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NO. 39283-6-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

MARY SLIGAR, an individual,

Appellant,

v.

KARA A. ODELL and "JOHN DOE" ODELL, wife and husband, and the
marital community composed thereof,

Respondents.

RESPONDENT'S BRIEF

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A. ASSIGNMENT OF ERROR

Respondents made no assignments of error before this Court.

B. STATEMENT OF THE CASE

The Appellant is the plaintiff below, Mary Sligar (“Ms. Sligar”). The Respondents are the defendants below Kara and David Odell (“the Odells”). This matter arises out of an alleged dog bite that occurred on the Odell’s property in October, 2006. The facts of the alleged bite are simple, and for the purposes of this appeal are undisputed.

Ms. Sligar and the Odells are next-door neighbors. CP 64. On October 10, 2006, Ms. Sligar was in her back yard where she saw her dogs and the Odells’ dogs barking at each other through a shared fence at the property line. The fence is a six-foot chain-link fence. CP 22. It allowed the dogs to see each other but prevented them from touching each other. *Id.* Though the Odells’ dogs could not get through the fence, Ms. Sligar attached chicken wire to the fence to keep her own dogs’ from putting their legs through the fence and onto the Odell property as they had done in the past. CP 21.

Ms. Sligar testified that on the date of the accident she approached her dog on her side of the fence to get it away from the fence. CP 23. She testified “I don’t know why I went out there. And I saw Pearl [her own dog] running at the fence.” *Id.* Her description of the bite was as follows,

“Well, I was trying to catch Pearl, and I stumbled and lost my balance and fell onto the fence. My hand went on the fence, my finger went through the fence, and Chico bit it.”¹ *Id.*

Throughout her brief, Ms. Sligar repeatedly refers to the Odell’s dog as a “vicious,” “aggressive,” “ferocious,” dog that “routinely foamed at the mouth, charged at the chain link fence...and barked menacingly.” Appellant’s Brief, p. 6. Though she seems to do her best to elicit images of Stephen King’s *Cujo*², the truth is: the Odell’s dog was a chocolate lab named Chico, who had never bitten anyone before, and Ms. Sligar provides no evidence to the contrary.

Ms. Sligar’s primary evidence of the Odells’ dog’s alleged viciousness is the fact that the Odells’ dog barked at her dogs through the fence, but she omits from her brief that her dogs were barking right back at him. CP 22. Her explanation: the Odells’ dog started it. *Id.*

Ms. Sligar provides argument that Chico had previously attacked her dog. Appellant’s Brief, p. 6. Particularly, she alleges that the Odells dog bit her dog’s leg when her dog put its leg through the fence. CP 37. Ms. Sligar leaves a few facts out of her brief regarding this allegation. First, she leaves out the fact that the alleged attack occurred after “one of

¹ Pearl was plaintiff’s dog, and Chico was defendants’ dog. CP 36-37.

my Miniature Schnauzers got its leg through the chain link fence,” so it was her dog that was trespassing at the time of the alleged event. CP 66. Second, she leaves out the fact that she eventually had to put up chicken wire to keep *her dogs* from putting their legs through the fence. CP 66. Third, she provides no indication that she ever reported the incident to the Odells or that they were in any way aware of it. In fact, despite her description of the event as an “attack,” she admits, “I didn’t see him do it, my sister did.” CP 36. There is no testimony from Ms. Sligar’s sister in the record before this court.

Ms. Sligar also admits that the Odell’s dogs could not get to her dogs through the fence. When questioned about the dogs’ interaction at the fence she testified as follows:

Q: Could they [the dogs] see each other through the fence?

A: Oh, certainly. It’s open wire fence.

Q: Could they touch each other?

A: No.

Q: How come they couldn’t touch each other?

A: Because of the wire fence.

Q: How high is that fence?

² King, Stephen. *Cujo*. New York: Viking Publishing, 1981.

A: Six foot.

CP 22.

Throughout her brief, Ms. Sligar repeatedly says that the dog bit her finger off in attempt to evoke an image that her entire finger was severed. That simply is not true. She lost *the tip* of her finger from the incident, as she mentions in her deposition going over to the Odells' house to show them where she says the dog bit her finger. CP 23. Though there is no dispute the Ms. Sligar's finger was injured, stating that the Odell's dog bit her finger off is simply hyperbole in an attempt to garner sympathy. Regardless, even if Ms. Sligar's entire finger had been severed, as Ms. Sligar would have this Court believe, such evidence would have no relevance to the issues before this Court.

Finally, Ms. Sligar discusses in her brief and in her declaration how she "often leaned on the fence while talking to either or both of the defendants." CP 65. The truth is: Ms. Sligar did not know the Odells. In fact, on the date of the incident, she did not even know their names. CP 23.

C. SUMMARY OF ARGUMENT

Ms. Sligar brought claims of strict liability and negligence against the Odells. Both are unsupported by the facts and the law.

First, the strict liability statute does not apply in this case because Ms. Sligar offered no evidence that she was lawfully in a private place at the time she was allegedly bitten as required by RCW 16.08.040.

Second, there was no evidence of negligence in this case. “To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause. *Little v. Countrywood Homes*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006); *review denied* at 149 P.3d 377 (2006) (citation omitted). In this case, Ms. Sligar has not provided any evidence of a breach any duty owed to her by the Odells.

Third, Ms. Sligar could not support her common-law strict liability claim because there was no evidence that the Odells had any information that their dog had vicious propensities and besides, Ms. Sligar did not plead a common-law strict liability claim in her complaint.

D. ARGUMENT

1. Ms. Sligar’s case was appropriately dismissed on summary judgment.

Courts should grant summary judgment when there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna Cas. and Sur. Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994). A “material fact” is one

upon which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 850 P.2d 1298 (1993).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. CR 56. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 77 P.2d 182 (1989). If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Id.* at 225.

Here, as discussed below, Ms. Sligar has failed in her burden of proof on all of her claims, and, therefore, her claims were properly dismissed below.

2. There is no statutory strict liability in this case.

Ms. Sligar alleges that, pursuant to RCW 16.08.040, the Odells are strictly liable for her injuries, but that statute does not support her claims. It states, "The owner of any dog which shall bite any person while such person is in or on a public place *or lawfully in or on a private place* including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten." RCW 16.08.040

(emphasis added). Here there is no dispute that Ms. Sligar was not in a public place; she was in a private place, so it must be determined whether she was “lawfully in or on a private place.”

RCW 16.08.050 provides that “a person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said consent shall not be presumed when the property of the owner is fenced or reasonably posted.” Here, Ms. Sligar did not prove she was lawfully in a private place because she did not prove that she had consent to be on the Odells’ property, and she did not prove that she was on her own property.

a. Ms. Sligar did not have consent to be on the Odells’ property.

The strict liability statute with respect to dog bites precludes Ms. Sligar’s presumption that she had the Odells’ consent to be on their property, but even if it did not, plaintiff cannot show that she had the Odells’ consent regardless of the statute.

i. RCW 16.08.050 precludes Ms. Sligar’s presumption of consent.

As stated above, the dog-bite statute states that consent to be on the owner’s property “shall not be presumed when the property of the owner is fenced or reasonably posted.” RCW 16.08.050. Here, there is no

dispute that the property was fenced.³ There is also no dispute that Ms. Sligar did not have express consent to enter the property. However, Ms. Sligar argues that because she had stuck her fingers through the fence on prior occasions, she *presumed* that she had the Odells' consent for her to do so. The statute's plain language says that she had no right to make that presumption.

