STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DONNA M. SUER, ET AL,

Plaintiffs,

vs.

JAMES S. VALENTINE, ET AL,

Defendants.

Case No. **CV 2011 2846**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE: GENERAL NEGLIGENCE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants Valentines' "Defendant's Motion for Summary Judgment Re: General Negligence" filed July 23, 2012. Contemporaneous with that filing were "Defendant's Memorandum of Authorities of Support for Motion for Summary Judgment Re: General Negligence", "Defendant's Statement of Facts in Support for Motion for Summary Judgment Re: General Negligence", and "Affidavit of Patrick W. Harwood in Support for Motion for Summary Judgment Re: General Negligence". On August 8, 2012, plaintiffs Suers filed "Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Re: General Negligence", and an "Affidavit of Jeffrey R. Owens in Support of Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Re: General Negligence". On August 15, 2012, Valentines filed "Defendants' Reply in Support of Motion for Summary Judgment Re: General Negligence", and another "Affidavit of Patrick W. Harwood in Support for Motion for Summary Judgment Re: General Negligence". Oral argument

was held on August 22, 2012.

This Court has previously set forth the factual and procedural history of this case in its February 15, 2012, Memorandum Decision and Order Denying Plaintiffs' Motions to Strike:

> Suers filed their Complaint on April 4, 2011, alleging Valentines were negligent in not recognizing their horse (named "Dusty") was dangerous, and that such negligence caused damages to Carianne Suer in excess of $10,000.00. Complaint for Damages, pp. 2-3. Valentines filed their Answer and Demand for Jury Trial on May 25, 2011. On July 11, 2011, this Court filed its Scheduling Order, Notice of Trial Setting and Initial Pretrial Order (Scheduling Order), scheduling this case for a five day jury trial to begin on May 21, 2012. That Scheduling Order established that "Motions for summary judgment shall be timely filed so as to be heard not later than **ninety-one (91) (thirteen weeks) before Trial.**" Scheduling Order, p. 2, ¶ 1. d. (bold in original).
>
> On February 3, 2012, Valentines filed a motion for summary judgment and supporting brief and affidavits, arguing that no evidence exists regarding Valentines' knowledge of the dangerous propensities of the horse at issue and Suers therefore cannot meet their burden of showing any breach of a special duty owed by virtue of that knowledge. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, p. 2. In support of that motion for summary judgment, Valentines submitted the affidavit of Alice Jordan. Jordan was the prior owner of the horse in question ("Dusty"), and sold Dusty to Christina Valentine in 2006 or 2007. Affidavit of Alice Jordan, pp. 2-3, ¶¶ 5-17. Valentines filed a Notice of Hearing scheduling the hearing on their motion for summary judgment for March 5, 2012. Notice of Hearing, p.1.
>
> On February 7, 2012, Suers filed their motion to strike the motion for summary judgment as untimely and their motion to strike the Affidavit of Alice Jordan. Also on February 7, 2012, Suers filed a motion to shorten time on the hearing of their motion to strike. On February 10, 2012, Valentines filed their opposition to the motion to strike and the motion to shorten time. At the beginning of the February 15, 2012, hearing on Suers' motions to strike, the Court granted Suers' motion to shorten time. The Court also rescheduled the hearing on Valentines' motion for summary judgment a day later, on March 6, 2012, due to Suers' counsel not being available on the March 5, 2012, date originally scheduled.

Memorandum Decision and Order Denying Plaintiffs' Motions to Strike, pp. 1-2.

On March 12, 2012, this Court entered its "Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment", in which the Court concluded:

> The Court, having resolved an issue of fact (whether Carianne crawled through the pasture split rail fence as Valentines contend, or was invited by Christina into the pasture to help as Suers contend) in favor of the non-moving party (the presumption on summary judgment is in favor of Suers' or Carianne's version, so it is the latter of those two scenarios upon which the Court makes its analysis at the present time), the Court now concludes that Valentines, the moving party, are entitled to judgment as a matter of law. There has been no evidence set forth by Suers that Valentines had any knowledge of Dusty's alleged propensity for violence. In fact, given the Affidavit of Alice Jordan (which this Court earlier refused Suers' motion to strike), the Court only has evidence of Dusty having never previously presented aggressive behavior.
>
> At oral argument, counsel for Suers mentioned that Christina Valentine was responsible for driving the horses right at Carianne Suers. But any specific action of Christina Valentine is not what is alleged in the Suers' Complaint. Suers Complaint is focused on the Valentines owning a dangerous horse, as that Complaint alleges: "At the time and place of this event, the Defendants either knew or should have known that their gelding had dangerous propensities and was a danger to the Plaintiff and others." Complaint for Damages, p. 2. As a result of what has been pled in the Complaint, the Court cannot graft on to that Complaint new causes of action based on Christina Valentine's driving Dusty into the direction of Carianne Suers.

Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment, pp. 12-13.

On March 26, 2012, Suers filed "Plaintiffs' Memorandum in Support of Their Motion to Amend the Complaint or, in the Alternative, Motion for Reconsideration". Both parties briefed the motions and oral argument was held on April 30, 2012. On May 9, 2012, this Court entered its "Memorandum Decision and Order Denying Plaintiffs' Motion to Amend, Denying Plaintiffs' Motion to Reconsider, and Granting Plaintiffs' Motion Under I.R.C.P. 59(e); Orders for Payment of Depositions, and Order Establishing Scheduling Conference." In granting Suers' I.R.C.P. 59(e) motion, this Court wrote:

> The Idaho Supreme Court in *Brown* went on to state:
>
> > Even where the Complaint, on its face, appears insufficient to place a reasonable defense attorney on notice of a cause of action, this Court may still find that pleading

> sufficient where the defendant responds to that cause of action in their answer. *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.,* 145 Idaho 241, 178 P.3d 606 (2008). In *Seiniger,* this Court noted that even where a complaint contained "glaring deficiencies," it was nevertheless judged sufficient to place the defendant on notice of a claim of breach of contract, where the defendant's answer offered a defense to a breach of contract claim. *Id. See also Zattiero v. Homedale School District No. 370,* 137 Idaho 568, 51 P.3d 382 (2002); *Vendelin v. Costco Wholesale Corp.,* 140 Idaho 416, 95 P.3d 34 (2004). Here, Pocatello's Answer and Demand for Jury Trial contains no mention of any particular cause of action that Pocatello is seeking to defend itself from and, as noted by the district court, Pocatello was the first party to file for summary judgment, and focused solely on the claim of negligence.

148 Idaho 802, 810, 229 P.3d 1164, 1172. In the present case, Valentines deny paragraph five of Suers' Complaint. Defendants' Answer, Affirmative Defenses and Demand for Jury Trial, p. 2, ¶ 6. In that denial, Valentines make no mention of or reference to any general negligence claims. However, Valnetines pled the affirmative defenses of:

> 2. Plaintiffs knowingly and voluntarily assumed the risk causing their claimed damages;
> 3. Plaintiffs' damages, if any, were the direct and sole proximate cause of Plaintiffs' comparative and/or contributory fault;

Defendants' Answer, Affirmative Defenses and Demand for Jury Trial, p. 2. Although assumption of the risk and comparative fault could be defenses to premises liability and liability based upon a known dangerous horse, assumption of the risk and comparative fault are also defenses to a general negligence action. While, just as in *Brown*, Valentines' Answer "contains no mention of any particular cause of action that Pocatello [Valentines] is [are] seeking to defend itself [themselves] from" (148 Idaho 802, 810, 229 P.3d 1164, 1172), similar to the portion of *Brown* citing *Seiniger*, Valentines' affirmative defenses are "nevertheless judged sufficient to place the defendant on notice of a claim of breach of contract [general claim of negligence], where the defendant's answer offered a defense to a breach of contract claim [defenses to a general claim of negligence].

It is this Court's failure to take into account Valentines' affirmative defenses, which causes this Court to now grant Suers' relief under I.R.C.P. 59(e). The general negligence claim of Suers is limited to: "After riding the horses, Christina Valentine asked Plaintiff, Carianne Suer, to assist her in holding a gate while she 'shooed' her 8 year-old gelding into a round pen." What negligence there is in that act remains to be seen. How asking Carianne Suer to hold a gate while Christina Valentine "shooed" her horse breached a duty owed to Carianne Suer remains to be seen.

Memorandum Decision and Order Denying Plaintiffs' Motion to Amend, Denying Plaintiffs' Motion to Reconsider, and Granting Plaintiffs' Motion Under I.R.C.P. 59(e); Orders for Payment of Depositions, and Order Establishing Scheduling Conference, pp. 15-16. This, then, led to the filing of "Defendant's Motion for Summary Judgment Re: General Negligence", filed July 23, 2012.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion for summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). The non-moving party "must respond to the summary judgment motion with

specific facts showing there is a genuine issue for trial." *Id*. In passing on motions for summary judgment, unsworn statements are entitled to no probative weight; mere denials unaccompanied by facts admissible in evidence are insufficient to raise genuine issues of fact. *Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct.App. 1984). In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

III. ANALYSIS OF SUMMARY JUDGMENT ON GENERAL NEGLIGENCE CLAIM.

The general principle regarding injuries by domesticated animals in Idaho is set forth in *McClain v. Lewiston Interstate Fair & Racing Ass'n.*, 17 Idaho 63, 104 P. 1015 (1909). *McClain* states that "The owner of domesticated animals is not liable for injuries done by them, unless he is proved to have had notice of the inclination of the particular animal complained of to commit such injuries: there being no presumption that animals of that species are vicious or dangerous." 17 Idaho 63, __, 104 P. 1015, 1020. The key to *McClain* was whether the domesticated animal was "rightfully in the place where they do mischief." *Id.*

