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Boswell v. Steele Respondent's Brief Dckt. 41684

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEPHEN BOSWELL and KARINA BOSWELL, husband and wife, Plaintiffs/Appellants, v. AMBER STEELE and the Estate of MARY STEELE, Defendants/Respondents.	Supreme Court Docket No. 41684-2013 Bannock Co. Case No. CV-2012-4120-PI

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Bannock, Hon. Don L. Harding and Hon. William H. Woodland, District Judges, Presiding.

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I. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

This is an appeal of the District Court's grant of summary judgment in favor of Defendants/Respondents the Estate of Mary Steele ("Mary Steele") and Amber Steele. The judgment dismissed Plaintiffs/Appellants Stephen Boswell's and Karena Boswell's ("Boswells") claims for strict liability, negligence, negligence per se and premises liability claims. Mr. Boswell was Mary Steele's son-in-law[1] and Karena Steele her daughter. Amber Steele is Mary Steele's granddaughter and Karena Boswell's niece. The Boswells' claims stemmed from an incident involving Amber Steele's dog Zoey.

After a social gathering at the Boswells' home, Mr. Boswell drove Mary Steele home. When Mr. Boswell entered the home, he saw Zoey, who was completely enclosed behind a gate in the kitchen. Zoey was also barking and growling, yet despite this, Mr. Boswell approached Zoey, with a closed fit, reached over the gate and was bitten.

The District Court correctly concluded there was no genuine issue of material fact that Idaho has never adopted strict liability as to dog bite cases; that there was no genuine issue of material fact that Mary Steele and Amber Steele were neither negligent nor negligent per se, as there was no evidence that they owed any duty to the Mr. Boswell or even if they had that they breached any duty; that there was no genuine issue of material fact that under the premises liability claim, Mr. Boswell was a social guest-licensee, not an invitee; and that there was no genuine issue of material fact that

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[1] Mary Steele passed away subsequent to the filing of the Boswells' complaint.

Zoey was not dangerous.

B. COURSE OF THE PROCEEDINGS BELOW.

On September 24, 2012, the Boswells filed their initial complaint, asserting negligence, unreasonable risks, negligence per se pursuant to Idaho Code §25-2805, and premises liability. R., pp. 14-18. Mary Steele and Amber Steele filed their answer denying any liability. R., pp. 20-23.

Subsequent thereto, on December 24, 2012, the Boswells filed a motion to amend their complaint, to which Mary Steele and Amber Steele objected, to add claims for strict liability and negligence per se under the Pocatello City Code related to dog bites. R., pp. 39-48; 49-72; 103-105. On April 10, 2014, the District Court granted the Boswells' motion, and set the matter for trial. R., pp. 143-153. The Boswells filed an Amended Complaint, as well as a motion for partial summary judgment, asserting there was no genuine issue of fact that Mary Steele and Amber Steele were strictly liable, that Mr. Boswell was an invitee, and that Mary and Amber Steele's affirmative defense of comparative fault was inapplicable. R., pp. 73-87; 125-133; 331-349; 409-412.

On July 12, 2013, Mary Steele and Amber Steele filed their motion for summary judgment, asserting there was no genuine issue of material fact that Idaho did not allow for strict liability in dog bite cases; that they owed no duty to the Boswells; that even if a duty were owed, they did not breach that duty; and that they were not negligent or negligent per se. R., pp. 160-242. Also, on July 16, 2013, a hearing was held on Mary Steele's and Amber Steele's motion to quash the deposition subpoena of John Billquist, an adjuster for Mary Steele's and Amber Steele's insurance carrier, State Farm. R., 245. Mary Steele and Amber Steele asserted that the Boswells were not allowed to depose

Mr. Billquist, as he was an adjuster for State Farm, and his actions were protected under the work product privilege, as well as the fact that the responsive letter he sent to the Boswells' counsel's settlement demand letter was protected under Idaho Rule of Evidence 408. Tr., p.2, l.2-p. 3, l.9; p. 8, l.24-p.9, l.18. The District Court granted the motion and quashed the subpoena. R., p. 245. Tr., p. 10, ll.12-21.

Mary Steele and Amber Steele opposed the Boswells' motion for partial summary judgment, and filed motions to strike the Affidavits of Mr. Boswell, Mrs. Boswell and Tamara Andersen, a City of Pocatello Animal Control officer who responded to the dog bite. R., pp. 247-309; 350-353. The Boswells filed a memorandum and affidavits in opposition to Mary Steele's and Amber Steele's motion for summary judgment and in opposition to the motion to strike affidavits. R., pp. 310-327;413-428.

On August 5, 2013, a hearing was held on the parties' respective motions for summary judgment and motions to strike. R., p. 454. On October 30, 2013, the District Court issued its Memorandum Decision & Order granting Mary Steele's and Amber Steele's motion for summary judgment and motion to strike the Tamara Andersen affidavit. R., pp. 455-466. Thereafter, on January 21, 2014, a hearing was held on the Boswells' motion for reconsider. R., p. 481. On February 25, 2014, the District Court filed its memorandum decision denying the Boswells' motion

to reconsider. R., pp. 483-488. The District Court then entered the Final Judgement on March 14, 2014. R., p. 489. The Boswells appealed.

C. STATEMENT OF FACTS.

1. Mary Steele put up "Beware of Dog" signs to the gates of her property. R., p. 187 (Mary Steele Deposition Transcript p. 17, ll.20-23).

2. Mary Steele and Amber Steele did not know that Zoey was dangerous[2] or vicious,[3] or that she would bite Mr. Boswell. R., pp.185-86(Mary Steele Depo. p.12, ll.5-13; p. 13, ll.10-15). Prior to the incident on October 8, 2011, there had been no complaints or any adjudication that Zoey was dangerous or had bitten anyone without provocation.[4] Zoey nipped at a friend of Amber Steele's, Chris Kettler, but only because Zoey saw Ms. Kettler reach or move towards Amber Steele and was being protective of her. R., pp. 71-72. Also, prior to the incident, Mary Steele never saw Zoey bare

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[2] Under Pocatello City Code 6.04.010A, B and C define "dangerous" as an "animal which, **when unprovoked** by teasing, taunting or **a threatening manner** by an person approaches said person in an apparent attitude of attack . . . . or any animal with a known propensity, tendency or disposition to attack unprovoked . . . or any animal which bites, inflicts injury, assaults or otherwise attacks a human being . . .without justifiable provocation[.]"[Emphasis supplied].

