Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-074

NOVEMBER TERM, 2006

Mary A. Morrissey	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
Rhoda Carroll and Timothy Carroll	}	
	}	DOCKET NO. 327-10-03 Bncv

Trial Judge: John P. Wesley

In the above-entitled cause, the Clerk will enter:

Plaintiff in this personal injury action appeals from a summary judgment of the Bennington Superior Court in favor of defendants Rhoda and Timothy Carroll. Plaintiff contends the court erred in finding that defendants had no duty to take special precautions to prevent their horse from bolting absent evidence that it had engaged in similar behavior in the past. We affirm.

This lawsuit arose from an incident that occurred on the afternoon of October 19, 2000, in Bennington, Vermont. Plaintiff Mary A. Morrissey was driving south on Middle Pownal Road when she encountered two unattended horses in the middle of the road. One of the horses appeared to be injured, and bleeding. Plaintiff

stopped at a nearby residence to ask the owners to call the police, returned to her vehicle, and followed the horses down the road. As they approached property owned by the O=Neills, plaintiff observed that a pasture fence had been knocked down. The horses entered the property over the fallen fence. At about this time, employees from the Town of Bennington arrived and started to secure the broken fence. As plaintiff observed the repairs, the injured horse suddenly reappeared, rammed through the fencing, and collided with plaintiff, causing a number of injuries.

Plaintiff subsequently filed a personal injury action against the owners of the horses, defendants Rhoda and Timothy Carroll, stating claims for strict liability and negligence. Plaintiff alleged that defendants had failed to take adequate precautionary measuresCsuch as a specially enclosed paddock and blindersCto protect against the risks posed by the horse (known as AJoker@), who suffered from a condition called moonblind uveitus which impaired her vision. The trial court granted defendants= motion for judgment on the pleadings as to the strict liability claim, ruling that, while strict liability might traditionally attach to a keeper of wild animals, a horse is a domestic animal and therefore subjects the owner only to common law negligence. Plaintiff has not appealed from this ruling.

Following additional discovery, defendants moved for summary judgment on the negligence claim, arguing that they had no prior knowledge of any similar incidents involving the horse in question, and therefore had no duty to take precautionary measures. Defendants relied principally on Zukatis v. Perry, 165 Vt. 298 (1996), in which this Court affirmed a summary judgment in favor of the owner of a horse that had kicked a trespassing child. In so holding, we cited the Ageneral rule@ that

> the keeper of a domestic [animal] is not liable for injuries to persons and property unless the owner had some reason to know the animal was a probable source of danger. Stated another way, liability attaches only when the [animal]=s past behavior has been such as to require a person of reasonable prudence to foresee harm to the person or property of others.

Id. at 303 (quotations omitted). Plaintiff argued, in response, that Zukatis does not control where there was evidence that the animal causing the injury had a condition which predisposed it to dangerous behavior. Plaintiff relied in this regard on the opinion of an expert in veterinary medicine that horses who suffer from moonblindness uvietus are prone to being spooked, and should therefore be confined to small paddocks and forced to wear blinders in order to protect against incidents of the sort that occurred in this case.

The trial court rejected plaintiff=s argument, ruling that, even giving full

> credence to the opinion offered by Plaintiff=s expertCthat visually impaired horses generally spook easilyC[plaintiff] still must produce evidence of Joker=s past bolting/escaping behavior to activate any heightened duty of care. There is simply nothing of record from which it might reasonably be inferred that either Defendant should have been aware of Joker=s potential danger due to susceptibility to startle or bolt.

Accordingly, the trial court entered summary judgment in favor of defendants. A subsequent motion to amend the judgment was denied. This appeal followed.

Plaintiff argues, as she did below, that Zukatis should not be construed to require evidence of prior aggressive behavior in a domestic animal when the owner was aware of an infirmity in the animal which predisposed it to such behavior. To borrow plaintiff=s example, the owner of a rabid dog should not entitled to a Afirst bite@ as a precondition to the imposition of a duty of care. The issue raised by plaintiff is an interesting one, and the argument is not without merit. We need not resolve the issue here, however, for even assuming a duty of care in these circumstances, plaintiff has adduced no facts from which a reasonable jury could find a breach of that duty. The ultimate question in determining actionable negligence is whether a prudent person, in like circumstances, would have reasonably anticipated the harm. See Schaad v. Bell Atlantic NYNEX Mobile, Inc., 173 Vt. 629, 631 (2002) (mem.) (AA longstanding principle of Vermont law is that a claim under the ordinary theory of negligence must establish that the defendant had knowledge or foresight, or

reasonably could be chargeable with knowledge.@); Zukatis, 165 Vt. at 302 (ASimply put, defendant can be found liable only if he has failed to take steps that a reasonable person would take under like circumstances.@). Although the issue of whether a defendant has breached a duty of care is normally a question for the jury, it will be decided as a matter of law when the material undisputed facts allow only one reasonable inference. LaFaso v. LaFaso, 126 Vt. 90, 96 (1966).

The record here contains no evidence from which a reasonable jury could infer that defendants knew or should have known that the horse posed a potential risk of harm of the kind that ensued. To be sure, there was no dispute here that defendants had been informed by several veterinarians of the horse=s condition, understood the condition to be an inflammation of the eyes, and were aware that it was becoming progressively worse. Defendant Rhoda Carroll also testified without contradiction, however, that she had been treating the condition precisely as she had been advised by the veterinarians, with an ointment and the use of a fly mask to prevent discomfort from sun glare, and also the occasional use of an anti-inflammatory. She also testified, again without contradiction, that none of the horse=s veterinarians had informed her that a horse with this condition would spook easily, or that defendants should do anything differently concerning the horse. And she testified further that, since developing the eye condition, the horse had displayed no change in temperament, which she described as very gentle. Indeed, until the day of the incident, she had seen the horse spooked only once, by a dirt bike. Finally, while acknowledging that she had some general awareness of the disease, based upon her extensive experience raising horses, she had observed that horses with similar conditions were cared for in the same manner that she had cared for her=s. It was her general understanding that visual conditions like uveitus were not be a problem for a calm, easily handled horse like Joker.

The record evidence summarized above provides no basis to support a finding that defendants knew or should have known that the horse=s condition could, as the expert suggested, cause it to be easily spooked. Nor is there any basis, as plaintiff suggests, to find a duty to inquire. On the contrary, all of the evidence indicated that defendants had no reason to suspect such a result. The treating veterinarians had prescribed only palliative measures such as ointments and fly masks to prevent discomfort, and had said nothing about the risk of being spooked or the need to protect against such a risk. Moreover, defendants= general understanding of

the condition raised no warning flags about such a possibility. Accordingly, we cannot find any basis on which a reasonable jury could conclude that a prudent person, in defendants= circumstances, should have known of the risks and taken steps to prevent it. Zukatis, 165 Vt. at 302. Thus, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice