[Cite as *Hendrickson v. Grider*, 2016-Ohio-8474.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

JO ELLEN HENDRICKSON, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 16CA3537
vs.	:	
RANDALL D. GRIDER, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Michael L. Benson and Mark D. Tolles, II, Chillicothe, Ohio, for Appellants

J. Richard Brown, Columbus, Ohio, for Appellee Norma Gartner

Brian D. Cope, Chillicothe, Ohio, appellee, pro se

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-14-16

ABELE, J.

{¶ 1} This is an appeal from two Ross County Common Pleas Court summary judgments in favor of Norma Gartner and Brian D. Cope, defendants below and appellees herein.[1] Jo Ellen and Richard E. Hendrickson, plaintiffs below and appellants herein, assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

[1] The other defendant, Randall D. Grider, is not involved in this appeal.

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE, RELATING TO HIS FIRST MOTION FOR SUMMARY JUDGMENT, WHERE HE FAILED TO STATE WITH PARTICULARITY THE GROUNDS FOR HIS FIRST MOTION FOR SUMMARY JUDGMENT, AS REQUIRED BY CIV.R. 7(B)(1), AND FURTHER FAILED TO IDENTIFY THOSE PORTIONS OF THE RECORD THAT DEMONSTRATE THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT, AS REQUIRED BY CIV.R. 56(C)."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO STRIKE DEFENDANT BRIAN COPE'S SECOND, UNTIMELY MOTION FOR SUMMARY JUDGEMENT [SIC]."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE, RELATIVE TO HIS SECOND, UNTIMELY MOTION FOR SUMMARY JUDGEMENT [SIC], WHEN THE TRIAL COURT RELIED UPON UNSUPPORTED STATEMENTS MADE IN DEFENDANT BRIAN COPE'S SECOND, UNTIMELY MOTION FOR SUMMARY JUDGEMENT [SIC], INCLUDING STATEMENTS REGARDING THE ALLEGED CONTENTS OF THE AFFIDAVITS OF BRIAN D. COPE, BRIAN C. COPE, SCOTT FREELAND, JR., RANDALL GRIDER, AND RANDY GRIDER, WHICH WERE NOT PRESENTED TO THE TRIAL COURT OR PLAINTIFFS' COUNSEL AND WHICH WERE NOT SUPPORTED BY THE EVIDENCE BEFORE THE TRIAL COURT. WITHOUT SUCH EVIDENCE, DEFENDANT BRIAN COPE FAILED TO MEET HIS BURDEN OF DEMONSTRATING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED."

FOURTH ASSIGNMENT OF ERROR:

"PURSUANT TO R.C. 951.02 AND R.C. 951.10, THE OWNERS OF ANIMALS ARE LIABLE FOR ANY DAMAGES THAT RESULT FROM SUCH ANIMALS RUNNING AT LARGE. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT BRIAN

COPE WAS NOT AN AGENT OF THE OWNER OF THE HORSES THAT CAUSED DAMAGES TO THE PLAINTIFFS AND, THEREFORE, ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE."

FIFTH ASSIGNMENT OF ERROR:

"PURSUANT TO R.C. 951.02 AND R.C. 951.10, THE KEEPERS OF ANIMALS ARE LIABLE FOR ANY DAMAGES THAT RESULT FROM SUCH ANIMALS RUNNING AT LARGE. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT NORMA GARTNER WAS NOT A KEEPER OF THE HORSES THAT CAUSED DAMAGES TO THE PLAINTIFFS AND, THEREFORE, ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT NORMA GARTNER."

SIXTH ASSIGNMENT OF ERROR:

"PURSUANT TO R.C. 951.02 AND R.C. 951.10, THE KEEPERS OF ANIMALS ARE LIABLE FOR ANY DAMAGES THAT RESULT FROM SUCH ANIMALS RUNNING AT LARGE. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT BRIAN COPE WAS NOT AN AGENT OF DEFENDANT NORMA GARTNER, WHO WAS A KEEPER OF THE HORSES THAT CAUSED DAMAGES TO THE PLAINTIFFS, AND, THEREFORE, ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE."

SEVENTH ASSIGNMENT OF ERROR:

"PURSUANT TO R.C. 951.02 AND R.C. 951.10, THE KEEPERS OF ANIMALS ARE LIABLE FOR ANY DAMAGES THAT RESULT FROM SUCH ANIMALS RUNNING AT LARGE. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT BRIAN COPE WAS NOT A KEEPER OF THE HORSES THAT CAUSED DAMAGES TO THE PLAINTIFFS IN HIS INDIVIDUAL CAPACITY AND, THEREFORE, ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE."

EIGHTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY

JUDGMENT IN FAVOR OF DEFENDANT NORMA GARTNER ON PLAINTIFFS' COMMON LAW NEGLIGENCE CLAIM."

NINTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BRIAN COPE ON PLAINTIFFS' COMMON LAW NEGLIGENCE CLAIM."

{¶ 2} The present case arises out of a December 3, 2013 motor vehicle accident that occurred when Jo Ellen's vehicle hit two horses that were located upon the roadway. Randall D. Grider owned the horses. Gartner owned the lot where Grider kept the horses. Cope is Gartner's son-in-law and acted as an intermediary between Gartner and Grider.

{¶ 3} On May 7, 2014, appellants filed a complaint against Grider, Cope, and Gartner and alleged that they were owners and/or keepers of horses within the meaning of R.C. Chapter 951 and that they negligently allowed the horses to escape. Appellants sought damages for Jo Ellen's injuries and a loss of consortium claim on Richard's behalf.

{¶ 4} Gartner subsequently requested summary judgment motion and asserted that she was not an owner or a keeper of the horses and, thus, could not be liable for appellants' injuries.

{¶ 5} On November 20, 2015, Cope filed a "motion to accept instantor [sic] defendant's motion for summary judgment." Cope requested the trial court to excuse his late filing because (1) Jo Ellen's deposition had not been filed, (2) he did not learn that Grider's deposition was available until it was filed on October 9, 2015, and (3) counsel incorrectly marked the due date on his calendar. Cope further alleged that Grider admitted fault and that neither Cope nor Gartner had any responsibility for the horses. Cope attached Grider's affidavit to his motion.

