

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28668

DARLETTE MAE RIDLEY,

Plaintiff and Appellant,

vs.

**SIOUX EMPIRE PIT BULL RESCUE, INC., SUSAN
TRIBBLE-ZACHER and HARRY PODHRADSKY,**

Defendants and Appellees.

**APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA**

**THE HONORABLE DOUGLAS E. HOFFMAN
CIRCUIT COURT JUDGE**

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Chronological Index are designated as "R." References to the Appendix to this brief are designated as "App." There is one transcript in this appeal. References to the transcript of the summary judgment hearing held on June 7, 2018 are designated as "HT."

STATEMENT OF JURISDICTION

Darlette Mae Ridley respectfully appeals from the order granting Defendants' motions for summary judgment dated July 3, 2018 and summary judgment dated July 3, 2018. (App. 1-4) (R. 380-381, 382-383).

Notice of entry of order granting Defendants' motions for summary judgment and summary judgment was served on Ridley on July 6, 2018. (R. 384). Ridley filed her notice of appeal and docketing statement on July 17, 2018. (R. 390-391; 398-402). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3(1) and (4).

REQUEST FOR ORAL ARGUMENT

Darlette Mae Ridley respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Did the trial court err in granting Appellees' motions for summary judgment because it acted as a factfinder and weighed the evidence?

The trial court granted summary judgment in favor of Defendants/Appellees.

- *Hamilton v. Sommers*, 2014 S.D. 76, 855 N.W.2d 855

II. Was there sufficient evidence for a jury to determine that Appellees breached their duty to Ridley?

The trial court granted summary judgment in favor of Defendants/Appellees.

- *Casillas v. Schubauer*, 2006 S.D. 42, 714 N.W.2d 84
- *Gehrts v. Batteen*, 2001 S.D. 10, 620 N.W.2d 775
- *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, 658 N.W.2d 76

STATEMENT OF THE CASE

This is a personal injury case initiated by Darlette Mae Ridley on October 18, 2016 in Lincoln County of the Second Judicial Circuit against Sioux Empire Pit Bull Rescue (“Pit Bull Rescue”). (R. 1-5). On July 24, 2017, Ridley filed her First Amended Complaint and added Susan Tribble-Zacher (“Zacher”) and Harry Podhradsky (“Podhradsky”) as additional defendants. (R. 28-33). Ridley alleged that Pit Bull Rescue, Zacher and Podhradsky were liable for the injuries she sustained as a result of being attacked by a pit bull at a Newton Hills State Park campground. (R. 28-33). Pit Bull Rescue, Zacher and Podhradsky denied that they were liable for Ridley’s injuries. (R. 7-9; 48-51).

On April 17, 2018, Pit Bull Rescue filed a motion for summary judgment, arguing there were no disputed material facts and it was entitled to judgment as a matter of law. (R. 64-206). On April 19, 2018, Zacher and Podhradsky filed a summary judgment motion arguing the same. (R. 207-230). Ridley resisted the motions. (R. 235-346).

On June 7, 2018, a hearing was held before the Honorable Douglas E. Hoffman. (App. 5) (R. 412). At the conclusion of the hearing, Judge Hoffman granted the motions for summary judgment and held that “there isn’t any evidence for the lack of reasonable care on the part of [Pit Bull Rescue, Zacher and Podhradsky].” (App. 8) (R. 458). On July 3, 2018, the circuit court signed its order granting summary judgment and filed it on July 5, 2018. (App. 1-2). On July 3, 2018,

the circuit court signed a summary judgment dismissing the case. (App. 3-4). On July 6, 2018, notice of entry of order was filed. (R. 384-385). This appeal followed.

STATEMENT OF THE FACTS

The Attack

On August 9, 2015, Ridley, her family and their two family dogs were camping overnight at Newton Hills State Park in Lincoln County, South Dakota. (R. 141; Ridley Depo., 29:15-25). At approximately 7:05 a.m., Ridley decided to take a morning walk around the campground. (R. 142; Ridley Depo., 33:3-10). While walking on the gravel road near Zacher and Podhradsky's campsite, Ridley heard a loud bark. (R. 143; Ridley Depo., 35:1-36:6). She turned her head and saw a pit bull tethered to a tree rear up on its hind legs and lunge towards her. (*Id.* at 35:1-36:6). When the dog lunged at Ridley, the force of the dog's movement broke the collar allowing it to race towards Ridley.¹ (*Id.* at 36:2-6). The dog knocked Ridley down and bit her. (*Id.* at 36:7-21; 37:6-38:16). It is undisputed that the attack was unprovoked and Ridley did nothing to incite it. (R. 168; Leighton Depo., 73:14-21); (R. 201; Synders Depo., 53:12-16); (R. 99; Zacher 62:25-63:3); (R. 116; Podhradsky Depo., 35:24-36:14).

Ridley remembered experiencing immediate and severe pain in her low back and fingers. (R. 144; Ridley Depo., 38:12-13; 22-23). Podhradsky assisted Ridley to a

¹ Pit Bull Rescue, Zacher and Podhradsky allege that the collar broke, but the whereabouts of the collar are unknown and Ridley never had the opportunity to inspect it. (App. 6) (HT 9:2-15).

nearby bench and then into the campground bathroom to clean off the large amount of blood on her hands. (*Id.* at 39:1-8). Zacher then helped Ridley to her campsite and Ridley's husband drove her to the emergency room. (*Id.* at 39:24-40:11). At the hospital, Ridley discovered she fractured her finger. (R. 144-145; Ridley Depo., 41:7-43:8). Ridley underwent a procedure to clean the finger and then had stitches to close the wound. (*Id.*) As a result of the attack, Ridley incurred medical expenses and lost wages. (R. 145-147; Ridley Depo., 45:23-50:24).

Sioux Empire Pit Bull Rescue

At the time of the attack, the pit bull was owned by Pit Bull Rescue. (R. 161; Leighton Depo., 44:22-25). Pit Bull Rescue is an organization that accepts pit bulls from shelters, abuse and neglect situations and dog fighting rings. (R. 170-171; Leighton Depo., 81:23-82:8). The organization does not have a physical location or building to care for the pit bulls. (R. 171; Leighton Depo., 82:21-24). As such, the animals are placed with foster providers until a permanent home can be located. (*Id.*) Rachael DeZell Leighton ("Leighton") has been the President of Pit Bull Rescue since 2011.² (R. 153; Leighton Depo., 13:11-23). Before Leighton started, Pit Bull Rescue did not require any training for its volunteers or board members and did not require them to obtain any certifications. (R. 153-154; Leighton 13:24-14:4). At the time Leighton joined the organization, there were no qualifications required to be

² Leighton is not a dog trainer. (R. 152; Leighton Depo., 9:14-25). She works at Citibank as a credential specialist and teaches dance part-time. (*Id.*)

eligible to be a board member or volunteer. (R. 154; Leighton 14:2-6). Now, Pit Bull Rescue requires its foster providers to sign contracts before they are able to start fostering.³ (R. 154; Leighton Depo. 14:7-16).

The Pit Bull

Before the pit bull attacked Ridley on August 9, 2015, the dog had been in the care of at least seven different providers in eight locations in less than thirteen months.⁴ Sometime before July 2014, the pit bull was picked up by the Sioux City Humane Society because it was not being properly cared for by its original owners. (R. 156; Leighton Depo, 22:18-23:4). Pit Bull Rescue admitted that it had “relatively minimal” information regarding the dog’s history. (R. 313; Snyders Depo. 16:17-23;

³ There are two versions of the contract that outline the responsibilities of the foster providers. (R. 102, 132).

⁴ In summary, the seven providers and eight locations from July 2014 to August 9, 2015 are:

1. The dog’s original owners in Elk Point. (R. 156; Leighton Depo., 22:22-23).
2. The Sioux City Humane Society. (R. 156; Leighton Depo., 22:18-19).
3. Leighton’s home in Sioux Falls in July 2014. (R. 156; Leighton Depo., 23:16-17; 24:15-18).
4. Jennifer Praske’s farm outside Worthing from July 2014 to December 2014. (R. 156-157; Leighton Depo., 25:25-26:4).
5. Desiree and Jon Adams’ home near Platte, Nebraska from December 2014 to April 2015. (R. 157; Leighton Depo., 27:5-10).
6. Heather Boon’s home from April 2015 to September 2015. (R. 157; 159; Leighton Depo., 28:14; 37:2-7).
7. Zacher and Podhradsky’s home the week before August 9, 2015. (R. 160; Leighton Depo., 38:16-18).
8. Newton Hills campground with Zacher and Podhradsky on August 8-9, 2015. (R. 91; Zacher Depo., 30:2-14).

17:17-21); (R. 293; Leighton Depo., 24:22-24) (Q: Is there anything else [Pit Bull Rescue] did to determine Meadow's background? A: Upon arriving, no.”).

After Pit Bull Rescue and Leighton took possession of the dog, it was placed with Jennifer Praske (“Praske”) as a foster provider in Worthing. (R. 294-295; Leighton Depo., 25:25-26:4). This arrangement lasted from July 2014 to December 2014. (*Id.*) After Praske could no longer care for the dog, Pit Bull Rescue transferred the dog to Desiree and Jon Adams' home in Platte, Nebraska in December 2014. (R. 296; Leighton Depo., 27:5-10). On March 1, 2015, when the Adams were attempting to introduce its family dog to the pit bull, an altercation ensued and both dogs were injured. (R. 298; Leighton Depo., 29:14-30:25). The veterinarian records state that the injuries were caused by a “dog fight.” (R. 300-301; Leighton Depo., 32:22-33:5).⁵

In April 2015, one month after the dog fight, the pit bull was placed with Boon as a foster provider. (R. 280; Boon Depo., 17:11-18). This was four months before Ridley was attacked. (R. 2-4). When Boon took the pit bull as a foster dog, Boon was not given any information about the dog's history or past abuse, fights, aggression or bites. (R. 281-282; Boon Depo., 18:10-12; 19:8-23). At that time, Boon was similarly unaware of the dog fight the month before as no one from Pit Bull Rescue informed her about the incident. (*Id.*)

⁵ The veterinarian records do not state which dog was the aggressor. (R. 177-180). Leighton testified that she believed that the pit bull in this case was not the aggressor, but she does not have any firsthand knowledge as she was not present when the fight occurred. (R. 299; Leighton Depo., 30:14-16).

Two-Week Shutdown Period

When a Pit Bull Rescue dog is being moved from one environment to another, the providers are required to place the dog in a two-week shutdown. (R. 156; Leighton Depo., 36:9-12) (Q: As Sioux Empire's policy, if I understand it, is that each time a foster family receives one of your animals that they are required to do the two-week shutdown? A: Correct). The two-week shutdown requires the new foster handlers to segregate the dog and bond the dog to only one caretaker. (R. 111; Podhradsky Depo., 16:18-17:5). During the two-week shutdown, the dog is required to be kept separate from other animals and is prohibited from leaving the foster provider's yard, going on walks and going on car rides. (R. 170; Leighton Depo., 80:19-23). The two-week shutdown is required to help the dog transition to new people and a new environment because the dog is unsure of the new environment and new foster provider. (R. 170; Leighton Depo., 80:24-81:1). When asked the purpose of the two-week shutdown, Leighton testified "[t]he two-week shutdown allows an animal to decompress and begin to bond with a handler. It builds the relationship of trust" between the dog and the new provider. (R. 159; Leighton Depo., 36:16-22). After the two-week shutdown, Pit Bull Rescue then:

slowly begin[s] to introduce them to new environments, new people, new animals, watch them very closely for stress signs, and continue just to monitor them to make sure that we are moving at the pace of the dog versus what possibly a human would want.

(R. 156; Leighton Depo., 25:1-6). The two-week shutdown recognizes that dogs need a transition period from one environment to another and need time to bond with a new provider.

Before the Attack

In the week leading up to the attack, the pit bull had been in three separate locations – Boon’s home, Zacher and Podhradsky’s home and then the state campground. *See supra* fn. 4. Boon wanted to go out of town and was required to notify Pit Bull Rescue to arrange for temporary foster providers. (R. 159-160; Leighton Depo., 37:23-38:2). Leighton arranged for Zacher and Podhradsky to act as temporary foster caregivers while Boon was out of town. (R. 160; Zacher Depo., 38:12-18). While Boon was dropping off the dog with Zacher and Podhradsky, she recognized that the dog would be in an unfamiliar environment with unfamiliar people. (R. 126; Boon Depo., 28:23-29:4). Boon testified that she left “a t-shirt that smells like me so she doesn’t think I abandoned her and I’m coming back.” (*Id.*)

When Zacher and Podhradsky took custody of the dog, they did not comply with the two-week shutdown. (R. 90-91; Zacher Depo., 29:12-30:7). Instead, they took the dog to their preplanned camping trip with unfamiliar people, animals, scents and sounds. It was initially arranged for Zacher and Podhradsky to have Meadow until Saturday, August 8, 2015. (R. 90; Zacher Depo., 29:15-22). Boon, however, contacted Zacher and stated that her trip was going to be extended and that she would not be home until Sunday, August 9, 2015. (*Id.*) Zacher and Podhradsky already had plans to camp overnight at Newton Hills so they decided to take the dog

camping with them. (*Id.*) After spending the night at the campground, in the early morning of August 9, 2015, the dog attacked Ridley without provocation. (R. 142; Ridley Depo., 33:3-10).

STANDARD OF REVIEW

Summary judgment is reviewed *de novo* and no deference is given to the circuit court's ruling. *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶ 7, 814 N.W.2d 413, 415 (citations omitted). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c).

This Court "affirms a grant of summary judgment only if 'there are no genuine issues of material fact and the legal questions have been correctly decided.'" *Morris Family, LLC ex rel. Morris v. S. Dakota Dep't of Transp.*, 2014 S.D. 97, ¶ 11, 857 N.W.2d 865, 869 (quoting *Quinn v. Farmers Ins. Exch.*, 2014 S.D. 14, ¶ 13, 844 N.W.2d 619, 623). "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 16, 757 N.W.2d 756, 761-62. "The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." (*Id.*)

"Summary judgment is generally not feasible in negligence cases." *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 13, 714 N.W.2d 84, 88. "It is only when the evidence is such that reasonable persons can draw but one conclusion from the facts and

inferences that they become a matter of law and this occurs rarely.” (*Id.*) (internal quotations omitted). Whether a breach of a “duty occurred is for the finder of fact, not this Court.” (*Id.* at ¶ 14). The inherent difficulty with summary judgment in cases such as this is succinctly summed up as follows:

What adds both to the intrinsic procedural difficulty of summary judgment and to some of the confusion in dealing with the device in negligence actions is that, even if there is no dispute about how an accident occurred, the presence or absence of negligence often remains a question of fact, which requires a trial under traditional principles of the law of negligence. Because the reasonableness of a party's actions is a question whose resolution requires a determination of the reasonableness of those acts and the conduct of parties under all the facts and circumstances of the case, the issue of negligence must normally be presented to a jury and cannot be disposed of by summary judgment.

73 Am. Jur. 2d Summary Judgment § 8.

ANALYSIS

I. THE CIRCUIT COURT IMPROPERLY WEIGHED THE EVIDENCE AND DID NOT VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO RIDLEY.

The circuit court granted summary judgment only after improperly weighing the evidence and viewing the facts and inferences in the light most favorable to Pit Bull Rescue, Zacher and Podhradsky. The evidence in the record is generally not disputed. What is disputed, however, is the inferences from the evidence and whether Pit Bull Rescue, Zacher and Podhradsky are entitled to judgment as a matter of law. The circuit court adopted Pit Bull Rescue, Zacher and Podhradsky’s version of the facts and inferences and disregarded any facts that contradicted them. The circuit court concluded that “there isn’t any evidence for the lack of reasonable care

on the part of the defendants.” (App. 8) (HT 47:23-24). In other words, summary judgment was granted on the factual element of breach. This weighing of evidence is contrary to the well-established principal that “[t]he judge’s function at the summary judgment stage ... is not to weigh the evidence and determine the matters’ truth.”

Hamilton v. Sommers, 2014 S.D. 76, n. 42, 855 N.W.2d 855, 868.

II. THERE IS SUFFICIENT EVIDENCE FOR A JURY TO CONCLUDE THAT PIT BULL RESCUE, ZACHER AND PODHRADSKY BREACHED THEIR DUTY TO RIDLEY.

There is sufficient evidence for the jury to conclude that Pit Bull Rescue, Zacher and Podhradsky were negligent. “Negligence is the breach of a duty owed to another, the proximate cause of which results in an injury.” *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 6, 741 N.W.2d 767, 770 (quoting *Pierce v. City of Belle Fourche*, 2001 S.D. 41, ¶ 22, 624 N.W.2d 353, 356–57). In this case, the duty is the “ordinary, prudent person” standard. *Gehrts v. Batteen*, 2001 S.D. 10, ¶ 9, 620 N.W.2d 775, 778. This standard “denote[s] a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.” *Nugent v. Quam*, 82 S.D. 583, 595, 152 N.W.2d 371, 377 (1967) (quoting Restatement of the Law, Torts, s 283, Comment a).

There are two avenues to prove liability of a dog owner or handler: (1) the knowledge test and (2) foreseeability test based on the totality of the circumstances. *Gehrts*, 2001 S.D. 10, ¶¶ 8-9, 620 N.W.2d at 778. The law states that “to establish foreseeability, a plaintiff in a dog bite case may either argue to the jury that the owner

knew or should have known of the dog's dangerous propensities [knowledge test] or that, under the totality of the circumstances, injury to the plaintiff was reasonably foreseeable [foreseeability test].” *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, ¶ 9, 658 N.W.2d 76, 79. This analysis focuses on foreseeability in the context of breach. *Id.* at ¶ 7.

Ridley asks this Court to reverse the trial court's grant of summary judgment based on the foreseeability test.⁶ In establishing the foreseeability test, this Court stated:

When the owner does not know of the animal's dangerous propensities, the ordinary negligence standard of foreseeability will still be applied. To recover, the plaintiff must establish that a duty existed between the owner and the victim and that there was a breach of that duty. Thus, when no actual knowledge of dangerousness exists, the plaintiff must establish that as an ordinary, prudent person, the owner should have foreseen the event that caused the injury and taken steps to prevent the injury. Such liability may arise depending upon the kind and character of the particular animal concerned, the circumstances in which it is placed, and the purposes for which it is employed or kept.

Gehrts, 2001 S.D. ¶ 9, 620 N.W.2d at 778 (internal citations omitted). The duty Pit Bull Rescue, Zacher and Podhradsky owed to Ridley was to act as an ordinary, prudent person. The question in this case is whether there is sufficient evidence for a jury to conclude that Pit Bull Rescue, Zacher and Podhradsky breached that duty. The two factors in this analysis that are relevant and discussed in detail below are: (1)

⁶ Ridley is not appealing the circuit court's grant of summary judgment on the knowledge test.

the kind and character of the animal; and (2) the circumstances in which the animal was placed.

a. Kind and Character of Animal: Pit Bulls Are High-Energy, Aggressive and Were Bred to Fight.

The dog that attacked Ridley was classified as a pit bull, which is a mix between bulldogs and terriers.⁷ (R. 168, Leighton Depo., 72:10). Dogs with the characteristics of “wide head, wide chest” falls into the category. (R. 170; Leighton Depo., 81:2-8). The bulldogs and terriers were “selectively bred for specific and superior fighting abilities” and are more apt to pick fights. (R. 170; Leighton Depo., 81:9-14). Pit Bull Rescue instructs its volunteers that they “should never trust a pit bull not to fight” because “that is genetically what they were bred to do.” (R. 170, Leighton Depo., 81:15-22).

