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Litke v. Munkhoff Appellant's Brief 2 Dckt. 44735

IN THE SUPREME COURT OF THE STATE OF IDAHO

KLAUS KUMMERLING and BAERBEL LITKE, husband and wife, Plaintiffs/Respondents, vs. MARK MUNKHOFF and ROBYN MUNKHOFF, Defendants/Appellants, CITY OF COEUR D'ALENE, IDAHO, a political subdivision of the State of Idaho; COEUR D'ALENE IDAHO POLICE CHIEF RON CLARK; and SAM MUNKHOFF, Defendants.	Supreme Court Case No. 44735 District Court No. CV-2015-5381

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

The Honorable Cynthia K. C. Meyer, Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules & Statutes

Other

I. INTRODUCTION

This case requires the Court to determine whether the scope of the general duty to secure an aggressive or dangerous dog should be extended to require custodians of dogs to continue to take steps to prevent injury after the dog's owner has resumed custody and control and removed the dog from the custodian's property. This case also asks this Court to examine the scope of liability of parents for the actions of their adult children that occur off the parents' property when the parents are not present. And, this case asks this Court to examine the extent of proximate cause.

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an Order of the First District Court denying the Appellants Mark Munkhoff and Robyn Munkhoff (collectively, Munkhoffs)'s Motion for Summary Judgment as to plaintiffs' claim for negligence and from the trial court's Order denying the Munkhoffs' I.R.C.P. 59.1 and 60 Motion for Remittitur and New Trial.

B. Statement of the Facts

The Munkhoffs live next door to Respondent Klaus Kummerling (Kummerling) on Sutters Way in Coeur d'Alene. In November 2012, the Munkhoffs' adult son Sam Munkhoff adopted a pit bull named Bo; Sam was residing on E. Walnut Avenue in Coeur d'Alene at the time. (R 63, ¶2; R 69, ¶3.B; R 72, ¶4; R 74, ¶6.A) Starting July 5, 2013, Sam began working in North Dakota. (Tr. Vol. II, p. 238 ll. 17-23, p. 241 ll. 19-21, p. 263 ll. 17-22) Sam left Bo in the care of the Munkhoffs on July 5 and returned July 25. (Tr. Vol. II, p. 245 ll. 4-11) Sam and Bo

were both staying with the Munkhoffs on July 30, 2013, when Bo bit Kummerling in or near Kummerling's driveway. (Tr. Vol. II, p. 239 ll. 17-19, p. 252, ll. 10-14) Sam was taking Bo for a walk at the time of the injury and had him on a leash. (R 65 at ¶6; R 87, 112; Tr. Vol. I p. 9-17, Vol. II, p. 240 l. 16 to 241 l. 6)

Bo had been declared an aggressive dog in November 2012. (R 70, ¶3.D) An animal control officer, Laurie Deus, provided Sam with a copy of City Ordinance No. 6.20.030 and a declaration form which explained the responsibilities of an owner of an aggressive dog. Id. Officer Deus stated she also explained the requirements for containing Bo to Mark, but Mark and Sam testified that the information provided to Mark was incomplete. (R 70-71, ¶3.E; Tr. Vol. II, p. 232 l.20 to p. 233 l. 9; p. 256 l. 7 to p. 257 l. 20) Bo was declared a dangerous dog in April 2013, but the Munkhoffs testified that they were unaware of the declaration. (Tr. Vol. II, p. 244 l. 19 to p. 245 l. 3, p. 261 ll. 2-9, p. 272 ll. 8-12) Sam turned twenty-years-old in May 2013, and was not residing with the Munkhoffs. (R 97; Tr. Vol. II p. 228 ll. 21-24)

Sam left Bo in the Munkhoffs' care on July 5, 2013. (R 99, ¶99; Tr. Vol. II, p. 241 l. 19-p. 242 l. 2; Vol. II, p. 267 ll. 4-7, p. 281 l. 20 to 282 l. 4) The Munkhoffs' home had a beware of dog sign on the property already, as the Munkhoffs had a Boxer. (Pl's Ex. 26) Kummerling testified that he did not see the sign. (Tr. Vol. I, p. 72 ll. 23-25) Kummerling complained to the Munkhoffs that Bo barked and would charge the fence between the two properties "with all four paws against the fence" so hard that the fence would move "about two feet left and right." (Tr. Vol. I, p. 59 ll. 5-11; Vol. III p. 367 ll. 10-20)

On July 30, 2013, while Sam was temporarily staying with the Munkhoffs (R 64, ¶5) Sam took Bo for a walk from the Munkhoffs' home into the Canfield Mountain area. (R 64, ¶6; Tr. Vol. I, p. 74:9-13) Sam did not muzzle Bo. (Tr. Vol. I, p. 74 ll. 16-17) As Sam was returning from the walk, Kummerling approached Sam and Bo. (Tr. Vol. I, p. 75 ll. 4-24) Kummerling claimed that he asked Sam if he could pet Bo, explaining to Sam that he wanted to "make friends with [Bo] so he won't bounce against the fence all the time." (Tr. Vol. I, p. 75 ll. 13-18) Kummerling testified that he asked, "He's not going to bite me, is he?" and that Sam had stated Bo would not bite Kummerling. (Tr. Vol. I, p. 75 ll. 17-19)

As Klaus bent toward Bo, Bo bit his face causing substantial injury. (Tr. Vol. I, p. 76 ll. 6-14) Sam was holding Bo's leash at the time. (R 112, ¶3) Neither of the Munkhoffs were present. (R 64, ¶7; Tr. Vol. I, p. 123 ll. 17-25) The dog bite occurred either in Kummerling's driveway or on the sidewalk in front of his home. (Tr. Vol. I, p. 124 ll. 1-3) The Munkhoffs were not present at the time of the injury. (Tr. Vol. I, p. 124 ll. 4-6)

C. Course of Proceedings

Kummerling and his wife Baerbel Litke filed a complaint in the District Court of the First Judicial District, making claims for negligence, gross negligence, outrage, and nuisance against the City of Coeur d'Alene, Coeur d'Alene Police Chief Ron Clark, Mark Munkhoff, Robyn Munkhoff, and Sam Munkhoff. (R 10-18) The trial court dismissed the claims against the City and Chief Clark.

1. The Munkhoffs filed a motion for summary judgment seeking dismissal of the negligence claim based upon their lack of custody and control over Bo at the time of the injury.

