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State of Minnesota  
In Court of Appeals

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In Re The Matter of:

THE DISPOSITION OF MOLLY, A GERMAN SHORTHAIRED POINTER  
OWNED BY WILLIAM FREDERICK KLUMPP, JR.,

*Appellant,*

vs.

CITY OF ARDEN HILLS,

*Respondent.*

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RESPONDENT'S BRIEF

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**TABLE OF CONTENTS**

STATEMENT OF LEGAL ISSUES. . . . . 1

STATEMENT OF THE CASE. . . . . 3

STATEMENT OF FACTS. . . . . 3

ARGUMENT. . . . . 7

    I.    THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY  
          FINDING THAT MOLLY KILLED SCOOTER, BECAUSE  
          SCOOTER WAS EUTHANIZED AND DIED AS A RESULT OF THE  
          WOUNDS INFLICTED BY MOLLY. . . . . 8

    II.   THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF  
          THE LAW BY ALLOWING THE CITY OF ARDEN HILLS TO  
          ENFORCE THE MINNESOTA DANDEROUS DOG STATUTE. . . . 9

        A.  THE CITY OF ARDEN HILLS, HAVING THE RIGHTS OF A  
            MUNICIPAL CORPORATION, HAS BOTH THE POWER TO  
            REGULATE DANGEROUS DOGS AND ALL THE  
            LEGISLATIVE POWER POSSESSED BY THE LEGISLATURE  
            IN THIS CASE. . . . . 11

        B.  THE CITY OF ARDEN HILLS GAVE MR. KLUMPP AND  
            MOLLY DUE PROCESS THROUGH ITS MOTION PURSUANT  
            TO AN ORDER TO SHOW CAUSE. . . . . 13

    III.  THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY  
          DETERMINING MOLLY WAS UNPROVOKED WHEN IT  
          ATTACKED SCOOTER. . . . . 15

CONCLUSION. . . . . 17

## TABLE OF AUTHORITIES

### CASES

Amaral v. Saint Cloud Hosp., 598 N.W.2d 379 (Minn. 1999). . . . .	8, 9
Am. Dog Owners Ass'n v. City of Minneapolis, 453 N.W.2d 69 (Minn. Ct. App. 1990). . . . .	12, 14
Bailey v. Morris, 323 N.W.2d 785 (Minn. 1982). . . . .	9, 15
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, (1971). . . . .	13
Cherne Indus., Inc. v. Grounds & Associates, Inc., 278 W.2d 81 (Minn. 1979). . . . .	7
City of St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972). . . . .	11
Corn v. Sheppard, 179 Minn. 490, 229 N.W. 8569 (1930). . . . .	13
Erickson v. Sunset Mem'l Park Ass'n, 259 Minn. 532, 108 N.W.2d 434 (1961). . . . .	10
Fake v. Addicks, 45 Minn. 37, 47 N.W. 450 (1890). . . . .	15
Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96 (Minn.1999). . . . .	15
Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980). . . . .	8
Hannan v. City of Minneapolis, 623, N.W.2d 281 (Minn. Ct. App. 2001). . . . .	12
Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527 (Minn. 1985). . . . .	7, 8

Mangold Midwest Co. v. Vill. of Richfield, 274 Minn. 347, 143 N.W.2d 813 (1966). . . . .	11, 12
Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990). . . . .	7
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, (1950). . . . .	13
Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). . . . .	14
Owens v. Federated Mut. Implement & Hardware Ins., 328 N.W.2d 162 (Minn. 1983). . . . .	9
Park v. City of Duluth, 134 Minn. 296, 159 N.W. 627 (1916). . . . .	11
State v. Dailey, 284 Minn. 212, 169 N.W.2d 746 (1969). . . . .	11
Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758, 594 N.W.2d 216 (Minn. Ct. App. 1999), <i>review denied</i> (Minn. July 28, 1999). . . . .	8

**AMENDMENTS**

U.S. Const. Amend. V. . . . .	13
U.S. Const. Amend. XIV. . . . .	13

**STATUTES**

Minn. Stat. § 347.50 (2005). . . . .	8, 15
Minn. Stat. § 347.53 (2005). . . . .	11

**RULES**

Minn. R. Civ. P. § 52.01 (2005). . . . .	7
--	---

**CITY ORDINANCES**

City of Arden Hills Ord. § 410.05. . . . . 12, 13  
City of Arden Hills Ord. § 410.06. . . . .12-14

## STATEMENT OF LEGAL ISSUES

- I. Did the district court abuse its discretion in determining a “killing” under Minn. Stat. § 347.50, subd. 2(2) included a dog inflicting wounds upon another dog causing the dog to be euthanized?

