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STATE OF MINNESOTA
IN SUPREME COURT
A11-191

Gordon Helmer Anderson, et al.,

Plaintiff-Respondent,

vs.

Neil Raymond Christopherson,

Defendant,

and

Dennis Christopherson,

Defendant-Appellant.

BRIEF OF *Amicus Curiae*
MINNESOTA ASSOCIATION FOR JUSTICE

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INTRODUCTION

Amicus Minnesota Association for Justice (MAJ)[1] submits this brief to aid the court in clarifying the responsibility of one who "harbors" a dog under Minn. Stat. § 347.22 and in defining the obligation of a claimant to express the "focus" of a dog in presenting a *prima facie* statutory claim.

Amicus MAJ[2] summarizes the history, development and application of both the "harboring" and the "focus" considerations of the statute.

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[1] Pursuant to Minn. R. Civ. App. Prac. 129.03, it should be noted that neither MAJ nor the writer of this brief has received or been promised any monetary or other compensation in regard to this case, and neither has a financial stake in the outcome of this case. No one affiliated with a party has participated in writing any part of this brief.

[2] Defendant-Respondent Dennis Christopherson served and filed a petition for Rule 117 review of the August 8, 2011 Court of Appeals decision, which was granted by the Supreme Court on November 15, 2011. The court granted leave to MAJ to submit a brief as *amicus* on November 22, 2011.

ANALYSIS

I. Whom does the Statute make Liable for the Injurious actions of a Dog?

While the statute has evolved over time, it has always extended liability to persons who "own," "harbor" or "keep" a dog,[3] and does so at present, providing:

> 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

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[3] The statute as originally enacted in 1951 limited liability to injuries by dogs in urban areas, and provided:

> If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be in any urban area, 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. The term "dog" includes both male and female of the canine species.

Act of Apr. 12, 1951, 1951 Minn. Laws, ch. 315, § 1. In 1980 it was amended to delete the reference to urban areas, extending liability throughout the state, and to make clear that while other classes of persons were liable in addition to "owners" that an "owner" had primary liability:

> If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be ~~in an urban area~~, 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 <u>but the owner shall be primarily liable</u>. The term "dog" includes both male and female of the canine species.

Act of Mar. 3, 1980, 1980 Minn. Laws, ch. 347, § 1 (~~strike-through~~ is deletion, <u>underlining</u> is addition). It was last changed by Act of Mar. 12, 1986, 1986 Minnesota Laws, ch. 444, to achieve gender neutrality, without the intent of altering substantive meanings. *Id.*

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.[4]

II. What Meaning has been Ascribed to the terms Owner, Harborer, and Keeper?

A. An Owner means a person with property rights

While undefined by the statute, the plain meaning of the term "owner"[5] is someone who has "a right of property in a dog."[6] The statute states that "[t]he term 'owner' includes any person harboring or keeping a dog." Minn. Stat. § 347.22. Thus the legal duties exacted of an "owner" are also exacted of one who "harbors" or "keeps" a dog.

B. A Harborer is one who affords shelter to a dog temporarily

The Minnesota Supreme Court declared 35 years ago in *Verrett v. Silver*,[7] that

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[4] Minn. Stat. § 347.22 (2010).

[5] As a fundamental principal of statutory construction, in the absence of an ambiguity, the language of a statute is to be given its "plain meaning." *See* Minn. Stat. § 645.08(1) (2010) ("words and phrases are construed according to rules of grammar and according to their common and approved usage"); *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) ("We review the interpretation of statutes *de novo*. . . . The touchstone for statutory interpretation is the plain meaning of a statute's language.") (Citing Minn. Stat. § 645.16 (2004)). "Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007).

[6] *Tschida v. Berdusco*, 462 N.W.2d 410, 412 (Minn. App., 1990), *review denied* (Minn., Dec. 20, 1990), *quoting* ILL. REV. STAT., ch. 8, ¶ 352.16, § 2.16 (1987). This is consistent with the definition ascribed by BLACK'S LAW DICTIONARY, 996 (9th ed. 2009) ("person in whom is vested the ownership, dominion, or title of property.").

[7] 309 Minn. 275, 244 N.W.2d 147 (1976).

while "[h]arboring 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,"[8] that "Harboring means to afford lodging, to shelter or to give refuge to a dog."[9] The temporary nature of "harboring" is made clear by the court's definition of the "keeper" of a dog.

C. Keeping involves broader responsibility or longer term care giving

According again to *Verrett*, " Keeping a dog, as used in the statute before us, implies more than mere harboring of the dog for a limited purpose or time."[10]

D. An Actor's status is a fact issue to be resolved by a jury

In *Verrett*, the dog's owner was temporarily staying at the defendant's house. "Defendant, after the dog had been in the home about a week, left for a vacation and returned home the day after the dog-bite incident."[11] The supreme court held that "whether defendant was harboring or keeping the dog, under the peculiar facts of this case, was an issue of fact which was properly submitted to the jury with instructions that conveyed the meaning of the statute."[12]

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[8] *Id.* at 277, 244 N.W.2d at 149.

[9] *Id.*

[10] 309 Minn. at 277, 244 N.W.2d at 149.

[11] *Id.* at 276-77, 244 N.W.2d at 148.

[12] *Id.* at 278, 244 N.W.2d at 149.

E. Here the Court of Appeals distinguished its earlier ruling in *Tschida* that had implied "harboring" to involve a longer-term undertaking, and confirmed that the language of *Verrett* made "harboring" a shorter-term effort

In addressing the issue of whether the facts in the instant case supported a finding of "harboring," the Court of Appeals looked back at prior definitions of harboring. It noted that the Court of Appeals had previously cited *Verrett* in the case of *Tschida v. Berdusco*, 462 N.W.2d 410, 411 (Minn. App. 1990), *review denied* (Minn., Dec. 20, 1990), as having "defined harboring as giving lodging, shelter, or refuge to a dog for longer than a limited time or for more than a limited purpose,"[13] but observed that *Tschida* was "not an accurate interpretation of the definitions of keeping and harboring identified in *Verrett*."[14] The reason is obvious: *Verrett* actually ruled to the contrary, as *Verrett* declared that under the statute:

> Harboring means to afford lodging, to shelter or to give refuge to a dog. Keeping a dog, as used in the statute before us, implies more than mere harboring of the dog for a limited purpose or time.[15]

The plain language of *Verrett* thus vests "harboring" with the character of a short-term "keeping" of an animal. *Verrett* suggest that while "ownership" is the permanent control

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[13] *Anderson v. Christopherson*, A11-191, - - N.W.2d - - , slip op. at 11 (Minn. App., Aug. 8, 2011) (emphasis added).

[14] *Id.* (emphasis added).

[15] *Verrett v. Silver*, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976), *quoted in Anderson, supra,* slip op. at 10.

and responsibility for management of a dog as an item of personal property,[16] "keeping" is the longer-term dominion over the animal, so as to make the keeper a substitute owner, while "harboring" is a shorter-term keeping, in which the person has assumed certain responsibilities for the animal on a limited basis or for a limited time.

F. The Trial Court's reliance on *Tschida*'s errant definition of harboring was thus an error that had to be reversed, and the meaning restored to the Supreme Court's use of these terms in *Verrett.*

The Court of Appeals noted that the "district court here . . . relied on the . . . quote from *Tschida* to support its conclusion that [Appellant] Dennis [Christopherson] was not harboring [the dog] . . . law because Neil [Christopherson, its owner] was staying at Dennis's house for only a limited period of time and for a limited purpose."[17]

Recognizing that "*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*," the Court of Appeals reversed "the district court's conclusion that as a matter of law [that] Dennis was not harboring [the dog] Bruno."[18] In light of the fact *Verrett* also declared that the issue of one's status toward a dog was an issue of fact for a jury,[19] the Court of Appeals here ruled that since "Dennis was arguably

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[16] "Dogs are personal property" under Minnesota law. *See Corn v. Sheppard*, 179 Minn. 490, 492, 229 N.W. 869, 870 (1930).

[17] *Anderson, supra*, slip op. at 11.

[18] *Id.* at 11-12.

[19] *Verrett*, 309 Minn. at 278, 244 N.W.2d at 149.

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."[20]

The Court of Appeals ruling was thus squarely within the precedent established by *Verrett*, that "harboring" is short-term "keeping" of an animal and that resolution of the factual predicates to "harboring" is a jury task. Only if the Supreme Court wishes to modify existing practice should this case be reversed on the "harboring" issue.

G. *Verrett* establishes a workable and prudent definition of "harboring" and should be maintained by the Supreme Court as the legal test.

The state of Illinois had a statute similar to Minnesota's in all material respects,[21] and its courts have said that:

> Harboring a dog has been defined as "to afford lodging, to shelter or to give refuge to a dog." [citing Minnesota Supreme Court in *Verrett*]. Harboring means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law. [Illinois citations omitted]. The question of whether or not a person is a keeper or harborer of a dog depends upon the peculiar facts and circumstances of each individual case. [Illinois citation omitted].[22]

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[20] *Anderson, supra,* slip op. at 12.

[21] Chapter 8, § 12d of Illinois Revised Statutes (1953), provided that: "If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he 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. The term 'dog' includes both male and female of the canine species." *See McEvoy v. Brown*, 17 Ill. App.2d 470, 474, 150 N.E.2d 652, 653 (Ill. App. 1958)(quoting statute).

[22] *Steinberg by Martinez v. Petta*, 139 Ill.App.3d 503, 507-08, 487 N.E.2d 1064, 1068 (Ill. App. 1985).

Similarly, under Wisconsin Statute § 174.02, a person who owns, harbors, or keeps a dog is liable for damages caused by the dog injuring or causing injury to a person,[23] and there the courts have noted that while the question of "whether a person is one who 'harbors' or 'keeps' a dog is ordinarily a factual question for the fact finder" and "depends upon the peculiar facts and circumstances of each individual case,"[24] the

> distinction between one who "keeps" and one who "harbors" a dog has not been crisp over the years either in the dog injury statutes or in the case law.
>
> "[E]arly Wisconsin cases appear to use these terms interchangeably." In *Hagenau v. Millard*, 182 Wis. 544, 547, 195 N.W. 718 (1923), the court defined a "keeper" of a dog as one who harbored the dog. The court stated that "[t]o be a keeper of a dog, one must harbor the animal, and the word 'harbor' in its meaning signifies protection. . . ." The 1923 statutory provision at issue in *Hagenau* used the words "keeper" and "owner," not the word "harbor." Other 1923 statutory provisions governing dogs used the words "harbors" and "keeps."[25]

The Wisconsin Supreme Court just two years ago explained that:

> In *Hagenau*, the court concluded that the proprietor of a restaurant and lodging house was not the keeper of his employee's dogs when the employee kept the dogs in a separate apartment on the third floor where the employee "maintained a separate and distinct home or place of abode.". . . The distinction between "keep" and "harbor" was discussed more recently by the court of appeals in *Pattermann v. Pattermann*, 173 Wis.2d 143, 496 N.W.2d 613 ([Wis.].App.1992). "Keeping," stated the court of appeals in *Pattermann*, generally requires "exercising some measure of care, custody

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[23] Specifically, while the cited statute explains the liability of an "owner," Wisconsin Stat. § 174.001(5) defines the word "owner" as including "any person who owns, harbors or keeps a dog."

[24] *Hagenau v. Millard*, 182 Wis. 544, 547, 195 N.W. 718, 719 (1923).

[25] *Pawlowski v. American Family Mut. Ins. Co.*, 2009 WI 105, ¶ 23-24, 777 N.W.2d 67, 72-73 (Wis. 2009) (footnotes omitted).