Kummerling alleged in his complaint that the Munkhoffs were negligent because they harbored Bo at their home, despite being aware of his vicious propensities, and because they failed to ensure the public was protected from Bo. (R 16, ¶¶6.5, 6.7) The Munkhoffs filed a motion for summary judgment on March 17, 2016. (R 44) The trial court granted the Munkhoffs' motion as to all claims except the claim for negligence. (R 208)

The following facts were undisputed at summary judgment: (1) Sam owned Bo (R 11, ¶3.2; R 32, ¶1; R 20, ¶6; R 27-29, ¶XXVIII; R 63, ¶2; R 72, ¶4; R 74, ¶6.A; R 97); (2) Sam was then twenty-years-old (R 97); (3) the Munkhoffs allowed Sam to bring Bo to their home when he stayed with them (R 64, ¶¶3, 5); (4) Sam had left Bo with the Munkhoffs while he was working in North Dakota, but had returned to Coeur d'Alene and was staying with the Munkhoffs at the time of the injury (R 99); (5) Sam had sole physical control of Bo at the time of the injury, had left the Munkhoffs' property with Bo, and was holding Bo's leash at the time of the injury (R 1, ¶3.14; R 65, ¶6, 8; R 112, ¶3); (6) the Munkhoffs were not present at the time of the injury (R 65, ¶7); (7) the injury occurred in or near the driveway of Kummerling's home and not on the Munkhoffs' property (R 112, ¶2; R 65, ¶7); and (8) Kummerling asked if it was okay to pet Bo immediately before the injury (R 112, ¶3). Kummerling presented no proximate cause evidence linking the alleged omissions of the Munkhoffs to the injury. (See R 107-29)

The Munkhoffs argued that no duty was breached as a matter of law because it was undisputed that Sam had sole custody and control of Bo at the time of the injury. (R 51-52, 152)

The Munkhoffs reasoned that it was unduly burdensome to extend the duty to prevent injury to include even those instances when an animal was not under a defendant's control and was at an unknown location outside the defendant's property. (R 51) Extending the scope of duty to require the Munkhoffs to exercise control over Bo even after Sam had removed him from the Munkhoffs' property would require temporary custodians of animals to exercise control over the animals' adult owners, even when they had no legal right to do so. (R 51-52) Further, even if the Munkhoffs had some duties under the City's municipal code merely because Bo had stayed with them in the past, the ordinance did not require the Munkhoffs to keep Bo off their property or to inform Kummerling that Bo had been declared aggressive or dangerous (R 151-52; see Coeur d'Alene Municipal Code 6.20.030)

The Munkhoffs also argued Kummerling had failed to establish the Munkhoffs' actions were the proximate cause of Kummerling's injury and argued Sam's actions were a superseding cause of the injury. (R 53-56) The Munkhoffs pointed out that the injury could have happened regardless of any acts or omissions by the Munkhoffs because they could not control how another adult managed his dog. (R 54-55) Even if that were not the case, Sam's independent action in deciding to take Bo for a walk without muzzling Bo and in allowing Kummerling to approach Bo was a superseding cause of the injury. (R 55-56)

Kummerling did not dispute that the Munkhoffs did not have control of Bo at the time of the attack and did not dispute that the bite had occurred outside of the Munkhoffs' property. (R 149-51) Instead, Kummerling claimed it did not matter who was controlling Bo at the time of the injury because Bo "would not have been there [in Kummerling's driveway] at all if not for

the acquiescence and agreement of the Munkhoffs." (R 136; see R 107-29) Kummerling alleged that the Munkhoffs owed a duty to Kummerling to: (1) remove Bo from their property, (2) muzzle Bo, or (3) notify the public that they had a dangerous dog on their premises. (R 134)

Kummerling relied solely on argument to claim that the Munkhoffs' alleged harboring of Bo without muzzling and failure to provide notice to the public of Bo's propensities was the proximate cause of the injury to Kummerling. (R 138-39) Kummerling claimed that, because the Munkhoffs had a duty to prevent Bo from even being present on their property, Sam's actions in walking Bo without a muzzle and allowing Kummerling to attempt to pet Bo could not be a superseding cause. (R 139-40) Kummerling presented evidence indicating that Sam had been cited in regard to Bo's previous conduct and had been advised that he was required to muzzle Bo. (R 124) Kummerling presented no evidence, however, connecting the alleged breaches by the Munkhoffs to his injury. (See R 112-15)

The trial court did not examine whether the Munkhoffs were custodians at the time of the injury. Instead the trial court focused upon the Munkhoffs' knowledge of Bo's propensities and erroneously reasoned that whether the Munkhoffs owed a duty at the time of the injury turned upon how long Bo had stayed with the Munkhoffs before the injury. (R 174) The trial court further ruled that whether the Munkhoffs breached a duty, whether the breach was a proximate cause of the injury, and whether Sam's actions were a superseding cause of the injury were all dependent upon whether the Munkhoffs were harboring Bo. (R 176, 178) The trial court dismissed all claims against the Munkhoffs, except Kummerling's claim for negligence. (R 208)

2. Trial.

The case was tried to a jury from September 19, 2016 through September 22, 2016. The key issues at trial were: (1) whether the Munkhoffs owed a duty to Kummerling at the time of the injury; (2) whether Kummerling was at fault for bending to pet a pit bull, whom he had observed behaving aggressively; (3) whether Sam's act in walking Bo without a muzzle and allowing Kummerling to approach Bo was a superseding cause; and (4) damages. Sam appeared pro se.

a. Evidence presented at trial.

At trial Kummerling testified that he did not see Bo very much and that Robyn had told him that the Munkhoffs were taking care of the Bo for Sam. (Tr. Vol. I, p. 58 ll.10-17, p. 71 ll. 8-9) Kummerling testified that he was unaware of any beware of dog signs and that the Munkhoffs had not told him that Bo had been declared an aggressive dog, but that he had seen Bo charging the fence with all four paws so hard that the fence would move a couple of feet. (Tr. Vol. I, p. 98 ll. 24-25, p. 109 ll. 1-16, p. 122 ll. 6 to p. 123 l. 16) This had happened on several occasions before the date of the injury when Kummerling was cleaning up plums in his own yard near the Munkhoffs' fence. (Tr. Vol. I, p. 122 l. 16 to p. 123 l. 15)

Kummerling testified that on July 30, 2013, before the injury, he had seen Sam walk Bo to Canfield Mountain without a muzzle on Bo. (Tr. Vol. I, p. 74 ll. 9-17) When Sam returned and neared Kummerling's driveway, Kummerling asked Sam if he could pet Bo. (Tr. Vol. I, p. 75 ll. 7-24) Bo was on a leash held by Sam, but was not wearing a muzzle. (Tr. Vol. I, p. 75 ll. 17-18, p. 76 ll. 20-21, ll. 24 to p. 77 l. 1) Kummerling testified that he asked Sam if Bo would bite and

that Sam had said "no." (Tr. Vol. I, p. 75 ll. 17-18) Kummerling then bent down and tried to pet Bo, when Bo bit him. (Tr. Vol. I, p. 76 ll. 6-10)

Kummerling testified that neither of the Munkhoffs were present and that the injury did not occur on their property:

Q. And now, just so we're clear, this dog bite did not happen in Mark and Robyn's house, did it?

A. No.

Q. And it did not even happen on their property, did it?

A. No.

Q. And Mark and Robyn were not present at the time it happened.

A. No.

Q. It happened either on a public sidewalk or perhaps just inside your driveway; right?

A. Yes.

Q. And the only people around, as far as you can remember, were you and Sam.

A. Yes.

(Tr. Vol. I, p. 123 l. 17 to p. 124 l. 6)

Kummerling's wife, Baerbel Litke, testified that she had never seen Bo at the Munkhoff home before the injury. (Tr. Vol. I, p. 137 ll. 20-25)

Sam testified that he had been residing at locations other than the Munkhoffs' home from at least November 2012 up until the time of the injury. (Tr. Vol. II, p. 228 ll. 12-24) Sam also

testified that he had owned Bo beginning at the end of November 2012. (Tr. Vol. II, p. 229 ll. 17-19, p. 230 ll. 6-11) Sam acknowledged that when Bo was declared an aggressive dog in November 2012, he was informed of the City's requirements for keeping Bo, including muzzling Bo. (Tr. Vol. II, p. 231 ll. 23 to p. 232 l. 15)

Sam testified at trial that for a period in July 2013 he was working in North Dakota and that Bo stayed at the Munkhoffs' home when he was gone, but that Bo remained Sam's responsibility. (Tr. Vol. II, p. 241 l. 19 to p. 242 l. 16) Sam left for North Dakota on July 5 and returned on or about July 25, 2013, five days before the injury. (Tr. Vol. II. p. 245 ll. 4-11)

Mark Munkhoff confirmed that Sam was staying with the Munkhoffs at the time of the injury and that Bo was at the Munkhoffs' home beginning when Sam began work in North Dakota on July 5, 2013. (Tr. Vol. II, p. 252 ll. 1-14, p. 263 ll. 12-22) Robyn Munkhoff also testified that Bo stayed at the house in July 2013 and that she provided Bo with basic care during that time. (Tr. Vol. II, p. 281 l.20 to p. 282 l. 4)

Testimony from Animal Control Officer Laurie Deus confirmed that only Sam, as Bo's owner, had been cited by the City and notified of the declarations of Bo's status as an aggressive dog and then dangerous dog. (Tr. Vol. III, p. 361 l. 22 to p. 362 l. 11; Tr. Vol. II, p. 207 ll. 14-23, p. 211 ll. 6-11, p. 215 ll. 10-13, p. 216 l. 24 to p. 217 l. 11; Tr. Vol. II, p. 205 ll. 17-19)

No testimony was admitted at trial indicating that Bo was a permanent resident at the Munkhoffs', that Bo was not in the sole custody and control of Sam after Sam returned from North Dakota, or that anyone other than Sam had any control over Bo at the time of the injury.

b. The jury's verdict.

Kummerling argued in closing that all three of the Munkhoffs were owner/custodians of Bo and that the jury should use their verdict to send a message regarding responsible pet ownership. (Tr. Vol. IV, p. 466 l. 21 to 467 l. 4, p. 488 ll. 18-22)

The jury found for Kummerling awarding $16,603.00 in economic damages and $185,000.00 in non-economic damages, and allocated fault by special verdict as follows:

Sam Munkhoff	45%
Mark Munkhoff	40%
Robyn Munkhoff	10%
Klaus Kummerling	5%

3. Motion for Remittitur and New Trial

The Munkhoffs brought a motion for a new trial or for remittitur and/or relief from judgment on October 11, 2016 under §6-807, and I.R.C.P. 59, 59.1, and 60. (R 410-18) There, the Munkhoffs argued that there was insufficient evidence to support the allocation of fault to Mark and to Robyn. (R 449)

The trial court denied the Munkhoffs' motion. The trial court opined that the court's allocation would have been slightly different, but that the disparity between the court's allocation and the jury's did not shock the conscience, such that the motion for new trial should be granted. (R 452) The trial court further reasoned that she did not believe that the Munkhoffs did not have authority to require their adult son to muzzle his dog when he took Bo off their property. (R 488) The trial court reasoned that liability was apportioned appropriately based upon her view that

Robyn's testimony regarding her knowledge of Bo's propensities was not credible and her belief that Mark knew what the municipal ordinances require. (R 451) On November 7, 2016, the trial court entered its Judgment on Special Verdict imposing judgment against Mark in the amount of $77,243.30 and against Robyn in the amount of $19,310.82. (R 460-61)

The Munkhoffs have appealed from the court's order on summary judgment and order denying remittitur and new trial.

III. ISSUES PRESENTED ON APPEAL

A. Whether the trial court erred in denying summary judgment dismissing Kummerling's negligence claim.

1. Whether a custodian's duty extends to times when the owner of an animal has resumed custody and control over the animal.

2. Whether the trial court erred in finding there was a genuine issue of fact as to causation where the plaintiff presented no evidence regarding proximate cause and where undisputed evidence established a superseding cause.

B. Whether the trial court erred in denying the Munkhoffs' motion for remittitur and for new trial where there was insufficient evidence to establish the Munkhoffs were custodians at the time of the injury.

IV. ARGUMENT

To prevail on his claim for negligence against the Munkhoffs, Kummerling bore the burden of proving (1) the Munkhoffs owed Kummerling a duty that is recognized by law; (2) the Munkhoffs breached that duty; (3) a causal connection between the duty and the resulting injury;

and (4) actual loss or damage. Turpen v. Granieri, 133 Idaho 244, 247, 985 P.2d 669 (1999). Whether a party owes a duty is a question of law that must be determined at the time of the injury. Kummerling presented no evidence at summary judgment or at trial disputing Sam's sole custody and control of Bo at the time of the injury. The trial court therefore erred in denying the Munkhoffs' motion for summary judgment and their motion for a new trial.

Whether an alleged breach was a substantial cause of an injury can be determined on summary judgment when no evidence is presented from which a reasonable juror could find causation. Path to Health, LLP v. Long, 161 Idaho 50, 161 P.3d 1220, 1228 (2016). Kummerling presented argument of counsel, but no evidence establishing any nexus between the alleged breach by the Munkhoffs and Kummerling's injury. Because Kummerling failed to meet his burden on summary judgment, dismissal was required as a matter of law. The trial court therefore erred in reserving the issue for the jury.

A. The trial court erred in denying the Munkhoffs' motion for summary judgment dismissing Kummerling's negligence claim because Kummerling failed to create a genuine issue of fact as to either the Munkhoffs' duty or proximate cause.

There were no genuine issues of fact at summary judgment because the threshold issue—whether the Munkhoffs were Bo's custodians at the time of the injury—was clear. No party alleged that anyone other than Sam had control over Bo when Bo bit Kummerling. Therefore as a matter of law, the Munkhoffs had no affirmative duty at that moment (or immediately before that moment) to prevent injury to Kummerling. Because Kummerling failed to meet his burden as to this critical threshold issue, the trial court erred in ruling that issues regarding the

foreseeability of the injury and the Munkhoffs' knowledge of Bo's propensities must be tried to the jury.

