

---

**ST. REGIS MOHAWK TRIBAL COURT**


---

<b>Melanie K. Burns,</b>	)	
<b>Plaintiff</b>	)	
	)	<b>Case No.: 09-SC-00003</b>
<b>v.</b>	)	
	)	
<b>Lisa A. Ward,</b>	)	
<b>Defendant</b>	)	

---

DECISION AND ORDER

I. PROCEDURAL HISTORY

Plaintiff, Melanie K. Burns, brought action in the St. Regis Mohawk Tribal Court, on December 12<sup>th</sup>, 2009, against Lisa A. Ward, seeking a monetary judgment, to recover veterinarian bills, estimated in the sum of \$3,000 and court fees. Plaintiff alleges that Defendant's dog allegedly attacked Ms Burns' cat while it was on her back porch. (*See*, Amended Brief of Brown). On September 22<sup>nd</sup>, 2010, Plaintiff amended the monetary request to \$2,042.69, which reflects what she alleges to be the actual and final costs of veterinarian bills sustained from this incident.

On January 7<sup>th</sup>, 2010, Defendant was hand delivered the Complaint and 20-day summons by Process Server Chris Cooke, who filed a Proof of Service with the Court on January 8<sup>th</sup>, 2010. Defendant did not file a timely Answer to the 20 day-summons. A pre-trial conference was scheduled for April 28<sup>th</sup>, 2010 and a letter of notice sent. Plaintiff appeared as scheduled; but, the Defendant, Ward, did not. On May 3<sup>rd</sup>, 2010, a Notice of Hearing to appear before the Court on May 24<sup>th</sup>, 2010 was sent the parties via certified return receipt mail. Plaintiff appeared as scheduled; however, the Defendant did not. Tribal Police attempted to serve Defendant in person but were unsuccessful. Defendant called the day of the conference, on 5/24/2010, at/or around 4:23pm, inquiring why Tribal Police were looking for her and was told by Corporal Marty Jock she was being served to appear in Tribal Court that day at 4:30. On May 25<sup>th</sup>, 2010 the Notice of Hearing sent to Defendant was returned to the Court unclaimed.

On July 6<sup>th</sup>, 2010 the Court found Lisa Ward to be in violation of St. Regis Mohawk Tribal law, specifically St. Regis Mohawk Tribal TCR 2008-20, Rules of Civil Procedure, [Hereinafter SRMT Civ. Pro], whereby Ms. Ward was in contempt of Court for failing to answer the directives of the SRMT Court after service of process. (*See*, SRMT Civ. Pro. § XXII(E)[Rule 18]and St. Regis Mohawk Tribal, TCR2008-19, Civil Code Section VII (B)). As such the Court issued an order to the St. Regis Mohawk Tribal Gaming Commission [herein after Gaming Commission] to suspend Defendant's Class II Gaming License if the Defendant had such a license. On July 7<sup>th</sup>, 2010, the Court received a letter from the Gaming Commission stating that Defendant no longer worked for the Mohawk Bingo Palace.

On July 15<sup>th</sup>, 2010, the Court sent both parties via certified (return receipt) mail Notice of Hearing to appear before the Court on August 9<sup>th</sup>, 2010 at 6:00pm. Plaintiff appeared as

scheduled; but, the Defendant did not. Thereafter, Plaintiff filed a Motion for Default Judgment, which included the enforcement methods chosen by the Plaintiff against Defendant on September 22<sup>nd</sup>, 2010. Pursuant to SRMT Civ. Pro § XII Rule 10, a Notice of Motion for Default Judgment was served via certified mail return receipt to the Defendant on 9/22/10, giving at least 10 days notice, to the Defendant to be heard on October 8<sup>th</sup>, 2010 at 9:30 am. *See* §XVI [Rule 13](B).

The October 8<sup>th</sup> hearing was rescheduled to October 10<sup>th</sup>, at 9:00 am. Plaintiff was notified by phone and on October 7<sup>th</sup>, 2010 Defendant was served a notice of the October 10<sup>th</sup> hearing by Tribal Police Corporal Faron Cole. On October 10<sup>th</sup> the Defendant failed to show. On October 22, 2010, Defendant Lisa A. Ward hand delivered to the Court an Answer, a notarized letter, stating in effect that she has been out of work since August 2010 and is currently looking for work along with her phone number.

