

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 minor,

Respondent,

vs.

JOSEPH GARRETT,

Defendant,

and

MONIKA GLOVER,

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. Statement of Facts.

Plaintiff/Respondent Sylvia Weber placed an advertisement on Craig's List for a beginner's horse for her daughter, Amanda Weber. She received an email from Defendant Joseph Garrett stating that he possibly had a horse that fit the description. Mr. Garrett owned six horses at that time, including one named Taz. Mr. Garrett wanted to give Taz away because he was not getting much use. In correspondence, Taz was described as being "willing, cooperative, and gentle" and "great with kids." Mr. Garrett further stated "I...am motivated to find him a great home, preferable with children." CP at 12, 30-31.

One week prior to the incident, Ms. Weber met Mr. Garrett to inspect Taz at Appellant Monica Glover's home. Ms. Glover was not home for this first visit. Ms. Weber, and her two children, rode Taz and determined him to be well-behaved. CP at 21, 34, 71-72. At that time, Ms. Weber scheduled with Mr. Garrett to pick up the horse one week later. CP at 62.

Ms. Weber returned to Ms. Glover's home one week later to pick up Taz. Ms. Weber signed a lease agreement allowing her to take Taz home and if everything worked out, Mr. Garrett would then transfer the horse's papers. CP at 26, 60-62.

Although the parties dispute who suggested the idea, it was decided that Amanda would ride Taz. Mr. Garrett saddled and tacked the horse and Amanda was placed on Taz with stirrups that were too long and did not come up to Amanda's feet. Ms. Weber began leading Amanda when her youngest child, Hannah, had to use the bathroom. At that point, she asked Mr. Garrett to hold the horse so that she could take Hannah inside Ms. Glover's house to use the bathroom. CP at 37-39. Ms. Weber handed Mr. Garrett the lead line and followed Ms. Glover into the house. CP at 27.

When Ms. Weber returned, she noticed that Amanda was on the ground in an area away from where she had left her. Mr. Garrett testifies that he resumed slowly leading the horse with Amanda on it and that, for no apparent reason, Amanda fell off. However, Amanda stated that she fell off when Mr. Garrett made the horse trot. CP at 28, 38-39, 42. Mr. Garrett denies that the horse trotted. CP at 39. Amanda was then taken to the Evergreen Hospital where she later underwent surgery. CP at 28.

B. Statement of Procedure.

As Amanda Weber's guardian, Sylvia Weber sued Joseph Garrett and Monica Glover. CP at 122-123. After discovery, Ms. Glover moved for summary judgment. CP at 101-111. After oral argument, the Honorable George N. Bowden denied Ms. Glover's motion for summary

judgment. On September 20, 2013, counsel for Ms. Glover filed a timely Notice of Discretionary Review to the Court of Appeals, Division I and on December 17, 2013, Commissioner Neel granted discretionary review.

II. ARGUMENT

Summary judgment shall only be granted when “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.” CR 56(c); *Downey v. Pierce County*, 165 Wn. App. 152, 161, 267 P.3d 445 (2011). “A material fact exists when the outcome of the litigation depends on its resolution.” *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004).

In reviewing a denial of summary judgment, the appellate court makes the same inquiry as the trial court, “i.e., summary judgment is proper where there are no genuine issues of material fact.” *Robb v. City of Seattle*, 176 Wn.2d 427, 432, 295 P.3d 212 (2013). Further, the court views “[t]he facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party.” *Id.* at 432-433.

A. Defendant Glover had a Duty to Warn which was Breached and therefore Summary Judgment was Properly Denied.

The threshold issue of whether a duty exists is a question of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). However, whether that legal duty has been breached is generally a question of fact to be determined by a jury. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 857, 292 P.3d 779 (2013). A court may determine breach as a matter of law only where reasonable minds could not differ. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

1. Ms. Glover breached her duty to Amanda as an invitee.

It is undisputed, for the purposes of this appeal, that Ms. Weber was a business invitee on Ms. Glover's property at the time of the incident. "A landowner owes the highest duty of care to an invitee: that of reasonable care for the invitee's personal safety." *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 869, 82 P.3d 1175 (2003). A landowner is subject to liability for harm caused to an invitee by a condition on the land if the possessor:

knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 138, 875 P.2d 621 (1994). An invitee is entitled to expect that the land has been made safe for her entry. *Id.* Reasonable care requires the landowner to correct the dangerous condition or warn the invitee of the danger. *Id.* at 139.

The appellant is incorrect in asserting that no condition on the premises was dangerous or caused the accident. To the contrary, a fully grown horse presents an unreasonable risk of harm to an eight year old girl with extremely limited riding experience. Further, this line of reasoning is what led the trial court to deny Ms. Glover's motion for summary judgment. Ms. Glover should have recognized this unreasonable risk of harm existed and exercised reasonable care to prevent Amanda from unknowingly accepting the risk.

