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SUPREME COURT NO. 91323-4

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

HAROLD RATH,

Petitioner,

v.

GRAYS HARBOR COUNTY

Respondent.

RESPONDENT GRAYS HARBOR'S ANSWER TO PETITION FOR REVIEW

John E. Justice, WSBA #23042
Law, Lyman, Daniel,
Kamerrer, & Bogdanovich, P.S.
2674 RW Johnson Blvd SW
Tumwater, WA 98512
Tel: (360) 754-3480, Fax: (360) 357-3511
Email: jjustice@lldkb.com

ORIGINAL

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I. IDENTITY OF RESPONDENT

Grays Harbor County is the respondent.

II. COUNTER-STATEMENT ISSUE PRESENTED FOR REVIEW

A. Has Mr. Rath established that the decision of the Court of Appeals is in conflict with a decision of this Court or another decision of the Court of Appeals?

B. Has Mr. Rath established that his case involves an issue of substantial public interest that should be determined by the Supreme Court?

III. STATEMENT OF THE CASE

A. Factual Background.

On January 7, 2010, the appellant, Harold Rath, pled guilty to the crimes of possession of a stolen motor vehicle, theft of a motor vehicle and unlawful possession of a firearm. CP 58-62. His August 19, 2009 arrest for those three crimes, which culminated in his guilty plea, was the precipitating event for this lawsuit. CP 3-7. Weeks prior to his arrest, Mr. Rath was seen by Grays Harbor County Sheriff's Deputy Kevin Schrader driving in a stolen vehicle. CP 16-17. Deputy Schrader first witnessed Mr. Rath doing donuts in the middle of a roadway, creating a cloud of

dust. VRP 62. He initiated a traffic stop by getting behind Mr. Rath's vehicle and activating his emergency lights. Id. Mr. Rath performed a radical steering maneuver that caused his vehicle to quickly turn 180 degrees and end up facing Deputy Schrader about 30 feet away. VRP 64.

As Deputy Schrader got out of his patrol car, Mr. Rath accelerated rapidly in his direction and passed by him within a couple of feet. VRP 64-65. Mr. Rath then performed another 180 degree maneuver and ended up behind Deputy Schrader, this time facing the rear of his patrol car, now about 20 feet away. VPR 65-66. Deputy Schrader assumed Mr. Rath was about to ram his patrol car. Id. Again Mr. Rath revved his engine and sped directly toward Deputy Schrader. Deputy Schrader moved his patrol car enough to avoid being rammed; but still Mr. Rath came within one to two feet of striking his vehicle. VRP 66-67. Deputy Schrader then followed Mr. Rath with his lights and sirens activated. VRP 67. Mr. Rath accelerated to about 80 m.p.h. VRP 68.

Mr. Rath was able to elude capture by Deputy Schrader by going down a deeply rutted dirt road, jumping out of the stolen truck, jumping in a nearby river and swimming across. VRP 68-69; CP 17. Deputy Schrader confirmed that the truck Mr. Rath was driving was stolen and

inside he found a stolen 12 gauge shotgun. VRP 71-72. Mr. Rath was a convicted felon and not allowed to possess a weapon; stolen or not. Id.

For the next several weeks, Mr. Rath avoided capture by law enforcement by hiding out in the woods around Grays Harbor and moving frequently. CP 19. He believed he would be arrested if he came in contact with law enforcement. CP 20. In fact, Mr. Rath was the subject of an outstanding warrant for first degree felony kidnapping, in addition to his more recent theft of the truck, possession of the shotgun and eluding. CP 71.

On the day of his arrest, Mr. Rath reportedly went to the trailer of Valerie Dixon. CP 21. While there, law enforcement received a report that Mr. Rath was hiding out in a trailer park in the vicinity of the Hoquiam River. VRP 83. In the course of a systematic check of local RV parks, two Grays Harbor County deputies arrived at the trailer where Mr. Rath was hiding. VRP 83-84.

