8-27-2014

Boswell v. Steele Appellant's Brief Dckt. 41684

IN THE SUPREME COURT OF STATE OF IDAHO

STEPHEN BOSWELL and KARENA BOSWELL, husband and wife,

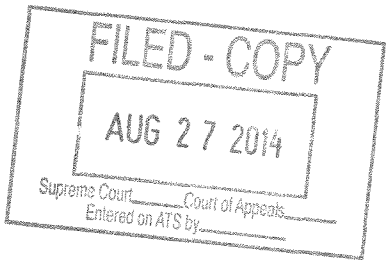
Plaintiffs and Appellants,

v.

AMBER STEELE,
The Estate of MARY STEELE,

Defendants and Appellees.

Case No. 41684 - 2013



APPELLANTS' BRIEF

APPEAL FROM A DECISION OF THE SIXTH JUDICIAL DISTRICT COURT IN BANNOCK COUNTY, THE HONORABLE DON L. HARDING

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TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES

Page

CASES

STATUTES

RULES

SECONDARY SOURCES

STATEMENT OF THE CASE

(i) Nature of the case

This case is a dog bite and premises liability case. Rather generic in its facts. it involves Steve Boswell who had the back of his hand removed by the dog bite; Steve's mother-in-law, Mary Steele, who harbored the dog[1], Steve's niece, Amber Steele, who owned the dog[2], and the dog, Zoey, who had bitten at least two other people on at least two prior occasions[3].

(ii) Course of proceedings in the trial court

Plaintiffs brought their action for common law strict liability for dog bite, negligence, negligence *per se*, and premises liability. (R. 42-48). Plaintiffs relied on prior Idaho case law, the *Restatement (Second) of Torts* §§ 509 and 513, *Restatement (Third) of Torts* § 23, Idaho Code § 25-2805(2), and Pocatello Municipal Ordinance 6.04.050 and 6.04.060 concerning abnormally dangerous dogs. Plaintiffs filed for partial summary judgment on two counts and on some of Defendants' affirmative defenses. (R. 73). Defendants also filed for Summary Judgment. (R. 160).

The trial court disposed of Plaintiffs' case. The trial court handled the *Restatements of the Law* by not addressing them at all. (R. 456-466). The court brushed aside the Idaho statute, concluding that the two prior bites were insufficient to put the owners on notice that the dog was abnormally dangerous. (R. 464, L.15-16). The City Ordinance allows only one defense for the owner of a biting dog and that one defense is provocation. The trial court ruled, as a matter of law, that Steve's holding out his closed hand towards the dog was provocation. (R. 464, L.24).

Plaintiffs filed a motion to reconsider to no avail.

This matter is now before this Court on Appeal.

(iii) Concise statement of the facts

On October 8, 2011 Steve Boswell gave his mother-in- law, Mary Steele, a ride, as was his customary routine whenever she needed a ride. (R. 460, L.20-1). When he brought her home he

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[1] R. 186-7, L.25-17, pp 16-17

[2] R. 184, L. 24-25, of page 6

[3] R. 516-517, L. 15-10

helped her to her door, as was his customary routine whenever he brought her home. (R.460, L.21). When they entered the house, Steve went to the small toddler gate between the living room and the kitchen, as was his customary routine whenever they entered. (R. 219, L.21 of page 29). There, he would routinely open the gate and allow Mary's pet Shih Tzu to enter the living room with him and Mary where they would typically visit a while. (R. 219, L.16-21 of page 29; R. 221, L. 12 of page 36).

On this occasion, something happened that was not routine. Besides Mary's Shih Tzu, a Scottish Terrier stood on the other side of the toddler gate. (R. 461, L.5). The Terrier belonged to Steve's niece, Amber Steele. (R. 459 L. 11-12). Amber resided with Mary. (R. 459, L. 9-10). The Terrier was usually kept locked in the basement—and for good reason. (R.460, L. 16-17). Unbeknownst to Steve, but soon to be discovered by him, the Terrier had a rather nasty disposition. When Steve offered the Terrier the back of his hand to sniff, the Terrier removed the back of Steve's hand with its teeth. (R. 461, L. 6-7).

The Terrier had priors. On at least two previous occasions the dog had drawn blood from its victims. (R. 459-60, L. 15-20). If we include the incident referred to in the letter from the insurance adjuster, John Billquist, the dog had shown abnormally dangerous propensities on at least three prior occasions. (R. 77).

The undisputed facts are these:

1. Defendant, Mary Steele, owned the property located at 1115 Verdugo in Pocatello, Idaho. (R. 759, L. 6-8).

2. Defendant, Amber Steele, was Mary's granddaughter and resided with her at that address. (R. 459, L. 9-10).

3. Amber owned a Scottish Terrier named Zoey that also resided at Mary's residence. (R. 459, L. 11-12).

4. Mary Steele harbored the dog named Zoey. (R. 186-7, L. 25 of p. 16 - 17 of p. 17).

5. Prior to the incident where Mr. Boswell was bit on October 8, 2011, there have been at least two incidents where Zoey had bitten someone. The first known incident, according to the records, was when Zoey bit Amber's friend, Chris Kettler, at a barbeque party held at Mary's house. The bite drew blood, and was bandaged. (R. 459-460, L.15-3).

6. The second known incident, according to the record, is based on Karina Boswell's testimony that she witnessed one of Amber's friends got bit by Zoey at a party at Mary's house. The friend's wound also drew blood. (R. 750, L. 9-10).

7. There was a gate in the kitchen to keep Mary's dog from making a mess on the carpet. For the most part, Amber kept Zoey in a room in the basement when Amber was out of the house. (R. 460, L. 16-17)

8. Mr. Boswell had spent some time with Zoey before the incident. Zoey let Mr. Boswell pet Zoey and she had played on Steve's lap. (R. 460, L. 18-19).

9. On the day of the incident, October 8, 2011, Mr. Boswell gave Mary a ride home after a visit at the Boswell's home. Mr. Boswell went inside Mary's home with Mary. (R. 460, L. 20-21).

10. When Mr. Boswell and Mary entered the home, Amber was not in the house. Zoey and Mary's dog were in the kitchen behind the gate, Zoey was barking. (R 461, L. 1-3).

11. Mr. Boswell walked over to the gate to pet Zoey, who was on the other side of the gate. He extended his right hand to Zoey. As he reached his hand towards the dog, Zoey bit his hand and took a hunk of flesh from Mr. Boswell's hand. (R. 461, L. 9-7).

12. Mr. Boswell went to the hospital to have his injuries treated. A report was made by animal control officer, Tamara Andersen. (R.461, L. 8-12).

ISSUES PRESENTED ON APPEAL

The issues of this appeal are as follows:

ISSUE 1: Is the Standard in *McClain v. Lewiston Interstate Fair & Racing Assoc'n*, 17 Idaho 63, 104 P. 1015 (1909), Pertaining to Injury by Domestic Animals Still Good Law in Idaho?

ISSUE 2: Is the *Restatement (Second) of Torts*, § 509 (1977) Good Law in Idaho?

ISSUE 3: Is the *Restatement (Third) of Torts,* Phys. & Emot. Harm, § 23 (2010) Good Law in Idaho?

ISSUE 4: Is the *Restatement (Second) of Torts* § 513 (1977) Good Law in Idaho?

ISSUE 5: Did the District Court Err in Concluding That Neither Mary Steele Nor Amber Steele Owed Any Duty to Steve Boswell to Protect Him from Their Vicious Dog.

ISSUE 6: Did the District Court Abuse its Discretion in Making Unwarranted Conclusions of Law That Should Have Been Issues of Fact.

ISSUE 7: Did the District Court Err in Striking the Affidavit of Tamara Andersen.

ISSUE 8: Did the District Court Err in Ruling That an Insurance Adjuster, Who Makes Himself a Fact Witness, Is Immune from Testifying?

ATTORNEY FEES ON APPEAL

The law of appellate practice requires a party to include any argument for fees in the opening brief. Plaintiffs recognize that one's assessment of the merits of any case is, to some degree, a matter of perspective. But plaintiffs are troubled more than usual by the outcome of this case and how that outcome was reached.

Plaintiffs are troubled by the fact that the trial court in its opinions, and the defense in its briefing, declined to even mention the *Restatements of the Law* that seem pertinent to this case. Plaintiffs are troubled by the fact that the trial court in its opinions, and the defense in its briefing, declined to even discuss whether Idaho, like forty-seven other states and the District of Columbia, will hold a dog owner responsible for dog bites that occur when the owner already knows the dog will bite. Plaintiffs are troubled by the fact that the trial court in its opinions, and the defense in its briefing, declined to even address the authoritative articles and the decisions of other jurisdictions that interpret *McClain v. Lewiston Interstate Fair & Racing Assoc'n,* 17 Idaho 63, 104 P. 1015 (1909) the same way as plaintiffs do.

Plaintiffs are troubled that the trial court made many findings of fact in favor of the defendants to whom the court then granted summary judgment.

On an abiding belief that the trial court's decision is indefensible on appeal, plaintiffs ask for attorney fees to be awarded on this appeal against the defense under Idaho Code § 12-121.

ARGUMENT

1. The Standard in *McClain v. Lewiston Interstate Fair & Racing Assoc'n*, 17 Idaho 63, 104 P. 1015 (1909) Pertaining to Injury by Domestic Animals is Still Good Law in Idaho.

