69103-1

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No. 69103-1

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

MARGARET l. BRISCOE,

Appellant

v.

RANDALL LAMONICUS McWILLIAMS, LEVITICUS JADE McWILLIAMS, ELIZABETH ANN ROWLAND, and VICTOR GREER,

Respondent

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF CASE

Appellant Margaret Briscoe (Margaret) was asked by her nephew, Victor Greer, to inspect and confirm that Greer's townhouse rented to Respondent Randall McWilliams (Randall), had been vacated as reported by Randall to Greer. When she entered the premises, she had no reason to suspect that she would be attacked and mauled by a pit-bull, Jersey, owned by McWilliams' brother Leviticus (Levi) who was then staying and working on the premises in Randall's employment

Margaret sued Randall on a number of theories, three of which are before this Court:

1. Respondeat superior, claiming that Levi was acting within the scope of his employment as the agent for Randall when he left the townhouse he was cleaning to obtain additional cleaning supplies, leaving his guard dog Jersey unleashed inside the townhouse. Complaint ¶ 18. (CP 4.)
2. Premises liability, claiming that both Randall and his agent/employee had created an unsafe condition on the premises, to wit, the presence of a pit-bull free to roam inside the house where it was foreseeable that a business or social

invitee, such as Margaret, might access the premises and be injured. Complaint ¶ 15 and ¶ 16. (CP 3-4.)

3. Negligent Entrustment, claiming Randall was negligent in entrusting the control of his premises to his brother, a person who was homeless and whose near constant companion was a pit-bull. Complaint ¶ 17. (CP 4.)

Randall moved for summary judgment solely on the theory that there were no issues of triable fact showing any negligence on the part of Randall. However, the defendant did not make any attempt to establish that there were no genuine issues of material fact as to whether Levi was acting with the scope of his employment for Randall when he left the premises to obtain more cleaning supplies without placing Jersey on a leash or otherwise restraining him. Nor did the motion make any attempt to establish that there were no facts upon which Plaintiff could prevail on her premises liability theory, i.e., that Randall knew or should have known of an unsafe condition on his premises (a pit bull) or that his agent, Levi, had himself created that unsafe condition. Randall's motion therefore did not comply with CR 56 and should have been denied on that reason. Randall's principal argument for summary judgment was that only the owner, keeper, or harborer of the pit bull could be held liable for Margaret's injuries and that because Randall did not own Jersey and did

not specifically authorize Levi to bring Jersey to the premises, he could not be held liable under any theory. See Defendant's Motion for Summary Judgment (CP 44-51). The trial court granted summary judgment dismissing the claims against Randall with prejudice. It erred in doing so, in part because material issues of fact existed on those three theories of liability, and in part because Randall had not met his burden of proof of establishing there were no genuine issues of material fact on the "scope of employment" and "premises liability" allegations of Plaintiff's claims.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in granting summary judgment where there were several viable legal theories of liability and where liability turned on disputed facts and Randall's credibility.

Answer: Yes. CR 56 should not be used as a vehicle to deny a litigant their day in court where the culpability of the Respondent depends upon what he knew or reasonably should have known.

2. Did the trial court err in granting summary judgment as to a specific legal theory (premises liability) that was properly plead where the moving party did not even attempt to establish that there were no facts upon which a reasonable jury could conclude that Randall knew or should have known of a dangerous condition on his premises, including one that was created by his agent Levi when he left his pit-bull unattended.

Answer: Yes. Under CR 56 the moving party has the burden of establishing that there are no genuine issues of material fact in support of a particular legal theory before any burden shifts to the responding party.

3. Did the trial court err in granting summary judgment on Margaret's respondeat superior theory where it was undisputed that Levi was employed by Randall and left the premises to get cleaning supplies but there were disputed facts as to whether Levi

was acting within the scope of his employment in bringing the guard dog Jersey onto the premises and leaving Jersey unattended in going on that errand?

Answer: Yes. Randall, as employer, can be held liable for Margaret's injuries because there are genuine issues of material fact as to whether Levi was serving his master by leaving the guard dog to guard to premises while he left to obtain supplies to clean the townhouse.

4. Assuming that the motion for summary judgment was directed to Margaret's premises liability theory, did the trial court err in granting summary judgment as to that theory where Randall's agent, Levi, created a unsafe condition on the premises by leaving Jersey unattended and unleashed when he went to get cleaning supplies?

Answer: Yes: there are disputed facts as to whether Levi as an agent of Randall rendered Randall liable as the principal for injuries to a social invitee for Levi's creation of an unsafe condition on the premises.

5. Did the trial court err in granting summary judgment on Margaret's negligent entrustment theory where it was undisputed that Randall turned control of the rented premises to his brother, Levi, knowing that he was homeless and likely to bring his pit bull with him to the premises when he cleaned the premises on Randall's behalf?

Answer: Yes. Randall, was aware that his brother was homeless and that his brother was responsible for and usually had with him, his pit bull dog and thus there are genuine issues of material fact as to whether Randall was negligent in leaving the premises under his brother's control in such circumstances knowing that persons might be lawfully coming to the premises and thus that it was foreseeable that such persons might be injured.

III. STATEMENT OF THE CASE

Margaret Briscoe is the aunt of Victor Greer, although she raised him as her own son. CP 81, 84. In October 2007, Victor purchased a townhouse at 1924 14th Avenue South on Beacon Hill and lived in it until

taking a job in Los Angeles early in October 2008. CP 81, 84-85. Since the real estate market was so bad at that time, Victor agreed to rent the townhouse to his longtime friend, Appellant Randall McWilliams. (hereafter Randall). CP 81, 85. They entered a month to month lease that began in March 2009, and prohibited pets. CP 85, 93. Randall was aware that his brother, Defendant Leviticus McWilliams (hereafter "Levi") would come over on occasions and bring Jersey with him. CP 110, 111. Jersey could pretty much run free on the first (main) floor. CP 111-112, 113. Jersey would be kept separated if there were other people around. CP 111. It was likely that Jersey had spent the night with Levi at the townhouse. CP 114. Randall knew that Jersey was a pit bull and that pit bulls are guard dogs. CP 92-93.

In the spring of 2010, Victor decided he would try to sell the townhouse. CP 85. Victor listed the townhouse with a realty company and made Randall aware that realtors would bring prospective buyers to the townhouse and that a lockbox would be placed upon the front door to permit entry for that purpose. CP 85, 95.

