SUPREME COURT NO. 91323-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HAROLD RATH,

Petitioner,

v.

GRAYS HARBOR COUNTY

Respondent.

PETITIONER'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authorities

I. IDENTITY OF PETITIONER

Harold Rath, Petitioner, asks this Court to accept review of the Court of Appeals decision identified in Part B of this Petition.

II. COURT OF APPEALS DECISION

On January 21, 2015 the Court of Appeals filed a decision dismissing Petitioner's claim as moot, finding that Petitioner no longer had a claim after the Legislature amended the statute relied upon by Petitioner during the pendency of this matter despite the fact that the amendment did not express a remedial or curative purpose or intent to be applied retroactively. *Rath v. Grays Harbor Cnty.*, No. 45076-3-II, 2015 Wash. App. LEXIS 76 (Jan. 21, 2015). A copy of the decision is provided in the Appendix at pages A1-5.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision finding Petitioner's claim as moot because the Legislature amended RCW 16.08.040 after Petitioner filed this action is in conflict with other decisions of the Supreme Court and Court of Appeals.

2. Whether the Court of Appeals should have decided Petitioner's appeal on the merits because Petitioner's action was not moot.

IV. STATEMENT OF THE CASE

A. Factual History

On August 19, 2009, Petitioner, Harold Rath was bitten multiple times by Respondent, Grays Harbor County's police dog while he was in his friends' residence with their permission. At that time RCW 16.08.040 imposed strict liability against all dog owners – including the County of Grays Harbor – when the owner's dog bit and injured an individual lawfully on the premises.

On August 19, 2009, Mr. Rath was in the premises of the trailer with the owner's permission and that permission was never revoked. See CP 423-25 (Dixon Decl.); 426-27 (Ver Valen Decl.). Mr. Rath was wanted by law enforcement for an incident that occurred sometime prior to August 19, 2009. CP 292 (Rath Dep. 14:3-10); VRP 37, 38 (Direct Exam of Harold Rath). Mr. Rath did not know there was an Arrest Warrant out for his arrest. CP 292 (Rath Dep. 17: 23-25); VRP 37 (Direct Exam of Harold Rath). Law enforcement received information that Mr. Rath was at a trailer park on the Hoquiam River. VRP 83 (Second Direct Exam of Dep. Crawford). Ultimately the officers made their way to the trailer in which Mr. Rath was present. CP 242-43 (Crawford Dep.15: 15-21; 17:7-14); VRP 83.

Officers, including Deputy Crawford and his police dog, entered the trailer where Mr. Rath was sleeping. CP 242 (Crawford Dep. 23: 20); VRP 95 (Second Direct Exam of Dep. Crawford). Deputy Crawford knew from experience that trailers often had a storage area underneath the bed

and thought Mr. Rath was in that area. CP 245 (Crawford Dep. 25: 7-11); VRP 101. Deputy Crawford lifted up the bed to reveal the storage area. CP 245 (Crawford Dep. 25: 7-11); VRP 10, 11, 18 (Direct Exam of Crawford). Mr. Rath was lying on his stomach, was not making any movements and was non-responsive. CP 246 (Crawford Dep. p. 29: 3, 19-21; 30: 2-5); VPR 11, 12. Deputy Crawford deployed Gizmo to bite Mr. Rath. CP 246 (Crawford Dep. 30:8-13); VRP 6 (Direct Exam of Dep. Crawford). Mr. Rath recalls Gizmo biting him first on the wrist, then on his arm, and then on his shoulder. CP 295-296 (Rath Dep. 29:7-8, 19-22; 30:1-14); VRP 39-42 (Direct Exam of Harold Rath). Mr. Rath attempted to protect his face, but his arms were grabbed by the officers, allowing Gizmo to begin biting his head. *Id.*

B. Procedural History

Mr. Rath filed a lawsuit against Grays Harbor County pursuant to Washington's strict liability dog bite statute, which provided: "The owner of any dog which shall bite a person while such person is lawfully in a private place shall be liable for such damages as may be suffered by the person bitten." RCW 16.08.040.

