Case Nos. A11-191

State of Minnesota
Supreme Court

Gordon Helmer Anderson,

Respondents,

vs.

Neil Raymond Christopherson and
Dennis Christopherson,

Appellants.

APPELLANT DENNIS CHRISTOPHERSON'S BRIEF

Date of Filing of Court of Appeals Decision: 8/8/11

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STATEMENT OF LEGAL ISSUES

I. Can Dennis Christopherson be held strictly liable under Minn. Stat. § 347.22 for the injuries sustained by Gordon Anderson if the dog's conduct was not focused upon or otherwise directed at Anderson prior to his sustaining those injuries?

The trial court answered this question in the negative upon Petitioner's Motion for Summary Judgment and dismissed the statutory claims as a matter of law. Add.1-Add.7. The Court of Appeals reversed and held that the question of focus is only one factor for the court to consider in the applicability of §347.22. App.55-App.66.

Lewellin on Behalf of Heirs of Lewellin v. Huber, 465 N.W.2d 62 (Minn.1991)
Morris v. Weatherly, 488 N.W.2d 508 (Minn.App.1992)
Mueller v. Theis, 512 N.W.2d 907 (Minn.App.1994)
Knake v. Hund, 2010 WL 3119506 (Minn.App.2010)

Minn. Stat. § 347.22 (2010).

II. Can Gordon Anderson establish that his injuries meet the limited proximate cause standard of "direct and immediate results of the dog's actions" so as to impose strict liability under § 347.22?

The trial court answered this question in the negative upon Petitioner's Motion for Summary Judgment and dismissed the statutory claims as a matter of law. Add.1-Add.7. The Court of Appeals held that it was a material issue of fact whether Gordon Anderson's actions broke the chain of causation so as to preclude liability under Minn. Stat. § 347.22. App.55-App.66.

Lewellin on Behalf of Heirs of Lewellin v. Huber, 465 N.W.2d 62 (Minn.1991)
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Minn. Stat. § 347.22 (2010).

III. Can Dennis Christopherson be considered a "harborer" under Minn. Stat. § 347.22?

The trial court answered this question in the negative upon Petitioner's Motion for Summary Judgment and dismissed the statutory claim against Dennis Christopherson as a matter of law. Add1-Add.7. The Court of Appeals reversed and held that this matter reflected a material issue of fact that must be resolved by a jury. App.55-App.66.

Verrett v. Silver, 244 N.W.2d 147 (Minn.1976)
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STATEMENT OF THE CASE

The claims on appeal involve an allegation by Respondent Gordon Anderson (hereinafter "Respondent" or "Anderson") that Petitioner Dennis Christopherson (hereinafter "Petitioner" or "Dennis Christopherson") and his son, Neil Christopherson are strictly liable under Minnesota's dog bite statute (Minn. Stat. § 347.22) for injuries Respondent sustained in a dog-related incident. Petitioner seeks the following action by this Court:

1. Reversal of the Court of Appeals' decision that there is not an independent requirement that the dog's conduct be focused upon or otherwise directed at the injured party in order for strict liability under Minn. Stat. § 347.22 to apply.

2. Reversal of the Court of Appeals' decision that a material issue of fact exists as to whether Respondent's injuries were a "direct and immediate" result of the dog's conduct.

3. Reversal of the Court of Appeals decision that a material issue of fact exists as to whether Dennis Christopherson could be considered a "harborer" under Minn. Stat. § 347.22.

The Anoka County District Court, Honorable Tammi A. Fredrickson presiding, dismissed the entirety of the Respondent's statutory claims for damages on summary judgment.[1] The primary basis for the district court's dismissal of these claims was undisputed evidence that the dog's conduct was not focused on the Respondent at any time prior to his sustaining injury. The district court also determined that Dennis Christopherson could not be considered an "owner" under Minn. Stat. § 347.22 and could

[1] The district court Order also dismissed as a matter of law Respondent's claim for common law negligence against Petitioner Dennis Christopherson. However, the Order held that a material issue of fact existed with respect to Respondent's claim of common law negligence against Neil Christopherson and accordingly, denied summary judgment on that issue.

therefore not be held strictly liable for the actions of the dog in question. It was undisputed that Dennis Christopherson was not the legal owner or "keeper" of the dog; therefore, the sole remaining issue was whether he could be considered a "harborer." Based on case law defining "harborer" as an individual "giving lodging, shelter or refuge to a dog for longer than a limited period of tome or for more than a limited purpose," the district court found that Dennis Christopherson was not a "harborer" and statutory liability could not apply to him. *Tschida v. Berdusco*, 462 N.W.2d 410, 411 (Minn.App.1990), *review denied* (Minn. Dec. 20, 1990).

The Court of Appeals erred when it reversed the above determinations by the district court. Its analysis and subsequent holdings disregarded large portions of relevant, controlling case law, as well as serious public policy concerns.

The Court of Appeals decision with respect to the "focus" requirement departed from longstanding case law and undermined this Court's holding in *Lewellin v. Huber*, 564 N.W.2d 62 (Minn.1991). By holding that it is not necessary for the dog's conduct to be focused upon or directed at the injured party, the Court of Appeals ignored substantial portions of this Court's analysis in *Lewellin* that both refer to and reply upon such a requirement. Furthermore, the practical implications of this holding show a disregard for this Court's articulated interest in limiting strict liability under Minn. Stat. § 347.22 for public policy reasons. *See Lewellin*, 564 N.W.2d at 66 ("In applying our dog owner's liability statute, public policy and legislative intent are best served by limiting proximate cuase to direct and immediate results of the dog's actions...").

The Court of Appeals then erred in its determination that a material issue of fact existed as to whether the Respondent's injuries were a "direct and immediate" result of the dog's actions. Again, the Court of Appeals disregarded directly relevant and controlling language from *Lewellin* relating to the requisite chain of causation in claims arising under Minn. Stat. § 347.22. *See Lewellin*, 465 N.W.2d at 65-66. The Court of Appeals' failure to address such language and its applicability to the facts here resulted in insufficient, flawed reasoning and an erroneous holding that cannot be reconciled with this Court's holding in *Lewellin*.

Finally, with respect to the "harborer" issue, the Court of Appeals inexplicably focused its analysis on only one aspect of the discussion, thereby failing to take into account or adequately address the underlying, more serious issues of applicability. Specifically, the Court of Appeals only discussed the validity of the definition of "harborer" from *Tschida*. *See* 462 N.W.2d at 411. The court then ended its discussion on the "harborer" issue without taking into consideration the undisputed evidence that Dennis Christopherson was never present during the dog's stay on his property and had no personal involvement with the dog. Under these facts, Dennis Christopherson's relationship with the dog and property was more analogous to the absentee landlord-tenant relationship at play in *Gilbert v. Christiansen*, 259 N.W.2d 896 (Minn.1977), which went unmentioned in the Court of Appeals' decision. In *Gilbert*, this Court held that an absentee landlord could not be a "harborer" simply based on its ownership of the property and right to exclude the dog. *Gilbert*, 259 N.W.2d at 897. Under *Gilbert*, as a matter of law, Dennis Christopherson cannot be considered a "harborer" under Minn.