An occupant of the trailer, Leonard Vervalen, answered the door and initially indicated that only he and his girlfriend, Ms. Dixon, were inside, but his hesitation in answering led the deputies to ask him to step outside the trailer. VRP 85; CP 36-37. Once outside, Mr. Vervalen

indicated that Mr. Rath was inside the trailer. Id. He was not sure if Mr. Rath was armed. CP 37. The deputies then asked Ms. Dixon to come outside, which she did. VRP 86-87. Ms. Dixon told the deputies that Mr. Rath was hiding inside and knew law enforcement was outside. CP 38; 76. The owner of the trailer consented to law enforcement entering the trailer to arrest Mr. Rath. VRP 18.

The two deputies waited for back up officers to arrive. CP 38. Mr. Rath was wanted for a felony, and he had recently been armed with a stolen shotgun. CP 32-34. He was known to have made statements that he would not go back to Jail and would shoot police. Id. At the trailer, the deputies made numerous unsuccessful efforts to get Mr. Rath to come out voluntarily, including shouting orders to surrender and deploying OC (pepper) spray into the small trailer. VRP 91-93. An entry and arrest team was formed once it was clear Mr. Rath was not voluntarily coming out. VRP 95. The team included Grays Harbor K-9 Deputy Rob Crawford and his police dog Gizmo. VRP 95-96.

Deputy Crawford entered the trailer behind another officer carrying a ballistic (bullet-proof) shield. Id. All members of the entry team were also wearing Kevlar helmets. Id. The entry team continued to

shout orders to surrender as they advanced, including Deputy Crawford's issuance of the standard K-9 announcement two or three times:

> "Grays Harbor Sheriff's K-9 . . . This trailer will be searched by a K-9. Come out now or you will be bitten." VRP 97.

Gizmo led the officers to the bedroom in the trailer and Gizmo alerted to the bedroom area, although Mr. Rath could not be seen. VRP 99-100. Deputy Crawford was aware that there were often storage spaces under beds inside such trailers, and he lifted the bed while keeping Gizmo on lead. VRP 101. Once the bed was lifted, Deputy Crawford saw Mr. Rath lying under the bed in the storage space. VRP 102.

Deputy Crawford described Mr. Rath's appearance as follows:

> He was positioned or oriented face down, head toward us, towards the foot of the bed, and arms up tucked underneath his body.

VRP 103.

Deputy Crawford explained that the main concern at that point was not being able to see Mr. Rath's hands and to make sure he did not have a concealed weapon. *Id.* Deputy Crawford shouted at Mr. Rath to show his hands. VRP 104. Deputy Crawford witnessed Mr. Rath bracing. Id. Mr. Rath did not surrender or show his hands to establish he was unarmed. Id. Gizmo was then deployed to assist in getting Mr. Rath safely under

control, so that he could be placed under arrest. VRP 105. Mr. Rath struck out at Gizmo during the encounter. Id.

Mr. Rath's only cause of action was against Grays Harbor County for strict liability under the state's strict liability dog bite statute, RCW 16.08.040. CP 5. That statute was amended on June 7, 2012, to clarify that it "does not apply to the lawful application of a police dog." Laws of 2012, ch. 94, § 1. It is undisputed that Mr. Rath did not have a judgment entered in his favor prior to the amendment of the statute. It is also undisputed that Mr. Rath cannot proceed under the statute as amended because he was bitten during the lawful application of a police dog.

B. Procedural Background.

The parties filed cross-motions for summary judgment on the question of RCW 16.08.040's application. CP 79-90; 355-379. Grays Harbor County contended, in part, that RCW 16.08.040 did not apply to the lawful use of a police canine to arrest a suspect and the person bitten is the intended target of the canine. CP 82-88. The County also argued that Mr. Rath was not "lawfully" in a private place at the time he was bitten because he was unlawfully refusing orders to surrender to arrest. CP 88. Mr. Rath argued that all he needed to show was that he had the consent of

the trailer owners to be in the trailer and liability was established regardless of his clearly unlawful refusal to exit the trailer when ordered. CP 369-70. The trial court denied the County's motion, but held that there was a genuine issue of material fact as to whether Mr. Rath "lawfully" remained in the trailer at the time he was bitten by Gizmo in the course of being arrested. CP 228-230. The case proceeded to a jury trial. Id.

