. (R. 163). The cat leaned into him apparently



enjoying the attention and then suddenly attacked Mr. Jackson's hand. (R. 163-64.)

Based on the record of evidence, every time the Mateuses' cat has encountered a person, other than the Mateuses, an attack has occurred. (R. 160-61, 163-64). Subsequent to the second attack by their cat, the Mateuses continued to allow the cat to roam free, and the cat was routinely seen in the Jacksons' yard. (R. 165).

The bites inflicted by the Mateuses' cat forced Mrs. Jackson to undergo surgery on her hand to combat the severe infection that resulted from the bites. (R. 166). Dr. Vanderhoof, the doctor who performed the surgery on Mrs. Jackson, stated in his deposition that cat bites are particularly virulent because cats have long, sharp teeth, and the animals' mouths are filthy and contain bacteria that causes severe infections. (R. 166). Dr. Vanderhoof also stated that cat bites tended to be more problematic, in terms of resulting serious infections, than dog bites. (R. 166).

Prior to being attacked by the Mateuses' cat, Mrs. Jackson had a medically stable autoimmune disorder. (R. 165-66.) The severe and widespread infection inflicted by the cat bites resulted in throwing the autoimmune disorder into a state of medical instability, and caused her to have to undergo several surgeries. (R. 166). In 1998, Mrs. Jackson was forced to undergo a procedure on her esophagus that was closed up by strictures, which left her with a severely painful throat. (R. 167). In 1999, Mrs. Jackson was required to have her submandibular salivary glands removed due to their propensity to

become infected as a direct result of the aggravation of her autoimmune disorder. (R. 167). The removal of the submandibular salivary glands deprived Mrs. Jackson of the ability to produce saliva. (R. 167). Now Mrs. Jackson is prone to oral lesions, and develops bone spurs in her mouth that must be removed periodically. (R. 167).

In addition, as a result of the cat attack and resulting infection, Mrs. Jackson developed Frey's syndrome, which causes gustatory salivation. (R. 167). The condition causes the nerve endings from the parotid glands to attach to the sweat glands in the side of the face and resulted in the production of drenching sweat on the sides of Mrs. Jackson's face when she ate. (R. 167). Mrs. Jackson was forced to undergo surgery in which her sternocleidomastoid muscle was dissected and a portion of the muscle was pulled into her cheek to create a barrier between the nerve endings and the sweat glands to correct the condition. (R. 167). The surgery left a noticeable scar along Mrs. Jackson's jaw line just below her ear. (R. 167-68).

### **SUMMARY OF ARGUMENT**

The district court erred in granting the Mateuses' motion for summary judgment because it had evidence of negligence on the part of the Mateuses. The district court failed to apply the common law which requires animal owners to exercise reasonable control over their animals and prevent injuries to others. This rule of law was discussed

in the case of Pullan v. Steinmetz, 16 P.3d 1245 (Utah 2000), but not applied, as articulated in Restatement (Second) of Torts § 518.

The court below also erred in failing to hold that the Mateuses were negligent for violating Salt Lake County Ordinances, which are safety statutes designed to prevent attacks by animals. The ordinances impose liability for animal owners' negligence regardless of the owner's knowledge of an animal's propensity to bite. A jury considering such statutes could have found that the Mateuses were negligent in failing to control their cat and prevent the attack on Mrs. Jackson.

The Mateuses argued, and the district court agreed that a cat is entitled to one free bite before liability may be imposed on the owner. The one free bite rule is falling into disfavor in many jurisdictions as evidenced by the enactment of strict liability dog bite statutes. There is no logical or just reason why cat owners should be allowed to escape liability when dog owners are held liable for the first bite of their pets. The reasons articulated in Pullan by the Court for not extending liability under the dog bite statute to horse owners do not apply to cats. As predatory animals capable of inflicting serious and life changing injuries, cats should be treated in a manner similar to dogs. The Mateuses should be held liable for failing to control their pet and for allowing it to attack and severely injure Mrs. Jackson.

## **RELIEF SOUGHT ON APPEAL**

The Court should reverse the judgment of the trial court that granted summary judgment to the defendants, and the case should be allowed to go to trial and have a jury decide the disputed factual issues.

## **ARGUMENT**

### **POINT I.**

#### **MRS. JACKSON'S NEGLIGENCE CLAIMS AGAINST THE MATEUSES SHOULD NOT HAVE BEEN DECIDED ON SUMMARY JUDGMENT.**

- a. Summary judgment is rarely the appropriate procedure for resolving a negligence claim.**

The trial court erred in stripping Mrs. Jackson of her right to have her negligence claims against the Mateuses heard before a jury. Mrs. Jackson has presented evidence showing that the defendants were negligent in allowing their cat to injure her. This Court has ruled that summary judgment is rarely an appropriate remedy for resolving negligence actions, Williams v. Melby, 699 P.2d 723, 728 (Utah 1985), and this case does not present the rare situation where summary judgment for the defendant was clear or unmistakable.

