9-19-2017

Litke v. Munkhoff Respondent's Brief Dckt. 44735

IN THE SUPREME COURT OF THE STATE OF IDAHO

KLAUS KUMMERLING and BAERBELLITKE, husband and wife, Plaintiffs/Respondents, vs. MARK MUNKHOFF and ROBYN MUNKHOFF, husband and wife, 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, Defendant.	Supreme Court Docket No. 44735 District Court No. CV 2015-5381

RESPONDENT'S 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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I. INTRODUCTION

This case involves an appeal of a jury verdict in favor of the respondent who was viciously attacked by a dog whom prior to the attack had been cited as dangerous/dangerous dog by animal control. Appellants appealed the jury verdict against them on the theory that they were not custodians of the dog at the time of the attack and that their son as owner of the dog and as such was solely responsible for the attack. The jury held that the Appellants who had knowledge of the dangerous propensities of a dog, assumed the role of caretakers of the dog and failed to take steps to protect the public from the dangerous propensities of that dog were responsible for the damages as a result of the dog attacking innocent third parties.

II. STATEMENT OF THE CASE

A. Nature of the Case

A jury verdict was entered against the Appellants, Mark and Robyn Munkhoff collectively the Munkhoffs, along with their adult son, Sam, for negligence in regards to an attack on Mr. Kummerling by a dog named "Bo". The appellants are not appealing the jury's verdict in favor of assessing that damage, but instead are appealing the denial of a Motion for Summary Judgment as to a negligence claim by the Kummerlings. Reference to the

"Kummerlings" hereinafter shall include both Plaintiffs, Klaus Kummerling and Baerbel Litke husband and wife. The Munkhoffs are also appealing the Order denying the Munkhoffs a new trial and request for remittitur under I.R.C.P. 59.1 and I.R.C.P. 60. Appellants' argue that this matter should not have gone to trial and the summary judgment should be granted on the basis that no genuine issue of material fact existed. As can be seen from the trial court's transcript and Affidavit of Officer Laurie Deus, there were substantial issues of material fact, which were disputed. In the end the jury believed the credibility of the Kummerlings and their version of events in regards to disputed facts.

B. Statement of Facts

Both the Respondents, Kummerlings and the Appellant Munkhoffs reside beside each other on Sutter's Way Street in Coeur d' Alene, Idaho. (R 64 ¶ 4). In November, 2012 the Munkhoff's adult son, Sam Munkhoff (Sam) claimed ownership of a Pitbull named Bo. Sam adopted the Pitbull to avoid it being taken to the Kootenai County Animal Control. (TR Vol. II Page 230 11 2-11). Sam lied to Animal Control and said the dog was his even though it was not. Bo, in November 2012, was found in an alley standing on top of a vehicle barking profusely. (R 79 ¶ 1). The dog was threatening and aggressive. (R 79 ¶ 1). Concerned about the danger to the public posed by

the dog; the dog was tasered. (R 79 ¶ 5). Sam was cited for having an aggressive dog. (R 69 ¶ C).

Sam was provided a copy of the city ordinances with the requirements for maintaining an aggressive dog including fencing, muzzling and signage requirements on November 27, 2012. (R 79 ¶ D). Officer Laurie Deus explained these requirements both to Sam and Mark Munkhoff at the Munkhoff's residence on Sutter's Way. (R 79-80 ¶ D & E). Mark Munkhoff further affirmed that the dog would be contained there and was part of the family. (R 80 ¶ E). The information provided to Sam and Mark Munkhoff indicated that if Bo was to stay anywhere else that animal control must be notified. Evidence and testimony at trial indicated that Bo continued to reside at the Munkhoff's through July 30, 2013 when Bo viciously attacked Mr. Kummerling in the driveway of his home. (R 73 ¶ 6) (R 114 ¶ 12).

On the other hand the actual residences for Sam between November 2012 and July 30, 2013 are disputed. Mr. Kummerling stated that Sam resided at the Munkhoff's for months before the attack. (R 112 ¶ 4). Sam indicated he was living in Long Beach California (Tr Vol. II Page 237 ll. 22-25 and page 238 ll. 1-9) and Spokane, Washington (R 73 ¶ B) to Officer Deus (R 98). He later admitted at trial that he lied to Officer Deus about living in California. (Tr Vol. II Page 230 ll. 2-3). In regards to Sam's assertion that he

was living in the Spokane Valley in April 2013; Bo was cited for being a dangerous dog for biting a person in Coeur d' Alene at the same time. (R 98). Officer Deus drove by the Munkhoff home in December, 2012 and did not see any beware of dog signs posted on the property (R 91 ¶ 3).

On February 9, 2013, Bo was found running loose in the City of Coeur d' Alene by animal control officers. (R 98). He was picked up by animal control, returned to Sam and not cited. (Tr Vol. II Page 234 ll.1 16 through page 256 Line 25).

On April 29, 2013, Bo was running loose in the vicinity of Munkhoff's home. (Tr Vol. II Page 235). Bo bit a person in that incident (Tr Vol. II Page 234 ll. 16 through Page 256 Line 25). Sam was cited for having a dangerous dog as a result of that incident. (Tr Vol. II Page 236 ll. 1-4). The Munkhoffs dog, Dexter, was also running loose with Bo and cited by animal control. (Tr Vol. II Page 236 ll. 5-13). Though numerous attempts were made by animal control to serve Sam with the declaration of dangerous dog to sign; they were unsuccessful. (R 73 ¶ 4(b)(c)). Mark Munkhoff told Officer Deus on two separate occasions in April and May of 2013 that Bo was not allowed on his property (R 93) and (R 94 ¶ 4).