Ms. Sligar attempts to have this Court ignore the plain language of the statute, and adopt a strained interpretation that requires the Court to make assumptions about modifiers within the language of the statute to divine some hidden legislative intent. Her argument in this respect reveals a basic misunderstanding of the interaction between the terms "implied" and "presumed." Specifically, she seems to miss that a presumption arises out of an implication. "Implied Consent" is defined as, "That manifested

³ Though she does not dispute that there was a fence going all the way around the Odells' property, Ms. Sligar argues in a footnote that because the fence that divides her property from the Odells' was already present when the Odells moved in, the Odells' property "was not truly 'fenced.'" Appellant's Brief, p. 18. She argues the Odells' property did not become "truly fenced" until they built a second, solid fence abutting the old fence, undoubtedly to keep Ms. Sligar and her dogs from continuously penetrating the old fence into their yard. Putting aside the fact that Ms. Sligar thought so little of this argument that she, perhaps out of embarrassment, put it in a footnote, it should be noted that plaintiff provides no citation to the record of any evidence of who built the fence, when it was built, by whom, who owned the fence, or whether it was on her property or the Odells'. She further provides no authority for any requirement that the fence in question belong to the dog owner, or even be on the dog owner's property, in order for the statute to apply. In spite of this, Ms. Sligar would have this court find that in order for neighbors to get the protection of the statute, they must erect double fences at each of their property lines and have their property surveyed to ensure that no part of their fence crosses the property line in any location. Her lack of any citation to authority or to the record on this argument is telling of its merit.

by signs, actions, or facts, or by inaction or silence, which raise *a presumption* or inference that the consent has been given.” *Black’s Law Dictionary*, p. 305 (6th Ed. 1990).

The first half of the statute in question acknowledges, of course, that there are circumstances under which consent to enter land could be implied. However, the second half of the statute states that even if the landowner has acted in a way that has, in some way, implied consent, if the property is fenced, a plaintiff cannot presume from that implication that she actually has permission to enter the property.

The entire purpose of the implied consent doctrine is to protect people from being misled by the action or inaction of a landowner. However, the second half of the statute eliminates any risk of a person being misled by their interpretation of a landowner’s actions with respect to the dog-bite statute by stating that one cannot be misled if there is a fence. If there is a fence, there is a clear indication that there is no permission absent *actual* consent.

Ms. Sligar mistakenly argues, “The trial court’s interpretation of RCW 16.08.050 would mean that a person who has the landowner’s express consent to come on the property to, for example, feed the dog would be barred from asserting a claim for statutory strict liability if the property is fenced.” Appellant’s Brief, p. 19. Ms. Sligar misreads the

statute. Ms. Sligar's hypothetical person's claim would not be barred. That person would simply have to prove that they had the *actual* consent of the owner to be on the property because if the property was fenced, consent could not be "presumed."

Ms. Sligar argues that the "no presumption" clause means that a plaintiff simply has to provide direct evidence of implied consent, and that a court cannot just presume consent. So, essentially she argues: if you put up a fence, then any perspective plaintiff would have to prove that they had consent, but that suggests, in the converse, that if there were no fence, plaintiff would *not* have to prove consent with any evidence. The problem with this interpretation is that it would either improperly shift the burden of proof to the defendant that they did not consent or render the clause meaningless because plaintiffs always have to prove consent, fence or not. Neither situation is consistent with the law; therefore, plaintiff's interpretation of the statute must be incorrect.

Whether or not the property is fenced, there is never an unsupported presumption of consent. Because the legislature must have put the fence clause in the statute for a reason, it must have been for the more obvious reason that the legislature was precluding plaintiffs from presuming that they had consent when there was a fence present. There

would have been no reason to add that sentence otherwise because plaintiffs already had the burden of providing evidence of consent.

ii. There was no implied consent.

Even if the statute did not specifically exclude the possibility of a presumption of consent, there is still no consent in this case. As stated above, it is undisputed that there was no express consent for Ms. Sligar to reach through the fence. However, Ms. Sligar argues that she had implied consent to reach through the fence. Her argument fails.

In a case with extremely similar facts to the case at bar, the Minnesota Supreme Court reviewed implied consent under similar circumstances. *See Matson v. Kivimaki*, 294 Minn. 140 (1972)⁴. In that case, a small child squeezed partially through a fence and into a neighboring yard where he was bitten by a neighbor's dog. *Id.* at 144. Minnesota's strict liability dog bite statute also requires that a plaintiff be "lawfully" in the place where the bite occurs. *See* Minn. Stat. § 347.22.

In the *Matson* case, like this case, there was no evidence presented that the child had the express permission of the defendant to enter his property, even partially. As a result, the *Matson* court held, "there is not sufficient evidence to justify a finding that [the child] was in a place where

⁴ A copy is attached for the Court's reference.

he was lawfully entitled to be at the time of the incident of the bite by defendant's dog and that *it was error to submit to the jury for its consideration the question of statutory liability.*” *Id.* at 148 (emphasis added).

Here, as in *Matson*, the Ms. Sligar extended a portion of her body through the fence, and onto the Odells’ property, where it was allegedly bitten. There is no evidence that Ms. Sligar had the express or implied consent of the Odells to be on their property. Accordingly, Ms. Sligar was not “lawfully” on the Odells’ property, and therefore the strict liability statute does not apply.

Ms. Sligar’s purported evidence that she had implied consent to enter the Odell’s property was that she would occasionally pet their dog through the fence and she would occasionally lean on the fence while talking to the Odells. By this argument, Ms. Sligar would have this Court find that if a neighbor so much as puts a finger across the property line (literally in this case), or leans on the fence during a conversation, that a property owner must admonish their neighbor or risk losing the right of exclusive control and use of their property and subject themselves to the risk of increased liability if the neighbor goes onto their property when they are not around. That simply cannot be the law and cannot be the objective of a civil society.

In determining the scope of a person's consent, "One important form of restriction is the limitation of the consent to acts done for a particular purpose. When there is a restriction or it is implied from the terms of the consent or the circumstances, the consent may be regarded as conditioned upon the purpose, and it confers no privilege to do the same act for a different purpose." Restatement (Second) of Torts, § 892A, comment g.

Ms. Sligar says she "often leaned on the fence to steady [herself] while talking to either or both defendants." CP 65. Though it did not create implied consent, even if it did, at best it would give her permission to enter the Odells' property when they were there and she was talking to them. It certainly did not give her permission to enter the property when they were not there.

Ms. Sligar also says that she would occasionally put her fingers through the fence to pet the Odell's dog. Though there is evidence that Mrs. Odell witnessed her doing that on at least one occasion, there is no evidence that Ms. Sligar knew that Mrs. Odell witnessed her doing so through a window. As a result, there is no action or inaction by the Odells that would reasonably lead Ms. Sligar to believe she had permission to reach through the fence or pet the Odell's dog.

To illustrate this point, if A is secretly stealing apples from B's tree, and B, unbeknownst to A, discovers the infraction, but because B does not want to be involved in a confrontation, does not reprimand A, that does not mean B consents to A's thievery. Ms. Sligar offers no evidence that she knew that the Odells had seen her petting their dog through the fence, so there could be no action by the Odells that would have reasonably led her to believe that she had permission to do so.

Additionally, even if Ms. Sligar knew that the Odell's had seen her petting their dog, at best that would give her permission to reach through the fence for the purpose of petting their dog. "To be effective, consent must be...to the particular conduct, or to substantially the same conduct." Restatement (Second) of Torts, § 892A(2)(b).

In this case, Ms. Sligar's entry onto the Odell's land was not to pet the dog as it had been in the past. Therefore even if there were implied consent, that consent was limited in scope and did not include her putting her finger through the fence when the Odell's dog was excited and barking.

