

Case No. A09-1760

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State of Minnesota
Supreme Court

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

Respondent,

vs.

Steven and Christina Loyas,

Appellants.

APPELLANT'S 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 LEGAL ISSUES

- I. Whether a jury instruction on provocation that requires a deliberate, voluntary act, but does not specifically exclude inadvertent acts from provocation is a correct statement of Minnesota law?

The Court of Appeals determined that the jury instruction on provocation was not an accurate statement of the defense of provocation.

Apposite Authority:

Bailey by Bailey v. Morris, 323 N.W.2d. 785 (Minn. 1982)

Fake v. Addicks, 47 N.W. 450 (Minn. 1890)

Grams v. Howard's O.K. Hardware Co., 446 N.W.2d 687 (Minn. Ct. App. 1989)
Minn. Stat. § 347.22

STATEMENT OF THE CASE

Ten year-old Amber Engquist was bitten by a dog owned by Appellants Steven and Christina Loyas. The bite occurred in a confined basement crawl space with absolutely no lighting. Amber Engquist approached Respondents' dog in the confined basement crawl space and attempted to put her arm around the dog. At the time, the dog was cornered in the crawl space. Amber Engquist then reached for the dog while in complete darkness and without warning, verbal or otherwise. She was then bitten by the frightened dog. A jury trial was held on May 18-19, 2009. The jury found that, while Amber Engquist was bitten, she provoked the dog. As a result, she was not entitled to damages pursuant to Minn. Stat. § 347.22. Appellant then initiated a motion for a new trial or JMOL. The trial court denied Appellant's motion. Respondent Jill Engquist, as parent and natural guardian of Amber Engquist appealed the decision of the trial court. The Court of Appeals determined that the jury instruction concerning provocation was an incorrect statement of the law and reversed and remanded this matter for a new trial on liability. The Court of Appeals also went on to create its own jury instruction for provocation. The issues concerning denial of JMOL and damages were affirmed.

STATEMENT OF FACTS

The dog bite at issue occurred on July 11, 2006. Amber Engquist was visiting Appellants' home to play with their daughter, Gabrielle Beede. At the time, Appellants possessed a dog named Bruno. Bruno is a Black Labrador. Appellant Steven Loyas acquired the fully-grown dog from a co-worker. (Trial Transcript 64-5). Initially, Bruno did not reside with Steven and Christina Loyas, he resided with Steve Loyas' brother-in-

law. (TT 65). It was not until June 2006 that Bruno began residing with the Appellants. (TT 66). During the weeks that Bruno resided with the Appellants before the bite, Bruno did not exhibit any behavioral problems. (TT 66). He had not attacked or bitten anyone. Id. He was well behaved. (TT 67). He regularly played with children and wasn't afraid of them. (TT 67 & 79). He did not have an aversion to being touched. (TT 68). Bruno was a well behaved and fun dog. (TT 79).

On July 11, 2006, Amber Engquist went to the Appellant's house to play with her friend, Gabrielle Beede. Amber Engquist had never been around Bruno before that day. Id. Amber Engquist and Gabrielle Beede were playing hide-and-seek in the Appellants' basement. (TT 191). During the course of playing hide-and-seek, Amber Engquist and Gabrielle Beede hid under the basement steps. (TT 191-2). There was a small, dark, confined crawl space located under the stairs that was an ideal hiding spot. Id. Once in the crawl space, Amber Engquist called Bruno into the crawl space with them. (TT 192). Bruno went into the crawlspace with the two girls.

Because the crawlspace was completely dark, Amber Engquist could not see Bruno or Gabrielle. (TT 193). Bruno was cornered in the crawl space and could not escape. (TT 193-4). Amber Engquist reached for Bruno in the dark and attempted to hug or put her arm around Bruno. Id. She did not speak to Bruno or attempt to warn him first. (TT 194). Since Bruno could not see what was occurring, he considered Amber Engquist's actions as a threat and he growled at her when she attempted to hug him. (TT 185). Bruno then lunged at Amber Engquist and bit her in the face. (TT 185-6).

