

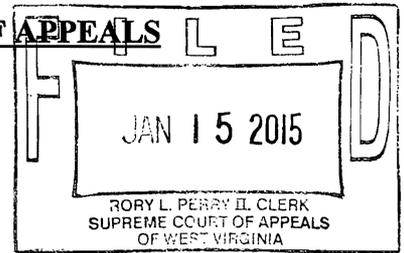
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

STATE OF WEST VIRGINIA,

Plaintiff/Respondent Herein,

v.

Case No.: 14-0757  
(Wayne County Circuit Court  
Nos.: 14-M-15 and 14-M-16)



MICHAEL BLATT and  
KIM BLATT,

Defendants/Petitioners Herein.

**PETITIONERS' REPLY BRIEF**

FILED BY:

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES. . . . .	3
ARGUMENT. . . . .	4
1.    The Respondent, Just Like the Circuit Court, Has Improperly and Incorrectly Attempted to Distinguish the Case of <i>Durham v. Jenkins</i> , 229 W.Va. 669, 735 S.E.2d 266 (2012). . . . .	4
2.    The Respondent and the Circuit Court of Wayne County, West Virginia, Have Elected to Ignore the Evidence as a Whole Which Clearly Fails to Prove that Tinkerbelle is Vicious, Dangerous and in the Habit of Biting People. . . . .	6
3.    Respondent’s Position Does Not Change the Fact that The Circuit Court of Wayne County, West Virginia’s Decisions Following the June 17, 2014 Criminal Hearing and June 30, 2014 Destruction Hearing Have Infringed Upon Petitioners’ Rights Under the United States Constitution and West Virginia Constitution and have subjected the Petitioners to “Double Jeopardy.” . . . .	9
CONCLUSION. . . . .	10
CERTIFICATE OF SERVICE . . . . .	12

**TABLE OF AUTHORITIES**

**STATUTORY LAW**

West Virginia Code §19-20-20. . . . . 4-5, 10

**CASE LAW**

*Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012). . . . . 4-5

*Kirkham v. Will*, 311 Ill.App. 3d. 787, 724 N.E.2d 1062 (2000). . . . . 8

*Nelson v. Lewis*, 36 Ill. App. 3d 130, 344 N.E.2d 268 (1976). . . . . 8

## ARGUMENT

### I. The Respondent, Just Like the Circuit Court, Has Improperly and Incorrectly Attempted to Distinguish the Case of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012).

As expected, the Respondent has latched onto the Circuit Court's attempt to distinguish the case of *Durham v. Jenkins*, 229 W.Va. 669, 735 S.E.2d 266 (2012). The language of West Virginia Code §19-20-20 is not in dispute in this matter as it has been precisely quoted by both Petitioners and Respondent. What is in question is the interpretation and evaluation of §19-20-20.

In further evaluation of this Court's holding in *Durham*, the entirety of the Court's reasoning was:

“Section 19-20-20 is not like § 19-20-18. Where § 19-20-18 deals with livestock, which is personal property, § 19-20-20 declares that it is a crime to own a dog that is a danger to people. Section 19-20-20, which is **entirely** criminal in nature, **only provides for the killing of a dog when it is first found that the dog's owner committed a crime described in the first sentence of the section**. During that criminal proceeding, upon finding that the dog is dangerous, which is an element of the crime to be proved, the judge may then order the dog killed. **For a magistrate or circuit court to obtain authority to order a dog killed, the magistrate or judge must first find, upon conducting a criminal proceeding, that a crime described in the first sentence of § 19-20-20 has been committed**. This Court holds that the authority to order a dog killed pursuant to W.Va. Code § 19-20-20 (1981), stems solely from a criminal proceeding, and a private cause of action may not be brought for the destruction of a dog under this section.” 735 S.E.2d at 270.  
(Emphasis added).

This language is unambiguous and without need for interpretation. The Respondent and the Circuit Court clearly and unequivocally attempted to avoid the clear precedential case law in *Durham* by attempting to argue the exact opposite as the ultimate

holding in *Durham*. It is without question that the holding in *Durham* **demands** that a dog can only be killed if the owner is convicted of a crime under § 19-20-20. In this case, neither Michael Blatt nor Kim Blatt were convicted of a crime under §19-20-20, and therefore, Tinkerbelle cannot be killed under the authority outlined in *Durham*. Astonishingly, the Respondent argues exactly the opposite and asserts that a dog can be killed even if the owner is not convicted. This premise is not found anywhere in *Durham*, is not a line of reasoning articulated by the Court, nor is it sound logic from the line of reasoning which is articulated by the Court in *Durham*. In fact, the Respondent has cited no law contrary to the clear holding in *Durham* other than to explore very generic “legislative purpose” arguments and to cite a dissenting opinion from the *Durham* case. West Virginia Courts are the appropriate forum for interpretation of statutes and laws and the *Durham* Court properly and correctly evaluated West Virginia Code §19-20-20. The majority holding in *Durham* is the controlling law in this matter and not the non-binding dissenting opinion.

