

A05-1130

STATE OF MINNESOTA
IN COURT OF APPEALS

**In the Matter of the Disposition of
Molly, a German Shorthaired Pointer
Owned by William Frederick
Klumpp, Jr.**

APPELLANT'S BRIEF AND APPENDIX

Thomas F. Pursell
Attorney I.D. #012168x
Lindquist & Vennum P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 371-3211

*Attorneys for Appellant
William Frederick Klumpp, Jr.*

Jerome P. Filla
Attorney I.D. #29166
Peterson, Fram & Bergman
50 Fifth Street East
Suite 300
St. Paul, MN 55101-1197
Telephone: (651)

*Attorneys for Respondent
City of Arden Hills*

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STATEMENT OF ISSUES

- I. Can Molly have been found to have “killed” a domestic animal under Minn. Stat. § 347.51, subd. 2(2) where the complaining owner refused treatment to stabilize her animal and instead instructed the veterinarian to euthanize it?**

The court below found in the affirmative. Minn. Stat. §§ 347.51, subd. 2(2); 645.08(1); and 645.17(4).

- II. Can Respondent City of Arden Hills, without any enabling procedure in its ordinances or in the state statute, bring an action under the dangerous dog statute pursuant to an order to show cause after having already taken its authorized action?**

The court below did not rule. Minn. Stat. 347.50, et seq.; Minn. Gen. R. Prac. 116; *Fuller v. City of Mankato*, 248 Minn. 342, 80 N.W.2d 9 (1956); Arden Hills Ords. 410.01 and 410.06.

- III. Did Respondent City of Arden Hills prove Molly acted without provocation?**

The court below made no such specific finding of fact.

STATEMENT OF THE CASE

Over three months after the incident and after having already proceeded against Appellant under a city ordinance Respondent City of Arden Hills initiated an action pursuant to an order to show cause to have Molly declared a dangerous dog pursuant to Minn. Stat. § 347.50, subd. 2(2) for having “killed” a neighbor’s dog without provocation. The City had no enabling procedure in its ordinances or resolutions to declare a dog to be dangerous under the state statute and the statute itself has no enabling procedure. No other statute or court rule authorized the City to proceed under an order to show cause. After a short hearing the District Court, John T. Finley presiding, found Molly was a dangerous dog even though the evidence was uncontradicted that the complaining owner refused an offer by the veterinarian to stabilize her animal and instead requested euthanasia. The evidence also established multiple forms of provocation. This appeal followed.

STATEMENT OF FACTS

Molly is a pedigreed almost six-year-old German shorthaired pointer owned by Appellant.¹ T. 48.² Appellant, his family, Molly, and an 11-year-old cat named Tipper had lived in Arden Hills for over 17 years but moved out of the city in June, 2005 due to

¹ All ages are as of the March 14, 2005 hearing.

² “T” represents the transcript of the March 14, 2005 hearing before the Hon. John T. Finley. The Arabic numbers represent the pages of the consecutively numbered transcript.

this situation. T. 48, 89, 93; Exhibit attached to March 16, 2005 Affidavit of Thomas Pursell. (App. 60)³

Molly is a well socialized, friendly and well trained hunting dog. T. 48, 86. As a puppy she received general obedience and socialization training. T. 48. She received nine weeks of professional gun dog training at a cost of over \$1700. T. 49. Molly has never behaved aggressively towards any person. T. 45-6, 50, 78, 82, 87. Molly has frequent contact with other dogs on her twice daily walks and, during cooler weather, weekly baths at a local self-service pet washing facility. T. 49-50. She also hunts with other dogs and visits with the dogs owned by friends of Appellant. T. 49-50, 75-6, 86. She is submissive towards other dogs. T. 86. Molly's career as a hunting dog in Minnesota is now over because under the terms of the dangerous dog statute she must be muzzled and on a leash whenever she is outside a "proper enclosure." T. 65; Minn. Stat. 347.52(a).

Neighbors Patricia Minogue and James Paulet, appellant's hunting friend John Dixon, Appellant and Sharon Klumpp have never seen Molly behave aggressively towards another animal even when provoked or attacked by other large or small dogs. T. 76-8, 80-2, 86-7, 89. All of these people have seen Molly frequently. Mr. Paulet has no concerns about his young daughters caring for Molly. T. 80.

Mr. Paulet's small dog pulled its tie out stake out of the ground and attacked Molly on the street while on a walk with Appellant one evening. T. 51, 80-4.

³ "App. ____" indicates a document contained in the Appendix, and it's page number in the Appendix.

Mr. Paulet's dog was not injured in the confrontation even though Mr. Paulet believed that Molly had grabbed and held his dog by the neck because it was wet. T.82. Mr. Paulet's dog had bitten Molly. T. 51.

John Dixon described situations where his "yappy little [miniature] Schnauzer" had behaved aggressively towards Molly, who ignored the Schnauzer. T. 78. Mr. Dixon also described witnessing just days after the incident in question a very aggressive Husky pestering, pursuing and attempting to ride Molly to the extent it interfered with Molly's ability to hunt pheasant. T. 76-8. To Dixon's surprise Molly did not react aggressively towards the Husky. T. 77.