In the months prior and up to the attack on Mr. Kummerling on July 30, 2013, Sam was working in North Dakota (R 99 ¶ 5) and (R 113 ¶ 7). All

during this time the Munkhoffs were the sole caretakers of Bo and he stayed in their backyard (R 113 ¶ 7).

Despite the requirement of signage informing the public of a dangerous dog as required by Coeur d' Alene City none was ever placed on the Munkhoffs premises (R 99 ¶ 5). Bo was never seen wearing a muzzle (R 108 ¶ 5). Robyn Munkhoff indicated Sam bought a muzzle for Bo but wasn't aware he was required to us it. (R99).

The Kummerlings never saw any signage on the Munkhoffs property indicating the Munkhoffs had a dangerous dog (R 108 ¶ 4) and (R 114 ¶ 14). On July 30, 2013, Klaus Kummerling was sitting in his driveway when Sam, with Bo on a leash, approached on the sidewalk in front of the Kummerling home (Tr Vol. I Page 75). Mr. Kummerling asked Sam if it was okay to pet Bo (Tr Vol. I Page 75 ll 13-24). As Mr. Kummerling bent down to reach out and pet Bo; Bo lunged at Mr. Kummerling biting him in the face and knocking him down in his driveway (Tr Vol. I Page 76). Mr. Kummerling suffered permanent and disfiguring injuries to his face. A portion of his lip was ripped off (Tr Vol. I Page 76 ll 13-14). He suffered permanent nerve damage to the lip and chin area (Tr Vol. I Page 105 ll 9-14). Immediately after the attack Sam left the area and took Bo with him (Tr Vol. II Page 241 ll 9-12). Robyn Munkhoff arrived at the scene and demanded that Bo be shot (Tr Vol. I Page

141 ll 2-5). Mr. Kummerling informed Officer Deus that if the Munkhoffs had posted dangerous dogs signs, he would not have attempted to pet Bo (R 99).

C. Procedural History

Klaus Kummerling and his wife, Barbara Baerbel Litke filed a Complaint in District Court, 1st Judicial District alleging 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). As a result of a Summary Judgment Motion filed by the City of Coeur d'Alene, the trial court dismissed the City of Coeur d' Alene and the Coeur d' Alene police chief, Ron Clark as defendants (R 210-228). The Munkhoffs also filed a Motion for Summary Judgment requesting dismissal of all the Kummerlings' claims (R 44-45). The trial court dismissed all claims except the negligence claims against the Munkhoffs (R 189-209). Sam, who represented himself, did not join in the Summary Judgment Motion of the Munkhoffs.

Trial was held on the matter before Judge Cynthia K. C. Meyer from September 19 through September 22, 2016. The jury, after deliberating, returned a verdict in the sum of $185,000.00 for non-economic damages and $16,603.00 in economic damages finding Sam Munkhoff 45% responsible,

Mark Munkhoff 40% responsible, Robyn Munkhoff 10% responsible and Klaus Kummerling 5% responsible.

Subsequent to the jury verdict, the Munkoffs filed a Motion for remittitur and new trial on October 11, 2016 (R 410-418). After hearing on the matter, the trial court denied said motions pursuant to a memorandum decision (R 436-456). The Appellants filed this appeal on December 14, 2016, (R 462-465) which was amended on January 31, 2017 (R 466-469) and subsequently again amended on February 28, 2017 (R 470-476).

1. Munkhoff's Motion for Summary Judgment

The Munkhoffs filed a Motion for Summary Judgment in this matter on March 17, 2016 (R 44-45). The Munkhoffs, in their Motion, moved for an Order Granting Summary Judgment on Kummerling's claim of negligence, nuisance and outrage as stated in the Kummerling's third cause of action in the Complaint. Sam Munkhoff, who wa Pro Se, did not file a motion for summary judgment nor did he join in the Munkhoff's Motion. On May 17, 2016, the trial court filed a Memorandum Decision in regards to the Munkhoff's Motion for Summary Judgment (R 168-188). An Amended Memorandum Decision was filed by the trial court with the corrections to specifically page 14 on May 18, 2016 (R 189-209). In that decision the trial

court dismissed Kummerling's claims of outrage and nuisance but denied the Munkhoff's Motion to dismiss the Kummerling's claims of negligence.

2. Trial

The case was tried to a jury on September 19, 2016 through September 22, 2016. The sole issue was whether the Defendants were negligent in allowing the dog, Bo to attack Mr. Kummerling and that negligence was a proximate cause of the Kummerling's damages. Sam Munkhoff appeared Pro Se. The jury ultimately found in favor of Kummerling in which he was awarded $16,603.00 in economic damages and $185,000.00 in non-economic damages. The fault by jury verdict was allocated as follows: Sam Munkhoff 45%, Mark Munkhoff 45%, Robin Munkoff 10% and Klaus Kummerling 5%.

3. Motion for Remittitur and New Trial

Munkhoffs filed a Motion for Remittitur for a New Trial on October 11, 2016 (R 410-418). In the Motion for New Trial pursuant to I.R.C.P. 59(a)(1), the Munkhoffs alleged three basis'. The first was an irregularity in the proceedings by an adverse party. The Munkhoffs alleged that Klaus Kummerling, who was hard of hearing, "faked" his hearing loss when he requested an assisted hearing device from the court (R 407-408) and (R 412). The Munkhoffs alleged that Mr. Kummerling was not hard of hearing when

asking to pet the dog, Bo on July 30, 2016, but somehow at the time of trial, a little over a year later, indicated he had trouble hearing (R 410-418). In actuality Mr. Kummerling had suffered a medical condition between July 30, 2016 and the trial date, which caused a severe and permanent hearing loss (R 419-420) and (R 423-425). These facts were unrebutted by Munkhoffs.