> or control over the dog," while "'harboring' is often defined as sheltering or giving refuge to a dog. Thus, 'harboring' apparently lacks the proprietary aspect of keeping." . . . According to the *Pattermann* decision, "'[h]arboring 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." . . . Thus the court of appeals distinguished "harboring" a dog from "keeping" a dog, concluding that harboring "means to afford lodging, to shelter or to give refuge to a dog."[26]

Thus, while the Wisconsin *Patterman* case involved only a "homeowner who allowed the dog in his home for a short time" and held he was not a "harbor[er] or keep[er]," it was because neither a longer or shorter-term dominion was exercised over that animal.[27] The Wisconsin courts have thus established under their similar statute that while "owners" actually own an animal, "keepers" exercise the ownership-like dominion of the dog for a longer-term and "haborers" exercise some control over such a short period that they lack the "proprietary" interest of owners or keepers, though harborers still have statutory liability.

In *Pawlowski v. American Family Mut. Ins. Co.*,[28] the Wisconsin Supreme Court thus recently ruled that based on "the distinction between 'harbor' and 'keep' set forth in *Pattermann*, and acknowledging the sometimes overlapping meaning of the words 'harbor' and 'keep' (and their variations)," the supreme court felt that defendant was a

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[26] *Pawlowski* 2009 WI 105, at ¶ 25-27, 777 N.W.2d at 73 (footnotes omitted).

[27] *Pawlowski* 2009 WI 105, at ¶ 28, 777 N.W.2d at 73-74 (footnotes omitted).

[28] 2009 WI 105, 777 N.W.2d 67 (Wis. 2009).

"harborer" while the court of appeals had ruled her a "keeper," but the supreme court said that statutorily, "the liability of one who harbors a dog and one who keeps a dog is the same," and thus the distinction did not materially matter so long as the defendant acted in one of those capacities.[29]

While other states have distinguished *Verrett*'s contrast of the types of "owners" for purposes of their own statutes, it because of the unique statutory formulations of their individual state laws.[30] The approach of the Minnesota Supreme Court in *Verrett* gives effect to each type of control that might be exercised over an animal on a scale running from owner-to-keeper-to-harborer,[31] and treats these listed terms as each having its own meaning, rather than read them as a mere verbal stutter by the legislature.[32]

Given the sound policy basis for the court's ruling in *Verrett*, there is no justification to abandon its formulation of liability,[33] and the Court of Appeals here

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[29] *Pawlowski*, 2009 WI 105, at ¶ 31,777 N.W.2d at 74.

[30] *See, e.g., Rodriguez v. Cordasco*, 279 N.J.Super. 396, 403, 652 A.2d 1250, 1253 (N.J. App. 1995) (distinguishing *Verrett*'s "keeper" and "harborer" analysis from New Jersey law which confers liability on "owners" for "dog bites").

[31] *See* Minn. Stat. § 645.16 ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.").

[32] *See* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions.").

[33] The doctrine of *stare decisis* directs that courts "adhere to former decisions in order that there might be stability in the law." *See Naftalin v. King,* 257 Minn. 498, 509, 102 N.W.2d 301, 308 (1960). "While the doctrine of *stare decisis* is not inflexible, it is not to be abandoned on a whim . . . ." *Zettler v. Ventura*, 649 N.W.2d 846, 852 (Minn.

brought its own decisions in line with *Verrett* in reversing the trial court. The appellate court should be affirmed.

III. What Role exists for a Dog's "Focus" in stating a *Prima Facie* Statutory Claim?

A. The strict-liability statute applies to a dog's non-aggressive behavior

Near the outset of the statute's inception,[34] and continuing to the present, the Minnesota Supreme Court has determined that the dog-owner's liability statute of § 347.22 is a strict-liability statute and that common-law negligence defenses are inapplicable to it.[35]

While some other states created a statutory claim only for a dog's aggressive behavior in "biting" people,[36] Minnesota's statute applies when a dog "attacks or injures any person," and the latter reference raises the prospect of liability for a dog's non-aggressive behavior. This issue was reached almost a quarter century ago by the Court of Appeals in *Boitz v. Preblich.*[37]

In *Boitz*, a dog bumped into the plaintiff, causing him to fall and break his wrist.