{¶ 6} On December 10, 2015, appellants filed a motion to strike Cope's motion to accept

his summary judgment motion instanter. They asserted that Cope failed to demonstrate excusable neglect. Also, on December 10, 2015, appellants filed a memorandum in opposition to Gartner's summary judgment motion. They asserted that genuine issues of material fact remain regarding whether (1) Gartner was a keeper and therefore liable under R.C. 951.02 and R.C. 951.10, and (2) Gartner exercised ordinary care.

{¶ 7} On December 15, 2015, the trial court granted Cope's motion to file his summary judgment motion instanter. At the same time, Cope filed his summary judgment motion. In his motion, Cope argued that he was not an owner or keeper of the horses and, thus, could not be held liable for appellants' injuries. To support his motion, Cope attached his, Gartner's, Grider's, and Scott Freeland, Jr.'s affidavits.

{¶ 8} In her affidavit, Gartner explained that she owned the vacant lot where Grider kept his horses. She stated that Cope, who lived on the property directly north of her vacant lot, asked her if Cope's friend's stepfather (Grider) could keep his three horses on Gartner's lot. Gartner testified that she informed "Cope that would be fine so long as Mr. Grider took care of the horses and put up a suitable fence." Gartner averred that before Jo Ellen's accident, she "did not have any involvement in the maintenance, care or control of Mr. Grider's horses on my land. Specifically, I had no involvement in maintaining the fence, watering, maintaining, caring for or have any control or management of Mr. Grider's horses." Gartner further stated that before the accident, she "had no knowledge that Mr. Grider's horses had ever escaped."

{¶ 9} In his affidavit, Scott Freeland Jr. (Grider's stepson), stated that he is friends with Cope, who is Gartner's son-in-law. Freeland stated that Grider expressed interest in keeping his horses on Gartner's lot. Freeland contacted Cope and asked him to discuss Grider's request with

Gartner. Cope subsequently informed Freeland that Gartner advised Cope that Grider could keep his horses on Gartner's "property, at no charge, [and with the] understanding that [Grider] would have to construct and maintain adequate fencing for the horses." Freeland then relayed the message to Grider.

{¶ 10} Grider likewise stated in his affidavit that he asked Freeland to inquire whether Grider could use Gartner's land for Grider's horses. Grider averred that he "understood that [he] could keep [the] horses on the property, at no charge, if [he] constructed and maintained adequate fencing for the horses." Grider further indicated that he never requested assistance maintaining the fence or caring for the horses.

{¶ 11} In his affidavit, Cope similarly stated that Freeland asked Cope to ask Gartner whether Grider could keep his horses on Gartner's vacant lot. Cope also indicated that Gartner agreed to allow Grider to keep the horses on her lot, as long as Grider "took care of the horses" and built "a suitable fence." Cope stated that before the accident, he "did not have involvement in maintaining the fence, watering, maintaining, caring for or having any control or management of Mr. Grider's horses." Cope additionally testified that before the accident, he "had no knowledge that Mr. Grider's horses had ever escaped."

{¶ 12} On December 30, 2015, appellants filed a "motion to strike the second untimely motion for summary judgement [sic] filed by" Cope. They claimed that on November 20, 2015, "Cope filed his first, untimely Motion for Summary Judgment in a document entitled a 'Motion to Accept Instantor [sic] Defendant's Motion for Summary Judgment.'" Appellants asserted that this was "an all-inclusive document, which included * * * Cope's arguments and the evidence that he intended to rely upon in support of his Motion for Summary Judgment. That document did not

reference nor rely upon any separate Motion for Summary Judgment document to be considered." Appellants claimed that the court granted Cope's motion on December 10, 2015. They thus argued that Cope's December 15, 2015 motion was untimely. They also argued that Cope did not properly serve them with a copy of his "second" summary judgment motion.

{¶ 13} On December 30, 2015, appellants filed a memorandum in opposition to Cope's "first motion for summary judgment." They argued that genuine issues of material fact exist regarding whether Cope was Grider's or Gartner's agent and whether Cope was a keeper of the horses. Appellants further alleged that Cope failed to delineate the particular grounds to support his summary judgment motion and to identify the portions of the record that demonstrate the absence of a material fact.

{¶ 14} To support their various arguments, the parties relied, in part, upon Cope's and neighboring property owner Pamela K. Smith's depositions. In his deposition, Cope explained that Gartner called him one day to inform him that she received information that the horses may have escaped from their enclosure. Cope stated that he spoke with Freeland's wife to inform her of the situation, "and that was the end of it." Cope relayed that he did not receive any other phone calls that the horses had escaped, and he never noticed that the horses had escaped.

{¶ 15} Smith, a neighboring property owner, testified that she contacted Gartner during the summer or early fall of 2013, shortly after the horses arrived and before the accident, to inform Gartner that the horses were loose. Smith stated that Gartner indicated that she would "try to get ahold [sic] of somebody about [the horses]." Smith further explained that Gartner relayed that Gartner did not know who owned the horses. Smith testified that she never again called Gartner about the horses.

{¶ 16} On February 23, 2016, the trial court granted Gartner and Cope summary judgment. The court initially noted that no dispute existed that "Grider was the sole owner of the horses involved." The court next determined that no genuine issues of material fact remained regarding appellants' common law negligence claim, or whether Gartner or Cope were "keepers" of the horses subject to liability under R.C. Chapter 951.

{¶ 17} With respect to Gartner, the trial court concluded that the following facts demonstrated the absence of a material fact regarding appellants' negligence claim: (1) she did not have an ownership interest in the horses and was not the horses' owner or custodian; (2) she only permitted Grider to keep the horses on her vacant lot; and (3) she "never undertook any direct action to exert any control over or manage the horses." The court concluded that the following facts demonstrated the absence of a material fact regarding whether Gartner was a "keeper:" (1) Gartner "had no involvement in the construction or maintenance" of the fence that Grider built to contain the horses; (2) Gartner did not exercise "any daily care or control of the horses on her property nor expended any of her own funds to maintain the horses;" and (3) Gartner "never fed the horses." The court additionally rejected any argument that Gartner's status as the landowner rendered her liable for injuries that Grider's horses caused. The court further disagreed with appellants' argument that Gartner's conduct in contacting Cope after the neighbor alerted Gartner that the horses were loose demonstrated that Gartner exercised "dominion and control of the horses."

