10-26-2017

Litke v. Munkhoff Appellant's Reply Brief 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' REPLY BRIEF

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

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

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I. INTRODUCTION

Idaho law requires the question of whether a defendant owes a duty to a plaintiff to be determined at the time of the injury. Caldwell v. Idaho Youth Ranch, Inc., 132 Idaho 120, 123-24, 968 P.2d 215 (1998). The court considers whether the defendant exercised reasonable care only after control at the time of the injury is established. Id. at 124. In this case, there has never been an issue of fact—either at summary judgment or at trial—regarding whether either of the Munkhoffs had custody and control over Sam's dog ("Bo") when Bo bit Respondent, Klaus Kummerling ("Kummerling"). This fact is dispositive. Id.

Because the threshold issue of custody and control at the time of the injury was undisputed, the trial court erred in denying Appellants Mark Munkhoff and Robyn Munkhoff's (collectively, "Munkhoffs") motion for summary judgment as to the negligence claim and erred in denying the Munkhoffs' motion for new trial and for remittitur.

Kummerling responds by asking this Court to change Idaho law, arguing that liability should be determined by examining the extent and nature of the prior custody, regardless of whether or not custody and control existed at the time of the injury. Even if a change in the law were justified, the argument's factual premise is unsupported by the evidence and Kummerling's own testimony at trial.

Adopting a rule that imposes a duty that extends beyond the scope of the defendant's custody and control would expand the duties and liability of all entities and persons who have custody and care of persons and animals, including schools, boarding kennels and stables, youth camps,

and religious organizations. This Court has previously rejected such calls for a change in law and should do so again here.

Instead, this Court should affirm established principles of negligence by holding the trial court erred in denying the Munkhoffs' motion for summary judgment and compounded that error by finding there was sufficient evidence at trial to support the jury's verdict against the Munkhoffs.

II. REBUTTAL STATEMENT OF THE CASE

On appeal, Kummerling fails to present any facts or argument disputing Sam Munkhoff's sole custody and control over Bo at the time of the injury and fails to present facts or argument linking the injury to any alleged breaches of duty that may have occurred while the Munkhoffs did have custody of Bo. Instead, Kummerling claims (contrary to the record) that the Munkhoffs had continuous custody of Bo from November 2012 until the date of the injury and intermingles evidence that was not presented until trial with the record on summary judgment, creating the appearance of issues of fact where none existed.

Because the record at summary judgment established no genuine issue of material fact, the Munkhoffs were entitled to judgment as a matter of law. Because the jury's verdict was excessive and based on insufficient evidence (including no evidence that the Munkhoffs had custody of Bo at the time of the injury), the Munkhoffs' motion for new trial should have been granted.

A. Kummerling extends and misstates numerous facts in order to create the impression that the Munkhoffs and Sam Munkhoff were joint owners of Bo.

Though not material to whether the Munkhoffs had custody and control of Bo at the time of the incident, Kummerling repeatedly asserts to this Court that the Munkhoffs continuously cared for and housed Bo from November 2012 until the incident. (Resp. Br. at 3, 4, 13) At summary judgment, however, the trial court found "no evidence on the record that [Bo] was harbored at Defendants' residence when the prior incidents [in November, February, and April] occurred; in fact the record reflects he was not." (R 186) The trial court went further to point out that harboring or keeping a dog that has been declared dangerous is not sufficient to establish liability. (R 186)

The record as a whole reflects that (1) from at least November 2012 until May 2013 Sam and Bo were living at 1109 E. Walnut in Coeur d'Alene, (2) afterwards Sam and Bo lived on 18th Street, (3) prior to Kummerling's injury Sam and other family members reported to Animal Control that Sam and Bo were not living with the Munkhoffs, (4) Kummerling did not see Bo at the Munkhoffs' home very often prior to July 30, 2013, and (5) Kummerling's wife had never seen Bo prior to the bite. (R 63, ¶2; R 69, ¶3.B; R 72, ¶4; R 74, ¶6.A, R 80, R 93, R 99; Tr. Vol. I p. 58 ll. 10-17, p. 137 ll. 20-25, Tr. Vol. II p. 228 l. 12 to p. 229 l. 10, p. 236 l. 24 to p. 237 l. 2) This evidence is all inconsistent with Kummerling's assertion for the first time on appeal that Bo resided with the Munkhoffs (but not Sam) continually from November 2012 until July 30, 2013. Kummerling's assertion is also inconsistent with the undisputed fact that only Sam was cited for violating Coeur d'Alene City Ordinances governing aggressive or dangerous dogs. (R 101)

Sam Munkhoff testified that Bo stayed with the Munkhoffs while Sam was working in North Dakota, from July 5-30, 2013. (Tr. Vol. II, p. 238 ll. 17-23, p. 241 ll. 19-21, p. 245 ll. 4-11, p. 263 ll. 17-22) This is consistent with Robyn Munkhoff's contemporaneous statements to Officer Laurie Deus (though not Ms. Deus's assumption that Sam Munkhoff had been working in North Dakota for months) and with the Kummerlings' testimony regarding how little they had seen Bo prior to the date of injury. (R 99; Tr. Vol. I p. 58 ll. 10-17, p. 137 ll. 20-25)