The dog bite was not severe and Amber Engquist fully recovered from it. While the bite damaged the eyelid on one eye, her vision was not affected. (TT 157 & 196-7). In fact, the eyelid functions normally. (Respondent's Appendix 7). The scars she received from the bite do not bother her. (TT 198). Initially, she had some bad dreams concerning the dog bite. (TT 161). However, she no longer suffers from bad dreams. Id. Amber Engquist's scars from the bite were minor. They were so minor that her treating physicians did not refer her to a plastic surgeon. (TT 168). Amber Engquist did consult with a plastic surgeon, at the request of her attorney. (TT 167-8). The plastic surgeon acknowledged that the scars were repaired well and were minimal. (RA 3-4).

Amber Engquist has not been treated for injuries related to the dog bite since July 2006. (TT 167-8). She has no follow up treatment scheduled and she does not plan on undergoing the revision surgery for her scars. (TT 171 & 198).

During trial, counsel disagreed on the wording of the jury instruction concerning the issue of provocation. Defense counsel suggested a jury instruction concerning the issue of provocation that stated as follows:

To "provoke" means to engage in a voluntary act which excites, stimulates, irritates, arouses, induces, or enrages.

(Appellant's Appendix 46). Respondent's counsel proposed a jury instruction concerning provocation drafted as follows:

You will be asked to determine whether Amber Engquist provoked the dog owned by Defendants into biting her. Provoke means to deliberately insight to anger. An inadvertent act by the victim, with out warning by the owner that the dog may bite or attack, does not constitute provocation.

Id. Ultimately, the jury instruction regarding Minn. Stat. § 347.22 and the issue of provocation was submitted to the jury as follows:

MINNESOTA STATUTE § 347.22 DAMAGES, OWNER
LIABLE

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.

PROVOCATION

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.

Id.

The jury determined that Amber Engquist sustained injuries as a result of the dog bite. (AA 21). However the jury concluded that Amber Engquist provoked Bruno. Id. Upon appeal, the Court of Appeals determined that this jury instruction was not an accurate statement of Minnesota law concerning the issue of provocation. The Court of Appeals did affirm the trial court's determinations on the issue of damages and denial of Respondent's motion for JMOL.

STANDARD OF REVIEW

A trial court has broad discretion in determining jury instructions. State Farm Fire & Casualty Co. v. Short, 459 N.W.2d 111, 113 (Minn. 1990). The instructions will withstand scrutiny as long as the charge as a whole conveys to the jury a clear and correct

understanding of the law. Cox v. Crown Coco, Inc., 544 N.W.2d 490, 497 (Minn. Ct. App. 1996). An error in jury instructions is prejudicial and requires a new trial only if it leads to a verdict not supported by the evidence. See Kirsebom v. Connelly, 486 N.W.2d 172, 175 (Minn. Ct. App. 1992).

DISCUSSION

I. A JURY INSTRUCTION ON PROVOCATION THAT DOES NOT SPECIFICALLY EXCLUDE INADVERTENT ACTS FROM PROVOCATION IS A CORRECT STATEMENT OF LAW.

The Minnesota dog bite statute provides:

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 injury sustained.

Minn. Stat. § 347.22. Provocation is a defense to liability pursuant to Minn. Stat. § 347.22. Seim v. Garavalia, 306 N.W.2d 806, 812 (Minn. 1981). In the context of the dog-bite statute, Minn. Stat. § 347.22, provocation is generally a question of fact for the jury. Bailey by Bailey v. Morris, 323 N.W.2d 785, 787 (Minn. 1982).

Errors in jury instructions warrant a new trial only if the instruction destroys the substantial correctness of the entire jury charge, results in a miscarriage of justice, or leads to substantial prejudice of a party. Lindstrom v. Yellow Taxi Co., 214 N.W.2d 672, 676 (Minn. 1974). Trial courts are allowed “considerable latitude” in fashioning instructions and selecting the precise language of the jury charge. Alholm v. Wilt, 394 N.W.2d 488, 490 (Minn. 1986). A new trial shall not be granted where the instructions

fairly and correctly state the applicable law. Alevizos v. Metropolitan Airports Comm'n, 452 N.W.2d 492, 501 (Minn. Ct. App. 1990), review denied (Minn. May 11, 1990).

