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NO. A11-191

State of Minnesota  
**In Court of Appeals**

Gordon Helmer Anderson,

*Appellant,*

vs.

Neil Raymond Christopherson and Dennis Christopherson,

*Respondents.*

**APPELLANT'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

#### Did The Trial Court Err When She Held As A Matter Of Fact And Law That Gordon Anderson's Fall Did Not Occur As A Direct Result Of The Actions Of Neil Christopherson's Dog, Bruno?

The trial court held that Gordon Anderson's fall and broken hip did not occur as a direct result of the actions of Bruno because Bruno was "focused" on Mr. Anderson's dog (ADD. 5, AA-6).<sup>1</sup>

Apposite Cases:

*Lewellin v. Huber*, 465 N.W.2d 62 (Minn. 1991);  
*Morris v. Weatherly*, 488 N.W.2d 508 (Minn. App. 1992).

### II

#### Did The Trial Court Err When She Held As A Matter Of Fact And Law That Dennis Christopherson Was Not Harboring Bruno At The Time Of Gordon Anderson's Fall?

The trial court held as a matter of fact and law that homeowner Dennis Christopherson was not harboring Neil Christopherson's dog (ADD. 5-6, AA-6).

Apposite Case:

*Verrett v. Silver*, 244 N.W.2d 147 (1976).

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<sup>1</sup> "ADD." Refers to Mr. Anderson's Addendum and "AA" refers to his Appendix.

## **STATEMENT OF THE CASE**

Appellant Gordon Anderson sued Respondents Neil Raymond Christopherson and Dennis Christopherson alleging absolute strict statutory liability under Minnesota's dog injury statute, Minnesota statutes § 347.22 (AA 1-3). Mr. Anderson also alleged common law negligence against both Christophersons. *Id.* The parties cross-moved for summary judgment (AA-6). Anoka County District Court Judge Tammi A. Fredrickson denied Mr. Anderson's motions and granted most of the Christophersons' motions permitting only Mr. Anderson's common law negligence claim against dog owner Neil Christopherson to go forward (ADD. 1-6). In a second proceeding, Judge Fredrickson signed an "Amended Order" pursuant to MRCP 54.02 (ADD. 8-9). Judgment was entered on December 13, 2010 (ADD. 9), and Mr. Anderson appeals from the judgment (AA-127).

## **STATEMENT OF FACTS**

### **Neil Christopherson And His Dog Bruno**

Respondent Neil Christopherson lives in Sioux Falls, South Dakota (AA-26, depo. 4-5). Although Neil Christopherson lives in Sioux Falls, he grew up in Andover, Minnesota, in the home of his parents Dennis and Kathleen Christopherson (AA-28, depo. 11 & AA 37-8, depo. 5-6). In September, 2009, Neil Christopherson obtained a

dog named Bruno, which weighs about 50-60 pounds (AA-28, depo. 10-11).

When Neil visited his parents at their Andover home, he always made sure it was okay with them. *Id.* Neil Christopherson contacted his mom and asked if he could stay at his parents' Andover residence for a week, including September 27, 2009 (AA-29, depo. 15-17). His mom said "yes" and she had no problem with him bringing Bruno along. Neil's parents knew that Bruno would be sheltered or lodged in the garage ... he would not be out in the elements (AA-28, depo. 12-13). At one point, Neil Christopherson agreed that Bruno had a "refuge" in Dennis Christopherson's garage when Neil visited (AA-28, depo. 12-13).

Neil Christopherson had his parents' permission to stay at their home as long as he followed their rules (AA-29, depo. 16-17). He took care of his parents' home while they were out of town ... he cleaned stuff up, did some yard work and cleaned the garage (AA-33, depo. 33).

Although Neil Christopherson was not present at his parents' home when the incident occurred on September 27, 2009, he learned from Alice (who was present) that Bruno had run from the Christophersons' yard. Bruno's "shock" collar failed and he ran into

the street (AA 32-3, depo. 27-30). The Anoka County Sheriff cited Neil Christopherson for violating the leash law and permitting Bruno to run at large (AA 68-9).