Former Pit Bull Rescue board member, Brittany Snyders, acknowledged that pit bulls are high-energy and that Pit Bull Rescue’s training includes specific training on aggression. (R. 194; Snyders Depo., 25:3-19). Snyder also acknowledged that “[p]it bulls – all dogs have bred tendencies, and pit bulls have more of a tendency toward being unsure around other dogs. So their dog interactions are different than other dogs or dogs and people.” (R. 200; Snyders Depo., 49:16-19). Furthermore, Pit Bull Rescue prohibits its dogs from going to dog parks and requires dogs to be

⁷ This Court has not decided a case involving the liability of an owner or custodian of a pit bull. See *Warnick v. Mulvey*, 80 S.D. 511, 127 N.W.2d 433 (1964) (German Shepard); *Ross v. Hanson*, 86 S.D. 654, 200 N.W.2d 255 (1972) (Shepherd); *Gehrts*, 2001 S.D. 10, 620 N.W.2d 775 (St. Bernard); *Blaha v. Stuard*, 2002 S.D. 19, 640 N.W.2d 85 (Yellow Labrador); *Rowland*, 658 N.W.2d 76 (Akita).

supervised and leashed at all times. (R. 163; 168; Leighton Depo., 52:17-23; 70:10-13; 71:17-20).

As recognized by Pit Bull Rescue, being a good manager of a dog recognizes that different kinds of dogs have different innate tendencies.⁸ Individuals buy Golden Retrievers to retrieve, Labradors to hunt and Australian Shepherds to herd. Those instincts are inherent in the breed. The dangers associated with caring for each type of dog is different. The ordinary, prudent person standard dictates that the care and treatment of a dog is different for a pit bull than a five pound Pomeranian based on the breed, breed tendency, size and dangerousness. If a Pomeranian is brought by a virtual stranger to a new campsite and the dog breaks its leash, the magnitude of harm is relatively low. The dog cannot knock a person over and any bite would be minimal because of the size of the dog's jaw and teeth. A pit bull, however, poses a much greater threat and requires more precaution than a smaller, less aggressive animal.

The reasonable person standard required Pit Bull Rescue, Zacher and Podhradsky to handle an unfamiliar pit bull differently than they would have treated a

⁸ In response to Pit Bull Rescue's statement that "you should never trust a pit bull not to fight," Leighton testified:

That is genetically what they were bred to do so, again, each animal is an individual, and we measure them on a spectrum of dog tolerance levels, but to be a *good manager*, that is the appropriate thing.

(R. 170, Leighton Depo., 81:15-22) (emphasis supplied).

smaller dog that was not prone to aggression. A jury could find that Pit Bull Rescue, Zacher and Podhradsky were negligent by ignoring the danger that the pit bull posed by exposing the dog to a new environment with random families, animals, scents and sounds.⁹

b. Circumstances in Which Animal was Placed: the Dog was at a Public Campsite with a New Temporary Foster Provider – the Dog’s Third Location that Week.

The second part of the analysis pursuant to *Gebrets* looks at the circumstances in which the animal was placed in determining the reasonableness of the handler’s actions. This is not the case where a family brought their longtime family pet to a familiar environment. This is a case where a new temporary foster providers took a pit bull with an unknown history to an unfamiliar place. First, the dog never should have been at the campground as it should have been in the two-week lockdown. Second, a reasonable person would have foreseen the harm from the dog’s lack of consistency and structure in its living arrangements.

⁹ To be clear, Ridley is not asking the Court to pronounce a rule that pit bulls are inherently dangerous by virtue of their breed or to create strict liability for pit bull owners. The discussion regarding the characteristics of a breed or kind is one part of the analysis to establish the contours of the reasonable person standard as noted in *Gebrets*, 620 N.W.2d 775, 2001 S.D. 10.

Further, Pit Bull Rescue, Zacher and Podhradsky are likely to note that South Dakota has enacted a law disfavoring breed specific ordinances, policies or resolutions. *See* SDCL 40-34-16. By its statute, the Legislature opted not to regulate dog ownership in the state. The Legislature did not opine on the differences between breeds, breed tendencies, innate aggression or propensity to attack.

i. The Mandatory Two-Week Shutdown Period was Violated.

When analyzing why Ridley was attacked, Leighton told animal control “that the dog had been moved three times in the past week and [she] was concerned about this and wandered [*sic*] if the dog was reacting to all the change in her environment.” (R. 337). Leighton testified that she was surprised to hear about the attack on Ridley because “[o]ur dogs are so properly trained and we set up them up for success.” (R. 165, Leighton Depo., 60:6-10). The problem for Pit Bull Rescue, Zacher and Podhradsky is that the dog was cared for in a manner that breached Pit Bull Rescue’s policies and procedures that were enacted to provide a smooth transition to a new environment or home.

Leighton testified without qualification that any transfer to another temporary or foster family required the two-week shutdown. (R. 170; Leighton Depo., 78:6-13) (Q: ...You said it’s required, obviously, any time one of your dogs goes into a temporary or any foster family? A: Yes). *See also* R. 159, Leighton Depo., 36:23:27:1 (Q: And, again, you said that [two-week shutdown] is required for all foster families

to do when they receive an animal into...their care? A: Yes).¹⁰ Up until the attack on Ridley at the campground, the two-week shutdown period was followed when the pit bull was transferred to a new environment. When the Sioux City Humane Society

¹⁰ Leighton later tried to retreat from this testimony and testified that “babysitters” do not need adhere to the two-week shutdown period. (R. 170, Leighton Depo., 80:4-13). Leighton testified:

Q: Harry Podhradsky testified that he and Susan did not do the two-week full shutdown. And I wasn't aware of that earlier time in the summer, I apologize, but in August of 2015 when they received possession of her, they did not do the two-week full shutdown. Are you aware of that?

A: Correct.

Q: That would be then against Sioux Empire policy?

A: Our baby-sitters have the option, if they feel comfortable and have been with the program long enough, to put animals together.

Q: Okay. I'm sorry. I thought you told me earlier that it's required each time they go into a new environment to do the two-week shutdown.

A: It is required.

Q: And during this two-week shutdown, they're not supposed to leave the foster's yard, right?

A: No.

Q: No car rides, no other dogs, no pet stores, no walks, etc.?

A: No.

Q: The reasons for that is they're just kind of unsure of their environment and who the foster provider is quite yet?

A: Yes.

(R. 170; Leighton Depo., 80:4-81:1).

Leighton's attempt to distinguish between a temporary foster family and babysitter is unpersuasive and irrelevant as Pit Bull Rescue admitted that Zacher and Podhradsky were “temporary foster parent[s].” (R. 414; HT 3:10-11) (“Susan ... had Meadow as a temporary foster parent for Sioux Empire Pit Bull Rescue.”). For purposes of summary judgment, all factual disputes are resolved in favor of Ridley and is it assumed the two-week shutdown applied.

transferred the dog to Leighton, the dog underwent the two-week shutdown. (R. 156; Leighton Depo., 24:25-25:6). When the dog was transferred from Leighton to Praske, the dog again underwent the two-week shutdown. (R. 157; Leighton Depo., 26:22-24). When the dog was transferred from Praske to the Adamses, the dog underwent the two-week shutdown at that time. (R. 159; Leighton Depo., 36:4-8). Finally, consistent with Pit Bull Rescue's policies, the dog underwent the two-week shutdown for a fourth time when the dog was transferred from the Adamses to Boon. (R. 159, Leighton Depo., 36:13-15).

When Pit Bull Rescue's policies are followed and the dogs are properly managed, the risk of an attack decreases and the animals are not as dangerous to the public. (R. 163; Leighton Depo., 53:13-20.)¹¹ The inverse of this statement must also be true. When Pit Bull Rescue's policies are not followed, it is foreseeable that the animal could be a danger to the public.

It is undisputed that Zacher and Podhradsky failed to adhere to the two-week shutdown period required to help the dog transition. While the dog should have been in the two-week shutdown to allow it to "decompress," "bond with a handler" and build "the relationship of trust," it was brought by new foster providers to a new

¹¹ Q: So specifically with regard to your pit bulls that Sioux Empire owns, if they've gone through the two-week shutdown period when they come into any foster family's care, whether temporarily or on a long-term basis, and the foster families are following the guidelines provided by Sioux Empire, your testimony is that they would not be a danger to the public?

A: Yes.

campsite filled with strangers, young children, new smells and unknown dogs. If Zacher and Podhradsky would have adhered to Pit Bull Rescue's policy that was enacted to help dogs transition to a new environment, Ridley never would have been attacked. Instead, Zacher and Podhradsky did not want to disrupt their preplanned camping trip when Boon's trip was extended. Zacher and Podhradsky ignored Pit Bull Rescue's policy and the purpose behind the policy to the detriment of Ridley.

ii. Consistency Matters Especially with Foster Dogs.

Even if the dog was not required to be in a two-week shutdown, a jury could find that Pit Bull Rescue, Zacher and Podhradsky should have understood that having a pit bull at three different locations in less than one week may be difficult and stressful on an animal – even an “easy-going” one. Leighton testified that “[a]nimals that are properly managed...are great individuals to have in your family.” (R. 162; Leighton Depo., 46:2-4). When asked if “properly managed” included consistent living arrangement and a structured home, Leighton agreed that would be part of the criteria. (*Id.* at 46:5-47:6). When asked to define “a structured home,” Leighton stated it would include “[s]omeone that is able to provide consistency with daily schedules.” (*Id.*)

According to Leighton, a lack of consistency can throw the animal “out of whack” and can create stress on the animal. (*Id.* at 47:13-18). Leighton also testified:

Q: Would you agree with me that taking a dog to a different location outside the home could be upsetting or unsettling for the dog?

A: Yes.

Q: Why?

A: Any change is going to be difficult...
Q: Any new environment for any breed of dog could be unsettling --
A: Yes.
Q: -- especially for a foster dog?
A: Yes.

(R. 164; Leighton Depo., 55:2-21). Boon testified similarly to Leighton and stated:

Q: Would you agree with me that it could be upsetting and unsettling for a dog to be transferred to three different homes in one week, especially for a foster dog?
A: It's possible.
Q: Why?
A: A lot of moving around, you get used to one place and then you're uprooted.
Q: Even dogs of a calmer nature, that could be upsetting for them, couldn't it?
A: Anybody, person or dog.

(R. 125; Boon Depo., 24:5-16). When asked about a foster dog being placed in three different places in one week, Zacher testified:

Q: Would you agree with me that it could be unsettling for a pit bull to be transferred to three different places in one week?
A: Yes.

(R. 94; Zacher Depo., 43:19-22).

This testimony unequivocally establishes what common sense dictates and that is that consistency matters with animals – especially with animals of an unknown background. Pit Bull Rescue, Zacher and Podhradsky treated this dog no differently than the average family dog that had a consistent caretaker and a steady environment. They ignored that they were only temporarily taking care of the dog and that the dog's normal routine was upended when Boon went out of town. Boon recognized the potential turmoil that the dog may undergo with a new caretaker when she

provided her shirt for the dog to know what she was not abandoning it. (R. 126; Boon Depo., 28:23-29:4). Pit Bull Rescue, Zacher and Podhradsky had no business bringing the dog to a public campground. This evidence of and the inferences derived therefrom are sufficient for a jury to conclude that Pit Bull Rescue, Zacher and Podhradsky violated the reasonable person standard.

III. *ROWLAND V. LOG CABIN, INC.*, 2003 S.D. 20, 658 N.W.2D 76, IS DISPOSITIVE.

In *Rowland*, 2003 S.D. 20, ¶ 14, 658 N.W.2d 80, a patron of a bar sued the bar when he was bit by a dog owned by another patron. The Court noted that the dog was an Akita that stood three feet high from the top of its back. *Id.* ¶ 3. The plaintiff sat down near the dog and stuck his thumb in the dog's mouth. *Id.* at ¶ 4. At that point, the dog lunged and bit the plaintiff's face. *Id.*

This Court reversed the grant of summary judgment and stated “[w]hether a reasonable person would have realized that a large, unknown dog roaming free in a small bar with drunken patrons involved an unreasonable risk of harm is a question for the jury.” The same analysis applies in this case. A reasonable prudent person would have realized that placing a dog bred for fighting with an unknown background in a public place creates an unreasonable risk of harm. As in *Rowland*, this is a question for the jury.

CONCLUSION

Ridley was at the state campsite with her family enjoying their stay when she was attacked by a pit bull. Ridley did nothing more than go for a walk and Pit Bull Rescue, Zacher and Prodradsky should be responsible for her injuries. They violated

the reasonable person standard by ignoring the two-week shutdown and by failing to recognize the danger with moving an animal multiple places in a short time period. They also failed to recognize the inherit breed tendencies of pit bulls and the heightened danger that pit bulls pose when they attack. The reasonable person standard dictates a recognition and steps to address the innate aggression, size and strength of pit bulls. Pit Bull Rescue, Zacher and Prodradsky's failures caused Ridley's injuries and pain.

Zacher and Prodradsky ignored the purpose behind the two-week shutdown period and exposed the pit bull to unknown people, animals, scents and sounds. Zacher and Prodradsky wanted to care for the dog, but did not want the responsibility of following Pit Bull Rescue's rules. They had a prearranged camping trip and acted in their best interest, not the pit bull's or the public's. Although Zacher admitted that it could be dangerous taking a new foster dog to a campground, she did it anyway. (R. 94; Zacher Depo., 42:17-43:11).

Pit Bull Rescue, Zacher and Podhradsky had the duty to act as an ordinary, prudent person would act. This requires an acknowledgement that pit bulls were bred to fight, have innate breed tendencies and that this particular pit bull had an unknown history. It also requires an acknowledgment that the dog was removed from its original owners and had been in eight different locations with seven providers in a little more than a year. Most importantly, as expressed by Pit Bull Rescue's President, the dog had been moved from Boon's home to Zacher and Podhradsky's home and then to a campsite all in a one week time period. It is up to

the jury to determine based on the totality of the circumstances whether Pit Bull Rescue, Zacher and Podhradsky did or did not act in accordance with the reasonable person standard.

Ridley respectfully requests that this Honorable Court reverse the trial court's grant of the motions for summary judgment and remand to allow a jury to determine whether Pit Bull Rescue, Zacher and Podhradsky's actions were reasonable.

Dated this 9th day of October, 2018.

**JOHNSON, JANKLOW, ABDALLAH
& REITER, L.L.P.**

BY: /s/ Jami J. Bishop

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*Attorneys for Darlette Mae Ridley, Plaintiff and
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
was served via electronic mail upon the following:

Attorney for Appellee Sioux Empire Pit Bull Rescue, Inc.

Michael J. Schaffer
Schaffer Law Office, Prof. LLC
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Sioux Falls, SD 57104-3602

Attorney for Appellees Susan Tribble-Zacher and Harry Podbradsky

Melanie L. Carpenter
Woods Fuller Shultz & Smith, P.C.
300 S. Phillips Avenue, Suite 300
Sioux Falls, SD 57104-6322

on this 9th day of October, 2018.

/s/ Jami J. Bishop
Jami J. Bishop

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5839 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Jami J. Bishop
Jami J. Bishop

APPENDIX

Order Granting Defendants’ Motion for Summary Judgment.....	App. 1
Summary Judgment	App. 3
Transcript of Summary Judgment Hearing (relevant portions).....	App. 5
Defendant Sioux Empire Pit Bull Rescue’s Statement of Undisputed Material Facts	App. 9
Plaintiff’s Response to Defendant Sioux Empire Pit Bull Rescue’s Statement of Undisputed Material Facts	App. 13
Defendants Susan Tribble-Zacher and Harry Podhradsky’s Statement of Undisputed Material Facts	App. 18
Plaintiff’s Response to Defendants Susan Tribble-Zacher and Harry Podhradsky’s Statement of Undisputed Material Facts	App. 27

)

IN CIRCUIT COURT

:SS

SECOND JUDICIAL CIRCUIT

0-0

DARLETTE MAE RIDLEY,

:

41CIV16-000387

Plaintiff,

:

V.

•

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

SIOUX EMPIRE PIT BULL RESCUE, INC.,
 SUSAN TRIBBLE-ZACHER, and HARRY
 PODHRADSKY,

• •

..

Defendants.

• •

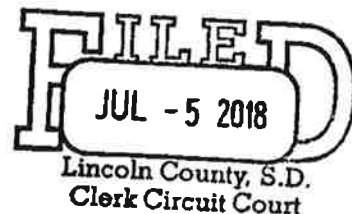
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On April 17, 2018, Sioux Empire Pit Bull Rescue, Inc. filed a motion for summary judgment. On April 19, 2018, Susan Tribble-Zacher and Harry Podhradsky filed a motion for summary judgment. On June 7, 2018, a hearing on Defendants' motions for summary judgment was held before the Honorable Douglas E. Hoffman, in the Lincoln County Courthouse in Canton, South Dakota. Sioux Empire Pit Bull Rescue appeared by Schaffer Law Office and Michael J. Schaffer, its attorneys; Susan Tribble-Zacher and Harry Podhradsky appeared by Woods, Fuller, Shultz & Smith, PC and Melanie L. Carpenter, its attorneys; and Plaintiff Darlette Ridley appeared by Johnson, Janklow, Abdallah & Reiter, LLP and Jami J. Bishop, her attorneys.

After considering the written briefs, the arguments of counsel, all of the materials on file, and otherwise being fully advised, the Court issued an oral decision granting Defendants'

{03014175.2}

- 1 -



App. 1

Motions for Summary Judgment. Specifically, the Court found that there was no dispute as to material facts, and that Defendants are entitled to judgment as a matter of law.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendants' motions for summary judgment are granted, and Darlette Ridley's suit against Sioux Empire Pit Bull Rescue, Inc., Susan Tribble-Zacher, and Harry Podhradsky is dismissed with prejudice.

Dated this 3 day of July, 2018.

BY THE COURT:



ATTEST:

Kristie Torgerson, Clerk

By Karen Johnson
Deputy

Douglas E. Hoffman
Honorable Douglas E. Hoffman
Circuit Court Judge

Motions for Summary Judgment. Specifically, the Court found that there was no dispute as to material facts, and that Defendants are entitled to judgment as a matter of law.

Accordingly, it is hereby

ORDERED AND ADJUDGED that judgment be awarded against Plaintiff and in favor of Defendants Sioux Empire Pit Bull Rescue, Inc., Susan Tribble-Zacher, and Harry Podhradsky; and that Defendant Sioux Empire Pit Bull Rescue, Inc. be awarded its costs and disbursements in the amount of \$ 1,245.07 to be inserted by the Clerk of this Court; and that Defendants Susan Tribble-Zacher and Harry Podhradsky be awarded their costs and disbursements in the amount of \$ 538.04 to be inserted by the Clerk of this Court.

Dated this 3 day of July, 2018.

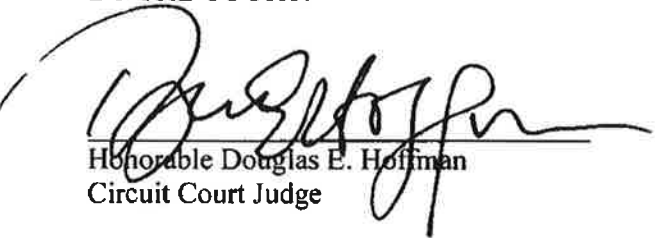
BY THE COURT:



ATTEST:

Kristie Torgerson, Clerk

By Karen Nelson
Deputy


Honorable Douglas E. Hoffman
Circuit Court Judge

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
 2 COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

3

4 _____)
 Darlette Ridley,)
 5)
 Plaintiff,)
 6) Motion Hearing
 vs.)
 7) CIV 16-387
 Sioux Empire Pit Bull)
 8 Rescue, Inc., Susan Tribble)
 Zacher, and Harry Podhradsky)
 9)
 Defendants.