The trial court also erred in usurping the jury's prerogative to determine whether the Mateuses breached the required standard of care, as that question is generally a jury

question, Jackson v. Dabney, 645 P.2d 613 (Utah 1982), to be determined by whether the injury which occurred was of the type that fell within the zone of risk created by the defendants' negligent conduct. "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); see also Eaton v. Savage, 502 P.2d 564 (Utah 1972); Wheeler v. Jones, 431 P.2d 985, 988 (Utah 1967).

**b. Summary judgment was improperly granted where Mrs. Jackson presented a prima facie case of negligence against the Mateuses.**

A prima facie case of negligence requires a showing of: (1) a duty of reasonable care extending to plaintiff; (2) breach of that duty; (3) proximate and actual causation of the injury; and (4) damages suffered by plaintiff. Williams, 699 P.2d at 726. The court erred in finding that Mrs. Jackson did not present a prima facie case of negligence against the Mateuses. Specifically, the district court erred in holding that the Mateuses did not have a duty to protect Mrs. Jackson from their cat and that, absent a showing that the cat had attacked anyone before, the attack on Mrs. Jackson was unforeseeable. (See, R. 530).

However, Utah law, as articulated in Pullan v. Steinmetz, 16 P.3d 1245 (Utah 2000) and Salt Lake County's ordinances do not require a showing, in certain instances,

that an animal owner had prior knowledge of an animal's viciousness in order to hold them liable for their animal's attacks. The district court should have held the Mateuses liable for failing to restrain and control their cat and for failing to control their cat so as to prevent the attack on Mrs. Jackson. At the very least, the court should have allowed a jury to determine whether the Mateuses were negligent.

For purposes of their summary judgment motion, the Mateuses conceded that their cat attacked and injured Mrs. Jackson. The Mateuses submitted an affidavit in which they professed a lack of knowledge of their cat's vicious tendencies. However, contrary evidence was also submitted to the district court that the Mateuses' cat inflicted a vicious, unprovoked attack on Mrs. Jackson. Moreover, the trial court had evidence from Richard Jackson that the Mateuses' cat had also attacked him and that, as an owner of cats himself, it was his observation that the Mateuses' cat "had a mean streak." This evidence, and all inferences which can be drawn from it, viewed in a light most favorable to Mrs. Jackson, showed that the Mateuses knew or should have known of the vicious and ill-tempered tendencies of their cat. Based on the evidence before the trial court, summary judgment should not have been granted.

The district court also received evidence consisting of Salt Lake County Ordinance § 8.24.010, which defines a vicious animal as one which "bites, inflicts injury, assaults, or otherwise attacks a human being..." Salt Lake County Ord. § 8.24.010(B). Under a plain

reading of the § 8.24.010, prior knowledge of an animal's viciousness is irrelevant for purposes of imposing liability for injuries inflicted by an animal. This evidence presented a genuine issue of material fact as to the viciousness of the cat, and should have precluded summary judgment. The trial court erred in ignoring such evidence and in granting summary judgment for the Mateuses.

**POINT II:**

**DEFENDANTS SHOULD BE LIABLE  
FOR BREACHING THEIR COMMON  
LAW DUTIES TO CONTROL THEIR CAT.**

**a. The common law requires that pet owners control their animals.**

The district court erred in ruling, as a matter of law, that the Mateuses had no duty to control their cat. The court also erred in failing to rule that the Mateuses did not exercise reasonable care to keep their animal under control. Commentators, citing the common law, have recognized that domestic animal owners have a duty to control their pets:

[u]nder the common law, as articulated in the Restatement, Torts 2d § 518, even if the owner or keeper of a domesticated animal does not know or have reason to know that the animal is abnormally dangerous, he has a duty to exercise reasonable care to keep the animal under control.

Cheryl M. Bailey, Annotation, *Liability for Injuries Caused by Cat*, 68 ALR 4<sup>th</sup> 823, 829 (1989) (emphasis added). The Annotation also states: “[i]n some jurisdictions, statutes have abrogated that requirement [that owners know of their animal’s viciousness],

imposing liability on the owner or keeper of a domesticated animal even though he did not know of its viciousness or mischievous propensities.” *Id.* at 830.<sup>1</sup> In this case, at the very least, a genuine issue of material fact exists regarding whether the defendants exercised reasonable care in keeping their cat under control. The district court erred by failing to find that the Mateuses did not exercise reasonable care to keep their animal under control, especially in light of the fact that the cat had no right to be on the Jackson’s property when the attack occurred.

**b. Restatement (Second) of Torts § 518 states that an animal owner has a duty to control its animals.**

Mrs. Jackson alleged in her Complaint that: “Defendants negligently failed to restrain and control their cat, proximately resulting in the attack and bite, and plaintiff’s injury and damages.” (R. 1.) Under the common law, an animal owner has a duty to exercise reasonable care to keep the animal under control. Restatement (Second) of Torts § 518, articulates that duty and imposes a duty of reasonable care upon an animal owner to control its animals. Section 518 states in pertinent part:

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, but only if:

....

