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IN THE DISTRICT SUPREME COURT OF THE STATE OF IDAHO

WHITNEY L. BRIGHT,

Plaintiff- Appellant,

vs.

ROMAN MAZNIK AND NATALYA K.
MAZNIK, husband and wife,

Respondents, and

JAMES R. THOMAS, KATHERINE L.
THOMAS,

Defendants.

Supreme Court Doc. No. 44129-2016

Canyon Co. Case No. CV2014-9957

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APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR THE COUNTY OF CANYON

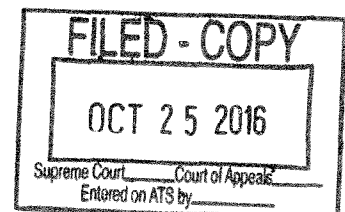
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STATEMENT OF THE CASE

(i) Nature of the Case:

This case is a personal injury action arising out of a dog attack of a Belgian Shepherd, which Complaint alleged *per se* violations of statute, strict liability, and negligence against the property owners and their tenants. The case involves the interpretation of Idaho Code § 25-2805(2) in addressing the liability of a property owner for injuries suffered due to an attack and bite from a vicious dog that is housed on property. The Appellant, Whitney Bright (“Bright”) seeks to reverse the summary judgment ruling issued in favor of the Respondents, Roman and Natalya Mazniks (“Mazniks” or “Landlord”) on the basis that there were material issues of fact existing in the record upon which the juror fact finders could rely to find the Landlord liable for the injuries caused by the vicious dog.

Bright contends that, by definition under Idaho Code § 25-2805(2), the dog owner “**and the owner of the premises**” on which the animal is housed, both have imposed on them a duty of responsibility resulting from an unprovoked attack by a vicious dog. There is no exception under the statute for lack of knowledge nor is there a requirement of a prior bite or attack. In fact, the statute details the further consequences of what happens on a “second or subsequent violation” so that it is clear that the first sentence of Idaho Code § 25-2805(2) applies to duties on the first attack of a vicious dog. Notwithstanding, the District Court ruled on summary judgment in favor of Mazniks following the theory that a vicious dog is allowed “one free bite” and holding that no duty attaches under the statute unless a prior incident clearly establishes a foreseeable harm.

Bright further contends that conflicting evidence existed in the record between witnesses as to the vicious nature and dangerous propensities of the dog. Statements made by both the owners of the dog and the closest neighbor established that the dog was dangerous, intimidating, barked wildly, and lunged hard at the neighbor on its leash. This was in conflict with the statements of the

Landlord's agent, who claimed that although the dog barked loudly when she picked up the rent each month from the tenants, she did not feel the dog was vicious. The conflicting statements asserted in the evidence constitute material issues of fact that should have prevented the case from determination at summary judgment and allowed the case to proceed to a jury trial. A jury should be allowed to weigh the material factual issues regarding knowledge of the dangerous and vicious propensities of the dog as against the owner of the premises, the Landlord.

(ii) Course of Proceedings:

Bright filed a Complaint on September 25, 2014, bringing her claim for personal injury damages resulting from a vicious dog attack against both the dog owner, and the Mazniks, as owners of the property where the vicious dog was housed. R. Vol. I, pp. 5-9. The Complaint alleged that the Mazniks had a duty under Canyon County Code and Nampa City Code to keep the dog restrained and controlled at all times, as well as causes of action for strict liability and negligence. R. Vol. I, pp. 5-9. The Complaint alleged that the Mazniks are the owners of the property harboring the dog with the vicious nature, disposition and propensity where the Mazniks knew of, or had reason to know of, the vicious nature of the dog. R. Vol. I, pp. 7-8.

Bright filed her First Amended Complaint on May 20, 2015, to add the wife of the dog owner as a Defendant. R. Vol. I, p. 3 and R. Vol. I, pp. 97-102. The proceeding against Defendants James and Katherine Thomas ("Thomases"), the owners of the dog, proceeded through default and a Judgment for \$25,000 was entered on March 24, 2016. R. Vol. I, p. 280. That Judgment against the dog owners, Thomases, is not at issue in this appeal.

Mazniks filed an Answer to the Complaint and a demand for jury trial on November 10, 2014. R. Vol. I, pp. 10-17. A Motion for Summary Judgment was filed by the Mazniks on April 15, 2015, arguing that the Respondents do not have a statutory or common law duty with regard to

the dog owned by the Thomases and further sought the dismissal of Mazniks as defendants in the case. R. Vol. I, pp. 20-21.