The Munkhoffs also requested a new trial based upon excessive damages citing I. C. § 6-807(1)(2) (R 412-414). The trial court found that in relationship to the horrific damages suffered by Mr. Kummerling that the damages were not excessive and were reasonable (R 436-456). The jury found that the actions or inactions of the Munkhoffs constituted negligence and in part ere a proximate cause of the injuries to Mr. Kummerling. The court denied the Munkhoff's motion finding no excessive verdict and no basis for remittitur or a new trial (R 436-456). On November 7, 2016, the Judgment on Special Verdict against Mark Munkhoff in the amount of $77,243.30, Robin Munkhoff in the amount of $19,310.82 and Sam Munkhoff in the amount of $86,898.71 was entered (R 477-478).

III. ISSUES PRESENTED ON APPEAL

Were the Munkhoff's negligent in their caretaking of Bo and did such negligence proximately cause Mr. Kummerling's injuries?

IV. ARGUMENT

A. The trial court correctly denied the Munkhoff's Motion for Summary Judgment regarding Kummerling's negligence claim because the Kummerlings raised genuine issues of fact as to Munkhoff's duty and proximate cause.

There were a number of factual disputes at the time of summary judgment including the extent and nature of care and control that the Munkhoffs exercised over the dog Bo. Also, disputes of facts arose at the time of summary judgment as to the Munhoff's knowledge of the vicious propensities of Bo. Finally, there were genuine issues of material fact regarding Munkhoff's compliance with Coeur d' Alene City Ordinances in order to protect the public, which required appropriate signage, fencing and muzzling of Bo. The Munkhoffs throughout have dismissed any responsibility for the acts of Bo, despite evidence which demonstrated that Bo continually resided in their home from November 2012 to July 30, 2013 when the attack occurred. Evidence about the time of Summary Judgment also demonstrated the Munkhoffs were aware of the requirements of housing a dangerous, aggressive dog and agreed to adhere to those requirements, i.e. muzzling, signage ect. . . but failed to do so. Certainly no injury to Mr. Kummerling would ever have occurred had the Munkhoffs followed their

duty imposed, not only by ordinance, but my common law to protect the innocent third parties from attacks by a dog with known vicious propensities

1. Standard of Review on Motion for Summary Judgment

I.R.C.P. 56(c) provide that "The judgment sought shall be rendered forthwith 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." The Munhoffs have the burden of proof to show that there is no genuine issue of material fact with regard to the Kummerling's claim Chandler v. Hayden, 147 Idaho 765 (2009). The Appellate Court standard of review of a denial of Summary Judgment is the same as the Trial Court Thomson v. Idaho Insurance Agency, Inc., 126 Idaho 527, 530 887 P.2d 1034, 1037 (1994). All facts are to be construed liberally in favor of the nonmoving party and all reasonable inferences that can be drawn from the facts are to be in favor of the non-moving party Bonz v. Sudweeks, 119 Idaho 539, 541 808 P.2d 876, 878 (1991). The material issues of fact in this case involved the Munkhoff's allegations that they had no care, control, or involvement with the dog, Bo, or knowledge of Bo's vicious propensities.

The trial court correctly determined that the evidence, when construed in the light most favorable to the Kummerlings, presented genuine issues of

material fact and/or demonstrated that the Munkhoffs were not entitled to summary judgment as a matter of law. Kiebert v. Goss, 144 Idaho 225, 228 159 P.3d 862, 865 (2007). One of the major issues in this case was the credibility of the witnesses. Where there is a conflict in evidence; a determination should not be made on summary judgment if the credibility can be tested by testimony in a court of trial before the trier of fact. Argyle v. Slemaker, 107 Idaho 668 691 P.2 1283 (Ct. App. 1984). The issues of credibility in this case were very important as can be seen by the Trial Court's Memorandum denying a new trial in this matter (R 447-449). There were genuine issues of material fact as to when, where, what times and under what conditions Bo was kept at the Munkhoff home and the extent of the Munkhoff's caregiving duties.

2. The Munkhoffs breach their duty to Mr. Kummerling because not only were they custodians of Bo; they were care keeper and harborers of Bo.

There is no distinction between custodian and owner of an aggressive or dangerous dog pursuant to Coeur d' Alene City Ordinances 6.20.030 and 6.20.040 (R 82-89). These ordinances specifically mention not only the owner but also the custodian of the dog are responsible for harboring an aggressive or dangerous animal and are bound by the requirements of appropriate signage, fencing and muzzling of the aggressive/dangerous dog.

