11-22-2016

Bright v. Maznik Respondent's Brief Dckt. 44129

IN THE SUPREME COURT OF THE STATE OF IDAHO

WHITNEY L. BRIGHT, Plaintiff/Appellant, v. ROMAN MAZNIK and NATALYA K. MAZNIK, husband and wife, Defendants/Respondents.	)	Supreme Court Doc. No. 44129-2016 Canyon Co. Case No. CV2014 - 9957

RESPONDENTS' BRIEF

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

HONORABLE THOMAS J. RYAN, DISTRICT JUDGE, PRESIDING

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II. STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiff, now ("Appellant Bright"), filed a complaint for personal injury resulting from a dog bite. The complaint named the Respondents, Roman and Natalya Maznik, ("Respondents Maznik" or "Landlord") who rented property to James and Katherine Thomas ("Tenants") as defendants in the suit. The complaint alleged various theories of liability based on negligence per se for violation of a statute, strict liability and common law negligence.

There is no dispute that Appellant Bright was bitten by a dog owned by Tenants on property which Tenants rented from Respondents Maznik. Appellant Bright claims that there were material facts in dispute to prove that Landlord knew or should have known of the vicious propensities of the dog and therefore, had a duty to warn her. However, there was no evidence presented to prove that Landlord had actual or direct knowledge of vicious propensities of the dog. Appellant Bright also argues that Landlord violated provisions of Idaho Code § 25-2805(2), which defines a "vicious" dog and provides penalties for harboring a vicious dog.

Respondents Maznik filed a motion for summary judgment with respect to each of Appellant Bright's theories of liability. The District Court analyzed the claims and granted summary judgement to Respondents Maznik on each of Appellant Bright's claims of liability. Appellant Bright appealed from the District Court's grant of summary judgment.

It should be noted that the 2016 Idaho Legislature made substantial revisions to the statutory scheme applicable to dogs. Idaho Code § 25-2805(2) has been replaced with Idaho

Code § 25-2810 which eliminates the definition of a "vicious" dog and replaces it with new definitions of an "[A]t-risk-dog" and a "[D]angerous dog." Idaho Code § 25-2810(1)(a) and (b). The new Idaho Code § 25-2810(10) reads as follows:

> Any dog that physically attacks, wounds, bites or otherwise injures any person who is not trespassing, when such dog is not physically provoked or otherwise justified pursuant to subsection (3) of this section or as set forth in section 25-2808, Idaho Code, subjects either its owner or any person who has accepted responsibility as the possessor, harborer or custodian of the dog, or both, to civil liability for the injuries caused by the dog. A prior determination that a dog is dangerous or at-risk, or subject to any court order imposing restrictions or requirements pursuant to the provisions of this section, shall not be a prerequisite to civil liability for injuries caused by the dog.

Respondents Maznik respectfully request that this Court uphold the grant of summary judgment by the District Court on all claims of Appellant Bright.

B. Statement of Facts

At all times material hereto, Respondents Roman Maznik and Natalya K. Maznik ("Respondents Maznik" and "Landlord"), were the owners and landlords of real property in Nampa, Idaho, where the dog bite incident took place. R. Vol. I, p. 48. Cashflow Management, a property management company in Idaho, was the agent of Landlord pursuant to a Property Management Agreement signed by Respondents Maznik and Cashflow Management. R. Vol. I, p. 48. Trina Neddo ("Agent Neddo") and her husband were the owners of Cash Flow Management.

On or about April 1, 2009, a Residential Lease/Rental Agreement for the Nampa, Idaho property was signed by James R. Thomas and Katherine Thomas ("Tenants").

R. Vol. I, p. 55. There is a Pet Agreement attached as an addendum to the Residential Lease/Rental Agreement which pertains to all pets which Tenants would have on the property. R. Vol. I, p. 60.

Tenants owned two dogs. The dog which was involved in the dog bite incident on January 21, 2014, was named Murphy ("Murphy the dog"). Murphy was a medium-coated German Shepherd which a lot of people mistook for a Belgian Malinois, instead of a German Shepherd, according to Tenant Katherine Thomas. R. Vol. I, p. 155.

Prior to the dog bite incident on January 21, 2014, no complaints had been reported to Cashflow Management regarding either of the Tenants' dogs. R. Vol. I, p. 80. Agent Neddo of Cashflow Management met the Tenants' dogs when she went by the residence once a month to pick up the rental check and she observed no dangerous propensities or characteristics about the dogs. No behaviors or characteristics about the Tenants' dogs had caused concern for agent Neddo. R. Vol. I, p. 70. In fact, Appellant Bright has presented no information regarding any prior attacks by the Tenants' dog Murphy, before the January 21, 2014, incident. R. Vol. I, p. 80.

The Landlord did not regulate the size of the Tenants' dogs that could be kept at the Nampa rental property. The Pet Agreement did not require information about the size of a dog. However, in this situation, the size of the dog (40 lbs) was handwritten as part of the description of the dog in the Pet Agreement. R. Vol. I, p. 60. Landlord, through its agent, Cashflow Management, did investigate, inspect and ask questions and found nothing of concern regarding the dogs. R. Vol. I, pp. 70-71.

