

NO. A11-191

State of Minnesota
 In Supreme Court

Gordon Helmer Anderson,

Respondent,

v.

Dennis Christopherson and Neil Raymond Christopherson,

Appellants.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

I.

Should The Court Add To The Dog Injury Statute A Provision That A Dog Must Focus On An Injured Person Before The Statute Applies?

The trial court said “Yes” (ADD. 5) but the court of appeals reversed, holding the statute may apply when a dog injures a person on which it is not focused. *Anderson v. Christopherson*, 802 N.W.2d 832, 836 (Minn. App. 2011).

Lewellin v. Huber, 465 N.W.2d 62 (Minn. 1991)

Boitz v. Preblich, 405 N.W.2d 907 (Minn. App. 1987)

Morris v. Weatherly, 488 N.W.2d 508 (Minn. App. 1992)

Minn. Stat. § 347.22

II.

Should Juries Decide Whether A Dog’s Affirmative Conduct Directly And Immediately Causes Injury Or Immediately Implicates A Person Causing Injury?

The trial court said “No” (ADD. 5) but the court of appeals reversed, holding a jury must decide if an injury meets the *Lewellin* causation standard. *Anderson v. Christopherson*, 802 N.W.2d 832, 837 (Minn. App. 2011).

Lewellin v. Huber, 465 N.W.2d 62 (Minn. 1991)

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Minn. Stat. § 347.22

III.

Should This Court Depart From Its Precise Definition Of “Harboring” In *Verrett v. Silver*?

The trial court said “Yes” (ADD. 5-6) but the court of appeals reversed, applying this Court’s *Verrett* definition remanding for trial. *Anderson v. Christopherson*, 802 N.W.2d 832, 838 (Minn. App. 2011).

Verrett v. Silver, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976)
Minn. Stat. § 347.22

STATEMENT OF THE CASE

Appellant asks this Court to depart from the meaning this Court gives to two phrases in Minnesota States section 347.22, our dog injury statute.¹ Those phrases are “attacks or injures” and “harboring or keeping.” This Court’s present look at the phrases will reveal that it clearly defined the meaning of “attacks or injures” in *Lewellin v. Huber*, 465 N.W.2d 62 (Minn. 1991). The Court will also find that it accurately defined “harboring or keeping” in *Verrett v. Silver*, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976). *Lewellin* and *Verrett* give the four operative words in the phrases precise definitions making “attacks,” “injures,” “harboring,” and “keeping” terms of art which help courts to understand the statute so that it is correctly applied. The

¹ Appellant refers to section 347.22 as a “dog bite statute” but “bite” does not appear in the statute. This Court labels it “the dog-owner’s liability statute.” *Lewellin v. Huber*, 465 N.W.2d 62, 63 (Minn. 1991).

court of appeals recognized these legal realities and reversed. Affirmance is warranted.

A sixty pound dog owned by appellant Neil Christopherson and sheltered by appellant Dennis Christopherson attacked Mr. Anderson's twenty pound dog Tuffy. Mr. Anderson immediately attempted to protect Tuffy but fell and broke his hip during the scuffle. Anderson sued the Christophersons under the statute.

On cross-motions for summary judgment, Anoka County Judge, Tammi Fredrickson, ignored this Court's analysis in *Lewellin v. Huber*, where this Court addressed the meaning of "attacks or injures." The trial court departed from *Lewellin* and relied upon *Mueller v. Theis*, 512 N.W.2d 907 (Minn. App. 1994), where the court of appeals held that an injured person seeking to apply the statute must prove that the dog's "focus" was upon him. *Mueller*, 512 N.W.2d at 910-11 (ADD. 5). The trial court also ignored the precise definition given to "harboring" by this Court in *Verrett v. Silver*, instead choosing a hybrid definition of "harboring" created by the court of appeals in *Tschida v. Berdusco*, 462 N.W.2d 410, 411 (Minn. App. 1990) (ADD. 5-6).

After seventeen years in which district courts and the court of appeals focused on a dog's subjective "focus" to determine if the statute applied, the court of appeals returned to and applied this

Court's definition of "attacks or injures" in *Lewellin v. Huber*, reversing the trial court. *Anderson v. Christopherson*, 802 N.W.2d 832, 835-7 (Minn. App. 2011). The court of appeals also cleared up confusion about the meaning of "harboring or keeping" in *Tschida's* wake, holding that "harboring" and "keeping" are terms of art with distinct meanings under *Verrett v. Silver*. *Id.* at 837-8. Finally, the decision by the court of appeals reflects a refreshing appreciation for the task of juries to resolve close fact questions on causation, harboring and keeping. See generally. *Id.* This Court granted Dennis Christopherson's petition for review. The court of appeals should be affirmed.

STATEMENT OF FACTS

Neil Christopherson And Bruno Visit Dennis Christopherson

Dennis Christopherson co-owns an Anoka County home with his spouse, Kathleen (APP. 34). Although Dennis Christopherson resides in Sioux Falls, he also states that he has lived in the Anoka County neighborhood near Gordon Anderson for twenty-two years (APP. 34, 36). Dennis Christopherson had seen Gordon Anderson in the neighborhood over the years (APP. 36). Neil Christopherson, Dennis' son who also resides in Sioux Falls, visited Dennis and Kathleen Christopherson's Anoka County home from time-to-time (APP. 28, 35).

According to Dennis Christopherson, Neil was welcome at his Anoka County home (APP. 36). The Christopherson family is close --- they reside adjacent to each other in Sioux Falls (APP. 26, 33-5, RAPP. 15-16).²

Neil Christopherson obtained a dog named "Bruno" (RAPP. 4). Bruno weighed fifty-sixty pounds. *Id.* at 6. A few weeks later he visited his father Dennis Christopherson's Anoka County home for a week with his girlfriend (APP. 29). Before arriving Neil contacted his parents for permission to bring Bruno with him (APP. 28-9). Neil's parents knew that Bruno would be staying on their Anoka County property --- outside, in the house or garage (APP. 28-9). Bruno would be sheltered, lodged and/or refuged on the property. *Id.* at 28-9.

If Neil needed to bring the dog with him, Dennis authorized it (RAPP. 17). Neil took care of his parents' Anoka County home while they were out of town --- he cleaned stuff up, did yard work and cleaned the garage (APP. 31).

Bruno Injures Gordon Anderson

Gordon Anderson, eighty-six years of age, owned a miniature Schnauzer named "Tuffy" (APP. 38, RAPP. 23). Tuffy weighed about twenty pounds and Gordon was able to pick him up (APP. 38).

² "RAPP." Refers to Respondent's Appendix.

Mr. Anderson, who lives in Dennis Christopherson's neighborhood, walked Tuffy around the block every few days. *Id.* The walks took Mr. Anderson and Tuffy by Dennis Christopherson's home *Id.* at 39. Mr. Anderson put Tuffy on a nonretractable leash for the walks. *Id.* at 39.

On September 27, 2009, when they walked past Dennis Christopherson's home, Bruno charged at Tuffy and bit Tuffy in the chest (APP. 40, RAPP. 23). Anderson did not notice Bruno until Bruno hit the street. *Id.* at 39. Bruno bit Tuffy and never let go. *Id.* at 38-40. Anderson tried to separate the dogs. *Id.* at 40-1. Gordon Anderson may have been trying to kick Bruno to get him off Tuffy but nothing fazed Bruno. *Id.* at 41. Mr. Anderson fell to the ground and broke his hip during the scuffle. *Id.* at 39; RAPP. 24. The whole incident took seconds (APP. 41). A neighbor eventually got Bruno off Tuffy. *Id.* Mr. Anderson's most accurate description of the incident is:

I lost my balance because of the action. How it happened, I don't know. I just – next thing I know, I'm on the ground.

Id. at 41. Dennis Christopherson was not present at the time of the incident (APP. 31).

Trial Court Order Departing From *Lewellin* and *Verrett*

The parties cross-moved for summary judgment. Judge Fredrickson held that neither Dennis Christopherson nor Neil

Christopherson were strictly liable under the statute because Bruno was not “focused” on Mr. Anderson, within the meaning of *Mueller v. Theis*, 512 N.W.2d 907, 910-11 (Minn. App. 1994) (ADD. 5). Ignoring this Court’s holdings in *Verrett*, Judge Fredrickson also held that Dennis Christopherson was not “harboring” Bruno because “harboring” means “giving ... shelter, or refuge to a dog for longer than a limited time or for more than a limited purpose” under *Tschida v. Berdusco*, 462 N.W.2d 410, 411 (Minn. App. 1991) (ADD. 5-6).

ARGUMENT

A. Standard Of Review

“On an appeal from summary judgment, [the court asks] two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The lower courts’ conclusions on both questions are reviewed *de novo*. *Star Centers Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-7 (Minn. 2002).

B. The Statute

Minnesota’s dog injury statute, Minnesota Statutes section 347.22, provides in part:

DAMAGES, OWNER LIABLE.

If a dog, without provocation, *attacks or injures* any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term “owner” includes any person *harboring or keeping* a dog but the owner shall be primarily liable.

Minn. Stat. § 347.22 (2010) (emphasis added). This Court holds that the statute is a strict-liability statute and that common-law negligence defenses are inapplicable. *Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981). The *Garavalia* court also labeled section 347.22 an “absolute liability” statute because the legislature intended to preclude certain defenses and place the entire responsibility for an injury upon an individual who violates the statute. 306 N.W.2d at 811-12.

C. Principles Of Statutory Construction.

When this Court construes a statute, it presumes that distinctions in language in the same context are intentional and the Court applies the language consistent with such intent. *In Re Stadsvold*, 754 N.W.2d 323 (Minn. 2008). Similarly, when this Court interprets a statute, it presumes that distinctions in language in the same context are intentional and it applies those distinctions in light of such intent. *In Re Welfare of Children of N.F.*, 749 N.W.2d 802

(Minn. 2008). No word, phrase or sentence in a statute should be deemed superfluous, void, or insignificant, when possible. *Krueger v. Zeman Const. Co.*, 781 N.W.2d 858 (Minn. 2010). Statutory language should be construed in a manner that gives effect to all of its terms to avoid rendering terms useless. *U.S. v. Ellerbe Becket, Inc.*, 976 F.Supp. 1262 (D. Minn. 1997).

I. The Court Should Not Add To The Statute A Provision That A Dog’s Conduct Must Be Focused On An Injured Person Before The Statute Applies.

A. *Lewellin v. Huber* Defines “Attacks Or Injures.”

In *Lewellin v. Huber*, 465 N.W.2d 62 (Minn. 1991), a dog riding in a car distracted the driver who then veered off the road killing a boy. *Id.* at 63. A district court granted summary judgment for plaintiff, holding that the dog’s owners were strictly liable under the statute. *Id.* But this Court reversed, holding 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 the statute imposes.” *Id.* at 66.

