

1-28-2014

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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Richard J. Braese, Jr.,

*Plaintiff/Appellant,*

v.

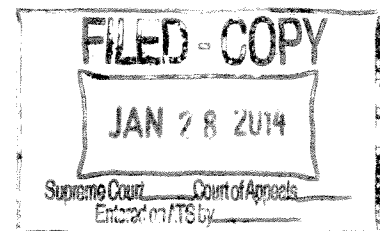
Stinker Stores, Inc.,

*Defendant/Respondent.*

Idaho Supreme Court Docket No. 41296

(District Court Case No. CV PI 1202147)

**APPELLANT'S REPLY BRIEF**



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**APPELLANT'S REPLY BRIEF**

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**THIS CASE SHOULD BE ANALYZED UNDER PRINCIPLES OF ORDINARY NEGLIGENCE IMPLICATING THE “GENERAL DUTY OF DUE CARE FOR THE CUSTOMERS OF RETAIL ESTABLISHMENTS”**

Respondent persists in invoking irrelevant premises liability cases to support its argument that Appellant asks the Court to adopt a new duty applicable to its negligence in permitting an obviously excited, unrestrained, and out of control dog the freedom to jump upon its elderly patron, the Appellant. However, the general duty of due care for the customers of retail establishments is well established. A retailer has a duty to his guests or customers of caring for their safety. *Johnson v. K-Mart Corp.*, 126 Idaho 316, 318, 882 P.2d 971, 973 (Ct. App. 1994). “Generally, “owners and occupiers of land will be under a duty of ordinary care under the circumstances towards invitees who come upon their premises.” *Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989), *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 284, 255 P.3d 1166, 1170 (2011). In holding that the Idaho’s Legislature abolished the open and obvious danger doctrine when it passed Idaho’s comparative negligence statute (I.C. § 6-801), it noted:

Under an ordinary negligence standard of care, the owner or occupier of premises is not held strictly liable for injuries to invitees who enter upon the property:

The duty not to be negligent is only a duty to take *reasonable* precautions against risk of undue harm. Even if the possessor were to come under the ordinary rule of negligence, therefore, he could always repel the obligation to take any precaution he could show to be unreasonable and burdensome.

Shindurling, “The Law of Premises Liability-is a Reasonable Standard of Care Unreasonable?” 13 Idaho L.Rev. 67 (1976) (citing 2 Harper & James, *The Law of Torts* at 1437 (1956)) (emphasis in original).

By removing the open and obvious danger bar we implement further the legislative mandate compelled by I.C. § 6-801: "Contributory negligence *shall not bar recovery* in an action by *any* person or his legal representative to recover damages for negligence ..." (emphasis added). Issues involving the parties' negligence, if any, will normally be considered and decided by the jury, which is as it should be:

We must either trust the jury or get rid of it. One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.

Hughes, "Duties to Trespassers: A Comparative Survey and Revaluation," 68 Yale L.J. at 700 (1959).

*Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989).

*Harrison* and its progeny teach that ordinary negligence defines the standard of duty in the ordinary case. *Harrison*'s citation to Shindurling's article is particularly helpful in this case, because it is doubtful that Respondent could establish that the precaution of keeping dogs out of its stores would have been "unreasonable and burdensome" in light of the fact that the dog was not permitted in the store given the requirements of the Idaho Food Code,<sup>1</sup> which if followed would have precluded allowing the dog into the store:

Prohibiting Animals. (Pertinent parts)

(A) Except as specified in ¶¶ (B) and (C) of this section, live animals may not be allowed on the PREMISES of a FOOD ESTABLISHMENT.

(B) Live animals may be allowed in the following situations if the contamination of food; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLEUSE ARTICLES cannot result:

\* \* \*

(2) Patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;

---

<sup>1</sup> Because the District Court implicitly held that violation of the Idaho Food Code was irrelevant, Appellant hopes that this Court will address the significance of an ordinance which, while admittedly insufficient to warrant an instruction on negligence *per se*, is nevertheless relevant to rebutting a defense based on the argument that taking measures to prevent injury would be "unreasonable and burdensome." The relevant provisions of the Idaho Food Code are:

(3) In areas that are not used for FOOD preparation and that are usually open for customers, such as dining and sales areas, SERVICE ANIMALS that are controlled by the disabled EMPLOYEE or PERSON, if a health or safety HAZARD will not result from the presence or activities of the SERVICE ANIMAL; ...