A summary of the best information that Appellant Bright has been able to produce, with respect to whether Respondents Maznick knew or should have known of dangerous propensities of the dog, is characterized in the following statements made in the "Nature of the Case" section of Appellant's Brief:

> "Statements made by both the owners of the dog and the closest neighbor establish that the dog was dangerous, intimidating, barked wildly, lunged hard at the neighbor on its leash . . . " Appellant's Brief, p. 4-5.

There are no facts in the record to show that the statements made by the Tenant or the neighbor about the dog Murphy were ever communicated to the Landlord or its agent, Cashflow Management.

III. ISSUES ON APPEAL

A. Whether the District Court was Correct in Granting Summary Judgment to Defendants (Respondents Maznik);

B. Whether the District Court was Correct in Finding the Provisions of Idaho Code §25-2805(2) to be Ambiguous;

C. Whether the District Court's Interpretation of Idaho Code §25-2805(2) was Correct.

IV. ARGUMENT & AUTHORITIES

A. Standard of Review.

1. Summary Judgment:

This Court exercises free review over appeals from a district court's grant of summary judgment, applying the same standard the district court used in ruling on the motion. *Taylor v.*

McNichols, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010) (quoting *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008)). Under that standard, 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." I.R.C.P. 56(c). " If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007).

The party initially bringing the motion has the burden to prove that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 746, 215 P.3d 457, 466 (2009) (citing *Cafferty v. Dep't of Transp., Div. of Motor Vehicle Servs.*, 144 Idaho 324, 327, 160 P.3d 763, 766 (2007)). After the moving party meets this burden, " the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact." *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, 152 Idaho 338, 343-44, 271 P.3d 1194, 1199-1200 (2012) (quoting *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009)). This Court will " construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences in that party's favor." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (citing *Thompson v. Pike*, 125 Idaho 897, 899, 876 P.2d 595, 597 (1994)). However, " the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Curlee*, 148 Idaho at

394-95, 224 P.3d at 461-62 (quoting *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994)).

2. Statutory Review:

The interpretation of a statute is a question of law over which the Court exercises free review. *Doe v. Boy Scouts of America,* 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole." *City of Huetter v. Keene,* 150 Idaho 13, 15, 244 P.3d 157, 159 (2010) (quoting *Athay v. Stacey,* 142 Idaho 360, 365, 128 P.3d 897, 902 (2005)). " If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Harrison v. Binnion,* 147 Idaho 645, 649, 214 P.3d 631, 635 (2009) (quoting [264 P.3d 948] *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006)).

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).

B. THE DISTRICT COURT CORRECTLY CONCLUDED THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACTS IN DISPUTE WITH REGARD TO EACH THEORY OF LIABILITY URGED BY APPELLANT IN THIS MATTER.

1. Evidence in the Record Does Not Support Appellant Bright's Argument That Respondents Maznik, Knew or Should Have Known that the Dog Was Vicious.

Appellant Bright sets out a summary of facts, which, she claims, when viewed most

favorably to her, show that the Landlord knew or should have known that the dog was vicious. Appellant's Brief, p. 13. However, Appellant Bright seems to interchange facts with assumption or conclusions.

Appellant Bright makes a statement that "Mazniks [Landlord] assumed a duty to screen out tenants with dogs of an aggressive breed." Appellant's Brief - p. 13. (emphasis added) This is a legal conclusion rather than a statement of fact. Although, it is not clear whether Appellant Bright is arguing this issue on appeal, Respondents Maznik will briefly review the issue.

The District Court analyzed Appellant Bright's "assumption of duty" claim in its Memorandum Decision. R. Vol. I, pp. 11-13. The District Court determined the following: that ". . . whether Mazniks had a duty to protect third parties from the Tenants' dog depends on whether, they, through their Agent Neddo, did either of two things: (1) collected a pet deposit with the intent to protect third parties, and/or (2) whether they restricted the type or size of dog Tenants could keep on the property."

The Idaho Court of Appeals in *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008), addressed similar questions where the injured party asserted the landlord assumed a duty to protect third parties. The injured party claimed the landlord regulated the type or size of dog permitted on the property and the landlord collected a pet deposit, thus, it assumed a duty. The Idaho Appellate Court in *Boots*, at 396, concluded there was no assumption of duty on the part of the landlord.

The Idaho Supreme Court has recognized that it is possible to create a duty where one

previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner. *Udy v. CusterCounty,* 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001); *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). *See also Sharp,* 118 Idaho at 300, 796 P.2d at 509. Liability for an assumed duty, however, can only come into being to the extent that there is in fact an undertaking. *Udy,* 136 Idaho at 389, 34 P.3d at 1072. *See also Bowling v. Jack B. Parson Cos.,* 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990). Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered. *Udy,* 136 Idaho at 389, 34 P.3d at 1072.

