STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

JULIE A. AUGSBURGER,

Plaintiff-Respondent,

Case No. 12 AP 641

v.

Circuit Court Case No.
10 CV 844

HOMESTEAD MUTUAL INSURANCE COMPANY
and
GEORGE KONTOS,

Defendants-Appellants,

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

Defendants.

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

On appeal from Winnebago County,
the Honorable Judge Gary R. Sharpe Presiding

Submitted by:
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ARGUMENT

I. Kontos' Purported Liability In This Case Is Not Dictated By *Pawlowski v. American Family* And Should Be Factually And Legally Distinguished From That Case.

As discussed in the Appellants' Brief, the circuit court only examined two recent Wisconsin Supreme Court "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 – in reaching its summary judgment decision on the liability of Kontos and Homestead. Although the circuit court erroneously determined liability based upon its incomplete analysis of the Pawlowski decision, Augsburger contends in her Response Brief that Pawlowski is the "clear" or "controlling" precedent without recognizing or acknowledging the clear distinctions between that case and this one which is now being presented on appeal and without addressing the merits of Smaxwell. See, e.g., Response Brief, pp. 1, 2, 9, 17.

The issue before the Pawlowski court was "whether a *homeowner* is liable under Wis. Stat. §174.02, as a person who either "harbors" or "keeps" a dog, for injuries *caused by a dog she allows to reside in her home* when the dog injures a third party after the unleashed dog is allowed out of the house by its legal owner." Pawlowski, 2009 WI 105, ¶3. In its analysis, the Pawlowski court concluded that "[t]he concepts of "harbor" and "keep" are similar. . . (id. at ¶31) [and that] some dictionary definitions of these two words are similar and . . . the words seem to have overlapping meanings." (id. at ¶21).

The facts giving rise to Pawlowski include the following:

- Seefeldt agreed to let Waterman move into her *home* in June or July 2003. Id. at ¶9.
- Seefeldt was *at home* at the time the attack occurred. Id. at ¶13.
- Seefeldt allowed the dog to live in *her home* for several months. Id. at ¶29.
- Seefeldt sheltered, maintained, and protected the dog *on her premises*. Id. at ¶31.
- The dog's legal owner, Waterman, occupied a bedroom in *Seefeldt's home*. Id. at ¶52.
- Both Seefeldt and Waterman lived *in the same undivided residence* with their dogs. Id. at ¶54.
- Seefeldt allowed an unknown dog to live *in her home*. Id. at ¶66.
- Seefeldt's liability as a *homeowner* is not the result of a "mere 'transient invasion'" or the "'casual presence'" of the dog *on her premises*. Id. at ¶69.
- The dog bit a neighbor walking *in front of Seefeldt's home*. Id. at ¶71.
- It is not "highly extraordinary" that providing shelter for a dog *in your home* may create risks for a passerby if the dog is not properly restrained. Id. at ¶72.

- Seefeldt acknowledged that the dog lived *in her home* on more than a transient or casual basis. Id. at ¶73.
- The dog and its owner lived *in a single private residence* with Seefeldt. Id. at ¶75.
- The dog resided *in Seefeldt's residence* for approximately four months. Id.
- Both the dog and its legal owner had the *homeowner's* (Seefeldt's) explicit permission to reside *in the home*. Id.

(emphasis supplied).

None of these fundamental facts 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 and home 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 Veiths' homestead. See Pawlowski at ¶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.

Thus, because of the 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 the Pawlowski court's analysis 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 at ¶47.

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), it is undisputed that the Veiths were not houseguests of or cohabitants in Kontos' residence and home and that Kontos did not provide shelter for the Veiths' dogs in his residence and home. In stark contrast to Pawlowski, the Veiths are more akin to tenants than houseguests. See id. at ¶52.

In summary, the Pawlowski court agreed that the purpose of Wis. Stat. §174.02 is "*protecting[ing] those people who are not in a position to control the dog.*" 2009 WI 105, ¶76 (quoting Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis. 2d 258, 268, 549 N.W.2d 723 (1996), emphasis added). Because the circuit court failed to properly analyze and apply the facts and the law, its decision and order in this case should be reversed by this Court.

II. Liability Should Be Precluded Under The Holdings And Guidance Of Applicable Case Law.

Augsburger contends that the numerous Wisconsin cases cited by Kontos and Homestead "provide no guidance" to the Court because they are factually distinguishable (Response Brief, p. 12). At the same time, she completely ignores the factual distinctions between this case on appeal and Pawlowski. Contrary to Augsburger's arguments, each case provides instructive guidance on the potential liability of Kontos and Homestead to Augsburger for her injuries sustained at the Veiths' homestead.