See, *Appendix*, Idaho Food Code (compilation of IDAPA 16.02.19), definition of “Food Establishment” in Section 1-201.10(B) (36) and “Prohibiting Animals” Section 6-501.115, IDAPA adopted pursuant to IDAPA 16.02.19.000 and, Idaho Code §39-1603

The regulation distinguishes between 1) areas in which contamination can result (in which no live animals are allowed), 2) areas in which food is not prepared but in which a health or safety hazard may result (in which no live animals are allowed), and 3) areas in which food is not prepared and in which a health or safety hazard will not result (in which only “service animals” are allowed).

Indeed, Respondent claims that they were already voluntarily protecting customers from unruly dogs:

Q Appreciate the clarification. 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.

*Wilson Depo.* Pg. 37 Ln. 1-8, Cr. 000146.

Further, even if Respondent's argument that foreseeability is negated by an absence of prior injuries caused by unruly dogs were not self-refuting, it is belied by recent authority from this Court. In *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 296 P.3d 373, (2013) the Respondent argued that it needed a special duty rule because of the absence of prior injury:

Boise Baseball admits that at least for “seven seasons [, Mr. Rountree's] accident is the only time a spectator has suffered a ‘major’ injury because of a foul ball” at Memorial



Stadium. The rarity of these incidents weighs against crafting a special rule. There is no history of accidents that we can look to, and draw from, to sensibly create a rule.

*Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 173, 296 P.3d 373, 379 (2013).

Retail establishments are liable for boxes that fall on patrons, floors that are too slick or wet, etc. There is nothing new about the duty to prevent foreseeable injury. Respondent argues that it was essentially good for business to allow dogs in its establishment at Hyde Park, even though other Stinker Stores had not allowed it, because it was near a park, “everybody did it,” and if Respondent had prohibited it they would have been the real mean people.” *Wilson Depo.* Pg. 36 Ln. 9-16, Cr. 000146. Based upon Respondent’s manager’s testimony it is clear that it foresaw the risk of unruly dogs, and that it voluntarily took action to prevent resulting injury, even if it adopted lax measures to attract business.

**IT IS UNDISPUTED THAT THE POSSIBILITY OF INJURY CAUSED BY UNRULY DOGS WAS FORESEEN**

Respondent argues that notwithstanding the fact that it foresaw the need to implement rules for its employees regarding keeping unruly dogs not under the control of a leash out of its premises, “It was not reasonably foreseeable that the dog in this case would cause injury to plaintiff.” It is undisputed that Respondent’s Manager understood the dogs posed a risk of injuring people.<sup>2</sup> Respondent’s arguments for upholding summary judgment rely on a series entangled logical fallacies. 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>3</sup> Specifically, it is undisputed

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<sup>2</sup> *Id.*, *Wilson Depo.* Pg: 38 Ln: 10 – 18. CR 146.

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

that Respondent's manager Susie Wilson had advised its employees during the twelve years in which she was manager prior to August 6th, 2011 to "Make [the customers] take their dogs outside if they're uncontrollable, and especially if they're not on a leash."<sup>4</sup> Clearly, Respondant foresaw the dangers of unruly dogs, yet it argues that when its employee failed to follow its safety rule, Appellant's resulting injuries were unforeseeable. The fallacy in this argument is so transparent that its refutation requires no further elaboration.

Respondent's second argument is similarly fallacious. In essence, Respondent argues that the apparent efficacy of its safety measures proves that they were unnecessary in this case. Respondent argues that because millions of people frequent Respondent's stores each year, but only two known incidents involving dogs have occurred, injuries by dogs are unforeseeable. The fact that the Respondent's precautions allegedly had previously proved effective in preventing injuries such as those suffered by the Appellant is not evidence that adherence to Respondent's voluntarily adopted rules was unnecessary in this case, or that Appellant's injury was unforeseeable. To the contrary, it is confirmation of foreseeability and the consequences of dereliction of duty.

In some ways, this case is analogous to *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416, 419 (1985) in which this Court affirmed the denial of summary judgment allowing a plaintiff to proceed on a theory of negligent creation of a foreseeable risk of harm, which does not require that the retailer to have actual or constructive knowledge of a dangerous condition unless the moving party establishes that the condition (not the injury) is an isolated occurrence.