The District Court, in the instant case, analyzed similar questions. The Pet Agreement indicated the Tenant will pay an additional $300 for ". . . cleaning, repairs, or delinquent rent when the Resident vacates." The District Court, referencing the *Boots* case, supra, concluded ". . .the mere act of collecting the pet deposit did not mean that a landlord assumed a duty." R. Vol I, p. 247.

The District Court then discussed whether there was evidence that the Landlord regulated the type or size of dog. The District Court reviewed the deposition testimony of Agent Neddo, and concluded that ". . . there was nothing in her testimony that implies that even Pit bulls and Rottweilers were necessarily excluded by Neddo, just that she might pay more attention to considering whether these breeds should be allowed. " R. Vol I, p. 248.

Based on the foregoing, the District Court, in the instant case, correctly found that Landlord had not assumed a duty to protect third parties from the Tenants' dog. R. Vol I,

p. 248.

Appellant Bright also makes the statement that "[a] simple internet search would have revealed the aggressive nature of this breed." Appellant's Brief, p. 13. This is not a fact but rather an assumption made by Appellant Bright. Furthermore, the internet reference by Appellant Bright contains no statement that the breed Malinois is aggressive, beyond saying the breed is used to "guard the grounds of the White House." R. Vol. I, p. 174. Obviously, to be used as a guard dog, the animal would need to be specifically trained for that purpose. What the internet reference does say is that "[W]ell-raised and trained Malinois are usually active, intelligent, friendly, protective, alert and hard-working." R. Vol. I, p. 175.

Appellant Bright has translated a generalized statement found on an internet web page into a statement of fact suggesting that a certain breed of dog which has been used as a guard dog is from an aggressive breed. From there, Appellant Bright makes the leap to conclude that an aggressive dog is therefore a vicious dog. However, Appellant Bright has failed to assert any facts which provide direct evidence that the dog in the instant case had bitten or attacked any person in the past.

Appellant Bright refers to an affidavit from a neighbor of the Tenant dog owner, who described being outside one day when the dog was out with the owner. The neighbor claims that the dog lunged and barked at her, while on a leash, so the neighbor characterized the dog as vicious. R. Vol. 1, pp. 106-107. However, a neighbor characterizing the dog as vicious does not make the dog vicious in the legal sense in the absence of any evidence of bites or physical attacks. And more importantly, there is no

evidence in the record that the Landlord or its agent were aware of this incident described by the Tenant's neighbor.

With respect to Appellant Brights's claim that Landlord, through their agent, knew or should have known of the vicious tendencies of the Tennant's dog, there is no evidence in the record to support these contentions. Therefore, summary judgment as a matter of law, was correct on any theory of liability requiring proof that Respondents Maznik knew or should have known of the vicious tendencies of the Tenant's dog.

2. The District Court Was Not in Error in Finding That the Dog Did Not Fit the Definition of a Vicious Dog at the Time of the Incident as Set Forth in Idaho Code §25-2805(2)

Appellant Bright argues that Landlord is subject to liability for negligence per se due to a violation of I.C. § 25-2807(2). The statute states in pertinent part:

> 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. I.C. § 25-2807(2)

Each party in this action interpreted I.C. § 25-2807(2) in a different way. The District Court found the different interpretations to be reasonable and therefore acted within the bounds of its discretion to interpret the statute.

The interpretation of a statute is an issue of law over which this Court exercises free review. *Dyet v. McKinley*, 139 Idaho 526, 528, 81 P.3d 1236, 1238 (2003). 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).

The District Court analyzed the reasonableness, public policy and legislative history of the statute. *L & W Supply Corp. v. Chartland Family Trust*, 136 Idaho 738, 743, 40 P.3d 96, 101 (2002). The District court reviewed the recent case of *James v. City of Boise*, 2016 Isa. LEXIS 83, 376 P.3d 33 (Idaho2016) and concluded that the James case supported the Respondents Maznik's argument that "every dog gets one free bite . . . " under the statute.

The District Court then reviewed the legislative history of I.C. § 25-2805(2) and concluded that the ". . . legislature seemed to recognize viciousness as a condition precedent to liability, as did the Mazniks." The District Court also analyzed a similar statute and case law from the State of Washington and other jurisdictions and stated:

> Interestingly, the State of Washington imposes liability on a dog owner regardless of the former viciousness of the dog RCWA 16.08.040. Importantly, the Washington statute imposes liability on dog owners, not the premises' owner. *See Frobig v. Gordon,* 124 Wash.2d 732 (1994); *Deane-Gordly v. Willett,* 162 Wash.App. 1029 (2011). Washington Courts have recognized important policy reasons for imposing liability on animal owners, but not on premise owners — "[o]ur rule...promotes the salutary policy in placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability." *Clemmons v. Fidler,* 58 Wash.App. 32, 38 (1990).
>
> In contrast, our legislature amended I.C. §25-2805(2) in 1998 making it unlawful for the owner or for the owner of premises to keep a vicious dog outside a secure enclosure.
>
> Our legislature could have drafted a statute similar to Washington and have imposed liability regardless of the former viciousness of the dog—but it did

> not. Finally, other states who do impose liability regardless of former viciousness of the dog fail to extend liability to landlords. *See* RCWA 16.08.040 (Washington); Cal. Civ. Code § 3342 (California); MCA 27-1-715 (Montana).

