

12-19-2013

# Braese v. Stinker Stores Appellant's Brief Dckt. 41296

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Braese v. Stinker Stores Appellant's Brief Dckt. 41296" (2013). *Idaho Supreme Court Records & Briefs*. 4754.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/4754](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4754)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

Richard J. Braese, Jr.,

*Plaintiff/Appellant,*

v.

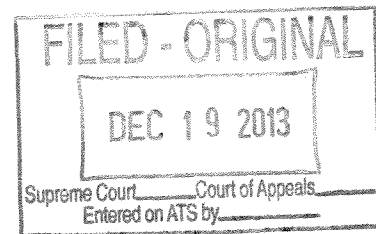
Stinker Stores, Inc.,

*Defendant/Respondent.*

Idaho Supreme Court Docket No. 41296

(District Court Case No. CV PI 1202147)

**APPELLANT'S OPENING BRIEF**



WM. BRECK SEINIGER, JR.  
ISB #2387  
SEINIGER LAW OFFICES, P.A.  
942 Myrtle Street  
Boise, Idaho 83702  
Voice: (208) 345-1000  
Facsimile: (208) 345-4700  
Attorney for the Plaintiff/Appellant

JAMES G. REID  
ISB #1372  
RINGERT LAW CHARTERED  
455 S. Third, P. O. Box 2773  
Boise, Idaho 83701-2773  
Telephone: (208) 342-4591  
Facsimile: (208) 342-4657  
Attorneys for Respondent Stinker Stores, Inc.

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

TABLE OF CASES AND AUTHORITIES ..... iii

INTRODUCTORY SUMMARY ..... 1

STATEMENT OF THE CASE..... 1

    NATURE OF THE CASE..... 1

    THE COURSE OF THE PROCEEDINGS BELOW ..... 1

    STATEMENT OF THE FACTS ..... 2

ISSUES PRESENTED ON APPEAL..... 9

ARGUMENT ..... 9

    Standards Applicable To Motions For Summary Judgment ..... 9

    Respondent Stinker Store Had A General Duty of Due Care Towards Its Patrons..... 10

    The District Court Erred by Granting Summary Judgment on Plaintiff’s General Negligence  
    Claim ..... 17

    Respondent Stinker Store Voluntarily Assumed A Duty of Due Care To Its Patrons With  
    Respect to Dogs ..... 20

CONCLUSION..... 21

**TABLE OF CASES AND AUTHORITIES**

**Cases**

*Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175–76, 804 P.2d 900, 904–05 (1991)..... 11

*Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct. App. 2008) 14, 17, 21

*Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)..... 10

*Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999) ..... 21

*Delaney v. Saint Alphonsus Regional Medical Center, 2002 Westlaw 433638 (Idaho, 2002)*..... 10

*Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 132 Idaho 559, 564, 976 P.2d 913 (1998)..... 10

*O'Guin v. Bingham Cnty.*, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005)..... 11

*Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969) ..... 10

*Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995)..... 15

*Smith v. Meridian Joint School District No. 2*, 918 P.2d 583, 588 (Idaho, 1996)..... 10

*Thomas v. Medical Center Physicians, P.A.* 61 P.3d 557, 562 (Idaho,2002)..... 10

*Thompson v. I.O. Insurance Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994)..... 9

*Turpen v. Granieri*, 133 Idaho 244 at 247-48, 985 P.2d 669 at 672-73 (1999)..... 14

*Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001)..... 21

**Rules**

I.R.C.P. 56(c) ..... 10

## **INTRODUCTORY SUMMARY**

This is a simple negligence case requiring the reversal of a summary judgment. The case involves an excited dog whose leash was not being held that jumped up on an elderly man (Appellant Richard Braese, Jr.) in a convenience store (of the Respondent) causing injury. Video surveillance cameras show the excited dog jumping up and putting its paws on the counter six or seven times before the Appellant Richard Braese, Jr. entered the store. The excited dog was jumping up to get dog treats which were kept behind the counter and fed to patrons' dogs by the store's clerk. It was clear that the dog was excited and out-of-control and should have been removed from the store in keeping with the Respondent's voluntarily-adopted policy. It was foreseeable that the excited dog might jump up on a patron causing injury, yet the convenience store cashier permitted the dog to stay in the store and did not require its owner to pick up the leash and hold the excited dog so that it could not jump up on the counter or other patrons. The District Court invaded the province of the jury in granting the convenience store summary judgment holding that it had no duty to Appellant.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

This is a negligence case involving injury sustained by a business invitee when an excited and out-of-control dog—being fed treats by a shop keeper behind the checkout counter of a convenience store—jumped up on a man in his eighties and caused him injuries.

### **THE COURSE OF THE PROCEEDINGS BELOW**

A complaint was filed in this case against Defendant/Respondent Stinker Stores, Inc. on

February 6, 2012.<sup>1</sup> Respondent Stinker Stores, Inc. filed an Answer to the Complaint on May 4, 2012.<sup>2</sup> Respondent Stinker Stores, Inc. obtained leave to join the dog owner, Bryce Fuller, as a third party defendant, and obtained entry of default and default judgment against him.<sup>3</sup> Respondent Stinker Stores, Inc. brought a motion for summary judgment that was granted by the Court.<sup>4</sup>

Appellant Braese filed an amended complaint naming Bryce Fuller as a Defendant.<sup>5</sup> *Default Judgment Against Bryce M. Fuller* was entered on Appellant Braese's Amended Complaint.<sup>6</sup> The *Default Judgment Against Bryce M. Fuller* was certified as the final judgment was entered by the District Court on July 30, 2013. Appellant Braese timely filed a notice of appeal on August 6, 2013.