Instead of relying on clear and unambiguous law, both the Circuit Court and the Respondent chose to ignore the applicable law and advance their own created “two-fold purpose,” one being criminal and one being “regulatory,” that simply does not and cannot exist given that this statute was previously deemed “entirely criminal in nature.” The fact remains, the *Durham* case is precedent and must be followed. Respondent has provided no new information or compelling arguments as to why the *Durham* case can be blatantly ignored in this matter. For these reasons and the reasons set forth in Petitioners’ Brief, the order for execution of Tinkerbelle is not appropriate as there was no finding that Mr. and/or Mrs. Blatt committed any crime under West Virginia Code §19-20-20, which is a prerequisite for a destruction order. Therefore, the

Court's Order of July 7, 2014, demanding the destruction of Tinkerbell was in error and must be overturned.

**II. The Respondent and the Circuit Court of Wayne County, West Virginia, Have Elected to Ignore the Evidence as a Whole Which Clearly Fails to Prove that Tinkerbell is Vicious, Dangerous and in the Habit of Biting People.**

In the Response Brief, the Respondent has “cherry picked” the testimony from Tara Smith, the mother of the minor child, Gregory Scott Iseli and Phillip Hickey to attempt to justify the Court's holding that Tinkerbell is “vicious, dangerous and/or in the habit of biting people.” In so doing, Respondent merely cites testimony of Tara Smith (or “Schmidt” depending on the portion of the transcript) regarding the injuries sustained by “L.L.” The Respondent has wholly and completely omitted (or intentionally ignored) the testimony of Ms. Smith as a whole. As pointed out in the Petitioner's Brief, Ms. Smith testified regarding her knowledge of Tinkerbell being present since at least August 2013, that there were no previous problems with Tinkerbell while her child was at the Blatt home and that her daughter had commented that Tinkerbell was “hyper” and would “jump on the kids and knock them over once in a while.” (See Appendix, Exhibit 10, pages 42-44). Also ignored was Ms. Smith's testimony that she was not worried about Tinkerbell while her children were playing at the Blatt home and that she had never heard anything about Tinkerbell being vicious, dangerous or biting people. (See Appendix, Exhibit 10, pages 44-45).

Although Mr. Iseli and Mr. Hickey testified regarding their “expertise” in identifying “pit bulls”, the Respondent wholly and completely ignores Mr. Iseli's testimony whereby he admitted that although he knew what “pit bulls” were like “normally,” he could not

testify as to Tinkerbell's specific disposition as he was never able to meet her. (Exhibit 10, p. 61). Although Mr. Iseli testified that "pit bulls" are "sometimes more aggressive," he could not state that all "pit bulls" are of this nature. (Exhibit 10, p. 63). Also ignored was Mr. Hickey's testimony that he observed Tinkerbell to be "mild demeaned" (Ex. 10, p. 70), did not appear to be aggressive (Ex. 10, p. 72), that there were no prior complaints regarding Tinkerbell and there were no problems with her at any time while she was quarantined at the animal shelter. (Ex. 10, p. 73). Even more compelling is Respondent's failure to consider Mr. Hickey's testimony that he could not consider the bite of Tinkerbell on "L.L." to be "aggression" because he was not there to witness the events of the bite. (Ex. 10, p. 74). The real telling sign regarding Tinkerbell's demeanor would be to consider the opinions of the shelter workers who have cared for her since her incarceration in July 2014, who have voiced their overwhelming praise for Tinkerbell and their desire to see her released. Given Tinkerbell's docile history and the complete lack of any prior or subsequent incidents clearly and unequivocally show that the incident in question was simply a one time unintentional accident.

Instead of relying on the specific facts of this case, the Respondent has merely elected to concentrate on the alleged breed of Tinkerbell. Regardless of whether Tinkerbell is a "pit bull," Doberman, Golden Retriever, Cocker Spaniel, Beagle or other breed of dog, the facts and evidence elicited at the bench trial and the destruction hearing simply do not support any conclusion that Tinkerbell is "vicious, dangerous or in the habit of biting persons."

Also of note, the Petitioners take issue with the Respondent's finding that this incident was "unprovoked." It does not appear that the West Virginia Supreme Court has ever addressed the issue of provocation in relation to dog bites. A review of other states' law brings

to light the case of *Kirkham v. Will*, 311 Ill.App.3d 787, 724 N.E.2d 1062 (Ill.App. 2000). Although the *Kirkham* case is civil in nature, the Court specifically addressed the issue of provocation. (A copy of *Kirkham* is attached hereto). The *Kirkham* case involved a lawsuit regarding injuries sustained as a result of a dog attack. The Court in *Kirkham* was called upon to address the issue of provocation in relation to dog bites. In so doing, the *Kirkham* Court noted that prior cases focused on provocation from the perspective of the animal and how an “average dog,” neither unusually aggressive nor unusually docile, would react to an alleged act of provocation. *Id* at 1067. The *Kirkham* case specifically cited *Nelson v. Lewis*, 36 Ill.App. 3d 130 at 131, 344 N.E.2d 268, 270 (1976) which involved a case where a two and a half year old accidentally stepped or fell on the tail of a dog that was chewing a bone. The dog reacted by scratching the child’s eye. The Court found that case did not involve a vicious attack that was out of proportion to the unintentional acts involving and that provocation existed. The *Nelson* Court also defined provocation as “an act or process of provoking, stimulation[,] or incitement.” *Kirkham* at 1065.

