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John T. Balle, Alisha Balle, Amber Balle, John T. Balle, Amie Balle, Ashlee Balle, Andrea Balle, Anjalee Balle, Amanda Balle v. Bryce Thomas, Quinn Erickson and Kevin Roseman : Brief of Respondent

Utah Court of Appeals

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Bradley H. Parker; Parker, McKeown & McKonkie.

J. Kent Holland; Anderson & Holland.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

COURT OF APPEALS
BRIEF

JOHN T. BALLE, an Individual,)
ALISHA BALLE, AMBER BALLE, and)
JOHN T. BALLE as the parent)
and general guardian of AMIE)
BALLE, ASHLEE BALLE, ANDREA)
BALLE, ANJALEE BALLE, and)
AMANDA BALLE, minor children,)

Plaintiffs/Appellants,)

v.)

BRYCE THOMAS, QUINN ERICKSON)
and KEVIN ROSEMAN,)

Defendants/Respondents.)

Case No. 940480-CA

Priority 15

940480

ON APPEAL FROM AN ORDER OF SUMMARY JUDGMENT
ISSUED BY THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH,
HONORABLE RAY M. HARDING, JUDGE.

BRIEF OF RESPONDENT KEVIN ROSEMAN

Bradley H. Parker, #2519
PARKER, McKEOWN & MCKONKIE
4001 South 700 East, Suite 500
Salt Lake City, Utah 84107
Tel: (801) 363-9345

J. Kent Holland #1520
ANDERSON & HOLLAND
P.O. Box 11643
623 East 100 South
Salt Lake City, Utah 84157-0643

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BRIEF OF RESPONDENT KEVIN ROSEMAN

STATEMENT OF JURISDICTION

Jurisdiction in this matter is proper pursuant to Utah Code Annotated § 78-2a-3(2)(k).

ISSUE PRESENTED AND STANDARD OF REVIEW

The issue presented is as follows:

Did the trial court err in granting summary judgment in this matter based upon its interpretation of Utah Code Annotated §41-6-38 and the uncontroverted evidence presented?

In reviewing the trial court's ruling on a summary judgment motion, this Court reviews the matter for correctness. Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991).

DETERMINATIVE STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

This matter is governed by Utah Code Annotated § 41-6-38:

TITLE 41. MOTOR VEHICLES
CHAPTER 6. TRAFFIC RULES AND REGULATIONS
ARTICLE 4 ACCIDENTS

Sec. 41-6-38. Livestock on highway--Restrictions--Collision, action for damages

(1) A person owning or in possession or control of any livestock, may not willfully or negligently permit any of the livestock to stray or remain unaccompanied by a person in charge or control of the livestock upon a highway, both sides of which are adjoined by property which is separated from the highway by a fence, wall, hedge, sidewalk, curb, lawn, or building. This subsection does not apply to range stock drifting onto any highway in going to or returning from their accustomed ranges.

(2) A person may not drive any livestock upon, over, or across any highway during the period from half an hour after sunset to half an hour before sunrise, without keeping a sufficient number of herders with warning lights on continual duty to open the road to permit the passage of vehicles.

(3) In any civil action brought by the owner, operator, or occupant of a motor vehicle or by their personal representatives or assignees, or by the owner of the livestock for damages caused by collision with any domestic animal or animals on a highway, there is no presumption that the collision was due to negligence on behalf of the owner or the person in possession of livestock.

As last amended by Chapter 138, Laws of Utah 1987.

SUMMARY OF ARGUMENT

In Summary, the Appellants fail in three areas; they fail to cite relevant legal precedent defining the scope of duty owed to the public by the owner of livestock and they fail to direct the Court's attention to the binding precedent.

Secondly, Appellants claim a dispute of facts and rely upon the testimony of a witness that was not previously presented to the Court.

Lastly, the owner or possessor of livestock must have contributed to the animal's presence there in a tangible and direct way to be liable for damage resulting from their presence on a highway, appellants fail to present evidence which would support this conclusion in the trial court.

ARGUMENT

THIS APPEAL IS NOT WELL TAKEN BECAUSE APPELLANT HAS FAILED TO CITE THE RELEVANT LEGAL PRECEDENT

Appellant has failed to cite the relevant legal precedent to the Court in defining the scope of the duty owed to the public by the owner of livestock. Appellant does note the existence of Utah Code Annotated 41-6-38, but fails to direct the Court's attention to the binding precedent which interprets this statute.

The Utah Supreme Court held, in Rhiness v. Dansie, 472 P.2d 428 (Utah 1970), that the mere fact that an animal had escaped from its enclosure and was on the highway was not sufficient to show negligence on the part of the owner of the animal. The Court again upheld this interpretation of Utah Code Annotated § 41-6-38(3) and Salt Lake County Ordinance § 10-10-3 to mean that specific acts of the individual, directly allowing, sanctioning or encouraging the animal to be in the road were required in Hornsby v. Corp of Presiding Bishop, 758 P.2d 929 (Utah 1988), (adopting rule of Santanello v. Cooper, 475 P.2d 246 (Ariz. 1970)).