Under SRMT Tribal law the finding of a default judgment has strict pre-requisites that must be adhered to prior to granting a default judgment, which is followed to ensure that the Due Process rights of the Defendant are met. (*See*, SRMT Civ. Pro. §XIII [Rule 10]) Since the Court had not written a decision in the said case, the Court allowed the answer to stand and scheduled a new hearing date for December 13<sup>th</sup>, 2010. During this hearing date the Defendant appeared but, the Plaintiff did not. On January 5<sup>th</sup>, 2011 the next scheduled Pre-trial hearing date, the Defendant appeared but, the Plaintiff, Ms Burns, did not.

Finally, both parties were present during a pre-trial hearing on February 9<sup>th</sup>, 2011. The parties were offered alternative dispute resolution, which they rejected. The parties appeared and presented their arguments during a full trial on March 9<sup>th</sup> 2011. This decision and order is based on whether the Plaintiff is entitled to the monetary relief sought from the Defendant for damage to her property.

## II. DISCUSSION

Pursuant to SRMT Civ. Pro the Plaintiff carries the burden of proof. § XX [Rule 17](A); "he who pleads must prove."<sup>1</sup> The burden moving forward is one of proving a cause of action upon which relief may be granted by this Court. In doing so, Plaintiff must prove that Defendant's dog caused damages to her property, in the case at bar, a domestic cat requiring veterinarian bills totally \$2,042.69 plus court costs.

The Plaintiff, in order to file a tort/property claim, must first meet the statute of limitations requirement found in SRMT Civ. Pro. §VIII [Rule 5] (A) (1), which states "In the case of torts and oral contracts, and actions not otherwise provided for herein, within three (3) years." The

---

<sup>1</sup> *Actori incumbit onus probandi*. The burden of proof is upon on the Plaintiff.

Plaintiff, Melanie Burns, met this requirement by timely filing her complaint, on December 3<sup>rd</sup>, 2009. The damage to her property occurred on October 27<sup>th</sup>, 2009 (*See, Burns Exhibit 1(Letter from St. Lawrence Valley Animal Hospital)*)

The SRMT TCR 2008-19 Tribal Civil Code (herein after SRMT Civ. Code) specifically lays out, in a hierarchical fashion, the choice of law to be applied by the SRMT Court, which gives precedence to those first appearing in the list. The Court must first determine by examining § V (A) (1)-(6), in sequence, which law is controlling in the case at bar.

1. Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);

Plaintiff's Complaint is not based on a Constitutional claim, nor is it made under a federal statute: Therefore, the Court must look to the second prong of Tribal law to see which law is controlling.

2. Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe;

In 2008, the SRMT Court requested from Tribal Council that a certified copy of the laws the Court is to utilize be sent to the Court. The Court received a bundle of certified laws, which included the following: SRMT TCR 2008-16 Rules of Civil Appellate Procedure, SRMT TCR 2008-17 Rules of Evidence, SRMT TCR 2008-18 Attorney Practice Requirements, SRMT TCR 2008-19 Civil Code, SRMT TCR 2008-20 Rules of Civil Procedure, SRMT TCR 2008-21 Court Filing Fees, and SRMT TCR 2008-22 Tribal Court and Judiciary Code. In 2009, the Court received a certified copy of SRMT TCR 2009-51 Animal Control Ordinance, which was enacted August 3<sup>rd</sup>, 2009 [hereinafter, SRMT Animal Ordinance].<sup>2</sup>

Here, Plaintiff filed a complaint that is based upon tort/property law, damages to her property, a domestic cat. Although it would appear that a written SRMT law applies (the SRMT Animal Ordinance) and that the Court must give preference to the SRMT Animal Ordinance in determining the case at bar, a careful reading of the Tribal law here indicates that it is almost mute with respect to the issue at bar: Damages to property (a pet) caused by property (a pet). At most, the Tribal ordinance allows for a 'citation' for a potential Tribal fine, and the ordinance also permits the owner of the 'tortfeasor pet' to be held "responsible." However, nothing else is provided in the SRMT Animal Ordinance.