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<sup>4</sup> *Wilson Depo.* Pg: 32 Ln: 15 to Pg: 33 Ln: 16. Emphasis supplied.

In *Tommerup*, we distinguished the “isolated incident” situation from circumstances where an alleged tortfeasor is charged with having actively created a foreseeable risk of danger in its course of business, stating:

Appellants cite *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839 (1972) in support of this argument. That case, however, is readily distinguished on its facts. In *Jasko*, the plaintiff was injured in the defendant's store when she slipped on a slice of pizza which was on the terrazzo floor. An associate manager of the store testified that 500–1000 individuals per day purchased one or more slices of pizza at the pizza counter. There were no chairs or tables by the counter. Many customers stood in the aisle and ate the pizza from the wax paper sheets upon which they were served. When pizza was being consumed, porters “constantly” swept up debris from the floor.

In reversing an order granting defendant's motion for summary judgment, the Colorado Supreme Court held defendant's method of selling pizza was one which led inescapably to such mishaps as that of the plaintiff, and in such a situation conventional notice requirements (i.e. actual or construction knowledge of the *specific* condition) need not be met. The court there stated:

“The practice of extensive selling of slices of pizza on wax paper to customers [to] consume it while standing creates the reasonable probability that food would drop to the floor. Food on a terrazzo floor will create a dangerous condition. In such a situation, notice to the proprietor of the specific item on the floor need not be shown....”

The court further stated:

“The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence, for this condition may arise temporarily in any place of business. [Citation omitted.] Nor does proof of a slippery floor, without more, give rise to an inference that the proprietor had knowledge of the condition. [Citation omitted.] *But we are not dealing with an isolated incident.*” *Jasko v. F.W. Woolworth Co.*, 494 P.2d at 840.

The facts of the instant case more closely approximate those of *Jasko*, than those of *Tommerup*. Certainly, the trial court could not have concluded *as a matter of law* that the presence of the ice cream on the floor was merely an isolated incident. Hence, it did not err in denying Safeway's motion for summary judgment.

*McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416, 419 (1985).

Here, there is no argument that no other unruly dogs had been permitted in the store, or that they had not previously been removed when it became apparent to Respondent's employees

that they were out of control:

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.

*Wilson Depo.* Pg. 32 Ln. 15 to Pg. 33 Ln. 3, Cr. 000146.

**THE ISSUE OF MORAL BLAME IS IRRELEVANT IN AN ORDINARY NEGLIGENCE CASE**

The issue of moral blame is a curious one if it is to be applied in an ordinary negligence case, because generally speaking, it is reasonable to assume that either no moral blame attaches to common law negligence, or it attaches to all acts and omissions which are simply negligent, and not reckless. Assuming that an injury caused by an item falling from a shelf or a slip on a slippery floor is caused by ordinary negligence, there is no moral blame unless one considers all acts of carelessness to be immoral. If anyone holds such a view, it is unlikely that members of this Court share it. Appellant submits that the balancing process employed by the Court is unnecessary with respect to simple acts of active negligence on the part of a business serving the public, and, therefore, the issue of moral blame is unnecessary to the analysis in this case. The general duty of a business owner to refrain from active negligence is well settled. 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). Surely, it cannot be the intent of this Court that every fact situation involving active negligence on the part

of a business presents a new issue of law that must be analyzed under *Turpin* as a matter of law, or that the application of the general concept of active negligence to unique facts constitutes an “extension of the law” requiring a Court to apply the *Turpin* analysis. Such a holding would literally require this Court to entertain appeals in every factual scenario presented in the various cases that come before Idaho’s trial courts, for the reason that each new factual scenario requires an extension of the law. For this reason, this Court has stated “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). It is sufficient for trial courts to recognize the general duty to use due care under the circumstances in cases involving ordinary negligence in a business context.

Respondent argues that the dog in question had been in the store before on many occasions and had never caused a problem. “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 foreseeable that she would jump on the Plaintiff and cause injury.” This conclusion is based on statements made without sufficient foundation, as it is a generalization made by Respondent’s manager apparently based on hearsay, unless she witnessed every such occasion.