{¶ 18} With respect to Cope, the court concluded that the following facts demonstrated the absence of a material fact regarding appellants' negligence claim: (1) Cope did not have an

ownership interest in the horses; (2) Cope was only an intermediary between Gartner and Grider; and (3) "Cope never undertook any direct action to exert any control over or manage the horses." The court concluded that the following facts demonstrated the absence of a material fact regarding whether Gartner was a "keeper:" (1) Cope was not involved in constructing or maintaining the fence used to contain the horses; (2) Cope "never exercised any daily care or control of the horses;" (3) Cope never "expended any of his own funds to maintain the horses;" and (4) "Cope never fed the horses."

{¶ 19} The court thus concluded that Gartner and Cope were entitled to summary judgment. This appeal followed.

I

SUMMARY JUDGMENT PRINCIPLES

{¶ 20} All of appellants' assignments of error relate to the trial court's decisions granting Gartner and Cope summary judgment. Due to the structure of appellants' arguments, we consider the assignments of error in combined fashion, when appropriate, and consider some assignments of error out of order. For ease of discussion, we first set forth the summary judgment principles that guide our disposition of this appeal.

{¶ 21} Generally, appellate courts conduct a de novo review of trial court summary judgment decisions. E.g., Snyder v. Ohio Dept. of Nat. Resources, 140 Ohio St.3d 322, 18 N.E.3d 416, 2014–Ohio–3942, 18 N.E.3d 416, ¶2; Troyer v. Janis, 132 Ohio St.3d 229, 2012–Ohio–2406, 971 N.E.2d 862, ¶6; Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. E.g., Brown v. Scioto Bd.

of Commrs., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993); Morehead v. Conley, 75 Ohio App.3d 409, 411–12, 599 N.E.2d 786 (4th Dist.1991). To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law. Snyder at ¶2. Civ.R. 56(C) provides in relevant part:

> * * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *

{¶ 22} Thus, pursuant to Civ.R. 56, a trial court may not grant summary judgment unless the evidence demonstrates that: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. E.g., Snyder at ¶20; Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp., 140 Ohio St.3d 193, 16 N.E.3d 645, 2014–Ohio–3095, 16 N.E.3d 645, ¶8; Smith v. McBride, 130 Ohio St.3d 51, 2011–Ohio–4674, 955 N.E.2d 954, ¶12; New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011–Ohio–2266, 950 N.E.2d 157, ¶24; Vahila v. Hall, 77 Ohio St.3d 421, 429–30, 674 N.E.2d 1164 (1997).

{¶ 23} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence

of a material fact. Vahila, supra; Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nomoving party's claims. Civ.R. 56(C); Dresher, supra.

{¶ 24} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc., 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once the moving party satisfies its burden, the nomoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); Dresher, supra.

II

FIRST ASSIGNMENT OF ERROR

{¶ 25} In their first assignment of error, appellants argue that the trial court erred by granting Cope's "first" summary judgment motion. Specifically, they claim that Cope failed to state the grounds in support of his motion with particularity and also failed to identify the portions of the record that demonstrate the absence of a material fact.

{¶ 26} We initially disagree with appellants' characterization of Cope's November 20,

2015 motion as Cope's "first" summary judgment motion. Instead, Cope's November 20, 2015 motion was a motion that requested the trial court to accept his summary judgment motion instanter. "This was a motion for permission to file a [summary judgment] motion and not an actual [summary judgment] motion." Capital One Bank v. Toney, 7th Dist. Jefferson No. 06JE28, 2007-Ohio-1571, 2007 WL 969420, ¶47; see generally Capital One Bank (USA) N.A. v. Ryan, 10th Dist. Franklin No. 14AP-102, 2014-Ohio-3932, 2014 WL 4460280, ¶20 (rejecting appellant's claim that appellee filed "proposed" cross-summary judgment motion). Thus, because Cope's November 20, 2015 motion was not, as appellants allege, a summary judgment motion, we find their first assignment of error to be devoid of merit.

{¶ 27} Accordingly, based upon the foregoing reasons, we overrule appellants' first assignment of error.

III

SECOND ASSIGNMENT OF ERROR

{¶ 28} In their second assignment of error, appellants assert that the trial court abused its discretion by failing to strike Cope's "second" summary judgment motion. They claim that Cope failed to demonstrate excusable neglect so as to permit the untimely filing. Appellants further allege that Cope failed to serve a copy of this "second" motion on appellants.

{¶ 29} We first note that the trial court did not specifically rule upon appellants' motion to strike. "Nevertheless, when a trial court fails to rule upon a pretrial motion, it may be presumed that the court overruled it." State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn., 69 Ohio St.3d 217, 223, 631 N.E.2d 150, 155 (1994), citing Newman v. Al Castrucci Ford Sales, Inc., 54 Ohio App.3d 166, 561 N.E.2d 1001 (1988).

> "The determination of a motion to strike is within a court's broad discretion. Consequently, absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding a motion to strike. A decision constitutes an abuse of discretion when it is unreasonable, arbitrary, or unconscionable. Moreover, when applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court."

Wesley v. Walraven, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶ 22 (citations omitted); accord Martin v. Wandling, 4th Dist. Gallia No. 15CA4, 2016-Ohio-3032, — N.E.3d —, 2016 WL 2870481, ¶51.

{¶ 30} In the case at bar, we are unable to conclude that the trial court abused its discretion by denying appellants' motion to strike the summary judgment motion that Cope filed on December 15, 2015. Although appellants claim that the December 15, 2015 summary judgment motion was Cope's "second" motion, the trial court does not appear to have treated it as such. Instead, as we noted above, on November 20, 2015, Cope requested the court to allow him to file a summary judgment motion instanter. On December 15, 2015, at 3:02 p.m., the trial court granted Cope's motion to file his summary judgment motion instanter. On that same date and at the same time, Cope filed his summary judgment motion. Although appellants claim that the trial court granted Cope's motion to file his summary judgment motion instanter on December 10, not December 15, 2015, the record shows otherwise. The trial judge may have dated his signature December 10, but the entry was time-stamped December 15. Consequently, we do not believe that the record reasonably supports appellants' claim that Cope's December 15, 2015 summary judgment motion was his "second" such motion.

{¶ 31} Appellants additionally argue that the trial court abused its discretion by failing to strike Cope's December 15, 2015 motion due to Cope's failure to properly serve the motion. Appellants allege that Cope failed to serve a copy of the motion upon appellants' counsel.

