

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 PAMELA MCSWAIN,)
4)
5 Plaintiff,)
6 vs.)
7 UNITED STATES OF AMERICA,)
8 Defendant.)
9

Case No.: 2:15-cv-01321-GMN-GWF

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

10 Plaintiff Pamela McSwain (“Plaintiff”) initiated this action against Defendant United
11 States of America (“Defendant”) on July 13, 2015, asserting a claim for negligence under the
12 Federal Tort Claims Act (“FTCA”). (See Compl., ECF No. 1). Beginning on July 2, 2018, the
13 Court conducted a three-day bench trial. Having reviewed the parties’ briefs and related
14 exhibits, and having considered the argument of each of the parties at trial, the Court hereby
15 makes the following findings of fact and conclusions of law.

16 **I. FINDINGS OF FACT¹**

17 1. On the morning of September 29, 2014, Plaintiff entered the TSA security
18 checkpoint at McCarran International Airport. Plaintiff had with her a carry-on luggage bag
19 and her Cocker Spaniel “Chief.” Chief served as an emotional support dog for Plaintiff while
20 flying.

21 2. TSA canine handler Raymond Fasciano (“Fasciano”) and his dog “Vadar” were
22 stationed at the security checkpoint by Plaintiff. Vadar, a young Labrador Retriever, was
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25 ¹ To the extent any Finding of Fact should be properly designated a Conclusion of Law, it shall be deemed a
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shall be deemed a Finding of Fact.

1 secured by a leash attached to a harness. Vadar was chosen as a TSA canine for his high
2 energy and drive.

3 3. Fasciano was acting within the scope of his employment at the time of the subject
4 incident.

5 4. Upon seeing Plaintiff and her dog, Vadar began barking and pulling on the leash
6 in Plaintiff's direction. Fasciano attempted to block Vadar's view of Chief and regain Vadar's
7 focus but was unsuccessful.

8 5. Vadar had barked or been distracted by passenger animals roughly forty times
9 between May 2014 and September 2014.

10 6. While Vadar was barking, TSA agent Robin Cotton directed Plaintiff to move
11 from the TSA Precheck lane to the disability and wheelchair lane.

12 7. As Plaintiff was transitioning between lanes, Fasciano knelt down to try and calm
13 Vadar. By kneeling down, Fasciano had less leverage and control over Vadar's leash. Vadar
14 abruptly pulled backwards, slipped out of his harness, and began running towards Plaintiff and
15 Chief.

16 8. TSA standards and guidelines provide that a handler must maintain positive
17 control over the canine. These standards encompass, inter alia, keeping the canine on a leash.

18 9. Plaintiff's canine handling expert, Kerry Tritschler ("Tritschler"), testified that
19 Fasciano improperly handled Vadar during the subject incident. Tritschler also testified that
20 Vadar would not have been able to slip out of his harness were it properly tightened. The Court
21 finds Tritschler's opinions to be credible.

22 10. After Vadar escaped from his harness, Plaintiff bent down to pick up Chief in her
23 arms. Vadar then ran through the security line and made contact with Plaintiff, knocking her
24 and Chief to the floor. As a result of the incident, Plaintiff sustained physical injuries to her
25 back.

1 11. Plaintiff saw numerous medical professionals after the incident. In determining
2 which treatments are related to the incident, the Court finds credible the testimony and report of
3 Dr. Richard C. Rosenberg. According to Dr. Rosenberg, “the MRI scans and x-rays that are
4 related to the September 29, 2014, incident were one cervical MRI scan, one lumbar MRI scan
5 and one MRI scan of the thoracic spine.” Dr. Rosenberg estimated the cost of these procedures
6 at \$4,500.00. In addition, Dr. Rosenberg found that twelve of forty-one physical therapy
7 treatment sessions were related to the incident, totaling \$2,500.00. Plaintiff also incurred
8 expenses for administrative fees, medication, and other lesser treatments. Based upon a review
9 of the record, the Court finds that Plaintiff is entitled to \$10,000.00 in reasonable medical
10 expenses.

11 12. Following the incident, Plaintiff had Chief examined for injuries at Banfield
12 Medical Center’s offices in San Jose, California, and Henderson, Nevada. Based upon a review
13 of the record, the Court finds that Plaintiff is entitled to \$863.00 in reasonable veterinarian
14 expenses.

15 13. Plaintiff and her significant other, John Hendrick, testified to the mental and
16 emotional impact of the subject incident on Plaintiff. Based upon a review of the record, the
17 Court finds that Plaintiff is entitled to \$25,000.00 in damages for pain and suffering.

