

Case No. A09-1760

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*State of Minnesota*  
***Supreme Court***

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

*Respondent,*

vs.

Steven and Christina Loyas,

*Appellants.*

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**APPELLANTS' REPLY BRIEF**

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**I. NO SPECIFIC REFERENCE TO “INADVERTENCE” WAS REQUIRED IN THE JURY INSTRUCTION FOR PROVOCATION IN THIS CASE.**

In Respondent’s Brief, Engquist continues to argue that the jury instruction in this case should include a statement which specifically provides that inadvertent acts cannot constitute provocation. But Engquist’s request must fail for two reasons: (1) The instruction used by the trial court properly stated the law because its terms specifically excluded a finding that inadvertent acts could constitute provocation, and (2) such an instruction was not needed as a result of a total lack of inadvertent action by Engquist in this case when she provoked the Loyas’ dog.

As discussed in Appellant’s brief, the inclusion of the phrase “deliberate, voluntary act” in the jury instruction on provocation in this case specifically excludes acts which are inadvertent. Inclusion of the term “inadvertence” would, thus, be repetitive. “Inadvertence” is defined as “[a]n accidental oversight; a result of carelessness.” Black’s Law Dictionary, p. 336 (Second Pocket Ed. 2001). Accidental or careless acts are not “deliberate” and “voluntary.” Because the trial court’s instruction properly stated the law relating to inadvertent acts and provocation, no revision is needed to the instruction.

The Court of Appeals’ proposed instruction demonstrates the repetitive nature of the use of the term “inadvertent.” After concluding that the district court committed reversible error by failing to specifically include the term “inadvertence” from its jury instruction, the appellate court went on to create an “example” instruction which uses that term in a merely repetitive context. Engquist v. Loyas, 787 N.W.2d 220, 225-26 (Minn. Ct. App. 2010). In other words, the phrase “and not by inadvertence” could be omitted

from the appellate court's proposed jury instruction without changing its meaning. If that phrase were omitted, the first sentence of the appellate court's proposed instruction would state, "A person provokes a dog when, by voluntary conduct, the person invites or induces injury." The inclusion of the phrase, "by voluntary conduct," by itself, effectively prevents a finding that an accidental – or inadvertent – act can constitute provocation.

The Minnesota Court of Appeals in this case – as well as in previous cases – seems to misconstrue the definition of "inadvertence" and mistakenly use it when actually analyzing whether provocation was intentional or unintentional. In doing so, the Court of Appeals contradicts law which it recognizes itself; that a jury can find that provocation exists under Minn. Stat. § 347.22 whether such provocation was intentional or unintentional. Bailey by Bailey v. Morris, 323 N.W.2d 785, 787 (Minn. 1982). Similarly, in Grams, the appellate court discussed whether a toddler's voluntary act of "hugging" a dog was inadvertent; all the while seeming to instead discuss whether the toddler intended to provoke the dog. Grams v. Howard's O.K. Hardware Co., 446 N.W.2d 687, 690 (Minn. Ct. App. 1989). The only Minnesota case which properly applies the definition of inadvertence was decided by this Court. See Fake v. Addicks, 47 N.W. 450 (Minn. 1890).<sup>1</sup> Fake involved, at most, purely accidental contact between the plaintiff and dog. Id. The testimony from one of the eyewitnesses in Fake was that the

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<sup>1</sup> A Michigan case cited in Respondent's Brief also includes facts of purely accidental provocation of a dog. See Bradacs v. Fiacobone, 625 N.W.2d 108 (Mich. Ct. App. 2001) (in which a 12-year-old bent down to pick up a football near the defendant's dog while it was feeding and was bit).

plaintiff was scuffling with a third party and accidentally backed up into the dog as it lay on the ground, causing it to bite. Id. The conduct described in Fake is consistent with the accidental or careless conduct included in the definition of inadvertence.

In the instant matter, what the appellate court uses as an example of a potential finding of inadvertence is actually a question of whether the provocation was intentional or unintentional. The relevant part of the appellate court's opinion states:

Respondents note that the instruction given to the jury requires a "deliberate voluntary act," and argue that because "an inadvertent act cannot be deliberate and voluntary," the instruction properly excludes inadvertent acts. We disagree. A jury could reasonably find that Amber's putting her arm around Bruno constituted provocation because it was a "deliberate voluntary" act that "stimulated" Bruno, without considering whether Amber invited or induced the injury or whether the danger of injury was apparent to Amber.

Engquist, 787 N.W.2d at 225. But the questions of whether Amber Engquist "invited or induced the injury or whether the danger of injury was apparent to [her]" are not questions relating to whether her conduct was accidental or careless; instead, they are questions relating to whether she intended to provoke Bruno.