Again, regardless of how long or often Bo had stayed at the Munkhoffs' home, the key facts material to both duty and causation were the facts that Sam Munkhoff removed Bo from his parents' property, took him on a walk, did not muzzle Bo, and allowed Kummerling to approach Bo; whereupon Kummerling was bit. (R 64 ¶6, R 112 ¶3; Tr. Vol. I, p. 74 ll. 6-17, p. 75 ll. 4-24, p. 75 ll. 13-19, p. 76 ll. 6-14) These facts were undisputed at summary judgment and at trial. Id. They remain undisputed on appeal. (Resp. Br. at 5)

B. The facts material to duty and causation were undisputed or uncontested at summary judgment.

The Munkhoffs identified the material facts that were undisputed at summary judgment. (App'ts' Br. at 4) Kummerling failed to meet his burden of citing to admissible portions of the record at summary judgment to create an issue of fact as to any of the identified material facts. (Resp. Br. at 2-6) Instead, Kummerling attempts to create the impression that a question of fact existed at summary judgment by merging those facts presented at summary judgment with those that were not presented until trial. (See Resp. Br. at 2-6) Those new factual allegations, however,

go to credibility and to the length of time that Bo was cared for by the Munkhoffs, and not to facts determinative of duty or causation. Id.

Kummerling also seeks to create an issue of fact with statements that are unsupported by the record. For example, Kummerling suggests that Sam Munkhoff was working in North Dakota up to the time of the injury. (Resp. Br. at 4) The record cited, however, states only that Bo had been staying in the Munkhoffs' backyard when Sam Munkhoff was in North Dakota, and that only when Sam was absent the Munkhoffs were the sole custodians of Bo. (R 99, 113 ¶7) Regardless of how long Bo stayed at the Munkhoffs' home, Kummerling agrees that only Sam had custody and control over Bo at the time of the attack. (Resp. Br. at 5)

Kummerling also attempts to create the impression that admissible evidence in the record created an issue of fact as to whether alleged deficient signage was a cause of his injury. (R. 5-6) Although the Munkhoffs raised causation at summary judgment, Kummerling presented no admissible evidence creating a genuine issue of fact as to whether his injury was caused by any alleged breach of duty by the Munkhoffs, even assuming the Munkhoffs continued to owe a duty when Sam resumed custody of Bo. (R 107-129; Tr. Vol. I p. 12 ll. 6-9, p. 17 ll. 11-14, p. 18 l. 25 to p. 19 l. 4 (striking and limiting portions of the Declaration of K. Kummerling)) On appeal, Kummerling points to Kummerling's own inadmissible double hearsay statement in Officer Deus' report submitted by the City of Coeur d'Alene that Kummerling "stated he is very upset that he did not know that a dog declared aggressive by animal control was living next door and that he was unaware of it. He said he would never have asked to pet the dog if he had known

that."[1] (R 100) At trial, Kummerling's testimony regarding his previous interactions with Bo was inconsistent with his speculation regarding causation. (Tr. Vol. I, p. 59 ll. 5-11; Vol. III p. 367 ll. 10-20)

C. Kummerling failed to present evidence sufficient to support the jury's verdict at trial.

More importantly for this appeal, as to the facts admitted at trial, Kummerling relies on testimony concerning the credibility of Sam Munkhoff and the length of Bo's stay at the Munkhoffs', but points to no evidence of the Munkhoffs' custody and control of Bo at the time of the injury or to any evidence indicating that any alleged breach by the Munkhoffs was a cause of Kummerling's injury. (Resp. Br. at 28-32) In fact, Kummerling agrees that he was on Kummerling's own property, Bo was on a leash held by Sam, and Kummerling asked Sam Munkhoff if he could pet Bo immediately before the injury occurred. (Resp. Br. at 5)

III. ARGUMENT

Idaho tort law does not impose liability on supervisors or custodians who no longer have custody or control of persons or animals that may pose a danger to others. Caldwell v. Idaho Youth Ranch, Inc., 132 Idaho 120, 124, 968 P.2d 215 (1998). Idaho—just like the other jurisdictions identified by the Munkhoffs—looks first to whether the owner or custodian had control over the dangerous animal or person at the time of the injury. Id. at 123-24; McClain v. Lewiston Fair & Racing Ass'n, 17 Idaho 63, 104 P. 1015, 1026 (1909). Thus, whether the Munkhoffs had custody and control over Bo at the time of the injury was the threshold issue that

[1]Although Kummerling cites R 99 (Resp. Br. at 6), this appears to be a scrivener's error. (See R 99-100)

had to be determined before the Munkhoffs could be found liable. Evidence disputing that fact was necessary to prevent dismissal of Kummerling's negligence claim and to support a jury verdict imposing liability on the Munkhoffs.

Kummerling has never disputed Sam's exclusive control over Bo at the time of the injury. Although Kummerling attempts to justify the trial court's rulings by claiming on appeal that the Munkhoffs had assumed continuous custody of Bo from November 2012 until the date of the injury, the trial court found that this was not the case. (R 186)

A. It was undisputed that only Sam had custody and control over Bo at the time of the injury, and Kummerling presented no evidence showing that any breach while the Munkhoffs did have custody proximately caused Kummerling's injury.