In late June or early July 2010, Randall notified Victor that he would be vacating the premises by July 15 2010. CP 85. By that time Randall had become slow on paying the rent, and was behind for June, so his moving out by July 15 was fine with Victor. CP 85. Victor would be

selling the townhouse as a short sale "as is". CP 85. He wanted Randall and Randall's property out, with the items Victor had left at the townhouse being left for Victor. CP 85.

Randall hired his brother, Levi, to clean the townhouse and to remove Randall's property. CP 94. Randall was to pay Levi $300. CP 94-95. While Randall was in California, he paid Levi on Friday July 16, when he was advised by Levi that the job would be completed that night, by depositing the funds in defendant Elizabeth (Liz) Rowland's bank account. CP 95. On Friday, July 16, 2010, Randall was in Los Angeles and contacted Victor and told him that the premises had been vacated. CP 85-86, 99. Randall and Victor agreed that since Victor was out as of July 16, rent for that month would be $750 and Randall understood that the longer he was in the townhouse, the more rent he would have owed. CP 97. Although Randall told Victor that the premises were vacated he in fact knew that Levi had not finished and Randall anticipated that Levi would probably return to the premises to conclude cleaning, but the majority of the work was done. CP 96.

Later that same day, Victor called Margaret to request that she go to the town house the next day (Saturday, July 17), to see if in fact Randall was moved out and if Victor's few possessions remained. CP 82, 86.

Margaret went to the property on the morning of July 17, 2010, and entered the front door of the townhouse and was immediately attacked by the pit bull guard dog Jersey which tore large chunks of tissue from each of her legs. CP 82. She spent 2½ weeks in the Harborview Medical Burn Center being treated for those wounds including multiple skin graft surgeries. CP (*Ibid).* As of July 17, the townhouse was neither clean nor vacant as is depicted by the photographs taken by the police the day of the attack. CP 104-106.

Jersey, the pit bull that attacked Margaret was owned by Randall's brother Levi and Liz, Levi's partner of six years and the mother of his child. CP 108, 114. Randall knew that Levi and Jersey were pretty much inseparable. CP 102, 114. Earlier in Randall's tenancy of the townhouse, Liz had performed contract work there for Randall five mornings a week and Levi would sometimes come over with Jersey and Randall had no rule against Jersey being there. CP 110, 111. Randall, when he heard of the attack on Margaret at the townhouse by a dog, immediately knew it must have been Jersey. CP 97-98. Randall and Levi were close, and, among other things, had lived together in Southwest Seattle along with Liz and Jersey. CP 92, 99, 108, 120-121. Randall and Levi had owned a business together, RDL Technical, LLC. CP 122.

In July 2010, Levi was homeless and staying on friends' couches and he had Jersey with him. CP 101. Levi claims to have spent only one night at the townhouse while he was doing the cleaning. CP 101. Randall knew his brother was homeless. CP 87, 113. Randall knew that Jersey needed to be isolated when strangers were around. CP 90, 111.

Randall and Liz testified that Levi left the dog there while Levi went to get some cleaning supplies. CP 98, 113. While Randall asserts that he did not grant Levi permission to bring the dog to the premises (CP 76), there is no evidence that he ever prohibited Levi from bringing the dog and as noted above he had allowed Levi to bring Jersey there. CP 110, 111. Levi testified that he relied upon what Randall told him for his belief that no one would be coming to the townhouse. CP 102. And Levi testified that if Randall had told him that someone might come over, Levi would have taken Jersey with him or would tied the dog up while he was out. CP 102-103.

IV. SUMMARY OF PLEADINGS BELOW

The Complaint was filed on April 18, 2011, and alleged as theories of liability against Randall the following: (1) two claims of negligence related to dangerous condition on the premises (Complaint ¶ 15 and ¶ 16, CP 3-4); (2) a claim of negligent entrustment of the premises (Complaint ¶ 17, CP 4); (3) agency liability alleging that Randall was responsible for

the acts of Levi, the agent he hired to clean the premises and remove his property (Complaint ¶ 18, CP 4); (4) violation of the lease which prohibited pets from the premises (CP 4); and (5) third party beneficiary of the lease (CP 4). By order of the trial court on July 22, 2011, the court granted Randall's Motion to Dismiss as to third party beneficiary (and by implication violation of the lease) and denied the motion as to (1) negligence and (2) agency theories of liability. CP 42-43.

On March 13, 2012, Randall brought a motion for summary judgment which argued that there were no genuine issues of material fact on Margaret's negligence/agency theory. The motion did not specifically seek summary judgment on Margaret's theories of liability for premises liability or agency/respondeat superior that were clearly alleged in the Complaint. CP 44-51. It did not, for instance, argue that there were no genuine issues of material fact that Levi acted within the scope of his employment in leaving the premises to purchase cleaning supplies without restraining Jersey. Nor did the motion address Plaintiff's claim that Randall, as the person in control of the premises, was liable because he knew or should have known of an unsafe condition on the premises, nor that Levi, as Randall's sub-contractor and agent, had created that unsafe condition by leaving Jersey unrestrained. As such, the motion should have been denied without even requiring Margaret to respond. Despite failing

to meet his burden of proof under CR 56 and the controlling case law cited below, Randall was granted summary judgment against Margaret on all theories, including premises liability and respondeat superior. This was reversible error.

V. FACTS AND INFERENCES

The following are facts as set forth above and reasonable inferences therefrom that a jury could draw to find liability on Randall's part.