Ms. Sligar describes the dog as barking viciously at the time she put her finger through the fence. CP 37. No reasonable person would presume from the information Ms. Sligar had, that she had the Odells

consent to put her fingers through the fence at a time when the Odells' dog was agitated and charging the fence.

b. Ms. Sligar's trespass argument is misplaced and incorrect.

Ms. Sligar provides extensive argument that she did not hold the status of trespasser at the time of her injury. Ms. Sligar's analysis of her own status is both misplaced and incorrect. As explained below, it is misplaced because it does not matter if she was a trespasser or not, and it is incorrect because she was, in fact, a trespasser.

i. It does not matter if Ms. Sligar was a trespasser.

Ms. Sligar's analysis of whether or not she was a trespasser is of no consequence to the statutory analysis presented to this Court. The relevant statute states, "a person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner." RCW 16.08.050. The statutory provision does not say a person is lawfully on the property as long as she is not a trespasser, it says "*within the meaning of RCW 16.08.040*," a person is lawfully on the property if she is upon the property with the *consent* of the owner.

It does not matter if Ms. Sligar was a trespasser or not. There was no consent, and consent is the key to the statutory requirement. To

illustrate this point, if Ms. Sligar had been attacked by brigands and forcibly thrown over the fence onto the property of the Odells against her will, under those circumstances, though she did not enter the property of the Odells through any fault of her own, or even by any voluntary action, she still did not have the Odell's *consent*, and it is consent that is required by the statute. Here there was no consent.

ii. Ms. Sligar was a trespasser.

Even if it did matter whether Ms. Sligar was a trespasser, this Court should still affirm because Ms. Sligar *was* a trespasser.⁵ Ms. Sligar argues that she was not a trespasser for two reasons (1) she argues that she had the Odells' consent to be on their property; and (2) she argues that because she accidentally fell into the Odells' property, she was removed from the class of trespassers. Ms. Sligar is incorrect on both fronts. The first point, Ms. Sligar's consent argument, is addressed above. Ms. Sligar's second point that she was an accidental trespasser is addressed below.

⁵ Ms. Sligar argues that the Odell's affirmative defense of trespass should have been stricken. However, the Odells' assertion that plaintiff was a trespasser, though listed in the affirmative defenses portion of their answer, was not an affirmative defense at all. As stated throughout this brief, Ms. Sligar has the burden of proving that she was the Odells' property with their consent, which she has failed to do. The Odells have no burden to prove that Ms. Sligar was, in fact, a trespasser, though the evidence and law in this case demonstrate that she was.

“[T]he status of an accidental trespasser is still that of a trespasser.” Restatement (Second) of Torts § 329, at comment c. Ms. Sligar’s argument to the contrary, relying on the fact that she fell onto the Odell’s property, is misplaced because her analysis is based upon an incorrect and inapposite section of the Restatement of Torts.

Ms. Sligar fails to distinguish between her being liable to a landowner in tort as a trespasser from having the status of trespasser for the purposes of determining a landowner’s duty to her. Ms. Sligar cites the Restatement arguing “A person who unintentionally and without negligence enters the land of another is not a trespasser.” Appellant’s Brief, p. 15 (citing Restatement (Second) of Torts § 166). This is a blatant mischaracterization of what the Restatement actually says, which is:

Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does ***not subject the actor to liability to the possessor***, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

Restatement (Second) of Torts § 166 (emphasis added). The section does not in any way state that the actor is “is not a trespasser” as Ms. Sligar says. It says that an entry under the circumstances stated “does not subject

the actor to liability to the possessor,” which is something decidedly different.

Here, the Odells have not brought a claim for liability for trespass against Ms. Sligar, so § 166 is inapplicable here. Section 166 is within Division 1, Chapter 7, of the Restatement, entitled “Invasions of the Interest in the Exclusive Possession of Land and Its Physical Condition (Trespass on Land).” The entire section deals solely with whether the trespasser is liable to the landowner, rather than the landowner being liable to the trespasser. In fact, § 166 itself is entitled “Non-Liability For Accidental Intrusions.”

In addition to misstating the language of the Restatement, Ms. Sligar also provides three examples that were included in the comments to § 166, but, again, she mischaracterizes what they say, and she specifically leaves out the results.

Ms. Sligar’s brief says, “a person who is walking on an icy roadway who slips and accidentally falls onto the property of a landowner abutting the icy road...is not a trespasser under the doctrine of unintentional entry onto land and is, therefore, lawfully on the land.” Appellant’s Brief, p. 15 (citing § 166, illustration 1). That is not what the illustration actually says. What it actually says is:

A is walking along the sidewalk of a public highway close to the border of B's land. Without fault on his part, A slips on a piece of ice, and falls against and breaks a plate glass window in B's store adjoining the sidewalk. ***A is not liable to B.***

Restatement (Second) of Torts § 166, illustration 1 (emphasis added).

There is no mention in the illustration that A "is not a trespasser," nor is there any reference to A's being "lawfully on the land," nor does the illustration even imply either fact. The illustration simply states that under those circumstances, "A is not ***liable*** to B."

The other two examples provided by Ms. Sligar were similarly mischaracterized. Despite Ms. Sligar's mischaracterizations, none of the illustrations Ms. Sligar provides actually says that A is not a trespasser, nor do they actually say A is lawfully on B's land. They simply say that A is not ***liable*** to B under the circumstances described. *See Id.* at illustrations 2 & 4.

The section of the Restatement that is applicable to the determination of a person's status as a trespasser, rather than a person's liability for the tort of trespass, is Section 329. That section is in Division 2, Chapter 13, which is entitled "Liability for Condition and Use of Land." It states "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement (Second) of Torts § 329.

The comments to that section specifically address and reject Ms. Sligar's argument that she was not a trespasser based on her assertion that she did not intentionally enter the Odells' property. The comment states "In determining whether the person who enters or remains on land is a trespasser within the meaning of this Section, the question whether his entry has been intentional, negligent, or purely accidental *is not material....*" *Id.*, at comment c. The comment goes on to state, "Such a person will himself become *liable in an action for the tort of trespass* to land...only if his intrusion has been intentional, or negligent, or the result of an abnormally dangerous activity in which he is engaged." *Id.* (emphasis added).

Section 329 provides an illustration that demonstrates the applicability of the section to this case. It states:

Without any negligence on his part A, standing on the platform of a subway station of the X Company, slips and falls onto the tracks. While there he is run over by the train of X Company, and injured. A is a trespasser, and the liability to him is determined by the rules stated in §§ 333 and 336, notwithstanding the accidental character of his intrusion.

Id., at illustration 1. There can be little doubt of the Restatement's approach to Ms. Sligar's argument. Ms. Sligar was a trespasser.

c. Ms. Sligar attempts to inappropriately shift the burden of proof to the Odells.

Ms. Sligar argues that the Odells did not offer evidence that Ms. Sligar was on their property, and, therefore, they cannot deny that she was lawfully in a private place. By doing so, Ms. Sligar is inappropriately attempting to shift her burden of proof to the Odells.

The statute states that there is strict liability if the bite occurred while plaintiff “is in or on a public place or lawfully in or on a private place.” RCW 16.08.040. The Odells have no burden to prove that Ms. Sligar *was not* lawfully in a private place. In order to obtain the benefit of the statute *Ms. Sligar* must prove that she *was* lawfully in a private place.

