10-27-2014

Boswell v. Steele Appellant's Reply 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' REPLY BRIEF

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

Reed W. Larsen
Javier L. Gabiola
COOPER & LARSEN, CHTD
P.O. Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Facsimile: (208) 235-1182
Attorneys for Appellees

Kent A. Higgins
MERRILL & MERRILL, CHTD
P.O. Box 991
Pocatello, Idaho 83204-0991
Telephone: (208) 232-2286
Facsimile: (208) 232-2499
Attorneys for Appellants

TABLE OF CONTENTS:

Page

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

OTHER AUTHORITIES:

REPLY ARGUMENT

A. Idaho Is a Strict Liability State in More Ways than One.

The Defense opens its response argument with this declaration: "Idaho has only adopted the concept of strict liability in cases dealing with the seller of a defective product to a consumer," (Res. Br. P. 10).

Actually, Idaho recognizes strict liability in a myriad of circumstances. For example, Idaho recognizes strict liability at common law of a bailee for the misdelivery of goods. *Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 938 P.2d 189 (1997).

Idaho recognizes strict liability at common law of a corporation for the crimes of its agent. *State v. Adjustment Dep't Credit Bureau, Inc.*, 94 Idaho 156, 158-59, 483 P.2d 687, 689-90 (1971).

Idaho recognizes strict liability at common law for commercial carriers who fail to safely transport goods. *McIntosh v. Oregon R. & Nav. Co.*, 17 Idaho 100, 105 P.66 (1909).

Idaho recognizes strict liability at common law for livestock dealers who fail to pay for purchased cattle. *U.S. Fidelity & Guaranty Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969).

Under Idaho Code § 6-320 Idaho recognizes strict liability for a landlord who fails to keep the premises safe for tenants. *(Jesse v. Lindsley,* 149 Idaho 70, 233 P.3d 1 (2008)).

Under Idaho Code § 6-210 Idaho recognizes strict liability of a parent for harm done by a minor child.

Under Idaho Code § 25-2806 Idaho recognizes strict liability of an owner of a dog that injures poultry or livestock.

In the criminal realm, Idaho recognizes strict liability for injury caused by a defendant guilty of aggravated DUI, I.C. § 18-8006. *State v. Robinett*, 141 Idaho 110, 106 P.3d 436 (2005); Idaho recognizes strict liability without criminal negligence for failure to affix illegal drug stamps. *State v. Romero-Garcia,* 139 Idaho 199, 204, 75 P.3d 1209 (Ct. App. 2003); for vehicular manslaughter, *Haxforth v. State,* 117 Idaho 189, 786 P.2d 580 (1990); for statutory rape, *State v. Stiffler,* 117 Idaho 405, 410, 788 P.2d 220 (1990); for sale of securities when not licensed, *State v. Montgomery,* 135 Idaho 348, 17 P.3d 292 (2001); and for driving without a valid driver's license. *State v. Taylor,* 139 Idaho 402, 80 P.3d 338 (2002).

An employer is also strictly liable for statutory penalties for failure to secure payment for workers compensation. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

Last, and most importantly, Idaho recognizes common law strict liability, and strict premises liability, in dogbite cases when an owner or harborer of a dog knows or ought to know the dog will cause injury. *McClain v. Lewiston Interstate Fair & Racing Ass'n,* 17 Idaho 63, 104 P. 1015 (1909).

In *McClain* the Idaho Supreme Court declared:

> If domestic animals, such as oxen and horses, injure any one,[sic] 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. at 1016.

Although the wording is not word-for-word exactly the same, the sentiment of the declaration of law is identical to that of the *Restatement (Second) of Torts,* § 513 (1977):

> The possessor of a wild animal or an abnormally dangerous domestic animal 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.

The sentiments of both statements are identical. It doesn't matter whether Zoey was behind a gate where she belonged. It wouldn't matter if the gate had been put up to keep Zoey from biting people, although it wasn't. It was erected to keep Mary's Shih Tzu from urinating on the living room carpet. It doesn't matter if Steve Boswell was there as an invitee or a licensee.

Under either the declaration of law in *McLain,* or the declaration of law in the *Restatement (Second) of Torts* § 513 (1977), the outcome is the same. The harborer of the dog is strictly liable to <u>anyone</u> coming onto the property whether invitee or licensee if the dog is known to bite.