[3] Idaho Code §25-2805 defines vicious as a dog, "which, **when not physically provoked**, physically attacks, wounds, bites or otherwise injures any person who is not trespassing. . . ." [Emphasis supplied].

[4] This is required under Pocatello City Code 6.04.050A. Also, under Idaho Code §25-28-5(2) a person is guilty of owning a vicious dog where it is established the dog bites or injures a person, "**when not physically provoked**[.]"[Emphasis supplied].

her teeth. R., p. 189 (Mary Steele Depo. p. 26, ll.2-3).

3. Mary Steele had a fenced-in back yard to keep Zoey on her property. *Id., p. 11, ll.5-9.*

4. Zoey was owned by Amber Steele, who kept Zoey in the basement almost every day and all day long. R., p.229 (Karena Boswell Deposition, pp. 7-8).

5. Mr. Boswell was well acquainted with Zoey prior to the incident. R., p.214 (Stephen Boswell Deposition p. 12, ll.7-14). Zoey let Mr. Boswell pet her before and he held her on his lap and she showed him affection. R., 189-90 (Mary Steele Depo. p. 26, l.20-p. 27,l.1).

6. On the date of the incident, Mr. Boswell picked up Mary Steele to take her to his and Mrs. Boswell's home for a family gathering. R., p.184 (Mary Steele Depo. p. 6, ll.17-20; R., p. 217 (Stephen Boswell Depo., p. 23, l.17-p.24, l.23). Amber Steele was not at Mary Steele's home at the time Mary and Mr. Boswell were there. R., p. 190 (Mary Steele Depo. p. 32, ll.8-10; R., 221 (Stephen Boswell Depo. p. 37, l.10-12; R., p. 235 (Karena Boswell Depo. p. 30, ll.6-8).

7. Before Mary Steele left her home, she placed Zoey behind a gate in the kitchen of her home, and Zoey was completely confined, and not loose, when she and Mr. Boswell returned. Rp. 184 (Mary Steele Depo. p. 7, l.2-p. 8, l.18); R,pp. 208-209; R., 514, Exhibits 1-4. Zoey was confined and penned in behind the gate and in an area she was supposed to be. R., 186(Mary Steele Depo. p. 14, ll.3-13; R., 192 (Mary Steele Depo. p. 40, ll. 10-13);R., 514, Exhibits 1-4.

8. When Mr. Boswell and Mary Steele returned, they entered Mary's home, and, prior to the bite, Zoey was barking and growling. R., 184 (Mary Steele Depo. p. 6, ll. 21-25).

9. **Mr. Boswell, on his own, and without Mary Steele's knowledge or at her request, approached Zoey, who was behind the gate, with his right hand in a closed fist.** R., 219-20 (Stephen Boswell Depo. p. 29, l.7-p. 33, l.5)(emphasis supplied). Mr. Boswell reached to Zoey and she bit him.

10. Mr. Boswell admitted that there was no reason for him to go beyond the gate, and that Mary never asked him to go to Zoey, and he decided on his own to go to Zoey. R., p.185 & 192 (Mary Steele Depo. p. 12; p. 40, ll. 14-18; R., 218 (Stephen Boswell Depo. p. 25, ll.22-24).

11. The Boswells both admitted that they knew that Mary Steele and Amber Steele kept Zoey in the basement, and did not think Mary Steele did anything wrong in keeping Zoey in a fenced in back yard or behind the gate in her house. R., p.215 (Stephen Boswell Depo. p. 13, ll. 6-7; p. 16, ll.11-19; R., p. 232 & 238 (Karena Boswell Depo. p. 19, ll.2-6; p. 42, l.10-p. 43, l.3). Even more telling is that Mr. Boswell admitted he did not believe Mary Steele was negligent, as he testified, "**I don't think she [Mary] did anything wrong.**" R., 220 (Stephen Boswell Depo. p. 35, l.25-p.35, l.1)(emphasis supplied). Mrs. Boswell admitted while she was around Zoey she and did not have any concerns. R., p.232 (Karena Boswell Depo. p. 17, ll.19-23). Mrs. Boswell also admitted she could not say Mary Steele's or Amber Steele's leaving Zoey in the kitchen behind the gate was an act of negligence, actually thought it was reasonable to keep a gate/barrier to keep the dogs segregated, and could not be critical of Mary Steele in her actions. R., p. 237 (Karena Boswell Depo.

p. 42, l.10-p.43, l.3). Mrs. Boswell also could not say whether the bite was unpredictable or not to Mary or Amber. R., p. 235 (Karena Boswell Depo. p. 33, ll.1-8).

II. ISSUES ON APPEAL

1. Did the District Court correctly grant summary judgment in concluding that Idaho has never adopted strict liability in dog bite cases?

2. Did the District Court correctly conclude there was no genuine issue of material fact that Mary Steele and Amber Steele were not negligent, as they owed no duty to Mr. Boswell, where they did not have any knowledge or notice that Zoey was a dangerous or vicious animal, where they kept Zoey completely enclosed behind a gate in the kitchen of the home, and where Mr. Boswell approached Zoey, who was barking and growling, with a closed fist?

3. Did the District Court correctly conclude that there was no genuine issue of material fact that neither Mary Steele nor Amber Steele had knowledge or notice that Zoey was a dangerous or vicious animal, where she was completely enclosed behind a gate in the kitchen of the home and where Mr. Boswell approached Zoey, who was barking and growling, with a closed fist?

