

1994

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 Appellant

Utah Court of Appeals

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J. Kent Holland; Anderson & Holland; Attorneys for Appellees.

Bradley H. Parker; Parker, McKeown & McConkie; Attorneys for Appellants.

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IN THE UTAH COURT OF APPEALS

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/Appellees.

940480

Case No. 940480-CA

Argument Priority No. 15

BRIEF OF THE APPELLANTS

Appeal from a Summary Judgment in favor of Defendants/Appellees in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Ray M. Harding, Judge.

J. Kent Holland
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

Attorneys for Appellees

Bradley H. Parker, #2519
PARKER, McKEOWN & McCONKIE
4001 South 700 East, Suite 500
Salt Lake City, Utah 84107
Telephone: (801) 264-6620

Attorneys for Appellants

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ANDERSON & HOLLAND
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Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

Attorneys for Appellees

Bradley H. Parker, #2519
PARKER, McKEOWN & McCONKIE
4001 South 700 East, Suite 500
Salt Lake City, Utah 84107
Telephone: (801) 264-6620

Attorneys for Appellants

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Case No. 940480-CA

Argument Priority No. 15

BRIEF OF THE APPELLANTS

JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court by Utah Code Ann. § 78-2a-3(2)(k) (1993 as amended), which grants the Court of Appeals appellate jurisdiction over "cases transferred to the Court of Appeals from the Supreme Court." This appeal is taken from the final judgment of the Fourth Judicial District Court of Utah County, State of Utah, the Honorable Ray M. Harding, Judge, presiding.

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

The following issues are presented for review in this brief:

1. Did the trial court commit reversible error when it granted Defendant Kevin Roseman's Renewed Motion for Summary Judgment?

a. Did the trial court properly determine as a matter of law that Defendant Roseman was not negligent?

b. Did the trial court properly determine as a matter of law that Defendant Roseman was without notice and therefore did not breach a duty of care owed to Plaintiffs?

In reviewing a case which has been disposed of by summary judgment, the appellate court must accept the facts and all inferences fairly arising from them in the light most favorable to the party against whom summary judgment has been granted. Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). The appellate court will affirm only where it appears that there is no genuine dispute as to any issues of material fact, or where, even according to the facts as contended to the losing party, the moving party is entitled to judgment as a matter of law. Hunt v. ESI Engineering, Inc., 808 P.2d 1137, 1139 (Utah Ct. App. 1991), *cert denied*, 826 P.2d 651 (Utah 1991). Because a challenge to summary judgment presents only conclusions of law for review, the appellate court reviews a trial court's conclusions for correctness without according them any deference. Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184, 192 (Utah 1991).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Any statutes, rules, and constitutional provisions relevant to the disposition of this appeal are set forth in the text or addenda of this brief.

STATEMENT OF THE CASE

On November 19, 1991, Paulette Balle, deceased, was fatally injured when the automobile she was driving collided with a horse on SR-73, west of Lehi, in Utah County, State of Utah. The Plaintiffs and Appellants in the present matter are the surviving husband and seven (7) surviving daughters, four (4) of whom are minors.

Plaintiffs and Appellants filed their First Amended Complaint in the Fourth District Court alleging negligence against Defendant Bryce Thomas. (R. 15) Shortly thereafter, Plaintiffs were able to conduct sufficient discovery to determine that Defendant Thomas should not be a party to the action. Plaintiffs consequently stipulated to the dismissal of all claims against Defendant Thomas and he is therefore, not a party to this appeal. (R. 26)

On August 31, 1992, Plaintiffs filed their Second Amended Complaint in the Fourth District Court against Defendants Kevin Roseman and Quinn Erickson alleging negligence on the part of Defendants as the proximate cause of the collision fatally injuring Paulette Balle. (R. 33) Upon court hearing and approval Plaintiffs have settled all claims against Defendant Erickson. (R. 170) Consequently, the remaining dispute only involves Defendant and Appellee Kevin Roseman, the owner of the horse allegedly involved in the accident.

After some discovery had occurred, Defendant Roseman filed his first Motion for

Summary Judgment. The court denied Defendant's Motion reasoning that it could not rule as a matter of law that Defendant Roseman did not breach his duty of care to the deceased. (R. 136) The court found that Plaintiffs raised genuine issues of material fact regarding Defendant's alleged negligence that precluded the granting of summary judgment. (R. 136)

After both parties had completed additional discovery, Defendant Roseman renewed his Motion for Summary Judgment. (R. 172) Upon oral argument and at the conclusion of the hearing on the Motion, the court determined as a matter of law that Defendant Roseman was not negligent. (R. 294) Additionally, the court concluded that assuming *arguendo*, that Defendant Roseman was negligent, he had no notice of a duty of care and therefore, without notice, there could be no breach of duty. (R. 294) The court issued an Order of Judgment granting Defendant Roseman's Renewed Motion for Summary Judgment and dismissed Plaintiffs' Complaint with prejudice on the merits. This appeal followed.

FACTS

Viewed in the light most favorable to the Plaintiffs, as required by the standard of review, the simple facts of this case are as follows. On November 19, 1991, Paulette Balle, deceased, was fatally injured when the automobile she was driving collided with a horse on SR-73, west of Lehi, in Utah County, State of Utah. On the date of the accident, Defendant and Appellee Kevin Roseman owned a horse that was boarded on the property of his brother-in-law, Defendant Quinn Erickson. Roseman last saw his horse "in the

first week or two of November" of 1991. (R. 227) She was last seen by him on the Erickson property. (R. 223) Roseman did not sell the horse, she "just disappeared." (R. 224) When shown a photograph of the dead horse involved in the accident, Roseman stated that the markings on the dead horse were "similar" to the markings on his horse and that there was nothing in the photograph that would lead him to think the dead horse was not his horse. (R. 225)

On the morning after the accident, Utah County Sheriff Sergeant Rex N. Murdock and Deputy Richard L. Healey followed two (2) sets of tracks from the location of the dead horse back to and up the driveway of the Erickson property. (R. 214). Witnesses at the scene of the accident reported seeing a dark colored mule running with the horse that was hit. (R. 214) After following the tracks to the Erickson property, Sergeant Murdock observed a dark mule in the pasture behind the Erickson home. (R. 214)

Some time prior to the date of the accident in question, Shelby Taylor, a neighbor living near the Erickson property, helped capture a horse that had escaped from the Erickson pasture and was running unattended in the street. Mr. Taylor actually helped return the horse to the Erickson property. (R. 289)

Roseman entered into a written agreement with Quinn Erickson on May 7, 1989 in which Erickson gave express permission for Roseman to keep his animals on Erickson's property upon the condition that Roseman (i) furnish feed when needed; and (ii) maintain the fence and gates. (R. 217) By the terms of this agreement, Roseman accepted full responsibility for the health and safety of his animals while on Erickson's property. (R.