Contrary to Kummerling's unsupported allegation, the Munkhoffs have never claimed "they had no care, control, or involvement with the dog Bo." (Resp. Br. at 11) The Munkhoffs have consistently claimed (and Kummerling has not disputed) that Sam Munkhoff had exclusive care, control and involvement with Bo at the time of the injury. (See, e.g., R 65 ¶¶6-8) Sam's sole custody and control of Bo at the time of the injury rendered the Munkhoffs' previous care for Bo and knowledge of his run-ins with Animal Control immaterial. Where there are no genuine issues of material fact, only a question of law remains. Kiebert v. Goss, 144 Idaho 225, 227, 159 P.3d 862 (2007). The trial court erred in finding that an issue of fact remained and further erred in finding that sufficient evidence was presented at trial.

1. Because there was no dispute concerning Sam's complete custody and control over Bo at the time of the injury, the trial court erred in ruling that whether the Munkhoffs had a duty was a question of fact for the jury.

Kummerling misstates Idaho law in claiming that custodians continue to have a duty to prevent harm after the owner has resumed custody and control. Idaho law requires that duty be determined at the time of the injury; therefore the status of the owner or custodian at the time of the injury dictates whether any duty existed. See Turpen v. Granieri, 133 Idaho 244, 247, 985 P.2d 669 (1999); Caldwell, 132 Idaho at 124; McClain, 104 P. at 1026. This rule is unaffected by the duration or nature of the prior custody or the custodian's knowledge. See McClain, 17 Idaho at 1017 (discussing dismissal at trial of claim against head of household for injuries that occurred after family dog was removed from the home by other family members).

Coeur d'Alene Municipal Code §§6.20.030 and .040 and Idaho Code §25-2805(2) are addressed to the "owner or custodian" not to the "owner and custodian," implicitly recognizing that there may be situations where the duty is imposed on either the owner or the custodian, but not both. (Emphasis added.) Whether one is the custodian is determined by whether at the time of the injury one has undertaken to protect the animal and control its actions. Bright v. Maznik, 162 Idaho 311, 396 P.3d 1193, 1196 (2017); McClain, 104 P. at 1026; see also, Caldwell, 132 Idaho at 123-24. Notably, here, Animal Control cited Sam for violations of §6.20.040, but not the Munkhoffs. (R 101)

Kummerling's representation that McClain stands for the proposition that whether any person is a custodian is always a question of fact for the jury is inconsistent with the McClain court's holding and the facts of that case. Significantly, in McClain, John P. Vollmer who (like

the Munkhoffs) "kept, harbored, owned, and maintained" the errant dog at his family residence was dismissed upon a motion for nonsuit and received a judgment for costs. McClain, 104 P. at 1018. The McClain court held that whether John P. Vollmer's son, Norman Vollmer, who was present at the time of the injury, was "the owner, harborer, or in control was a question of fact to be determined by the jury." Id. at 1026. Neither the Supreme Court nor the trial court made any such ruling as to John P. Vollmer, who was not present at the time of the injury. Id.

McClain, therefore, stands for the proposition that the liability of persons who harbor a dog generally is cut off by the act of another of assuming custody and removing the dog from the residence; but that a question of fact may exist as to whether persons who removed the dog were custodians at the time of the injury. Id. In McClain, as is the case here, it was the act of removing the dog from the control of the head of the household that was sufficient to terminate liability for the injury.

An owner's undertaking to remove a dangerous dog from the custody and control of the custodian is sufficient to terminate the legal responsibility of the custodian for the dog. This is the law in Idaho, and it is consistent with Idaho law concerning custodians of dangerous persons and with the law of other states, even where the owner or custodian is aware of the dangerous propensities of the dog. See, e.g., McClain, 104 P. at 1017; Jones v. Starnes, 150 Idaho 257, 261, 245 P.3d 1009 (2011) (holding knowledge of dangerous propensities is insufficient to extend duty beyond period of custody and control); Stoddart v. Pocatello Sch. Dist. No. 25, 149 Idaho 679, 687, 239 P.3d 784 (2010); Cormier v. Willis, 313 Ga. App. 699, 701, 722 S.E.2d 416 (2012) (no liability under Georgia dangerous dog statute where defendant did not have management or

control of dog at the time of the injury); Goodman v. Kahn, 182 Ga. App. 724, 725, 356 S.E.2d 757 (1987) (finding no liability under Georgia dangerous dog statute where roommate did not have custody or control at time of injury, despite alleged knowledge of dangerous propensities and previous care for dog); Auster v. Norwalk United Methodist Church, 286 Conn. 152, 160, 943 A.2d 391 (2008) (holding evidence was insufficient to sustain the jury's verdict finding church liable for injury by dog kept on church grounds, despite knowledge of prior attack by dog, the fact that the dog was owned by an employee of the church who resided on church property, and undertaking by the church to direct dog owner's management of the dog).

2. Idaho law does not impose a duty on custodians to prevent injury that occurs after the owner of the dangerous dog has resumed custody and control.

Resting on his unsupported assertion that the Munkhoffs assumed permanent responsibility for Bo, Kummerling argues the Munkhoffs were "responsible for any foreseeable damage that can be caused by" Bo. (Resp. Br. at 16) Once again, this is inconsistent with the facts at summary judgment and at trial, the finding of the trial court regarding Bo's residence, and Idaho law.

