NOTICE OF VICIOUS PROPENSITIES DETERMINES ANIMAL LIABILITY

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A few months ago, I was asked if I was aware of any recently reported court decisions involving petting zoos. Although the two recent cases presented herein do not involve petting zoos, they do illustrate the general rule of law regarding domesticated animals. In such instances, liability is based upon notice that a particular animal has vicious propensities.

A BITE AT THE FAIR

In the case of *Brophy v. Columbia County Agricultural Society*, 498 N.Y.S.2d 193 (A.D. 3 Dept. 1986), a young girl was bitten by a horse while attending a county fair. The of the case were as follows:

> On September 4, 1982, Deborah Brophy, accompanied by her 3 1/2 year old daughter, Elizabeth, paid an admission fee for entry to the Columbia County Fair operated by defendant Columbia County Agricultural Society (Society) Brophy and her daughter entered a barn to look at horses stabled therein. This partic ular barn was leased by the Society to defendants Ronald and Barbara Eigenbradt, and despite a "no trespassing" sign, was open to the fairgoers for the purpose to viewing horses The Brophys looked at horses in the first three stalls and, as they approached the fourth stall, a 12-year-old boy, Ronald Ernst, whom Barbara Eigenbradt had left in charge of the horses, called out, "You better stay away from that horse, it bites" At the same moment, the horse in the fourth stall, named "Copies Reflection," leaned out and bit the infant on her face and neck, lifting her off the ground approximately one foot and dropping her to the barn floor.

Brophy alleged that the Society, as owners of the barn, and the Eigenbradts, as owners of the horse, were negligent in failing "to restrain the horse despite its vicious propensities." The trial court denied defendants' motion for summary judgment which would dismiss the case. The Society and the Eigenbradts appealed.

On appeal, the defendants argued that Brophy had "failed to factually demonstrate that the horse had any vicious propensities, or that defendants knew or should have known of such propensities." As described by the appeals court, the following rule of law would govern negligence liability in this particular instance:

> To establish a prima facie case for an injury caused by a domestic animal, a horse, it was incumbent on plaintiff [Brophy] to demonstrate not only that the animal had vicious propensities but that the owner had knowledge of such propensities or that a reasonably prudent person would have dis - covered them. Vicious propensity has been defined as the tendency of an animal to do an act which might endanger another. Proof of a previous attack is unnecessary where other factors are indicative of knowledge.

Applying these principles to the facts of the case, the appeals court found that Brophy had met the burden of establishing a case in negligence against the Eigenbradts.

> In an examination before trial Barbara Eigenbradt admitted that she left Ernst, who regularly helped out with their horses, to watch over the horses and warn the fairgoers to stay away from them. As indicated, Deborah Brophy attested to the fact that Ernst warned her just moments before the incident in question, that Copies Reflection "bites." While Barbara Eigenbradt testified that Copies Reflection was of average size, she earlier stated that this horse was very large and had a long reach, which prompted her to advise Ernst to warn fairgoers to keep their distance. Further testimony from both of the Eigenbradts indicated that the horse had a tendency to push people, although, in their view, not in a harmful manner. Very clearly, if a 12-year old boy was aware of the horse's vicious nature, as his untimely warning to the Brophys evidences, it would not be unreasonable to attribute a similar awareness to the Eigenbradts, who owned and trained the horse for five years.

Brophy contended that the Society, as the operator of the fair, "owed his family a duty to provide a safe place for viewing and that a question of facts exists as to whether this duty was breached." The Society maintained that the duty owed was more narrow. Specifically, the Society argued that "the same rule of liability applicable to the Eigenbradts extends to them, i.e. no liability exists absent a showing of knowledge of the horse's vicious tendencies," In the opinion of the appeals court, a question of tact was raised as to the Society's liability under either theory, safe viewing place or notice of vicious propensities.

> As part of its leasing agreement, the Society maintained and inspected the barn areas Copies Reflection had been stabled on its property for five years, giving rise to an inference that the Society's representatives may have been aware of the horse's nature.

The appeals court, therefore, concluded that "a question of fact is pre-seated as to whether the Society knew or should have known about Copies Reflection's tendencies," Summary judgment dismissing a suit is inappropriate where a question of tact exists. A question of fact exists where reasonable minds could differ on the evidence necessary to establish liability. In this case, summary judgment for defendants was inappropriate since reasonable minds could differ as to whether or not the Society and the Eigenbradt's bad notice of Copies Reflection's vicious nature. As a result, the appeals court found that the trial court had properly denied defendants' motion for summary judgment to dismiss Brophy's negligence claim, Consequently, this case would be allowed to proceed to a full trial before a jury.