Depending on where the property line was, Ms. Sligar was either on her property, or unlawfully on the Odell’s property, as discussed above. If Ms. Sligar wanted to prove that she was on her own property at the time of the bite, she should have done so by providing some evidence of that fact. She did not. In fact she admits she does not know which side of the property line the fence is on; she simply states the fence was “somewhere near the property lines.” CP 65. Therefore, she has provided no evidence that she was lawfully in a private place, and therefore this Court should affirm the trial court’s dismissal of her statutory strict liability claim.

3. There is no negligence in this case.

Ms. Sligar also brings a claim of negligence against the Odells. “To succeed on a negligence claim, the plaintiff must prove: (1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause.” *Little v. Countrywood Homes*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006); *review denied* at 149 P.3d 377 (2006) (citation omitted).

The mere fact that Ms. Sligar sustained an injury does not entitle her to put the Odells to the expense of trial. *Marshall v. Bally’s PacWest*, 94 Wn. App. 372, 972 P.2d 475 (1999). In this case, Ms. Sligar cannot offer any evidence that the Odells breached any duty of care.

The alleged bite occurred within the Odells’ yard, which was fully fenced. The Odells had control of their pet, and Ms. Sligar invaded its space by putting her finger through the fence. There is no evidence of breach; therefore, Ms. Sligar’s claims should be dismissed.

In, *Arnold v. Laird*, a case cited by Ms. Sligar, the plaintiff made a claim arising out of injuries a child suffered when she was climbing on defendant’s fence and defendant’s dog either bit or scratched her face. *See Arnold v. Laird*, 94 Wn.2d 867, 621 P.2d 138 (1980). In reviewing plaintiff’s negligence claim, the Supreme Court held that because the dog was fenced, “plaintiffs did not show that the owners failed to assert the

type of control which a reasonable person would exercise under the attendant circumstances.” *Id.* at 871. That court went on to hold, “it is not *per se* unreasonable to keep a dog in a fenced backyard if the animal has not exhibited dangerous tendencies.” *Id.* The Arnold court concluded under the circumstance, “Since plaintiffs did not present substantial evidence of negligence which proximately caused the claimed injuries, the trial court correctly refused to instruct on that theory.” *Id.* at 871-872 (citations omitted).

Ms. Sligar makes two allegations of breach in her brief. She claims that the Odells were negligent because 1) they failed to construct a fence that prohibited their dog from attacking people on Ms. Sligar’s side of the fence until after the subject attack occurred; and 2) they failed tie up or otherwise restrain their dog within their back yard so it could not attack people on Ms. Sligar’s side of the fence. Appellant’s Brief, p. 4.

There are four significant problems with Ms. Sligar’s breach theories:

First, Ms. Sligar admits in her own deposition that the Odell’s dogs could not get through the fence. CP 22.

Second, as the *Arnold* court held, it is not unreasonable to keep a dog in a fenced back yard if there is no knowledge of dangerous

propensities. *Arnold*, at 871-872. In the *Arnold* case, the dog injured the plaintiff by jumping up onto the fence while she was climbing it. *Id.* at 869. Despite the dog's ability to reach the plaintiff, who was still mostly outside the fence at the time of her injury, the plaintiff's evidence was found insufficient to support liability on a negligence claim. That should be all-the-more true in this case where the injury took place within the dog's yard.

Third, Ms. Sligar admits that though the Odells' dogs could not get through the fence, *her dogs* could and did put their legs through the fence and onto the Odell's property. CP 66. In fact, Ms. Sligar fell and put her finger through the fence while she was trying to stop *her dog* from putting his paws through the fence and onto the Odells' property. CP 37.

Fourth, even if the fence had not been constructed in such a way as to prevent the Odells' dogs from biting people on Ms. Sligar's property, as Ms. Sligar alleges, and even if that were a breach of the standard of care, that breach would not be the proximate cause of Ms. Sligar's injuries because Ms. Sligar admits that the bite occurred on the Odells' side of the fence. Because the dog did not "attack people on Ms. Sligar's side of the fence," even if the Odells did breach some duty, it

did not proximately cause Ms. Sligar's injuries because the dog did not bite anyone on Ms. Sligar's side of the fence.

4. There is no common-law strict liability in this case.

Ms. Sligar argues that the trial court should not have dismissed her common law strict liability claims. However, Ms. Sligar fails to mention that she did not allege a common law strict liability claim in her complaint. *See* CP 5.

Ms. Sligar's complaint with respect to strict liability is limited to statutory strict liability under RCW 16.08 *et seq.* *See* CP 5. Having failed to have pled this claim below, Ms. Sligar may not now argue it on review. *See Prater v. Kent*, 40 Wn. App. 639, 642, 699 P.2d 1248 (1985) (citing *Muck v. Snohomish County PUD 1*, 41 Wn.2d 81, 88, 247 P.2d 233 (1952)). However, even if Ms. Sligar had pled it below, she has failed to provide support for a common law strict liability claim because she has provided no evidence that the Odells were aware of any allegedly vicious propensities of their dog.

Ms. Sligar's brief does not properly state the law with respect to common-law strict liability. Ms. Sligar relies on *Arnold v. Laird, supra*, which relies on the Restatement, which says, "A possessor of a domestic animal that he knows or has reason to know has dangerous propensities

abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.” Restatement (Second) of Torts § 509 (emphasis added). Furthermore, “the possessor of a dog is not liable for its biting a person...unless he has reason to know that it is likely to do so.” *Id.* at comment f.

“The phrase ‘has reason to know’ here as elsewhere in the Restatement means that the person in question knows or from facts known to him should know.” *Id.*, at comment b.

Ms. Sligar’s evidence of the Odell’s dog’s prior “vicious” behavior was the fact that she says he would bark and charge at the fence. However, she admits that her own dogs did the same thing. In fact, her dog was doing exactly that at the time of her injury. She testified “I don’t know why I went out there. And I saw Pearl [Ms. Sligar’s dog] *running at the fence.*” CP 23 (emphasis added).

If running and barking at the fence is menacing or vicious behavior, it would be true of all dogs, regardless of size, including Ms. Sligar’s own dog. So, regardless, based on the evidence before this Court, a dog’s running and barking at the fence is not “*abnormal to its class*” as required by the Restatement. In fact, it seems quite normal from the evidence presented here.

Ms. Sligar cannot be heard to complain that a large dog barking and running at the fence is “vicious” behavior while at the same time dismissing her own dog’s exhibiting the same behavior as simple playfulness of “a puppy.”⁶ The fact is: dogs like to bark at each other through fences. That is not unusual behavior for any dog, and it certainly not evidence that a dog is vicious.

Regardless of whether the barking and charging was evidence of viciousness, there is no evidence that the Odells knew anything about the dog’s charging the fence or barking viciously, and as stated above, in order for liability to attach, the Odells would have had to have reason to know of the dog’s “vicious propensities” “from facts known to them.” Restatement (Second) of Torts, § 509, comment b. In other words, they do not have to know that the dog had bitten somebody in the past, but they do have to have *actual knowledge* that “it has on other occasions exhibited such a tendency to attack human beings.” *Id.*, comment g. Here there is no actual knowledge. Despite the Restatement’s requirement, Ms. Sligar provides absolutely no “facts known” to the Odells with respect to their dog’s behavior, whether or not they indicate

⁶ Though she testified in her deposition that immediately before her injury, her dog was “running at the fence,” when she drafted her declaration in support of her motion to reconsider the dismissal of her claim, she changed her story and said her “puppy was playing in my back yard” near the fence. CP 66.

viciousness. Therefore, they are not charged with any knowledge of alleged vicious tendencies.