Although Kummerling cites Braese v. Stinker Stores, Inc. for the proposition that custodians have a continuous duty to prevent care if they have knowledge of an animal's dangerous propensities, Braese is distinguishable. (Resp. Br. at 13 (citing Braese v. Stinker Stores, Inc., 157 Idaho 443, 337 P.3d 602 (2014)). In Braese, the injury occurred on the premises of the defendant, a retailer. Id. at 444-45. At issue was whether allowing dogs in a store created an unreasonable risk to members of the public who entered the store and whether there was a duty

to protect patrons from the particular dog at issue. Id. at 445-46. The injury did not occur outside the premises, while the dog was under the sole control of the owner, and the plaintiff did not assert that the retailer's duty continued after the dog left the store. Id. at 443.

Braese would have application here if the injury had occurred because of failure to protect or warn Kummerling when he was on the Munkhoff's property, but that is not what occurred. Here, it is undisputed that the injury occurred on or near Kummerling's own property when the Munkhoffs were not present. (R 11-13) No evidence was presented that showed that the Munkhoffs had assumed a duty to control Bo after he had been removed from the Munkhoffs' property by their adult son.

"Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered." Boots ex rel Boots v. Winters, 145 Idaho 389, 396, 179 P.3d 352 (2008). The assumed duty is further limited to the duty actually assumed and exists only to the extent that there is an actual undertaking. Beers v. Corp. of the Pres. of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 688, 316 P.3d 92 (2013). Kummerling seeks to extend Mark Munkhoff's agreement in November 2012 to follow the requirements verbally explained to him by Officer Deus to impose unlimited duties to protect the public from all foreseeable harms, regardless whether or not Sam resumed custody and control of Bo. (Resp. Br. at 15)

City ordinances can define the standard of care owed and replace a common law duty where (1) the regulation clearly defines the standard of conduct, (2) must have been intended to prevent the harm that the defendant's act caused, (3) the plaintiff is a member of the class of persons the

regulation seeks to protect, and (4) the violation was the proximate cause of the injury. Boswell v. Steele, 158 Idaho 554, 563, 348 P.3d 497 (2015) (citing O'Guin v. Bingham Cnty., 142 Idaho 49, 52, 122 P.3d 308 (2005)). Assuming Officer Deus accurately and completely explained the requirements, Mark Munkhoff agreed that while Bo was under Mark Munkhoff's custody and control, Mark Munkhoff would: (1) keep Bo in a fenced enclosure, (2) muzzle Bo when removing Bo from the Munkhoff's property, and (3) place in a prominent place a sign indicating a dangerous or aggressive dog is on the premises. (Coeur d'Alene Municipal Code §6.20.030.A, .040.A)

The bulk of the ordinances' requirements are clearly designed to ensure the dog is in an enclosure or is restrained at all times; while the requirement of signage warns those persons entering or nearing the property that an aggressive or dangerous dog is on site. See §§6.20.030, .040. The harms sought to be prevented and persons to be protected are thus: (1) injury to persons entering the owner or custodian's property, (2) injury to the public resulting from the dog getting loose, and (3) injury to persons who encounter the dog when it is removed from the property.

The ordinances do not require owners or custodians to make general warnings to the public to ensure that all persons within the vicinity of the dog are aware of its propensities. Coeur d'Alene Municipal Code §§6.20.030, .040. The ordinances do not prohibit homeowners from keeping dangerous or aggressive dogs on their property, or require continuous muzzling of the dog at issue as Kummerling suggests. Id. (see also, R 186) Nor do the ordinances purport to impose liability on custodians for actions by owners. Id.

Further, by definition and under established principles of common law, the duties imposed under the ordinances cannot be breached by persons who do not have custody of the dangerous dog at the point in time at which the breach occurs. See Caldwell, 132 Idaho at 123-24 (holding that the analysis for the liability of custodians requires the court to first determine if the custodian had control over the person in question and then whether the injury was foreseeable) (citing Restatement (Second) of Torts, §319). There was no dispute at summary judgment or at trial that Sam had sole custody and control of Bo when Sam removed Bo from the Munkhoffs' property without muzzling him, and continued to keep Bo unmuzzled while Sam walked Bo. Only Sam can be liable for injury resulting out of the failure to muzzle. And, although Kummerling alleged the Munkhoffs violated the ordinances, only Sam Munkhoff was cited. (R 101)

To the extent that any liability can extend to the Munkhoffs based upon negligence per se, the only creditable potential basis was the alleged inadequate signage, and that only to the extent that evidence established the lack of adequate signage before Sam resumed custody and control of Bo proximately caused a dog bite that occurred after Sam removed Bo from the Munkhoffs' property without a muzzle and did not prevent Kummerling from petting Bo after Kummerling asked Sam if it was safe to pet Bo.

3. Kummerling did not dispute the material facts which determined whether the Munkhoffs breached a duty to Kummerling and failed to present any evidence establishing that any action by the Munkhoffs was a proximate cause of the injury.