Stat. § 347.22 and the Court of Appeals decision on this issue should be reversed. Public policy and case law from other jurisdictions further supports the inapplicability of § 347.22 to Dennis Christopherson under the facts of this case.

STATEMENT OF FACTS

This case arises out of an incident that occurred on September 27, 2009. At the time of the incident, Anderson was walking his dog, "Tuffy," down the street of a residential neighborhood in Andover, Minnesota. App.38.

As Anderson was walking by a home owned by Petitioner Dennis Christopherson, a dog named "Bruno," owned by Dennis Christopherson's son, Neil, ran out from the Christopherson yard and bit Anderson's dog. App.39. Once Bruno bit Tuffy, he did not let go until the incident was over. Add.9. While Bruno was holding onto Tuffy, Anderson began kicking at Bruno, trying to separate the two dogs. In the process of trying to separate the dogs, Anderson fell to the ground, injuring his hip. Add.11-Add.12.

Appellant Dennis Christopherson resides in South Dakota. App.33-App.34. He raised his children in Minnesota, but then moved to South Dakota to run his manufacturing business approximately 7 years before this incident occurred. App.33. Neil Christopherson also lived in South Dakota at the time this incident occurred. App.26-App.27. Neil Christopherson and his girlfriend were staying at Dennis Christopherson's house while visiting friends in Minnesota. App.28. The couple planned to stay at the house for approximately one week. App.29. Neil Christopherson was allowed to occasionally stay at the home while visiting Minnesota. App.35.

On the week of their Minnesota visit, the couple brought along Bruno, who they had recently obtained from the Sioux Falls Humane Society. App.28. Before Neil Christopherson acquired the dog from the Humane Society, Bruno was administered a series of behavioral tests and was approved as fit for adoption. App.42.

On the date of the incident, Neil Christopherson was not present at the home. He later learned from his girlfriend, who was in the front yard with Bruno at the time of the incident, that Bruno had run from the yard and that his "shock" collar failed to work. App.30-App.31.

ARGUMENT

Minnesota's dog bite statute, Minn. Stat. § 347.22 provides as follows:

> 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. 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. Ann. § 347.22 (West).

I. INTRODUCTION

Relying upon well established Minnesota case law interpreting the meaning and application of Minn. Stat. § 347.22, the trial court granted summary judgment for both Dennis and Neil Christopherson on the issue of statutory liability under this section. Specifically, the trial court (1) declined to find legal causation so as to trigger liability for

either Neil or Dennis Christopherson, as the dog's conduct was not focused upon Gordon Anderson and (2) held that Dennis Christopherson was not an "owner" under § 347.22.

The Court of Appeals reversed and remanded the case after departing from the longstanding requirement that the dog be "focused" on the injured party in order to meet the limited proximate cause standard set forth by this Court in *Lewellin v. Huber*, 465 N.W.2d 62 (Minn.1991). The Court of Appeals also determined that there were material questions of fact regarding (1) whether Gordon Anderson's injuries were a "direct and immediate result" of the dog's actions and (2) whether Dennis Christopherson could be considered an "owner" as a "harborer" under § 347.22.

As will be shown below, based on this Court's previous rulings, there are no material issues of fact with respect to the Christophersons' statutory liability under § 347.22 and summary judgment was appropriate. Such a determination is further supported by public policy and related case law from other jurisdictions.

II. THIS COURT REVIEWS *DE NOVO* THE TRIAL COURT'S SUMMARY JUDGMENT ORDER

The trial court in this matter entered judgment on the issue of statutory liability under Minn. Stat. § 347.22 pursuant to Minn. R. Civ. P. 56. When reviewing the dismissal of claims pursuant to Minn. R. Civ. P. 56, this Court reviews *de novo* "whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

"[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.* No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69 (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *Id.* at 71. The non-moving party "may not rely on the possibility that he will be able to develop evidence at trial, but must present specific admissible facts showing a material fact issue." *O'Neil v. Kelly*, 239 N.W.2d 231, 232 (Minn. 1976); *see also North States Power Co. v. Minnesota Metro Council*, 684 N.W.2d 485, 491 (Minn. 2004).

III. IT IS UNDISPUTED THAT THE DOG AT ISSUE WAS NOT FOCUSED ON OR OTHERWISE DIRECTING ITS CONDUCT TOWARDS GORDON ANDERSON AND ACCORDINGLY, AS A MATTER OF LAW, LEGAL CAUSATION DOES NOT EXIST AND DENNIS CHRISTOPHERSON CANNOT BE LIABLE UNDER MINN. STAT. § 347.22

A. *LEWELLIN V. HUBER*

In *Lewellin v. Huber*, this Court interpreted the meaning and application of Minnesota's dog bite statute, Minn. Stat. § 347.22. 465 N.W.2d 62 (Minn.1991). In *Lewellin*, the defendant was the owner of a dog that distracted a vehicle's driver while she was driving. *See id.* As a result of the dog's distracting behavior and the driver's attempt to get the dog settled, the driver lost control of the vehicle, drove off the road and fatally injured a child playing in the ditch. *Id.*

The primary issue addressed in *Lewellin* was what could constitute legal causation so as to establish a statutory cause of action under § 347.22. This Court first discussed the meaning of "attacks or injures," as utilized in Minnesota's dog bite statute. It determined that:

> ...the legislature intended the verb "injures" to cover a dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior.

Id. at 64. In explaining its understanding of the phrase "immediately implicated," this Court stated:

> When a dog *attacks* a person without provocation, there is no attenuated chain of causation between the attack of the injury ... Similarly, it is intended that there be no attenuated chain of causation when the dog "injures" a person, such as when a dog exuberantly **jumps upon** or unintentionally **runs into** a person and injures that person.

Id. (emphasis added). This Court concluded that:

> It is enough to say here that **legal causation for absolute liability under the statute must be direct and immediate, *i.e.* without intermediate linkage.**

Id. (emphasis added). *Lewellin*'s "direct and immediate" causation requirement reflected a purposeful departure by this Court from the traditional concept of proximate cause. In its opinion, this Court explained that the departure was necessary from a public policy perspective, because § 347.22 falls within an "exceptional class" of statutes providing absolute liability:

> In applying our dog owner's liability statute, public policy and legislative intent are best served by **limiting proximate cause to direct and immediate results of the dog's actions**, whether hostile or nonhostile.

Id. at 66. (emphasis added). This Court then held that the facts in *Lewellin* lacked legal causation and therefore failed to trigger liability under § 347.22, explaining:

> There was no direct, immediate connection between the dog's behavior and the child lying in the ditch. **The dog's conduct was directed at the driver of the car.** The driver's subsequent efforts to handle the dog's distracting but nonattacking conduct introduced another link in the chain of causation. **Though there may be causation in fact here, this chain of events is too attenuated to constitute legal causation for the radical kind of liability that the statute imposes.**

Id. (emphasis added).