2002) (Anderson, R., J., dissenting).

[34] *See Lavalle v. Kaupp*, 240 Minn. 360, 363-64, 61 N.W.2d 228, 230-31 (1953).

[35] *See Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981).

[36] *See, e.g., Rodriguez v. Cordasco*, 279 N.J.Super. 396, 403, 652 A.2d 1250, 1253 (N.J. App. 1995) (describing New Jersey statute that confers liability on "owners" for "dog bites").

[37] 405 N.W.2d 907, 909 (Minn. App. 1987).

Though the statute speaks both of "attacks" and of the alternative of a claim for "injuries" caused by a dog, the district court in *Boitz* had granted summary judgment to the dog owner, reasoning that the strict-liability statute "should be limited to apply only to bites or other 'vicious or dangerous' attacks by dogs."[38] Noting the disjunctive nature of the statutory predicate to liability of behavior through which a dog "attacks or injures" a person,[39] the Court of Appeals in *Boitz* reversed and held that "injuries inflicted by a dog outside the scope of a vicious attack are not, as a matter of law, excluded from coverage under the statute."[40]

B. The Supreme Court has declared that the causal link between the dog's non-aggressive behavior and the resulting injury may not be too attenuated

Four years after *Boitz*, the Minnesota Supreme Court then addressed the case of *Lewellin v. Huber*,[41] in which a dog riding in a car distracted its driver, and the driver then veered off the road and killed a nine-year-old boy who was playing in a ditch beside the road.[42] While the issue of whether the dog's non-aggressive conduct could form the basis for a claim was raised by its owners in their request for summary judgment, the Supreme

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[38] *Id.* at 910.

[39] *See* Minn. Stat. § 347.22 ("attacks or injures any person").

[40] *Id.* (emphasis added).

[41] 465 N.W.2d 62 (Minn. 1991).

[42] *Id.* at 63.

Court ruled without reaching that question and focused instead on the highly attenuated nature of the chain of causation, deeming it as a matter of law to be too tenuous to support a claim.[43] The *Lewellin* court held that "[t]hough 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."[44] Declining to address the issue of whether actual physical contact between the dog and the injured person was required to state a case, the court disposed of the issue as one would any tort claim suffering from a *Palsgraf*-like causal chain,[45] saying that "legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage."[46] *Lewellin* thus did little more than apply the basic tort concept of non-attenuated causation to the statutory claim, declining to apply the statute - - or any other legal basis for a tort claim - - that was so remote that it lost its foreseeability; the central basis for legal duty under tort law.[47] A

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[43] *Id.*

[44] *Id.* at 66 (emphasis added).

[45] The reference is to Chief Judge Benjamin Cardozo's case of *Palsgraf v. Long Is. RR.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), in which a person attempted to board a train with a package, and an employee aiding their boarding jostled the package loose, and it fell and exploded, sending a shockwave that tipped over a large scale that then fell on a passerby.

[46] *Lewellin*, 465 N.W.2d at 65.

[47] At common law, whether a claim for negligence exists "depends on the definition of duty and existence of foreseeability." *Hellman v. Julius Kolesar, Inc.*, 399 N.W.2d 654, 655 (Minn. App. 1987). "The common-law test of duty is the probability or foreseeability of injury to the plaintiff." *Austin v. Metropolitan Life Insurance Co.*, 277

cause that is too attenuated may not form the basis for a legal duty when it is too attenuated to be foreseeable to a reasonable person, whether the duty is premised on the common law, a statute, or otherwise.[48]

Shortly after *Lewellin* was decided, the Court of Appeals again addressed the unanswered question of whether the statute imposes liability even when a dog never comes into physical contact with the injured person, in the case of *Morris v. Weatherly*,[49] which involved the consolidation of two different claims. In one case, a plaintiff was bicycling when a dog ran at him, looking as though it would attack him, so he quickly dismounted his bike in an effort to flee the animal, and was injured when he fell from his bike.[50] In the other case, the plaintiff was a postal carrier delivering mail on foot when he saw a dog running toward him, and though it ran past him, the dog's action prompted the