The issue in *Lewellin* was how the statutory phrase “attacks or injures” should be understood? This Court defined “attack” as “to move against with more or less violent intent, implying aggressiveness in any sense and the initiative in the onset.” *Lewellin*, 465 N.W.2d at

64 quoting Webster's Third New Int'l Dictionary, 140 (1971). So, "[w]hen a dog attacks, it bites; when it bites a person, it attacks." *Lewellin*, 465 N.W.2d at 64.

Then, this Court addressed the meaning of "injures" in section 347.22. The Court defined "injures" in two apparently interchangeable ways: "Injures" means a dog's affirmative but nonattacking behavior which harms a person "immediately implicated by such nonhostile behavior." See *Lewellin*, 465 N.W.2d at 64. Or, "injures" means a dog's nonattacking behavior which "directly and immediately, without intermediate linkage, harms a person." *Id.* at 65.

B. *Lewellin and Boitz v. Preblich* – "Injures" Covers "Affirmative But Nonattacking Behavior"

The *Lewellin* Court relied upon *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. App. 1987), in explaining its "immediate implication" causation standard. See *Lewellin*, 465 N.W.2d at 64. In *Boitz*, a pedestrian suffered injuries when a dog bumped him as the pedestrian walked down a footpath toward an alley. *Boitz*, 405 N.W.2d at 910. This Court in *Lewellin*, indicated that the dog in *Boitz* fell within the "injures" component of the statute, rather than the "attacks" component. See *Lewellin*, 465 N.W.2d at 64.

Consistent with its reasoning and the facts in *Boitz*, this Court set forth two examples that would fall within the “injures” statutory component: (1) when a dog jumps upon a person or (2) when a dog unintentionally runs into a person. *Lewellin*, 465 N.W.2d at 64. Finally, in contrast with the definition it gave to “attacks,” the *Lewellin* court stated that “injures” is intended to cover injuries suffered by a person who is immediately implicated by nonhostile dog behavior. See *Lewellin*, 465 N.W.2d at 64.

C. The Lewellin Rule

So what are the rules of law from *Lewellin*? First, “[a]n ‘attack’ by a dog necessarily implies that the dog is focused on the injured party.” Compare *Anderson v. Christopherson*, 802 N.W.2d 832, 836 (Minn. App. 2011); and *Lewellin*, 465 N.W.2d at 64. Second, and most important for purposes of this appeal, Mr. Anderson suggests this rule: A dog “injures” within the meaning of the statute, when it causes harm to a person who is directly and immediately implicated by the dog’s affirmative but nonattacking nonhostile behavior relative to that person. See *Lewellin*, 465 N.W.2d at 64-5.

D. Morris v. Weatherly Applies Lewellin Rule

The *Lewellin* court acknowledged that its decision did not specifically address whether physical contact between an injuring dog

and the injured person is required before strict statutory liability triggers. *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991). But the court of appeals took up the “physical contact” issue and applied the *Lewellin* standard in *Morris v. Weatherly*, 488 N.W.2d 508 (Minn. App. 1992), review denied (Minn. Oct. 28, 1992).

Morris was a consolidated appeal. *Id.* at 509. In one case, a dog ran at a bicyclist with “his ears laid back.” *Morris*, 488 N.W.2d at 509. The bicyclist got off his bike and fell, injuring his shoulder. *Id.* at 509. The dog stopped several feet short of the bicyclist and walked away, never coming in contact with him. *Id.* In the other case, a letter carrier saw a dog running toward him “flying through the air.” *Id.* at 510. The dog did not contact the letter carrier who suffered back injuries when he spun around, apparently surprised by the dog. *Id.* Juries in both cases found for the injured plaintiffs and the district court judges held that the statute applied despite the fact that neither plaintiff came in contact with the injuring dogs. *Id.* at 510.

The court of appeals affirmed holding that the statute applied in both cases: “The injuries of both [the bicyclist] and [the letter carrier] were the direct and immediate result of the dogs’ actions.” *Id.* at 510. In the bicyclist’s case, the dog’s actions caused him to dismount quickly and in doing so, to fall, injuring his shoulder. *Id.* Similarly,

the dog's actions directly and immediately produced the letter carrier's injury. *Id.* Our court of appeals concluded, "The statute applies to the hostile or nonhostile actions of a dog which *cause* injury, regardless of actual physical contact with the injured party." *Id.* at 511 (emphasis in original).

E. *Mueller v. Theis* Departs From *Lewellin* Standard Adding Dog's "Focus" To Statutory Analysis

Two years after the court of appeal's simple and straightforward *Lewellin*-based analysis in *Morris v. Weatherly*, the court of appeals decided that the "direct and immediate implication" *Lewellin* standard was too simple. See *Mueller v. Theis*, 512 N.W.2d 907 (Minn. App. 1994) review denied, April 28, 1994. The *Mueller* court held that the direct and immediate results of the dog's actions required that both the dog's conduct be focused on the injured party and that the injury be the direct and immediate result of that focus. *Mueller*, 512 N.W.2d at 910-11 (emphasis added).³

Mr. Christopherson, and apparently the *Mueller* court, extrapolate the "focus" standard from this Court's observation in

³ Dennis Christopherson states that the *Mueller* standard is "extrapolated" from *Lewellin* (appellant brief, p. 10). Mr. Christopherson's use of "extrapolated" appropriately describes the *Mueller* standard since "extrapolate" means "to project ... into an area not known ... to arrive at a usually conjectural knowledge of the unknown area." M-W.Com.