4. Did the District Court correctly conclude that there was no genuine issue of material fact that Mr. Boswell was a social guest/licensee, that Mary Steele did not owe a duty to Mr. Boswell, and even if she had, that there was no genuine issue of material fact that Mary Steele breached any duty, where Zoey was completely enclosed behind a gate in the kitchen of the home,

where Mr. Boswell did not consider Zoey to be dangerous or vicious, and where Mr. Boswell approached Zoey, who was barking and growling, with a closed fist?

5. Did the District Court correctly strike the Affidavit of Tamara Andersen, pursuant to Idaho Rule of Civil Procedure 56(e), where Ms. Andersen's affidavit was conclusory, lacked foundation and based on pure speculation?

6. Did the District Court correctly grant the motion to quash the deposition subpoena of John Billquist, where there was no evidence that neither the attorney-client nor work product privileges were waived?

7. Are Amber Steele and Mary Steele entitled to attorney's fees and costs on appeal, pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41?

III. STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment "shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995). In making this determination, a court should liberally construe the record in favor of the party opposing the motion and draw all reasonable inferences and conclusions in that party's favor. *Smith,* 128 Idaho at 718, 918 P.2d at 587 (citing *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994)). Based on the evidence, if reasonable persons could reach

differing conclusions or draw conflicting inferences, summary judgment must be denied. *Id.* (citing *Harris v. Department of Health and Welfare,* 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)).

Further, when a defendant moves for summary judgment, asserting there is no genuine issue of material fact as to an element of a plaintiff's case, the plaintiff "must establish the existence of an issue of fact regarding that element." *Zimmerman v. Volkswagen of America, Inc.,* 128 Idaho 851, 854, 920 P.2d 67, 70 (1996). Moreover, the non-moving party "has the burden of presenting sufficient evidence to establish a triable issue which arises from the facts, and a genuine issue of fact is not created by a mere scintilla of evidence." *Jarman v. Hale,* 122 Idaho 952, 955-956, 842 P.2d 288, 291-292 (Ct. App. 1992) (internal citations omitted). "If the moving party fails to challenge an element or fails to present evidence establishing the absence of genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the nonmoving party is not required to respond with supporting evidence." *Smith, supra,* 128 Idaho at 719, 918 P.2d at 588 (citing *Thomson*, 126 Idaho at 530, 887 P.2d at 1038)). Further, "a nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial, requires the entry of summary judgment. *Jarman, supra,*

122 Idaho at 955-956, 842 P.2d at 291-292. (Internal citations omitted). Thus, where the non-moving party fails, by way of affidavit or deposition, to make a sufficient showing to establish an essential element to its case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

In this matter, Mr. Boswell and Mrs. Boswell failed to meet their burden on summary judgment, as they failed to make a sufficient showing to establish the existence of the elements of their claims. The District Court's granting summary judgment to Mary Steele and Amber Steele, and denial of Mr. Boswell's and Mrs. Boswell's motion for reconsideration must be affirmed.

IV. ARGUMENT.

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IDAHO HAS NEVER ADOPTED STRICT LIABILITY IN DOG BITE CASES.

The District Court properly granted summary judgment on the Boswells' strict liability claim, as the Idaho courts have never adopted or applied strict liability to dog bite or premises liability cases.

Idaho has only adopted the concept of strict liability in cases dealing with a seller of a defective product to a consumer. This was set forth in the case of *Shields v. Morton Chemical Company*, 95 Idaho 674, 518 P.2d 857 (1974). In that case, this Court adopted a concept of strict liability in torts as stated in the Restatement of Torts 2nd § 402a, which pertained to a seller of a defective product to a consumer. The seller needs to be engaged in the business of selling the

product and the product is expected to and does reach the consumer without substantial change in the condition in which it was sold. *See Shields,* 95 Idaho at 676, 518 P.2d at 859. While Idaho has continued to adopt the concept of strict liability, it is has been within the confines of the Restatement of Torts 2nd § 402a concept. Idaho has not adopted strict liability in dog bite cases.

In their opening brief, the Boswells give short shrift to to *McClain v. Lewiston Interstate Fair and Racing Association*, 17 Idaho 63, 104 P. 1015 (1909) in support of their position on appeal. However, *McClain* does not impose strict liability. In *McClain,* this Court dealt with two causes of action, negligence and trespass. In 1909, this Court did not expand the concept of negligence and trespass[5] to impose strict liability. The Boswells'' argument to the contrary is an erroneous reading of the case. The quote on page 79 of the *McClain* decision must be read in its proper context. That context puts the quote as follows:

> 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 anyone, 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."
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> "The owner of domestic animals, *if they are wrongfully in the place where they do any mischief,* is liable for it, though he had no notice that they had

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In citing to *McClain*, Mary Steele and Amber Steele do not acknowledge, but rather continue to oppose that they were negligent in any manner, as will be discussed in more detail in the remainder of this brief. In addition, the Boswells have never asserted any trespass claim.

> been accustomed to do so before. In cases of this kind the ground of the action is, that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner, that they had previously been vicious."
>
> This case clearly draws the distinction between that class of cases cited by counsel for appellant and that class of cases coming under the allegation of the complaint in this case. Where it is alleged, as in the case at bar, that the animal is wrongfully at the place where the mischief is done, the owner is liable for the damage done, if any, although he had no notice that such animal possessed the trait or characteristic of doing the particular thing which caused the injury. The right of action arises by reason of the fact that as against the plaintiff the animal causing the injury is a trespasser, is unlawfully at the place where the injury occurs and at which place the plaintiff has a legal right to be. So in the case at bar the allegations of the complaint are to the effect that the plaintiff was invited by the fair association to engage in riding a race upon the grounds controlled by the fair association and at a time when the air association was conducting its fair, thus clearly showing the plaintiff to be a licensee upon the racetrack at the time the accident occurred. Then follow the allegations that the defendants unlawfully, wrongfully, negligently and wantonly permitted the dog in controversy to go upon, run over such racetrack and come in contact with the horse ridden by the plaintiff which occasioned and caused the injury for which damages are sought. Under these facts it was not necessary to allege or prove any particular trait or characteristic of the dog, or that the defendants had knowledge that such dog, or the class of dogs to which the same belonged, possessed any peculiar trait or characteristic, or the trait or characteristic which led it to the place and to do the act which caused the injury. (*Decker v. Gammon*, 44 Me. 322, 69 Am,. Dec. 99; *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567, 2 Cyc. 373; 1 Thompson on Neg., 888.) These authorities seem to be in line with the reason of the case.