217)

The fence and gates, including the latch on the gate on the Erickson property were no different and were essentially in the same condition on the date of the accident as they were at the time of the taking of Roseman's deposition. (R. 218-19)

Plaintiffs' liability expert, Met Johnson, has previously been qualified as an expert at trial in the Fourth Judicial District Court in the case of Askew v. Hardman, Civil No. 91-0400665, relating to an automobile accident involving a horse that had escaped from a fenced-in area. (R. 209-11) Prior to rendering an opinion in the present matter, Mr. Johnson was provided with and read the depositions of Defendants Roseman and Erickson. He personally interviewed Utah County Sheriff Sergeant Rex N. Murdock, and he visited the Erickson property where he personally examined the fencing and gates. (R. 206-07) Mr. Johnson is of the opinion that the Roseman horse escaped through the gate at the end of the driveway of the Erickson property. (R. 198) The latch on the gate was so negligently constructed and maintained that the gate would not close securely and by merely bumping the gate the latch would come open and the gate by its own weight would swing open the width of "two refrigerators." (R. 204-05) While Mr. Johnson was inspecting the Erickson property, he twice saw the gate swing open after attempts to shut it. (R. 198, 203)

During the winter months when the snow in the pasture was too deep for the animals to feed, Roseman would feed his horse with hay that he would keep on the outside side of the gate. (R. 221-22) The hay was placed such that a horse would likely

bump the gate as it attempted to reach over the gate to feed.

SUMMARY OF THE ARGUMENT

The trial court improperly granted summary judgment in this matter because genuine issues of material fact are in dispute. Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment is appropriate "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). If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Frisbee v. K & K Construction Co., 676 P.2d 387, 389 (Utah 1984). Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. Id. at 389. Under Rule 56, it is not always required that the party opposing summary judgment proffer affidavits in order to avoid judgment against him. Rule 56(e) states specifically that a response in opposition to a motion must be supported by affidavits or other documents only in order to demonstrate that there is a genuine issue of fact for trial. Where the party opposed to the motion submits no documents in opposition, the moving party may be granted summary judgment only "if appropriate," that is, if he is entitled to judgment as a matter of law. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984) (quoting Olwell v. Clark, 658 P.2d 585 (Utah 1982)).

In this case, the evidence in the record and the other documents submitted by

Plaintiffs in opposition to summary judgment demonstrate that Defendant Roseman owed a duty to Paulette Balle to use reasonable care to keep his horse from entering upon a highway. The evidence demonstrates that Roseman breached that duty in as much as he expressly assumed full responsibility to maintain the Erickson fence and gates to prevent his horse from escaping and he acted unreasonably under the circumstances. Further, the evidence shows that such breach of duty was the proximate cause of Plaintiffs' injury and Plaintiffs in fact suffered injury. Because Plaintiffs presented evidence to prove each and every element of the negligence claim, it was error for the trial judge to take the issues of negligence and breach of duty of care from the jury and rule as a matter of law that Defendant Roseman was not negligent and breached no duty to Paulette Balle.

ARGUMENT

POINT I

THE COURT IMPROPERLY RULED AS A MATTER OF LAW THAT DEFENDANT ROSEMAN WAS NOT NEGLIGENT, A QUESTION RESERVED FOR THE TRIER OF FACT.

Following the oral argument and hearing on the motion for summary judgment, the trial court concluded that there was no showing that Defendant Roseman was negligent. Utah courts have repeatedly held that the issue of negligence is a question of fact for the determination by the jury. Determination of negligence becomes a question of law only when undisputed facts permit only one reasonable conclusion. Marquez v. Pepsi Cola Bottling Co. of Salt Lake City, 838 P.2d 660 (Utah Ct. App. 1992).

One of the disputed material facts at issue in this case is whether the horse

involved in the fatal collision with Paulette Balle was indeed the horse owned by Defendant Roseman. Defendant Roseman argued in support of his motion for summary judgment that Plaintiffs failed to show that he is the owner of the horse involved in the collision. (R. 191) Plaintiffs provided the trial court, however, with sufficient evidence for a jury to find that the horse involved in the accident was Defendant's horse. The morning after the November 19, 1991 accident, Utah County Sheriff Sergeant Rex Murdock and Deputy Richard Healey followed two sets of tracks from the location where the horse had been hit, back to and up the driveway of the Erickson property where Roseman's horse was being pastured. The tracks ended in front of the gate to the fenced area on the Erickson property. Mysteriously, Roseman's horse, which had been kept with a mule on the Erickson property "just disappeared" at this time. When asked in his deposition about the markings on a photo of the dead horse involved in the accident, Roseman admitted that his horse had "similar" markings and he indicated that there was nothing in the photo that made him think the horse involved in the accident was not his horse. (Addendum A)

Plaintiffs realize that the mere showing that the horse involved in the collision was owned by Defendant Roseman is not sufficient. Additionally, Plaintiffs realize that Utah courts have long held that "[t]he mere happening of [an] accident . . . does not prove that the defendants were negligent." Kitchen v. Cal Gas Company, Inc., 821 P.2d 458, 461 (Utah. Ct. App. 1991), *cert. denied*, 832 P.2d 476 (Utah 1992) (quoting Horsley v. Robinson, 112 Utah 227, 186 P.2d 592, 596 (1947)). Rather, Plaintiffs must prove each

and every element of the negligence claim. In granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (a party must make a sufficient showing to establish the existence of all essential elements of a claim on which that party will bear the burden of proof at trial); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) (a party must prove a claim with clear and convincing evidence at the summary judgment stage if that is the burden required at trial); Robinson v. Intermountain Health Care, 740 P.2d 262, 264 (Utah Ct. App. 1987) (in evaluating whether summary judgment should be granted, we must take into consideration the eventual standard of proof for each element of the claim at trial on the merits).