Contrary to the appellant's assertion, the duty to warn did not arise from the horse itself. The appellant correctly points out that "domestic animals such as horses are not presumed to be vicious or dangerous" and therefore, "absent evidence that the horse in question is vicious, dangerous, or unmanageable, a defendant has no duty to warn about it." *See Brief of Appellant* at 9. (citing *Patrick v. Sferra*, 70 Wn. App. 676, 687, 855 P.2d 320 (1993)). Rather, the respondent is arguing that Ms. Glover owed a duty from her status as a business invitee.

2. Ms. Glover breached her duty of care to Amanda by failing to prevent foreseeable dangerous conduct by Mr. Garrett.

Additionally, a landowner owes a duty of care to invitees to take reasonable steps to protect them from imminent harm and reasonably foreseeable conduct by third persons. *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997).

An issue of material fact exists as to whether Ms. Glover owed a duty of care to Amanda. If a duty was owed, an issue of material fact exists as to whether Ms. Glover took reasonable steps to prevent any foreseeable conduct by Mr. Garrett resulting in harm to Amanda. Ms. Glover owes a duty of care to Amanda as an invitee. It was reasonably foreseeable that Mr. Garrett's conduct might result in harm to Amanda, a young and inexperienced rider. Ms. Glover took no action to warn or ensure that Mr. Garrett handled Taz in a responsible and safe manner around Amanda.

Summary judgment was correctly denied. The trial court properly recognized that under the facts of this case, the issue of breach is one for the jury to decide. The trial court's determination was not an obvious or probable error.

B. Defendant Glover is Not Immune from Liability under the Equine Activities Statute.

The trial court also rejected Ms. Glover's argument that she is immune from liability under the equine activities statute, RCW 4.24.530-540, because she is not an equine activity sponsor or equine professional. The court should affirm the denial of summary judgment because the trial court did not commit an obvious or probable error in making this determination.

RCW 4.24.540(1) provides immunity from liability for equine activity sponsors and equine professionals due to the injury or death of an equine activity participant. However, Ms. Glover never presented any evidence or argument that she was an equine activity sponsor or professional. The statute defines an "equine activity sponsor" as:

An individual, group, or club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity including but not limited to: **pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and, operators, instructors, and promoters of equine facilities**, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

RCW 4.24.530(3)(emphasis added). Ms. Glover was not sponsoring, organizing, or providing facilities for an equine activity of the type contemplated by the statute. The listed activities include public, group-

oriented equine activities and professional equine activities. Regardless of the fact that Ms. Glover was not paid, the statute could easily have contained sales of horses, but it did not.

The legislature did not intend for this statute to extend immunity from liability to all equine activities or to the type of equine activity in question in the present case. If it had, the statute could have simply stated that equine activities include all horse related activities or omitted the list entirely. Instead, the legislature lists equine activities of a similar nature, noting that the list is not exclusive, which in turn suggests that other comparable equine activities would fall under the statute.

Ms. Glover was not the “equine activity sponsor” contemplated by the statute. She may have provided facilities, but not for operating a for-profit or nonprofit equine activity, this was her home. Instead, her “facility” was provided to aid in the sale of a horse to Ms. Weber, not for any of the reasons envisioned by the statute. The trial court correctly determined that this statute does not apply to grant immunity to liability to Ms. Glover’s actions.

III. CONCLUSION

The trial court did not commit any obvious or probable error in denying Ms. Glover’s motion for summary judgment. Instead, it determined that the issue of breach of duty should be left for the jury to

decide. Further, Ms. Glover is not immune from liability for this incident under the equine liability statute. The plaintiff/respondent respectfully requires that the Court affirm the trial court's denial of summary judgment in favor of the defendant/appellant Ms. Glover.

Dated this 4th day of March, 2014.

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DECLARATION OF SERVICE

I declare that I served the foregoing Respondent's Appeal Brief on the parties below:

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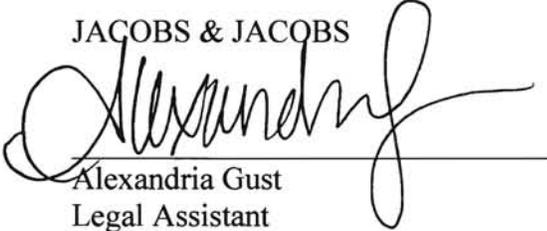
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by causing a full, true and correct copy thereof to be hand delivered by ABC Legal Messenger Service to the parties, at the addresses listed above, on March 5, 2014, and mailed the original to the Court of Appeals on March 4, 2014.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 4th day of March, 2014, at Puyallup, Washington.

JACOBS & JACOBS

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