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No. 42502-5-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

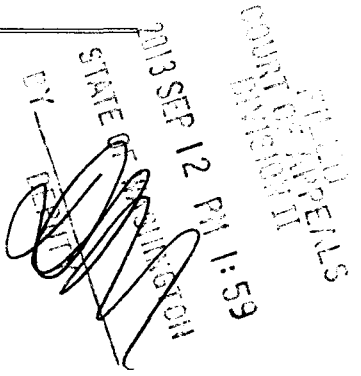
SUE ANN GORMAN,

Plaintiff/Respondent/Cross-Appellant,

vs.

PIERCE COUNTY,

Defendant/Appellant/Cross-Respondent.



SUE ANN GORMAN'S PETITION FOR DISCRETIONARY REVIEW

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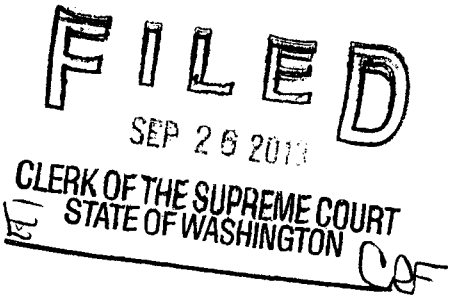


TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

WASHINGTON CASES

CASES FROM OTHER JURISDICTIONS

WASHINGTON COURT RULES

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Sue Ann Gorman asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Ms. Gorman asks that this Court review the portion of the August 13, 2013 opinion in which the Court of Appeals determined that Ms. Gorman waived her argument regarding her legal duty by failing to raise it in her original motion under CR 50 (see Published Opinion at A-19 – A-20). A copy of the Court of Appeals' opinion is in the Appendix at pages A-1 through A-29.

C. ISSUE PRESENTED FOR REVIEW

Did Ms. Gorman preserve the issue of her legal duty for purposes of appeal when the issue is one of pure law, Ms. Gorman raised the issue in a post-trial motion under CR 50, Pierce County substantively responded to and the trial court ruled on Ms. Gorman's post-trial motion, and review of the issue is needed to prevent a manifest injustice?

D. STATEMENT OF THE CASE

Sue Gorman was severely mauled by two pit bulls who entered her bedroom via an open pet door and who attacked her as she slept in her bed. Published Opinion at A-1 – A6. She brought suit against Pierce

County and the dogs' owners, Shellie R. Wilson, Zachary Martin, and Jacqueline Evans-Hubbard. *Id*.at A-6.

Ms. Gorman objected to all jury instructions on comparative or contributory negligence, including the special verdict form. RP 1351-53. At the close of evidence at trial, Ms. Gorman moved for a directed verdict on the issue of comparative or contributory negligence under CR 50. CP 1427-51. The motion was denied. RP 1463-66. In its verdict, the jury assessed 1% comparative fault to Ms. Gorman. CP 902-04.

After the verdict was entered, Ms. Gorman moved for judgment notwithstanding the verdict on the issue of her comparative negligence, asking that the jury's determination of 1% fault be stricken. CP 1467-94. Ms. Gorman argued specifically that she was under no statutory or common law duty to keep her pet door closed, and that her actions once the pit bull attack commenced were reasonable. *Id.*; 9/15/11 RP 5-14. Only Defendant Evans-Hubbard objected to the inclusion of this issue in Ms. Gorman's motion. CP 1496-98; CP 1505-06. Defendant Pierce County did not object, but provided a substantive response. CP 1495-99; RP 1463-66.

The trial court denied the motion, refusing to rule on the purely legal issue of Ms. Gorman's duty:

I will tell you that I find a lot of what Mr. McKasy says

> about leaving the door open rather compelling, not the – but it's not for this Court to decide policy decisions.

9/15/11 RP 27. *See also* CP 1532-34; 9/15/11 RP 26-30.

On appeal, Ms. Gorman argued that the trial court should have granted her post-trial CR 50 motion, that the issue of comparative fault should never have gone to the jury, and that comparative fault should have been stricken from the verdict. *See* Respondent's Brief at A-96 – A-102. Evans-Hubbard objected, arguing that Ms. Gorman did not include the issue of her legal duty in her first CR 50 motion. Published Opinion at A-19. The Court of Appeals agreed with Evans-Hubbard and held that Ms. Gorman had waived the issue on appeal. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) provides in pertinent part:

> A petition for review will be accepted by the Supreme Court only: . . .
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Supreme Court should accept review of this issue because the Court of Appeal's decision is not consistent with case authority decided under CR 50's federal counterpart. This divergence from federal law is an issue of substantial public interest.