#### STATEMENT OF THE FACTS

At the time of the incident in this case, Respondent Stinker Stores, Inc. owned and operated a convenience store located at 1620 N. 13th Street, Boise, Idaho 83702. Respondent Stinker Stores, Inc. identified that store as Stinker Station Number 32. This particular store is referred to for convenience hereinafter simply as the "Stinker Store." On the date of the incident in this case, August 6, 2011, the Stinker Store had a practice of feeding customer's dogs treats kept behind the check out counter in its store located in the Hyde Park neighborhood in Boise,

---

<sup>1</sup> CR 8-13.

<sup>2</sup> CR 14-20.

<sup>3</sup> CR 27-32.

<sup>4</sup> CR 207-219.

<sup>5</sup> CR 119-130.

<sup>6</sup> CR 226-227. Defendant Fuller filed for Bankruptcy in United States Bankruptcy for the District of Idaho, Case 13-01899-JDP.

Idaho.<sup>7, 8, 9</sup> The Stinker Store was a Licensed Food Establishment, licensed by the Central Health Department.<sup>10</sup> This practice violated the Idaho Food Code.<sup>11</sup>

As might be expected, the Respondent's corporate management denied recognizing any risk to customers at all, but Respondent's Retail Operation's Manager, Jon Mangum, admitted being aware that dogs jumped up on the counters in its stores.<sup>12</sup> Mr. Mangum testified:

---

<sup>7</sup> The following documents and their attached exhibits contained in the Augmented Record are exhibits attached to Plaintiff's *Motion to Augment Record* (filed November 20, 2013) and *Renewed Motion to Augment Record and Suspend Briefing Schedule* (filed December 12, 2013):

Exhibits attached to Motion to Augment Record

Affidavit Of Tom Schmalz And Certification Of Business Records Or Regularly Conducted Activity	February 11, 2013
Affidavit of Plaintiff regarding Damages	July 3, 2013
Default Judgment against Bryce M Fuller	July 30, 2013
Order on damages	July 30, 2013

Exhibits attached to Renewed Motion to Augment Record

Affidavit of Wm Breck Seiniger, Jr. In Support of Motion to Amend Complaint	February 11, 2013
Affidavit of Counsel in Opposition to Motion to Amend to State a Claim for Punitive Damages	February 28, 2013

<sup>7</sup> CR 187. See, video *Affidavit of Susie Wilson in Support of Motion for Summary Judgment* (hereafter "*Wilson Aff.*"), Exhibit A. CR 151-153. See also *Affidavit of W<sup>m</sup> Breck Seiniger, Jr. In Support of Motion to Amend Complaint* (hereafter "*Seiniger Aff.*"), Exhibits 2 and 3 (mistakenly identified in the documents footer as "Affidavit of Tom Schmalz and Certification of Business Records or Regularly Conducted Activity") and *Affidavit of Tom Schmalz and Certification of Business Records or Regularly Conducted Activity* (hereafter "*Schmalz Aff.*") and its attached exhibits.

<sup>8</sup> *Seiniger Aff. Exhibit 1, Deposition of Respondent Stinker Store*, Pg: 17 Ln: 5-1. *Aff. Of Counsel In Opposition to Motion to Amend to State a Claim for Punitive Damages* (hereafter "*Mahoney 1<sup>st</sup> Aff.*") Exhibit B, *Deposition of Susie Wilson*, Pg: 26 Ln: 9 to Pg: 27 Ln: 3; *Wilson Aff., Exhibit A*. CR 151-153.

<sup>9</sup> *Aff. Of Counsel In Support of Motion For Summary Judgment* (hereafter "*Mahoney 2<sup>nd</sup> Aff.*"), Exhibit A, *Wilson Depo.* Pg: 32 Ln: 15 - Pg: 33 Ln: 9, CR 145.

<sup>10</sup> *Id.*

<sup>11</sup> *Schmalz Aff.*, Exhibit attached to *Motion to Augment Record*. It is the position of Appellant Braese that the violation of the Idaho Food Code is circumstantial evidence of a general attitude of carelessness, but Appellant Braese does not contend that its violation was negligence per se in this case, since the statute was not intended to protect individuals from dog attacks.

<sup>12</sup> *Seiniger Aff., Exhibit 1, Depo. of Stinker Stores, Inc.* Pg. 15 ln. 18 to Pg. 16 ln. 12, Exhibit attached to *Renewed Motion to Augment Record*.

Q. Prior to the incident involving Mr. Braese, did Stinker have any concern that its patrons could be injured by people's animals that were permitted to come in the store?

A. Could you repeat that? I'm sorry.

MR. SEINIGER: Can you read that back, Dean.

THE COURT REPORTER: "Prior to the incident involving Mr. Braese, did Stinker have any concern that its patrons could be injured by people's animals that were permitted to come in the store?"

THE WITNESS: No.

BY MR. SEINIGER:

Q. Okay. So, I'm assuming that Stinker didn't have any policy to try and prevent any such accidents; would that be correct?

A. That is correct.

Q. Okay. Were animals permitted to -- for lack of a better way to say it -- jump up on the counter, put their paws on the counter?