Furthermore, even this self-serving statement does not state that the dog never jumped up on anyone on a previous occasion, but simply that it had never done so and caused injury. It is easily conceivable that a friendly but unruly dog might jump up on people all of the time, and only cause injury when it did so to a frail, elderly gentlemen. Appellant disagrees that this fact has any significance whatsoever if it is advanced simply for the proposition that the absence of prior injury necessarily compels the conclusion that the dog never jumped up on anyone, and never presented a

danger. Nevertheless, the statement raises a significant favorable inference—the benefit of which has thus far been denied to the Appellant.

Animals, like humans, tend to be creatures of habit. It is probable that the dog behaved on prior occasions similarly to the way it did on the occasion on which Appellant was injured. It appears from the surveillance videos that the dog’s owner, at least on this occasion, did not bother to hold his leash, and that he was not sufficiently trained to refrain from jumping up on the counter. In the absence of evidence of the contrary, there is no reason to believe that the dog behaved “better” on prior occasions. In the final analysis, how the dog and its owner behaved on prior occasions is not dispositive.

**Table 1**

**EVIDENCE OF DOG’S BEHAVIOUR ON PRIOR VISITS TO THE STINKER STORE**

<b>OBSERVATIONS ON PRIOR OCCASSIONS</b>	<b>Dog held on leash</b>	<b>Dog not held on leash</b>
<b>Dog jumping on counter</b>	Scenario #1: Notice that dog is unruly and not kept under control	Scenario #2: Notice that dog is unruly and not kept under control
<b>Dog not jumping on counter</b>	Scenario #3: No inference can be drawn that dog will not become unruly when leash not held	Scenario #4: Reasonable inference that dog will not become unruly when not under control of leash

Only in Scenario #4 is it reasonable to assume that the dog will not become unruly when his leash is not held. But we need not speculate as to the nature of the prior conduct of the dog in question, because Respondent’s Brief supplies us with the necessary information:

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, 11. 17-21, CR 147. *Respondent’s Brief* at 14.

Ms. Wilson testified:

Q Okay, and at least in looking at the video, what I saw was the dog sort of jump up on the counter and put his front paws up on the counter. Did you see that in the video?

A Oh, yeah, he was an excited little dog -- yeah, big dog.

Q When you saw that in the video, was that a surprise to you?

A No.

Q That was typical of his behavior?

A Yes.

Q So you knew he was a dog that jumped up?

A Yes.

*Wilson Depo. Pg. 40 Ln. 11-23, CR 000146.*

In other words, Respondent admits that it had foreknowledge that it was typical for the dog to jump up on the counter and on people prior to the occasion in question, but it denies that the dog had previously caused injury. This is akin to an argument in a dram shop case that a patron had previously appeared to be intoxicated, but had never been known to cause an accident.

Even assuming that competent evidence demonstrated Scenario #4 had characterized the vast majority of the dog's prior visits to the store, once the dog demonstrated his unruliness by jumping repeatedly on the counter—as demonstrated in the videos—it would at least arguably be unreasonable to rely on the dog's prior behavior as an excuse for not requiring the dog's owner to grab the leash and get the dog under control. In sum, the record does not demonstrate the dog's prior visits to the store can be characterized as falling within Scenario #4, and even if it did, this would not entitle Respondent's employee to ignore a clear change in the dog's customary behavior.

Respondent's argument on this point simply has no logical force, and, respectfully, the District Court's finding that the injury was unforeseeable is similarly flawed.

Respondent argues that the Court's finding of no duty was also supported by the District Court's finding "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).” This argument’s force is blunted by the fact that there was clearly evidence of injury contained in the record irrespective of the sanguinity of the District Court’s view of the effect of the dog jumping upon on Appellant derived from her view of the videos, and the fact that the District Court’s assessment of foreseeability invades the province of the jury.

One can assume that at least elderly jurors, who presumably exercise typical caution against falls commensurate with their age, would not regard a large dog jumping up on them as free of risk. It is common knowledge that in the elderly, particularly those with the osteoporosis that generally attends aging, a fall can cause a hip fracture, which can often result in decline leading to death. There is simply nothing in the record from which the District Court could have concluded as a matter of law that 1) the store did not serve elderly patrons, or 2) that a dog jumping up on elderly patrons could not cause them injury. At a minimum, a jury could reasonably conclude that the cashier should have told the dog’s owner to pick up the leash and hold him when an elderly man entered the store, and that he should have desisted in exciting the dog by feeding it treats from behind the counter.