The Idaho Supreme Court further explored this issue in *Smith v. Potlatch Lumber Co.*, 22 Idaho 782, 128 P. 546 (1912). In *Smith*, the employee plaintiff was hitching the employer plaintiff's horse to a truck when the horse kicked him. 22 Idaho 782, 786-87, 128 P. 546, 547-48. The Court emphasized the fact that the immediate cause of the plaintiff's injury was the kick of the horse, that the actual cause was the kick itself. *Smith*, 22 Idaho 782, 791, 128 P. 546, 550. The Court held that as such, it "certainly

could not be contended that the mere fact of kicking would create a liability, because there is no evidence at all to establish that the company knew anything about the habit or probability of the horse kicking." *Id*. Furthermore, the Court stated, the plaintiff had experience with horses before his employment and knew how to handle them. *Id*. Finally, the Court concluded that every horse, even a docile and gentle one, will kick when defending themselves, and that to allow the plaintiff to recover would subject every horse owner to liability, in every situation, even if the horse is a docile, kind and gentle animal. *Id*. The Idaho Supreme Court held that such an automatic negligence claim does not arise from the mere fact that the plaintiff was kicked by a horse. *Id.* However, the Court did not hold that there would be no circumstance in which a horse owner could not be held liable for the mischief of his or her animal.

McClain and *Smith* do not analyze the actions of the animal's owner, at least as far as the animal's owner actions in setting the animal in motion (shooing the horse in the present case) and in directing the location of the injured party (to go hold a gate a confined area where the owner of the animal wants the horse to go in the present case). *McClain* and *Smith* analyze only the actions of the animal and whether the animal was located where it rightly belonged.

As argued by Valentines, other jurisdictions have also addressed the issue of injuries by domesticated animals. *Bard v. Jahnke*, 6 N.Y.3d 592, 848 N.E.2d 463 (Ct.App.N.Y. 2006); *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (Neb. 1997); *Burns v. Leap*, 285 Ga.App. 307, 645 S.E.2d 751 (Ga.Ct. App. 2007). Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment Re: General Negligence, pp. 6-8.

In *Bard*, plaintiff was asked by defendant's employee to assist in repairs on a dairy farm. 6 N.Y.3d 592, 594. The plaintiff was attacked by a bull while making the repairs. *Id*. It was conceded that the bull in question had never threatened or injured any other farm animal or human being prior to the incident. 6 N.Y.3d 592, 595. The Court of Appeals of New York held that owners of domesticated animals will be held liable if they know or should have known of the animal's dangerous propensities. 6 N.Y.3d 592, 596-97. Furthermore, that Court held that the defendant could not be held liable on a theory of common-law negligence for the same reason. *Id*. The Court of Appeals of New York held: "Section 518 [Restatement (Second) of Torts § 518] provides generally that the owner of a domestic animal, which the owner does not know or have reason to know to be abnormally dangerous, is nonetheless liable *if he intentionally causes the animal to do harm*, or is negligent in failing to prevent harm." 6 N.Y.3d 592, 598. (italics added). As mentioned above, this Court has previously found:

> The general negligence claim of Suers is limited to: "After riding the horses, Christina Valentine asked Plaintiff, Carianne Suer, to assist her in holding a gate while she 'shooed' her 8 year-old gelding into a round pen." What negligence there is in that act remains to be seen. How asking Carianne Suer to hold a gate while Christina Valentine "shooed" her horse breached a duty owed to Carianne Suer remains to be seen.

Memorandum Decision and Order Denying Plaintiffs' Motion to Amend, Denying Plaintiffs' Motion to Reconsider, and Granting Plaintiffs' Motion Under I.R.C.P. 59(e); Orders for Payment of Depositions, and Order Establishing Scheduling Conference, p. 16. Christina Valentine's actions of 1) asking Carianne Suer to help Valentine by holding a gate while 2) Valentine shooed the horse into a round pen is the allegedly negligent act. As in *Bard,* if Christina Valentine intentionally caused the animal to do harm, Valentines may be liable.

In *Blose*, the plaintiff was the farrier (blacksmith) for defendant's horse who was injured when he attempted to catch the horse and the horse jumped out of the paddock and broke the top part of the fence, part of which struck and injured plaintiff. 252 Neb. 333, 335, 562 N.W.2d 363, 366. The record showed that the horse had never kicked, bit, threatened or reared up in defendant's presence. *Id*. The Supreme Court of Nebraska held that ordinarily, the owner of a domesticated animal is liable for injuries by the animal when the animal has vicious or dangerous propensities and the owner has knowledge of such. *Id*., 252 Neb. 333, 338, 562 N.W.2d 363, 367. Due to the fact that the defendant had no knowledge regarding the horse, the Court found that the plaintiff had failed to establish a prima facie case of negligence. *Id*., 252 Neb. 333, 339, 562 N.W.2d 363, 368.