Similar to the *Arnold* case, in *Matson, supra*, plaintiff made the same argument Ms. Sligar makes here, based on similar, but even better evidence from a plaintiff's view. The *Matson* court found the evidence insufficient to support a common-law claim, reversed the trial court's finding for the plaintiff, and remanded with instructions to dismiss.

In *Matson*, as here, there was evidence that plaintiff had "seen the dog charge toward the fence, barking at children playing in adjoining yards," but that court also noted "there is no evidence that any of the neighbors, including plaintiffs, ever complained to defendant about his dog." *Id.* at 143. The same is true here. In *Matson*, there was also evidence that that dog had bitten two kids in the past and that the dog's owner was aware of it. *Id.* at 143-144. That was *not* the case here. Here there is no evidence that the Odells' dog had ever bitten anyone.

In examining the situation of a person putting part of his body through the fence in that case, the *Matson* court found "The actions of the dog in this situation...were more in the nature of a reflex action than part of a continued course of vicious conduct known to defendant." *Matson* at 155. As a result, the court then went on to hold, "Under the facts and evidence of this case, we hold that plaintiffs are not entitled to

recover either under the statute or under the common law.” *Id.* Under the same analysis, this court should affirm the trial court’s dismissal of Ms. Sligar’s common law claims.

5. There is no gross negligence in this case.

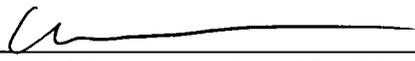
Ms. Sligar brought a claim for gross negligence against the Odells in the court below, but she does not raise or brief the issue on her appeal. The Court of Appeals should not review issues on appeal “which are supported neither by argument nor authority.” *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). Therefore, the trial court’s dismissal of Ms. Sligar’s gross negligence claims should be affirmed.

E. CONCLUSION

Ms. Sligar did not have permission to be in the Odell’s yard. She did not even have their consent to put her finger into their yard. Through no fault of the Odells, she tripped and fell through the fence. She alleges while she was partially on their property she was bitten by their dog, but she has provided no evidence of any wrongdoing by the Odells, nor has she taken responsibility for *her* tripping and falling, on *her* property, while trying to get *her* dog, who was admittedly out of control and attempting to get through the fence into the Odell’s property. The Odell’s have committed no tort, and this Court should affirm the dismissal of Ms. Sligar’s claim against them.

RESPECTFULLY SUBMITTED this 12th day of October, 2009.

McDermott Newman, PLLC

By: 
Eric S. Newman, WSBA No. 31521
Of Attorneys for Respondent

APPENDIX

Attachment A: *Matson v. Kivimaki*, 294 Minn. 140 (1972)

Attachment A

FOCUS™ Terms

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Citation: 294 Minn. 140294 Minn. 140, *; 200 N.W.2d 164, **;
1972 Minn. LEXIS 1381, ***

Erik Matson, by His Father and Natural Guardian, Robert Matson, and Another v. Rudolph Kivimaki

No. 43267

Supreme Court of Minnesota

294 Minn. 140; 200 N.W.2d 164; 1972 Minn. LEXIS 1381

July 14, 1972

PRIOR HISTORY: [***1] Action in the Ramsey County District Court brought on behalf of Erik Matson, a minor, by his father and natural guardian, Robert Matson, for personal injuries allegedly sustained by the minor plaintiff as the result of being bitten by defendant's dog; and by said Robert Matson on his own behalf for consequential damages. The case was tried before J. Jerome Plunkett, Judge, and a jury, which returned a verdict for plaintiff for \$ 4,000. Defendant appealed from an order denying his alternative motion for judgment notwithstanding the verdict or for a new trial and from the judgment entered.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant owner appealed from an order of the Ramsey County District Court (Minnesota), which denied his alternative motion for judgment notwithstanding the verdict or for a new trial and from the judgment entered in favor of plaintiffs, a minor and his father, in a dog bite action.

OVERVIEW: The minor was bitten by the owner's dog when he reached through the owner's fence. The father recovered damages for injuries sustained by the minor and for medical expenses. On appeal, the court reversed. The court ruled that the trial court erred in submitting the case to the jury under the dog bite statute, Minn. Stat. § 347.22. There was no evidence that would justify a finding that the minor was lawfully in a place he was entitled to be at the time of the incident. The owner's son saw the minor wedge half of his body through the owner's fence in an attempt to touch the owner's sleeping dog. There was no evidence which would allow an inference of an implied invitation for the minor to project his body through the owner's fence onto the owner's property. The court ruled that the trial court also erred in submitting the common law liability question to the jury. The instructions to the jury assumed that the dog was vicious. The only evidence of vicious propensities of the dog were two previous occasions involving a nipping of the hands of the owner's nephew and niece while they were playing with the dog.

OUTCOME: The court ruled in favor of the owner, reversed the judgment, and remanded the case to the trial court with instructions to enter judgment for the owner.

CORE TERMS: dog, animal's, vicious, common-law, fence, lawfully, trespasser, propensity, cat, dog bite, right of recovery, domestic animals, possessor, yard, statutory liability, reason to know, possessor of land, viciousness, playing, bitten, bite, dog-bite, invitation, general verdict, uncontradicted, common law, reasonable care, artificial condition, favorable, scratched

LEXISNEXIS® HEADNOTES

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Civil Procedure > Appeals > Standards of Review > General Overview

HN1 On any appeal the evidence must be viewed in the light most favorable to the prevailing party, and if there is any evidence whatsoever on which a jury could reasonably have based its decision, the verdict must stand. [More Like This Headnote](#)

Governments > Agriculture & Food > Pets & Service Animals

Torts > Negligence > Duty > Animal Owners > Ownership

Torts > Strict Liability > Harm Caused by Animals > Defenses

HN2 Minn. Stat. § 347.22 provides that if a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be in any urban area, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Torts > Negligence > Duty > Animal Owners > Ownership

Torts > Negligence > Duty > Animal Owners > Scienter

HN3 Generally the owner of a domestic animal is under no obligation to guard against injuries which he has no reason to expect on account of some disposition of the individual animal different from the species generally if he has no notice of such disposition. Hence, if the injury has resulted from the exercise of a vicious propensity, which is not natural to the class of animals to which the offending animal belongs, the owner or keeper of the animal is usually not liable if he did not have

previous knowledge or scienter of the vicious propensity, or could not have ascertained the same by the exercise of reasonable care, unless there has been negligence or the animal was wrongfully in the place where the injury was inflicted. On the other hand, if the animal, to the knowledge of the owner, is vicious, he must keep it safely or respond in damages for injuries resulting from a display of its known propensities; and it is often held that the liability thus imposed is in no way dependent upon the existence of negligence, although there is also authority to the contrary. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

HEADNOTES / SYLLABUS **Hide****HEADNOTES****Appeal and error -- review -- view of evidence.**

1. On an appeal the prevailing party is entitled to have the evidence reviewed in the light most favorable to him.

Animals -- dog-bite cases -- recommended trial procedure.

2. In dog-bite cases involving both the statutory and common-law remedies, it is recommended that a special verdict or a general verdict with special interrogatories be used instead of a general verdict.

Animals -- statutory liability for dog bite -- proof required.

3. In order for plaintiffs to recover under Minn. St. 347.22, **[**2]** the dog-bite statute, all elements of the statute must be proved. Under the evidence in this case, we hold as a matter of law that the minor plaintiff, at the time of the injury, was not in a place where he was lawfully entitled to be, and, therefore, it was error for the trial court to submit to the jury the statutory liability of defendant owner.

Animals -- common-law liability for dog bite -- effect of statutory liability.