McClain, 17 Idaho at 79-80, 104 P. at 1020-21 [italics in original][underscore supplied].

If Idaho were adopting a strict liability standard in 1909, this Court certainly would not have phrased its holding in terms of the status of the allegations in the complaint which were negligence and trespass by a dog and its owner. In fact, strict liability was not pled in 1909 in *McClain*; it was

not the legal theory in 1909, and is not the holding of *McClain*.. This is clearly indicated when this Court, in *McClain,* discussed its holding as opposed to a discussion of the *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99, case. On pages 81 and 82, this Court issued its true holding in which it clearly supported that liability in *McClain* is based on theories of negligence and trespass. In that regard, this Court stated:

> The dog is generally recognized as an essential part of every well-regulated family, and of a higher degree of intelligence than other domestic animals, and given privileges not generally conceded to other members of the animal family. But we are inclined to the opinion that notwithstanding this fact, and notwithstanding the fact that the dog occupies a higher position in the social world of the animal family, and an important one in human affairs, still that the owner of such animal should not be excused from liability for injuries done by the dog when invading the rights of person or property. This position that the dog has well earned, by reason of his heroic acts and deeds of valor, might be a reason for exacting from the owner a higher duty as to responsibility for the dog's acts, but it certainly is not a reason why the owner of such animal should be not equally responsible for the wrongs done by a dog as for wrongs done by other domestic animals. And we believe, both upon reason and authority, that when a dog invades and trespasses upon the legal rights of a person and injures person or property, and such invasion and trespass is the result of the negligence of the owner, the owner is liable for the damages done. *Emphasis supplied.*

17 Idaho at 81-82. 104 P. at 1021.

Clearly, this Court in *McClain* did not expand the pleadings of the plaintiff from negligence and trespass to strict liability. There has been no case cited by the Boswells since *McClain* to indicate that this Court has adopted strict liability in dog bite cases, and this Court should not do so here.

The Boswells cite to non-binding treatises for their strained interpretation of *McClain* as

holding Idaho allows for strict liability in dog bite cases. Again, the Boswells' position lacks merit. Again, strict liability was not pled in 1909 in *McClain*; it was not the legal theory in 1909, and is not the holding of the *McClain* court, as clearly indicated therein,. *See, McClain*, 17 Idaho at 81-82, 104 P. At 1021. *McClain* never adopted or applied strict liability to dog bite or premises liability cases. Further, if Idaho were adopting a strict liability standard in 1909, this Court certainly would not have phrased its holding in terms of the status of the allegations in the complaint which were negligence and trespass by a dog and its owner. And, again, under the Boswells' erroneous position, like the facts in this case, a person could reach their hand into a dog pen, receive a dog bite and then have no responsibility for their own behavior that initiated the incident. Idaho's tort system has never endorsed such lack of personal responsibility. *See Idaho Code § 6-801 et. seq.*

Further, as the Boswells fail to provide the Court with any law in Idaho applying strict liability in dog bite or premises liability cases, they attempt to deflect from this by citing the Court to non-binding case law/statutes of other states. It appears the Boswells obtained these citations from some legal compilation or treatise, and did not carefully read or scrutinize them. Again, the glaring fact the Boswells cannot escape is that **Idaho is not a strict liability state, along with Hawaii, Kansas, North Dakota** (see, *Sendelbach v. Grad*, 246 N.W. 2d 496, 501 (N.D. 1976) (premises liability), **Vermont and Virginia. Indiana presumes a dog is harmless and applies strict liability only where a letter carrier is involved. Nevada actually requires two bites in an eighteen month period, without provocation** (N.R.S. 202.500)(2013). **Rhode Island only applied strict**

liability if the dog gets out of its enclosure. *DuBois v. Quilitzsch,* 21 A.3d 375, 380 (R.I. 2011). Additionally, there are states that require the plaintiff show the owner knows or reasonably knows the dog is vicious or dangerous, and, of those, **South Dakota-***Gehrts v. Batteen,* 620 N.W. 775, 778 (S.D. 2001) and **Tennessee**, *Fletcher v. Richardson*, 603 S.W.2d 734, 735-36 held that the **showing of knowledge was a negligence, not strict liability, theory**. In Alaska, summary judgment was granted to the defendant animal owner, since the plaintiff knew of the animal's dangerous propensities (*Hale v. O'Neill,* 492 P.2d 101, 104 (Alaska 1971). New Mexico has a similar law to Alaska. *Smith v. Village of Ruidoso,* 994 P.2d 50, 54 (N.M. Ct. App. 1999). **Other states held that provocation, comparative fault and assumption of risk theories applied** in such cases (*Priebe v. Nelson,* 140 P.3d 848, 849 (Cal. 2006); *Russo v. Zeigler,* 67 A.3d 536 (Del.Sup. Ct. 2013); District of Columbia (D.C. Code § 8-1902(b)(1)(B); Florida, Fla. Stat. Ann. §767.04 (2013) (comparative fault applies); *VanBeheren v. Bradley,* 640 N.E. 2d 664, 666-67 (Ill. Ct. App. 1994); *Fouts v. Mason,* 592 N.W.2d 33,36 (Iowa 1999); *Pepper v. Triplet,*864 So. 2d 181, 191-92 (Louisiana 2003); *Audette v. Comm.,* 829 N.E.2d 248, 255 (Mass. 2005); *Hill v. Sacka,* 666 N.W. 2d 282, 287-88 (Mich. Ct. App. 2003); *Engquist v. Loyas,* 803 N.W. 2d 400, 403 (Minn.2011); Nebraska. Rev. Stat. 54-601(b)(2013); *Bohan v. Ritzo,* 679 A.2d 597, 601 (N.H. 1996). Nevertheless, Idaho is not a strict liability state, and has never recognized strict liability in dog bite cases.