Appellants did not present evidence that Roseman sanctioned the presence of the horse on the highway. The uncontroverted evidence showed that the events complained of took place without his knowledge or presence, but in his absence. The testimony by both Roseman and Defendant Erickson, submitted to the trial court pursuant to Utah Rule of Civil Procedure 56, was uncontroverted by Plaintiffs. The plaintiffs failed to show facts that would raise a material issue as to whether or not Defendant Roseman

specifically allowed and sanctioned the presence of his horse on the highway, as defined by the Supreme Court in these cases.

Plaintiffs presented opinion testimony that the latch securing the gate on the Erickson property was defective in design, allowing a clever enough horse to open the gate by use of its head, hindquarters, or other part of the body. (R203-202) Respondent Roseman asked the Court to assume *arguendo* that this theory was true, and view the facts and inferences to be drawn therefrom in the light most favorable to the plaintiffs, maintaining that this did not make out even a *prima facie* case against Roseman. The owner of the property is generally responsible for its condition, unless this is modified in some way. Here, the only possible modification that may have existed is the lease executed by Roseman and Erickson on May 7, 1989. (R217) This lease determines Roseman's affirmative duties in this agreement:

"1. He is to furnish feed when needed

2. Maintain fence gate"

This agreement does not place Roseman under a duty to improve the property in any way, only to repair breakage or wear and tear. Applying the plain meaning test to the word "maintain", it is not possible to read into it a duty to make improvements. Black's Law Dictionary defines the word "maintain" as follows:

Maintain. The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep from change; keep from falling, declining or ceasing; keep in existence or

continuance; keep in force; keep in good order; keep in proper condition; keep in repair; keep up; preserve; preserve from lapse, decline failure or cessation; provide for; rebuild; repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold. Negatively stated, it is defined as not to lose or surrender, not to suffer to fail or decline.

Under the plain terms of the agreement, Roseman was under a duty to keep the fence and gate in the same condition as he found them, to preserve them from decay. Any underlying design defect would be the responsibility of the latch's designer and builder and/or owner. Mr. Roseman was not the designer, builder or owner of said latch. Therefore, no legal basis was presented upon which the plaintiffs could have prevailed. Snyder v. Merkley, 693 P.2d 64 (Utah 1984). Summary Judgment was properly granted in this matter.

**SUMMARY JUDGMENT WAS PROPER IN THIS MATTER
BECAUSE THERE IS NO DISPUTE AS TO FACTS.**

Appellants claim a dispute of facts, relying apparently upon the testimony of a witness that was not presented to the Court below. Appellants properly direct this Court's attention to Rule 56(e), which states that affidavits are only required when a party is claiming disputes of fact. Specifically, the Rule states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. URCP 56(e)

This Court may not consider evidence not presented in the matter below. Finlayson v. Finlayson, 874 P.2d 843, 847 (Utah App. 1994); Low v. Bonacci, 788 P.2d 512, 513 (Utah 1990); LeBaron & Assoc. v. Rebel Enters., Inc., 823 P.2d 479, 483 (Utah App. 1991);

Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah App. 1989). A statement by counsel that a factual issue exists, unsupported by affidavit or other evidence, does not create an issue of fact. D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989); Bradshaw v. Beaver City, 27 Utah 2d 135, 493 P.2d 643 (1972). Appellants are now attempting to bolster their case after the fact with evidence not presented at the trial court, in clear violation of Utah law.

**THE TRIAL COURT CORRECTLY INTERPRETED UTAH CODE ANNOTATED
§ 41-6-38 GIVEN THE FACTS PRESENTED**

Under Utah Law, for an owner or possessor of livestock to be liable for damage resulting from their presence on a highway, the owner must have contributed to the animal's presence there in a tangible and direct way. Utah Code Annotated § 41-6-38; see e.g. Hornsby v. Corp. of Presiding Bishop, supra; Lee v. Mitchell Funeral Home Ambulance Service, 606 P.2d 259 (Utah 1980); Rhiness v. Dansie, supra; Hyrum Smith Estate Co. v. Petersen, 227 F.2d 4421 (10th Cir 1955). Appellants failed to produce any evidence of any negligent acts on the part of Defendant Roseman, but rested on a theory of negligent omissions, which is contrary to Utah law. Appellants have also failed to cite any of the precedent setting cases in this area, ignoring the binding precedent that applies to cases involving collisions with livestock.

With no duty imposed under these circumstances by the general law, we next should examine whether Respondent assumed any higher duty. This duty would need to come from the arrangements between Defendants Roseman and Erickson. Under the terms of the pasturing agreement, Defendant Roseman was obligated to maintain the fences

and gates in the condition that they were in when he began pasturing his animal(s) there. He was not under any obligation to improve the property, and the owner, Defendant Quinn Erickson, was responsible for the original construction and any improvements. It was uncontested that fence was maintained adequately, and it has been alleged by Plaintiffs that the horse used the gate to leave the pasture. Appellants failed to show a breach of any duty to either the appellants or to Defendant Erickson in this case which properly was dismissed on a Motion for Summary Judgment.