In the instant case, the jury instruction concerning provocation was an accurate statement of the law of provocation in Minnesota. The jury instruction at issue states that provocation is a deliberate, voluntary act which excites, stimulates, irritates, arouses, induces or enrages. It does not specifically exclude an involuntary act. Rather, it limits provocation to deliberate acts that excite, stimulate, irritate, arouse, induce or enrage. This instruction comports with relevant case law in Minnesota and other jurisdictions.

The jury instruction used in this case expressly provides that provocation must be a deliberate, voluntary act. This is consistent with other cases decided by this Court. One such case is Fake v. Addicks, 47 N.W. 450 (Minn. 1890). In Fake, this Court held that accidental interference with a dog, such as accidentally stepping on it, does not constitute provocation. This Court determined that there must be a voluntary act of provocation. By limiting the potential provoking actions to "deliberate" actions, the instruction used in this case inherently excludes inadvertent acts. The accepted definition of "deliberate" is "characterized by or resulting from careful and thorough consideration." Webster's Ninth New Collegiate Dictionary 336 (1991). Therefore, a "deliberate" act cannot be an "inadvertent" act. In fact, "inadvertent" is an antonym of the word "deliberate." Merriam Webster Thesaurus at <http://www.merriam-webster.com/thesaurus/deliberate>. As such, the jury instruction given in the instant case properly excludes inadvertent acts such as accidentally falling or stepping on a dog.

The remaining portion of the jury instruction concerning provocation contains the regularly accepted definition of provocation used by other courts in the State of Minnesota. In Ward v. Freiderich, 2006 WL 44280 (Minn. Ct. App. 2006) (unpublished decision) (AA 52-5), the trial court instructed the jury that provocation “means to excite, to stimulate, to arouse, to irritate, or enrage.” 2006 WL 44280 at *2. This is the same definition of provocation as was used in the instant case. While it is not clear as to whether the plaintiffs in Ward challenged the definition of provocation used by the trial court, the Minnesota Court of Appeals did not determine the use of the definition was improper.

Additionally, a similar definition of provocation was used in Grams v. Howard’s O.K. Hardware Co., 446 N.W.2d 687 (Minn. Ct. App. 1989). In Grams, the trial court, in its jury instructions, defined an act of provocation as “one which excites, stimulates, irritates or arouses.” Again, the definition of provocation in Grams is similar to that used in the instant case. While the main issue in Grams was whether provocation could be unintentional or not, it does not appear that the definition of provocation was challenged. Regardless, the Minnesota Court of Appeals did not hold that this definition was contrary to Minnesota law.

Several of the cases relied upon by the Court of Appeals in determining that the jury instruction in this matter was improper are clearly distinguishable from the instant case. One of the main cases cited by the Court of Appeals and the Respondent is Grams. In Grams, a one-year old child was bitten by a strange dog while she attempting to hug it in a retail store. It was ultimately determined that there was no provocation in Grams.

While Grams is similar to the instant case due to the similar actions the children took toward each dog, the remaining facts of each case are markedly different. Specifically, the environment in each case was radically different. The dog bite in Grams occurred in a hardware store which was likely an open, well lit space. The dog suffered from a painful hip condition that was not known to the child. However, the child was informed that it was safe to pet the dog. In the instant case, the dog bite occurred in a small, dark confined space. Bruno did not suffer from an unknown medical condition that affected his mood. It was the small, dark, confined space, combined with the act of putting her arm around Bruno that created a threatening situation that provoked Bruno. These facts are clearly distinguishable from Grams.

In Grams, the Court of Appeals stated that while the evidence permitted a finding that the child “stimulated” the dog, there was “no direct evidence to demonstrate that appellant's act was other than inadvertent.” 446 N.W.2d at 690. The Court of Appeals interpreted this to mean that more than stimulation is needed to find provocation. Evidence that the act was not inadvertent is necessary. However, there was more than simple stimulation in this case and there is evidence the act was not inadvertent. As previously stated, Bruno was approached in a small, dark confined space, not a large, well-lit, open hardware store. Amber Enquist intentionally approached Bruno under these circumstances, circumstances that Bruno considered threatening. Given these circumstances, it is clear that Amber Enquist's actions were not inadvertent. The circumstances of the instant case differ significantly from those in Grams. It is these

important differences that confirm the jury instruction on provocation, and the jury's determination, were proper.

