1-16-2014

Braese v. Stinker Stores Respondent's Brief Dckt. 41296

IN THE SUPREME COURT OF THE

STATE OF IDAHO

ROBERT J. BRAESE, JR.,	)	Docket No. 41296
	)	(Dist. Court Case No. CV PI 12-2147)
Plaintiff-Appellant,	)	
	)	
v.	)	**RESPONDENT'S BRIEF**
	)	
STINKER STORES, INC.,	)	
	)	
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY

HONORABLE LYNN G. NORTON, District Judge, Presiding

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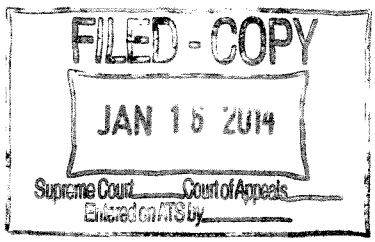

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury case wherein Plaintiff alleges that he was injured by a dog inside of the Stinker Store in Hyde Park, Boise, Idaho. Specifically, Plaintiff alleges that a dog owned by Defendant Bryce Fuller was in the Stinker Store at the counter when he approached the counter area, and that the dog placed his paws on Plaintiff, causing him to fall into a display. Plaintiff alleges that he was injured as a result.

B. Statement of Facts

On August 6, 2011, Defendant Bryce Fuller was at the counter at the Stinker Store located at 1620 N. 13th Street, Boise, Idaho, (hereafter "Hyde Park Stinker Store") with his dog Darma. (CR 23; 33; Ex. A to Wilson Depo., CR 151). While it is clear Darma had a leash on, it is not clear whether Defendant Fuller was holding the leash at that time. (Ex. A to Wilson Depo., CR 151). As Defendant Fuller stood at the counter with Darma, Plaintiff walked into the store to purchase a lottery ticket. (Plaintiff's Aff., at ¶ 2-3, CR 186). As he entered the store, Plaintiff could see the dog with her paws up on the counter. (CR 189). Plaintiff walked behind Mr. Fuller to make payment to the cashier. (Plaintiff's Aff., at ¶ 8, CR 186). Defendant Fuller's dog then came behind Mr. Fuller and placed his paws on the Plaintiff, causing him to fall backward into a rack in the store. (*Id.* at 9; Wilson Aff., Ex. A). Plaintiff claims he was injured as a result.

Dogs were allowed in the Hyde Park Stinker store because it was near a park and it was part of the culture of Hyde Park to allow dogs in businesses in that area.[1] (Wilson Depo. at 36, ll. 9-16, CR 146; Wilson Depo. at 21, ll. 15-20, attached as Exhibit B to the Affidavit of Wm. Breck Seiniger Jr, part of the augmented record). Darma had been in the Hyde Park Stinker Store before, and her behavior did not give any cause for concern to the management of the store. (Wilson Depo., at 33, ll. 12-23, CR 145). In fact, in the twelve years that Suzie Wilson had been the manger at the Hyde Park Stinker Store, there had never before been an incident involving a dog at that store. (Wilson Depo., 29, ll. 21-25; 30, ll. 18-25, CR 144).

On February 6, 2012, Plaintiff filed a complaint against Stinker Stores, Inc., (hereafter "Stinker Stores") alleging common law negligence and negligence *per se*. (CR 8-13). By way of an Amended Complaint filed March 12, 2013, Plaintiff added claims against the owner of the dog, Bryce Fuller. (CR 125-130). Plaintiff obtained a Default against Defendant Fuller and a Default Judgment in the amount of $25,101.20 was entered against Defendant Fuller on July 30,

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[1] In his brief, Plaintiff argues that the Idaho Food Code prohibited dogs from being in the Hyde Park Stinker Store at the time of the incident. (Appellant's Brief, at 3) However, whether the Idaho Food Code did in fact prohibit dogs in the Hyde Park Stinker Store was disputed before the District Court and is not relevant to the Court's decision on the issue of general negligence. Moreover, the manager of the Hyde Park Stinker Store testified that, while the store was inspected every six months for its certificate, she had never been told by anyone at the Health Department that the Food Code prohibited dogs from being in the store. (Wilson Depo., at 31, ll. 11-25, CR 144).

2013.