Both parties moved for summary judgment on the issue of whether the strict liability dog bite statute applied to this case. After oral argument on January 25, 2013 the trial court properly held that the dog bite statute was applicable to this case, and that as a matter of law Mr. Rath did not provoke the dog to bite him under RCW 16.08.060, but reserved ruling on liability as to whether Mr. Rath was 'lawfully on' the premises when he

was bitten. The court informed the parties that it would hold a bifurcated trial proceeding to first determine whether Plaintiff was lawfully on the premises, and if so, then proceed to a determination of damages.

The case proceeded to a bifurcated trial on June 3 & 4, 2013 to first determine whether Plaintiff was lawfully on the premises, and if so, would then proceed to a determination of damages. After the parties rested, the trial court gave the jury the following instruction, among others: INSTRUCTION NO. 10: "A person remains unlawfully in a private place when he or she purposefully refuses to leave a premises or submit to arrest when given a lawful order to do so." CP 490-92 (Court's Instructions to the Jury).

The trial court did not provide authority from which it based its jury instruction number 10 and its language was inconsistent with WPIC 65.02 that defines lawful presence. Plaintiff objected to jury instruction number 10 being given to the jury as being contrary to Washington law on the definition of "lawfully on the premises." VRP 121, 122. The jury returned a verdict finding that Mr. Rath was bitten by the police dog, but that he was not lawfully in the trailer when he was bitten. Plaintiff requests that this court reject instruction No. 10 and direct a verdict on liability in favor of Plaintiff since it is undisputed that he was bitten by Defendant's dog on premises where he had permission from the owners to be.

Mr. Rath sought appeal seeking to (1) reverse the trial court's denial of summary judgment on the issue of strict liability; (2) find that the trial court's jury instruction number 10 misstated the law on the issue of being lawfully in a private residence; and, (3) direct a verdict on the issue of liability in favor of Plaintiff.

The Court of Appeals filed a decision on January 21, 2015 finding that Mr. Rath was divested of his cause of action when the Legislature added an affirmative defense of "the lawful application of a police dog" to the statutory strict liability statute; therefore his claim was moot and dismissed the action. *Rath, supra*, Appendix at pages A4-5. The Court of Appeals did not reach any of the substantive issues of Mr. Rath's appeal.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may accept review of a Court of Appeals decision if it involves a decision that is in conflict with other decisions of the Supreme Court or Court of Appeals, or is an issue of substantial public interest. RAP 13.4(b)(1-2, 4). The Court of Appeals' finding that Mr. Rath's claim is moot and failure to make an analysis of the amended statute's retroactivity is in conflict with other decisions of this Court and the Court of Appeals which hold that legislative enactments are presumptively applied prospectively. The Court of Appeals' decision also creates tremendous uncertainty regarding the prospective or retroactive application of future statutory amendments, which is a substantial issue of

public interest. If Division II's analysis is allowed to stand, the Legislature and public's reliance on the longstanding rule of prospective application of statutory amendments will be misplaced and the ultimate intent of the Legislature and reliance by the public will be misplaced.

A. This Court should accept review because the Court of Appeals reliance on *Hansen v. West Coast Wholesale Drug Co.* to find Petitioner's claim moot was in conflict with other published Washington appellate decisions.

The Court of Appeals found Mr. Rath's claim was automatically abolished by the Legislature upon the 2012 amendment of RCW 16.08.040 that provided government defendants a new potential affirmative defense. *See* Laws of 2012, ch. 94, § 1. In finding Mr. Rath's claim as moot the Court of Appeals relied extensively on *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn.2d 825, 289 P.2d 718 (1955). In *Hansen*, the Court addressed a dramshop act. While the case was pending on appeal the Legislature *repealed* the entire act. *Id.* at 826. The Court went on to find that "[w]here 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." *Id.* at 827 (quoting *Robinson v. McHugh*, 158 Wash. 157, 164, 291 P. 330 (1930)). In essence, the *Hansen* court implied that the repeal of the entire statutory cause of action meant that the Legislature intended retroactive application. In *Rath*, the relevant statute was not repealed, only amended with the addition of an affirmative defense. RCW 16.08.040. The Court of Appeals in *Rath* extended its reasoning beyond whether the Legislature had the right to divest Mr.