The trial court bifurcated the trial into a liability phase and a damage phase. Appellant's Brief, pg. 12. The liability trial was to answer the question of whether Mr. Rath was "lawfully" in the trailer when he was bitten. Id. After two days of evidence, the jury was asked:

Was the Plaintiff lawfully on the premises when he was bitten by Defendant's dog?

The jury answered this question: No.

CP 224.

There being no need for a damage phase, the trial court entered judgment for Grays Harbor County on the jury's verdict. CP 225-26. Mr. Rath appealed the judgment. CP 482. Grays Harbor County cross-appealed from the denial of its motion for summary judgment solely on the legal issue of the applicability of RCW 16.08.040 to the lawful use of a

police canine on the intended individual being arrested. CP 227-230.

The Court of Appeals, in an unreported decision, held that Mr. Rath's complaint should have been dismissed prior to the trial:

> On March 23, 2012, Rath filed a civil complaint for strict liability damages under the strict liability dog bite statute, RCW 16.08.040. At the time Rath filed the civil complaint, former RCW 16.08.040 (1941) was in effect and stated, in relevant part:
>
> > The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.
>
> On June 7, 2012, the legislature added section (2) to RCW 16.08.040 which reads: "This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410." Laws of 2012, ch. 94, § 1.

Rath v. Grays Harbor County, No. 45076-3-II, pg. 1.

The Court then noted that:

> A plaintiff has no vested right in a tort action until final judgment has been entered in his or her favor. *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn. 2d 825, 827, 289 P.2d 718 (1955). "'Where a tort action can be brought only by virtue of a statute, there can be no vested right therein, and the Legislature may take away the right at any time.'" *Hansen*, 47 Wn.2d at 827 (*quoting Robinson v. McHugh*, 158 Wash. 157, 164, 291 P. 330 (1930), *aff'd*, 160 Wash.

> 703, 295 P. 921 (1931)); *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wn. 2d 584, 587, 478 P.2d 232 (1970). Here, Rath's claim was under former RCW 16.08.040. Because Rath's claim was derived solely from a statute, he had no vested interest in the claim unless a judgment was entered in his favor. There was no judgment entered in Rath's favor at the time the statute was amended; therefore, any claim that Rath may have had under former RCW 16.08.040 was abolished by the legislature.
>
> Once an appellant has been divested of his or her cause of action, the appeal becomes moot. *Hansen*, 47 Wn.2d at 827. Because the legislature divested Rath of his claim under former RCW 16.08.040 when Laws of 2012, ch. 94, § 1 became effective, Rath's appeal is moot.

Id., pg. 2.

IV. ARGUMENT

This Court should deny review of the unpublished Court of Appeals decision. It does not conflict with a decision of this Court or any Court of Appeals' decision. It also does not involve an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2) & (4).

A. The Decision of the Court of Appeals is not in Conflict with a decision of this Court or a decision of the Court of Appeals.

In *Hansen, supra*, 47 Wn. 2d at 826, the appellant sued under the Dramshop Act. The trial court dismissed the suit on a motion on the

pleadings. *Id.* While the appeal was pending, the Dramshop Act was repealed. *Id.* The Supreme Court reasoned that because the appellant's cause of action only arose by virtue of the Dramshop Act and had not been reduced to a final judgment before the Act was repealed, the appellant had been "divested of her right of action by the legislature". *Id.* at 827. Therefore, the court dismissed her appeal as moot. *Id.* at 827–28.