1. Standard of Review of Ruling on Motion for Summary Judgment

On review, the Supreme Court applies the same standard used by the trial court when ruling on the motion. Bright v. Maznik, No. 44129, 2017 WL 2644705, at *2 (Idaho, June 20, 2017). "The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The reviewing court reviews only that portion of the record that was before the trial court at the time the motion was presented. Brown v. Matthews Mortuary, Inc., 118 Idaho 830, 832, 833, 801 P.2d 37 (1990).

In order to create a genuine issue of material fact, the plaintiff must do more than offer conclusory assertions that an issue of fact exists. Cates v. Albertson's Inc., 126 Idaho 1030, 1033, 895 P.2d 1223 (1995). The nonmovant's response "must set forth specific facts showing there is no genuine issue for trial." Id. (quoting I.R.C.P. 56(e)). Speculation and a mere scintilla of evidence is insufficient to create an issue of fact. G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 517, 808 P.2d 851 (1990).

2. The Munkhoffs breached no duty to Kummerling because they were not custodians of Bo at the time of the injury.

The existence of a duty is a question of law that must be determined at the time of the injury. Turpen, 133 Idaho at 247; Caldwell v. Idaho Youth Ranch, Inc., 132 Idaho 120, 124, 968 P.2d 215 (1998). Each person has a duty to exercise ordinary care to prevent unreasonable

foreseeable risks to others. Braese v. Stinker Stores, Inc., 157 Idaho 443, 445, 337 P.3d 602 (2014) (citing Turpen, 133 Idaho at 247). But, there is no affirmative duty to prevent harm to another regardless of foreseeability unless there is a special relationship or an assumed duty based on an undertaking. Beers v. Corp. of President of Church of Jesus Christ of Latter Day Saints, 155 Idaho 680, 686, 316 P.3d 92 (2013). As a matter of law the Munkhoffs had no special relationship and had no undertaking at the time of the injury that would induce Kummerling's reliance and impose a duty on the Munkhoffs to protect Kummerling from harm. Moreover, the balancing of the harms clearly weighs against expanding the scope of duty.

a. Duties of custodians of animals are limited by the owner's ability to assume custody and control over their property.

Under Idaho common law and statute, custodians of animals have a duty to exercise reasonable care to prevent injury if they are aware of the dangerous propensities of the dog. Braese, 157 Idaho at 446. Whether one is a custodian or owner for purposes of liability must be determined at the time of the injury. McClain v. Lewiston Interstate Fair & Racing Ass'n, 17 Idaho 63, 104 P. 1015, 1026 (1909). Therefore, whether the Munkhoffs owed a duty to Kummerling turns upon whether the Munkhoffs continued to be the custodians of Bo even after Sam took custody of Bo and removed him from the Munkhoffs' home. Id.; see also, Jones v. Starnes, 150 Idaho 257, 261, 245 P.3d 1009 (2011) (holding that knowledge of dangerous propensities alone does not create a duty to prevent harm after the perpetrator has left the premises). Only after custody has been determined does the defendant's knowledge and the scope of the duty become relevant. See McClain, 104 P. at 1025-26.

This Court has recently held that, in order for the defendant to be subject to the statute as a harborer or keeper of the dog under I.C. §25-2805(2) (2015), the plaintiff must show that the defendants "received or concealed clandestinely" an animal, had the animal in their keeping, protected the animal or undertook to control its actions. Bright, 2017 WL 2644705 at *3; see also, McClain, 104 P. at 1026. ("Harboring means protecting, and one who treats a dog as living in his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law.") Ownership of the property on which the animal is kept is insufficient "even when coupled with permission given to a third person to keep it." Bright, 2017 WL 2644705 at *3.

Similar to the definition of keeper, Merriam-Webster Dictionary defines custodian as "one that guards and protects or maintains; especially: one entrusted with guarding and keeping property or records." https://www.merriam-webster.com/dictionary/custodian. No Idaho case has imposed liability on a custodian of a dog for injuries occurring when the dog was in the sole custody and control of the owner.

For instance, in McClain, this Court first considered who among a number of family members was the keeper or custodian of a family dog at the time of injury. McClain, 17 Idaho 63, 104 P. 1015 (1909). The dog was alleged to belong to one defendant, John Vollmer, but to be in the custody and care of Norman Vollmer at the time of the injury. Id. at 1017. Similar to the facts here, the complaint alleged that the dog was kept, harbored, and maintained at the family residence of John Vollmer, where Norman Vollmer also resided. Id. at 1018. Norman Vollmer was alleged to have removed the dog from the family home and taken him to the fairgrounds where the injury occurred. Id. At the end of the plaintiffs' case-in-chief, the trial court granted a

motion for nonsuit as to John Vollmer; the jury then returned a verdict against Norman Vollmer and the owner of the fairgrounds. Id. at 1017.

The McClain court explained that if the dog was kept where Norman Vollmer lived and was permitted to leave the premises with Norman Vollmer and was under Norman Vollmer's control at the time the injury occurred, he could be considered in control of the dog for purposes of liability. Id. at 1026. Notably, John Vollmer's status as the dog's owner and the head of the household where the dog resided was insufficient to create a duty to prevent harm at the time of the injury. Id. at 1017, 1025.

The holdings of other courts are similar and persuasive. In Cormier v. Willis, 313 Ga. App. 699, 701, 722 S.E.2d 416 (2012), the Georgia court of appeals held that the father of a pit bull's owner, who was also the owner of the home where the injury occurred, was not liable as a matter of law for an attack by the dog because the plaintiff had alleged and the daughter had confirmed that the dog belonged to the daughter and was under her management and control at the "critical time." In another Georgia case, the court of appeals affirmed summary judgment in favor of the roommate (Kahn) of the owner of a dangerous dog because it was undisputed that, although Kahn had cared for his roommate's dog in the past when the owner was out of town, at the time of the injury the dog was solely under the control of its owner. Goodman v. Kahn, 182 Ga. App. 724, 725, 356 S.E.2d 757 (1987). As a matter of law, Kahn could not be said to be the dog's keeper at the critical time. Id. Moreover, the court held that Kahn could not be liable for negligently managing the dog or allowing it to run free because the injury had occurred outside

Kahn's property. Id. Notably, the dog's status as a vicious dog did not dispense with the plaintiff's requirement to prove Kahn was the dog's custodian at the time of the injury. See Id.

