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NO. A09-1760

State of Minnesota
In Court of Appeals

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

Appellant,

vs.

Steven and Christina Loyas,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE CASE

Amber Engquist suffered a severe dog bite to her face on July 11, 2006 at the home of the defendant Steve and Christina Loyas. A lawsuit based on Minn. Stat. §347.22 was commenced in Chisago County District Court. A.A. 1, 4. A jury trial before Judge Elizabeth H. Martin commenced on May 18, 2009 and concluded the following day, May 19, 2009. At the close of defense's evidence, Plaintiff moved for a directed verdict on the issue of provocation, as no facts were shown that would support a claim for provocation, pursuant to Minn. Stat. §347.22. The Court denied Plaintiff's motion for a directed verdict on the issue of provocation.

Alternative jury instructions on provocation were provided by Plaintiff and Defendant. The Trial Court accepted the provocation instruction proposed by Defendant, which stated as follows: "You will be asked whether Amber Engquist 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." Plaintiff objected to this jury instruction and proposed a jury instruction which stated as follows:

"You will be asked to determine whether Amber Engquist provoked the dog owned by Defendants into biting her. Provoke means to deliberately incite to anger. An inadvertent act by the victim, without warning by the owner that the dog may bite or attack, does not constitute provocation."

The jury subsequently returned a special verdict form finding that the Plaintiff Amber Engquist provoked the Loyas' dog into biting her on July 11, 2006, awarded \$15,000.00 in pain, disability, disfigurement and emotional distress up to the date of the

verdict, awarded past medical expenses up to the date of the verdict in the amount of \$6,419.51, awarded future medical expenses in the amount of \$3,000.00 and found that Plaintiff Amber Engquist would not incur damages for future pain, disability, disfigurement and emotional distress. A.A. 8.

Following trial, Plaintiff brought a motion for new trial on July 10, 2009 before Judge Martin. A.A. 10. The motion was based on the following:

- (a) An order or abuse of discretion whereby the moving party was deprived of a fair trial;
- (b) Excessive or insufficient damages, appearing to be given under the influence of passion or prejudice;
- (c) Errors of law occurring at trial and objected to at the time or if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the Notice of Motion; and
- (d) The verdict is not justified by the evidence or is contrary to law; but unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground of the verdict, decision or report was not justified by the evidence.

The Trial Court denied Appellant's motion for a new trial. A.A. 19. This appeal then commenced. A.A. 26.

LEGAL ISSUES

- I. Whether an inadvertent act of petting a dog constitutes an act of provocation sufficient to exclude liability pursuant to Minn. Stat. §347.22.

A. Whether a motion for a directed verdict in favor of Appellant on the issue of provocation should have been granted by the Trial Court.

Trial Court held sufficient facts existed for the issue of provocation to go to the jury.

B. Whether a jury instruction on provocation that does not advise the jury to exclude inadvertent acts from provocation is a correct statement of Minnesota law.

Trial Court held the jury instruction on provocation does not require exclusion of inadvertent acts.

II. Whether the damages awarded by the jury were insufficient as a matter of law where no future disfigurement was awarded contrary to the evidence and the amounts awarded for general damages were based on prejudice created by the issue of provocation which was provided improperly to the jury.

Trial Court held damages awarded were sufficient.

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 Engquist 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. Medical bills incurred as a result of the dog bite totaled \$6,419.51. Trial Transcript pg 156. Future medical expenses in the nature of plastic surgery reconstruction was provided by Dr. Wilke, who testified by videotape deposition. Dr. Wilke's testimony

indicated that the scarring incurred by Amber Engquist as a result of the dog bite would require reconstructive surgery and despite the surgery, her scarring would be permanent in nature. *See* Dr. Wilke's trial deposition, pg. 20.

As a result of the Loyas' failure to vaccinate the dog, Amber Engquist also underwent a painful series of rabies vaccinations. Trial Transcript pg 153. At least one of the rabies vaccinations was injected directly into Amber Engquist's eye. Trial Transcript pg 153. Additional injections were placed in her leg on multiple occasions. Trial Transcript pg 153. For much of the summer following the incident, Amber Engquist was required to stay out of the sun, was in pain due to the shots, and tearful. Trial Transcript pgs 153, 155. Testimony established that after the dog bite, Amber Engquist had many emotional issues including nightmares, difficulty sleeping, and embarrassment. Trial Transcript pgs 160, 161, 188. Amber Engquist testified that since the accident she suffers from headaches. Trial Transcript pg 188. In addition, the scar provides a flashback to her dog bite. Trial Transcript pg 189.

