12-13-2016

Bright v. Maznik Appellant's Reply Brief Dckt. 44129

IN THE 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

APPELLANT'S REPLY BRIEF

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

HONORABLE THOMAS J. RYAN, DISTRICT JUDGE, PRESIDING

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INTRODUCTION

Pursuant to Idaho Appellate Rule 34(c) and 35(c), Appellant Whitney Bright ("Appellant" or "Ms. Bright") submits this Reply Brief in rebuttal to the arguments and additional issues raised by Respondents Roman and Natalya Maznik ("Respondents" or "Mazniks") in Respondents' Brief filed November 22, 2016. Appellant incorporates her statements of the course of proceedings and facts in Appellant's Brief herein.

Appellant continues to assert that by definition under Idaho Code § 25-2805(2), both the dog owner and the owner of the premises on which the animal is housed have a duty for 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 before liability attaches. In fact, the statute details the further consequences 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. The District Court erred by finding that the statute was ambiguous and considered extraneous issues that were outside the clear language outlining the statutory requirements to impose liability on the owners of the premises. Appellant further asserts that the District Court erred in granting summary judgment in favor of the Respondents on Appellant's negligence claim. The factual evidence produced by Appellant to establish that the Respondents knew or should have known of the vicious tendencies of the dog constituted a genuine issue of material fact that should have been submitted to a jury. Determination by summary judgment was inappropriate.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT WHERE GENUINE ISSUES OF MATERIAL FACT WERE PRESENTED BY APPELLANT.

A. Summary Judgment was Improper Pursuant to Rule 56(c), Idaho Rules of Civil Procedure.

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). As detailed in Respondents' Brief at page 10, 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 845, 489 (2009)). "On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

B. As the Party Moving for Summary Judgment, Respondents Failed to Meet Their Burden to Establish that There Was No Genuine Issue of Material Fact.

> The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.

> *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence, or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses, or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 847, 846 P.2d at 156.

Boswell v. Steele, 158 Idaho 554, 558-559, 348 P.3d 497, 501 (Ct. App. 2015).

II. ENTRY OF SUMMARY JUDGMENT WAS IMPROPER.

Respondents cite to the Idaho Supreme Court case, *L & W Supply Corporation v. Chartrand Family Trust*, 186 Idaho 738, 40 P.3d 96 (Idaho 2002), to support the position of the District Court to analyze the various factors involving the reasonableness and public policy behind I.C. § 25-2805(2) and the legislative history. R. Vol. 1, p. 240 (Memorandum Decision Upon Defendants' Motion for Summary Judgment, dated Jul. 17, 2015). In doing so, the District Court further evaluated genuine issues of material fact in supporting the decision to enter summary judgment. However, there is a very important procedural distinction between *L & W Supply* and the instant case that was not addressed by the Court.

> In *L & W Supply*, both parties to the case filed motions for summary judgment:
>
> When both parties file motions for summary judgment on the same facts, issues, and theories, essentially the parties stipulate that there is no genuine issue of material fact that would preclude the court from entering summary judgment. *Daugharty*, 134 Idaho at 733, 9 P.3d at 536. When the parties have so stipulated and when the trier of fact is to be court, rather than a jury, the trial court is free to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences. See *Killinger v. Twin Falls Highway District*, 135 Idaho 322, 324, 17 P.3d 266, 268 (2000); *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 640 P.2d 657, 661 (1982).
>
> The parties both moved for summary judgment centering on whether Total American was an agent or a subcontractor, based on their respective interpretation of the facts and law related to I.C. § 45-501 and the case was to be tried without a

> jury. Therefore, the district judge was free to resolve any conflicting inferences arising from the facts presented. Review of the trial court's resolution of those conflicting inferences is limited to whether the record is sufficient to support the trial court's findings. *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997); *Riverside*, 103 Idaho at 520, 650 P.2d at 662.