Bright filed her Memorandum in Opposition to Defendants' Motion for Summary Judgment on June 8, 2015 (R. Vol. 1, pp. 139-142) asserting Defendant Thomas' testimony and the testimony of the dog owners' closest neighbor, Janette Endecott ("Endecott") established that this dog was intimidating, dangerous, and known to be vicious. R. Vol. I, pp. 155 and 106-107. The Memorandum further sets out the facts showing that Mazniks, through their agent, had approved the Belgian Shepherd dog in the Residential Lease/Rental Agreement, and personally collected the rent from the tenants each month and had personally observed the dog's behavior and demeanor. R. Vol. I, p. 60, 78. Bright's Memorandum in Opposition of Summary Judgment asserted that: (i) this was a vicious dog by definition under Idaho Code § 25-2805(2); (ii) the Mazniks, through their agent, Ms. Neddo, had knowledge of, or should have known about the vicious nature of the dog; and (iii) therefore, under the statute, the Mazniks could be liable for the injuries caused to by the dog. R. Vol. I, pp. 186-195. There is no statutory requirement that the dog must have a prior bite or attack for liability to attach under the clear language of Idaho Code § 25-2805(2). The statute further does not distinguish between whether the property owner is a landlord or an owner occupying the property.

A hearing on the Summary Judgment Motion was conducted by the court on June 18, 2015, and the court issued its Memorandum Decision Upon Defendants' Motion for Summary Judgment on July, 17, 2015. R. Vol. I, p. 236-249. The court determined that an ambiguity existed in the statute which required the court to look to the reasonableness and the public policy behind the statute and legislative history. R. Vol. I, p. 240. The court held that because there was no evidence in the record that the Dog had physically attacked or otherwise bitten anyone prior to this incident,

the court found that the Mazniks were entitled to judgment as a matter of law on Bright's negligence *per se*, strict liability, and negligence claims.

(iii) Statement of Facts:

The Mazniks are the owners of real property in Canyon County, Idaho, identified as 813 Heartland Court, Nampa, Idaho (the "Property"). The Property includes a townhome unit that the Mazniks rented out through their property management agent, Cashflow Management. R. Vol. I, pp. 55-60. On January 21, 2014, the Defendants Thomases ("Thomases") jointly owned a large dog of the German or Belgium Shepherd breed ("the Dog"), which was approximately six and a half (6 ½) years old. R. Vol. I, p. 98. Thomases lived with the Dog at their residence located at the Property. Thomases had actual knowledge that the Dog had violent propensities and was a danger to other persons. The Thomases did not keep the Dog reasonably and properly confined. R. Vol. I, p. 98. Mr. Thomas told the investigating police officer that the Dog had been "protective trained." R. Vol. I, p. 147.

Mazniks, as owners of the Property wherein the Thomases resided, knew or should have known that the occupants of the residence were harboring the dangerous Dog. The Mazniks' knowledge and actions are as imputed from their property management agent, the principal of Cashflow Management, Trina Neddo (Ms. Neddo), who personally collected the rents each month from the tenants of the properties and had personally observed the vicious Dog on these occasions. Ms. Neddo testified to her agency with the property owners as follows:

6 Q. Do you have any problem stating that anything
7 you did in relation to Mr. Thomas, this case, anything
8 you did or did not do was within the scope of your
9 agency on behalf of Roman Maznik?

10 A. Yes, I do.

11 Q. Do you agree to that?

12 A. Yes.

13 Q. And do you agree that anything that was within
14 your knowledge or not within your knowledge is also
15 within the scope of your agency with Mr. Maznik?

16 A. Yes.

(Depo. of Trina Neddo, pg 62, lines 6-16, Exh. C, Affidavit of Pope.) R. Vol. I, p. 78.

