

NO. A09-1760

State of Minnesota
In Court of Appeals

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

Appellant,

v.

Steven and Christina Loyas,

Respondents.

APPELLANTS' REPLY BRIEF

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. Respondent provides only speculation as to the dog's motivation in biting Appellant.

Respondent contends that Bruno, the dog that bit Appellant Amber Engquist, felt threatened when it was in a dark area entrapped. This argument fails due to the completely inaccurate suggestion by Respondent that the dog was trapped within the crawlspace. Despite citation to the record Trial Transcript pgs 193-194 as Respondent indicates in their brief, no such evidence that Bruno was trapped exists. No witness in this case testified that Bruno was unable to escape from this space prior to the dog bite. Respondent's daughter, Gabrielle Beedy, specifically testified that Bruno entered the crawlspace on his own and sat in front of both girls. Trial Transcript pg. 49. She was specifically asked, "At any point was Bruno prevented from leaving by you or by Amber?" Her response was "No." Trial Transcript pg. 49. Appellant followed up with the following question, "He was free to go any time he wanted?". Ms. Beede's response was, "I think so yeah." Trial Transcript pg. 50. Ms. Beede was asked how long she was under the stairs with the dog prior to the dog bite, and she indicated five minutes. Trial Transcript pg. 50. She testified that no one held on to Bruno during the five minutes he was underneath the crawlspace. Trial Transcript pg. 50.

Respondent's argument relative to the issue of provocation identifies no factors showing provocation. While respondent alleges the dog was provoked by being in the dark, no evidence whatsoever has been offered to show Bruno or any dog is threatened by being in the "dark." Such a contention is at best pure speculation. In *Bailey by Bailey v Morris*, 323 N.W. 2d 785 (Minn. 1982), provocation was upheld by the Minnesota Supreme Court where a child was bitten while petting a female dog that had just had new puppies. In that particular case, the child was warned that the dog was nervous, and it would also be well understood that a dog with new puppies may be provoked. In *Grams v Howard's O.K. Hardware Company*, 446 N.W. 2d. 689 (Minn. App. 1989), the dog that bit Plaintiff in that matter had a hip injury. The Supreme Court in that case reversed the jury's finding of provocation, as the victim was told that the dog could be safely petted, and while it could be found that the condition of the dog caused a propensity to defend itself, no direct evidence existed which would demonstrate that the act of the victim was anything other than inadvertent. *Id.* at 688.

In this case, the lighting in the area where the dog was playing with the girls cannot be found to be a provocative factor. Clearly, a dog that has just had new puppies or a physical injury sensitive to touch can arguably lead to a provocative act whether it is intentional or unintentional. However, even in *Grams* that act was deemed inadvertent. No evidence was provided to the jury by testimony or otherwise that Bruno was in any way sensitive to the dark. No evidence exists, nor does common sense dictate that dogs bite because their eyesight is diminished by darkness as opposed to any other reason.

Such an argument is speculative at best, and as indicated above is in fact contradictory to the evidence in this case.

As the case as set forth in Appellant's Brief reflects, appropriate analysis of provocation does not involve speculation. Respondent's argument is that since the dog bit, provocation must exist. This is an improper analysis, as all dogs that bite do so for a reason. Where the reason is clear, such as abusive behavior, interfering with a dog that just had puppies or other similar acts, provocation may exist. Absent those facts, no Minnesota cases or cases in any other jurisdiction have found provocation in a situation similar to this case. As no facts exist that would show provocation, a directed verdict was appropriate as to that issue.

II. An appropriate jury instruction would have instructed the jury that inadvertent acts cannot establish provocation.

The jury instruction in this matter that failed to include an instruction that an inadvertent act cannot be provocative clearly led to an improper verdict. The jury was left with only one conclusion to make following the jury instruction provided by the Court, that Bruno was excited, stimulated, irritated, aroused, induced or enraged. Under the analysis by Respondent, in the jury instruction, provocation must exist since the dog bit someone. Such an analysis completely obfuscates Minn. Stat. §347.22. Under this jury instruction and the analysis by Respondent, no dog owner could be held liable. The trial court's decision not to instruct the jury that inadvertent actions cannot be deemed provocative clearly was in error.

If the jury instruction provided in this matter is determined to be appropriate, no situation exists that would allow liability under Minn. Stat. §347.22. No dog bites a human unless it is enraged, induced, irritated or aroused. Minn. Stat. §347.22 provides provocation as a defense to protect dogs and their owners where the actions of the alleged victim are such that provocation is a reasonable defense. By allowing inadvertent acts to be considered effectively removes any potential liability under Minn. Stat. §347.22, and any such legal instruction is improper as a matter of law.

III. The damages awarded by the jury were insufficient as a matter of law and a result of passion and/or prejudice.

A reviewing court must reconcile the jury's Special Verdict answers "In a reasonable manner consistent with the evidence and its fair inferences." *Raze v. Mueller*, 587 N.W. 2d. 648 (Minn. 1999). The Court in *Raze* further indicated that a jury's verdict should stand if its Special Verdict answers "can be reconciled on any theory." *Id.* at 648. In this case the jury's failure to award any future damages for disfigurement reflects the prejudice they applied to their deliberations on damages. Expert testimony as well as photographs established a permanent disfigurement in nature of a scar above the right eyebrow as well as a scar on Appellant's eyelid where it was reattached. Under any analysis of Appellant's injuries, a future disfigurement existed without evidence to the contrary. Unlike pain and suffering, which is a subjective issue, disfigurement objectively exists. The jury in this matter awarded zero damages for future disfigurement. There is absolutely no evidence presented to the jury that the

disfigurement was nonexistent, nor could any conclusion be reached in this regard due to the overwhelming evidence on a permanent disfigurement. Had the jury awarded some amount, even a nominal one, an argument could be made that the jury appropriately considered the law and the evidence in their decision. The unrefuted evidence that a disfigurement did exist renders the damage award by the jury for future disfigurement as insufficient as a matter of law and as a result of prejudice.

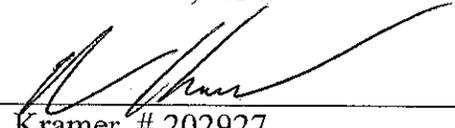
In *Wefel v. Norman*, 296 Minn 506, 508 207 N.W. 2d. 340, 341 (1973), the Minnesota Supreme Court held that where a jury's determination that the defendant is not liable is supported by credible evidence, the denial of damages or granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse such that a new trial is warranted. In this case as set forth above, it is clear that the jury's determination on liability was not supported by any credible evidence or law and accordingly the denial of damages for future disfigurement clearly show prejudice and a perverse verdict such that a new trial is warranted. See e.g. *Wefel*.

CONCLUSION

Pursuant to the arguments set forth in Appellant's Brief and above in her Reply, the Court of Appeals should reverse and remand this matter for a new trial on the issues of liability and damages.

KRAMER & SHORT, LLC

Dated this 2 day of February, 2010



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CERTIFICATION OF BRIEF LENGTH

Appellant,

APPELLATE COURT

vs.

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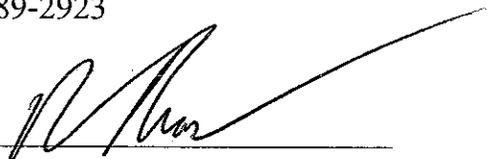
Steven and Christina Loyas,

Respondents.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a monospaced font. The length of this brief is 150 lines. This brief was prepared using Times New Roman, 13 point, on Microsoft Word 2007.

Date: February 2, 2010.

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