The Munkhoffs agreed to keep the dog at their home and abide by the City of Coeur d' Alene's Ordinances regarding aggressive, dangerous dogs. The Munkhoffs knew the dog was aggressive/dangerous. The dog predominantly resided at the Munkhoffs. They were aware or should have been aware of the fact that Bo was declared aggressive on November 27, 2012, when found running loose near their home in February, 2013, bit another person on April 9, 2017 and still kept the dog at their home without proper signage or muzzling. They assumed the duty and responsibility by taking all these actions.

a. The Munkhoffs had complete care, custody and control of the dog, Bo and despite that custody failed to take reasonable steps to protect Mr. Kummerling

Both under Idaho law, common law and statute, custodians have a duty to exercise reasonable care to prevent injury if they are aware of the dangerous propensities of the dog Braese v. Stinker Stores, Inc. 157 Idaho 443, 337 P.3d 602 (2014). Coeur d' Alene City Ordinance 6.20.030 and Coeur d' Alene City Ordinance 6.20.040, I.C. § 25-2805(2). The Munkhoffs were custodians of Bo in that they housed, fed, and cared for him while he resided at their premises from November, 2012 through July 30, 2013. Those actions to the ordinary person would make them appear to be the owner as well.

While there are no definitions of custodian either under the Coeur d' Alene City Ordinance or Idaho Statute pertinent to animals; the dictionary definition of custodian is "One who has care of something as of the exhibits in a museum, a caretaker or keeper". The definition of custody is "a keeping safe or guarding; care; protection; guardianship" *Webster's New Universal Abridged Dictionary 2nd Edition (1983).* The definitions clearly fit the relationship that the Munkhoffs had with the Bo. Sam himself acknowledged that the Munkhoffs would be better custodians of Bo and that he should be kept at their house (R 69 ¶ B).

The Munkhoff's argue that the mere walking of a dangerous dog is sufficient to terminate any legal responsibilities the custodians and caregivers of that dog might have. The Munkhoffs cite McClain v. Lewiston Interstate Fair and Racing Ass'n, 17 Idaho 63, 104 P. 1015, (1909) for the proposition that a family member taking a dog out in public relieves the owner and/or custodian for harm the dog causes while in public. In McClain the court determined that if a person was an owner or caretaker in control of such animal was a question of fact to be determined by the jury McClain at 1027. The Munkhoffs have cited Georgia, Illinois and Wisconsin cases for the proposition that a person who keeps a dog and allows a third party to take control of it is not responsible for the damage the dog might cause. This is

not the law of Idaho nor are these Idaho cases. More importantly all five of these cases are inapplicable to the preset case, as the dogs involved were not previously adjudged aggressive or dangerous nor did any of the custodians/owners assume a duty under statute or ordinance to take steps to protect the dog from injuring persons. Steps such as muzzling and signage is the case in this appeal. There is no evidence that the owners/custodians the dogs mentioned in those out-of-state cases were required to fence, muzzle and provide adequate signage to inform the public and protect the public as is the case here.

b. The Munkhoffs had a duty because they specifically undertook the responsibility to house Bo consistent with Coeur d' Alene City Ordinances

This case does not involve a set of facts where Bo was visiting the Munkhoffs and Sam decided to take Bo for a walk resulting in the injury. Bo resided at the Munhoffs. He was cared for by the Munkhoffs. The Munkhoffs assumed this responsibility or undertaking by acknowledging the requirements of the city ordinances regarding fencing, muzzling and signage and affirmatively indicated that they would comply with those requirements. A Prima Facia case of negligence requires that a plaintiff must establish "1). A duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; 2). A breach of that duty; 3). A casual connection

between the defendant's conduct and the resulting injury; and 4). Actual loss or damage" Turpen v. Granieri, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). In Braese, the court indicated "A store owner would also have a duty to protect patrons from a dog that the store owner knew or should have known of the animals vicious or dangerous propensities Braese at 446. The Munkhoffs were well aware of the dangerous propensities of the dog. Or at least a question of fact arose as to those dangerous propensities. A person who keeps, harbors or otherwise has custody of a dog is required to exercise proper judgment in the control of that dog. See McClain supra. The Munkhoffs once they assumed the duty of harboring the dog are responsible for any foreseeable damage that can be caused by the aggressive, dangerous dog, in this case, Bo. The Munkhoffs breached that duty by failing to have proper signage informing the public including Mr. Kummerling of the dangerousness of the dog and/or allowing the dog to be in public without a muzzle.

The casual connection, which is a third requirement of negligence for summary judgment purposes was met in that had the dog been muzzled or had adequate precautions been made regarding the signage or simply had the Munkhoffs refused to house the dog, Mr. Kummerling would not have

been injured. The fourth element, which is the actual loss or damage is evident by the injuries suffered by Mr. Kummerling to his face.

c. All the arguments raised in Munkhoff's appeal of the summary judgment involve questions of fact, which were disputed at the time of the hearing.

The Munkhoffs have argued that they have no duty to protect Mr. Kummerling from Bo. These duties arrive in large part and are determined by what Kummerling knew as well as the Munkhoffs regarding the dangerous propensities of Bo. The factual circumstances surrounding that case are relevant for determining that duty i.e. what each person knew and what steps did he take. Those were factual issues which were disputed at the time of the summary judgment hearing. The factual issues of custody, compliance with the Coeur d' Alene City Ordinance regarding signage and muzzling as well as whether the Munkhoffs affirmatively undertook the duty to care for the dog are all questions of fact and not subject to dismissal at summary judgment. The issue of negligence itself is more appropriate for a jury to determine than to be decided at summary judgment. "It is for the jury to decide what a reasonably careful person would do under circumstances shown by the evidence." Smith v. Praegitzer, 113 Idaho 887, 890 749 P.2d 1012, 1015 (1988).