Rath's statutory cause of action and whether it intended to do so and ruled that, contrary to established Washington law, the amended statute divested all his rights retroactively instead of prospectively as a matter of law without any evidence of the Legislature's intent to do so. *Rath, supra*, Appendix at page A-5.

In the present matter the Court of Appeals relied upon the above quoted language to find that Mr. Rath's claim derived solely from the statute. However, the Court of Appeals' reliance upon *Hansen* is erroneous, as *Hansen* addressed the repealing of an entire statute, not the amending of a statute, as is the case of RCW 16.08.040. The amendment to RCW 16.08.040 added the following section: "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. This amendment did not reinstate sovereign immunity for the county; nor did it absolutely repeal the county's liability for dog bites. The amendment simply changed the manner in which future victims of police dog bites may seek relief by adding a potential new affirmative defense. This distinction is significant in the application of the now amended, not repealed statute, to the case at hand.

The weight of cases in Washington provide that statutory amendments apply prospectively unless intended otherwise, thus the Court of Appeals should have engaged in an analysis to determine if the Legislature intended the statute to apply retroactively. *Magula v. Benton*

Franklin Title Co., 131 Wn.2d 171, 930 P.2d 307 (1997) (definition of "marital status" is amended after an alleged unlawful termination under the Washington Law Against Discrimination, this Court did not apply the legislative definition that existed at the time the decision was issued, but rather engaged in a retroactivity analysis and found no intent to apply the new definition retroactively); *Ballard Square Condo. Owners Assoc. v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617-19, 146 P.3d 914 (2006) (applying a retroactive intent analysis to an amended statute of limitations for bringing actions against dissolved corporations); *1000 Virginia Ltd. v. Vertecs Corp.*, 158 Wn.2d 566, 584-88, 146 P.3d 423 (2006) (applying a retroactive intent analysis to a new statute that "prevents application of the discovery rule of accrual in the case of written construction contracts"); *see also A.M.M. v. Dept. of Soc. & Health Srvcs.*, 182 Wn. App. 776, 786-91, 332 P.3d 500 (2014) (finding that the trial court should have retroactively applied the amended statute in a matter terminating the parental rights of an incarcerated person where the triggering event is the removal of the parental rights).

Division II specifically contradicted the rule set down in *Magula*, that even if a legislative amendment narrowed the application of a statutory right in a manner that would defeat a claim in the future, the amendment would not be applied to defeat the pending claim without satisfying one of the exceptions requiring retroactive application -- expressed intent or remedial or curative purpose. *Magula, supra.* The

plaintiff in *Magula* sued her employer under a statutory marital discrimination claim when she was terminated due to her spouse's misconduct. 131 Wn.2d at 178, 930 P.2d at 311. At the time of her termination, the interpretation of statutory marital discrimination contemplated and prohibited this type of termination. *Id.* While her case was pending, the Legislature amended the statutory definition of marital discrimination by narrowing it to not include termination due to spousal misconduct. 131 Wn.2d at 181, 930 P.2d at 313. The Supreme Court in *Magula* held that her claim could have been precluded by the narrower statutory definition but ruled that her claim survived because the amendment to the statute was presumed to apply prospectively only unless one of the exceptions to that rule was proven -- intent, curative or remedial. 131 Wn.2d at 181-182, 930 P.2d at 313. Mr. Rath's case and the statutory amendment to RCW16.08.040 are no different and his claims are likewise preserved as a matter of law.

B. This Court should accept review to determine if the amendment to RCW 16.08.040 should be applied prospectively and to clarify the proper analysis for an amended statute.

In order to analyze an amendment's prospective or retroactive effect the Court should first determine the statute's triggering event. *In re Estate of Haviland*, 177 Wn.2d 68, 77, 301 P.3d 31 (2013). If the triggering event falls before the statute's effective date then the Court should move to the retroactive analysis to determine if any of the three exceptions to the prospective application presumption are present:

(1) legislative intent, (2) "clearly curative" in nature, or (3) remedial in nature. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992) (citations omitted). In Mr. Rath's case, the Court of Appeals did not engage in the retroactive analysis.