And in Janssen v. Voss, 189 Wis. 222, 207 N.W. 279 (1926), the Wisconsin Supreme Court reversed a jury verdict against the mother of the owner of a dog, even though the owner was a minor and the dog resided at the family home and was ordinarily under the mother's care and control. Prior to the injury, the mother had left her minor children in the care of a friend and had left the dog at an animal hospital. Id. at 279. The son then removed the dog from the animal hospital and brought him to the home of the friend where the dog then bit a child. Id. at 279. The Wisconsin Supreme Court held on appeal that the degree of care exercised by the mother was immaterial; the sole question was whether the mother was the keeper of the dog at the time of the injury. Id. at 280.

The Janssen court reasoned that if the owner of the dog had been the adult child of the defendant who removed the dog, the question as to whether the mother-defendant continued to be the dog's keeper would be "obvious." Id. In Janssen, even though the owner was a minor, his property rights as the owner of the dog could not be curtailed by his mother's actions as his guardian and as the keeper of his dog. Id.

> We are forced to the conclusion that, when the owner of the dog, even though such owner be an infant son of the defendant, took personal custody and possession of the dog, even though such an action on his part was against the will and consent of his natural guardian, his mother, he thereby became the legal keeper of the dog, and that mother was no longer responsible for the conduct of the dog. From the conclusion it results that the judgment should be remanded with instructions to dismiss the plaintiff's complaint.

Id. at 280.

Illinois likewise follows the rule that whether a defendant is a custodian for purposes of liability must be determined at the time of injury. See Frost v. Robave, Inc., 296 Ill. App.3d 528, 534, 694 N.E.2d 581 (1998). In Frost, the plaintiff claimed that a business was liable for a dog bite injury because the owner-employee of the business took the dog with him when he went to work on a regular basis and fed and watered the dog on the premises. Id. at 530-31. The Illinois court of appeals held that to establish that one is a keeper of the dog, the plaintiff must show that the person had control over the dog at the time of the injury or immediately prior to the injury. Id. at 534. Liability should not extend beyond its reasonable scope to punish those who are not in control of the animal at the time of the injury. Id.

Because the keeper's status can change subject to the will of the owner, the focal point of the inquiry must be on the time of the injury and not on some other time period. Id. at 535. "'*The moment the owner removes the dog from the custody of the keeper*, the dual authority [of the owner and keeper] is merged in the owner, and at that very moment *the keeper's rights and responsibilities concerning the dog are at an end.*'" Id. (quoting Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis.2 258, 266, 549 N.W.2d 723 (1996)) emphasis original. Therefore, any duty owed by the business ended as soon as the owner-employee returned the dog to his apartment, even though the apartment was located in the same building as the business. Id. at 530, 536. These cases are consistent with Idaho animal control law and tort principles and should be considered as persuasive authority.

As in McClain, Goodman, Janssen, and Frost, Sam and Bo resided (temporarily) at the Munkhoffs' home in July 2013. Just as in those cases, Sam removed Bo from the custody of the

Munkhoffs by returning from North Dakota to Coeur d'Alene where he resumed care for Bo and by removing Bo from the Munkhoffs' property to take him on a walk. Just as in the cases above, the Munkhoffs were not present at the time of the injury and were not in a position to prevent harm to Kummerling. Even in the cases above where the dog lived at the defendant's home full time or on a regular basis, where the defendants knew of the propensities of the dog, or where the defendant was the parent of a minor child, the courts found no duty as a matter of law because the defendants were not the custodians or keepers of the dog at the time of the injury. This Court should likewise hold that the Munkhoffs were not liable as a matter of law because they were not custodians at the time of the injury.

b. The Munkhoffs had no duty based upon a special relationship to Sam.

Kummerling essentially argued at trial that the Munkhoffs had a duty to prevent harm to Kummerling because of their relationship to Bo's owner and because it was foreseeable that Sam would walk his own dog. Absent unusual circumstances, a person has no duty to prevent harm, regardless of foreseeability. Beers, 155 Idaho at 686. In order to establish an affirmative duty to prevent harm, Kummerling was required to establish a special relationship, or a specific assumed undertaking, that would justify Kummerling's reliance.

A special relationship may exist between an actor and a third party which imposes a duty on the actor to control the third party's conduct. Id. This duty requires that the actor have knowledge of an unreasonable risk of harm and have a right to control the third party's conduct. Id. There is no duty arising from a special relationship without a right and ability to control the conduct of the third party. Id. at 689. The age of majority in Idaho is 18. I.C. §32-101. Even if

the Munkhoffs had knowledge of any unreasonable risk posed by Bo, they had no right or ability to control Sam's management of Bo outside their own property limits.

It is undisputed that Sam was twenty years old at the time of the injury and that the injury occurred off of the Munkhoffs' property when neither Munkhoff was present. (R 13 ¶3.14; R 65¶¶6-7; R 97; R 112 ¶3) It is also undisputed that Bo belonged to Sam—and not the Munkhoffs. (R 11, ¶3.2; R 64 ¶2; R 97) The Munkhoffs had no right or duty to control Sam's management of Bo outside the Munkhoffs' property, and had no duty to prevent Sam from committing negligence. See Normington v. Neely, 58 Idaho 134, 70 P.2d 396, 399 (1937). Further, even if Sam were a minor, no cause of action for negligent supervision of Sam's management of Bo would lie. See Fuller v. Studer, 122 Idaho 251, 255, 833 P.2d 109 (1992). Because Bo belonged to Sam, the Munkhoffs had no right to control Bo once Sam had removed Bo from the Munkhoffs' property. Any duty to prevent Bo from causing injury after Sam resumed custody cannot arise from the Munkhoffs' parent-child relationship with their adult son.

c. *At the time of the injury, the Munkhoffs had no duty based upon any undertaking to harbor or keep Bo.*

If a party should assume a duty by voluntarily performing an act that the party had no previous duty to perform, the duty that arises is limited to the duty actually assumed and comes into being only to the extent that there is an actual undertaking. Beers, 155 Idaho at 688. Thus, to the extent the Munkhoffs assumed any duty as to Bo, that duty was limited to the actual undertaking of caring for Bo while Sam was away and did not extend to monitoring or controlling Bo after Sam had resumed custody.

In Idaho, as in other states, statutes and regulations may define the applicable standard of care owed. Bright, 2017 WL 2644705 at *2. Idaho law and Coeur d'Alene City Ordinance impose on custodians of dogs declared aggressive or dangerous certain duties relating to the securing of the dog. I.C. §25-2805(2) (2015); City Code 6.20.030 and .040. Because the purpose of animal control laws is to impose liability on those persons who are in a position to prevent injury, the statutory and regulatory requirements should not be construed to place an ongoing obligation on custodians that continues after the owner has resumed custody and control of the dog. "Courts should presume that a statute was not enacted to work a hardship or effect an oppressive result." Lawless v. Davis, 98 Idaho 175, 177, 560 P.2d 497 (1977).