The Munkhoffs cite Stoddart v. Pocatello School District No. 25, 149 Idaho 679, 239 P.3d 784 (2010) for the premise that injuries which occur by an instrumentality off the defendant's property relieves him of liability. However, in Stoddart the issue was one of foreseeability in that it was not foreseeable that a child would be murdered. Also, contrary to the case at hand, in Stoddart there were no specific statutory provisions that the school had violated. In this case there were specific restrictions as a condition of keeping the dog, which the Munkhoffs ignored. Consequently a question of fact regarding negligence remained after summary judgment, which was for the jury to resolve.

d. It was foreseeable that damage would result to third parties if the Munkhoffs continued to harbor Bo without taking precautions to protect the public

Boswell v. Steele, 158 Idaho 554 348, P.2d 497 (Ct. App. 2015) stands for the proposition that in a dog bite case, especially involving an animal that had previous incidents, dismissal of a negligence claim at summary judgment is inappropriate. The issue of whether a duty occurs in large part is based upon whether the harm was foreseeable Turpen v. Granieri, supra. Foreseeability is a question of fact, which precludes entry of a summary judgment. Lundy v. Hazen, 90 Idaho 323, 411 P.2d 768 (1966). Whether

liability attaches and a duty exists is in large part foreseeability of the injury depends on the degree of harm and the effort to prevent it. Where the degree of the result of harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required Turpen 133 Idaho at 248. Foreseeability also relates to the size of the harm rather than the specific mechanism of the injury Sharp v. W.H. Moore, Inc., 118 Idaho 297, 300, 796 P.2d 506 (1990). The issue at summary judgment is whether sufficient facts disputed or not exist take to the jury. It is within the province of the jury to determine whether the harboring of Bo would lead to injury to innocent persons.

The Munkhoffs acknowledge in page 23 of their Brief that it was foreseeable that Sam would walk Bo while he was visiting the Munkhoffs. It is also foreseeable that if the dog was allowed to walk without a muzzle and was approached by someone in a nonthreatening manner, that person could be attacked.

3. The Munkhoffs harboring of Bo and failure to abide by signage and muzzling requirements was a proximate cause of Mr. Kummerling's injuries.

The Munkhoffs argue that there is no proximate cause link between any duty the Munkhoffs may have had of reasonable care that resulted in injuries to Mr. Kummerling. Proximate cause is a question of fact. Cramer v. Slater, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009). There can be more

than one proximate cause of the injury complained of, which can result in liability to the defendant. Unrelated tortious acts of different defendants can occur as proximate causes of an injury Lindhartsen v. Myler, 91 Idaho 269, 272, 420 P.2d 259, 262(1966).

There were sufficient facts before the court to survive summary judgment regarding proximate cause. True proximate cause focuses on whether legal policy supports responsibility being "extended to the consequences of conduct. . . (it) determines whether liability for that conduct attaches." Henderson v. Comico, Inc., 95 Idaho 690, 695, 518 P.2d 873, 878 (1973). If the Munkhoffs actions in harboring the dog, failure to muzzle and failing to provide adequate signage was reasonably foreseeable as a natural probable consequence of the defendant's conduct, then liability attaches. Doe 1 v. Sisters of the Holy Cross, 126 Idaho 1036, 895 P.2d 1229, Ct. App. (1995).

a. The failure of signage is a breach of the ordinance and constitutes a genuine issue of fact.

Whether the signage caused, in part, the damage to Mr. Kummerling is a question of fact. If the Munkhoffs violated any of the City of Coeur d' Alene's Ordinances, which is undisputed they did, such violation constitutes negligence Sanchez v. Galey, 112 Idaho 609, 617, 733 P.2d 1234, 1242

(1986). Establishing negligence per se through violation of statute is to conclusively establish the first two elements of a cause of action in negligence, (duty and breach) Slade v. Smith's Management Corp., 119 Idaho 482, 489, 808 P.2d 401, 408 (1991).

b. The walking of Bo by Sam did not constitute the superseding cause, which would relieve the Munkhoffs from liability.

A superseding cause is an act of a third person or force, which by its intervention prevents the actor from being liable for harm to another, which is antecedent negligence is substantial fact of bringing about Lundy v. Hazen, 90 Idaho 323, 329 411 P.2d 768, 771 (1966). Sam's actions in walking the dog were not a superseding cause because it was reasonably foreseeable.

The Restatement Second of Torts Section 42 (1965) provides the following guidelines to determine whether an act is a superseding cause: (a) The fact that the intervention brings about harm different in kind from which would otherwise have resulted from the actor's negligence; (b) The fact that its operation of or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) The fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the

other hand is or is not a normal relief result of such situation; (d) The fact that the operation of the intervening force is due to a third person's act or his failure to act; (e) The fact that the intervening force is due to an act of a third person, which is wrongful towards the other and as such subjects the third person to liability to him; (f) The degree of culpability of a wrongful act of a third person, which sets the intervening force in motion. The Plaintiffs did argue at the time of hearing that if Defendants had posted warning signs, Mr. Kummerling would not have tried to pet the dog. Also, if Bo had been muzzled, the injury would not have occurred. Applying the above referenced factors of the restatement, it is clear that Sam's walking Bo was not a superseding factor to eliminate responsibility of the Munkhoffs.

It is clearly foreseeable that the dog whether by Sam, or otherwise, would be walked. Mr. Kummerling would not have attempted to pet Bo if he aware that dangerous dog signs had been posted on the Munkhoff's property (R 100). The requirements of foreseeability have been met by the Kummerlings. 1)The Munkhoffs were aware of the dog's aggressive/dangerous propensities; 2) The Munkhoffs were aware of steps that were necessary to address the aggressive/dangerous propensities of the dog and keep the dog on their premises but failed to do so; 3) It was foreseeable that if the Munkhoffs did not address those issues regarding

muzzling, harboring an aggressive dangerous dog and/or fencing, the dog could in fact harm someone; and 4) It was foreseeable that Sam would take the dog for a walk and the dog could possibly bite someone during that walk if not muzzled.