10

11

12 BEFORE: THE HONORABLE DOUG HOFFMAN
 Circuit Court Judge
 13 Canton, South Dakota
 June 7, 2018, at 1:30 p.m.

14

15

APPEARANCES:

16

17 For the Plaintiff: Jamie Bishop
 Attorney at Law
 18 PO Box 2348
 Sioux Falls, South Dakota 57101

19

20 For the Defendants: Melanie Carpenter
 Attorney at Law
 21 300 South Phillips #300
 Sioux Falls, South Dakota 57117

22

Michael Schaffer
 23 Attorney at Law
 412 West 9th Street #1
 24 Sioux Falls, South Dakota 57104

25

1 MR. SCHAFFER: Um, Your Honor, I think everything has been
2 pretty adequately briefed. There are no real disputed
3 material facts as I see this case. The facts are relatively
4 simple.

5 On August 9 of 2015, which was an early Sunday morning
6 about 7 in the morning, Susan Zacher and her -- I'll call
7 live-in boyfriend -- they're a couple -- were camping at
8 Newton Hills State Park here in Lincoln County. They got up
9 early that morning. Susan fed her dog Meadow and she had
10 Meadow as a temporary foster parent for Sioux Empire Pit
11 Bull Rescue. The way Sioux Empire Pit Bull operates -- and
12 I'll just generically refer to it as Sioux Empire -- it's a
13 voluntary organization. People in the Sioux Falls area
14 comprised of 20 to 30 foster families -- they have no
15 facilities themselves where they can, like, take a dog to
16 put it into a kennel and could keep in any place. They have
17 no actual facilities. So when a dog is brought to them, in
18 this case, as the other dogs are initially brought to -- in
19 this case I'll call her Rachel Leighton. I know her last
20 name is Dezell. She inspects the animal. They also have
21 some minimal information on the dog and sometimes they have
22 no information. In this particular dog, Meadow, that was
23 picked up by the Sioux City Humane Society because
24 apparently this had been running at large and near Elk Point
25 and had been caught several times and the Sioux City Humane

1 kind of metal --

2 MS. CARPENTER: No. No. And nobody even knows where the
3 collar is. Nobody even knows what became of it. But I
4 mean, it's clear -- I mean, I can see if this was a frayed
5 collar and the leather that was covered with cloth was
6 snapped and broken and deteriorated or something that would
7 be one thing, but how is anybody supposed to know the rings
8 -- the metal rings will break?

9 THE COURT: So somebody took a picture of the collar, but
10 now it's disappeared?

11 MR. SCHAFFER: Susan Zacher took a picture of the collar and
12 she took all of the pictures after the incident and nobody
13 knows what became of it because we asked for it and nobody
14 knows if it went back to Heather Boon where it was, you
15 know -- who originally had the dog at the time.

16 The other thing is, the dog was put into in-home
17 quarantine afterwards and the animal control person looked
18 and had declared it wasn't vicious, so...

19 THE COURT: So now Ms. Bishop going to tell us, though, that
20 there was some protocols that Sioux Empire had about when
21 you go from one foster parent to another foster parent,
22 they're supposed to stay home and not take the dog out in
23 the public for a while so the dog can settle in and get used
24 to the changed environment and that that wasn't done here
25 and that that was neglect, et cetera. So how do you address

1 So when we rub it and scrub it, it seems to me that
2 there isn't any evidence to suggest that this dog had
3 dangerous propensities. There wasn't any history of any
4 kind of dangerous or aggressive behavior on the part of the
5 dog. The closest thing that the plaintiffs can suggest is
6 that the dog was the victim of an attack by another dog two
7 and a half years prior, and I don't think we can draw any
8 inferences in the light most favorable to the plaintiff that
9 are beyond that and the plaintiff chose not to go down and
10 try to find some witnesses that would say, no, Meadow was
11 the aggressor. And so I don't think that gets them
12 anywhere.

13 There isn't any evidence to show that the defendants
14 knew or should have known the collar was going to break on
15 that morning at 7 o'clock if the dog put physical stress on
16 it. It's anticipated that dogs were going to put stress on
17 collars and that's why you have a collar that fits the dog
18 and you have a tether that's adequate to hold the dog, and
19 there isn't indication that the defendants have any reason
20 to believe that that wasn't an appropriate safety device.
21 So I can't draw any conclusion of negligence from that. We
22 don't have any expert testimony to contradict that, um, so
23 there isn't any evidence for the lack of reasonable care on
24 the part of the defendants that's been brought to the record
25 at this point in time. There's a suggestion that while they

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

DARLETTE MAE RIDLEY,

41CIV16-000387

Plaintiffs,

vs.

DEFENDANT SIOUX EMPIRE PIT
BULL RESCUE, INC.'S
STATEMENT OF UNDISPUTED
MATERIAL FACTS

SIOUX EMPIRE PIT BULL RESCUE,
INC., SUSAN TRIBBLE-ZACHER,
and HARRY PODHRADSKY,

Defendants.

COMES NOW the above-named Defendant, Sioux Empire Pit Bull Rescue, Inc., by and through their counsel of record, Michael J. Schaffer, and, pursuant to SDCL § 15-6-56(c) provides the following Statement of Undisputed Material Facts in support of their Motion for Summary Judgment.

1. The Plaintiff was injured on August 9, 2015, at Newton Hills State Park in Lincoln County, South Dakota.
2. The Plaintiff was walking around the park in the early morning on August 9, 2015. Darlette Ridley Depo. at 33.
3. The Plaintiff approached a campsite at which Susan Zacher, Harry Podhradsky and Susan Zacher's son had been camping over the weekend. Susan Zacher Depo. at 44-46.
4. Susan Zacher was a temporary foster parent for a dog owned by Sioux Empire Pit Bull Rescue, Inc. Susan Zacher Depo. at 29-32.
5. The dog, Meadow, was tethered to a tree near Susan Zacher and Harry Podhradsky's camper. Susan Zacher Depo. at 50-52.

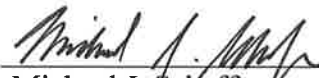
6. Meadow apparently ran and the collar attached to the leash broke. Meadow then ran toward the Plaintiff knocking her down. Susan Zacher Depo. at 51-52.
7. It is unclear whether Meadow bit the Plaintiff. The Plaintiff claims that Meadow bit her finger. Darlette Ridley Depo. at 37-38.
8. Susan Zacher and Harry Podhradsky believe that the injury to Plaintiff's finger was due to her fall. Susan Zacher Depo. at 65-66, Harold Podhradsky Depo. at 36-37.
9. In any event, Meadow was not known to have any dangerous or vicious propensities. Susan Zacher Depo. p. 66, Heather Boon Depo. p. 41, Harold Podhradsky Depo. p. 37.
10. The incident was entirely unforeseeable. Susan Zacher Depo. p. 67, Heather Boon Depo. p. 42, Harold Podhradsky Depo. p. 38.
11. Meadow was described as a calm, very nice, family dog. Susan Zacher Depo. p. 33
12. Meadow was also described as a very, very good dog. Harold Podhradsky Depo. p. 16.
13. Mr. Podhradsky observed the collar that broke. Two metal pieces on it broke and in his opinion it was a manufacturing defect in the collar. Harold Podhradsky Depo. p. 31.
14. The Plaintiff has no evidence that prior to this incident the dog (Meadow) had any propensities for running at or jumping on people. Darlette Ridley Depo. at 52.

15. The Plaintiff has no evidence that any of the Defendants had any knowledge of any dangerous or vicious propensities of the dog (Meadow) prior to the incident giving rise to this lawsuit. Darlette Ridley Depo. at 53.

16. The Plaintiff has no evidence that Sioux Empire Pit Bull Rescue, Inc., did anything wrong to cause or contribute to the accident. Darlette Ridley Depo. at 54.

Dated this 17th day of April, 2018.

SCHAFFER LAW OFFICE, PROF. LLC



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Facsimile (605) 274-6764

Attorneys for Defendant Sioux

Empire Pit Bull Rescue, Inc.

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant hereby certifies that a true and correct copy of the foregoing “Defendant Sioux Empire Pit Bull Rescue, Inc.’s Statement of Undisputed Material Facts” was served by electronic filing with the Clerk of the Court by using the Odyssey File & Serve system, which sent notification of such filing upon:

Kimberly J. Lanham

Jami J. Bishop

Johnson Janklow Abdallah Reiter and Parsons, LLP

101 S. Main Street, Ste. 100

Sioux Falls SD 57104

Attorneys for Plaintiff

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Sioux Falls SD 57104-6322
*Attorneys for Defendants Susan Tribble-Zacher and Harry
Podhradsky*

on this 17th day of April, 2018.



STATE OF SOUTH DAKOTA)
 :ss
COUNTY OF LINCOLN)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

DARLETTE MAE RIDLEY,

Plaintiff,

vs.

SIOUX EMPIRE PIT BULL RESCUE,
INC., SUSAN TRIBBLE-ZACHER, and
HARRY PODHRADSKY,

Defendants.

CIV. # 16-387

**PLAINTIFFS' RESPONSE TO DEFENDANT
SIOUX EMPIRE PIT BULL RESCUE'S
STATEMENT OF UNDISPUTED
MATERIAL FACTS
-AND-
PLAINTIFFS' STATEMENT OF
DISPUTED MATERIAL FACTS**

Pursuant to SDCL 15-6-56(c)(2), Plaintiff Darlette Mae Ridley, respectfully submits her response to the Defendant Sioux Empire's Statement of Undisputed Material Facts. This response is supported by the Affidavit of Jami J. Bishop and accompanying exhibits. The references to Exhibits in this pleading refer to those exhibits to the Affidavit of Jami J. Bishop.

RESPONSE TO STATEMENT OF MATERIAL FACTS OF
SIOUX EMPIRE PIT BULL RESCUE

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. Not disputed.
5. Not disputed.

6. For purposes of summary judgment only, it is not disputed that Defendants have testified that Meadow broke her collar running towards Darlette. Defendants'

description of the attack is not accurate as Darlette testified that she was not only knocked down, but also bit by Meadow. (Ex. 6 at 35:1-15; 37:6-38:5).

7. Disputed. See Response to Paragraph 6.

8. Disputed. See Response to Paragraph 6. Furthermore, for purposes of summary judgment, the facts have to be viewed in the light most favorable to the nonmoving party, so Defendants self-serving testimony is not the standard to view the motion.

9. Disputed. Meadow was a shelter dog that Pit Bull Rescue had very little information about before taking possession of the dog. (Ex. 4 at 24:22-24; Ex. 5 at 16:17-23; 17:17-21). A few months before this attack, Meadow was involved in a dog fight during Meadow's placement with another foster family. (Ex. 4 at 25:7-28:16; Ex. 10). In the week before Meadow attacked Darlette, Meadow's foster caregiver, Heather Boon, was on vacation so Meadow was placed with a new, temporary foster family, Defendants Zacher and Podhradsky. (Ex. 3 at 25:1-8). In violation of Pit Bull Rescue's policies and procedures, Meadow did not undergo the mandatory two-week shutdown at Defendants Zacher and Podhradsky's house. (Ex. 2 at 17:6-12; 19:12-16). In addition, when Defendants Zacher and Podhradsky took Meadow to the campground, it was the third place that Meadow had been that week. Defendant Zacher took Meadow even though she admitted that it could be dangerous taking a new foster dog to a campground. (Ex. 1 at 42:17-43:5). *See also* Plaintiff's Statement of Disputed Facts and Brief in Opposition to Defendants' Motion for Summary Judgment.

10. Disputed. See Response to Paragraph 9.

11. Disputed. See Response to Paragraph 9.

12. Disputed. See Response to Paragraph 9.

13. For purposes of summary judgment only, it is not disputed that Defendants Podhradsky testified that Meadow broke her collar.

14. Disputed. See Response to Paragraph 9.

15. Disputed. See Response to Paragraph 9.

16. Disputed. See Response to Paragraph 9.

DISPUTED MATERIAL FACTS ASSERTED BY PLAINTIFF

1. Meadow was a shelter dog that Pit Bull Rescue had very little information about before taking possession of the dog. (Ex. 4 at 24:22-24; Ex. 5 at 16:17-23; 17:17-21).
2. Defendant Sioux Empire Pit Bull Rescue had knowledge of a previous altercation involving Meadow in March 2015. (Ex. 4 at 25:7-28:16; Ex. 10).
3. In the week before Meadow attacked Darlette, Meadow's foster caregiver, Heather Boon, was on vacation so Meadow was placed with a temporary foster family, Defendants Zacher and Podhradsky. (Ex. 3 at 25:1-8).
4. In violation of Pit Bull Rescue's policies and procedures, Meadow did not undergo the mandatory two-week shutdown at Defendants Zacher and Podhradsky's house. (Ex. 2 at 17:6-12; 19:12-16).
5. Meadow had been in three different places the week prior to this incident.
6. It can be dangerous taking a new foster dog to a campground. (Ex. 1 at 42:17-43:5).

7. Pit bulls are high-energy animals. (Ex. 5 at 25:3-7; 17-19)
8. Pit Bull Rescue specifically provides training on aggression in the pit bulls. (Bishop Aff. Ex. 5 at 49:16-20).
9. Pit Bulls are designed to fight. (Ex. 4 at 50:1-2).
10. Instead of being camping with random people, children and dogs, Meadow should have been in the mandatory two-week shutdown. (Ex. 4 at 53:13-20).
11. The purpose of the shutdown is to provide continuity for an animal during a time of transition, allow the animal to decompress and to build a relationship of trust between the handler and the animal. (Ex. 4 at 53:13-20).
12. Defendants Zacher and Podhradsky failed to comply with Pit Bull Rescue's required policy regarding the two-week shutdown. (Ex. 2 at 17:6-12; 19:12-16).
13. A lack of consistency can throw the animal "out of whack" and can create stress on the animal. (Ex. 4 at 47:13-18).
14. A change in environment can be difficult for a dog. (Ex. 4 at 55:2-21).
15. A change in environment can be especially difficult for a foster animal. (Ex. 4 at 55:2-21).
16. The campground was the third place that Meadows had been the week before the attack.
17. It can be unsettling for a pit bull to be transferred to three different places in one week. (Ex. 1 at 43:19-22).

Dated this 31st day of May, 2018.

**JOHNSON JANKLOW ABDALLAH
& REITER LLP**

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing was served by electronic filing with the Clerk of the Court by using Odyssey File & Serve system upon the following:

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on this 31st day of May, 2018.

/s/ Jami J. Bishop
Jami J. Bishop

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
COUNTY OF LINCOLN)	SECOND JUDICIAL CIRCUIT

0-0

DARLETTE MAE RIDLEY,	:	41CIV16-000387
	:	
Plaintiff,	:	
	:	
v.	:	DEFENDANTS
	:	SUSAN ZACHER AND
	:	HAROLD PODHRADSKY
	:	STATEMENT OF UNDISPUTED
SIOUX EMPIRE PIT BULL RESCUE, INC.,	:	MATERIAL FACTS IN SUPPORT OF
SUSAN TRIBBLE-ZACHER, and HARRY	:	MOTION FOR SUMMARY
PODHRADSKY,	:	JUDGMENT
	:	
Defendants.	:	

0-0

Defendants Susan Zacher and Harold Podhradsky (“Defendants”), for their statement of undisputed material facts in support of their motion for summary judgment, state as follows:

1. On August 9, 2015, at approximately 7:00 a.m., Darlette Ridley (“Plaintiff”) was walking on a gravel road in the campground area of the Newton Hills State Park (“Newton Hills”). (D. Ridley Depo. at 33-34).¹
2. On the day in question, Defendants were camping at Newton Hills with Zacher’s son and dog, Ollie, and a rescue dog they were dog sitting named Meadow. (Zacher Depo. at 44, 51, 53).²
3. As Plaintiff walked by Defendants’ campsite she saw Meadow tethered to a tree. (D. Ridley Depo. at 35).³

¹ The Deposition of Darlette Mae Ridley is attached to the Affidavit of Michael J. Schaffer as Exhibit D. A photograph of the campsite and road is attached to the Affidavit of Michael J. Schaffer as Exhibit 2C.
² The Deposition of Susan Tribble-Zacher is attached to the Affidavit of Michael J. Schaffer as Exhibit A. A photograph of Ollie and Meadow is attached to the Affidavit of Michael J. Schaffer as Exhibit 2D.

4. Defendants were also outside with Meadow—Zacher was standing right next to Meadow and Podhradsky was standing a few feet away. (Zacher Depo. at 46, 51); (Podhradsky Depo. at 27).⁴

5. As Plaintiff passed by, Meadow ran away from the tree and her collar broke. (D. Ridley Depo. at 35); (Zacher Depo. at 45, 51, 53); (Podhradsky Depo. at 28).⁵

6. Meadow was wearing a “Martingale” collar, which had been provided by Defendant Sioux Empire Pit Bull Rescue, Inc. (“Sioux Empire”). (Zacher Depo. at 46, 53); (Leighton Depo. at 61-62).⁶

7. Meadow was tethered to the tree by a cable leash “tie-out.” (Zacher Depo. at 50-51); (Podhradsky Depo. at 31).

8. Sioux Empire had never had one of its collars break. (Leighton Depo. at 64).

9. A “tie-out” is an outside extension that is hooked to a tree or the ground. A “tie-out” is an approved method of securing animals outside. (Leighton Depo. at 66).

10. After Meadow’s collar broke, Meadow ran toward and into Plaintiff and knocked her down onto the gravel road. (D. Ridley Depo. at 35-37); (Zacher Depo. at 51-52).

11. Zacher called for Meadow to return to her and Meadow immediately obeyed. (Zacher Depo. at 52).

12. As a result of her fall, Plaintiff had cuts on her elbow and left ring and pinky fingers. (D. Ridley Depo. at 37); (Zacher Depo. at 57).⁷

³ Photographs of the tree and tether are attached to the Affidavit of Michael J. Schaffer at Exhibits 2F and 2G.

⁴ The Deposition of Harold Podhradsky is attached to the Affidavit of Michael J. Schaffer as Exhibit B.

⁵ A photograph of the broken collar is attached to the Affidavit of Michael J. Schaffer as Exhibit 2E.

⁶ The Deposition of Rachael Leighton Dezell is attached to the Affidavit of Michael J. Schaffer as Exhibit E.

13. Plaintiff believes that Meadow bit her. (D. Ridley Depo. at 37, 38).

14. Zacher testified that Meadow did not bite Plaintiff. (Zacher Depo. at 55-56).

15. At the time of this incident, Meadow was a foster dog owned by Sioux Empire.
(Leighton Depo. at 44).

16. Sioux Empire is a volunteer, pit-bull rescue organization. (Leighton Depo. at 12).

17. Sioux Empire does not have a facility to house the dogs; rather all of the rescue
dogs live in foster homes until they are adopted permanently. (Leighton Depo. at 82).

18. Sioux Empire acquired Meadow from the Sioux City Humane Society in July
2014. (Leighton Depo. at 22-23).

19. Prior to acquiring Meadow, Sioux Empire received videos of Meadow, which
were reviewed by Sioux Empire President, Rachael Leighton. (Leighton Depo. at 23-24).

20. Based on the videos, and the information provided by the local rescue
coordinator, Leighton determined that Meadow was a nice dog that would fit well with most of
Sioux Empire's foster families. (Leighton Depo. at 24).

21. Brittany Synders, who was the secretary of Sioux Empire in 2015, testified that
the information Sioux Empire received from the Sioux City Humane Society about Meadow was
that Meadow had a "nothing history, no issues." Synders further testified that from her personal
experience Meadow "was a really happy, sweet dog" and "easy to deal with." (Synders Depo. at
19-20).⁸

⁷ Photographs of Plaintiff's injuries are attached to the Affidavit of Michael J. Schaffer as Exhibits 2A and 2B.

⁸ The Deposition of Brittany Snyder is attached to the Affidavit of Michael J. Schaffer as Exhibit F.