### **CONCLUSION**

This is a case that never should have been dismissed on summary judgment. Respondent had a duty of ordinary care as a matter of law. There is no genuine issue of material fact as to foreseeability in general, because it is undisputed that Respondent voluntarily took action to guard against injury to patrons from unruly dogs. There is a genuine issue of material fact as to whether or not injury was foreseeable once the cashier saw the dog in question jumping up and unrestrained by a leash. There is a genuine issue of material fact as to whether or not the cashier acted reasonably in not telling the dog owner to either get the dog under control or remove it from the store in keeping with what the manager has testified was her practice. Summary



judgment should be affirmed with instructions to the District Court to permit Plaintiff to introduce evidence for a limited purpose of the Idaho Food Code's prohibition against having a dog in the store, assuming a proper foundation, because it is relevant to the Defendant's claim that it would be unreasonable and overly burdensome to have to take action to prevent its patrons from having to encounter unruly and potentially dangerous animals within its stores.

DATED: January 27, 2014.

SEINIGER LAW OFFICES, P.A.



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#### CERTIFICATE OF SERVICE

On January \_\_\_ 2014 I served the foregoing by hand delivery on the following as provided by the Idaho Appellate Rules.

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Dated January 27, 2014.

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*Attorney for Plaintiff/Appellant*

# **APPENDIX**

# IDAHO FOOD CODE



**Idaho Department of Health and Welfare  
Division of Health  
Office of Epidemiology and Food Protection  
Boise, Idaho**

**INFORMATIONAL COPY**

APPENDIX

**This copy of the IDAHO FOOD CODE is not the official copy of the rules as they appear in the Idaho Administrative Code. This is a compilation of: 1) the updated rules, IDAPA 16.02.19, and 2) the 2001 FOOD CODE, which is adopted by reference in the rules and incorporated into this document.**

## Chapter 1

# Purpose and Definitions

### Parts

1-1 TITLE, INTENT, SCOPE

1-2 DEFINITIONS

## 1-1 TITLE, INTENT, SCOPE

### Subparts

1-101 Title

1-102 Intent

1-103 Scope

1-104 Authority

### **IDAPA 16.02.19.100. PURPOSES AND DEFINITIONS.**

Section 100-199 will be used for modifications and additions to Chapter 1 of the 2001 Food Code as referenced in Section 004 of these rules.

### *Title*

1-101.10 Food Code.

These provisions shall be known as the Food Code, hereinafter referred to as "this Code."

### *Intent*

1-102.10 Food Safety, Illness Prevention, and Honest Presentation.

The purpose of this Code is to safeguard public health and provide to CONSUMERS FOOD that is safe, unadulterated, and honestly presented.

### *Scope*

1-103.10 Statement.

This Code establishes definitions; sets standards for management and personnel, FOOD operations, and EQUIPMENT and facilities; and provides for FOOD ESTABLISHMENT plan review, PERMIT issuance, inspection, EMPLOYEE RESTRICTION, and PERMIT suspension.

## **1-2 DEFINITIONS**

### *Subpart*

#### **1-201 Applicability and Terms Defined**

### *Applicability and Terms Defined*

#### 1-201.10 Statement of Application and Listing of Terms.

(A) The following definitions apply in the interpretation and application of this Code. The definitions shown as IDAPA 16.02.19.110 are modifications or additions to the definitions in the 2001 Food Code.

(B) Terms Defined.

(1) **Accredited program.**

(a) "**Accredited program**" means a food protection manager certification program that has been evaluated and listed by an accrediting agency as conforming to national standards for organizations that certify individuals.

(b) "**Accredited program**" refers to the certification process and is a designation based upon an independent evaluation of factors such as the sponsor's mission; organizational structure; staff resources; revenue sources; policies; public information regarding program scope, eligibility requirements, re-certification, discipline and grievance procedures; and test development and administration.

(c) "**Accredited program**" does not refer to training functions or educational programs.

(2) **Additive.**

(a) "**Food additive**" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, § 201(s) and 21 CFR 170.

(b) "**Color additive**" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, § 201(t) and 21 CFR 70.

(3) "**Adulterated**" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, § 402.

(31) **Fish.**

(a) "**Fish**" means fresh or saltwater finfish, crustaceans and other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, if such animal life is intended for human consumption.

(b) "**Fish**" includes an edible human FOOD product derived in whole or in part from FISH, including FISH that have been processed in any manner.