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Minn. 214, 217, 152 N.W.2d 136, 138 (1967). Negligence must be "predicated upon what should have been reasonably anticipated and not merely upon what happened." *Anderson v. St. Thomas More Newman Ctr.*, 287 Minn. 251, 253, 178 N.W.2d 242, 243 (1970) (quotation omitted). "The duty is to guard, not against all possible consequences, but only against those which are reasonably to be anticipated in the normal course of events." *Johnson v. Evanski*, 221 Minn. 323, 326, 22 N.W.2d 213, 215 (1946).

[48] In *Palsgraf*, Justice Cardozo explained the relationship between foreseeability and duty, saying "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Isl. RR.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

[49] 488 N.W.2d 508 (Minn. App. 1992), *review denied* (Minn., Oct. 28, 1992).

[50] *Id.* at 509.

man to spin around and he was hurt.[51] Since the *Morris* court had the benefit of *Lewellin*'s pronouncement on the role of attenuated causation, it assessed the direct chain of events in each case before it and deemed them not too attenuated to form the basis for a foreseeable injury and thus for the existence of a legal duty, affirming jury awards for both plaintiffs.[52]

"Although no physical contact occurred, the dog's actions directly and immediately produced" the injuries,[53] because "[t]he actions of the dogs caused the injuries without any attenuated chain of causation."[54] *Morris* thus emerged as a mere application of the Supreme Court's *Lewellin* rule. In contrast to the outcome in *Morris* is the application of the *Lewellin* test of causation to a more attenuated fact pattern in the Court of Appeals case of *Mueller v. Theis*,[55] two years later, where the only alleged basis of the statutory claim was the mere presence of the dog when an injury occurred.

In *Mueller*, a vehicle operator swerved to avoid a dog in the road, but hit the dog and then lost control of the car and was injured in the ensuing crash.[56] Unlike *Lewellin*, it was the driver of the car who was injured, not a second party, and unlike *Morris*, it was

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[51] *Id.* at 510.

[52] *Id.* at 510-11.

[53] *Id.* at 510.

[54] *Id.* at 511.

[55] 512 N.W.2d 907, 909 (Minn. App. 1994), *review denied* (Minn., Apr. 28, 1994).

[56] *Id.* at 909.

the mere presence of a dog that caused the driver's reaction and not any affirmative behavior by the dog. The Court of Appeals applied the attenuated causation rule of *Lewellin* and ruled that the dog's owner was not strictly liable for the driver's injuries under the statute because "[f]irst, we cannot characterize the dog's behavior here as the type of 'affirmative' conduct contemplated under the statute,"[57] and "[s]econd, . . . the 'direct and immediate results of the dog's actions,' 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."[58]

C. The dog's "focus" is not an element of a *prima facie* statutory claim

In the instant case, the district court dismissed the plaintiff's statutory claim basing its ruling on the second reason expressed by the *Mueller* court: because the dog's conduct was not "focused on" the plaintiff.[59] The Court of Appeals reversed because it recognized that this second *Mueller* factor of the "dog's focus" is not - - under *Lewellin* - - a proper "independent element of causation," but is instead merely "one of several factors in determining whether a nexus exists between the dog and the victim such that the injury is the direct and immediate result of the animal's actions."[60]

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[57] *Id.* at 910.

[58] *Id.* at 910-11, *quoting Lewellin*, 465 N.W.2d at 66.

[59] *Anderson, supra*, slip op. at 7.