Thus, the Court looks to SRMT Civil Code § V(A)(3), which provides:

---

<sup>2</sup> These SRMT certified laws can be found at the Court's webpage. *See*, [http://srmt-nsn.gov/divisions/justice/tribal\\_court/](http://srmt-nsn.gov/divisions/justice/tribal_court/)

Generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;

As such, and under the Tribal Civil Code the Court must also look at the Restatement (Second) of Torts (1998) to address the case at bar. (*See*, SRMT Civil Code § V (A) (1)-(6)). It is from these points, the Tribal law and the Restatement of Torts, that the Court begins its' analysis of this case which is also a case of first impression for the SRMT Court.

### III. ANALYSIS

In the case before the Court, Plaintiff alleges that her pet domestic cat, "Mittens," was attacked and seriously injured, on her back porch by what is alleged to be Defendant's dog. (*See*, Amended Brief of Burns). Plaintiff seeks to recover veterinarian bills totaling \$2,042.69 plus court costs. (*Id.*)

American law has deep roots emanating from the beliefs of such philosophers as Rene Descartes and Immanuel Kant who viewed persons as having rights and 'things,' as being devoid of rights.<sup>3</sup> In this dualistic ideology the world consists of, 'things' and 'persons' and it is from these roots that common and civil law began to view animals as things, as property, and as the property of persons. Jeremy Bentham's a lawyer and utilitarian philosopher felt animals should have legal protections and it is his ideology that influenced many jurisdictions to draft anti-animal cruelty laws. (*Id. C. Reinold Noyes, p. 9*).

The Court on prior occasions reviewed the legal status of animals on the SRMIR and came to the same conclusion, and with no Tribal Law to the contrary, the Court deemed that animals are to be treated as property.

The SRMT Animal Act was drafted to protect the welfare of people and animals by mandating specific owner responsibilities and legal obligations for caring for animals within the SRMT's Jurisdiction.

All animals shall be kept under restraint. Owners of "aggressive" animal(s), as determined by the Animal Control Officer, must take extra caution that their animal(s) are not given free, unsupervised access to the general public. An owner must ensure that his animal is not a nuisance in any way to the general public. The owner of every animal shall be held responsible for every behavior of such animal under the provisions of this ordinance. (SRMT Animal Ordinance §3 (A)(B))[Emphasis added].

---

<sup>3</sup> *See*, C. Reinold Noyes, *The Institution of Private Property* 290 n. 13 (1936)

Here there is no known determination by the Animal Control Officer that: The Defendant owned the dog in question; and, that the animal was to be considered an 'aggressive animal.' Next, the SRMT Animal Ordinance states that "owners are to be held responsible;" but, it does not provide for what happens when a failure to be responsible occurs, although the Ordinance does provide for a citation and fine, it says nothing with respect to private causes of action on a tort claim as is the case at bar.

Obligations under the SRMT Animal Ordinance also mandates owners to ensure that their animals are not running unrestrained or being a nuisance.<sup>4</sup> (*See, SRMT Animal Ordinance §2*)

**At large:** Means an animal shall be deemed to be at large when off the property of the owner and/or not under restraint or control of the owner.

**Nuisance:** Means an animal shall be considered a nuisance if it: is at large, damages, soils, defiles, or defecates on private property other than the owner's or on public walks and recreation areas unless such waste is immediately removed and properly disposed of by the owner; causes unsanitary, "dangerous," or offensive conditions; causes a disturbance by excessive barking or other noise making; or chases vehicles, or molests, attacks, or interferes with persons or other domestic animals on public property. (*See, Id.*)

At trial, both parties alleged that the other party did not restrain their pets. According to Tribal Police reports, offered in this case, they had to respond multiple times to complaints of what was allegedly the Defendant's dog running unrestrained and being a nuisance, during which Defendant was mandated to tie up the dog, including the night of October 27, 2009, which was the night Plaintiff's cat was injured. (See, Burns Exhibit #2, #4, and #5). Defendant at trial alleged that the Plaintiff's cat left paw prints on her vehicle and gets into the garbage. Until proven, both Plaintiff's and Defendant's assertions remain just allegations.

