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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2358**

Sarah Jewell, et al.,
Appellants,

vs.

Dorothy Backes, individually, and
d/b/a Maywood Road B's Thoroughbred Farm,
Respondent.

**Filed September 9, 2008
Affirmed
Schellhas, Judge**

Benton County District Court
File No. 05-CV-06-3173

Stephen D. Gabrielson, Stephen D. Gabrielson, Ltd., 18 Riverside Avenue South, Suite 200, Sartell, MN 56377; and

John D. Hagen, Jr., P.O. Box 15609, Minneapolis, MN 55415 (for appellants)

Paul Wocken, Willenbring, Dahl, Wocken & Zimmerman, P.L.L.C., 318 Main Street, P.O. Box 417, Cold Spring, MN 56320 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellants challenge the district court's grant of summary judgment against them on their negligence and scienter claims arising out of an injury sustained from a horse bite that occurred on respondent's farm. Because the injury was not foreseeable and appellants failed to demonstrate that the horse had vicious propensities, we affirm.

FACTS

Appellants Sarah Jewell (Jewell) and Michael Jewell, husband and wife, challenge the district court's grant of summary judgment to respondent Dorothy Backes, individually,¹ and doing business as Maywood Road B's Thoroughbred Farm.

Jewell visited respondent's horse farm at the invitation of Brenda Rick, an employee of respondent. Jewell and Rick walked through respondent's barn looking at and petting the horses, including Good Boy, a retired Thoroughbred racehorse. Rick did not notice Good Boy to be upset. On their way out of the barn, Jewell and Rick paused to talk in front of Good Boy's stall. Good Boy reached his head out of his stall and bit off part of Jewell's left ear. A surgeon sewed on the severed ear part, but it did not attach successfully.

Rick's deposition testimony and affidavit were submitted to the district court by respondent. Rick had known Good Boy since he was a yearling and did not know him to have aggressive or vicious tendencies. In Rick's opinion, the bite "could have been a sign of playfulness as opposed to an act of aggression," and if Good Boy had been mad,

¹ Respondent Dorothy Backes is now deceased.

he “would have made more noise,” “hit the stall door,” and “most likely would have bitten [Jewell’s] entire ear off.”

The deposition testimony of Todd Hoffrogge was submitted to the district court by respondent. Hoffrogge is an experienced trainer and horse racer and trained some of respondent’s horses, including Good Boy. “[M]idseason in [Good Boy’s] career,” Good Boy bit Todd Hoffrogge in the back when Hoffrogge bent down to exit Good Boy’s stall. Hoffrogge could not remember the exact year in which this incident occurred, and he was not aware of, or could not remember, any other incident of Good Boy biting anyone. Hoffrogge thought that Good Boy biting him was “kind of a game” to Good Boy, that Good Boy knew Hoffrogge was in a vulnerable position, and that “to [Good Boy] at that point it was . . . hey, I got ya, ha ha.” No evidence was submitted to the district court that Good Boy’s bite of Hoffrogge resulted in any injury to Hoffrogge or that he sought medical attention as a result of the bite. Hoffrogge did not tell respondent about the horse bite. Hoffrogge opined that Good Boy was not prone to violent or aggressive tendencies, and with reference to the injury suffered by Jewell, he did not see how Rick could have prevented or foreseen that “[Good Boy] would have reacted” as he did. Hoffrogge explained that if Good Boy had pinned back his ears, Rick maybe could have seen that he was giving a warning sign.

The deposition testimony of Nicole Eller-Medina, D.V.M, was submitted to the district court by respondent. Dr. Eller-Medina is a veterinarian who was acquainted with Good Boy, his trainer, and other horses at respondent’s farm. Dr. Eller-Medina never had a particular problem with Good Boy in terms of aggressive behavior. According to Dr.

Eller-Medina, when horses are upset or aggressive, they give off warning signs, such as, baring their teeth and flattening back their ears.

Respondent moved for summary judgment, arguing that Jewell's injury was not reasonably foreseeable and that there was no evidence that Good Boy had vicious propensities. The district court granted summary judgment. This appeal follows.

D E C I S I O N

I.

On appeal from summary judgment, appellate courts ask if the district court erred in its application of the law and if there are any genuine issues of material fact. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In reviewing a grant of summary judgment, "the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993.)

"The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) (quotation omitted). The district court concluded there was no duty of care.

"The common-law test of duty is the probability or foreseeability of injury to the plaintiff." *Connolly v. Nicollet Hotel*, 254 Minn. 373, 381, 95 N.W.2d 657, 664 (1959). The duty is defined by the risk reasonably to be perceived. *Id.* The risk to be perceived is the risk to another "within the range of apprehension." *Id.* (quotation omitted). The

risk is sufficient “if the possibility of an accident was clear to the person of ordinary prudence.” *Id.* (quotation omitted). But the risk must be *reasonably* anticipated, and “no one can be expected to guard against an occurrence which is so unlikely, remote, or improbable that the possibility of such an occurrence is commonly disregarded.” *Luke v. City of Anoka*, 277 Minn. 1, 8, 151 N.W.2d 429, 434 (1967). “Generally, the existence of a legal duty is an issue for the court to determine as a matter of law.” *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

The district court concluded that the injury was not foreseeable, and we agree. We emphasize that the issue for consideration is not whether Good Boy’s prior bite was playful or a game to him, but whether the prior bite showed a tendency to cause harm. “The correct view of the law . . . is that *any* serious prior injury or behavior by the animal tending to cause harm can of itself be sufficient evidence of a vicious or dangerous propensity, whether manifested in play or in anger.” *Ryman v. Alt*, 266 N.W.2d 504, 507 (Minn. 1978) (emphasis added). Though *Ryman* addressed a scienter claim, the rule that playfulness is irrelevant to tendency to cause harm is equally applicable in a negligence claim. See *Harris v. Breezy Point Lodge, Inc.*, 238 Minn. 322, 325-26, 56 N.W.2d 655, 658 (Minn. 1953) (addressing dangerous propensities for a negligence claim); *Boitz v. Preblich*, 405 N.W.2d 907, 911 (Minn. App. 1987) (citing dangerous propensities portion of *Harris* in scienter analysis). Thus, in this case, the issue is not whether Good Boy’s bite of Hoffrogge was playful, but whether it made a future harmful bite foreseeable because of seriousness of the prior injury. Here, as above noted, appellants submitted no

evidence to the district court that the bite to Hoffrogge resulted in any injury let alone a serious injury.

Appellants have failed to present sufficiently probative evidence that Good Boy's prior behavior demonstrated a tendency to cause harm that made future injury foreseeable, therefore, we agree with the district court that respondent owed no duty of care. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (holding that no genuine issue of material fact exists when "the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.") While a risk that a horse will bite or kick always exists, no evidence was submitted to the district court to establish that the foreseeability that Good Boy would bite someone in a way that caused serious injury. We affirm the district court's grant of summary judgment on this claim.

II.

Under a common-law scienter action a person injured by a domestic animal "may recover from the animal's keeper for injuries inflicted by the animal . . . by proving that (1) the animal had a vicious propensity, and (2) the animal's keeper had notice of the vicious propensity." *Ryman*, 266 N.W.2d at 506. The district court concluded that the record lacks any evidence that Good Boy had a vicious propensity, and we agree. Appellants failed to provide evidence showing that Good Boy had a dangerous propensity or "behavior tending to cause harm." *Ryman*, 266 N.W.2d at 507. Accordingly, the first

element of a scienter claim is lacking. We therefore affirm the district court's grant of summary judgment on this claim as well.

Affirmed.