### **Gordon Anderson's Accident And Injuries**

Eighty-seven year old Gordon Anderson lives at 14514 Kiowa Street Northwest in Andover. He has lived there since 1985 and possesses a B.S. degree in aeronautical engineering from the University of Minnesota (AA-49, depo. 5-6). Gordon Anderson has known Dennis Christopherson since about 1985 when the Andersons moved into their house ... the Christophersons were already residents and the Andersons and Christophersons were neighbors (AA 51-2, depo. 16-17).

In September, 2009, Gordon owned a miniature Schnauzer named "Tuffy." Tuffy weighs about 20 pounds and Gordon was able to pick him up (AA-52, depo. 18-19).

Gordon Anderson testified that one or two times a week he walked Tuffy around the block (AA-52, depo. 20). The walk takes Mr. Anderson and Tuffy by the Christophersons' (which is a little bit northeast of plaintiff's home). *Id.* It takes Mr. Anderson and Tuffy about 15 minutes to walk around the block (AA-54, depo. 26).

Mr. Anderson put Tuffy on a non-retractable leash about five feet long (AA-54, depo. 27). They walked on the street against traffic (AA-54, depo. 26 & AA-45, depo. 37). When they passed defendant Dennis Christopherson's home, Bruno charged at Tuffy and bit Tuffy in the chest (AA 54-5, depo. 27-31). Bruno was on a dead run when he hit the street and it took only about ten seconds for Bruno to reach Tuffy (AA 55-6, depo. 29-33). There was no time for Mr. Anderson to pick Tuffy up. *Id.*

Gordon Anderson may have been trying to kick Bruno to get him off Tuffy but nothing fazed Bruno. The whole incident took seconds and eventually, Gordon Anderson fell to the ground and broke his hip (AA-56, depo. 34-5 & AA-58, depo. 44).

Mr. Anderson was asked many questions about how the seconds-long incident occurred but perhaps his most accurate statement to sum up the realities of the incident are set forth in this quote from his deposition:

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.

(AA-56, depo. 34). According to Mr. Anderson, a dog from the Christopherson home charged he and Tuffy about three weeks earlier (AA-53, depo. 21-2). Years earlier, the Christophersons kept another dog that ran loose (AA-53, depo. 23).

### **Dennis Christopherson's Home Available To Bruno**

Defendant Dennis Christopherson co-owns (with his wife Kathleen) the home on Kiowa Street Northwest in Andover where his son Neil and Bruno stayed (AA 37-9, depo. 5-6, 13). According to Dennis Christopherson, the Christophersons are "family" and Neil Christopherson is always welcome at the home in Andover (AA 39-40, depo. 13-14).

Dennis stated that Neil must obtain permission from Dennis or his wife to stay at their home on Kiowa Street (AA-40, depo. 16-17). It was fine for Neil to come with Bruno if he obeyed Dennis's rules, i.e., Neil's dog would not make a mess, etc. (AA 40-1, depo. 17-18). If Neil's dog needed to spend the night, Dennis authorized it but Dennis preferred that the dog sleep in the garage (AA 41-2, depo. 21-2). Dennis Christopherson was not surprised that Neil was staying at his home at the time of the accident and he was not surprised that Neil's dog was with him (AA-46, depo. 40-1).

### **Trial Court Order**

Trial court judge Tammi A. Fredrickson held that neither Dennis Christopherson nor Neil Christopherson were absolutely strictly liable under the dog injury statute because Bruno "was focused" on Tuffy, not Mr. Anderson (ADD. 1-5). Judge Fredrickson also held as a

matter of law that Dennis Christopherson did not harbor Bruno (ADD. 1-6). The trial court also held that Dennis Christopherson was not common law negligent leaving only the issue of Neil Christopherson's common law negligence for jury resolution (ADD. 6-7).