In the case at hand, the Respondent totally and completely ignores the facts of how this incident occurred and instead, relies solely on Tinkerbelle’s alleged breed to support that she is “vicious, dangerous or in the habit of biting persons.” The facts of this case clearly show that the injured child took a ball away from Tinkerbelle as she was playing. The child then held the ball over his head in either a game of “keep away” or to throw the ball for Tinkerbelle to retrieve. Tinkerbelle approached L.L. and jumped up for the ball, striking L.L. in the face and mouth area. (See Appendix Exhibit 11, page 19). Immediately after the incident, Tinkerbelle ran into the house and hid under a chair or barstools. (See Appendix Exhibit 11, page 29 and

Exhibit 10, page 113). These actions and the description of the incident are in no way indicative of a dog that is “vicious, dangerous or in the habit of biting persons.”

Respondent’s Brief does nothing more than show the intentions of the Respondent and the Circuit Court to ensure Tinkerbelle’s destruction based on nothing more than her alleged breed. There are no facts specific to this incident or to Tinkerbelle being “vicious, dangerous or in the habit of biting persons.” To the contrary, the facts taken as a whole and not limited to those relied upon by the Respondent, clearly show that this was a **one-time accident** that was in no way prompted by Tinkerbelle being inherently dangerous. Based upon the actual evidence of record as a whole, there are no facts that would support any finding that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting persons.” Therefore, Respondent’s theories and slanted factual recitations must be rejected and the order of euthanization of Tinkerbelle must be reversed as being a complete disregard of the evidence of record.

**III. Respondent’s Position Does Not Change the Fact that The Circuit Court of Wayne County, West Virginia’s Decisions Following the June 17, 2014 Criminal Hearing and June 30, 2014 Destruction Hearing Have Infringed Upon Petitioners’ Rights Under the United States Constitution and West Virginia Constitution and have subjected the Petitioners to “Double Jeopardy.”**

In response to Petitioners’ position, Respondent merely states the proposition that Petitioners were not subject to double jeopardy as the bench trial was regarding Petitioners keeping or harboring a dog known to them to be a dangerous or vicious dog and the “destruction hearing” was held in regard to whether such dog was in fact vicious, dangerous or in the habit of biting or attacking other persons.

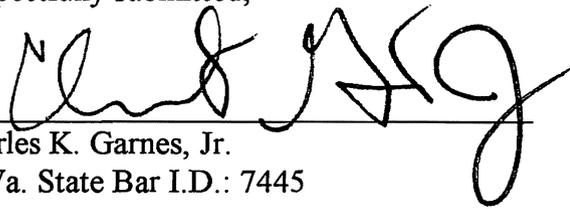
At no time during the bench trial of June 17, 2014 was Tinkerbelle found to be “vicious, dangerous or in the habit of biting persons.” Even though acquitted and there being no finding that Tinkerbelle was “vicious, dangerous or in the habit of biting persons,” the Petitioners were still yet subjected to a second duplicative trial under the exact same subsection which was described as a “destruction hearing” by the Circuit Court of Wayne County, West Virginia. Call it a “destruction hearing” or whatever you will, the fact of the matter is, this second “hearing” was nothing more than a violation of Petitioners’ rights under the United States and West Virginia Constitutions and has wrongfully subjected the Petitioners to double jeopardy.

Interestingly, the Respondent has completely failed to address the Circuit Court’s manipulation of West Virginia Code § 19-20-20 (a clearly criminal statute) by finding that part of the statute is criminal in nature and requires proof “beyond a reasonable doubt” and then rendering the decision on destruction subject to proof “by a preponderance of the evidence.” Again, this shift in evidentiary standard essentially shifted the burden of proof from the prosecution to prove that Tinkerbelle is “vicious,” “dangerous” or “in the habit of biting persons” to the Petitioners to prove that she is not. (See Appendix, Exhibit 9, pages 0069-0070). The Respondent failed to meet its burden and now attempts to hide behind the Circuit Court’s erroneous application of varying evidentiary standards under the same exact criminal statute as justification.

### **CONCLUSION**

For the reasons set forth herein and in Petitioners’ Brief, the Petitioners are entitled to relief from the Court’s July 7, 2014 Order which directed the destruction of Tinkerbelle and said Order must be reversed in whole.

Respectfully submitted,



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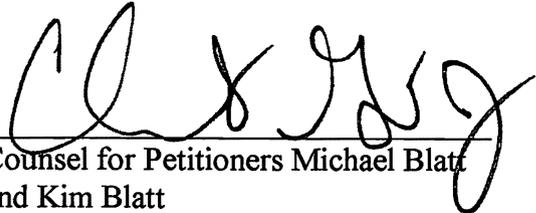
**CERTIFICATE OF SERVICE**

I, Charles K. Garnes, Jr., counsel for Petitioners, hereby certify that the foregoing *Petitioners' Reply Brief* has been served upon counsel of record by depositing the same in the United State Mail, postage prepaid, addressed as follows:

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724 N.E.2d 1062

311 Ill.App.3d 787, 724 N.E.2d 1062, 244 Ill.Dec. 174

(Cite as: 311 Ill.App.3d 787, 724 N.E.2d 1062, 244 Ill.Dec. 174)

▽

Appellate Court of Illinois,  
Fifth District.  
Mary KIRKHAM, Plaintiff-Appellant,  
v.  
Ron WILL and Jody Will, Defendants-Appellees.

No. 5-99-0019.

Feb. 16, 2000.