McClain v. Lewiston Interstate Fair & Racing Assoc'n, 17 Idaho 63, 104 P. 1015 (1909), is the authoritative case on animal injury law. In *McClain* the Idaho Supreme Court said:

> One of the early cases in this country considering the legal principles involved in the case at bar, under the facts as alleged in the complaint is that of Decker v. Gammon, 44 Me. 322, 69 Am, Dec. 99, and in our opinion states the rule correctly, as follows: "If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief; and, in suits for such injuries, such knowledge must be alleged and proved, *for, unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge, he is liable.*

104 P. 1015, at 1020. (Emphasis added).

The *McClain* case is still good Idaho law. *Suer v. Valentine, No. CV* 2011-2846 (First Judicial District, 2012 WL 894476 (2012). The *McClain* case is cited in several secondary sources as standing for the position that Idaho is a common law "one bite rule" strict liability jurisdiction. Liability results when the abnormally dangerous propensities of the offending animal are known to the owner or harborer. At least three other authorities read the *McClain* decision the same way as Plaintiffs. Allison E. Butler, *33 Causes of Action 2d 293* (Originally published in 2007); Adam P. Karp, J.D., M.S. *38 Causes of Action 2d 281* (Originally published in 2008); Georde Duckler, Ph.D., Esq. *Animal Wrongs: On Holding Animals to (and Excusing Them from) Legal Responsibility for Their Intentional Acts*. 2 J Animal L. & Eth. 91, 121 (2007).

> All three reach the same conclusion. Consider the following quotes:
>
> "*A person injured by a domestic animal may bring a common-law strict liability action against the owner or keeper of the animal.* ***McClain v. Lewiston Interstate Fair & Racing Ass'n***, 17 Idaho 63, 104 P. 1015 (1909). In order to establish a prima facie case *in a common-law strict liability action* the plaintiff must prove that he or she was injured by a domestic animal, that the animal had dangerous propensities, and that the defendant knew of the animal's propensities prior to the time the injury was suffered. The fact that the owner exercised care in keeping the animal is no defense. ***McClain***, above."

33 Causes of Action 2d 293 § 52 (Originally published in 2007). (Emphasis added).

> "Contrast this with ***Idaho, which establishes common law strict liability without proof that the defendant failed to exercise reasonable care: demonstrating scienter is all that is required. McClain v. Lewiston Interstate Fair & Racing Asso'n***, 17 Idaho 63, 104 P. 1015 (1909)."

38 Causes of Action 2d 281 § 5 [Cumulative Supplement] (Originally published in 2008). (Emphasis added).

> "Strict Common Law Liability: ***A common law strict liability action may be brought against the owner or keeper of the animal McClain v. Lewiston Interstate Fair & Racing Ass'n,*** 17 Idaho 63, 104 P. 1015 (1909). In order to establish a prima facie case, the plaintiff must prove injury by a domestic animal, having dangerous propensities that the defendant knew of prior to the time the injury was suffered. The fact that the owner exercised care in keeping the animal is no defense."

38 Causes of Action 2d 281 § 42 (originally published in 2008). (Emphasis added).

> Currently, animals– minds, bodies, and all – are personal property under the law, and as with all personal property are treated as having owners. Animal owners, in turn, are those upon whose shoulders rest the obligation to adhere to social norms resulting from ownership. As owned objects, animals are currently free of personal obligation. In essence, animals have the unfettered freedom to do whatever it is they wish to do . . .; ***it is those who own the animals who are truly fettered by assuming the legal responsibility for the animals' actions***. ***McClain v. Lewiston Interstate Fair & Racing Ass'n,*** 104 P.1015. 1021 (Idaho 1909).

Georde Duckler, Ph.D., Esq. *Animal Wrongs: On Holding Animals to (and Excusing Them from) Legal Responsibility for Their Intentional Acts*. 2 J Animal L. & Eth. 91, 121 (2007). (Emphasis added)

The *McClain* decision has also attained its share of notoriety by the Supreme Courts of other states. Consider the following:

> ***The essence of the action is not ownership, but the keeping and harboring of an animal, knowing it to be vicious***. One who keeps a savage dog is bound to secure it against it doing mischief. *Vide Quilty v. Battie*, supra; *Oakes v. Spaulding*, 40 Vt. 347, 94 Am.Dec. 404; *Smith v. Royer*, 181 Cal, 165, 183 P. 660; ***McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015, 25 L.R.A., N.S. 691, 20 Ann. Cas.** 60; *Lanna v. Konen*, 119 Conn. 646, 478 A 425.

Barber v. Hochstrasser, 136 N.J.L. 76, 80, 54 A.2d 458, 460 (Sup. Ct. 1947). (Emphasis added)

> ***The gist of an action for damages by a vicious dog, who propensities are known, is not negligence in the manner of keeping the dog; it is keeping the dog at all***; and the action is founded upon the theory of maintenance of a nuisance, not negligence. *Jaco v. Baker,* 174 Or. 191, 148 P.2d 938. The essence of the action is not

> ownership, but the keeping and harboring of an animal, knowing it to be vicious. One who keeps a savage dog is bound to secure it against its doing mischief. *Vide Quilty v. Battie*, [135 N.Y. 201, 32 N.E. 7, 17 L.R.A. 521] supra; *Oakes v. Spaulding*, 40 Vt. 347, 94 Am.Dec. 404; *Smith v. Royer*, 181 Cal. 165, 183 P. 660; ***McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015, 25 L.R.A.,k N.S. 691, 20 Ann Cas. 60**; *Lanna v. Konen*, 119 Conn. 646, 178 A 425.' *Barber v. Hockstrasser*, 136 N.J.L. 76, 54 A.2d 458, 460.

Hunt v. Hazen, 197 Or. 637, 639-40, 254 P.2d 210, 211 (1953).

The *McClain* decision is accepted by other authorities as affirmation that Idaho's position on the law is, as advocated by the plaintiffs but rejected by the trial court: If an owner or harborer knows of a dog's abnormally dangerous nature, the owner or harborer is liable for injuries caused.

Of the 50 United States and the District of Columbia, forty-eight are strict liability jurisdictions. The strict liability jurisdictions are divided into two categories: Those which, by statute make a dog-owner strictly liable for the injuries caused by the dog, regardless of prior knowledge of the dogs propensities; and the others, like Idaho, that adopt the common law rule dating back to English law, which is, as expressed in *McClain*: ***"[U]nless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge, he is liable***." The following chart outlines the position of the United States Jurisdictions:

Alabama	Ala. Cod § 3-7-1	Strict Liability
Alaska		One-Bite Rule
Arizona	Ariz. Rev. Stat. § 11-1025 Ariz. Rev. Stat. § 11-1020	Strict Liability
Arkansas		One-Bite Rule
California	Cal C.V. Code § 3342	Strict Liability
Colorado	Colo. Rev. Stat. 13-21-124	Strict Liability
Connecticut	Conn. Gen Stat. § 22-357	Strict Liability
Delaware	9 Dela. Code § 913	Strict Liability
D.C.	D.C. Code Ann. § 8-1812	Strict Liability
Florida	Fla. Stat. Ann. §§ 767.01 Fla. Stat. Ann. §§ 767.04	Strict Liability

Georgia	GA Code Ann. § 51-2-7	The owner or keeper of a "vicious or dangerous" animal may be liable for injuries (Caused by the dog through careless management or by allowing the dog to go at liberty (off leash or otherwise not under control)
Hawaii	Haw. Rev. Stat. §§ 663-9, 663-9.1	Owner liable if animal was known to be dangerous, or if plaintiff proves that owner was negligent. One-Bite Rule
Idaho		One-Bite Rule
Illinois	510 Ill. Cop. Stat. §5/16	Strict Liability
Indiana	Ind. Code 15-20-1-3	Strict Liability
Iowa	Iowa Code Ann. § 351.28	Strict Liability
Kansas		One-Bite Rule
Kentucky	Ky. Rev. Stat. § 258.235	Strict Liability
Louisiana	La. Civ. Code arc. 2321	Strict Liability
Maine	Me. Rev. State Ann. Tit. , § 3961	Strict Liability
Maryland		One-Bite Rule
Massachusetts	Mass. Gen. Laws ann. Ch, 140 § 155	Strict Liability
Michigan	Mich. Comp. Laws Ann § 287-351	Strict Liability
Minnesota	Minn. State Ann. § 347.22	Strict Liability
Mississippi		One-Bite Rule
Missouri	Mo. Rev. Stat. 273.036	Strict Liability
Montana	Mont. Code Ann. § 27-1-715	Strict Liability
Nebraska	Neb. Rev. Stat. § 54-601	Strict Liability
Nevada		One-Bite Rule

New Hampshire	N.H. Rev. Stat. Ann § 466-19	Strict Liability
New Jersey	N.J. Stat. Ann § 4-19-16	Strict Liability
New Mexico		One-Bite Rule
New York		One-Bite Rule
North Carolina	N.C. Gen. Stat. Ann. § 67-4-4	The owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal
North Dakota		One-Bite Rule
Ohio	Ohio Rev. Code Ann. § 955.28	Strict Liability
Oklahoma	Okla. Stat. Ann. tit. 4 § 42.1	Strict Liability
Oregon		One-Bite Rule
Pennsylvania	3 Pa. Stat. § 459-502 (b)	Strict Liability
Rhode Island	R.I. Gen. Laws § 4-13-16	Strict Liability
South Carolina	S.C. Code Ann. § 47-3-110	Strict Liability
South Dakota		One-Bite Rule
Tennessee	Tenn. Code Ann. § 44-8-513	(1) The owner of a dog has a duty to keep that dog under reasonable control at all times, and to keep that dog from running at large. A person who breaches that duty is subject to civil liability for any damages suffered by a person who is injured by the dog while in a public place or lawfully in or on the private property of another. (2) Such a person may be held liable regardless of whether the dog has shown

		any dangerous propensities or whether the dog's owner knew or should have known of the dog's dangerous propensities.
Texas		One-Bite Rule
Utah	Utah Code Ann. § 18-1-1	Strict Liability
Vermont		One-Bite Rule
Virginia		One-Bite Rule
Washington	Wash. Rev. Code Ann. § 16.08.040	Strict Liability
West Virginia	W. Va. Code § 19-20-13	Strict Liability
Wisconsin	Wis. Stat. Ann. § 174.02	Strict Liability
Wyoming		One-Bite Rule

Coulter Boeschen *"One-Bite" v. Strict Liability Rules for Dog Bite Injury Cases,* http://www.allaw.com/articles/nolo/personalinjury/one-bite-strict.liability-dog-bite.html.