B. *MUELLER V. THEIS* AND RELATED CASE LAW

Three years after this Court decided *Lewellin*, the Court of Appeals addressed the applicability of § 347.22 in *Mueller v. Theis*, 512 N.W.2d 907 (Minn.App.1994), *review*

denied (April 28, 1994). In *Mueller*, a motorist was injured in an automobile accident after he swerved to avoid hitting a dog standing in the roadway. *Id.* at 909.

In its analysis, the Court of Appeals relied upon this Court's reference to and requirement of (1) "affirmative" conduct by the dog in question, and (2) injuries that are the "direct and immediate results of the dog's action." *Id.* at 910. The Court of Appeals looked to the language and reasoning set forth by this Court in *Lewellin* and extrapolated a two-prong test to determine whether the injuries were the "direct and immediate results of the dog's action":

> ...the "direct and immediate results of the dog's action," require both that the dog's conduct be focused on the injured party and that the injury be the direct and immediate result of that focus.

Id. at 910-11 (*citing Lewellin*, 465 N.W.2d at 66). The court explained this reasoning by referencing this Court's analysis in *Lewellin*, as provided above, stating that:

> For example, in *Lewellin* the dog focused its conduct on the driver rather on the injured child, and the child's death was not the direct and immediate result of that focus, but instead was caused by the driver's conduct.

Id. at 911 (*citing Lewellin*, 465 N.W.2d at 66). In this explanation, the Court of Appeals paraphrased this Court's analysis from *Lewellin* and substituted the word "focused" for "directed." *Cf. Lewellin*, 465 N.W.2d at 66 ("There was no direct, immediate connection between the dog's behavior and the child lying in the ditch. The dog's conduct was directed at the driver of the car. The driver's subsequent efforts to handle the dog's distracting but nonattacking conduct introduced another link in the chain of causation.") and *Mueller*, 512 N.W.2d at 910-11 ("For example, in *Lewellin* the dog focused its

conduct on the driver rather on the injured child, and the child's death was not the direct and immediate result of that focus, but instead was caused by the driver's conduct."). The explanation in *Mueller* also takes into consideration this Court's requirement that there be no "intermediate linkage" in the chain of causation to trigger statutory liability under Minn. Stat. § 347.22, which will be addressed in further detail below. *See Lewellin*, 465 N.W.2d at 64.

Applying this Court's analysis in *Lewellin*, the court in *Mueller* eventually declined to find legal causation and held that:

> Here, the dog's conduct was not focused on [the plaintiff] and therefore, his injuries cannot result from that focus. As in *Lewellin*, while the dog's conduct may be a "cause in fact," imposing absolute liability under these circumstances would extend the statute beyond its intended purpose.

Id. at 911. *Mueller* distinguished this holding from a previous consolidated case, *Morris v. Weatherly*, 488 N.W.2d 508 (Minn.App.1992), stating:

> ...causation existed in the consolidated *Morris* cases because, in the first case, the dog focused its conduct on the injured bicyclist, and the bicyclist's injuries were the direct and immediate result of the dog's pursuit. And, in the second *Morris* case, causation existed because the dog focused its conduct on the injured mailman by approaching him in an attacking posture and the mailman's injuries were the direct and immediate result of the dog's attack.

Mueller, 512 N.W.2d at 911 (internal citations omitted). In *Mueller*, however, "the dog's conduct was not directed at Mueller ... The dog was simply walking across the road when Mueller came upon it." *Id.* at 910. The defendant in *Mueller* could therefore not be

held strictly liable under § 347.22. This Court declined review of *Mueller* following the Court of Appeal's decision.

Going forward, in cases invoking statutory liability under § 347.22, the Court of Appeals continued to apply the two-prong test for determining whether the alleged injuries were the "direct and immediate results of the dog's actions." In 2010, the Court of Appeals decided *Knake v. Hund*, A10-278, 2010 WL 3119506 (Minn. Ct. App. Aug. 10, 2010) (unpublished and attached hereto). The plaintiff in *Knake* was injured when she slipped on some ice after a dog, heading toward a garage, cut in front of her path. *See id.* The court again declined to find legal causation for lack of "focus" and distinguished the facts of *Knake* from the consolidated *Morris* cases, which had served as the primary bases for the plaintiff's arguments. *See id.* at *2, *3. *Knake* stated:

> Here, appellant did not protect herself from [the dog's] conduct and [the dog] did not approach appellant at "a fast pace." Appellant and [the dog] walked together on an icy sidewalk when [the dog] maneuvered to get to the garage before appellant. This case is more like *Lewellin* ... Here, [the dog] was not focused on appellant; [the dog], as appellant explained, was focused on getting "to the garage."

Id. at *3.

C. *ANDERSON V. CHRISTOPHERSON* AND THE COURT OF APPEALS

Anderson argues that there should be no independent "focus" requirement in establishing statutory liability under Minn. Stat. § 347.22 and that the establishment of such a requirement in *Mueller* misapplied this Court's decision in *Lewellin*. The Court of Appeals agreed with Anderson, departed from its holding in *Mueller* and held that "Bruno's focus on Tuffy at the time of the attack does not shield [the Christophersons]

from liability for [Gordon Anderson's] injuries under the statute." *Anderson v. Christopherson*, 802 N.W.2d 832, 836 (Minn.App. 2011).

The Court of Appeals' basis for its holding on the "focus" requirement appears to have largely disregarded the analysis put forth by this Court in *Lewellin* and instead focused on a novel and overly broad interpretation of § 347.22. In essence, the Court of Appeals found that because the word "attack" "necessarily implies that a dog is focused on the injured party," the phrase "or injures" must negate such a requirement. *Id.* The Court of Appeals goes onto explain that:

> As noted by the supreme court in *Lewellin*, "it would appear that the legislature intended the verb 'injures' to cover a dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior." There is nothing in this interpretation or in the plain language of the statute requiring that the dog be "focused" on the injured person. We therefore conclude that the dog-owner's liability statute may apply when a dog injures a person who is not the focus of the dog's conduct.

Id. (internal citation omitted). This reasoning is not only flawed and "extend[s] absolute liability beyond its intended purpose and reach," but also fails to take into account significant portions of this Court's opinion in *Lewellin*. 465 N.W.2d at 65.

D. NO LEGAL CAUSATION EXISTS UNDER *LEWELLIN* AND THE COURT OF APPEALS' INTERPRETATION OF § 347.22 IS CONTRARY TO CONTROLLING CASE LAW

a. Erroneous Application of Statutory Interpretation

In *Lewellin*, this Court agreed with the conclusion reached in a previous Court of Appeals case, *Boitz v. Preblich*, 405 N.W.2d 907 (Minn.App.1987) regarding the interplay and meaning of "attacks or injures," as utilized in §347.22. *Lewellin*, 465

N.W.2d at 64. This Court explained that "to attack" means "to move against with more or less violent intent, implying aggressiveness in any sense and the initiative in the onset." *Id.* (*citing Webster's Third New Int'l Dictionary* 140 (1971)). Therefore, the inclusion of "or injures" in the Statute suggested that the legislature intended statutory liability to extend to instances of a "dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior." *Id.* However, *Lewellin* goes on to specify that "or injures" does not suggest or allow for any additional attenuation in the chain of causation. *Id.* Suggested examples of "or injures" situations included when a dog: (1) exuberantly **jumps upon** or (2) unintentionally **runs into** a person and injures that person. *Id.* In other words, the reason for including both "attacks" and "injures" in the Statute was to accommodate both hostile and non-hostile situations. Legal causation for either situation is identical: "direct and immediate results of the dog's actions." *See id.* at 64-66.