ARGUMENT

I. THE ACTIONS OF AMBER ENGQUIST PRIOR TO THE DOG ATTACK FAIL TO RISE TO THE LEVEL OF PROVOCATION PURSUANT TO MINN. STAT. §347.22.

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 attached 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)

The Minnesota Supreme 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.

A. THE DISTRICT COURT ERRED BY DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF EVIDENCE ON THE ISSUE OF PROVOCATION.

At the close of evidence, Appellants moved for a directed verdict on the issue of provocation. Trial Transcript 218. The Trial Court denied this motion. A District Court may grant a motion for directed verdict when, as a matter of law, the evidence is insufficient to present a question of fact to the jury. *Zinnel v. Berghuis Const. Co.*, 274 N.W. 2d 495, 498 (Minn. 1979). When deciding a motion for a directed verdict the district court must treat as credible all evidence from the non-moving party and all inferences that may be reasonably drawn from that evidence. *Plutshack v. University of Minn. Hospitals*, 316 N.W. 2d 1, 5 (Minn. 1982). In review of a denial of a motion for a directed verdict, the appellate court "must independently determine whether an issue of fact exists when the evidence is viewed in the light most favorable to the non-moving party." *Baber v. Dill*, 531 N.W. 2d 493, 495 (Minn. 1995).

The record in this matter is completely absent as to any facts that would establish provocation. Gabrielle Beede was in the same position as Appellant at the time of the incident and can provide no evidence whatsoever that would indicate Amber Engquist provoked the dog prior to the attack. Trial Transcript pg 49. Further, Respondents Steven and Christina Loyas testified that they are aware of no facts that would have shown provocation on the part of Amber Engquist. Trial Transcript pgs 50, 77. Both of

them indicated that at all times Amber Engquist was well-behaved at their home and acting peaceably. Trial Transcript pgs 70, 94. Her actions directly before the attack occurred were of putting her arm around the dog, and then withdrawing it as soon as the dog growled. She moved as far away from the dog as she could and the animal lunged at her, creating bites that tore her eyelid off and caused permanent scarring. Amber Engquist did not strike the dog, raise her voice at the dog, or in any way act in a manner that would commonly be deemed as provocative. Trial Transcript pg 185. Her actions at all times were appropriate for a nine-year-old girl playing hide and seek. In *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), the Supreme Court reversed a jury's finding of provocation as no facts existed which would have shown provocation. In *Grams*, the victim was told that the dog could be safely petted, and while evidence permitted an inference that the child stimulated the dog by hugging or possibly sitting on it, no direct evidence existed which would demonstrate that the act of the victim was anything other than inadvertent. *Grams* at 688.

In *Bailey by Bailey v. Morris*, 323 N.W. 2d 785 (Minn. 1982), the Minnesota Supreme Court upheld a finding of provocation where a dog that had just given birth to puppies bit a child. Evidence in that case reflected that the child was warned the mother dog was nervous and to be careful. Evidence also reflected that the dog growled as the children approached, and despite the growling the victim reached out to pet the dog and was bitten on the forehead. *Bailey* at 786. The Supreme Court's discussion relative to the victim's acts in *Bailey* is instructive in this matter:

“Here the jury could believe that appellant approached a growling dog and, despite warnings about the dog’s nervous condition, attempted to pet it. This is not a case of inadvertently tripping on a dog or playing with the mother dog or her puppies and being bitten without warning. While we note that the unusually nervous condition of a mother dog with puppies may have made it advisable for the owners to do more than warn the children, appellant made no attempt to show that owners have a special duty to keep children away, and the statute under which appellant sued has no such provision.” *Bailey* at 787.

In this case there is no evidence of any type of warning as in *Bailey*. In addition, the dog did not growl prior to Appellant touching it as in *Bailey*, but instead after it growled, Appellant immediately withdrew and was then attacked. Under any reasonable examination of the facts of this case, no evidence of provocation exists.