Idaho law presents an interesting dichotomy. Idaho is a statutory strict liability state if the dog bites about anything that moves other than a human being. Idaho Code § 25-2806 provides:

> The owners, possessor, or harborer of any dog or animal that kills, worries, or wounds any livestock and poultry which are raised and kept in captivity for domestic or commercial purposes, is liable to the owner of the same for the damages and costs of suit, to be recovered before any court of competent jurisdiction.

Like the other thirty-one strict liability states, knowledge of abnormally dangerous propensities, is not even an issue: if the dog injures — the owner is liable.

But what if it isn't poultry or livestock that is injured? What if it is a human being? What then? The Boswells submit here, as they did below, that the *McClain* case, and the *Restatement of Torts*, sets the standard. The district court gave all of Steve Boswell's arguments the short shrift with the following:

> The question presented in *McClain* is whether the animal has trespassed or not. If the animal has trespassed, then the owner is strictly liable. If the animal has not

> trespassed and is lawfully where it is entitled to be, then the owner is only liable if they have knowledge of the vicious character of the animal.[4]

(R. 462, L.23-27).

With that, the trial court summarily struck all of plaintiff's arguments that were grounded in Idaho Common Law and the *Restatements.* The trial court then declared that if Plaintiff had any cause of action at all it could only be in negligence. (R. 462, L.32).

Such is not the law in Idaho. If it was, there would be no need for Idaho Code § 25-2805(2) which provides:

> Any dog which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing, is vicious. It shall be unlawful for the owner or for the owner of premises on which a vicious dog is present to harbor a vicious dog outside a secure enclosure. A secure enclosure is one from which the animal cannot escape and for which exit and entry is controlled by the owner of the premises or owner of the animal.

The toddler gate, that anyone can reach their hand over, is not a secure enclosure. Mary and Amber both knew that Zoey had physically attacked before. (R.459, L.15-16). Even by the trial court's rendition of the law, they should have been liable for the destruction of Steve Boswell's hand.

2. The *Restatement (Second) of Torts*, § 509 (1977) is Good Law in Idaho.

The *Restatement (Second) of Torts*, § 509 (1977) provides:

> (1) A possessor a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
>
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

Since 1970, the Idaho Supreme Court has cited the *Restatement* (Second)of Torts over 240 times. (See Addendum 1). Out of those 240 times, with only three exceptions[5] this Court has consistently cited the *Restatement* authoritatively, as a correct statement of Idaho Law.

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[4] Both Mary and Amber **did** have prior knowledge of Zoe's abnormally dangerous propensities. So why are they not liable? Why was the case dismissed?

[5] *Hopper v. Swinnerton,* 155 Idaho 801, 317 P.3d 698, 705 (2013), reh'g denied (Feb. 12, 2014); *State v. Corbus,* 150 Idaho 599, 605-06, 249 P.3d 398, 404-05 (2011); *Keller v. Holiday Inns, Inc.,* Idaho 593, 595, 691. P.2d 1208, 1210 (1984).

If the *Restatement (Second) of Torts*, § 509 (1977) is Idaho law, then this case raises an issue of fact as to whether Zoey's two prior "nippings," both of which drew the blood of her victims, constitute a "dangerous propensity abnormal to its class." If so, liability is implicated even if Mary and Amber "exercised the utmost care to prevent it from doing the harm." Thus, contrary to the trial court's opinion, Steve Boswell does have more than just negligence as a viable cause of action.

The trial court never addressed the *Restatement*, even though Idaho has, ninety-nine percent of the time, adopted *Restatement of Torts* at every given opportunity.

The court summarily rejected, without addressing the fact, that 47 out of the 51 states and the District of Columbia (48, if Idaho is included) adopt the strict liability approach in dog bite cases.

Accordingly, the law in Idaho needs to be acknowledged and the trial court's opinion needs to be reversed.

3. The *Restatement (Third) of Torts,* Phys. & Emot. Harm, § 23 (2010) is Good Law in Idaho.

The *Restatement (Third) of Torts,* Phys. & Emot. Harm, § 23 (2010) provides:

> An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.

Restatement (Third) of Torts, Phys. & Emot. Harm, § 23 (2010).

As explained in the preceding section, this Supreme Court has all but universally adopted the *Restatement's* position on the law as Idaho law. The trial court's dealings with the *Restatement (Third) of Torts,* Phys. & Emot. Harm, § 23 (2010) was to never mention it, as though the issue had not been raised, or as though the *Restatement* had never been brought to the court's attention.

If the *Restatement (Third) of Torts*, § 23 (2007) is Idaho law, then this case also raises an issue of fact as to whether Zoey's two prior "nippings" that drew the blood of her victims, constitutes "dangerous tendencies abnormal for the animal's category ." If so, Steve Boswell has a viable cause under the *Restatement (Third) of Torts*, § 23.

4. The *Restatement (Second) of Torts* § 513 (1977) Is Good Law in Idaho.

In regards to owners of domestic animals that cause harm on their property, the *Restatement Second of Torts* provides:

> The possessor of an abnormally dangerous dog who keeps it upon land in his possession, is subject to strict liability to persons coming upon the land in the

exercise of a privilege whether derived from his consent to their entry or otherwise. *Restatement (Second) of Torts* § 513 (1977).

This section of the *Restatement* presents a premises liability cause of action. It is separate and apart from the liability pronounced in the *Restatement (Second) of Torts*, § 509 and *Restatement (Third) of Torts*, § 23. According to the *Restatement*, it makes no difference whether Steve Boswell was an invitee or a licensee because he was in Mary Steele's home by privilege, as licensee *or* invitee.[6] It makes no difference. Once again, the question arises whether Idaho will reject the *Restatement* for only the fourth time in forty-plus years, or whether *Restatement (Second) of Torts* § 513 (1977) aptly expresses Idaho law. If it is a correct statement of Idaho law, then Steve Boswell has a viable claim for premises liability. If it does not, then an issue of fact still exists as to whether Steve conferred a "tangible benefit" to Mary by serving her with free chauffeur services. Even according to existing Idaho decisions, the conferral of a "tangible benefit" to Mary would make Steve's status that of an invitee, and Mary would have the duty "to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Bates v. Eastern Idaho Regional Medical Center,* 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988). *Wilson v. Bogert,* 81 Idaho 535, 347 P.2d 341 (1959). The issue of Steve's status is an issue for the jury.

In *Thurmond v. Saffo,* 238 Ga. App. 687, 520, S.E.2d. 43 (1999), the Georgia Supreme Court found that the injured party was but a social guest in the home. But the court nonetheless reversed summary dismissal of a dog bite negligence action on the basis that the facts presented a jury question as to whether the homeowner should have anticipated an attack on a guest, and whether the homeowner should have warned the guest, or taken other actions to prevent her from being attacked.

Mary knew the dog would bite. The trial court dealt with the *Restatement (Second) of Torts* § 513 (1977) by not addressing it.

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[6] Idaho courts have maintained that the duty of owners and possessors of land is determined by the status of the person injured on the land (*i.e.,* whether the person is a invitee, licensee or trespasser). *E.g., Rehwalt v. American Falls Reservoir, Dist. No. 2,* 97 Idaho 634, 636, 550 P.2d 137, 139 (1976). An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary ***or other tangible benefit to the landowner***. *Wilson v. Bogert,* 81 Idaho 535, 347 P.2d 341 (1959). A landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers. *Bates v. Eastern Idaho Regional Medical Center,* 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988).

5. **The District Court Erred in Concluding That Neither Mary Steele Nor Amber Steele Owed Any Duty to Steve Boswell to Protect Him from Their Vicious Dog.**

The owner or harborer of a dog has duties to anyone who may come in contact with the animal. The negligence for harboring a vicious dog is variously stated as:

> [T]he failure to act upon the knowledge of an animal's abnormally dangerous propensities establishes a breach of the duty or care owned by the owner to those that come in contact with the animal.

Gehrts. v. Batteen, 2001 S.D. 10, 620 N.W. 2d 775, 778 (2001).

> It is the duty of the owner of such an animal, having knowledge of its vicious propensities, to give notice of the propensities or to restrain the animal, and that failure to do so is negligence that makes the owner liable for its consequences.

Stokes v. Lyddy, 75 Conn. App. 252, 265-66, 815 A.2d 263, 273 (2003).

> [T]he issue is whether the defendant breached a duty of care owed to the plaintiff by negligently failing to prevent a foreseeable injury.

Arbanil v. Flannery, 31 A.D.3d 588, 589, 819 N.Y.S.2d 91, 92 (2006).

> ***The gist of an action for damages by a vicious dog, whose propensities are known, is not negligence in the manner of keeping the dog; it is keeping the dog at all***; and the action is founded upon the theory of maintenance of a nuisance, not negligence.

Hunt v. Hazen, 197 Or. 637, 639-40, 254 P.2d 210, 211 (1953). (Emphasis added).

> ***The essence of the action is not ownership, but the keeping and harboring of an animal, knowing it to be vicious***. One who keeps a savage dog is bound to secure it against it doing mischief. *Vide Quilty v. Battie*, supra; *Oakes v. Spaulding*, 40 Vt. 347, 94 Am.Dec. 404; *Smith v. Royer*, 181 Cal, 165, 183 P. 660; *McClain v. Lewiston Interstate Fair & Racing Ass'n,* 17 Idaho 63, 104 P. 1015, 25 L.R.A., N.S. 691, 20 Ann. Cas. 60; *Lanna v. Konen*, 119 Conn. 646, 478 A 425.

Barber v. Hochstrasser, 136 N.J.L. 76, 80, 54 A.2d 458, 460 (Sup. Ct. 1947). (Emphasis added).