In *Burns*, the plaintiff was injured when she attempted to divert a running horse by "shooing" her, as instructed by the defendant. 285 Ga.App. 307, 308, 645 S.E.2d 751, 752. It was established that the defendant had boarded the horse for many years and had never observed the horse exhibit any tendency to run directly at a person or exhibit any violent or dangerous propensities. *Id*. The Court of Appeals of Georgia held that there was no negligence claim because the plaintiff failed to establish that the horse had violent propensities. *Id*., 285 Ga.App. 307, 309, 645 S.E.2d 751, 752. That was the holding even though the negligence claims seemed to focus on the *actions of the owner* of the horse: "Burns filed suit, claiming that Leap was negligent in failing to ensure that the gates were closed, asking Burns to close the gate, instructing Burns to attempt to wave her arms at the two horses to divert them, failing to advise Burns to flee the area, and failing to warn Burns of the dangers in the pasture." 285 Ga.App. 307, 308, 645 S.E.2d 751, 752. The Court of Appeals of Georgia wrote:

> 1. Burns contends that the trial court erred in granting summary judgment to Leap. We disagree. OCGA § 51-2-7, which addresses injuries caused by vicious or dangerous animals, provides in pertinent part that "[a] person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured."

285 Ga.App. 307, 308-09, 645 S.E.2d 751, 752. However, the Court of Appeals of Georgia simply did not analyze whether the defendant had committed any "careless management". In any event, the Georgia statute being analyzed required two things: First, a vicious or dangerous animal (that court's analysis also required knowledge of those dangerous propensities) and; second, careless management of the animal.

Thus, in these cases cited by Valentines, *Blose* and *Burns* are not particularly instructive as they deal with negligence due to the animal having known dangerous propensities. Summary judgment has previously been granted to Valentines on that portion of the present case. *Bard* is most on point as it analyzes both the situation where the animal owner knows or should have known of the animal's dangerous propensities, and the situation where the animal was not known to have dangerous propensities. When, as in the present case, the animal had no dangerous propensities, that situation is governed by Restatement (Second) of Torts § 518.

> Under the Restatement [(Second) of Torts § 518] approach, there is no liability for harm done by a domestic animal unless the owner of the animal intentionally causes the animal to do harm or unless the owner is negligent in failing to prevent the harm. The comments to the Restatement make it clear, however, that owners of domestic animals are "under a duty to exercise reasonable care to have them under a constant and effective control." The Restatement sets the degree of care that must be exercised "commensurate with the character of the animal." Of particular relevance to this case is the Restatement's language indicating that an owner is "required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm." These principles from the Restatement provide the court with the standards by which it is possible to evaluate plaintiffs' negligence claim.

Sinclair v. Okata, 874 F.Supp. 1051, 1059-60 (D.Alaska 1994).

The Court can find no indication that Restatement (Second) of Torts § 518 has been adopted by Idaho's appellate courts. There is no "general adoption" of the Restatements in Idaho. The Idaho Supreme Court has held:

> Rather than categorically adopting an entire chapter of the Restatement, this Court has consistently displayed its preference for selectively examining various sections and comments from the Restatement, and thereafter adopting, citing favorably, or rejecting the provision, as the occasion warrants. *See e.g., Shields v. Morton Chemical Co.,* 95 Idaho 674, 518 P.2d 857 (1974) (adopting Section 402A, Restatement (Second) of Torts, without adopting all the comments thereto); *Toner v. Lederle Laboratories,* 112 Idaho 328, 732 P.2d 297 (1987) (adopting comment k to Section 402A and noting that "courts must decide the applicability of comment k case by case, and only after taking evidence related to the various factors" related to the comment); *Idaho Bank & Trust v. First Bancorp,* 115 Idaho 1082, 772 P.2d 720 (1989) (declining to adopt the Restatement standard regarding liability of a professional for negligent misrepresentation). This approach provides us with an opportunity to thoroughly explore the advantages and disadvantages of any given section on a case by case basis, where it may be examined in the context of a specific set of facts. *Toner v. Lederle Laboratories,* 112 Idaho 328, 732 P.2d 297 (1987).

Diamond v. Farmers Group, Inc., 119 Idaho 146, 149-50, 804 P.2d 319, 322-23 (1990). (footnote omitted). Because neither party has briefed the issue as to whether Idaho appellate courts would adopt Restatement (Second) of Torts § 518, this Court is reluctant to make such analysis at this time. However, obviously, that issue will need to be decided prior to the jury trial in this case.