A. They did. Yeah. I would say that it happened.

However, the manager of the store in question made admissions regarding foreseeability and the voluntary assumption of a duty to protect customers. Respondent's Manager admitted that she understood the dogs posed a risk of injuring people.<sup>13</sup> Respondent's Manager Suzie Wilson testified that Stinker Store had voluntarily adopted rules regarding dogs, consistent with her admission that there that there is always a risk that a dog can startle someone by barking or anything like that.<sup>14</sup>

These rules were conveyed to Stinker Store employees prior to August 6, 2011. From the beginning of Ms. Wilson's tenure as a manager at the Stinker Store dogs had to be on a leash and they could not be "unruly." The dogs had to be "controllable." Ms. Wilson specifically advised her employees to remove unruly dogs from the premises:

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 --

---

<sup>13</sup> *Id.*, *Wilson Depo.* Pg: 38 Ln: 10 - 18. *CR* 146.

<sup>14</sup> *Id.*, *Wilson Depo.* Pg: 37 Ln: 9 - Pg: 38 Ln: 3. *CR* 146.



A. Yes.

Q. -- to your employees regarding allowing dogs in the store prior to August 6th, 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 6th, 2011?

A. Make them take their dogs outside if they're uncontrollable, and especially if they're not on a leash.<sup>15</sup>

The significant events in this case were recorded by multiple security cameras located at a variety of vantage points within the store. The video recordings made by Respondent were entered by it into evidence as *Exhibit A* to the affidavit of Respondent's Manager Suzie Wilson.<sup>16</sup> *Exhibit A to the Affidavit of Susie Wilson in Support of Motion for Summary Judgment*<sup>17</sup> is a computer disk containing video recordings of the incident in this case made by Respondent Stinker Store. These recordings are referred to hereafter as "the Surveillance Videos." For the convenience of the District Court and potentially this Court, Appellant Braese reviewed the Surveillance Videos and identified a series of photographs extracted from the Surveillance Videos showing the actions of the excited dog. These photographs are time stamped, and are attached to Appellant Braese's affidavit as Exhibit 1.<sup>18,19</sup>

---

<sup>15</sup> *Wilson Depo.* Pg: 32 Ln: 15 to Pg: 33 Ln: 16. Emphasis supplied.

<sup>16</sup> *Wilson Aff., Exhibit A.* CR 151-153.

<sup>17</sup> *Affidavit of Plaintiff Opposing Summary Judgment* (hereafter "*Braese Aff.*"), CR 185-187, ¶¶4-14.

<sup>18</sup> *Braese Aff.*, CR 185-192.

<sup>19</sup> Appellant Braese's affidavit identifies each picture, each of which bears a time stamp allowing the Court to get a sense of the time frames involved in the numerous times that the dog jumped up on the counter before it jumped up on Appellant Braese. *Braese Aff.*, CR 186-187. The first photograph shows that the dog's owner is not holding the leash of his dog. The next eight photographs on pages 1-3 of Exhibit 1 show the dog with his paws on the counter. CR 188-190.

When Appellant Braese entered the Stinker Store, Bryce Fuller had been in it for some time with his dog. Respondent Stinker Store's Surveillance Videos evidence the fact that prior to Appellant Braese entering the store, the excited dog jumped up on the counter approximately seven times just before the incident in which Appellant Braese was injured.<sup>20</sup> The manager of the Stinker Store, Suzie Wilson, testified that she was familiar with the dog that jumped up on the counter, and that this was typical of his behavior.<sup>21</sup> On the sixth time that the excited dog jumped on the counter prior to Appellant Braese entering the store, it was fed a dog treat by the cashier.<sup>22,23</sup>

The excited dog had on a leash, but no one was holding it.<sup>24</sup>

Respondent Stinker Store knew that it had the right to tell people to hold the leash, but it chose not to do so:

Q. Okay. You as -- Stinker as the property owner has the right to tell people if they are going to be on your property they have to have their dog on a leash, doesn't it?

A. Yes, we do.

Q. But that's just something that you don't choose to do?

A. That is correct.

Q. Okay. And you didn't choose to do it then and you don't choose to do it now?

A. That is correct.<sup>25</sup>

---

<sup>20</sup> *Wilson Aff., Exhibit A, CR 151-153.*

<sup>21</sup> *Mahoney Aff., Exhibit A, Wilson Depo. Pg. 40 ln. 11-23.*

<sup>22</sup> *Wilson Aff., Exhibit A, CR 185-192.*

<sup>23</sup> If the Court reviews the surveillance videos attached to the affidavit of Susie Wilson it will see that the dog jumped up approximately 7 times on the counter, including one time (the sixth time jumped up on the counter) when he was being fed by the cashier. These instances are also shown on page 2 of Exhibit 1 to Appellant Braese affidavit. *CR 189.*

<sup>24</sup> *Braese Aff., CR 187, see photographs attached as Exhibit 1, CR 188-191. Wilson Aff., Exhibit A. CR 185-192.*

<sup>25</sup> *Mahoney Aff., Exhibit B, Respondent Stinker Store Depo. Pg: 23 Ln: 3-13, CR 150.*

Appellant Braese, a gentleman in his eighties, entered the Stinker Store to purchase a lottery ticket.<sup>26</sup> As Appellant Braese entered the store, store patron Bryce Fuller was standing at the checkout counter with his dog next to him.<sup>27</sup> As evidenced by the video on *Exhibit A* to the Affidavit of Suzie Wilson entitled “*Video At Back Corner Of Store During Incident*” the excited dog jumped up repeatedly on the counter, the dog is not under the owner’s control or held by its leash, and that the cashier does not appear to do anything to try to stop the dog or to get the owner to control the dog.<sup>28</sup> The dog was unknown to the Appellant Braese.<sup>29</sup>

Appellant Braese walked behind Mr. Fuller and approached the cashier to make payment.<sup>30</sup> The excited dog jumped up on Appellant Braese, causing him to become startled and Appellant Braese reflexively jerked backwards into a rack in the store.<sup>31</sup> Appellant Braese was very concerned because he was recovering from a prior back injury at the time and the dog’s paws on his chest were in immediate proximity to the external port of his pacemaker.<sup>32</sup>

---

<sup>26</sup> *Braese Aff.*, CR 186. Appellant Braese age is stated in the complaint, CR 10 ¶12, but is not stated in his affidavit. Appellant Braese age is evidenced in his medical records attached as Exhibits to his *Affidavit of Plaintiff re: Damages*, item 4 attached to Appellant’s *Motion to Augment Record* filed November 20, 2013.