Engquist's actions in this case were not inadvertent. The unrebutted testimony in this case is that Amber Engquist voluntarily and purposefully called Bruno into a crawl space and then touched Bruno and reached her arm around Bruno before she was bit. These actions are not akin to accidentally backing up into a dog, as the plaintiff did in

Fake. Nothing in the record supports a finding that Amber's action of reaching for the dog was accidental or a result of carelessness. She meant to do exactly what she did; i.e. pet or hold the dog. Pursuant to law stated in Grams, the jury need not be asked whether Engquist's provoking acts were intentional because intentional and unintentional provocation have the same effect on whether plaintiff can recover under Minn. Stat. § 347.22. The jury can only be asked whether the acts were accidental. Based on these principles, the appellate court's proposed instruction is contrary to Minnesota law. Furthermore, because there are no facts which tend to establish Amber Engquist's acts as being accidental, the jury need not have been specifically instructed about inadvertent acts as they relate to a finding of provocation.

**II. MINNESOTA LAW DOES NOT REQUIRE A JURY INSTRUCTION ON PROVOCATION OF A DOG WHICH REFERENCES THE PLAINTIFF'S KNOWLEDGE OF POTENTIAL FOR DANGER.**

By arguing that the Minnesota Court of Appeals' example jury instruction in this case is proper, Engquist is essentially arguing that the jury must be instructed to find that the danger of injury was apparent to the plaintiff at the time of the provocation. This argument is not supported in Minnesota statutes or caselaw. Recall that the appellate court proposed the following jury instruction:

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

Engquist, 787 N.W.2d at 225-26. This proposed instruction would require that a plaintiff have knowledge of and comprehend the fact that the dog may react violently at the time of the injury.

As discussed above, the question of whether a plaintiff appreciated danger of being injured by a dog is more a question about intent than it is about whether the plaintiff acted inadvertently. For this reason, the Minnesota case law presented by Respondent does not require an instruction as the one proposed by the appellate court in the instant matter. Because unintentional provocation can still be found by the jury to constitute provocation under Minn. Stat. § 347.22, the above instruction is a misstatement of the law.

### **III. USE OF THE TRIAL COURT’S JURY INSTRUCTION ON PROVOCATION DOES NOT CONSTITUTE REVERSIBLE ERROR.**

Even if this Court determines that statements relating to inadvertence or the appreciation of danger should be included in a jury instruction on provocation in the interest of clarity, the trial court’s use of its instruction in this case still does not amount to reversible error. The Bailey case provides an example of a less-than-perfect submission to the jury which was determined by this Court to *not* amount to reversible error. In Bailey, the special interrogatory to the jury on provocation did not clarify that only the plaintiff’s conduct can constitute provocation. Bailey, 323 N.W.2d at 787 (asking the jury, “Did [the dog] bite [the plaintiff] because the dog was provoked?”). This Court acknowledged that an interrogatory which referenced “provocation on the part of [the plaintiff]” would perhaps have provided “greater assurance that the jury connected

the provocation with appellant.” Id. But this Court found that the respondent was not prejudiced by use of the special interrogatory to the extent that a new trial was warranted.

Id.

Here, while the trial court’s jury instruction may have provided “greater assurance” of accuracy if it included references to the notion of inadvertent acts, the omission of such terms was not prejudicial. As discussed above, the term “inadvertence” is merely repetitive of the phrase “deliberate, voluntary act” in the trial court’s instruction. As well, the omission of that term is not prejudicial because no evidence exists that Amber Engquist’s provocative actions toward the dog were anything other than voluntary. For these reasons, this Court should determine that any error in the trial court’s instructions to the jury on provocation was not so prejudicial as to require a new trial.

#### **IV. INACCURATE STATEMENTS OF FACTS IN ENGQUIST’S BRIEF**

It is prudent at this time for the Loyas’ to clarify several misstatements of fact included in Respondent’s Brief. For instance, Engquist’s recital of the dog’s history with the Loyas family is incorrect. Bruno was not owned by the Loyas family when it moved into the neighborhood in May, 2006. See Respondent’s Brief, p. 2. The dog also had not been in the Loyas’ care for “months” prior to this incident. See Id. Bruno was not brought into the Loyas home until mid-June, 2006; just three or four weeks prior to this incident. TT 66, 93.

With regard to the facts of the accident itself, both Gabrielle Beede and Amber called the dog into the hiding space (as opposed to Engquist’s allegation that only

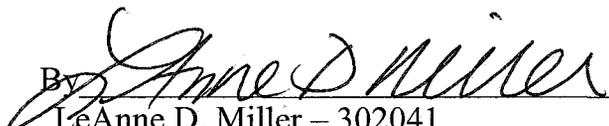
Gabrielle Beede called the dog). TT 184. Although Amber testified that she did not do the few acts listed in Respondent's Brief – i.e. poke the dog, pull its tail, etc. – there is no basis for Engquist's "factual" statement that, "At no point prior to the attack of the dog had Amber Engquist . . . did [sic] any act whatsoever that would be deemed provocative." Respondent's Brief, p. 3. Such a statement is merely argument and not a statement of facts in evidence. To the contrary, the facts allow an inference – as the jury ultimately determined – that Amber Engquist's actions indeed provoked Bruno.

### CONCLUSION

For the above reasons, Appellants again respectfully request that this Court reverse the Minnesota Court of Appeals' order for a new trial on liability. The use of the trial court's instruction on provocation was not prejudicial and, thus, does not constitute reversible error.

Dated this 3<sup>rd</sup> day of January, 2011.

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