The defense argued, and the trial court agreed: Mary Steele was just hanging up her coat and Amber, the owner, was not even there, so neither owed any duty to Steve. Thus, this must be all Steve's fault. But this is not so. The duty of care goes to the keeping of the dog, including:

(a) Keeping and harboring a vicious dog.

(b) Failure to warn of the dog's abnormally dangerous propensities.

(c) Failing to take reasonable precautions to secure the dog from the opportunity of attacking, biting and mauling the Plaintiff;

(d) Failure to secure the dog in accordance with the "secure enclosure" requirements of Idaho Code § 25-2805(2).

(e) Failing to adequately restrain, leash, cage or otherwise secure such dog when Defendants knew or had reason to know of the dog's abnormally dangerous propensities, and could have foreseen it attacking, biting and mauling Stephen Boswell;

(f) Inadequately training and/or supervising and/or tending the dog;

(g) In otherwise negligently failing to exercise that degree of care, diligence; caution and reasonable precautions as would be demonstrated by a reasonably prudent person under the same or similar circumstances so as to prevent any risk of foreseeable harm to the Plaintiffs.

The law again is quite clear. You don't harbor a dog that is known to bite. If you do, you take responsibility for its actions.

The owner or harborer who knows the dog is abnormally dangerous has a heightened duty of care to anyone who may come in contact with the dog. The trial court erred in ruling that the defendants owed Steve Boswell no duty of care, and in granting the defendants summary judgment.

6. The District Court Abused its Discretion in Making Unwarranted Conclusions of Law That Should Have Been Issues of Fact.

In reaching a grant of summary judgment, the district court made several unwarranted conclusions of law. Many of these conclusions of law, are in fact, issues of fact, and those issues of fact rightfully should be grounds for denying summary judgment to the defendants. Without the trial court's abundant indulgence to the defense, the "facts" would never establish a prima facie entitlement to judgment as a matter of law.

For example, the court said:

> The record does not reflect that Amber or Mary had (1) knowledge that Zoey was a vicious or dangerous dog . . . Although there were two incidents where Zoey had bit or "nipped" at somebody before Mr. Boswell was attacked, neither incident was serious enough to require medical attention or to report to the authorities.

(R. 464, L.16-19).

The trial court took away from the jury, the issue of fact as to whether two prior bites by Zoey, were notice that Zoey was abnormally dangerous. Certainly, if the trial court were correct,

there must be caselaw out there somewhere that the court or defense counsel could cite that would support the proposition that a "nip" that only draws a little blood is harmless and not evidence of an abnormally dangerous propensity.

The trial court also took from the jury the issue of fact as to whether the two prior incidents were serious enough to report to authorities, or whether they should have been reported, but were improperly concealed from the authorities. The court took away from the jury the right to decide whether the owner or harborer of an animal is excused in doing nothing, despite her superior knowledge of the dog's temperament. In doing so, the court overreached its prerogatives.

The court then proceeded:

> Chris Kettler testified that Zoey was simply being protective of Amber, as most Scottish Terriers are. The two incidents are not enough to prove that Amber or Mary had knowledge or put them on notice that Zoey was a vicious or dangerous dog as defined by statute.

(R. 464, L.19-22).

Well, who is to say the dog was only being protective, or that such "protective" behavior as biting people is appropriate and acceptable? Or who is to say that it is okay for Scottish Terriers to engage in "protective biting" but not other breeds? Are not those issues of fact for the jury to decide and for experts to provide guidance? Where in the record is Chris Kettler shown to be an expert on the motives of biting dogs?

Next, consider the trial court's ruling that Steve Boswell holding his hand toward Zoey, was, as a matter of law, provocation.

> Furthermore, there is no dispute that Mr. Boswell voluntarily, and on his own accord, approached Zoey at the gate while she was barking, and reached towards Zoey, who was behind the gate at the time, with a closed fist. The Court concludes that the actions of Mr. Boswell constitute provocation.

(R. 464, L.22-26).

If what Steve did to Zoey is provocation as a matter of law, then it must be that in ***every*** instance that anyone extends a hand to a dog, the dog is warranted to viciously retaliate. Such precedence would virtually eliminate all remedies for victims of dog bites in Idaho. If reaching toward a dog is not *always* provocation, then, if, in fact, it is *ever* provocation must be an issue of fact for the jurors to decide.

Although Idaho is a common law 'one bite rule" state, the City of Pocatello, like most of the fifty states, is a statutory strict liability municipality. It doesn't matter if the dog has never bitten before, or even if the dog has never growled before, the ***only*** defense is if the dog is provoked. So, the trial court found that Zoey was provoked.

But that same ordinance defines provocation as "taunting, teasing, or threatening" the dog. (Addendum 2; § 6.04.010: Definitions: Dangerous Animal).

Attached as Addendum 2 are Sections 6.04.010 through 6.04.060 of the Pocatello Municipal Code. Code Section 6.04.010 gives five definitions of a dangerous animal. Those five definitions are the only definitions of dangerous animal applicable to the ordinance. Nowhere in the Code, does it require that the animal be previously adjudicated as vicious before it is dangerous. It is dangerous if it meets any of the five criteria. Of particular interest are criteria 2 and 3 which provide:

> 2. Any animal with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise endanger the safety of human beings or domestic animals or livestock; ***or***
>
> 3. Any animal which bites, inflicts injury, assaults, or otherwise attacks a human being or domestic animal or livestock without justifiable provocation.

Notice the connector: "or." If the dog bites without provocation, as, as Zoey did here, it is dangerous.

If the animal is dangerous under that definition of dangerous — and Zoey was dangerous under the definition of dangerous — then the law holds the owner responsible for its biting. 6.04.050(2)

Paragraph E provides:

> E. Owner Liability. An adult owner/custodian of a vicious animal shall be liable for all injuries and property damage sustained by any person or domestic animal caused by an unprovoked attack by any vicious animal, plus all costs, civil judgment or penalties, criminal fines, final terms, and any other penalties and orders. . . .

The statute speaks for itself and the statute is clear. Zoey acted dangerously when she attacked Steve Boswell. The defendants are liable for civil damages unless the dog was taunted, teased, or threatened. It is really that simple.

At least one jurisdiction has held the exact opposite of the trial court below. At least one jurisdiction has held that holding one's hand toward a dog, even holding one's hand toward a dog

over a fence and on the dog's side of the fence, is, *as a matter of law*, ***not*** provocation. The Montana Supreme Court considered remarkably similar issues and determined that reaching over a fence is ***as a matter of law***, not provocation under any reasonable interpretation of the term. The Court said:

> Similarly, Stroop's extending his hands and forearms into the Days' property was not provocation. There was no testimony that Stroop thrust his hands toward the dog or made any quick or threatening gestures. As discussed below, Stroop's hands were lawfully on the Days' property. Mere presence on the property of another does not amount to provocation. See *Smith v. Pitchford* (Ill.Ct.App. 1991), 219 Ill.App.3d 152, 161 Ill.Dec. 767, 579 N.E. 2d 24. Conduct such as Stroop resting his arms on the fence and allowing his hands and forearms to dangle over the Days' property ***cannot be considered provocation under any reasonable interpretation of that term.***

Stroop v. Day, 271 Mont. 314, 319, 896 P.2d 439, 442 (1995). (emphasis added). Plaintiffs submit that the *Stroop* opinion is the better reasoned approach, i.e. that extending one's hand toward a dog is, as a matter of law, *not* provocation.

Next, consider the trial court's conclusion that Steve threatened the dog with a clenched fist. Steve's version was that he approached the dog with the back of his hand, his fingers curled out of the way, to allow the dog to sniff him before touching the dog. (R. 325).

On reconsideration, the trial court summarily adopted Mary Steele's testimony, as though undisputed, that Steve's hand was across the toddler gate because that was where the blood was. (R. 483, L. 6-8). But noone disputes that after Zoey removed the back of Steve's hand, she wrestled and chewed the bloody piece of skin all over the floor on her side of the toddler gate. Steve was adamant that his hand was on ***his*** side of the gate; that Zoey reached over the gate and took off the back of Steve's hand. (R. 219, L. 25-8 of pp. 31-32). That too is an issue of fact for the jury.

Either, as Steve said, Mary was hanging up her coat, who saw nothing until Steve said, "he bit me," or she was standing there looking on silently as Steve presented the back of his hand to the dog. And Mary, knowing full well the dog had two priors, just stood there and watched and said nothing until Steve lost his skin to the jaws of the dog. At a minimum, Steve's account of the facts presents an issue of fact. The trial court summarily decided otherwise.

Then, there is the court's finding that a "nip" although it draws blood, is not evidence of an abnormally dangerous propensity.

Or the finding that when Steve approached the child's gate the dog was barking and growling, when Steve's version was that the dog was "whining, wagging her tail, excited." (R. 219, L.15 of page 32).

Or the finding that Steve did not think Mary did anything wrong, when Steve testified that Mary should have warned him the dog would bite. (R. 230, L.4-15 of page 35).

A. The reason the word negligent was used is probably because I had never been told not to have any association with the dogs.
Q. And it is your testimony that Mary should have somehow told you that?
A. I believe she should
Q. And why:
A. Well, if she knew that the dog had bit somebody before, she should have told me.

The district court methodically went through, construed too many facts in favor of the defense, and then found for the defense. This is not the standard for summary judgment. *Nw. Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 41 P.3d 263 (2002).

7. The District Court Erred in Striking the Affidavit of Officer Tamara Andersen.

Idaho Rule of Civil Procedure 56(e) governs the form of affidavits filed in support or in opposition to motions for summary judgment. Rule 56(e) states: "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). "The Idaho Supreme Court applies an abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony offered in connection with a motion for summary judgment." *J–U–B Eng'rs, Inc. v. Sec. Ins. Co. of Hartford,* 146 Idaho 311, 314, 193 P.3d 858, 861 (2008) (citing *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 15, 175 P.3d 172, 177 (2007)).