This case is governed by the law established in the above cited statute and cases. The rule explicitly set forth in these cases, is that the term "permit" means that the owner must directly allow, sanction or encourage the animal to be in the road, with the owner's knowledge and consent. See Hornsby, 758 P.2d 929 at 935 (specifically adopting the interpretation in Santanello v. Cooper, 475 P.2d 246 (Ariz. 1970).

The Supreme Court was clear when it stated the law. Rhiness v. Dansie, 472 P.2d 428 at 429-430.:

"In order for the plaintiffs to recover in this action, they must show two things: First, that the highway was fenced on both sides; and second that the horses got onto the highway through the negligence of the defendant . The mere fact that the animals escaped from the enclosure is not sufficient evidence, standing alone, to justify the submission of defendant's negligence to the jury.

The facts here are nearly identical to those in Rhiness. Here, The Appellants have stated that a horse was on the highway, and therefore, the enclosure was negligent. There is no record of any animal escaping from the subject enclosure before this incident.

(R202) Appellants, relying upon argument made by their counsel for the first time at oral argument in this matter, unsupported by Affidavits, have attempted to raise an issue of fact at this time.

(R 289) This assertion is not evidence and should not be considered. Even if this Court considers that a neighbor of Mr. Erickson's once returned a horse to the property, this still does not show affirmative acts of negligence on Mr. Roseman's part.

Appellants asserted below that Defendant Roseman was negligent in boarding his horse in a pasture with only a latch to secure the gate. That position was correctly rejected as not supported by Utah law. Rhiness, supra.

Respondent Roseman agreed to maintain the property in question, and it was uncontested at the time of summary judgment that the property did not deteriorate during the time of the lease. Plaintiffs' expert stated that the fences had been repaired sufficiently. Respondent Roseman fulfilled his duties under the lease, and any claims that the latch was "woefully insufficient" should be made against the designer and builder of the latch, Defendant Erickson. All that has been presented in this case has been speculative opinions unsupported by factual evidence. (R212-198)

There was no evidence presented that the gate was open the night of the accident. Appellants' expert stated that the gate would fall open, if not properly latched. (R 203) However, this would indicate, at most, that the last person to close the gate may not have secured it properly, or that the gate was not secured

properly. There is no evidence that the halter, or body part of the horse, came into contact with the latch. (R 202)

There are no witnesses, evidence or other facts to support Johnson's opinion. (R 202) All that Johnson actually observed was that if the gate was not properly closed, it could fall open. (R203-202)

These unsupported opinions do not amount to a charge of negligence. There is no duty under Utah law to devise a self-latching, self-locking apparatus on a pasture gate. No latch will hold a gate closed if not properly secured. It may be true that the last person to leave the pasture should be careful to secure the gate, but Appellants provided no evidence as to that person's identity. It was undisputed at the time of summary judgment that it was possible that someone could have opened the gate without Defendant Erickson's knowledge. If this could be done without the resident of the property knowing, it would seem even more likely that it could happen without the knowledge of an absent party, Respondent Roseman. Appellants failed at the time of summary judgment to show any dispute as to the facts, and failed to show any facts supporting a finding of negligence on the part of Defendant Roseman.

CONCLUSION

Summary Judgment was properly granted in this matter. Appellants have attempted to raise issues of contested fact by presenting evidence not given to the trial Court. Under the facts presented, Appellants failed to make a prima facie case of

negligence as specifically stated in Utah law, specifically, they failed to show any affirmative acts by Respondent Roseman sanctioning the presence of his horse on the highway. Rhiness v. Dansie, 472 P.2d 428 at 429-430.

Wherefore, Respondent Roseman respectfully requests that this Court affirm the decision of the trial Court dismissing this action.

Dated this 30th day of January, 1995.

Respectfully submitted,

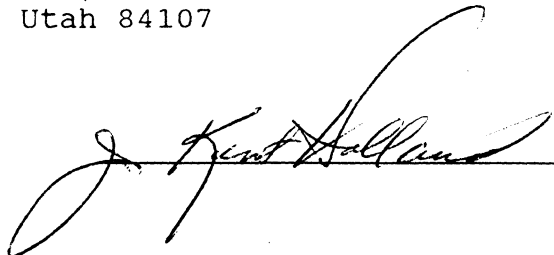

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J. KENT HOLLAND
Attorney for Respondent Roseman.

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Brief of Respondent Kevin Roseman were mailed, postage pre-paid, to the following this 31st day of January, 1995.

Bradley Parker, Esq.
PARKER, McKEOWN & McKONKIE
4001 South 700 East, Suite 500
Salt Lake City, Utah 84107


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