The district court found that Molly killed Scooter because Scooter was euthanized and died as a result of the wounds inflicted by Molly.

*Most apposite authorities:*

Minn. Stat. § 347.50, subd. 2(2) (2005);  
Amaral v. Saint Cloud Hosp., 598 N.W.2d 379 (Minn. 1999);  
Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980);  
Erickson v. Sunset Mem'l Park Ass'n, 259 Minn. 532, 108 N.W.2d 434 (1961).

*Applicable Rule:*

Minn. R. Civ. P. § 52.01 (2005).

- II. Did the district court error as a matter of law, allowing the City of Arden Hills to enforce the Dangerous Dog Statute while proceeding with an order to show cause?

The district court allowed the City of Ardent Hills to enforce the Dangerous Dog Statute because the city had the power to regulate dogs and followed due process.

*Most apposite authorities:*

Minn. Stat. § 347.53 (2005);  
Park v. City of Duluth, 134 Minn. 296, 159 N.W. 627 (1916);  
State v. Dailey, 284 Minn. 212, 169 N.W.2d 746 (1969);  
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, (1950);  
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, (1971).

*Applicable Rule:*

Minn. R. Civ. P. § 52.01 (2005).

III. Did the district court abuse its discretion by ruling Molly was unprovoked when it attacked Scooter?

The district court determined Molly was unprovoked when it attacked Scooter.

*Most apposite authorities:*

· Minn. Stat. § 347.50, subd. 2(2) (2005);  
Bailey v. Morris, 323 N.W.2d 785 (Minn. 1982).

*Applicable Rule:*

Minn. R. Civ. P. § 52.01 (2005).

## STATEMENT OF THE CASE

The City of Arden Hills (hereafter “Respondent”) brought a motion pursuant to an order to show cause against William Frederick Klumpp, Jr (hereafter “Mr. Klumpp) and his German wirehaired pointer, Molly, to designate Molly as a “dangerous dog” pursuant to Minnesota Statute § 347.50, subd. 2 (2) (2005) (hereafter “Dangerous Dog Statute”). (Order to Show Cause.) Honorable Judge John T. Finley presiding in Minnesota District Court, Second Judicial District, granted Respondent’s request and held a hearing on March 10, 2005. *Id.* At the hearing, Mr. Klumpp contested the authority of the Respondent to enforce the Dangerous Dog Statute, but agreed a hearing pursuant to an order to show cause was an appropriate process for designating Molly a “dangerous dog.” (Tr. at 6.) The district court found Molly was a “dangerous dog” because Scooter died as a result of the wounds inflicted by Molly and ordered Mr. Klumpp to comply with the provisions of Minnesota Statutes §§ 347.51, 347.515 and 347.52. (Order for J. ¶ 1.) Mr. Klumpp appeals the district court’s determination that Molly was a “dangerous dog” under the Dangerous Dog Statute. (Notice of Appeal.)

## STATEMENT OF FACTS

On October 24, 2004 Mr. Paul Mertensotto and Mrs. Linda Mertensotto euthanized their dog, Scooter, because of the severe injuries it had sustained. (Tr. at 28 ;Findings of Fact ¶ 11). The severe injuries sustained by Scooter were the result of wounds inflicted by Molly. (Tr. at 23-27 & 40-43; Findings of Fact ¶ 14).

Molly is a fifty-nine pound German wirehaired pointer owned by Mr. Klumpp and his wife Sharon. (Tr. at 94; Findings of Fact ¶ 1). Although the Klumpps took their dog through obedience training and claim it has never attacked another dog, (Tr. at 48-50), Molly grabbed James Paulet's dog PJ by the neck in an encounter they had in the street one evening. (Tr. at 80-82; Findings of Fact ¶ 3). Other than this occasion, Mr. Klumpp claims Molly never behaved aggressively toward animals and avoids confrontation when provoked. (Tr. at 48-50; Findings of Fact ¶ 3).