As a threshold matter, Kummerling was required to show a duty recognized by Idaho law. Stoddart, 149 Idaho at 683. Kummerling presented no evidence from which the trial court or the jury could infer the Munkhoffs had custody and control over Bo when Bo bit Kummerling. (R 107-14) In fact, Kummerling in his pleadings agreed that Sam owned Bo and that only Sam was present when Bo bit Kummerling. (R 12-13)

Under Idaho law the custodian's custody and control at the time of the injury must be established before the trial court's analysis moves to a determination of the scope and nature of the custodian's duty. Caldwell, 132 Idaho at 123-24. If the dangerous person or animal is not in the defendant's custody and control at the time of the injury, there can be no breach that is the basis for liability, and the analysis stops. Id. at 124. Only after the court finds the supervising person or entity has control does the trial court move on to consider foreseeability. Id. This analysis is consistent with Idaho law limiting the affirmative duty to control others to instances where the defendant has a right and an ability to do so. Turpen v.Granieri, 133 Idaho at 248. Here the trial court erred by diving into analysis of the extent and nature of the Munkhoffs' duties to Kummerling without stopping to consider that it was undisputed that only Sam had custody and control of Bo at the critical time. (See R 172-76) This error was compounded when the trial court found sufficient evidence at trial to support the jury's verdict without considering or applying the correct legal standard. (See R 448, 451-52)

Because only Sam was present and in control of Bo at the time of the injury, disputed facts concerning the extent of the Munkhoffs' knowledge of Bo's propensities and the requirements of local ordinances, and whether the Munkhoffs had violated those ordinances were immaterial. Caldwell, 132 Idaho at 124. Yet, these facts formed the bases for the trial court's denial of summary judgment and denial of the motion for remittitur and for new trial. (R 172-76, 448, 251-52)

Questions of fact regarding foreseeability are material to a custodian's liability only if the custodian had actual control of the dangerous animal or person at the time of the injury. See Caldwell, 132 Idaho at 123-24; Jones, 150 Idaho at 261 (holding no duty to prevent even foreseeable injury once attacker has left premises); McClain, 104 P. at 1026. Because there were no issues of fact concerning the Munkhoffs' lack of control of Bo at the time of the injury, the trial court erred in ruling that the jury must determine the existence of duty and in finding sufficient evidence to support the jury's award.

B. Even if Idaho law imposed a duty on custodians who no longer have custody and control of the dog, the trial court erred because Kummerling submitted no evidence showing that his injury was proximately caused by an alleged breach by the Munkhoffs.

"Questions of negligence, proximate cause, intervening cause, and foreseeability are generally regarded as questions of fact for determination by the jury unless the proof is so clear that reasonable minds cannot draw different conclusions or where all reasonable minds would construe the facts and circumstances in only one way." Lundy v. Hazen, 90 Idaho 323, 327, 411 P.2d 768 (1966). Here, Kummerling presented no proof at summary judgment and only his testimony at trial to establish that conduct by the Munkhoffs caused his injury or that Sam's

conduct in walking Bo without a muzzle and allowing Kummerling to attempt to pet Bo was not a superseding cause. Thus, the trial court erred in ruling that genuine issues of material fact remained.

1. Kummerling presented only argument at summary judgment to establish causation and on appeal cites to inadmissible hearsay statements.

Proximate cause requires the trial court to consider (1) whether the injury would have occurred if the alleged breach had not occurred, and (2) whether Idaho legal policy supports imposing liability. Doe v. Sisters of Holy Cross, 126 Idaho 1036, 1040, 895 P.2d 1229 (1995). The Munkhoffs argued on summary judgment that because the injury occurred off their property when Bo was not under their control, Kummerling could not establish proximate cause, and presented affidavit evidence supporting their assertion. (R 53-54, 63-66)

Kummerling argues that there were questions of fact concerning whether the Munkhoffs, by harboring Bo, allegedly failing to post adequate signage, and failing to muzzle Bo were a proximate cause of his injuries. Kummerling failed, however, to present admissible evidence linking any alleged breach to his injuries. As discussed above, the Munkhoffs breached no duty by harboring Bo, as the Coeur d'Alene ordinances specifically allow for custodians and owners of aggressive and dangerous dogs to keep them within the city limits, with specified limitations. Coeur d'Alene Municipal Code §§6.20.030, .040.

Neither can Kummerling sustain a claim that the Munkhoffs' failure to muzzle Bo was the proximate cause of his injury because it was undisputed that it was Sam—and not the Munkhoffs—who failed to muzzle Bo on the date of the injury. Kummerling can argue he would

not have been injured but for Sam's failure to muzzle Bo, but there is no genuine issue of material fact in the record at summary judgment showing that either of the Munkhoffs were responsible for a failure to muzzle Bo on the date of the injury. (See R 107-14) Kummerling asserts for the first time on appeal that if he had seen a muzzle on Bo at any time prior to the date of the incident that the muzzle would have warned him of Bo's propensities (presumably preventing Kummerling from attempting to pet Bo). (Resp. Br. at 23-24) This assertion is entirely unsupported by the record and is contrary to Kummerling's testimony at trial, including that "he was aware of the aggressive nature of Bo based on the dog's charging and impacting the fence between the properties," as re-stated by the trial court. (See id.; R 451, ¶1; Tr. Vol. I p. 59 ll. 5-11; Tr. Vol. III p. 367 ll. 10-20)

Where parties fail to come forward with any admissible evidence proving an element of their claims, there is a failure of proof, which renders all other facts immaterial. Ambrose v. Buhl Joint Sch. Dist. No. 412, 126 Idaho 581, 584, 887 P.2d 1088 (Ct. Ap. 1994). Raising the slightest doubt as to the facts is insufficient; the non-moving party must create a genuine issue of material fact. Id. Kummerling presented no evidence showing causation. The trial court therefore erred in ruling that whether the conduct of the Munkhoffs had proximately caused Kummerling's injury was a question of fact for the jury and in denying the Munkhoffs' motion for new trial and remittitur. (See R 75; R 456)

Moreover, even if Kummerling had met his burden of coming forward with evidence showing his injury would not have occurred but for the lack of signage, he failed to show that being bit by Bo on his own property was a natural and probable consequence of the Munkhoffs'

alleged failure to post signs warning that a dangerous dog was on their property. (R 107-14) Because Kummerling failed to meet his burden on summary judgment, the trial court erred in ruling that a genuine issue of fact remained to be determined by the jury.