The Defense's opening declaration, and twice more repeated in their brief, is: "*Idaho has only adopted the concept of strict liability on cases dealing with a seller of a defective product to a consumer*," "*Again, the only time strict liability has been allowed in Idaho is in products liability cases*," and "*The District Court properly followed Idaho law, which does not recognize strict liability in cases other than products liability.*" But such is <u>not</u> the law in Idaho.

Some matters in the law just lend themselves to the application of strict liability. Harboring a child who destroys others' property is one of them. (I.C.§ 6-210). Harboring a dog that injures others' chickens and sheep is another. (I.C.§ 25-2806). And harboring a dog that bites other people's hands is another. (*McClain, supra.*).

B. Idaho Law on Domestic Animals Is Broad Enough to Cover Dogbite.

Since the declaration of law from *McClain* speaks only of a dog "rightfully in the place where they do the mischief, the Defense adheres to the view that it is not possible to extrapolate an Idaho position on dogbite law irrespective of whether or not the dog is "rightfully in its place." Plaintiffs hold to the opposite view. If, as the *Restatement* says, and as *McClain* says: a dog owner is strictly liable for a mischievous dog when the dog is in its rightful place; then *a fortiori,* an owner who knows a dog will bite is also strictly liable whether the dog is at home or elsewhere. Just as the *Restatement* says:

> (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.

Restatement (Second) of Torts § 509 (1977).

> And just as the newer *Restatement* says:
>
> 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).

The *McClain* declaration, the *Restatement (Second)* declarations on premises liability and dogbite liability, and the *Restatement (Third)* declaration on dogbite liability are also completely consistent with the Idaho Code § 25-2805(b) 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.

Just like *McClain*, just like the *Restatements*, the Idaho Code does not distinguish between dogbite injuries to licensees or invitees – only trespassers. The argument over invitee *vs.* licensee is the proverbial red herring. The Idaho Code does not excuse dogs "in their rightful place." A "***secure*** enclosure" is the only insurance for the owner of a vicious dog. What constitutes a secure enclosure is a question of fact appropriate for a jury to decide. It is not appropriate to dispose of on summary judgment.

C. Silence on the Law Does Not Mean the Defense Prevails.

The law in Idaho, at least until now, has never been if the Plaintiff cannot cite to Idaho precedent the Defense automatically prevails. One reason this Court has adopted the *Restatement* 237 times out of the last 240 the *Restatement on Torts* has been considered is because Idaho doesn't always have a prior decision directly on every point of law. That does not mean, that the Plaintiff has no cause of action due to lack of precedent.

Assuming, *arguendo*, we ignore *McClain*; we assume *McClain* is not directly on point, or that its statement of the law is dicta, it does not follow that Idaho rejects strict liability for repeat offender canines. It does not follow that Idaho rejects the *Restatements*. It does not follow that Idaho rejects the majority view held by other states. Even assuming *McClain* is insufficient in itself to substantiate the positive, that does not automatically establish the negative. At least Plaintiffs have one case in their favor. Defendants have none.

Idaho law is not silent on the liability of an owner of a dog that is known to do mischief. *McClain*. Just as the Defendants' err in declaring that Idaho only recognizes strict liability is in the case of products liability, Defendants also err in declaring "*the law is well settled that there is no strict liability in dogbite cases in Idaho.*" (Res. Br. P. 33. l, 1)

The Defense believes that because the *McClain* case involved a large Greyhound that trespassed onto a race track, the principle of law enunciated in *McClain* cannot be generalized beyond the specific facts of the case. The Defense's reading of *McClain* is so narrow that the principles of law in that case would not apply to a dog biting, to a horse kicking, or a bull charging, but only to a Greyhound, a large one at that, that runs onto a race track; the principle of law would not apply if the dog was a Doberman or a German Shepherd.

The *McClain* case is recognized in Supreme Court decisions of two other states as standing for the proposition that if a dog owner has knowledge that the dog has a propensity to do injury, the owner is accountable. *Hunt v. Hazen,* 197 Or. 637, 639-40, 254 P.2d 210,211 (1953); *Barber v. Hockstrasser*, 136 N.J.L. 76, 80, 54 A.2d 458, 560 (Sup. Ct. 1947). The *McClain* case is recognized by at least four secondary sources as standing for the same proposition. Allison E. Butler, *33 Causes of Action 2d 293* (Originally published in 2007) p. 52; Adam P. Karp, J.D., M.S. *38 Causes of Action 2d 281* (originally published in 2008) p. 42; 38 Causes of Action 2d 281 [Cumulative Supplement] p. 5; George Ducker, Ph.D. Esq., *Animal Wrongs: On Holding Animals to (and Excusing Them from) Legal Responsibility for Their Intentional Acts.* 2 JAnimal L. & Eth. 91, 121 (2007). At least the Plaintiffs have the *McClain* case, two opinions of other state courts applying *McClain,* and four secondary sources. So far, neither party presents any authority to the contrary.