The Idaho Supreme Court has held in order to prove a cause for negligence, a plaintiff must establish four things:

> 1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct, 2) a breach of duty, 3) a causal connection between the defendant's conduct and the resulting injury and 4) actual loss or damage.

Orman v. Idaho Power Co., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

Each person, in conducting his or her business, has a duty to exercise ordinary care to "prevent unreasonable, foreseeable risks of harm to others." *Sharp v. W.H. Moore Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990). The Court has identified a number of factors to be considered in determining whether a duty will arise in a particular context:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rife v. Long, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995) (quoting *Isaacs v. Huntington Mem'l Hosp.*, 38 Cal.3d 112, 211 Cal.Rptr. 356, 695 P.2d 653, 658 (1985)). Whether the duty attaches is largely a question for the trier of fact as to the foreseeability of the risk. *Sharp*, 118 Idaho 297, 300, 796 P.2d 506, 509.

The Court in *Sharp* went on to describe the role of foreseeability in determining whether a duty exists in a particular case.

> Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus, foreseeability is not to be measured by just what is more probable then not, but also includes whatever result is likely enough in the setting of modern life that a reasonable prudent person would take such into account in guiding reasonable conduct.

Sharp, 118 Idaho 300-01, 796 P.2d 509-10.

The Idaho Supreme Court discussed the duty factors at length, particularly those concerning foreseeability in *Boots v. Winters*. 145 Idaho 389, 179 P.3d 352 (2008). In *Boots*, the plaintiffs sued the defendant landlords for injuries received from a tenant's

dog. 145 Idaho 392, 179 P.3d 354. The Court was faced with determining whether landlords have a duty to protect third persons from their tenants' dogs. 145 Idaho 394, 179 P.3d 357. The Court went through some of the factors set forth in *Rife*, including foreseeability and burden on plaintiffs. *Id*. In analyzing foreseeability, the Court determined that the degree of foreseeability in the case was very low because 1) the landlords had no knowledge of any dangerous propensities of the tenant's dog, 2) the initial attack on the child plaintiff appeared to have been provoked and 3) both attacks on the plaintiffs occurred only after the victims climbed the fence confining the dog to the rented property. *Id*. The Court also determined that requiring landlords to investigate whether a lessee's pet is dangerous prior to allowing the lessee to keep the pet on the rented property would impose a heavy burden on the landlords. *Id*.

Idaho has recognized a number of situations in which duties do not arise. A school district has no duty to a contracted physical therapist who injures herself assisting a handicapped student off of a school bus. *Daleiden v. Jefferson County Joint School Dist. No. 251*, 139 Idaho 466, 80 P.3d 1067 (2003). In *Daleiden*, the Court found that the School District had no foreseeable reason to know that the plaintiff would try to assist the student when a bus aid was provided for that purpose. 139 Idaho 471, 80 P.3d 1072. A bar has no duty to a non-patron who gets struck by an unknown assailant outside of the establishment. *Jones v. Starnes*, 150 Idaho 257, 245 P.3d 1009 (2007). In *Jones*, the Court held that the assault was not foreseeable because there was no evidence that the bar had knowledge of the unknown assailant's violent propensities, but also no indication that the group of people from which the assailant came had left the bar any way but voluntarily. 150 Idaho 260-61, 245 P.3d 1012-13. Essentially, there was no evidence that the bar had in any way started the chain of

events leading to the assault. *Id*. In the present case, there is evidence that Christina Valentine started the chain of events by asking Carianne Suer to hold the gate and then, by shooing the horse in Carianne's direction.

The Ninth Circuit Court of Appeals has addressed the issues of duty and foreseeability as well. *Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir. 1975). The Court in *Kunz* states that the existence and nature of a duty of care is a question of law for the court, while foreseeability is a question for the jury. 526 F.2d 503-04. This seems consistent with the Idaho Supreme Court's holding in *Sharp*, 118 Idaho 297, 300, 796 P.2d 506, 509, discussed above. The Ninth Circuit has also defined the issues of duty and liability in terms of the relationship between the parties and the nature of the plaintiff's dependence according to Prosser:

> The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has gotten himself into such a relationship with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.

526 F.2d 503, citing Prosser, The Law of Torts s 56 (4th ed. 1971).

In this case, as stated above, construing the facts in the light most favorable to the Suers, the Court must find that Carianne followed Christina into the pen upon Christina's invitation to do so. This Court also previously established in this case that *McClain* is still good law and sets forth the applicable standard for domestic animals, that of prior notice of the animal's dangerous propensities. Thus, it is not necessary to revisit the general issue regarding the standard applied to injuries caused solely by the domesticated animal's conduct.