After its analysis, the District Court correctly concluded that "[t]here is no evidence in the record that Murphy the dog has physically attacked or otherwise bitten anyone prior to the current incident. Given this Court's reading of I.C. § 25-2805(2), the holding in the *James* case, and the legislative history set forth above, this Court finds the Mazniks are entitled to judgment as a matter of law on Bright's negligence per se claim."

Interpreting the statute in the way urged by Appellant Bright would likely lead to an unreasonable or absurd result. " . . . [C]ourts should refrain from skewing the statute in a way that would lead to absurd or unreasonably harsh results." *Jasso v. Camas County* 151 Idaho 790, 798, 264 P.3d 897, 905 (2011).

According to I.C. § 25-2805(2), there are certain prerequisites which must first be met in order for a dog to qualify under the definition of a vicious dog. These prerequisites require a physical attack, wound, bite or other injury to a person who is not trespassing and who has not physically provoked the dog. Prior to a physical attack, a wound, a bite or other injury, the dog is not deemed vicious under the statute and no duty arises on the part of the owner or owner of property to harbor the dog in a secure enclosure.

Under Appellant Bright's interpretation of the statute, all dog owners would need to keep their dog in a secure enclosure at all times, unless on a chain, because the owner would not know beforehand whether or when the dog might attack, bite or injure a person. If this is what the legislature intended, then they could easily have written the statute to require all dogs to be

harbored inside a secure enclosure or held on a chain at all times. Or, the legislature could easily have enacted a statute of strict liability which says that the owner of a dog which attacks, bites or otherwise injures a person is liable for any damages caused to the person period, with no prerequisites.

Instead, the Idaho Legislature enacted a statute which requires the prerequisites discussed above, before a legal duty attaches to the owner to keep the dog in a secure enclosure or on a chain. Prior to the happening of one or more of the prerequisites, there is no duty and no liability under the statute.

The Idaho Supreme Court recently affirmed the rule under common law that all dogs, regardless of breed or size, are presumed to be harmless domestic animals. *Boswell v. Steele*, 348 P.3d 497 (Idaho App. 2015), quoting *Braese v. Stinker Stores, Inc.*, 157 Idaho 443, 337 P.3d 602 (2014).

Following the reasoning of *Braese*, the dog Murphy was presumed to be a "harmless domestic animal" at all times prior and up to the very moment it bit Appellant Bright on January 21, 2014. Once the dog attacked Appellant Bright, it then became "vicious" under the statutory definition. Therefore, Appellant Bright's continual assertions found throughout Appellant's Brief that Murphy was a "vicious dog" are unwarranted.

Another argument in support of the District Court's finding that the I.C. § 25-2807(2) does not apply to the dog Murphy under the facts of this case is that Appellant Bright was a "trespasser," in the legal sense, on the premises of the Landowner. The statute clearly states: "Any dog which, when not physically provoked, physically attacks, wounds, bites or otherwise

injures any person who is not trespassing, is vicious." (emphasis added)

The Idaho Courts have repeatedly established the difference between the various classes of people who enter upon the land of another and the duty owed to such people. The duty of a landowner to the person injured on the land turns on the status of the injured person. *Holzheimer v. Johannesen,* 125 Idaho 397, 399, 871 P.2d 814, 816 (1994). The status of the person injured on the land is divided into three categories: invitee, licensee, or trespasser. "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." Id. at 400, 871 P.2d at 817. A landowner's duty to an invitee is to warn of hidden or concealed dangers and to keep the land in a reasonably safe condition. 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. A trespasser is anyone who goes onto the land without permission, invitation or lawful authority. *Bicandi v. Boise Payette Lumber Co.,* 55 Idaho 543, 552, 44 P.2d 1103, 1106 (1935); see also, *Lindquist v. Albertsons, Inc.,* 113 Idaho 830, 831, 748 P.2d 414, 415 (Ct.App.1987). A landowner's duty to a trespasser is to refrain from willful or wanton acts which might cause injury. *Huyck v. Hecla Mining Co.,* 101 Idaho 299, 301, 612 P.2d 142, 144 (1980). (emphasis added)

Appellant Bright states in an affidavit, "I was visiting for a business purpose to determine why Thomas [the Tenant] was behind on vehicle payments and determining whether the vehicle should be repossessed." R. Vol. I, p. 139. Appellant Bright was not an "invitee" because she was not on the real property owned by the Landlord, to "confer a business, commercial, monetary, or other tangible benefit to the landowner." Appellant Bright was not a licensee because there is no evidence that she came upon the premises of the Landlord with the consent of the Landlord in pursuit of her own purpose. Appellant Bright did not have the consent of the Landlord or the Tenants to come upon the property. This was obviously not a social visit and Appellant Bright was not a "social guest" of the Tenants.

