
NO. A11-191

State of Minnesota
In Court of Appeals

Gordon Helmer Anderson,

Appellant,

vs.

Neil Raymond Christopherson and Dennis Christopherson,

Respondents.

APPELLANT'S REPLY BRIEF

James S. Ballentine (#209739)
William R. Sieben (#100808)
SCHWEBEL, GOETZ & SIEBEN, P.A.
5120 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402-2246
(612) 377-7777

Attorneys for Appellant Gordon Anderson

Chad D. Dobbelaere (#0332380)
TEWKSBURY & KERFELD, P.A.
88 South Tenth Street, Suite 300
Minneapolis, Minnesota 55403
(612) 334-3399

*Attorneys for Respondent
Neil Christopherson*

Troy A. Poetz (#0318267)
Kristi D. Stanislawski (#348570)
RAJKOWSKI HANSMEIER, LTD.
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, Minnesota 56302
(320) 251-1055

*Attorneys for Respondent
Dennis Christopherson*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	2
1. <u>The Trial Court And Respondent Dennis Christopherson Wrongly Fail to Acknowledge That Gordon Anderson Was Immediately Implicated By Bruno's Attack, Fulfilling The Statute's Causation Standard.</u>	2
2. <u>What About Knake v. Hund?</u>	6
CONCLUSION	8
CERTIFICATION OF BRIEF LENGTH	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<i>Boitz v. Preblich</i> , 405 N.W.2d 907 (Minn. App. 1997)	1, 3, 4, 5, 7
<i>Knake v. Hund</i> , 2010 WL 3119506 (Minn. App.)	6, 7
<i>Lewellin v. Huber</i> , 465 N.W.2d 62 (Minn. 1991)	2, 3, 4, 5, 7
<i>Morris v. Weatherly</i> , 488 N.W.2d 508 (Minn. App. 1992)	6, 7
<i>Seim v. Garavalia</i> , 306 N.W.2d 806 (Minn. 1981)	2
<u>Statutes:</u>	
Minnesota Statutes section 347.22	1, 4, 5
<u>Miscellaneous:</u>	
<u>A DICTIONARY OF MODERN LEGAL USAGE</u> 279 (1987)	3

INTRODUCTION

Minnesota Statutes section 347.22, Minnesota's dog injury¹ statute, imposes absolute strict liability on dog owners or harborers if the dog which they own and/or harbor attacks and/or injures a person. But the statute sets forth two defenses or elements which must be present before absolute liability under the statute is imposed: (1) the injured person must be an entrant, not a trespasser; and, (2) the injured person's injury cannot result from that person's dog provocation. See Minn. Stat. § 347.22. Consistent with his claims below, respondent Dennis Christopherson adds two more elements to the clear language of the statute: The injuring dog must be focused on the injured party and the injury suffered must be the direct and immediate result of that focus (Dennis Christopherson's brief, p. 6). Mr. Anderson submits this Reply Memorandum to address issues related to Mr. Christopherson's extra-statutory propositions.

¹ The statute does not contain the word "bite" and this Court has held that absolute liability under the statute may be triggered in the absence of "vicious" dog activity. See *Boitz v. Preblich*, 405 N.W.2d 907, 910 (Minn. App. 1987). Nevertheless, defendant Dennis Christopherson persists in labeling section 347.22 the "dog bite" statute, a complete misnomer.

ARGUMENT

1. The Trial Court And Respondent Dennis Christopherson Wrongly Fail to Acknowledge That Gordon Anderson Was Immediately Implicated And Injured By Bruno's Attack, Fulfilling The Statute's Causation Standard.

The trial court held that absolute strict statutory liability cannot be found here because Bruno was not “focused” on Gordon Anderson at the time of the attack (ADD. 5). Although the trial court referenced *Lewellin v. Huber*, 465 N.W.2d 62, 66 (Minn. 1991) (ADD. 5), she really did not address whether Bruno’s actions directly implicated Mr. Anderson, causing his injury within the meaning of the statute. Instead, the trial court focused only on Bruno’s “focus,” concluding that, because Bruno was not focused on Gordon Anderson when he attacked, absolute strict statutory liability was absent (ADD. 5). Ignoring the trial court’s failure to address the statute’s causation standard, Dennis Christopherson effectively “lumps” causation and Bruno’s focus together in his effort to persuade this Court to affirm.