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

---

<sup>1</sup>As will be shown below, Utah has enacted such a statute. See, Utah Code Ann. § 18-1-1, et seq.



See also Drake v. Dean, 19 Cal. Rptr. 2d 325, 331 (Cal. App. 1993) (quoting Section 518 and stating that “[t]he common law recognizes negligence as a distinct legal theory of recovery for harm caused by domestic animals that are not abnormally dangerous.”)

Comment e of Section 518 states that animal owners are “under a duty to exercise reasonable care to have them under a constant and effective control.” Moreover, comment h of Section 518 mandates that an owner is “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.” Whether or not the Mateuses had prior knowledge of their cat’s viciousness, under common law, they can and should be held liable for injuries inflicted by their animal based on their failure to control the animal or their failure to take steps to prevent their animal from coming into contact, without their supervision, with other persons.

**c. Foreseeability under the Pullan v. Steinmetz case.**

This Court recently addressed the issue of whether to adopt Restatement (Second) of Torts, § 518 in Pullan v. Steinmetz, 16 P.3d 1245 (Utah 2000). The Court left for another day the decision whether to adopt Section 518. However, the day has come.

This Court, in Pullen, stated that the plaintiff could not show that harm to Arielle Pullen was unforeseeable because the defendants had no knowledge that the plaintiff or other children were entering the stables and feeding the horses. Id., 2000 UT 103, ¶ 13.

On its face, the case states that the harm was unforeseeable because the contact between human and animal was unforeseeable.<sup>2</sup>

In this case, the undisputed facts reveal that an entirely different situation occurred. The Mateuses claim the right to allow their cat to enter on the Jackson's private property. The Mateuses conceded that they made no effort to control their pet's activities and failed to prevent their cat from trespassing on others' property. (R. 133.) The Mateuses should have been aware that their cat would come into contact with other persons. They should have also known that "even ordinarily gentle animals are likely to be dangerous under particular circumstances" and that their cat's contact could result in an attack and harm to innocent persons. The reasoning set out by the Court in Pullan favors the adoption of Section 518 and application of that Section in this case to hold the Mateuses liable for the harm caused by their animal to Mrs. Jackson, because their cat's contact with others was foreseeable.

Reading Pullan and Looney v. Bingham Dairy, 260 P. 855 (1929), together, it is readily apparent that Utah courts have endeavored to create a balance between the right of animal ownership and the protection of innocent third parties from injury by those

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<sup>2</sup> "Simply maintaining a horse in a stable in a residential subdivision **without any knowledge or 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 the defendant.**" Pullan, 2000 UT 103 at ¶ 13. Emphasis added.

animals. The court in Looney, stated 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.” Id., at 857. Emphasis added. This quote from Looney shows how the district court erred in the present case: When an animal is confined and is previously unknown to be vicious, the animal is unlikely to be placed in a position to cause injuries to others. Moreover, if the animal is confined, its contact with third persons is regulated, and the chance that an injury will occur is decreased. However, where, as in the present case, an animal is allowed to stray, and its actions are unsupervised, the animal owner cannot claim that an animal is “rightly at the place where the injury occurs”, and there is no requirement that the owner show that prior viciousness was not known. Where the animal is wrongfully at the place that an attack occurs, an animal owner should not be allowed immunity from liability under the rules set out in Looney and Pullan.

In this case, the Mateuses’ cat was not rightly on the Jackson’s property when the injury occurred, and therefore, Mrs. Jackson need not show that the Mateuses have knowledge of their cat’s viciousness in order to impose liability for the cat’s attack. The above analysis reveals the injustice of the district court’s ruling. The grant of summary judgment to the Mateuses relieves a pet’s owners of all responsibility over and for their pet’s actions, even where their actions have allowed the cat to come into contact with

others in the first place. Moreover, the rule places the burden of regulating pets, and of dealing physically, financially, and emotionally, with the injuries caused by other person's animals, on persons significantly less able to control the animals. The rule of law advocated by the Mateuses and approved by the trial court relieves the party most able to control an animal of all responsibility to do so, and instead places that burden on innocent third parties like Mrs. Jackson. If this Court is to continue utilizing tort law as a device for protecting society, the parties most able to prevent injuries, the Mateuses in this case, must be held accountable for their failure to do so.

**d. Pullan's requirement that an animal be rightly at the place where the injury occurred.**

Returning to Pullan, it must be noted that the Pullens conceded that they could not meet the test for imposing liability on either of the Defendants because the horse was rightly at the place where the injury occurred. However, in this case, Mrs. Jackson does meet the test for imposing liability on the Mateuses, because their cat was not rightfully on Ms. Jackson's property. The cat was an unwelcome trespasser at the time it attacked Mrs. Jackson. The record reveals that Mrs. Jackson momentarily mistook the Mateuses' cat for her own cat. Mrs. Jackson's temporary mistake of identity did not change the animal's unwelcome status, and the trial court erred in holding that the Mateuses' cat had a right to be on the Jacksons' property.