Pat Minogue's dog plays with Molly, whom she describes as friendly, submissive and well socialized. T. 86. Ms. Minogue is active with Responsible Owners of Mannerly Pets, R.O.M.P., an advocacy organization for dogs. T. 85-6.

Appellant witnessed two situations where Molly suffered puncture wounds after being attacked and bitten by other dogs. T. 50-1. In the one situation Molly did not react at all to being bitten by a friend's dog and in the other situation she did not harm the other neighbor's smaller dog that had attacked Molly without provocation in the street while Molly was on a walk with appellant and his wife. Id.

The complaining neighbor, Linda Mertensotto, described one incident, that of October 24, 2004, in which she claimed to have witnessed Molly behaving aggressively towards her dog, Scooter. T. 24. Even the complaining neighbor's spouse, Paul Mertensotto, testified that after the incident Molly dropped Scooter on command, never made another move towards their dog, and did not act aggressively towards

Mr. Mertensotto. T. 40, 44-5. He had never seen Molly behaving aggressively towards a person or animal before that day. T. 45-6.

The complaining neighbor had a four and one-half year old “cockapoo” named Scooter, a mixed breed dog of cocker spaniel and poodle origin. T. 17. Complainant’s dog was aggressive, fearful and not well socialized according to one of Appellant’s neighbors who had interacted with her. T. 87. No evidence was introduced regarding Scooter ever having been trained or socialized. Mertensottos would let their dog run off leash in their yard. T. 30-1, 45

In the weeks before October 24 on at least three occasions Bill Klumpp saw the complaint’s dog come into appellant’s yard and bark and snarl at Molly just outside of Molly’s kennel. T. 61. On one other occasion in the weeks before October 24 Appellant saw complainant’s dog come into appellant’s yard when Molly’s kennel was empty and defecate in Molly’s kennel. Id. On each of those occasions Paul Mertensotto had to come into Klumpps’ yard to retrieve the dog. T. 62. There were several other times when Sharon Klumpp saw complainant’s dog come into appellant’s yard and chased the dog back into Mertensottos’ yard. T. 93. Sharon Klumpp had also heard barking on other occasions and later heard Appellant comment that Scooter had been on the Klumpps’ property. Id. Notwithstanding the city ordinance prohibiting dogs from running loose, neither of the Klumpps ever complained to Mertensottos about complainant’s dog’s running at large. T. 94.

Molly had gotten loose before. T. 32, 45.⁴ Mr. Mertensotto had seen Molly running outside of Klumpps' yard. T. 45. Mr. Mertensotto acknowledged that their dog also had run around the neighborhood from time to time. Id.

On October 24, 2005 around noon Bill Klumpp was blowing leaves off the landscaping rocks around his home with an electric blower so they could be raked up before winter. T. 52. He wanted to blow the leaves out of Molly's kennel so they would not deteriorate because Molly is allergic to mold. Id. Molly had experienced a flare up in her allergies and on October 21 her dermatologist at the University of Minnesota's Veterinary Hospital had prescribed Prednisone for her. T. 62; Exhibit 7. One of the side effects of Prednisone is that "[s]ome animals may become aggressive while on Prednisone." Exhibit 7; T. 62. She had previously been treated for skin conditions related to the allergies. T. 63.

Molly was in her kennel and Bill entered the kennel with the blower and began to blow leaves out of the kennel. T. 52. The blower was very loud and needed an extension cord. Id. Bill closed the gate to the kennel. Id. Molly was behind him as he blew the leaves out. T. 54. The cord apparently pulled the gate inward and Molly ran out of her kennel, most likely frightened by the loud noise. T. 53. She ran south towards the Mitchells' home with Bill running after her. T. 54, 71. She then turned and headed north and then west between the Petrys' and Mertensottos' houses. T. 54. Petrys lived immediately behind (west) of the Klumpps. Mertensottos' house was kitty corner from

⁴ Appellant disputes the accuracy of complainant's statement because Molly had escaped from their yard only twice in the three years before the hearing.

the Klumpps' and about 20 yards from the corner of the Klumpps' lot. T. 54-5;
Exhibit 5.

Even though Molly usually came when called, Molly did not respond to Bill's calls. T. 71. He ran after her but did not catch up with her until after the incident. T. 41, 54-5. Complainant was in her front yard doing yard work to get ready for winter. T. 16. Her six-pound dog was tied to a 20 foot rope which was tied to a rail of the garage door. T. 17, 18. Complainant was kneeling down trimming some bushes near a tree at the south end of her home. T. 18; Exhibit 1. She first saw Molly running from the east down the hill into Petrys' front yard almost to Petrys' driveway; therefore, complainant was facing to the south. T. 20. Complainant's dog was to the north and began barking at Molly but, according to complainant, was not jumping up and down. T. 21-2. Scooter, however, had advanced to the end of the rope, and therefore, was as close to Molly as she could get. T. 22 Molly was not barking. T. 21.