CR 50 provides as follows:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . .
>
> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under rule 59. . . .

CR 50(a) and (b).

When a Washington court rule is identical to the corresponding federal rule, Washington courts will look to federal case law for guidance in interpreting the Washington rule. *See, e.g., Soter v. Cowles Pub. Co.,* 162 Wn.2d 716, 739, 174 P.3d 60 (2007); *Carson v. Fine,* 123 Wn.2d 206, 223, 867 P.2d 610 (1994). *See also* Karl B. Tegland, 4 WASH. PRAC., Rules Practice CR 50, Drafters' Comment, 2005 Amendments (5th ed. 2012) ("In addition, it is beneficial in this situation to have Washington and federal practice be the same.").

Federal courts have held that the requirement that identical issues be raised in pre- and post-verdict CR 50 motions only applies in appeals based on the sufficiency of evidence, **not issues of law.** *See, e.g., Bryant*

v. Dollar Gen. Corp., 538 F.3d 394, 397 n.2 (6th Cir. 2008), *cert. denied* 555 U.S. 1138 (2009); *Estate of Blume v. Marian Health Center,* 516 F.3d 705, 707 (8th Cir. 2008); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939-41 (7th Cir. 2006), *cert. denied* 549 U.S. 1180 (2007); *Metcalf v. Bochco,* 200 Fed Appx. 635, 637 n.1 (9th Cir. 2006) (unpublished). *See also* Miller & Wright, 9B FED. PRAC. & PROC. CIV. § 2537 "Renewal of Motion for Judgment as a Matter of Law after Trial" (3rd ed. 2012) ("Unitherm's rationale for renewal is that the judge who saw and heard the witnesses and has the feel of the case, rather than a new judge relying on an appellate printed transcript, should decide whether a new trial should be granted or a judgment entered under Rule 50(b). **This rationale does not apply to purely legal questions.**") (emphasis added).

The cases relied upon by the Court of Appeals were distinguishable and did not address the proper procedure to follow when a purely legal question is presented after a verdict is rendered. Specifically, in *Washburn v. City of Federal Way,* 169 Wn. App. 588, 283 P.3d 567 (2012), *rev. granted* 176 Wn.2d 1010 (2013), the City failed to renew its CR 50(a) motion after the verdict, and did not object to the jury instruction relating to its duty. *Id.* at 611- 15. The court there concluded that because of the City's failures, the issue for purposes of CR 50 was not one of pure law, but related to the sufficiency of the factual evidence. *Id.* at 615. In

the present case, Ms. Gorman **did** make a post-trial CR 50 motion and objected to the jury instructions relating to comparative fault. Thus, *Washburn* is not on all fours and the Court of Appeals should not have relied on the case in its opinion.

In *Hanks v. Grace,* 167 Wn. App. 542, 273 P.3d 1029 (2012), *rev. denied* 175 Wn.2d 1017 (2012), the court did not address what rules would apply if a purely legal issue were presented. Thus, the case provides no guidance.

The Court of Appeals concluded that Ms. Gorman raised a "new theory" in her post-trial CR 50 motion, relying on *Hill v. BCTI Income Fund-I,* 144 Wn.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.,* 157 Wn.2d 214, 137 P.3d 844 (2006). However, in that case, the plaintiff had initially requested relief based on a failure to provide reasonable accommodation. *Id.* at 193 n.20. For the first time in a post-trial CR 50 motion, the plaintiff raised a completely new basis for relief—wrongful discharge. *Id.* That is unlike the case at bar, where in both the initial CR 50 motion and in the post-trial CR 50 motion Ms. Gorman raised the same theory: comparative fault. Ms. Gorman did not raise any "new theory" in her post-trial motion, so *Hill* is inapplicable.

