

NO. A09-1760

State of Minnesota
In Supreme Court

Jill Engquist, as parent and natural
guardian of Amber Engquist, a minor,

Respondent,

vs.

Steven and Christina Loyas,

Appellants.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Minnesota Court of Appeals found that the District Court's jury instruction on provocation was not an accurate statement of the law. They further found that the instruction on provocation was so misleading as to render incorrect the jury instruction as a whole, reversing and remanding for a new trial on liability. The Minnesota Court of Appeals specifically provided an instruction that accurately reflects Minnesota law in the defense of provocation as follows: "A person provokes a dog when, by voluntary conduct, and not by inadvertence, the person invites or induces injury. Mere physical contact with a dog, or conduct that results in stimulating a dog, does not constitute provocation unless the danger of injury is apparent when the person acts to invite or induce injury."

Appellant Loyas has appealed the decision of the Minnesota Court of Appeals to the Minnesota Supreme Court.

LEGAL ISSUES

I. Whether a jury instruction on Minn. Stat. §347.22 is an accurate statement of Minnesota law where it fails to exclude inadvertent acts from consideration on the issue of provocation.

The Minnesota Court of Appeals specifically found that a jury instruction on provocation that does not advise the jury to exclude inadvertent acts is an incorrect statement of Minnesota law.

STATEMENT OF FACTS

On July 11, 2006, nine-year-old Amber Engquist was invited by a friend, Gabrielle Beede, age 10, to spend the night at Gabrielle's family home. Trial Transcript 45. Gabrielle's mother, Christina Loyas, and her stepfather, Steven Loyas were present at the home on July 11, 2006. Trial Transcript pg 47. The Loyas family had moved into the neighborhood in May 2006 along with their two-year-old mixed breed dog named Bruno. Trial Transcript pg 65. Steven Loyas had adopted the dog months prior to July 11, 2006 and had never had the dog vaccinated. Trial Transcript pg 66. No evidence exists that the dog had ever bitten anyone prior to Amber Engquist. However, Bruno had growled at the Loyas' three-year-old daughter prior to the incident with Amber Engquist, according to Christina Loyas. Trial Transcript pg 93. That information was never disclosed to Amber Engquist. Trial Transcript pg 94.

At the time of the dog bite, Gabrielle Beede, her younger sister, two cousins, and Amber Enquist were playing hide and seek in the basement of the Loyas' home. Trial Transcript pg 46. It was Gabrielle Beede's suggestion to play hide and seek. Trial Transcript pg 47. At the time of the game Steven and Christina Loyas were in the upstairs portion of the home and the children were unsupervised. Trial Transcript pg 47. Neither Steven nor Christina Loyas provided any rules whatsoever to the children regarding playing with the dog. Trial Transcript pg 47. Amber Enquist was provided no information whatsoever relative to the dog's sensitivities, behavior, demeanor or willingness to be touched by humans. Trial Transcript pgs 48, 69, 92.

While Gabrielle Beede and Amber Enquist were playing, they decided to hide under the stairs in the basement in a small, dark space. Trial Transcript pg 49. Gabrielle Beede called Bruno, who went under the stairs with the two girls. Trial Transcript pg 49. At no point in time was Bruno prevented from leaving the small space underneath the stairs by either Gabrielle Beede or Amber Engquist. Trial Transcript pg 49. Prior to this incident, Amber Enquist had never met Bruno. Trial Transcript pg 182. At no point in time before the dog attack was Amber Engquist ever warned that the dog had any propensities toward biting. Trial Transcript pg 182. Neither Steven nor Christina Loyas ever told Amber Enquist not to play with the dog, not to pet the dog, nor to not touch the dog. Trial Transcript pg 183. While underneath the stairs and sitting next to Gabrielle Beede, Amber Engquist put her arm around the dog and petted him. Trial Transcript pg 184. The dog growled at Amber Engquist, causing her to pull her arm back and move away from the animal, having no physical contact with it whatsoever. Trial Transcript pg 184. At that time, the dog launched at her and bit her in the eye area and lower part of her face. Trial Transcript pg 184. At no point prior to the attack of the dog had Amber Enquist pulled the dog's tail, poked it, raised her voice at the dog, or did any act whatsoever that would be deemed provocative. Trial Transcript pg 185.

Gabrielle Beede is unaware of Amber Engquist doing anything to the dog that would have caused it to bite. Trial Transcript pg 50. Steven Loyas has no awareness of Amber Engquist provoking the dog at all before being bitten. Trial Transcript pg 77. Christina Loyas likewise is aware of no evidence of provocation on the part of Amber Engquist. Trial Transcript pg 94. Both Steven and Christina Loyas indicate that at all

times at their home Amber Engquist was well behaved and caused no problems whatsoever. Trial Transcript pgs 70, 94.