Lewellin that the dog in *Lewellin* “directed” his attention at the driver. Compare *Lewellin*, 465 N.W.2d at 66 and *Mueller*, 512 N.W.2d at 910-11. But *Mueller* and Christopherson make the same mistake when they convert this Court’s factual observation that the dog in *Lewellin* directed his attention at the driver into the legal causation focus standard. The court of appeals below refused to make this unwarranted *Mueller*-based “legal leap” and reversed the trial court.

Our court of appeals’ “focus on the dog’s focus” as set forth in *Mueller v. Theis*, has generated confusion and, in respondent’s opinion, absurd analyses at both the district court and court of appeals levels. *Knake v. Hund*, 2010 WL 3119506 (Minn. App.) (UP.1-Appellants’ Brief), illustrates the absurdity. In *Knake*, a cleaning woman approaching a client’s house slipped and fell on the driveway, injuring herself. The cleaning woman claimed that the client’s dog, which was walking alongside her, unexpectedly cut in front of her in an apparent effort to get to the garage ahead of her. *Id*

On appeal, the court of appeals held (perhaps correctly) that ice on the driveway was an intermediate cause of the cleaning woman’s fall (the woman testified that she slipped because of the ice) preventing application of the statute. But the court felt compelled to

add that the statute did not apply because the dog “was not focused on appellant” but “was focused on getting to the garage.” *Id.*

Knake’s holding begs multiple questions which the court of appeals here answered correctly. For instance, how does a judge or jury really know where an injuring dog’s focus is directed? Should we depose the dog? More important, as one of the flashpoints in this appeal, should an injuring dog’s focus have any part in determining whether strict statutory liability attaches? Gordon Anderson argues that the answer is a resounding “No” (see Minnesota Association for Justice Brief, pp. 16).

F. Court Of Appeals Acknowledges Problems With Dog’s “Focus”

Our court of appeals acknowledged the problems associated with making a dog’s “focus” part of the section 347.22 statutory analysis in *Robinson v. Robinson*, 1998 WL 901766 (Minn. App.) (UP. 4). There, a six year old was vacationing with her father and grandparents at a cabin. *Id.* The child played with her grandparents’ dog under a kitchen table. *Id.* When the dog barked, the child ran, colliding with the table and sustaining a facial laceration. *Id.* The child’s mother sued the grandparents under the statute. *Id.*

At trial, the district court judge instructed the jury that in order for the statute to apply “*there must have been affirmative conduct by*

the dog, which conduct was focused on the injured party.” *Id.* (emphasis in original). The jury held for the dog owner and the child appealed.

Although the court of appeals affirmed citing the “focus” of the dog language in *Mueller v. Theis*, 512 N.W.2d 907 (Minn. App. 1994), it noted that, “[u]nfortunately the word ‘focus’ introduces a subjective element into this strict liability statute, in that it compels the trier-of-fact to consider whether the dog was ... ‘concentrating’ its attention at the injured person.” *Robinson*, UP. 5. Here, the court of appeals recognized the problems associated with the subjective “focus on the dog’s focus” which required it to reverse based upon this Court’s clear-cut standard and definitions in *Lewellin v. Huber*, supra.

G. Court Of Appeals Gets It Right Here

Judge Halbrooks wrote an insightful and well-reasoned opinion explaining the statute, its history, *Lewellin*, *Boitz*, *Morris*, and *Mueller*. The Court cut to the chase when it observed that the *Mueller* court and the trial court misapplied *Lewellin* “... by treating the dog’s ‘focus’ as an independent element of causation rather than as one of several factors in determining whether a nexus ...” existed between the dog and the victim rising to the direct and immediate result *Lewellin* standard. See *Anderson*, 802 N.W.2d at 836.

Writing for the unanimous panel, Judge Halbrooks agreed that *Mueller* produced an erroneous interpretation of the statute because it introduced a subjective element into the strict liability statute ... a dog's focus. *Id.* "Attacks" and "injures" in the statute are terms of art: "An 'attack' by a dog necessarily implies that the dog is focused on the injured party." *Id.* at 836. On the other hand, the legislature clearly contemplated situations in which a dog could otherwise injure a person. *Id.* How so? Because the verb "injures" contemplates "a dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior." *Anderson*, 802 N.W.2d at 836 quoting *Lewellin*, 465 N.W.2d at 64. The court of appeals correctly concluded that "there is nothing in [*Lewellin's* statutory interpretation] or in the plain language of the statute requiring that the dog be focused on the injured person." *Anderson*, 802 N.W.2d at 836.

Our court of appeals, consistent with this Court's definitions of "attacks" and "injures" in *Lewellin*, got it right when it held 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. *Anderson*, 802 N.W.2d at 836. Affirmance is appropriate.

H. Lewellin Is The Gold Standard

Our court of appeals had a choice. Would it stick with and apply this Court's *Lewellin* standard embodied in the definition and meaning which this Court gave to "injures?" Or, would it reject the *Lewellin* standard and "buy into" the subjective "dog's focus" standard created by the court of appeals in *Mueller v. Theis*? Fortunately and wisely, the court of appeals rejected *Mueller's* "focus" standard and applied the *Lewellin* standard. When it did so, it cleared up years of confusion about the meaning of "injures" and it stopped the silliness and subjectivity associated with focusing on a dog's focus as part of the strict liability dog injury statute analysis.

This Court has stated that the doctrine of absolute liability applies when the legislature, by enacting a statute, intends to preclude certain defenses and place the entire responsibility for the injury upon the individual who violated the statute. *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981). *Seim* also recognized that section 347.22 is equivalent to absolute liability except for the statutory defenses of provocation and trespass. See *Seim v. Garavalia*, 306 N.W.2d at 812 citing *LaValle v. Kaupp*, 240 Minn. 360, 61 N.W.2d 228 (1953).