[60] *Id.*

The Court of Appeals' ruling here is correct and is in parallel with the Supreme Court's *Lewellin* rule as the *Mueller* gloss on *Lewellin* by which the "dog's focus" was injected into cases improperly "introduced a subjective element into this strict-liability statute [by] compel[ing] a consideration of where the dog was directing its attention at the time of the attack."[61]

The district court here, in applying the second *Mueller* factor of the "dog's focus" ruled against the statutory claim because the "dog's focus" was on another dog and not on the other dog's owner, who was hurt while trying to separate the animals.[62] The Court of Appeals noted that while

> Bruno's focus on Tuffy at the time of the attack [it] does not shield [the owners] from liability for [plaintiff's] injuries under the statute. This is not to say that we would have reached a different outcome in *Mueller*. Based on the plain language of the statute, the dog must "attack" or "injure" a person. We agree with the *Mueller* court that this language requires some sort of affirmative conduct by the dog. But we disagree with the language in *Mueller* that arguably added a requirement that the dog must also be "focused" on the injured person in order for the person's injuries to be the direct and immediate result of the dog's conduct. Indeed, we find that the use of the phrase "or injures" negates the requirement that a dog must always be focused on the injured person.[63]

While an "attack" by a dog necessarily implies that the dog is focused on the injured party, the legislature's reference to actionable claims in situations in which a dog could

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[61] *Anderson, supra,* slip op. at 7.

[62] *Id.*

[63] *Id.*

otherwise "injure" a person obviously contemplates a prima facie claim to lie in circumstances other than "attacks," so long as the chain of causation was not so attenuated that the "injury" was no longer linked to the dog's behavior.

D. The statute's reference to "attack" or "injury" as the basis for a claim is a legislative recognition of alternative bases for a statutory claim and both must be given effect by interpreting courts

Indeed, the Supreme Court in *Lewellin* observed that "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."[64]

In this case the Court of Appeals noted that "[t]here 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."[65]

Under tenets of statutory construction that were described in the section of this brief on "harboring," the plain meaning of the statute must be given to the full statute, and as the *Lewellin* court noted, that means recognizing both the claims that are triggered by an "attack" and those from any "injury," so long as the chain of causation is not too attenuated.

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[64] *Lewellin*, 465 N.W.2d at 64.

[65] *Anderson*, *supra*, slip op. at 8.

E. The chain of causation was not too attenuated here

Under the *Lewellin* formulation, a dog owner may be relieved from statutory liability when the chain of events between the dog's behavior and an injury is too attenuated to impose strict liability on the dog's owner.[66]

Here, the plaintiff was hurt as he made an effort to save his dog from the attack of another animal.[67] Since here the injury resulted to the plaintiff himself and not to a third-party, the *Lewellin* situation (driver swerves to avoid dog and injures third-party bystander) is not present. Since the attacking dog here directly attacked plaintiff as plaintiff interceded in a dog fight, the *Mueller* situation (dog distracts driver who over-reacts and rolls a car injuring himself) is also not present as there was affirmative conduct by the attacking dog here (biting the plaintiff's dog, foreseeably prompting plaintiff's intervention), unlike the passive distractions of the animal in *Mueller*.[68]

Here, it was not disputed at the trial court that "Bruno's attack on Tuffy was an affirmative act that prompted appellant's response, resulting in his injury."[69] The presence of an affirmative act by the dog that had a direct injury to the involved victim removes as a matter of law under *Lewellin* the instant case from the prospect of "undue attenuation."

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[66] *Lewellin*, 465 N.W.2d at 66.

[67] *Anderson*, *supra*, slip op. at 8.

[68] *Mueller*, 512 N.W.2d at 910.

[69] *Anderson*, *supra*, slip op. at 8.

The Court of Appeals was thus right - - under Supreme Court precedents - - to reverse the trial court decision and rule as a matter of law that the case was not too attenuated to establish a *prima facie* claim of statutory liability.

F. The issue of causation is thus for a jury and the case must be remanded

When the precedent of *Lewellin* is followed, the absence of undue attenuation in the chain of causation necessarily results in a denial of a dog owner's motion for summary judgment, as the issue of causation can not be resolved as a matter of law.