FACT	REASONABLE INFERENCE
1. Randall hired Levi to clean the townhouse and to remove Randall's property while Randall was in California agreeing to pay Levi $300.00. CP 94-95.	Levi was employed by Randall at the premises and was acting as the agent/employee of Randall while working at the premises.
2. Randall had previously lived for 6-8 months with his brother Levi, Levi's longtime partner, Liz, and their pit bull, Jersey. CP 92. He was aware that Jersey was a pit bull, that pit bulls are guard dogs. CP 92-93. And he was aware that Jersey was not safe to be around persons the dog was not familiar with, and needed to be isolated from them. CP 90, 109. Randall was aware in July 2010 that his brother, Levi, was homeless, unemployed, staying on friends' couches and Jersey was with him. CP 87, 94, 101, 113. Levi had a history of not holding jobs. CP 87. Randall was	Randall gave Levi, a person of questionable trustworthiness, access and free reign to the townhouse while Randall was going to be out of town in California knowing that Levi needed a place to stay and without regard to the possibility that Jersey, the pit bull dog, was likely to be with him.

also aware that where Levi went, Jersey likely went. CP 87, 102, 114. And Randall had allowed Levi and Jersey to be at the townhouse despite pets being prohibited. CP 110, 111-113. Levi with Jersey had stayed at least one night while he was working for Randall to clean the premises. CP 101.	
3. Randall would owe more rent the longer he was in the premises and he told Victor that he had vacated as of the evening of July 16. CP 93-94, 97. Yet he testified that Levi was still working there and completion on July 16 was an assumption on his part and that he thought it likely that Levi would have to go back to the premises. CP 96, 99.	It was in Randall's monetary interest to lead Victor to believe he was out of the premises sooner rather than later. Thus, Randall should have confirmed that his brother, Levi, had completed the job before he reported to Victor that the premises would be vacated the night of July 16, 2010. Had he checked with Levi he would have known that in fact the premises were not vacated that night and he could have so advised Victor who would not have requested Margaret to go and check on the premises the next day.
4. Randall told Victor on July 16, 2010, that he had cleared out of the townhouse. CP 85-86, 97, 99. Yet Randall knew that Levi might well go back for cleaning supplies. CP 96.	In reliance upon the information provided by Randall on July 16, there was no reason for Victor to believe or even suspect that anyone, much less a pit bull, would be at his townhouse when he asked Margaret, his aunt, to go over the next day and see if in fact the premises had been vacated and his property left for him. Likewise, there was no reason for Victor or Margaret to give any notice that Margaret would be coming to the premises on July 17, since both expected the premises to be vacant.
5. Randall led Levi to believe that while he was working there cleaning, no one would be coming to the property. CP 102. Had he	It was clearly forseeable to Randall that persons might come to the property was still for sale and accessible via the lockbox and he

been advised that there might be people coming, Levi would have either made other arrangements for Jersey or kept him tied up. CP 103.	especially could have foreseen that Victor might send someone to check on the premises once Randall reported to Victor that they were vacated.
6. On July 17, Levi needed cleaning supplies to complete the job, and left to get them leaving his pit bull Jersey at the townhouse. CP 98, 113. Jersey was a guard dog and would be expected to protect the property from persons he did not know. CP 92-93.	By leaving to obtain supplies, and by leaving a guard dog on the premises, Levi was acting in the interests of his employer Randall. He also created an unsafe condition on those premises as Randall's sub-contractor and agent.
7. A person, the Appellant, came to the property lawfully on July 17, and was viciously attacked by Jersey. CP 82. She was invited to come on to the premises by the owner to inspect after Randy told the owner the premises were vacated. CP 84-86.	Even if Levi had been at the townhouse when Margaret came, she would have let herself in thinking no one was there because Randall had reported the premises as vacated and it is fair to conclude that she would have still been attacked by Jersey.
8. Randall knew immediately when he learned of the dog attack on Margaret at the premises that it must have been done by Jersey. CP 97-98.	It was no surprise to Randall that Jersey was the dog that attacked Margaret at the premises because he knew that "where Levi went, Jersey went." So it was foreseeable to Randall that Jersey would be accompanying Levi when he was working for Randall at the premises.

These are not the only facts of importance to this Court's review nor are these the only inferences that a jury could reasonably draw that would allow for a jury verdict for Margaret. But as noted in the Argument, immediately below, where the credibility of the party motioning for summary judgment, here Randall, is of ultimate importance

in determining his culpability or non-culpability, that decision is best left for a jury. Here not only is Randall's credibility at issue, but the undisputed fact of Levi's employment by Randall, the fact he left to obtaining supplies, and the fact he left Jersey unrestrained and thus created an unsafe condition on the premises, fully support the liability of Randall. The trial court erred in deciding these factual issues itself rather than allowing this evidence to go to the jury.

VI. LEGAL ARGUMENT

A. Respondent Failed to Meet His Burden of Establishing He is Entitled to Summary Judgment. (Assignment #1)

In *Riley v. Andres*, 107 Wn.App. 391, 27 P.3d 618 (2001) the court stated:

> We review a summary judgment de novo, engaging in the same inquiry as the trial court. *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson,* 98 Wash. 2d at 437, 656 P.2d 1030. We construe the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Wilson,* 98 Wash. 2d at 437, 656 P.2d 1030. And where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. *See Michigan Nat. Bank v. Olson,* 44 Wash.App. 898, 905, 723 P.2d 438 (1986). In such cases, "it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying." *Olson,* 44 Wash.App. at 905, 723 P.2d 438 (quoting *Felsman v. Kessler,* 2 Wash.App. 493, 496-97, 468 P.2d 691 (1970)). (Emphasis added.)

In the instant case, the credibility of Randall McWilliams as to what he knew or should have known as a reasonable person will fail or succeed based almost totally upon his explanation as to what he knew about his brother and the pit bull and based upon his demeanor on the witness stand. Moreover, as more fully explained below, there are many genuine issues of material fact on Margaret's agency, negligence, respondeat superior and premises liability theories which make summary adjudication of this claim inappropriate. Under the Washington State Constitution a civil jury, not a judge, is the proper institution to resolve such disputes. *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (Wash. 1989) (holding right to jury trial in civil cases in "inviolate.").

B. The Trial Court Had Previously Ruled That RCW 16.08.040 Is Not The Sole Basis Of Liability When A Dog Bites A Person. (Assignment #2)

Randall's principal argument in support of his motion for summary judgment, below, was that under Washington law, specifically RCW 16.08.040, "only" a dog owner may be held liable for a dog bite, and since Randall McWilliams did not own Jersey, he is not liable. Randall asserted this as the only issue for summary adjudication, but clearly this assertion is wrong. This very same argument was the basis of the Randall's Motion to Dismiss filed at the outset of the litigation below. Margaret opposed

this motion on the grounds that the remedy and cause of action contained in RCW 16.08.040 does not limit her recovery to an action against the owner of the dog that bit her. The trial court denied the defense motion to dismiss. CP 42-43. Nothing of consequence changed since that ruling was entered. This Court should likewise reject this same argument. It was merely clothed in the garb of summary judgment but woven of the same cloth. This Court can take judicial notice of the $2.2 million dollar verdict last summer against both a dog owner and Pierce County. CP 123. Clearly Pierce County was not the owner of the dog that attacked that plaintiff.