DONKEY BASKETBALL

In the case of *Arbegast v, Board of Education of South Berlin Central School*, 65 N.Y. 2d 161,480 N.E.2d 365 (1985), plaintiff Christy Arbegast, a student teacher at the South New Berlin Central School was injured during a donkey basketball game when the donkey she was riding put its head down and she fell off. The circumstances surrounding the incident were as follows:

> The game sponsored as a fund-raising event for the senior class, was staged under contract by the defendant Buckeye Donkey Ball Company, which provided the donkeys, helmets tot each of the players, al/d an employee

> who transported and handled the animals, gave instructions to the participants, and acted as referee of the games, in return for which the company received a percentage of the receipts. Two games were played; the first pitted the faculty team against the first department team and was won by the faculty team; the faculty team then opposed the senior class team in the second game. Arbegast participated in the first game without mishap, but had a different, larger donkey for the second game than she had for the first. She spent a good deal of the game walking the donkey around but, at the urging of another faculty member, mounted. Soon thereafter she was thrown over the donkey's head when it put its head down as it stopped, with resultant permanent injuries to her left arm.

Arbegast sued the Board of Education and Buckeye, Arbegast settled with the Board of Education prior to trial.

Arbegast alleged that Buckeye was negligent in "knowing of the vicious propensities of the donkey," and allowing Arbegast "to ride without sufficient warning of such propensities." She also alleged that Buckeye failed to provide supervision and failed to provide adequate safety equipment. Buckeye denied any negligence on its part and argued that Arbegast had assumed the risk of injury under the circumstances of this case. There was evidence that "the instructions given by Buckeye's employee to the participants included the statements that the donkeys do buck and put their heads down causing people to fall off and that if injuries happened the participants were at their own risk."

The trial court had instructed the jury that they were to find for Arbegast if the donkey assigned to Arbegast was known by Buckeye to be vicious and Arbegast was *unaware* of such vicious tendencies. On the hand, the jury was instructed to find for Buckeye if Buckeye had warned Arbegast or Arbegast's own observations would have made her aware of any vicious tendencies, The jury found that Arbegast was actually aware, or in the exercise of reasonable care should have been aware, of the donkey’s vicious propensities.

The trial court, therefore, entered judgment for Buckeye. Arbegast appealed. The appeals court affirmed. Arbegast then appealed to the state supreme court.

issue before the state supreme court was whether the state comparative negligence statute applied to "a strict liability action involving the vicious propensities of a domesticated animal." Under a comparative negligence statute, plaintiff's recovery is reduced by that percentage of fault which caused his own injury. Unlike negligence, strict liability is liability without fault.

> The rule governing one who keeps an animal with knowledge of its vicious propensities is one of strict liability or, as it is sometimes called, absolute liability, rather than negligence ... [T]he rule applies not only to a wild animal, but also to a domestic animal which is vicious or has a dangerous tendency of which its owner knows or has reason to know.

As noted by the supreme court, "contributory negligence was not a defense to such [strict] liability, but assumption of risk was.” Contributory negligence is unreasonable conduct on the part of the plaintiff in failing to provide for his own safety under the circumstances, Assumption of risk is a voluntary encounter with a known hazard. The injured party may

expressly assume the risk verbally or in writing. On the other hand, assumption of the risk may be implied from his behavior under the circumstances.

Under the comparative negligence statute, the state supreme court found that the assumption of risk must be expressed, rather than implied, to be a defense in a strict liability action for the vicious propensities of a domesticated animal. In this particular instance, the court found that Arbegast had expressly assumed the risk of being thrown from the donkey. As a result, Arbegast was barred from recovery.

> Here there is evidence from which the jury could have concluded that Arbegast had knowledge of the risk and by participating in the games voluntarily assumed it, and no question that Arbegast's conduct in mounting the donkey from which she was thrown was a cause in fact of her injuries. She would, therefore, have been entitled to a comparative [negligence] causation charge on implied assumption of the risk had she not conceded that she was told before the games began that "participants are at their own risk." [A comparative negligence charge would have reduced, but not barred her recovery.] In light of that concession, however, [that Arbegast expressly assumed the risk] the Trial Judge should have directed a verdict for defendant [Buckeye].

The state supreme court, therefore, affirmed the judgment of the lower courts in favor of defendant Buckeye.