As a result of the dog bite, Amber Engquist's damages were significant. The bite tore away Amber Engquist's right eyelid, which was reattached in surgery. Significant bites also occurred above the eye and below the chin. Plaintiff's trial exhibits 3, 4, 5, 6, 7, 8, 9, 10, and 11 document the injuries sustained by Amber Engquist following the dog bite.

ARGUMENT

I. **WHETHER A JURY INSTRUCTION ON MINN. STAT. §347.22 IS AN ACCURATE STATEMENT OF MINNESOTA LAW WHERE IT FAILS TO EXCLUDE INADVERTENT ACTS FROM CONSIDERATION ON THE ISSUE OF PROVOCATION.**

Minn. Stat. §347.22 sets forth that liability is established against the owner of a dog:

“If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injuries sustained. The term “owner” includes any person harboring or keeping a dog but the owner shall be primarily liable. The term “dog” includes both male and female of the canine species.” Minn. Stat. §347.22 (2009)

This Court has construed Minn. Stat. §347.22 as creating absolute liability for dog owners subject only to two potential defenses: 1) provocation and 2) failure to conduct

oneself peaceably in any place where one may lawfully be. *Seim v. Garavalia*, 306 N.W. 2d 806 (Minn. 1981). The Court in *Seim* determined that absolute statutory liability does not permit the owners of dogs to assert the defense of comparative fault. *Id.* at 812. Nonetheless, the Court supported a jury's analysis of provocation or that the plaintiff was not acting peaceably at the time of the attack. In this case, the only defense issue presented to the Trial Court was provocation. No claim was made that the Appellant Amber Engquist was not acting peaceably at the Loyas' home on July 11, 2006.

In *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), this court reversed a jury finding of provocation due to the trial record's absence of any evidence of such incitement. *Id.* at 688. In *Grams*, the appellant was 22 months old and visiting a hardware store in St. Paul with her grandmother. The owner of the store had a dog with hip dysplasia at the store. The hip dysplasia was not evident, nor was the appellant warned not to pet the dog. Rather, the appellant's grandmother was assured that the dog would not bite. The 22 month old appellant walked up to the dog and put her arms around the dog's neck and was bitten. The Trial Court provided the following jury instruction identifying that provocation was "an act which excites, stimulates, irritates or arouses. The act of provocation can be intentional or unintentional." *Id.* at 688. This is the same instruction provided by Judge Martin in this matter. The court in *Grams* focused on the lack of any evidence that the victim appreciated any danger in approaching and petting the dog. The court acknowledged that evidence permitted an inference that the child "stimulated" the dog by hugging or possibly sitting on it. However, there was no direct evidence to show that the child's act

was anything other than inadvertent. *Id.* at 689. Finally, the court reversed the jury's findings, indicating that the finding of provocation in the matter would obliterate the difference between absolute statutory liability and common law liability. *Id.* at 689. The Court of Appeals concluded that the circumstances of the case raised no question of provocation. *Id.* at 689.

In *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982), the Minnesota Supreme Court found provocation where a child was bitten while petting a female dog with new puppies. In that matter, the child was warned that the dog was nervous and also the dog growled when the child approached. The court in *Bailey* focused on a finding of provocation for a voluntary act where there was evidence that the dog was nervous and growling prior to the child's approach. *Id.* at 787. This Court has analyzed *Bailey* as permitting a finding of provocation for a voluntary act but also confirms inadvertent acts are not a proper basis for finding provocation. *Grams v. Howard's O.K. Hardware Co.*, 446 N.W. 2d. 689, citing *Bailey* at 323 N.W. 2d at 787. Analysis of provocation by Minnesota courts clearly demonstrates that while provocation may be voluntary or involuntary, inadvertent provocation does not exist. *Grams* at 689.

Other states with statutes similar to Minnesota's analyze provocation in the same manner. In *Hunt v. Scheer*, 576 P. 2d 1190 (Okla. App. Div. 1, 1976), the Oklahoma Court of Appeals evaluated Okla. Stat. 4, §42.1, which is identical to Minnesota's. Okla. Stat. 4, §42.1 reads:

"The owner or owners of any dog which shall, without provocation, bite or injure any person while such a person is in or on a public place, or lawfully

in or upon the private property of the owner or owners of such dog, shall be liable for damage to any person bitten or injured by such dog to the full amount of the injury sustained.”

