SUPREME COURT OF WISCONSIN

JULIE A. AUGSBURGER,

Plaintiff-Respondent,

v. **Case No. 12 AP 641**
Circuit Court Case No. 10CV844

HOMESTEAD MUTUAL INSURANCE COMPANY
and
GEORGE KONTOS,

Defendants-Appellants-Petitioners,

ABC INSURANCE COMPANY,
JANET C. VEITH,
EDWARD VEITH,
and
CONVERGYS CORPORATION,
Defendants.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS-PETITIONERS, HOMESTEAD MUTUAL INSURANCE COMPANY AND GEORGE KONTOS

Submitted by:
Menn Law Firm, Ltd.
Attorneys for Defendants-Appellants-Petitioners
Homestead Mutual Insurance Company and George Kontos
Attorney Robert N. Duimstra | State Bar No. 1000707
Attorney Jarrod J. Papendorf | State Bar No. 1019702
Attorney Kurt F. Ellison | State Bar No. 1089940
2501 East Enterprise Avenue
Appleton, WI 54913

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Case Law

Case Law from Other Jurisdictions

Wisconsin Statutes

Other Authority

INTRODUCTION

The petitioners, Homestead Mutual Insurance Company ("Homestead") and George Kontos ("Kontos"), petitioned the Supreme Court of Wisconsin, pursuant to WIS. STAT. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District II, in Julie A. Augsburger, Plaintiff-Respondent, v. Homestead Mutual Insurance Company and George Kontos, Defendants-Appellants, ABC Insurance Company, Janet C. Veith, Edward Veith, and Convergys Corporation, Defendants, Appeal No. 2012AP641, filed on August 28, 2013. On February 21, 2014, this Court granted the petition for review.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. As a matter of law, did George Kontos harbor the subject dogs pursuant to WIS. STAT. § 174.001(5) and was he an owner of such dogs for purposes of WIS. STAT. § 174.02?

ANSWERED BY THE CIRCUIT COURT: Yes.

ANSWERED BY THE COURT OF APPEALS: Yes.

2. Should recovery against George Kontos be barred as a matter of public policy?

ANSWERED BY THE CIRCUIT COURT ANSWER: The circuit court did not address public policy issues in its decision and order on summary judgment.

ANSWERED BY THE COURT OF APPEALS: No

STATEMENT OF THE CASE

I. Nature of the Case

The plaintiff-respondent, Julie Augsburger ("Augsburger"), commenced the underlying lawsuit on April 27, 2010. (R.1). Augsburger alleges that on June 21, 2008, she was injured while at the residence of the defendants, Janet Veith ("Janet") and Edward Veith ("Ed") (collectively, the "Veiths"). Augsburger alleges that, on the date of the incident, she was a guest at the Veiths' residence located at 5558 Grandview Road, Larsen, Wisconsin (the "Grandview Home") and that she was injured by dogs that were at the Grandview Home of the Veiths. (Id.).

II. Statement of Facts

As the Court of Appeals' decision states, the relevant facts are undisputed. Kontos is Janet's father. Janet and Ed are married and have a daughter, Jordan Veith. The Veiths reside at the Grandview Home in Larsen. The Grandview Home is owned by Kontos. From the time that

they moved into that residence in February of 2007, until June 21, 2008, the only people residing at the Grandview Home have been Ed, Janet and Jordan Veith. Kontos resides approximately seven miles from the Grandview Home at 5089 Washington Street, Butte des Morts, Wisconsin. (R.22:100–103).

It is undisputed that the only owner of the Grandview Home is Kontos. Neither Janet nor Ed considered themselves to have any ownership interest in the property. In his deposition, Ed testified that Kontos was his landlord; however, the Veiths paid Kontos no rent and no rental arrangements were formalized. Ed did perform interior and exterior painting, some repairs and replacements, and generally maintained the Grandview Home, but Kontos did not require his daughter and her family to pay any other monetary rent. (R.22:94, 100–103, 110–113).

At the time of the incident, the Veiths owned six dogs. Kontos was not a legal owner of any of the dogs involved in the incident with Augsburger. (R.22: 11, 102). In discovery, Janet and Ed admitted that Kontos never provided any care for the dogs, never harbored the dogs, never exercised any measure of custody over the dogs, never exercised any control over any of the dogs, never fed the dogs, never watered the dogs,

never groomed the dogs, and never took the dogs to the veterinarian. Ed also testified that Kontos never kept any of the dogs at his Butte des Morts home and never exercised any dominion or control over any of the dogs in question, on or before June 21, 2008. (R. 4–7, 110–111).

Similarly, Kontos testified that he did not consider himself to be the keeper of the dogs, that he did not take care of them, and that he did not harbor them. Kontos also testified that he never took care of the dogs, never exercised any control over them, never fed, bathed, or watered them, never kept them at his Butte des Morts residence, never took them to the veterinarian, never brushed them, and did not do anything at all to keep the dogs alive. Moreover, he indicated that he did not pay for their food, nor did he instruct the Veiths on how to take care of the dogs. (R.22:91–95).

When asked for evidence of Kontos' role as an owner, keeper, or care provider of the dogs, Augsburger testified that when she was at the Veiths' Grandview Home, she never saw Kontos feeding the dogs, watering the dogs, or taking them for a walk. In fact, the only evidence given by Augsburger to connect Kontos to the dogs (apart from his ownership of the Grandview Home which was exclusively the Veiths' residence) was on a single occasion while she visited the Grandview Home of the Veiths when

Kontos was also visiting, where she testified that Kontos yelled at the dogs when they were playing rough together to "knock it off and shut up." (R.22:83–86).

Even though Kontos did not reside at the Grandview Home and was not at the Grandview Home at the time of the incident and provided no control, custody, or care for the dogs and even though the Veiths are the undisputed legal owners of the dogs in question, Augsburger asserts that Kontos is an "owner" of the dog(s) involved in the incident on June 21, 2008 pursuant to WIS. STAT. §§ 174.001(5) and 174.02. (R.22:10–14).

III. Disposition in the Circuit Court and the Court of Appeals.

The principal parties filed summary judgment or partial summary judgment motions in circuit court on liability, damages, and insurance coverage issues. After a summary judgment motion hearing in December 2011, the circuit court ruled on these various motions via its Decision on Motions for Summary Judgment in January 2012. (R.44; AA: 101–107). On March 1, 2012, the circuit court, the Honorable Gary P. Sharpe, presiding, entered a nonfinal Order on Motions for Summary Judgment (R.45; AA:108–109), stemming from the court's Decision on Motions for

Summary Judgment dated January 30, 2012. (R.44; AA:101–107). This Order set forth the following matters:

a. Found that Kontos harbored the subject dogs pursuant to WIS. STAT. § 174.001(5) and was an owner for purposes of WIS. STAT. § 174.02.

b. Determined that the defendants, Edward Veith and Janet Veith, are not insureds under the Homestead insurance policy.

c. Denied summary judgment for dismissal on the issue of double damages pursuant to WIS. STAT. § 174.02 due to issues of fact.

Kontos and Homestead petitioned the Court of Appeals for leave to appeal from the circuit court's nonfinal order. Augsburger did not oppose that petition. The Court of Appeals granted the petition for leave to appeal of Kontos and Homestead by its Order dated May 11, 2012. (R.51).

The parties thereafter briefed the case, which was subsequently submitted to the Court of Appeals on briefs, without oral argument, on February 21, 2013. On August 28, 2013, the Court of Appeals filed its decision, affirming the circuit court order. The Court of Appeals concluded that "Kontos was a harborer, and therefore a statutory owner, of the dogs and that public policy does not preclude his liability." Augsburger v.

Homestead Mut. Ins. Co., 2013 WI App 10, ¶ 1, 350 Wis. 2d 486, 838 N.W.2d 88.

IV. Standard of Review.

The principal issue presented for review by this Court is whether a property owner is liable under WIS. STAT. § 174.02, as a person who "harbors" dogs, for injuries inflicted on the property owner's property and caused by dogs legally owned by adult family members of the property owner who reside there, where the property owner maintains his residence at a separate, distinct, distant and different property he owns. Determining whether the property owner, George Kontos may be held strictly liable under WIS. STAT. § 174.02 involves the construction and application of a statute to a set of undisputed facts, which are generally questions of law that this Court reviews *de novo*. Malone v. Fons, 217 Wis. 2d 746, 763, 580 N.W.2d 697 (Ct. App. 1998).

The related issue presented for review by this Court is whether the property owner, George Kontos, is entitled to an exemption from liability, based upon public policy grounds, under the landlord-tenant exemption.

The application of judicial public policy factors is a question of law that this Court also reviews *de novo*. Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co., 2004 WI 62, ¶ 6, 272 Wis. 2d 46, 680 N.W.2d 345.

As stated in Smaxwell:

> [w]here the facts presented are simple and the question of public policy is fully presented by the complaint and the motion for summary judgment, this court may make the public policy determination.

Smaxwell v. Bayard, 2004 WI 101, ¶ 41, 274 Wis.2d 278, 682 N.W.2d 923 (citing Sawyer v. Midelfort, 227 Wis.2d 124, 141, 595 N.W.2d 423 (1999)).

The facts of the present case are simple and undisputed. Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 106, ¶ 2. Accordingly, this Court should apply the public policy factors to preclude liability as a matter of law. Smaxwell v. Bayard, 2004 WI 101, ¶ 41.

ARGUMENT

I. Landowners Like Kontos Should Not Be Liable As A Harborer Or An Owner Under Chapter 174 Of The Wisconsin Statutes In The Absence Of Control Over Or Custody Of The Subject Dogs.

The circuit court considered Kontos' potential liability in light of this Court's recent "dog bite" cases – Smaxwell v. Bayard, 2004 WI 101,

274 Wis. 2d 278, 682 N.W.2d 923 and Pawlowski v. Am. Fam. Mut. Ins. Co., 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67. However, its summary judgment decision focused solely on whether or not a traditional landlord-tenant relationship existed without giving any consideration to whether or not Kontos, as a non-resident property owner, exercised any dominion or control over the Veiths' dogs at their separate residence or was entitled to exemption from liability traditionally afforded to landlords:

> No landlord tenant relationship existed. Obviously, Mr. Kontos did not have the personal connection with the dogs like Ms. Seefeldt when they resided with her, however, Mr. Kontos has acknowledged in his deposition that he was at the residence occupied by Mr. and Mrs. Veith and the dogs enough time to know that they were there and that they were a part of the Veith family occupying the residence. Perhaps the facts of the instant case would be closer to the Seefeldt case had Mr. Kontos spent significant time at the Veith home interacting with the dogs, but he [sic] Court feels that he had sufficient connection and that the arrangement was based upon family as opposed to a landlord tenant/business relationship. As a result, the Court finds that Mr. Kontos harbored the dogs pursuant to Wis. Stats. § 174.001(5), and was an owner for purposes of Wis. Stats. § 174.02.

(Decision on Motions for Summary Judgment, pp. 3–4).

In a comparable manner, the Court of Appeals, used a "mechanistic approach" and a "hypertechnical application" of Pawlowski to classify Kontos as an "owner"; the court's analysis focused solely on whether

Kontos provided lodging, shelter, and refuge and disregarded any additional considerations. See Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶¶ 27– 28, 350 Wis. 2d 486, 838 N.W.2d 88 (Reilly, J., dissenting). But as this Court affirmed in Pawlowski, "a landlord does not become a harborer of a tenant's dog merely by permitting a tenant to keep a dog." Pawlowski, 2009 WI 105, ¶ 55 (citing Malone v. Fons, 217 Wis. 2d 746, 767, 580 N.W.2d 697 (Ct. App. 1998)). Kontos should not be deemed a harborer of the Vieths' dogs merely by allowing his daughter's family to keep them.

In Pawlowski, this Court analyzed the concepts of "harbor" and "keep" in light of a person exercising some measure of custody, care, control, dominion, authority, maintenance, or protection over a dog on the person's premises and on such person's relinquishment thereof. Pawlowski v. Am. Fam. Mut. Ins. Co., 2009 WI 105, ¶¶ 30–32, 50. See also Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶¶ 27, 29, (Reilly, J., dissenting) ("the critical difference between our case law, including Pawlowski and the facts present in this case [are] Kontos did not provide shelter, lodging, or refuge to the dogs *in the home where he lived. Cf.* Pawlowski, 2009 WI 105, ¶¶ 28, 52, 54–55." (emphasis in original)).

In Pawlowski, the homeowner, Seefeldt, allowed her daughter's unemployed acquaintance, Waterman, to occupy a bedroom in Seefeldt's home. Pawlowski, 2009 WI 105, ¶ 9. Seefeldt owned three dogs and her home had a large fenced backyard. Id. She permitted Waterman to keep his two dogs with him at her home without paying rent. Pawlowski, 2009 WI 105, ¶¶ 9, 52. When Waterman opened the front door of Seefeldt's home to go to the grocery store, his two dogs jumped off the porch and charged and attacked Pawlowski as she walked in front of Seefeldt's home. Id. at ¶ 13. Seefeldt was at home at the time the attack occurred and allowed Waterman and his dogs to live in her home for some time after the dog bite incident. Id. Seefeldt took no "affirmative" or "explicit" steps to terminate her harboring of Waterman's dogs prior to the incident. Id., ¶¶ 11, 13, 50.

In concluding that Seefeldt was a statutorily defined owner of Waterman's dog under WIS. STAT. § 174.02 at the time of the attack on Pawlowski, this Court reasoned that Seefeldt's "status as a harborer of the dog was not extinguished when the dog's legal owner took momentary control of the dog." Id. at ¶ 78. Seefeldt and Waterman, along with their dogs, lived in the same undivided residence. Id. at ¶ 54. This Court repeated the stated purpose of WIS. STAT. § 174.02 as "*protecting[ing]*

those people who are not in a position to control the dog," id. at ¶ 76 (quoting Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis. 2d 258, 268, 549 N.W.2d 723 (1996) (emphasis added)), thereby holding Seefeldt responsible for her control or dominion over Waterman's dogs *residing in her home*. Both the circuit court and the Court of Appeals erred in failing to consider and apply the prerequisites of any control over or custody of the Veiths' dogs on the part of Kontos.