<sup>27</sup> *Braese Aff.*, CR 186. *Wilson Aff.*. *Exhibit A*. CR 185-192.

<sup>28</sup> *Affidavit of Suzie Wilson in Support of Motion for Summary Judgment, Exhibit A*, CR 151-153. The video recordings offered by Respondent evidence the fact that Mr. Braese walked around Mr. Fuller and his dog, that he was on the opposite side of the dog and paid the cashier, and that is only after this that the dog goes around its owner and jumps up on Mr. Braese twice. (See video entitled “*Video Over Counter Good View Of Incident*”). If the Court wishes to look at the video entitled “*Video At Door During The Incident*,” the Court will clearly see that the dog is not being held on leash prior to the time that Mr. Braese enters the store. This is the only video that has audio. In this video, one can see that that the dog is clearly not only the verbal command of the owner and that the cashier is doing nothing to keep the dog jumping up on the counter.

<sup>29</sup> *Braese Aff.*, CR 187, ¶11.

<sup>30</sup> *Wilson Aff.*. *Exhibit A*. CR 185-192.

<sup>31</sup> *Braese Aff.*, CR 187, ¶8, 9. As illustrated in the bottom two photographs on page 4 and all three photographs on page 5 of Exhibit 1. See the bottom photograph on page 3 and all of the photographs on page 4 of Exhibit 1. *Braese Aff.*, CR 190-191. *Wilson Aff.*. *Exhibit A*. CR 185-192.

<sup>32</sup> *Braese Aff.*, CR 187, ¶12-13.

Appellant Braese immediately felt pain as a result of this incident.<sup>33</sup>

Appellant Braese injured himself during this process, though he did not know to what extent until he received medical attention.<sup>34</sup> While Appellant Braese was struggling with the excited dog and falling backward, the surveillance video shows the store manager watch the incident and walk behind Appellant Braese to the office without stopping to help him or making any attempt to enforce any store policies described by the Stinker Store's Manager, Ms. Wilson, described below.<sup>35</sup> The videos placed in evidence by Respondent show that the owner had the excited dog under control and held by a leash only after it jumped up on Mr. Braese.<sup>36</sup>

The deposition of Respondent Stinker Store was taken pursuant to I.R.Civ.P. 30(B)(6).

Respondent Stinker Stores testified:

Q. Did you talk to the person behind the counter?

A. In a situation kind of like this, yeah. Briefly.

Q. Okay. What did he tell you about what happened?

A. After I watched the video and kind of talked to him is (*sic.*) the customer came in, sat down, paid for his stuff. At the time they were handing dog treats to the dog, the dog jumped -- jumped -- put his feet on the thing, he handed him a dog treat, the dog sat back down. Then Mr. Braese walks into the store, comes around, reaches around the dog to buy a lottery ticket, the dog turned around and jumped up and that's when Mr. Braese stepped back and ran into a low rack.<sup>37</sup>

Stinker Store had adopted rules regarding dogs. These rules were conveyed to Stinker Store employees prior to August 6, 2011. Dogs in the Respondent's stores had to be on a leash

---

<sup>33</sup> *Braese Aff.*, CR 187, ¶12.

<sup>34</sup> *Id.*, CR 187, ¶13. *Affidavit of Plaintiff Regarding Damages*, ¶¶ 3-9, 16-44, Exhibit attached to *Motion to Augment Record*.

<sup>35</sup> *Braese Aff.*, CR 187, ¶14. *Wilson Aff.*. Exhibit A. CR 185-192.

<sup>36</sup> *Wilson Aff.*, Exhibit A. CR 151-153.

<sup>37</sup> *Seiniger Aff.*, Exhibit 1, *Depo. of Stinker Stores, Inc.* Pg. 17 Ln: 5-17, Exhibit attached to *Renewed Motion to Augment Record*.

and they could not be "unruly" to protect customers, employees, merchandise and "everything." The dogs had to be "controllable."<sup>38</sup> As a result of the dog attack, Appellant Braese sustained Past Medical damages of \$5,293.20 and Future Medical Damages of \$5,000.<sup>39</sup> A detailed description of Appellant Braese's injuries and medical treatment is contained in the *Affidavit of Plaintiff Regarding Damages*.<sup>40</sup>

### **ISSUES PRESENTED ON APPEAL**

1. Did the District Court Err In Granting Summary Judgment?

1.1 Did Respondent Stinker Store have a duty of due care towards the Appellant under the circumstances reflected in the record?

1.2 Did Respondent Stinker Store voluntarily assume a duty towards the Plaintiff and similarly situated patrons of the store?

1.3 Should Summary Judgment have been denied because the record contains material issues of fact as to general negligence?