According to BARRON'S LAW DICTIONARY 500 (3d ed. 1991) *citing* Restatement (Second) Torts § 329, A "trespasser" is one who enters or remains upon land of another without the owner's permission. There is no evidence or testimony that Appellant Bright asked permission from the Landlord or the Tenants to come upon the property for any purpose, even to speak to the Tenants.

There is no genuine issue of material fact that proves Appellant Bright to be anything but a "trespasser" on January 21, 2014, when she stepped onto the real property owned by the Landlord to speak to the Tenant about his late vehicle payments. Even if the District Court would have interpreted I.C. § 25-2805(2), as argued by Appellant Bright, to find that Murphy the dog was "vicious" because he bit her, the fact that she was a trespasser would nullify her claim under the statute. Furthermore, there is no evidence from any source that the Landlord committed any kind of a "willful" or "wanton" act to

injure Appellant Bright. Therefore, the District Court was correct in granting summary judgment for Respondents Maznik on this issue.

3. The District Court Did Not Error in Holding That Idaho Code §25-2805(2) Was Ambiguous.

Appellant Bright argues that the District Court determined I.C. § 25-2805(2) was ambiguous because the parties proposed differing interpretations of the statute. Appellant Bright's characterization of the District Court's determination is not complete. What the District Court said was, "After listening to arguments of both sides in this case, this Court finds there are two reasonable ways to read the statute as set forth above. Thus, there is an ambiguity." R. Vol, 1, p. 240. (emphasis added)

Not only did the District Court find "differing interpretations" of the statute as suggested by Bright, but it also found each party's interpretation provided a reasonable way to read the statute. The key is not that each party presented a differing interpretation but rather that each party provided a reasonable way to read the same statute, thus making the statute ambiguous. A statute is ambiguous when the meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden,* 78 Idaho 191, 195, 300 P.2d818, 819 (1956).

The statute might seem clear on the initial reading. Any dog which bites is a vicious dog and the owner is subject to civil liability and a criminal penalty. However, upon closer examination, many questions arise. For example, when does the owner become liable or when does the owner have a duty to keep the dog in a secure enclosure? Is it before or after the first

bite? If the answer is before the first bite, then how would an owner know his dog was going to bite and how would the owner know he had a duty to keep the dog in a secure enclosure before the bite? Or, in other words, if the owner was doing something he was legally permitted to do immediately before the bite, how can the owner then instantly at the time of the bite, become subject to both civil and criminal penalties at the time of the bite? If Appellant Bright's interpretation is correct, then the owner owes a duty for something she/he may not have been aware of. With the inclusion of a criminal penalty in the statute, does this not arguably create an "ex post facto" law which is prohibited by both the US Constitution and the Idaho Constitution? These and other conflicting questions could reasonably be raised by a reading of I.C. § 25-2805(2).

The District Court correctly found there were two reasonable ways to read the statute, therefore the statute was ambiguous as a matter of law. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004).

4. Neither the Dog Owner or the Property Owner were Required to To Provide a Secure Enclosure for the Dog at the Time of the Incident

Appellant Bright seeks to impose liability on Respondents Maznik as the Landlord under the provisions of I.C. 25-2805(2), for failure to ensure that the dog Murphy was kept in a secure enclosure on the property leased by Tenants. Respondents Maznik submit that the District Court was correct in finding I.C. 25-2805(2) ambiguous and in interpreting the statute to mean that before a dog bites once, it is not a vicious dog. The District Court correctly

concluded there was no evidence in the record that the dog had physically attacked or bitten anyone prior to the current incident. Therefore, under the statute, neither the dog owner or the Landlord had a duty to keep the dog in a secure enclosure prior to a physical attack or bite by the dog.

Appellant Bright argues that there are disputed facts on this issue and that these facts should have been presented to a jury. The Idaho Court of Appeals in *Boswell,* p. 509, referring to I.C. 25-2805(2) held that . . . "Whether the dog was vicious and whether it was properly confined in a secure enclosure, as contemplated by the statute, are questions for the jury." This statement, on its face, seems to support Appellant Bright's contention and automatically deny the opportunity to argue at summary judgment the provisions of I.C. § 25-2805(2).

However, the *Boswell* case is factually distinguished from the instant case. In *Boswell,* the dog in question had two (2) prior instances where it had bitten other people and there was a dispute as to whether these were actual bites or nips. Therefore, it was appropriate for the jury to determine whether the dog was "vicious" based upon these prior bites. There was also a question whether the gate in the kitchen was a secure enough enclosure to properly harbor the dog. Also at issue in *Boswell* was whether the dog had been provoked by the injured party when he stuck his fist into the dog's enclosure. The question of what constituted provocation is not at issue in the present case. The *Boswell* case also did not involve a landlord tenant relationship, as far as we know, and the property owner and dog owner lived on the same premises with the dog.