Our Minnesota Supreme Court explained in *Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991), that absolute strict liability is triggered under section 347.22 because a dog owner owns the animal ... principles of negligence and reasonable care are beside the point (emphasis added). See *Id.* citing *Seim v. Garavalia*, 306 N.W.2d 806,

811 (Minn. 1981). The legislature's use of the statutory words "attacks or injures" indicates that legal causation is one of the elements to be established to impose absolute strict statutory liability. See Lewellin, 465 N.W.2d at 64.

"[I]t would appear that the legislature intended the verb 'injures' to cover a dog's affirmative but non-attacking behavior which injures a person who is immediately implicated by such non-hostile behavior." Lewellin, 465 N.W.2d at 64 relying upon *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. App. 1997). "Implicate" means "to bring into play; ... or as a consequence ...; to involve (a person) in a charge or crime" B. Garner, A DICTIONARY OF MODERN LEGAL USAGE 279 (1987).

Gordon Anderson fell, fracturing his hip, because he was immediately implicated in or by Bruno's attack (AA-56, depo. 34). The supreme court in *Lewellin*, did not hold that a dog must be "focused" on an individual before that person can be immediately implicated by hostile or non-hostile dog activity. In legal reality, by referencing this Court's opinion in *Boitz v. Preblich*, the *Lewellin* court implicitly, if not explicitly, stated that a dog need not be focused upon an injured person before absolute liability under the statute is triggered. Compare *Lewellin*, 465 N.W.2d at 64 and *Boitz v. Preblich*, 405 N.W.2d

907 (Minn. App. 1987) (absolute statutory liability triggered when dog accidentally bumped into pedestrian while dog ran toward an alley).

What does this all mean? First, it means that this Court should reverse because Bruno's attack immediately implicated Gordon Anderson. The whole incident took only seconds. Mr. Anderson's fall and injury occurred because he was brought into play or implicated by Bruno's attack. Bruno's attack involved Mr. Anderson and Mr. Anderson's fall and injury were a consequence of Bruno's attack. These factual realities bring Mr. Anderson's injury within the *Lewellen* causation standard because he was immediately implicated in Bruno's actions.

Second, this Court should reverse the trial court on the "focus" issue. Why? Because a dog's focus is simply not found in the statutory language ... it is a judicial addition to the statutory language. This Court correctly recognized that the legal focus in a case involving section 347.22 should be on matters other than a dog's focus in *Boitz v. Preblich*, 405 N.W.2 907 (Minn. App. 1997). Fortunately in *Boitz*, this Court did not impose the "dog focus" element upon the statute in *Boitz*, because such an analysis likely would have resulted in no recovery for plaintiff ... there was no

indication that the dog was “focused” on the injured pedestrian in *Boitz*. See Id.

Mr. Anderson asks this Court to consider the causation standard set forth in *Lewellen v. Huber*, 465 N.W.2d 62 (Minn. 1991), because the trial court failed to apply it to this case (ADD. 5). Our supreme court in *Lewellen*, stated that “injures” in the statute addresses a dog’s affirmative but non-attacking behavior which injures a person who is immediately implicated by the dog’s non-hostile behavior. 465 N.W.2d at 64. Later on in the same decision, the supreme court indicated that “attacks or injures” contemplates action by a dog that directly and immediately produces injury to the person the dog injures. *Id.* at 64-5. Gordon Anderson submits that the two comments by the supreme court addressing the meaning of “injures” effectively constitute interchangeable definitions or a single statutory causation standard. Mr. Anderson meets the standard because Bruno’s actions directly implicated him causing his broken hip.

Finally, Gordon Anderson respectfully suggests that this Court refrain from imposing its “focus-of-the-dog” standard upon section 347.22 because it is unwarranted and unnecessary. As this Court demonstrated in its analysis in *Boitz v. Preblich*, 405 N.W.2d 907

(Minn. App. 1987), courts may successfully determine whether a dog's hostile or non-hostile acts immediately implicate an injured person without a subjective and confusing "focus-of-the-dog" analysis.