22. On or about July 24, 2014, Meadow was picked by a Sioux Empire volunteer, and taken to Leighton's house for an intake inspection. (Synders Depo. at 24-25).

23. After Meadow cleared the inspection, she was placed with foster Jennifer Praske. (Synders Depo. at 25-26).

24. In November 2014, Defendants first babysat Meadow while Praske went out of town for Thanksgiving. (Leighton Depo. at 78-79); (Zacher Depo. at 31-32); (Podhradsky Depo. at 12-14).

25. Defendants had experience raising, fostering, and dog sitting dogs. Defendants had two dogs of their own, and had been affiliated with Sioux Empire as foster parents since approximately 2010. (Zacher Depo. at 10-11,13, 26-27); (Podhradsky Depo. at 12).

26. As a member of Sioux Empire, Zacher attended monthly meetings, where she learned new training procedures and techniques for handling "pit-bull-type" breeds. (Zacher Depo. at 15-16).

27. Zacher had also volunteered at Second Chance Pet Rescue and the American Society for the Prevention of Cruelty to Animals ("ASPCA"). (Zacher Depo. At 13, 15, 18.)

28. Sioux Empire frequently reached out to Defendants to foster and/or dog sit dogs. (Zacher Depo. at 26-27); (Leighton Depo. at 37-38).

29. Prior to the November 2014 babysitting, Defendants also had interactions with Meadow at various Petco "meet and greet" events. (Zacher Depo. at 33-34); (Podhradsky Depo. at 12).

30. Zacher testified that what she knew of Meadow was that Meadow was a “calm, very nice, family dog.” (Zacher Depo. at 33).

31. Additionally, Podhradsky testified that “[t]here were zero problems with [Meadow]” when Defendants had her. (Podhradsky Depo. at 19-20).

32. During the November 2014 babysitting, there were no incidents that occurred with Meadow and she was returned to Praske. (Leighton Depo. at 79).

33. Later, Praske notified Sioux Empire that she could no longer foster Meadow because she was moving. (Leighton Depo. at 27).

34. During the time Meadow was in Praske care, Praske did not report any negative incidents with Meadow. (Leighton Depo. at 28-29).

35. On or about December 30, 2014, Meadow was transferred to Desiree and Jon Adams (“the Adams”). (Leighton Depo. at 28-29).

36. The Adams also owned a dog named Max that they had adopted from Sioux Empire. (Leighton Depo. at 30).

37. On or about March 1, 2015, when the Adams were introducing Max to Meadow, Max attacked Meadow. (Leighton Depo. at 29).

38. Max bit Meadow multiple times and injured Meadow’s shoulder and front paw. (Leighton Depo. at 29, 32-33).

39. Meadow responded and injured Max’s eye. (Leighton Depo. at 33).

40. As a result of this altercation, Meadow received drain tubes and stitches. (Leighton Depo. at 29).

41. Max did not receive any veterinary care. (Leighton Depo. at 33).⁹
42. The Adams reported the incident to Leighton. (Leighton Depo. at 30).
43. The Adams kept Meadow for another month and utilized the “crate and rotating” technique to keep the dogs separated. (Leighton Depo. at 34-35).
44. Meadow was transferred to Heather Boon in April 2014. (Leighton Depo. at 34-35); (Boon Depo. at 17).¹⁰
45. Prior to taking possession of Meadow in April 2014, Boon was unaware of any incidents involving Meadow. (Boon Depo. at 31-32).
46. Boon did not become aware of the March 1st incident until her deposition on October 31, 2017. (Boon Depo. at 31).
47. Defendants were also unaware of the March 1st incident until this litigation. (Zacher Depo. at 61); (Podhradsky Depo. at 24-25, 35).
48. While Meadow was in Boon’s care, Boon took Meadow to various public places, including, but not limited to: First Fridays and adoption days at Petco. (Boon Depo. at 21).
49. Boon never had any issues with Meadow and Meadow never had any issues with other dogs while in Boon’s care. (Boon Depo. at 31, 37).
50. In fact, when asked about Meadow’s demeanor, Boon testified that Meadow was “happy-go-lucky” and “[h]appy to walk up to somebody, lick their hand, [and] want to get petted.” Boon further testified that she never saw Meadow chase anybody. (Boon Depo. at 30).

⁹ The emergency veterinary records are attached to the Affidavit of Michael J. Schaeffer as Exhibit 5.

¹⁰ The Deposition of Heather Boon is attached to the Affidavit of Michael J. Schaffer as Exhibit C.

51. At the time of the incident, Defendants were babysitting Meadow for a third time. (Leighton Depo. at 79); (Zacher Depo. at 27).

52. Defendants babysat Meadow a second time earlier in the summer of 2015, without incident. (Leighton Depo. at 79); (Boon Depo. at 33).

53. During his deposition, Podhradsky testified that Meadow never tried to run away and never pulled at her least. (Podhradsky Depo. at 28, 32).

54. During her deposition, Zacher testified that Meadow never ran after people and was not a barker. (Zacher Depo. at 52).

55. On or about July 31, 2015, Boon brought Meadow to Defendants' home. (Zacher Depo. at 28-29).

56. Boon gave Defendants instructions about Meadows daily routine and brought various items for Meadow including: t-shirts, treats, food, her collar, leash, gentle leader, and a blanket. (Zacher Depo at 35); (Boon Depo. at 28-29).

57. Zacher testified that Boon told her that Meadow was "a calm not-very-excitable dog." Zacher also testified that Ms. Boon did not mention that she had any problems with Meadow. (Zacher Depo. at 35).

58. Ms. Boon testified that when she heard of the incident with Plaintiff she was "flabbergasted that something like that had happened" because Meadow had never done anything like it before. (Boon Depo. at 33).

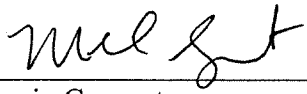
59. Following the incident with Plaintiff, Meadow remained with Boon until September 2015 when she was permanently adopted. (Leighton Depo. at 37, 39).

60. Sioux Empire maintains contact with the permanent families for the life of the dog. (Leighton Depo. at 40).

61. At the time of Leighton's deposition in January of 2018, Leighton testified that she had not received any negative behavior reports about Meadow. (Leighton Depo. at 40).

Dated this 19th day of April, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

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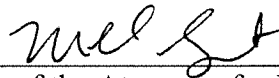
Attorneys for Defendants Susan Zacher and Harold Podhradsky

CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2018, a true and correct copy of the foregoing
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filed and served via Odyssey File & Serve upon the following:

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One of the Attorneys for Defendants Susan
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IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

CIV. # 16-387

**PLAINTIFFS' RESPONSE TO
DEFENDANTS ZACHER AND
PODHRADSKY'S STATEMENT OF
UNDISPUTED MATERIAL FACTS
-AND-
PLAINTIFFS' STATEMENT OF
DISPUTED MATERIAL FACTS**

SIOUX EMPIRE PIT BULL RESCUE,
INC., SUSAN TRIBBLE-ZACHER, and
HARRY PODHRADSKY,

Defendants.

RESPONSE TO STATEMENT OF MATERIAL FACTS OF
DEFENDANTS ZACHER AND PODHRADSKY

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. For purposes of summary judgment only, it is not disputed that Defendants testified that way.

5. For purposes of summary judgment only, it is not disputed that Defendants testified that way.
6. For purposes of summary judgment only, it is not disputed that Defendants testified that way.
7. For purposes of summary judgment only, it is not disputed that Defendants testified that way.
8. For purposes of summary judgment only, it is not disputed that Defendants testified that way.
9. For purposes of summary judgment only, it is not disputed that Defendants testified that way.
10. Not disputed. In addition, Plaintiff was also bit by Meadow. (Ex. 6 at 35:1-15; 37:6-38:5).
11. Disputed. Plaintiff did not testify that the dog was called back by Zacher and obeyed. (Ex. 6 at 35:1-15; 37:6-38:5).
12. Disputed. In addition to the injuries outlined by Defendant, Plaintiff was also bitten by Meadow. (Ex. 6 at 35:1-15; 37:6-38:5).
13. Not disputed.
14. For purposes of summary judgment only, it is not disputed that Defendant Zacher testified that way. However, the summary judgment standard requires the Court to view the facts and inferences in the light most favorable to Plaintiff. That means that it is assumed that Meadow bit Plaintiff.
15. Not disputed.

16. Not disputed.
17. Not disputed.
18. Not disputed.
19. Not disputed. However, other than watching videos of Meadow at the Sioux City shelter, Defendant Pit Bull Rescue had no other knowledge regarding Meadow's history or prior aggression, fights or bites. (Ex. 4 at 24:22-24; Ex. 5 at 16:17-23; 17:17-21).
20. Not disputed that Leighton testified that way.
21. Not disputed that Synders testified that way.
22. Not disputed.
23. Not disputed.
24. Not disputed.
25. Not disputed.
26. Not disputed.
27. Not disputed.
28. Not disputed.
29. Not disputed.
30. Not disputed that Zacher testified that way.
31. Not disputed that Podhradsky testified that way.
32. Not disputed that Leighton testified that way.
33. Not disputed.
34. Not disputed that Leighton testified that way.

35. Not disputed.

36. Not disputed.

37. Disputed. The veterinarian records from the dog fight state:

Dog fight.

RLD: 03-01-15 at 4:37p: the owner said that she is fostering Meadow for a rescue, and that about an hour ago, Meadow and her resident dog got into a fight where Meadow was bitten multiple times on her front left shoulder and on her front right paw. The other dog had a wound above his eye, and the owner would like for him not to be seen.

(Ex. 10). Nothing in the record indicates which dog was the aggressor.

Furthermore, Leighton was not present at the fight and any and all of her testimony is hearsay.

38. Disputed. See Response to Paragraph 37.

39. Disputed. See Response to Paragraph 37.

40. Not disputed.

41. Not disputed. It is important to note, however, that Max was injured, but his owner declined medical treatment as set forth in Response to Paragraph 37.

42. Not disputed. However, any and all of Leighton's testimony regarding the dog bite is hearsay and not admissible.

43. Not disputed.

44. Not disputed.

45. Not disputed as Pit Bull Rescue never informed Boon of the dog fight one month before placing Meadow with Boon.

46. Not disputed.

47. Not disputed.
48. Not disputed that Boon testified that way.
49. Not disputed that Boon testified that way.
50. Not disputed that Boon testified that way.
51. Not disputed.
52. Not disputed.
53. Not disputed Podhradsky testified that way.
54. Not disputed Zacher testified that way.
55. Not disputed.
56. Not disputed.
57. Disputed. Any recitation of what Boon told Zacher is hearsay.
58. Not disputed Boon testified that way. However, Boon did not have knowledge of Meadow's history and background and past dog fight in March 2015.
59. Not disputed.
60. Not disputed.
61. Not disputed.

DISPUTED MATERIAL FACTS ASSERTED BY PLAINTIFF

1. Meadow was a shelter dog that Pit Bull Rescue had very little information about before taking possession of the dog. (Ex. 4 at 24:22-24; Ex. 5 at 16:17-23; 17:17-21).
2. Defendant Sioux Empire Pit Bull Rescue had knowledge of a previous altercation involving Meadow in March 2015. (Ex. 4 at 25:7-28:16; Ex. 10).

3. In the week before Meadow attacked Darlette, Meadow's foster caregiver, Heather Boon, was on vacation so Meadow was placed with a temporary foster family, Defendants Zacher and Podhradsky. (Ex. 3 at 25:1-8).
4. In violation of Pit Bull Rescue's policies and procedures, Meadow did not undergo the mandatory two-week shutdown at Defendants Zacher and Podhradsky's house. (Ex. 2 at 17:6-12; 19:12-16).
5. Meadow had been in three different places the week prior to this incident.
6. It can be dangerous taking a new foster dog to a campground. (Ex. 1 at 42:17-43:5).
7. Pit bulls are high-energy animals. (Ex. 5 at 25:3-7; 17-19)
8. Pit Bull Rescue specifically provides training on aggression in the pit bulls. (Bishop Aff. Ex. 5 at 49:16-20).
9. Pit Bulls are designed to fight. (Ex. 4 at 50:1-2).
10. Instead of being camping with random people, children and dogs, Meadow should have been in the mandatory two-week shutdown. (Ex. 4 at 53:13-20).
11. The purpose of the shutdown is to provide continuity for an animal during a time of transition, allow the animal to decompress and to build a relationship of trust between the handler and the animal. (Ex. 4 at 53:13-20).
12. Defendants Zacher and Podhradsky failed to comply with Pit Bull Rescue's required policy regarding the two-week shutdown. (Ex. 2 at 17:6-12; 19:12-16).
13. A lack of consistency can throw the animal "out of whack" and can create stress on the animal. (Ex. 4 at 47:13-18).

14. A change in environment can be difficult for a dog. (Ex. 4 at 55:2-21).
15. A change in environment can be especially difficult for a foster animal. (Ex. 4 at 55:2-21).
16. The campground was the third place that Meadows had been the week before the attack.
17. It can be unsettling for a pit bull to be transferred to three different places in one week. (Ex. 1 at 43:19-22).

Dated this 31st day of May, 2018.

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on this 31st day of May, 2018.

/s/ Jami J. Bishop

Jami J. Bishop

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28668

DARLETTE MAE RIDLEY,

Plaintiff/Appellant,

vs.

SIOUX EMPIRE PIT BULL RESCUE, INC., SUSAN TRIBBLE-ZACHER and
HARRY PODHRADSKY,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

THE HONORABLE DOUGLAS E. HOFFMAN, CIRCUIT COURT JUDGE

**BRIEF OF APPELLEES SUSAN TRIBBLE-ZACHER and HARRY
PODHRADSKY**

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Notice of Appeal filed July 17, 2018

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JURISDICTIONAL STATEMENT

Plaintiff has appealed from summary judgment entered by the Honorable Douglas E. Hoffman, Circuit Court Judge, Second Judicial Circuit. (R. at 390-391, 398-402.) The Order granting Defendants' motions for summary judgment and Summary Judgment were signed on July 3, 2018 and filed on July 5, 2018. (R. at 380-383.) Notice of Entry of the Order was served and filed on July 6, 2018. (R. at 384-385.) Notice of Appeal was filed on July 17, 2018. (R. at 390-391, 398-402.)

REQUEST FOR ORAL ARGUMENT

Susan Tribble-Zacher and Harry Podhradsky respectfully request oral argument on all of the issues set forth herein.

STATEMENT OF THE ISSUES

- 1. Whether the circuit court properly ruled that Meadow's escape due to a broken collar was unforeseeable and not due to the negligence of Susan Tribble-Zacher and Harry Podhradsky.**

The circuit court held that Ridley failed to present any evidence to suggest that Zacher and Podhradsky knew or should have known that the collar was defective, or that the incident was foreseeable.

Gehrts v. Batteen, 2001 SD 10, 620 N.W.2d 775

Rowland v. Log Cabin, Inc., 2003 SD 20, 658 N.W.2d 76, 79

STATEMENT OF THE CASE

This lawsuit was commenced by Darlette Mae Ridley ("Ridley") on October 18, 2016 in Lincoln County, South Dakota, against Sioux Empire Pit Bull Rescue, Inc. ("Sioux Empire"). (R. at 1-5.) On July 24, 2017, Ridley filed her First Amended Complaint and added Heather Boon,¹ Susan Tribble-Zacher ("Zacher"), and Harry Podhradsky ("Podhradsky") as additional defendants. (R. at 28-33.) In her First

¹ Heather Boon was subsequently dismissed from the lawsuit by stipulation of the parties. (R. at 52-63.)

Amended Complaint, Ridley alleged that Sioux Empire, Zacher, and Podhradsky were liable for the injuries Ridley sustained as a result of a dog incident that occurred on August 9, 2015, at Newton Hills State Park. (*Id.*) Sioux Empire and Zacher and Podhradsky denied liability. (R. at 7-9; 48-51.)

On April 17 and 19, 2018, Sioux Empire and Zacher and Podhradsky, respectively, moved for summary judgment. (R. at 64-206; 207-230.) They argued there were no genuine issues of material fact regarding whether Defendants knew or should have known of the dog's dangerous propensities and whether Defendants violated the reasonable person standard of care. (R. at 64-206; 207-230; 347-354; 355-364.) Ridley resisted both motions. (R. at 235-261; 470-564.)

On June 7, 2018, a hearing was held before the Honorable Douglas E. Hoffman. (R. at 412-469.) Argument was presented by counsel for the parties, and the circuit court granted summary judgment in favor of Sioux Empire and Zacher and Podhradsky. (R. at 459.) This appeal followed.

STATEMENT OF FACTS

On August 9, 2015, at approximately 7:00 a.m., Ridley was walking on a gravel road in the campground area of the Newton Hills State Park ("Newton Hills"). (R. at 142-143.) Zacher and Podhradsky were camping at Newton Hills with their son, their dog, and Meadow. (R. at 94, 96.) At the time, Zacher and Podhradsky were dog sitting Meadow. (*Id.*) As Ridley walked by their campsite, she saw Meadow tethered to a tree. (R. at 143.) Zacher and Podhradsky were both outside with Meadow—Zacher was standing right next to Meadow and Podhradsky was standing a few feet away. (R. at 95-96; 114.) As Ridley passed by, Meadow ran towards Ridley and Meadow's collar broke. (R. at 94, 96; 114; 143.) Ridley herself saw the collar break. (R. at 143.)

Meadow was wearing a “Martingale” collar and was tethered to the tree by a cable leash “tie-out.”² (R. at 95-96; 115; 165-166.) A Martingale collar is a standard-issue collar that Sioux Empire provides to all of its rescue dogs. (*Id.*) Martingale collars are considered no-escape collars and are designed to tighten so a dog is not able to tip its head back and out. (R. at 167.) Prior to this incident, Sioux Empire had never had one of its Martingale collars break. (R. at 166.) There are no allegations, and Ridley has presented no testimony or evidence, that the collar was defective or improperly secured.

After Meadow’s collar broke, Meadow ran toward and into Ridley and knocked her down onto the gravel road. (R. at 96; 143.) Zacher called for Meadow to return to her, and Meadow immediately obeyed. (R. at 96.) As a result of her fall, Ridley had cuts on her elbow and left ring and pinky fingers. (R. at 97; 143.) Ridley believes that Meadow bit her, but Zacher testified that Meadow did not bite Ridley. (R. at 97; 143-144.)

At the time of this incident, Meadow was a foster dog owned by Sioux Empire, a volunteer, pit-bull rescue organization. (R. at 153, 161.) Sioux Empire does not have a facility to house the dogs; rather all of the rescue dogs live in foster homes until they are adopted permanently. (R. at 171.) Sioux Empire acquired Meadow from the Sioux City Humane Society in July 2014. (R. at 156.) Prior to acquiring Meadow, Sioux Empire received videos of Meadow, which were reviewed by Sioux Empire President, Rachael Leighton. (R. at 156.) Based on the videos, and the information provided by the Sioux

² A “tie-out” is an outside extension that is hooked to a tree or the ground. (R. at 167.) A “tie-out” is an approved method of securing animals outside. (*Id.*) Meadow’s “tie-out” was short enough that she could not have reached Ridley had the collar not broken. (R. at 105.)

City Humane Society rescue coordinator,³ Leighton determined that Meadow was a nice dog that would fit well with Sioux Empire’s foster families. (*Id.*) On or about July 24, 2014, Meadow was picked up by a Sioux Empire volunteer and was taken to Leighton’s house for an initial intake inspection. (R. at 194.) After Meadow cleared the inspection, she was placed with foster parent Jennifer Praske. (R. at 156-157.)