Victim of alleged dog bite sued owners of dog for injuries sustained. After initial grant of summary judgment to defendants was reversed on appeal, the Circuit Court, Effingham County, Richard H. Brummer, J., entered judgment on jury verdict for defendants, and denied plaintiff's posttrial motion. Plaintiff appealed. The Appellate Court, Maag, J., held that: (1) reasonableness of dog's response, rather than view of person provoking dog, is controlling factor in determining whether dog was provoked, so that owner is not liable under Animal Control Act for injuries caused by dog; (2) court's failure to define "provocation" in jury instruction was cured by its later response to jury inquiry, in which it defined term; and (3) court acted within its discretion by excluding testimony regarding dog's demeanor, and appearance of plaintiff's wounds.

Affirmed.

#### West Headnotes

[1] Appeal and Error 30 ↪ 969

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k969 k. Conduct of trial or hearing in general. Most Cited Cases

Trial 388 ↪ 228(1)

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k228 Form and Language

388k228(1) k. Form and arrangement. ~~Most Cited Cases~~

Decision whether to give a non-pattern instruction is within the discretion of the trial court, and will not be reversed absent a showing of abuse of discretion.

[2] Animals 28 ↪ 66.5(5)

28 Animals

28k66 Injuries to Persons

28k66.5 Dogs

28k66.5(5) k. Provocation. ~~Most Cited Cases~~

(Formerly 28k71)

In determining whether dog which inflicted injuries was provoked by victim, so that dog's owner is not liable for injuries sustained under Animal Control Act, it is not the view of the person provoking the dog that must be considered, but rather, the reasonableness of the dog's response to the action in question that actually determines whether provocation exists. S.H.A. 510 ILCS 5/16.

[3] Animals 28 ↪ 66.5(1)

28 Animals

28k66 Injuries to Persons

28k66.5 Dogs

28k66.5(1) k. Duties and liabilities in general. ~~Most Cited Cases~~

(Formerly 28k68)

Under Animal Control Act, owner of a dog is liable in damages for injuries sustained from any attack by the dog on a person who did not provoke the animal and who was peaceably conducting himself in a place where he may lawfully be. S.H.A. 510 ILCS 5/16.

[4] Trial 388 ↪ 296(4)

388 Trial

388VII Instructions to Jury

388VII(G) Construction and Operation

388k296 Error in Instructions Cured by Withdrawal or Giving Other Instructions

388k296(4) k. Contributory negligence. ~~Most Cited Cases~~

Deficiency resulting from failure of jury instruction in dog bite case to define "provocation," existence of which may operate under Animal Control Act to relieve dog's owner of liability for injuries caused by dog, was remedied by court's later instruction in response to jury inquiry, which accurately defined term. S.H.A. 510 ILCS 5/16.

[5] Animals 28 ↪ 66.5(5)

28 Animals

28k66 Injuries to Persons

28k66.5 Dogs

28k66.5(5) k. Provocation. ~~Most Cited Cases~~

(Formerly 28k71)

A dog's attack or injuring of victim is result of "provocation," as will operate under Animal Control Act to bar recovery for resulting injuries from dog's owner, when victim's action or activity, whether intentional or unintentional, would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence; standard takes into account both what a person would reasonably expect, and how a normal dog would react in similar circumstances. S.H.A. 510.I.L.C.S. 5/16.

[6] Evidence 157 ↪ 99

157 Evidence

157IV Admissibility in General

157IV(A) Facts in Issue and Relevant to Issues

157k99 k. Relevancy in general. ~~Most Cited Cases~~

Evidence 157 ↪ 143

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k143 k. Importance in general. ~~Most Cited Cases~~

Evidence should be admitted if it is material or relevant.

[7] Appeal and Error 30 ↪ 970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility of evidence in general. ~~Most Cited Cases~~

Evidence 157 ↪ 99

157 Evidence

157IV Admissibility in General

157IV(A) Facts in Issue and Relevant to Issues

157k99 k. Relevancy in general. ~~Most Cited Cases~~

Determination of what is relevant is a matter within the sound discretion of trial court, and that court's determination will not be disturbed on review absent an abuse of that discretion.

**[8] Evidence 157 ↪ 474(3)**

**157 Evidence**

**157XII Opinion Evidence**

**157XII(A) Conclusions and Opinions of Witnesses in General**

**157k474 Special Knowledge as to Subject-Matter**

**157k474(3) k. Bodily condition. Most Cited Cases**

**Trial 388 ↪ 56**

**388 Trial**

**388IV Reception of Evidence**

**388IV(A) Introduction, Offer, and Admission of Evidence in General**

**388k56 k. Cumulative evidence in general. Most Cited Cases**

Trial court acted within its discretion by excluding testimony regarding demeanor and disposition of dog, and appearance of puncture wounds on victim's leg, in dog bite case; nothing indicated that witness had adequate experience in observing dog bites to give him objective basis for determining that puncture wounds on victim's leg were consistent with a dog bite, and such testimony would have been cumulative of evidence regarding patient's medical history.

**[9] Trial 388 ↪ 49**

**388 Trial**

**388IV Reception of Evidence**

**388IV(A) Introduction, Offer, and Admission of Evidence in General**

**388k44 Offer of Proof**

**388k49 k. Rulings on offers. Most Cited Cases**

Trial court should rule on an offer of proof even though a ruling has been made on the same matter via a motion in limine.