2. What About *Knake v. Hund*?

Gordon Anderson is not surprised that Dennis Christopherson relies heavily upon *Knake v. Hund* (Respondent's Appendix 96-9), this Court's August, 2010, unpublished opinion. There, plaintiff fell suffering injuries when a dog unexpectedly cut in front of her to get into a garage. *Id.* A district court granted summary judgment to the dog owner and this Court affirmed for three apparent reasons. First, plaintiff testified unequivocally that the ice, not the dog, caused her to fall (Respondent's Appendix, p. 97). Second, this Court noted that the dog was "focused" on the garage, not plaintiff (Respondent's Appendix, p. 98). Third, plaintiff's injury was not the direct and immediate cause of the dog's behavior. *Id.*

The Court's *Knake* decision is understandable given the plaintiff's testimony that the ice caused her to fall. But what if plaintiff had testified, "The dog startled me and I lost my balance and fell." Gordon Anderson suggests that this Court would liken the facts to those in *Morris v. Weatherly* (see Appellant's main brief), where a

bicyclist fell after dismounting his bicycle because a dog was apparently chasing him.

This Court's *Knake* decision seems to be inconsistent with its decision in *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. App. 1997), where the Court did not see a need to address the "focus-of-the-dog" element despite the fact that the dog in *Boitz*, was apparently not "focused" on the pedestrian ... the dog was headed to an alley. *Id.* at 909.² In *Boitz*, this Court wisely left the "focus" analysis where it should be left, in a legal lockbox.

In the final analysis, this case is significantly different than the *Knake* case. Gordon Anderson testified that he lost his balance because of the action between Bruno, Tuffy and himself (AA-56, depo. 34). He also testified that he lost his balance because he was actively involved in trying to separate Bruno from Tuffy (AA-56, depo. 34). Gordon Anderson's testimony makes it quite clear that he was immediately implicated in Bruno's hostile attack meeting the "immediate implication" causation standard set forth in the *Lewellin*, case.

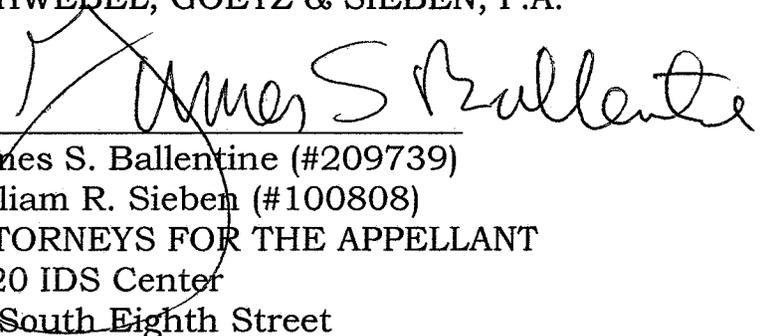
² Any claim that in *Boitz*, physical contact between the dog and the pedestrian occurred is meaningless because physical contact need not be present to trigger absolute statutory liability. See *Morris v. Weatherly*, 488 N.W.2d 508 (Minn. App. 1992).

CONCLUSION

For all of the reasons set forth herein and in Appellant's main brief, Gordon Anderson respectfully asks that this Court reverse the trial court on the issue of causation and order the trial court to submit the harboring issue to a jury.

SCHWEBEL, GOETZ & SIEBEN, P.A.

Dated: April 12, 2011

By: 

James S. Ballentine (#209739)

William R. Sieben (#100808)

ATTORNEYS FOR THE APPELLANT

5120 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2246

(612) 333-8361

CERTIFICATION OF BRIEF LENGTH

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 proportional font. The length of this brief is 1,723 words. This brief was prepared using Microsoft Word 2003.

SCHWEBEL, GOETZ & SIEBEN, P.A.

Dated: April 12, 2011

By:


James S. Ballentine (#209739)

William R. Sieben (#100808)

ATTORNEYS FOR THE APPELLANT

5120 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2246

(612) 333-8361