In November 2014, Zacher and Podhradsky first dog sat Meadow while Praske went out of town for Thanksgiving. (R. at 91; 110; 170.) Zacher and Podhradsky had experience raising, fostering, and dog sitting “pit-bull type” dogs. (R. at 86, 90; 110.) They had two dogs of their own, and had been affiliated with Sioux Empire as foster parents since approximately 2010. (R. at 86, 90; 110.) As a member of Sioux Empire, Zacher attended monthly meetings, where she learned new training procedures and techniques for handling “pit-bull-type” breeds. (R. at 87.) Zacher also volunteered at Second Chance Pet Rescue and the American Society for the Prevention of Cruelty to Animals (“ASPCA”). (R. at 86-88.) Sioux Empire frequently reached out to Zacher and Podhradsky to foster and/or dog sit their animals. (R. at 90; 159-160.)

Prior to dog sitting in November of 2014, Zacher and Podhradsky had interacted with Meadow at various Sioux Empire “meet and greet” events. (R. at 91-92; 110.) Zacher testified that from these interactions she believed Meadow to be a “calm, very nice, family dog.” (R. at 91.) Additionally, Podhradsky testified that “[t]here were zero problems with [Meadow]” when they had her. (R. at 112.)

³ Brittany Synders, who was the secretary of Sioux Empire in 2015, testified that the information Sioux Empire received from the Sioux City Humane Society about Meadow was that Meadow had a “nothing history, no issues.” (R. at 193.) Synders further testified that from her personal experience, Meadow “was a really happy, sweet dog” and “easy to deal with.” (*Id.*)

During the November 2014 dog sitting, no incidents of aggression or misbehavior occurred with Meadow, and she was returned to Praske. (R. at 170.) Later, Praske notified Sioux Empire that she could no longer foster Meadow because she was moving. (R. at 157.) During the time Meadow was in Praske's care, Praske did not report any behavioral issues with Meadow. (*Id.*)

On or about December 30, 2014, Meadow's foster care was transferred to Desiree and Jon Adams ("the Adams"). (*Id.*) The Adams also owned a dog named Max that they had adopted from Sioux Empire. (R. at 158.) On or about March 1, 2015, when the Adams were introducing Max to Meadow, Max attacked Meadow. (R. at 157.) Max bit Meadow multiple times and injured Meadow's shoulder and front paw. (R. at 157-158.) Meadow responded and injured Max's eye. (R. at 158.) As a result of this altercation, Meadow received drain tubes and stitches. (R. at 157.) Max did not receive any veterinary care. (R. at 158.) The Adams reported the incident to Leighton. (*Id.*) The Adams kept Meadow for another month and utilized the "crate and rotating" technique to keep the dogs separated. (R. at 159.) Meadow was transferred to Heather Boon in April 2014.⁴ (R. at 123; 159.)

While Meadow was in Boon's care, Boon took Meadow to various public places, including: First Fridays and Petco Adoption Days. (R. at 124.) Boon never had any issues with Meadow, and Meadow never had any issues with other dogs or people while in Boon's care. (R. at 127-128.) In fact, when asked about Meadow's demeanor, Boon testified that Meadow "was happy-go-lucky" and "[h]appy to walk up to somebody, lick

⁴ Prior to taking possession of Meadow, Boon was unaware of any incidents involving Meadow. (R. at 127.) Boon did not become aware of the March 1, 2015 incident until her deposition on October 31, 2017. (*Id.*) Zacher and Podhradsky were also unaware of the March 1 incident until this litigation commenced. (R. at 98; 113, 116.)

their hand, [and] want to get petted.” (R. at 127.) Boon further testified that she never saw Meadow chase anybody. (*Id.*)

At the time of the incident with Ridley, Zacher and Podhradsky were dog sitting Meadow for a third time. (R. at 90; 170.) Earlier that summer, they had dog sat Meadow a second time, without incident or concern. (R. at 127; 170.) During their depositions, Zacher and Podhradsky repeatedly testified that they never had any issues with Meadow. (R. at 96; 114-115.) Specifically, Podhradsky testified that Meadow never tried to run and never pulled at her leash. (R. at 114-115.) Zacher testified that Meadow never ran after people and was not a barker. (R. at 96.)

On or about July 31, 2015, Boon brought Meadow to Zacher and Podhradsky’s home. (R. at 90.) Boon gave them instructions about Meadow’s daily routine and brought various items for Meadow, including: a t-shirt, treats, food, collar, leash, gentle leader, and a blanket. (R. at 92; 126.) Zacher testified that at the time Boon dropped Meadow off, Boon told her that Meadow was “a calm not-very-excitable dog.” (R. at 92.) Zacher also testified that Boon did not mention any problems that she had with Meadow. (R. at 92.) Boon testified that when she heard of the incident with Ridley she was “flabbergasted that something like that had happened” because Meadow had never done anything like it before. (R. at 127.)

Following the incident with Ridley, Meadow remained with Boon until September of 2015 when she was permanently adopted. (R. at 159-160.) At the time of

Leighton’s deposition in January of 2018, Leighton testified that she had not received any negative behavior reports about Meadow.⁵ (R. at 160.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 SD 51, ¶ 8, 883 N.W.2d 506, 508. When reviewing a grant of summary judgment, the Court decides “whether genuine issues of material fact exist and whether the law was correctly applied.” *Id.* (quoting *Ass Kickin Ranch LLC v. N. Star Mut. Ins. Co.*, 2012 SD. 73, ¶ 6, 822 N.W.2d 724, 726). If no material facts are in dispute, the “review is limited to determining whether the trial court correctly applied the law.” *Id.* This Court “will affirm a circuit court’s decision so long as there is a legal basis to support its decision.” *Id.* “[S]ummary judgment is a preferred method for disposing of any legally inadequate claim.” *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, ¶ 7, 704 N.W.2d 24, 27. “Summary judgment is proper in negligence cases if no duty exists as a matter of law.” *Pierce v. City of Belle Fourche*, 2001 SD 41, ¶ 8, 624 N.W.2d 353, 355 (citing *Peterson v. Spink Elec. Corp., Inc.*, 1998 SD 60, ¶¶ 1-2, 578 N.W.2d 589, 591).

Pursuant to SDCL § 15-6-56(e), the nonmoving party in a summary judgment proceeding “must set forth specific facts showing that there is a genuine issue for trial.” *Roden v. Gen. Cas. Co.*, 2003 SD 130, ¶ 31, 671 N.W.2d 622, 629 (quoting SDCL § 15-6-56(e)). A nonmoving party may not rest on mere conclusory statements. *Id.* Instead, the nonmoving party must submit admissible evidence to create a genuine issue of fact. *Luther v. City of Winner*, 2004 SD 1, ¶ 11, 674 N.W.2d 339, 344-45.

⁵ Sioux Empire maintains contact with the permanent families for the life of the dog. (R. at 160.)

ARGUMENT

The circuit court properly ruled that Meadow’s escape due to a broken collar was unforeseeable and not due to the negligence of Zacher and Podhradsky.

“Negligence is the breach of a duty owed to another, the proximate cause of which results in an injury.” *Pierce*, 2001 SD 41, ¶ 22, 624 N.W.2d at 356–57. The existence of a duty owed by a defendant to a plaintiff is elemental to a negligence action and therefore “[b]efore a defendant can be held liable for negligence, the defendant must have breached a duty of care owed to the plaintiff.” *Locke v. Gellhaus*, 2010 SD 11, ¶ 11, 778 N.W.2d 594, 597; *see also Janis v. Nash Finch Co.*, 2010 SD 27, ¶ 8, 780 N.W.2d 497, 500. “[T]he existence of a duty is a question of law to be determined by the court.” *Janis*, 2010 SD 27, ¶ 8, 780 N.W.2d at 500 (quoting *Small v. McKennan Hosp.*, 403 N.W.2d 410, 413 (S.D. 1987)).

Under South Dakota law, “[o]wners of domesticated animals may . . . be held liable for harm caused by their pet” *Gehrts v. Batteen*, 2001 SD 10, ¶¶ 7-9, 620 N.W.2d 775, 777. Liability may attach under one of two theories—the knowledge theory or the foreseeability theory. *Id.* ¶¶ 8-9, 620 N.W.2d at 778 (“[T]he plaintiff must establish that the owner knew or should have known of that animal’s dangerous propensities When the owner does not know of the animals dangerous propensities, the ordinary negligence standard of foreseeability will still be applied.”); *Rowland v. Log Cabin, Inc.*, 2003 SD 20, ¶ 9, 658 N.W.2d 76, 79 (“[A] plaintiff in a dog bite case may either argue that the owner knew or should have known of the dog’s dangerous propensities or that, under the totality of the circumstances, injury to the plaintiff was reasonably foreseeable.”).

The circuit court granted Sioux Empire and Zacher and Podhradsky's motions for summary judgment under both theories:

[I]t seems to me that there isn't any evidence to suggest that this dog had dangerous propensities. There wasn't any history of any kind of dangerous or aggressive behavior on the part of the dog. The closest thing that the plaintiffs can suggest is that the dog was the victim of an attack by another dog two and a half years prior, and I don't think we can draw any inferences in the light most favorable to the plaintiff that are beyond that the plaintiff chose not to go down and try to find some witnesses that would say, no, Meadow was the aggressor. And so I don't think that gets them anywhere.

There isn't any evidence to show that the defendants knew or should have known the collar was going to break on that morning at 7 o'clock if the dog put physical stress on it. It's anticipated that dogs were going to put stress on collars and that's why you have a collar that fits the dog and you have a tether that's adequate to hold the dog, and *there isn't indication that the defendants have any reason to believe that that wasn't an appropriate safety device.* So I can't draw any conclusion of negligence from that. *We don't have any expert testimony to contradict that, um, so there isn't any evidence for lack of reasonable care on the part of the defendants that's been brought to the record at this point in time.* There's a suggestion that while they violated their own rule that you're supposed to have a two-week lockdown, but it sounds to me like that might be a made-up rule. There isn't anything to justify it or establish it as a duty of care. And the testimony is it was, you know, an option within the discretion of the parties based on their understanding of the pet and the circumstances, but in order to view that evidence as suggested by the plaintiff herein, I would have to find that it's negligence to take dogs camping and tether them to trees and – because the collar might snap. *And I just don't think that's foreseeable under the circumstances or in this particular case.*

(R. at 458-459) (emphasis added). Ridley now appeals the circuit court's grant of summary judgment based only on the foreseeability theory. (Appellant's Brief at 13 n.6) ("Ridley is not appealing the circuit court's grant of summary judgment on the knowledge test.").

1. Zacher and Podhradsky did not violate the reasonable person standard of care in their handling of Meadow.

This Court has held that when no knowledge of dangerousness exists, a plaintiff may still be allowed to recover if she can “establish that as an ordinary, prudent person, the owner should have foreseen the event that caused the injury and taken steps to prevent the injury.” *Gehrts*, 2001 SD 10, ¶ 9, 620 N.W.2d at 778. Such liability may arise depending on the circumstances and purposes for which the dog is being kept and the kind and character of the dog in question. *Id.* (internal quotations omitted). “All the surrounding facts and circumstances should . . . [be] examined to determine the foreseeability question.” *Rowland*, 2003 SD 20, ¶ 13, 658 N.W.2d at 79-80.

a. Meadow was properly secured to a tree under close watch by Zacher when Meadow’s collar broke. Her escape was unforeseeable.

In determining whether Zacher and Podhradsky violated the reasonable person standard, this Court examines “the circumstances in which [the dog] is placed, and the purpose for which it is employed or kept.” *Gehrts*, 2001 SD 10, ¶ 9, 620 N.W.2d at 778.

i. Meadow’s collar

Ridley focuses most of her brief arguing that Zacher and Podhradsky violated the reasonable person standard because they did not comply with the two-week shutdown and because they took Meadow to a public campground. (Appellant’s Brief at 16-21.) While these arguments will be addressed and discredited below, both are red herrings and irrelevant in determining whether Zacher and Podhradsky violated the reasonable person standard of care.

It is undisputed that Meadow was wearing her Sioux Empire-issued, Martingale collar and was tethered to a tree by a cable leash tie-out, an approved method of securing

large dogs outside. (R. at 95-96; 115; 165-167.) There are no allegations, and Ridley failed to present any testimony or evidence, that Meadow's collar was defective, that Zacher or Podhradsky knew or had reason to know that her collar was defective, or that she was improperly secured. Additionally, both Zacher and Podhradsky were outside with Meadow, with Zacher standing just a few feet away from her, and there is no evidence that the campsite was chaotic or stress-inducing. (R. at 95-96; 114.) Instead, the facts show the exact opposite. It was early in the morning, approximately 7:00 a.m., and Meadow had just been fed an hour earlier. (R. at 97.) There is no evidence that there were any other people, children, dogs, or animals around the campsite. (*Id.*)

The circumstances of the incident are such that no one could have anticipated or foreseen that Meadow's collar would break. As such, Zacher and Podhradsky cannot be held liable. To the extent the Court finds the discussion regarding the two-week shutdown and Meadow's environment to be relevant, these factors do not make the incident foreseeable.

ii. Two-week shutdown

In her appellant brief, Ridley states that "Leighton testified *without qualification* that any transfer to another temporary or foster family *required* the two-week shutdown." (Appellant's Brief at 17) (emphasis added). Ridley not only misconstrues President Leighton's testimony, but also conveniently omits sections of her deposition wherein she notes that the two-week shutdown is *optional*. (See R. 159, 170.)

According to then-President Leighton, the purpose of Sioux Empire's two-week shutdown policy is to "allow[] an animal to decompress and begin to bond with a handler. It builds the relationship of trust." (R. at 159.) Leighton went on to state that "[o]ur

babysitters have the *option* [of doing the two-week shutdown], if they feel comfortable and have been with the program long enough, to put the animals together.” (R. at 170) (emphasis added).

Here, it is undisputed that Zacher and Podhradsky and Meadow had already formed a “relationship of trust” prior to August 2015, and it is undisputed that they had, in fact, complied with the two-week shutdown. In November 2014, Zacher and Podhradsky dog sat for Meadow for the first time. (R. at 91; 110; 170.) Podhradsky testified that during this first time, Meadow was put into the two-week shutdown:

Q: Were you given any information about her history? Did anyone say, Harry, here’s what we know about Meadow’s history?

A: **Prior to –**

Q: Prior to –

A: **-- coming into foster?**

Q: No, prior to her coming into your temporary care during the week of August 2015.

A: **We had talked with them at all the meet-and-greets, and she was a very, very nice dog. We asked – we asked, have there been any problems? Because when she was with us to begin with, granted, she was in her two-week shutdown so there wasn’t a lot of interaction outside of the home. But she was a very, very good dog for us. And we just wanted to make sure after she went into her permanent foster that she was just as good as we had assumed she was going to be, and she was.**

Q: Tell me about this two-week shutdown. What is that?

A: **Whenever a dog comes into a foster care program, they go into a two-week shutdown period where they are segregated in the house and they have minimal interactions with anybody else, just the one person. And the one person feeds them. The one person takes them on a leash outside to go to the bathroom and brings them back in. They go back into – we have a special foster room in our house. Most of the fosters**

have a special foster room in their house for this. That establishes that they are the provider for this dog. And that's one of the most accepted methods, and that's one that SEPR or Sioux Empire, excuse me, has taught all the fosters to do that. In our home, this is Susan. She interacted with Meadow when we had her to begin with. And then when she came into our home after that as a temporary, she had her in the foster room. We didn't do the entire two-week shutdown the second time, when we were temporary, because she didn't need it, and she – when we introduced her to our other dog and introduced her to the family, she was wonderful.

(R. at 111.)

Zacher and Podhradsky also dog sat for Meadow in early summer 2015, and interacted with her at various Sioux Empire “meet and great” events, such as First Fridays and Petco Adoption Days. (R. at 91-92; 110-11; 170.) Neither Zacher, Podhradsky, their home, nor their other dogs or family members, were unfamiliar to Meadow, and they never had behavioral issues with Meadow. Meadow never had behavioral issues with other dogs or people while in their care. (R. at 96, 114-115.) Additionally, Zacher and Podhradsky had experience handling “pit-bull type” dogs. They were the owners of two other dogs and had been affiliated with Sioux Expire as foster parents since approximately 2011. (R. at 86, 90; 110.) Most notably, Zacher attended monthly Sioux Empire meetings, had previously volunteered at another dog rescue, and had volunteered with the ASPCA to help transition fighting pit-bull dogs into shelters. (R. at 86-88.)

Zacher and Podhradsky's decision not to put Meadow in the two-week shutdown during the third time that they had Meadow in their care did not violate the reasonable person standard. It is undisputed that it was an optional policy based on the dog's familiarity with its particular handlers, the handlers' familiarity with the dog, and the

handlers' level of experience. Ridley's arguments are simply an attempt to conjure up an issue of fact where none exists in order to defeat what was a properly granted motion for summary judgment.

iii. Meadow's environment

Ridley also argues that a genuine issue of material fact exists as to whether Zacher and Podhradsky violated the reasonable person standard because they took Meadow to a campground "filled with strangers, young children, new smells, and unknown dogs" and because Meadow was transferred to three different locations (Boon's home, Zacher and Podhradsky's home, and Zacher and Podhradsky's campsite) within a one week period. (Appellant's Brief at 19-21). In support of her argument, Ridley cites the following from President Leighton's deposition:

Q: Would you agree with me that taking a dog to a different location outside the home could be upsetting or unsettling for the dog?

A: **Yes.**

Q: Why?

A: **Any change is going to be difficult . . .**

Q: Any new environment for any breed of dog could be unsettling –

A: **Yes.**

Q: -- especially for a foster dog?

A: **Yes.**

(Appellant's Brief at 20) (citing R. at 164). This quotation is out of context and misconstrues the testimony of Leighton. Leighton's complete testimony is as follows:

Q: Do you agree with me that taking a pit bull to a campground where there are lots of other dogs and people around could be dangerous?

A: No.

Q: Why not?

A: *We take our dogs out in very public places, adoption events, pet stores, downtown. Our dogs are very used to being around lots of other people and lots of animals on leash. So in a campground, as long as everybody is following those leash laws and taking care of their animals, there would be no danger.*

Q: Sioux Empire doesn't have any rule, does it, prohibiting their foster families from taking dogs on vacations or to campgrounds?

A: **No. Whatever they are comfortable managing.**

Q: Would you agree with me that taking a dog to a different location outside the home could be upsetting or unsettling for the dog?

A: **Yes.**

Q: Why?

A: *Any change is going to be difficult. Our dogs are a little bit different in the fact that because they are used to so much socialization of the events and the meet-and-greets and any public appearances that they may have, generally we find our animals are even more tolerant of situations and changes because of the consistency of being in those roles and places.*

Q: Any new environment for any breed of dog could be unsettling –

A: **Yes.**

Q: -- especially for a foster dog?

A: **Yes.**

(R. at 164) (emphasis added).

It is undisputed that Sioux Empire dogs, including Meadow, were accustomed to changes in their environments because Sioux Empire made it a priority to acclimate their dogs to social settings. (R. at 164.) Additionally, Zacher and Podhradsky's experience with handling "pit-bull type" dogs in general, their familiarity with Meadow in particular,

Meadow’s environment on the morning in question, evidence of how Meadow was harnessed and tethered to the tree, and that Sioux Empire *never* had one of its Martingale collars snap, demonstrates that Zacher and Podhradsky used ordinary and reasonable care in their handling of Meadow.

In an attempt to further support her position, Ridley argues that the case of *Rowland v. Log Cabin, Inc.* is dispositive to the present case. (Appellant’s Brief at 21-22.) Ridley’s three-line attempt to analogize *Rowland* is unconvincing and should be rejected by the Court. (*Id.* at 22) (“The same analysis applies in this case. A reasonable prudent person would have realized that placing a dog bred for fighting with an unknown background in a public place creates an unreasonable risk of harm. As in *Rowland*, this is a question for the jury.”).