Acts of negligence whether joint or independent of each other can both cause the proximate cause of an injury Valles v. Union Pacific Railroad, Co., 72 Idaho 231, 238-239, 238 P.2d 1154, 1161-1162 (1951). Before an intervening superseding cause of an accident can become the sole proximate cause of the injury and thus relieve the first negligent wrong doer of liability, such subsequent cause must have been unforeseen, unanticipated and not a probable consequence of the original negligence. Lundy v. Hazen at 330 citing Dewey v. Keller, 86 Idaho 506, 388 P.2d 988 (1964). The Munkhoffs argue that the lack of signage and/or muzzling was not a direct or actual cause of Mr. Kummerling's injuries. Actual cause is whether a particular event produced a particular consequence Newberry v. Martens, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005). The issues with the signage is simply answered by the fact that Mr. Kummerling would not have attempted to pet the dog or come near it if he was aware that the dog had been declared dangerous and had been notified by adequate signage on the Munkhoff home. In regards to the muzzling, if Mr. Kummerling had seen the muzzle on

the dog, first of all that would have put him on notice that there was some dangerous propensities with the dog and secondly, the dog would not have been able to attack him.

B. The trial court's denial of the Munkhoff's motion for a new trial and remittitur were appropriate

The Munkhoffs filed a motion for new trial pursuant to I.R.C.P. 59(a)(1)(A), (F), (G), 60(b)(3) and I.C. § 6-807. (R 410-418) A motion for remitter under I.R.C.P. 59.1 also was filed by the Munkhoffs. (R 410-418) The Munkhoffs requested, in their Appellate Brief, relief pursuant to I.R.C.P 60(b)(6). No such request was made at the motion for new trial and therefore relief under that provision on the appellate level is inappropriate. (R 410-418)

The basis for the I.R.C.P. 59(a)(1)(A) and 60(b)(3) motions for new trial by the Munkhoffs was an unsubstantiated claim that Mr. Kummerling misrepresented to the court and jury at the time of trial, the extent of his hearing problems (R 412 ¶ A and R 416-417 R 407-409). Mr. Kummerling used a hearing aided device provided by the court during the trial. (R420 ¶ 4) Uncontroverted declarations and or affidavits of Mr. Kummerling (R 419-420), Baerbel Litke (R 422-423) and Kummerlings' attorney Larry J. Kuznetz (R 425-427) confirmed that Mr. Kummerling's hearing loss was substantial,

very real, and occurred after the dog attack and prior to trial. Consequently the Munkhoffs, for appellate purposes have failed to preserve and or present a claim for new trial under I.R.C.P. 60.

1. Standard of Review

The standard applicable to the trial court's decision to grant or deny a new trial under I.C.R.P. 59(a) is an abuse of discretion standard. Burggraf v. Chaffin, 121 Idaho 171, 173 823 P.2d 775 (1991). That abuse of discretion must be manifest Pratton v Gage, 122 Idaho 848, 850, 840 P.2d 392, 394(1992). The reason for this standard is that the trial court is best capable to weigh the demeanor, credibility, and testimony of the witnesses and evidence overall. Quick v Crane 111 Idaho 759, 770, 727 P.2d 1187, 1198 (1986). To determine whether a trial court has abused its discretion, the appellate court is to consider whether it correctly perceived the issue as discretion, whether it acted within the boundaries of its discretion and consistent with legal standards, and whether it reached its decision by an exercise of reason Reed v. Reed, 137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002).

2. The jury award was appropriate and not excessive.

The Munkhoffs have abandoned their appeal of the trial court's ruling denying their request for a new trial based upon irregularity by an adverse

party under I.R.C.P. 59(a)(1)(A) and fraud or misrepresentation pursuant to I.R.C.P. 60(b)(3). That leaves their appeal for a new trial claims based upon I.C. § 6-807 and I.R.C.P. 59(a)(1)(F) regarding excessive damages and I.R.C.P. 59(a)(1)(G) regarding insufficiency of the evidence to justify the verdict.

As a general rule it is the jury's function to set the damage award based upon its sense of fairness and justice Quick v. Crane, 111 Idaho 759, 769, 727 P.2d 1187, 1197 (1986). A verdict should only be overturned by a trial judge in very limited cases. Hei v. Holzer, 145 Idaho 563, 181P.3d. 489, (2008). Respondents have not found any Idaho case affirming the trial court's discretion to overrule jury verdict in favor of a Plaintiff. For this court at this juncture to overrule the jury's decision would be a manifest abuse of discretion and invade the province of a jury.

The power of the court over excessive damages exists only when the facts are such that excess appears as a matter of law or such as to suggest, at first blush passion prejudice, or corruption on the part of the jury Blaine v. Byers, 91 Idaho 665, 671, 429 P.2d 397, 403 (1967). To overrule a jury decision, an award must shock the conscience of the trial judge and lead the trial judge to conclude it would be unconscionable to let the damage award by the jury stand. Dinneen v. Finch, 100 ID 620, 625, 603 P.2d 575, 580 (1979). The jury award in this case did not shock the conscience of the trial

judge. The trial judge in a lengthy memorandum decision outlined in detail the reasons for the denial of the Munkhoffs motion for new trial. (R 436-455). In that decision the trial court stated the disparity between the jury's allocation and the court's allocation certainly does not shock the conscience of the court but instead convinces the court of the reasonableness of the jury's allocation and that it was not based upon passion or prejudice (R 452-453). The fact the amount the jury awarded and what the trial judge would have awarded is evidence itself of lack of passion or prejudice. In regard to the allocation of fault; the Trial Court stated, "With respect to the jury's allocation of fault, the Court has considered how it would have allocated fault based upon the evidence and it finds that the jury's allocation and the Court's allocation are very close" (R 452-453).