Examining a similar request to extend the scope of duty, in Stoddart v. Pocatello Sch. Dist. No. 25, 149 Idaho 679, 687, 239 P.3d 784 (2010), this Court refused to extend a school district's duty to act in loco parentis to require indefinite monitoring of students, even when the student in question was known to have made threats of violence against other students. There, the parents of a murdered student brought an action for negligence against the school district, based upon the school district's knowledge of the dangerous propensities of the perpetrators and the district's receipt of information about threats made by the perpetrators. Id. at 681-82. The parents relied upon the school district's common law duties and its duties under I.C. §33-512, which expressly identifies the school district's duties to protect students. Id. at 684. The parents claimed that the statutory duty applied because the danger to their child had arisen on school grounds during school hours, even if their child had been murdered at their own home. Id.

The district court ruled that the school district had no duty because "when a student is not under the care, custody, and supervision of a school, it is the parent's responsibility to take steps to protect the child from foreseeable risks of harm." Id. at 684. The Stoddart court considered whether the scope of the school district's duty should be extended to require the school district to take reasonable steps to prevent a violent criminal act against a student by a fellow student away from school grounds and not in connection with a school-sponsored activity. Id. at 685.

This Court held as a matter of law that the risk in question (though great) was not sufficiently foreseeable or specific to impose a duty on the school district to indefinitely monitor the actions of the perpetrators. Id. at 687. The Stoddart court further held that the school district's undertaking of its original investigation into the threats could not be construed as assuming a duty to provide future assistance. Id. at 687. "'When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty is limited to the duty actually assumed.'" Id. (quoting Martin v. Twin Falls Sch. Dist. No. 411, 138 Idaho 146, 150, 59 P.3d 317 (2002)).

Similarly, here, the Munkhoffs' duty is limited to their actual undertaking. There is no continuing duty to monitor Bo once he is no longer under their care, custody and supervision, regardless of their knowledge of Bo's propensities. Nor was there any duty to secure their yard or warn visitors to beware of a dog on the premises once Sam removed Bo from the Munkhoffs' property. Under the holding of Stoddart, any duty the Munkhoffs may have had to secure Bo within their yard and to warn visitors to their property of Bo's presence ceased as a matter of law

when Sam removed Bo, effectively ending the undertaking—even if only temporarily. See Stoddard, 149 Idaho at 684, 687.

d. The balancing of the harms does not favor expanding the scope of the duty of custodians.

Kummerling asked the trial court to extend the scope of the duties of custodians of animals to require them to continue to take measures to prevent harm even after they no longer have custody of the dog. Whether a duty of care should be extended is a question of law that is determined by balancing the harms. Rife v. Long, 127 Idaho 841, 846, 908 P.2d 143 (1995). Determining whether a new duty will arise from a particular situation requires the court to consider: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between defendants' conduct and the injury, (4) the moral blame attached to the defendants' conduct, (5) the policy of preventing future harm, (6) the extent of the burden on the defendant and consequences to the community of imposing a duty and resulting liability for breach, and (7) the availability, cost and prevalence of insurance for the risk involved. Id.

Here, it may have been foreseeable that Sam would walk Bo while he was visiting the Munkhoffs. It was far less foreseeable, however, that Sam, who knew of Bo's history, who knew of the requirements for keeping a dangerous or aggressive dog, and who was an adult, would violate those requirements by walking Bo without a muzzle, and that Kummerling (who had seen Bo jumping at the fence so hard it moved two feet) would approach the pit bull and would bend down to pet it. Moreover, preventing Sam, who was Bo's owner, from walking Bo without a

muzzle would have required the Munkhoffs to monitor and attempt to control their adult son's management of his pet, in contradiction to Sam's own rights over his property. Foreseeability does not favor extending a custodian's duty of care.

It is certain that Kummerling suffered injury as a result of Sam's negligence. The nexus between the injury and Munkhoffs' conduct is much more tenuous. Although Kummerling argued the injury would not have occurred if the Munkhoffs had not allowed Bo on their property or if the Munkhoffs had posted adequate signage, it was not illegal for the Munkhoffs to keep Bo within their fenced yard, and Kummerling presented no evidence at summary judgment linking his injury to the lack of signage. There is nothing in the record showing that Kummerling would not have asked to pet Bo if Kummerling had seen a beware of dog sign in addition to his own observations of Bo's behavior. (R 113 ¶11)

The moral blame attached to the Munkhoffs' conduct is minimal. At worst, they failed to provide adequate signage to advise persons approaching their property that they should beware of a dog during those times when Bo stayed with them. The policy of preventing harm is not furthered by shifting liability from those in immediate control of an animal to those persons who are not. Such a policy would interfere with the property rights of owners of animals, including adults whose parents now fear liability for the conduct of the pets of their adult children—even when those pets are off the premises. Because liability could potentially continue whenever and wherever the animal may be present, the burden on custodians would be enormous. Conversely, the current policy of imposing liability solely on the person who has custody and control of the animal at the time of the injury is better calculated to minimize the risk of harm. This Court

should therefore reject Kummerling's call to impose a continuing duty of care on all custodians of dogs.

3. If (contrary to principles of liability) the Munkhoffs had a continuing duty to exercise reasonable care, no breach of that duty can be said to be the proximate cause of Kummerling's injuries.

Even if Kummerling had created an issue of fact as to the existence of a duty and its breach, the trial court erred because Kummerling presented no evidence creating a genuine issue of fact as to whether there was a causal connection between the alleged breach by the Munkhoffs and Kummerling's injury and whether Sam's actions in walking Bo without a muzzle and in allowing Kummerling to approach Bo were superseding causes. See Deiter v. Coons, 162 Idaho 44, 394 P.3d 87, 94 (2017).

a. The failure of signage is the only alleged breach which is potentially wrongful under law and about which there is a genuine issue of fact.

In order to determine whether a sufficient nexus exists to impose liability and whether the actions of Sam were a superseding cause of the injury, Kummerling was required to identify the wrongful action or omission by the Munkhoffs that was the cause of his injury. At summary judgment, Kummerling argued that the cause of his injury was the fact that the Munkhoffs allowed Bo to stay on their property, that the Munkhoffs had not muzzled Bo and that the Munkhoffs had failed to post proper signage. (R 139-40) The Munkhoffs were not prohibited by law from keeping Bo on their property, even with knowledge that he had been declared dangerous or aggressive, and were not required to keep Bo muzzled while he was within a secure enclosure. I.C. §25-2802 (2015). It is undisputed that it was Sam—and not the Munkhoffs—who

removed Bo from the secure enclosure without muzzling Bo. Therefore the only alleged act or omission by the Munkhoffs that was wrongful and regarding which there was any genuine issue of fact was whether the Munkhoffs had posted adequate signage.

b. Kummerling presented no admissible evidence from which the trial court could infer that the failure to post proper signage was a substantial cause of the injury.