4. The creation of a statutory liability for dog-bite injuries in urban areas does not preclude the submission to the jury of the common-law liability of a dog owner.

Animals -- common-law liability for dog bite -- proof required.

5. To establish common-law liability of a dog owner, plaintiff must prove the vicious propensities of the dog and the knowledge of the owner of these vicious characteristics.

Animals -- common-law liability for dog bite -- instructions.

6. In a case involving common-law liability for a dog bite, it is proper to instruct the jury by paraphrasing the "attractive nuisance" doctrine so long as the question of utility of ownership of the dog is not included. The court must also properly instruct the jury **[**3]** regarding the term "vicious dog" and advise the jury that its function includes making such a determination.

Animals -- common-law liability for dog bite -- instructions.

7. As a matter of law, there was not sufficient evidence that the dog involved here was a "vicious dog." Therefore, it was error for the trial court to submit to the jury the question of common-law liability of defendant owner.

COUNSEL: *Meagher, Geer, Markham & Anderson, O. C. Adamson II, R. D. Blanchard, and J. Richard Bland*, for appellant.

Mast & Sweetman and Hugh Sweetman, Jr., for respondents.

JUDGES: Knutson, C.J., and Todd, MacLaughlin, and Gunn, JJ.

OPINION BY: TODD

OPINION

[*142] [165]** Plaintiff Erik Matson, a minor, was bitten by a dog belonging to defendant, Rudolph Kivimaki. Erik and his father, plaintiff Robert Matson, brought this action for damages. The matter was submitted to the jury under instructions which included consideration of Minn. St. 347.22, the so-called "dog-bite statute," and, alternatively, determination of common-law liability of defendant. The jury returned a general verdict, assessing damages for the injuries sustained by the minor child and allowing recovery **[**4]** of medical expenses to plaintiff Robert Matson. Defendant appeals from an order of the trial court denying his alternative motion for judgment notwithstanding the verdict or for a new trial and from the judgment. We reverse.

The incident which gave rise to plaintiffs' claim occurred on September 5, 1968. At that time, plaintiff Erik Matson was a minor child of the age of 2 1/2 years and resided with his parents at 2774 Dellwood Avenue, Roseville, Minnesota. The plaintiffs' next-door neighbors to the north are Jerry and Dee Scheve. Immediately abutting plaintiffs' property to the east is the property of a Dr. Gutzman, which fronts on Merrill Street. Immediately north of the Gutzman property and directly east of the Scheve property is the property of defendant, which also fronts on Merrill Street. Since there is no alleyway, the four properties have a common point of tangency at the center of their location.

In 1957 defendant constructed a 4-foot high wooden fence which completely enclosed **[**166]** his backyard. At the time of the construction of the fence, defendant, who was employed by the Minnesota Highway Department, secured the assistance of two friends, both of whom **[***5]** are registered civil engineers, to survey his property lines for purposes of installing the fence. It is uncontradicted **[*143]** in the evidence that the fence line is installed 6 inches within the property line of defendant as it abuts the Scheve property on the westerly boundary of defendant's property.

Plaintiff Robert Matson had purchased his property less than one year prior to the accident. The evidence indicates that plaintiffs and defendant were acquainted as neighbors, but there was no particular social contact between the families. There is no evidence that Erik ever played in the yard of defendant; his parents had expressly told him not to go into defendant's yard. Communication with the minor child at the time of the accident was limited by reason of the fact that he had a substantial hearing loss as a result of a birth defect.

There is some evidence that on occasion some of the neighborhood children did enter the yard of defendant, but Mr. Kivimaki's uncontradicted testimony is that, because of the substantial difference in age between his children and most of the other children in the neighborhood, the other children did not often come onto his property.

[*6]** Defendant was the owner of a 4-year-old female springer spaniel named Ruffles, who had been a family pet since she was a month old. The dog was not trained or used as a watch dog. She stood 2 to 2 1/2 feet tall at the shoulders and weighed 40 to 50 pounds and was kept either in defendant's house or his backyard. The dog could not crawl through defendant's fence. Although Robert Matson testified that on occasion he had seen the dog charge toward the fence, barking at children playing in adjoining yards, there is no evidence that any of the neighbors, including plaintiffs, ever complained to defendant about his dog.

At the farm of Mrs. Kivimaki's parents in 1967, Ruffles had nipped the hand of defendant's niece. About a year later, in the summer of 1968, Ruffles nipped the hand of defendant's nephew. In one of those cases there was no breaking of the skin, while in the other case the child's hand was scratched. The evidence **[*144]** is uncontradicted that both incidents occurred while the children were playing with the dog. Defendant knew of the incidents.

Between 4:15 and 4:30 p.m. on September 5, 1968, defendant's son, John, who was about 14 years of age at that time, **[***7]** went to the kitchen for a drink of water. While standing in the kitchen looking out the rear window, he observed Erik leaning through the lower boards of defendant's rear fence where it abutted the Scheve property, with approximately half of his body through the fence. John also observed the family dog, Ruffles, lying on the ground next to the fence, apparently sleeping. He testified that Erik was waving his hands in the direction of the dog, but could not say for sure whether Erik actually struck the dog. John then testified that the dog jumped up, bit Erik in the face area, and then ran back toward the house. John ran outside and scolded the dog and then waited for his mother and father to come home to tell them of the incident, as neither of them was there at the time.

At the time of the incident, Betty Matson, Erik's mother, was in her kitchen cooking. One of the Gutzman children came to the door and informed her that Erik had been bitten by the dog. She went into the back yard and observed Erik coming toward the house crying and bleeding from the area of the right eye. Medical treatment was obtained for Erik. Evidence adduced at the trial as to the damages sustained **[***8]** by Erik, as well as the medical damages sustained by Robert Matson, which were stipulated to, would justify the amount of the verdict returned.

It is unquestioned that Erik suffered real and serious injury. However, we conclude **[**167]** that under the law applicable herein, plaintiffs are not entitled to recover from defendant.

1. Plaintiffs rely on the well-known rule of law in this court that ^{HN1} on any appeal the evidence must be viewed in the light most favorable to the prevailing party, and if there is any evidence whatsoever on which a jury could reasonably have based its decision, the verdict must stand. Coenen v. Buckman Building Corp. 278 Minn. 193, 197, 153 N.W. 2d 329, 333 (1967); McCormack **[*145]** v. Hanksraft Co. Inc. 278 Minn. 322, 325, 154 N.W. 2d 488, 492 (1967).

2. Applying this general rule of law to the instant case, it must be kept in mind that the matter was submitted to the jury on two separate theories of recovery, namely, the statutory right of recovery under Minn. St. 347.22, the dog-bite statute, and the right of recovery permitted by the common law. We will treat each of these separately, but it should be noted that the use of a general verdict **[***9]** in this type of case without the submission of special interrogatories creates extreme difficulty for an appellate court since the factual basis for applying each theory of recovery is substantially different. We strongly urge the use of a special verdict or a general verdict with interrogatories in the submission of this type of case to a jury.

3. ^{HN2} Minn. St. 347.22 provides:

"If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be in any urban area, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term 'owner' includes any person harboring or keeping a dog. The term 'dog' includes both male and female of the canine species."

This statute was adopted by our legislature in 1951. Prior to that time, the only right of recovery for an injury to a person resulting from a dog bite was that established under the common law. ¹

FOOTNOTES

¹ An earlier statute covered situations where a dog killed, wounded, or worried domestic animals. Our court held that this statute was not applicable to harm done to human beings. Olson v. Pederson, 206 Minn. 415, 288 N.W. 856 (1939).