The arguments relative to provocation that were made by the defense were based upon the fact that the dog had previously been tame and had not bitten anyone. Speculation was provided by the defense that the dog was in a small closed area and would have felt threatened. Nonetheless, no expert testimony was provided in this case relative to the dog’s psychology, and even if it had it would not have been relevant to the issue of provocation. The Trial Court’s denial of the motion for directed verdict in allowance of the issue to be before the jury left the Appellant with no choice but to disprove the issue of provocation, an improper practical shifting of the burden of proof. By allowing the issue to be brought before the jury, Appellant was forced to show that

the dog was not provoked. Unquestionably, every dog who bites a human being has been provoked in some fashion. It is well accepted that dogs do not naturally bite humans. Instead from the dog's perception some type of threat occurs which causes them to bite in protection of themselves, defense of food, property, etc.

Unlike the facts in *Bailey*, the Loyas' dog in this matter had not just given birth to puppies, nor was it in any position requiring a defense. Evidence provided by Gabrielle Beede reflected that the dog was not blocked from exiting the space underneath the stairs, nor had either Gabrielle Beede or Amber Engquist attempted to keep the dog from leaving by holding its collar or otherwise preventing its exit. The mere act of petting the dog may in fact have provoked the bite; however, it was at best the type of inadvertent action described by *Grams v. Howard's O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), which found no facts regarding provocation were present. The lack of any evidence provided to the jury that would give even an inference of provocation compels a finding that the Trial Court erred in failing to direct a verdict for Appellant.

B. THE TRIAL COURT ERRED IN THE WORDING OF THE JURY INSTRUCTION ON PROVOCATION AS IT WAS AN IMPROPER STATEMENT OF MINNESOTA LAW.

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 Engquist 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 Appellant. Trial Transcript pgs 133

– 138. The requested instruction by the Appellant would have included that in order to find provocation, the actions of the Appellant would need to be inadvertent. Essentially, the Trial Court upon arguments by the defense, 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 this court’s analysis in *Grams v. Howard’s O.K. Hardware Company*, 446 N.W. 2d. 687 (Minn. App. 1989), it was urged by Appellant 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 by Appellant. 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 above set forth that the jury simply had to find any act that excited, stimulated, irritated, aroused, induced or enraged the dog was provocation. Clearly the dog was enraged, hence the dog bite. 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 Appellants 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.

II. THE JURY VERDICT ON DAMAGES IS CONTRARY TO THE EVIDENCE VIEWED AS A WHOLE AND SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL ON DAMAGES OR IN THE ALTERNATIVE ADDITUR ON THE ISSUE OF FUTURE DAMAGES.

A reviewing court may set aside a jury verdict on damages if it is manifestly and perversely contrary to the evidence viewed as a whole and in the light most favorable to the verdict. *Raze v Mueller*, 587 N.W. 2d 645, 648 (Minn. 1999). In this matter the jury awarded the medical expenses in the past in the amount of \$6,419.00. They also awarded pain and suffering up to the date of verdict in the amount of \$15,000.00. The only future damages awarded were \$3,000.00 for the cost of future plastic surgery. Clearly, the

evidence reflected by Dr. Wilke, the treating plastic surgeon, showed that plastic surgery was necessary; however, it would not completely cure the scarring. As the trial exhibits reflect, the scarring above Appellant's eye was noticeable, even in its healed condition. The award on pain and suffering in the past was insufficient based upon the failure to award appropriate general damages, both past and future. The facts reflected that the Appellant underwent surgery to reattach her eyelid, as well as a series of painful rabies injections as a direct result of the defendants' failure to vaccinate their dog. Testimony provided that she was housebound for two months following the accident, as her doctors instructed her to remain out of the sun. Appellant further testified to continued nightmares and issues she had relative to emotional problems regarding the attack.