Proximate cause has two elements, both of which must be established by the plaintiff: (1) cause in fact and (2) scope of legal responsibility. Doe v. Sisters of Holy Cross, 126 Idaho 1036, 1039, 895 P.2d 1229 (Ct. App. 1995). An event is the actual cause of an injury only if the succeeding injury would not have occurred but for the event. Id. at 1040. Where there are multiple causes, the plaintiff must establish that the event was a substantial factor in causing the injury. Id.

The second factor requires the plaintiff to establish that the circumstances were such that legal responsibility should be extended to cover the injury. Id. The court's analysis here looks to whether it could have been reasonably anticipated and foreseen that the plaintiff's injury would arise from the defendant's failure to use reasonable care. Id. Stated differently, the plaintiff must show that the negligent act produced the injury in the natural or probable sequence of events. Id. at 1041. Kummerling bore the burden of showing that he would not have been bitten if there had been adequate signage and that failing to post signage in the natural and probable sequence of events resulted in Bo biting Kummerling while he was on a leash outside the area where signs were to be posted.

Kummerling presented no admissible evidence at summary judgment showing that the dog bite would not have occurred but for the lack of signage. Nor did Kummerling establish that a dog bite off the Munkhoffs' property, while Bo was on a leash, was a natural and probable result of a failure to post beware of dog signs on the Munkhoffs' property. Kummerling merely presented argument by counsel claiming that he would not have approached Bo if he had seen a sign. Even if argument could be considered as evidence, Kummerling's claim is contrary to his own declaration in which he reports observing Bo's aggressive conduct. (R 113, ¶11) Moreover, a dog bite occurring while the dog is on a leash and away from the property is not a foreseeable result of a failure to post adequate signage on the property.

c. *The trial court erred in denying summary judgment on the basis of superseding cause because it was undisputed that Sam removed Bo from the property without a muzzle and allowed Kummerling to attempt to pet Bo.*

Even if Kummerling had succeeded in showing a nexus between the lack of signage and his injury, Sam's actions were a superseding cause that broke any chain of causation flowing from the Munkhoffs' alleged inadequate signage.

The natural and probable sequence may be broken by the independent actions of a third party or force which by its intervention prevents the defendant from being liable for harm to another. Cramer v. Slater, 146 Idaho 868, 877, 204 P.3d 508 (2009). To determine whether an intervening act is a superseding cause of the injury, the court looks to the following guidelines: (1) whether the intervention brings about a harm different in kind from that which would have otherwise resulted; (2) whether the operation of the intervening action appears after the event to

be extraordinary and not ordinary, based upon the circumstances at the time; (3) whether the intervening cause is operating independently of any situation created by the defendant's negligence, or is not the normal result of that situation; (4) whether the intervening force is due to a third person's actions; (5) whether the intervening force is due to an act of a third person that is wrongful toward the other and subjects the third person to liability; and (6) the degree of culpability of the third person for the wrongful act. Cramer, 146 Idaho at 877.

The undisputed facts at summary judgment established that Sam's act of walking Bo without a muzzle and allowing Kummerling to approach Bo was a superseding cause of Kummerling's injury. As to the first factor, the resulting harm from a failure to post signage changed the harm from an injury occurring on the Munkhoffs' property because a visitor approached Bo not knowing of his dangerous propensities to an injury occurring because a third party (who likely did know of Bo's propensities) approached Bo while he was on a walk outside of the Munkhoffs' property. The fact of Sam walking Bo without a muzzle and allowing Kummerling to approach Bo is extraordinary in view of Sam's knowledge that Bo was required to be muzzled and the previous incidents reported by animal control. Sam's determination to walk Bo without a muzzle and to allow Kummerling to approach Bo is not a normal result of the Munkhoffs' alleged inadequate signage. The operation of the intervening act is solely the result of Sam's decision to walk his dog without a muzzle—with the possible addition of Kummerling's own decision to pet Bo. The act of removing Bo from a secure enclosure without muzzling him and of allowing Kummerling to approach Bo was wrongful because Sam knew of Bo's propensities and had been ordered by the City to keep Bo muzzled. Sam had a heightened

degree of culpability because of his knowledge of the situation and his ownership of Bo. All of the factors favor a finding of superseding cause.

Nevertheless, the trial court denied summary judgment on proximate cause because she reasoned that whether Sam would walk Bo was foreseeable depended upon the factual question of whether the Munkhoffs were Bo's keepers and for how long. (R178-79) The trial court appeared to assume that the length of time that Bo had stayed with the Munkhoffs would affect the foreseeability of Sam walking his dog in the Munkhoffs' neighborhood. (R 179) This analysis missed the mark.

Importantly, Sam did not just take his dog for a walk. Sam took a dog for a walk, which he knew to have been declared a dangerous dog, without muzzling the dog, in violation of the municipal code. Even though he knew Bo's propensities and had not muzzled Bo as required, Sam allowed Kummerling to approach Bo and bend down to pet Bo. These facts are undisputed and uncontested by Kummerling. As a matter of law, Sam's actions were not the natural and probable result of Bo staying at the Munkhoffs' home (even if this were a breach) or of the Munkhoffs' alleged failure to post proper signage. Because Kummerling failed to create a genuine issue of material fact regarding causation, this Court may hold that, as a matter of law, the Munkhoffs' alleged failure to post proper signage was not the proximate cause of the injury, and even if it were a substantial cause, Sam's conduct is a superseding event which removes the Munkhoffs' liability.

B. **The trial court erred in denying the Munkhoffs' motion for a new trial because the jury's verdict was contrary to the manifest weight of the evidence which established that Sam had sole custody and control of Bo at the time of the injury.**

The Munkhoffs filed a motion for remittitur and for new trial under I.C. §6-807 and I.C.R.P. 59, 59.1 and 60. Idaho Code §6-807 grants the trial court discretion to reduce an award of damages if the amount awarded is unsupported or unjustified by the clear weight of the evidence or if it is demonstrated that the award is more likely than not a product of passion or prejudice by the jury. Civil Rule 60 authorizes the trial court to relieve a party from final judgment for any reasons that justify relief. I.C.R.P. 60(b)(6).

1. Standard of Review

The standard of review applicable to a district court's decision to grant or deny a new trial under I.R.C.P. 59(a) is abuse of discretion. See Burggraf v. Chaffin, 121 Idaho 171, 173, 823 P.2d 775 (1991). When a court's discretionary decision is reviewed on appeal, the appellate court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. Burggraf, 121 Idaho at 173, citing Sun Valley Shopping Center, Inc. v. Idaho Power Company, 119 Idaho 87, 94, 803 P.2d 993 (1990). This three-step test has commonly been referred to as the Sun Valley test.