The Mazniks, through their agent, lease almost exclusively (approximately 90%) to tenants with pets and often to tenants with large dogs. (Depo. of Trina Neddo, pg 22, lines 16-19, Exh. C, Affidavit of Pope.) R. Vol. I, p. 68. Their agent regulated the dogs of their tenants including the present dog owners, Thomases, by having them enter into a “Pet Agreement” which was attached to their lease and that required: (1) that the Dog be “kept under control at all times”; (2) that the Dog “be restrained when it is outside”; (3) that the Dog should not cause any “annoyance of discomfort to others”; and (4) that “any damage” by the Dog should be immediately paid for. The Pet Agreement made the Mazniks aware the Thomases owned a large “Belgian Shepherd (40 lbs.)” R. Vol. I, p. 60. The Mazniks, through their agent, were further involved in prior pet investigations as evidenced by their responses to interrogatories that: “Defendants Roman Maznik and Natalya K. Maznik entrusted Cashflow Management to deal with all necessary measures to provide safe rental premises, including checking the breed of the pet and avoids leasing the property to the Tenant with aggressive breeds.” R. Vol. I, p. 180. A Belgian Shepherd dog is the same breed that the U.S. Secret Service uses “to guard the grounds of the White House.” R. Vol. I, p. 174.

The Dog at issue in this case had no outside dog run or fenced yard and was kept in-doors constantly, except for occasional walks. As testified to by its owners, the dog received no socialization outside its cooped up home such that “if anybody got within our radius he turned his hackles up and was on guard” meaning the dog “got into a stance where he is ready to jump on you” “He was scared. If someone came near us that he didn’t know he responded like a scared animal would. He would bark.” (Depo. of Katherine Thomas, pgs. 15-19, Exh. 3, Aff. of Bright.) R. Vol. I, pp. 154-155. Mrs. Thomas further testified:

4 Q. So it was a warning bark?
5 A. Yes.
6 Q. And how loud was the bark?
7 A. He had a pretty loud bark.
8 Q. Was it what an average person would consider
9 an intimidating bark?
10 A. Yes.
11 Q. How would the average person interpret it to
12 be intimidating?
13 A. It's loud. And there is a dog standing there
14 barking at you looking at you straight in the eye. To
15 me that is intimidating.

(Depo. of Katherine Thomas, pgs. 16-19, Exh. 3, Aff. of Bright.) R. Vol. I, pp. 154-155.

Mr. Thomas told the investigating police officer that the Dog had been “protective trained.” R. Vol. I, p. 147.

A neighbor who was closest to the Property residence testified that:

The residents of 813 Heartland Court, Nampa, Idaho have had in past years a large German Shepherd or similar Shepherd breed dog. After the residents of 813 moved in, the gentleman owner of the dog came over to my front door, introduced himself and said “this is not a friendly dog” and it is a “retired police dog.”

On more than one occasion when I was out working in the yard, and the neighbor would walk his large Shepherd dog to the mail box, the dog would bark wildly at me and lunge hard against its leash toward me. There was no question in my mind but that this was a vicious dog.

(Affidavit of Janette Endecott). R. Vol. I, pp. 106-107.

The Mazniks through their agent, had monthly contact with the vicious Dog because the property manager personally went to the Property each month and collected the rent in person:

1 Q. How much contact did you have with Trina Neddo [Masnik’s agent]
2 or her husband from 2009 to September of 2014 while you
3 lived at 813 Heartland Court?
4 A. Monthly contact for rent pick up. And
5 whenever there was an issue with any maintenance of the
6 apartment.
7 Q. Did you ever have Murphy, the dog, in the
8 presence of Trina Neddo?
9 A. Yes.
10 Q. And did she observe the dog?

11 A. I believe so. She had the opportunity to.
12 Q. And did Murphy, the dog, bark wildly as you
13 described in the presence of Trina Neddo?
14 A. When she first came to the door, when anybody
15 came to the door, he would. But I don't -- yeah, I
16 believe I have answered that.
17 Q. And did Trina Neddo come to the door on a
18 monthly basis?
19 A. Yes.
20 Q. Collecting rent?
21 A. Yes.
22 Q. And would Murphy, the dog, be outside his
23 kennel inside the house on those occasions?
24 A. Yes. I believe. There were some times where
25 he was in his kennel asleep when she came to the door.
1 So I can't say for certain where he was all of the time
2 whenever she came.
3 Q. But there was some times when he was outside
4 the secure enclosure of the kennel when she came?
5 A. Yes.

(Depo. of James Thomas, pg. 54-55, Exh. 4.) R. Vol. I, p. 167.