Stinker Stores moved for summary judgment on Plaintiff's claims on March 15, 2013. (CR. 138-139). On May 17, 2013, the District Court granted Stinker Stores' motion for summary judgment, dismissing Plaintiff's claims against Defendant Stinker Stores in their entirety. (CR 207-217) It is this Order from which Plaintiff appeals.

While the District Court dismissed both the negligence and the negligence *per se* claims against Defendant Stinker Stores, the Plaintiff appeals only the decision to dismiss the claims involving general negligence.

II. ISSUES ON APPEAL

1. Was the District Court correct in holding that Stinker Stores did not have a duty under these circumstances to protect Plaintiff from Defendant Fuller's dog?
2. Was the District Court correct that Plaintiff's general negligence claims should be dismissed as a matter of law?

III. ARGUMENT

A. The District Court Was Correct In Holding That Defendant Did Not Have a Duty to Plaintiff Under These Circumstances

In analyzing the issue of whether Stinker Stores owed a duty of care to Plaintiff in this case, the District Court noted that a duty could potentially arise in one of two ways: (1) as the result of duties owed under premises liability, or (2) as a general duty to exercise due care. (CR at 214). Plaintiff suggests that "it would appear that the District Court's analysis of duty was

based upon a confused reading of Idaho's premises liability cases." (Appellant's Brief, at 11). However, the District Court does not appear to have been confused about the role of premises liability at all in this case. Rather, the District Court first looked to whether Stinker Stores had a duty as a landowner to prevent the type of harm suffered by the Plaintiff in this case. Because the harm was not caused by a condition of the property, it concluded premises liability did not apply. The District Court then went on to cite case law supporting the proposition that premises liability is not the exclusive source of duties where a landowner is involved. The District Court cited *Boots v. Winters*, for the proposition that "circumstances may give rise to a general duty of care owed to third parties" by landowners that is separate from the duty imposed under premises liability. 145 Idaho 389, 394, 179 P.3d 352, 357 (Ct.App. 2008) (emphasis added).

The Court of Appeals in *Boots* articulated a list of factors to be considered when determining whether the circumstances gave rise to duty of care by landowners to prevent harm caused by third parties:

> In determining whether a duty will arise in a particular context, our Supreme Court has identified several factors to consider. The factors include 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. Where the degree or result of 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. We engage in a balancing of the harm only in those rare situations when we are called upon to extend a duty beyond the scope previously imposed or when a duty has not previously been recognized.

Boots, 145 Idaho at 394, 179 P.3d at 357 (citing *Turpen v. Granieri* , 133 Idaho 244, 985 P.2d 669 (1999); *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995); *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990)). This portion of the *Boots* case was cited by the District Court in its decision. (CR at 215). The District Court then went on the use the factors set forth in *Boots* in determining that there was no duty owed by Stinker Stores in this case to prevent the harm allegedly caused by Defendant Fuller and his dog.

In looking at the undisputed facts of this case in light of the factors enumerated in *Boots, supra*, the District Court was correct in concluding that Stinker Stores did not owe Plaintiff a duty as a matter of law to prevent harm from Defendant Fuller's dog under these circumstances.

1. The Balancing Test Was Appropriately Applied

The Court in *Boots* held that it was only appropriate to balance the factors enumerated "when we are called upon to extend a duty beyond the scope previously imposed or when a duty has not previously been recognized." *Id.* Plaintiff argues that the District Court improperly analyzed the factors in *Boots* because this case did not create or extend a duty previously recognized in Idaho. Plaintiff argues a general duty of care has always existed. However, while

a general duty of care has been recognized, the District Court was correct in noting that the duty of a landowner to exercise care for injuries caused by a third party's dog is not clearly established. The District Court specifically noted that "there is no Idaho authority imposing a duty upon a landowner to protect third persons from another person's dog." (CR, at 215). Thus, the District Court correctly concluded that this case involved the application of a duty previously unrecognized in Idaho and held that whether a duty to prevent injury from Defendant Fuller's dog existed was based upon an analysis of the specific circumstances in this case.