The plaintiff in *Hunt* brushed the face of a dog while inspecting it for purchase. The dog reacted by biting her in the face. The Oklahoma Court of Appeals found that the action of the plaintiff touching the face of the dog did not exculpate liability on the part of the owner, and found that the Trial Court’s denial of plaintiff’s motion for a directed verdict on the question of liability should have been granted. *Id.* at 1190. In *Bradacs v. Jacobone*, 244 Mich.App. 263; 625 N.W. 2d 108 (Mich. App. 2001), the Court of Appeals in Michigan evaluated provocation in the context of the Michigan dog bite statute, Mich.Stat.Ann. §12.544, which is identical to Minnesota’s. In *Bradacs*, the 12-year-old plaintiff was at the defendant’s home at the invitation of defendant’s daughter. A 65 pound black Labrador retriever named Bear was being fed, and the plaintiff stood near it juggling a football approximately six inches from the dog. *Id.* at 108. The child dropped the football accidentally and bent down to pick it up. The dog responded by biting plaintiff’s right leg. *Id.* at 108. The Michigan Court of Appeals in *Bradacs* specifically cited *Grams v. Howard’s O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), as finding that while a jury could be instructed that provocation may be intentional or unintentional and defined as an act which “excites, stimulates, irritates or arouses,” an act which was inadvertent could not be found provocative. The Court of Appeals of Michigan in *Bradacs* found that the act of plaintiff picking up the ball in close proximity to the dog did not amount to provocation.

In *Kirkham v. Will*, 311 Ill. App. 3d 787; 724 N.E. 2d 1062 (Ill. App. 2000), the plaintiff was attacked by defendant's dog while walking up defendant's driveway. The Illinois Court of Appeals held that "It is not the view of the person provoking the dog that must be considered, but rather it is the reasonableness of the dog's response to the action in question that actually determines whether provocation exists." *Id.* at 791. The Illinois Court went on to note that unintentional acts which result in a proportional response from the dog could constitute provocation to preclude liability to defendants. *Id.* at 791. Another Illinois case, *Robinson v. Meadows*, 203 Ill. App. 3d 706; 561 N.E. 2d 111 (Ill. App. 1990), further held that when defendant's dog bit and scratched a child's face and neck when the child screamed in response to the dog's barking, no provocation existed as the dog's reaction was out of proportion to the alleged provocation. *Id.* at 112. The Michigan Court of Appeals in *Bradacs v. Jacobone*, 244 Mich.App. 263; 625 N.W. 2d 108 (Mich. App. 2001) focused on the definition of provocation which includes unintentional acts. However, the animal's response must be proportional to the victim's actions in order to preclude liability. *Bradacs* at 111.

As the record reflects, the jury in this matter was provided the following instruction on provocation by the District Court: "You will be asked whether Amber Enquist provoked the dog to bite her by a deliberate, voluntary act. Provoke means to engage in any act, which excites, stimulates, irritates, arouses, induces or enrages." This jury instruction was appropriately objected to by the Respondent. Trial Transcript pgs 133 – 138. The requested instruction by the Respondent would have included that in order to find provocation, the actions of Amber Engquist would need to be inadvertent.

Essentially, the Trial Court accepted the provocation instructions that had been used by the Trial Court in *Grams*. That jury instruction was not appealed in that case, the court of appeals instead found no facts existed that would reflect provocation. Pursuant to the Supreme Court's rulings in *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982) and the Court of Appeals' analysis in *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), it was urged by Respondent to the District Court that the term "inadvertent" be included within the instruction. Essentially, the jury should have been instructed that the actions allegedly causing the provocation cannot be inadvertent acts. Clearly, had this instruction properly been given as the case law dictates, the jury would have been appropriately instructed to exclude from provocation the innocent behavior of Amber Engquist just prior to the dog attack.

The jury instruction as provided by the District Court allowed the jury to find any act that excited, stimulated, irritated, aroused, induced or enraged the dog was provocation pursuant to statute. As common sense dictates, any dog that bites a human is excited, stimulated, irritated, aroused or enraged, no other conclusion per the instruction could be obtained. Accordingly, the jury was left with absolutely no way to answer that question "no." This instruction is contrary to the case law in Minnesota as set forth above.

In addition, as the above analysis of similar case law of other jurisdictions indicates, the appropriate discussion for provocation would include whether or not the dog's reaction was proportionate. In this case no conclusion could be reached that the vicious attack on Amber Engquist was in any way proportionate to her act of petting a

dog. This is completely the type of inadvertent action that was meant to be excluded by provocation according to *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982) and *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989).