There are several theories of liability upon which Margaret can prevail at trial as is detailed in this brief.

C. Respondent Made No Effort to Meet His Burden to Show that Levi McWilliams Was Acting Outside the Scope of His Employment When He Left the Pit Bull Unattended. (Respondeat Superior/Agency Liability). (Assignment #3)

On summary judgment, the party moving for summary judgment bears the burden of demonstrating an absence of a genuine issue of material fact with all reasonable inferences resolved in favor of the non-moving party. See CR 56 and *Young v. Key Pharmaceuticals,* Inc., 112 Wn.2d 216, 225, 770 P. 2d 182 (1989). Randall's motion made no attempt

to meet this burden as to Margaret's respondeat superior theory, i.e., that Levi was acting within the scope of his employment for Randall McWilliams and that therefore Randall is liable for Levi's action under the doctrine of respondeat superior. Nor, as is explained below, did he specifically address in his motion for summary judgment the facts related to Margaret's premises liability theory.

The doctrine of "let the master answer" holds that an employer is liable for the negligent acts of its employees that are "within the scope or course of employment." *Dickinson v. Edwards,* 105 Wn.2d 457, 466, 716 P.2d 814 (1986). As such, Randall's Motion was required to present facts which negate the claim that Levi was acting within the scope of his employment. Randall failed to do so. Rather he merely stated that he did not give consent for the dog to be on the premises. CP 49-50. But "consent" is not the sole test of whether someone was acting within the "scope of employment." As such, the motion should have been denied without even requiring Margaret to respond. CR 56. However, Margaret went beyond this argument and presented facts which clearly establish that there are genuine issues of material fact as to whether Levi was acting with the scope of his employment in at least three ways, each of which was a foreseeable and a proximate cause of injury to Margaret.

The test for determining when an employee acts within the scope of employment is well settled: "[W]hether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest." *Green v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958).

There are many factual situations where the primary purpose of an employee is to serve the employer, but the employee deviates and causes an injury to others, or the primary purpose is to serve the interests or pleasure of the employee and he makes a deviation for the benefit of his employer during which he negligently causes injury to others. *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 497, 224 P.2d 627 (1950). Under *McNew* and its progeny, where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nitpicky inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer. The fact that the predominant motive of the employee is to benefit himself does not prevent the act from being within the course or

scope of employment, and if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability if the act otherwise is within the service. *Id.* at 497-98.

Whether an employee was acting within the scope of his employment generally presents a jury question, but the issue may be resolved on summary judgment only when there can be only one reasonable conclusion from the undisputed facts. *Breedlove v. Stout*, 104 Wn.App. 67, 70, 14 P.3d 897 (2001) (citing *Strachan v. Kitsap County*, 27 Wn.App. 271, 616 P.2d 1251 (1980)). Whether a tortious act was performed within the scope of the servant's employment "is a determination which necessarily depends upon the particular circumstances and facts of the case." *Kuehn v. White*, 24 Wn.App. 274, 600 P.2d 679 (1979). Washington agency law has long held that a master cannot excuse himself when an unauthorized act is done in conjunction with other acts which are within the scope of duties the employee is instructed to perform. *Smith v. Leber*, 34 Wn.2d 611, 623, 209 P.2d 297 (1949).

The Court of Appeals, Ninth Circuit, in applying Washington law, held that the United States was vicariously liable for the negligent conduct of its employee in *Vollendorff v. United States*, 951 F.2d 215 (9th Cir. 1991). Mr. Vollendorff served a tour of duty in Honduras as a member of

the U.S. Army. After his return, he was required by Army regulation to take a medication, Chloroquine, to prevent malaria both for personal benefit and because of readiness concerns. Mr. Vollendorff stored the medication on his kitchen countertop, without securing the bottle. While he and his wife were away on a trip, his infant granddaughter Nicole was left unattended on the counter and took one of the pills, which are especially toxic to young children. Nicole suffered permanent brain damage as a result. Prior to his leaving on vacation, Nicole had gained access to the pills twice without ingesting any. Nonetheless, the pills remained on the countertop.

The government argued that as a matter of law, because Mr. Vollendorff took Chloroquine chiefly to avoid malaria, using Chloroquine was not within the scope of his employment, but for personal use. The court rejected this argument, noting that under Washington law, "if the purpose of serving the employer's business 'actuates the servant to any appreciable extent,' the employer is vicariously liable for conduct of the employee within the agency, even if the predominant motive of the employee is to benefit himself or a third party." 951 F.2d at 218, citing *Leuthold v. Goodman*, 22 Wn.2d 583, 157 P.2d 326 (1945). The district court could properly hold, as a matter of Washington law that Vollendorff's use of Chloroquine was within the scope of his employment.

Here, pursuant to Randall and Levi's deposition testimony, Levi was clearly employed by Randall to clean the townhouse and remove Randall's property. Indeed he was still working on this project on the day and at the time of the injury to Margaret. There were a number of discrete actions taken by Levi in the scope of his employment which create liability of the master Randall for the negligent acts of his servant Levi. Each of these discrete negligent acts are within the chain of causation and the "foreseeability" test which lead up to and were each a proximate cause of Margaret being severely bitten by Jersey, the employee's guard dog. These actions are detailed in the earlier table in this Brief but several merit more discussion.

(1) **Levi had left the townhouse in order to purchase some supplies or materials needed to finish the cleaning he was hired by Randall to do.** According to both Randall (CP 98) and Elizabeth Rowland (Levi's partner) (CP 113), Levi left for employment-related purposes, i.e., to get cleaning supplies. Because all factual inferences are to be resolved in favor of the Margaret, there is no question that a jury could find that Levi's leaving the premises was an act taken within the scope of his employment because it served the master for Levi to have the supplies needed to finish the cleaning job he was hired and paid to do. Leaving a guard dog alone and unrestrained at the premises was a

proximate cause of Margaret's injuries. The dog was the instrumentality of injury but it may as well have been an open pit on the premises, a piece of construction equipment, or virtually any number of instrumentalities rendering the premises unsafe to an unsuspecting invitee.