Based upon the circumstances in this case, and using the *Boots* factors, the District Court correctly concluded that Stinker Stores did not owe Plaintiff a duty to "protect Braese from Fuller's dog." This conclusion should be upheld.

a. It Was Not Reasonably Foreseeable that Darma Would Cause Injury To Plaintiff

The main factor in determining whether a duty of care exists is whether the risk of harm is foreseeable. Plaintiff argues in this case that Stinker Stores knew that dogs placed their paws on the counter to get treats and that it knew that dogs jumping on people could potentially cause harm. Thus, Plaintiff concludes his injury was foreseeable and that Stinker Stores should have had Bryce Fuller remove his dog from the store. Plaintiff thinks this is just common sense. However, this conclusion ignores the fact that while dogs had been coming into the Stinker Store for many years, there had never been an incident where a dog caused any injury by jumping up onto a customer.

Both Suzie Wilson, the manager of the Hyde Park store, and Jon Mangum, the retail operations manager for Stinker Stores, testified that in their many years of experience in retail stores, dogs have not posed an unreasonable danger to customers. Specifically, Jon Mangum testified that in the past fifteen years, he is only aware of one other incident involving an injury due to a dog, and that was at the Broadway location where a person was bit by a dog on the sidewalk on the corner of their property. (Mangum Depo., at 9. 18-24, CR 149). **There were no incidents involving dogs jumping up on people and injuring them in his time as retail operations manager.** Thus, Stinker Stores did not have any information which would lead it to conclude that allowing dogs in the Hyde Park Stinker Store would pose an unreasonable danger to the customers.

Nor did it have reason to believe that dogs putting their paws on the counter or getting treats would lead to dogs jumping on customers. Thus, Stinker Store was not acting in a manner inconsistent with the protection of its customers, including Plaintiff. Jon Mangum testified:

> We see millions of people a year. I've had two accidents in 15 years. Or incidents. That's millions upon millions of people that are in our stores on a daily basis and things happen . . . I don't think animals are a nuisance to people. Especially in the Hyde Park area.

(Mangum Depo., at 21, ll 20-25; 22, ll. 1-3, CR 150). The two incidents he refers to are the bite on the sidewalk at the Broadway store and Mr. Braese. Prior to Mr. Braese's incident, there simply was nothing that would give Stinker Stores cause to believe that allowing dogs in its

stores was a danger to its customers.

Moreover, Darma had been in the store before and did not cause any concern to Stinker Stores. Plaintiff would like to turn this around and argue that Darma had been in before so management knew she was an excited dog, somehow implying a duty to control Darma or keep her out of the store. However, management's knowledge of Darma only supports its argument that it did not believe she posed an danger to others. She had been in the store before, she had been a busy playful dog and yet she had never jumped up on anyone before. Thus, Stinker Stores had no reason to ask Defendant Fuller to remove her from the store this time. It simply was not forseeable that she would jump on the Plaintiff and cause injury. The fact that she placed her paws on the counter does not equate to general knowledge that she might jump up on a patron when she had never done so before.

While there are no Idaho cases dealing with exactly this issue, there are cases addressing whether landowners owe a duty for the actions of others under the general duty of ordinary care. For example, *Turpen v. Granieri* was a case against the lessor of real property. 133 Idaho 244, 985 P.2d 669 (1999). In *Turpen*, the plaintiff's son had died of alcohol poisoning while at a residence owned by the defendant. The plaintiff argued that defendant breached his duty of ordinary care by renting the house to students, when in the past the house had gained a reputation as a party house. The court held that, while the defendant had a duty of ordinary care to "prevent unreasonable, foreseeable risks of harm to others," that duty did not extend to the facts of that

case, where it was undisputed that the defendant had received no complaints about the current lessees.

Similarly, in this case, while Stinker Stores owed a general duty of care to "prevent unreasonable, foreseeable risks of harm to others," this duty does not extend to protecting patrons from injury by a third party's dog, when the dog had never caused any problems in the store before or given any indication that it would jump onto patrons.

b. There Is No Degree of Moral Blame Attached to Stinker Stores' Actions In This Case

Plaintiff also argues that Stinker Store was somehow morally culpable for allowing dogs in the Hyde Park Stinker Store because it violated the Idaho Food Code to do so. However, Stinker Stores was not aware that the Idaho Food Code may have required it to keep dogs out of the store. The manager of the Hyde Park Stinker Store testified that no one at the Department of Health or the police had ever informed her that the Idaho Food Code prevented dogs from coming into the store. (Wilson Depo., at 32, CR 145). Thus, Stinker Stores was not intentionally flouting any rules or regulations when it allowed dogs into the store, it was simply not aware that an argument could be made that the Idaho Food Code required dogs be kept out of the store.