L & W Supply Corporation, 136 Idaho 738 at 742, 40 P.3d 96, 100 (2002). In the instant case, the Respondents solely moved for summary judgment, with Appellant opposing entry of summary judgment. Furthermore, included in the First Amended Complaint and the Maznik's Answer both sides made a demand for trial by jury pursuant to I.R.C.P. 38(b). R. Vol 1, pp. 9, 16, 127, 135. Because there was no effective stipulation between the parties to establish that there were no genuine issues of material fact existing, and because a jury was to be the trier of fact in this case, the court was not in a position to resolve conflicting inferences arising from the facts presented. The entry of summary judgment based on these procedural deficiencies was in error and should be reversed.

III. APPELLANT'S FACTUAL EVIDENCE SUPPORTING HER CLAIM FOR PREMISES LIABILITY SHOULD HAVE BEEN SUBMITTED TO THE JURY.

In addition to the Statutory negligence *per se* claim, Appellant Bright also brought a negligence claim against the Mazniks. The elements of negligence are well established: (1) duty; (2) breach; (3) causation; and (4) damages. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175-76, 804 P.2d 900, 904-05 (1991). *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003).

In *Boswell v. Steele*, 158 Idaho 554, 348 P.3d 497, (Ct. App. 2015), the Court considered the issue of an owner's premises liability for an unprovoked dog attack. Without determining 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, who fails to warn

is liable for damages from an unprovoked attack. The Court defined the duty of property owners to invitees as follows: "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* at 562. 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 the signs posted on her fence warning others to beware of the dog.

In this matter, Appellant provided evidence to establish that (1) the dog owners 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, 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). Furthermore, the Appellant provided specific factual evidence that the property owners Mazniks knew or should have known that the Dog was vicious, including:

- 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.
- 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.

"When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion." *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). In this case, Appellant 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 the evidence on material issues of fact and failed to view those items of evidence in a light most favorable to Appellant as the non-moving party.

IV. THE HOLDING IN *BOOTS v. WINTERS* IS DISTINGUISHABLE.

The reliance of the District Court on the holding in *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. The facts presented in *Boots* are distinguished from the present case. In *Boots*, two brothers, ages 9 and 11, were walking to their school bus stop through an alley abutting the fenced backyard of the residence rented to a dog owner. The evidence in that case established that the younger brother had provoked the dog that was contained inside the fenced yard by kicking the fence and swinging his jacket at the dog. When his jacket was then pulled into the yard by the dog, the older brother climbed inside the fence to retrieve the jacket and was

attacked by the dog. The younger brother ran back home to get his mom to come help, and when she also entered the fenced yard to help her son, she, too, was attacked and injured by the dog.

In *Boots*, the Court found that I.C. 25-2805(2) does not create a duty on a landowner for an attack by a vicious dog when the victim provoked the dog or trespassed on the property. The Court could have simply determined that the dog in this circumstance did not meet the "vicious" definition under the statute and it therefore did not apply. The Court then determined that that the landlord did not owe a duty to third parties for the dog attack on the basis of collecting a pet deposit and, further, that there was no evidence that the landlord regulated the size or type of the dog that could be kept on the premises.

The *Boots* case differs substantially from the instant case on the essential element that the dog in *Boots* was not found to be vicious under the Statute. Furthermore, the facts of the present case show that not only did the Mazniks, through their agent, Ms. Neddo, evaluate the breed of dogs allowed on the rental property, but actually had the opportunity to observe the dog's demeanor and aggressiveness as the agent collected the rent directly from the tenants' home on a regular monthly basis. Through the landlord's agent, the evidence is available to establish a reasonable inference that the landlord had reason to know of this particular dog's aggressive propensities and behaviors. Furthermore, the facts of this case clearly establish that the dog was vicious under the statutory definition and the attack was not provoked and Ms. Bright was not a trespasser.

V. THE DISTRICT COURT FAILED TO FOLLOW THE UNAMBIGUOUS LANGUAGE OF I.C. § 25-2805(2).

A. Statutory Construction is Inappropriate when the Language of the Statute is Clear and Unambiguous.

The District Court failed to look to the clear unambiguous language of the statute and proceeded to interpret the statute to require an additional element, not present in the actual statutory language, that before liability can attach, there must be a prior attack or some other evidence of the dog's vicious propensities. The court followed the "one free bite" theory of liability even through there is no language to that effect in the statute itself.