2. Even if Kummerling had presented evidence establishing causation, the undisputed facts regarding Sam's removal of Bo from the Munkhoffs' home, walking Bo without a muzzle, and allowing Kummerling to approach Bo render Sam's actions a superseding cause as a matter of law.

Kummerling relies solely on the fact that it is foreseeable that a dog will be walked by someone to argue that Sam's conduct in removing Bo from the Munkhoffs' property, failure to muzzle Bo, failure to warn Kummerling when Kummerling asked if it was safe to pet Bo, and Sam's failure to prevent Kummerling from attempting to pet Bo was not a superseding cause of Kummerling's injury. This Court has held, however, that the superseding cause and injury must be a foreseeable result of the original negligence in order for liability to attach to the original wrong-doer. Lundy, 90 Idaho at 329–30.

Kummerling fails to point to any evidence in the record suggesting that Sam's act in walking Bo without a muzzle was a foreseeable result of the alleged lack of signage at the Munkhoffs' property. (See Resp. Br. at 21-22) Instead Kummerling simply argues that Sam's conduct is not superseding cause because it was foreseeable that Sam would walk Bo, without even identifying the alleged negligent act by the Munkhoffs. Id. This is insufficient to create an issue of fact as to whether Sam's conduct was a foreseeable result of negligence by the Munkhoffs.

Because it was (and is) undisputed that Sam had sole custody and control over Bo at the time of the injury and because Kummerling failed to come forward with proof showing his injuries

were proximately caused by alleged breaches by the Munkhoffs and that Sam's conduct was a foreseeable consequence of the alleged breach, there were no genuine issues of material fact at summary judgment. The trial court thus erred in ruling that the determination of duty and causation was to be left for the jury. The trial court further erred by denying the Munkhoffs' motion for new trial and remittitur when Kummerling failed to present at trial any evidence disputing Sam's sole custody and control of Bo at the time of the injury.

C. The trial court erred in denying the Munkhoffs' motion for remittitur or new trial because no evidence was admitted at trial establishing the Munkhoffs' custody and control over Bo at the time of the injury.

Kummerling acknowledges the Munkhoffs sought a new trial and remittitur based upon insufficient evidence, but claims this issue is not properly before this Court merely because the Munkhoffs' did not use the term "custodian" in their challenge to the verdict. The Munkhoffs argued that the evidence was insufficient to support the verdicts against either of the Munkhoffs because the basis for liability was familial relationship and knowledge of past violations; neither of which was sufficient under the law to support liability. (R 414-15) Notably, Kummerling responded by arguing that whether a custodian of a dog is present at the time of injury is irrelevant to a determination of liability. (R 432-33) Kummerling's claim that the Munkhoffs did not preserve the issue for appeal is thus controverted by his own briefing.

The Munkhoffs now appeal the trial court's decision denying their motion for new trial and remittitur on four legal bases: 1) the excessive award given under influence of passion and prejudice (Rule 59(a)(1)(F)); 2) insufficient evidence to support the verdict (Rule 59(a)(1)(G));

3) the necessity of remittitur in lieu of a new trial (Idaho Code § 6-807 and Rule 59.1); and 4) justice requires relief from judgment (Rule 60(b)).

1. The trial court abused its discretion in denying a new trial.

The test for whether the trial court abused its discretion is as follows: (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 standard applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason ("Sun Valley Test"). Sun Valley Shopping Ctr. v. Idaho Power, 119 Idaho 87, 94, 803 P.2d 993 (1991). This is the appropriate standard of review this Court must consider when determining if the trial court abused its discretion in denying the Munkhoffs' motion for new trial and remittitur. (See Blizzard v. Lundeby, 156 Idaho 204, 206, 322 P.3d 286 (2014)). The discretion with which the trial judge is entrusted is a sound legal or judicial discretion. Blaine v. Byers, 91 Idaho 665, 671, 429 P.2d 397 (1967).

a. The trial court erred in denying a new trial based on the excessive damages inappropriately assessed against Mark and Robyn Munkhoff.

Here, under Sun Valley the trial court perceived the issue of whether there were excessive damages awarded as one of discretion, but did **not** act within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it when denying a new trial based on excessive damages. A trial court may grant a new trial due to excessive damages appearing to have been given under the influence of passion or prejudice. I.R.C.P. 59(a)(1)(F). The trial court must consider under the "Blaine Test", 1) whether the trial

court's verdict was against the weight of the evidence, and 2) whether a different result is likely to occur on retrial (provided the correct legal standard is applied). Blaine v. Byers, 91 Idaho 665, 671, 429 P.2d 397 (1967) (emphasis added). The trial court must make an independent determination as to whether the evidence supports the verdict. Sheridan v. St. Luke's Reg'l Med. Ctr., 135 Idaho 775, 781, 25 P.3d 88 (2001).