In its decision here, the Court of Appeals again addressed the interplay and meaning of "attacks or injures" and found that the use of "or injures" was *also* included so as to accommodate situations wherein the dog was not focused on the injured party. *Anderson*, 802 N.W.2d at 836. Accordingly, under this decision, there is now absolute liability for the "owner" of a dog in situations where that dog injures someone (1) whether its conduct is hostile or not hostile, **and** (2) whether its conduct was directed at the injured party or not. This interpretation is not supported by this Court's analysis in *Lewellin* and flies in the face of the public policy limiting absolute liability, as plainly stated by this Court in that opinion. *Lewellin*, 564 N.W.2d at 66 ("In applying our dog

owner's liability statute, public policy and legislative intent are best served by limiting proximate cause to direct and immediate results of the dog's actions..."). Indeed, it is difficult to envision a situation involving a dog-related injury that would not invoke statutory liability under the Court of Appeals' expansive interpretation of "attacks or injures."

There are any number of conceivable differences in meaning between "attacks" and "or injures," but there must be some limitation with respect to the use of such meanings in establishing statutory liability under § 347.22. Further, this is not a situation where "or injures" is rendered superfluous by *not* differentiating based on "focus" or "directed" conduct. As previously noted, this Court has already supplied an interpretation and differentiation that supplies clear and significant meaning to both terms. This Court's analysis in *Lewellin* would appear to contemplate the most obvious, easily applied and appropriate differentiation between the terms "attack" and "or injures." The Court of Appeals' interpretation, on the other hand, is vague, difficult to apply and "extend[s] absolute liability beyond its intended purpose and reach." *Id.* at 65. This interpretation cannot and should not be the standard for establishing the kind of "radical" liability imposed by § 347.22. Moreover, as *Lewellin* already addressed the interpretative issues presented by "attacks or injures," that interpretation remains the controlling precedent for this case.

b. "Directed at" Language in *Lewellin* Supplies "Focus" Element

In addition to supplying a new and unnecessary interpretation of "attacks or injures," the Court of Appeals disregarded this Court's significant references to and

reliance upon conduct "directed at" the injured party in *Lewellin*. In *Lewellin*, this Court specifically explained that the phrase "or injured" did not imply an expanded chain of causation. *Id.* at 64. Its examples of "or injures" situations plainly envisage conduct "directed at" the injured party: (1) when a dog exuberantly **jumps upon**, or (2) unintentionally **runs into** a person and injures that person. *Id.* For further clarity on this subject, when explaining why there was not "direct and immediate" connection to the dog's actions and in the injury sustained in *Lewellin*, this Court specifically noted that "[t]he dog's conduct was directed at the driver of the car." 465 N.W.2d at 66. The logical inference from this statement, and that set forth in *Mueller*, is that therefore the dog's conduct was *not* "directed" at the injured party. *See Mueller*, 512 N.W.2d at 911 ("in *Lewellin*, the dog focused its conduct on the driver rather than on the injured child...").

The Court of Appeals wholly failed to address the above language in its opinion on this matter and solely looked to this Court's interpretation of "attacks or injures" in determining whether a "focus" element should be or is part of establishing statutory liability under § 347.22. *See Anderson*, 802 N.W.2d at 836 (explaining that there is nothing in the supreme court's interpretation of "attacks or injures" or in the statute itself that would require the dog to be "focused" on the injured party). When read as a whole, *Lewellin* clearly establishes a requirement that the dog's conduct be "directed at" or, as the Court of Appeals put it in *Mueller*, "focused" upon the injured party in order to establish "the radical kind of liability that [§ 347.22] imposes." *Lewellin*, 465 N.W.2d at 66. This Court's analysis in *Lewellin* did not begin and end with its discussion of "attacks or injures." Rather, it went on for another two pages discussing the requirements

for legal causation and the corresponding relevance of whom or what the dog's conduct targeted.

The Court of Appeals is not free to simply pick and choose which sections of this Court's opinions it will apply, but that is exactly what it did here. By failing to take into consideration the full text of *Lewellin* and in fact, the most relevant portion of that opinion, the Court of Appeals wrongly concluded that "Bruno's focus on Tuffy at the time of the attack does not shield [the Christophersons] from liability ... under the statute" and this holding must be reversed.

E. PUBLIC POLICY AND CLARITY OF CASE LAW

Finally, it should be noted that even if there was some efficacy to the Court of Appeals' expanded scope of liability under § 347.22, this would not be an appropriate case in which to address such an expansion. Part of Anderson's argument, which the Court of Appeals agreed with, is that the "focus" element "introduced a subjective element into this strict-liability statute and compels a consideration of where the dog was directing its attention at the time of the attack." *Anderson*, 802 N.W.2d at 836. However, unlike the *Robinson* case cited by Anderson, in the case at hand, it is both clear and undisputed that the dog was *not* focused upon or in any way directing its conduct towards Gordon Anderson prior to his injury. *See Robinson v. Robinson*, C6-98-815, 1998 WL 901766 (Minn. Ct. App. Dec. 29, 1998) (unpublished and attached hereto) ("...the word "focus" introduces a subjective element into this strict liability statute, in that it compels the trier-of-fact to consider whether the subject dog was "directing" or "concentrating" its attention at the injured person.").

The record shows that Bruno ran from the Christopherson yard and headed directly towards Tuffy. Bruno never growled, bit or showed any sign of aggression toward Anderson himself. Add.11. Instead, Bruno ran at Tuffy, bit Tuffy in the chest, and held on to the smaller dog until the entire incident was over. Mr. Anderson testified:

> Q: And once he grabbed onto Tuffy, once he bit Tuffy, did he ever let go until the very end when the incident was over?
>
> A: No.
>
> Q: In other words, he didn't bite Tuffy three, four times. He just bit him once and held on?
>
> A: Yes.
>
> Q: From beginning to end?
>
> A: Yes.
>
> Q: And during that time is when you were trying to separate the dogs?
>
> A: Yes.

Add.9-Add.10.

> Q: And it doesn't sound like at any time the dog tried to bite you. He was focused on Tuffy, huh?
>
> A: Yes.
>
> Q: All right. And it sounds like he was focused on Tuffy from the moment he came charging out of the yard; is that right?
>
> A: Yes.

Add.11. Subjectivity does not enter into the equation in this case. There is no question as to where or upon whom Bruno directed his actions. Gordon Anderson voluntarily and

purposefully inserted himself into an ongoing dog fight and as a result of that action, injured himself. As applied here, the "focus" or "directed at" element is not problematic, but instead provides a necessary and logical limit to the "radical" kind of liability imposed by § 347.22. If Minnesota were to depart from its established requirement that the dog's conduct be somehow "directed at" the injured party, this would not be the time to do so.