Complainant got up and ran northwards to grab her dog's rope before Molly got into complainant's yard. T. 22-3, 25-6. First, complainant testified that she screamed when she got up but then changed her testimony and said she didn't scream until Molly had grabbed Scooter. T. 23. Complainant said Molly ran past her in the front yard directly in front of complainant's dog, turned, grabbed Scooter by the back of her head, picked her up and shook her three times. T. 23-4. Complainant said she was right by the dogs and was screaming. T. 25. Complainant said her dog quit barking once Molly turned. T. 23.

Molly showed no sign that she was going to attack Scooter; nor did Molly bark, growl or display her teeth, the common signs of canine aggression. Affidavit of Linda Mertensotto. (App. 28) This all happened very quickly according to complainant. T. 23.

At first complainant testified she did not know if her dog's rope was extended fully when Molly was shaking complainant's dog. T. 24. However, she later changed her testimony and said the rope was not tight. T. 30.

Paul Mertensotto was kneeling down working on the stoop to the front door behind the bushes in front of their home. T. 18, 23, 36-7. He did not see what happened. T. 26, 43. He got up when he heard his wife screaming, not realizing anything was wrong, and had to come around the bushes. T. 24, 26, 39. Complainant testified Mr. Mertensotto yelled, "No, Molly, no," as he ran towards the dogs. T. 27. Mr. Mertensotto testified he yelled, "Don't, Molly, don't," as he rounded the corner of the bushes running towards the dogs. T. 39. He later testified he "probably" yelled, "No, Molly, no," as he ran towards her. T. 40.

According to complainant her husband pulled on the rope and was pulling it towards the garage. T. 30. Thus, Mr. Mertensotto engaged in a "tug of war" with Molly. According to complainant Molly, while holding onto complainant's dog, was pulling away on the rope. T. 27.

Mr. Mertensotto testified he grabbed Molly by the collar, yelled, "Molly, no," and Molly immediately released complainant's dog. T. 27, 40. Complainant testified that Molly let go of the dog as soon as her husband grabbed Molly. T. 27. Mr. Mertensotto led Molly off to the side towards his driveway. T. 40. Molly allowed Mr. Mertensotto to

take her to the side of his driveway without any struggle, didn't try to bite him, didn't act aggressively towards him in any way and just stood by the driveway; therefore, making no effort to go back towards complainant's dog. T. 42, 44-5.

Mr. Mertensotto turned towards his dog and saw Bill Klumpp come running around the corner of Petrys' house. T. 41. Molly turned away from Mr. Mertensotto, pulled out of her collar and ran back towards her home between Mertensottos' and the Petrys' houses, therefore, past Scooter, but making no effort to attack her. T. 41, 42, 56. Mr. Mertensotto took the rope off of their dog. T. 42. She started breathing once the rope was off. T. 42. Complainant's dog had bloodshot eyes and was bleeding from her nose and mouth. T. 27, 43.

The complainant yelled at Bill, "I want that dog put down!" T. 33, 56. Bill said he wasn't going to do that and went to retrieve Molly. T. 56. Bill did not know what had happened at that point. Id. Sharon Klumpp had heard the commotion and came outside. T. 90. Molly was standing in the evergreens on the border between the Klumpp and Minogue homes. T. 56-7, 91. Sharon heard Molly crying, as she does when she is injured. T. 57, 91. Bill told Molly to "stay," slipped a leash on her and put Molly in her crate inside the house.

Bill returned to Mertensottos' front yard where he saw that Mr. Mertensotto was holding Scooter, who was injured, on a towel or blanket. T. 57. Bill started to apologize because he could see complainant's dog had been hurt. Id. Mr. Mertensotto said the complainant was "pretty hot." Id. Bill left and returned with Sharon so as to hopefully

defuse the situation. T. 57-8, 91. Complainant kicked the Klumpps out of her yard. T. 32, 58, 91. Bill and Sharon left immediately and returned home. T. 58, 91.

Mertensottos drove their dog to the University of Minnesota Veterinary Hospital. T. 28-9; Exhibit 15. The veterinarian requested permission to start an IV catheter to begin stabilization. T. 99; Exhibit 15. Complainant declined the request to begin treatment. Id. Instead complainant asked to have her dog euthanized. Id. The dog was euthanized and cremated. Id.; Exhibit 6.

Knowing that the Univ. of Minn. Veterinary Hospital was the only facility open that Sunday, Bill called and gave his credit card number so that any treatment required by complainant's dog would be billed to him. T. 59. He paid \$312.90 for an emergency diagnosis, euthanasia, group cremation and a record charge. Id; Exhibit 6.⁵

Respondent City did not produce any testimony from the U of M veterinarian who examined complainant's dog. Instead, over objection on hearsay, foundation and lack of disclosure grounds, respondent introduced during rebuttal an uncertified copy of the treatment record obtained by the complainant. Exhibit 15; T. 97. The veterinary hospital record reflected and complainant agreed that the veterinarian "[r]equested permission for IV catheter to begin stabilization. Owner declined and elected for euthanasia." Exhibit 15; T. 99.