**[10] Appeal and Error 30 ↪ 169**

**30 Appeal and Error**

**30V Presentation and Reservation in Lower Court of Grounds of Review**

**30V(A) Issues and Questions in Lower Court**

**30k169 k. Necessity of presentation in general. Most Cited Cases**

**Appeal and Error 30 ↪ 215(1)**

**30 Appeal and Error**

**30V Presentation and Reservation in Lower Court of Grounds of Review**

**30V(B) Objections and Motions, and Rulings Thereon**

**30k214 Instructions**

30k215 Objections in General

30k215(1) k. Necessity of objection in general. ~~Most Cited Cases~~

An instruction that is not objected to at trial, or an issue that is not raised, is waived on appeal.

~~[11]~~ Appeal and Error 30 ~~↪~~ 215(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k214 Instructions

30k215 Objections in General

30k215(1) k. Necessity of objection in general. ~~Most Cited Cases~~

Alleged error in jury instruction was waived for purposes of appeal, where objection initially raised to instruction was subsequently withdrawn.

~~\*\*1063 \*788 \*\*\*175 Fred Johnson, David Stevens, Heller, Holmes & Associates, P.C., Mattoon, for Appellant.~~

~~Gregory C. Ray, Kristine M. Tuttle, Craig & Craig, Mattoon, for Appellees.~~

Justice MAAG delivered the opinion of the court:

The plaintiff, Mary Kirkham, filed a complaint on November 7, 1996, against the defendants, Ron and Jody Will. Specifically, plaintiff claimed that on May 3, 1995, she was attacked and bitten by defendants' dog while she was lawfully on defendants' premises to purchase asparagus from Jody Will's mother, Evelyn Having, who lived next door to defendants. Plaintiff alleged that she was peacefully conducting herself when the attack occurred and that defendants' dog also caused her to trip and fall during the attack. Plaintiff claimed that as a direct and proximate result of the dog's bite and the fall, her ~~ankle was fractured~~, which required her to have surgery and be hospitalized. Plaintiff prayed for damages pursuant to the Animal Control Act (510 ILCS 5/16 (~~West 1994~~)), which states as follows:

"If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained."

On December 4, 1995, defendants filed an answer to plaintiff's complaint. Defendants denied liability. On January 17, 1997, defendants filed a motion for summary judgment, claiming that \*789 plaintiff was not lawfully on the premises at the time of the alleged attack because her blood alcohol level was in excess of 0.10. Defendants also claimed that since plaintiff did not have permission to be on their property and because she did not intend to be on defendants' property, she was trespassing. Subsequent to plaintiff's response and affidavit being filed, several motions to strike were also filed. Ultimately, the circuit court granted defendants' motion for summary judgment.

Plaintiff filed a notice of appeal on July 7, 1997. This court reversed the circuit court's order granting defendants' motion for summary judgment because a material ~~\*\*1064 \*\*\*176~~ issue of fact remained unresolved. *Kirkham v. Will*, 294 Ill.App.3d 1129,

~~242 Ill.Dec. 585, 721 N.E.2d 864 (1998) (unpublished order pursuant to Supreme Court Rule 23 (166 Ill.2d R. 23)).~~ In the prior appeal, the record showed that plaintiff was picking up the asparagus for Linda Shafer, Having's daughter and Jody Will's sister. Shafer told plaintiff that the asparagus would be in the gas grill and that plaintiff should take the asparagus and replace it with a \$10 bill. The gas grill was located at the back of Having's house, and Having knew that plaintiff was coming. Having shared a driveway with defendants, and their homes were adjacent to one another. The driveway was continuous; one end of it entered on Having's property and the other end of it entered on defendants' property. Plaintiff entered the driveway on defendants' property. Because the driveway was blocked by a parked truck, plaintiff exited her car, intending to walk to the gas grill to retrieve the asparagus. As she was walking up the driveway on defendants' property toward Having's house, plaintiff was attacked by defendants' dog. This court determined that plaintiff presented evidence that she entered defendants' property during daylight hours and for a lawful purpose, that is, to purchase asparagus from Having, who lived next door to and shared a driveway with defendants. Plaintiff presented evidence that she had used the driveway in the past to access Having's home, that she had been observed doing so by defendant Jody, and that defendants never objected. The driveway that plaintiff used, although partially on defendants' property, also led directly to Having's home and, according to plaintiff, was used by others to reach Having's home. Defendants presented no evidence to the contrary. Defendants attempted to escape liability by claiming that since plaintiff's blood alcohol level was above 0.10 at the time of the attack, she was not lawfully on the premises. This court held, however, that the Animal Control Act does not require that the plaintiff lawfully *arrive* at the place where she is injured. The Animal Control Act requires that the plaintiff lawfully *be* at that place. We determined that plaintiff presented evidence that she was using defendants' driveway during daylight hours, for a lawful purpose. The driveway \*790 provided access from a public way to Having's property. There was no evidence of any notice or warning to stay off defendants' property, nor was there any evidence that plaintiff committed any unlawful act upon defendants' property or caused any damage to defendants' property. We therefore reversed the summary judgment in favor of defendants and remanded this case for further proceedings.

A jury trial was held on November 2 and 4, 1998. The jury returned a verdict in favor of defendants, and the court entered judgment on the verdict. Plaintiff filed a posttrial motion on November 12, 1998. On December 22, 1998, plaintiff's posttrial motion was denied. Plaintiff filed a timely notice of appeal on January 6, 1999.