(2) **Randall misinformed Victor that the townhouse would be clean and vacated by Friday night, July 16.** When Randall asked Levi if cleaning the townhouse and removing Randall's property was completed, Levi told him that he just needed to finish a few tasks but that the work would be completed by that evening, July 16. CP 95. This conversation was clearly within the scope of his employment because Levi was serving his master by informing him of the progress of the work. This statement was a crucial link in the chain of causation because Randall communicated this misinformation to Victor Greer telling him that he (Randall) had "cleared out" of the premises rather than telling Victor that Levi expected to be finished by that evening. Victor, based upon this misinformation, asked Margaret to check the premises, which she did the next day to see if, in fact, Randall had vacated. Levi misinformed Randall that the work would be completed that day, July 16, when in fact the photographs taken the next day, the day of the attack, show that the premises were still a mess and property was not cleared out. Thus, a jury could conclude that Randall would not have told Victor and Victor would

not have asked Margaret to check the townhouse to see if Randall had in fact vacated and left Victor's items there if the true state of events had been conveyed to Victor.

Had Randall simply checked with Levi before going to bed on Friday night July 16, or early the morning of Saturday, July 17, to determine whether or not Levi had completed the job, he would have learned the job was not complete and he could have passed that correct information on to Victor rather than the erroneous information that the townhouse had been cleaned and vacated. Since Randall knew that his prorated rent for July would be based upon how long he was there, (CP 97), he was motivated on July 16 to report that he was out of there even though he only had an expectation that Levi would be done. Further, a jury could easily conclude that Randall was aware that Levi was homeless, was likely to stay at the townhouse while Randall was in California, and since Randall knew that where Levi went, Jersey went as well, that the dog would be there. It is up to a jury to determine the reasonableness of such an inference and not for the trial court to conclude that no reasonable juror could "connect these dots," which is what the court below did in granting summary judgment.

(3) **Leaving Jersey to guard the townhouse premises while he was gone served the interest of Randall.** Rather than bring his pit

bull Jersey with him when he went to buy supplies, or placing him on a secure leash, Levi made the negligent decision to leave Jersey unattended and unrestrained at the townhouse. This decision may have served his own convenience, but it was also within the scope of his employment because it also served Randall's interest in having his townhouse guarded while Levi was away. There is no dispute but that Jersey was a guard dog and Randall so acknowledged in his deposition. (CP 92-93). By leaving Jersey at the townhouse when he left to obtain cleaning supplies, the premises were guarded by Jersey in Levi's and Randall's absence. Making sure the premises were protected while Randall was out of town certainly served Randall's purposes, whether he was aware of Jersey's presence or not; and whether or not he had authorized Levi to bring Jersey with him.

Under the case law cited above, it is up to the jury to determine whether Levi acted within the scope of his employment. Making representations about the progress of the work was clearly in the employer's interest under this case law. Leaving the townhouse to get supplies was also employment related. Leaving a guard dog to guard the premises was similarly in the employer's interest. There is no legal requirement that the employer directed his employee to perform any of

these acts as long as a jury could conclude that these acts benefitted the employer.

The Respondent and apparently the trial court had it backwards: Randall did not prohibit Levi from bringing his dog into the townhouse; he simply denied that he affirmatively authorized Levi to bring the dog. Randall was well aware that Levi had the dog and that it was a guard dog. It was certainly foreseeable to Randall that Levi, his homeless brother, would bring Jersey with him when he was cleaning the townhouse. Randall was aware that Levi and his pit bull were virtually inseparable. As such, it was within the purview of Levi, as an employee, to decide whether and when to leave the premises to get supplies and whether to leave Jersey to guard the townhouse. The servant/employee, Levi's negligent decisions, statements and actions are attributed to Randall, his master/employer. It is for a jury to hear the testimony, see the evidence, judge the credulity and demeanor of the witness, draw reasonable inferences, and resolve these factual issues.

(4) Even if there were evidence that Randall had specifically told Levi not to bring Jersey, summary judgment should still have been denied. Even had Randall told Levi not to bring Jersey to the property (and there is no evidence of any such directive) and, despite such an admonition, Levi had brought Jersey resulting in the attack that

injured Margaret, the case should have still proceeded to a jury trial. The law of respondeat superior can apply even where a servant violates workplace rules. Our Supreme Court had recent occasion to visit the law of respondeat superior In *Rahman v. State,* 170 Wn.2d 810, 246 P.3d 182 (Wash. 2011). In *Rahman*, the State was held liable where an employee violated state policy and had his wife ride along with him in a state vehicle when his negligent driving injured the wife. In the instant case the master (Randall) is liable even if the servant (Levi) had violated a specific directive from Randall not to bring Jersey to the worksite. The Court noted in *Rahman* at pp. 818-819:

> First, as to precedent, we have previously rejected the notion that an employee's violation of a workplace rule renders the employee's conduct outside the scope of employment. *Dickinson,* 105 Wash.2d at 470, 716 P.2d 814 (" ' [A]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment.' " (quoting Restatement (Second) of Agency § 230 (1958))); *Smith v. Leber,* 34 Wash.2d 611, 623-24, 209 P.2d 297 (1949). [Citations omitted.]
>
> These cases underscore the sound policy supporting respondeat superior. The doctrine rests upon the relationship between an employer and employee, which is characterized by a right of control. The very fact that the employer is in a position to impose workplace rules and standards justifies vicarious liability, even where the employee acts in a forbidden way. *See Poundstone v. Whitney,* 189 Wash. 494, 500-01, 65 P.2d 1261 (1937). We said in *Poundstone*: "If it were true that a servant is outside the scope of his employment whenever he disobeys the orders of his master the doctrine of *respondeat superior*

> would have but scant application, for the master could always instruct his servant to use ordinary care under all circumstances. The servant's negligence would therefore always be contrary to orders and the nonliability of the master would follow. But such is not the law. The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business though the particular act is contrary to instructions."

Levi was furthering Randall's business when he was cleaning and clearing property out of the townhouse and when he went to get supplies for the job. So if Randall can be held responsible even had he told Levi not to bring Jersey, surely he can be held responsible where he did not prohibit Levy from bringing Jersey with him.