In *Rowland*, Rowland, the patron of the Log Cabin bar, sued the bar after being bit in the face by Tyson, a fellow bar patron’s Akita dog. 2003 SD 20, ¶¶ 3-4, 658 N.W.2d at 77. Log Cabin moved for summary judgment, which was granted by the trial court. *Id.* ¶ 1, 658 N.W.2d at 77. On appeal, this Court analyzed “not the dog owner’s negligence,” but whether Log Cabin breached a duty of care to Rowland as a business invitee. *Id.* ¶ 10, 658 N.W.2d at 79. In reversing the grant of summary judgment, this Court stated that “[w]hether a reasonable person would have realized that a large, unknown dog roaming free in a small bar with drunken patrons involved an unreasonable risk of harm is a question for the jury.” *Id.* ¶ 14, 658 N.W.2d at 80.

The facts and analysis in *Rowland* are clearly distinguishable from the present case. For example, the dog in *Rowland* was unleashed, “roaming free in a small bar,” and there was a dispute of fact regarding the level of interaction between Rowland and

Tyson—Log Cabin’s witness alleged that Rowland stuck his hand into Tyson’s mouth. *Id.* ¶ 4, 658 N.W.2d at 78. Rowland alleged that, before he petted Tyson, he asked Tyson’s owner if Tyson bit and was assured that he did not. *Id.* ¶ 5, 658 N.W.2d at 78. Here, it is undisputed that Meadow was harnessed and leashed in a Sioux Empire-approved manner, that she was in a calm environment, and that nothing, or no one, provoked her.

The facts in the present case are more closely related to those of *Stein v. Reger*, 2016 WL 3162589 (Tex. App. June 2, 2016). In *Stein*, plaintiff, a UPS delivery person, was bit by defendant’s dog when the dog jumped the fence while plaintiff was retrieving a package from defendant’s home. *Id.* at *1. Plaintiff sued defendant for negligence, and defendant moved for summary judgment. *Id.* at *1-2. In support of his motion, defendant presented evidence that the dog was always fenced in the yard, had never tried to jump the fence, and had never bitten anyone, jumped on anyone, or escaped the fenced in yard. *Id.* at *2. The trial court granted defendant’s motion and plaintiff appealed. *Id.* On appeal, the court of appeals affirmed. *Id.* at *5. In affirming, the court analyzed “whether the risk of injury from a dog bite [was] foreseeable[,]” and found that “[plaintiff] did not proffer evidence that the [defendant] breached any duty to [plaintiff] by failing to secure Bella. [Plaintiff] did not identify any evidence that the [defendant] did not use ‘ordinary care’ in securing Bella behind an iron-wrought fence.” *Id.* at *4.

Similar to the facts in *Stein*, and for all the reasons previously stated, Zacher and Podhradsky did not violate the reasonable person standard in their care and handling of Meadow. Ridley’s attempt to portray to the Court that Meadow’s environment was

somehow overly chaotic or inconsistent is simply untrue and fails to create a genuine issue of material fact regarding Zacher and Podhradsky's liability.

b. Meadow was a calm, well-behaved dog with no aggressive tendencies towards dogs or people. Her actions were unforeseeable.

Another factor in a foreseeability analysis is the “kind and character *of the particular animal concerned.*” *Gehrts*, 2001 SD 10, ¶ 9, 620 N.W.2d at 778 (internal quotations omitted) (emphasis added). “Dogs, however, are presumed tame and docile and the burden is on plaintiffs to show otherwise.” *Tipton v. Town of Tabor*, 1997 SD 96, ¶ 23, 567 N.W.2d 351, 362. Ridley simply argues, without citing any statistical or expert authority, that pit bulls are generally dangerous, high energy, aggressive, and bred to fight, and therefore, Zacher and Podhradsky were negligent by “ignoring the danger that the pit bull posed” (Appellant’s Brief at 13-16.) This argument is contrary to the above-stated authority, the majority view among courts, and public policy.

The circuit court held, and Ridley does not appeal, that there is no evidence that Meadow ever exhibited dangerous tendencies prior to this incident. (R. at 458); (Appellant’s Brief at 13 n.6.) Rather, an analysis of *this* dog reveals that Meadow was a “calm,” “gentle,” “nice,” “sweet,” “happy-go-lucky,” and “easy to deal with” dog that caused “zero problems.” (R. at 91; 112; 127; 193.) During the two previous times that Zacher and Podhradsky dog sat for Meadow, and during the other times that they interacted with Meadow at Sioux Empire events, Meadow never tried to run away, never pulled at her leash, never ran after people, and was not a barker. (R. at 96; 114-115.)

The majority of courts hold that breed alone will not suffice to establish that a dog either did or did not have dangerous propensities. *See, e.g., Lundy v. California Realty*, 216 Cal. Rptr. 575 (Cal. Ct. App. 1985) (fact that dog was German Shepherd was not

relevant to finding that it had dangerous propensities); *Eason v. Miller*, 265 S.E.2d 340 (Ga. 1980) (breed alone is no indication of dangerous propensity); *Alfano v. Stutsman*, 471 N.E.2d 1143 (Ind. Ct. App. 1984) (breed is no indication of dangerous propensity); *Burgin By and Through Akers v. Tolle*, 500 N.E.2d 763 (Ind. Ct. App. 1986); *Slack v. Villari*, 476 A.2d 227 (Md. Ct. Spec. App. 1984) (mere fact that dog was Doberman Pinscher was not evidence of dog's dangerous propensity); *Moura v. Randall*, 705 A.2d 334 (Md. Ct. Spec. App. 1998) (fact that dog was Rottweiler was not sufficient to establish that he was vicious, for purposes of strict liability claim); *DeVaul v. Carvigo Inc.*, 526 N.Y.S.2d 483 (N.Y. App. Div. 1988) (viciousness of German Shepherd dogs was not an appropriate subject of judicial notice); *Chee v. Amanda Goldt Prop. Mgmt.*, 50 Cal. Rptr. 3d 40 (Cal. Ct. App. 2006); *see also* Restatement (Second) of Torts § 509. This view is also reflected by the South Dakota Legislature in SDCL § 40-34-16, which provides, in part, that “[n]o local government . . . may enact, maintain, or enforce any ordinance, policy, resolution, or other enactment that is specific as to the breed or perceived breed of a dog.” As such, public policy also dictates that no specific dog breed is to be labeled as having vicious propensities.

Despite Ridley’s attempts to raise an issue of fact as to the breed of the dog, Ridley does not appeal, and it is undisputed, that Meadow was a calm, well-behaved dog with no aggressive tendencies towards dogs or people. Her actions that morning were completely foreign to Zacher and Podhradsky and were not foreseeable.

CONCLUSION

It was not foreseeable that Meadow’s collar would break. The collar was a Sioux Empire-approved, Martingale collar. Sioux Empire had never had one of its collars break before this incident, and Zacher and Podhradsky did not know, or have reason to know,

of any defect with the collar. As the circuit court aptly noted, “[d]og collars are designed to anticipate th[at] dogs will pull on them because that’s what dogs do.” (R. at 441.)

It was also unforeseeable that Meadow would run toward Ridley. No evidence has been presented by Ridley that Meadow was anything but a calm, well-behaved dog, and no evidence has been presented that the morning of August 9, 2015, was chaotic or agitating to Meadow. Rather, evidence suggests the exact opposite.

For these reasons, as well as the other reasons set forth in this brief and in the record, Zacher and Podhradsky respectfully request this Court affirm the circuit court’s grant of summary judgment.

Dated this 7th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 5,815 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2018, I served a true and correct copy of the foregoing *Brief of Appellees Susan Tribble-Zacher and Harry Podhradsky* via electronic mail on the following:

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APPENDIX

SDCL § 15-6-56(e)	App. 1
SDCL § 40-34-16	App. 2

APPENDIX

SDCL § 15-6-56(e)	App. 1
SDCL § 40-34-16	App. 2

15-6-56(e). Form of affidavits for summary judgment--Further testimony--Defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Source: SD RCP, Rule 56 (e), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

40-34-16. Ordinance specific as to breed of dog prohibited. No local government, as defined in § 6-1-12, may enact, maintain, or enforce any ordinance, policy, resolution, or other enactment that is specific as to the breed or perceived breed of a dog. This section does not impair the right of any local government unit to enact, maintain, or enforce any form of regulation that applies to all dogs.

Source: SL 2014, ch 196, § 1.

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 28668

DARLETTA MAE RIDLEY,
Appellant,

vs.

SIOUX EMPIRE PIT BULL RESCUE, INC.,
SUSAN TRIBBLE-ZACHER and HARRY
PODHRADSKY,
Appellees.

Appeal from Circuit Court
Second Judicial Circuit, Lincoln County, South Dakota
Honorable Douglas E. Hoffman, Circuit Court Judge

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Notice of Appeal Filed July 17, 2018

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PRELIMINARY STATEMENT

Reference to the record pages as paginated by the Clerk of Court will be referred to as “R” with the appropriate page citation, with specific citation to the deposition page when necessary. The transcript from the June 7, 2018 hearing will be referred to as “T” with the appropriate page citation. Appellant Darlette Mae Ridley will be referred to as Ridley. Appellee Sioux Empire Pit Bull Rescue, Inc. will be referred to as SEPR. Appellees Susan Tribble Zacher and Harry Podhradsky will be referred to as Zacher and Podhradsky.

JURISDICTIONAL STATEMENT

Ridley appeals from the July 3, 2018 Order Granting Defendants’ Motions for Summary Judgment and July 3, 2018 Summary Judgment. (R 380-384) The Order and Summary Judgment were filed on July 5, 2018, with notice of entry being served on July 6, 2018. (R 380, 382, 384-385) Ridley appealed on July 17, 2018. (R 390) This Court has jurisdiction pursuant to SDCL 15-26A-3 (1) and (4).

STATEMENT OF THE ISSUES

1. *Whether the trial court properly granted summary judgment to SEPR.*

The trial court granted summary judgment against Ridley and in favor of SEPR, Zacher and Podhradsky.

Legal Authority:

Gehrts v. Batteen, 2001 SD 10, 620 N.W.2d 775.

Tipton v. Town of Tabor, 1997 SD 96, 567 N.W.2d 351.

SDCL 40-34-16

Gross v. Turner, --- A.3d ---, 2018 VT 80 (Vt. 8/10/18).

STATEMENT OF THE CASE

On October 20, 2016, Ridley commenced this action against SEPR through service of a Summons and Complaint. (R 6) Ridley alleged she was injured on August 8, 2015 by a pit bull owned by SEPR. (R 3) The Complaint alleged SEPR was negligent. (R 4) SEPR filed its Answer denying liability on December 28, 2016. (R 7-8) On July 24, 2017, Ridley filed her First Amended Complaint. (R 28) Ridley's Amended Complaint added Heather Boon, Zacher and Podhradsky, alleging they were negligent in caring for, restraining and supervising the dog. (R 28-33) Through a Stipulation for and Judgment of Dismissal filed on December 5, 2017, Heather Boon was later dismissed as a defendant. (R 52-56)

On April 17, 2018, SEPR filed its Motion for Summary Judgment, Statement of Undisputed Material Facts and Brief in Support of Motion for Summary Judgment. (R 64-73) On April 19, 2018, Zacher and Podhradsky filed their Motion for Summary Judgment, Statement of Undisputed Material Facts in Support of Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment. (R 207-230) On May 31, 2018, Ridley filed her Brief in Opposition to Defendant's Motion for Summary Judgment and Response to Defendant Sioux Empire Pit Bull Rescue's Statement of Undisputed Material Facts and Statement of Disputed Material Facts. (R 235-253)

On June 7, 2018, a hearing was held on the Motions before the Honorable Douglas E. Hoffman. (T 1-2) After hearing argument, Judge Hoffman granted summary judgment in favor of SEPR, Zacher and Podhradsky. (T 47-49) The Court's written Order Granting Defendants' Motions for Summary Judgment and July 3, 2018 Summary

Judgment were signed on July 3, 2018, filed on July 5, 2018 and Notice of Entry was served on July 6, 2018. (R 380-385) Ridley appeals. (R 390)

STATEMENT OF FACTS

SEPR is a volunteer pit bull rescue operation. (R 153, Leighton Depo at 12-13) Rachel Leighton Dezell is the president of SEPR and has held that position since 2011. (R 154, Leighton Depo at 15) Brittany Synders served on the SEPR board from 2012 through 2017. (R 191, Synders Depo. at 12-13)

SEPR does not have a facility to house dogs and relies on foster parents to keep the dogs until the dogs are ultimately adopted. (R 171, Leighton Depo at 82) SEPR contacted Zacher and Podhradsky for foster care and to also dog sit while other foster parents were away. (R 90, Zacher Depo at 26-27; R 159-60, Leighton Depo at 37-38) Podhradsky and Zacher had experience caring for dogs. They had two dogs of their own and had been affiliated with SEPR as foster parents since 2010. (R 86, Zacher Depo at 10-11) In fact, Zacher attended monthly SEPR meetings to learn new training techniques with the breed and had also volunteered at Second Chance Pet Rescue and the American Society for the Prevention of Cruelty to Animals (ASPCA). (R 86-88, Zacher Depo at 13, 15-16, 18)

This action involves a dog named Meadow that was, at the time of this incident, owned by SEPR. (R 155-56, Leighton Depo. at 21-23) SEPR obtained Meadow from the Sioux City Humane Society in July 2014. (R 156, Leighton Depo. 22-23) Meadow had been picked up a number of times by the Elk Point police and they felt Meadow was a good dog and they did not want her to get run over or stolen. (R 156, Leighton Depo at 22-23) The Elk Point police turned Meadow into the Sioux City Humane Society hoping

it could find Meadow a caring family. (R 156, Leighton Depo. at 22-23) The Sioux City Humane Society sent videos of Meadow to SEPR for its review. (R 156, Leighton Depo. at 23). Rachel Leighton Dezell determined that the Meadow was a nice middle-aged dog that would fit in with foster families. (R 156, Leighton Depo. at 24)

SEPR ultimately obtained Meadow in July 2014. (R 156, Leighton Depo at 24,) At that time, Meadow went through an intake inspection with Rachel Leighton Dezell and she placed a new Martingale collar on Meadow. (R 156, 166, Leighton Depo. at 25, 62-63) Following her inspection, Meadow was placed with foster parent, Jennifer Praske. (R 156-57; Leighton Depo. at 25-26)

Zacher and Podhrasky first interacted with Meadow at a meet and greet at Petco. (R 91-92, Zacher Depo. at 33-34; R 110, Zacher Depo. at 12) Later, in November 2014, Zacher and Podhrasky first babysat Meadow while Jennifer Praske was Meadow's foster parent. (R 170, Leighton Depo. at 78) Podhrasky and Zacher had no problems with Meadow when they babysat her in November 2014. (R 170, Leighton Depo. at 79).

Jennifer Praske's home situation changed in late 2014 and she could no longer foster dogs. (R 157, Leighton Depo. at 27) During the five months that Jennifer Praske fostered Meadow, she did not report any issues with Meadow. (R 157, Leighton Depo. at 29) On December 30, 2014, Meadow was transferred to Desiree and Jon Adams, who are fosters who live in Platte, Nebraska. (R 157, Leighton Depo. at 27)

Desiree and Jon Adams had their own dog named Max. (R 158, Leighton Depo. at 30) On March 1, 2015, the Adams were introducing Max to Meadow, and when they went outside, Max's leash came free from Desiree's hands and he started a small altercation with Meadow. (R 157, Leighton Depo. at 29) Max injured Meadow's right

shoulder and front paw. (R 157, Leighton Depo. at 29) After Max initiated the altercation, Desiree Adams was worried about Max being around Meadow and decided she no longer should foster Meadow. (R 159, Leighton Depo. at 34)

On April 4, 2015, SEPR transferred Meadow to foster parent Heather Boon. (R 159, Leighton Depo. at 35) Heather Boon had been a foster with SEPR since 2013. (R 159, Leighton Depo. at 35) In the summer of 2015, Heather Boon contacted Rachel Leighton Dezell to inform her she was going on vacation in early August and needed someone to babysit Meadow while she was gone. (R 159-60, Leighton Depo. at 37-38) Rachel Leighton Dezell then sent out an email to approved foster parents to see if someone could take Meadow while Heather Boon was on vacation. (R 160, Leighton Depo. at 38) Susan Zacher volunteered to babysit Meadow while Heather Boon would be on vacation. (R 160, Leighton Depo. at 38) She had babysat for Meadow one previous time earlier that summer without incident. (R127, 170, Leighton Depo. at 79, Boone Depo. at 33)

Zacher and Podrhasky took possession of Meadow on or about July 31, 2015. (R 160, Leighton Depo. at 38) On August 8, 2015, while Meadow was with Zacher and Podrhasky, they went camping at Newton Hills State Park with Zacher's son, their own dog Ollie and Meadow. (R 90-91, 94, 96, Zacher Depo. at 29-30, 44, 53) They planned to camp overnight, return home the next day, and then return Meadow to Heather Boon. (R 90-91, Zacher Depo. at 29-30)

On the morning of August 9, 2015, Ridley was walking around the park in the early morning. (R 142, Ridley Depo. at 33) Ridley approached Zacher and Podhrasky's campsite. (R 143, Zacher Depo. at 34-35). Meadow was tethered to a tree near Susan

Zacher and Harry Podhradsky's camper. (R 96, Zacher Depo. at 50-52) Zacher and Podhradsky were both outside the camper. (R 96, Zacher Depo. at 51; R 114, Podhrasky Depo. at 28-29) Meadow apparently ran and the Martingale collar attached to the leash broke. (R114, Podhrasky Depo. at 28) Meadow then ran toward Ridley, knocking her down. (R 96, Zacher Depo. at 51-52) It is unclear whether Meadow bit Ridley. Ridley claims that Meadow bit her finger. (R 143, Ridley Depo. at 37-38) Zacher and Podhradsky believe that the injury to Plaintiff's finger was due to her fall. (R 99, Zacher Depo. at 65-66, R 144, R 116, Podhradsky Depo. at 36-37).

Meadow was not known to have any dangerous or vicious propensities. (R100, Zacher Depo. at 66-67; R 129, Boon Depo. at 41; R116, Podradsky Depo. p. 37) Meadow was described as a calm, very nice, family dog. (R 91, Zacher Depo. p. 33) Meadow was also described as a very, very good dog. (R16, Podhradsky Depo. at. 16. Brittany Synders similarly noted that there was no history with Meadow. She had also interacted with Meadow and found Meadow to be a sweet dog that was easy to handle. (R193, Synders Depo. at 19-20) She never had an issue with Meadow exhibiting high energy or trying to get off a leash. (R 193, Synders Depo. at 20) Meadow's foster parent, Heather Boon, was flabbergasted that this happened and nothing like this had never happened before while she had Meadow. (R127, Boon Depo. at 33).

The incident was entirely unforeseeable. (R, 100, Zacher Depo. at 67; R 129-30, Boon Depo. at 41-42; R 117, Podhradsky Depo. p. 38) Podhradsky observed the collar that broke. Two metal pieces on the collar clasp broke and in his opinion it was a manufacturing defect in the collar. (R 115, Podhradsky Depo. at 31-33) Ridley presented no evidence that prior to this incident Meadow had any propensities for

running at or jumping on people. (R 147, Ridley Depo. at 52) Ridley has no evidence that there was something wrong with that particular collar. (R 156, 166, Leighton Depo. at 25, 62-63) The Martingale collar was roughly a year old and SEPR had never had an issue with that type of collar before this incident. (R 166, Leighton Depo. at 64) The metal portion of the collar broke, as shown below:



(R 204)

STANDARD OF REVIEW

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SDCL 15-6-56(c). In reviewing the trial court’s decision to grant summary judgment, this Court “view[s] the evidence ‘most favorably to the nonmoving party and resolve[s] reasonable doubts against the moving party[.]’” *Fischer v. City of Sioux Falls*, 2018 SD 71, ¶6, 919 N.W.2d 211, 214 (citing *Gades v. Meyer Modernizing Co.*, 2015 SD 42, ¶ 7, 865 N.W.2d 155, 158 (quoting *Peters v. Great W. Bank, Inc.*, 2015 SD 4, ¶ 5, 859 N.W.2d 618, 621)). However, a plaintiff must “substantiate [his] allegations with sufficient probative evidence that would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy[.]” *Id.* at ¶6 (citing *Schaefer v. Sioux Spine & Sport, PLLC*, 2018 SD 5, ¶ 9, 906 N.W.2d 427, 431 (quoting *Peters*, 2015 SD 4, ¶ 13, 859 N.W.2d at 624)).