Utah's courts and the Utah Legislature, as well as the Salt Lake County's governing body, have recognized that animals have no right to trespass on other's property, and in certain instances have imposed liability on animal owners when they fail to restrain and/or prevent their animals from trespassing. See, e.g., Utah Code Ann. § 10-8-64 (which gives boards of commissioners and city councils of cities power to regulate and prohibit animals from running at large, within the limits of a city); Utah Code Ann. § 4-25-4 (the purpose which is "to afford protection to the owners or real property against animals trespassing thereon.")<sup>3</sup> See, Nielsen v. Hyland, 170 P. 778, 780-81 (Utah 1918)(stating that one of the purposes of the statute regarding animal trespass is to afford protection to the owners or real property against animals trespassing thereon.) From these authorities, there is a general recognition in Utah that animals have no legal right to be on another's property without permission from the property owner.

This point is supported by Section 8.24.030 of the Salt Lake County Ordinances which states, in pertinent part, that it is unlawful for an animal owner to allow certain animals off their premises unless the animal is restrained:

It is unlawful for the owner of any fierce, dangerous or vicious animal to permit such animal to go off or be off the premises of the owner unless such

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<sup>3</sup> Mrs. Jackson concedes that Utah Code Ann. § 4-25-4 deals with large animals. However, this statute is indicative of a public policy against allowing an animal belonging to one person to enter on another's property.

animal is under restraint and properly muzzled so as to prevent it from injuring any person or property. . . .

Salt Lake County Ord. § 8.24.030. Because the defendants' cat was vicious<sup>4</sup>, fierce and/or dangerous, it should not have been allowed to leave the defendants' premises without restraint.<sup>5</sup>

Violation of the above ordinance is just one example of the fact that defendants' cat was not rightfully on the Jacksons' property when the attack occurred. Defendants cannot show that their cat was rightfully on the Jacksons' property at the time the cat viciously attacked Mrs. Jackson, and they may be held liable for their negligence, without requiring knowledge of viciousness of the cat, under Utah law.<sup>6</sup>

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<sup>4</sup>Salt Lake County Ordinance § 8.24.010, which defines a vicious animal as one which "bites, inflicts injury, assaults, or otherwise attacks a human being..." Salt Lake County Ord. § 8.24.010(B).

<sup>5</sup>Viewed in a light most favorable to Mrs. Jackson, the facts reveal that the Mateuses cat was vicious, fierce, and dangerous.

<sup>6</sup>This analysis of absence of foreknowledge under the common law does not even take into account the Salt Lake County Ordinance, § 8.24.210(C), which is clear in its imposition of liability even where a pet owner has no foreknowledge of any propensity of an animal to attack or cause injury.

- e. Animal owners are required to understand that gentle animals can be dangerous and are required to prevent foreseeable harm.**

The Court in Pullan continued its analysis of the plaintiff's negligence cause of action and addressed the standards set out in Restatement (Second) of Torts, § 518, and referenced comment h of Section 518, which provides:

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 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.*

(Emphasis added). This Court found that the plaintiff in Pullan would be unable to meet the requirements for imposing liability because the harm was unforeseeable.

However, comment h supports a finding that the Mateuses were negligent. A cat is likely to be dangerous so as to require that its owner take care to prevent foreseeable harm. Certainly, a cat's sharp claws and long, sharp teeth combined with its predatory instincts and its tendency to attack and kill prey are traits of which a cat owner are required to know.<sup>7</sup> It is entirely foreseeable that when a cat is allowed to stray without restraint, it will come into contact with other persons and be placed in a situation where it could attack and bite a person. Under Section 518, comment h, the Mateuses were

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<sup>7</sup> "By nature, cats are predatory animals, stalking, chasing, catching, sometimes 'toying with,' then finally killing their prey, using their claws and teeth at various stages throughout the ritual." Cheryl M. Bailey, Annotation, *Liability for Injuries Caused by Cat*, 68 ALR 4<sup>th</sup> 823, 829 (1989).

negligent in failing to realize that their cat, even if ordinarily gentle, could come into contact with and harm other persons with its sharp teeth and claws. They were negligent in failing to prevent their cat from coming into contact with others and for failing to prevent Mrs. Jackson's injuries. Contrary to the defendants' unsupported assertion below that cat owners cannot anticipate that their animals may attack or injure some innocent person, Mrs. Jackson presented evidence to the trial court in the form of Dr. Vanderhoof's deposition, where he testified that cat bites "are not uncommon" and that they can result in serious injuries. The Mateuses presented only unsupported argument that cat bites cannot be expected.<sup>8</sup>

The Mateuses have also argued that cats are not inherently dangerous animals.<sup>9</sup>

However, their argument fails to recognize the reality articulated in Comment h of the

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<sup>8</sup> Again, what defendants were really arguing was foreseeability, which was a question of fact which should not have been resolved on summary judgment. The issue of whether the cat bite was foreseeable should have been allowed to go to a jury.