Here, however, is not a situation involving only the animal's or plaintiff's behavior. This case involves behavior by a horse that arguably was set in motion by

Christina's conduct. Christina not only requested that Carianne stand by the open gate to try and separate Dusty from the rest of the horses, but also began "shooing" the horses in order to try and get Dusty to move into the circular pen. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p.3. This independent act of Christina's is unlike the situation in *Smith*, where the employer's horse kicked the plaintiff upon *plaintiff's* act of hitching the horse to the truck, or the situation in *Daleidein*, where the plaintiff's back was injured when the *plaintiff* voluntarily assisted the student off the bus, or the situation in *Jones*, where the plaintiff was injured by an unknown assailant, not sparked by any conduct of the defendant. Though the cases of New York, Georgia and Nebraska are instructive on the issue of injuries by domesticated animals, none appear to be directly on point. *Bard* and *Blose* both involve situations in which the defendants' conduct was not the spark that ignited the animal's conduct. *Bard* involved conduct by the bull alone and *Blose* involved conduct by the plaintiff by attempting to catch the horse. In *Burns*, the defendant instructed the plaintiff to "shoo" the horse but did not cause the horse to run at the plaintiff. However, as discussed above, the court there did not analyze the defendant's conduct. Thus, none of the cases presented to the Court gives a fact scenario where the defendant's direct actions caused the conduct of the animal or person which injured the plaintiff. Therefore, the Court cannot apply the general principle that owners of domesticated animals cannot be held liable for injuries inflicted by those animals unless the owner had prior knowledge of the animal's dangerous propensities to this case because, in viewing the facts in the light most favorable to Carianne, Christina's act of "shooing" Dusty and the other horses arguably caused the horses to run. Thus, the Court turns to the four elements of negligence in Idaho.

The first element to be examined is **duty**. As stated above, each person has a duty to exercise ordinary care to prevent "unreasonable, foreseeable" risks of harm to others. *Sharp*, 118 Idaho 300, 796 P.2d 509. Looking at the factors set forth in *Rife*, 127 Idaho 841, 846, 908 P.2d 143, 148, as to foreseeability and whether a duty will arise, the first factor, the closeness of the connection between Christina's conduct of "shooing" the horses and Carianne's injuries, is arguably great, as Christina's "shooing" could be linked to the horses running into Carianne. The second factor, the moral blame attached to defendant's conduct is minimal, if existent at all, as both Carianne and Christina have stated that "shooing" horses to get them to move in the direction desired is an acceptable method. The third factor, the degree of certainty that the plaintiff suffered injury is great, if viewed in hindsight, as Carianne was hit by Dusty and suffered many injuries from the accident. However, this is a foreseeability analysis, and must be viewed in the context of all similar circumstances. Viewed that way, the degree of certainty that the plaintiff would suffer injury could be viewed as very minimal, as most occasions following the "shooing" of a horse, there would be no physical contact with any person. But Christina shooed the horse in a particular direction, intending the horse to go into a much more confined space, a space in which Christina knew Carriane was occupying. Viewed this way, the degree of certainty of harm to the plaintiff becomes greater. The fourth factor, the extent of the burden to the defendant and consequences to the community, would arguably be great as it would make it difficult for horse owners to request assistance when trying to manage their horses. This factor was the determinative factor for the Idaho Supreme Court in *Rife*. In *Rife,* the parents of Jacob Rife sued the School district (and others) when their son was run over by a semi-tractor trailer, on his way home from school, but while off the school grounds. In analyzing whether to extend the School district's duty of care while the child

is on school grounds to situations where the student is off school grounds, the Idaho Supreme Court in *Rife* held:

> We find, in weighing these basic policy considerations, the burden on our school districts would be enormous. If we were to impose a duty on each school district to protect its students outside of school and school hours, they would incur substantial financial and additional manpower burdens. Conversely, the harm to the students is relatively small given that the school district releases the students back to the care of their parents at the end of the school day. We believe the common law duty arose because the parents are not in a position to protect their children while they are attending school. Thus, the school district bears that burden while the children are in its custody. However, after school has adjourned for the day, and the students have been released, the parents are free to resume control over the child's well-being. Accordingly, we decline to extend a common law duty under the circumstances of this case.

127 Idaho 841, 847, 908 P.2d 143, 149. The extent of the burden could be viewed as making it difficult for horse owners to request assistance when trying to manage their horses. The extent of the burden could also be viewed as minimal, in that it would not be too difficult for the horse owner to wait until the helper is safely positioned before the owner begins to shoo the horse. This would not require any more "financial" or "manpower" burden on the owner of the horse. The fifth and final factor, availability, cost and prevalence of insurance is unknown, as neither party has given the Court any information regarding such.