None of the fundamental facts giving rise to the imposition of liability in Pawlowski apply to Kontos, whose home at 5089 Washington Street in Butte des Morts, Wisconsin was wholly separate, distinct, distant, and different from the Veiths' residence at 5558 Grandview Road in Larsen, Wisconsin. Unlike Seefeldt's argument for "pro bono landlord" status with Waterman despite living in the same undivided residence, Kontos occupied and maintained a separate residence from the Veiths and their dogs and, like an absentee landlord, had limited control over the homestead occupied and possessed by the Vieths. See Pawlowski 2009 WI 105, ¶ 52. Kontos' only connection to the dog bite incident involving Augsburger (apart from his family relationship with the Veiths) is his fee simple ownership of the Larsen real estate where it occurred: "Kontos

owned a residential property where his daughter lived just as a landlord owns a residential property where a tenant lives." Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 106, ¶ 29 (Reilly, J., dissenting). However, "[t]he fact that Kontos owned a residential property where dogs lived does not make him a statutory "owner" of those dogs." Id., ¶ 27.

Because of Kontos' absentee ownership situation, the reasoning and holdings of the landlord-tenant dog bite cases of Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), Malone v. Fons, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998), and Smaxwell v. Bayard, 2004 WI 101, 274 Wis.2d 278, 682 N.W.2d 923 apply under the facts of this case to absolve Kontos and Homestead of dog bite liability to Augsburger. This outcome comports with this Court's analysis in Pawlowski of the homeowner's dog bite liability in Koetting v. Conroy, 223 Wis. 550, 270 N.W. 624 (1936). The holding in Koetting depends on the fact that the father allowed his daughter's dog to remain *in his home* and *cared for the dog*). Pawlowski, 2009 WI 105, ¶ 47 (emphasis added).

While Pawlowski states that "[n]o authority in dog bite cases has been cited that treats a *houseguest or cohabitant in a single residence* as a 'tenant'" (id. at ¶ 75) (emphasis added), the Veiths were not houseguests of

or cohabitants in Kontos' residence and Kontos did not provide shelter for the Veiths' dogs in his residence and home. In stark contrast to Pawlowski, the Veiths are equivalent to tenants and not houseguests. See id., ¶ 52. See also Augsburger, 2013 WI App 106, ¶ 28 (Reilly, J., dissenting,) ("I find that [the landlord-tenant exemption] is appropriate as Kontos was akin to a pro bono landlord at the time of the dog attack."). Under this standard, Kontos "does not become a harborer of a tenant's dog merely by permitting a tenant to keep a dog." Id. (quoting Pawlowski, 2009 WI 105, ¶ 55)).

The circuit court's and the Court of Appeals' decisions are also devoid of any analysis of Kontos' control over or custody of the Veiths' dogs pursuant to this Court's reasoning and holding in Smaxwell. In Smaxwell, this Court concluded, "on public policy grounds, that common-law liability of *landowners* and landlords for negligence associated with injuries caused by dogs is limited to situation where the *landowner* or landlord is also the owner or keeper of the dog causing injury." Smaxwell v. Bayard, 2004 WI 101, ¶ 39 (emphasis added).

In Smaxwell, Thompson, the landowner and landlord, allowed Bayard, her tenant, to keep dogs on a parcel adjacent to the parcel containing Thompson's residence and rental property on the condition that

Bayard take care of and secure the dogs. Id., ¶¶ 3–4. Thompson did not charge Bayard any additional rent to keep her dogs on the adjacent parcel for the eight or nine years it was used to house Bayard's dogs. Id., ¶ 4. Thompson took no active role in caring for or housing the dogs and exercised no control over the animals. Id., ¶¶ 3– 5.

The incident giving rise to the "dog bite" case decided by the Smaxwell Court occurred when Thompson and her adult daughters were inside Thompson's residence and the daughters' minor children were playing outside. Id., ¶ 7. In absolving Thompson of liability for injuries to her grandchild, this Court held "that allowing recovery against *landowners* or landlords who are neither the owners nor keepers of dogs – that is, *landowners* or landlords who do not have control over or custody of dogs – causing injury to someone on or around their property would simply have no sensible or just stopping point." Id. at ¶ 47 (emphasis added).

In Smaxwell, this Court focused on fostering "the sound policy of *ensuring that liability is placed upon the person with whom it belongs* rather than promoting the practice of seeking out the defendant with the most affluence." Id. at ¶ 53 (citing Malone v. Fons, 217 Wis. 2d at 767, 580 N.W.2d 697) (emphasis added). This Court's decision in Smaxwell

applies unequivocally to both landlords and mere *landowners* without regard to whether or not a traditional landlord-tenant relationship existed. Smaxwell, 2004 WI 101, ¶ 47. While the circuit court erred in making this distinction, the Court of Appeals erred by failing to even consider or address the Smaxwell issue. Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 106, ¶ 28 (Reilly, J., dissenting) ("The majority also fails to consider an issue central to Kontos's appeal: whether he is entitled to exemption from liability traditionally afforded to landlords. . . . The majority confuses legal arguments with issues." (citing State v. Weber, 164 Wis. 2d 788, 789 & n.2, 476 N.W.2d 867 (1991))).

As Justice Reilly's dissent recognizes, both the circuit court and Court of Appeals overlooked a critical distinction underpinning both of the holdings of Smaxwell, and Pawlowski: the liability of property owners or the exception to the traditional rule of non-liability for landlords is dependent upon the property owner exercising dominion, custody, or control over the dog or the landlord residing in the same premises as the tenant. Augsburger, 2013 WI App 10, ¶¶ 27–28 (Reilly, J., dissenting); see 33 CAUSES OF ACTION 2D 293 *Liability Dependent on Defendant's Being Owner, Keeper or Harborer of an Animal* § 4 (2007). Under these

circumstances, liability attaches because the dog has effectively become a part of the landowner's "household" or within parts of the premises in which the lessor maintains some control. See Carr v. Vannoster, 48 Kan. App. 2d 19, 29, 281 P.3d 1136 (2012) (quoting RESTATEMENT (SECOND) OF TORTS § 514 cmt. a (1988)). This interpretation is also consistent with the view of the RESTATEMENT (SECOND) OF TORTS, as well as case law from across the nation. See, infra Part II.

Like the property owner, Thompson, in Smaxwell, there is absolutely no evidence in this record that Kontos, as owner of the Grandview Home, did any of the following:

1. Lived at the Grandview Home;
2. Purchased the subject dogs;
3. Had any ownership interest in the dogs;
4. Ever took the dogs to the veterinarian for vaccinations or quarantine or check-ups or otherwise;
5. Provided or paid for food for the dogs;
6. Kept the dogs at his Butte des Morts residence, at any point;
7. Ever watered or groomed the dogs;
8. Installed or maintained any of the fencing at the Grandview Home to keep the dogs on the property;
9. Ever cared for the dogs; or
10. Ever had custody of the dogs.

Furthermore, unlike the landowner in Smaxwell, Kontos had no knowledge of any prior incident involving the dogs in question.