<sup>9</sup> Which was irrelevant to the issues before the trial court. However, it is significant to note that despite the fact that Utah and several other jurisdictions have dog bite statutes, courts have found that the dog species as a whole (excepting generally attack or fighting dogs) is not inherently dangerous. Lundy v. California Realty, 216 Cal. Rptr. 575 (1985) (refusing to notice judicially that German shepherds are inherently dangerous); Sea Horse Ranch, Inc. v. Superior Court 30 Cal. Rptr. 2d 681 (1994) (quoting Rolen v. Maryland Casualty Company, 240 So.2d 42, 44, (La.Ct.App. 1970) overruled on other grounds, Holland v. Buckley 305 So.2d 113, 114, 117 (La. 1974) ("With regard to tort liability for keeping mischievous animals, most jurisdictions follow the rule that. . . animals which have become domesticated by man, such as horses, cows, dogs, et cetera, . . . are regarded as inherently safe."))



Restatement § 518, that any animal can be dangerous in particular situations. The Mateuses' complete failure to regulate and control their cat's activities, and their uncaring attitude for the rights of others living in close proximity to them shows a failure to exercise reasonable care to prevent Mrs. Jackson's severe injuries.

The Mateuses have also argued that cats are good animals and are beneficial to mankind and therefore liability for their pet's attack on Mrs. Jackson should not be imposed on them. While persons may disagree regarding the merits of the cat species, the inherent qualities of cats are not at issue in this case. The defendants' negligence is the issue, and the trial court erred in holding as a matter of law that they should not be held liable for their failure to control their cat. The district court had evidence of the Mateuses' negligence and erred in granting summary judgment.

### **POINT III**

#### **A JURY COULD FIND THAT THE MATEUSES WERE NEGLIGENT DUE TO THEIR VIOLATIONS OF SALT LAKE COUNTY ORDINANCES.**

Salt Lake City Ordinance § 8.24.010 imposes liability on pet owners, when the animal attacks another person, even where an owner may not know of the animal's vicious propensities. Section 8.24.010 provides in pertinent part:

Any owner or person having charge, care or 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.

Salt Lake County Ord. § 8.24.010(A).

Subsection B of the ordinance defines an animal as a nuisance as follows, “[a]ny animal which bites, inflicts injury, assaults, or otherwise attacks a human being or domestic animal on public or private property.” See, Salt Lake County Ord., § 8.24.010(B).

Salt Lake County Ord. § 8.24.030 also provides that:

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 . . . .

These ordinances impose liability on a pet owner when he or she fails to properly control and restrain a pet so as to prevent injuries and attacks. The Salt Lake County ordinances do not in this case, as argued by the defendants before the district court, impose strict liability on pet owners or require that all animals to be confined at all times. Rather, the ordinances are merely evidence of the Mateuses’ negligence and require them to control their pet and take steps to prevent injuries and damages, such as Mrs. Jackson experienced.

Violation of a safety standard set by statute or ordinance constitutes prima facie evidence of negligence.<sup>10</sup> Adkins v. Uncle Bart’s, Inc., 1 P.3d 528 (Utah 2000). It cannot

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<sup>10</sup> Prima facie evidence is “[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced

be disputed that Salt Lake County Ordinance § 8.24.010 and § 8.24.030 are safety statutes designed to protect human beings against the negligence of animal owners and the danger of animal attacks. Furthermore, the undisputed material facts show that the Mateuses violated the ordinance by failing to control an animal that “bites, inflicts injury, assaults, or otherwise attacks a human being.” See, Salt Lake Ord. § 8.04.210(C).

The rule of law adopted by the trial court is contrary to the plain language of Salt Lake County Ordinance § 8.24.030, which states that a vicious animal that bites, inflicts injury, assaults or otherwise attacks a human being, must be kept “under restraint [while off the owner’s premises] and properly muzzled to prevent it from injuring any person or property.” Id. Under the Salt Lake County Ordinances cited above, if a pet owner fails to control their pet while the animal is off their property, the owner may be held liable for injuries that animal inflicts.