In a negligence action, the plaintiff has the burden of establishing four elements: "that the defendant owed the plaintiff a duty; that defendant breached the duty (negligence); that the breach of the duty was the proximate cause of plaintiff's injury; and that there was in fact injury." Kitchen at 461. (quoting Steffensen v. Smith's Management Corp., 820 P.2d 482, 485 (Utah Ct. App. 1991), *affd.*, 862 P.2d 1342 (Utah 1993)). In this case, Utah Code Ann. § 41-6-38 (1953 as amended) creates a duty upon Defendant Roseman to use reasonable care to prevent his horse from entering upon a highway.

Section 41-6-38 provides in part:

- (1) A person owning or in the 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.

The trial judge, in granting summary judgment in this matter, concluded that Defendant Roseman had no notice of any duty to act reasonably to prevent his horse from entering upon a highway unattended. The trial judge ruled that without notice, there could be no breach of duty. (R. 294) While the issue of whether a duty of care exists is a question of law to be determined by the court, see e.g., Hunsaker v. State, 870 P.2d 893 (Utah 1993), C.T. v. Martinez, 845 P.2d 246 (Utah 1992), the conclusion in this case that Roseman had no notice is clearly erroneous. Defendant Roseman entered into a written agreement with Defendant Quinn Erickson on May 7, 1989. (Addendum B) In this agreement, Erickson gave express permission for Roseman to keep his animals on Erickson's property upon the condition that Roseman (i) furnish feed when needed; and (ii) maintain the fence and gates. By the terms of this agreement, Roseman accepted full responsibility for the health and safety of his animals while on Erickson's property. This responsibility included making certain the fence and gates would reasonably prevent his horse from escaping from its pasture and entering a highway.

In addition, some time prior to the date of the accident, Shelby Taylor, a neighbor living near the Erickson property, personally helped capture a horse that had escaped from the Erickson property. While that horse was not one owned by Roseman, the prior escape provides evidence in the record that there was prior notice that the fence or gates were in a defective condition. It is therefore a question for the jury to determine whether, based upon this prior escape incident and the express terms of the pasturing agreement,

Roseman breached the duty to use reasonable care.

POINT II

THE COURT IMPROPERLY RULED AS A MATTER OF LAW THAT DEFENDANT ROSEMAN DID NOT BREACH A DUTY OF CARE OWED TO PLAINTIFFS. SUCH A DETERMINATION IS A QUESTION FOR THE JURY AND CANNOT BE APPROPRIATELY DECIDED IN SUMMARY JUDGMENT.

It is clear that Defendant Roseman owed a duty of care to Paulette Balle. Most importantly, Plaintiffs must show that Roseman was negligent and breached that duty. This court has noted that "[a]s a general proposition, summary judgment is inappropriate to resolve a negligence claim on its merits, and should be employed 'only in the most clear-cut case.'" Schreiter v. Wasatch Manor, Inc., 871 P.2d 570, 575 (Utah Ct. App. 1994), *cert. denied*, 879 P.2d 266 (Utah 1994) (quoting Ingram v. Salt Lake City, 733 P.2d 126, 126 (Utah 1987) (per curiam)), *cert. denied*, 789 P.2d 33 (Utah 1990). Further, "[o]f particular concern is the precept that '[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury.'" Id. at 575. (quoting Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982)). Accordingly, summary judgment is improper unless the standard of care can be determined as a matter of law, "and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances." Id. "Summary judgment should be granted with great caution in negligence cases." Doe v. Doe, 878 P.2d 1161, 1162 (Utah Ct. App. 1994) (quoting Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614, 615 (Utah 1985)).

The particular standard of care that Defendant Roseman owed Paulette Balle

cannot be determined as a matter of law, because "[t]he 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. Schreiter at 575. (quoting DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983)).

Accordingly, whether Defendant Roseman breached the required standard of care is a question for the jury, which cannot be appropriately decided in summary judgment.

Plaintiffs provided the trial court with sufficient evidence to support Plaintiffs' claim that Roseman was negligent. A reasonable mind could conclude that Roseman was negligent under the circumstances in allowing his horse to be pastured on property on which the gate to prohibit egress from the property would swing wide open if merely bumped. By written agreement with Erickson, Roseman agreed to be responsible for the safety of his own horse and to therefore accept responsibility for the fencing and gates on the Erickson property. As the owner of a horse, Defendant Roseman had the duty and responsibility to reasonably secure and pasture his horse. This responsibility was not abrogated when he pastured his horse on the Erickson property.

The question of whether Roseman acted reasonably under the circumstances is a question of fact and should be reserved for the jury. Utah Code Ann. § 41-6-38 provides that Roseman had a duty to maintain a secure area for his horse to run unattended and to not negligently or willfully permit it to enter upon a highway. The latch on the gate was so insufficient that twice while Plaintiffs' expert, Met Johnson, was on the Erickson property the latch came undone and the gate came wide open. (Addendum C) This was

not only the condition of the gate and latch at the time it was inspected by Met Johnson, it was also the condition of the gate and latch at the time of the accident.

The obvious insufficiency of the gate and latch was exacerbated by the fact that Roseman's horse was encouraged to bump against the gate to feed because Roseman stored his hay on the outside side of the gate. During the winter he would just throw the hay over the gate for his horse to eat. Met Johnson, Plaintiffs' expert, is of the opinion that placing feed next to the gate was a negligent act on the part of Roseman. Each of these acts of Defendant Roseman constitute genuine issues of material fact that a jury could reasonably conclude constitutes negligence and a breach of duty. Determination of negligence becomes a question of law only when undisputed facts permit only one reasonable conclusion. In this case, certainly more than one reasonable conclusion is possible. It is clearly a question for the jury.

CONCLUSION

The trial court improperly granted summary judgment in this matter because genuine issues of material fact exist between the parties. Plaintiffs have presented a prima facie case for negligence against Defendant Roseman and have introduced sufficient evidence to carry the burden of persuasion on each element of the negligence claim. Summary judgment is only appropriate when no issues of material fact exist and the case can therefore be submitted as a matter of law. In ruling on a motion for summary judgment, all facts and all inferences that can be reasonably drawn therefrom

are to be viewed in the light most favorable to the party opposing the motion. Generally, questions of negligence are questions to be left to a jury and only become questions of law when the facts are undisputed and only one conclusion may be drawn.