Under this Court's rationale underlying its holdings in both Smaxwell and Pawlowski, it is clear that Kontos, as the non-resident property owner of the Grandview Home (where solely the Veiths and their dogs resided), who maintained his own separate, distinct, distant, and different residence, did not have control over or custody of the Veiths' dogs and should not be liable. Allowing recovery by Augsburger against Kontos and Homestead based solely upon Kontos' ownership of the Grandview Home contravenes the purpose and policy embodied by WIS. STAT. § 174.02. The "mechanistic" and "hypertechnical" application of Pawlowski "stretches the interpretation [of owner]. . .so as to arguably make every person who donates to a local humane society liable for injuries caused by the dogs that the society shelters." Augsburger, 2013 WI App 106, ¶ 26, (Reilly, J., dissenting) (footnote omitted).

Following this same reasoning, Kontos and Homestead further assert that every landlord who fails to promptly evict a non-paying tenant with a dog, every vacation property owner who allows extended stays for friends or family and their dogs at such vacation property, every homeless shelter or nursing home that allows a dog on its premises, and every neighbor who disciplines the unleashed dog from next door is potentially at risk of

liability if the dog causes injury thereafter. Adopting the Court of Appeals' interpretation of WIS. STAT. § 174.02 will have statewide impact by expanding liability in landlord-tenant interactions, in charity or gift situations, in relations between families and friends with dogs, in property investment and management, in ownership decision-making, and other potential ways. Such results would contravene the principle affirmed by this Court that "a landlord does not become a harborer of a tenant's dog merely by permitting a tenant to keep a dog" and stretch the scope of the statute beyond what was intended by the legislature. Pawlowski, 2009 WI 105, ¶ 55 (citing Malone v. Fons, 217 Wis. 2d 746, 767, 580 N.W.2d 697 (Ct. App. 1998)).

This Court should overturn the Court of Appeals' definition of "owner" for purposes of WIS. STAT. § 174.02 as having gone too far. See Augsburger, 2013 WI App 106, ¶ 31 (Reilly, J., dissenting). Accordingly, this Court should find, as a matter of law, that Kontos cannot be found to be an owner or harborer under WIS. STAT. § 174.02. Such a determination of non-liability on the part of Kontos is consistent with existing Wisconsin case law and the general principles of law underpinning dog bite liability as it pertains to landlords and persons other than the dog's true owner.

II. Prevailing Principles of Law Support Non-Liability In This Case.

A. Wisconsin Case Law Supports Non-Liability On The Part Of Kontos And Homestead Concerning Augsburger's Damages Sustained From The Veiths' Dogs At The Veiths' Residence.

Kontos and Homestead respectfully submit that the circuit court's limited review and analysis of only two cases and the Court of Appeals' nearly exclusive reliance on a single phrase from Pawlowski in deciding to apply statutory liability neglected to fully address, consider, and properly apply the legal underpinnings of Chapter 174. Based on the reasoning of Wisconsin cases extensively reviewed and analyzed in both the Smaxwell and the Pawlowski decisions, a number of which cases are discussed below, Kontos and Homestead should not be held liable to Augsburger for her damages sustained from the Veiths' dogs while at the Veiths' residence.

In Pattermann v. Pattermann, 173 Wis. 2d 143, 150–51, 496 N.W.2d 613 (Ct. App. 1992), the Court of Appeals concluded that a homeowner did not "keep" a visiting dog legally owned by the homeowner's adult son because the homeowner merely directed where the dog was to be placed while visiting and did not feed or care for the dog in any way and did not "harbor" the dog because of its temporary placement within the

homeowner's residence.[1] By contrast, this Court held in Koetting v. Conroy, 223 Wis. 550, 551–52, 270 N.W. 624 (1936), that a father (and homeowner) was the keeper of his adult daughter's dog when it injured the plaintiff at a public park because the daughter lived with her father ***in his home*** as a member of his family, receiving board, lodging, and support and keeping her dog in his house. See also Erdmann ex rel. Laughlin v. Progressive Northern Ins. Co., 2011 WI App 33, ¶ 33, 332 Wis. 2d 147, 796 N.W.2d 846 (finding that homeowner, who was babysitting her grandchildren and the plaintiff, and also taking care of her daughter's dog at the time of the dog bite incident, both kept and harbored the dog and was therefore an owner for purposes of WIS. STAT. § 174.02 because the homeowner made sure the dog had water throughout the day, let him outside, and occasionally checked on him).

The case of Hagenau v. Millard, concluded that a restaurant and lodging house proprietor was not the keeper of his employee's dogs when the employee kept the dogs in a separate apartment on the proprietor's

[1] While Pattermann was formally abrogated by Smaxwell, its reasoning remains helpful to the present case in that the court was still looking for some element of control or custody of the dog by the property owner to support a finding of liability. Smaxwell, 2004 WI 101, ¶ 50, n. 8. Smaxwell essentially took Pattermann one step further and clarified that, based on public policy grounds, the "common-law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at ¶ 54.

premises which was the employee's "separate and distinct home or place of abode." 182 Wis. 544, 546–47, 195 N.W. 718 (1923). In both Janssen v. Voss, 189 Wis. 222, 207 N.W. 279 (1926) (dog removed from home and kept at dog hospital when homeowner left town for funeral) and Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis. 2d 258, 549 N.W.2d 723 (1996) (vacationing dog owners left dog at kennel, where kennel employee became keeper under WIS. STAT. § 174.02), the homeowners each took affirmative and explicit steps to relinquish physical control and custody and possession of the subject dogs so as to be absolved from liability caused by the dogs.

In Gonzales v. Wilkinson, 68 Wis. 2d 154, 155–56, 227 N.W.2d 907 (1975), the owner-occupant of a duplex was not liable for injuries caused by the dog owned by the tenant living in the other unit of the duplex because the law does not require the owner of a building to be an insurer of the acts of the building's tenant. Similarly, Malone v. Fons, 217 Wis. 2d 746, 755, 580 N.W.2d 697 (Ct. App. 1998), which involved a dog bite by a tenant's dog occurring on a driveway adjacent to the defendant's property, held that a landlord who is not the owner or keeper of his tenant's dog and who exercises no dominion or control over the dog cannot be held liable for the acts of the dog.

Finally, in Fandrey ex rel. Connell v. American Fam. Mut. Ins. Co., 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345, liability against the dog's owners, which occurred in the owners' unlocked home and involved friends entering the owners' home without their express or implied consent and without invitation or notice, was denied under WIS. STAT. § 174.02 because recovery would be too disproportionate to the dog owners' culpability, recovery would place too unreasonable a burden on dog owners, and imposing liability would enter a field having no sensible or just stopping point.

These cases all demonstrate that (i) physical control, custody and possession of a dog on the property owner's or landlord's premises, and (ii) the property owner's or landlord's dominion over, control over, or custody of a dog at the time of the incident, are prerequisites to liability for a dog's actions under Wisconsin law. See also Ladewig ex rel. Grischke v. Tremmel, 2011 WI App 111, ¶¶ 28–34, 336 Wis. 2d 216, 802 N.W.2d 511 (discussing Smaxwell and other cases and distinguishing control over a premises from control exercised over a dog on the premises). These cases also show that, contrary to the Court of Appeals' decision, "Kontos knowingly afford[ing] the dogs living at his Larsen property shelter and

lodging" is insufficient to impose liability. Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶ 24.