Respondent produced only one witness who claimed to have seen how Scooter came to be injured, the complainant Linda Mertensotto. T. 24. Her husband was present

⁵ Bill had to obtain a certified copy of the record by subpoena even though a copy had been sent to him by the University because complainant objected to releasing any of her dog's records to Bill. T. 59-60.

at the time but did not see what happened. T. 26, 43. Complainant testified David and Judy Petry were also present but they were not produced by respondent. T. 16. Complainant also testified two other neighbors, Holly and Tom Arnfelt, had just walked by but they were not produced either. Id.

Linda Mertensotto called the Ramsey County Sheriff's Department and talked to Dep. Tholen who responded. Report of Dep. Tholen. (App. 8) Afterwards the deputy went to the Klumpps and talked with Bill and Sharon Klumpp. Id.; T. 67. The Klumpps explained what had happened and answered all of the deputy's questions. Id. Molly sat by the deputy and sniffed him when he sat down at the Klumpps' kitchen table. T. 68. Dep. Tholen petted Molly. Id. Bill asked him to look at Molly and asked if there was anything he wanted to do with her. Id. Dep. Tholen noted the Klumpps "were extremely sorry for what happened." Dep. Tholen report.

Later that day Bill telephoned Mertensottos and was switched into their voice mail. T. 58-9. He began leaving a message saying that he was sorry for what had happened when the complainant picked up the telephone. T. 59. Bill again started to apologize for what had happened. Id. The complainant told Bill that she really just wasn't ready to talk at that time. Id. Bill said he understood, said goodbye and hung up. Id.

No one from the City or Animal Control ever came out to look at Molly or observe her behavior even though Bill asked them to do so. T. 68. An animal control officer left a citation at Bill's house charging him with a misdemeanor violation of the dog-at-large

ordinance and the civil provision. T. 69.⁶ Bill Klumpp appeared in court to request a formal complaint, which was filed but charged only the dog-at-large ordinance criminal violation. Id. He entered a plea to that charge as a petty misdemeanor on March 15, 2005. T. 69; Exhibit 12; and had already agreed to do so as of the date of the hearing in this matter. T. 69.

The Klumpps made every effort to comply with Arden Hill Ord. 410.06 voluntarily. T. 69-70. On November 5, 2004, Bill Klumpp met with two fence company representatives. Id. The Klumpps had Midwest Fence construct a five-foot high chain link fence completely enclosing their back yard where Molly's kennel was located. T. 69-70; Exhibit 14. The fence cost \$3,285. Exhibit 14. Molly had already had a microchip implanted as a puppy. T. 70.

Even though the Klumpps had lived at their Arden Hills home for almost 18 years, they moved out of Arden Hills in June, 2005 because the incident had divided the neighborhood in a way the Klumpps found regrettable and because the Klumpps wanted to open a new chapter in their lives. T. 93; Exhibit attached to Affidavit of Thomas Pursell dated March 16, 2005. (App. 60)

On November 5, 2004 Animal Control left a blank dangerous dog registration form tucked into the Klumpps' garage door even though Bill was at home. T. 68; Exhibit 10. Animal Control, at the request of the City Attorney, some days later left a

⁶ The issuance of the citation by an animal control officer who was not a peace officer was unlawful and in itself a misdemeanor because Respondent City had not authorized animal control to serve such a summons. Minn. Stats. §§ 626. 862, 626.863; Arden Hills Ord. 120.04.

partially completed dangerous dog registration form on the Klumpps' driveway. T.69; Exhibit 11.

On January 28, 2005 Respondent filed and moved for an order requiring Bill Klumpp to show cause why Molly should not "be designated a Dangerous Dog pursuant to Minnesota Statutes Sec. § 347.50, Subd. 2(2)." Respondent's Motion dated January 4, 2005; Order to Show Cause dated January 31, 2005; Notice of Case Filing. Respondent's trial memorandum alleged Molly's "actions caused damages sufficient to require the neighbors [sic] dog to be euthanized." City's Memorandum dated January 4, 2005. Respondent set the matter for hearing March 11, 2005. Notice of Case Filing; City's Notice of Motion and Motion. Respondent did not serve counsel for appellant until February 8, 2005. Affidavit of Service by Mail. The matter was heard March 14, 2005. On March 31, 2005 the court granted Respondent's motion with judgment being entered April 7, 2005. Findings of Fact, Conclusions of Law and Order. (App. 1) Respondent never served a copy of the order on counsel for Appellant. The notice of appeal was filed June 6, 2005. The transcript was mailed July 11, 2005.

ARGUMENT

I. Molly did not “kill” a domestic animal within the meaning of Minn. Stat. § 347.50, subd. 2(2) because complainant declined medical treatment and, instead, requested euthanasia.