Likewise, the case of *Browne v. Cassidy,* 46 Wn. App. 267, 728

P.2d 1388 (1986), is inapplicable. There, the plaintiff failed to request jury instructions on the issue of partnership liability, or move for a directed verdict on the issue of partnership liability. *Id.* at 269. The case went to the jury on ordinary negligence. *Id.* The plaintiff raised the issue of partnership liability in a post-trial CR 50 motion, which was denied. *Id.* at 269-70. Here, Ms. Gorman objected to the jury instructions on comparative fault and raised the issue of comparative fault both before and after the verdict. *Browne* does not discuss how to handle a purely legal issue which is raised in a post-trial CR 50 motion. *Id.* The case offers no guidance.

Here, the existence of a duty on Ms. Gorman's part was purely a question of law. *Christensen v. Royal School Dist. No. 160,* 156 Wn.2d 62, 66, 124 P.3d 283 (2005). Under the federal authorities cited above, the fact that Ms. Gorman raised the issue in one, but not both, of her CR 50 motions did not preclude the Court of Appeals from reviewing the issue.

Furthermore, even if Ms. Gorman's raising "duty" for the first time in her post-trial motion was objectionable, only one of the Defendants (Evans-Hubbard) actually objected. CP 1496-98; CP 1505-06. The Defendant who did not object, Pierce County, provided a substantive response and the trial court ruled on the motion. CP 1495-99; CP 1532-34; RP 1463-66. Thus, according to federal authorities, Pierce County has

waived the objection on appeal. *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1203 (Fed. Cir. 2010); *Wallace v. McGlothan,* 606 F.3d 410, 418-19 (7th Cir. 2010); *Howard v. Walgreen Co.*, 605 F.3d 1239, 1243-44 (11th Cir. 2010), *cert. denied* 132 S. Ct. 1795 (2012); *Art Attacks Ink, LLC v. MGA Entertainment*, 581 F.3d 1138, 1143 (9th Cir. 2009). At the very least, the Court of Appeals should have considered the issue of Ms. Gorman's legal duty as between herself and Pierce County. The Court of Appeals did not address Pierce County's failure to object in its opinion.

Finally, an appellate court can review an issue that was not raised in a motion for judgment as a matter of law if needed to prevent a "manifest injustice." *Clergeau v. Local 1181,* 162 Fed. Appx. 32, 34 (2nd Cir. 2005) (unpublished); *Rodick v. City of Schenactady,* 1 F.3d 1341, 1347 (2nd Cir. 1993). *See also* Miller & Wright, 9B FED. PRAC. & PROC. CIV. § 2537 "Renewal of Motion for Judgment as a Matter of Law after Trial" (3rd ed. 2012). "Manifest injustice" occurs when a jury's verdict wholly lacks legal support. *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 129 (2nd Cir. 1999).

Here, the Defendants provided no authority for the proposition that Ms. Gorman owed a duty to close her back door in the morning when she had only seen Betty and Tank loose in the afternoons and early evenings,

and she had no way of knowing that Betty and Tank would enter her home and attack her while she was sleeping. Based on "mixed considerations of 'logic, common sense, justice, policy, and precedent,'" Ms. Gorman owed no duty to close her back door. *Christensen,* 156 Wn.2d at 66.

> In particular, the plaintiff may not be required to surrender a valuable right or privilege merely because the defendant's conduct threatens him with what would otherwise be an unreasonable risk. Because the defendant builds a powder mill or runs a railroad near his property, he need not abandon it, or take special precautions against fire. He is not to be deprived of the free, ordinary and proper use of his land because his neighbor is negligent, and he may leave the responsibility to the defendant.

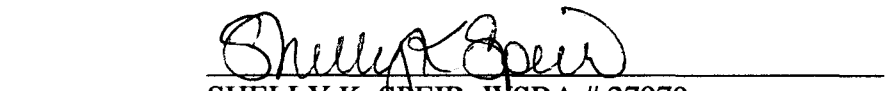
William L. Prosser, THE HANDBOOK OF THE LAW OF TORTS § 65, "Contributory Negligence," p. 425 (4th ed. 1971). To allow the jury's finding of comparative negligence to stand when Ms. Gorman owed no legal duty would result in a manifest injustice. The Court of Appeals did not address "manifest injustice" in its opinion.

F. CONCLUSION

Based on the foregoing, Ms. Gorman requests that the Court accept review, find that Ms. Gorman preserved the issue of her legal duty for appeal, reverse the Court of Appeals in part, find that Ms. Gorman owed no legal duty to close her pet door, and strike the jury's assessment of 1% comparative fault.