The undisputed facts demonstrate that Kontos was not exercising the requisite control or custody of the Vieth's dogs on the date of the dog-bite incident. In fact, on June 21, 2008, Kontos was residing in his Butte des Morts home approximately seven miles from the Grandview Home where the Veiths and their dogs resided; he was not present at the Grandview Home and had no control over or custody of those dogs so as to justify liability or allow recovery.

Furthermore, the Court of Appeals reliance upon the Minnesota Supreme Court's Ruling in Anderson v. Christopherson, is misplaced based on the differences in procedural and factual history between that case and the case at bar. See Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶ 15. Anderson, involved a situation where the plaintiff, Gordon Helmer Anderson, fell and broke his hip in an attempt to rescue his dog from an attack by a larger dog, owned by Neil Christopherson. Anderson v. Christopherson, 816 N.W.2d 626, 628 (2012). Prior to Anderson's fall, the larger dog, "Bruno" ran out of a house in Andover, Minnesota which was owned by Neil's father, Dennis Christopherson, and attacked Gordon's

smaller dog, "Tuffy," which was being walked on the sidewalk adjacent to the home. Id. at 628–29.

The house from which Bruno ran was not a primary residence of either Dennis or Neil Christopherson; both Dennis and Neil resided in Sioux Falls, South Dakota. Id. at 629. At the time of the incident, Neil was visiting the Andover home with his fiancé, with the permission of Dennis. Id. Dennis was aware that Neil was visiting the home and was bringing Bruno. Id. Unlike the present case, Dennis established rules pertaining to Bruno's ability to stay at the house. Id. at 633. Further, unlike the Court of Appeals' decision in the present case, the Minnesota Supreme Court, in Anderson, merely decided that a genuine issue of material fact existed as to whether Dennis was a harborer for purposes of MINN. STAT. § 347.22, Minnesota's dog-bite liability statute. Id. at 634.

The court in Anderson acknowledged that "a harborer must do more than exercise control over the land upon which a dog resides." Id. at 633. Thus, the court relied upon "these facts" to find that a jury could conclude that Dennis harbored Bruno:

> Dennis Christopherson considered Neil welcome at the home in Andover, the Christopherson family was very close and lived next door to each other in Sioux Falls, and the

> Andover house was Neil's childhood home. In addition, Neil Christopherson had permission to bring Bruno to the Andover house, had discussions with his parents about rules and regulations for Bruno's conduct while in Andover, and was responsible for helping with maintenance while staying at the Andover house.

Id. at 633–34.

Factually, Anderson is distinguishable from the present case in important respects. Unlike in Anderson, Kontos did not provide rules and regulation pertaining to the Vieths' keeping of the dogs, the Grandview Home was not a shared residence and also was not Janet Vieth's childhood home, but rather a separate and distinct property seven miles away from Kontos' residence in Butte des Morts. Id.

Upon closer examination of the authorities relied upon by the court in Anderson, it becomes clear that these factual differences were significant to the court's holding. In other words, the holding of Anderson, did not address the precise factual situation presented by this case; Kontos exercised no dominion or control over the dogs or the Grandview Home, he merely "exercised control over the land on which the dog[s] reside[d]." Id. at 633. Also, the court in Anderson acknowledged that its finding that a factual issue remained as to whether Dennis Christopherson was an

"owner" for purposes of Minnesota's strict liability statute, was in accordance with the RESTATEMENT (SECOND) OF TORTS § 514. Id. at 634. The cited portion of the RESTATEMENT, comment a, indicates:

> [t]he rule stated in this Section imposes the same liability upon one who, although neither the owner nor the possessor of the animal, harbors it by making it part of his household. This he may do by permitting a member of his household, including those servants who are regarded as members, to keep the animal either in the house or on the premises that are occupied as the home of the family group of which he is head. Thus a person harbors a dog or cat by permitting his wife, son or household servant to keep it in the house or on part of his land that is occupied by the family as a group. On the other hand, the possession of the land on which the animal is kept, even coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harborer of the animal.

RESTATEMENT (SECOND) TORTS § 514 cmt. a (1977).

The comment then addresses a factual situation nearly identical to the present case, concluding that no liability should attach to the non-resident property owner:

> A father [(like Kontos)], on whose land his son lives in a separate residence, does not harbor a dog kept by his son, although he has the power to prohibit the dog from being kept and fails to

> exercise the power or even if he presents the dog to his son to be so kept.

Id.

The other authority upon which Anderson relies for its holding is Verret v. Silver, 309 Minn. 275, 244 N.W.2d 147. Verret involved the issue of whether the defendant homeowner was "harboring" a dog when his tenant-roommate's Great Dane bit a minor child. Id. at 276–77. The defendant did not exercise any control or custody over the dog, which was typically kept in the tenant-roommate's bedroom, but occasionally allowed to run freely about the house. Id. Further, the defendant had requested that his tenant-roommate remove the dog from the house, and was on vacation at the time the dog ran out of the house and bit the minor child who was playing in the nearby street. Id. at 277. The circuit court in Verrett instructed the jury that:

> [h]arboring or keeping a dog means something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog.

Id. at 277.

Relying on this instruction, the jury found that the defendant and property owner was not a harborer and the Supreme Court upheld the use of the above quoted jury instructions as an accurate portrayal of the law, citing

with favor Hagenau v. Millard, 182 Wis. 544, 195 N.W. 718 (1923). Id. at 278.

In the present case, Kontos permitted his daughter, Janet, and her family to keep a dog in a separate residence, which was owned by Kontos. Also, Kontos' connection to the dogs was significantly more remote than in Verrett, where the defendant was occupying the same home as his roommate/dog-owner. Id. As the Restatement section cited in Verret illustrates, harboring requires affirmative action to afford shelter, lodging or refuge to dogs and more than the mere presence of the dog on the property owner's premises. RESTATEMENT (SECOND) OF TORTS § 514 (1977). This concept is consistent with both Wisconsin law and the prevailing legal principles regarding dog-bite liability.

B. The Prevailing Principles of Law Across the United States Favor Non-Liability For Kontos And Homestead

While Wisconsin Courts have frequently addressed dog bite liability, the precise factual circumstances of this case present a matter of first impression to Wisconsin Courts. As the circuit court noted, the present case contains factual similarities to both Smaxwell and Pawlowski, but neither case is directly on point. See (Decision on Motions for Summary Judgment, p. 3).

As previously discussed, the circuit court and Court of Appeals' interpretations of these authorities was erroneous and Wisconsin case law and public policy favor finding no liability for property owners, like Kontos, whose only connection to the dogs is the ownership of property upon which another family resides and owns, cares for and controls the dogs. See Smaxwell, 2004 WI 101, ¶¶ 48, 52–53. Because Wisconsin Courts are frequently faced with questions of liability for landowners and landlords arising out of injuries caused by dogs, this Court's resolution of the legal questions presented in this case are of particular importance in developing, clarifying and harmonizing the scope and limits of liability imposed on such landowners and landlords in the event of injuries sustained by a person or persons lawfully on the owned or rented property

and caused by a dog or dogs exclusively owned and controlled by the occupant and possessor or the tenant of such property. See Smaxwell, 2004 WI 101, ¶ 2.