Additionally, Suzie Wilson testified that it is part of the culture of Hyde Park to allow dogs and Stinker Stores had no reason to believe that allowing dogs in its stores posed an unreasonable danger to its customers:

> A. . . . It was a big thing in Hyde Park. I mean, all the businesses, everybody in Hyde Park let their dogs go in. It was just something you did in Hyde Park. When I managed stores before that, we didn't freak out if a dog came in the store, but it didn't happen like it did in Hyde Park.

(Wilson Depo., at 21, ll. 15-20, attached as Exhibit B to the Affidavit of Wm. Breck Seiniger Jr, part of the augmented record). Similarly, Jon Mangum testified that he is aware of dogs being allowed in other retail businesses, "[e]specially in the Hyde Park area." (Mangum Depo., at 22, l. 3, CR 150).

Plaintiff's characterization of Defendant as a company that flouts the Idaho Food Code evidencing a "general lack of due care" for its customers is not supported by the record and is simply unfair. Defendant did not flout the Idaho Food Code by allowing dogs in its stores as it was not aware the Idaho Food Code prohibited dogs in its stores. It allowed dogs as a way to fit in with the culture in Hyde Park and without knowledge that any argument could be made that it was not permitted. This simply does not evidence any bad motive or disregard for customers.

c. The District Court Correctly Concluded That No Duty Was Owed By Stinker Stores In This Case

It does not appear from the language of *Boots v. Winters*, that a Court must discuss all the factors listed. 145 Idaho 389, 179 P.3d 352. Rather, the Court of Appeals noted that "[i]n determining whether a duty will arise in a particular context, our Supreme Court has identified several factors to consider." *Id.* at 394, 179 P.3d at 357 (emphasis added).

In fact, in *Jones v. Starnes*, 150 Idaho 257, 245 P.3d 1009 (2011), this Court held that a

bar did not owe a general duty of care to protect patrons from the actions of third parties based solely on the issue of foreseeability: "even if Mr. Jones was a patron and the injury occurred on the premises, the assault was not foreseeable because there is no evidence that Boomers had knowledge of the unknown assailant's violent propensities." *Id.* at 260, 245 P.3d at 248. This Court concluded that the bar did not owe a general duty of care to its patron to protect him from the assault of a third person because such attack was not foreseeable. This Court then addressed the issue of premises liability, and cited *Boots v. Winters, supra,* for the proposition that premises liability did not provide a duty when the injury was from an activity on the land and not a condition. This Court did not address the balancing test, but held that because the injury was not reasonably foreseeable, there was no duty. Thus, it appears that the list of factors in *Boots* are merely factors which a court may consider in determining whether a duty arises, but not all of the factors must be addressed by the Court.

In this case, the Court addressed several of the factors, holding (1) that Stinker Stores had no knowledge of any dangerous propensities of Fuller's dog, (2) that the injury was not severe and was not close in connection between the conduct because Mr. Braese did not appear injured and walked around the same before and after he was bumped into the rack, and (3) this was not a case where there was a foreseeability of great harm. (CR 216). The District Court was not required to address all the factors in *Boots*, and could have made the determination on the basis of foreseeability alone, as this Court did in *Jones v. Starnes, supra.*

Under either analysis, it is clear that Stinker Stores did not have a general duty of care to protect Plaintiff from Defendant Fuller's dog, and the District Court was correct in dismissing Plaintiff's general negligence claim.

2. The District Court Properly Analyzed the Facts Presented

At page 12 of his brief, Plaintiff suggests that the District Court "ignored entirely" its citations to the record on a number of issues. This is not supported by the District Court's decision. First, Plaintiff believes the District Court ignored the fact that Stinker Stores was familiar with the dog. However, the District Court noted that Stinker Stores had not been informed of any dangerous propensities of Fuller's dog. (CR at 216). In fact, it was aware of Fuller's dog and found him never to have harmed anyone. Thus, the District Court did not ignore that issue.

