

NO. 70853-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SYLVIA WEBER, as mother and natural guardian of AMANDA S. WEBER, a
min,

Respondent,

vs.

JOSEPH GARRETT,

Defendant,

and

MONICA GLOVER,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Joseph Garrett owned a horse he sometimes pastured on land owned by Monika Glover.¹ Garrett gave the horse to Sylvia, who was looking for one for her daughter, Amanda. The horse was accustomed to children and was known to be gentle. Before taking the horse home, Sylvia allowed Amanda to ride it. Using Garrett's tack, Sylvia led the horse with her daughter on it slowly around an area on Monika's premises. When Sylvia's 2-year old needed a bathroom, Monika and Sylvia took the child inside Monika's home. Garrett continued to lead the horse Amanda was riding.

Amanda fell off, breaking her leg. She claimed Garrett had the horse trot. Garrett denied it.

Sylvia sued Garrett and Monika. The trial court denied Monika summary judgment, even though there was no dispute Monika neither owned the horse nor had any reason to know it was anything but gentle or that Garrett could not properly supervise while Amanda was riding it.

II. ASSIGNMENT OF ERROR

The trial court erred in denying Defendant Glover's Motion for Summary Judgment. (CP 5-6)

III. ISSUES PRESENTED

1. Did Monika have a duty to warn Amanda about the horse, where there was no evidence that (a) the horse was vicious, or (b) even if it had been, Monika knew that it was vicious?

2. Did Monika negligently supervise Garrett, where there was no evidence that (a) Garrett could not be trusted to monitor Amanda on the horse or (b) even if he could not be trusted, Monika knew that?

3. Is Monika immune from liability under the Equine Activities Act, RCW 4.24.530-540?

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff/respondent Sylvia Weber was looking for a horse for her daughter, Amanda. Sylvia, who held a degree in veterinary technology, had more than 30 years' experience in owning, showing, training, and breeding horses: she had owned and trained a Shetland pony in grade school; graduated in seventh grade to a Morgan X mare, which she rode on trails, jumped, and rode western, dressage, and English style; when the mare gave birth, she trained and showed the foal at horse shows; gave riding lessons to fellow 4H members; trained an Arabian for a family

¹ Defendant Monika Glover's first name was misspelled "Monica" in the caption to plaintiff's amended complaint.

friend; owned and trained a Thoroughbred yearling; and owned a Morgan X mare and a half Lippizan, which she rode in 25-50 mile endurance rides. By 2011, she had owned 5 different horses. (CP 71, 78-80, 87-88)

By the time of the incident in question, Sylvia's family had already owned four horses and a pony. Amanda had had the pony, but Sylvia felt she was ready for a horse, so they could go trail riding together. (CP 71, 78-79)

Defendant Joseph Garrett owned six horses including a horse named Taz. Garrett wanted to give Taz away because he had his other horses and felt he was too heavy to ride Taz. He responded to a "horse wanted" ad placed by Sylvia. (CP 30-31, 64, 88)

Sylvia and her two youngest children came out to see the horse. At the time, Garrett was pasturing Taz on the property of his fiancée, defendant/appellant Monika Glover. Garrett rotated his horses between his property and Monika's depending on the availability of grass. At the time of Sylvia's first visit, Monika was not present. (CP 34, 59, 72, 79)

Garrett told Sylvia that Taz had been a training horse at a riding stable that specialized in small children and that after that, Taz had been Garrett's 13-year-old son's horse. Taz had also been used in Civil War reenactments where there were cannons and guns. (CP 31, 71-72)

Sylvia and her two children all rode Taz. Sylvia would later testify that the horse had been well-behaved. She explained to Garrett that she was looking for a horse for Amanda, who had outgrown her pony. (CP 71-72, 79)

Pleased with Taz, Sylvia scheduled a date with Garrett to pick up the horse. A week later, Sylvia returned with all three of her children and a horse trailer. (CP 26, 62, 79)

In horse transfers, it is customary to allow the new owner to take the horse for a week or two to evaluate it and have a veterinarian check it, so Sylvia signed a lease agreement that allowed her to take Taz and try him out. If, during this trial period, everything was satisfactory, Garrett would transfer the horse's papers to her. (CP 26, 60-62)

Although the parties disagree whether it was Garrett's or Amanda's idea that Amanda should ride Taz before taking him home, there is no dispute that it was not Monika's idea. In any event, Sylvia held the horse while Garrett saddled him. Then Amanda was placed on Taz, using tack owned by Garrett.² Sylvia led the horse slowly around, while

² There is a dispute whether Garrett had already given away the saddle and halter to Sylvia as part of the transfer of the horse. For purposes of this appeal, it will be assumed Garrett still owned both items.