On October 24, 2004, around midday, Molly escaped from its backyard kennel while Mr. Klumpp was blowing leaves out of the kennel. (Tr. at 52-24; Findings of Fact ¶ 7). When Mr. Klumpp noticed Molly had escaped, he began chasing and calling Molly. *Id.* Molly did not stop or respond. (Tr. at 50-51; Findings of Fact ¶ 7). Molly left the Klumpp's yard and proceeded toward the property of the Klumpp's neighbors. *Id.* Mr. Klumpp has since been cited and pled guilty to "dog at large," a petty misdemeanor under City of Arden Hills Ordinance § 400.01. (Tr. at Ex. 12.)

Scooter is a six pound cockapoo owned by Mr. and Mrs. Mertensotto. (R. at 17; Findings of Fact ¶ 8). On October 24, 2004, when Molly escaped its yard, the Mertensottos were working in their front yard. (Tr. at 18 & 36; Finding of Fact ¶ 8). Mrs. Mertensotto was working on the front east side of their house and Mr. Mertensotto was working in the middle of the front of the house by their front door. *Id.* While the Mertensottos were working at the front of their house, Scooter

was tethered to the attached garage and near the front west corner of the Mertensotto's house. *Id.*

When Molly left its yard, it preceded south through the back yard of the Mertensottos' neighbors, the Petrys, and then west through the Petrys' front yard toward the Mertensottos' front yard. (Tr. at 20-21; Findings of Fact ¶ 8). Molly continued across the Mertensotto's front yard, toward Scooter and grabbed Scooter. (Tr. at 23-24; Finding of Fact ¶ 8). Scooter had been barking as it saw Molly, but stopped as Molly came closer. (Tr. at 22; Finding of Fact ¶ 8). Mrs. Mertensotto also saw Molly coming through the front; moved towards Scooter, but could not prevent the attack. (Tr. at 22-23.)

Mrs. Mertensotto observed Molly use her mouth to pick up and grab Scooter by Scooter's head. (Tr. at 23-24). Molly's mouth was clamped down on Scooter's head and shook Scooter three times. *Id.* Mrs. Mertensotto screamed. *Id.* Then, Mr. Mertensotto came toward the dogs and grabbed Molly by the back of her neck. (Tr. at 39-41.) Molly released Scooter and left the area. *Id.*

Mrs. Mertensotto is a certified registered nurse. (Tr. at 26.) When she approached Scooter after the attack, she observed that there was blood in the whites of Scooter's eyes and that there was blood coming out of Scooter's nose and ears. (Tr. at 27.) Scooter was limp and not breathing. *Id.*

It took Mr. and Mrs. Mertensotto approximately 12 to 15 minutes to take Scooter to the University of Minnesota Veterinary Clinic after the attack. (Tr. at 27-29). Scooter was breathing at this point, but still bleeding. *Id.* It would also

make gurgling sounds as it breathed. *Id.* The University of Minnesota Veterinary Clinic diagnosed Scooter with head trauma, observing it was almost comatose, its pupils were dilated and it was hemorrhaging from the mouth and nose. (Tr. at Ex. 15). Because of the extent of the injuries, Mr. and Mrs. Mertensotto decided to have Scooter euthanized. (Tr. at 28 ;Findings of Fact ¶ 11). While the Mertensottos were at the veterinary clinic, Mr. Klumpp called and gave the clinic his credit card number to pay for the veterinary expenses. (Tr. at 59; Findings of Fact ¶ 11).

## ARGUMENT

When reviewing the district court's decision, this court must determine whether the district court abused its discretion in deciding Molly "killed" Scooter while unprovoked, thus designating Molly a "dangerous dog," and whether the district court erred as a matter of law in allowing the Respondent to proceed under the Dangerous Dog Statute. *De novo* review is not appropriate in deciding whether Molly "killed" Scooter under the Dangerous Dog Statute because the district court's determination includes mixed questions of law and fact. In this situation, the court must correct any erroneous applications of law, but accord the trial court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard. *See Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn.1990); Minn. R. Civ. P. § 52.01 (2005).

The abuse of discretion standard of review is also appropriate in deciding whether Molly was "provoked." When a district court's decision is based on findings of fact, the abuse of discretion review is appropriate. *Cherne Indus., Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 88 (Minn. 1979). Findings of fact will not be set aside unless clearly erroneous. Minn. R. Civ. P. § 52.01.