In her affidavit, Officer Andersen testified that she was the animal control officer who investigated this incident; that she had been working in the profession of care and control of dogs for at least twenty years; and that for fifteen years she had worked as an Animal Control Officer for the City of Pocatello. (R. 79, L.1-2). Officer Andersen testified of her qualifications as nationally certified by the National Cruelty Investigators School, Levels 1 and 2, by the University of Missouri Law Enforcement Training Institute, including training in the fields of animal behavior, how to approach an animal, how to handle animals safely, how to assess animal behavior and how to determine if an animal is injured or frightened; she testified as to her certification nationally in

dealing with animal attacks. (R. 79, L.3-7). Certainly, Officer Andersen met the "competent to testify" standards of Rule 56(e).

Officer Andersen testified that she had reviewed the Affidavit of Chris Kettler, wherein Ms. Kettler admitted to having been "nipped" by Zoey, and wherein she described the circumstances surrounding the "nip" and the bandaging of the wound. Officer Andersen testified that the incident described by Kettler constituted a previous bite, that it constituted unnatural behavior, and shows a dangerous propensity on the part of the dog. (R. 79, L.19-25). Officer Andersen's review of the deposition is the kind of personal knowledge upon which experts base their opinions and would be admissible in court.

Although Officer Andersen's affidavit meets all the requirements of Rule 56(e), the trial court ruled it incompetent because Officer Andersen did not also state that she had examined the dog. (R. 465, L4). Rule 56(e) does not require Officer Andersen to also "make additional study of Zoey's behavior" in order to testify whether the dog's prior bite was inappropriate for a domestic animal. The district court abused its discretion in striking Officer Andersen's affidavit.

8. The District Court Erred in Denying Plaintiffs the Right to Take the Deposition of John Billquist.

John Billquist made himself a fact witness. Idaho Rule of Civil Procedure 26(b)(1) provides:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . .

Plaintiffs notified John Billquist, the insurance adjuster, that Zoey had bitten before — and his insureds knew it. That fact should have ended the case. A dog that has bitten before is liability waiting to happen in 48 of 51 jurisdictions, and under both the Second and Third *Restatements of the Law*.

Rather than concede liability, John Billquist wrote back the following:

> We have reviewed the circumstances of this loss and have confirmed that in Mr. Boswell's statements to us and to others he admitted being aware of the prior conduct and demeanor of this dog. You mistakenly mention a prior biting incident. The incident I believe you refer to was one where the dog was provoked by an intoxicated individual. The dog then growled and nipped at him but did not bite.

(R. 77).

This incident described by John Billquist is in addition to any already known by plaintiff, and it is relevant to virtually every count of plaintiffs' claims. It is a different incident than anything Amber Steele described in her deposition. It is different than anything Mary Steele acknowledged in hers. It is extremely relevant to all of plaintiffs' case. It is also relevant discovery to find out where Mr. Billquist got his information. According to the letter of John Billquist,, the dog had nipped at an intoxicated man that was teasing the dog. According to the deposition testimony of Amber Steele (page 76 through 77, lines 3 through 14) and Chris Kettler, the only bitten person was not a man, but a woman, was not intoxicated and was not teasing the dog. This additional incident goes to the heart of plaintiffs' case.

The Idaho Supreme Court's position is clear; when a statement, otherwise privileged, is turned over to the opposing party, the privilege to the communication and the circumstances surrounding it is waived.

> To be a confidential communication the communication must "not be intended to be disclosed to third persons." I.R.E. 502(a)(5). Farr's argument fails because he did not act in a manner indicating that the communication was to be confidential. The letter was kept in PNI's files, all of which were sold to the respondents as an asset of the corporation. Farr's failure to remove the letter constitutes a waiver of his privileged communication claim.

Farr v. Mischler, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996).

Mr. Billquist's letter *was* intended to be disclosed to third persons. It was sent to third person(s) – plaintiffs' counsel.

Other states agree. John Billquist's disclosure is fully subject to further discovery. In *State v. Spear,* 596 S.W.2d. 499 (1980) the Missouri Appellate Court said that an insurance adjuster is perfectly susceptible to having a deposition taken as a fact witness. In *Halloran v Tousignant,* 230 Minn 399, 41 N.W.2d 874 (1950) the Minnesota Supreme Court said that a statement made by the insured to an adjuster following an accident is admissible. The trial court had refused an offer of the testimony on the ground that the statement was a confidential communication between attorney and client. But the statement came into the hands of the plaintiff through an agreement between his and the defendant's insurance companies. The court concluded that this arrangement waived any privilege that might otherwise have been invoked.

In *Sprader v Mueller,* 269 Minn 25, 130 N.W.2d 147 (1964) the court held that the any privilege of a statement made by the insured to an investigator and later forwarded to her attorney

was waived when that attorney furnished a copy of it to the assistant county attorney for further investigation even though the privilege was asserted in a civil case. In *Travelers Indem. Co. v Cochrane*, 155 Ohio St. 305, 302, 98 N.E.2d 840 (1951), the court stated that while a report made by an insured to his insurer, in anticipation of litigation, is ordinarily privileged, in this case the insured waived that privilege by voluntarily disclosing to others the contents of his statement concerning the accident. In *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557, 567 (N.D. Ill. 2007) the federal court ruled that once documents had already been provided to the opposing party those documents no longer are confidential, and are thus no longer privileged.

The list could continue, but needn't. John Billquist, recited the incident in his letter as though factual. The incident has direct bearing on several elements of plaintiff's case. He sent it to plaintiffs' attorney. The Boswells have no other means than from Billquist to find out more about the information. Plaintiffs have already tried to find out more through the defense's other witnesses, but their stories do not agree. By rights, plaintiffs ought to be allowed to take Mr. Billquist's deposition. At a minimum, plaintiffs ought to be allowed to introduce Mr. Billquist's letter into evidence.

CONCLUSION

Plaintiffs advocated to the trial court the law as delineated in *Restatement (Second) of Torts* § 509; the *Restatement (Third) of Torts* § 23 ,and Idaho Code §25-2805(2) concerning liability for dog bites. The trial court avoided any mention of either *Restatement* or the Idaho Code by ruling, as a matter of law, that Zoey's two prior bites did not give notice to either defendant that Zoey might bite again. The court took from the jury the right to decide otherwise.

Plaintiffs advocated to the trial court the law as delineated in *Restatement (Second) of Torts* § 513 pertaining to premises liability of animal owners. The trial court avoided any mention of the *Restatement* by ignoring any distinction between an animal owner's premises liability and that of any other premises owner. The trial court then ruled as a matter of law that Steve Boswell was only a licensee, and that Mary owed no duty to Steve as a licensee. The court took from the jury the right to decide otherwise.

Plaintiffs advocated to the trial court the law as delineated in Sections 6.04.010 through 6.04.060 of the Pocatello Municipal Code. These ordinances hold a dog owner liable from the very first bite unless the dog is provoked. The trial court then ruled as a matter of law that by presenting the dog the back of his hand, Steve Boswell provoked the dog as a matter of law. The court took from the jury the right to decide otherwise.

The trial court ruled that plaintiffs had presented "no authority""expressly or implicitly" for the one bite" strict liability rule in Idaho,(R.462, L.30-33) even though plaintiffs cited *McClain v. Lewiston Interstate Fair & Racing Assoc'n,* 17 Idaho 63, 104 P. 1015 (1909); even though plaintiffs cited the authoritative law articles discussing the *McClain* case; and even though plaintiffs cited the Supreme Court decisions from other states that read the *McClain* case the same way as plaintiffs. Even though forty-seven of the fifty states follow some form of strict liability for dog bites, the trial court said there is no authority for it here in Idaho. Couldn't the court have at least addressed it as a matter of first impression?

It is overreaching the parameters of judicial discretion to rule, as a matter of law, that a closed fist is a threat to a domestic dog, and that any dog so threatened, would be justified. Such a determination should be at least supported by expert testimony and left to a jury to decide. Any while we are at it, let's let the jury decide whether it really was a "closed fist" as defendants

advocate, or the back of the hand, as the plaintiffs advocate, when the physical evidence, i.e. the part now missing from Steve's hand by virtue of the dog's teeth, shows convincing proof that the plaintiffs' version of the facts at least deserves to be heard.

The Idaho Supreme Court recently reaffirmed "the overriding policy is to have issues between litigants decided on the merits." *First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc.*, 154 Idaho 626, 630, 301 P.2d 632, 636 (2012). That is all the Plaintiffs ask.

The Boswells ask the Idaho Supreme Court to address the status of dog bite law in Idaho, the application of the *Restatements*, negligence *per se* for violation of Idaho Code § 25-2805(2) and Pocatello Municipal Code §§ 6.04.010, through 6.04.060.

Finally, the Boswells ask the Idaho Supreme Court to reverse the trial court's decisions and award plaintiffs costs and fees for having to pursue this appeal.

Respectfully submitted this 25th day of August, 2014.

Kent A. Higgins
Attorney for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true, full and correct copy of the foregoing document was this 25th day of August, 2014, served upon the following in the manner indicated below:

Reed W. Larsen
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[ ] Hand Delivery
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Kent A. Higgins

ADDENDUM 1

ADDENDUM 1

Idaho Case Law Recognizing The Restatement (Second) Torts, and The Restatement (Third) Torts as Authoritative law in Idaho.