Moreover, the District Court correctly concluded **the Boswells did not cite to any authority that expressly or implicitly establishes that Idaho has adopted strict liability in dog bite cases.**

Much like the Boswells argued in their prior submissions, they never cited one Idaho case, including *McClain, supra*, where strict liability was recognized as a claim in a dog bite or premises liability case in Idaho. The Boswells asserted, both before the District Court and this Court, that because non-binding, treatises and foreign law allow for strict liability(most of which do not support the Boswells' position, as previously asserted), then Idaho is a strict liability state. However, simply because there may be case law in other jurisdictions does not change the fact that such law is non-binding authority, and the only authority that is binding is Idaho law. The District Court certainly recognized this, as evidenced by its citation to *McClain*, as follows:

> If domestic animals, such as oxen and horses, injure anyone, in person or property, **if they are rightfully in the place where they so 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. The owner of domestic animals, **if they are wrongfully in the place where they so any mischief, if liable for it, though he has no notice that they had been accustomed to do so before.** In cases of this kind the ground of the action is, that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner, that they has previously been vicious.
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> . . .
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> Where it is alleged, as in the case at bar, that the animal is wrongfully at the place where the mischief is done, the owner is liable for the damage done, if any, although he had no notice that such animal possessed the trait or characteristic of doing the particular thing which caused the injury. **The right of action arises by reason of the fact that as against the plaintiff the animal causing the injury is a trespasser,** is unlawfully at the place where the injury occurs and at which place the plaintiff has a legal right to be.

R., pp.461-462. Further, the District Court properly explained how *McClain* did not establish strict liability:

> It appears to the Court that *McClain* does not establish recovery based on strict liability. The question presented in *McClain* is whether the animal 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 or dangerous character of the animal. There is no dispute in the record that Zoey was rightfully in Mary's kitchen. Amber stayed in Mary's home and Mary consented that Amber could keep Zoey in her home. At the time of the bite, Zoey was in the kitchen behind the gate. Furthermore, Plaintiffs cannot cite to any authority that expressly or implicitly establishes that Idaho has adopted strict liability in dog bite cases. If Plaintiffs are to recover, it will be if the Defendants were negligent.

R., p. 462. It was readily apparent to the District Court that Plaintiffs failed to cite to any Idaho law where strict liability has been adopted in dog bite cases or premises liability cases. Further, in denying the Boswells' motion for reconsideration the District Court reasoned that in *McClain,*

> The Court therein clearly did not hold that strict liability is the law in Idaho in a dog bite case such as the instant action. No Idaho case law in the subsequent one hundred plus years has been cited as adopting this position no matter how the law in other states may have developed. It is not the trial courts[sic] responsibility to move the law beyond that which the Idaho Supreme Court have [sic] previously determined.

R., p. 484. Thus, it is abundantly clear the Boswells' citations to non-binding case law, treatises and to the Restatement (Second and Third) of Torts lacks merit. Again, the only time strict liability has been allowed in Idaho is in products liability cases. *See, Shields v. Morton Chemical Company*, 95

Idaho 674, 676, 518 P.2d 857, 859 (1974). The District Court properly followed Idaho law, which does not recognize strict liability in cases other than products liability, in granting summary judgment.

B. THE DISTRICT CORRECTLY CONCLUDED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT MR. BOSWELL WAS NOT AN INVITEE.

Mr. Boswell was not an invitee; rather, he was a social guest or licensee, as he rendered an incidental service to Mary Boswell–he drove her home–and never conferred any monetary, business or commercial benefit to Mary Steele. A social guest is a licensee, and a guest rendering a minor incidental service to the landowner does not change the guest from being considered a licensee. *Wilson v. Bogart*, 81 Idaho 535, 545, 347 P.2d 341, 347 (1959). As a social guest, or licensee, a landowner is only required to share with the licensee *knowledge of dangerous conditions or activities* on the land. *Evans v. Park*, 112 Idaho 400, 401, 732 P.2d 369, 370 (Ct. App. 1987)(emphasis supplied). Additionally, the Supreme Court has held that the fact that a guest may be rendering a minor incidental service to the host does not change the relationship between them as landowner and a licensee. *Wilson*, 81 Idaho at 545, 347 P.2d at 347. *See also*, *Mooney v. Robinson*, 93 Idaho 676, 471 P.2d 63 (1970).

In this case it is undisputed Mr. Boswell was Ms. Steele's son-in-law. R., p. 184 (Mary Steele Depo., p. 6, ll.7-9). It is undisputed Mr. Boswell was taking Ms. Steele home after a family gathering. R., p. 217 (Stephen Boswell Depo., p.23, l.17-p.24, l.23). It is further undisputed neither

Ms. Steele nor Mr. Boswell were conferring upon each other any economic benefit; rather Mr. Boswell was a "family member" who took Mary. Steele to and from her home for a family gathering. R.,p. 239 (Karena Boswell Depo., p.48, l.4-p. 50, l.15). This is exactly what this Court in *Wilson* contemplated as a social guest. Mr. Boswell was not receiving any remuneration. Ms. Steele was not conducting any business on her property. Thus, the District Court correctly concluded that Mr. Boswell was a social guest/licensee.

C. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE BOSWELLS FAILED TO ESTABLISH THE ELEMENTS OF THEIR NEGLIGENCE AND NEGLIGENCE PER SE CLAIMS.