> 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. *Struhs v. Protection Techs. Inc.*, 133 Idaho 715, 718, 992 P.2d 164, 167 (1999). However, ambiguity 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, 769 (2001).

L & W Supply Corporation, 136 Idaho 738, 742, 40 P.3d 96, 100.

In this case, the District Court erred in its interpretation of the statute as ambiguous and should have refrained from engaging in statutory construction. I.C. § 25-2805(2) establishes liability for injuries caused by a vicious dog for the dog owner and the owner the premises on which the animal is housed. The statute provides a clear definition of a vicious dog as "any dog, which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing." Once the "vicious" definition is met, the statute provides that "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."

I.C. § 25 -2805(2) clearly states that a property owner is 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. Black's Law Dictionary defines "harbor" as "[t]o afford lodging to, to shelter, or to give a refuge to." Black's Law Dictionary, Fifth Edition (1979). 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.

B. I.C. § 25-2805(2) Establishes Liability *Per Se.*

In this matter, the Maznik Respondents argue that they had no duty to protect Ms. Bright from an unprovoked attack. However, Idaho Code § 25-2805(2) imposes responsibility without requiring an analysis of duty. Violation of the statute constitutes negligence *per se*. Idaho Code § 25-2805(2) imposes liability *per se* 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. The Mazniks, through their agent, knowingly rented an insufficiently equipped unit to a tenant with two dogs. The Property had no fence, 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. Furthermore, the Mazniks have a standard policy to investigate the dog breeds of potential tenants and their investigation should have revealed that this breed of dog may have dangerous propensities due to

the breed's characteristic to be highly protective. The Maznik's failure to provide a secure enclosure on the Property, while electing to rent to a tenant with large breed dog known for its dangerous propensities, created an environment ripe for an unprovoked attack to result in an injury. Under the Statute, the Mazniks must bear liability for the risk of their decision to rent an ill-equipped premises to a tenant with a large breed dog known to react protectively.

C. Ms. Bright was an Invitee Upon the Premises.

Respondents' argument in their Brief at page 18-21 that Ms. Bright was a "trespasser" on the premises of the Landowner is unfounded. Respondents correctly identify the standards to determine the status of the person injured on the land 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." *Holzheimber v. Johannesen*, 125 Idaho 397, 299, 871 P.2d 814, 816 (1994). In the instant case, Appellant Bright was present on the property to discuss a late payment due on an auto loan with the tenant. She was there, specifically, to determine when payment could be expected in order to prevent the need to repossess the tenant's personal vehicle which was security for a consensual loan between the parties. Because this visit conferred a "business, commercial, monetary or other tangible benefit" to the tenant, Ms. Bright meets the definition of an invitee. The remainder of Respondents' arguments with respect to their claim that Ms. Bright was a trespasser, are outside of the scope of consideration in applying the statute. Any suggestion that this nullifies Ms. Bright's claim of liability is meritless.

D. The Statute Does Not Require a Previous Dog Attack as a Prerequisite to Civil Liability.

The District Court erred in its determination that the Statute was ambiguous. Furthermore, the court's process of interpreting the Statute in a manner in which to require the additional element of prior knowledge of the animal's vicious tendencies as shown through a prior attack is clearly at odds with the clear language of the Statute.

As noted in Respondents' Brief, I.C. § 25-2805(2) was replaced with I.C. § 25-2810 in the 2016 legislative session. The new I.C. § 25-2810 provides new terminology and definitions for an "at-risk dog" and a "dangerous dog." The new Statute further clarifies that there is no prerequisite of a previous attack by the dog in order for civil liability for damages to attach under the Statute and now includes a provision that reads as follows: "A prior determination that a dog is dangerous or at-risk, or subject to any court order imposing restrictions or requirements pursuant to the provision of this section, shall not be a prerequisite to civil liability for injuries caused by the dog." While this Statute was enacted after the instant case was commenced, it does provide guidance and clarification that Idaho does not follow the "one free bite theory" for imposing civil liability for injuries caused by a vicious dog.

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 13th day of December, 2016.

EVANS KEANE LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 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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