{¶ 32} Civ.R.5(B)(2)(c) allows service to be made by ordinary mail and further states that "service is complete upon mailing[.]" "A [rebuttable] presumption of proper service arises when the record reflects that a party has followed the Civil Rules pertaining to service of process." Poorman v. Ohio Adult Parole Authority, 4th Dist. Pickaway No. 01CA16, 2002–Ohio–1059, 2002 WL 398721, *2, citing Potter v. Troy, 78 Ohio App.3d 372, 377, 604 N.E.2d 828 (2d Dist.1992); accord Bader v. Ferri, 3rd Dist. Allen No. 1-13-01, 2013-Ohio-3074, 2013 WL 3776546, ¶20; Rafalski v. Oates, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212 (8th Dist. 1984). "In order to rebut the presumption of proper service, the other party must produce evidentiary-quality information demonstrating that he or she did not receive service." McWilliams v. Schumacher, 8th Dist. Cuyahoga Nos. 98188, 98288, 98390, 98423, 2013-Ohio-29, 2013 WL 118918, ¶51, citing Thompson v. Bayer, 5th Dist. Fairfield No. 2011–CA–00007, 2011–Ohio–5897, ¶23. "'[U]nsworn statements, such as bare allegations in an appellate [or trial] brief, do not constitute evidence and are not sufficient to rebut the presumption of proper service.'" Poorman, supra, at *2; accord Edney v. Life Ambulance Serv., Inc., 10th Dist. Franklin No. 11AP-1090, 2012-Ohio-4305, 2012 WL 4321163, ¶7. A reviewing court will not disturb a trial court's finding regarding whether service was proper unless the trial court abused its discretion. E.g., Huntington Natl. Bank v. Payson, 2nd Dist. Montgomery No. 26396, 2015-Ohio-1976, 2015 WL 2452302, ¶32; Ramirez v. Shagawat, 8th Dist. Cuyahoga No. 85148, 2005–Ohio–3159, 2005 WL 1490125, ¶11.

{¶ 33} In the case sub judice, the trial court did not enter an explicit finding regarding whether Cope properly served the December 15, 2015 motion upon appellants. Nonetheless, it rejected appellants' motion to strike Cope's December 15, 2015 motion, and we therefore presume that the court likewise rejected appellants' claim that they did not receive proper service. We do not believe that the court abused its discretion by determining that Cope's certificate of service creates a presumption of proper service and that appellants failed to overcome this presumption.

{¶ 34} The certificate of service attached to Cope's December 15, 2015 summary judgment motion indicates that on November 17, 2015, Cope's counsel served it upon appellants' counsel by ordinary mail. Appellants have not offered any evidence that they did not receive service of the motion. Instead, they present unsworn allegations that they have not received service of the motion. Unsworn allegations are insufficient to overcome the presumption of proper service. Poorman, supra.

{¶ 35} To the extent appellants possess evidence that they did not receive service of the December 15, 2015 summary judgment motion, we would be unable to add any such evidence to the record. Instead, appellants may choose to pursue a Civ.R. 60(B) motion for relief from judgment. PFG Ventures, L.P. v. King, 8th Dist. Cuyahoga No. 95352, 2011–Ohio–1248, 2011 WL 917724, ¶4 ("[Appellant] could have offered evidentiary support for his argument [that he was not served with the motion for summary judgment] by seeking relief from the summary judgment under Civ.R. 60(B), but he failed to do so.").

{¶ 36} Appellants further argue that the trial court abused its discretion by failing to strike Cope's December 15, 2015 motion due to his failure to file it within three days of service. Appellants point out that Cope's certificate of service is dated November 17, 2015, but the motion

was not filed until December 15, 2015. Appellants note that Civ.R. 5(D) requires a document to be filed within three days of service. Appellants thus assert that "it is obvious that the Certificate of Service attached to * * * Cope's second, untimely Motion for Summary Judgement [sic] is not accurate."

{¶ 37} Civ.R. 5(D) states: "Any paper after the complaint that is required to be served shall be filed with the court within three days after service." "The filing of the subsequent pleading, written motion, or other important paper under Rule 5(D), although obviously very important for record purposes, is a secondary act." Nosal v. Szabo, 8th Dist. Nos. 83974 and 83975, 2004–Ohio–4076, 2004 WL 1752916, ¶17, quoting 1970 Staff Note, Civ.R. 5 (internal quotation marks omitted). "Failure to file within the three-day period can result in the court striking the filing." Sovey v. Lending Group of Ohio, 8th Dist. Cuyahoga No. 84823, 2005-Ohio-195, 2005 WL 110449, ¶9; accord Bader at ¶34. "The trial court's decision regarding whether to permit or reject a filing will not be disturbed on appeal absent an abuse of discretion." Sovey at ¶10, citing State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs., 72 Ohio St.3d 464, 650 N.E.2d 1343 (1995).

{¶ 38} In the case at bar, we do not believe that the trial court abused its discretion by allowing Cope's summary judgment motion to be filed on December 15, 2015, more than three days after November 17, 2015, the date of mailing indicated on the certificate of service.

{¶ 39} Moreover, we must afford a presumption of regularity to the trial court's proceedings. State v. Raber, 134 Ohio St.3d 350, 2012–Ohio–5636, 982 N.E.2d 684, ¶19; Hartt v. Munobe, 67 Ohio St.3d 3, 7, 615 N.E.2d 617 (1993); Shoemaker v. Std. Oil Co., 135 Ohio St. 262, 20 N.E.2d 520, 14 O.O. 116 (1939), paragraph two of the syllabus. Indeed, "it is our duty to

assume that such court acted in accordance with law unless the record shows the contrary." Jaffrin v. Di Egidio, 152 Ohio St. 359, 366, 89 N.E.2d 459, (1949); State ex rel. Cincinnati Enquirer v. Lyons, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶35, quoting State v. Phillips, 74 Ohio St.3d 72, 92, 656 N.E.2d 643 (1995) (explaining that appellate courts ordinarily presume the regularity of trial court proceedings "'unless the record demonstrates otherwise'").

> "'No rule with relation to Ohio appellate courts is better settled than the fundamental principle that in appeals on questions of law, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment or decision under review, and of the regularity and legality of the proceedings below. This is in accordance with the old maxim * * * (all things are presumed correctly and with due formality to have been done until it is proved to the contrary).'"