1. Triggering event

In order to determine the proper application of a statutory amendment one must first determine if the relevant amendment is operating in a prospective or retrospective manner in relation to the case at hand. *See Matter of Estate of Burns*, 131 Wn.2d 104, 123, 928 P.2d 1094 (1997). In short, one must determine what triggers the statute, where "the proper triggering event is that which the statute intends to regulate." *Haviland*, 177 Wn.2d at 77, 301 P.3d 31. "A statute operates prospectively when the precipitating event for [its] application . . . occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute." *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992) (quoting *Aetna Life Ins. Co. v. Washington Life & Disab. Ins. Guar. Ass'n*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974)).

The proper triggering event for application of RCW 16.08.040(1) is the accrual of the action, the dog bite. At the time that Mr. Rath was bitten the statute provided that:

> 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.

RCW 16.08.040. Clearly the triggering event in the statute is the dog bite. One could argue that the triggering event is the initial filing of the action based on the application of strict liability in the causes of action in the complaint. However, in the present action the amendment to RCW 16.08.040 did not come into effect until June 7, 2012 (Laws of 2012, ch. 94, § 1). *Rath, supra*, Appendix at page A4. Therefore, either triggering date for the statute would be before the amendment took effect. Consequently, the Court should now look to determine if there is any basis for the amendment to RCW 16.08.040 to apply retrospectively.

2. Retrospective analysis

It is well settled that "generally, an amendment applies prospectively only." 131 Wn.2d at 171, 181, 930 P.2d 307 (citing *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 832 P.2d 1303 (1992); *Landgraf v. USI Film*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). However, in three circumstances an amendment can be applied retroactively: "(1)[when] the legislature so intended; (2) it is 'curative'; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition." *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000) (quoting *State v. Cruz*, 139 Wn.2d 186, 191, 985 P.2d 384 (1999) (citing *F.D. Processing*, 119 Wn.2d at 460, 832 P.2d 1303).

First, to determine legislative intent one must initially look to the express language of the statute, then if necessary one can look to the legislative history in order to determine the Legislature's intent. *F.D. Processing,* 119 Wn.2d at 460, 832 P.2d 1303. However, where a statute does not expressly provide for retroactive effect, "generally it should not be judicially implied." *Meibach v. Colasurdo*, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984) (citing *Everett v. State*, 99 Wn.2d 264, 270, 661 P.2d 588 (1983)).

RCW 16.08.040 does not expressly provide for any retroactive effect. The bill simply provides an effective date of June 7, 2012. Laws of 2012, ch. 94, § 1. Looking to the legislative history does not provide significant assistance. The amendment to RCW 16.08.040 was included with a bill amending other laws providing for civil penalties on persons who harm police dogs. Laws of 2012, ch. 94, § 2. Further, the Final Bill Report is completely silent as to any retroactive effect of the amendments. *See* Final Bill Report, 2012 Wash. Legis. Serv. ch. 94 (S.H.B. 2191), Appendix at pages A6-7.

Where the legislative intent cannot be determined the Court should then look to determine if the statute is "clearly curative." *F.D. Processing,* 119 Wn.2d at 460, 832 P.2d 1303. "An amendment is curative if it clarifies or technically corrects an ambiguous, older statute, without changing prior case law." *Magula*, 131 Wn.2d at 171, 182, 930 P.2d 307 (citing *F.D. Processing*, 119 Wn.2d at 461, 832 P.2d 1303; *Washington*

Waste Sys., Inc. v. Clark Cnty., 115 Wn.2d 74, 78, 794 P.2d 508 (1990)). In order for a statute to be curative an ambiguity must exist. A statute is ambiguous when the law "can be reasonably interpreted in more than one way." *McGee*, 142 Wn.2d at 316, 325, 12 P.3d 144 (quoting *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). However, when "ambiguity is lacking in statutory language, this court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied." *F.D. Processing,* 119 Wn.2d at 462, 832 P.2d 1303.