Mrs. Jackson provided evidence to the trial court which supported a finding that the Mateuses violated Salt Lake County Ordinances. Contrary to Salt Lake County Ordinance § 8.24.010, the Mateuses had care, custody or control over an animal that caused a nuisance. Contrary to Salt Lake County Ordinance § 8.24.030, the Mateuses

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with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented.” Child v. Gonda, 972 P.2d 425, 432 (Utah 1999) (quoting Gaw v. State, 798 P.2d 1130, 1190 (Utah. App.1990)). Prima facie evidence of negligence is evidence which would be sufficient to submit the question of negligence to the jury and support a verdict of negligence. Id.

allowed a vicious or dangerous animal off their premises and allowed it to come into contact with and attack Mrs. Jackson. The evidence of the defendants' negligence should have been submitted to the jury who could have then returned a verdict of negligence. The trial court erred in not allowing the issues to go to the jury.

#### **POINT IV**

#### **UTAH LAW DOES NOT ALLOW AN ANIMAL ONE FREE BITE BEFORE LIABILITY IS IMPOSED ON A PET OWNER.**

The “one free bite” theory advocated by the defendants is unsupported by Utah law. The defendants’ theory is particularly unsustainable in this case where the Mateuses’ cat was trespassing, and was not rightly on the Jackson’s property at the time of the attack. In their summary judgment motion, the Defendants cited a 1989 ALR Annotation (which Mrs. Jackson also quoted and which states that a cat owner must use reasonable care, even without knowledge of viciousness, to control their cat), a 1987 Georgia case (Fellers v. Carson, 356 S.E.2d 658 (Ga. App. 1987)), and a 1976 Nebraska case (Lee v. Weaver, 237 N.W.2d 149 (Neb. 1976)), and argued that “most” jurisdictions require notice to an owner of an animal’s viciousness before imposing liability on the owner for injuries caused by the animal.

The outdated notion advocated by the defendants and upheld by the trial court was shown to be falling into disfavor around the country. Mrs. Jackson provided the district

court with evidence that courts and legislatures around the United States are moving toward a more rational, principled and fair approach for imposing liability on pet owners when their pets cause damages to innocent persons. Utah has moved away from allowing one free bite by dogs, as shown by the Utah Dog Bite Statute, found in Utah Code Ann. § 18-1-1, et seq.

Other states have also disposed of the outdated notion that an animal is allowed a free bite before liability is imposed on its owner. For example, in Pennsylvania, the legislature has amended its “Dangerous Dog Statute,” and provides that the propensity of an animal to attack may be proven by a single incident of infliction of severe injury or attack on a human being without provocation. See 3 P.S. §§ 459-502-A to 459-507-A; 3 P.S. § 459-501-A (Repealed); Commonwealth v. Hake, 738 A.2d 46 (Pa. Commw. Ct. 1999) (discussing the statute); See also Montana Code Ann. § 27-1-715; (providing that dog owners are strictly liable for damages caused by their dogs); Arizona Revised Statutes. § 11-1020 (same); Minn. Stat. § 347.22 (1990)( which reads in part: “If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained.”) Among others, these states have done away with the antiquated “one free bite” rule.

Additionally, characterizing the rule as being one that was short of strict liability, the court, in Hossenlopp v Cannon, 329 S.E.2d 438 (S.C. 1985), approved for use in South Carolina a California jury instruction based on a California statute which holds a dog owner liable for injuries inflicted by the animal, regardless of knowledge, or lack thereof, of the animal's viciousness, and regardless of negligence, providing that the victim does not invite attack or expose himself to attack while on the owner's property. Applying that standard, the South Carolina Supreme Court held that a dog's owners were liable as a matter of law for dog bite injuries to a 4-year-old boy, notwithstanding the owners' claim that there was a factual issue regarding their knowledge that their dog had previously harmed others or had dangerous propensities. Accordingly, the court affirmed the grant of summary judgment in favor of the injured boy on the issue of liability.

With regard to the Georgia case of Fellers v. Carson, 356 S.E.2d 658 (Ga.App. 1987), cited by Mateuses, that case was analyzed in the later case of Fields v. Thompson, 378 S.E.2d 390 (Ga.App. 1989). Fields noted that Fellers predated the enactment of a Georgia statute § 51-2-7, which provides, in pertinent part, as follows:

A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time not at heel or on a leash.

The defendant in Fields, like defendants in this case, argued that he could not be held liable for his animal's attacks because he had no knowledge of the animal's vicious propensities. However, the court rejected the defendant's arguments pointing out that all of the cases cited by the defendant in support of his position predated the amended statute cited above. Therefore, that court held that the trial court erred in granting the defendant summary judgment and reversed the judgment.

Fields is illustrative in showing that courts and legislatures are coming to realize that giving an animal one free bite is no more just than allowing a motorist one free accident, or a doctor one free instance of malpractice, or a criminal one free crime before deciding to impose liability for such actions.<sup>11</sup> Moreover, the "one free bite" theory advocated by the defendants is particularly unsuited for this case where the undisputed facts show the defendants to be notoriously irresponsible pet owners. It is not surprising that defendants claim to be unaware of any other injuries inflicted by their cat. The evidence shows that the defendants seem to turn a blind eye to their animals' activities.