The issue relative to proportionality is important. As noted above, every dog which bites a human being is in some manner provoked. In order to exclude liability pursuant to Minn.Stat. §347.22, the provocation must be an act which is not inadvertent. In *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982), the victim had been advised that the dog was nervous due to its puppies, and the growl of the dog certainly provided notice to the victim of potential harm. The actions of the victim in reaching out and petting the dog despite this knowledge established that the act was not inadvertent. In *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989) the victim petted an animal with a hip problem. However, as the child was 22-months-old and unaware of the hip issue, provocation was not found. The jury in *Grams* relied on the same jury instruction that was provided in this case. Namely, they only had to find whether the dog had been excited, incited to anger, etc. The fact that the dog attacked the victim in this matter was the only evidence that the dog had been provoked. This is exactly the type of action for which the statute provides protection. Minn. Stat. §347.22 would be completely inapplicable if all that a jury would have to find is that a dog was angry prior to a dog bite. What caused a dog to bite a person is not the issue in a lawsuit brought pursuant to Minn. Stat. §347.22. The issue is whether the victim committed some type of an act, voluntary or involuntary, which was provocative. If the act was

inadvertent, the law does not provide for the defense. *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982).

The jury instruction provided by the District Court was in clear error and ignored the applicable law set forth in *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982) and *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989). As the jury instruction did not accurately state Minnesota law, it should be found to be improper and the District Court be directed to use a provocation instruction which excludes inadvertent conduct from consideration on provocation. The jury instruction provided to the Trial Court by Respondents in this matter clearly included an instruction that any action found to be provocative cannot include conduct which is inadvertent in nature. The District Court's decision not to provide this language in the instruction of provocation was an improper statement of Minnesota law.

The Minnesota Court of Appeals correctly provided an example of an instruction which reflects Minnesota law in the defense of provocation as follows:

A person provokes a dog when, by voluntary conduct, and not by inadvertence, the person invites or induces injury. Mere physical contact with a dog, or conduct that results in stimulating a dog, does not constitute provocation unless the danger of injury is apparent when the person acts to invite or induce injury.

The Court of Appeals concluded that the District Court's jury instruction was not an accurate statement of law. Because the instruction was so misleading as to render incorrect the jury instructions as a whole, the case was remanded for a new trial on

liability. This decision should be upheld by the Minnesota Supreme Court, as the Court of Appeals correctly found that the jury instructions provided by the District Court could infer only one response. For the first time, appellants raise Minn. Stat. §347.50 as setting forth a definition of the term provocation. Minn. Stat. §347.50 defines provocation as “an act that an adult could reasonably expect may cause a dog to attack or bite.” Minn. Stat. §347.50 subd. 8. No circumstances exist in this case which would have provided an adult’s reasonable expectation that Bruno would have attacked or bitten. The dog had been playing with the children for a period of time prior to the incident with no problems whatsoever. During a game of hide and seek, the dog went into a darkened area voluntarily. Evidence provides that at no time was the dog restrained by either Gabrielle Beede or Amber Engquist. As identified above, while the Appellant claims that the dark nature of the room was provocative, there is absolutely no evidence that Bruno, or any other dog, is afraid of the dark. Such a claim is speculative. Appellant has been unable to provide one instance of case law where the facts included a dog biting someone because it was dark. At trial, Appellant provided no facts whatsoever by way of opinion or anecdote that Bruno or any other dog is afraid of the dark, and that dark atmospheres may cause a dog to bite. An analysis pursuant to Minn. Stat. §347.50, which is unrelated to the strict liability statute, fails to compel any conclusion that Bruno was provoked and does not support the jury instruction provided by the District Court, which was an inaccurate statement of law.

CONCLUSION

The Minnesota Court of Appeals correctly provided the appropriate jury instruction for provocation and found that a new trial on liability was required due to the incorrect statement of law provided by the District Court in their jury instruction on provocation. No facts exist which would have shown any evidence of provocation by Amber Engquist. The lack of confirmation of the jury instruction to Minnesota law compels the conclusion which was reached by the Minnesota Court of Appeals. In order to clarify provocation instructions on future cases, the Minnesota Supreme Court should in all respects affirm the decision of the Minnesota Court of Appeals and find that the underlying District Court instruction failed to state Minnesota law correctly, and the deficiency in jury instructions warrants a new trial on the issue of liability for Respondent.

Dated this 20 day of December, 2010

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