Based upon the facts presented in the instant case, the dog Murphy became "vicious" at the time of the first attack on January 21, 2014, but not before. After the first attack, it

would then be appropriate to present the questions of whether the dog was vicious under the statute and whether the dog was properly confined in a secure enclosure to a jury. However, for purposes of this action it is premature to ask these questions because the dog Murphy was not yet deemed legally "vicious" when it attacked and bit Appellant Bright.

Appellant Bright argues that both the Landlord and dog owner are liable under I.C. § 25-2805(2). With respect to this argument, the statute reads, " . . . 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. . . " This is yet another example of the ambiguity of the statute. The legislature could have said "the owner and the owner of premises" instead of using the word "or." (emphasis added) This would have more clearly imposed liability on both. However, by using the word "or" we are left to question, if it means one or the other or both.

A reasonable interpretation of the statute would be that the duty is upon the dog owner unless the dog owner does not live on the property where the dog is kept, and in that situation, the duty transfers to the owner of the property on which the dog is kept, such as a kennel owner. Therefore, in the instant case, the duty would fall on the dog owner who lived on the premises rather than on the landlord who was the property owner. However, as stated above, there is no need to get to this issue, based upon the District Court's finding that the dog was not vicious under the statute.

The issue of negligence per se which Appellant Bright seeks to impose on the Respondents Maznik was recently analyzed by Judge Scott of the Fourth Judicial District in his Memorandum Decision and Order on Summary Judgment in *Pendery v. Camara et al.,* Ada County Case No. CV PI 1419270 R. Vol. I, p. 225. While not a

precedent for this Court, the issues and the facts of the *Pendery* case are similar to the instant case and Judge Scott's analysis is instructive on the issue of "harboring a vicious dog." R. I 230-232.

In the *Pendery* Decision, Judge Scott addressed the same issue that we find in the instant case as it pertains to negligence per se for a supposed failure by the landlords to harbor a "vicious" dog in a secure enclosure. R. Vol. I, pp. 230-232.

> Section 25-2805(2) criminalizes "harbor[ing] a vicious dog outside a secure enclosure" if the harboring is done by either the dog's owner or the owner of premises on which the dog is present. I.C. § 28-2805(2). To violate the statute, the dog's owner or the owner of the premises, as the case may be, must engage in conduct that constitutes harboring. The term "harbor" is not defined in the statute. That term therefore must he given its plain, usual, and ordinary meaning. E.g., Arnold v. City of Stanley, 158 Idaho 218,345 P.3d 1008, 1011 (2015). It is appropriate to consult a dictionary to discern that meaning. E.g, id. The verb form of "harbor" is at issue here. One meaning the Merriam-Webster online dictionary ascribes to the verb form of "harbor" is "to hold or contain (something)." http://www.merriamwebster.com/dictionary/harbor (last visited June 1, 2015). Of the various meanings, the Court considers that one most apt here. The question at hand, then, is whether there is evidence in the record that Apex and Camara [property owners] "harbor[ed]--i.e., held or contained Read's dog outside a secure enclosure.
>
> The answer to that question is, in short, that there is no such evidence. The record contains no evidence that Apex and Camara caused the dog to be, permitted the dog to be, or even knew the dog was outside a secured enclosure on the premises rented to Read's husband. Although Apex and Camara permitted dogs on the premises, they did not grant permission to let the dogs run loose. To the contrary, the Pet Addendum to the Lease Agreement sensibly required that the dogs be "on a leash or otherwise under Resident's control, and not left unattended when [they are] outside the Residence." (Pet Addendum § 5.) Because there is no evidence of any act or omission by Apex and Camara that could be considered "harbor[ing]—i.e., holding or containing—the dog outside a secure enclosure, Pendery has failed to identify a genuine factual dispute about whether Apex and Camara violated section 25-2805(2). They did not violate it. In the absence of a violation, there is no basis for Pendery's " negligence per se" claim. Apex and Camara are entitled to judgment as a matter of law against that claim.

The instant case presents almost identical facts. There is no evidence that the Landlord caused the dog Murphy to be outside a secure enclosure or even knew the dog was outside a secure enclosure on the premises rented to the Tenants who owned the dog.

Further, the Pet Agreement makes the "Resident" (here, Tenants) responsible to: 1) Keep the pet under control at all times and; 2) Keep the pet restrained, but not tethered, when it is outside the Resident's dwelling. R. Vol. I, p. 60. Although the Landlord, in the instant case, permitted dogs on the premises, Landlord did not grant permission to let the dogs run loose. Landlord required that the dogs be kept under control at all times and restrained when they were outside the residence. There is no evidence that Landlord did anything that could be considered "harboring" the dog Murphy outside a secure enclosure.

Appellant Bright has failed to show that Respondents Maznik owed a duty to Appellant Bright under I.C. § 25-2805(2) to harbor the dog Murphy in a secure enclosure before the January 21, 2014, attack. There is no genuine issue of material fact that Respondents Maznik violated § 25-2805(2) in any way and the District Court was correct in rendering summary judgment.