Jaffrin, 152 Ohio St. at 366, quoting 2 Ohio Jurisprudence (App. Rev., Pt. 2), 1015, Section 565. Consequently, we presume the regularity of the trial court's decision to accept Cope's December 15, 2015 summary judgment motion, even though the certificate of service is dated November 17, 2015.[2]

{¶ 40} Accordingly, based upon the foregoing reasons, we overrule appellants' second assignment of error.

IV

[2] We could speculate that Cope forwarded his summary judgment motion containing the November 17, 2015 certificate of service around the same time that he filed his motion that requested the court to allow him to file the motion instanter (November 20, 2015). The record, however, gives no indication that Cope submitted a summary judgment motion along with his request to file it instanter.

THIRD ASSIGNMENT OF ERROR

{¶ 41} In their third assignment of error, appellants argue that the trial court erred by granting Cope's "second" summary judgment motion. Appellants assert that Cope did not produce any evidence to support his "second" summary judgment, but instead, relied upon unsupported statements. Appellants thus contend that Cope failed to satisfy his summary judgment burden.

{¶ 42} We do not agree with appellants' assertion that Cope failed to attach affidavits to his December 15, 2015 summary judgment (which appellants term Cope's "second" such motion). They claim that their counsel went to the clerk's office to look at the motion filed with the court and that the motion did not include any attached affidavits. The record, however, reveals otherwise. Cope's December 15, 2015 summary judgment motion that is contained in the trial court file transmitted to this court on appeal includes Gartner's, Grider's, Cope's and Freeland's affidavits. Thus, appellants' assertion that Cope's December 15, 2015 motion lacks affidavit evidence is puzzling. The record refutes their assertion that Cope did not attach affidavits to his December 15, 2015 motion.

{¶ 43} Accordingly, based upon the foregoing reasons, we overrule appellants' third assignment of error.

V

FIFTH AND SEVENTH ASSIGNMENTS OF ERROR

{¶ 44} In their fifth and seventh assignments of error, appellants contend that the trial court improperly determined that no genuine issues of material fact exist regarding whether Gartner or Cope were keepers of the horses. Appellants allege that genuine issues of material fact remain

regarding whether Gartner had dominion and control over the horses, and thus, whether Gartner was a keeper of the horses. In particular, appellants argue that the following evidence shows that genuine issues of material fact remain as to whether Gartner had dominion over the horses: (1) Gartner owned the property upon which Grider kept the horses; (2) Gartner's ownership of the property demonstrates "that she (and her agents) alone had dominion over the property and the (non-trespassing) activities that took place on her property"; (3) "Gartner alone had the ability to grant * * * Grider permission to bring his horses onto her land"; (4) "Gartner alone had the ability to dictate the conditions upon which * * * Grider could bring the horses onto her property"; and (5) "Gartner dictated [these] conditions to * * * Grider (through his agent * * * Cope), indicating that he could bring the horses onto her property 'so long as Mr. Grider took care of the horses and put up a suitable fence.'" Appellants contend that the following evidence shows that genuine issues of material fact remain as to whether Gartner exercised control over the horses: (1) Grider leased the land from Gartner; (2) Gartner caused Grider "to install, maintain, and improve the fencing for the horses"; (3) Gartner had the "ability to get * * * Grider to round up the horses after they got loose."

{¶ 45} Appellants additionally contend that the evidence shows that genuine issues of material fact remain as to whether Cope was a keeper of the horses. Specifically, they claim that the following evidence creates genuine issues of material fact regarding Cope's status as a keeper of the horses: (1) "Cope testified that he frequently checked on the horses to see whether they were in their fenced areas"; (2) "Cope frequently permitted his children to go over to the property and help * * * Grider care for the horses"; and (3) "Grider told the Ohio Highway Patrol trooper (who investigated Jo Ellen's accident) that [Grider] leased the property directly from * * * Cope."

{¶ 46} Appellants further assert that Cope demonstrated that he had dominion over the horses because "he was able to determine when the horses could be put on * * * Gartner's property and when they had to be removed." The additionally claim that Cope exercised control over the horses due to "the existence of a lease concerning the property where the horses were kept, * * * Cope's ability to cause a fence to be installed for the horses, as well as * * * Cope's ability to get the horses round[ed] up * * * after they got loose and to have the horses removed from the property."

A

LIABILITY OF OWNERS AND KEEPERS OF CERTAIN ANIMALS RUNNING AT LARGE

{¶ 47} R.C. Chapter 951 places a duty upon owners of specified animals "to exercise ordinary care in preventing such animals from running at large upon public roads." Burnett v. Rice, 39 Ohio St.3d 44, 46, 529 N.E.2d 203 (1988); Barber v. Krieg, 172 Ohio St. 433, 435-436, 178 N.E.2d 170 (1961); Drew v. Gross, 112 Ohio St. 485, 491, 147 N.E. 757 (1925); see Reed v. Molnar, 67 Ohio St.2d 76, 80, 423 N.E.2d 140 (1981) (explaining that R.C. 951.02 is not a strict liability statute, but instead, "requires, at a minimum, negligent conduct on the part of an owner or keeper"). More specifically, R.C. 951.02 prohibits the "owner or keeper of horses"[3] from "permit[ting] them to run at large in the public road, highway, street, lane, or alley * * *." R.C. 951.10(A) states that if the owner or keeper of a horse "negligently permits it to run at large in violation of [R.C. 951.02], [the owner or keeper] is liable for all damages resulting from injury, death, or loss to person or property caused by the [horse] in [the public road, highway, street, lane,

[3] R.C. 951.02 specifies ten animals that the owner or keeper shall not permit to run at large. Because the case at bar involves horses, we have omitted any reference to the other animals.

or alley] * * *." R.C. 951.10(B) further states that "[t]he running at large" of the owner's or keeper's horses in or upon a public road "is prima-facie evidence in a civil action for damages * * * that the owner or keeper of the animal negligently permitted the animal to run at large in violation of section 951.02 of the Revised Code." Thus, the statutory scheme "creates a rebuttable presumption that the presence of an animal upon a public road was the result of the negligence of the owner."[4] Burnett, 39 Ohio St.3d at 46. An owner may rebut the statutory presumption of negligence by adducing evidence that he used "reasonable precautions to prevent the escape of [the animal]." Id.