Despite the evidence that shows that the defendants do not take steps to regulate their animals or even take steps to practice ordinary, safe, or prudent pet control, they

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<sup>11</sup> Defendants are correct in stating that, unfortunately, Nebraska continues to follow the old rule allowing animals one free bite. However, the Nebraska case cited by the defendants is inapposite to this case as Utah legislators in Utah Code Ann. § 18-1-1, et seq., and the Salt Lake County Ordinances show an express rejection of the worn-out "one free bite" rule.

argue that they cannot be held liable unless they were aware of any prior instances of attacks or injuries. However, neither the common law, nor Utah statutes or the Salt Lake County ordinances allow persons to avoid liability by asserting ignorance of their pet's dangerous activities. The trial court erred in so ruling.

**POINT V:**

**LIABILITY FOR INJURIES INFLICTED  
BY A CAT SHOULD BE REGARDED  
IN A MANNER SIMILAR TO THOSE  
INFLICTED BY A DOG, OR ANY OTHER PET.**

**a. Cat bites are common.**

Cat bites, while perhaps occurring less frequently than dog bites are nevertheless common and can often be much more severe and dangerous. The district court was presented evidence in the form of the deposition of Dr. Eric Vanderhoof, who stated in his deposition that cat bites are common and can be very serious:

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.) Given the fact that cat bites are more dangerous than dog bites, in terms of possible infection, there is no reason why the trial court or this Court should give a cat owner the safe harbor of having one free bite when Utah dog owners receive no such escape from liability.

**b. Utah law does not allow a dog one free bite.**

The Utah Legislature has eliminated the element of foreknowledge of a dog's viciousness in order to hold a dog owner liable for his animal's attacks in Utah Code Ann. § 18-1-1, as follows:

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.

Utah Code Ann. § 18-1-1. Emphasis added.

Despite a conscious decision by the Utah Legislature to impose liability on dog owners for their animal's attacks, without requiring a showing that the owner know of previous attacks, the Mateuses argue that they cannot be held liable for a cat attack under similar circumstances. The Mateus's argument defies logic. The Utah Legislature has

made an express decision to reject the antiquated “one free bite” doctrine, and there is no reason why that decision should not apply with equal weight to cats as well a dogs.

Placing the burden of controlling an animal, whether cat or dog, on the pet’s owners reflects a just and principled approach to preventing animal attacks. Imposing liability on pet owners also places the burden of preventing such attacks on the party most capable to do so. By acting responsibly, a pet owner is in the best position to control and restrain the animal and not allow it off of the owner’s property, train the animal not to attack or be dangerously aggressive, and prevent it from harming others. In addition, by imposing liability on the Mateuses, Mrs. Jackson, an innocent party, is not required to bear the costs of the Mateuses’ negligence. Notions of justice and fair play require that the Mateuses be held liable for their actions and for the actions of their cat. Therefore, the trial court’s ruling should be reversed, and the case should be allowed to proceed to trial where the issues presented to the Court will be justly adjudicated.

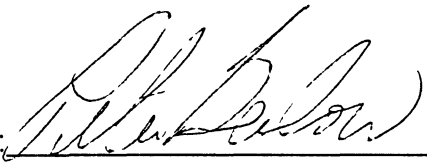
### **CONCLUSION**

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 contract 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.

Utah law does not allow an animal one free bite where the animal is an unwelcome trespasser on its victim's property. Because the Mateuses' cat has no legal right to be on Mrs. Jackson's property, there was no requirement that she show that the Mateuses have prior knowledge of their cat's vicious propensities. The district court erred in so ruling. Therefore, the district court's grant of summary judgment for the Mateuses should be reversed and the district court should be order to allow the case to go to trial.

DATED this 12 day of October, 2001.

STRONG & HANNI

By: 

Roger H. Bullock

Peter H. Barlow

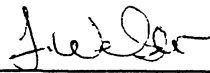
Attorneys for Plaintiff/Appellant

Judith Campbell Jackson

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 12<sup>th</sup> day of October, 2001, a true and correct copy of the foregoing Brief of Appellant Judith Campbell Jackson was mailed, first-class postage prepaid, to the following:

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\_\_\_\_\_

**ADDENDUM A:**

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT**

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**FILED DISTRICT COURT**  
Third Judicial District  
APR - 2 2001  
By SALT LAKE COUNTY  
Deputy Clerk

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JUDITH CAMPBELL JACKSON,

Plaintiff,

vs.

ROBERT MATEUS and KRIS MATEUS,

Defendants.