The issue in Pattermann v. Pattermann, 173 Wis. 2d 143, 150-51, 496 N.W.2d 613 (Ct. App. 1992) was whether a homeowner should be liable for the temporary placement of a dog in the property owner's home. Because Kontos and the Veiths maintained separate homes, the Pattermann court's conclusions concerning the homeowner's non-liability in that case should similarly bear upon Kontos' non-liability here. Kontos did not "keep" the Veiths' dogs because the Veiths determined where the dogs were to be placed at their home and Kontos did not feed or care for the dog in any way, nor did Kontos "harbor" the dogs because of they were never placed either temporarily or permanently within the homeowner's (Kontos') residence.

As discussed above, the holding in Koetting v. Conroy, 223 Wis. 550, 551-52, 270 N.W. 624 (1936) depended upon the father (and homeowner) allowing his adult daughter's dog to remain in his home and his caring for the dog. By contrast, neither the Veiths nor their dogs resided in Kontos' home; Kontos and

the Veiths had different residences. In addition, Kontos provided no care for the Veiths' dogs.

Erdmann ex rel. Laughlin v. Progressive Northern Ins. Co., 2011 WI App 33, ¶22, 332 Wis. 2d 147, 796 N.W.2d 846 cites Pawlowski for the proposition "that a *homeowner* harbored a dog she allowed to reside *in her home*." Kontos did not allow the Veiths' dogs in his home in Butte des Morts, Wisconsin; these dogs were kept at the Veiths' residence in Larsen, Wisconsin. Furthermore, Kontos did not take care of the dogs at any time prior to or at the time of the dog bite incident with Augsburger.

The relevant analysis in the case of Hagenau v. Millard, 182 Wis. 544, 546-47, 195 N.W. 718 (1923) pertains to the employee's (and legal dog owner's) "separate and distinct home or place of abode" vis-à-vis the premises of the restaurant and lodging house proprietor upon whom liability was sought, which is precisely the residential home situation between the Veiths and Kontos.

The Janssen v. Voss, 189 Wis. 222, 207 N.W. 279 (1926) case supports a determination that Kontos' responsibilities concerning the Veiths' dogs are non-existent due to the absence on his part of any dominion, authority, or custody over the dogs kept by the Veiths at their home. Because both Seefeldt and Waterman, along with their dogs, lived in the same undivided residence, the Pawlowski court found the Janssen case to not be on point. In this case, the Veiths and their dogs and Kontos did not live at the same residence. The analysis of Janssen is therefore instructive.

Armstrong v. Milwaukee Mut. Ins. Co., 202 Wis. 2d 258, 549 N.W.2d 723 (1996) is also beneficial in the Court's review of this case, given the separate and distinct residential homes of Kontos and the Veiths. Like the vacationing dog owners who left their dog at a kennel, such that the kennel employee became a statutory owner under Wis. Stat. §174.02, the absolute separation between Kontos' home and the Veiths' home evidences the non-existence and complete termination or relinquishment of any physical control and custody and possession or protection of the subject dogs by Kontos so as absolve him from liability caused by the Veiths' dogs.

The Gonzales v. Wilkinson, 68 Wis. 2d 154, 155-56, 227 N.W.2d 907 (1975) case was distinguished by Pawlowski on the basis of Seefeldt and Waterman living in the same undivided residence with their dogs. Pawlowski, 2009 WI 105, ¶54. Kontos, as the owner-occupant of his Butte des Morts residence, should not be held liable for injuries caused by the dogs owned by the Veiths and kept at their Larsen home, in like manner to the owner-occupant of a duplex residence in Gonzales who was not liable to the tenant-occupant of the adjacent unit of the duplex.

Similarly, in Malone v. Fons, 217 Wis. 2d 746, 765, 580 N.W.2d 697 (Ct. App. 1998), which dealt with a dog bite by a tenants' dog occurring on a driveway adjacent to the defendant's rental property, the court concluded that the mere fact that a landlord's tenants' dog had been on the leased premises *for a lengthy period of time* does not make the landlord a harborer of his tenants' dog. As a result,

Augsburger's liability claims based upon a "permanent" residence for the Veiths' dogs are unavailing due to the separate homes maintained by the Veiths and by Kontos.

Finally, in Fandrey ex rel. Connell v. American Fam. Mut. Ins. Co., 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345, the court's discussion concerning liability and the relationship between "public policy" and "proximate cause" is enlightening in the context of this case. The incident took place at the Veiths' home, not at Kontos' residence, such that there could be no express or implied consent and no invitation or notice on the part of Kontos as to Augsburger. It is undisputed that Augsburger opened a gate to the fenced area around the Veiths' residence in order take the most direct route to the barn where Janet Veith was at the time and that Augsburger was injured while walking through this fenced area. Response Brief, p. 5.

In summary, there is no factual or legal justification for assessing liability on or allowing recovery against Kontos, who resided in his Butte des Morts home located approximately seven miles from the Larsen home where the Veiths and their dogs resided and who was not present at the Veiths' residence on June 21, 2008 at the time of the incident. Consistent with the underlying purpose of Wis. Stat. §174.02 in protecting people who are not in a position to control the dog, Kontos should be precluded from liability as to Augsburger. Pawlowski, 2009 WI 21, ¶76.