The **foreseeability** of the harm to the plaintiff is the tricky one and is one that has been largely held to be a question for the trier of fact, the jury in this case. However, a "foreseeability" analysis takes us right back to the knowledge of the animal's dangerous propensities. The Court in *Boots* held that the degree of foreseeability in that case was very low because the landowner defendants had no knowledge of any dangerous propensities of the tenant's dog. *Boots*, 145 Idaho 394, 179 P.3d 357. It could be argued that the risk of harm from a horse that had never

previously run into a person is comparable to the risk of harm from a dog that had never previously attacked a person. However, the Court in *Boots* did not determine that the degree of foreseeability was very low only because of the lack of knowledge of the dog's dangerous propensities, but also because the initial attack on the victim appeared to have been provoked by the victim, and the attacks occurred only after the victims climbed into the fence which confined the dog. In this case, Carianne did not provoke Dusty into running into her. It would appear that knowledge of an animal's dangerous propensities (or lack thereof) is not necessarily enough, by itself, to consider the degree of foreseeability to be so low that it cannot be decided by a jury. The Court in *Sharp* stated that where the degree of harm is great, but preventing is not difficult, a relatively low degree of foreseeability is required, but if the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required.

Summary judgment requires that there be no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. While there appears to be no issues of material facts present, there is no clear indication that Christina is entitled to judgment as a matter of law. There is no case law in Idaho that sets forth a duty of care where one person asks another to assist in separating one horse from a herd. As such, it becomes necessary to look at the factors set forth in *Rife*. As discussed above, there is no clear choice as to whether a duty should be found. The biggest issue is foreseeability, and the Court in *Sharp* held that foreseeability is largely a question for the trier of fact. *See also, Orthman v. Idaho Power Co.,* 130 Idaho 597, 601, 944 P.2d 1360, 1364 (1997); *Walenta v. Mark Means Co.*, 87 Idaho 543, 548, 394 P.2d 329 (1964). *Orthman* requires that summary judgment be granted in favor of

Valentines only when the evidence establishes an absence of any genuine issue of material fact concerning the general risk of harm. 130 Idaho 597, 601, 944 P.2d 1360, 1364. While foreseeability of harm may be "very low" as argued by Valentines (Defendants' Reply in Support of Motion for Summary Judgment Re: General Negligence, p. 6, citing *Boots*), there is some evidence of some risk of harm. Therefore, Valentines are not entitled to judgment as a matter of law, and summary judgment must be denied. The question of foreseeability on the general negligence claim must be submitted to the jury.

IV. ANALYSIS OF SUERS' CLAIM THAT VALENTINE "ASSUMED A DUTY".

Suers claim that "Defendant Christina Valentine in the instant case voluntarily took it upon herself to allow Carianne to take part in an activity that she had very little experience doing." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 6. This claim is based on a "teacher-pupil relationship." *Id.*

The Idaho Supreme Court has recognized that it is possible to create a duty, in situations where a duty did not previously exist. *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). However, liability for an assumed duty can only come into being to the extent that there is in fact an undertaking. *Udy*, 136 Idaho 389, 34 P.3d 1072. A person can assume a duty to act on a particular occasion, but the duty is limited to the discrete episode in which the aid is rendered. *Id*. In *Boots v. Winters*, the Court held that a landlord had not assumed a duty to a passerby who was bitten by the tenant's dog because the landlord had not taken any action with the intent of protecting third parties from the tenant's dog. 145 Idaho 389, 395-96, 179 P.3d 352, 358-59 (2008). In *Udy v. Custer County*, the Court held that a sheriff's voluntary removal of

rocks from the State's highways on prior occasions did not convey a voluntary assumption of a duty to remove rocks on every occasion. 136 Idaho 386, 390, 34 P.3d 1069, 1073 (2001). The Court has also held that where a sorority invited new members to attend various fraternity parties and knew or should have known that alcohol would be served to minors, appointed a "guardian angel" sorority member to accompany the plaintiff sorority member, and undertook to care for the plaintiff after she became intoxicated, that there existed a material issue of fact as to whether the defendant sorority voluntarily assumed a duty to supervise and protect the plaintiff until she was out of danger of harm due to her intoxication. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999). The Court has also held that a landlord, having voluntarily provided a security system, is potentially subject to liability if the security system fails as a result of the landlord's negligence. *Sharp*, 118 Idaho 300, 796 P.2d 509.

The Ninth Circuit has also addressed assumption of duty issues. *Kunz*, 526 F.2d 500, 503. When one person has voluntarily undertaken to assist another, he is required to exercise reasonable care to protect the other's interests. *Id*. In cases where such liability has been found, the plaintiff's condition was usually worsened by his reliance on the defendant's action, though such detrimental reliance is not always required. *Id*.