To require that an injured person show that an injuring dog focused upon him to cause harm makes the strict absolute liability dog injury statute a mere suggestion rendering it ineffective to accomplish its purpose. How so? Because on its face, the statute is conspicuously silent about a dog's focus as a statutory defense. The court of appeals got it right and it should be affirmed.

I. Public Policy Requires Rejection Of Subjective "Focus" Standard

"It is clear that the legislature considered the statute to be designed for the protection of people who are subject to attacks and immediate harm from dogs, especially persons who come upon private residential premises lawfully." *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991). "The doctrine of absolute liability is applicable when the legislature, by enacting a particular statute, intends to preclude certain defenses and place the entire responsibility for the injury upon the individual who violated the statute." *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981). This Court has held "that the legislature intended to impose absolute liability upon a violator of the [statute]" *Id.* at 812. Thus, except for the defenses already built into the law, recovery is insured in all cases. *Id.*

Rejection of the subjective "dog focus" standard reinforces the public policy underlying section 347.22. Owners, keepers and

harborers of dogs will be liable simply because they own, harbor, or keep a dog without regard to fault. Inserting the “dog focus” prong into the statute undercuts the clear policy forming the basis for the statute because in every situation, a “dog’s focus” will be in doubt making application of the statute sketchy. Our Court of Appeals must be affirmed.

In distinguishing proximate cause from causation in fact, this Court quotes Professor Prosser’s statement that, “[a]s a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability.” *Lewellin v. Huber*, 465 N.W.2d 62, 65-6 (Minn. 1991) quoting Prosser, *The Minnesota Court on Proximate Cause*, 21 Minn. L. Rev. 19, 22 (1937). Mr. Anderson submits that Bruno’s sudden, unexpected, decisive and affirmative actions, resulting in Anderson’s immediate response, fall and injury land squarely within Minnesota’s policy underlying the statute.

II. Juries Should Decide Whether A Dog’s Conduct Directly And Immediately Causes Injury Or Immediately Implicates A Person Causing Injury.

A. Court Of Appeals’ Reasoning

The court of appeals’ rejection of a “dog’s focus” as part of the statutory analysis required it to determine whether the chain of events

between Bruno's actions and Mr. Anderson's injury was "too attenuated" to impose strict liability on Bruno's owner? This query is ultimately a causation question. *Anderson*, 802 N.W.2d at 837 relying upon *Lewellin*, 465 N.W.2d at 65 ("Courts have always used the tort doctrine of proximate cause, as distinguished from cause in fact, to implement public policy in establishing the parameters of liability").

Judge Halbrooks concluded that extensive attenuation, so as to preclude a jury question, was not present. The Court set forth two facts militating against such attenuation. First, Mr. Anderson himself suffered injuries because he directly responded to Bruno's behavior (unlike the child by the side of the road in *Lewellin* who was a person once removed from the distracted driver). And second, Bruno engaged in affirmative behavior, unlike the dog in *Mueller v. Theis*. *Anderson*, 802 N.W.2d at 836-7. No real dispute exists about whether Bruno's attack on Tuffy was an affirmative act that prompted Anderson's immediate response, resulting in his injury. See *Id.* at 837.

After observing that a jury may conclude that Anderson's decision to intervene on behalf of Tuffy interrupted the chain of causation, the court of appeals properly remanded for a jury determination of whether, under these facts, Mr. Anderson's injury was the "direct and immediate" result of Bruno's conduct. *Anderson*,

802 N.W.2d at 837 citing *Lewellin*, 465 N.W.2d at 65-6. This is precisely the kind of question that juries decide.

B. *Morris* Gives Guidance About Handling “Intermediate Linkage”

Lewellin held that a dog injures when its nonattacking behavior “directly and immediately, without intermediate linkage, harms a person.” *Lewellin*, 465 N.W.2d at 65. Dennis Christopherson claims that Gordon Anderson’s efforts to protect Tuffy constitute the kind of intermediate linkage, as a matter of law, that results in a failure to meet the *Lewellin* causation standard. Mr. Anderson disagrees and so did the court of appeals.

Both plaintiffs in *Morris* suffered injuries as a direct and immediate result of a dog’s actions. *Morris v. Weatherly*, 488 N.W.2d at 510. The bicyclist in *Morris* was injured as he attempted to protect himself from attack from a large collie running toward him in an aggressive manner. *Id.* at 510.⁴ Likewise, the letter carrier in *Morris* twisted his back because a large dog ran past or around him. *Morris*, 488 N.W.2d at 510.

⁴ With all due respect to the court of appeals, how does anyone really know that the dog running after the bicyclist in *Morris* was “attacking” the bicyclist? The bicyclist testified that the dog’s ears were laid back but that the dog stopped and walked away when the bicyclist stopped his bike and got off. *Morris v. Weatherly*, 488 N.W.2d at 509. Perhaps the dog was “focused” on or “attacking” the bike and when the wheels stopped turning the dog lost interest? But we will never know.

And what is the statute-triggering standard when a dog has not attacked an injured person within the meaning of *Lewellin's* "attack" definition? Mr. Anderson suggests that that standard is essentially the *Lewellin* standard: A jury question exists if a person suffers injury because he directly and immediately responds to a dog's affirmative nonattacking nonhostile behavior. Here, a jury question exists because Gordon Anderson immediately responded to Bruno's attack on Tuffy to which he was tethered. Anderson's fall and injury, like the incidents in *Morris*, were immediately prompted by Bruno's affirmative acts and Anderson's injuries were directly and immediately caused by those affirmative acts.