In order to designate Molly as a dangerous dog as alleged the evidence must establish that Molly “killed a domestic animal without provocation while off the owner’s property.” Minn. Stat. § 347.50, subd. 2(2). “Kill” is not defined in the statute nor is it a technical word. Therefore, it is to be construed according to the rules of grammar and to the common and approved usage. Minn. Stat. § 645.08(1). “Kill” means “to deprive of life.” *Merriam Webster’s Collegiate Dictionary* (Merriam-Webster, Inc. 1993). Clearly, Molly did not kill Scooter because the U of M did not euthanize an already dead animal.

Respondent did not allege Molly “killed” the complainant’s dog because Respondent knew that was factually not correct. Instead, Respondent alleged that Molly “caused damages sufficient to require the neighbors [sic] dog to be euthanized.” City’s Memorandum dated January 4, 2005. The trial court found, contrary to the uncontradicted evidence regarding euthanasia, that the complainant’s dog “died as a result of the wounds inflicted by Molly.” Paragraph 14, Findings of Fact, Conclusions of Law and Order.

In this case of first impression this court must determine if “kill” for purposes of Minn. Stat. § 347.50, subd. 2(2) has its common and ordinary meaning or if means only to be an ultimate cause of death. That clearly was not what the legislature intended when it adopted the dangerous dog statutes in 1988. Laws 1988, chapter 10, section 1. Because this is an issue of statutory construction, this Court reviews the issue de novo.

State v. Stevenson, 656 N.W.2d 235 (Minn. 2003); *Woods v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704 (Minn. Ct. App. 2002).

“[W]here a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction.” Minn. Stat. § 645.17(4). Prior to 1988 Minnesota’s appellate courts had interpreted many times the meaning of Minnesota’s homicide and wrongful death statutes. Those statutes do not require proof that the actor “killed” another. The murder in the first and second degree statutes use the phrase “causes the death of a human being.” Minn. Stat. §§ 609.185; 609.19. The murder in the third degree statute uses the phrases “causes the death of another” and “proximately cause the death of a human being.” Minn. Stat. § 609.19(a) and (b). The manslaughter and criminal vehicular homicide statutes all use the phrase “causes the death of” a human being or another. Minn. Stat. §§ 609.20; 609.205; 609.21, subd. 1.

For liability to attach for homicide the criminal defendant’s actions must have been a “substantial causal factor” in the death of the victim. *State v. Sutherlin*, 396 N.W.2d 238, 240 (Minn. 1986); *State v. Southern*, 304 N.W.2d 329, 330 (Minn. 1981). Because the legislature used the word “kill” in the dangerous dog statute rather than “cause the death of” a different meaning was deliberately intended.

The wrongful death statute uses the phrase “[w]hen death is caused by the wrongful act or omission of any person or corporation” to impose tort liability. Minn. Stat. § 573.02, subd. 1. Before a physician may be successfully sued for wrongful death the plaintiff must prove that the doctor’s “action or inaction was the direct cause of

decedent's death." *Silver v. Redleaf*, 292 Minn. 463, 465, 194 N.W.2d 271, 273 (1972).

Here the direct cause of Scooter's death was euthanasia.

In the instant case the complainant declined to let the veterinarian stabilize her dog even when the doctor offered. Instead, the complainant requested euthanasia. No evidence was admitted to show that complainant's dog would have died in any event – it may well have survived if treated. Based on the evidence adduced at the hearing, we just don't know. In this unusual situation, complainant's decision to euthanize her dog was an intervening act which directly caused the dog's death. It did not just contribute to the animal's death. This was indeed tragic and may have been morally justified; however, that does not justify ignoring the plain meaning of "kill" on a record where Molly's conduct cannot be fairly evaluated.

Had the Legislature intended the meaning alleged by Respondent and the interpretation of the trial court, it would have used the phrases previously interpreted by the Minnesota Supreme Court as explained above. Because the Legislature used different wording, a different meaning was clearly intended. If Molly had killed complainant's dog, the decision to euthanize would have been unnecessary.

There are also good policy reasons for reversing the interpretation of the dangerous dog statute by the trial court. By adopting the word "kill" rather than some other choice of words the legislature restricted the designation of dangerous dog only to those dogs who continue their unprovoked actions until the actual death of the other domestic animal. In this case Molly dropped complainant's dog upon command and allowed herself to be led away by Mr. Mertensotto without trying to continue an attack.

Indeed, even when she ran home Molly ran past Scooter and made no attempt to harm her further.

Due to the expensive and onerous conditions which follow from the designation of dangerous dog, the designation is reserved for those dogs seriously injuring humans without provocation and those dogs which, without provocation, kill another domestic animal by continuing to attack until the other animal is dead without the intervention of a veterinarian. Indeed both the published and unpublished cases citing the dangerous dog statute all involved dogs which attacked and seriously injured humans and not another animal. See e.g. *Hannan v. City of Minneapolis*, 623 N.W.2d 281 (Minn. Ct. App. 2001).