Because of the importance of the legal questions before the Court, Kontos and Homestead respectfully request that, as further guidance to its decision, this Court should consider the prevailing case law from other jurisdictions, which has followed the principle that mere ownership of property at which dogs reside is not sufficient to constitute "harboring." One case, Carr v. Vannoster, decided by the Kansas Court of Appeals, is particularly useful in that it addressed circumstances with greater factual similarity to the present case than any of the cases relied upon by the Court of Appeals and circuit court. 48 Kan. App. 2d 19, 281 P.2d 1136 (2012).

Carr, like the present case, involved an action against a dog's owner, and the owner of property on which the dog was present when it bit someone. 48 Kan. App. 2d 19, 20. The property owner, Jim Vannoster ("Jim"), was the father and putative landlord of Rodney Vannoster ("Rodney"), the dog's owner. Id. at 22–23. Rodney suffered a spinal injury in 2000, and was disabled and confined to a wheelchair. Id. at 22. Around this same time, Jim purchased and renovated a handicap accessible

home, approximately one mile away from Jim's residence, for Rodney and his wife to live in. Id. 20, 22. The home was initially "rented" to Rodney at about $300 to $350 per month, although there was no formal written lease agreement. Id. at 22. However, for over a year prior to the dog bite incident, Rodney did not pay Jim any rent to live in the home. Id. Rodney lived in the home for about five years prior to the dog bite incident, and acquired his pit bull dog approximately 3 years prior to the dog bite. Id. at 23.

Like Kontos in the present case, Jim never had the dog at his personal residence, never transported the dog, and never "owned, possessed, kept or cared for the dog." Id. at 22. Like Kontos, Jim allowed Rodney to live in the home (for at least a year) without paying any rent; Rodney was not paying rent at the time of the dog bite incident. Id. at 22. Also, like Kontos, Jim was aware of the dog's presence at Rodney's residence. Id. at 22–23.

The Kansas trial court granted summary judgment in favor of Jim Vannoster, and the court of appeals unanimously affirmed. Id. at 32. In reaching its conclusion, the court of appeals relied upon the prevailing principles of law on dog bite liability as modeled by the RESTATEMENT

(SECOND) OF TORTS § 514 (1977)[2]. See Id. at 30. The court indicated that, although material factual issues remained as to whether Jim Vannoster was a landlord, and thus subject to the general rule of non-liability, this finding would not impact the result of the case. By the court's reasoning, Jim Vannoster was either a landlord, and thus subject to the general rule against liability, or not a landlord and thus only liable if he possessed or harbored the Rodney's dog. Id. at 31. The court found that Jim Vannoster was not a harborer because:

> Rodney was not a member of Jim's household. Rodney maintained his own household on the premises where he lived with his wife. The home where he kept his dog was not the home or premises occupied "as the home of the family group of which [Jim was] the head." The two homes were about a mile apart. Carr does not provide us with any evidence in the record that Rodney was ever physically present in his father's house after he took up residence with his wife in the separate house where he kept the dog.

Id. at 30.

The facts of the present case are highly comparable to those of Carr. Like Jim Vannoster, Kontos never exercised any custody or control over the

[2] As discussed in part II.A., *supra*, the RESTATEMENT (SECOND) OF TORTS requires more than merely owning the property on which a dog resides, to impose liability against the owner of the land as a "harborer." Comment a to the RESTATEMENT (SECOND) OF TORTS § 514 as quoted in part II.A. of this brief, was also recognized by the Kansas Court of Appeals in Carr as strikingly similar to the facts of that case. Carr, 48 Kan. App. 2d 19, 30, 281 P.3d 1136.

Vieths' dogs and he maintained a separate and distinct residence, miles away from the Vieths. Further, like in Carr, Kontos is effectively a pro-bono landlord, and whether he in fact qualifies as a landlord should be irrelevant to this Court's finding as to whether Kontos harbored the subject dogs. Carr, 48 Kan. App. 2d 19, 30, 281 P.3d 1136; see also Augsburger, 2013 WI App 106, ¶¶ 27, 30 (Reilly, J., dissenting).

In line with Carr and the RESTATEMENT (SECOND) OF TORTS, the predominant view of legal authority on this topic has been against imposing liability against a property owner or absentee landlord. 85 AM. JUR. *Proof of Facts* 3D *General Rule of Nonliability of Landlord—Effect of Statutes Imposing Strict Liability on Dog Owner; Statutes Imposing Liability on "Keeper" or "Harborer" of Dog* § 7 (2005). The third edition of the legal encyclopedia, American Jurisprudence Proof of Facts ("AM. JUR."), demonstrates this viewpoint. Id. The AM. JUR. digest gathers, examines, and synthesizes overarching principles in American Law. According to this resource:

> [i]n cases involving absentee landlords, the courts generally have ruled that landlords could not be held liable as keepers or harborers of their tenants' dogs, even though they had authority to forbid tenants from keeping dogs and to make rules governing the keeping of

> dogs on the premises…By contrast, however, in some cases involving on-premises landlords—landlords who reside on or otherwise share the lease premises with tenants—the courts have determined that the landlords could be held liable as keepers or harborers of their tenants' dogs.

85 AM. JUR. 3D *Proof of Facts* § 7.

Generally speaking, rules regarding liability for dog bites generally apply to the animal's owner and to persons who keep and harbor the animal on their premises with notice of its dangerous propensities. 85 AM. JUR. 3D *Proof of Facts Liability Independent of Ownership* § 5 (2005). However, some jurisdictions, such as Minnesota, Kansas, Wisconsin, and Connecticut, have enacted statutes or ordinances that impose liability on persons other than the dog's actual owner, "under proper circumstances." Id. Under these statutes, liability attaches to owners, keepers, or harborers of dogs. Id. While "keeping" and "harboring" are sometimes used interchangeably, the former term is usually given a more proprietary aspect, including caring for or having custody or control of the dog. Id.; see also, Pawlowski, 2009 WI 105, ¶ 27. Harboring, by comparison is usually defined as "sheltering or giving refuge to the animal." 85 AM. JUR. 3D *Proof of Facts* § 5.

Nonetheless, "[l]iability generally will not attach to those who do not have control over the animal in question." Id.

The application of these principles is illustrated, for example, by the Appellate Court of Connecticut, in Auster v. Norwalk United Methodist Church. 94 Conn.App. 617, 622–23, 894 A.2d 329 (2006). In Auster, the court interpreted a strict liability dog bite statute substantially similar to WIS. STAT. § 174.02 and concluded that liability could not attach to the owner of the church premises for injuries to a patron of a church parish house that was bitten by a dog owned by an employee of the church who resided in an apartment in the parish house. 94 Conn. App. 617, 622–23, 894 A.2d 329 (2006). Likewise, in Florida, a nightclub was found not liable for injuries to a pedestrian who was bitten by an employee's dog, despite knowledge on the part of the nightclub that the dog was being brought on the premises. Roberts v. 219 South Atlantic Blvd., Inc., 914 So. 2d 1108 (Fla. Dist. Ct. App. 4th Dist. 2005).