D. The Court Erred in Granting Summary Judgment Under a Negligence Theory for Randall's Maintaining Premises That Were Not Reasonably Safe For Persons Lawfully Coming To The Premises. (Assignment #4)

It is indisputable that Randall McWilliams was the "possessor" of the premises where Margaret was injured and therefore owed a duty of care to invitees. *Gildon v. Simon Property Group, Inc.,* 158 Wn. 2d 483, 145 P. 3d 1196 (2006). There is at least a genuine issue of material fact as to whether Levi was acting as the agent/sub-contractor/employee of Randall at all relevant times. (*See*, Argument C, above.) As such, Randall owed a duty to guests and invitees like Margaret who were legitimately on his premises to take reasonable steps to discover whether there were any

conditions that posed any unreasonable risks of harm. Whether a landowner (or his agent/employee) breaches this duty, as well as its duty to exercise reasonable care under the circumstances, to protect invitees against a danger, is an issue for the jury. *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 862, 31 P.3d 684 (2001).

1) There are genuine issues of material fact as to whether Randall had actual or constructive notice of a dangerous condition on his premises and failed to exercise reasonable care to discover whether his agent Levi brought his guard dog pit bull Jersey onto his premises.

Under the standard set by Restatement (Second) of Torts § 343, and endorsed by Washington case law, a landowner's duty of care attaches if the landowner "knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk..." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). The phrase "reasonable care" imposes on the landowner the duty "to inspect for dangerous conditions, 'followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Iwai v. State*, 129 Wn.2d at 96 (citing *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). In applying this knowledge requirement to premise liability actions, Washington law requires Margaret to show that the landowner had actual or constructive

notice of the unsafe condition, or that one of the two recognized exceptions to the "notice" requirement is met. *Iwai v. State*, 129 Wn.2d at 96. To prove constructive notice, Margaret has the burden of showing the specific unsafe condition had "existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Iwai v. State*, 129 Wn.2d at 96 (citing *Pimentel v. Roundup Co.*, 100 Wn.2d at 44). The notice requirement insures liability attaches only to owners once they have become aware of a dangerous situation. *Iwai v. State*, 129 Wn.2d at 96-7. Margaret must show the specific and particular condition had existed long enough for defendants to have become aware of it. *Iwai v. State*, 129 Wn.2d at 97.

Here the facts and inferences viewed most favorably to the non-moving party establish that Randall had actual and constructive notice of the risk of harm to others posed by the presence of a pit bull on the premises and failed to inspect for or correct this condition. He had actual notice because the knowledge of an agent, Levi, is imputed to his principal, Randall. *See Sparkman v. McLean v. Wald,* 10 Wn. App. 765, 520 P.2d 173 (1974). *L.J. Dowell, Inc. v. United Pac. Cas. Ins. Co.,* 191 Wn. 666, 681, 72 P. 2d 296 (1937). Here a jury could conclude that Levi was acting for Randall when working at the premises and then driving off

to get cleaning supplies, while leaving his guard dog at the premises unattended created an unreasonable risk of injury to a person lawfully coming onto the premises.

Randall also had constructive notice of Jersey's presence because he failed to conduct any inspection of the premises or investigation into Levi's progress and the presence of Jersey on the premises. The facts supporting such constructive notice include that Randall (1) paid Levi to go to his townhouse to clean the premises, to remove furniture and belongings and prepare the premises for occupancy for a number of days, (2) knew Levi was homeless but had a guard dog pit bull that was usually with him, (3) failed to inspect the premises or to inquire of Levi whether he had brought Jersey with him, and (4) failed to prevent him from leaving Jersey unattended when it was likely that Levi would bring Jersey to the premises. Respondent argued that he did not authorize Levi to bring Jersey with him. Rather, knowing that the dog was usually with Levi, Randall should have prohibited him from having the dog with him and inquired to make sure he did not. This testimony can best be considered by a jury which hears all of the available evidence as to whether Respondent satisfied his requisite duty of care. This is particularly true here, because it was Randall who knew that someone like Margaret might foreseeably come onto the premises as a business or social invitee and

would therefore encounter the conditions that Randall and Levi had created. But clearly Randall had a duty of care, and summary judgment is therefore inappropriate as reasonable minds could differ as to whether he met that duty of care.

2) A well-recognized exception to the notice requirement exists here because the possessor of the premises, through his sub-contractor/agent, created the dangerous condition.

It is well established that when the landowner or possessor of a property causes the hazardous condition, then a plaintiff's duty to establish notice is waived. *Iwai v. State*, 129 Wn.2d at 102 (citing *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750 (1995)). If the plaintiff can prove the possessor (or his contractor/agent) creates the hazardous condition in a negligent manner, then the plaintiff does not have to prove the defendant's notice of a dangerous condition. *Iwai v. State*, 129 Wn.2d at 102; *Sorenson v. Keith Uddenberg, Inc.*, 65 Wn. App. 474, 479, 828 P.2d 650 (1992). In *Sorenson,* it was not the landlord but rather his agent/sub-contractor that had created a hazardous condition by plowing snow and ice into a snow pile. Such activity by the sub-contractor was attributable to the landlord and imposed liability. Here, Randall, left his agent, Levi, in possession and control of the premises and Levi created the condition which injured the Margaret, to wit, bringing

Jersey onto the premises and leaving him unrestrained. Notice of such condition of risk is therefore not required.

E. Respondent is Liable Because He Negligently Entrusted the His Townhouse to Levi to Clean and Vacate Knowing It was Foreseeable that Levi Would Bring His Pit Bull Jersey with Him. (Assignment #5)

Washington has adopted the doctrine of negligent entrustment, based upon the Restatement (Second) of Torts. See, e.g., *Hickle v. Whitney Farms, Inc.,* 148 Wn.2d 911, 925-6, 64 P.3d 1244 (Wash. 2003); *Bernethy v. Walt Failor's, Inc.,* 97 Wn.2d 929, 653 P.2d 280 (1982). Restatement (Second) of Torts Sec. 308 (1965) provides:

> It is negligence to permit a third person to use a thing **or to engage in an activity** which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. (Emphasis added.)