[*10]** In submitting the statute to the jury, the trial court properly instructed as to the elements to be considered as follows:

"Now under this statute if the plaintiff proves the following elements the Plaintiff Erik Matson is entitled to recover damages. The elements are four and they are as follows:

[*146] "First, it must be shown that the defendant's dog, without provocation, attacked and injured Erik Matson.

"Secondly, it must be shown that at said time Erik Matson was peaceably conducting himself.

"Thirdly, it must be shown that at the time Erik Matson was at a place where he may lawfully be.

"Fourthly, it must appear that the area in question was an urban area.

"Under the facts as determined in this lawsuit you are hereby instructed that the area in question was an urban area, and therefore this particular element or the last one is concluded in favor of the plaintiff. It's for you, however, as members of the Jury to determine from the facts as you find the facts to be whether or not the plaintiff has proved to you the other three elements."

Under the evidence in this case, it was proper to submit the first two elements to the jury. However, we hold that it [***11] was improper to submit the statutory question to the jury for consideration in [**168] this case, since there is no evidence that would justify a finding that Erik was lawfully in a place he was entitled to be at the time of the incident.

In making this determination as a matter of law, we have carefully reviewed the entire record in this case and find no evidence whatsoever which would allow an inference of an implied invitation for Erik to project his body through defendant's fence onto defendant's property. In constructing a substantial fence, defendant clearly manifested an intent to circumscribe his property with a barricade to increase both his right of privacy and his right to use his own property without interference from others. The fence not only served to keep others out, but permitted defendant to give his dog a limited amount of freedom while still containing the dog on his own property.

The California District Court of Appeals in Fullerton v. Conan, 87 Cal. App. 2d 354, 197 P. 2d 59 (1948), in considering a similar statute, had occasion to consider the question of what [*147] constitutes being lawfully on the premises. ² In that case, plaintiff was a 5-year-old [***12] minor child, who had been taken by her mother to visit a family friend. The friend's home had a fenced-in backyard. The child was left outside with instructions to stay in the front yard while the mother went inside. Apparently, the child opened a gate in the fence, entered the backyard, and was bitten by the dog. Summarizing the plaintiff-appellant's argument, the court there wrote (87 Cal. App. 2d 356, 197 P. 2d 61):

"Appellant bases the within action on the foregoing provision [of the statute quoted in footnote 2] and in that connection argues, 'In plain language, the statute provides that, if appellant came upon respondent's premises lawfully and was bitten by his dog, respondent is liable. Because the statute is clear and unambiguous, there is no room for judicial construction.

"The court's duty is to apply the statute. The definition, that one is lawfully upon the owner's property if there pursuant to express or implied invitation, leaves no room to discuss the nice distinctions between invitee, business invitee, social guest, or trespasser. Every person, other than a trespasser, comes upon premises by invitation. Any invitation is sufficient to satisfy the requirement [***13] of the statute."

[*148] The court, however, went on to hold (87 Cal. App. 2d 358, 197 P. 2d 62):

"* * * Although there is no direct evidence as to just what happened, the inference is warranted that the child opened the gate and entered the back yard. Manifestly, the host was not responsible for such conduct on the part of the child. And, in that connection, it should be emphasized that the responsibility of the mother for the welfare of her child does not shift to the host upon a visit by the mother and child to the latter's residence.

"In the circumstances here presented, 'The owner of any dog which shall bite any person' is liable only when such person [**169] is, 'lawfully upon the private property of such owner.' The conclusion reached by the trial court that the child was a 'trespasser' simply means that the child was not lawfully upon the property of the dog owner at the point where the biting occurred."

FOOTNOTES

² The applicable California statute at that time, while not exactly the same as the Minnesota statute, contained the same general language in requiring that a person be lawfully on private property in order to recover for injuries sustained as a result of a dog bite. Cal. Stat. 1931, c. 503, § 1, provided: "The owner of any dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, or when he is on such property upon the invitation, express or implied, of the owner thereof."

[***14] We hold in this case that there is not sufficient evidence to justify a finding that Erik was in a place where he was lawfully entitled to be at the time of the incident of the bite by defendant's dog and that it was error to submit to the jury for its consideration the question of statutory liability.

4-5. We must next consider whether there is any evidence viewed in the light most favorable to plaintiffs that would justify a finding of common-law liability of defendant.

We have previously indicated and now hold that the creation of statutory liability did not abolish the common-law right of recovery. Lavalle v. Kaupp, 240 Minn. 360, 364, 61 N.W. 2d 228, 231 (1953). The general rule regarding liability of the owner of a domestic animal under the common law is set forth in 3 C.J.S., Animals, § 148:

^{HN3} "Generally the owner of a domestic animal is under no obligation to guard against injuries which he has no reason to expect on account of some disposition of the individual animal different from the species generally if he has no notice of such disposition. Hence, if the injury has resulted from the exercise of a vicious [*149] propensity, which is not natural to the class [***15] of animals to which the offending animal belongs, the owner or keeper of the animal is usually not liable if he did not have previous knowledge or scienter of the vicious propensity, or could not have ascertained the same by the exercise of reasonable care, unless there has been negligence * * * or * * * the animal was wrongfully in the place where the injury was inflicted. On the other hand, if the animal, to

the knowledge of the owner, is vicious, he must keep it safely or respond in damages for injuries resulting from a display of its known propensities; and * * * it is often held that the liability thus imposed is in no way dependent upon the existence of negligence, although there is also authority to the contrary."

Our court in Fake v. Addicks, 45 Minn. 37, 38, 47 N.W. 450, 451 (1890), set forth the general common-law requirements for recovery as follows:

"The *gravamen* of the action is the neglect of the owner of an animal, known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage; and the notice of such propensity must be such as to put a prudent man on his guard."

Shortly thereafter, in Cuney v. Campbell, *****16** 76 Minn. 59, 62, 78 N.W. 878, 879 (1899), the court emphasized that two separate elements were involved:

"* * * Proof of the vicious character of the animal is quite as essential in order to sustain a recovery as is proof of the scienter."

The language of both these cases was again cited with approval in Anderson v. Anderson, 259 Minn. 412, 415, 107 N.W. 2d 647, 649 (1961), where we said:

"The right of recovery in this type of case rests upon a common-law liability of one who neglects to restrain an animal known to be vicious. While the decisions often speak in terms **[*150]** of negligence, the right of recovery, under the rule we follow, is not really based upon common-law concepts of negligence at all."

6. In submitting the question of common-law liability of defendant to the jury in this case, the trial court paraphrased the so-called "attractive nuisance" instruction appearing in Minnesota Jury Instruction Guides, Instruction 328, substituting the words "vicious dog" for the phrase "structure *****170**" or other artificial condition" and instructing the jury as follows:

"Aside from this statute that I have read to you it is the law of our state that a possessor *****17** of land is subject to liability for bodily harm done to trespassing children caused by a vicious dog kept on said premises if four conditions exist:

"One, the place where the condition is maintained is one upon which the defendant knows or has reason to know that children are likely to trespass.

"Secondly, the condition is one in which the defendant knows or has reason to know of and which he realizes or should realize would involve an unreasonable risk of serious bodily harm to children.

"Thirdly, the children because of their youth at the time of the event did not discover the condition or realized the risk involved in meddling with or coming within the area made dangerous.

"And fourth, the usefulness of the defendant in keeping the dog is slight as compared with the risk to the children involved.

"If the four elements above are proved to you and you find that Erik Matson's injuries were a direct result of the dog bite, then Erik Matson is entitled to recover damages against the defendant, and you will then address yourself to the question of damages which I'll discuss later. If these four conditions are not found by you to exist, then your verdict should be for the defendant."