1. The record shows the Boswells failed to establish each element of their common law negligence claim.

For a valid claim of negligence, a plaintiff must show (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage. *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct. App. 2008)(*citing*, *Nation v. State, Dept of Corrections,* 144 Idaho 177, 189, 158 P.3d 953, 965 (2007)). The Boswells failed to meet their burden, and have not disputed that Mary Steele put up warning signs; that she and Amber Steele did not know Zoey to be dangerous or vicious; that prior to the incident, there had been no complaints or any adjudication that Zoey was dangerous or had bitten anyone without provocation; that Zoey nipped at a Chris Kettler, but only because Zoey saw Ms. Kettler reach or move towards

Amber Steele and was being protective of her; that Mary Steele and Amber Steele never saw Zoey bear her teeth, snarl or lunge at someone; that Mary Steele had a fenced-in back yard to keep Zoey on her property; that Zoey stayed in the basement or was behind the gate in the kitchen, where she was at the time of the incident.

Further, the Boswells do not dispute that **Mr. Boswell, on his own, and without Mary's knowledge or her at her request, approached Zoey, who was behind the gate, with his right hand in a closed fist.** R., 219 (Stephen Boswell Depo., p. 29, l.7-p. 33, l.5). Mr. Boswell reached to Zoey and she bit him. The Boswells do not dispute Mr. Boswell admitted that there was no reason for him to go beyond the gate, and that Mary Steele never asked him to go to Zoey, and he decided on his own to go to Zoey. R., p. 184 (Mary Steele Depo., p. 12; p. 40, ll. 14-18; R., p.218 (Stephen Boswell Depo. p. 25, ll.22-24).

Even more telling is that **the Boswells admitted that they knew that Mary Steele and Amber Steele kept Zoey in the basement, and did not think Mary did anything wrong in keeping Zoey in a fenced in back yard or behind the gate in her house.** R., p. 220 (Stephen Boswell Depo., p. 34, l.24-p. 35, l.1; R., 232 &238(Karena Boswell Depo., p. 19, ll.2-6; p. 42, l.10-p. 43, l.3). Mrs. Boswell admitted after the bite, she still was around Zoey and did not have any concerns, could not say Zoey's conduct was predictable and could not be critical of Mary Steele's actions. R., p. 232, 236, 238(Karena Boswell Depo., p. 17, ll.19-23; p. 33, ll.1-8; p. 42, l.10-p.43, l.3).

The District Court correctly concluded that Mr. Boswell was a social guest, not an invitee. R., 465-66; 484, 485. In its decisions, the District Court correctly outlined the elements of negligence, citing to *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct. App. 2008). R.,p. 465. The District Court then, properly, stated "the Boswells failed to establish that Mary Steele had a recognizable duty to Mr. Boswell." R., p. 465. The District Court then, as it properly should have, discussed the issue of premises liability, in relation to the duties owed to an invitee and licensee. R., p. 465-66. What the Boswells fail to recognize is that premises liability is a form of negligence, and the duty owed is determined on the status of the person entering the premises, i.e. invitee, to whom the owner owes a duty to keep the premises safe and warn of hidden or concealed dangers and licensee, or social guest, to whom a landlord only owes a duty to disclose *known* dangerous conditions or activities on the land. The District Court went through this analysis, citing to *Bates v. EIRMC*, 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988), *Wilson v. Bogert*, 81 Idaho 535, 545, 347 P.2d 341, 347 (1959) and *Pincock v. McCoy*, 48 Idaho 227, 281 P.2d 371 (1929), and determined, based on the undisputed facts in the record, that Mr. Boswell was not an invitee, but a licensee or social guest, as he was not conferring any business, commercial or monetary or other tangible benefit to Mary Steele. R.,466. The District Court then went on to properly determine that as the Boswells failed to establish evidence that Mary Steele breached her duty, as the record was undisputed that Zoey was behind a gate in the kitchen, in an enclosed area, where she was supposed to be, and it was Mr. Boswell who approached Zoey, on his own accord, putting his closed fist to Zoey and was bitten. R., p. 466. In denying the Boswells' motion for reconsideration, the District

Court correctly and succinctly stated the Boswells failed to meet their burden in establishing negligence, reasoning:

> Although Defendants knew of the prior bites by the dog, they also knew of the circumstances of these bites and were not on notice that they were harboring a dangerous animal. In addition, the injuries received by the Plaintiff occurred as the result of his approaching the dog which was behind a closed gate. Plaintiff's actions were a proximate cause of his own injuries.

R., p. 487. Again, the record clearly shows the Boswells failed to meet their burden on summary judgment, and that the District Court properly granted summary judgment to Mary Steele and Amber Steele.

2. The Boswells failed to meet the elements of their negligence per se claims.

The Boswells asserted negligence per se pursuant to Pocatello City Code 6.04.050 and Idaho Code §25-2805. On both of those matters, the Boswells failed to meet each element to establish their negligence per se claims, thereby entitling Mary Steele and Amber Steele to summary judgment.

As the District Court stated in its decision, to establish a claim for negligence per se, a plaintiff must show that:(1) the statute or regulation clearly defines the required standard of conduct; (2) that the statute or regulation is intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff is a member of the class of persons the statute or regulation was designed to protect; and (4) the violation was the proximate cause of the injury. R., p. 485(citing *Jones v. Starnes,* 150 Idaho 257, 262, 245 P.3d 1009, 1014 (2011); *O'Guin v. Bingham County,* 142

Idaho 49, 52, 122 P.3d 308, 311 (2005); *Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001).

Pocatello City Code 6.04.050 provides, in relevant part, as follows:

> 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 c 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[...]
> 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.[Emphasis supplied].

Pocatello City Ordinance 6.04.060 sets forth restraint requirements, stating that, "[t]he

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 . . . ." Sections 6.04.050A and B provide that a person cannot harbor a dangerous animal only after an animal is "adjudicated" as dangerous. Further, this is supported by the language of section 6.04.060 mandates restraint of a dangerous animal where "the owner/custodian of any animal **convicted** of a violation of the dangerous conduct prohibitions . . . ." [Emphasis supplied].