Garrett, Monika, and Sylvia's two younger children watched. (CP 37-39, 62-63, 66, 70, 79, 89-90)

Sylvia's youngest child, a 2-year old, then had to use a bathroom. Monika agreed to show Sylvia and the child where the bathroom was. After handing the horse's lead line to Garrett, Sylvia went inside Monika's house with her youngest and Monika. Garrett remained outside with Amanda still on Taz. Sylvia later testified that she expected Garrett to just hold the horse with her daughter on it while she was gone. She admitted, however, that she had not voiced this expectation. (CP 28, 67, 87, 93, 98-99)

Garrett resumed slowly leading the horse with Amanda on it. (CP 38, 39) He would later testify that, for no apparent reason, Amanda fell off. (CP 38) Amanda would later testify (CP 42):

Q. So did the horse start to trot and then you fell?

A. Yes.

....

Q. Were you afraid when he started to trot the horse?

A. Yes.

Q. Did you ask him to stop?

A. No. Because I fell off when he started trotting me.

Garrett denied that the horse had trotted. (CP 39) Both Garrett and Amanda agreed the horse was calm and did not buck. (CP 38, 42) Neither Monika nor Sylvia was present when the accident occurred. (CP 28, 34)

B. STATEMENT OF PROCEDURE.

Sylvia, as Amanda's guardian, sued both Garrett, the horse owner, and Monika, the premises owner. (CP 122-23)

At her deposition, Sylvia testified as follows (CP 91, 92-93):

Q. ...do you think that Monika Glover did something wrong here to have Amanda fall off the horse, and if it is, I'd like to know what that is?

A. Personally, her—no.

Q. Personally you don't; is that right?

A. She wasn't leading the horse.

Q. That[']s right. She wasn't leading the horse, it wasn't her horse. So as you sit here today, you don't think that there's anything Monika Glover did that led to Amanda falling off the horse, true?

A. Yeah.

Q. You don't have any evidence that there was any condition on the property that actually caused Amanda to fall off the horse, do you?

A. No, not that I'm aware of.

Garrett confirmed there was no condition on the premises that caused the fall. (CP 71) A photo of the area where Amanda was riding shows a flat, grassy area. (CP 69)

Monika moved for summary judgment. (CP 101-11) Plaintiff submitted no evidence that Monika had any reason to know the horse might not be gentle or that Garrett could not be trusted to properly supervise Amanda while on the horse. (CP 21-42) Nevertheless, the trial court denied the motion. (CP 5-6)

Commissioner Neel granted Monika's motion for discretionary review.

V. ARGUMENT

The purpose of summary judgment is to avoid a useless trial where, as here, there is no genuine issue of material fact. *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 848, 728 P.2d 617 (1986). A party opposing summary judgment may not merely rely on conclusory allegations, speculative statements, or argumentative assertions. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009). Rather, that party must produce specific facts demonstrating a genuine issue of material fact. *Id.*

As will be discussed, Sylvia failed to present **any** specific facts, not to mention reasonable inferences therefrom, that would create a genuine

issue of material fact. Indeed, Sylvia herself admitted she knew of nothing Monika had done that had caused her daughter's accident. (CP 91, 92-93) Under these circumstances, the trial court erred in denying Monika summary judgment. This court should reverse.

A. THERE WAS NO EVIDENCE TO SUPPORT PLAINTIFF'S THEORY OF LIABILITY AGAINST MONIKA.

In her response to Monika's summary judgment motion, Sylvia described her theory of liability as follows:

Monika Glover allowed Taz to be kept on her property, she shared the common goal of giving away of a number of horses that her fiancé, Mr. Garrett, owned, and she knew that Sylvia and Amanda Weber were coming to her property ... to take Taz. Defendant Glover owed the Webers a duty to warn them of the risk of horse-back riding and to supervise and protect them from the risk of harm from Mr. Garrett showing them the horse. Instead, Ms. Glover gave them no warnings and did nothing to ensure that Mr. Garrett handled Taz in a responsible and safe manner. She therefore breached her duty of care to Amanda Weber

(CP 47-48) In other words, she claimed that Monika should be liable as the premises owner and for her alleged failure to supervise or otherwise prevent Mr. Garrett's alleged negligence.

1. Premises Liability.

First, no one claims that any condition of the premises was dangerous or caused the accident. (CP 71, 92-93) Thus, Monika cannot be liable for any condition of the premises.