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S CROSS-MOTION  
FOR SUMMARY JUDGMENT**

Civil No. 990904929

Judge Tyrone Medley

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Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment came on for hearing before the Honorable Tyrone Medley on March 5, 2001, at 9:00 a.m. Plaintiff Judith Jackson Campbell was present. Plaintiff was represented by counsel Roger Bullock and Peter Barlow. Defendants Robert Mateus and Kris Mateus were represented by counsel Melinda A. Morgan. The Court, having reviewed the file in this matter, and having permitted supplemental briefing by the parties, and otherwise being fully advised, now makes and enters the following ruling:

### **FINDINGS OF FACT**

1. This action arises out of a cat bite that occurred on or about January 15, 1996, in Salt Lake County, State of Utah.
2. Plaintiff alleges that she was injured as a result of that cat bite because defendants “negligently failed to restrain and control their cat.” See Complaint at ¶ 3.
3. Even though the defendants dispute that it was their cat that actually bit plaintiff, for the purposes of these motions, defendants assumed that their cat was the one that bit plaintiff.
4. Plaintiff provided no evidence to show that defendants had any prior knowledge that their cat would cause harm to anyone, including bite or attack anyone.

### **CONCLUSIONS OF LAW**

1. A prima facie case of negligence requires plaintiff to establish a duty owed to her by defendants.
2. In order to establish that duty, plaintiff has the burden to prove that it was foreseeable to the defendants that their cat would bite plaintiff.
3. Plaintiff is unable to show that it was foreseeable to the defendants that their cat would harm anyone, including bite or attack anyone.
4. Since plaintiff could not establish that the cat bite was foreseeable to defendants, plaintiff is unable to show that the defendants owed her a duty to restrain their cat.

5. Because plaintiff cannot establish a duty was owed to her by defendants, and because the establishment of this duty is necessary to prove a prima facie case of negligence against defendants, plaintiff is unable to prove a case of negligence against them.

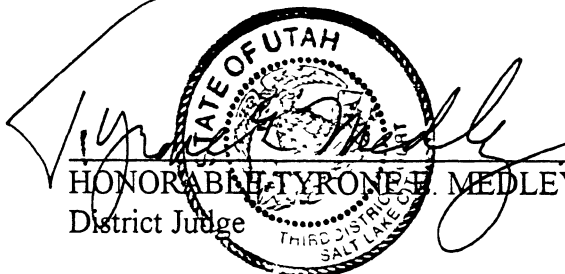
6. This Court adopts the analysis and authorities of Defendants' Memorandum in Support of Summary Judgment, defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, and defendants' Supplemental Briefing on Defendants' Motion for summary Judgment, with one exception: this Court is not granting summary judgment to defendants on the basis of defendants' argument that the Salt Lake County Ordinances are unconstitutional.

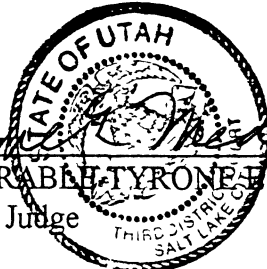
### **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, defendants' Motion for Summary Judgment is GRANTED, and plaintiff's Cross-Motion for Summary Judgment is DENIED. Plaintiff's Complaint is hereby dismissed with prejudice in its entirety, each party to bear its own costs.

DATED this 2 day of April, 2001.

BY THE COURT:


  
HONORABLE TYRONE E. MEDLEY  
District Judge





APPROVE AS TO FORM:

STRONG & HANNI



ROGER H. BULLOCK

PETER H. BARLOW

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered on this 27th day of March, 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  
350037

**ADDENDUM B:**

**SALT LAKE COUNTY  
ORDINANCE § 8.04.210**

**8.04.210 Vicious animal.**

"Vicious animal" means:

- 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 attach 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. (Ord. 1019 § 3, 1988: prior code § 100-1-1 (20))

**ADDENDUM C:**

**SALT LAKE COUNTY  
ORDINANCE § 8.24.010**

**8.24.010 Nuisance acts designated--Penalties.**

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:

- a. Causes damages to the property of anyone other than its owner,
- b. Is a vicious animal as defined in this title and kept contrary to Section 8.24.030 below,
- c. Causes unreasonable fouling of the air by odors,
- d. Causes unsanitary conditions in enclosures or surroundings,
- e. Defecates on any public sidewalk, park or building, or on any private property without the consent of the owner of such private property, unless the person owning, having a proprietary interest in, harboring or having care, charge, control, custody or possession of such animal shall remove any such defecation to a proper trash receptacle,
- f. Barks, whines or howls, or makes other disturbing noises in an excessive, continuous or untimely fashion,
- g. Molests passersby or chases passing vehicles,
- h. Attacks other domestic animals,
- i. Otherwise acts so as to constitute a nuisance or public nuisance under the provisions of Chapter 10, Title 76, Utah Code Annotated (1953);

2. Any animals which, by virtue of the number maintained, are offensive or dangerous to the public health, welfare or safety. (Prior code § 100-1-16)

**ADDENDUM D:**

**SALT LAKE COUNTY  
ORDINANCE § 8.04.030**

Title 8 ANIMALS

Chapter 8.24 ANIMAL BITES AND NUISANCES

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**8.24.030 Fierce, dangerous or vicious animals.**

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. (Prior code § 100-1-15)