## **ARGUMENT**

### **A. Standard Of Review**

An appellate court applies the same standard as the trial court when it reviews a summary judgment. The Court must determine (1) whether there are any genuine issues of material fact; and (2) whether the trial court erred in its application of the law. *L & H Transport, Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 227 (Minn. 1987). Issues of statutory interpretation involve legal questions which this Court reviews de novo. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

### **B. The District Court Erred When She Decided As A Matter Of Fact And Law That Gordon Anderson's Fall And Broken Hip Did Not Occur As A Direct And Immediate Result Of Bruno's Attack.**

#### **1. The Statute**

Minnesota Statutes section 347.22 provides in part:

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 .... The term 'owner'

including any person harboring or keeping a dog but the owner shall be primarily liable.

Minn. Stat. § 347.22. Except for the defenses already built into the law, recovery is ensured in all cases. *Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981).

## **2. The Trial Court Holding**

The trial court concluded that it:

[Did] not need to speculate, as [Gordon Anderson] suggests, as to what was Bruno's focus during the incident. Bruno charged at, bit, and held onto Tuffy. At no time was Bruno focused on [Gordon Anderson] himself. [Gordon Anderson] argues that although Bruno only bit Tuffy, Bruno was focused on [Gordon Anderson] as well because [Gordon Anderson] was holding the leash connected to Tuffy. The analysis does not change because [Gordon Anderson] was holding a leash connected to Tuffy – Bruno's focus was solely on Tuffy.

(ADD. 5).

Judge Fredrickson based her analysis and holding on *Mueller v. Theis*, 512 N.W.2d 907, 910-11 (Minn. App. 1994) rev. denied (Minn. April 28, 1994) (ADD. 5). This Court stated in *Mueller*, that, “[i]n our view, the direct and immediate results of the dog's actions require both that the dog's conduct be focused on the injured party and that the injury be the direct and immediate result of that focus.” *Id.*

### 3. The Lewellin Case

In the *Mueller* case, upon which the trial court relied, this Court construed the supreme court's decision in *Lewellin v. Huber*, 465 N.W.2d 62 (Minn. 1991). The *Lewellin*, case involved dog owners who hired a teenager to house-sit and care for their dog. While the teenager operated her automobile the dog, which was in the backseat, attempted to get into the vehicle's front seat, distracting the teenager. The teenager lost control of her vehicle, striking and killing a little boy in the ditch. *Id.* at 63. A wrongful death trustee sued the dog owners under section 347.22 and, after this Court held for the trustee, the supreme court reversed. *Id.*

The *Lewellin* court addressed the meaning of "attacks or injures" as the language appears in the statute. *Id.* at 64. Our supreme court noted that the phrase "attacks or injures" contemplates action by a dog that directly and immediately produces injury to the person the dog attacks or injures. *Id.* at 65. Thus, legal causation triggering absolute liability under the statute must be direct and immediate without intermediate linkage. See *Id.* at 65. Public policy and legislative intent were best served by limiting proximate cause to direct and immediate results of the dog's actions, whether hostile or non-hostile. See *Id.* at 66.

4. **Mueller v. Theis And This Court's Introduction Of A Dog's Subjective Intent Or "Focus" Into The Causation Analysis**

This Court in *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. App. 1987) correctly rejected a dog owner's claim that section 347.22 requires that an injury result from a vicious dog attack before absolute statutory strict liability could be imposed:

From the plain meaning of Minn. Stat. § 347.22, we hold that injuries inflicted by a dog outside the scope of a vicious attack are not, as a matter of law, excluded from coverage under the statute.