Massey v. Conagra Foods, Inc., 156 Idaho 476, 328 P.3d 456, 460 (2014)

Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 316 P.3d 92, 98 (2013)

Frogley v. Meridian Joint Sch. Dist. No. 2, 155 Idaho 558, 569, 314 P.3d 613, 624 (2013)

Washington Federal Sav. v. Van Engelen, 153 Idaho 648, 289 P.3d 50 (2012);

Hopper v. Swinnerton, 155 Idaho 801, 317 P.3d 698, 705 (2013), reh'g denied (Feb. 12, 2014)

Kerr v. Bank of Am., Idaho, N.A., 37754, 2011 WL 11047661 (Idaho Ct. App. Nov. 22, 2011)

State v. Corbus, 150 Idaho 599, 605-06, 249 P.3d 398, 404-05 (2011)

Weitz v. Green, 148 Idaho 851, 865, 230 P.3d 743, 757 (2010)

Daleiden v. Jefferson Cnty. Joint Sch. Dist. No. 251, 139 Idaho 466, 470, 80 P.3d 1067, 1071 (2003)

Doe v. Haw, CV OC 0205441D, 2003 WL 21015134 (Idaho Feb. 5, 2003)

State v. Sibley, 138 Idaho 259, 263, 61 P.3d 616, 620 (Ct. App. 2002)

Zimmerman v. Volkswagen of Am., Inc., 128 Idaho 851, 854, 920 P.2d 67, 70 (1996)

Manning v. Twin Falls Clinic & Hosp., Inc., 122 Idaho 47, 51-52, 830 P.2d 1185, 1189-90 (1992)

Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 285, 824 P.2d 841, 860 (1991)

Murray v. Farmers Ins. Co., 118 Idaho 224, 227, 796 P.2d 101, 104 (1990)

Bowling v. Jack B. Parson Companies, 117 Idaho 1030, 1031, 793 P.2d 703, 704 (1990)

Powell v. Nietmann, 116 Idaho 590, 604, 778 P.2d 340, 354 (1989)

Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 115 Idaho 56, 59, 764 P.2d 423, 426 (1988)

Jacobsen v. City of Rathdrum, 115 Idaho 266, 278, 766 P.2d 736, 748 (1988)

Kearney v. Denker, 114 Idaho 755, 758, 760 P.2d 1171, 1174 (1988)

Myers v. A.O. Smith Harvestore Products, Inc., 114 Idaho 432, 435, 757 P.2d 695, 698 (Ct. App. 1988)

Arnold v. Diet Ctr., Inc., 113 Idaho 581, 585, 746 P.2d 1040, 1044 (Ct. App. 1987)

Sidwell v. William Prym, Inc., 112 Idaho 76, 78-79, 730 P.2d 996, 998-99 (1986)

O'Neil v. Schuckardt, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986)

McPheters v. Peterson, 108 Idaho 107, 109, 697 P.2d 447, 449 (1985)

Luzar v. W. Sur. Co., 107 Idaho 693, 696, 692 P.2d 337, 340 (1984)

Runcorn v. Shearer Lumber Products, Inc., 107 Idaho 389, 394, 690 P.2d 324, 329 (1984)

McEnroe v. Morgan, 106 Idaho 326, 330, 678 P.2d 595, 599 (Ct. App. 1984)

Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 902, 665 P.2d 661, 666 (1983)

Leliefeld v. Johnson, 104 Idaho 357, 385, 659 P.2d 111, 139 (1983)

Obray v. Glick, 104 Idaho 432, 434, 660 P.2d 44, 46 (1982)

Volk v. Baldazo, 103 Idaho 570, 572, 651 P.2d 11, 13 (1982)

Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc., 103 Idaho 377, 381, 647 P.2d 1249, 1253 (1982)

Baker v. Burlington N., Inc., 99 Idaho 688, 692, 587 P.2d 829, 833 (1978)

State ex rel. Evans v. Spokane Int'l R. Co., 99 Idaho 197, 199, 579 P.2d 694, 696 (1978)

Ryals v. Broadbent Dev. Co., 98 Idaho 392, 396, 565 P.2d 982, 986 (1977)

Ralphs v. City of Spirit Lake, 98 Idaho 225, 231, 560 P.2d 1315, 1321 (1977)

McAlvain v. Gen. Ins. Co. of Am., 97 Idaho 777, 781, 554 P.2d 955, 959 (1976)

Easter v. McNabb, 97 Idaho 180, 182, 541 P.2d 604, 606 (1975)

Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 35, 539 P.2d 584, 587 (1975)

Bushong v. Kamiah Grain, Inc., 96 Idaho 659, 661, 534 P.2d 1099, 1101 (1975)

Munson v. State, Dep't of Highways, 96 Idaho 529, 533, 531 P.2d 1174, 1178 (1975)

Taylor v. K. T. V. B., Inc., 96 Idaho 202, 205, 525 P.2d 984, 987 (1974)

Twin Falls Farm & City Distrib., Inc. v. D & B Supply Co., Inc., 96 Idaho 351, 359, 528 P.2d 1286, 1294 (1974)

Rindlisbaker v. Wilson, 95 Idaho 752, 759, 519 P.2d 421, 428 (1974)

Shields v. Morton Chem. Co., 95 Idaho 674, 676, 518 P.2d 857, 859 (1974)

Weeks v. M-P Publications, Inc., 95 Idaho 634, 636, 516 P.2d 193, 195 (1973)

S. H. Kress & Co. v. Godman, 95 Idaho 614, 617, 515 P.2d 561, 564 (1973)

Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 823, 498 P.2d 1292, 1296 (1972)

Cox v. Stolworthy, 94 Idaho 683, 690, 496 P.2d 682, 689 (1972) *overruled by Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 665 P.2d 661 (1983)

Openshaw v. Oregon Auto. Ins. Co., 94 Idaho 335, 338, 487 P.2d 929, 932 (1971)

Davis v. McDougall, 94 Idaho 61, 63, 480 P.2d 907, 909 (1971)

Smith v. State, 93 Idaho 795, 804, 473 P.2d 937, 946 (1970)

Mooney v. Robinson, 93 Idaho 676, 679, 471 P.2d 63, 66 (1970)

Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc., 153 Idaho 440, 283 P.3d 757 (2012);

Carrillo v. Boise Tire Co., Inc., 152 Idaho 741, 274 P.3d 1256 (2012);

Beaudoin v. Davidson Trust Co., 151 Idaho 701, 263 P.3d 755 (2011);

Wesco Autobody Supply, Inc. v. Ernest, 149 Idaho 881, 243 P.3d 1069,(2010);

Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642 (2010);

Castorena v. General Elec., 149 Idaho 609, 238 P.3d 209 (2010);

Mortensen v. Stewart Title Guar. Co., 149 Idaho 437, 235 P.3d 387 (2010);

Weinstein v. Prudential Property and Cas. Ins. Co., 149 Idaho 299, 233 P.3d 1221 (2010);

Schmechel v. Dille, 148 Idaho 176, 219 P.3d 1192 (2009);

Harrison v. Binnion, 147 Idaho 645, 214 P.3d 631 (2009);

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 210 P.3d 63 (2009);

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ADDENDUM 2

ADDENDUM 2

POCATELLO MUNICIPAL CODE - ANIMAL CODE

6.04.010: DEFINITIONS:

As used in this chapter, each of the terms defined shall have the meanings given in this section unless a different meaning is clearly required by the context. "Shall" is mandatory, not discretionary.

ABUSE: Any intentional, wilful, or negligent conduct resulting in bruising, bleeding, malnutrition, dehydration, burns, fractures or breaks of any bones, subdural hematoma, soft tissue swelling, or death.

ADULT: Any person eighteen (18) years of age or older.

ALLOW: To forbear or neglect to restrain or prevent, regardless of intent or participation.

ANIMAL: A mammal, bird, reptile, fish or amphibian.

ANIMAL CONTROL CENTER: Any premises designated by the city for the purpose of impounding and caring for animals held under the authority of this chapter.

ANIMAL CONTROL OFFICER: Any person(s) employed by the city to administer and enforce the licensing, inspection, and enforcement requirements contained within this chapter.

ANIMAL NUISANCE: Any nuisance arising out of the keeping, maintaining or owning of, or failure to exercise sufficient control of an animal.

AT HEEL: A dog is next to a person (no more than 1 foot away in any direction) and obedient to that person's command.

AT LARGE: An animal that is off the premises of the owner, and not on a leash ten feet (10') or less in length, or confined in a motor vehicle. In the case of a dangerous animal "at large" means not confined or leashed as required in section **6.04.060** of this chapter.

COMMERCIAL ANIMAL ESTABLISHMENT: Any place of business for the care of animals, including, but not limited to, the boarding, grooming, breeding, training, or selling of animals.

CRUELTY: Any act or omission whereby unjustifiable physical pain, suffering or death of an animal is caused or permitted, including, but not limited to, failure to provide proper drink, air, space, shelter or protection from the elements, a sanitary and safe living environment, veterinary care or nutritious food in sufficient quantity. In the case of activities where physical pain is necessarily caused, such as medical and scientific research, food processing, customary and normal veterinary and agricultural husbandry practices, pest elimination, and animal training and hunting, "cruelty" shall mean a failure to employ the most humane method reasonably available.

CUSTODIAN: Any person having custodial care of an animal by his or her own choice, or at the request of, or with the consent of, the owner of the animal, including, but not limited to, the parent(s) or guardian(s) of a minor child.

DANGEROUS ANIMAL: A. Any animal which, when unprovoked by teasing, taunting, or a threatening manner by any person, approaches said person in an apparent attitude of attack upon the streets, sidewalks, public grounds or places, common areas within subdivisions or mobile home or recreational vehicle parks, commons grounds of apartment buildings, condominiums, or townhouse developments, or private property not solely owned or possessed by the owner or custodian of the animal.

B. Any animal with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise endanger the safety of human beings or domestic animals or livestock; or

C. Any animal which bites, inflicts injury, assaults, or otherwise attacks a human being or domestic animal or livestock without justifiable provocation; or

D. Any animal owned or harbored primarily or in part for the purpose of fighting or any animal trained for fighting; or

E. Any dog which has been trained as an attack dog, except dogs used by law enforcement agencies.

Exceptions: An animal will not be considered dangerous if it engages in any of the above listed actions toward a person or animal that is either: a) committing a trespass or other tort upon the premises of the animal's owner or custodian, or b) committing a crime against the animal's owner or custodian. An animal will not be considered dangerous if any of the above actions occur when the animal is being teased, tormented, or abused, or if the actions were in reaction to either a crime committed by a person or an attempt by the person to commit a crime.