Plaintiff claims on appeal that the circuit court erred in instructing the jury on defendants' liability. More specifically, plaintiff claims that the circuit court erred in failing to use the tendered pattern jury instruction (~~Illinois Pattern Jury Instructions, Civil, No. 110.04~~ (3d ed. 1995) (IPI Civil 3d)), because the tendered instruction accurately stated the law in Illinois. Plaintiff claims that since the circuit court refused to use that instruction, this court must reverse the judgment of the circuit court and remand this case for a new trial.

The instruction at issue reads as follows:

"At the time of the occurrence there was in force in the State of Illinois a statute governing the responsibility of one owning, keeping or harboring a dog or other animal. That statute provides that [the owner of an animal] [a person keeping an animal] [a person harboring an animal] is liable in damages for injuries sustained from any attack or injury by the animal on a person peacefully conducting himself in a place where he may lawfully be [unless that person \*\*1065 knew of the presence of an animal and did something a reasonable person should have known would be likely to provoke an animal to attack or injure him] [unless that person \*\*\*177 knew of the presence of an animal and the unusual and dangerous nature of that animal and did something a reasonable person should have known would be likely to provoke an attack or injury by that animal]." ~~IPI Civil 3d No. 110.04.~~

As his proposed instruction number 9, plaintiff's counsel tendered a modified version of IPI Civil 3d No. 110.04 that omitted the bracketed material on provocation. Defense counsel first argued that the bracketed language on provocation should be included, and plaintiff's counsel agreed. After reviewing the IPI instruction more thoroughly, however, defense counsel argued that the IPI instruction was not an accurate statement of the law, even with the bracketed material, and that the IPI instruction should not be given. The circuit court agreed and refused the IPI instruction.

\*791 The instruction that was given, defendant's instruction number 7, reads as follows:

“At the time of this occurrence there was in force in the State of Illinois a statute governing the responsibility of one owning a dog. That statute provides that the owner of a dog is liable in damages for injuries sustained from any attack by the dog on a person who did not provoke the animal and who was peaceably conducting himself in a place where he may lawfully be.”

[1] Pursuant to ~~Supreme Court Rule 239 (179 Ill.2d R. 239)~~, “Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used *unless the court determines that it does not accurately state the law* \* \* \*.” (Emphasis added.) “The decision whether to give a non-IPI instruction is within the discretion of the trial court[ ] and will not be reversed absent a showing of abuse of discretion.” *People v. Hudson*, ~~157 Ill.2d 401, 446, 193 Ill.Dec. 128, 626 N.E.2d 161, 180 (1993)~~.

[2] The real question is whether the IPI instruction in this case accurately states the law in the State of Illinois. A review of the following decisions makes it clear that the language contained within the first bracket of the IPI instruction concerning provocation inaccurately states the law. The circuit court correctly refused the IPI instruction. The IPI instruction takes the view of a reasonable person. The courts have consistently pointed out that it is not the view of the person provoking the dog that must be considered, but rather it is the reasonableness of the dog's response to the action in question that actually determines whether provocation exists.

In *Nelson v. Lewis*, ~~36 Ill.App.3d 130, 131, 344 N.E.2d 268, 270 (1976)~~, the court defined provocation as “an act or process of provoking, stimulation[,] or incitement.” In *Nelson*, the 2 1/2 -year-old plaintiff accidentally stepped or fell on the tail of a dog that was chewing a bone. The dog reacted by scratching the plaintiff's eye. This court held that the case did not involve a vicious attack that was out of proportion to the unintentional acts involved and that provocation existed. The *Nelson* court concluded that an unintentional act can constitute provocation within the plain meaning of the statute. ~~36 Ill.App.3d at 131, 344 N.E.2d at 270-71~~. Provocation in this case was considered from the perspective of the “normal” dog, since it does not matter whether the acts that caused the provocation were unintentional or intentional.

In *Stehl v. Dose*, ~~83 Ill.App.3d 440, 38 Ill.Dec. 697, 403 N.E.2d 1301 (1980)~~, the plaintiff was attacked by the defendant's 100-pound German shepherd, \*792 which the defendant kept tied on a 25-foot chain. The defendant wanted to get rid of the dog because he was afraid that his young son \*\*1066 \*\*\*178 might get within the dog's reach. When the plaintiff heard about the defendant's dog, he offered to take the dog. The plaintiff was familiar with German shepherds and had been around them his whole life. The defendant's hired man, George, told the plaintiff that he could pick the dog up in the afternoon. The plaintiff brought a bag of food scraps for the dog and took the bag to a point three to four feet inside the perimeter of his chain. After petting and talking to the dog, the plaintiff turned his head to go find a rope and the dog attacked, sinking his fangs into the plaintiff's right forearm. The plaintiff had to endure extensive medical treatment. The jury returned a verdict in favor of the defendant. On appeal, this court stated that the issue in the case was whether it was provocation for the plaintiff, acting in a

peaceable manner, to cross the perimeter of the dog's chain. The court also focused on the fact that the plaintiff entered the territory that the dog was protecting and remained within the dog's reach while he was eating. Because the court determined that the answer to the question was for the jury to determine, it could not find that the verdict was contrary to the manifest weight of the evidence. The court did state, however, that the question of what conduct constitutes provocation is primarily a question of whether the plaintiff's actions would be provocative *to the dog*. Thus, the court determined that neither the fact that the plaintiff had the owner's permission to approach the dog nor the fact that the plaintiff was conducting himself in a manner approved by the hired hand was a matter bearing on the issue of provocation. Stehl, 83 Ill.App.3d at 443, 38 Ill.Dec. 697, 403 N.E.2d at 1303.