5. The Case of Boswell v. Steele Does Not Distinguish the Holding in Boots v. Winters with Respect to the Accountability of an Owner for an Unprovoked Dog Attack Based Upon the Theory of Premises Liability. However, Even if it Did Distinguish the Holding, the Result Would be the Same in the Instant Case.

Appellant Bright argues that the Idaho Court of Appeals in *Boswell,* distinguished its holding in *Boots,* with respect to a claim based upon premises liability and therefore, the District

Court's (and Respondents Maznik's) reliance on *Boots* was misplaced.

Appellant Bright is correct that there is a distinction between the cases, but the distinction is not in the holding but rather the facts. In *Boots*, the Idaho Court of Appeals was analyzing a fact situation similar to the instant case, where the landlord rented property to a tenant who owned a dog which was involved in a dog bite incident on the rented property. However, the landlord did not reside on the premises and did not have knowledge of dangerous propensities of the dog. The claimant in *Boots*, argued that the landlord had a duty to maintain the premises in a safe condition and the dog was a condition on the premises which rendered the premises unsafe. Based on these facts, the *Boots*' Court concluded that having the dog on the property was not a condition of the property but rather an activity on the land, and under a theory of premises liability, the landlord had no duty to protect third parties from activities taking place on the rented property which did not implicate the physical condition of the property. *Boots,* p. 397.

In the *Boswell* case, the Idaho Court of Appeals was analyzing a different fact situation where there was no evidence of a landlord tenant relationship. In *Boswell,* A granddaughter lived with her grandmother in a house owned by the grandmother. The grandmother and granddaughter each owned a dog which they kept at the house owned by the grandmother. The granddaughter's dog bit a son-in-law of the grandmother while he was on the property. The Court was not dealing with a landlord tenant type relationship but rather a situation where the property owner lived on the same property with the dog which bit. Also present in the *Boswell* case were disputed issues of fact as to whether two previous bites, which the granddaughter referred to as nips, were sufficient to put the owner on notice of dangerous propensities of the

dog, whether the enclosure the dog was kept in was secure and whether or not the dog was provoked.

The *Boswell* Court determined, under the theory of premises liability, that the injured son-in-law was a social guest on the property and that the landowner owed a duty to warn the social guest of a "known dangerous dog." *Boswell,* p. 506. The Boswell Court then concluded there were issues of fact with respect to whether the landowner failed to warn the injured party of a dangerous dog, so the district court erred when it granted summary judgment.

The *Boswell* Court did not specifically or expressly distinguish or overrule the *Boots* holding. Rather, it found a different duty owed by the dog owner to the injured party, based upon the unique circumstances of the case. The District Court in the instant case, correctly relied on the holding in *Boots*, with respect to Appellant Bright's premises liability claim, because the circumstances involving a landlord tenant relationship were similar to the *Boots* case.

Regardless of whether the *Boswell* case distinguished the holding in the *Boots* case, the final result would be the same. Relying on *Boots,* the District Court found a tenant's keeping a dog on the landlord's rented premises constituted an activity taking place on the rented property and the landlord owed no duty, under a theory of premises liability, to protect third parties from a tenant's dog. Under this ruling, the Landlord, in the instant case, owed no duty to Appellant Bright.

If the District Court had applied the holding in *Boswell*, with respect to premises liability, then the Landlord would have had a duty to warn Appellant Bright only of a "known dangerous

propensities of the dog." *Boswell*, p. 506. However, as stated above, the District Court found that there was no evidence in the record that Landlord knew or should have known of the dangerous propensities of the dog, prior to the dog bite. Therefore, the result would have been the same whether the District Court relied on the holding in *Boots* or *Boswell*, with respect to Appellant Bright's claim based on premises liability.

In addition, both the *Boswell* and *Boots* Courts acknowledged that the duty owed by the owner or possessor of land, under a claim for premises liability, depended on the status of the person injured on the land, i.e., whether the person was an invitee, licensee or trespasser. Appellant Bright was a trespasser on the land because she had no permission to be there and was not there for any business related to the landowner. (Please refer to Respondents Maznik's prior discussion on the status of a trespasser) Respondent's Brief, p. 19-20) The only duty owed to a trespasser, is to refrain from wanton or willful acts that cause injury. Appellant Bright presented no evidence that Landlord engaged in "wanton or willful" acts to injure her.

Even if the legal status of Appellant Bright on the property of the Landlord was considered to be that of a licensee or social guest, as was the situation in the *Boswell* case, the Landlord would then only owe a duty to warn Appellant Bright of known dangerous conditions or activities on the land. As previously stated, the District Court found there were no issues of material fact that Landlord knew or should have known that Murphy the dog had dangerous propensities. Therefore, there was no duty to warn Appellant Bright under this theory of premises liability.

Although the District Court may have relied on the authority of *Boots*, to reach its

conclusion, the outcome it reached was still correct. There were no issues of material fact to support Appellant Bright's claim for premises liability and summary judgment was appropriate on this issue.

6. The District Court Was Correct in Finding There Were No Issues Of Material Fact With Respect to Evidence of the Vicious Propensities of the Dog and Summary Judgment Was Appropriate on This Issue.