A party is entitled to affirmance of the circuit court’s entry of summary judgment, “when all legal questions have been decided correctly and there are no genuine issues of material fact.” *Gehrts v. Batteen*, 2001 SD 10, ¶4, 620 N.W.2d 775, 777 (internal citations omitted). Finally, this Court will affirm a summary judgment if the circuit court was correct for any reason. *Id.*

LEGAL ARGUMENT

1. The trial court properly granted summary judgment to SEPR.

A. Overview.

“In order to prevail in a suit based upon negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation and actual injury.” *Andrushchenko v. Silchuk*, 2008 SD 8, ¶ 21, 744 N.W.2d 850, 857 (quoting *Fisher Sand & Gravel Co. v. South Dakota Dept. of Trans.*, 1997 SD 8, ¶12, 558 N.W.2d 864, 867). “A duty can be created either by statute or common law.” *Id.*

Before the owner of a domesticated animal may be held liable for harm to another, it must be shown that the owner knew or should have known of the animal’s dangerous propensities. *Gehrts, supra*, 2001 SD 10, ¶ 8, 620 N.W.2d at 777-78. As this Court observed in *Gehrts*: “Before this breach of duty will affix to an owner, the plaintiff must establish that the owner knew or should have known of that animal’s dangerous propensities.” *Id.* Absent the plaintiff establishing knowledge of the animal’s propensities, the plaintiff must establish “that as an ordinary, prudent person, the owner should have foreseen the event that caused the injury and taken steps to prevent the injury.” *Id.* at ¶ 9, 620 N.W.2d at 778.

Ridley, in her brief, has abandoned her claim that Meadow had dangerous propensities that were known to SEPR. (Appellant’s Brief at p. 13, Fn. 6) Her claim that Meadow had some troubling propensity is simply belied by the record and was properly abandoned.

However, Ridley now claims that SEPR should have foreseen that she would be injured. Her argument that the trial court erred in granting SEPR summary judgment is misplaced. Her argument that her injury was foreseeable is that somehow SEPR should have apparently known Meadow would be taken to a state park campground on August 9, 2015, and while safely tied out to a tree with a cable tie out, a perfectly good collar would unexpectedly break when the dog pulled on the tie out. That is her foreseeability argument. In fact, the circuit court correctly granted summary judgment to SEPR. To accept Ridley's argument would effectively create strict liability for any dog owner. However, this Court was clear in *Gehrts* that strict liability should not be established by this Court and the decision to alter the standard must be made by the legislature. *Gehrts*, *supra*, 2001 SD 10, ¶15, 620 N.W.2d at 779.

The trial court recognized that the established foreseeability analysis must have some boundaries and does require that Ridley establish a claim of negligence. The trial court aptly reasoned:

There isn't any evidence to show that the defendants knew or should have known the collar was going to break on that morning at 7 o'clock if the dog put physical stress on it. It's anticipated that dogs were going to put stress on collars and that's why you have a collar that fits the dog and you have a tether that's adequate to hold the dog, and there isn't any indication that the defendants have any reason to believe that that wasn't an appropriate safety device. So I can't draw any conclusion of negligence from that. We don't have any expert testimony to contradict that, um, so there isn't any evidence for lack of reasonable care on the part of the defendants that's been brought to the record at this point in time. There's a suggestion that while they violated their own rule that you're supposed to have a two-week lockdown, but it sounds to me like that might be a made-up rule. There isn't anything to justify it or establish it as a duty of care. And the testimony is it was, you know, an option within the discretion of the parties based on their understanding of the pet and the circumstances, but in order to view that evidence as suggested by the plaintiff herein, I would have to find that its negligence to take dogs camping and tether them to trees and – because the collar might snap.

And I just don't think that's foreseeable under the circumstances or in this particular case.

You know, this is the kind of case that puts into attention an extreme interpretation of the law versus, I think, the common sense that folks expect the law to adhere to . . .

(T 47-48)

The trial court was correct. The material facts of this case are straightforward, simple, and undisputed. On August 9, 2015, Zacher, a temporary foster parent for Meadow, had her with her family on an overnight camping trip at Newton Hills State Park campground. Zacher and Podhradsky were outside their camper in the early morning. Meadow was tethered to a tree with the cable tie out attached to a Martingale collar affixed to Meadow. Ridley was walking around the campground. As Ridley approached the area where Zacher and Podhradsky were camping, for some unknown and unforeseen reason Meadow ran toward Ridley and the Martingale collar broke. Zacher was standing right next to Meadow when this occurred. Meadow knocked Ridley down, and Ridley claims that Meadow bit her finger. Shortly thereafter Meadow ran back to Zacher. The entire incident was unforeseen and unforeseeable. SEPR had never had a problem with a Martingale collar. There had never been an incident where a Martingale collar had broken before, as it did here. Meadow had no history of running toward people or chasing them or fighting a leash. That is this case. There was no negligence on the part of SEPR.

Faced with these determinative facts, Ridley raises various arguments to attempt to claim the trial court erred. Ridley's argument is that the circumstances surrounding Meadow somehow establish this was foreseeable. This is misplaced. Essentially, Ridley's arguments boil down to a claim that Meadow should not have been tethered at a campground. The trial court was correct in noting that "in order to view that evidence as

suggested by the plaintiff herein, I would have to find that its negligence to take dogs camping and tether them to trees and – because the collar might snap. And I just don't think that's foreseeable under the circumstances or in this particular case.” (T at 48)

B. The Two-Week Shutdown.

Ridley, argues in her brief that Zacher and Podhrasky violated the two-week shutdown period and that this makes this incident foreseeable. This is not correct. The testimony from Rachel Leighton Dezell was that the two-week shutdown period was optional for volunteers who babysat SEPR's foster dogs. (R 170, Leighton Depo. at 80) This was confirmed by Podhrasky. (R 112, Podhrasky Depo. at 20) Further, Zacher and Podhradsky had babysat Meadow on two occasions prior to the occasion in August 2015. (R 170, Leighton Depo. at 78-79) In addition, Zacher and Podhradsky had prior interactions with Meadow at various meet and greet events. (R 91, Zacher Depo. at 33-34; R 110, Podhradsky Depo. at 12) Zacher further testified that she did not do the entire full two-week shutdown because “she didn't need it and she – when we introduced her to our other dog and introduced her to the family, she was wonderful.” (R 111, Zacher Depo. at 17) In short, Zacher and Podhradsky had Meadow two times before this incident and she was comfortable with them.

In the end, Ridley's argument about a two-week shutdown is misguided. The issue here is whether it was foreseeable that Meadow would break her collar while she was safely tethered outside with her temporary foster parents present. It was not foreseeable and the two-week shutdown period is inapplicable and irrelevant.

C. The Environment.

Next, Plaintiff seems to suggest that having a dog in a campground or park was somehow improper. Sioux Empire Pit Bull has a policy of not permitting their dogs to be turned loose in dog parks or where other dogs run around without a leash. Taking a dog to a campground, however, is not prohibited and would not have been inappropriate in this case. Rachael Leighton Dezell testified as follows on that subject:

Q: Do you agree with me that taking a pit bull to a campground where there are lots of other dogs and people around could be dangerous?

A: No.

Q: Why not?

A: We take our dogs out in very high public places, adoption events, pet stores, downtown. Our dogs are very used to being around lots of other people and lots of animals on leash. So in a campground, as long as everybody is following those leash laws and taking care of their animals, there would be no danger.

Q: Sioux Empire doesn't have any rule, does it, prohibiting their foster families from taking dogs on vacations or to campgrounds?

A: No. Whatever they are comfortable managing.

(R164, Leighton Depo. at 54-55) As further evidence that SEPR's dogs, and particularly Meadow were used to being around people, Heather Boon, who was the foster parent at the time, took Meadow to various public places including downtown and never had any issues with Meadow. (R 124, 127-28, Boon Depo. at 21, 30, 37)

Most significantly, the critical fact, which remains undisputed, is that this incident would never have occurred, if the Martingale collar would not have broken. Even Ridley Plaintiff had to admit this. She testified as follows:

Q: And if this dog's collar hadn't broke and it had stayed on its tether, would this incident ever have even occurred?

Ms. Lanham: Object to the form of the question, calls for an improper hypothetical and speculation.

Q: Go ahead.

A: I don't know.

Q: Okay. In other words, you were far enough away - -

A: Yes.

Q: - - from the dog that if it had run or reached the end of its tether and the collar had held, this accident wouldn't have happen. You agree with that?

A: I agree with that.

(R147-48, Ridley Depo. at 53-54)

Ridley acknowledged that she had no evidence that SEPR did anything wrong. (R 148, Ridley Depo. at 54) She also admitted that she had no evidence that SEPR did anything wrong that caused or contributed to the accident. (R 148, Ridley Depo. at 54) She also acknowledged that she did not know of anything that Zacher or Podhradsky could have done to prevent the accident. (R 148, Ridley Depo. at 54-55)

The entire incident was unforeseen and unforeseeable. No one could have predicted that the Martingale collar would break. Thus, the most critical undisputed fact in this case, shows that regardless of any other so-called disputed facts, this accident would never have occurred but for an unforeseen event for which SEPR cannot be held liable. *Gehrts, supra*, 620 N.W.2d at 778 (recognizing a Plaintiff must establish that a duty existed between the owner and the victim and that there was a breach of that duty).

Finally, Ridley's reliance on *Rowland v. Log Cabin, Inc.*, 2003 SD 20, 658 N.W.2d 80 is misplaced. Although *Rowland* involved a dog bite, it was a premises liability case involving the negligence of a business invitee. *Id.* at ¶10, 658 N.W.2d at 79.

The facts in *Rowland* are also clearly distinguishable from the situation here. The dog in *Rowland* was not tethered to a tree at a campground, but was roaming free in a

small bar with drunken patrons. *Id.* at ¶ 14, 658 N.W.2d at 80. The owner of the dog was told to remove the dog, but did not, and was ultimately allowed to keep the dog in the bar over the bartender's objection. *Id.* at ¶ 4, 658 N.W.2d at 78. Rowland, who had been drinking, asked to pet the dog, was informed by the owner that the dog did not bite, and the dog bit him when he put his hands in the dog's mouth. *Id.* at ¶5, 658 N.W.2d at 78. This was quite a different situation from that here where the dog was safely tethered at a campground away from people and the collar restraining the dog broke unexpectedly.

D. Meadow's Character.

Ridley also claims to consider "the kind and character" of animal that Meadow was in her brief. (Appellant's Brief at 14-16). However, Ridley's discussion ignores Meadow's actual character. She fails to address the undisputed fact that Meadow was a good, calm dog. Zacher testified that she knew Meadow as a calm, very nice, family dog. (R 91, Zacher Depo. at 33) Podhradsky testified that there was zero problems with Meadow when they had her and she would not pull on a leash or run off. (R 112, 114 Podhradsky Depo. at 20, 28) Heather Boon had Meadow for four months by the time of this incident. She had never had any issues with Meadow and was shocked to hear that Meadow ran and broke her collar. (R 129, Boon Depo. at 41) Meadow pulling against the tie out was totally out of character and unfortunately the collar broke, allowing her to run. Meadow's character, as observed by her caretakers, does not lead to the conclusion that it was foreseeable the collar would break.

Faced with the undisputed testimony that Meadow was a nice, calm dog, Ridley argues that because she was a pit bull it makes this incident foreseeable. When Ridley's

argument is broken down, it is nothing more than a claim that one is negligent if the person safely tethers a pit bull in a public campground.

Ridley's argument is not consistent with South Dakota law. This Court has recognized that dogs "are presumed tame and docile and the burden is on plaintiffs to show otherwise." *Tipton v. Town of Tabor*, 1997 SD 96, ¶ 24, 567 N.W.2d 351, 362. (internal citations omitted) Furthermore, the South Dakota legislature enacted a specific statute prohibiting local governments from enacting, maintaining, or enforcing ordinances or other policies specific to a breed or perceived breed of a dog. SDCL 40-34-16. The public policy in South Dakota is found in the "letter or purpose of a constitutional or statutory provision or scheme, or in a judicial decision." *Law Capital, Inc. v. Kettering*, 2013 SD 66, ¶10, 836 N.W.2d 642, 645 (quoting *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781, 783 (S.D. 1993) Thus, the public policy enacted by the legislature is not to label a specific dog breed or perceived breed of dog as having any particular vicious propensities. This is consistent with decisions from other jurisdictions. See e.g., *Gross v. Turner*, --- A.3d ---, 2018 VT 80 (Vt 8/10/18)(rejecting plaintiff's sweeping claim that the court should conclude that pit bulls are dangerous breed); *Rivers v. New York City Housing Authority*, 264 N.Y.S.2d 57, (N.Y. App. Div. 1999)(recognizing trial court erred in taking judicial notice that pit bulls are vicious because it must be shown the actual animal involved had dangerous propensities); *Olave v. Howard*, 547 So.2d 349 (Fl. App. 1989)(rejecting claim that dog was vicious simply because it was part pit bull).

In *Gehrts*, this Court made this particularly pertinent observation:

As the nonmoving party, Gehrts has the obligation to “set forth specific facts showing that there is a genuine issue for trial.” SDCL 15-6-56(e). “[P]roof of a mere possibility is never sufficient to establish a fact. ‘When challenging a summary judgment, the nonmoving party “must substantiate [her] allegations with sufficient probative evidence that would permit a finding in [her] favor on more than mere speculation, conjecture, or fantasy.” ‘ ” Elliott v. A & B Welding Supply Co., 1999 SD 57, ¶16, 594 N.W.2d. 707, 710 (internal citations omitted). Gehrts has failed to substantiate her allegations beyond the level of mere speculation or conjecture.

Gehrts, supra, 2001 SD 10, ¶ 12, 620 N.W.2d at 779. Here, Ridley did not establish her claim for negligence. She merely enters into speculative arguments that devolve into her ultimate argument that it was negligent to have Meadow safely tethered to a tree at a campground. The trial court was correct when it concluded that it was not foreseeable that the collar would break and SEPR was not negligent.

CONCLUSION

The circuit court properly granted summary judgment to SEPR. Ridley’s argument that SEPR should have foreseen that the collar would break and she would be injured at a campground on August 9, 2015 simply goes too far. This was an unforeseen accident. To allow Ridley’s claim to continue under the circumstances here would effectively create strict liability for any dog owner. SEPR respectfully requests that the Court affirm the trial Court’s Order Granting Defendants’ Motion for Summary Judgment.

Dated this 10th day of December, 2018.

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REQUEST FOR ORAL ARGUMENT

Appellee Sioux Empire Pit Bull Rescue, Inc., respectfully requests that they be granted the privilege of appearing before this Court for an oral argument in this appeal.

/s/ Michael J. Schaffer

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Brief of Appellee Sioux Empire Pit Bull Rescue, Inc.*, complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellee Sioux Empire Pit Bull Rescue, Inc.* contains 4681 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare

Brief of Appellee Sioux Empire Pit Bull Rescue, Inc. The original *Brief of Appellee Sioux Empire Pit Bull Rescue, Inc.*, and all copies are in compliance with this rule.

/s/ Michael J. Schaffer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing “Brief of Appellee Sioux Empire Pit Bull Rescue, Inc.” was served by email service to the following attorneys in PDF format on December 10, 2018, before 11:59 p.m. on that date:

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 28668

DARLETTE MAE RIDLEY,

Plaintiff and Appellant,

vs.

**SIOUX EMPIRE PIT BULL RESCUE, INC., SUSAN TRIBBLE-ZACHER and
HARRY PODHRADSKY,**

Defendants and Appellees.

**APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA**

**THE HONORABLE DOUGLAS E. HOFFMAN
CIRCUIT COURT JUDGE**

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REPLY ANALYSIS

Darlette Mae Ridley (“Ridley”) respectfully asks this Court to reverse the grant of summary judgment, remand this case, and allow a jury to determine whether Sioux Empire Pit Bull Rescue (“Pit Bull Rescue”), Susan Zacher (“Zacher”) and Harry Podhradsky (“Podhradsky”) were negligent.

I. PIT BULL RESCUE, ZACHER AND PODHRADSKY FAIL TO ADDRESS THE EVIDENCE IN THE RECORD THAT CONTRADICTS THEIR VERSION OF THE FACTS.

“[W]hether a defendant’s conduct constitutes a breach of a duty is a question of fact.” *Nicolay v. Stukel*, 2017 S.D. 45, ¶ 16, 900 N.W.2d 71, 78. The evidence and every reasonable inference drawn from the facts are viewed most favorable to Ridley. *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 16, 714 N.W.2d 884, 891 (orders of summary judgment require “all facts and favorable inferences from those facts must be viewed in a light most favorable to the nonmoving party”). “The question is not whether this Court would find [] negligence, but whether the facts create a genuine issue of material fact from which a reasonable juror could find” that Pit Bull Rescue, Zacher and Podhradsky breached the ordinary prudent person standard. *Fischer v. City of Sioux Falls*, 2018 S.D. 71, ¶ 20, 919 N.W.2d 211, 218 (internal citations omitted). “Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial.” *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762.

The crux of Pit Bull Rescue, Zacher and Podhradsky’s argument is that, as a matter of law, there was not a breach of the standard of care. In support of their

arguments, however, Pit Bull Rescue, Zacher and Podhradsky only present the facts in the light most favorable to them. They ignore the evidence in the record that contradicts their arguments and, in doing so, ignore the summary judgment standard. Nowhere in the briefs do Pit Bull Rescue, Zacher and Podhradsky cite the facts and evidence in the light most favorable to Ridley nor do they even acknowledge the facts that support Ridley's claim. Instead, they present the facts in the light most favorable to them and ask the Court to act as a factfinder by adopting their version of the disputed facts and inferences. If Pit Bull Rescue, Zacher and Podhradsky wanted to prove that they should prevail, they should have stated the facts in the light most favorable to Ridley and then argued why they still prevailed. They did not do so.

Asking this Court to act as a factfinder circumvents the role of the court and Ridley's right to have her case heard by a jury of her peers. Pit Bull Rescue, Zacher and Podhradsky can cite the facts that they like, but they cannot disregard the facts in the record that they do not like. Pit Bull Rescue, Zacher and Podhradsky will have the opportunity to present the facts they prefer, but to the jury instead of the trial court or this Court.¹

¹ Pit Bull Rescue also argued that Ridley could not identify concerns with the dog. (Pit Bull Rescue Brief, p. 14). When she was attacked, Ridley was a stranger to Pit Bull Rescue, Zacher, Podhradsky and the dog. Ridley, like most dog bite victims that were attacked at random, does not have any firsthand knowledge of the dog. "The purpose of pretrial discovery is to allow 'the parties to obtain the fullest possible knowledge of the issues and facts before trial.'" *Papke v. Harbert*, 2007 S.D. 87, ¶ 55, 738 N.W.2d 510, 529 (quoting *Kaiser v. Univ. Physicians Clinic*, 2006 SD 95, ¶ 31, 724 N.W.2d 186, 194) (internal quotations omitted).

a. There Are Factual Disputes Regarding the Two-Week Shutdown and All Factual Disputes Must be Resolved in Favor of Ridley.

i. Two-Week Shutdown was Mandatory.