The award on pain and suffering for past and future damages is insufficient when taken into light with the verdict as a whole. Relying on the basis of provocation as instructed, the jury found no liability, as they clearly blamed Amber Engquist for the dog attack. The improper jury instruction and refusal to grant Appellant's motion for a directed verdict on the issue of provocation led to the jury first making a decision on the verdict form that Amber Engquist was responsible for her own injuries and that she provoked the dog. The lack of significant pain and suffering damages in the past and no pain and suffering in the future reflects the prejudice by the jury toward Appellant directly caused by the issue of provocation. In *Hurr v. Johnston*, 242 Minn. 329; 65 N.W. 2d 193 (Minn. 1954), the Minnesota Supreme Court determined that where there appears to have been a compromise between the right of recovery and amount of damages, there is a right to a new trial on all issues, and if the verdict is inadequate, a

new trial should be ordered on the issue of damages alone. In this case, the amount of damages was clearly compromised based upon the jury's finding of no right of recovery. The defense provided no independent medical evaluation or other evidence indicating that the extent of Appellant's injuries were anything other than claimed. Testimony by Dr. Wilke, the testifying expert, indicated that the scarring would be permanent regardless of plastic surgery.

Where an inference can be made that inadequate damages are awarded as a compromise between the right of recovery and the amount of damages sustained, a new trial should be ordered as to all issues. *Caswell v. Minar Motor Company*, 240 Minn. 213; 60 N.W. 2d 263 (Minn. 1953). In this case the jury clearly relied on the provocation issue to reduce the amount of damages typically awarded for past and future pain and suffering under the facts presented. Jury instructions on damages provide that future damages for disfigurement are awardable. Testimony of Dr. Wilke alone indicated that the scar is not completely repairable, providing unrefuted evidence of a disfigurement that will exist in the future. Such evidence supports a finding of future damages for disfigurement, and the lack of any damages for future disfigurement reflects the prejudice that the jury applied to the damages issues as a direct result of the improper jury instruction and/or the District Court's failure to grant Appellant's motion for a directed verdict at the close of evidence.

In *Erickson by Erickson v. Hammermeister*, 458 N.W. 2d 172 (Minn. App. 1990), this court reviewed damages from a dog bite where the jury awarded \$40.00 for pain and suffering where Plaintiff had incurred significant scarring and the loss of teeth. Evidence

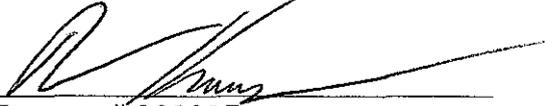
existed that Plaintiff Erickson may have been riding the dog earlier in the day and had attempted to get on its back while the dog was sleeping. The Court of Appeals in *Erickson* found that the \$40.00 awarded was a nominal award in past and future pain and suffering and appeared to be a compromise. In *Kloos v. Soo Line Railroad*, 286 Minn. 172; 176 N.W. 2d 274 (Minn. 1970), the Supreme Court granted a new trial on damages where the jury found an award less than undisputed general damages. The failure to provide the award for general damages was found to be in violation of the plaintiff's right to a jury trial, namely the right to fair and impartial consideration of all proven elements of damages. *Id.* at 277-278. In this case, there is no evidence that the Appellant would not sustain future disfigurement. There is evidence in terms of the scarring and emotional issues and accordingly, the presence of the future disfigurement supported an award for future damages.

CONCLUSION

No facts exist which would show any evidence of provocation by Amber Engquist prior to the dog attack on July 11, 2006. The Trial Court erred by failing to grant a motion for directed verdict to Appellant on the basis of such lack of evidence. In the alternative, even if the standard for directed verdict has not been met, the Trial Court erred by providing the jury instruction on provocation that did not conform with Minnesota law. Finally, the damages awarded by the jury were insufficient as a matter of law, compelling a new trial on the issue of damages. Appellant requests that as a matter of law the issue of provocation is not available to the defense, and the matter be retried on the basis of damages.

KRAMER & SHORT, LLC

Dated this 18 day of December, 2009



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STATE OF MINNESOTA

IN COURT OF APPEALS

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

CERTIFICATION OF BRIEF LENGTH

Appellant,

APPELLATE COURT

vs.

CASE NO.: A09-1760

Steven and Christina Loyas,

Respondents.

I hereby certify that this brief conforms to the requirements of
Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a monospaced
font. The length of this brief is 447 lines. This brief was prepared using Times New
Roman, 12 point, on Microsoft Word 2007.

Date: December 18, 2009.

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