Plaintiff Bright testified by affidavit and by deposition that she was attacked by the vicious Dog, without provocation, on the evening of January 21, 2014 when she approached the door of the Property:

On the evening of January 21, 2014 at approx. 9:30 p.m., I approached the front door of 813 Heartland Ct., Nampa, ID, the residence of James R. Thomas. I was visiting for a business purpose to determine why Thomas was behind on vehicle payments and determining whether the vehicle should be repossessed. I knocked on the front door or rang the doorbell. The porch light came on. Thomas opened the door behind which was a large barking vicious dog. Thomas stepped back allowing the dog to charge out biting and tearing at my left elbow. I was on the walkway off the porch and turned to run but the dog then attacked and bit my upper leg. My only escape was to run inside the house. The viscous dog then began charging and biting at the door further intimidating me and causing excruciating fear as I hid in the house until the dog was finally subdued and removed.

At no time did I take any action to provoke the vicious dog. In fact, before the door was opened, I had stepped back off the porch onto the sidewalk and away from the door. There was no screen door on the property at 813 Heartland Court. There was no secure enclosure at 813 Heartland Court to keep the vicious dog from escaping. There was no secure enclosure at 813 Heartland Court for which exit and entry of the vicious dog was controlled by the owner of the premises or owner of the vicious dog.

(Affidavit of Whitney Bright.) R. Vol. I, pp. 139-140.

Bright was taken to the hospital and treated for her injuries. Bright has incurred severe pain and suffering with medical procedures and medical expenses. In addition, Bright is left with large permanent scars. R. Vol. I, p. 125. The subsequent police investigation revealed that the Dog had not had its rabies vaccination despite the fact that the Dog is over six years old. Subsequent to the attack, Thomases were required to quarantine the Dog. R. Vol. I, pp. 146-148. Eventually, the Dog was “put down.” (Depo. of James Thomas, pp. 45-46.) R. Vol. I, pp. 164-165.

ISSUES ON APPEAL

1. Whether the District Court on Summary Judgment liberally construed all reasonable inferences and controverted facts in favor of the Plaintiff as required on summary judgment;
2. Whether material issues of fact existed in the record upon which a fact-finder could have relied to find liability against the property owner - landlord respondents;
3. Whether the District Court erred by determining that the statutory language of Idaho Code § 25-2805(2) was ambiguous and required “one free bite” before attaching any liability for a vicious dog; and
4. Whether the District Court erred in entering summary judgment against the Plaintiff.

ARGUMENT

I. STANDARDS OF REVIEW

A. Summary Judgment.

When this Court reviews a district court’s grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999). Summary judgment is proper “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.” *Id.* at 870. “The record is construed in the

light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate. On appeal, this Court exercises free review.” *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 345, 33 P.3d 816, 819 (Idaho 2001).

B. Statutory Review.

This Court freely reviews the interpretation of a statute and its application to the facts. *State v. Yzaguirre*, 144 Idaho 471, 474, 163 P.3d 1183, 1186 (2007). The primary function of the Court is to determine and give effect to the legislative intent. Such intent should be derived from a reading of the whole act at issue. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). If the statutory language is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." *Payette River Property Owners Assn. v. Board of Commrs. of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Gillihan v. Gump*, 140 Idaho 264, 266, 92 P.3d 514, 516 (2004). When a statute is ambiguous, the determination of the meaning of the statute and its application is also a matter of law over which this Court exercises free review. *Kelso & Irwin, P.A. v. State Insur. Fund*, 134 Idaho 130, 134, 997 P.2d 591, 595 (2000); *J.R. Simplot Co. v. Western Heritage Ins. Co.*, 132 Idaho 582, 584, 977 P.2d 196, 198 (1999). If it is necessary for this Court to interpret a statute, the Court will attempt to ascertain legislative intent, and in construing a statute, may examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute. *Kelso & Irwin, P.A.* at 134, 997 P.2d at 595. To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its

legislative history. *Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006).

II. WITH THE SPECIFIC FACTS OF THIS CASE, THE MATTER SHOULD HAVE BEEN ALLOWED TO BE RESOLVED BY A JURY.

A. The Evidence Existed in the Record That Mazniks Knew or Should Have Known That the Dog Was Vicious.

The following is a summary of facts, viewed most favorably to Bright, that the property owners, Mazniks knew or should have known that the Dog was vicious:

- Mazniks worked solely through their property managing agent who admitted that everything the agent knew or did was on behalf of Mazniks. R. Vol. I, p. 187.
- Mazniks' property agent rents to nearly 90% pet owners in order to tap that market. R. Vol. I., p. 68.
- Mazniks entered a "Pet Agreement" with the dog owners in this case granting permission to have a "Belgian Shepherd – 40lbs." on the premises. R. Vol. I, p. 60.
- Mazniks' assumed a duty to screen out tenants with dogs of an aggressive breed. R. Vol. I, p. 180.
- Mazniks failed through its agent's ordinary practice to investigate the Belgian Shepherd breed to find that it is a regularly used guard dog. A simple Internet search would have revealed the aggressive nature of this breed. R. Vol. I, p. 174.
- The Dog was confined to the small home with no dog run or kennel and no socialization with others outside the home. R. Vol. I, pp. 154-155.
- Mazniks through their agent, personally visited the home each month to pick up the rent payment and therein observed the confining conditions of the large Dog along with the wild barking and aggressive nature of the Dog. R. Vol. I, p. 167.

This is not the typical landlord-tenant relationship where the property owner does not know anything about the tenants' pets, has no pet agreement in the lease, and receives the mailed in rental payments never visiting the property. In that typical relationship it would make sense for the court to rule that there are no issues of fact to be presented to the jury on the landlord's potential liability. However, in this case, Bright presented to the District Court the above

detailed substantial competent evidence upon which a jury could conclude that the property owners, Mazniks, knew or should have known of the vicious nature of the Dog. Bright asserts on appeal that the District Court erred in failing to acknowledge those items of factual evidence and failing to view those items of evidence in a light most favorable to the non-moving party, Bright.

B. The Dog Fits the Definition of a Vicious Dog Pursuant to Idaho Code § 25-2805(2) as His Attack was Unprovoked.

The facts of this case clearly reveal that Bright was attacked by the Thomases' large Dog and that the attack was completely unprovoked. Bright simply rang that doorbell seeking the Defendant Thomas to inquire regarding a debt he owed. Without warning or provocation, Thomases' Belgian Shepherd pushed through the door and attacked Bright. Thomas was unable to contain the animal prior to, during, and after the attack. The vicious Dog was not contained in a "secure enclosure." The Dog was able to bite and tear two wounds into Bright's extremities before she was able beat the Dog with her clipboard to get it to release. Even then, the Dog ran through the front yard before Thomas could contain or gain control of the animal.

Idaho Code § 25-2805 (2) defines a vicious dog as "[a]ny dog which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing... ." Idaho Code § 25-2805(2) alerts both the dog owner and the "**owner of the premises**" on which the animal is housed that duty attaches to both for responsibility resulting from an unprovoked attack.

There is no exception, under the statute, for lack of knowledge nor is there a requirement of a prior bite or attack. In fact the statute details the further consequence of what happens on a "second or subsequent violation" so that it is known that the first sentence of Idaho Code §25-2805(2) applies to duties on the first attack of a vicious dog.

C. The District Court Erred in Holding that I.C. §25-2805(2) is Ambiguous.

The District Court determined that because the parties disputed the required meaning of the word “vicious” under the statute that an ambiguity existed within the statute itself. The Mazniks contended that the statute requires a previous un-provoked attack or bite before it is considered vicious under the statute, claiming that the Dog should be allowed “one free bite” before it can be considered vicious. Bright contended that it is irrelevant under the statute whether there has been a previous attack. The clear language of the statute provides the definition of “vicious” as a non-provoked attack, wound or bite that causes injury to a non-trespasser. Nothing in the statute requires a preceding attack or bite in order to establish that the dog is vicious. The court determined that because the parties were proposing differing interpretations of the statute, the statute was ambiguous requiring the court to look to reasonableness and public policy arguments.

Where the language of a statute is clear and unambiguous, statutory construction is unnecessary, and this Court need only determine the application of the words to the facts of the case. *Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001). A statute is ambiguous where the language is reasonably capable of more than one conflicting construction. *Shruhs v. Protection Techs, Inc.*, 133 Idaho 715, 718, 992 P.2d 164, 167 (1999). However, “[a]mbiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous.” *Hamilton*, 135 Idaho at 572, 21 P.3d at 894. Therefore, “[t]he interpretation should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning.” *Williamson v. City of McCall (In re Williamson)*, 135 Idaho 452, 455, 19 P.3d 766, 679 (2001).

L & W. Supply Corporation v. Chartrand Family Trust, 136 Idaho 738, 743, 40 P.3d 97, 101 (2002).