DISPOSITION: Adoption, quarantine, voluntary or involuntary custodianship or placement, or euthanasia humanely administered to an animal. "Disposition" includes placement or sale of an animal to the general public or removal of an animal from any pet shop to any other location.

DOG PARK: A defined area set aside for dogs which have not been convicted of being dangerous as defined in this section to exercise and play off leash in a controlled environment under the supervision of their owners/custodians, and subject to posted rules and to the provisions of this code.

IMPOUNDMENT: The taking into custody of an animal by any person, police officer, animal control officer, or any authorized representative thereof.

LIVESTOCK: Cows, sheep, horses, goats, pigs, hogs, llamas, camels, donkeys, burros, and mules, or any other similar animals whose mature size is approximately that of those set out herein.

MISUSE: The wilful or intentional causing of an animal to perform a noncustomary task, excepting those tasks and actions required of dogs used by law enforcement agencies, which could be dangerous or harmful to the animal or to any person.

MULTIPLE ANIMAL HOUSING: Any premises or portion thereof where three (3) or more dogs, or more than five (5) cats, over the age of three (3) months, are kept or harbored solely for the hobby of the owner or tenant of the premises, without any pecuniary gain.

MUZZLE: A device constructed of strong, soft material or of metal, designed to fasten over the mouth of an animal to prevent the animal from biting any person or other animal.

OWNER: Any person having temporary or permanent custody of, sheltering or having charge of, harboring, exercising control over, or having property rights to, any animal for five (5) or more consecutive days, or whose child, or other person over whom guardianship is exercised, who resides with said person, so harbors or keeps an animal.

PUBLIC NUISANCE ANIMAL: Any animal that unreasonably annoys humans, endangers the life or health of a person or another animal, or substantially interferes with the rights of a person, other than its owner/custodian, to enjoyment of life or property.

RESEARCH FACILITY: Any college, university, or other research institution which uses live animals in research, tests, or experiments. (Ord. 2908, 2012: Ord. 2884, 2010: Ord. 2667 § 2, 2001)

6.04.020: AUTHORITY TO ENFORCE:

1. A. Animal control officers, in addition to Pocatello police officers, are hereby authorized to carry out the duties necessary to enforce this chapter, including licensing, inspections, and enforcement, including issuance of Idaho uniform citations for any violations of this chapter.

B. It shall be unlawful for any person to hinder or obstruct, or attempt to hinder or obstruct, an animal control officer in the discharge of his duties. (Ord. 2667 § 2, 2001)

6.04.030: NUISANCES PROHIBITED:

1. A. It shall be unlawful for any person to keep any animal on any property located within the city when the keeping of such animal, or the method of keeping or harboring such animal(s), constitutes a public nuisance or menace to public health or safety.

B. No person owning, harboring, keeping, or in charge of any animal shall cause unsanitary, dangerous, or offensive condition(s) by virtue of the size or number of animals maintained at a single location or due to the inadequacy of the facilities. It shall be a violation of this section if the number of animals maintained at a single residence or the condition of the facilities is offensive, injurious, or dangerous to the public health or the neighbors in close proximity to the premises, regardless of whether or not a multiple animal housing license has been obtained. The animal control director shall revoke the multiple animal housing permit of any person found in violation of this section.

C. It shall be unlawful for any person to allow any animal in his/her care to become a public nuisance animal. Conduct which renders an animal a public nuisance shall include, but not be limited to:

1. Repeated running at large (more than 2 violations).

2. Being at large in any section of a park or public recreation area without being controlled by a leash no longer than ten feet (10') or similar physical restraint.

3. Damaging, soiling, defiling, urinating on, or defecating on any property other than that of its owner.

4. Making disturbing noises, including, but not limited to, continued and repeated howling, barking, whining, crowing, braying, or other utterances causing unreasonable annoyance, disturbance, or discomfort to neighbors or others in close proximity to the premises where the animal is kept or harbored.

5. Fouling of the air by noxious or offensive odors and thereby creates unreasonable annoyance or discomfort to neighbors or others in close proximity to the premises where the animal is kept or harbored.

6. Molesting, attacking, causing a noise disturbance, or otherwise interfering with the freedom of movement of persons in a public right of way or on private property not its own.

7. Chasing motor vehicles in a public right of way.

8. Interfering with the enjoyment or use of another's property.

D. Any owner or custodian whose animal has become a public nuisance animal may be issued a notice of violation and assessed the fee per occurrence as set by annual resolution of the city council, to be paid at the animal control center. The notice of violation shall be independent of any criminal misdemeanor or infraction proceedings which might be instituted under this section.

E. After the conviction of an owner or custodian for allowing his animal to become a nuisance for more than two (2) running at large violations, the owner or custodian shall have the animal neutered or spayed by a licensed veterinarian and provide proof to the animal control department of such alteration within thirty (30) days of sentencing.

F. After the conviction of an owner or custodian for allowing his animal to become a nuisance, the owner or custodian, at his own expense, may be required by the court to successfully complete a city approved animal obedience program with the nuisance animal, to the satisfaction of the animal control director. (Ord. 2884, 2010: Ord. 2838 § 1, 2008: Ord. 2764 § 1, 2005: Ord. 2697 § 9, 2002: Ord. 2667 § 2, 2001)

6.04.040: RESTRAINT AND CONFINEMENT BY OWNER/CUSTODIAN:

1. A. Dog At Large Prohibited: It is unlawful for any owner/custodian to fail to keep any dog under restraint or to permit such animal to be at large upon the streets and public ways of the city or on public or private property without the consent of the owner of the property unless the dog is under the control of a person holding a leash no longer than ten feet (10'), securely attached to the animal and of sufficient tensile strength to restrain it, or unless the dog is confined in a motor vehicle in such a manner that neither its claws nor its teeth can extend beyond the exterior of the vehicle. Any dog found at large may be impounded as provided hereafter in this chapter.

B. Exceptions:

1. Bartz Field: The area known as Bartz Field on the Idaho State University campus may be used, subject to rules and regulations as may be prescribed by Idaho State University, for the training or exercise of nondangerous dogs. Nondangerous dogs within Bartz Field need not be controlled by leash but shall be under the control of a responsible person and controlled by a whistle, noise, or other effective command. The owner must, if requested by the police or an animal control officer or an ISU public safety officer, prove his/her control in order to avoid impoundment of the dog.

2. Dog Parks: Any public areas officially designated as dog parks by the city of Pocatello may be used by dogs and their owners/custodians to exercise and play off leash, subject to the provisions of this code and any particular rules posted at the dog park. Nondangerous dogs at dog parks need not be controlled by leash but shall be under the control of the owner/custodian of said dog, and controlled by a whistle, noise, or other effective command. The owner/custodian must, if requested by the police or an animal control officer, prove his/her control in order to avoid impoundment of the dog.

C. Other Animals At Large: It is unlawful for any owner/custodian to fail to keep said animal from being at large upon the streets and public ways of the city or on public or private property without the consent of the owner of the property unless controlled by leash as provided above.

D. Location Of Dog Runs Or Kennels: No person shall maintain or construct any dog run within thirty feet (30') of the residence of any neighboring property.

E. Animals In Public Buildings Or Common Carriers: It is unlawful for a person to permit, allow, keep, or carry any animal in, upon, or within a common carrier, public transportation facility or any other public building or facility, particularly a building or facility in which food or drink is prepared or stored, except that persons with disabilities shall not be denied the use of any common carrier or public transportation facility or admittance to any cafe or any other public building or place by reason of his being accompanied by a seeing eye or guide dog or other "assistive animal" specially trained for such purpose.

F. Large Animals Prohibited On Public Ways: No person shall lead, drive, or ride any horse, cattle or other large animal over, across, or upon any sidewalk, parkway, or public parking area, or over or across any public park. (Ord. 2908, 2012: Ord. 2884, 2010: Ord. 2667 § 2, 2001)

6.04.050: DANGEROUS CONDUCT BY ANIMALS PROHIBITED;

A. Dangerous Conduct By Animal Prohibited: The owner or custodian of any animal which commits any of the acts defined in this chapter as "dangerous" may be cited for a misdemeanor and the animal control department may seize and impound the animal until the matter has been adjudicated. The conduct shall not be deemed dangerous if the victim (person, domestic animal, or livestock) was committing a tort against the animal's owner/custodian, or committing a trespass or other tort on the premises of the animal's owner/custodian. Specifically prohibited are the following acts:

1. If unprovoked by teasing, taunting, or a threatening manner by any person, approaching said person in an apparent attitude of attack upon the streets, sidewalks, public grounds or places, common areas within subdivisions or mobile home or recreational vehicle parks, common grounds

of apartment buildings, condominiums, or townhouse developments, or private property not solely owned or possessed by the owner or custodian of the animal; or

2. Biting, inflicting injury, assaulting, or otherwise attacking a human being or domestic animal or livestock without justifiable provocation.

B. Prohibited Animals: No person may own or harbor or have custodial care of any of the following types of vicious animals:

1. Any animal with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise endanger the safety of human beings or domestic animals or livestock, unless restrained and/or confined as provided in section 6.04.060 of this chapter; or

2. Any animal which is used primarily or in part for the purpose of fighting, or any animal trained for fighting; or

3. Any dog which has been trained as an attack dog, except dogs used by law enforcement agencies.

C. Impoundment And/Or Destruction: Any animal whose owner or custodian has been found guilty of or entered a plea of guilty to the offense of dangerous conduct by his/her animal is subject to impoundment and destruction. For a first offense, the court shall set the matter for sentencing and notify the office of the city attorney (prosecutor) of the date, time, and place of sentencing. The prosecutor may request that the court order the destruction of the animal. If the court determines that destruction is warranted, it shall issue an order authorizing any animal control officer or police officer to enter the property where the animal is located and to seize the animal and impound it for destruction if the animal has not been voluntarily surrendered by five o'clock (5:00) P.M. on the date of sentencing.