Under the first prong of the Blaine Test, the trial court's special verdict awarding nearly $200,000 in economic and non-economic damages to Mr. Kummerling was against the weight of the evidence. (R 460-461) Although the Munkhoffs were not custodians of Bo at the time of the injury, had no right to prevent Sam from walking his own dog without a muzzle, and were not present at the time of the incident, they were assessed by the jury to be 50% liable ($96,554.12) for Mr. Kummerling's damages. (R 149-151, 411) This exorbitant damage calculation for a temporary custodian of an animal can only be explained by the influence of passion and prejudice, including Kummerling's theme during trial that parents of young adult dog owners should be held liable for the acts of their adult children. This prejudice against parents of adult dog owners is inconsistent with Idaho's law and policy and led to a verdict against the weight of evidence relieving the Munkhoffs from liability.

Under the second prong of the Blaine Test, a different result is likely to occur on retrial because it is **not** the law of Idaho that parents should be held vicariously liable for actions of their adult children; nor is the law of Idaho that the scope duty of custodians extends beyond the actual custody of the dangerous animal or person. (See §A above.)

Even if Sam was a minor child, the Idaho Legislature recognizes that it is contrary to public policy to hold parents vicariously liable for the torts of their children. Fuller v. Studer, 122 Idaho 251, 254, 833 P.2d 109 (1992). Recovery against parents for the torts of their minor children is limited to two thousand five hundred dollars ($2,500.00) in Idaho.[2] I.C. § 6-210. Subsection (2) of the statute disallows recovery from parents for "less tangible damage such as pain and suffering, wrongful death, or emotional distress," similar to the non-economic damages awarded to Mr. Kummerling. I.C. § 6-210 (2).

Whether or not Mark and Robyn Munkhoff had control of Sam when he took Bo off of their premises is a legal question, not a factual question to be determined by witness credibility as the trial court did in this case. Likewise, whether or not the Munkhoffs were custodians who could be held liable was a question of law here, because the facts establishing Sam's sole custody and control of Bo at the time of the injury were never disputed. The trial court erred in reasoning Mark and Robyn Munkhoff lacked credibility in "protestations that they had no control over Sam's taking Bo off their premises" and that the trial court "simply does not believe" that the Munkhoffs couldn't control their young adult son. (R 448) The trial court also made a point to mention Sam was "only" twenty years old, minimizing the fact that he is an adult responsible for his own actions and showing further prejudice to his parents. (R 448) On retrial a different result is probable if the correct legal standard is applied.

[2] A "minor" child is a child that is under 18 years old and living with their parents. I.C. § 6-210(1).

The trial court did not reach its decision to deny a new trial due to excessive damages by an exercise of reason. For the trial court to properly uphold the jury's decision, it must be evident that the trial court (1) contemplated what it would have awarded if it had been the finder of fact and (2) determined that any difference between the jury award and what the trial court would have awarded is not so great as to show a verdict based on prejudice or passion. Barnett v. Eagle Helicopters, Inc., 123 Idaho 361, 365, 848 P.2d 419 (1993). Here, the trial court did not specifically state how much damages it would have assessed to each party, but generally concluded that there would be "little, if any disparity between its award and the jury's award." (R 449) The trial court failed to explain why $96,554.12 was an appropriate award of damages in favor of Mr. Kummerling and against the Munkhoffs, especially where Sam Munkhoff was assessed a lesser sum of $86,898.71.[3]

For the same reasons this Court should reverse the trial court's decision denying a new trial due to excessive damages, this Court should grant remittitur. I.R.C.P. 59.1. One limitation on the use of remittiturs that has been recognized in other jurisdictions is that they are not proper if the verdict was the result of passion or prejudice to such an extent that such passion or prejudice may have infected the jury's decision on liability as well as damages. Quick v. Crane, 111 Idaho 759, 770, 727 P.2d 1187 (1986). At trial, Kummerling went so far as to argue there "was a conspiracy of the Munkhoffs to keep the dog Bo's dangerous condition from the public and failure to take acts to protect the public from that dangerous condition." (R 431) Due to the

[3] The Judgment on Special Verdict awards Mr. Kummerling $86,898.71 against Sam Munkhoff, $77,243.30 against Mark Munkhoff, and $19,310.82 against Robyn Munkhoff. (R 460-461)

significant effects of passion or prejudice in this case against the Munkhoffs a new trial is proper, but remittitur is requested as an alternative measure to ensure a more fair judgment against the Munkhoffs.

b. The trial court erred in denying a new trial based on insufficient evidence to support the jury's verdict.

According to the Sun Valley Test, the trial court incorrectly perceived the discretion required in considering the issue of whether there was insufficient evidence to justify the verdict or whether a new trial was proper. The trial court failed to appreciate the "qualitative difference between a trial judge's role in deciding whether a new trial is justified based on the insufficiency of the evidence, and whether a new trial is justified based on the amount of the jury's award of damages." Quick, 111 Idaho at 768. The trial court showed such indifference for the variance in these standards by stating its analysis of insufficient evidence is "similar to the analysis set forth above for an argument claiming the damages awarded are excessive" and failing to offer additional substantive analysis of the evidence. (R 450)

The trial court did not act within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it when denying a new trial based on insufficient evidence. A trial court may grant a new trial if there is insufficiency of evidence to justify the verdict or that the verdict is against the law. I.R.C.P. 59(a)(1)(G). A trial court may grant a new trial based on insufficiency of evidence if it considers all the evidence, including its own determination of the credibility of the witnesses, and concludes that the verdict is not in accord with its assessment of the clear weight of the evidence. Quick, 111 Idaho at 766.