### **ARGUMENT**

#### **Standards Applicable To Motions For Summary Judgment**

In order for the moving party to prevail in summary judgment, it must establish the absence of any genuine issue of material fact on an element of a non-moving party's case through evidence. *Thompson v. I.O. Insurance Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994). If the moving party fails to challenge an element or fails to present evidence

---

<sup>38</sup> *Mahoney Aff., Wilson Depo. Exhibit A*, Pg: 32 Ln: 15 - Pg: 33 Ln: 9; Pg: 37 Ln: 1 - 8. CR 144-146.

<sup>39</sup> *Order on Damages 1-2*, Exhibit attached to Motion to Augment Record.

<sup>40</sup> *Affidavit of Plaintiff Regarding Damages*, Exhibit attached to Motion to Augment Record.

establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence. *Smith v. Meridian Joint School District No. 2*, 918 P.2d 583, 588 (Idaho, 1996). Statements that are conclusory or speculative cannot satisfy either the requirement of the admissibility or competency under I.R.C.P. 56(e). *Delaney v. Saint Alphonsus Regional Medical Center*, 2002 Westlaw 433638 (Idaho, 2002). A summary judgment is appropriate only where the record shows there is no genuine issue as to any material fact. I.R.C.P. 56(c). The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 132 Idaho 559, 564, 976 P.2d 913 (1998).

The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969). The adverse party, however, may not rest upon the mere allegations or denials of his pleadings, but must respond, by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). Therefore, the moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Thomas v. Medical Center Physicians, P.A.* 61 P.3d 557, 562 (Idaho, 2002). *Accord, Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) citing *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

### **Respondent Stinker Store Had A General Duty of Due Care Towards Its Patrons**

This case is based upon Respondent Stinker Store's active negligence. There is no dispute that Appellant Braese's Complaint and Amended Complaint alleged negligence. "The

elements of a common law negligence action are (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the Defendant's conduct and the resulting injury; and (4) actual loss or damage.” *O'Guin v. Bingham Cnty.*, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005) quoting *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175–76, 804 P.2d 900, 904–05 (1991).

Because the dog attack on Appellant occurred in a store, Respondent Stinker Store argued below that it was not liable under a theory of premises liability. Appellant Braese agreed because the case did not involve a condition on the land. *CR 214*. Nevertheless, the District Court’s *Memorandum Decision and Order Granting Summary Judgment* discusses the theory of premises liability at great length, and it would appear that the District Court’s analysis of duty was based upon a confused reading of Idaho’s premises liability cases *CR 213-215*.

Only in the penultimate paragraph of its analysis does the District Court’s *Memorandum Decision and Order Granting Summary Judgment* come around to analyzing Appellant Braese’s general negligence claim, and at that point, its analysis drifts into confusion:

Based on the facts above and the admissible evidence at this hearing, Stinker Stores was never informed of any dangerous propensities of Fuller's dog. Although Braese testified he suffered injury as a result of the subject incident, there is no indication from the testimony, the video, or otherwise that Braese's injuries were substantial. Indeed, the video shows Braese moving and acting the same before and after Fuller's dog jumped onto him. The degree of foreseeability appears to be low because Stinker Stores had no knowledge of any dangerous propensities of Fuller's dog. The Plaintiff contends that the dog jumping on the counter as seen in the video should have placed Stinker Stores on notice of the dangerous propensities of this particular dog. The court does not find this to be a case where there was a great foreseeability of harm. The court only engages in balancing the harms in rare situations where the court is called upon to extend a duty beyond the scope previously imposed ... which in this case is premises liability which the court has already determined does not apply to Stinker Stores. In engaging in this balancing of harm beyond premises liability, this court finds Stinker Stores did not owe a general duty to protect Braese from Fuller's dog in this case based upon all admissible evidence presented at this summary judgment proceeding.

Before discussing the District Court's reasoning, it must be noted that in reaching its decision, the District Court ignored entirely Appellant Braese's citation to the record and applicable Idaho authority concerning Respondent Stinker Store's (1) admission that it was familiar with the dog in question (and the inference raised concerning its character by its video-recorded behavior notwithstanding Ms. Wilson's self-serving denials regarding the dog's nature), (2) admissions regarding its practice of feeding dogs treats from behind the counter, (3) the video evidence showing that the dog was in a state of excitation and was repeatedly jumping up precipitated by the clerk feeding it treats from behind the counter, and (4) Respondent's admissions concerning its voluntarily assumed duty, discussed at length below. *CR 176*.

The District Court apparently concluded that harm was not foreseeable, contrary to Respondent Stinker Store's own policy that dogs in the store had to be on a leash, could not be "unruly," and had to be "controllable" to protect customers, employees, merchandise and "everything." Respondent Stinker Store's manager admitted to the necessity of keeping unruly dogs, especially those not restrained by a leash, out of the store:

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 allowing dogs in the store prior to August 6th, 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 6th, 2011?

A. Make them take their dogs outside if they're uncontrollable, and especially if they're



not on a leash.<sup>41</sup>

Q. .... Now, one of the things that you said with respect to your own employees, the dogs had to be on a leash and they couldn't be unruly and that was to protect the customers; is that correct?