C. Jury Resolution Is Appropriate Under *Lewellin* Standard

The court of appeals identified at least two factors which district courts might consider when determining whether cases of this nature should proceed to trial. For instance, a district court or jury should consider the "Who was injured?" factor. *Anderson*, 802 N.W.2d at 836-7. Here, Judge Halbrooks noted that Mr. Anderson himself suffered injury when he immediately responded to Bruno's attack upon Tuffy. *Id.* The court of appeals may have decided different if another pedestrian across the street was injured when she rushed to protect Tuffy or aid Mr. Anderson.

District courts may also consider the “affirmative conduct” factor. *Id.* at 836-7. That is, if a dog is merely present by the side of the road, statutory strict liability may not attach. On the other hand, if a dog affirmatively acts (as Bruno acted), even if it is in a nonattacking, nonhostile manner relative to the person who is ultimately and immediately injured, a jury question exists under the *Lewellin* “nonhostile, nonattacking but affirmative behavior” standard which applies to the “injures” component of section 347.22.

Dennis Christopherson claims that Judge Halbrook’s discussion about the “who was injured?” and “affirmative act” factors means that the chain of causation will never be too attenuated resulting in application of the statute “world without end.” Mr. Christopherson’s conclusion ignores two legal and factual realities. First, Judge Halbrooks was not stating a legal rule --- she explained how the *Lewellin* rule should be analyzed by the courts and practitioners. And second, Judge Halbrooks’ discussion reflects the kind of arguments which juries may hear when causation under *Lewellin* cannot be decided as a matter of law at summary judgment as in this case. The court of appeals reversed and simply sent this case back to the district court for jury resolution because it could not decide as a matter of law

and fact that Mr. Anderson's fall and injury were "too attenuated" from Bruno's actions.

Gordon Anderson is confident that district courts will be able to properly apply the *Lewellin* standard at summary judgment as articulated in *Lewellin* and applied in *Anderson v. Christopherson*, 802 N.W.2d 832 (Minn. App. 2011). Mr. Anderson is equally confident that district courts are equipped to properly instruct juries when summary judgment is not appropriate as in this case. The court of appeals should be affirmed.

D. Jury Instructions And Special Verdict

How would the district court instruct a jury in a case where the facts fit the *Lewellin* rule on the "injures" component of section 347.22? Mr. Anderson suggests that the district court might give this instruction: A dog injures when it causes harm to a person who is directly and immediately implicated by the dog's affirmative but nonattacking nonhostile behavior relative to that person. See *Lewellin*, 465 N.W.2d at 64-5.

And how would a special verdict interrogatory look? Gordon Anderson suggests this question: Was John Doe injured because he was directly and immediately implicated by Fido's affirmative but nonattacking nonhostile behavior relative to him?

Gordon Anderson's suggested instruction and interrogatory accurately and simply reflect the *Lewellin* standard. Judge Halbrooks reasoned that, under the facts, the court could not decide as a matter of law that there was no liability under the statute and the *Lewellin* standard. *Anderson*, 802 N.W.2d at 837. But neither could the court of appeals say, as a matter of law, that the Christophersons were strictly liable under the statute for Mr. Anderson's injuries. *Id.* at 837. Such a conclusion, or lack thereof, is not surprising because "determining proximate cause requires an intensely fact-specific inquiry [and] it is rarely susceptible to resolution as a matter of law and is typically submitted to the jury." *Id.* at 837 citing *McCuller v. Workson*, 248 Minn. 44, 47, 78 N.W.2d 340, 342 (1956).

The trial court wrongly decided the causation question because it focused on Bruno's focus, essentially ignoring the *Lewellin* standard. Dennis Christopherson's solution to the issue ("All Anderson had to do was stay out of the fight and he would have remained injury-free," p. 22 Christopherson opening brief) is alarming and it ignores the policy upon which the statute is based. But the court of appeals made it right by sending it back to the district court for trial. This result is correct.

III. This Court Should Not Depart From Its Precise Definition Of “Harboring” In *Verrett v. Silver*.

A. *Verrett v. Silver* Defines “Harboring” And “Keeping”

Verrett v. Silver, 309 Minn. 275, 244 N.W.2d 147 (Minn. 1976), is the seminal case on the meaning of “harboring or keeping” in section 347.22. There, a woman stayed at defendant’s home for three weeks while her home was redecorated. *Verrett*, 244 N.W.2d at 148. She paid no rent. *Id.* After staying at defendant’s home for about a week, she brought her dog to the home. *Id.* The woman generally kept the dog in her bedroom, but occasionally the dog ran loose. *Id.* Defendant left on vacation about a week after the woman brought in the dog. *Id.* At some point before the three weeks expired and after defendant left home, the dog ran from defendant’s yard and bit a child who lived across the street. *Id.* The child’s father sued defendant under the statute.