Next Plaintiff contends the District Court ignored testimony about treats being given from behind the counter. To the extent there was such testimony and to the extent that it was anything other than inadmissible hearsay, it would not be relevant because whatever the practice had been regarding treats, the fact was in twelve years as manager Suzie Wilson had **never** had an incident involving a dog prior to this one.

The Plaintiff also believes the District Court ignored the video evidence. However, the District Court clearly considered the video evidence, it is cited in notes 2-7 of the Memorandum, Decision and Order and in its conclusion. (CR at 208; 216). The District Court simply did not

agree with Plaintiff's characterization that the video shows a dangerous dog or that this was a violent incident. The fact that a dog has its paws up on a counter does not mean it is a danger to humans. The fact that a dog has its paws on the counter does not mean it will jump up on humans. In fact, Darma had not posed a danger to patrons in all the other times she had been in the store.

B. Stinker Stores' Policies Did Not Create a Duty To Plaintiff Under These Circumstances

Plaintiff's final argument on appeal is that Stinker Stores voluntarily undertook a duty to prevent injuries to third parties from dogs and that it breached that duty when it failed to ask Defendant Fuller to remove his dog from the premises. However, the Suzie Wilson specifically testified that Darma was not the type of dog the policies were designed to address:

> Q. I want to talk to you a minute or two about your rules for your employees in the Stinker Store regarding dogs. Did you have rules that you had put in place –
>
> A. Yes
>
> Q. -- to your employees regarding dogs in the store prior to August 6, 2011.
>
> A. Yes. From the beginning that I've been at that store, the dogs had to be on a leash and they could not be unruly dogs. They had to be dogs that were controllable. We did have some customers that I really made mad because I would not allow them to bring their dogs into the store because they did not look controllable to me.
>
> Q. In this regard, what did you specifically advise your

employees during the 12 years you were manager prior to August 6, 2011.

A. Make them take their dogs outside if they're uncontrollable, and especially if they are not on a leash.

Q. The dog in this case, I think the name was Darma?

A. Darma, yeah. We knew Darma's name. We just didn't know the owner's name.

Q. I take it prior to August 6, 2011, you had seen Darma before?

A. Yes.

Q. Did you have any reason to be concerned about Darma creating problems in the store?

A. No, I had no reason.

Q. **Would Darma have been the type of dog based upon your personal knowledge and observation that you would have instructed your employees not to allow in the store - -**

A. **No**.

(Wilson Depo. at 32, ll. 15-25; 33, 1-24, CR 145) (emphasis added). On the date of the incident, Darma was acting in the typical way she usually did, and that behavior had not been cause to remove her or implicate the policies of the store manager on prior occasions. (Wilson Depo. at 40, ll. 17-21, CR 147). Thus, the store policies did not create a duty on the part of the cashier to remove Darma from the store.

IV. CONCLUSION

Under the circumstances in this case, where dogs had not caused injury inside the Hyde Park Stinker store at least in the twelve years that Suzie Wilson had been manager, and where the dog in question had been in the store before without incident, there is no basis to find that Stinker Stores owed Plaintiff a duty to keep Defendant Fuller's dog out of the store, or to ask him to leave for putting his paws on the counter. The policies of the store with respect to dogs did not create an additional duty to the Plaintiff to have Defendant Fuller remove his dog.

Despite Plaintiff's attempts to characterize this case as one where a vicious dog jumped up on him, a review of the video shows that the dog did not attack the Plaintiff, she was not vicious, and the Plaintiff was not seriously injured as a result. As the District Court noted from its review of the video "[i]ndeed, the video shows Brease moving and acting the same before and after Fuller's dog jumped onto him." (CR 216).

While the incident is unfortunate, the duty to control his dog lies with Defendant Fuller and Plaintiff has in fact obtained a Judgment against Fuller. It is simply not reasonable to hold Stinker Stores liable for the damage caused by Fuller's dog when it had no reason to believe the dog would jump up onto patrons.

Based on the foregoing, the Respondent respectfully request the Judgement of the District Court be affirmed.

DATED this 16th day of January, 2014.

RINGERT LAW CHARTERED

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2014, two true and correct copies of the foregoing were served upon all parties listed below by:

☑ U.S. Mail ☐ Fax ☐ By Hand ☐ Overnight

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