The Munkhoffs have argued in their appeal that the trial court inappropriately applied the two-pronged test stated in Robertson v. Richards, 115 Idaho 628, 769 P.2d 505 (1989) citing Blaine v Byers 91 Idaho 665, 429 P.2d 397 (1967). In the present case, the trial court, after weighing all the evidence and determining the credibility of the witnesses, determined that the jury award was reasonable. The trial court took pains to address the credibility of the witnesses in its' memorandum decision denying the Munkhoffs' motion for new trial. The trial court found the plaintiffs', Mr.

Kummerling and Ms. Litke, to be credible. (R 447). The trial court found Sam Munkhoff to lack credibility. (R 447-448) "The Court also found Mark Munkhoff, and, to a lesser extent, Robyn Munkhoff, to lack credibility". (R 448) The trial court did satisfy the second prong of the test cited in Blaine and Robertson directing the court to consider whether *probably* a different result would occur in retrial. The trial court did consider this prong and basically stated it was in agreement with both the jury award and allocation of fault negating the probability of a different result at a new trial.

3. There was sufficient evidence to support the jury verdict and the denial of the motion for a new trial was appropriate.

The Munkhoffs state that there is no evidence showing the Munkhoffs were custodians of Bo at the time of attack. The following evidence demonstrates that the Munkhoffs had care, control and custody of Bo at the time of attack:

a. Sam acknowledged on November, 27 2012, when he met Officer Laurie Deus at the Munkhoffs home, that Bo would be housed there. (Tr. Vol. II, p. 207 ll 2-6).

b. Based upon discussions with Mark Munkhoff on November 27, 2012, Officer Deus believed Bo would be housed at the Munkhoff's home.(Tr. Vol. II, p. 208 ll. 6-25)

c. Officer Deus indicated on the declaration of aggressive dog citation regarding the November, 2012 incident with Bo that the address where the dog would be housed was the Munkhoff's home at 3810 Sutters Way. (Tr. Vol. II, p. 211 ll. 1-11)

d. Mark Munkhoff indicated to Officer Deus on November 27, 2012 that Bo would be staying at his home. (Tr. Vol. II, p. 214, ll. 12-22. Mark Munkhoff also stated he would contain the dog and the dog was part of the family, (R 71-72 ¶ E)

e. Officer Deus reviewed the requirements for keeping an aggressive dog including fencing, signage and muzzling with both Sam and Mark Munkhoff on November 27, 2012 and Mark Munhoff verbally agreed to those conditions. (Tr. Vol. II, p. 215 ll. 2-9)

f. The dog, Bo, was residing at the Munkhoff's home on April 30, 2013 when he attacked another person.(Tr. Vol. II, page 219 ll. 24-25 and page 220 ll. 1-2)

g. Officer Deus testified that once a dog has been declared aggressive or dangerous; the owner or custodian must notify the City of Coeur d' Alene where the dog is residing, including any changes in residence. (Tr. Vol. II, page 199 ll. 14-20. No residence addresses for the location of Bo were provided to Officer Deus other than the Munkhoff's home.

h. Sam Munkhoff testified Bo and the Munkhoff's dog "Baxter" were running loose on April 29, 2013, after escaping the Munkhoff's yard. (Tr.Vol. II, page 236 ll. 2-22. In this incident Bo bit a third party and was cited as a dangerous dog. (Tr. Vol. II, page 235 ll.

i. Bo was also found running loose in Coeur d' Alene in February of 2013 but was not cited. (Tr.Vol. II, page 234 ll. 16-24)

j. Mark Munkhoff falsely indicated to Officer Deus on April 30, 2013 and May 3, 2013, that Bo was not allowed on his premises but stated "if the dog shows up, he will shoot it" (R 93) and (R 94 ¶ 4). He also indicated on May 3, 2013 that Sam was not allowed to move back in the Munkhoff's home R 94 ¶ 4)

k. Robyn Munkhoff told Officer Deus immediately after the attack that Sam had been working in North Dakota the last few months and Bo had "been living in our backyard the whole time Sam had been in North Dakota" (R 99 ¶ 5).

l. Bo had been residing at the Munkhoffs residence a number of months prior to the attack according to Mr. Kummerling (R 112 ¶ 6).

m. Mark and Robyn Munkhoff had been the sole custodians of Bo while Sam was in North Dakota (R 113 ¶ 7).

n. The Munkhoffs admitted Bo was allowed to stay with them (R 64 ¶ 3). and was staying with them at the time of the attack on July 30, 2013 (R 65 ¶ 5).