Furthermore, the Legislature restricted the designation so that dog owners were not subject to varying standards of treatment of injured animals or to the economic situations of the owners of the injured animals. The legislature recognized that owners may not wish to treat an injured animal due the expense of treatment or the burden the recovery process may place on the owner. Here the complainant made the decision to euthanize rather than treat her dog, who was obviously still alive even though injured.

Because the evidence was uncontroverted that Scooter died from euthanasia, because there was no evidence she would have died anyway, and because the trial court's interpretation of "kill" for purposes of Minn. Stat. § 347.50, subd. 2(2) is contrary to the canons of construction and the clear, common meaning of the word, the trial court's findings, and the designation of Molly as a dangerous dog, should be reversed.

II. Respondent should not be permitted to bring an action to enforce the dangerous dog statute pursuant to an order to show cause where the City has adopted its own dog ordinance, had not adopted an enabling ordinance and the statute itself has no enabling procedure.

Respondent City through its motion sought to have appellant show cause why Molly should not be designated a dangerous dog under the state statute. T. 5-6. In so doing, it ignored the civil remedies had adopted in its own ordinances, choosing instead to proceeding under a state statute it had not adopted, and using the disfavored “order to show” as a substitute for clearly articulated procedures.

Notwithstanding counsel for respondent’s claims to the contrary (see T. 5-6), Respondent does have a dangerous dog ordinance it could have proceeded under Arden Hills. Ord. 410.06. That ordinance, in accord with the relevant constitutional due process requirements, sets forth definitions and the enabling procedure. Under that ordinance the court “may either order the dog killed or destroyed in a humane manner, or order the owner or custodian to remove it from the City, or order the owner or custodian to keep it confined to a designated place.” Arden Hills Ord. 410.06, subd. 2. Respondent may proceed under Ord. 410.06 if a dog has “destroyed property” or “is a public nuisance as defined in this chapter.” Arden Hills Ord. 410.06, subd. 1(A) and (D). Dogs are personal property under Minnesota law, *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 8569 (1930); therefore, a dog which kills another dog has clearly “destroyed property.” Arden Hills Ord. 400.01, subd. 7 defines “nuisance to “mean any dog which...attacks other animals.” Thus, Respondent clearly has an ordinance that could have been used in this situation and

one which complies with due process by setting forth the application of the ordinance and the process to enforce it.

The City prosecuted Appellant for a misdemeanor under its ordinance, but its refusal to proceed with the civil case under its own ordinance has several problems which should cause this Court to conclude that the City acted outside its authority in acting under the dangerous dog statute.

First, it is uncontested that the City had not incorporated or adopted the dangerous dog statute, or established procedures for enforcing the law, nor has Ramsey County.⁷ While Minn. Stat. § 347.50, et seq. places certain responsibilities on counties, it sets forth no process by which a dog can be declared to be a dangerous dog, leaving that process to be adopted by city councils or county boards through passage of an ordinance.⁸ Indeed, because the dangerous dog statute allows the destruction of private property without a hearing, it violates due process on its face. *See e.g. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The statute *requires* implementing procedures such as those adopted by the City of St. Paul. This literal lack of authority to prosecute under the dangerous dog statute is not a meaningless technicality.

⁷ Arden Hills ordinances are available on-line at www.ci.arden-hills.mn.us. Ramsey County ordinances are available on-line at www.co.ramsey.mn.us.

⁸ Ramsey County has never even adopted a fee schedule for the registration of dangerous dogs. Appellant registered Molly at the City of St. Paul's L.I.E.P. Office as requested in Exhibits 10 and 11 and was charged a \$75 fee, the amount set by St. Paul's ordinance. The fee has recently been refunded due to the lack of any county ordinance or resolution establishing the fee.)

Arden Hills, like other cities, must give its residents notice of the laws that apply to them. Every ordinance must be published once in the City's official newspaper. Minn Stat. § 412.91, subd. 4. Adopting Minnesota statutes by reference avoids the publication requirement. Minn. Stat. § 471.62. Errors in publication may or may not affect the validity of the ordinance. If the error is minor so that the correct meaning is clear from the context, the error has no effect on the ordinance's validity. When the error is more substantial, the ordinance provision containing the error is ineffective & void. *W.H. Barber C. v. City of Mpls.*, 227 Minn. 77, 34 N.W.2d 710 (1948). Only the city council has the power to enact ordinances. Minn Stat. § 412.191, subd 4; 412.221, subd 33.

Arden Hills Ord. 210.06 makes reference to putting the affidavit of publication in the city code book. Every city ordinance must be placed in the ordinance book containing copies of all ordinances passed by the council & must be recorded in the ordinance book within 20 days of publication. Minn Stat §§ 412.151, subd 1; 412.191, subd 4. Arden Hills has adopted the state traffic code (Ch. 169) in Arden Hills Ord. 800.01 and the State Building Code in Arden Hills Ord. 900.04.