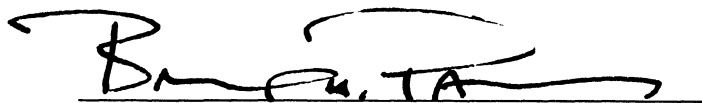
In this case, Plaintiffs have provided sufficient evidence for a jury to find that Defendant Roseman was negligent in the manner he pastured his horse. Utah law provides that the owner of a horse may not negligently permit his horse to enter a highway while unattended. The gate and latch on the Erickson property allowing egress from the pasture area was woefully insufficient in that the latch would often fail to secure the gate and the gate would fall open of its own weight. Bumping against the gate exacerbated this tendency and such bumping was encouraged by Defendant Roseman in that he stored hay and feed on the outside side of the gate. It is from this gate that Roseman's horse escaped and entered the highway causing the collision which resulted in the death of Paulette Balle.

Wherefore, Plaintiffs respectfully request that the court reverse the trial court's order granting summary judgment and remand to allow the issues of negligence and breach of duty to come before the jury, the proper finders of fact in this case.

Dated this 4 day of January, 1995.

Respectfully submitted,

PARKER, McKEOWN & McCONKIE:

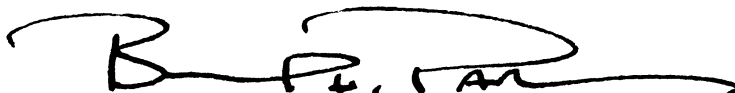
A handwritten signature in black ink, appearing to read "Bradley H. Parker", written over a horizontal line.

Bradley H. Parker
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing BRIEF
OF THE APPELLANTS was either hand delivered or mailed by United States Mail,
postage prepaid, this 5 day of June, 1995, to the
following:

J. Kent Holland
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643

A handwritten signature in black ink, appearing to read 'B. H. Parker', written over a horizontal line.

Bradley H. Parker
Attorney for Plaintiffs/Appellants

ADDENDUM A

COPY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

* * *

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,

vs.

BRYCE THOMAS, QUINN ERICKSON,
and KEVIN ROSEMAN,

Defendants.

Civil No. 920400151 PI

Deposition of:

KEVIN ROSEMAN

QUINN ERICKSON,

Cross-Claimant,

vs.

KEVIN ROSEMAN,

Cross-Claim Defendant. :

* * *

BE IT REMEMBERED that on the 23rd day of
February, 1993, the deposition of KEVIN ROSEMAN was taken
before Shelly Van Tassell, a Certified Shorthand Reporter
(License No. 321), Registered Professional Reporter and
Notary Public, in Salt Lake City, Utah.

* * *

Reporter: Shelly Van Tassell



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1 of '91 other than Mr. Erickson's?

2 A Just behind my house.

3 Q And when was that?

4 A Part of October and probably part of November.

5 She was at both places so I didn't have to chase her

6 around.

7 Q So when do you last recall seeing Dolly?

8 A The first week or two in November.

9 Q How old was Dolly?

10 A Thirteen or fourteen.

11 Q And you had owned her for how long?

12 A Either nine or ten years.

13 Q Had you ever taken Dolly to the vet?

14 A Nope.

15 Q Did Dolly have any identifying marks or

16 characteristics?

17 A No, not really.

18 Q Did she have any scars on her hind legs that you

19 recall?

20 A Nope.

21 Q That's no you don't recall, or no she didn't?

22 A No, I don't believe she did.

23 Q What about any special markings on her body,

24 legs, forehead? Did she have any distinctive markings that

25 you recall?

1 A Yes, just one.

2 Q And what was that one?

3 A She had like a little star on her forehead.

4 Q Now, do you have any pictures that you took of
5 Dolly while you owned her?

6 A No.

7 Q Well, I know in your answer to interrogatories
8 and in your response to the request for production of
9 documents some pictures were produced. Do you know where
10 those pictures came from?

11 A I give them to him. That's what I say, I don't
12 have them now.

13 Q And are those the only pictures that you had of
14 Dolly, or do you have other pictures?

15 A That's all I could find.

16 MR. PARKER: Let me go off the record.

17 (Off the record.)

18 Q You say there was a star on her head. Can you
19 be more specific about that mark?

20 A No, just a star on her forehead.

21 (Whereupon Exhibit No. 1 was
22 marked for identification.)

23 Q Mr. Roseman, let me show you what has been
24 marked as Deposition No. 1. That is a xerox picture of a
25 horse. Does that appear to you to be correct?

1 A Yes.

2 Q Is that Dolly?

3 A I don't know.

4 Q Compare the marking on the forehead of the horse
5 in Exhibit 1 with the marking on Dolly.

6 A They look similar.

7 Q Would you describe the marking on Deposition
8 Exhibit 1 as a star?

9 A Not necessarily, but --

10 Q From seeing the marking on the forehead, does
11 that lead you to believe that the horse pictured in
12 Deposition Exhibit 1 is Dolly?

13 A It looks similar.

14 Q Is there anything in looking at that that makes
15 you think it isn't Dolly?

16 A No.

17 Q Now, there appears to be a halter on the horse;
18 does there not?

19 A Yes.

20 Q Have you ever owned a blue halter?

21 A Yeah, I'm sure I have.

22 Q Since November of '91, have you been missing a
23 halter?

24 A Nope, not that I'm aware of.

25 Q Do you still own a blue halter?

1 A Yes.

2 Q From whom did you purchase Dolly?

3 A All I know is his last name was Peet.

4 Q And that was nine or ten years ago?

5 A Yes.

6 Q Who are the farriers you've used with Dolly, if

7 any?

8 A The shoer?

9 Q Yes.

10 A Teri Kirkham, Steve Winters, and the other boy's

11 last name is Trapp.

12 Q And who was the last one to shoe Dolly before --

13 well, who was the last one to shoe Dolly, that you know of?

14 A I'm not positive, but it may have been Ryan

15 Trapp.

16 Q In November of 1991, did you own any other

17 horses?

18 A No, I don't believe so.

19 Q Now, you stated that you don't own Dolly

20 anymore. What happened to Dolly, if you know?