Likewise, I.C. §25-2805 provides that a vicious dog is a dog, "which, **when not physically provoked**, physically attacks, wounds, bites or otherwise injures any person who is not trespassing . . . ." and that, "[p]ersons guilty of a violation of this subsection . . .shall be guilty of a misdemeanor." [Emphasis supplied].

The District Court found the Pocatello City Code failed to comply with the first prong of the negligence per se analysis, which requires that the "regulation clearly defines the required standard of conduct." Deficient in the code were definitions of what constitutes "provocation" or what "threatening manner by any person" means. R., p. 486. Thus, the Boswells' reliance on the city code is faulty and that aspect of their negligence per se claim was properly dismissed.

Additionally, the District Court properly noted that the record was void of any facts showing Amber Steele or Mary Steele knew Zoey was vicious or dangerous or that the attack was unprovoked. This comports with the aforementioned codes and statute. Sections 6.04.050A and B provide that a person cannot harbor a dangerous animal only after an animal is "adjudicated" as dangerous. Further, section 6.05.060 mandates restraint of a dangerous animal where "the

owner/custodian of any animal [is] **convicted of a violation of the dangerous conduct prohibitions** . . . ." Likewise, §25-2805 provides that a vicious dog is a dog, "which, **when not physically provoked**, physically attacks, wounds, bites or otherwise injures any person who is not trespassing . . . ." and that, "[p]ersons guilty of a violation of this subsection . . .shall be guilty of a misdemeanor." [Emphasis supplied]. Again, there was no factual dispute that there had been no adjudication that Zoey was found to be dangerous or vicious. Further, Mr. Boswell admitted, on his own, and without telling Mary, he approached Zoey, **with a closed fist**, and put his closed fist to her face. This certainly qualifies as provocation, thereby negating any basis for Plaintiffs' negligence per se claims, which the District Court properly recognized as undisputed.

Furthermore, the District Court found that the fourth prong of the negligence per se analysis, that the violation was the proximate cause of the injury, was not met by the Boswells. Again, as the record unequivocally shows, Mr. Boswell approached Zoey, extended his arm beyond the gate that enclosed her in the kitchen and it was his conduct that was the proximate cause of his injury. R., p. 486. It cannot be overstated that Mr. Boswell admitted, on his own, and without telling Mary, he approached Zoey, **with a closed fist** (despite attempting to contradict this testimony in his inadmissible affidavit), and put his closed fist to her face. R., 219-20 (Stephen Boswell Depo. p. 29, l.7-p. 33, l.5)

Additionally, the Boswells' argument that the District Court should have addressed non-binding decisions from other jurisdictions lack merit. Again, those decisions are non-binding, and not consistent with Idaho law. Thus, the District Court correctly granted summary judgment and this Court should affirm that decision.

3. There is no private cause of action under Idaho Code § 25-2805 or Pocatello City Codes §§ 6.04.050 and 6.04.060.

It is patently obvious, in reviewing the city codes and Idaho statute asserted by the Boswells there is no private cause of action, either express or implied. "When a statute is silent regarding private enforcement, courts may recognize a private right only when it is necessary to assure effectiveness of the statute." *Foster v. Shore Club Lodge, Inc.,* 127 Idaho 921, 908 P.2d 1228 (1995); *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 101, 730 P.2d 1014, 1021 (1986)). Likewise, this Court has held that there was no private cause of action for an insured who sought to sue its insurer under criminal statutes for obstruction of justice, bribery and corrupt influences, reasoning that those statutes were not designed to protect any special class of persons, only the general public, and that there was no legislative intent to create a private cause of action through those statutes. *Yoakum v. Hartford Fire Ins. Co.,* 129 Idaho 171, 176, 923 P.2d 416, 421 (1996). It is clear that a private cause of action is unnecessary to give effect to §§ 25-2805 or Pocatello City Codes §§ 6.04.050 and 6.04.060. Those statutes do not establish any right of the Boswells, either express or implied, and are expressly limited to criminal sanctions. The Boswells'' attempt to invoke a private right under the statutes is an attempt to assert a criminal statute in a civil action, which was expressly prohibited by the Court in *Yoakum, supra.* If the Idaho legislature or Pocatello City wanted to

provide for a private cause of action through Idaho Code § 25-2805 and Pocatello City Codes §§6.04.050 and 6.04.060, they could have expressly provided for civil remedies, but only set forth criminal remedies. As a result, since those statutes do not provide for a private cause of action, the Court should find this as an additional basis for dismissal of the Boswells' claims.

D. THERE IS NO FACTUAL DISPUTE THAT AMBER STEELE DID NOT OWN THE PROPERTY WHERE THE INCIDENT OCCURRED, AND SUMMARY JUDGMENT WAS PROPERLY GRANTED TO HER.

The Boswells have not put forth any facts disputing Amber Steele was not an owner of the premises where the incident occurred. They also fail to cite to any case law contrary to the case law cited by Amber Steele that only a landowner owes a duty to a person entering the premises, subject to the person's status as an invitee, licensee or trespasser. *See, supra, at 18-19.* As Amber Steele did not own the premises, summary judgment was properly granted to her.

E. THE DISTRICT COURT PROPERLY EXCLUDED THE AFFIDAVIT OF TAMARA ANDERSEN.

Idaho Rule of Civil Procedure 56(e) provides, in pertinent part, as follows:

> Supporting 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.

Additionally, Idaho Rule of Evidence 401 provides:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 provides:

> All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Rule 404 provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Further, as to testimony of witnesses, lay and expert testimony "is governed by the rules of evidence regarding the opinion testimony of lay witnesses and experts under *Idaho Rules of Evidence*

701 and 702." I.R.E. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

However, expert testimony that is based on speculation, is not admissible under Rule 702. Speculation, as it relates to expert testimony is defined as "the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge." *Karlson v. Harris,* 140 Idaho 561, 564, 97 P.3d 428, 432 (2004).