o. Sam lied to Officer Deus when he told her that he and Bo were residing in the Long Beach, California, area sometime between November, 2012 and July 30, 2013. (Tr. Vol. II. Page 222 ll. 22-25 and page 238 ll.1-5)

p. According to Sam, he was working in North Dakota from July 5, 2013 through the end of August, 2013, while Bo was still residing at the Munkhoff's home. (Tr. Vol. II. page 238 ll. 17-25 and page 239 ll. 1-12). Contrary to this Robyn Munkhoff stated to Officer Deus that Sam had been working in North Dakota the last few months prior to the attack (R 112 ¶ 6)

q. Bo was a 65 pound pit bull who was solid muscle and Sam was concerned it wasn't safe for his mother to walk the dog. (Tr. Vol. II. Page 243 ll. 7-12)

r. Sam admitted he lied to protect Bo. (Tr. Vol. II. Page 243 ll. 13-15)

s. Mark Munkhoff told Officer Deus that "he agreed to contain the dog in my yard". (Tr. Vol. II, page 255 ll. 23-25, and page 256 line 1.)

t. Mark Munkhoff testified that he was the primary caregiver for Bo in July of 2013. (Tr. Vol. II, page 267 ll. 3-7.)

u. Robyn Munkhoff fed and watered Bo in July of 2013. (Tr. Vol. II, page 281 ll 20-25.)

v. Robyn Munkhoff could not provide any addresses for where Sam and Bo allegedly lived from November, 2012 thru July 30, 2013. (Tr. Vol. II, page 279 ll.18-25, and page 280 ll. 1-4.)

w. Robyn Munkhoff told Mr. Kummerling that she was taking care of Bo and suggested Mr. Kummerling spray the fence to stop Bo from jumping on it. (Tr. Vol. I, page 70 ll.213-25 and page 71 ll. 1-15.)

x. Mr. Kummerling did not see a beware of dog sign posted on the Munkhoff's property prior to and up until the time he was attacked. (Tr. Vol. I, page 72 ll. 23-25, and page 73 ll.1-7.)

y. Robyn Munkhoff indicated if her dog bit someone she would take precautions that she needed to. Tr. Vol. III, page 372 ll. 8-15.)

z. Officer Deus did not see a beware of a dog sign on the Munkhoff property either in December 2012 or at the time of the attack on July 30, 2013 (R 81 ¶ 3) (R 99 ¶ 5).

aa. Sam told Officer Deus that it would be better if Bo stayed at the Munkhoff's home (R 80 ¶ 3).

There is more than substantial evidence that the Munkhoffs were the caretakers of Bo, and that Bo resided at the Munkhoff's home at the time of

the attack on Mr. Kummerling. This combined with the lack of credibility of all the defendants supports the jury verdict in this matter. A jury verdict must be upheld if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury April Beguesse Inc. v Rammell, 156 Idaho 500, 509, 328 P.3d 480, 489 (2014). The jury's verdict on factual issues will generally not be disturbed on appeal McKim v Horner, 143 Idaho 568, 572, 149 P3d 843, 847 (2006).

4. The Munkhoff's motion for a new trial filed with the trial court does not raise an issue regarding the custodian of Bo.

The word custodian is never used in the Munkhoff's Motion for New Trial (R 410-418). That issue is raised for the first time on appeal. The Munkhoffs in their motion for new trial only indicated under I.C.R.P. 59(a)(1)(G) that there was insufficient evidence to find the Munkhoffs responsible. They did not indicate that there was insufficient evidence to find that the Munkhoffs were custodians or that Sam was not the sole custodian; but just a vague reference to the fact that Robin Munkhoff should not have the percentage of liability attached to her (R 414-416). The Munkhoffs admitted that the evidence justified placing some responsibility on Mark Munkhoff (R 415-416). In the Munkhoffs' motion for new trial they did not allege that it was improper for the jury to hold Mark Munkhoff responsible;

they merely asserted the percentage of allocation of fault to him was inappropriate (R 414-416).

There is no evidence that the jury was confused regarding the concept of custodian and owner. Contrary to the assertion of the Munkhoffs under City of Coeur d' Alene Ordinance, a custodian as well as the owner of an aggressive, dangerous dog can be held responsible for the action of that dog (R 83-88).

5. The trial court's denial of the Munkhoffs motion for remittitur and pursuant to I.C. § 6-807 was appropriate.

Respondents herein reallege the same arguments for denial of the motion for remittitur and pursuant to I.C. § 6-807 as contained in the argument for new trial in paragraph IV, B, 3 above. Whether remittitur or additur; The Supreme Court of Idaho has previously stated it will not overrule the trial court concerning request for a new trial pursuant to I.R.C.P. 59 where the trial court did not abuse its discretion and where the trial court stated the reasons for its ruling with sufficient particularity. Tuttle v Wayment Farms Inc. 131 Idaho 105, 107, 952 P2d 1241, 1243 (1998).

The trial court in its Amended Memorandum Decision and Order Denying the Munkhoffs motion for New Trial and Remittitur specifically

addressed the four criteria of I.C. § 6-807 and found that 1) the jury verdict was supported by the evidence, including the fact the court would have come to the same conclusion and allocate the liability similar to the jury verdict (R 449); 2) the damage to Mr. Kummerling was severe and commensurate with the damages awarded, and did not shock the conscience of the court (R 449, 452); 3) there was no fact or legal error during the presentation of evidence (R 451-452); and 4) the award was not a result of passion or prejudice (R 445-449) Hei v Holzer at page 568-569 and 494-495.

V. CONCLUSION

For the foregoing reasons the Kummerlings request the court affirm the decision of the trial court and deny the Munkhoffs request to overturn the trial court's decision on Summary Judgment Motion and the Motion for Remittitur of New Trial.

DATED this 15th day of September, 2017.

POWELL, KUZNETZ & PARKER, P.S.

By _____
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I hereby certify that I caused a true and complete copy of the foregoing to be

☒ mailed, postage prepaid;
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