IV. AS A MATTER OF LAW, GORDON ANDERSON'S ACTIONS CONSTITUTE "INTERMEDIATE LINKAGE", THEREBY BREAKING THE CHAIN OF CAUSATION REQUIRED UNDER MINN. STAT. § 347.22 AND *LEWELLIN*

Regardless of the "focus" question discussed above, it is clear and undisputed that in order to invoke the absolute liability imposed by § 347.22, Anderson's injury has to be the "direct and immediate result" of Bruno's actions and not the result of "intermediate linkage" or and an additional "link in the chain of causation." *Lewellin*, 465 N.W.2d at 65-66. The existence of proximate cause is generally a question of fact, but it may be resolved as a matter of law if the evidence would permit reasonable minds to arrive at only one conclusion. *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn.1995). Here, the Court of Appeals held that a material issue of fact existed as to whether Anderson's injuries were the "direct and immediate result" of Bruno's conduct and accordingly, it reversed the trial court's grant of summary judgment on this basis. As will be shown below, in arriving at this decision, the Court of Appeals again disregarded large portions of this Court's *Lewellin* opinion, rendering certain aspects of that opinion meaningless

and leaving the case law on this issue unclear. Its decision is contrary to the holding in *Lewellin*, as well as public policy and must be reversed.

A. *LEWELLIN V. HUBER*

In *Lewellin*, as quoted above, this Court explained that:

> There was no direct, immediate connection between the dog's behavior and the child lying in the ditch. The dog's conduct was directed at the driver of the car. **The driver's subsequent efforts to handle the dog's distracting but nonattacking conduct introduced another link in the chain of causation.** Though there may be causation in fact here, this chain of events is too attenuated to constitute legal causation for the radical kind of liability that the statute imposes.

Id. (emphasis added). Looking at this reasoning in conjunction with this Court's earlier reference to "direct and immediate" meaning "without intermediate linkage," it is logical to conclude that the driver's conduct in *Lewellin* was an example of "intermediate linkage" sufficient to break the chain of causation and preclude liability under § 347.22.

B. APPLICATION OF *LEWELLIN* TO THE CASE AT HAND

Applied here and contrary to the Court of Appeals' holding, there can be no question that Gordon Anderson's conduct represents a clear instance of "intermediate linkage" that precludes absolute liability under *Lewellin*. Indeed, the case for "intermediate linkage" is arguably stronger in the present case than that of *Lewellin*. Unlike the driver in *Lewellin*, who was distracted by the dog and accidentally drove into the ditch, Anderson chose to put himself in harm's way and interfere in an ongoing dog fight. He voluntarily and purposefully inserted himself into that risky situation and as a

result of *that* action, lost his balance, fell and injured himself. This chain of events is undisputed and well established by the record.

According to Anderson's own testimony, he fell while in the act of trying to separate the two dogs:

> Q: Just so I understand, you lost your balance because you were in the midst of trying to separate the dog from Tuffy?
>
> A: Yes.

Add.11. This is reinforced by the police report in this matter, as well as Anderson's Interrogatory responses. The police report states: "Mr. Anderson stated he injured his right leg and hip while trying to kick the pitbull[2] off of the small dog he was walking." Add.13-Add.14. In his Interrogatory answers, Anderson writes that he: "tried to help his dog, and in trying to rescue his dog during the attack, fell down fracturing his right hip and injuring his right leg." Add.15-Add.16.

If Anderson's voluntary, after-the-fact intervention in a dog fight does not constitute "intermediate linkage" or an additional "link in the chain of causation," what does? The Court of Appeals glossed over this aspect of the case and simply relied upon the unrelated facts that Bruno's attack on Tuffy was an "affirmative act" and that it was Anderson himself who was injured. *Anderson*, 802 N.W.2d at 836. Its decision suggests that as long as (1) the dog performed an "affirmative act" and (2) the injuries were not sustained by a third party, the chain of causation will never be too attenuated and absolute liability under § 347.22 may exist. *Id.* ("...the question remains whether respondents are

[2] There is no evidence that the dog was a pitbull and the Christophersons have vehemently denied that the dog was a pitbull. However, for the purposes of the summary judgment motion, and to the extent that the dog's breed is material, the fact was unchallenged at the hearing.

nevertheless relieved from strict liability because the chain of events between the dog's actions and the injury was too attenuated to impose strict liability on the dog's owner. But no such attenuation is present here: appellant's effort to save Tuffy from Bruno's attack did not result in an injury to a third party, but to appellant himself ... [and] there is not dispute that Bruno's attack on Tuffy was an affirmative act that prompted appellant's response..."). This reasoning oversimplifies and misstates controlling case law. More specifically, under *Lewellin*, this analysis in entirely insufficient, as it disregards significant portions of this Court's opinion and it renders certain aspects of that opinion effectively meaningless, *i.e.* "without intermediate linkage." *See Lewellin*, 465 N.W.2d at 65-66.

The fact that Anderson himself was not personally implicated or threatened by Bruno's "affirmative act" was not addressed by the Court of Appeals. Neither was the fact that Anderson's injuries solely resulted from his interference in the dog fight. Absent Anderson's intervention, Bruno's conduct alone would not have resulted in injury to Anderson. As explained above, it is undisputed that Bruno's actions were at all times focused on and directed only at Tuffy. All Anderson had to do was stay out of the fight and he would have remained injury-free.

If under these circumstances Anderson's injuries in this case are "direct and immediate results of the dog's actions," what injuries would not satisfy this standard? Could Anderson invoke liability under § 347.22 if he had run across the street to intercede in the fight? Would it still apply if it were not his dog? Based on the Court of Appeals' holding in *Anderson*, it would appear possible for statutory liability to exist in

such seemingly extraordinary circumstances. This interpretation improperly broadens the scope of absolute liability far beyond its intended purpose and is contrary to both public policy and controlling case law. In accordance with *Lewellin*, Anderson's interference in the dog fight must be considered "intermediate linkage" sufficient to break the chain of causation and preclude liability under § 347.22. The record on the issue of Anderson's intervention is not only clear, but also undisputed. No material issues of fact exist so as to allow reasonable minds to find statutory liability for Anderson's injuries. The Court of Appeals' decision on this issue must be reversed.

C. CLARITY OF CASE LAW AND PUBLIC POLICY

Finally, the Court of Appeals' opinion is not reconcilable to either those cases establishing or failing to establish liability under § 347.22. For example, how can this case be reconciled with that of *Lewellin*? The intermediary act of Anderson intervening in the dog fight is plainly analogous to the driver's conduct after being distracted by the dog in *Lewellin*. *See Lewellin*, 465 N.W.2d at 66. In *Lewellin*, this Court specifically noted that while the dog's conduct may be a cause in fact of the child's injuries, those injuries were not the "direct and immediate" result of the dog's conduct. *See id.* Therefore, statutory liability could not exist. *See id.* With regard to legal causation and the addition of a significant event breaking that chain of causation, *Lewellin* and *Anderson* cannot be practically distinguished. By finding that Anderson's injuries could be the "direct and immediate result" of Bruno's conduct, the Court of Appeals failed to adhere to controlling case law and effectively attempted to overrule this Court's decision in *Lewellin*.