In deciding whether the Respondent has the power to enforce the Dangerous Dog Statute and whether it followed due process through an order to show cause, the *de novo* standard of review is appropriate. *De novo* review is appropriate when a district courts decision is based on both statutory interpretation and procedural due process and the question is one of law. *See Hibbing Educ.*

*Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985);  
*Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220  
(Minn.App.1999), *review denied* (Minn. July 28, 1999).

**I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT MOLLY KILLED SCOOTER BECAUSE SCOOTER WAS EUTHANIZED AND DIED AS A RESULT OF THE WOUNDS INFLICTED BY MOLLY.**

For this court to find the district court abused its discretion, an animal euthanized because of wounds inflicted by a dog must not be a “killing” under the Dangerous Dog Statute. The statute states, “Dangerous dog means any dog that killed a domestic animal without provocation while off the owner’s property.” § 347.50, subd. 2 (2). When interpreting a statute, the court must first look to see whether the statute's language, on its face, is clear or ambiguous. *See Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn.1999). “A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Id.* The interpretation of killed is only subject to one reasonable interpretation, its plain and ordinary meaning.

An animal euthanized because of wounds inflicted by a dog meets the plain and ordinary meaning of “killed” in the statute. Basic canons of statutory construction instruct that courts are to construe words and phrases according to their plain and ordinary meaning. *See Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn.1980). The plain and ordinary meaning of “killed” according to Merriam-Webster Dictionary 661 (9<sup>th</sup> ed. 1984) is to

“deprive of life.” Molly deprived Scooter of life. Molly picked Scooter up by the back of the head and shook it violently causing Scooter to have blood coming from its nose and mouth. The wounds inflicted upon Scooter were so severe that the Mertensottos were forced to euthanize Scooter. The district court, hearing all the testimony and reviewing all the evidence, correctly concluded Molly “killed” Scooter, depriving it of life because it was necessary to euthanize Scooter.

The district court also followed the intent of the legislature when it concluded Molly killed Scooter. When construing a statute, the court’s goal is to ascertain and effectuate the intention of the legislature. *See Amaral*, 598 N.W.2d at 385-86. Arguably, the legislature did not define “killed” because it intended the trier of fact to decide whether a dog killed a domestic animal. The trier of fact decides whether a dog killed a domestic animal by applying the facts of each particular case to the plain meaning of “killed.” This is exactly the same process the legislature intended when deciding “provocation” under the Dangerous Dog Statute, where the facts of a particular case are applied to the plain and ordinary meaning of “provocation.” *See Bailey v. Morris*, 323 N.W.2d 785, 787 (Minn. 1982). The district court applied the facts received at the hearing pursuant to an order to show cause and concluded Molly killed Scooter. Thus, the district court followed the intent of the legislature.

Furthermore, the district court’s decision to allow the euthanasia of Scooter to constitute a killing under the Dangerous Dog Statute avoids absurd results and unjust consequences. Courts should construe a statute to avoid absurd results and

unjust consequences. See *Erickson v. Sunset Mem'l Park Ass'n*, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961). The Mertensottos and all domestic animal owners should not be required to allow their animals to suffer to constitute a killing under the Dangerous Dog Statute. Euthanasia is the humane practice for an animal suffering hopelessly to its death. This was the only concern of the Mertensottos. Mr. Klumpp was paying for all the veterinary treatment at the time the Mertensottos made their decision. The Mertensottos made the humane decision for Scooter and the district court considered that decision in finding Molly killed Scooter.

The district court did not abuse its discretion in concluding the facts showed Molly killed Scooter because of the wounds Molly inflicted upon Scooter. The district court followed the plain and ordinary meaning of “killed,” followed the intent of legislature as the trier of fact and avoided the absurd or unjust consequences of requiring people to not euthanize their animals. Therefore, the district court’s ruling that Molly killed Scooter is not clearly erroneous.

**II. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE LAW BY ALLOWING THE CITY OF ARDEN HILLS TO ENFORCE THE MINNESOTA DANDEROUS DOG STATUTE.**

In determining whether the district court erred as a matter of law, this court should consider both the powers given to the Respondent and the due process Respondent afforded Mr. Klumpp and Molly. The Respondent used the powers given to it by the state legislature to enforce the Dangerous Dog Statute. The

Respondent also afforded Mr. Klumpp and Molly proper due process with its hearing pursuant to an order to show cause. Since the Respondent had the power to enforce the statute and afforded due process, the district court did not error as a matter of law. Therefore, the district court's decision should be affirmed.