21 A I don't know.

22 Q You didn't sell her?

23 A No.

24 Q And she's just disappeared?

25 A Yes.

1 Q The last time you saw her was sometime in the
2 first two weeks of November of '91, to your recollection?

3 A Yes.

4 Q And that was on the Quinn Erickson property?

5 A Yes.

6 Q Did Dolly have a brand?

7 A No.

8 Q When you kept Dolly on the Erickson property,
9 did you keep a halter on that property also?

10 A No. Usually I hung it in my horse trailer.

11 Q And your horse trailer was stored where?

12 A At my house.

13 Q Did you ever store a halter at the Erickson
14 residence?

15 A No. I keep them in my trailer.

16 Q Would you leave a halter on Dolly when she was
17 pastured at Erickson's?

18 A Once in a while.

19 Q Was there a halter that was just her halter that
20 you normally used for her?

21 A No.

22 Q Ever use a blue halter on her?

23 A Yeah.

24 Q And, to your knowledge, since November of '91,
25 the 1st of November of '91 on, are you missing a blue

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(Whereupon Exhibit No. 2 was
marked for identification.)

Q Mr. Roseman, let me show you what has been
marked as Deposition Exhibit 2. Have you ever seen that
document before?

A Yes.

Q You saw it when the last deposition was being
taken of Mr. Erickson, did you not?

A Yes.

Q Had you seen it before then?

A Nope.

Q That purports to be a drawing, I believe, of the
Erickson property. Does it look like that to you?

A Yes.

Q Now, you indicated just a moment ago that when
you would go and feed Dolly you'd throw hay over the back
gate. And I'm just wondering -- I notice on the property
there's two gates, a thirteen-foot gate and a four-foot
gate. Which gate would you throw the hay over?

A The thirteen-foot gate.

Q Did you store hay on the Erickson property?

A Oh, sometimes I'd put three or four bales right
there. The rest of the time I'd take it in my pickup.

MR. SWENSON: For clarification, what do
you mean by storing? Do you mean keep it there some place,

1 or do you mean put it there in advance for this horse, or
2 what are you asking?

3 Q Well, let me just maybe clarify that. You
4 indicated you might keep three or four bales close to the
5 thirteen-foot gate; is that correct?

6 A Yeah.

7 Q And you might keep them there overnight or for a
8 period of weeks, and then you'd periodically throw hay over
9 the fence for Dolly to eat.

10 A Yes.

11 Q And that was generally all year around, or
12 generally in the winter months?

13 A Just when the snow was too deep.

14 Q When you entered the property, would you enter
15 through the four-foot gate or the thirteen-foot gate?

16 A The four-foot gate.

17 Q Tell me, if you can recall, what type of latch
18 or locking mechanism, if any, is on the four-foot gate.

19 A There isn't one on that one.

20 Q That one just swings shut?

21 A It is the one that leans in. He built it on a
22 lean.

23 Q So when you go in there and let it go it swings
24 back shut?

25 A Yeah, it's pretty heavy. And it stays shut.

1 Q On the thirteen-foot gate, what type of latch is
2 there?
3 A A wooden latch.
4 Q And describe how that latch works, if you can.
5 A He's got a piece of wood you push down into a
6 latch.
7 Q That's a latch -- it's not a purchased metal
8 latch?
9 A No.
10 Q And that's located on which side of the gate, on
11 the north side?
12 A North side.
13 Q Okay. Now, you mentioned that when you'd go to
14 the Erickson property you'd also look over your fences; is
15 that right?
16 A Yes.
17 Q Why would you do that?
18 A I have ever since I was a kid. I grew up on a
19 farm. I look for any trouble or any holes in the fence.
20 Q Did you feel a special obligation or
21 responsibility to look at the fences on the Erickson
22 property?
23 A Yes.
24 Q And why was that?
25 A My horse was there.

1 Q Is the fence in good shape at present?

2 A Yes.

3 Q Is it in as good as shape now as it was in

4 November of '91?

5 A Yes, to my recollection.

6 Q Would you say with repairs you've done it's even

7 in better shape than it was in November of '91?

8 A No, I wouldn't say it's any better. It's as

9 good.

10 Q Has there been any significant deterioration of

11 the fencing since November of '91?

12 A No.

13 Q Have you ever seen anyone else do repair on the

14 fencing or maintenance?

15 A No.

16 Q Are you aware if Mr. Erickson has ever done any

17 repair or maintenance of the fencing?

18 A No.

19 Q Meaning no you don't believe he has?

20 A No, I've never seen him.

21 Q Other than the two gates that are shown on the

22 Deposition Exhibit 2, the thirteen-foot gate and the

23 four-foot gate, are there any other exits from the

24 fenced-in property?

25 A No.

1 Q Are there any gaps or holes in the fence where a
2 horse could get through or over?
3 A No.
4 Q And essentially that's pretty much the way it
5 was in November of '91 also, correct?
6 A Yes.
7 Q Are the latches any different now than they were
8 in November of '91?
9 A No.
10 Q Did you ever have anyone help you as you
11 maintained or worked on the fencing?
12 A No.
13 Q Do you know John Balle?
14 A No.
15 Q Do you know who he is?
16 A No.
17 Q Have you ever met, or did you ever meet Paulette
18 Balle?
19 A No.
20 Q Have you ever known any of the Balle children?
21 A No.
22 Q Have you ever talked with any of the Balles?
23 A No.
24 Q Have you ever told anyone that your horse, that
25 Dolly was sold to someone in Mt. Pleasant?

ADDENDUM B

OCT 06 1992

RECEIVED

Land Lease

5-7-89

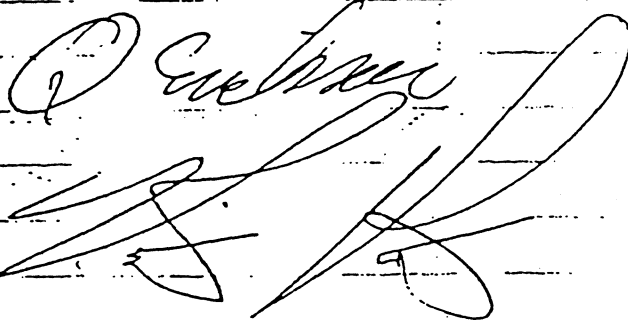
SEP 14 1992

I, Quinn Eubanks give Kevin Roseman
permission to keep his Animals on my
property under the following condition. State Farm Insurance

1 He is to furnish feed when needed

2- Maintain fences - Gates

I will not be responsible for the health
or safety of his Animals.