RCW 16.08.040 is not ambiguous and the Legislature's amendment is not clearly curative. RCW 16.08.040 was originally passed in 1941 and remained unchanged until the recent amendment in 2012. *See* Laws of 1941, ch. 77, § 1; Appendix at page A8; Laws of 2012, ch. 94, § 1. In over 70 years of existence the statute has not demonstrated more than one reasonable interpretation. *See Beeler v. Hickman*, 50 Wn. App. 746, 752, 750 P.2d 1282 (1988)) (finding that only one previous case had addressed the meaning of owner); *Shafer v. Beyers*, 26 Wn. App. 442, 446, 613 P.2d 554 (1980). *See also Peterson v. City of Federal Way, et al*, 2007 WL 2110336 at *3 (W.D. Wash. July 18, 2007) (not reported) (citing *Rogers v. City of Kennewick, et al*, 2007 WL 2055038 at *7 (E.D. Wash. July 13, 2007) (not reported), aff'd; *Rogers v. City of Kennewick, et al.*,

2008 WL 5383156 (9th Cir. Dec. 23, 2008) (not selected for publication). If a statute is not ambiguous, then an amendment cannot be curative.

When an amendment is found not to be curative, the Court should then look to determine if the amendment is remedial. *F.D. Processing,* 119 Wn.2d at 460, 832 P.2d 1303. "A statute is remedial when it relates to practice, procedure, or remedies." *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). A remedial statute "afford[s] a remedy, or better[s] or forward[s] remedies already existing for the enforcement of rights and the redress of injuries. *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (citing 3 Sutherland, *Statutory Construction* § 60.02 (4th rev. ed. 1974)).

RCW 16.08.040 is not remedial in nature because it does not relate to a practice, procedure, or remedy. The amendment to RCW 16.08.040 simply allows an additional affirmative defense against future victims of lawfully applied police dog bites from under the strict liability statute.

The relevant amendment in this case went into effect after Mr. Rath's claim accrued and after he filed suit. Because, there is no basis to infer any legislative intent, curative effect or remedial purpose, the Court of Appeals should not have inferred retroactive application contrary to the presumption of prospective application. *Magula, supra.* Unlike *Hansen* where an entire statutory cause of action was repealed, the 2012 amendment to RCW 16.08.040 did not repeal the cause of action; it only added a potential affirmative defense, which should only be applied

prospectively. *Hansen, supra.* The *Rath* Court of Appeals' decision was clearly in error and contrary to the weight of Washington appellate law interpreting retrospective application of statutory amendments and thus must be reversed in order to avoid upsetting the longstanding reliance by the Legislature and the public on prospective application of statutory amendments absent intent to the contrary.

C. This Court should accept review to determine if the Court of Appeals should have addressed Petitioner's appeal on the merits

If this Court finds that the Court of Appeals' decision is contrary to published opinions of this Court and the Court of Appeals and thus should have determined if the amendment to RCW 16.08.040 applies prospectively or retroactively, instead of dismissing the claim as moot, then this Court should also find that the Court of Appeals should have ruled on the merits of Petitioner's claim. The Petitioner sought review of the trial court's summary judgment ruling regarding strict liability and jury instruction regarding the well established law surrounding lawful presence on private property as more fully set out in Mr. Rath's appeal below.

The statutory scheme of the strict liability dog bite statute defines what it means to be lawfully upon private property in RCW 16.08.050, which states:

> A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said consent shall not be

> presumed when the property of the owner is fenced or reasonably posted.

The definition of lawful presence in Chapter RCW 16.08 is focused on the permission to be on the property, whether express or implied. *Sligar v. Odell*, 156 Wn.App. 720, 728-29, 233 P.3d 914 (2010). It is undisputed that Mr. Rath had permission from the private property owners to enter and remain on their property at the time he was bitten by Respondent's dog.