**A. THE CITY OF ARDEN HILLS, HAVING THE RIGHTS OF A MUNICIPAL CORPORATION, HAS BOTH THE POWER TO REGULATE DANGEROUS DOGS AND ALL THE LEGISLATIVE POWER POSSESSED BY THE LEGISLATURE IN THIS CASE.**

The Respondent has the power to enforce the Dangerous Dog Statute from the legislature. Minnesota Statute § 347.53 (2005) gives the power to “any statutory or home rule city, or any county” to regulate dangerous dogs. The statute does not include any requirement that the city or county adopted the state statute to enforce it. *Id.* Furthermore, cities such as the Respondent, “as to matters of municipal concern, have all the legislative power possessed by the legislature of the state except such power which is expressly or implicitly withheld.” *See Park v. City of Duluth*, 134 Minn. 296, 298, 159 N.W. 627, 628 (1916); *City of St. Paul v. Whidby*, 295 Minn. 129, 203 N.W.2d 823 (1972). The Respondent used the power conferred to it by the state to regulate Molly.

In addition, the Respondent may choose to enforce the state statute instead of its city ordinance. “Statutes and ordinances on the same subject are intended to coexist.” *State v. Dailey*, 284 Minn. 212, 215, 169 N.W.2d 746, 748 (1969). The Respondent's ordinance does not conflict with the state statute because the ordinance is “merely additional and complementary” to the statute. *See Mangold*

*Midwest Co. v. Vill. of Richfield*, 274 Minn. 347, 352, 143 N.W.2d 813, 816-817 (1966). Since the state statute and city ordinance are in addition to each other and coexist, the Respondent may chose which method of enforcement is appropriate for a particular situation.

The Respondent City Ordinances §§ 410.05 and 410.06 apply to “vicious dogs,” not dangerous dogs and have much different consequences. A dog designated a “vicious dog” under these ordinances is not allowed on the premises of anyone and may be destroyed. *Id.* Designating Molly as a “vicious dog” would have more severe consequences than being designated a “dangerous dog” under the Dangerous Dog Statute. Although a city may enforce an ordinance regulating dogs that is more severe than the state statute, *see Hannan v. City of Minneapolis*, 623, N.W.2d 281,284-285 (Minn. Ct. App. 2001), the Respondent chose to regulate Molly under the state statute.

The Respondent chose the method of enforcement that was most appropriate for this situation because of the effect it would have on the local populace, namely Mr. Klumpp. Cities have a high interest in taking appropriate measures for animal control because it primarily affects the local populace. *See Am. Dog Owners Ass’n v. City of Minneapolis*, 453 N.W.2d 69, 72 (Minn. Ct. App. 1990). By proceeding under the Dangerous Dog Statute, the Respondent would allow Mr. Klumpp to keep the dog on his premises and also prevent any immediate action for the destruction of Molly. *See City of Arden Hills Ord. §§*

410.05 and 410.06. The Respondent chose the appropriate method of enforcement for its local populace with the powers it had available.

The district court did not error as a matter of law in allowing the Respondent to enforce the Dangerous Dog Statute. The Respondent chose the appropriate method of enforcement for Molly and proceeded with a hearing pursuant to an order to show cause.

**B. THE CITY OF ARDEN HILLS GAVE MR. KLUMPP AND MOLLY DUE PROCESS THROUGH ITS MOTION PURSUANT TO AN ORDER TO SHOW CAUSE.**

The Respondent afforded Mr. Klumpp and Molly proper due process with a hearing pursuant to an order to show cause. An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, (1950); U.S. Const. Amends. V and XIV. The “root requirement” of the due process clause is “that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.” *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, (1971). Dogs are personal property under Minnesota law. *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 8569 (1930).

Before Molly was designated a “dangerous dog,” the City followed a process that gave Mr. Klumpp an opportunity in front of an objective fact finder to provide and prove evidence Molly was not a “dangerous dog.” “Due process is flexible and calls for such procedural protections as the particular situation

demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). Respondent and Mr. Klumpp agreed this was the proper process for designating Molly a “dangerous dog” and it was appropriate for this particular situation. This is also the same process the Respondent would have taken had it acted under its own ordinance. *See City of Arden Hills Ord. § 410.06*. Mr. Klumpp had his day in court and was given his opportunity for due process.