Even if precedent does not prove Idaho is a strict liability state, the law does not default to conclude Idaho is not a strict liability state. The default is to address the matter as an issue of first impression. The approach to handle a matter of first impression is set by Idaho Code § 73-116, i.e. to follow the common law[1]. The common law on dogbite is recognized as being embodied in the *Restatement (Second) of Torts* § 509 (1977). *Borns v. Gannon*, 2003 Wyo. 74, 70 P.3d 262, 266 (2003). The Defense has yet to acknowledge the *Restatements*, or address them. The silence of any authority to say Idaho is not a strict liability speaks volumes.

D. Issues of Fact Should Be Given to the Jury.

If the "Boswells failed to meet their burden of establishing their negligence, negligence per se and premises liability claims" (Res. Br. P.33, l. 2-3) it is because they were deprived of a trial where they would have had to meet that burden. Setting aside strict liability for now and addressing Plaintiffs' other claims of negligence, several issues of disputed fact were treated as issues of law. Several others were construed against the plaintiffs despite ample disputation of the Defense's version of the facts:

Whether a canine puncture that draws blood is a meaningless "nip" or a portentous "bite" is a question of fact for a jury. *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008).

---

[1] **I.C. §73-116. Common law in force**

> The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the Untied States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.

Likewise, irrespective of its characterization as "nipping" or "biting" whether such penetration of human flesh constitutes notice of a vicious propensity is a question of fact for a jury to decide. *Earl v. Pioway*, 42 A.D.3d 865, 839 N.Y.S.2d 861, (2007); *Haberman v. Babai*, 21 Misc. 2d 1093, 14 N.Y.S.2d 721 (1959); *Rogers by Rogers v. Travis,* 229 A.D.2d 879, 646 N.Y.S.2d 206 (1996). Whether the owner of a dog has superior knowledge to the injured victim is a question of fact for the jury to decide. *Willis v. Neal*, 179 Ga. App. 732, 347 S.E.2d 700 (1986).

Whether a dog was provoked before it bit is a question of fact for the jury to decide. *Toney v. Bouthillier*, 129 Ariz. 402, 631 P.2d 557 (1981); *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (1982); *Engquist v. Loyas*, 787 N.W.2d 220 (2010); *Ward ex rel. Ward v. Freiderich,* Not Reported in N.W.2d (2006).

Even if we assume *arguendo* that it matters, Defense applies the wrong standard as to whether Steve Boswell was a licensee or an invitee. The Defense words the standard as follows:

> "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 – ane never conferred any money, business of commercial benefit to Mary Steele."

In fact, the standard is actually as follows:

> 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***.

Ball v. City of Blackfoot, 152 Idaho 673, 677, 273 P.3d 1266, 1270 (2012).

Steve Boswell provided transportation to Mary Steele to a party she wanted to go to. He provided her the ride home. He conferred a tangible benefit to her. More importantly, the status of licensee or invitee is an issue of fact for the jury to decide. *Willis v. Neal*, 179 Ga. App.732, 347 S.E.2d 700 (1986); *Ambort v. Nowlin*, 289 Ark.124, 70 S.W.2d 407 (1986).

Historians note well the infamous principle that "if you repeat something frequently enough people will sooner or later believe it." But repetition does not resolve issues of fact. The Defense says, eleven times in their opposition brief, that Steve Boswell came at the dog with a closed fist. Steve explained that he was only repeating the Defense's choice of words (fist) when he described

approaching the dog with the back of his hand, fingers curled together. (R. 325) Whether Steve was trying to threaten the dog with a poke on the nose with his fist, or, as he says, he was approaching the dog with the back of his hand, is a question of fact for the jury to decide. Although it was disputed, that issue got treated as undisputed fact because the Defense repeated it and repeated it – and repeated it.

And on that subject, whether a closed fist is or is not a threat to a dog is also an issue of fact for the finder of fact.

Whether the dog was growling, as stated three times in the response brief, or as Steve testified: "the dog was not growling but barking and wagging its tail," (R.219, L.15 of page 32). is a question of fact for the jury to decide.