Consistency is no less problematic in looking at the *Anderson* decision from the other side. How can it be reconciled with the holdings in cases finding legal causation, such as *Morris* and *Boitz*? Anderson was not being attacked or chased by Bruno. *See Morris*, 488 N.W.2d 508. He was not injured as a result of trying to avoid or escape Bruno. *Id.* He was not even inadvertently "bumped into" in the course of Bruno's rush towards Tuffy. *See Boitz*, 405 N.W.2d 907. Rather, *after* Bruno reached Tuffy, Anderson inserted himself into the dog fight and *as a result of that action*, lost his balance and fell. *See supra* Statement of Facts at p. 4. Bruno's actions alone did not result in Anderson's injuries. But for his decision to intercede, Anderson would have had no cause to even come in contact with Bruno. Anderson's injuries were seemingly the "direct and immediate result" of his own actions and not those of Bruno.

At no point prior to the Court of Appeals' decision here have Minnesota courts suggested an extension of absolute liability sufficient to embrace the facts of this case. Just as in *Lewellin* and *Mueller*, "this chain of events is too attenuated to constitute legal causation for the radical kind of liability that the statute imposes" and "[i]mposing absolute liability under these circumstances would extend the statute beyond its intended purpose." *Lewellin*, 465 N.W.2d at 66; *Mueller*, 512 N.W.2d at 911. The trial court's grant of summary judgment on this issue was appropriate and the Court of Appeals' decision should be reversed.

V. AS A MATTER OF LAW, DENNIS CHRISTOPHERSON DID NOT AND COULD NOT BECOME A "HARBORER" UNDER MINN. STAT. § 347.22 BY SIMPLY ALLOWING THE DOG ONTO HIS PROPERTY AND THEREFORE CANNOT BE HELD STRICTLY LIABLE FOR ANDERSON'S CLAIMED INJURIES

The Court of Appeals held that a material issue of fact existed as to whether Dennis Christopherson could be a "harborer" under § 347.22. Its decision focused on the validity of a definition of "harborer" from *Tschida v. Berdusco* that defines "harborer" as "giving lodging, shelter, or refuge to a dog for longer than a limited time or for more than a limited purpose." 462 N.W.2d 410, 411 (Minn.App.1990), *review denied* (Minn. Dec. 20, 1990). Here, the Court of Appeals found that in *Tschida*, it misinterpreted this Court's language in *Verrett v. Silver*, 244 N.W.2D 147, 149 (Minn.1976) and accordingly, the above definition was not accurate and was improperly relied upon by the trial court in this case. The Court of Appeals then simply concluded that:

> Because *Tschida* is not on point and because the language relied on by the district court does not accurately reflect the Minnesota Supreme Court's definition of harboring identified in *Verrett*, we reverse the district court's conclusion that as a matter of law Dennis was not harboring Bruno. Because Dennis was arguably affording lodging, providing shelter, or giving refuge to Bruno by allowing Neil to keep Bruno at his home, this question too should be resolved by a jury.

Anderson, 802 N.W.2d at 838. In reaching this conclusion, the Court of Appeals failed to take into consideration the underlying and more significant issues relating to Dennis Christopherson's residence status and personal involvement in the presence of Bruno at the location of the incident, upon which the record is both clear and undisputed. These issues were properly briefed and argued at each stage of this litigation. By failing to

address such issues, the Court of Appeals ignored controlling case law and expanded the scope of "harborer" far beyond that which is considered practicable or reasonable in most, if not all, jurisdictions interpreting dog bite liability. The only possible result under a thorough analysis of this issue is that, as a matter of law, Dennis Christopherson is not a "harborer" and accordingly, the Court of Appeals' decision should be reversed.

A. *VERRETT V. SILVER* AND *GILBERT V. CHRISTIANSEN*

In *Verrett*, the sole issue on appeal was the propriety of a jury instruction concerning who could be considered a "harborer" or "keeper" of a dog under § 347.22. *See* 244 N.W.2d at 149. In relevant part, the jury instruction read as follows:

> Harboring or keeping a dog means something more than a meal of mercy to a stray dog or the **casual presence of a dog on someone's premises**. Harboring means to afford lodging, to shelter or to give refuge to a dog...

Id. at 149. This Court held that the instruction given "properly states the law concerning the liability of one who harbors or keeps a dog as declared by courts of other states" and that it was properly submitted to the jury in *Verrett*. *Id.*

One year later, in *Gilbert v. Christiansen*, this Court examined liability under § 347.22 for a landlord (Towns Edge) that allowed a tenant to keep a dog on its property. 259 N.W.2d 896 (Minn.1977). This Court held that Towns Edge should not be liable and explained that, **"the mere right to exclude dogs" is not a sufficient ground to make the landlord "an insurer of the conduct of dogs residing" on its property.** *Id.* at 897. This Court went on to cite with approval Section 15, comment a of the Restatement (Second) of Torts:

> **The possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harborer of the animal.**

Gilbert, 259 N.W.2d at 897-98 (*citing* Restatement (Second) Torts §15, cmt a (1977)) (emphasis added).

B. APPLICATION OF RELEVANT CASE LAW TO *ANDERSON*

A brief review of the facts of this case may be beneficial before addressing the "harborer" issue and its application to Dennis Christopherson. The incident at issue occurred outside a property owned by Dennis Christopherson in Andover, Minnesota. *See supra* Statement of Facts at p. 4. However, at the time of the incident, Dennis Christopherson and his wife had resided in South Dakota for approximately 7 years. *See supra* Statement of Facts at p. 4. They allowed their children, who also resided in South Dakota, to stay at the property in Andover when they were in town. *See supra* Statement of Facts at p4. . During the time period in question here, Dennis Christopherson's son, Neil was staying at the Andover house with his girlfriend and their newly adopted dog. *See supra* Statement of Facts at p. 4-5. The couple was in town visiting friends. *See supra* Statement of Facts at p. 4. Neither Dennis Christopherson nor his wife was present at any time during their son's visit. *See supra* Statement of Facts at p. 4-5.

First, as explained above, it well established law in Minnesota that the "mere right to exclude dogs" is not a sufficient ground to make a landlord an "insurer of the conduct of dogs residing" on that property. *Gilbert*, 259 N.W.2d at 897. Furthermore, by itself,

"the possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harborer of the animal." *Id.* (*citing* Restatement (Second) of Torts § 514, cmt a (1977)). Section 514, comment a goes on to provide a number of illustrative examples, which are particularly significant when applied to the facts at issue here:

> Thus a father, on whose land his son lives in a separate residence, does not harbor a dog kept by his son, although he has the power to prohibit the dog from being kept and fails to exercise the power or even if he presents the dog to his son to be so kept. The same is true when a master permits his servant to keep a dog in a house or part of the premises that is given over to the exclusive occupation of his servant. So, too, he does not become a harborer of a dog that he permits a friend to keep on his land unless he takes it into his home and thus makes it, as it were, a member of his household. Similarly, a shopkeeper does not harbor dogs that he permits his customers to bring into his shop, nor does the permission given to a particular motorist or to motorists in general to camp on a part of the possessor's land make him the harborer of those animals which, as he knows, the motorists are likely to bring upon the land.