Hansen is still good law and clearly supports the Court of Appeals decision in this case. Plaintiff, however, argues that because *Hansen* involved the elimination of a cause of action by *repeal* of a statute, rather than by an amendment, the Court of Appeals was required to undertake a retroactivity analysis. However, *Hansen* does not make that point, and petitioner cites no other case that does. In this case, the petitioner relied exclusively on a cause of action for statutory strict liability under RCW 16.08.040. It is undisputed that, after the amendment, plaintiff no longer had a cause of action for strict liability under the statute. Thus, while the entire statute was not repealed, the amendment to that statute eliminated plaintiff of a cause of action before it vested. He does not argue to the contrary.

Plaintiff's petition confuses the use of court created rules to aid

construction of a statute, with a *legal* principle regarding whether or not a purely statutory cause of action has been eliminated before a right in that cause of action has vested. In *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 559-60, 663 P.2d 482 (1983), the Court explained that "rules of statutory construction . . . are not statements of law. Rather they are rules in aid of construing legislation and an aid in the process of determining legislative intent." Significantly, the statement of law in *Hansen*, that a statutory cause of action can be eliminated by the legislature before it vests, has not been held to require the retroactivity analysis espoused by plaintiff.

In fact, in *Johnson, supra*, that analysis yielded "conflicting results." Still the Court retroactively applied a statutory amendment to the Tort Reform Act, relying on *Hansen* to note that "no one can be said to have had a vested right until the cases were finally resolved on appeal and a final judgment entered." *See, also, Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617-18, 146 P.3d 914 (2006) (" Just as the legislature can divest a plaintiff of a statutory claim after suit is filed, it follows that it can shorten the time period for bringing a statutory claim and so terminate a plaintiff's action without

impairing any vested right.").

Petitioner argues that the decision of the Court of Appeals is in conflict with *Magula v. Benton Franklin Title Co.,* 131 Wn.2d 171, 181-82, 930 P.2d 307 (1997) and other cases analyzing the retroactive application of a statute. No such conflict exists.

In *Magula*, the Court discussed whether a statutory amendment to the definition of "marital status" should be applied to the case before it. The parties did not argue that the amendment eliminated plaintiff's cause of action and that issue was never discussed. The Court was thus not considering a legislative enactment that divested a person of a statutory cause of action *before it vested. Hanson* is not even cited.

In *Ballard Square*, *supra,* 158 Wn.2d at 603, the Court analyzed whether a newly enacted statute of limitations should be applied to a pending statutory cause of action. The case did not involve *elimination* of a statutory cause of action, only the application of a new statute of limitations. Significantly, the Court noted that "a cause of action that exists only by virtue of a statute is not a vested right, and it can be retroactively abolished by the legislature." *Id.* at 617. While the Court discussed rules of statutory construction, it did not hold that such rules

must be applied invariably to statutory amendments that *eliminate* a purely statutory cause of action.

In *1000 Virginia Ltd. v. Vertecs Corp.*, 158 Wn.2d 566, 585, 146 P.3d 423 (2006), the Court considered whether a statute that "prevents application of the discovery rule of accrual in the case of written construction contracts" should apply retroactively. The statutory enactment in question did not eliminate a statutory cause of action sounding in tort. In fact, as the Court noted, "even if there is a vested right in the running of a statute of limitations, this right would not be at issue when a rule defining the time of accrual is at issue, rather than a change in the statute of limitations." *Id.* at 577-78.

Finally, in *A.M.M. v. Dept. of Soc. & Health Srvsc.*, 182 Wn. App. 776, 332 P.3d 500 (2014), the Court was not dealing with the elimination of a statutory cause of action. Instead, the trial court failed to apply a statutory amendment that added factors that needed to be considered before terminating a parent's rights even though the amendments became effective shortly before the trial. The Court held that "'a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative

history to the contrary.'" *Id.* at 789, *quoting*, *Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal*, 39 Wash.App. 609, 621, 694 P.2d 697 (1985). *AAM* does not involve a statutory cause of action that was eliminated before.