A district court judge instructed the jury on the issue of whether defendant was harboring or keeping a dog within the meaning of section 347.22: “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.” *Verrett*, 244 N.W.2d at 149. But then the judge got more specific: “Harboring means to afford lodging, to shelter or to

give refuge to a dog.” *Id.* But “keeping a dog, as used in the statute before us, *implies more than the mere harboring of the dog for a limited purpose or time.*” *Id.* (emphasis added). The trial court went on to explain that “one becomes the keeper of a dog only when he either with or without the owner’s permission undertakes to manage, control or care for it as dog owners in general are accustomed to do.” *Id.*

This Court held that the instruction properly stated the law. See *Id.* The issue of whether defendant was harboring or keeping the dog at the time of the injury was properly submitted to a jury and the district court was affirmed. *Id.*

This Court’s *Verrett* holding is significant because, consistent with rules of statutory construction, this Court presumed that the legislature intended to insert “harboring or keeping” in the statute. The Court also presumed that “harboring” and “keeping” are not the same. Consequently, this Court gave precise meanings to “keeping” and “harboring.” Although both harboring and keeping mean more than giving a stray dog a meal, this Court made it clear that “harboring” and “keeping” are different terms with precise definitions. Unlike “keeping,” “harboring” can mean sheltering a dog or giving refuge to a dog for a limited purpose or time. See *Verrett*, 244 N.W.2d at 149.

Judge Halbrooks read *Verrett* correctly when the court held that the definition of “harboring” does not require a person to afford the dog shelter or give the dog refuge for more than a limited period of time. *Anderson*, 802 at 838. But “keeping” a dog is something more substantial ... “keeping” implies more than harboring, sheltering or giving refuge to a dog for a limited purpose or a limited time. “Keeping” is undertaking to manage, control or care for a dog like a primary owner. *Id.* at 149.

Verrett’s definitions are as far as this Court went in explaining the terms. And for good reason: Whether one harbors or keeps a dog is a jury question. See *Verrett*, 244 N.W.2d at 149. A jury here should receive an instruction similar to, if not identical to, the instruction that the jury received in *Verrett*. The court of appeals correctly held that it is the fact-finder’s task to determine if Dennis Christopherson was harboring Bruno so as to be an owner within the meaning of the statute. The court of appeals should be affirmed.

B. *Verrett* Definitions Confirmed In *Gilbert v. Christiansen*

One year after defining “harboring” and “keeping” in *Verrett v. Silver*, this Court quoted verbatim the *Verrett* definitions in *Gilbert v. Christiansen*, 259 N.W.2d 896, 897 (Minn. 1977). There, a tenant in an apartment building sued a second tenant and the apartment

management corporation after the second tenant's dog attacked the first tenant's child in the first tenant's apartment. *Id.* at 896. This Court stated that application of the *Verrett* definitions meant that the apartment management corporation did not harbor or keep tenant's dog. *Id.* at 898. But the first tenant contended that the apartment management corporation "owned" the dog within the meaning of the statute because it had a right to exclude dogs from the complex. *Id.* at 897. This Court disagreed, holding that the right to exclude did not, by itself, make the apartment management corporation a harborer of the dog within the meaning of the statute. *Id.*

Most important, for purposes of this appeal, is that this Court left intact the definition which it gave to "harboring" and "keeping" in *Verrett v. Silver*. See *Gilbert v. Christiansen*, 259 N.W.2d at 897. But another factual component is present here which makes it appropriate for courts and the statute to treat home and property owners like Dennis Christopherson different than landlords who may have a contractual or regulatory right to exclude dogs from the premises: Dennis Christopherson affirmatively welcomed primary dog owner Neil Christopherson to refuge, shelter and lodge Bruno on the premises (APP. 28-9, 36). These words (refuge and shelter) fall squarely within the definition of this Court's definition of "harboring" in *Verrett*.

C. Tschida And Its Hybrid “Harboring” Definition

A review of the district court’s memorandum reveals that she adopted a hybrid definition of harboring from *Tschida v. Berdusco*, 462 N.W.2d 410, 411 (Minn. App. 1990) review denied (Minn. Dec. 20, 1990), to grant summary judgment in favor of Dennis Christopherson (ADD. 5-6). *Tschida*, is critically and factually distinguishable because it involves a veterinarian’s employee who was bitten by a dog in the veterinarian’s care. *Id.* at 410. The employee sued the dog’s owners. *Id.* at 410-11. Ultimately, the court of appeals held that the employee “keeper” could not successfully bring a statutory strict liability action against the dog’s primary owners. *Id.* at 412-13.

Ignoring rules of statutory construction and *Verrett*’s definitional precision, *Tschida* misapplied *Verrett*, wrongly stating that this Court “... defined harboring as giving lodging, shelter, or refuge to a dog for longer than a limited time or for more than a limited purpose.” *Tschida*, 462 N.W.2d at 411 citing *Verrett v. Silver*, 309 Minn. 275, 244 N.W.2d 147, 149 (1976).⁵ The definition which *Tschida* gave to “harboring” is precisely the definition this Court did not give in *Verrett*.

⁵ In *Carlson v. Friday*, 694 N.W.2d 828 (Minn. App. 2005), the court of appeals perpetuated *Tschida*’s error when it acknowledged that in *Tschida*, it did not distinguish between “harboring” and “keeping.” See also *Peshon v. Carney*, 1991 WL 690196 (Minn. App.) (court cites *Lewellin* “harboring” definition but treats harboring and keeping synonymously) (Minnesota Defense Lawyers Association’s addendum).

Our court of appeals below readily recognized the error in *Tschida* which required it to reverse the district court: *Tschida* was not on point and the district court's quotation from *Tschida* did not accurately reflect this Court's *Verrett* definition of "harboring." *Anderson*, 802 N.W.2d at 838 quoting *Verrett*, 244 N.W.2d at 149. Fact questions remained about whether Dennis Christopherson harbored Bruno justifying reversal and a jury trial. *Anderson*, 802 N.W.2d at 838.