Furthermore, the Respondent’s hearing pursuant to an order to show cause is the same procedural due process asked for by the American Dog Owners Association in *Am. Dog Owners Ass’n*. 453 N.W.2d at 71. The American Dog Owners Association stated the appropriate due process for enforcing animal control ordinances is “the right to a judicial proceeding before a neutral and detached judicial officer.” *Id.* Most importantly though, the court held that a lesser degree of due process was still appropriate when enforcing animal control ordinances. *Id.* at 69 (The court found a notice by a commissioner of health and the request for a hearing before the commissioner satisfies procedural due process to enforce animal control ordinances). The Respondent afforded Mr. Klumpp the due process he agreed to and that was the most appropriate for this situation.

Respondent used the powers given to it by the state legislature and followed due process with its hearing pursuant to an order to show cause. It chose the appropriate method of enforcement for its local populace, chose to use the state statute instead of its city ordinance and regulated Molly as a “dangerous dog” under Dangerous Dog Statute. The Respondent also chose a fair and appropriate

procedure for this particular situation by using a hearing before a neutral and detached judicial officer which the Respondent and Mr. Klumpp agreed was best for this particular situation. Therefore, the district court did not error as a matter of law in allowing the Respondent to enforce the Dangerous Dog Statute with a hearing pursuant to an order to show cause and the district court's decision should be affirmed.

**III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING MOLLY WAS UNPROVOKED WHEN IT ATTACKED SCOOTER.**

The district court decision must be clearly erroneous for this court to find Molly was provoked when it killed Scooter. No definition of "without provocation" is given in § 347.50 subd. 2 (2). The issue of whether a dog has been provoked is one for the jury or trier of fact to decide. *Bailey*, 323 N.W.2d at 787. The district court, in deciding Molly was a "dangerous dog" under Dangerous Dog Statute, decided Molly was unprovoked when it killed Scooter.

The district court's decision that Molly was unprovoked when it killed Scooter is supported by reasonable evidence. Findings of fact are clearly erroneous only if there is not "reasonable evidence to support" them. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn.1999). Molly traveled onto the Mertensottos' property without any action from the Mertensottos or Scooter. The only action taken when Molly reached the Mertensotto's property was a simple bark from Scooter and it is reasonable that simple bark does not constitute provocation.

Furthermore, in *Fake v. Addicks*, 45 Minn. 37, 47 N.W. 450 (1890), under a common law action against the owner for injuries inflicted by a dog bite, the court held provocation must be voluntary, thus inviting or inducing the injury. The district court reasonably concluded nothing was voluntarily done by the Mertensottos or Scooter to invite or induce Molly to bite and kill Scooter.

The district court reasonably concluded Molly was unprovoked when it attacked and killed Scooter. Therefore, the district court's decision is not clearly erroneous and its decision should be affirmed.

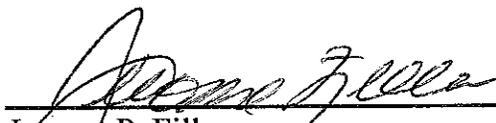
## CONCLUSION

The district court did not abuse its discretion or error as a matter of law designating Molly a dangerous dog under Minnesota Statute § 347.50 subd. 2 (2). In deciding whether Molly killed Scooter, the district court followed legislative intent, the plain meaning of the statute and avoided absurd results. Furthermore, the district court properly allowed the Respondent to enforce the statute pursuant to an order to show cause and correctly decided Molly was unprovoked. Therefore, the district court's ruling designating Molly a "dangerous dog" should be affirmed.

**PETERSON FRAM & BERGMAN, P.A.**

Dated: September 12, 2005

By: \_\_\_\_\_



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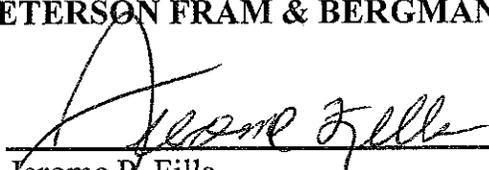
**CERTIFICATE PURSUANT TO RULE 132.01**

Jerome P. Filla, being first duly sworn upon oath, does hereby depose and state that: This Brief of Respondent complies with the word count limit set forth in Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. The Brief of Respondent was prepared utilizing Microsoft Word, and consists of 3,790 words, less than the 14,000 words permitted under the Rule. This Brief of Respondent further complies with the typeface requirement of the Rules, utilizing Times New Roman typeface and 13 point font.

**PETERSON FRAM & BERGMAN, P.A.**

Dated: September 12, 2005

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