In reviewing a district court's ruling on a motion for a new trial under the Sun Valley three-step analysis, the Supreme Court must necessarily review the evidence; however, its

primary focus is on the process by which the district court reached its decision, not on the result of the district court's decision. The Supreme Court's review of the evidence is not a weighing of the evidence, but again, rather, on the **process** by which the district court reached its result. Sheridan v. Jambura, 135 Idaho 787, 789, 25 P.3d 100 (2001) (citing Quick v. Crane, 111 Idaho 759, 770, 727 P.2d 1187 (1986)); Hughes v. State of Id. Dept. of Law, 129 Idaho 558, 561, 929 P.2d 120 (1996) (emphasis added).

2. Motion for New Trial

In determining whether the trial court acted within the outer boundaries of its discretion and applied the correct legal standards to the specific choices available in a new trial setting under I.R.C.P. 59(a)(6), a two-pronged analysis has been established which the trial court must follow in making a determination with regard to a motion for new trial. In Robertson v. Richards, 115 Idaho 628, 769 P.2d 505 (1989), the Court, citing Blaine v. Byers, 91 Idaho 665, 429 P.2d 397 (1967), described the analysis. The first prong of the Blaine test directs the trial judge to consider whether the verdict was against the weight of the evidence and if the ends of justice would be served by vacating the verdict. Robertson, 115 Idaho at 631, 632.

A trial court must grant a new trial where, after it has weighed all the evidence including its own determination of the credibility of the witnesses, it concludes that the verdict is not in accord with its assessment on the clear weight of the evidence. I.R.C.P 59(a)(6); Robertson, 115 Idaho at 630. When there is not substantial evidence to support the verdict, or when the verdict is against the great weight of the evidence, the verdict cannot stand. Garrett Freightlines, Inc. v. Bannock Paving Co., 112 Idaho 722, 727, 735 P.2d 1033 (1987). Stated another way, "[i]f

having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be **expected** that he will grant a new trial." Sheridan, 135 Idaho at 788 (citing Quick, 111 Idaho at 768) (emphasis added).

The second prong of Blaine directs the trial court to consider whether a different result would follow in a retrial. Robertson, 115 Idaho at 632. The trial court did not consider this prong. Because, however, the district court failed to consider whether the weight of the evidence supported the elements Kummerling was required to prove at trial, the trial court misapplied the law and therefore exceeded its discretion.

At trial Kummerling presented no evidence tending to show that the Munkhoffs were Bo's custodians at the time of the injury. No evidence contradicted testimony and documentary evidence showing that Sam was Bo's owner and was the sole custodian at the time of the injury, regardless of whether Bo had stayed at the Munkhoffs' home on occasion. No testimony was entered showing that the Munkhoffs had any authority or control over Sam or Bo when they left the Munkhoffs' property on July 30, 2013, with Bo unmuzzled. No evidence was entered contradicting the Munkhoffs' testimony that they were not even aware that Sam had taken Bo off the property without muzzling him. There was therefore no competent evidence in the record showing that, at the time of the injury, the Munkhoffs were custodians of Bo who owed a duty to Kummerling.

Nevertheless, the trial court ruled that the jury properly concluded that the Munkhoffs had conspired with Sam to keep Bo's propensity from the public and that because the Munkhoffs

were custodians of Bo when Sam was out of town and were likely aware of Bo's propensities, there was sufficient evidence in the record to find negligence. (R at 431-32) The court ruled that whether the Munkhoffs were present and in control of Bo at the time of the injury was irrelevant. (R at 432-33) The trial court thus applied the wrong legal standard to the evidence, abusing her discretion.

a. A different result is likely to occur on retrial provided the correct legal standard is applied.

The second prong of the Blaine analysis directed the district court to consider whether a different "result" would likely follow in a retrial.[1] Robertson, 115 Idaho at 632. This standard requires more than a mere possibility; there must be a probability that a different result would be obtained in a new trial. Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 782, 25 P.3d 88 (2001). An appellate court need not attempt to quantify the probability of a different result on retrial. Pierson v. Brooks, 115 Idaho 529, 534, 768 P.2d 792 (Ct. App. 1989).

Here, the trial court did not analyze whether a different result would follow. It is apparent, however, that because the factual issues establishing Sam's sole custody over Bo were undisputed at trial, a different result is highly likely to follow. Notably, Kummerling improperly lumped the Munkhoffs together with their adult son in closing. (Tr. Vol. IV, p. 466 l. 24 to p. 467 l. 4) There was no evidence entered showing that the Munkhoffs were ever Bo's owners or that

[1] The second prong of the Blaine test comes out of the Blaine v. Byers case wherein the Idaho Supreme Court stated, in 1967, and citing a 1948 case, that: "[a]dditionally, the general rule which prevails in this jurisdiction is that a motion for a new trial should not be granted unless it appears that a different result would follow a retrial." Blaine, 91 Idaho at 671, 429 P.2d at 403, citing Consumers Credit Co. v. Manifold, 65 Idaho 238, 142 P.2d 150 (1948), and other cases therein cited.

the Munkhoffs continued to care for or control Bo when Sam returned on or about July 25, 2013, even if he was staying at his parents' home. Moreover, because the injury did not occur on the Munkhoffs' property, the implication from counsel's argument and the jury's subsequent verdict is that the Munkhoffs had a duty to control their adult son, even when he left their property. This is contrary to Idaho law and policy, which recognizes persons over 18 as adults responsible for their own actions and no longer subject to the control of their parents. The jury's verdict thus appears to reflect their confusion regarding the concepts of custodian and owner which were critical to this case.

3. Because the jury's verdict lacked an evidentiary basis, it appears the jury was motivated by a desire to send a message about dog ownership to parents of dog owners.

As discussed above, Kummerling exploited the family relationship at trial to make it appear that the Munkhoffs were joint owners of Bo with Sam, arguing in closing that all three should be considered owners and custodians, encouraging the jury to consider the Munkhoffs as owners of Bo together with Sam that should all be sent a message regarding responsible pet ownership. (Tr. Vol. IV, p. 466 l. 24 to p. 467 l.4, p. 488 l. 19-22) Kummerling's appeal to the jury's potential prejudice or passion regarding the parents of adult children who may cause injury through their own lack of judgment was improper. It was also successful. The jury found that Sam was 45 per cent liable for Kummerling's injury, but that the Munkhoffs were collectively 50 per cent liable. Because this verdict is contrary to the evidence and was a response to an invitation to enter a verdict based upon passion and prejudice, it should be reversed and this matter remanded for a new trial.

V. CONCLUSION

For the foregoing reasons, the Munkhoffs ask this Court to reverse the decision of the trial court on the Munkhoffs' motion for summary judgment and remand this matter for entry of an order dismissing all claims against the Munkhoffs. Alternatively, this Court should hold that the trial court abused its discretion in denying the Munkhoffs' motion for remittitur or new trial, reverse, and remand the case for a new trial.

DATED this 19th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and complete copy of the foregoing to be
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☒ mailed postage prepaid (2 copies);
☐ hand delivered;
☐ sent via facsimile
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