Restatement (Second) of Torts § 514, cmt a (1977).

There are absolutely no additional facts in the record of this case that would suggest a situation unique from those addressed in *Gilbert* and § 514, comment a. Dennis Christopherson was nothing more than the possessor of the property where Bruno was temporarily staying. At no time during Bruno's stay on the property was Dennis Christopherson present. If liability could not exist in *Gilbert*, where the dog permanently resided on the property, how could it exist here where the dog was only present for a week long visit? Even assuming that Dennis Christopherson had expressly provided Neil with permission to bring his dog, which he denies doing, under *Gilbert*, this would not be

a sufficient ground to hold him strictly liable for the subsequent conduct of that dog. Under the plain meaning and application of controlling case law to the undisputed facts of this case, Dennis Christopherson cannot be a "harborer" under § 347.22 and strict liability cannot apply.

Second, as this Court stated in *Verrett*, "

> Harboring ... means something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog.

244 N.W.2d at 149. The presence of Bruno on property owned by Dennis Christopherson is exactly the kind of "casual" situation that this Court explained did *not* confer statutory liability. The dog merely accompanied his owner, Neil Christopherson, onto the property during a short visit. Dennis Christopherson was not present for any of this visit and there is nothing in the record to suggest that Bruno's presence on the property was the result of any kind of affirmative act or intention by Dennis Christopherson to care for the dog.

This Court's language in *Verrett*, as cited above, combined with the holding in *Gilbert*, clearly indicates that a "harborer" must actively *do* something in order to afford lodging, provide shelter or give refuge to a dog. *Id.* The terms "shelter" and "give refuge" plainly imply a conscious aim to care for or protect the dog in question. Logically, the term "afford lodging" should be similarly understood and interpreted. In order to impose statutory liability as a "harborer" under § 347.22, there must be some minimal showing of care for the dog by the alleged harborer. Such a showing must go

beyond simple ownership of the land upon which the dog was present. Gordon Anderson can point to no additional facts apart from Dennis Christopherson's legal ownership of the property in question. Accordingly, Dennis Christopherson cannot be a "harborer" under §347.22 and the Court of Appeals' decision to the contrary must be reversed.

C. CASE LAW BEYOND MINNESOTA

Dennis Christopherson's arguments against the Court of Appeals' expansive interpretation of the term "harborer" are further supported by a wealth of case law from around the Country. For more than a century, courts outside Minnesota have repeatedly addressed the issue of who can be statutorily liable for the actions of a dog. *See generally,* 64 A.L.R.4th 963 (Originally published in 1988) (providing a comprehensive discussion on rulings from around the Country regarding the definition of "harborer" and "keeper" under dog bite liability statutes and under common law). From these cases and the case law they created, a relatively consistent set of standards and requirements has arisen in the realm of dog bite liability. Part of the reason for this level of consistency is that dog bite liability largely arises from a common law notion of liability based on "ownership" of the dog, which includes the legal owner, a keeper or a harborer. Many states have codified this common law idea into statute, but for the most part, the analysis remains identical.

It should be noted that in a number of jurisdictions, there is not a meaningful differentiation between "keeper" and "harborer." *See e.g., Buturla v. St. Onge*, 519 A.2d 1235 (Conn.App.1987). Rather, "harborer" is simply part of the definition of "keeper." *Id.* In this way, Minnesota's dog bite liability is already seemingly broader than that of

other states. The Court of Appeals' decision in *Anderson* would remove Minnesota from the rest of the pack entirely and provide for an unprecedented scope of liability. Such an extension in liability is contrary to public policy, as well as a multitude of case law, including that put forward by this Court in *Gilbert*, and therefore must be reversed.

This Court cited to a number of decisions outside of Minnesota in support of its decision in *Gilbert*, including the following: *Hagenau v. Millard*, 195 N.W. 718 (Wis.1923) (holding that employer who provided employee living quarters and also sublet another room of the building to the employee's husband was not a keeper of the employee's dog); *Denagy v. Doscher*, 243 N.Y.S.2d 575 (Sup.Ct.1963) (holding that plaintiff was not entitled to recover from landlord on basis that landlord leased property to owner of dog with knowledge that dog was vicious); *Collins v. Otto*, 369 P.2d 202 (Colo.1970) (affirming dismissal of landlord, as landlord could not be liable for the injuries sustained by the injured party); *Harris v. Turner*, 466 P.2d 202 (Wash.1970) (holding that statement by defendant that owners of land were taking care of dog owned by occupants of land on day dog was involved in collision with plaintiff's motorcycle did not establish that owners of land were owners of dog within meaning of statutes pertaining to harboring vicious dogs).

Since *Gilbert*, a number of more recent cases have been decided that continue to display and apply the same basic reasoning set forth by this Court in *Gilbert*. The common thread in these cases continues to be a requirement of some basic degree of care for or involvement with the dog so as to impose statutory liability as a "harborer." A number of cases go a step further and require a showing of some level of custody or

control for the dog by the alleged "harborer." The following is but a small sampling of these cases.

In *Buturla v. St. Onge*, summary judgment was affirmed in favor of landlords in a dog bite case involving a tenant's dog kept with the landlord's consent. *See* 519 A.2d 1235 (Conn.App.1987). The court's analysis looked to the traditional definition of "harborer" from Webster's, as well as that found in Words & Phrases and Corpus Juris Secundum (CJS). *Id.* at 1236. Both Words & Phrases and CJS refer to the case of *Markwood v. McBroom,* 188 P. 521 (Wash.1920) and state that **a harborer of a dog is "one who treats a dog as living in his home and undertakes to *control* the dog's actions."** 39A C.J.S. 354; 19 Words & Phrases (West 1970), p. 96 (emphasis added). The court went on to hold that in order to harbor or possess a dog, some degree of control must be exercised over the dog. 19 A.2d at 1237. Therefore, it declared that there was no basis for the claim that the landlords afforded lodging to, sheltered or gave refuge to the dog. *Id.* at 1237.

The Illinois Supreme Court addressed a similar question as that presented in *Buturla* in *Steinberg v. Petra*, 504 N.E.2d 1263 (Ill.1986). In *Steinberg*, the dog belonged to the ground-floor tenants of the landlord's two-story house. *Id.* The landlord's manager gave the tenant's permission to erect a fence in the backyard and keep a dog. *Id.* The minor victim, by and through his mother, brought the action against the absentee landlord of the tenants shoe dog had bitten the boy arguing that the landlord had "harbored" the dog within the meaning of the applicable statute. *Id.* The Illinois Supreme Court reversed a jury verdict and held as a matter of law that the landlords could

not be "harborers" under the statute and therefore could not be statutorily liable for the conduct of the dog. *Id.* at 1266. Specifically, the court stated that it believed the statute "**contemplates some degree of care, custody or control on the part of a harborer** or keeper, and that was not shown here." *Id.* (emphasis added).