*Boitz*, 405 N.W.2d at 910. In *Boitz*, a pedestrian suffered injuries when a dog bumped him. It appears from the facts in *Boitz*, that the dog bumped plaintiff as it ran down a footpath toward an alley. *Id.* This Court saw no need to determine the dog's focus or what its apparent intent might be. See *Id.*

But, in *Mueller v. Theis*, 512 N.W.2d 907, 910-11 (Minn. App. 1994), this Court introduced a new factor to the "direct and immediate" *Lewellin*, causation standard ... where was the dog "focused" when the injury occurred? *Id.* This Court reasoned that, in *Lewellin*, the dog focused its conduct on the driver rather than on the injured child in the ditch. *Mueller v. Theis*, 512 N.W.2d at 911 citing *Lewellin*, 465 N.W.2d at 166. Therefore, under *Mueller*, plaintiffs must now show that an injury be both a direct and immediate result of a

dog's activity and a result of the dog's focus. *Mueller*, 512 N.W.2d at 910-11.

By introducing the "dog focus" language into the section 347.22 causation analysis, this Court introduced a subjective element which the statute does not contain. In doing so, the Court has effectively introduced a third defense into the statute ... now the plaintiff must demonstrate that he was not (1) trespassing or (2) provoking the dog and (3) that the dog was "focused" on him before absolute strict statutory liability is triggered.

**5. The Court Of Appeals Has Criticized Its "Focus" On The "Dog's Focus."**

This Court commented on *Mueller's* "dog focus" language in *Robinson v. Robinson*, 1998 WL 901766 (Minn. App.) (AA-129). In *Robinson*, a six year old vacationed with her grandparents and their dog at a cabin. When the six year old was playing on the floor near a table petting the dog, it suddenly barked, prompting the six year old to run. She collided with the table, sustaining facial scarring. *Id.* The six year old's parent brought an action under section 347.22 against the grandparents. A trial court judge instructed the jury with the "focus" language from *Mueller v. Theis*. Although this Court affirmed the trial court, the Court commented on and/or criticized the *Mueller* language:

[W]e are aware that the “focus” language can be troubling ... Unfortunately, the word “focus” introduces a subjective element into this strict liability statute, in that it compels the trier-of-fact to consider whether the subject dog was “directing” or “concentrating” its attention at the injured person.

*Id.*

So, how might the *Mueller* “dog focus” factor complicate the causation analysis and/or adversely affect a dog injury victim’s claim? Mr. Anderson suggests that, given this Court’s *Mueller v. Theis*, analysis, the victim in *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. App. 1997) (victim bumped by dog as dog ran to an alley), might not benefit from section 347.22 absolute statutory liability because he could not show that the running dog was “focused” on him. Or, in this case, the trial court held that Mr. Anderson could not benefit from the statute’s absolute strict liability because, even though he fell down during the tussle between Bruno, Tuffy and himself, Bruno was not “focused” upon him.

**6. *Morris v. Weatherly***

This fact scenario is not different, in any meaningful way, from the facts in *Morris v. Weatherly*, 488 N.W.2d 508 (Minn. App. 1992). There, plaintiff bicyclist noticed that a dog was approaching him from

behind on a public road. *Id.* at 509.<sup>2</sup> The bicyclist quickly dismounted his bike and his left leg collapsed, causing him to fall suffering a rotator cuff tear. *Id.* This Court affirmed noting that the injuries were the direct and immediate result of the dog's actions. *Id.* at 510.

Here, Gordon Anderson saw Bruno running toward he and Tuffy. Although Mr. Anderson could not explain precisely what happened, and although he testified about trying to kick Bruno, he was clear about one thing: He fell because of the interaction between himself, Tuffy and Bruno (AA-56, depo. 34). Mr. Anderson contends that his fall and broken hip were a direct and immediate result of Bruno's actions which is all that the supreme court required in *Lewellin*. Unfortunately, the trial court here took this Court's *Mueller v. Theis*, "where-was-Bruno-focused?" analysis and ran with it, holding that because Bruno's focus was on Tuffy, absolute liability did not attach even if Anderson's fall was a direct and immediate result of Bruno's actions. The trial court should be reversed.