(32) "**Food**" means a raw, cooked, or processed edible substance, ice, BEVERAGE, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(33) "**Foodborne disease outbreak**" means the occurrence of two or more cases of a similar illness resulting from the ingestion of a common food.

(34) "**Food-contact surface**" means:

(a) A surface of EQUIPMENT or a UTENSIL with which FOOD normally comes into contact; or

(b) A surface of EQUIPMENT or a UTENSIL from which FOOD may drain, drip, or splash:

(i) Into a FOOD, or

(ii) Onto a surface normally in contact with FOOD.

(35) "**Food employee**" means an individual working with unpackaged FOOD, FOOD EQUIPMENT or UTENSILS, or FOOD-CONTACT SURFACES.

(36) **Food Establishment.**

(a) "**Food establishment**" means an operation that stores, prepares, packages, serves, vends, or otherwise provides FOOD for human consumption:

(i) Such as a restaurant; satellite or catered feeding location; catering operation if the operation provides FOOD directly to a CONSUMER or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution, or FOOD bank; and

(ii) That relinquishes possession of FOOD to a CONSUMER directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(b) "**Food establishment**" includes:

- (i) An element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location *unless the vending or feeding location is PERMITTED by the REGULATORY AUTHORITY*; and
- (ii) An operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the PREMISES; and regardless of whether there is a charge for the FOOD.

(c) "**Food establishment**" does not include:

- (i) *An establishment that offers only prepackaged FOODS that are not POTENTIALLY HAZARDOUS;*
- (ii) *A produce stand that only offers whole, uncut fresh fruits and vegetables;*

IDAPA 16.02.19.08 Modification to Section 1-201.10(36)(c) by deleting (iii).

(iv) *A kitchen in a private home if only FOOD that is not POTENTIALLY HAZARDOUS is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by LAW and if the CONSUMER is informed by a clearly visible placard at the sales or service location that the FOOD is prepared in a kitchen that is not subject to regulation and inspection by the REGULATORY AUTHORITY;*

(v) *An area where FOOD that is prepared as specified in Subparagraph (C)(iv) of this definition is sold or offered for human consumption;*

(vi) *A kitchen in a private home, such as a small family day-care provider; or a bed-and-breakfast operation that prepares and offers FOOD to guests if the home is owner occupied, the number of available guest bedrooms does not exceed 10, breakfast is the only meal offered, the number of guests served does not exceed 18, and the CONSUMER is informed by statements contained in published advertisements, mailed brochures, and placards posted at the registration area that the FOOD is prepared in a kitchen that is not regulated and inspected by the REGULATORY AUTHORITY; or*

(vii) *A private home that receives catered or home-delivered FOOD.*

**(37) Food Processing Plant.**



(A) Items that are unnecessary to the operation or maintenance of the establishment such as EQUIPMENT that is nonfunctional or no longer used; and

(B) Litter.

#### **6-501.115 Prohibiting Animals.\***

(A) Except as specified in ¶¶ (B) and (C) of this section, live animals may not be allowed on the PREMISES of a FOOD ESTABLISHMENT.

(B) *Live animals may be allowed in the following situations if the contamination of food; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES can not result:*

(1) *Edible FISH or decorative FISH in aquariums, SHELLFISH or crustacea on ice or under refrigeration, and SHELLFISH and crustacea in display tank systems;*

(2) *Patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;*

(3) *In areas that are not used for FOOD preparation and that are usually open for customers, such as dining and sales areas, SERVICE ANIMALS that are controlled by the disabled EMPLOYEE or PERSON, if a health or safety HAZARD will not result from the presence or activities of the SERVICE ANIMAL;*

(4) Pets in the common dining areas of institutional care facilities such as nursing homes, assisted living facilities, group homes, or residential care facilities at times other than during meals if:

(a) *Effective partitioning and self-closing doors separate the common dining areas from FOOD storage or FOOD preparation areas,*

(b) *Condiments, EQUIPMENT, and UTENSILS are stored in enclosed cabinets or removed from the common dining areas when pets are present, and*

(c) *Dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service; and*

(5) *In areas that are not used for FOOD preparation, storage, sales, display, or dining, in which there are caged animals or animals that are similarly confined, such as in a variety store that sells pets or a tourist park that displays animals.*

(C) *Live or dead FISH bait may be stored if contamination of FOOD; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES can not result.*