The court of appeals here mirrored this Court's *Verrett* analysis when it held that a jury should determine if Dennis Christopherson was harboring Bruno so as to render him a statutorily liable owner under section 347.22. See *Id.* This Court should reject the efforts of the Christophersons and the Minnesota Defense Lawyers Association's efforts to blur the distinctions between "harboring" and "keeping" identified by this Court in *Verrett*. This Court stated in *Verrett* that keeping a dog implies managing or controlling or caring for a dog while harboring does not. Similarly, this Court indicated that keeping a dog may involve a more substantial period of time than harboring a dog. *Verrett v. Silver*, 244 N.W.2d at 149 ("keeping ... implies more than mere harboring ... for a limited purpose or time."). Affirmance is warranted.

D. Verrett Definitions Of “Harboring” And “Keeping” Reflect The Law In Other States.

At least two states with dog injury statutes that contain the words “harbor” and “keep,” or their derivatives, construe the meaning of those words very similar to how this Court defined the words in *Verrett*. Under Wisconsin Statutes section 174.02, a person who owns, harbors, or keeps a dog is liable for damages caused by the dog injuring a person. *See Id.* Recently, the Wisconsin Supreme Court in *Pawlowski v. American Family Mut. Ins. Co.*, 777 N.W.2d 67 (WI 2009) distinguished and defined “harboring” and “keeping.”

Before defining “harboring” and “keeping,” the court noted that, as a basic rule of statutory construction, it endeavored to give each statutory word independent meaning so that no word would be redundant or superfluous. *Pawlowski*, 777 N.W.2d at 72. “When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings.” *Id.* Finally, it observed that the use of different words joined by the disjunctive connector “or” usually broadens the coverage of the statute to reach distinct, although potentially overlapping sets. *Id.* (Citations omitted).

The issue before the *Pawlowski* court was whether a homeowner was statutorily liable as a person who either “harbors” or “keeps” a

dog. A third party suffered injuries, caused by a dog the homeowner allowed to reside in her home, after the unleashed dog was allowed out of the house by its legal owner. *Pawlowski*, 777 N.W.2d at 69.

Pawlowski acknowledged that the distinction in Wisconsin between one who “keeps” and one who “harbors” a dog had not been crisp in the statute or case law. *Id.* at 72-3. Ultimately, *Pawlowski* acknowledged that “keeping” a dog generally requires “exercising some measure of care, custody or control over a dog,” while “harboring” is often defined as sheltering or giving refuge to a dog. *Pawlowski*, 777 N.W.2d at 73 citing *Patterman v. Patterman*, 173 Wis. 2d 143, 149 n.4, 496 N.W.2d 613 (Ct. App. 1992). *Pawlowski* went on to adopt the “sheltering or giving refuge” definition of harboring, holding the homeowner liable under the statute as a “harborer” of the dog. *Pawlowski*, 777 N.W.2d at 74, 82.

Ohio Statutes section 955.28(B) provides that “the owner, keeper, or harborer of a dog is liable in damages for any injury” See *Id.* The statute does not define “keeper” or “harborer” but the Ohio Court of Appeals defines the words: an “owner” as the person “to whom a dog belongs, while a keeper has physical control over the dog.” *Khamis v. Everson*, 623 N.E.2d 683, 686 (Ohio Ct. App. 1993) quoting *Flint v. Holbrook*, 608 N.E.2d 809 (Ohio Ct. App. 1992). On

the other hand, “a harbinger is one who has *possession and control* of the premises where the dog lives, and silently acquiesces to the dog’s presence.” *Khamis*, 623 N.E.2d at 686 (emphasis in original) (citation omitted).

To summarize, Minnesota, Wisconsin and Ohio generally define “harboring” as sheltering or giving refuge to a dog for more than a few minutes but less than some indefinite extended period of time. Additionally, Minnesota, Ohio and Wisconsin generally give “keeping” a definition that includes management and control. This Court’s *Verrett* definitions reflect well-settled law in other states.

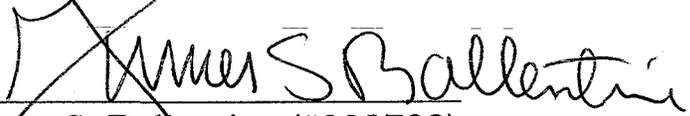
CONCLUSION

This Court issued a clear opinion setting forth the workable statutory meanings of “attacks” and “injures” in *Lewellin*. Taking those definitions, this Court also set forth a realistic and workable standard for district court judges to use in determining whether a dog injury case should proceed to trial under *Lewellin*’s “direct and immediate – immediately implicated” causation standard. Neither the *Lewellin* standard nor the statute reference a dog’s focus as part of the causation standard and this is how it should remain. Similarly, this Court set forth precise but workable definitions of “harboring” and “keeping” in *Verrett*. Finally, *Lewellin*, *Verrett* and the court of appeals

below properly recognize the need for jury resolution in cases of this nature. The court of appeals should be affirmed in all respects.

SCHWEBEL, GOETZ & SIEBEN, P.A.

Dated: 1/17, 2012

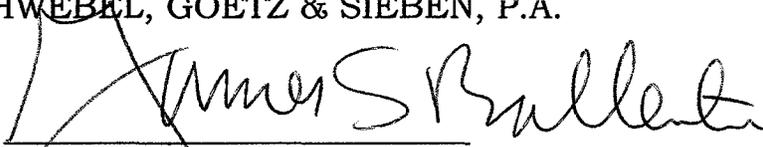
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,976 words. This brief was prepared using Microsoft Word 2010.

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