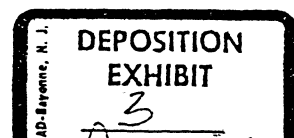
Quinn Eubanks


5/7/89

9-14-92

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(pitt returned
original. in
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ADDENDUM C

U U F U

93N00

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

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,

vs.

BRYCE THOMAS; QUINN ERICKSON,
and KEVIN ROSEMAN,

Defendants.

DEPOSITION OF:
Met Johnson

CIVIL NO. 920400151PI

Judge Ray M. Harding

QUINN ERICKSON,

Cross-Claimant,

vs.

KEVIN ROSEMAN,

Cross-Claim Defendant.

PURSUANT TO NOTICE, and on the 19th day
of August, 1993, commencing at the hour of 11:15 a.m.,
the deposition of **Met Johnson** was taken in the offices
of Parker, McKeown & McConkie, 4001 South 700 East,
Suite 500, Salt Lake City, Utah, before Jill S. Nielsen,
a Registered Professional Reporter and Notary Public in
and for the State of Utah.

Ace Reporting, Inc.

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Salt Lake City, Utah 84110-2219
(801) 969-1952

Jill S. Nielsen, RPR
LICENSE NO 279

3

1 fences and give him my opinion as to what happened or how
2 it happened or evaluate the circumstances for him.

3 Q Okay. Do you act as a consultant for lawyers on
4 a regular basis?

5 A I try not to.

6 Q Okay. Have you done it before?

7 A Yes.

8 Q And in what capacity?

9 A Again, as an expert witness on -- in the
10 livestock matters. Usually it has to do with fence
11 matters.

12 Q Okay. Have you ever testified as an expert
13 witness in court?

14 A Yes.

15 Q And when was that?

16 A Well, many times. I owned the livestock market
17 in Cedar City which I sold about five years ago, and
18 "livestock matters" are, oh, differences of opinion between
19 different parties, and the court would call me in to give
20 an expert witness on values or conditions like this. So in
21 those 20 years, fairly often. And in the last probably
22 five or six years, it's been mostly on fence matters and
23 those kind of things. The last time was -- I don't
24 remember -- maybe a year and a half ago.

25 Q When you say "on fence matters," what are you

1 talking about?

2 A When there's been circumstances that they needed
3 to have someone who had a great deal of experience building
4 and maintaining fence and/or especially I think because of
5 my raising horses for as many years as my family has and I
6 have, that they called on me to be the expert witness in
7 those matters.

8 Q Are you talking about cases where animals get
9 out of a fence and there's a question about how that
10 happened?

11 A Exactly.

12 Q Or if there was some kind of a problem with the
13 fence?

14 A Yes.

15 Q Okay. And can you tell me what court was the
16 last one that you testified in regarding a case where an
17 animal allegedly escaped from a fenced-in area?

18 A It was in Provo.

19 Q Okay. And who were you retained by?

20 A I don't recall offhand, but --.

21 Q Was it an attorney?

22 A Oh, yes.

23 Q Okay. Was it the plaintiff's attorney or the
24 defendant's attorney?

25 A It was the plaintiff's.

1 Q Okay. And you cannot remember who the lawyer
2 was?

3 MR. PARKER: Off the record.

4 (Discussion off the record.)

5 Q It was the law firm Kimball, Parr?

6 A That's correct.

7 Q Out of Salt Lake City?

8 A Correct.

9 Q And did you testify in a trial --

10 A Yes.

11 Q -- in that case? But the trial was held in
12 Provo?

13 A That's correct.

14 Q Okay. Do you remember the name of the case?

15 A No.

16 Q Okay. What was the general issue involved, or
17 what were the facts in the case?

18 A An accident involving an automobile that a young
19 lady was hurt severely in and a horse.

20 Q Okay. And you testified on behalf of the young
21 lady?

22 A That's correct.

23 Q And did you come to some conclusion that there
24 was a problem with a fence in that case?

25 A Yes.

1 Q Was your deposition taken in that case?

2 A Yes.

3 Q Do you have a copy of it?

4 A I don't.

5 Q Can you remember any other cases that you've
6 testified in where there's been an automobile accident
7 involving an animal where you were asked to give an opinion
8 regarding how the animal got to where it was or a problem
9 with the fence?

10 A Not in court.

11 Q Okay. In a deposition?

12 A In a deposition.

13 Q Okay. Can you give me the name of any other
14 attorneys you've been retained by for that type of a case
15 where you've been deposed?

16 A I don't recall the name of the attorney. Hold
17 on just a minute. Their offices are just across the street
18 from like the Market Street Grill.

19 Q Don Purser?

20 A Don Purser, yes.

21 Q And in that case was Don Purser representing the
22 plaintiff or the defendant?

23 A Defendant.

24 Q And your deposition was taken in that case?

25 A That's correct.

1 Q All right. Do you hold yourself out as an
2 expert witness, then, or an expert, I should say, in
3 fencing? Is that the area?

4 A Fencing and horses and cattle behavior, yes.

5 Q Okay. Are you familiar with anybody else who is
6 an expert in that area?

7 A No.

8 Q Okay. And is your knowledge or skill or
9 whatever you want to call it in that area, is that based on
10 anything other than hands-on experience as a rancher?

11 A I took a variety of agriculture classes in
12 college, but mostly I think it's because of my -- my realm
13 of work.

14 Q Okay. Are you familiar with any books,
15 pamphlets or other written material that deal with this
16 subject matter?

17 A No.

18 Q What information have you been given in this
19 case to review as part of your evaluation?

20 A I think two depositions, police report,
21 photographs.

22 Q Whose depositions were they?

23 A Erickson and Roseman.

24 Q And you read those?

25 A Yes.

1 Q And what photographs were you given?

2 A This booklet (indicating).

3 Q This is a booklet from when you went down to the
4 property?

5 A That's correct.

6 Q And these are photographs that were taken there?

7 A Yes.

8 Q And anything else other than the police report?

9 A I don't think so.

10 Q Okay. Now, other than reviewing those
11 materials, what other information have you been given
12 regarding the case?

13 A I haven't been given any except by the people
14 that I have spoken to.

15 Q Okay.

16 A And Officer --.

17 Q Who have you talked to?

18 A He runs the animal shelter, I think, by Provo,
19 but I've forgotten his name.

20 Q Murdock?

21 A Murdock, Mr. Murdock.

22 Q When did you talk to him?

23 A I think, oh, maybe April, May.

24 Q Of '93?

25 A '93.

1 then we went and took different pictures of different items
2 that could be of some significance.