In this case, it does not appear that Christina assumed a duty to Carianne. As *Udy* points out, liability for an assumed duty can only occur where there is an undertaking. Here, Christina did not take any action with the intent of protecting Carianne from the horses, similar to the landlord's not taking any action with the intent of protecting third parties from the tenant's dog in *Boots*. Further, any past voluntary

actions by Christina are not relevant, as in *Udy*, where the Court held that the sheriff's voluntary removal of rocks in the past did not automatically convey a voluntary assumption of duty to remove rocks in every situation. Though the Ninth Circuit has discussed the issue of assumption of duty, it does not change the analysis, as the Court there also stated that in order to assume a duty, one person voluntarily undertakes to assist another. Christina did not voluntarily assist Carianne when Carianne climbed into the pen. Instead, Christina was helping herself by requesting Carianne's assistance. Thus, Christina did not "assume" a duty of care to Carianne.

V. ANALYSIS OF VALENTINES' CLAIM THAT THERE IS NO PROXIMATE CAUSE.

Valentines argue "there was not an unreasonable risk of harm in Christina allegedly asking Carianne to assist in standing by a gate while shooing Dusty into a round pen." Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment Re: General Negligence, p. 8. Valentines make this argument following a discussion about proximate cause. Valentines note:

> Proximate cause consists of two components – actual cause and legal cause. [Johnson v. McPhee, 147 Idaho 455, 467, 210 Idaho P.3d 563, 575 (2009), citing Hayes v. Union Pacific RR Co., 143 Idaho 2004, 2008, 144, P.3d 1073, 1077 (2006)] The "legal responsibility" component focuses upon "whether it was reasonably foreseeable that such harm would flow from the negligent conduct." *Id.* Proximate causation cannot be established if "the injury and manner of occurrence" are "so highly unusual that a reasonable person making an inventory of the possibilities of harm which his or her conduct might produce, would not have reasonably expected the injury to occur." *Id.*

Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment Re: General Negligence, pp. 7-8. Suers have not addressed Valentines' proximate cause argument.

Idaho Civil Jury Instruction (IDJI) 2.30.1 sets forth the jury instruction for proximate cause, "but for" test:

> When I use the expressions "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

IDJI 2.30.1. The Idaho Supreme Court has held that this instruction's predecessor, IDJI 2.30 is a correct statement of the law. *Hilden v. Ball*, 117 Idaho 314, 317, 787 P.2d 1122, 1125 (1989).

"Proximate cause consists of two factors, cause in fact and legal responsibility." *Fragnella v.* Petrovich, 153 Idaho 266 __, 281 P.3d 103, 110 (2012, reh'g denied (Aug. 1, 2012), (quoting *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991)). The legal responsibility element is satisfied if at the time of the defendant's negligent act, the plaintiff's injury was "reasonably foreseeable as a natural or probable consequence of the defendant's conduct." *Doe I v. Sisters of the Holy Cross*, 126 Idaho 1036, 1041, 895 P.2d 1229 1234 (Ct. App. 1995). In deciding the scope of legal responsibility, the appropriate inquiry is whether the harm suffered by the plaintiff was a reasonably foreseeable consequence of the defendant's breach of his or her duty of care. *Sisters of the Holy Cross*, 126 Idaho 1036, 1043, 895 P.2d 1229, 1236 (Ct. App. 1995). It does not require that the defendant must have been able to foresee the precise harm that resulted from the negligent conduct, but only requires that the defendant be able to "understand and appreciate that results of some kind of injurious nature may be reasonably anticipated from the negligent act of omission or commission. *Burklund v. Oregon Short Line R. Co.*, 56 Idaho 703, 713-14, 58 P.2d 773, 777 (1936). Proximate cause cannot be established if the "injury and manner of occurrence are 'so highly unusual that . . . a reasonable [person], making an inventory of the possibilities of harm which his conduct might produce, would not have reasonable expected the injury to

occur.'" *Cramer v. Slater*, 146 Idaho 868, 877, 204 P.3d 508, 517 (2009) (quoting *Sisters of the Holy Cross*, 126 Idaho 1036, 1041, 895 P.2d 1229, 1234). A judge may only decide the legal responsibility issue as a matter of law when reasonable minds could come to but one conclusion as to whether the plaintiff's injury was reasonably foreseeable. *Hayes v. Union Pac. R. Co.*, 143 Idaho 204, 208, 141 P.3d 1073, 1077 (2006). Thus, in the present case, in order to grant summary judgment for Valentines, the Court would have to find as a matter of law that reasonable minds could only come to the one conclusion that plaintiff's injury was not reasonably foreseeable, as a result of Christina's shooing the horse after directing Carianne where she should stand. The Court cannot do this.

VI. CONCLUSION AND ORDER.

For the reasons stated above, this Court must deny summary judgment in favor of Valentines on the general negligence claim of Suers.

IT IS HEREBY ORDERED Valentines' Motion for Summary Judgment Re: General Negligence is DENIED.

Entered this 13th day of September, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Jeffrey R. Owens	667-1939	Todd R. Startzel/Patrick Harwood	509-624-2081

_____
Jeanne Clausen, Deputy Clerk