In Robinson v. Meadows, 203 Ill.App.3d 706, 713, 148 Ill.Dec. 805, 561 N.E.2d 111, 115 (1990), the four-year-old plaintiff began screaming when the defendant's dog began barking. The dog responded by attacking the plaintiff viciously, tearing her lip and inflicting puncture wounds and scratches on her face, neck, and throat. This court determined that, while the plaintiff's scream triggered the dog's attack on her, that scream could not be regarded "under any reasonable standard" as having been sufficient to account for the savagery of the dog's assault. Thus, no provocation existed. The court, in making this statement, appears to suggest that the dog reacted in an unreasonable manner to the child's screams.

In Smith v. Pitchford, 219 Ill.App.3d 152, 161 Ill.Dec. 767, 579 N.E.2d 24 (1991), the eight-year-old plaintiff approached the defendant's home with another friend. They called out to the defendant and asked if her daughter, whom they had played with at the defendant's home on prior occasions, was home. The defendant's dog approached the plaintiff. The \*793 plaintiff said, "Hi Roscoe." The plaintiff had met the dog on a prior occasion. After petting the dog for approximately 30 seconds, the plaintiff looked down at the dog, at which time the dog jumped up and bit the plaintiff in the face. The *Smith* court stated that mere presence on private property does not constitute provocation regardless of how the animal might interpret the visitor's movements. "Provocation cannot be said to exist within the meaning of section 16 of the Animal Control Act [citation] where such unintentional stimuli as greeting or petting a dog result in the dog attacking the plaintiff viciously and the attack is 'out of all proportion to the unintentional acts involved.'" Smith, 219 Ill.App.3d at 154, 161 Ill.Dec. 767, 579 N.E.2d at 26, quoting Robinson v. Meadows, 203 Ill.App.3d 706, 713, 148 Ill.Dec. 805, 561 N.E.2d 111, 115 (1990). The *Smith* court is setting forth a "reasonable dog" standard. In other words, a "normal" dog would not be provoked by one's mere presence on private property. See Smith, 219 Ill.App.3d at 154, 161 Ill.Dec. 767, 579 N.E.2d at 26.

In Wade v. Rich, 249 Ill.App.3d 581, 188 Ill.Dec. 744, 618 N.E.2d 1314 (1993), the 18-month-old plaintiff accidentally fell onto the middle of a dog that was sleeping in the sun. The dog responded by repeatedly biting the plaintiff on and about \*\*1067 \*\*\*179 the head and face, resulting in seven lacerations, the largest one being four to five inches long. The plaintiff required a total of 23 stitches. The *Wade* court noted that where the acts that stimulated or excited the dog were unintentional, no provocation can be said to exist within the meaning of the statute if the acts cause the dog to attack the plaintiff viciously and the vicious attack is out of all proportion to the unintentional acts involved. Again, it appears that the court is looking at how a "normal" dog would react to someone falling on it while it is sleeping. If the dog's attack is out of proportion to the unintentional acts, no provocation exists. See Wade, 249 Ill.App.3d at 589, 188 Ill.Dec. 744, 618 N.E.2d at 1320.

In VonBehren v. Bradley, 266 Ill.App.3d 446, 203 Ill.Dec. 744, 640 N.E.2d 664 (1994), the two-year-old plaintiff pulled the dog's tail and ears and hit the dog several times in order to get a bird out of its mouth. The dog bit the plaintiff in the face. This court held that a dog owner has no common law duty to control the dog's response to acts of provocation directed toward it. The court stated that since provocation is measured solely from the perspective of the *animal*, the evidence showed that the striking of the dog and the plaintiff's attempts to remove the bird from its mouth constituted provocation and not contributory negligence. Hence, no breach of the defendant's duty occurred. VonBehren, 266 Ill.App.3d at 450, 203 Ill.Dec. 744, 640 N.E.2d at 667.

These cases demonstrate that previous courts have focused on provocation from the perspective of the animal. The cases tend to \*794 focus on how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation. Hence, we believe that the trial court correctly refused the IPI instruction tendered by plaintiff. With respect to the language in the second bracket, we express no view. This case does not involve an animal known to have an “unusual and dangerous nature.”

[3][4] We further believe that the court did not abuse its discretion by giving defendants' tendered instruction number 7 instead. Defendants' instruction number 7 is a correct statement of the law. However, it is incomplete because it fails to define provocation. This deficiency was remedied, as we will explain, when later the court further instructed the jury in response to an inquiry.

Next, plaintiff claims that the circuit court erred in defining the term “provocation” for the jury using a “reasonable dog” standard and that this court must reverse the judgment of the circuit court and remand this cause for a new trial.

[5] During deliberations, the jury returned a note to the circuit judge. The note read as follows: “We need a definition of Provoke. Need a legal definition. Foremen [*sic*].” The circuit judge returned a note to the jurors that read as follows: “When I use the phrase [‘]to provoke[‘] or the word [‘]provocation,[‘] I mean any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence.” This definition is accurate in light of our prior analysis. We note that the definition takes into account what a person would “reasonably expect,” and it also takes into account how a normal dog would react in similar circumstances. We believe that in future cases of this type, this definition of provocation should be given as part of the instructions to the jury. Once again we must emphasize that we are expressing no view on what instruction is proper when the case involves an animal known to have an unusual and dangerous nature.