This is because the inquiry on causation by the trial court in such cases is not causation-in-fact, but is the legal inquiry of proximate cause. "Proximate cause is a question of fact which normally must be left to the jury, and causation becomes a question of law only where different minds can reasonably arrive at only one result."[70] If a cause is too attenuated to be reasonably foreseeable, that "proximate cause" question becomes a legal judgment for a court to make. Should the evidence lead to only one possible result, that as well takes the issue from a jury and makes it a question for the courts. *Lewellin* noted that "[c]ourts have always used the tort doctrine of proximate cause, as distinguished from causation in fact, to implement public policy in establishing the parameters of liability."[71]

Since here, the causal link is not too tenuous or attenuated, public policy does not

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[70]*Lyons v. SCNEI, Inc.*, 262 N.W.2d 169, 170 (Minn. 1978), *citing Pluwak v. Lindberg*, 268 Minn. 524, 528, 130 N.W.2d 134, 138 (1964).

[71] *Lewellin*, 465 N.W.2d at 65.

justify removal of the issue of causation from a jury. Moreover, because a jury could reach more than one conclusion on the cause of the incident, the matter must be remanded to a fact finder to resolve the issue of causation.[72] "Since proximate cause is usually a question of fact for the jury, it can seldom be disposed of on a motion for summary judgment."[73] This is because the determination of proximate cause is an intensely fact-specific inquiry and is thus not generally susceptible to resolution as a matter of law and is typically submitted to the jury.

G. *Lewellin* establishes a workable and prudent definition of "attenuated causation" and should be maintained by the Supreme Court as the legal test.

If precedent is followed, the *Lewellin* decision dictates that the Court of Appeals be affirmed and the case remanded for a jury's resolution of the issue of causation. There is no justification to deviate from precedent. The Minnesota Supreme Court has noted that "[i]n 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

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[72] Here, the plaintiff testified that he "lost [his] balance because of the action. How it happened, I don't know. I just—next thing I know, I'm on the ground." *Anderson, supra*, slip. Op. at 9. "Viewing [this] statement in the light most favorable to him, a jury could reasonably conclude that his broken hip was a direct and immediate result of Bruno's actions. But appellant also stated that it was ten seconds from the moment Bruno bit Tuffy to the time that appellant fell and that during those ten seconds he was kicking Bruno and trying to separate the dogs. It is possible that a jury could conclude that [plaintiff's] decision to intervene in a dog fight interrupted the chain of causation such that his injury was not a direct and immediate result of Bruno's actions." *Id.*

[73] *McCuller v. Workson*, 248 Minn. 44, 47, 78 N.W.2d 340, 342 (1956)("This principle is of long standing." (footnote omitted)).

actions, whether hostile or nonhostile."[74] This is the "attenuation" rule of *Lewellin*, and it has a sound public policy basis, restricting claims to those involving reasonably foreseeable injuries.

The *Lewellin* formulation need not be abandoned, as the statute has not changed materially since the court's pronouncements in *Lewellin*.

Rather, by affirming the Court of Appeals decision, the Minnesota Supreme Court can authoritatively restore the rule of law to this area of jurisprudence, expressing *Verrett* and *Lewellin* as the appropriate tools to guide the courts, counsel and citizens.

CONCLUSION

In conclusion, the issues of what is meant by "harboring" a dog and whether the dog's "focus" is an element of a *prima facie* claim under § 347.22 were correctly stated by the Minnesota Supreme Court over two decades ago, and the Court of Appeals mis-stated that law for a period of time until catching its mistake in the instant decision. Since the decision of the Court of Appeals properly states Minnesota law as established by the Minnesota Supreme Court and there are no sound policy reasons to abandon that precedent, The Supreme Court should affirm the Court of Appeals.

"Haboring" is a fact issue for a jury when an individual asserts some dominion and control over a dog for a limited period of time. The dog's "focus" is irrelevant to the statement of a claim, so long as the chain of causation between its non-aggressive

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[74] *Lewellin*, 465 N.W.2d at 65-66.

behavior and an injury is not too attenuated.

Respectfully Submitted,

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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 front. The length of this brief is 527 lines and 6,228 words. This brief was prepared using Corel WordPerfect Office X4.

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