18 **II. CONCLUSIONS OF LAW**

19 1. The Court has subject matter jurisdiction over this action pursuant to the FTCA,
20 28 U.S.C. § 1346(b)(1), which states that federal courts “shall have exclusive jurisdiction of
21 civil actions on claims against the United States, for money damages, accruing on or after
22 January 1, 1945, for injury or loss of property, or personal injury or death caused by the
23 negligent or wrongful act or omission of any employee of the Government while acting within
24 the scope of his office or employment, under circumstances where the United States, if a
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1 private person, would be liable to the claimant in accordance with the law of the place where
2 the act or omission occurred.”

3 2. The “law of the place” refers to the law of the state where the act or omission
4 occurred. See *Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir.2001).

5 3. To establish a claim of negligence in Nevada, a plaintiff must demonstrate by a
6 preponderance of the evidence that: (1) the defendant owed the plaintiff a duty of care; (2) the
7 defendant breached that duty; (3) the defendant’s breach of duty was a legal cause of Plaintiff’s
8 injuries; and (4) that the plaintiff suffered damages. See *DeBoer v. Sr. Bridges of Sparks Fam.*
9 *Hosp.*, 282 P.3d 727, 732 (Nev. 2012).

10 4. Foreseeability of harm is a predicate to establishing the element of duty. *Ashwood*
11 *v. Clark Cty.*, 930 P.2d 740, 743 (Nev. 1997). With respect to domestic animals, courts look to
12 the characteristics of the animal which are normal to its class and create a foreseeable risk of
13 harm. See Restatement (Second) of Torts § 518 cmts. g, h (Am. Law. Inst. 1965). As to those
14 characteristics, the owner has a duty to anticipate the harm and exercise reasonable care to
15 prevent the harm. *Id.*; see also *Nichols v. Gallant*, No. A-12-667264-C, 2013 WL 7095982
16 (Nev. Dist. Ct. Nov. 5, 2013) (stating that an owner or keeper of a dog may be liable for its
17 vicious or mischievous acts if the owner or keeper had prior knowledge of such propensities);
18 *Drake v. Dean*, 19 Cal. Rptr. 2d 325 (1993) (“The common law [] provided that the owner of
19 an animal which was not vicious . . . but which was prone to some other potentially harmful
20 behavior, could be held liable under a theory of negligence for any injury proximately caused
21 by such behavior.”).

22 5. The Court finds it foreseeable that an energetic, young Labrador Retriever
23 without a leash could knock down and injure an individual. Defendant had prior knowledge of
24 Vadar’s propensity for such energetic behavior upon seeing other domestic animals at the
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1 security checkpoint. Defendant therefore had a duty to exercise reasonable care towards
2 Plaintiff on September 29, 2014.

3 6. Defendant breached this duty by mishandling and leashing Vadar such that Vadar
4 was able to escape his harness and run freely through the security area. Defendant's breach is
5 further supported by the failure to abide by the TSA canine handling guidelines and regulations.
6 See Bolt v. United States, 509 F.3d 1028, 1032 (9th Cir. 2007) (stating that federal statutes and
7 regulations are relevant to establish the standard for reasonable care once a state law duty is
8 found to exist).

9 7. As a direct and proximate result of Defendant's breach, Plaintiff sustained
10 physical and mental injuries. See Babcock & Wilcox Co. v. Nolton, 71 P.2d 1051, 1056 (Nev.
11 1937) (allowing recovery for both physical and mental injuries in negligence actions).

12 8. To recover for medical expenses and treatment, a plaintiff must prove that the
13 expenses and treatments were "reasonable and necessary" as a result of the defendant's tortious
14 conduct. Wilson v. Biomat USA, Inc., 2:10-cv-1657-GMN-RJJ, 2011 WL 5239236, at *3 (D.
15 Nev. Oct. 31, 2011) (citing Hall v. SSF, Inc., 930 P.2d 94, 97 (Nev. 1996)). Plaintiff has met
16 this burden as to the damages detailed in the previous section. With respect to the remaining
17 asserted damages, however, Plaintiff has failed to sufficiently demonstrate a causal relationship
18 with the subject incident.

19 9. For injuries to a pet, Nevada law limits recovery to the lesser of actual veterinary
20 expenses or \$5,000. See NRS 41.740(1)(a), (2), (3).

21 10. Based on the foregoing, the Court concludes that Defendant was negligent in
22 failing to properly handle and leash Vadar. Defendant's negligence resulted in Plaintiff's
23 damages as stated above.

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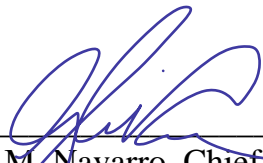
1 **III. CONCLUSION**

2 THEREFORE, in light of the foregoing Findings of Fact and Conclusions of Law,

3 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that Judgment is entered
4 against Defendant and in favor of Plaintiff.

5 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that Plaintiff is
6 awarded damages in the amount of \$35,863.00.

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8 **DATED** this 4 day of **August**, 2018.

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12 Gloria M. Navarro, Chief Judge
13 United States District Judge
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