A. Protect everything, yeah, protect everything, the employees, customers and merchandise, stuff in the store, yeah.<sup>42, 43</sup>

This case does not involve the extension of a new previously unrecognized duty to a business. The general duty of a business owner with respect to the conduct of its business is well-settled in Idaho. Every person, in the conduct of his business, has a duty to exercise ordinary care to “prevent unreasonable, foreseeable risks of harm to others.” *Sharp v. W.H. Moore Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990); *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). The foregoing admissions made by the very manager of the Respondent Stinker Store in question can leave little doubt as to foreseeability. More to the point, however, is the fact that the duty not to entice dogs to become excited and jump up in an area populated by customers is not an extension of a duty previously unknown in the law. It is a matter of common sense. Consequently, the balancing test engaged in by the District Court was unnecessary. This Court has repeatedly held that premises liability is not the exclusive source of

---

<sup>41</sup> *Mahoney Aff., Exhibit A, Wilson Depo.* Pg: 32 Ln: 15 - Pg: 33 Ln: 9.

<sup>42</sup> *Id.* Pg: 37 Ln: 1 – 8.

<sup>43</sup> Respondent Stinker Store witnesses contradicted one another with respect to its policies. When the corporation was deposed pursuant to I.R.Civ.P. 30(b)(6) its designee testified:

“Q. Prior to the incident involving Mr. Braese, did Stinker have any concern that its patrons could be injured by people's animals that were permitted to come in the store?”

THE WITNESS: No.

BY MR. SEINIGER:Q. Okay. So, I'm assuming that Stinker didn't have any policy to try and prevent any such accidents; would that be correct?A. That is correct.Q. Okay. Were animals permitted to -- for lack of a better way to say it -- jump up on the counter, put their paws on the counter?A. They did. Yeah. I would say that it happened.”

*Seiniger Aff., Exhibit 1, Stinker Station Depo* Pg. 15 Ln. 24 to Pg. 25 Ln. 12, Exhibit attached to *Renewed Motion to Augment Record.*

duties where a landowner is involved. Instead, circumstances may give rise to a general duty of care owed to third parties. *Turpen v. Granieri*, 133 Idaho 244 at 247-48, 985 P.2d 669 at 672-73 (1999). *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct. App. 2008).<sup>44</sup> “We only engage in a balancing of the harm 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.” *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995). Appellant submits that *Rife* and sound judicial policy discourage revisiting the issue of duty in the context of a business and applying the *Rife* factors in every negligence case brought against a business owner. In most cases the general definition of duty contained in *Sharp* and *Turpen* sufficiently defines the duty owed. Holding otherwise invites revisiting the concept of duty in every case involving a business and invites unnecessary appeals in which the business owner argues “Idaho has never held that a duty exists under these facts.” When, as here, a business owner is sued for the kind of negligence that is actionable in other contexts, such as claims against dog owners themselves, examining the *Rife* factors is not warranted.

No duty analysis involving the *Rife* factors was implicated by the facts of this case, particularly because Respondent Stinker Store had voluntarily undertaken a duty as evidenced by its foregoing admissions and the analysis below. However, even if it were, the conclusion reached by the District Court is not supported by the teachings of *Rife* and its progeny. In determining whether a duty will arise in a particular context, several factors are to be considered. *Turpen*, 133 Idaho at 247, 985 P.2d at 672. The factors include the foreseeability of harm to the Plaintiff, the degree of certainty that the Plaintiff suffered injury, the closeness of the connection

---

<sup>44</sup> *Boots* is a case which considered and rejected liability on the part of a landowner. However, *Boots* makes it clear that the determination of duty is to be made on a case-by-case basis of the facts.

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. *Id.*; *Rife v. Long*, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995). Where the degree or result of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. *Turpen*, 133 Idaho at 248, 985 P.2d at 673; *Sharp*, 118 Idaho at 300–01, 796 P.2d at 509–10. “Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required.” *Turpen*, 133 Idaho at 248, 985 P.2d at 673; *Sharp*, 118 Idaho at 301, 796 P.2d at 510. “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.” *Turpen*, 133 Idaho at 248, 985 P.2d at 673.

Looking at the *Rife* factors, was it foreseeable that an excited dog that jumped up on a counter six times might also jump up on an elderly patron? Of course it was. There is no question that Appellant Braese suffered some injury, and there is a close connection between the Defendant's conduct and the injury suffered.

The moral blame attached to the Defendant's conduct is the same as in any other typical negligence case, and in this case there is more moral blame because the Defendant was flouting the Idaho Food Code that prohibited dogs from being in the store in the first place.<sup>45</sup> The policy of preventing future harm is obvious, and the extent of the burden to the Defendant and

---

<sup>45</sup> Appellant Braese acknowledges that violation of the Idaho Food Code does not constitute negligence per se in this instance, because the relevant statute is intended to protect against a different harm than that suffered by Appellant Braese. Nevertheless, it is indicative of a general level of disregard for safety.

consequences to the community of imposing a duty to exercise care with resulting liability for the breach is diminished, if not nonexistent, because the dog was not allowed on the premises in the first place because of the Idaho Food Code's prohibition against it being there. There is no factual issue as to the availability, cost, and prevalence of insurance for the risk involved. Consequently, all of the *Rife* factors are satisfied with respect to imposing a duty in this case.

Finally, the District Court's gratuitous observation that Appellant Braese did not appear to be seriously injured is irrelevant to analysis under *Rife*, since the degree of injury actually suffered is not one of its factors. The District Court observed that "[a]lthough Braese testified he suffered injury as a result of the subject incident, there is no indication from the testimony, the video, or otherwise that Braese's injuries were substantial. Indeed, the video shows Braese moving and acting the same before and after Fuller's dog jumped onto him." There was no indication of the severity of his injuries, because they were not germane to the issues raised by Respondent Stinker Store's Motion for Summary Judgment, and therefore it was unnecessary for the Appellant to make a record of the severity of his damages at that stage of the proceedings. Appellant Braese was seriously injured, as the District Court concluded when she heard his motion for entry of default judgment, and granted him \$5,293,20 in past special damages and \$5,000 in future medical damages.<sup>46,47</sup>

---

<sup>46</sup> Appellant Braese was seriously injured, as the District Court concluded when she heard his motion for entry of default judgment, and granted him \$5,293,20 in past special damages and \$5,000 in future medical damages. *Order on Damages 1-2*, Exhibit attached to *Motion to Augment Record*.