III. Liability Should Be Precluded As A Matter Of Public Policy.

Even assuming Kontos and Homestead could 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. 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.

"[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, 332 Wis. 2d 147, 796 N.W.2d 846 (other citations omitted). New or different facts suggest different results. Id. (other citation omitted).

The fundamental problem with Augsburger's arguments concerning the public policy considerations at issue in this case is her failure to recognize and acknowledge the significant factual and legal distinctions arising from Kontos' occupation and maintenance of a separate residence in Butte des Morts from the home of the Veiths and their dogs in Larsen. In addition, Augsburger refuses to accord any relevance to the facts that Kontos never took care of the dogs, never fed, bathed, or watered them, never kept them at his Butte des Morts residence, never took them for a walk, never took them to the veterinarian, never brushed them, and did not do anything at all to keep the dogs alive. (See R.22:4-7, 10-14,

91-95, 100-103, 110-111). According to Augsburger, the only fact that matters in this case is Kontos' ownership of property constituting the Veiths' residence and the home of their dogs.

Augsburger argues that "Kontos could have done several things to minimize the risk of injury" to people at the Veiths' home in Larsen, yet only gives one example, i.e. "limiting the number of dogs kept on the property." Response Brief, p. 22. As discussed above in the context of Malone v. Fons and endorsed by Pawlowski, Kontos, in his role akin to an absentee landlord, does not become a harborer of the Veiths' dogs merely by permitting them to keep dogs at their residence. See Pawlowski, 2009 WI 105, ¶55. Moreover, despite the existence of a fenced area around the Veiths' home, Augsburger opened the gate and walked through it toward the barn rather than going around the fenced area. Essentially the only thing Kontos did "wrong" here was to provide his daughter and her family with their own residence and home out of his love and compassion as a father. Clearly, Kontos is too removed from Augsburger's injury and the alleged negligence in time, place, or sequence of events of the incident with the Veiths' dogs in order to be held liable. Likewise, recovery from Kontos is too disproportionate to his culpability as the fee simple owner of the Veiths' Larsen home. See Fandrey, 2004 WI 62, ¶¶ 34 and 40.

Similarly, allowing recovery against Kontos would place too unreasonable a burden on him and others like him who act out of love and compassion or for charitable or philanthropic reasons. Penalizing Kontos for merely owning the

property which was the Veiths' home is the type of scenario which "shock[s] the conscience of society to impose liability." Fandrey, 2004 WI 62, ¶15, 272 Wis. 2d 46, 680 N.W.2d 345.

In arguing against the "no sensible or just stopping point" and the "too highly extraordinary" public policy factors, Augsburger once again ignores the factual and legal distinctions of the applicable cases. Because the Veiths' dogs were never placed either temporarily or permanently within the homeowner's (Kontos') residence, the "transient invasion" or "casual presence" discussion in Augsburger's Response Brief (p. 23), stemming from the Pattermann case, is inapposite to these factors. The circuit court's family relationship basis for assessing liability runs counter to the holding in Koetting, which depended on the fact that the father allowed the dog to remain *in his home* and cared for the dog. See Pawlowski at ¶47. Also, the Veiths and their dogs were not houseguests or cohabitants with Kontos in a single residence; they had different homes. Kontos did not provide shelter for the Veiths' dogs *in his home*. Mere ownership of property where a dog bite incident occurs provides no sensible or just stopping point for imposing liability. Likewise, imposing liability on the basis of such property ownership is too highly extraordinary.

This Court should apply public policy to bar liability. Application of one or more of these public policy factors should result in a reversal of the circuit court's erroneous summary judgment against Kontos for harboring the subject dogs pursuant to Wis. Stat. §174.001(5) and being an owner for purposes of Wis. Stat.

174.02 so as 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.

CONCLUSION

Contrary to Augsburger's argument, the crux of this appeal is not "the interpretation of both statutory and case law interpreting who is an "owner" of a dog for purposes of liability for a dog injury." Response Brief, p. 7. Rather, it is the *application* of the statutory and case law to the undisputed facts. Nevertheless, Augsburger ignores the significant factual distinctions between this case and Pawlowski and seeks to have this Court ignore the other case law bearing upon the dog bite incident giving rise to this appeal.

For all of the reasons stated above and in their Appellants' Brief, Kontos and Homestead respectfully request that this Court reverse the summary judgment of the circuit court and remand this matter to the circuit court for entry of summary judgment in favor of Kontos and Homestead on the issues of Kontos' purported liability for the subject dogs as a harborer under Wis. Stat. §174.001(5) and as an owner for purposes of Wis. Stat. §174.02.

Dated this 2nd day of October, 2012.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,990 words.

Dated this 2nd day of October, 2012.

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I hereby certify that:

I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that:

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

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

Dated this 2nd day of October, 2012.

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CERTIFICATION OF MAILING

I hereby certify that on October 2, 2012, I deposited this Reply Brief in the United States mail for delivery by first class mail to the following:

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

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