The trial court gave the following jury instruction, among others: INSTRUCTION NO. 10: "A person remains unlawfully in a private place when he or she purposefully refuses to leave a premises or submit to arrest when given a lawful order to do so." CP 490-92 (Court's Instructions to the Jury). According to jury instruction number 10, ignoring police officer demands to exit a private home revokes the express permission of an invited guest to remain on the premises. This jury instruction is unsupported by any case law or statutory authority and is contrary to WPIC 65.02 that defines lawful presence based on permission or license by the owner without regard to third party law enforcement commands. The only question regarding lawful presence is one of permission by the private property owner, whether implied or express. *Sligar*, 156 Wn. App. at 728-29, 233 P.3d 914; *Hansen v. Sipe*, 34 Wn. App. 888, 891, 664 P.2d 1295 (1983); *See also*, WPIC 65.02 and WPIC 120.01 (defining a

trespasser as a person who enters or remains upon the premises of another without permission or invitation, express or implied).

Jury instruction number 10 creates a new exception to the strict liability dog bite statutes. The assertion that Mr. Rath was illegally in the private residence by not responding to police does not impact the lawfulness of his presence in the trailer as it is defined in the dog bite statute, by case law, or the Washington Pattern Jury Instructions.

VI. CONCLUSION

Petitioner, Harold Rath, respectfully requests that this Court grant review under RAP 13.4(b) to determine if the amendment to RCW 4.16.080 should be applied prospectively. Further, Petitioner requests this Court to accept review to determine if the Court of Appeals should have ruled on the merits of the appeal below and determine if jury instruction 10 was contrary to law; and the jury's decision, therefore, should be reversed and a directed verdict on liability entered in favor of Petitioner.

Respectfully submitted this 18th day of February, 2015.

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CERTIFICATE OF SERVICE

I, Breean L. Beggs, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 18th day of February, 2015, I caused a true and correct copy of Petitioner's Petition for Review to be emailed (by agreement of counsel) and mailed by U.S. Postal Service, with proper postage and addressed to:

John E. Justice
Law, Lyman, Daniel, Kamerrer
& Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508

DATED February 18, 2015.

s/Breean L. Beggs
Breean L. Beggs

APPENDICES

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HAROLD RATH, Appellant/ Cross-Respondent, v. GRAYS HARBOR COUNTY, a municipal corporation and political subdivision of the State of Washington, Respondent/ Cross-Appellant.	No. 45076-3-II UNPUBLISHED OPINION

LEE, J. — Harold Rath appeals the judgment entered in favor of Grays Harbor County following a jury trial on his claim that the County was liable for injuries suffered when he was bitten by a police dog during his arrest. The County cross-appeals the trial court's order denying its motion for summary judgment arguing that the trial court erred by denying its motion for summary judgment when the legislature abolished Rath's cause of action before trial. Because the legislature may abolish a statutorily created cause of action at any time, Rath no longer had a cause

of action when the legislature's amendment became effective. Therefore, Rath's appeal is moot. Accordingly, we dismiss Rath's appeal.[1]

FACTS

On August 4, 2009, Grays Harbor County Sheriff's Deputy Kevin Schrader was on patrol when he observed a pickup truck creating a large cloud of dust. Schrader initiated a traffic stop of the truck. After attempting to hit Schrader's patrol vehicle, the driver of the truck sped down the road. Schrader identified Rath as the truck driver. Ultimately, Rath drove down a dirt road, swam across a river, and escaped.

Schrader identified the truck as stolen. A 12-gauge shotgun was found in the truck. And, at the time, there was a felony arrest warrant authorizing Rath's arrest on first degree kidnapping. Rath spent the next few weeks evading law enforcement in order to prevent being arrested.

On August 19, 2009, the Grays Harbor Sheriff's Office received information that Rath was in a trailer at a recreational park (RV) park in Hoquiam. Deputy Robert Crawford responded to the RV park with another deputy. Crawford was a K-9 handler and had his patrol canine, Gizmo, with him. Although the responding deputies repeatedly ordered Rath to surrender, Rath did not exit the trailer. Crawford deployed Gizmo to effectuate Rath's arrest. Rath immediately began striking and fighting Gizmo, but he was quickly subdued and successfully arrested. Rath sustained numerous injuries and was transported for medical care after his arrest.