<sup>47</sup> The District Court granted Appellant Braese less in general damages than in special damages, *Order on Damages 1-2*, and miscalculated the amount of the final judgment entered against Defendant Fuller. *Default Judgment CR 226-227*. Given the proof put on by Appellant Braese the amount of general damages appears to be conservative to the point of penuriousness, but is concededly within the bounds of discretion. Appellant Braese's Counsel cannot help but observe that in the present climate it may be a mistake not to demand a jury trial as to damages in the case of a default, though to do so a litigant would likely have to raise a constitutional challenge under Idaho Constitution Article 1 §7 to I.R.Civ.P. 55(b)(2)'s apparent limitation of the determination of damages to the exclusive discretion of a Court.

## **The District Court Erred by Granting Summary Judgment on Plaintiff's General Negligence Claim**

Appellant Braese does not contend that Respondent Stinker Store is liable to it under a theory of premises liability. Nevertheless, Appellant Braese contends that Respondent Stinker Store owed a general duty of due care to Appellant Braese on the day of the incident. See *Turpin and Boots, supra*. This liability arises from the active negligence of Stinker's cashier and not from a condition on the land. According to the affidavit of the Plaintiff, the following occurred. On or about 8/06/2011, Appellant Braese entered the Stinker Station Number 32 located at 1620 N. 13th Street, Boise, Idaho 83702 to purchase a lottery ticket. As Appellant Braese entered the store, there a was a man standing at the check out counter with an excited dog next to him. Appellant Braese reviewed the surveillance tapes provided by Respondent Stinker Stores in discovery, copies of which he understands to be contained on computer desk that is attached as *Exhibit A* to the *Affidavit of Susie Wilson in Support of Motion for Summary Judgment*. Attached to Appellant Braese's affidavit as Exhibit 1 is a series of photographs taken from the surveillance videos provided to him in discovery by Respondent Stinker Stores and to the Court as an exhibit to the Affidavit of Suzie Wilson. On page 1 of Exhibit 1 (to Appellant Braese's affidavit) the top photograph shows Defendant Bryce Fuller standing at the checkout counter of Stinker Store Number 32. The photograph shows that he is not holding the leash of his excited dog.

The next two photographs on page 1 of Exhibit 1 show the dog with his paws on the counter. If the Court reviews the surveillance videos attached to the affidavit of Susie Wilson, it will see that the excited dog jumped up approximately seven times on the counter, including one time (the sixth time jumped up on the counter) when he was being fed by the cashier. These instances are also shown on page 2 of Exhibit 1. When Appellant Braese entered Stinker Store Number 32 on August 6, 2011, he walked behind Mr. Fuller and approached the cashier to make

payment. See the bottom photograph on page 3 and all of the photographs on page 4 of Exhibit 1. As illustrated in the bottom two photographs on page 4 and all three photographs on page 5 of Exhibit 1, the excited dog jumped up on Appellant Braese, causing him to become startled and reflexively jerked backwards into a rack in the store. To the best of Appellant Braese's knowledge the dog was not being held by his leash or otherwise restrained at any time prior to its attacking him.

The dog was unknown to Appellant Braese. Appellant Braese immediately felt pain as a result of this incident and he hurt himself. Appellant Braese was very concerned because he was recovering from a prior back injury at the time and the dog's paws on his chest were in immediate proximity to the external port of his pacemaker. Appellant Braese injured himself during this process, though he did not know to what extent until he received medical attention. While Appellant Braese was struggling with the excited dog and falling backward, the surveillance video shows the store manager watch the incident and walk behind him to the office without stopping to help him or making any attempt to enforce any store policies described by Ms. Wilson in her deposition, as set forth below.

If the Court reviews the videos that are attached to the affidavit provided to it by Defendant, it will see in the videos that the excited dog is not being held on a leash prior to its jumping up on Appellant Braese, and that it jumps up on the counter no less than seven times. The videos show the cashier feeding the excited dog the sixth time that it jumps up on the counter. The Court will also see that Appellant Braese walked around Mr. Fuller and his dog, that he was on the opposite side of the dog and paid the cashier, and that is only after this that the excited dog goes around its owner and jumps up on Appellant Braese twice. (See video entitled "*Video Over Counter Good View Of Incident*".) If the Court looks at the video entitled "*Video At*

*Door During The Incident,*” the Court will clearly see that the dog is not being held on leash prior to the time that Appellant Braese enters the store. This is the only video that has audio. In this video, one can see that that the dog is clearly not under the verbal command of the owner and that the cashier is doing nothing to keep the excited dog from jumping up on the counter. It is also clear in the video entitled “*Video At Back Corner Of Store During Incident*” that the excited dog is jumping up repeatedly on the counter, that the excited dog is not under the owner’s controller or being held by its leash, and that the cashier does not appear to do anything to try to stop the excited dog or to get the owner to control the dog. The videos show that the owner had the dog under control and held by a leash only after it has jumped up on Appellant Braese.