B

OWNERS AND KEEPERS

{¶ 48} R.C. Chapter 951 imposes a duty only upon "owners" and "keepers" of the specified animals. "An 'owner' is the person to whom the [animal] belongs." Buettner v. Beasley, 8th Dist. Cuyahoga No. 83271, 2004-Ohio-1909, 2004 WL 813515 ¶14, citing Garrard v. McComas, 5 Ohio App.3d 179, 182, 450 N.E.2d 730 (1982); accord Hill v. Hughes, 4th Dist. Ross No. 06CA2917, 2007-Ohio-3885, 2007 WL 2189072, ¶26. "A 'keeper' is the person who has physical care or charge of the [animal]." Buettner at ¶14; accord Hill. "Keepership has a proprietary or dominion aspect, and involves the exercise of some degree of management, possession, care, custody or control over the [animal]." Godsey v. Franz, 6th Dist. Williams No. 91WM8, 1992 WL 48532 (Mar. 13, 1992), *3 (citations omitted). Courts have not, however, developed an "ironclad definition of the term 'keeper.'" Manda v. Stratton, 11th Dist. Trumbull No. 98-T-0018.

[4] At the time Burnett was decided, R.C. 951.02 set forth the rebuttable presumption. In 2011, the statute was amended, and the rebuttable presumption now is set forth in R.C. 951.10(B).

1999 WL 266613 (Apr. 30, 1999), *4 (citations omitted); accord Krzywicki v. Galletti, 2015-Ohio-312, 27 N.E.3d 991, ¶35 (8th Dist.). Instead, the inquiry ordinarily is highly fact-specific. Manda; accord Buettner at ¶14.

{¶ 49} In Moore v. Ferkel, 6th Dist. Sandusky No. S–97–042, 1998 WL 160040 (Mar. 31, 1998), the court considered whether a farm owner fit the definition of a "keeper." In Moore, the farm owner's son owned a horse, and the farm owner allowed his son to keep the horse on the farm. The farm owner built a pen for a horse, occasionally fed and cared for the horse, paid the electricity bill for the electric fence surrounding the pen, and did not charge any rent. Based on the foregoing facts, the court determined that a question of fact remained regarding whether the farm owner "exercised some degree of control over the horse." Id. at *3.

{¶ 50} In contrast, the evidentiary materials in the case at bar fail to reveal that either Gartner or Cope exercised any degree of control over the horses. The evidence does not suggest that either Gartner or Cope physically cared for the horses or that either has a proprietary interest in the horses. Furthermore, the evidence fails to show that either Gartner or Cope managed, possessed, or cared for the horses, or that they had custody or control over the horses. Neither Gartner nor Cope ever fed, watered, checked the well-being of, or otherwise had any physical interaction with the horses. Simply because Gartner allowed Grider to keep the horses on her land, thus allowing the horses to eat the grass located on her land and to drink water located partially on her land, does not establish that Gartner exercised dominion or control over the horses.

{¶ 51} Furthermore, even if an inference exists that Cope or his children wandered over to look at the horses, looking at the horses is a far cry from caring for or controlling them. Moreover, any indirect interaction Gartner or Cope may have had with the horses was far too

tenuous to demonstrate some degree of management, control, custody, or possession in order to support a conclusion that either was a "keeper" of the horses.

{¶ 52} Additionally, we disagree with appellants that Gartner's act of contacting Cope to inform him that the horses had escaped shows that she exercised control over, or that she managed, the horses. Instead, it shows that she understood that she should contact Cope so he could try to reach the owner of the horses, the individual who could control the horses. Likewise, Cope's conduct in trying to reach the horses' owner does not show that he controlled or managed the horses.

{¶ 53} We further reject appellants' argument that the alleged existence of a lease between Gartner and Grider (the parties dispute whether there was a lease) shows that Gartner exercised control or dominion over the horses. The mere existence of a lease does not, by itself, sufficiently demonstrate dominion or control so as to impose liability as a "keeper." See Morris v. Cordell, 1st Dist. Hamilton No. C-150081, 2015-Ohio-4342, 2015 WL 6166662, ¶14 (explaining that "routine and common acts conducted by a landlord, such as making repairs, paying taxes, insuring the structure, and the like, do not constitute the control necessary to establish liability"); Garrard v. McComas, 5 Ohio App.3d 179, 182, 450 N.E.2d 730 (1982) (noting that simply because a landowner "established rules for the maintenance of animals owned by tenants on his property" did not show that landowner exercised control over the animals); see generally Morris v. Cordell, supra; White v. Elias, 2012-Ohio-3814, 4 N.E.3d 391, ¶34 (8th Dist.); Flint v. Holbrook, 80 Ohio App.3d 21, 26, 608 N.E.2d 809 (2nd Dist. 1992); Parker v. Sutton, 72 Ohio App.3d 296, 594 N.E.2d 659 (6th Dist. 1991).

{¶ 54} We also observe that the portions of Cope's deposition that appellants cite to

support their claims that Cope "frequently" checked on the horses or that he "frequently" allowed his children to help Grider do not appear to support their claims. The first part appellants cite, Cope Deposition 28:18-23, reads as follows:

> "Q. When you went home that evening, do you recall horses being loose?
> A. No.
> Q. Could they have been loose?
> A. No, they weren't. They weren't loose. I didn't see any horses running around."

The second part, Cope Deposition 30:12-18 reads as follows:

> "Q. Were [your children] always with an adult or going [to look at the horses] by themselves?
> A. They were going by themselves. They would go over when [Grider] would go over there.
> Q. They would hang out with [Grider] while he was doing whatever he was doing?
> A. Yeah."

Just before this line of questioning, Cope indicated that his children "from time to time" went to "look at [the horses] because they're curious kids."

{¶ 55} Absolutely nowhere in the above colloquies does Cope state, or even imply, that he "frequently" checked on the horses or that his children "frequently" helped Grider care for the horses. We have thoroughly reviewed Cope's deposition and have not found any other part where he states that he "frequently" checked on the horses or that his children "frequently" helped Grider care for the horses. Thus, appellants' claims to the contrary are completely baseless.

{¶ 56} In sum, construing the evidence and all reasonable inferences most strongly in appellants' favor does not allow reasonable minds to conclude that either Gartner or Cope was a "keeper" of the horses. Instead, reasonable minds could only conclude that Gartner and Cope were not "keepers" of the horses. We therefore agree with the trial court's conclusion that no

genuine issues of material fact remain regarding whether Gartner or Cope is a "keeper" of the horses.