3 Q And were you specifically looking at this area
4 to see if you could find any explanation for how a horse
5 could get out of that pasture?

6 A Yes.

7 Q Okay. Did you form any conclusions in that
8 regard?

9 A Yes.

10 Q And what were your conclusions?

11 A My conclusions are that there's negligence with
12 the way the latch was constructed, and when we get to the
13 photographs, I can show you. I'd be happy to show you now.

14 Q First just tell me what your conclusions are.
15 You said you thought there was something negligent about
16 how the latch was constructed?

17 A Yes, the latch and the keeper both.

18 Q The latch on which gate?

19 A Especially on -- let's, for all intents and
20 purposes, call it the large one or the 13-foot one.

21 Q Okay. The large one?

22 A Or the one that swings in, whichever one you
23 want.

24 Q It's a 13-foot gate --

25 A I'm not sure, but it's the wide one, the big

1 the winter, as was stated in the depositions, then that was
2 negligence.

3 The halter being left on the horse in especially
4 the -- that pasture with the rubbish and the old vehicles
5 and the trash and so many things that the halter could be
6 hooked over was negligence in the care of the horse.

7 The way that the latch was constructed with -- I
8 think there's a hook on it on one side -- woops -- on the
9 bottom side I put it. And if I recall, there's a bolt
10 probably used as a handhold. Those are both features that
11 a halter could be hooked on, or a horse even bumping it
12 could -- the negligence in the construction of the gate,
13 bumping the gate if the keeper is not -- even if it's all
14 the way down, if it's bumped hardly or bumped securely or
15 severely or if even bumped a little, if the feed were put
16 closely enough to the fence -- pardon me -- to the gate on
17 the other side, then horses would tend to reach for that
18 and their pushing motion would rattle that gate loose.

19 In the construction of the gate, the gate was
20 constructed so if it were unlatched by any means or left
21 unlatched, it would fall open to the -- to the width, I
22 would say, of -- I'll use two refrigerators because we
23 actually photographed how far it would fall open.

24 Q Did you measure how far it fell open?

25 A I don't think -- I don't recall that we measured

1 made of wood, and it has a great deal of weight. It will
2 pull against this if this isn't in its position. In fact,
3 it did that two or three times when Mr. -- whose place is
4 this?

5 Q Erickson?

6 A Erickson. Okay. When we were there at
7 Mr. Erickson's place, we went out of that gate a couple
8 times with him. Well, you were there, too, I think. That
9 very thing happened. As we walked off, it fell open again
10 and he went back and pushed it down again to close it.

11 So it's a normal thing that this does. This
12 keeper -- wow -- this latch, if it isn't forced into the
13 keeper severely or securely, it will happen just like you
14 saw it that day. It just comes open again.

15 Q Okay. Is there any evidence that you are aware
16 of, any witness, any investigating officer, anybody, who
17 has provided any information as to what condition the latch
18 was in in relationship to the keeper on the day of the
19 accident?

20 A Not to my knowledge.

21 Q Okay. So how, in your opinion, did this gate
22 come open, if that is your opinion? Is it your opinion
23 that that gate came open and that the horse got out?

24 A That's my strongest opinion of this whole thing,
25 is that gate came open or was bumped open, and/or was --

1 the halter was hooked into it or the rear end or the front
2 shoulder bumped either one of these in an upward motion, or
3 the horses may have been fighting over the hay that could
4 have been fed even on this side, and turning around could
5 have bumped it.

6 Bumping or straining either one of these in an
7 upward motion would have done it. Bumping the gate would
8 have rattled this so this could have come up as it's
9 slanted out as this is drawn. Any bumping could make that
10 move up.

11 So there are five or six alternatives of how
12 that could have come free by an animal, either from his
13 body and/or from especially the halter.

14 Q Okay. But we don't have any facts to support
15 that any of that stuff happened, do we?

16 MR. PARKER: You mean witnesses?

17 A Like witnesses?

18 Q Witnesses or anything.

19 MR. HOLLAND: Physical evidence.

20 Q Any evidence whatsoever that corroborates those
21 various possibilities that you just stated.

22 A Not on that night, but I did see it happen that
23 very day that we were all there.

24 Q What, you saw a horse bump up against it?

25 A Not a horse, but this not being latched securely

1 and the gate fell open.

2 Q Are there any other possibilities that you have
3 other than what you just identified as to how this gate
4 could have come open?

5 A Not particularly.

6 Q Would you agree, Mr. Johnson, that your theory
7 about how a horse could get out of that pasture, when you
8 apply it to what you know about that night when this
9 accident happened, that you're really just speculating?

10 A I'm pretty convinced that that -- that any one
11 of those things happened because of the negligence of the
12 way this whole thing was constructed. I owned a livestock
13 market at Cedar City. Did I -- has that been mentioned?

14 MR. HOLLAND: Yes.

15 Q Yes.

16 A And we handled like from thirty to 50,000 head
17 of livestock every year for 20 years. The thousands of
18 horses that I've raised and been around, you get to know
19 them as well as you know any species that you could, and
20 when you see elements of construction like this, it throws
21 up a red flag in a hurry that -- that it limits it to the
22 options in a big hurry.

23 Their behavior is pretty predictable, and so is
24 the maintenance and/or the construction of the facilities.
25 You get to know after that much time what works and what

1 what you're saying about the gate and the problems with the
2 gate.

3 A Okay.

4 Q All I want to do is, is there anything else that
5 you, in your opinion, in your area of training, see as a
6 negligent act that contributed to cause the horse to get
7 out of the pasture?

8 A Well, the placement of the hay that's been
9 referred to is a negligent act in having it apparently
10 close enough to the gate that the horses will attempt to
11 reach over it. That will be one that has been mentioned,
12 but I'll summarize all of them.

13 Q And do you have any information to indicate that
14 there was, in fact, hay placed in that area on the outside
15 of the gate on the day of the accident?

16 A Only that we saw very old hay where it had been
17 stacked.

18 Q Did the officer say he saw any hay stacked in
19 that area when he went up there the next morning after the
20 accident?