Whether as stated five times, Steve Boswell reached over the fence, or as Steve testified vehemently, he never reached over the fence, but the dog reached over the fence to take off the back of his hand, (R. 219, L. 25-8 of pp. 31-32) is a question of fact for the jury to decide.

Credibility of witnesses is also an issue of fact for the jury to decide. *Bradley v. Hendricks,* 251 Ark. 733, 474 S.W.2d 677 (1972).

Whether, as represented six times, Defendants had no warning the dog was dangerous (despite two previous biting incidents!), or as represented twice that Zoey was only being protective, or three times that Steve did not think Mary or Amber did anything wrong, even though Steve testified Mary should have warned him the dog would bite (R. 230, L.4-15 of page 35), all of these issues are issues of fact for the jury. The subjective opinion that the attack was provoked by Steve, the random representation that Steve was bringing Mary home from a family gathering, (which he was not) though repeated incessantly does not make them reality.

Simply put, the district court took from the jury issues that were clearly in the purview of the jury as the trier of fact. Summary judgment should not have been granted against Steve and Karena Boswell. All these matters are issues of fact for a jury. If reasonable persons could reach different conclusions or draw conflicting inferences, summary judgment must be denied." (Respondents' Brief pages 8-9, citing *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996)).

F. Pocatello Municipal Code § 604.050 E Creates a Private Cause of Action.

The Defendants' response raises a host of issues not ripe for review because they were never ruled on by the Trial Court. While the proper way to address them is to let the District Court address

them first, as a precautionary measure Plaintiffs will address the Defenses claim that Pocatello Municipal Code §§ 6.04.010 et seq. does not create a private cause of action. Clearly it does. Section 6.04.050 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 judgments*** or penalties, criminal fines, final terms, and any other penalties and orders. . . .

(Emphasis added).

The code clearly intends to provide personal relief for injuries. Civil damages cannot be recovered unless obtained through a civil action. The Municipal Ordinance provides both a right and a remedy.

In *Meade v. Freeman,* 93 Idaho 389, 462 P.2d 54, 66-67 (1969) this Court declared the following concerning private rights of action:

> The violation of a statutory provision containing a mandate to do an act for the benefit of another, or ***a prohibition against the doing of an act which may be to his injury, is generally regarded as giving rise to a liability and creating a private right of action***, whenever the other elements essential to a recovery are present. This is true regardless of actual negligence on the part of the violator of the statute, and ***although no actions are given in express terms by the statute.*** *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 .2d 766, filed July 9, 1969. ***The test whether an individual injured by the violation of a statue may recover from the wrongdoer has been declared to be whether the legislature intended to give such right.***

Meade v. Freeman, 93 Idaho 389, 401-02, 462 P.2d 54, 66-67 (1969) overruled on other grounds by *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980). (Emphasis added).

This standard enunciated in *Meade* fits the parameters of the Pocatello Municipal Code as snugly as a custom made glove.

CONCLUSION

In summary, the Defense has premised its defense on several untenable premises. First, that Idaho only recognizes strict liability in products liability cases. Second, that Idaho law is silent on dogite liability. Third, that it is Plaintiffs' duty to produce precedent on every point of law, and if Plaintiffs fail, the law is always in the Defense's favor. Fourth, it is the prerogative of the court to draw legal conclusions as to whether a canine injury that draws blood is a bite or a nip; and if it's a

nip, whether a nip counts as bad behavior or "just being protective;" whether such "just protective" biting is acceptable behavior for a domestic dog; and whether reaching a hand towards a dog is, as a matter of law, such provocation as would justify any dog in removing the hand.

And finally, the Defense relies on its reading of the Pocatello Municipal Code as giving a right with no remedy; taking the view that a person injured by a dangerous dog has the right compensation for injuries sustained, plus costs and civil judgments, but the same person may not pursue the civil judgments. That is not how the law works.

The Boswell v. Steele summary judgment decision was not a proper application of Idaho law or Idaho jurisprudence.

For these reasons the decision should be reversed.

Respectfully submitted, this 23rd day of October, 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 23rd day of October, 2014, served upon the following in the manner indicated below:

Reed W. Larsen
Javier L. Gabiola
COOPER & LARSEN, CHARTERED
P.O. Box 4229
Pocatello, ID 83205-4229

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Overnight Delivery
[ ] Telefax

Kent A. Higgins