{¶ 57} Accordingly, based upon the foregoing reasons, we overrule appellants' fifth and seventh assignments of error.

VI

FOURTH AND SIXTH ASSIGNMENTS OF ERROR

{¶ 58} In their fourth and sixth assignments of error, appellants assert that the trial court wrongly determined that no genuine issues of material fact remain regarding whether Cope was Grider's or Gartner's agent.

{¶ 59} "'Agency' has been defined as '"a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent."'" Cincinnati Golf Mgt., Inc. v. Testa, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶20, quoting Evans v. Ohio State Univ., 112 Ohio App.3d 724, 744, 680 N.E.2d 161 (10th Dist. 1996), quoting Funk v. Hancock, 26 Ohio App.3d 107, 110, 498 N.E.2d 490 (12th Dist. 1985), citing Haluka v. Baker, 66 Ohio App. 308, 312, 34 N.E.2d 68 (9th Dist. 1941). "The relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." Hanson v. Kynast, 24 Ohio St.3d 171, 494 N.E.2d 1091 (1986), paragraph one of the syllabus.

{¶ 60} In the case at bar, even if we were to agree with appellants that Cope was either Grider's or Gartner's agent, appellants have not cited any authority that would make Cope (the agent) liable for either Gartner's or Grider's (the principals') conduct. In fact, the law appears to

specifically refute appellants' presumption that Cope, as the alleged agent, could be personally liable for his purported principals' claimed negligent conduct when Cope did not engage in negligent conduct of his own. Andrews v. Kern's TV & Appliance, Inc., 3rd Dist. Defiance No. 4-2000-09, 2000 WL 1186425 (Aug. 22, 2000), quoting Hohly v. Sheely, 11 Ohio C.D. 678 (1900) ("It is well-settled in the law that an agent is 'liable for his acts only' while a principal is liable for the actions of the 'agents and servants done in the performance of her business.'"); George v. Franklin Woods, Ltd., 12th Dist. Warren No. CA8611071, 1987 WL 15718, *2 (citations omitted) ("An agent is liable only for its own acts or omissions and not for the acts or omissions of its principal."); Foust v. Valleybrook Realty Co., 4 Ohio App.3d 164, 167, 446 N.E.2d 1122 (6th Dist. 1981) ("The principal is always liable to third persons for misfeasances and the omission of duty of his agent, in all cases within the scope of his agency, equally as for acts of his own although the agent himself is liable for positive wrongful acts and misfeasances committed while acting as agent."); 3 Ohio Jurisprudence 3d, Agency and Independent Contractors, Section 153 (stating that an "agent is liable only for the agent's own acts or omissions, however, and not for the principal's acts or omissions"). Consequently, even if we agreed with appellants that genuine issues of material fact remain as to whether Cope was Grider's or Gartner's agent, appellants have not shown that the law would permit Cope to be liable for his purported principals' conduct.

{¶ 61} Accordingly, based upon the foregoing reasons, we overrule appellants' fourth and sixth assignments of error.

VII

EIGHTH AND NINTH ASSIGNMENTS OF ERROR

{¶ 62} In their eighth assignment of error, appellants contend that the trial court improperly

determined that no genuine issues of material fact remain regarding whether Gartner is liable under a common law negligence theory. In their ninth assignment of error, appellants argue that the trial court improperly determined that no genuine issues of material fact remain as to whether Cope (as Gartner's agent) may be held liable for Gartner's supposed negligence.

{¶ 63} "'Negligence' is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances." Gedeon v. E. Ohio Gas Co., 128 Ohio St. 335, 338, 190 N.E. 924, 40 Ohio Law Rep. 649 (1934) (citations omitted). "In general, a cause of action for negligence requires proof of (1) a duty requiring the defendant to conform to a certain standard of conduct, (2) breach of that duty, (3) a causal connection between the breach and injury, and (4) damages." Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶23, citing Menifee v. Ohio Welding Products, Inc., 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). "If a defendant demonstrates that the plaintiff will be unable to prove any one of the foregoing elements, the defendant is entitled to judgment as a matter of law." Wheatley v. Marietta College, 2016-Ohio-949, 48 N.E.3d 587, ¶51 (4th Dist.) (citations omitted).

{¶ 64} In general, "'[t]he existence of a duty depends on the foreseeability of the injury.'" Cromer at ¶24, quoting Menifee, 15 Ohio St.3d at 77. Thus, an individual generally possesses a duty "to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate." Id., citing Commerce & Industry Ins. Co. v. Toledo, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). Conversely, an individual ordinarily does not possess a duty "to guard against risks that the reasonable person would not foresee." Id., citing Menifee, 15 Ohio St.3d at 77, and Keeton, Dobbs, Keeton & Owen, Prosser and Keeton on the Law of Torts, Section 43, 280

(5th Ed.1984). Thus, "the existence and scope of a person's legal duty is determined by the reasonably foreseeable, general risk of harm that is involved." Id. Unless "specific conduct involving an unreasonable risk is made manifest by the evidence presented, there is no issue to submit to the jury." Menifee, 15 Ohio St.3d at 77, citing Englehardt v. Philipps, 136 Ohio St. 73, 23 N.E.2d 829 (1939), and Prosser & Keeton Law of Torts, Section 31 (5 Ed.1984), at 169.

{¶ 65} Generally, a risk of harm is foreseeable if "a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Menifee, 15 Ohio St.3d at 77. The law limits liability in negligence to those risks which a reasonably prudent person would have anticipated as a result of his conduct. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99 (N.Y.App.1928) ("The risk reasonably to be perceived defines the duty to be obeyed * * *."). Accordingly, "[t]he foreseeability of harm usually depends on the defendant's knowledge." Menifee, 15 Ohio St.3d at 77.

{¶ 66} We further note that "'[t]he test for foreseeability is one of likelihood, not mere possibility.'" Wheatley at ¶61, quoting Shadler v. Double D. Ventures, Inc., 6th Dist. Lucas No. L–03–1278, 2004-Ohio-4802, 2004 WL 2026412, ¶31; accord Gedeon, 128 Ohio St. at 338 ("No one is bound to take care to prevent consequences, which, in the light of human experience, are beyond the range of probability."). "[I]n determining whether the defendant should recognize the risks which are involved in his conduct as being unreasonable, only those circumstances which the defendant perceives or should perceive at the time he acts or fails to act are to be considered." Englehardt, 136 Ohio St. at 78.