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<sup>2</sup> This Court observed in the *Morris*, case that the approaching dog was on "a dead run," "running low to the ground" with "his ears laid back." Such language apparently connotes "viciousness" but viciousness is irrelevant to absolute statutory liability under the Court's analysis in *Boitz v. Preblich*, 405 N.W.2d 907, 910 (Minn. App. 1987).

C. **The District Court Erred When She Decided The Harboring Question As A Matter Of Law Rather Than Letting The Issue Go To A Jury.**

1. **The Trial Court Holding**

Judge Fredrickson held that there was "... no evidence to suggest Dennis Christopherson provided Bruno with lodging, shelter or refuge for longer than a limited time or for anything more than a limited purpose" (ADD. 5-6). As a basis for her holding, the trial court noted that Dennis Christopherson was not present at his Andover property at the time of the attack (ADD. 5-6).

2. **Verrett v. Silver**

In *Verrett v. Silver*, 244 N.W.2d 147 (Minn. 1976), a trial court allowed the issue of harboring or keeping a dog to go to a jury. This is what the trial court should have done here.

Similar to this case, the facts in *Verrett*, indicate that the primary owner of a dog was temporarily staying with some neighbors while her own home was redecorated. About a week after the primary owner began staying with her neighbors, she brought her dog to the home. *Id.* at 148. The homeowner was on vacation when the primary dog owner's dog ran down the street and bit a neighbor child. *Id.*

The issue in *Verrett* for jury resolution was whether the homeowner was harboring or keeping the dog. The trial court instructed the jury, in part, as follows:

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

*Verrett v. Silver*, 244 N.W.2d at 149.

On appeal, the Supreme Court noted that this instruction properly states the law concerning the liability of one who harbors or keeps a dog. *Id.*

### **3. What The Trial Court Should Have Done**

Instead of denying Gordon Anderson's motion for summary judgment and granting Dennis Christopherson's motion for summary judgment on the harboring issue, the trial court essentially "cherry-picked" language from the *Verrett* instruction and decided, as a matter of law, that Dennis Christopherson could not have been harboring Bruno because Bruno was at Dennis Christopherson's home for a limited time and purpose (ADD. 5-6). But this factor is only one of many factors in the complete *Verrett*, instructions. *Verrett*, 244 N.W.2d at 149. Mr. Anderson contends that, after hearing that Neil Christopherson and Bruno were living at Dennis Christopherson's home for a week (AA-29, depo. 15-17) and after hearing that three

weeks before the incident a dog ran at Mr. Anderson from the Christopherson home (AA-53, depo. 21-2), a jury could conclude that Dennis was in the habit of harboring Neil's dog.

Although Judge Fredrickson reasoned that Dennis Christopherson was not present at the time of the attack (ADD. 5-6). But the homeowner in *Verrett*, was also absent, a fact that was obviously not germane to the instruction language. See *Verrett*, 244 N.W.2d at 149. The trial court should have permitted a jury to decide whether Dennis Christopherson was harboring Bruno.

### **CONCLUSION**

For all of the reasons set forth herein, this Court should reverse the trial court and find that Gordon Anderson's fall and injury were the direct and immediate result of Bruno's actions. In the alternative, this Court should send the case back to the trial court for a trial with an appropriate instruction on the "attacks or injures" statutory language. Finally, the Court should reverse the trial court and instruct her to convene a trial on the issue of whether Dennis Christopherson harbored Bruno at the time of his attack and Mr. Anderson's injury.

SCHWEBEL, GOETZ & SIEBEN, P.A.

Dated: 3/4, 2011

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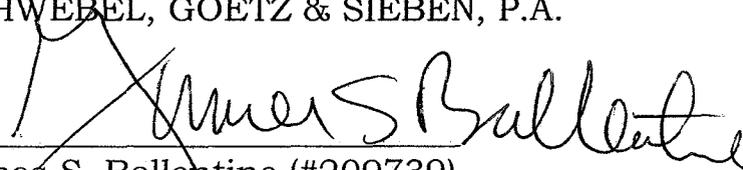
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,880 words. This brief was prepared using Microsoft Word 2003.

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