> An expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue. **Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded."**

Id. [Emphasis added] [Internal citations omitted]. *See also Jones v. Crawforth,* 147 Idaho 11, 205 P.3d 660 (2009) (expert opinions are only admissible if they assist the trier of fact in understanding the evidence or determining an issue of fact); *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007) (expert opinion that is speculative, conclusory or unsubstantiated by facts in the record does not assist the jury and is inadmissible).

Ms. Andersen's affidavit was conclusory, lacked foundation and was based on speculation. R., pp. 78-80. For example, in paragraph 11, Ms. Andersen failed to provide any foundation as to her conclusion what a "previous bite" was. R., p. 79. Further, in paragraph 12, Ms. Andersen's statement is based on her unfounded premise Amber Steele was not honest with her, which is a

credibility issue for a jury to decide, not something to which Ms. Andersen can provide testimony. R.,p. 79. *See, State v. Parry,* 150 Idaho 209, 229, 245 P.3d 961, 981 (2010). The averment was also based on speculation and should be stricken. Further, paragraphs 13-17 were based on pure speculation. R., pp. 79-80. Ms. Andersen never examined or conducted any personal evaluation of Zoey, and, in essence, she tried to say that Zoey had the propensity or habit of biting people, without foundation, which led to Mr. Boswell's being bitten, which violates Idaho Rule of Evidence 404. Ms. Andersen apparently did not supplement her affidavit, as after she submitted it, she could have read the deposition of Mr. Boswell, who admitted he approached and reached over to Zoey with a closed fist. Thus, Ms. Andersen's opinions lacked foundation and were conclusory. The District Court correctly concluded that such opinions were conclusory, reasoning that Ms. Andersen failed to make any additional study of Zoey's behavior or other witnesses, as well as her "unfounded conclusion that Amber 'lied' to her at the time of the incident." R., pp. 465-66.

F. THE DISTRICT COURT CORRECTLY QUASHED THE DEPOSITION SUBPOENA OF JOHN BILLQUIST.

Mr. Billquist, a former adjuster for Mary Steele's and Amber Steele's insurer, State Farm, never made a witness of himself. Rather, Mr. Billquist wrote a letter to the Boswells' attorney, in response to their settlement demand. Thus, the letter he sent was not admissible pursuant to Idaho Rule of Evidence 408, which prohibits the admission of settlement discussions. It states:

> Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity

> or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation.

At the hearing on July 16, 2013, the District Court concluded that Mr. Billquist could not be deposed about the letter, citing the Court's holding from *Dabestani v. Bellus,* 131 Idaho 542, 961 P.2d. 633 (1998), which precluded the disclosure, under the work product privilege, of an adjuster's statement of another party. Tr., p. 10. Further, Mr. Billquist's letter was a settlement discussion, as clearly, the first part of the letter stated, "This letter is in response to your demand of August 29, 2012. R., 77. I.R.E. expressly prohibits the letter and Mr. Billquist's deposition.

Additionally, there was no waiver of any attorney client or work product privilege as the Boswells' argue. While not cited by the Boswells in their opening brief on appeal, below, they cited to *Skelton v. Spencer,* 98 Idaho 417, 420, 565 P.2d 1374, 1377 (1977), where this Court cited to the U.S. Supreme Court, *Hunt v. Blackburn,* 128 US 464, 470-71 (1888), for the well-settled principle that the attorney client privilege "is that of the client alone. . . ." Additionally, Idaho Rule of Evidence 502(c) also specifically provides that only the client may assert the privilege:

> Who may claim the privilege. The privilege may be claimed by the client or for the client through the client's lawyer, the guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but

> only on behalf of the client. The authority of the lawyer or lawyer's representative to do so is presumed in the absence of evidence to the contrary.

Furthermore, Idaho Rule of Evidence 510, related to waiver of privilege by voluntary disclosure provides that the holder of the privilege waives such privilege when the holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

In this matter, the Boswells have not provided any evidence establishing that Mary Steele or Amber Steele waived the attorney client or work product privileges. The District Court previously and correctly found that the work product privilege set forth in *Dabestani*, barred the deposition of Mr. Billquist, and his letter in no way was a waiver of any privilege. Further, Mr. Billquist was not a witness, and had no personal knowledge of the Chris Kettler incident. Ultimately, the District Court correctly found that the record clearly showed that neither privilege had been waived.

G. AMBER STEELE AND MARY STEELE, NOT THE BOSWELLS, ARE ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Amber Steele and Mary Steele are entitled to attorney's fees and costs under Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41. In addition, Idaho Code § 12-121 and I.A.R. 41 allow for the award of attorney's fees and costs in a civil action where a matter was defended frivolously, unreasonably and without foundation. *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Additionally, I.A.R. 40 allows for the award of costs to the prevailing party on appeal.

It is patently clear the Boswells have pursued their claims frivolously, unreasonably and

without foundation. The law is well settled that there is no strict liability in dog bite cases in Idaho, and the record is abundantly clear that the Boswells failed to meet their burden of establishing their negligence, negligence per se and premises liability claims. Based upon the aforementioned statute and rules, as well as I.A.R. 40, Northwest is entitled to an award of attorney's fees and costs on appeal.

V. CONCLUSION

Based on the foregoing, Defendants/Respondents Amber Steele and Mary Steele request that the Court affirm the District Court's grant of summary judgment to them, dismissing Plaintiffs/Appellants Stephen Boswell's and Karina Boswell's claims, in their entirety, with prejudice. Defendants/Respondents further request the Court award them their attorney's fees and costs on appeal.

DATED this 29 day of September, 2014.

COOPER & LARSEN, CHARTERED

By _____
REED W. LARSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of September, 2014, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Kent Higgins	[X]	U.S. Mail/Postage Prepaid
Merrill & Merrill, Chtd.	[ ]	Hand Delivery
PO BOX 991	[ ]	Overnight Mail
Pocatello, ID 83204-0991	[ ]	Facsimile / 232-2499