The language of Idaho Code § 25-2805(2) is clear and unambiguous. The statute does not require a prior attack or bite to establish the vicious nature of a dog. The District Court erred by seeking extrinsic guidance from legislative history and other sources in this case. Reviewing

the actual words in the statute make clear that the court misapplied the definition of “vicious” by adding unnecessary elements that are not within the meaning of the statute.

The District Court further relied upon the Idaho Supreme Court case *James v. City of Boise*, 158 Idaho 713, 351 P.3d 1171 (Idaho 2015)¹ to support its interpretation that I.C. § 25-2805(2) follows the “one free bite” approach. The court’s reliance on the *James* case was not appropriate as that case involved the issue of a law enforcement officer’s liability under I.C. § 25-2805(2). The court in *James* determined that an officer was exempt under this statute for public policy reasons. The *James* case concerns an officer’s qualified immunity in carrying out policy work decisions based on probable cause and very specific circumstances in the protection of the public. The comments made in this case regarding I.C. § 25-2805(2) were set out to establish that the statute is inapplicable to law enforcement officers where specifically trained canines are used in police work. The decision did not set out the standards for applying I.C. § 25-2805(2) in non-law enforcement situations, nor does it stand for the policy that there must be a prior attack by the dog before liability can be imposed.

D. Failure to Provide a Secure Enclosure Provided an Opportunity for an Unprovoked Attack.

Stated in its entirety, I.C. § 25-2805(2) clearly states that a property owner can be held responsible for the unprovoked attack of an animal housed on his/her property. Further, the Statute does not distinguish between whether the property owner is a landlord or an owner occupying the property. The Statute simply states the “owner of premises on which a vicious dog” is harbored. Section 2805(2) states as follows:

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**

¹ A substitute opinion was subsequently entered by the Idaho Supreme Court on March 23, 2016. *James v. City of Boise*, 2016 Ida. LEXIS 83, 376 P.3d 33 (Idaho 2016).

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. Any vicious dog removed from the secure enclosure must be restrained by a chain sufficient to control the vicious dog. Persons guilty of a violation of this subsection, and in addition to any liability as provided in section 25-2806, Idaho Code, shall be guilty of a misdemeanor. For a second or subsequent violation of the subsection, the court may, in the interest of public safety, order the owner to have the vicious dog destroyed or may direct the appropriate authorities to destroy the dog.

Under the Statute, any vicious dog must be maintained in a secured enclosure, from which it cannot escape. Further, the animal must be restrained before it can be removed from the secured enclosure.

In this matter, the Mazniks argue that they had no duty to protect Bright from an unprovoked attack. However, Idaho Code § 25-2805(2) imposes responsibility without requiring an analysis of duty. It is *per se* negligence as a violation of a statute. Idaho Code § 25-2805(2) imposes *per se* liability for failure to house a vicious dog in a secure and inescapable enclosure. This liability is imposed on the property owner. This liability likewise attaches on the first unprovoked attack. In other words, the Statute does not require that the property owner have knowledge of prior attacks. In fact, the Statute specifically states more severe penalties for a second attack.

In this matter, the Mazniks through their agent knowingly rented an insufficiently equipped facility to a tenant with two dogs. The Property had no fence. The Property had no kennel or dog run. Further, the Property had no screen doors that could have at a minimum provided a protective barrier for invitees approaching the door to the Property.

The Dog owned by the tenant was of a breed known to have protective and vicious propensities. The Dog had been “protective trained.” Mazniks’ own investigation should have revealed the type of dog it was. A simple Internet search would have revealed that this breed, Belgian Shepherd, is a guard dog used for security purposes even at the White House. The

Mazniks rely on their agent to vet out dogs with dangerous propensities, and they failed in this instance. This information was relayed to the Mazniks through the Pet Agreement wherein the breeds and size of the dogs were described. The Mazniks failure to provide a secure enclosure on the Property, while electing to rent to a tenant with not one but two dogs, one of which is a large breed known for its dangerous propensities, created an environment ripe for an unprovoked attack to result in an injury. Under I.C. § 25-2805(2), the Mazniks must bear potential liability of the risk for their decision to rent an ill-equipped premise to a tenant with a large breed dog known to react viciously. Under I.C. § 25-2805 (2), the Mazniks' potential liability for Ms. Bright's damages from the unprovoked attack should be allowed to be presented to a jury.