These cases demonstrate, consistent with Pawlowski and Smaxwell, that absent some evidence greater than tacit permission to allow a dog on the premises, a landlord or property owner is typically not liable for injuries caused by a dog on property they own. Pawlowski, 2009 WI 105, ¶ 55,

Smaxwell, 2004 WI 101, ¶ 53; see also, Marie v. American Alternative Ins. Co., 97 So. 3d 8 (La. Ct. App. 5th Cir. 2012), writ denied, 91 So.3d 970 (La. 2012) (finding that a hospice and its liability insurer were not to be strictly liable for dog bite injuries as a "harborer" when a dog owned by hospice resident's daughter was brought in to visit the resident and bit a visitor of the hospice); Steinberg v. Petta, 114 Ill. 2d 496, 502, 501 N.E.2d 1263 (1988) (finding that absentee landlord did not "harbor" tenant's dog within the meaning of animal control statute, where landlord, acting through agents, did nothing more than allow tenant (without a written lease) to keep a dog in a house and fenced backyard, owned by landlord); Gilbert v. Christiansen, 259 N.W.2d 896, 897 (finding that "mere right to exclude" was an insufficient basis for liability of landlord for injuries caused by tenant's pet); accord, Hagenau v. Millard, 182 Wis. 544, 195 N.W. 718 (1923) (employer not liable as keeper of employee's dog where employer provided a living quarters and also sublet another room of the building to employee's husband). When, however, the landlord or property owner has either retained control of a shared area of the premises on which the dog is allowed, or resides on the same premises as the dog's owner, some jurisdictions have been willing to find liability, including Wisconsin. See

e.g., Pawlowski, 2009 WI 105, ¶ 47, 52. These were the triggering circumstances necessary to Pawlowski's holding. Pawlowski, 2009 WI 105, ¶ 47, 52. Further, this Court should avoid unreasonably extrapolating facts such as Kontos' one instance of yelling at the Vieths' dogs to "shut up," to mean that Kontos was disciplining the dogs or akin to a trainer. Augsburger, 2013 WI App 106, ¶ 27 (Reilly, J., dissenting).

Without stretching the facts of the present in an unreasonable manner, the "proper circumstances" do not exist to impose liability on Kontos and Homestead. 85 AM. JUR. 3D *Proof of Facts* § 5. Kontos' only connection with the dogs was tacitly permitting their presence on a property owned by him. Kontos' actions are akin to a landlord but for monetary payment and a written lease agreement. Thus, this Court should follow the legal principles expounded by Wisconsin case law other than the Court of Appeals' decision in this case, the principles of law presented by the RESTATEMENT (SECOND) OF TORTS, the legal synthesis provided by AM. JUR., and the factually similar holding of Carr, to preclude liability against Kontos and Homestead and to develop the law of dog-bite liability in Wisconsin in a manner consistent with sound logic and public policy.

III. Public Policy Should Bar Recovery Against Kontos And Homestead Because Liability Would Be Unreasonable And Disproportionate.

"[T]he purpose of bringing an action against a party who is neither the owner nor keeper of the dog is primarily related to the need for the Plaintiff to reach a deep pocket." *2* AM. JUR. Proof of Facts 3D *Landlord's Liability for Injury by Tenant's Dog*, 393, 399 (1988) (cited with favor in Smaxwell, 2004 WI 101, ¶ 53). This Court has stated "that limiting the liability of landlords when they are neither owners nor keepers of dogs causing injury on or around their property fosters the sound policy of ensuring that liability is placed upon the person with whom it belongs rather than promoting the practice of seeking out the defendant with the most affluence." Smaxwell, 2004 WI 101, ¶ 53 (citing Malone, 217 Wis. 2d at 767, 580 N.W.2d 697).

Even assuming Kontos and Homestead should somehow be held responsible to Augsburger under WIS. STAT. § 174.02, "liability may still be precluded as a matter of judicial public policy." Cefalu v. Continental W. Ins. Co., 2005 WI App 187, ¶ 12, 285 Wis. 2d 766, 703 N.W.2d 743. As aptly stated by Judge Reilly in his dissent, "Public policy is not served by imposing strict liability upon those who provide lodging, shelter, or

refuge to *people* through charity or gift versus no strict liability for the cold cash-receiving landlord." Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶ 30 (Reilly, J., dissenting) (emphasis in original).

The following public policy considerations may preclude liability even where negligence and negligence as a cause-in-fact of injury are present:

> "(1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance for recovery would enter a field that has no sensible or just stopping point."

Becker v. State Farm Mut. Auto. Ins. Co., 141 Wis. 2d 804, 817–18, 416 N.W.2d 906 (Ct. App. 1987). Application of judicial public policy factors presents a question of law. Fandrey, 2004 WI 62, ¶ 6, 272 Wis. 2d 46, 680 N.W.2d 345. The existence of any *one* of the six public policy factors is sufficient to bar liability and recovery on public policy grounds. Alwin v. State Farm Fire and Cas. Co., 2000 WI App 92, ¶ 12, 234 Wis. 2d 441, 610 N.W.2d 218.

Wisconsin jurisprudence emphasizes that public policy considerations must play an important role in cases involving WIS. STAT. § 174.02 to prevent the statute's strict liability nature from being converted into an absolute liability statute, which automatically imposes liability for violation of a law. Meunier v. Ogurek, 140 Wis. 2d 782, 785–86, 412 N.W.2d 155 (Ct. App. 1987). The purpose behind applying the public policy factors is ensuring that only those in a position to protect against injury will be held liable under the statute. See Pawlowski v. Am. Family Mut. Ins. Co., 2009 WI 105, ¶76, 322 Wis. 2d 21, 777 N.W. 2d 67. "[T]he application of public policy to bar liability must be done on a "case-by-case" basis. Erdmann ex rel. Laughlin v. Progressive Northern Ins. Co., 2011 WI App 33, ¶ 9 (other citations omitted). New or different facts suggest different results. Id. (other citations omitted).

Kontos and Homestead respectfully submit that precluding liability against them is necessary and appropriate under the circumstances in order to avoid "shock[ing] the conscience of society" by imposing liability. Fandrey, 2004 WI 62, ¶ 15, 272 Wis. 2d 46, 680 N.W.2d 345. The circuit court and the Court of Appeals' decisions effectively result in a pure penalty against Kontos for his mere ownership of the Grandview Home, for

his love and compassion as Janet's father in providing for her and her family during a time of financial distress, and for his failure to evict the Veith family and their dogs from the property in the absence of receiving monetary rent. Fandrey, 2004 WI 62, ¶ 33 (quoting Alwin, 2000 WI App 92, ¶ 14).