21 A I don't believe that I asked him that question.

22 Q Okay. And he didn't tell you that, did he?

23 A I don't believe so.

24 Q All right. Anything else, now, that we haven't
25 gone over that you think is a causal relationship to

1 A Oh, I'm sure I have. I mean, the answer is yes.
2 I can't be specific, but I'm sure I have.

3 Q And this oftentimes happens especially during
4 hunting season, does it not, oftentimes?

5 A Well, hunters have a reputation for doing that,
6 yes.

7 Q Okay. I just need you to give me some
8 information. Does the gate swing only one direction, swing
9 in or swing out, or does it swing both ways?

10 A No, it swings only in to the pasture.

11 Q So a horse pushing on it would close the gate,
12 would it not, on the gate?

13 A It would push the gate closed, yes, to the
14 closed position. The problem with that is if this is not
15 secure, any rattling will make this latch move up and out
16 as it's pushed and pushed and pushed again. That would
17 continue to climb until it was totally released if it
18 weren't properly latched.

19 Q Right. At least on the date that you saw it, it
20 would have that effect?

21 A I can only substantiate that by the gentleman
22 who said it hadn't been touched or repaired since the date
23 of the accident, so what I saw is what I saw, and that's
24 what he said.

25 Q Okay. You talked about ground. When ground is

1 Q Now, you indicated that sometimes the latch,
2 when you set it, it wouldn't close; is that correct?

3 A Correct.

4 Q And what do you base that opinion on?

5 A Well, one time when I tried the gate, which
6 means perform that latch exercise, it didn't go down far
7 enough, it came undone and fell away. The other time when
8 Mr. Erickson and I and I think maybe a couple others went
9 in, he reached over the gate, put the latch down, and it
10 didn't go far enough and it did the same thing as when I
11 did it, it popped out and fell open again.

12 Q You've been asked some questions about how the
13 horses could have possibly escaped from the field. Do you
14 have an opinion as to how they probably escaped from the
15 field?

16 A Well, as I stated before, in my opinion, the
17 probability is that they came out the gate area. I mean,
18 without a doubt, that's -- well, that's where the tracks
19 led to, and that's my opinion.

20 MR. SCHULTZ: I object to that. It lacks
21 foundation, and I would move to strike it.

22 Q Well, let me ask you this: Is any part of that
23 opinion based on the information you obtained from
24 Sergeant Murdock as to where, at least in his opinion, the
25 animals were tracked to?

ADDENDUM D

formation to disclose the cause, conditions then existing, and the persons and vehicles involved in the traffic accident.

(2) Every accident report requested under Section 41-6-35 shall be made in writing and on the appropriate form approved by the department. It shall contain all of the information required that is available.

(3) (a) The department shall suspend the license or permit to operate a vehicle and any nonresident operating privileges of any person failing to report an accident as requested under Section 41-6-35 until the report has been filed.

(b) The department may extend the suspension, not to exceed 30 days.

(c) Any person convicted of failing to make a report under Section 41-6-35 is punishable under Section 41-6-12.

History: L. 1941, ch. 52, § 27; C. 1943, 57-7-104; L. 1949, ch. 65, § 1; 1961, ch. 86, § 1; 1979, ch. 242, § 9; 1986 (2nd S.S.), ch. 4, § 3; 1987, ch. 138, § 29; 1993, ch. 234, § 31.

Amendment Notes. — The 1993 amendment, effective July 1, 1993, subdivided Sub-

sections (1) and (3), substituted "law enforcement agencies" for "police departments" in Subsection (1)(a), substituted "Section 41-6-12" for "Section 41-6-164" in Subsection (3)(c), and made a stylistic change.

COLLATERAL REFERENCES

C.J.S. — 60 C.J.S. Motor Vehicles § 43.

Key Numbers. — Automobiles ☞ 10.

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

(1) A person owning or in the 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.

History: L. 1941, ch. 52, § 28; C. 1943, 57-7-105; L. 1987, ch. 138, § 30.

Cross-References. — Livestock highways, § 27-12-117 et seq.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
No presumption provision.
Cited.

Constitutionality.

This section and § 4-25-8 do not unconstitutionally discriminate among similarly situated plaintiffs in actions involving unrestricted livestock merely because each provision imposes a different burden of proving liability. The legislature reasonably could have concluded that people's interest in the crops, fences and even personal security on their own land is both greater and different in kind than travelers' interest in safety on the highway. *Vaderwater v. Hatch*, 835 F.2d 239 (10th Cir. 1987).

No presumption provision.

This provision is clear and unambiguous and

in an action where plaintiff's motorcycle collided with a horse on a highway, it means that there is no presumption that the defendant was guilty in permitting the horses to be upon the highway under the conditions that were found there and the burden rests upon the plaintiff to establish acts of negligence. *Hyrum Smith Estate Co. v. Peterson*, 227 F.2d 442 (10th Cir. 1955).

Trial court properly directed verdict for defendant owner of horse struck by vehicle, since under this section the mere fact defendant's horses escaped from enclosure was not sufficient to justify submitting defendant's negligence to jury. *Rhiness v. Dansie*, 24 Utah 2d 375, 472 P.2d 428 (1970).

Cited in *Hornsby v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 758 P.2d 929 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

C.J.S. — 60 C.J.S. Motor Vehicles § 43.

A.L.R. — Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street, 49 A.L.R.4th 653.

Liability of governmental entity for damage to motor vehicle or injury to person riding

therein resulting from collision between vehicle and domestic animal at large in street or highway, 52 A.L.R.1th 1200.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 A.L.R.4th 822.

Key Numbers. — Automobiles ⇐ 10.

41-6-38.5. Peace officer investigating accident to notify owner if livestock or broken fence involved — Exempt from liability.

(1) A peace officer investigating an accident resulting in injury or death of any livestock shall make reasonable efforts as soon as possible to locate the owner of the livestock and inform the owner of the injured or dead animal.

(2) A peace officer investigating an accident resulting in a broken fence, if it appears the fence contains or controls the movement of livestock, shall make reasonable efforts as soon as possible to locate the owner of the property and inform the owner of the broken fence.

(3) Civil or criminal liability for claims does not arise against any peace officer for failure to locate the owner of the livestock or property. This subsection does not preclude disciplinary action by the department against a peace officer for failure to perform duties required by this section.

History: C. 1953, 41-6-38.5, enacted by L. 1985, ch. 127, § 1; 1987, ch. 138, § 31.