Plaintiff also argues on appeal that the instruction was an inaccurate statement of the law because it did not include a reference to liability for a dog that “injures” a person but only referred to liability for a dog that “attacks” a person.

\*\*1068 \*\*\*180 A review of the complaint in the instant case shows that in paragraph 5 plaintiff alleged that “the dog of the Defendants *attacked* the Plaintiff without provocation, bit her[,] and caused her to trip and fall.” (Emphasis added.) Plaintiff even testified at trial, “I took about two steps and the dog *attacked*.” (Emphasis added.) Hence, the instruction was consistent with the pleadings and the testimony given at trial. In an appropriate case, the word “injure” may be substituted for the word “attack” if the facts justify the use of that term.

\*795 Plaintiff also claims that the circuit court erred in refusing to allow testimony regarding the demeanor of the dog, its propensity to attack, and the consistency of the puncture marks with those left by a dog.

The circuit court initially granted, in part, defendants' first motion *in limine* barring Dan Overbeck's testimony regarding the appearance of the puncture wounds on Mary's leg and the demeanor and disposition of the dog. Plaintiff's counsel made an offer of proof that established that Overbeck was familiar with the dog as of the date of the occurrence. Overbeck stated that he was afraid of the dog due to its aggressive behavior. He admitted, however, that he was, in general, fearful of dogs “more so than the average person.” Overbeck believed that the dog was likely to bite someone. He agreed that the puncture wounds on Mary's ankle were consistent with the marks that would be left by a dog; however, he also agreed that the wounds were

consistent with a puncture that could occur from a small branch or twig being stuck in the side of one's ankle. Overbeck agreed on redirect examination during the offer of proof that his opinion was not based solely on his fear of dogs but was based upon a comparison of this dog to other dogs in general.

~~[6][7]~~ Evidence should be admitted if it is material or relevant. See *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill.App.3d 94, 108, 199 Ill.Dec. 609, 634 N.E.2d 448, 459 (1994). The determination of what is relevant is a matter within the sound discretion of the trial court, and that court's determination will not be disturbed on review absent an abuse of that discretion. See *Hartman v. Pittsburgh Corning Corp.*, 261 Ill.App.3d 706, 723, 199 Ill.Dec. 779, 634 N.E.2d 1133, 1145 (1994).

[8] A review of the record shows that plaintiff failed to present any evidence that Overbeck had adequate experience in observing dog bites in order for him to give him an objective basis for determining that the puncture wounds on plaintiff's leg were consistent with a dog bite. Moreover, we note that Overbeck's testimony that the puncture wounds on plaintiff's leg were consistent with a dog bite would have been cumulative to Dr. Timothy Gray's reading of plaintiff's medical history, which stated that plaintiff "was bitten by a dog on the left ankle." We find no abuse of discretion in the court's ruling. Any error was harmless at most.

[9] We note parenthetically that plaintiff claims that the circuit court abused its discretion in failing to rule on the offer of proof. Although we agree with plaintiff that the circuit court should have made a final ruling on the offer of proof, it is clear from the record that the trial judge heard nothing during the offer of proof that prompted him to change his mind. The circuit court rejected the offer of proof as the \*796 record does not indicate that the jury received evidence or heard argument based on the offer of proof. For future guidance to the circuit courts, we urge the court to rule on an offer of proof even though a ruling has been made on the same matter via a motion *in limine*. See *Ely v. National Super Markets, Inc.*, 149 Ill.App.3d 752, 760, 102 Ill.Dec. 498, 500 N.E.2d 120, 126 (1986).

Finally, plaintiff claims that the circuit court erred in giving defendants' instruction number 5 regarding plaintiff's burden of proof. Specifically, plaintiff claims that the question of whether plaintiff was "lawfully on defendants' property" is a question of law, which should have been determined by the circuit court rather than the jury.

**\*\*1069 \*\*\*181** The relevant portion of instruction number 5 is as follows: "The plaintiff has the burden of proving each of the following propositions: First, that the plaintiff was lawfully on the defendants' property \* \* \*." The court refused both parties' tendered definitional instructions and gave the following as the court's instruction number 1:

"When I use the term 'lawfully on the defendants' property' or 'where he may lawfully be', I mean that the plaintiff was in a location that is consistent with the reasonably expected use of that location, even if the plaintiff was not given permission by the defendants to be at that location. In the absence of such permission, a person may lawfully be on the property if he is there for a lawful purpose during daylight hours, he is using a path, walkway, or driveway to gain access, and there is no sign or warning to 'stay off.' Whether the plaintiff was lawfully where she claims to have been attacked by defendants' dog is for you to decide."

[10][11] We note that plaintiff's counsel withdrew his objection to the court's instruction number 1. An instruction that is not objected to at trial or an issue that is not raised is waived on appeal. See *Konieczny v. Kamin Builders, Inc.*, 304 Ill.App.3d 131, 136, 237 Ill.Dec. 440, 709 N.E.2d 695, 699 (1999). We express no view on the propriety of the instruction or the issue framed. This issue is waived.