Unlike *Magula*, and the other cases cited by Mr. Rath, the Court of Appeals in this case was not just analyzing whether a statutory amendment should be applied retroactively. The legislative enactment in this case did not "narrow" petitioner's cause of action or change a statute of limitations. Instead, the legislature *eliminated* Mr. Rath's cause of action. Plaintiff was bitten during the lawful application of a police canine. He does not claim otherwise. Thus, he is not able to proceed under RCW 16.08.040, the only cause of action he asserted. There is no conflict between the Court of Appeals decision in this case and *Magula*.

Even if the "retroactivity analysis" urged by Mr. Rath were required, however, the outcome of this case would not change.

B. The Legislature's 2012 Amendment is Remedial and Curative.

Statutes that are remedial in nature may apply retroactively if such application furthers its remedial purpose. *Macumber v. Shafer*, 96 Wash.2d 568, 570, 637 P.2d 645 (1981). "A statute is remedial when it

relates to practice, procedure, or remedies and does not affect a substantive or vested right." *Miebach v. Colasurdo*, 102 Wash.2d 170, 181, 685 P.2d 1074 (1984). A curative amendment is one that clarifies or technically corrects an ambiguous statute and can also be applied retroactively. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007). This is true even if the legislature did not expressly state the amendment applies retroactively. *Johnson v. Continental West,* 99 Wn. 2d 555, 559, 663 P.2d 482 (1983).

RCW 16.08.040(2) is remedial because it relates to remedies, i.e. a strict liability cause of action for dog bites. It is undisputed that it does not affect a vested right.

RCW 16.08.040(2) is also curative because it clarifies the application of a statute that was, prior to the amendment, ambiguous as police dogs. The statute does not define "owner" to specifically include the government.[1] *Beeler v. Hickman, supra*, 50 Wn. App. at 751. A statute is ambiguous when it is susceptible to two or more reasonable

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1. RCW 16.08.070 includes a definition of "owner" which does not specifically include municipalities. Further, while the plaintiff argues the definition found in RCW 16.08.070 applies to RCW 16.08.040, it only states that its definitions apply to RCW 16.08.070 and RCW 16.08.100. It is therefore not clear that the definition of "owner" in RCW 16.08.070 applies to RCW 16.08.040.

interpretations. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). It is certainly reasonable to interpret the statute as not applying to police dogs given that state law expressly permits their use in this situation. *(See next section).*

In order to be applied retroactively, it is also necessary that the amendment "contravenes no construction placed on the original statute . . ." *State v. Jones*, 110 Wn. 2d 74, 82, 750 P.2d 620 (1988). While there are a few unreported federal cases cited by Mr. Rath that have construed RCW 16.08.040[2] to apply to a *bystander* and non-intended target, he has cited no state appellate cases applying RCW 16.08.040 to a police dog. The unreported federal district court cases are not binding on this court. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn. 2d 27, 47, 204 P.3d 885 (2009). The only *reported* federal decision that applied the statute to an arrestee is *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003). In

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2. *See Smith v. City of Auburn, et al.*, No. 04–cv–1829–RSM, 2006 WL 1419376, (W.D.Wash. May 19, 2006) (applying RCW § 16.08.040 to police dog bite of a man who claimed he was innocent of any crime); *Rogers v. City of Kennewick, et al.*, No. 04–cv–5028–EFS, 2007 WL 2055038 (E.D.Wash. July 13, 2007) (applying RCW § 16.08.040 to man mistakenly bitten by police dog); *Terrian v. Pierce County*, 2008 WL 2019815 (W.D.Wash., 2008) (finding statute did not apply to reasonable use of police dog); *Peterson v. City of Federal Way*, 2007 WL 2110336 (W.D.Wash., 2007) (person *mistakenly* bitten by police dog may pursue strict liability).