Another important Minnesota case concerning the issue of provocation is Bailey by Bailey v. Morris, 323 N.W.2d. 785 (Minn. 1982). Bailey supports a finding that the jury instruction in this matter is an accurate statement of Minnesota law. In Bailey, a child attempted to pet a dog and her puppies. Prior to attempting to pet the dogs, the child was warned that the dog was nervous by the dog's owner. Additionally, the dog was growling prior to the child's attempt to pet the dogs. Once the child attempted to pet the dogs, the child was bitten. This Court found that the act of petting the dog was not an inadvertent act. The basis of this finding was due to the warning given to the child and the fact the dog was growling prior to the child attempting to pet it.

The child in Bailey did not accidentally or inadvertently pet the dog, the child intended to pet the dog. Therefore, the act could not have been inadvertent. The issue this Court decided was whether the intentional act of petting the dog inadvertently caused the dog to bite or provoked it. There can be no dispute that the act of petting the dog provoked it as it did bite the child. The question was whether the child deliberately provoked the dog under the circumstances. Ultimately, the jury found that the act of petting the dog under those circumstances constituted provocation. This Court agreed with that decision.

The instant case is similar to Bailey in that other circumstances existed. It is not a simple case of a child being bitten after attempting to pet or hug a dog. In the instant case, Amber Engquist approached the dog in complete darkness and silence while in a

confined space. Furthermore, the dog in the instant case, Bruno, even growled prior to biting. It is reasonable to believe that a dog may feel threatened when being approached in such a small, dark confined space and that it is not prudent to attempt to pet or hug a dog under those circumstances. In Bailey, the jury determined that petting a dog after being told it was nervous and growled constitutes provocation. Likewise, it is provocation to attempt to hug or pet a dog in a dark, confined space. The circumstances surrounding the dog bite in Bailey dictated a finding of provocation. Since there are similar extenuating circumstances in the instant case, Amber Enquist's actions toward Bruno can be considered provocation that is not inadvertent.

The jury instruction in the instant case required the jury to determine the same issues as in Bailey. The jury was instructed to determine whether the actions of Amber Enquist were deliberate and voluntary. The jury had to determine whether her actions were inadvertent or not. Also, they jury was instructed to determine whether her actions constituted provocation. After reviewing the facts of this case, the jury determined that Amber Enquist excited, stimulated, irritated, aroused, induced or enraged Bruno.

Bailey also stands for the proposition that the existence of provocation is an issue for the jury to determine. In this matter, the jury determined that there was provocation. Likely for the same reasons the jury in Bailey found that provocation occurred. Bruno was trapped against some boards in the crawl space. His only means of escape was blocked by Amber Engquist. Additionally, the crawlspace was entirely dark. In addition to Bruno, Amber Engquist and Gabrielle were in the crawl space. No one was speaking. Amber Engquist did not alert Bruno that she was approaching him or that she was going

to reach for him in the dark. Amber Engquist approached a strange dog in complete darkness and attempted to put her arm around him while blocking his only path of escape. These actions can easily be perceived as a threat to the dog. A human being would feel threatened in a similar situation. As such, these facts support the jury's determination in this matter. Since the jury found that provocation existed in this matter, the jury's decision should not be set aside due to a jury instruction concerning provocation which is consistent with other jury instructions on the same issue and Minnesota law.

Here the Court of Appeals has held that a jury instruction on provocation must consider whether the individual who is bitten somehow invited or induced the bite. The Court seems to infer that not only must the bite be invited or induced, the injured party must also be aware of the danger of injury. The dog bite statute in Minnesota does not address or require a finding that the injured party was aware of the danger of injury. Furthermore, there is no such requirement contained in case law interpreting the statute.