> "'Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question

> of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers.'"

Hetrick v. Marion–Res. Power Co., 141 Ohio St. 347, 358–59, 48 N.E.2d 103 (1943), quoting 1 Shearman and Redfield on Negligence, Rev.Ed., 50, Section 24; accord Wheatley at ¶61.

{¶ 67} In the case at bar, appellants assert that under Drew v. Gross, 112 Ohio St. 485, 147 N.E. 757 (1925), Gartner possessed a duty to use ordinary care in the use of her property.

{¶ 68} In Drew, the court held:

> "The owner of a domestic animal is responsible for negligence in its keeping whereby damage is occasioned. The principal test, as to whether the owner is or is not negligent, is whether he could or could not reasonably have anticipated the occurrence which resulted in the injury. It is a question of fact for the jury whether an owner of horses who turns them loose unattended into a field adjacent to a much-traveled highway in the nighttime, the fence of which field is in such defective condition that the horses may easily stray out onto the highway, could have anticipated that one of the horses would stray out onto the highway and collide with an automobile thereon.
>
> The owner of livestock is chargeable with knowledge of the propensities of his livestock, and is bound to know that horses or cattle when placed in an inclosure where the fence is so defective that they may easily pass out of the inclosure and onto adjacent property will probably do so."

Id. at 489-490.

{¶ 69} Although Drew involved an owner of livestock who also owned the property upon which the livestock were kept, the court broadly stated: "[T]he law imposes upon every person the duty of using his own property so as not to injure his neighbor." Id. at 491. From this, appellants

conclude that Gartner possessed a common law duty to use her property so as not to injure another.[5] Appellants contend that the following evidence shows that genuine issues of material fact remain as to whether Gartner breached her duty: (1) during the summer of 2013, Gartner permitted Grider to keep the horses on her property before fencing had been installed; and (2) Gartner allowed Grider to keep the horses on her property even though the horses had escaped from the fenced enclosure several times before Jo Ellen's accident.

{¶ 70} As to the first claim–that Gartner breached her duty by allowing Grider to keep the horses on her property before fencing had been installed–even if this was a breach of her duty of care, this breach was not a proximate cause of appellants' injuries. Appellants claim that the horses were on the property, without fencing, in the summer of 2013. Jo Ellen's accident occurred in December 2013. Thus, the lack of fencing, even if a breach of Gartner's duty of care, was not proximately related to Jo Ellen's accident.

{¶ 71} Appellants next argue that Gartner breached her duty by allowing Grider to keep the horses on her property when the horses had escaped several times before the accident. With respect to negligence cases brought against owners of animals, "liability is customarily determined by assessing whether the owner could have reasonably anticipated the event that resulted in injury." Moore v. Spencer, 7th Dist. Carroll, 06CA830, 2007-Ohio-4745, 2007 WL 2694925, ¶23. Thus, "the owner of a domestic animal is not liable for injuries committed by it, unless the owner had

[5] We may be wrong, but we do not believe that Drew created a special duty applicable solely to landowners. Instead, Drew seems to recognize that landowners, like all individuals, generally possess a duty "to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate." Cromer at ¶24, citing Commerce & Industry Ins. Co. v. Toledo, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). If Drew created a special duty, it was a special duty applicable to owners of livestock who also own the land upon which the livestock are kept.

notice that it was accustomed to do mischief." Ross v. Schwegel, 8th Dist. Cuyahoga No. 80183, 2002-Ohio-3772, 2002 WL 1728595, ¶10, citing Spring Co. v. Edgar, 99 U.S. 645, 25 L.Ed. 487 (1878). While Gartner was not the horses' owner, we think similar rules generally should apply to the property owner on whose property the horses were kept. That is, Gartner's "liability [should be] determined by assessing whether [she] could have reasonably anticipated the event that resulted in injury" and she should not be liable for injuries the horses caused "unless [she] had notice that [the horses were] accustomed to do mischief." This rule is essentially the standard that ordinarily applies in a negligence action, i.e., duty is based upon the foreseeability of the injury, and foreseeability is evaluated based upon facts within the defendant's knowledge. Cromer, supra; Menifee, supra.

{¶ 72} In the case sub judice, the evidence fails to suggest that Gartner reasonably should have foreseen that the horses would escape and injure an individual traveling upon a public road. The evidence does not show that Gartner knew, before the accident, that the horses had escaped several times. Only one individual, a neighboring property owner, stated that before the accident, the horses escaped on multiple occasions. This neighboring property owner explained that she informed Gartner of the horses' escape on one occasion only–during the summer or early fall of 2013. After Gartner received the information, she promptly took steps to remediate the situation by calling Cope to ask him to inform the horses' owner that they had escaped. No evidence exists that after this one incident, Gartner learned that the horses again had escaped or that the horses had not been adequately contained. Even if Gartner knew of a general possibility that the horses could escape and cause injury to another individual, the mere possibility of a risk of harm does not mean that a risk of harm was reasonably foreseeable. See Hetrick, supra; Wheatley, supra. The record

does not contain any evidence that Gartner had reason to suspect that the horses were likely to escape and injure another person. Construing the facts in the case at bar most strongly in appellants' favor, we do not believe that reasonable minds could conclude that Gartner negligently allowed Grider to keep the horses on her property.

{¶ 73} In their ninth assignment of error, appellants seek to hold Cope liable for Gartner's supposed negligence under an agency theory. However, not only have they failed to cite any authority that would make an agent liable for a principal's negligent conduct (see our discussion of appellants' fourth and sixth assignments of error), but we also have determined that no genuine issues of material fact remain as to whether the purported principal, Gartner, was negligent. Consequently, appellants' ninth assignment of error is meritless.

{¶ 74} Accordingly, based upon the foregoing reasons, we overrule appellants' eighth and ninth assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

{¶ 75} Because the summary judgment evidence indicates Gartner may have known Grider's horses had escaped on at least one prior occasion, a genuine issue of material fact exists about whether she could have reasonably anticipated another escape. This is especially true in light of deposition testimony that indicates Gartner received a phone call about the loose horses, but there is no evidence that she took any affirmative actions to ensure it did not happen again. Thus, I find merit in Hendrickson's eighth assignment of error.

{¶ 76} In all other regards I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs in Part and Dissents in Part with Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.