A council enactment that regulates or governs people or property and provides a penalty for violation, is an ordinance. Therefore, the council must pass in ordinance form all police regulations for public health, moral, economic wellbeing, welfare and safety. Any regulation should be of general application within the city and of a permanent and continuing nature. See e.g. *Hanson v City of Granite Falls*, 529 N.W. 2d 485 (Minn Ct App 1995). Ordinances must be reasonably certain in their terms and set forth objective

standards for both the police & for the public to provide adequate notice of what is required. *Chicago v Morales*, 119 SCt 1849 (1999).

City of West Covina v. Perkins, 525 U.S. 234, 119 S.Ct. 678 (1999), held that when police seize property, due process does not require them to provide the owner with notice of state law remedies which are established by published, generally available state statutes and case law regarding the process by which the property may be reclaimed, as long as the property owner is informed that the property has been seized. By analogy if the city provides notice it intends to require certain dogs to be registered as dangerous and the consequences of such a designation, due process is satisfied only as long as the process by which the designation may be challenged or by which the dog is to be so designated is clearly set forth in the statute or ordinance. Here, neither the state statute nor any city ordinance gives notice as to the process or establishes the process. Therefore, due process has not been satisfied.

There is simply nothing in Respondent's ordinances or in the state statute to tell a dog owner in Appellant's position how to challenge a "dangerous dog" designation or the process by which a city or county may require such registration. The kind of notice contemplated by the requirement of publication is not satisfied by expecting a city resident to read the mind of the city attorney or city council as to the process. Had Respondent incorporated or referenced Minn. Stat. § 347.50 in Ord. 410.06 Respondent may well have complied with due process, but it did not. Appellant does not deny that the City could have adopted the dangerous dog statute. *See Hannan v. City of Minneapolis*, 623 N.W.2d 281 (Minn. Ct. App. 2001).

This lack of considered adoption of the dangerous dog statute has left the City, through its attorney, to make up *ad hoc* enforcement procedures of dubious validity. Cities frequently adopt the state traffic code, Minn. Stat. § 169.01, et seq., by ordinance so the city can enforce the traffic code in the same manner as other city ordinances. See e.g. Vadnais Heights City Ord. 76.010; City Arden Hills Ord. 800.⁹ The City of St. Paul adopted a dangerous dog ordinance which incorporates many of the requirements of Minn. Stat. § 347.50 et seq. and which establishes a clear administrative process to determine the animal's dangerousness. See St. Paul Ords. 200.12; 200.121.¹⁰ In this case, Respondent initially tried to require Molly to be registered without any process whatsoever. Exhibits 10, 11. Later, Respondent City of Arden Hills chose to proceed by way of an "order to show cause." Minn. Gen. R. Prac. 116 provides:

An order to show cause will be issued *only* in a case where a statute or rule of civil procedure provides that such an order may be issued or where the court deems it necessary to require the party to appear in person at the hearing.

However, as Counsel for respondent conceded that at the beginning of the hearing, T. 5-6, no statute or rule of civil procedure authorizes an order to show cause in this case. Nor was appellant's appearance necessary. Respondent did not call appellant as a witness, as Respondent apparently believed it could make its case only by calling the complainant and her husband. As noted in *3A Minn. Practice Series, General Rules of Practice Annotated*, David F. Herr & Laurie A. Kindel, p. 213, (Thompson West 2005):

⁹ Vadnais Heights city ordinances are available on-line at www.ci.vadnais-heights.mn.us.

¹⁰ St. Paul city ordinances are available on-line at www.ci.stpaul.mn.us.

Rule 116 establishes the procedure for obtaining an order to show cause when issuance of an order to show cause is authorized by rule or statute. The order to show cause is not a favored tool because it has the effect of ordering a person to attend a hearing and has been abused in the past. There are relatively few occasions that are not just as well served by a notice of hearing, allowing the party to elect not to attend and suffer the consequences of the motion being unopposed.

When the legislature adopted the dangerous dog statute in 1988, it had already adopted a number of statutes setting forth an enforcement procedure by way of an order to show cause. See e.g. Minn. Stat. §§ 80A.13, subd. 2 (denial, suspension and revocation of securities registration); 260B.335, subd. 2 (contributing to delinquency of a minor jurisdiction); 260C.405, subd. 4 (violation of child protection order for protection); 299L.07, subd. 8b (suspension of gambling license). It can therefore be inferred that the omission of the order show cause procedure in the dangerous dog statute was not inadvertent but a deliberate decision to let cities and counties devise and adopt the process by ordinance. In the absence of such procedures, this Court should not allow a City to adopt *ad hoc* process or impose the equivalent of new ordinances *after* the supposed violation. Moreover, the chosen remedy in this case is not only “disfavored,” but was also an end run around the discovery and alternative dispute resolution rules normally governing civil actions; and fails to establish who has the burden of proof.