Public policy should bar liability. Kontos is too removed from Augsburger's injury and the alleged negligence in time, place, or sequence of events in relation to the incident with the Veiths' dogs. See Beacon Bowl, Inc. v. Wisconsin Elec. Power Co., 176 Wis. 2d 740, 762, 501 N.W.2d 788 (1993). Kontos was not the legal owner of the dogs and was not at the Grandview Home at the time of the dog bite incident. Other than not allowing his daughter and her family to reside at the Grandview Home, there was nothing that Kontos could have done differently to prevent the Augsburger's injuries. A landlord's failure to exercise a right to require a tenant to remove a dog is not typically a valid basis for the liability against the landlord for injuries caused by tenant's dogs. See e.g., Malone v. Fons, 217 Wis. 2d 746, 766–67, 580 N.W.2d 697; Gilbert v. Christiansen, 259 N.W.2d 896, 897 (cited with favor by Anderson v. Christopherson, 816 N.W.2d 626, 633). Recovery from Kontos solely on the basis of his status

as a landowner would be wholly disproportionate to his culpability. Fandrey, 2004 WI 62, ¶ 34, 272 Wis. 2d 46, 680 N.W.2d 345. Imposing liability solely on the basis of Kontos' property ownership in regard to his purported negligence and the resulting harm is too highly extraordinary. Holding Kontos liable would place too unreasonable a burden on him as mere owner of the Grandview Home and the father of Janet. Id. at ¶ 35. Furthermore, imposing liability on Kontos would place too unreasonable burden on similarly situated tortfeasors whose only purported negligence is failing to evict his or her financially distressed family members and/or their dogs from a separate property they are residing in that is owned by the tortfeasor.

Similarly, imposing liability on Kontos based solely on his ownership of Grandview Home and his love and compassion as a father "would enter a field that has no sensible or just stopping point." Id. at ¶ 36. If the circuit court's and Court of Appeals' interpretation of WIS. STAT. § 174.02 is adopted, presumably any person who owns the land on which a dog injures another could be found liable as a "harborer." Augsburger, 2013 WI App 106, ¶ 27 (Reilly, J., dissenting). Landlords would be forced to immediately evict dog-owning tenants who have fallen behind on their

payments rather than working out a deal to keep the tenant, and his or her dog, from living on the street. Presumably, the dogs of these evicted tenants would be exposed to an even greater number of people and the likelihood of injury would also increase.

Likewise, facilities that allow frequent access by guide or therapy dogs could face liability for dog bites caused when these dogs are provoked, stepped on, or otherwise lose control. Dogs are animals. Regardless of the amount of training provided to a dog, there is a risk that it can cause injury to a human. This logic underpins the rule against liability of landlords for injuries caused by tenant's dogs; the landlord exception "promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability." Augsburger v. Homestead Mut. Ins. Co., 2013 WI App 10, ¶ 30 (Reilly, J., dissenting) (quoting Malone ex rel. Bangert v. Fons, 217 Wis. 2d 746, 766–67, 580 N.W.2d 697 (Ct. App. 1998)). Holding Kontos liable for the actions of dogs in a separate residence, miles away, when he had relinquished control of the residence to his daughter and her family, stretches the definition of owner for purposes of WIS. STAT. § 174.02 too far.

For the foregoing reasons, this Court should apply the public policy factors to preclude liability with respect to Kontos' purported harboring of the subject dogs pursuant to WIS. STAT. § 174.001(5) and being an owner for purposes of WIS. STAT. § 174.02 as allowing liability under the circumstances of this case would "shock the conscience of society."

CONCLUSION

Kontos' should not be held liable as a "harborer" of the subject dogs pursuant to WIS. STAT. §§ 174.001(5) and 174.02. The holdings of the circuit court and the Court of Appeals regarding Kontos' harboring of the subject dogs pursuant to WIS. STAT. § 174.001(5) and Kontos' ownership of the subject dogs for purposes of WIS. STAT. § 174.02 should be reversed. Reversing the lower courts' holdings is necessary to provide a sensible limit to the scope of strict liability on property owners under the "dog owner statute." Kontos and Homestead submit that this Court should construe and apply the "dog owner statute" in a logical and just manner to absolve Kontos and Homestead of liability in the absence of any physical control, custody, care or dominion by Kontos over the Veiths' dogs. The lower courts' interpretation of Wisconsin's dog bite statute expands the scope of liability under the statute beyond the dictates of Wisconsin law,

the prevailing principles of law regarding landowners' liability for dog bite injuries, as well as the dictates of sound logic and public policy. Public policy should bar recovery in this case because it would "shock the conscience of society" to impose liability on a property owner like Kontos, whose purported negligence stems from failing to evict his family members or their dogs, during a time of financial and emotional distress, from a separate residence owned by Kontos.

For all of the foregoing reasons, the defendants-appellants-petitioners, George Kontos and his insurer, Homestead Mutual Insurance Company, respectfully request that this Court reverse the Court of Appeals' decision affirming the circuit court's Order on Motions for Summary Judgment finding Kontos to be a harborer of the Veiths' dogs under WIS. STAT. § 174.001(5) and thus an owner for purposes of WIS. STAT. § 174.02.

Dated this 20th day of March, 2014.

MENN LAW FIRM, LTD.
Attorneys for Defendants-Appellants,
Homestead Mutual Insurance Company and George Kontos

By: /s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707
Attorney Jarrod J. Papendorf
State Bar No. 1019702
Kurt F. Ellison
State Bar No. 1089940

Post Office Address:
Menn Law Firm, Ltd.
2501 East Enterprise Avenue
P.O. Box 785
Appleton, WI 54912-0785
(920) 731-6631
Facsimile: (920) 734-0981

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief and appendix conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and § 809.62(4) for a petition and appendix produced with a proportional serif font. The length of this brief is 9,862 words.

Dated this 20th day of March, 2014.

/s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707

CERTIFICATION CONCERNING APPENDIX

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with s. 809.62(2)(f) and that contains, at a minimum: (1) The decision and opinion of the court of appeals. (2) The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition. (3) Any other portions of the record necessary for an understanding of the petition. (4) A copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of March, 2014.

/s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that: I have submitted an electronic copy of this petition for review, which complies with the requirements of WIS. STAT. § 809.19(12) and § 809.62(4)(b).

I further certify that: This electronic petition for review is identical in content to the printed form of the petition filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 20th day of March, 2014.

/s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)(f)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. § 809.19(13) and § 809.62(4)(b).

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 20th day of March, 2014.

/s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707

CERTIFICATION OF MAILING

I hereby certify that on Thursday, March 19, 2014, I deposited this Brief and Appendix in the United States mail for delivery by first class mail to the following:

Pursuant to WIS. STAT. § 809.19(8)(a)(2):

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Habush Habush & Rottier S.C.
4100 Boardwalk Court
Appleton, WI 54914-7531

Janet C. Veith and Edward Veith
5558 Grandview Road
Larsen, WI 54947

Convergys Corporation
201 East Fourth Street
Cincinnati, OH 45202

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P.O. Box 1688
Madison, WI 53701

I further certify that the Brief and Appendix was correctly addressed and postage was pre-paid.

Dated this 20th day of March, 2014.

Signed,

/s/ Robert N. Duimstra
Robert N. Duimstra
State Bar No. 1000707

APPENDIX
TABLE OF CONTENTS