D. Subsequent Violations:

1. Upon the conviction or plea of guilty to a second or subsequent offense of dangerous animal conduct, regardless of the form of the current or any prior judgment, if the subsequent conduct involved the animal being dangerous, the court shall order destruction of the animal. If the court determines that destruction is warranted, it shall issue an order authorizing any animal control officer or police officer to enter the property where the animal is located and seize the animal and impound it for destruction if the animal has not been voluntarily surrendered by five o'clock (5:00) P.M. on the date of sentencing.

2. If the subsequent conduct did not involve the animal being dangerous, the court may, but is not required to, order destruction of the animal regardless of the form of the current or prior judgment.

E. Owner Liability: An adult owner/custodian of a dangerous animal shall be liable for all injuries and property damage sustained by any person or by any animal caused by an unprovoked attack by any dangerous animal, plus all costs, civil judgments or penalties, criminal fines, final terms, veterinary fees, shelter impound fees, and any other penalties and orders. In the event that the owner/custodian of the dangerous animal is a minor, the minor's parent or guardian shall be so liable.

F. Failure To Surrender Animal: It shall be a separate offense to fail to surrender an animal for impoundment and/or destruction. (Ord. 2884, 2010: Ord. 2838 § 2, 2008: Ord. 2764 § 3, 2005: Ord. 2667 § 2, 2001)

6.04.060: RESTRAINT AND CARE OF DANGEROUS

A. Restraint Requirements: The owner/custodian of any animal convicted of a violation of the dangerous conduct prohibitions set out in this chapter shall complete the requirements of this subsection and subsection B of this section within thirty (30) days of the date of such conviction. Every dangerous animal shall be securely confined by its owner/custodian within a building or secure enclosure as set out herein, and whenever off the premises of its owner/custodian, shall be either caged or securely muzzled and restrained by an adult with a chain or tether having a minimum tensile strength of three hundred (300) pounds and not more than three feet (3') in length, and shall be under the direct control and supervision of the adult owner/custodian of the dangerous animal. Every person harboring a dangerous animal is charged with an affirmative duty to confine the animal in such a way that persons and other animals do not have access to such animal. To be considered secure, a facility must be constructed in a manner capable of containing the animal. It shall be a completed structure with a securely attached roof of durable material which is secured to a foundation or concrete pad, or it shall be a chainlink structure which includes a securely attached roof, and which is embedded into the ground to a depth of no less than one foot (1'). Both the completed structure and the chainlink structure shall be at least six feet (6') in height and shall include a locking mechanism which shall be kept locked at all times the animal is within said facility.

B. Signage: The owner/custodian of a dangerous animal shall display in a prominent place on the premises a clearly visible warning sign indicating that there is a dangerous animal on the premises, with lettering large enough to be read from the adjacent public right of way. A second warning sign must be posted on the facility in which the animal is kept.

C. Compliance Enforcement Authority: Animal control officers are empowered to make whatever inquiry is necessary to ensure compliance with the provisions of this chapter, and may seize and impound any dangerous animal whose owner fails to comply with the provisions of this chapter.

D. Microchip Implantation And Alteration Required: Any person who has been found guilty of or pled guilty to a violation of the dangerous conduct prohibitions set out above shall, within five (5) days of conviction, have a microchip implanted in the animal by a licensed veterinarian or the animal control department, pay all associated costs, and, for work performed by a veterinarian, provide proof to the animal control department that the microchip has been implanted. In addition, the owner or custodian shall have the animal spayed or neutered by a licensed veterinarian and shall provide proof to the animal control department of such alteration within thirty (30) days of the conviction.

E. Notification To Animal Control: The owner/custodian of a dangerous animal shall notify the animal control department within twenty four (24) hours if said dangerous animal is at large, is unconfined, has attacked another animal or a human being, has temporarily or permanently relocated to another address, or has died, been sold or given away. If the dangerous animal has been sold or given away, the owner/custodian shall also provide the animal control department with the name, address and telephone number of the new owner/custodian of the dangerous animal, within twenty four (24) hours.

F. Impoundment: If a dangerous animal whose owner or custodian has previously been found guilty of or pled guilty to a violation of the dangerous conduct prohibitions in this chapter, regardless of the form of the prior or current judgment(s), is alleged to have committed a subsequent violation of

section 6.04.050 or 6.04.040 of this chapter or this section, or is found to be at large, the animal control department shall seize and impound the animal until the matter has been adjudicated. The owner/custodian of the animal shall be responsible for all cost of impound fees, medical care, and other expenses for said animal while it is in custody with the Pocatello Animal Shelter, and the owner/custodian shall pay all such impound fees, medical care, and other expenses within five (5) days of the sentencing, or animal control may dispose of the animal, including, but not limited to, adoption or destruction, without further notice to the owner/custodian.

G. Cash Bond Required:

1. If any animal is seized under this section or any other section of this chapter, the owner or custodian of said animal shall be liable for the reasonable costs of the seizure and the care, keeping, and disposal of the animal. Reasonable costs shall include, but shall not be limited to, transportation, medical, board, shelter, and farrier costs.

2. If any animal is in the possession of, and being held by the city of Pocatello pending the outcome of a criminal action charging a violation of this chapter, prior to final disposition of the criminal charge, the city of Pocatello may file a petition in the criminal case requesting that the court issue an order forfeiting the animal to the city of Pocatello. The petitioner shall serve a true copy of the petition upon the defendant.

3. Upon receipt of a petition pursuant to subsection G2 of this section, the court shall set a hearing on the petition. The hearing shall be conducted within fourteen (14) days after the filing of the petition. The hearing shall be limited to the question of forfeiture of the animal.

4. At a hearing conducted pursuant to subsection G3 of this section, the petitioner shall have the burden of establishing probable cause to believe that the animal was subjected to conduct which constitutes a violation of this chapter, or that the animal has committed a violation of this chapter. A prior finding of probable cause to proceed on the criminal case will create a permissive presumption that probable cause exists for the forfeiture proceeding. After the hearing, if the court finds probable cause exists, the court shall order immediate forfeiture of the animal to the petitioner, unless the defendant, within seventy two (72) hours of the hearing, posts a cash bond with the municipal treasurer in an amount determined by the court to be sufficient to repay all reasonable care of animal costs incurred, and anticipated to be incurred, for the care of the animal up to the time set for trial on the criminal case. If, after the hearing, the court finds that no probable cause exists, the animal shall be returned to the owner/custodian, and the owner/custodian shall not be responsible for any care of animal costs unless the person later pleads guilty to or is found guilty of a violation of this chapter, at which time the defendant shall owe all care of animal costs as restitution to the city of Pocatello in the criminal case.

5. At the end of the time for which expenses are covered by the cash bond, if the owner/custodian desires to prevent disposition of the animal, the owner/custodian shall post a new cash bond with the municipal treasurer which must be received before the expiration date of the previous cash bond. The court may correct, alter or otherwise adjust the new cash bond upon a motion made before the expiration date of the previous cash bond, provided, however, no person may file more than one motion seeking an adjustment to the new cash bond.

6. If a cash bond has been posted in accordance with this subsection, the city of Pocatello may draw from that cash bond reasonable care of animal costs in keeping and caring for the animal from the date of the seizure to the date of final disposition of the animal in the criminal action.

7. At the end of the time for which care of animal costs are covered by the bond, if no additional cash bond has been posted in accordance with this subsection, the city of Pocatello may determine disposition of the animal. The owner/custodian of the animal shall be liable for all unpaid reasonable care of animal costs. Posting of the cash bond shall not prevent the city of Pocatello from disposing of the seized or impounded animal before the expiration of the period covered by cash bond if the court orders the forfeiture of the animal or the owner relinquishes the animal.

8. Upon resolution of the criminal action, including any appeal(s), regardless of the court's decision of guilt or innocence, remaining funds deposited with the municipal treasurer which have not, and will not be expended for care of animal costs, shall be remitted to the owner/custodian of the animal.

9. Regardless of any other provision of this section, if in the written determination of a licensed veterinarian the animal is experiencing extreme pain or suffering, or is severely injured or diseased and therefore not likely to recover, the animal may be immediately euthanized.

10. No proceeding under this section shall be used as a basis for a continuance or to delay the criminal case nor shall proceedings in the criminal case, other than dismissal, be used as a basis to delay or continue the forfeiture proceeding as provided for in this section. Proceedings under this section are of a civil nature and governed by the Idaho rules of civil procedure except as to limitations upon the discovery process. Due to the need to conduct any proceeding necessary under this section in an expeditious manner and the right of any criminal defendant to avoid self-incrimination, any and all discovery requests shall be granted only under authority of the court. Discovery mechanisms shall not include the deposition of any party, witness, or representative, the use of interrogatories, requests for admission, or the demand to inspect any records outside the immediate reports and financial accountings for the animal in question.

11. "Care of animal costs" include, but are not limited to, costs of transportation, medical care, food, shelter, boarding, impound fees, disposal fees, and farrier fees. (Ord. 2894, 2011: Ord. 2884, 2010)

6.04.070: ANIMAL BITES; NOTIFICATION

A. When an owner/custodian of an animal has knowledge that his or her animal has bitten a human being, a pet, domestic animal, or livestock, such owner or custodian shall immediately notify personnel at the animal control center or the police department of the time and circumstances of such bite, and the name and address of the person bitten, if known, and the precautionary provisions in regard to rabies set out in this chapter shall be followed.

B. When any person, including doctor, veterinarian, or medical facility staff, has information that a person or domestic animal or livestock has been bitten by another animal, he or she shall immediately notify personnel at the animal control center or police department and the precautionary provisions in regard to rabies set out in this chapter shall be followed. (Ord. 2667 § 2, 2001)