The Court of Appeals even went so far as to propose a provocation instruction. This proposed jury instruction seems to require an examination of the knowledge of the individual who is bitten. If the injured party is unaware that particular contact or conduct toward a dog involves the danger of injury, provocation cannot be found. Such a requirement will likely destroy the provocation defense in many cases as many dog bite cases involve young children. For example, if a young child does not believe or know that striking a dog in the head with a toy invites injury, provocation cannot be found. Additionally, if a child is under two years old, the child will possess no concept of what actions and circumstances will likely cause a dog to bite. Under the jury instruction

proposed by the Court of Appeals, any stimulating act by a very young child cannot constitute provocation as the child will have no concept of danger of injury. The dog bite statute allows a provocation defense without regard to the dog bite victim's knowledge.

While the jury should consider the circumstances surrounding the dog bite, it would be improper to require the jury to determine the understanding or knowledge of the injured party to determine if the danger of injury was apparent. Such an examination will necessitate an inquiry into whether the injured party knew that the action taken was likely to result in a dog bite. Examination of the knowledge or understanding of another person is difficult. One person cannot truly know what another person knows or expects. This problem is compounded in cases in which a child is the injured party. The knowledge of children vary drastically based on their age, experience, and intelligence. A reasonable person would not approach a strange dog in a small, confined, dark, crawl space. A reasonable person would understand that a dog may consider that situation threatening. Knowing that this situation is threatening, a reasonable person would realize that attempting to pet or hug a dog under these circumstances may result in a dog bite. Most children do not even consider whether an act they are about to take is dangerous or not. They simply act without regard to their safety. The jury instruction proposed by the Court of Appeals would essentially remove the provocation defense with respect to children. As long as the child testifies that there was no knowledge that there was a danger of being bitten as a result of a "stimulating" action, there can be no provocation. This certainly was not the intent of the legislature in promulgating the dog bite statute. The legislature expressly allows a defense of provocation.

The legislature's intent with respect to the definition of the term provocation can be found in a related section of Minnesota Statutes. Minn. Stat. §§ 347.50 to 347.56 concern "dangerous dogs." These sections deal with registration, seizure, and destruction of dangerous dogs. Minn. Stat. § 347.50 contains a definition of the term provocation that relates specifically to provocation of a dog. Provocation is defined as "an act that an adult could reasonably expect may cause a dog to attack or bite." Minn. Stat. § 347.50 subd. 8. This definition of provocation is contained in the same chapter as the dog bite statute and similarly relates to provocation of a dog. This definition of provocation clearly provides that in determining whether a dog was provoked, such determination should be made using a reasonable adult standard. In other words, provocation will be found if a reasonable adult would have expected an act to cause a dog to bite. Since this definition is used in the same chapter as the dog bite statute, it should also be used in the definition of provocation with respect to the dog bite statute.

The facts of the instant case illustrate how jury instructions may result in disparate results. The jury determined that Amber Engquist provoked Bruno by attempting to hug or pet him in a small, dark, confined crawl space. The jury made this determination because a reasonable person would recognize the situation as one which may cause a dog to bite. However, children who do not think about or consider the ramifications of their actions may not appreciate the risk of injury associated with petting or hugging a strange dog in a confined space that is pitch black. Regardless of the child's knowledge, the events in the instant case constitute provocation. The jury instruction given by the trial court accurately reflects Minnesota law. The jury verdict was supported by evidence and

is consistent with other cases concerning the issue of provocation. The proper decision may not have been reached had the jury instruction proposed by the Court of Appeals been used as it compels an examination of matters outside the requirements of the dog bite statute.

CONCLUSION

The jury instruction concerning provocation in the instant case is similar to jury instructions in other cases considered by the appellate courts in Minnesota. These similar jury instructions were not found to be lacking or inaccurate statements of law. The jury instruction given in the instant case complies with Minnesota law. It excludes accidental or inadvertent acts. While it does not require an examination of whether the injured party was aware of the danger of injury, there is no such requirement in the dog bite statute. In fact, relevant case law does not even require such an examination. For these reasons, the decision of the Court of Appeals should be reversed and the decision of the trial court should be affirmed.

Dated this 17th day of November, 2010.

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