E. *Boswell v. Steele* Distinguishes The Holding In *Boots v. Winters* Holding An Owner Accountable For An Unprovoked Dog Attack.

The Respondents' reliance on *Boots v. Winters* 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008) for the proposition that a property owner has no premises liability for a vicious dog is misplaced. Idaho's Court of Appeals, as recently as April 2015, revisited the holding in *Boots* and distinguished the same in situations where a dog attacks without provocation. In the case of *Boswell v. Steele*, 2014 Ida. App. LEXIS 27, (Ct. App. 2015), the Court again considered the issue of an owners' premises liability for an unprovoked dog attack. Without defining whether harboring a vicious dog was a condition or an activity on the land, the Court determined that a property owner, with knowledge of an animal's dangerous propensities, that fails to warn is liable for damages from an unprovoked attacked. The Court recited the rules regarding premises liability as follows:

The duty owed by owners and possessors of land depends on the status of the person injured on the land--that is, whether he or she is an invitee, licensee, or trespasser. *Ball v. City of Blackfoot*, 152 Idaho 673, 677, 273 P.3d 1266, 1270 (2012); *Robinson v. Mueller*, 156 Idaho 237, 239-40, 322 P.3d 319, 321-22 (Ct. App. 2014). 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. *Holzheimer v. Johannesen*, 125 Idaho 397, 400, 871 P.2d 814, 817 (1994). A landowner owes an invitee the duty to keep the premises in a reasonably safe condition or to warn of hidden or concealed dangers. *Id.* A licensee is a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the visitor's purpose. *Id.*; *Evans v. Park*, 112 Idaho 400, 401, 732 P.2d 369, 370 (Ct. App. 1987). Likewise, a social guest is also a licensee. *Holzheimer*, 125 Idaho at 400, 871 P.2d at 817. The duty owed to a licensee is narrow. A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land. *Evans*, 112 Idaho at 401, 732 P.2d at 370.

2015 Ida. App. LEXIS 27, *15 (Ct. App. 2015). Ultimately, under the facts of the *Boswell* case, the homeowner was held liable for the unprovoked attack of her terrier on an invitee who had been to the home on several occasions. The Court found her liable despite her warning signs posted on her fence warning others to beware of the dog.

In this matter, the Mazniks cannot hide under the cloak of ignorance as to the dog or its vicious propensities. As noted above, the Mazniks were well aware that their property did not contain a secure enclosure. Further, they were well aware from the Pet Agreement that the tenants they elected to rent to had not one but two dogs; one of which was clearly a large breed with dangerous and protective tenancies.

F. The Evidence of the Vicious Propensities of the Dog Involved a Material Issue of Fact That Was Not Appropriate for Summary Judgment.

The District Court determined that the Mazniks were entitled to summary judgment on the claim for liability for domestic animals because there was no evidence in the record that the Dog had physically attacked or otherwise bitten anyone prior to the attack on Bright. However, there was evidence in the record (1) that: Thomases believed the Dog to be intimidating (R. Vol. I, p. 155); (2) that their closest neighbor, Janette Endecott, had personally observed the Dog on several occasions and stated “the dog would bark wildly at me and lunged hard against its leash toward me” and “[t]here was no question in my mind but that this was a vicious dog” (R. Vol. I,

p. 107); and (3) that Mr. Thomas had introduced himself to his neighbor, and explained that the Dog “is not a friendly dog” (R. Vol. I, p. 106-107).

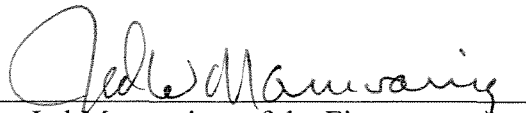
The evidence of the vicious nature of an animal is not limited to the existence of a prior attack. Observations of the Dog’s behaviors from the owners and neighbors should have been provided to a jury to enable a weighing of the evidence to determine this issue. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999). Summary judgment is proper “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.” *Christensen Family Trust* at 870. “The record is construed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate.” *Hayward* at 819.

CONCLUSION

For the reasons stated above, Ms. Bright respectfully requests that this Court reverse the District Court’s judgment dismissing Ms. Bright’s Complaint as to Mr. and Mrs. Maznik and order that the First Amended Complaint be allowed with a full trial on the issues of fact.

DATED this 25th day of October, 2016.

EVANS KEANE LLP

By 
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2016, a true and correct two (2) copies of the foregoing document were served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

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