Although Defendant Stinker attempts to rely upon the deposition of the manager, Ms. Wilson, she was not a witness to the incident. Nevertheless, her testimony does provide circumstantial evidence that indicates that Defendant Stinker recognized, or at least voluntarily accepted, a duty that ran to Appellant Braese. Ms. Wilson understood that the Stinker Store she managed was licensed as a food establishment by the Central District Health Department. She had reviewed the Idaho Food Code.<sup>48</sup> Notwithstanding the fact that dogs were not permitted in the store because it was a licensed “food establishment” subject to the Idaho Food Code, Stinker Corporation told her that dogs were allowed in the store.<sup>49</sup> (It is Appellant’s position that Respondent Stinker Stores’ flouting of the Idaho Food Code prohibiting the dog in question from being in the store is circumstantial evidence of their general lack of due care for customers, even

---

<sup>48</sup> *Affidavit of Counsel in Opposition to Motion to Amend to State a Claim for Punitive Damages, Exhibit B*, Pg: 24 Ln: 2 – 22, Pg: 25 Ln: 21 – 25, Exhibit attached to *Renewed Motion to Augment Record*.

<sup>49</sup> *Affidavit of Counsel in Opposition to Motion to Amend to State a Claim for Punitive Damages, Exhibit B*, Pg: 21 Ln: 8 – 25, Exhibit attached to *Renewed Motion to Augment Record*.

if violation of the Idaho Food Code does not constitute negligence *per se* in this instance.)

### **Respondent Stinker Store Voluntarily Assumed A Duty of Due Care To Its Patrons With Respect to Dogs**

Respondent's Manager Suzie Wilson testified that Stinker Store had adopted rules regarding dogs. These rules were conveyed to Stinker's employees prior to August 6, 2011. From the beginning of Ms. Wilson's tenure as a manager at the Stinker Store, dogs had to be on a leash and they could not be "unruly." The dogs had to be "controllable."<sup>50</sup> Ms. Wilson testified that dogs had to be on a leash and could not be unruly to protect customers, employees, merchandise and "everything."<sup>51</sup> Ms. Wilson acknowledged that there is always a risk that a dog can startle someone by barking or anything like that.<sup>52</sup> Ms. Wilson testified that she understood the dogs pose a risk of injuring people.

The sum and substance of Ms. Wilson's testimony is that as manager of the Stinker Store in the Hyde Park historical district of Boise, she recognized the duty to protect patrons from unruly dogs, but that her attempts to do so were undermined by Stinker's corporate manager, Mr. Mangum, at least after the fact. The affidavit of Appellant Braese and the video supplied by the Defendant show that the dog in question was out-of-control, leaping up on the counter repeatedly and being fed by the cashier at the counter, in violation of the Stinker Store's own policy and common sense (not to mention the Idaho Food Code). The cashier could see that the excited dog was not on a leash, and was "unruly." Thus, permitting the excited dog to remain on the premises of Stinker Store number 32 was not only a violation of the common-law duty of due care, but also violated the rules adopted by Ms. Wilson for that Stinker Store that dogs within the

---

<sup>50</sup> *Mahoney Aff., Exhibit A, Wilson Depo.* Pg: 32 Ln: 15 - Pg: 33 Ln: 9.

<sup>51</sup> *Id.* Pg: 37 Ln: 1 - 8.

<sup>52</sup> *Id.* Pg: 37 Ln: 9 - Pg: 38 Ln: 3.



store had to be on a leash and could not be “unruly.”<sup>53</sup> As Ms. Wilson said, the store’s rules were that the dogs had to be “controllable.” *Id.* That rule is essentially meaningless unless it required the store’s cashier to insist that Mr. Fuller keep his dog under control. Clearly, Stinker Store assumed the duty towards Mr. Braese and all similar customers. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner. *Udy v. Custer County*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). *See also Sharp*, 118 Idaho at 300, 796 P.2d at 509. *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 395-96, 179 P.3d 352, 358-59 (Ct. App. 2008)

### CONCLUSION

Respondent Stinker Store is not entitled to summary judgment. Respondent Stinker Store had a common-law duty towards Appellant Braese, and it voluntarily assumed such a duty. The actions of the excited dog, as depicted in the Surveillance Videos, show that it was out-of-control and leaping up repeatedly on the counter. The dog was “unruly” and out of the control of the owner which was apparent to the cashier well before Mr. Braese was ever injured. Defendant Stinker Store’s Motion for Summary Judgment must be reversed and this case remanded to the District Court for trial.

---

<sup>53</sup> *Affidavit of Counsel in Support of Motion for Summary Judgment, Exhibit B, Wilson Depo., Exhibit A, Wilson Depo.* Pg: 32 Ln: 15 - Pg: 33 Ln: 9. CR 145.

DATED: December 19, 2013.

SEINIGER LAW OFFICES, P.A.



Wm. Breck Seiniger, Jr.  
*Attorney for Plaintiff/Appellant*

**CERTIFICATE OF SERVICE**

On December 19, 2013 I served the foregoing by hand delivery on the following as provided by the Idaho Appellate Rules.

JAMES G. REID, ISB #1372  
RINGERT LAW CHARTERED  
455 S. Third, P. O. Box 2773  
Boise, Idaho 83701-2773  
Telephone: (208) 342-4591  
Facsimile: (208) 342-4657  
Attorneys for Respondent Stinker Stores, Inc.

Dated December 19, 2013.

SEINIGER LAW OFFICES, P.A.



W<sup>m</sup> Breck Seiniger, Jr.  
*Attorney for Plaintiff/Appellant*