Pursuant to statutory language identical to that of Minnesota, Wisconsin has repeatedly addressed the definition and application of the term "harborer." One of the first such decisions was *Hagenau v. Millard*, 195 N.W. 718 (Wis.1923). In *Hagenau*, the Wisconsin Supreme Court defined "keeper" as one who harbors the animal and then proceeded to address the meaning of "harbor" for purposes of determining liability. *Id.* Specifically, the court noted that "**the word 'harbor' in its meaning signifies protection**." *Id.* at 719 (emphasis added). Accordingly, the court went on to hold that "where a servant or tenant occupies a distinct portion of the premises of the master, where the dogs are kept, the master is not the keeper." *Id.*

Some years later, the Wisconsin Court of Appeals heard and decided *Pattermann v. Pattermann*, 496 N.W.2d 613 (Wis.App.1992). In *Pattermann*, the victim sued the owner of a home in which the bite occurred. *Id.* The injuries occurred as the Pattermann family assembled at the defendant homeowner's house prior to a family reunion. *Id.* at 615. One of the defendant's sons had brought his dog with him. *Id.* The defendant allowed the dog to be placed in the side entryway, the common entry into the house. *Id.* Shortly thereafter, another family member arrived, bent down to pet the dog and was bit in the face. *Id.* By this point in time, Wisconsin (like Minnesota) differentiated between the terms "keeper" and "harborer", as used in its dog bite statute. However, in its

analysis, the court still turned to the *Hagenau* decision and its language stating that "the word 'harbor' ... signifies protection." *Id.* at 616. Combined with this Court's discussion in *Verrett* and *Gilbert* that "harboring" entails "more than a meal of mercy ... of the causal presence of a dog on someone's premises," the court in *Pattermann* held that:

> **Strict construction of the word "harbor" suggests that [the dog's] transient invasion of Sallie's home while the family finished preparations for their trip is insufficient to trigger the statute.**

Id. (emphasis added). Although here, Bruno stayed at Dennis Christopherson's property for a somewhat longer period of time than that in *Pattermann*, he was by no means a permanent or long-term resident of the property.

Approximately six years after *Pattermann*, Wisconsin took up the issue of landlord liability under its dog bite statute. In *Malone*, the court explained that the transient nature of the dog's presence is not the sole factor in determining liability and liability may not exist even in situations where the dog permanently resides on the property with the permission of the landowner. *See Malone by Bangert v. Fons*, 580 N.W.2d 697, 706 (Wis.App.1998). The court stated:

> ...a landlord does not become a harborer of a tenant's dog merely by permitting his or her tenant to keep the dog. Because there is no evidence that Fons, aside from tacitly permitting Garner to keep a dog in the house, afforded lodging, or gave shelter or refuge to the dog, the trial court correctly found that Fons could not be liable under § 174.02.

Id. As mentioned above, the court recognized that this case differed from *Pattermann* because the dog was not "transiently" on the property, and explained that:

> *Pattermann* does not make every person who happens to have a dog on his or her premises, whether the premises are leased or not, a "harborer" of the dog merely because the dog has been on the person's premises for more than a "transient" period of time. *Pattermann* merely shows that a person will *not* be considered a harborer if a dog has made only a "transient invasion" of the premises.

Id.

As shown by the above cases, and particularly those of *Pattermann* and *Malone*, the relevant issue in determining liability as a "harborer" must be that person's level of involvement with or control over the dog. Although the facts of this case lie somewhere between *Pattermann* and *Gilbert*, it is clear that they do not and cannot support a finding that Dennis Christopherson was a "harborer" under Minnesota's dog bite statute. For all intents and purposes, Dennis Christopherson was nothing more than an absentee landlord. He exercised no personal care, custody or control over Bruno at any point during Bruno's stay on the property. Affirming the Court of Appeals' decision on this issue would effectively render the limitations of liability under § 347.22 meaningless and seriously call in question the continued efficacy of *Gilbert*. Liability could subsequently attach to the legal owners, "keepers" and anyone who owned the property upon which the dog was present at the time of the incident. Such an expansion of strict liability far exceeds the purpose of the statute and is contrary to public policy. Accordingly, the Court of Appeals' decision must be reversed.

CONCLUSION

Dennis Christopherson respectfully requests that the judgment and orders of the trial court which are on appeal be affirmed. First, this Court plainly adopted a

requirement in *Lewellin* that the dog's conduct somehow be "directed at" the injured party. The Court of Appeals failed to take this into consideration when it disagreed with its own language in *Mueller*. In this case, it is undisputed that *at no point in time* was Bruno focused upon or otherwise directing his conduct towards Gordon Anderson. Accordingly, the Court of Appeals' decision must be reversed and as a matter of law, Dennis Christoperson cannot be found strictly liable under § 347.22.

Second, even if the Court of Appeals rightly found that the "focus" element was only one of many factors to consider in determining liability, Gordon Anderson's act of intervening in the dog fight constitutes "intermediate linkage" such as to break legal causation and preclude statutory liability for his subsequent injuries. To hold otherwise would be to render this Court's language in *Lewellin* virtually meaningless and expand statutory liability far beyond the legislature's intended purpose. Similar to the theory behind provocation, how can an individual be liable for the voluntary and reckless acts of another? How can Dennis Christopherson be liable for Gordon Anderson conscious decision to interfere in an ongoing dog fight? The fact of the matter is that Gordon Anderson's interference broke the chain of causation. While Bruno's conduct may be a cause in fact of Anderson's injuries, just as in *Lewellin* and *Mueller*, the "chain of events is too attenuated to constitute legal causation for the radical kind of liability that the statute imposes" and "[i]mposing absolute liability under these circumstances would extend the statute beyond its intended purpose." *Lewellin*, 465 N.W.2d at 66; *Mueller*, 512 N.W.2d at 911. Accordingly, the Court of Appeals' holding on this issue must be reversed.

Finally, under *Gilbert* and as a matter of law, Dennis Christopherson cannot be considered a "harborer" under § 347.22 when his sole involvement in the incident stems from his ownership of the property. Dennis Christopherson was not present for any of his son's stay on the property and there are no facts in the record to suggest that he evinced any kind of intention to care for Bruno. While it is true that Dennis Christopherson was not a landlord in the traditional sense, as exhibited in *Gilbert*, his situation and relationship with Bruno cannot be meaningfully distinguished. Wisconsin addressed the temporary house guest scenario in *Patterman* and concluded that liability could not exist for the homeowner based on the dog's "transient" presence on the property. *See* 496 N.W.2d at 616. The Wisconsin Supreme Court later clarified this position in *Malone* and held that the true inquiry is whether the landowner did something more than simply permit the dog's presence on the property. *See* 580 N.W.2d at 706. Without such an additional showing, a landowner cannot be considered a "harborer" for purposes of statutory liability. *See id.* This sentiment is similarly reflected in other dog bite/animal injury cases from around the Country. *See infra.* Without this kind of limitation here in Minnesota, liability would extend far beyond that intended by the legislature and, as opined by this Court in *Lewellin*, exist contrary to public policy. 465 N.W.2d at 66. For these reasons, Dennis Christopherson cannot be considered a "harborer" under § 347.22 and the Court of Appeals' decision on this issue must be reversed.

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Respectfully submitted,

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