In the trial of this matter the Plaintiff did not offer any description of the dog that attacked her cat. In other words, Plaintiff never offered proof that, "a \_\_\_\_ colored pit bull standing an estimated \_\_\_\_ inches tall and weighing an estimated \_\_\_\_ pounds, which was observed at Defendant's, and under Defendant's control, was the dog that attacked the cat causing the damages." Likewise, for the Defendant there was similarly no proof as to the description of any cat that may have wandered unto her property causing the damages alleged by the Defendant. The major deficiency in this case, is that neither the Plaintiff's allegation nor the Defendant's response was sufficient proof offered that it was 'this dog' (Defendant's dog) that attacked this cat, or that Plaintiff's cat left the prints on Defendant's car.

---

<sup>4</sup> Section 2 of the SRMT Animal Ordinance defines owner as, "a person having the right of property or custody of an animal or who keeps or harbors an animal or knowingly permits an animal to remain on or about any premises occupied by that person." Although pet owners may find it repugnant to think of their pets as property, animals are treated such by SRMT law and owners have legal obligations over this property.

If anything, it appears both parties may have violated the ordinance by allowing their pets to be 'at large.' Plaintiff's cat was injured by a dog, on October 27<sup>th</sup>, 2009, while outside, and Defendant's car was damaged by a cat at some other date.

However, in the record there has only been passing reference to a dog described as a tan pit bull but there was no evidence offered putting this dog at the incident which damaged the Plaintiff's property, nor was there any showing (testimony or otherwise) of that animal being under the Defendant's control, nor was there a showing of that animal being determined to be "aggressive" by the SRMT Animal Control Officer, and the record is absent of any proof showing that the Defendant was cited under the SRMT Animal Control Ordinance. Although this would not be dispositive of case, it would show ownership or control by the Defendant of the dog that caused damage to Plaintiff's cat. But again, this is not present in the case at bar.

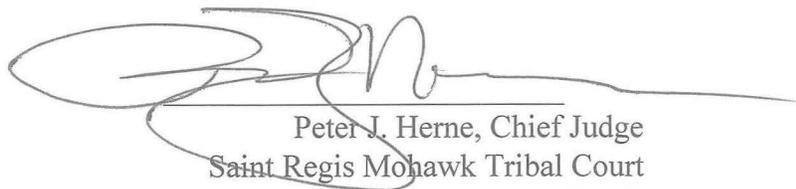
Finally, Plaintiff seeks to recover damages, she alleges, were caused by Defendant's negligence in allowing her dog to be at-large and a nuisance. In general, under the Restatement of Torts the amount of recovery for property damage in such a case is limited by evidence of 'replacement' value, cost of repairs, or loss of use until repaired or replaced. In terms of property value this literally leads to putting a value on a 12 year old cat. (*Id.* §928). But, in the case at bar we are not under any obligation to address this issue as the proof offered at trial was insufficient to find the Defendant liable for the damages to the Plaintiff's property (cat).

#### IV. Conclusion

The Court will take into account that both parties were errant in allowing their animals to run 'at large,' in violation of the SRMT Animal Ordinance and that Plaintiff witnessed her cat being attacked by a dog on October 27<sup>th</sup>, 2009. However, the Plaintiff offered no proof, or description, that would mandate the Court to find that the dog that attacked her cat on that date was in fact Defendant's dog. As such, the Court is forced to hold that no cause of action upon which damages can be awarded can be made against the Defendant.

Based upon the aforementioned reasons, the Plaintiff has not met the burden of proving that the dog that attacked and damaged the Plaintiff's property, (her cat), was Defendant's dog.

Entered by my hand on this the 9<sup>th</sup> day of June 2010/1



Peter J. Herne, Chief Judge  
Saint Regis Mohawk Tribal Court

SEAL