There are contradictory statements in the record regarding the two-week shutdown. As noted above, instead of acknowledging the contradictions in the record, Pit Bull Rescue, Zacher and Podhradsky simply disregard the testimony they do not like and then present their version of the facts. They argue that the two-week shutdown was not mandatory. (Pit Bull Rescue Brief, p. 12; Zacher and Podhradsky, p. 14). That contradicts the testimony of Pit Bull Rescue Rachael Leighton (“Leighton”). (R. 170; Leighton Depo., 78:6-13) (Q: ...You said [two-week shutdown was] required, obviously, any time one of your dogs goes into a temporary or any foster family? A: Yes). Leighton further stated:

Q: Harry Podhradsky testified that he and Susan did not do the two-week full shutdown. And I wasn't aware of that earlier time in the summer, I apologize, but in August of 2015 when they received possession of her, they did not do the two-week full shutdown. Are you aware of that?

A: Correct.

Q: That would be then against Sioux Empire policy?

A: Our baby-sitters have the option, if they feel comfortable and have been with the program long enough, to put animals together.

Q: *Okay. I'm sorry. I thought you told me earlier that it's required each time they go into a new environment to do the two-week shutdown.*

A: *It is required.*

(R. 170, Leighton Depo., 80:4-17). Leighton testified that “babysitters” are not required to do the two-week shutdown, but then, in the next question, reiterated that it was required. *Id.*

The jury should have the opportunity to sort through Leighton’s contradictory statements. Pit Bull Rescue, Zacher and Podhradsky’s argument that the two-week shutdown was not mandatory is asking this Court to engage in fact-finding and weigh the evidence. For summary judgment purposes, it is assumed the two-week shutdown was mandatory and it is undisputed that Pit Bull Rescue, Zacher and Podhradsky violated that mandate by bringing the dog to the campsite. As such, had Pit Bull Rescue, Zacher and Podhradsky adhered to the two-week shutdown, the dog never would have been at the campsite to attack Ridley. It, instead, would have been at Zacher and Podhradsky’s home where it could “bond,” “decompress” and “build the relationship of trust.” (R. 159, Leighton Depo., 36:16-20). The jury can find that a reasonable person would not have violated the two-week mandate when caring for the dog.

**ii. Zacher and Podhradsky Were Not “Babysitters” but
Were “Temporary Foster Parents.”**

Even if “babysitters” were not required to undergo the two-week shutdown, such a distinction does not matter in this case as Pit Bull Rescue, Zacher and Podhradsky admitted that Zacher and Podhradsky were “temporary foster parent[s]” – not babysitters. (R. 348) (“Susan Zacher, a temporary foster parent for Meadow.”); (R. 414; HT 3:10-11) (“Susan ... had Meadow as a temporary foster parent for Sioux

Empire Pit Bull Rescue”); (R. 285, Boon Depo., 25:1). Any attempt to characterize Zacher and Podhradsky as babysitters is contradicted by the statements made by Pit Bull Rescue and parties cannot claim a version of the facts more favorable than their testimony. *Petersen v. Sioux Valley Hosp. Ass'n*, 486 N.W.2d 516, 519 (S.D. 1992), *on reh'g*, 491 N.W.2d 467 (S.D. 1992) (citations omitted).

**iii. Even if Zacher and Podhradsky Were “Babysitters,”
the Purpose of the Two-Week Shutdown Applies
Regardless of the Label Provided to the Caregivers.**

The argument that the two-week shutdown did not apply to “babysitters” contradicts the purpose of the policy. If the purpose of the two-week shutdown is to “allow[] an animal to decompress and begin to bond with a handler” and “build the relationship of trust” then those same principals should apply whether it is to a foster caregiver, babysitter or permanent home. (R. 159, Leighton Depo., 36:16-20). The two-week shutdown helps to ensure that the dog successfully transitions from one environment to another and “is required each time they go into a new environment.” (R. 170, Leighton Depo., 80:14-17). At every transfer before the transfer from Heather Boon to Zacher and Podhradsky right before the attack, the dog underwent the two-week transition. (R. 156; Leighton Depo., 24:25-25:6); (R. 157; Leighton Depo., 26:22-24); (R. 159; Leighton Depo., 36:4-8); (R. 159, Leighton Depo., 36:13-15).

Somehow though, Pit Bull Rescue, Zacher and Podhradsky argue that the purpose and reasoning behind the two-week transition period does not apply to a new environment with a babysitter. If there is any situation for an animal to have

additional precautions taken, such as a two-week shutdown, it would be when the animal is placed with babysitters, who by definition, are temporary and provide a different environment and routine.

Animal rescue groups develop policies and procedures to minimize risk and harm to the animal, caregivers and public. Those policies and procedures are meaningless if they are not enforced or if there are no consequences for violating them and a person is injured as a result. Granting summary judgment condones Pit Bull Rescue, Zacher and Podhradsky's apathetic treatment of its policies and procedures designed to provide safe practices for the care of rescue animals.

iv. The Dog Had Only Been in Zacher and Podhradsky's Possession One Time Before August 2015.

Pit Bull Rescue, Zacher and Podhradsky state that at the time Ridley was attacked, the pit bull had been in Zacher and Podhradsky's care three times. (Pit Bull Rescue Brief, p. 13; Zacher and Podhradsky Brief, p. 12). This is inaccurate. Zacher testified that she only had the pit bull one time before Ridley's incident. (R. 91, Zacher Depo., 31:23-32:7). This occurred around November 2014 – eight months before they obtained the dog again in August 2015. (R. 170, Leighton Depo., 78:14-23). Leighton testified that she believed that Zacher and Podhradsky had the dog a second time before the attack, but that testimony is not supported by Zacher. (R. 170, Leighton Depo., 79:15-21). It is misleading to say that Zacher and Podhradsky "had already formed a 'relationship of trust' prior to August 2015" when they had the dog for a few days eight months before the attack. (Zacher and Podhradsky Brief, p.

12). Such an argument is speculative and, at best, pure conjecture. There is no way to say whether the dog could feel familiar or build a “relationship of trust” with people it saw at meet-and-greets (full of other people and other dogs) and stayed with for a few days eight months before the attack. Again, in viewing the facts in the light most favorable to Ridley, it is assumed that Zacher and Podhradsky had served as temporary foster caregivers only once before the attack.

As highlighted above, there are multiple contradictions and factual disputes to be sorted out by the jury. Pit Bull Rescue, Zacher and Podhradsky’s one-sided presentation of the evidence is in degradation of the summary judgment standard. In viewing the facts in the light most favorable to Ridley, there is sufficient evidence to submit to the jury regarding Pit Bull Rescue, Zacher and Podhradsky’s negligence.

II. PIT BULL RESCUE, ZACHER AND PODHRADSKY ARE ASKING THE COURT TO IGNORE ALL THE EVENTS LEADING UP TO THE ILL-ADVISED CAMPING TRIP.

a. Limiting the Analysis to Just the Collar Has No Basis in the Law.

Pit Bull Rescue, Zacher and Podhradsky want to limit the foreseeability analysis to just the collar. This means that they are asking the Court to focus only on a snapshot in time – the exact moment that the pit bull lunged and broke the collar. The practical application of this argument is that any and all events leading up to the incident are not relevant and do not matter for purposes of determining breach. If the Court adopts this argument then it would not matter that the pit bull had been in eight locations with seven different families in thirteen months or that it had been in

three different locations the week before the attack. It also would not matter that Pit Bull Rescue had a policy that required a two-week shutdown or that pit bulls are known to be high energy, strong, aggressive animals.

This limited view of the facts, however, is not founded in the law. The law requires the analysis to look at the totality of the circumstances and all facts surrounding the decisions made before Ridley was injured. *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, ¶ 8, 658 N.W.2d 76, 78. In *Rowland*, this Court rejected the “prior similar acts” rule as “unduly restrictive” as it “places too great of a burden on a plaintiff” and stated “[t]he duty to foresee a risk of harm is dependent upon all the surrounding facts and circumstances and may require further investigation or inquiry before action is taken.” (quoting *Small v. McKennan Hospital*, 403 N.W.2d 410, 413 (S.D. 1987)). The law requires a broader analysis than just whether the collar breaking was foreseeable. The question for the jury is whether Pit Bull Rescue, Zacher and Podhradsky’s conduct was prudent or reasonable based on “all the surrounding facts and circumstances.” *Id.* This requires more than just looking at a moment in time. It requires an analysis that looks at the events leading up to the actual moment when the dog attacked Ridley.

If the Court adopts Pit Bull Rescue, Zacher and Podhradsky’s argument, that means that every time a dog breaks a collar, jumps over a fence, breaks loose from the owner, digs a hole to escape or pulls out of a leash, the owner or handler is automatically absolved from any liability regardless of the surrounding circumstances. That means that even if the collar was worn or improperly attached, or the fence was

poorly maintained, or if the handler did not hold onto the lease tight enough, or if the dog never should have been at the public campsite that those facts would not matter for purposes of negligence. This argument would reverse this Court's precedence and remove the "totality of the circumstances" and "all the surrounding facts and circumstances" from the foreseeability analysis.

b. The Trial Court Erred When it Only Considered the Collar.

Pit Bull Rescue, Zacher and Podhradsky cited the trial court's statement that "in order to view that evidence as suggested by the plaintiff herein, I would have to find that it's negligence to take dogs camping and tether them to trees and – because the collar might snap." (T. 48; Pit Bull Rescue Brief, p. 12; Zacher and Podhradsky's Brief, p. 9). Pit Bull Rescue also states "[w]hen Ridley's argument is broken down, it is nothing more than a claim that one is negligent if the person safely tethers a pit bull in a public campground." (Pit Bull Rescue Brief, p. 16). The inherent problem with these statements is that it assumes that all dogs have the same breed tendencies, history, background and caretakers. There may be situations where it is not a breach of the standard of care to bring a dog to a campground. The converse is also true – there may be situations where it is a breach of the standard of care to bring a dog to a campground. This case is one of those situations. This was not a small unassuming dog brought by its longtime family to a campsite. It was a pit bull brought by temporary foster caregivers to its third environment, a public campground, in a one week timespan.

In *Tucker v. Duke*, 873 N.E.2d 664 (Ct. App. Ind. 2007), the court found liability on the part of the dog owner even though the owner had the dog chained to a stake in the ground. The dog injured two people after it was found running around loose. Much like there is no explanation for why the collar broke, in *Tucker*, there was no evidence of how the dog became loose as the “stake was in the ground, and the chain was not broken.” *Id.* at 666. The Court still imposed liability on the dog owner. *Id.*

III. RIDLEY SHOULD NOT BE PUNISHED AND HAVE HER CASE DISMISSED BECAUSE PIT BULL RESCUE, ZACHER AND PODHRADSKY FAILED TO PRESERVE THE COLLAR.

Pit Bull Rescue, Zacher and Podhradsky argue that Plaintiff has not presented evidence regarding the condition of the collar. (Zacher and Podhradsky’s Brief, p. 11) (“There are no allegations, and Ridley failed to present any testimony or evidence, that Meadow’s collar was defective”). The only evidence in the record is one picture and Podhradsky’s testimony that the collar was “worn.” (R. 98, Podhradsky’s Depo., 59:8-9) (Q: Did [the collar] appear worn? A: Yes). In making this argument, neither Pit Bull Rescue nor Zacher and Podhradsky informed the Court that the reason there is no evidence regarding the collar is because it disappeared after Ridley was injured. (T. 9) (“nobody even knows where the collar is”); (R. 167, Leighton Depo., 66:2-3); (R. 197, Synders Depo., 37:12-13).

Ridley was deprived of ever making any arguments regarding the collar because no one knows the whereabouts of the collar. *Id.* Ridley had no opportunity

to inspect the collar, determine whether it was in good condition, or whether it was appropriate for a pit bull of the dog's size. The fact that Pit Bull Rescue, Zacher and Podhradsky failed to preserve the collar should not be used against Ridley. To do so would essentially reward Pit Bull Rescue, Zacher and Podhradsky for depriving Ridley of the ability to fully investigate her claim.

IV. LEIGHTON OPINED THAT THE PIT BULL MAY HAVE ATTACKED RIDLEY BECAUSE IT "HAD BEEN MOVED THREE TIMES IN THE PAST WEEK."

When Leighton was told of the attack, she told animal control "that the dog had been moved three times in the past week and [she] was concerned about this and wandered [*sic*] if the dog was reacting to all the change in her environment." (R. 337). Sometimes dogs attack and people are left wondering why. In this case, Leighton, as the President of Pit Bull Rescue, provided an explanation about why the dog attacked and she stated she was concerned about the three locations. *Id.* She further stated that it could be because "the dog was reacting to all the change in her environment." *Id.* This testimony solidifies Ridley's position that consistency in environments matter for animals – especially animals with aggressive tendencies such as a pit bull. This testimony is part of the foreseeability analysis based on the totality of the circumstances. Leighton's testimony is consistent with common sense and that is that a normally calm dog can become agitated and attack when it is subjected to inconsistent living arrangements.

Zacher and Podhradsky try to soften Leighton's statements by arguing that Ridley took Leighton's statements "out of context" and misconstrued her testimony.

(Zacher and Podhradsky Brief, p. 14). The full testimony that Zacher and Podhradsky cited is actually helpful to Ridley and does not contradict her earlier statements that “change is going to be difficult” and that a new environment for any dog could be unsettling, especially for a foster dog. (R. 164; Leighton Depo., 55:2-21). Leighton’s testimony regarding consistency and the effect of change on a dog is consistent with her statements to animal control. (R. 337). “[A] party cannot claim a version of the facts more favorable to her claim than her own testimony.” *Petersen*, 486 N.W.2d at 519 (citations omitted). Pit Bull Rescue, Zacher and Podhradsky’s attempt to minimize the serious issues with upending a rescue foster animal’s routine and environment is not effective as Leighton’s testimony supports Ridley’s position that three different locations can cause stress in an otherwise “nice” animal.

V. THE BREED OF THE DOG MATTERS.

The jury will be instructed to use their common sense and knowledge in viewing the facts. South Dakota Jury Instruction (Civil) 1-10-30. Pit Bull Rescue, Zacher and Podhradsky want to present a picture of pit bulls that is not based in reality or common sense. Pit bulls were purposely bred for their superior fighting abilities, are more apt to pick fights and should never be trusted not to fight. (R. 170; Leighton Depo., 81:9-22).

Courts throughout the country have had the opportunity to analyze pit bulls and their innate characteristics and have held that pit bulls have higher levels of aggression, represent a higher percentage of dog-bite related fatalities and attacks and represent attacks that are more severe than other breeds. *See Tracey v. Solesky*, 427 Md.

627, 50 A.3d 1075 (2012), *as amended on reconsideration* (Aug. 21, 2012), *overturned due to legislative action*.² Pit Bull Rescue, Zacher and Podhradsky want this Court to state that animals do not have inherent tendencies based on breed. Such arguments overlook that animals do have innate tendencies, which explains why bears, lions and alligators should not be domesticated pets regardless of their environments or tender caretakers. In analyzing a village ordinance banning ownership of pit bulls, the court in *Garcia v. Village of Tijeras* stated:

Other evidence tended to establish that the American Pit Bull Terrier is an exceptionally strong and athletic dog. Extraordinary measures are required for confining American Pit Bull Terriers, such as a six-foot chainlink fence with an overhanging ledge to keep the dogs from jumping out, and six-inch wide, one-foot deep concrete footings around the base to keep the dogs from digging under. They have exceptionally strong bites, possibly twice the strength of bites of other dogs. They can grip cyclone fencing and tear it from its mounting, and have been known to destroy sheet metal panels by ripping them apart with their teeth.

108 N.M. 116, 120, 767 P.2d 355, 359 (1988).

Contrary to Pit Bull Rescue, Zacher and Podhradsky's misrepresentation of the tendencies of pit bulls, the jury will be able to use their common sense and common experiences in determining the reasonableness of Pit Bull Rescue, Zacher and Podhradsky's conduct. Summary judgment is only appropriate if "reasonable

² The court in *Tracey*, 427 Md. 627, 50 A.3d 1075, modified common law and held that strict liability applied for pit bull attacks. The Legislature overturned the decision. Ridley is not asking the Court to impose strict liability on pit bulls or create breed specific liability.

people can draw but one conclusion from the facts and inferences.” *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 13, 714 N.W.2d 84, 88. “This occurs rarely.” *Id.* There is sufficient evidence that the jury could find that reasonable persons would not have brought a temporary rescue foster animal to a campsite, which was a completely new environment with new and unfamiliar caretakers, scents, people and animals. This is not the rare case that a jury should not have the right to determine the reasonableness of the actions of the dog owners and caregivers.

Zacher and Podhradsky cited several cases from other states regarding breed specific findings. (Zacher and Podhradsky’s Brief, p. 19). As noted in the footnote above, Ridley is not asking the Court to impose strict liability on pit bull owners. The discussion regarding the characteristics of a breed or kind is one part of the analysis to establish the contours of the reasonable person standard as noted in *Gehrts v. Batteen*, 2001 S.D. 10, 620 N.W.2d 775. In the dog bite cases that this Court has had the opportunity to rule on, this Court has noted the breed of dog. *See Warwick v. Mulvey*, 80 S.D. 511, 127 N.W.2d 433 (1964) (German Shepard); *Ross v. Hanson*, 86 S.D. 654, 200 N.W.2d 255 (1972) (Shepherd); *Gehrts*, 2001 S.D. 10, 620 N.W.2d 775 (St. Bernard); *Blaha v. Stuard*, 2002 S.D. 19, 640 N.W.2d 85 (Yellow Labrador); *Rowland*, 658 N.W.2d 76 (Akita). Ridley is asking the Court to continue to recognize that the breed of the dog matters in analyzing foreseeability of harm.

VI. *STEIN V. REGER* IS NOT PERSUASIVE.

Zacher and Podhradsky cite the unpublished decision from Court of Appeals of Texas, *Stein v. Reger*, 2016 WL 3162589 (Tex. App. June 2, 2016), in support of its

position that their conduct was reasonable. That case is not on point and has no precedential value. In that case, the dog was at home and being cared for by its owners when it jumped the fence. *Id.* The court found that the plaintiffs “did not present any evidence of foreseeability.” In this case, the record is replete with evidence to support foreseeability – a dog with an unknown history was being cared for by temporary handlers at its third location, a campground, in one week in violation of a two-week shutdown period.

VII. *ROWLAND* PROPERLY FRAMES THE QUESTION IN THIS CASE.

Zacher and Podhradsky argue that *Rowland v. Log Cabin, Inc.*, 2003 S.D. 20, 658 N.W.2d 76, does not apply to this case. *Rowland* is instructive because it properly frames the question that is presented in this case: whether a reasonably prudent person, acting as a temporary caregiver, would have realized that placing a dog bred for fighting with an unknown background in a public place creates an unreasonable risk of harm. The question was asked in *Rowland* whether a reasonably prudent person would allow a dog to roam free in an establishment. This Court reversed the trial court’s grant of summary judgment. As in *Rowland*, there is more than sufficient evidence in the record to support the claim that Pit Bull Rescue, Zacher and Podhradsky breached their duties when they brought the pit bull to its third location, a public campground, in a one week time period.

CONCLUSION

Because the trial court did not view the facts in the light most favorable to Ridley and acted as a factfinder, she respectfully requests that this Honorable Court

reverse the trial court's grant of summary judgment. As Ridley has demonstrated, genuine issues of material fact exist and the record provides evidence for the jury to determine that Pit Bull Rescue, Zacher and Podhradsky were negligent. As such, summary judgment was not appropriate in this case.

Dated this 10th day of January, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4253 words from the Reply Analysis through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

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