Miller, the 9th Circuit Court of Appeals affirmed the district court's summary judgment that RCW 16.08.040 **did not** apply when, "the officers ordering the dog to bite was reasonable under the United States Constitution's Fourth Amendment." *Id.* at n. 14. *Miller*, *supra*, which was issued prior to the 2012 amendment.

C. Applying RCW 16.08.040 to this case produces an absurd result.

State law specifically contemplates the use of police dogs to apprehend suspects. RCW 4.24.410. Further, state law allows a police officer to "use all necessary means to effect" an arrest if the arrestee should "either flee or forcibly resist." RCW 10.31.050. *See also*, RCW 9A.16.020(1) (use of force lawful "[w]henever necessarily used by a public officer in the performance of a legal duty . . .") and RCW 9A.16.020(2) (use of force lawful when "necessarily used by a person arresting one who has committed a felony . . .") If State law specifically allows the use of police dogs to apprehend suspects it would be absurd to subject the government agency that owns the police dog to *strict liability* at the same time. "When interpreting a statute, [courts] must avoid unlikely, absurd, or strained results." *In re Det. of Coppin*, 157 Wn. App. 537, 552, 238 P.3d 1192 (2010).

Legislative history also suggests that such a result was not contemplated by the legislature. CP 75. (1989 legislative testimony on police dog handler immunity statute indicating that police dog's *owner* (the County in this case) might be liable for *negligence* to *innocent bystander* injured by a police dog.)

D. Applying RCW 16.08.040 to this case results in a conflict with specific statutes permitting the use of force to make an arrest.

If RCW 16.08.040 applies to police dogs in this case, then it also creates a conflict with RCW 10.31.050, and RCW 9A.16.020(1) and (2). That is because RCW 10.31.050 and RCW 9A.16.020 (1) and (2) permit law enforcement officers to utilize force when making an arrest. When "statutes conflict, specific statutes control over general ones." *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 869, 271 P.3d 381 (2012), *citing Hallauer v. Spectrum Props.*, Inc., 143 Wn.2d 126, 146–47, 18 P.3d 540 (2001). RCW 16.08.040 is a statute of general application. RCW 10.31.050 and RCW 9A.16.020(1) and (2) are specific statutes that apply to the use of force to effect an arrest. In this case, specific statutes make the use of Gizmo lawful. The conflicting general statute which, if applied, creates strict liability for damages for the lawful use of force should be

held inapplicable due to the conflict.

In sum, the use of Gizmo to assist in arresting Mr. Rath was constitutionally reasonable and permitted by state law. Applying the strict liability statute to police dogs being lawfully utilized to arrest a dangerous subject, would lead to the absurd result that government is strictly liable for damages for the use of force that is expressly permitted by state law and allowed by the U.S. Constitution. It would also conflict with specific statutes that permit that level of force. The conflict, and its absurd result are avoided by interpreting the statute as the Court in *Miller* did, i.e. it does not apply to the reasonable application of a police dog to apprehend the intended suspect.

E. This Case Does Not Involve an Issue of Substantial Public Interest That Should Be Determined by the Supreme Court.

Mr. Rath does not address this basis for review in his petition. However, this case involves an unpublished decision, which cannot be cited as authority. GR 14.1. It also involves a situation which will not be repeated now that individuals bitten during the lawful application of a police canine cannot state a claim for strict liability under the statute.

In short, no other state court decision (reported or unreported) has

addressed claims similar to Mr. Rath's. The decision by the Court of Appeals is important to Grays Harbor County and Mr. Rath. However, it is hard to see how it would be of significance to any other member of the public and Mr. Rath makes no convincing argument to the contrary.

V. CONCLUSION

Grays Harbor County respectfully requests that Mr. Rath's petition for review be denied.

RESPECTFULLY SUBMITTED this 18th day of March, 2015.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

John E. Justice, WSBA № 23042
Attorneys for Respondent Grays Harbor County