Second, Monika had no duty to warn. Domestic animals such as horses are not presumed to be vicious or dangerous. *Patrick v. Sferra*, 70 Wn. App. 676, 687, 855 P.2d 320 (1993), *rev. denied*, 123 Wn.2d 1008 (1994); *Hojem v. Kelly*, 21 Wn. App. 200, 205, 584 P.2d 451 (1978), *aff'd*, 93 Wn.2d 143, 606 P.2d 275 (1980). Thus, absent evidence that the horse in question was vicious, dangerous, or unmanageable, a defendant has no duty to warn about it. *Hojem*, 21 Wn. App. at 205.

There was no evidence that Taz, the horse in question was vicious, dangerous, or unmanageable. Before Garrett owned him, Taz had been a training horse at a children's riding stable and was accustomed to small children. (CP 31, 71-72) Amanda testified that Taz had been friendly and had not bucked or moved around. (CP 42)

Third, landowners are not guarantors or insurers of their invitees' safety. *Mucsi v. Graoch Associates L.P.*, 144 Wn.2d 847, 860, 31 P.3d 684 (2001); *see Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 54, 914 P.2d 728 (1996). Although landowners may have a duty to warn about even obvious hazards when "the possessor has reason to expect that the invitee will nevertheless suffer physical harm,"³ there is no evidence that

³ Glover disagrees that plaintiff was Monika's business invitee, but for the purpose of this appeal only, will assume she was.

Monika had any reason to expect that Amanda would suffer physical harm. RESTATEMENT (SECOND) OF TORTS § 343A, comment *f.* (1965). As discussed earlier, Taz, the horse, was known to be gentle and was used to children. (CP 31, 71-72) Furthermore, Monika knew that Garrett, the owner of several other horses, was with Amanda as she sat on Taz. (CP 30, 31, 34, 59, 99) There is no evidence that prior to Amanda's accident, Garrett had been negligent or risky around horses or, for that matter, children. Even if he had been, there was no evidence that Monika was aware of it.

2. Negligent Supervision.

Plaintiff claims that Monika negligently failed to supervise Garrett. A negligent supervision claim requires a showing that (1) the person whom allegedly should have been supervised posed a risk of harm to others; (2) the defendant who allegedly should have supervised that person knew, or reasonably should have known, that that person posed such a risk; (3) the defendant failed to exercise reasonable care in controlling the risk of harm posed by the person supervised; and (4) the alleged failure to adequately supervise was the proximate cause of plaintiff's injury. *See Steinbock v. Ferry County Public Utility District No. 1*, 165 Wn. App. 479, 490, 269 P.3d 275 (2011); *Barrett v. Pacheco*, 62 Wn. App. 717, 722, 815 P.2d 834 (1991).

Here, Sylvia presented not one shred of evidence that Garrett posed a risk of harm to others, let alone that Monika knew or should reasonably have known that he posed such a risk.

B. EVEN IF THERE WERE A GENUINE ISSUE OF MATERIAL FACT REGARDING MONIKA'S LIABILITY, SHE ENJOYS IMMUNITY UNDER THE EQUINE ACTIVITIES ACT.

Even if plaintiff had presented evidence that Monika had breached a common law duty to warn or to adequately supervise, she would be immune from liability under RCW 4.24.530-.540, the Equine Activities Act. Under the Act, an "equine activity sponsor" "shall not be liable for an injury to or the death of a participant engaged in an equine activity", with some limited exceptions to be discussed. RCW 4.24.540(1) (copy in Appendix A hereto).

The Act defines "equine" to include a horse. RCW 4.24.530(1). The Act also defines "equine activity" to include, among other things,

- "boarding equines";
- "riding, inspecting, or evaluating an equine belonging to another whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine"; and

“rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor.” RCW 4.24.530(2)(c)-(e).

An “equine activity sponsor” is defined in the Act to include an individual, whether or not operating for profit or nonprofit, which “sponsors, organizes, or provides the facilities for, an equine activity.” RCW 4.24.530(3). A “participant” is defined to mean “any person, whether amateur or professional, who directly engages in an equine activity, whether or not a fee is paid to participate in the equine activity.” RCW 4.24.530(4). RCW 4.24.530(5) defines “engages in an equine activity” to mean “a person who rides, trains, drives, or is a passenger upon an equine, whether mounted or unmounted”

Amanda was a participant engaged in an equine activity because she was directly engaged in riding an equine. She was riding, inspecting, or evaluating an equine belonging to another (Garrett) *or*, as will be discussed, was engaged in a ride sponsored by “an equine activity sponsor.” (CP 26, 42, 60-61)

Monika was an equine activity sponsor because she boarded Garrett’s horses (including Taz) and provided the facilities for Amanda’s ride and evaluation of Taz—her premises. (CP 59, 99)

Thus, Monika cannot be liable for Amanda's injury under RCW 4.24.540(1) unless one of the exceptions set forth in RCW 4.24.540(2) applies.