Section 390 of the Restatement (Second) of Torts is a sub-set or example of the basic principles of negligent entrustment laid down in Section 308. Section 390 has been adopted by Washington courts in the *Hickle* and *Bernethy* cases cited above and there is no reason to believe that Washington courts would not adopt Section 308 as well, as courts in other states have done. *See Gaines v. Krawczyk*, 354 F.Supp.2d 573 (W.D. Pa. 2004). ("Defendants have advanced no authority to support the

proposition that negligent entrustment is limited solely to circumstances involving the use of an instrumentality. *Id.* at 579.") *And see Jones v. D'Souza*, 2007 U.S. Dist. LEXIS 66993 (W.D. Va. Sept. 11, 2007), which noted:

> The court concludes that the Supreme Court of Virginia would recognize a cause of action for negligent entrustment of an activity, as set forth in §308 of the Restatement (Second) of Torts. The Supreme Court of Virginia has adopted the doctrine of negligent entrustment as defined by § 390 of the Restatement (Second) of Torts, *see Denby v. Davis,* 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972), and the court finds no reason to believe that the Supreme Court of Virginia would not also follow § 308, which provides "a more general definition of negligent entrustment," *Am. Guar. & Liab. Ins. Co. v. 1906 Co.,* 273 F.3d 605, 614, n. 5 (5th Cir.2001).

Here there is a genuine issue of material fact, which Randall did nothing to rebut, as to whether Randall permitted Levi to "engage in an activity which is under the control of the actor" (i.e., clean out his townhouse), and whether Randall knew or should have known that Levi, as the owner of a pit bull guard dog that was usually with Levi, would bring him to the premises to guard the townhouse and/or to keep him company while cleaning it.

The question posed by the trial court below for further briefing was whether there were any premises liability cases in which the risk of harm

or injury was caused by an animal, including a dog. Respondent's counsel had asserted that there were no such cases, arguing that premises liability rests upon some hazardous physical condition upon the land, a circumstance existing, or a dangerous activity being conducted there. Appellant's counsel argued that the general principles of premises liability apply and where there is an unreasonable risk of harm to invitees lawfully on the premises the precise mechanism or instrumentality does not matter. This issue had not originally been briefed below because Randall's Motion for Summary Judgment did not address Margaret's causes of action based upon premises liability. Defense counsel was of the mistaken belief that such a theory had not been pled. It had. Complaint ¶15 and ¶16. (CP 3-4.)

Research has disclosed that there are many cases around the country which hold that one who owns or controls premises can be held liable where an animal attacks an invitee on the property. These cases apply the generally accepted principles of premises liability to the particular facts of the case where an animal causes injury to an invitee. Some cases hold that granting summary judgment for the person in control of the premises was error. Other cases uphold a jury verdict for the invitee in such circumstances. Some cases hold that the facts of the particular case do not justify the imposition of liability (where, for instance, the

injury occurred away from the premises). In yet other cases, the law of the particular state, unlike Washington, requires that the person in control of the premises have actual or constructive knowledge of the danger posed by an animal. In Washington, such a requirement is a sufficient, but not a necessary, condition to the imposition of liability, including where the person in control or its agent or sub-contractor creates the danger to the invitee. *See*, Argument D. (2), *supra* at p. 26-7.

Margaret's counsel has found no case holding as a matter of law that under no circumstances can a landowner be held liable for injuries caused by an animal attacking an invitee. As such, the central tenet of the Randall's motion that one in control of premises, who is not the owner or harborer of the injuring animal owes no duty to an invitee injured by that animal, is fallacious and summary judgment should have been denied.

F. Case Law From Other States Uniformly Imposes a Duty on the Person in Control of Premises to Exercise Due Care to Protect Invitees from Animals Present on the Property. (Assignments #s 4 and 5)

In *Schrum v. Moskaluk*, 655 N.E.2d 561 (Ind., Ct, App. 1995), defendant Mosklauk had a garage sale at her residence. With the defendant's consent, plaintiffs Peter and Eva Schrum set up tables of their own and participated in the sale. The plaintiffs were accompanied by their four-year-old daughter, Katherine. A third party, Crisp, brought an Akita

dog, which weighed approximately 100 pounds, and was tied to a sidewalk railing in defendant's yard. While Crisp and defendant were inside defendant's house, Katherine approached the dog and was bitten on her face and neck. It was undisputed that defendant Mosklauk (the possessor of the premises) had no knowledge of the dog's presence. The Court held that a landowner owes the highest duty of care to an invitee; that is the duty to exercise reasonable care for his protection while he is on the landowner's property. *Burrell v. Meads,* 569 N.E.2d 637, 639 (Ind. 1991) (citing *Hammond v. Allegrett,* 262 Ind. 82, 311 N.E.2d 821 (Ind. 1974)). The *Burrell* Court adopted the Restatement's definition of this duty:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Burrell, 569 N.E.2d at 639-640 (citing Restatement (Second) of Torts § 343).

The Court held that Sonya owed Katherine a duty to exercise reasonable care to discover conditions that involved an unreasonable risk

of harm to invitees who would not realize the danger, or would fail to protect themselves against it. *See* Restatement § 343.

> "There is an issue of fact as to whether Sonya's actions constituted the exercise of reasonable care and whether she should have realized that the dog presented a potential danger to the invitees on her premises. Because we find that there exists a genuine factual issue as to breach of duty, we remand for a trial on the merits."

Schrum, 655 N.E.2d at 565-566.

In *Langan v. Valerie Wilson Travel, Inc.,* 2008 U.S. Dist. LEXIS 55323 (D.S.C. July 21, 2008). Plaintiff, eight years old, was bitten by a dog while on the premises of Valerie Wilson Travel while visiting her mother. The dog's owner and plaintiff's mother were both independent contractors of Valerie Wilson Travel. Plaintiff asserted that the defendant did not warn her of the concealed dangers or activities associated with the presence of the dog on the premises. The Court found that plaintiff was a licensee and had to accept the premises as they were, but if defendant was aware of the unreasonable risk that the dog presented, it was under a duty to warn either plaintiff or her mother of the dangerous nature of the dog or to eliminate the condition on the property, which it should have realized involved an unreasonable risk to harm the licensee. The Court denied the defendant's motion for summary judgment as to premises liability.