Conversely, to uphold a ruling for sufficiency of evidence, it must be evident that the trial court weighed the evidence and determined that the verdict is supported by that evidence. Bott v. Idaho State Bldg. Auth., 128 Idaho 580, 590, 917 P.2d 737 (1996). In the trial court's analysis of its denial of a new trial due to insufficient evidence, the trial court fails to adequately articulate what evidence was considered and why it believed it could reasonably conclude the verdict was appropriate. (See R 450-452)

The trial court failed to appropriately weigh the sufficiency of evidence of liability for Robyn Munkhoff. As the basis to deny a new trial due to insufficiency of evidence, the trial court explained that it questioned Robyn Munkhoff's "complete ignorance" of Bo's violent propensities and her opinion that Bo was gentle and kind, yet the trial court fails to cite evidence to controvert Robyn Munkhoff's testimony. (R 451) No further evidence is cited by the trial court in support of the sufficiency of evidence to justify the verdict against Robyn Munkhoff. The trial court pointed to no evidence showing Robyn Munkhoff had control and custody of Bo at the time Bo injured Kummerling.

The trial court failed to appropriately weigh the sufficiency of evidence showing Mark Munkhoff's liability. In a single sentence the trial court conclusively explains, "[t]he [c]ourt also weighed and considered the evidence and finds that Mark Munkhoff had knowledge concerning Bo's propensities and that Mark knew what was required by the City of Coeur d'Alene of someone who harbored Bo following the November incident." (R 451) No actual evidence is cited by the trial court in support of the sufficiency of evidence to justify the verdict against

Mark Munkhoff. The trial court cites to no evidence showing that Mark Munkhoff had custody and control over Bo at the time of the injury.

The trial court did not reach its decision to uphold the jury's verdict for sufficiency of evidence by an exercise of reason. The facts listed in Respondent's Brief do not "demonstrate that the Munkhoffs had care, control and custody of Bo at the time of the attack" and are merely red herrings offered to distract from the material and undisputed facts this Court should consider. (Resp. Br. at 28-32) From the following **undisputed** facts alone, all conceded to by Mr. Kummerling at summary judgment stage in April 2016, a trial court exercising sound discretion would grant a new trial due to insufficiency of evidence of the liability for Mark and Robyn Munkhoff:

(i) Sam, and only Sam, was Bo's owner (R 149, ¶1);

(ii) Mark and Robyn Munkhoff never received written notification from the City of Coeur d'Alene that Bo had been declared aggressive or dangerous (R 149, ¶2);

(iii) Bo was **not** on the Munkhoffs' property at the time of the incident on July 30, 2013 (R 150, ¶4);

(iv) Mark and Robyn Munkhoff were **not** present at the time Bo bit Mr. Kummerling (R 150, ¶6);

(v) Mark and Robyn Munkhoff were **not** taking care of Bo at the time Bo bit Mr. Kummerling (R 150-151, ¶7);

(vi) Mark and Robyn Munkhoff were **not** Bo's custodian at the time Bo bit Mr. Kummerling (R 150-151, ¶7);

(vii) Mark and Robyn Munkhoff had no authority to control Bo when Bo was not on their property and not physically in their presence (R 150-151, ¶7);

(viii) Mark and Robyn Munkhoff did not have authority to tell Sam (Bo's only owner) what to do with Bo when neither Sam nor Bo were on the Munkhoffs' property (R 150-151, ¶7); and

(ix) Sam had immediate, sole, and exclusive control of Bo at the time Bo bit Mr. Kummerling (R 150-151, ¶7).

The trial court acknowledged in its order denying a new trial that "Mr. Kummerling testified that he was aware of the aggressive nature of Bo based on the dog's charging and impacting the fence between the properties" and "he took the risk of petting a dog he knew to be aggressive." (R 451) Yet, Mr. Kummerling was only assessed 5% of fault. The trial court also claimed to believe "Sam Munkhoff had the greatest responsibility for the dog when he was in town and living with Mark and Robyn Munkhoff, as he was at the time of the incident" and that "Sam Munkhoff likely had the most knowledge of Bo's propensities." (R 451) No facts were presented at trial disputing Sam's exclusive control over Bo at the time of the injury. Yet, Sam Munkhoff was assigned less than half of the fault (45%), and less fault than his parents combined (50%), even though he had 100% control and ownership of the dog at the time of the July 30, 2013 incident. These factors further demonstrate how the trial court did not reach its decision to uphold the jury's verdict for sufficiency of evidence by any exercise of logical reasoning.

2. The trial court erred in denying the Munkhoffs relief from final judgment.

Finally, the Munkhoffs were denied relief from judgment pursuant to I.R.C.P. 60(b). All of the foregoing reasons justify relief from final judgment. The excessive damages assessed against Mark and Robyn Munkhoff and the fact that such damages were awarded based on grossly insufficient evidence to support the Munkhoffs' culpability are more than sufficient to justify relief from final judgment in this case. The trial court abused its discretion in denying the Munkhoffs relief from final judgment

IV. CONCLUSION

For the foregoing reasons, 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. Alternatively, 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.

DATED this 24th day of October, 2017.

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CERTIFICATE OF SERVICE

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