The conclusion that the City could not proceed under the dangerous dog statute also has general support in principles of statutory construction. When two provisions in law, one specific and one general, on the same subject conflict and the conflict is irreconcilable, the specific provision shall govern. Minn. Stat. § 645.26, subd. 1; *Beck v.*

Gore, 245 Minn. 28, 70 N.W.2d 886 (1955). If two statutory provisions conflict, the more specific controls over the more general. *Hyland Hill North Condominium Ass'n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1966), *cert. denied* 519 U.S. 1041, 117 S.Ct. 610. These same principles apply to conflicts within a city charter. *Fuller v. City of Mankato*, 248 Minn. 342, 80 N.W.2d 9 (1956). Those principles should also apply to the conflict here between a city ordinance and a state statute.

In the instant case there is a conflict between Arden Hills Ord. 410.06, which has a specific enforcement process set forth in its terms, and Minn. Stat. § 347.50, which has no process set forth in its terms. Therefore, Ord. 410.06 should govern. Respondent's attempt to enforce Minn. Stat. § 347.50 without adopting any enabling ordinance should be reversed. Although Respondent raised this issue below at the hearing, and in its written memorandum, the trial court failed to rule on this issue. T. 6; Respondent's Memorandum in Opposition to Designation of Molly as a Dangerous Dog. It should also be noted that the dangerous dog statute, unlike others, does not provide that its remedies are in addition to others provided by law. See e.g. Minn. Stat. § 8.31, subd. 3a ("In addition to the remedies otherwise provided by law" injured consumer has private right of action).

In summary, Respondent initially sought to proceed against appellant by both the criminal dog-at-large ordinance and the civil provision in Ord. 410.06 when Animal Control issued Appellant a citation. Respondent elected to proceed only on the criminal provision after a formal complaint was requested. Respondent waited over three months to file this action. If Respondent truly believed that Molly was dangerous, it would have

and should have filed immediately using the lawfully adopted process. Instead, it chose a disfavored procedure under an unauthorized statute. For these reasons, the decision of the lower court should be reversed and Respondent's motion denied with prejudice.

III. The lower court clearly abused its discretion when it found Molly's actions were unprovoked.

Before a dog is determined to be a dangerous dog under Minn. Stat. § 347.50, subd. 2(2) it must be proven that the dog "killed a domestic animal without provocation while off the owner's property." Here it is uncontested that Molly was off her owner's property. Minn. Stat. § 347.50, subd. 2(2) does not require that provocation come only from the injured domestic animal. Contrast Minn. Stat. § 609.226, subd. 3, which provides for an affirmative defense to criminal liability for an injury caused by a dangerous dog as defined under Minn. Stat. § 347.50, subd. 2 if "the victim provoked the dog to cause the victim's bodily harm."

Thus, provocation for the killing of a domestic animal can come from any number of sources. Here the lower court made no finding of fact that Molly's actions were "without provocation." See Findings of Fact, Conclusions of Law and Order. The lower court did order that Molly "be designated as a Dangerous Dog ...because it 'killed a domestic animal (Scooter) without provocation while off the owner's property.'" *Id.*

Findings of fact, when actually made by the lower court, will be overturned on appeal only when clearly erroneous. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451 (Minn. Ct. App. 2001). "The issue of whether a dog has been provoked is one for

the...trier of fact..." *Pittman v. City of St. Paul*, 2003 WL 22177346 (Minn. Ct. App. 2003) (copy provided at App. 65 pursuant to Minn. Stat. § 480A.08(3)).

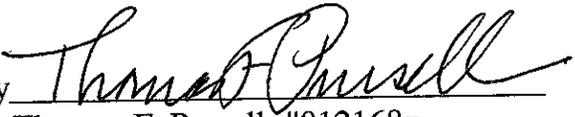
Here there was ample evidence that Molly's actions on October 24 were provoked. Scooter had behaved aggressively towards Molly on a number of occasions, including at least four times in the weeks just before October 24 as well as on other occasions. Molly was scared by the noise of the electric leaf blower and suffering the side effects of Prednisone. While still in Petrys' yard, Scooter began barking at Molly and advanced as close to Molly as Scooter's rope would allow. Complainant began screaming and ran towards the dogs. Mr. Mertensotto, according to complainant, pulled on the rope engaging in a tug of war while Molly had hold of Mertensottos' animal. By ignoring all of this evidence the court below clearly abused its discretion and the decision should be reversed.

RELIEF

Appellant asks for the following relief: (1) that the order of the court below designating Molly as a dangerous dog pursuant to Minn. Stat. § 347.50, subd. 2(2) and requiring Appellant to comply with Minn. Stat. §§ 347.51, 347.515 and 347.52 be reversed; (2) that the motion of Respondent be denied with prejudice; (3) that counsel for Respondent be ordered within 14 days to return to counsel for Appellant all dangerous dog registration materials pertaining to Molly and (4) that Molly be stricken from the listing of dangerous dogs at the City of St. Paul L.I.E.P. Office.

LINDQUIST & VENNUM P.L.L.P.

Dated: August 15, 2005

By 

Thomas F. Pursell, #012168x

4200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Telephone: (612) 371-3211

ATTORNEYS FOR APPELLANT

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) (with amendments effective July 1, 2007).