RCW 4.24.540(2) exempts the following from the immunity granted in RCW 4.24.540(1);

1. the horse racing industry, RCW 4.24.540(2)(a);
2. equine activity sponsors who provide the equipment or tack if the equipment or tack caused the injury, RCW 4.24.540(2)(b)(i)(A);
3. equine activity sponsors if they provided the equine and failed to (a) make reasonable and prudent efforts to determine the participant's ability to engage safely in the equine activity, (b) determine the ability of the equine to behave safely with the participant, and (c) determine the ability of the participant to safely manage the particular equine, RCW 4.24.540(2)(b)(i)(B);
4. equine activity sponsors who own, lease, rent, or otherwise are in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition known to or that should have been known to the equine activity sponsor and for which warning signs were not conspicuously posted, RCW 4.24.540(2)(b)(ii);

5. equine activity sponsors who commit an act or omission that constitutes willful or wanton disregard for the participant's safety and that act or omission caused the injury, RCW 4.24.540(2)(b)(iii);

6. equine activity sponsors who intentionally injure the participant, RCW 4.24.540(2)(b)(iv);

7. violations of liability provisions set forth in products liability laws, RCW 4.24.540(2)(b)(v); or

8. violations of liability provisions in RCW ch. 16.04, .13, or .16. RCW 4.24.540(2)(b)(vi).

No one claims exemptions 1 or 5-8 applies. There is no dispute that the tack provided Amanda was owned or provided either by Garrett or Amanda's mother, Sylvia. (CP 38, 66) There is no evidence it was owned or provided by Monika. Therefore, exemption 2 does not apply.

It is undisputed that Taz did not belong to Monika and that Monika did not provide the horse to Amanda. (CP 31, 60) Therefore, exemption 3 does not apply.

It is true that Monika owned the land where Amanda was injured. But, no one claims that there was a dangerous latent condition on the land or that if there was, it caused the accident. (CP 71, 92-93) Therefore, exemption 4 does not apply.

Since none of the exemptions to the RCW 4.24.540(1) immunity apply to Monika, she is immune from liability under the plain language of that statute.

VI. CONCLUSION

The transaction involving Taz was solely between Garrett and Sylvia. Monika did not own the horse. She did not own the tack. She was not present when the accident occurred. She did not know, and had no reason to know, that the horse was dangerous or that Garrett could not be trusted to supervise Amanda while she was on the horse. No one claims that any condition of the premises had anything to do with the accident.

Plaintiff failed to present *any* evidence that Monika did anything wrong that resulted in Amanda's fall off Taz. Sylvia has admitted as much. Moreover, Monika enjoys immunity from liability under RCW 4.24.540(1).

Under these circumstances, the trial court's denial of Monika's summary judgment motion was error. This Court should reverse and remand for entry of summary judgment in favor of Monika Glover.

Dated this 30th day of January 2014

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RCW 4.24.540**Limitations on liability for equine activities — Exceptions.**

(1) Except as provided in subsection (2) of this section, an equine activity sponsor or an equine professional shall not be liable for an injury to or the death of a participant engaged in an equine activity, and, except as provided in subsection (2) of this section, no participant nor participant's representative may maintain an action against or recover from an equine activity sponsor or an equine professional for an injury to or the death of a participant engaged in an equine activity.

(2)(a) RCW 4.24.530 and 4.24.540 do not apply to the horse racing industry as regulated in chapter 67.16 RCW.

(b) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine activity sponsor or an equine professional:

(i) If the equine activity sponsor or the equine professional:

(A) Provided the equipment or tack and the equipment or tack caused the injury; or

(B) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant, and determine the ability of the participant to safely manage the particular equine;

(ii) If the equine activity sponsor or the equine professional owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to or should have been known to the equine activity sponsor or the equine professional and for which warning signs have not been conspicuously posted;

(iii) If the equine activity sponsor or the equine professional commits an act or omission that constitutes willful or wanton disregard for the safety of the participant and that act or omission caused the injury;

(iv) If the equine activity sponsor or the equine professional intentionally injures the participant;

(v) Under liability provisions as set forth in the products liability laws; or

(vi) Under liability provisions in chapter 16.04, *16.13, or *16.16 RCW.

[1989 c 292 § 2.]

Notes:

***Reviser's note:** Chapters 16.13 and 16.16 RCW were each recodified and/or repealed in their entirety by 1989 c 286. For disposition of chapters 16.13 and 16.16 RCW, see Table of Disposition of Former RCW Sections.

Application -- 1989 c 292 §§ 1 and 2: See note following RCW 4.24.530.