[1] The County states that we do not need to consider its cross-appeal if the court's judgment is affirmed. Because we dismiss Rath's appeal as moot, the trial court's order remains unchanged and we do not address the County's cross-appeal.

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.

In December 2012, the parties filed cross motions for summary judgment. Rath argued that the strict liability dog bite statute applied to police dogs owned by the County and there was no genuine issue of material fact. Therefore, he was entitled to judgment as a matter of law. The County moved for summary judgment arguing (1) the 2012 legislative amendments to the strict liability dog bite statute—which specifically excluded "the lawful application of a police dog"—terminated Rath's cause of action; and (2) Rath was not lawfully in the trailer at the time Gizmo bit him. The trial court denied both motions for summary judgment.

After the jury entered a verdict finding that Rath was not lawfully in the trailer, the trial court entered judgment for the County and dismissed Rath's claims with prejudice. Rath appeals, and the County cross appeals.

ANALYSIS

Rath argues that the trial court erred by denying his motion for summary judgment and by improperly instructing the jury on the definition of lawfully. The County argues that the trial court erred by denying its motion for summary judgment because the 2012 amendment to the strict liability dog bite statute eliminated Rath's cause of action. Because the legislature has abolished Rath's cause of action, Rath has no remaining cause of action and his current appeal is moot.

On March 23, 2012, Rath filed his civil complaint under former RCW 16.08.040. But, on June 7, 2012, Laws of 2012, ch. 94, § 1 amended RCW 16.08.040 by adding a section that read: "This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410."

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.

We dismiss Rath's appeal as moot.

A majority of the panel having decided that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

FINAL BILL REPORT
SHB 2191

C 94 L 12
Synopsis as Enacted

Brief Description: Concerning police dogs.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives Rivers, Blake, Klippert, Hurst, Haler, Takko, Alexander, Hope, Harris and Reykdal).

House Committee on Public Safety & Emergency Preparedness
Senate Committee on Judiciary

Background:

A police dog is a dog used by a law enforcement agency specially trained for law enforcement work and under the control of a dog handler.

A person is guilty of Harming a Police Dog if he or she maliciously injures, disables, shoots, or kills a dog that the person knows or has reason to know is a police dog. The dog does not have to be engaged in police work at the time when the person injures or kills the dog. Harming a Police Dog is an unranked class C felony offense. The maximum sentence for unranked felonies is one year of confinement, along with possible community service, legal financial obligations, community supervision, and a fine.

Generally, state law provides that when a dog bites a person, the dog owner is liable for any damages that may be suffered by the victim, regardless of the former viciousness of the dog or the dog owner's knowledge of such viciousness.

Summary:

In addition to any criminal penalties that are imposed, courts are authorized to impose a civil penalty of $5,000 for harming a police dog. If the police dog is killed, courts must impose a mandatory civil penalty of $5,000; however, the court has authority to increase the fine up to a maximum of $10,000. Any money collected from the civil fines must be distributed to the jurisdiction that owns the police dog.

Police dogs are excluded from the statutory provisions that make a dog owner liable for damages that a victim may sustain from a dog bite.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Votes on Final Passage:

House	98	0	
Senate	49	0	(Senate amended)
House	95	0	(House concurred)

Effective: June 7, 2012

CHAPTER 77.

[S. B. 15.]

LIABILITY FOR DOG BITES.

AN ACT providing for the recovery of damages by persons bitten by dogs and creating a liability of the owner of such dog.

Be it enacted by the Legislature of the State of Washington:

Owner of dogs liable for damages.

SECTION 1. 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.

Construction

SEC. 2. A person is lawfully upon the private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of the State of Washington or of the United States or the ordinances of any municipality in which such property is situated.

Defense.

SEC. 3. Proof of provocation of the attack by the injured person shall be a complete defense to an action for damages.

Passed the Senate March 10, 1941.

Passed the House March 10, 1941.

Approved by the Governor March 18, 1941.