In *Garrett v. Overland Garage & Parts, Inc.*, 882 S.W.2d 188,

190-192 (Mo. Ct. App. 1994), Plaintiff went to Overland Garage and Parts to retrieve a truck, and was escorted to the back of the garage by defendant's employee. Defendant's Doberman pinscher jumped out from behind the truck, causing plaintiff to become startled. Plaintiff slipped and fell, causing injury. The jury found for plaintiff, and defendant appealed. The appellate court upheld the verdict, and found the duty owed to an invitee includes the duty to eliminate or warn of dangerous conditions, which the defendant knows about or in the exercise of reasonable care should have known about. The evidence was sufficient to submit the issue to the jury on whether defendant should have known his concealed eighty pound dog represented a dangerous condition to an unwary invitee. The Court also noted that in a premise liability case, where a dog is the dangerous condition, the law does not require a showing that an animal has injured or startled someone in the past, *Id* at p. 182. The Court noted that a dog's past behavior can be introduced to show that the defendant knew that the animal presented a danger to an invitee, but past behavior is not necessary to show that the appellant should have known that the manner in which he handled his animal presented a danger to an invitee.

In *Savory v. Hensick*, 143 S.W.3d 712, 715-717 (Mo. Ct. App. 2004), Plaintiff, a contractor, brought a premise liability action against homeowners for injuries suffered when plaintiff was working at the

homeowners' premises. Plaintiff was descending a ladder, stepped on the homeowners' dog at the base, and fell. After a jury verdict for plaintiff, defendants appealed. The Court of Appeals held the presence of the homeowners' dog made the yard foreseeably dangerous for the contractor. *Id.* at p. 717. The Court held that in a premise liability case, the possessor is subject to liability to an invitee, "if the dog presents a foreseeable danger to the invitee of which the possessor knows or should have known." See also, *Landings Association, Inc. v. Williams*, 309 Ga.App. 321, 325, 711 S.E.2d 294 (2011), a case involving naturally occurring alligators in a lagoon finding that the duty under Georgia law to keep one's premises safe is not limited to physical defects in the owner's property, but rather it extends to "risks upon the premises in the nature of vicious animals or ill-tempered individuals likely to inflict harm upon invitees visiting the premises." (Citing *Beard v. Fender*, 179 Ga.App. 465, 346 S.E.2d 901 (1986)).

G. Consistent With This Case Law, Washington Imposes Premises Liability Under a Wide Variety of Circumstances, Activities, and Conditions.
(Assignments #s 4 and 5)

There is no reason to believe that Washington law does not impose a duty on one in control of premises in situations where an animal on the premises causes injury to an invitee, as these cases from other states have

found. Under Washington law, actions involving injuries caused by dogs may be based on negligence (ineffective control of an animal) as well as strict liability. *Arnold v. Laird*, 94 Wn.2d 867, 871, 621 P. 2d 138 (1980). In premises liability cases, Washington courts have found the existence of a specific and unreasonably dangerous condition in a wide variety of factual situations involving physical conditions, activities, naturally occurring hazards, etc. See: *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089(1996) (naturally accumulated snow and ice); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996) (fast flowing creek adjacent to a child's play area); *Pimentel v. Roundup Company*, 100 Wn.2d 39, 666 P.2d 888 (1983) (can of paint overhanging shelf fell on patron's foot); *Jarr v. Seeco Construction Co.*, 35 Wn. App. 324, 666 P.2d 392 (1983) (falling sheetrock injured business invitee at construction site,); *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962) (banana peel on ground in supermarket); *Jurgens v. American Legion, Department of Washington, Cashmere Post No. 64, Inc.*, 1 Wn. App. 39, 459 P.2d 79 (1969) (presence of rocks on an established ball field injured defendant while mowing lawn); *Williamson v. Allied Group, Inc.*, 111 Wn. App. 451, 72 P.3d 230 (2003) (contractor closed footbridge for painting, forcing plaintiff to descend grassy slope where she fell); *Curtis v. Lein,* 169 Wn.2d 884, 239 P.3d 1078 (2010) (tenant suffered injuries after

falling through property owner's dock after step gave way). *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 240 P.3d 162 (2010) (an invitee worked on premises where construction activity caused asbestos to be a regular presence at shipyard).

The key distinction in Washington law, helpful to Margaret here, is that actual or constructive knowledge of the dangerous condition is not required where the person in control of the premises or its subcontractor/agent creates the dangerous situation or condition. *Iwai v. State*, 129 Wn.2d at 102 (citing *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 275, 896 P.2d 750 (1995); *Sorenson v. Keith Uddenberg, Inc.*, 65 Wn. App. 474, 479, 828 P.2d 650 (1992). Here Randall's agent/sub-contractor Levi created the unsafe condition by leaving Jersey unattended and untethered when he left to get cleaning supplies. Of course, as argued previously, the knowledge of the employee/agent Levi about Jersey and his whereabouts is imputed to the principal, Randall, so the element of actual notice is also satisfied. *See Sparkman & McLean v. Wald* 10 Wn.App. 765, 520 P.2d 173 (1974).

Since an animal can pose an "unreasonable risk of harm" on the premises controlled by Randall McWilliams, it is up to the jury to determine whether the duty of care was complied with. Respondent did not meet his burden of establishing there are no triable issues of fact.

VII. CONCLUSION

Appellant Margaret Briscoe should have her day in court before a jury of her peers. That fundamental right was taken from her by the trial court's improvident grant of summary judgment for Respondent on grounds that Margaret had failed to meet her burden of proof under CR 56. The Order Granting Summary Judgment for Respondent should be reversed and the case remanded for a jury trial under Margaret's well plead and well supported theories of action.

RESPECTFULLY SUBMITTED this ~~26th~~ 10 day of ~~September~~ October, 2012.

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DECLARATION OF SERVICE

I, Ronnette Peters Megrey, declare as follows: on this October 10, 2012, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S AMENDED OPENING BRIEF

Alice C. Brown c/o McLean & Associates 720 Olive Way, Suite 1600 Seattle, WA 98101	_x_ via WA Legal Messenger ___ via Facsimile ___ via E-mail ___ via US Mail
Pamela A. Okano c/o Reed McClure Two Union Square 601 Union Street, Suite 1500 Seattle, WA 98101-1363	_x_ via WA Legal Messenger via Facsimile ___ via E-mail ___ via US Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 10TH of October 2012.

Ronnette Peters Megrey