One of Appellant Bright's initial theories of liability was a claim for strict liability. Relying on the *Boswell* case, the District Court, in the instant case, correctly interpreted Appellant Bright's claim to be one of liability for domestic animals rather than a strict liability claim as urged by Appellant Bright. The *Boswell* Court indicated that, when responding to a claim for strict liability, it was not necessary to adopt the strict liability label. Instead, the Court reaffirmed the long standing rule established in *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909), which provides ". . . the Idaho Supreme Court has adopted a rule that an owner of a domesticated animal will be liable for injuries it causes if the owner had prior knowledge, or should have known, of the animal's dangerous propensity. It is the elements of the action that are significant, not the label of strict liability or negligence." *Boswell,* p. 505. "In cases where a domestic animal is not trespassing, the owner of the animal is liable for injuries caused if the owner knew or should have known of the animal's vicious or dangerous tendencies. *Boswell,* p. 505, quoting from *McClain*, Id.

In its analysis in the instant case, the District Court determined that the duty of an owner of an animal extended to a store owner in the case of *Braese v. Stinker Stores, Inc.*, 157 Idaho

443, 337 P.3d 602 (2014). In the *Braese* case, a dog was allowed into a store with its owner and jumped up on a customer causing injury. The Court in *Braese* stated:

> In the absence of a statute to the contrary, an owner is liable for injuries caused by a domesticated animal where the owner knew or should have known of the animal's vicious or dangerous propensity." *Braese*, 157 Idaho at 446, 337 P.3d at 605 (quoting 4 Am.Jur.2d *Animals* § 67). Therefore, " [a] store owner would also have a duty to protect its patrons from a dog that the store owner knew or should have known was vicious or had a dangerous propensity."

However, the Court in *Braese* found no evidence that either the store manager or the store cashier knew or should have known that the dog was likely to jump up on customers and therefore the store had no duty to protect customers from the dog.

The District Court also determined that the facts of the instant case were more like *Braese* than *Boswell*, so the issue was whether the Landlord, in the instant case, knew or should have known that the dog Murphy had dangerous propensities. There is no direct evidence that the Landlord knew or should have known the dog Murphy was vicious.

Appellant Bright attempted to prove knowledge on the part of the Landlord by offering indirect evidence that the Tenant dog owners knew of dangerous propensities since the dog owner believed the dog to be intimidating. R. Vol. I, pp. 154-155. However, being intimidating does not equate to the dog having vicious tendencies. Furthermore, it was the Tenant dog owner who believed this and not the Landlord or its agent.

A neighbor, in an affidavit, characterized the dog as vicious, due to barking and lunging. R. Vol. I, pp. 106-107. However, there was no evidence of the dog biting or attacking anyone. And again, no evidence that the Landlord or its agent knew of this. Lastly, Appellant claimed

that the dog owner told a neighbor that the dog was not friendly. Again, this does not equate to being vicious or having vicious propensities and there is no evidence that the Landlord or its agent, Cashflow Management, knew of the Tenant's statement that the dog was not friendly.

Based on this, the District Court was correct in finding there were no genuine issues of material fact to show that the Landlord or its agent knew or should have known of vicious propensities of the dog. Therefore, summary judgment on this issue was proper.

V. CONCLUSION

The District Court reviewed and analyzed each of Appellant Bright's theories of liability for the dog bite. After doing so, the District Court correctly concluded that there were no genuine issues of material fact on any claim urged by Appellant Bright. The District Court also correctly found Idaho Code § 25-2805(2) was ambiguous and that a correct interpretation of the law, when applied to the facts of the instant case, led to the conclusion that the dog Murphy did not fit the definition of a "vicious" dog at the time of the bite in question.

Based on the foregoing, Respondents Maznik respectfully ask this Court to uphold the District Court's grant of summary judgment on all issues.

Dated this 22nd day of November, 2016.

MONTGOMERY LAW OFFICES

By _____
Gary L. Montgomery
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 2016, I caused to be served a true and correct copy of the foregoing in the above-referenced matter by the method indicated below and addressed to the following:

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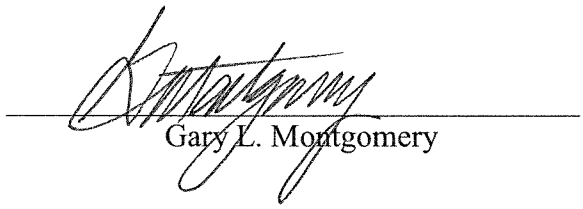

Gary L. Montgomery

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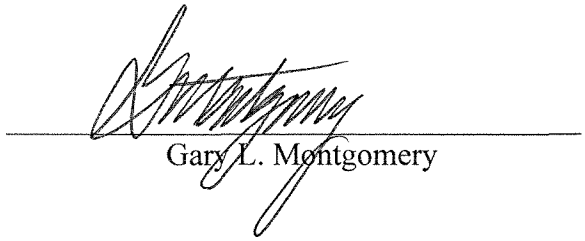

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