*****18** Defendant objected to these instructions and requested the **[*151]** trial court to submit the case in accordance with the rules of Restatement, Torts, §§ 511, 512. These sections provide as follows:

Section 511. "Except as stated in §§ 512 and 516, ³ a possessor of land is not liable to a trespasser thereon for harm done to him by a wild animal or an abnormally dangerous domestic animal kept by the possessor thereon although

"(a) the possessor has not exercised care to keep the animal under control, and

"(b) the trespasser has no reason to know that such animal is kept upon the land."

FOOTNOTES

³ Restatement, Torts, § 516, provides: "A possessor of land or chattels is privileged to employ a dog or other animal, for the purpose of protecting his possession of land or chattels from intrusion, to the same extent that he is privileged to use a mechanical protective device for such purposes."

Section 512. "A possessor of land who has reason to know that trespassers constantly intrude upon a limited area thereof *****19** is subject to liability for harm done to them while within such area by a wild animal or an abnormally dangerous domestic animal which he so keeps as to endanger such trespassers, unless he has exercised reasonable care to warn them of the presence of the animal."

The type of instruction used by the trial court finds support in Restatement, Torts 2d, Tent. Draft No. 10 (1964), § 512, which would completely eliminate the present § 512 quoted above and would substitute in its place the following language:

"512. Liability to Trespassers for Negligence

"The rules as to the liability of a possessor of land to a trespasser on the land for the possessor's negligence in failing to prevent harm to the trespasser from a wild animal or an abnormally dangerous domestic animal kept on the land, are the same as for artificial conditions on the land."

In *Comment c* under the proposed revision, it is stated: "If **[*152]** the trespasses of children are reasonably to be expected, the defendant may be required to exercise reasonable care to protect them from the animal, *****171** under the rule stated in § 339." Restatement, Torts 2d, § 339, which applies to artificial conditions *****20** on land, provides:

"A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

"(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

"(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

The trial court's instructions essentially included all but paragraph (e) of § 339.

As a rule of general application, we hold that it is improper under the decisions in Minnesota to include in these instructions [***21] a comparison between the utility of keeping a domestic animal and the risk to the children involved. In *Clark v. Brings*, 284 Minn. 73, 169 N.W. 2d 407 (1969), we rejected the criterion of usefulness of an animal in determining the issue of liability.

The "attractive nuisance" type of instruction given by the trial court was also deficient in that it not only failed properly to instruct the jury regarding the term "vicious dog," but it also [*153] did not properly instruct the jury that its function included determining whether the dog was vicious. Taking the instruction as a whole, it presumed that the dog was vicious. In this case, the only evidence of vicious propensities of this dog were the two previous occasions involving a nipping of the hands of defendant's nephew and niece while they were playing with the dog. It is uncontradicted that defendant knew of these incidents. The only other evidence which might tend to establish viciousness was the uncorroborated testimony of plaintiff Robert Matson that he had on occasion observed the dog charge toward the fence, barking at playing children. There is no evidence that defendant knew anything about these alleged situations, [***22] and it is uncontradicted that plaintiff Robert Matson did not communicate his observations to defendant prior to the time of the injury to his son.

In *Clark v. Brings*, *supra*, this court had occasion to discuss common-law right of recovery and the evidence necessary to establish viciousness of a domestic animal. That case involved an injury from a bite by a pet cat. The evidence established that the cat had once before bitten a baby sitter while she was playing with the cat and that the cat had scratched several members of the defendant's household. These incidents occurred while someone was playing with the cat. In that case, we held (284 Minn. 82, 169 N.W. 2d 412):

"It is true that a pet's owner need not 'have notice that the animal has frequently "broken through the tameness of his nature" into acts of aggression,' and that the notice is sufficient should the animal just once 'throw off the habits of domesticity and tameness, and * * * put on a savage nature.' *Kittredge v. Elliott*, 16 N.H. 77, 81 [1844]. 'It is not true, as has often been stated, that "the law allows a dog his first bite," for if the owner has good reason to apprehend, from his knowledge of the nature [***23] and propensity of the animal, that he has become evilly inclined, the duty of care and restraint attaches.' *Cuney v. Campbell*, [*154] 76 Minn. 59, 62, [**172] 78 N.W. 878, 879 [1899]. Here, however, the testimony shows that the cat was provoked and excited by play when it inflicted the first injury, and the authorities universally hold that '[s]uch an attack is no evidence of viciousness in the animal * * * and is insufficient to render the owner liable * * *.' *Erickson v. Bronson*, 81 Minn. 258, 259, 83 N.W. 988 [1900]; *Lee v. Seekins*, 208 Minn. 546, 294 N.W. 842 [1940]; *Lawlor v. French*, 2 App. Div. 140, 37 N.Y.S. 807 [1896]; *McHugh v. Mayor of City of New York*, 31 App. Div. 299, 52 N.Y.S. 623 [1898]. At best, to say that this bite 'was vicious is merely conjecture,' and the testimony thus cannot withstand a motion for a directed verdict. *Eastman v. Scott*, 182 Mass. 192, 194, 64 N.E. 968, 969 [1902].

"The evidence that the cat had several times scratched respondents themselves, their children, and their other babysitters is scarcely more significant. The cat usually scratched them on their hands, it appears, when they were picking it up or playfully handling [***24] it. We would agree that it is the mere dangerousness of an animal's character, and not any intentional malevolence, which must be proved to render its owner liable -- that the 'propensity is vicious if it tends to harm, whether manifested in play or in anger, or in some outbreak of untrained nature which, from want of better understanding, must remain unclassified.' *Hill v. Moseley*, 220 N.C. 485, 489, 17 S.E. (2d) 676, 678 [1941]; *Crowley v. Groonell*, 73 Vt. 45, 50 A. 546 [1901]; *Evans v. McDermott*, 49 N.J.L. 163, 6 A. 653 [1886]. But many of these incidents of scratching would seem necessarily to be excused as provoked, under the rule discussed *supra*; in any event, injuries of so slight a nature as those shown, unaccompanied by any indications of a propensity of the cat to cause greater harm, are inadequate to prove that it was dangerous and ought to have been caged or destroyed. *Maron v. Marciniak*, 165 Minn. 156, 205 N.W. 894 [1925]; *Goodwin v. E.B. Nelson Grocery Co.* [239 Mass. 232, 132 N.E. 51 (1921)]; *Merkle v. Schaeffer*, 80 N.J.L. 74, 76 A. 326 [1910]."

[*155] 7. Applying the same reasoning to the evidence in this case, there is no basis for submitting [***25] to the jury the question of the viciousness of this dog. Consequently, under the common-law theory of negligence, taking the findings of the jury most favorable to plaintiffs, we assume there was no provocation on the part of Erik as he approached the sleeping dog on defendant's property. The actions of the dog in this situation, however, were more in the nature of a reflex action than part of a continued course of vicious conduct known to defendant.

Under the facts and evidence of this case, we hold that plaintiffs are not entitled to recover either under the statute or under the common law; therefore, we reverse the decision and remand to the trial court with instructions to enter judgment for defendant. Neither party is allowed costs on this appeal.

Reversed.

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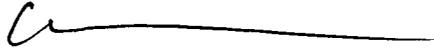
The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be delivered **via U.S. Mail** a copy of the above document to:

Mark Watson
2748 Milton Way, Suite 212
Milton, WA 98354

DATED this 12th day of October, 2009.

McDERMOTT NEWMAN, PLLC

By:


Eric S. Newman, WSBA No. 31521
Of Attorneys for Respondent

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