Respectfully submitted this 12th day of September, 2013.

TROUP, CHRISTNACHT, LADENBURG, McKASY, DURKIN & SPEIR, INC., P.S.



SHELLY K. SPEIR, WSBA # 27979
Of Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUE ANN GORMAN, a single person, Respondent/Cross Appellant, v. PIERCE COUNTY, a county corporation; SHELLIE R. WILSON and "JOHN DOE" WILSON, husband and wife and the marital community composed thereof; ZACHARY MARTIN and "JANE DOE" MARTIN, husband and wife and the marital community composed thereof; and JACQUELINE EVANS-HUBBARD and "JOHN DOE" HUBBARD, husband and wife and the marital community composed thereof, Appellants/Cross Respondents.	No. 42502-5-II consolidated with No. 42594-7-II PUBLISHED OPINION

PENOYAR, J. — Two dogs entered Sue Ann Gorman's house through an open door and mauled her in her bedroom. Invoking a statute imposing strict liability for dog-bite injuries, Gorman sued the dog owners, Shellie Wilson, Zachary Martin, and Jacqueline Evans-Hubbard. Gorman also sued Pierce County for negligently responding to complaints about the dogs before the attack. Pierce County invoked the public duty doctrine and sought dismissal of the claims against it, but the trial court ruled that the failure to enforce exception applied. A jury found all defendants liable and also found that Gorman's actions contributed to her injuries. Pierce County appeals, arguing that (1) the "failure to enforce" exception to the public duty doctrine does not apply, (2) the jury instructions misstated Pierce County's duty of care, and (3) the trial court erroneously admitted evidence of prior complaints about Wilson's other dogs. Gorman cross appeals, arguing that (4) the trial court erred by denying her motions for judgment as a matter of law, (5) the trial court erred by failing to give the emergency doctrine instruction, and

(6) insufficient evidence supports the jury's verdict on contributory fault. Because Pierce County had a mandatory duty to act, we affirm the trial court's determination that the failure to enforce exception applies. Additionally, the jury instructions properly stated the law and Pierce County opened the door to evidence about Wilson's other dogs. We further hold that Gorman failed to properly renew her motion for judgment as a matter of law and this argument is waived, Gorman failed to properly present the emergency doctrine instruction to the trial court, and there is sufficient evidence to support the jury's verdict that Gorman was contributorily negligent in incurring her injuries.

FACTS

I. SUBSTANTIVE FACTS

Shellie Wilson lived in Gig Harbor with her 16-year-old son, Zachary Martin. In 2006, they acquired a pit bull named Betty. Betty later had a litter of mixed-breed puppies, including one named Tank. In February 2007, Wilson and Martin gave Tank to Jacqueline Evans-Hubbard.

Two houses away from Wilson, Sue Gorman lived with her service dog, Misty. Gorman's next-door neighbor, Rick Russell, owned a Jack Russell terrier named Romeo.

On the cul-de-sac where Wilson, Gorman, and Russell lived, residents frequently let their dogs roam outdoors without a leash. Gorman left her sliding glass door open so that Misty and Romeo could come and go as they pleased.

Betty was the subject of several complaints to police and animal control officers. On August 31, 2006, Betty and another dog named Lola, belonging to Martin's houseguest, aggressively confronted Wilson's next-door neighbor in his yard, preventing the neighbor and his son from leaving their house for approximately 90 minutes. The neighbor called 911 and an

animal control officer contacted Wilson. On the basis of Wilson's admissions, the officer cited Wilson for allowing the dogs to run loose and failing to have a dog license. Wilson demanded that Martin's houseguest remove Lola from the house, and the houseguest complied.

A Pierce County ordinance allowed the county to classify a dog as "potentially dangerous" if the county had probable cause to believe the dog (1) bit a person or animal, (2) chased or approached a person "in a menacing fashion or apparent attitude of attack," or (3) was known to otherwise threaten the safety of humans or animals. Former Pierce County Code (PCC) 6.02.010(T) (2007). The county had a duty to evaluate a dog to determine if the dog was potentially dangerous if it had (1) a complainant's written statement that the dog met the code's definition, (2) a report of a dog bite, (3) testimony of an animal control or law enforcement officer who observed the dog, or (4) "other substantial evidence." RP at 964; Former PCC 6.07.010(A) (2007). In deciding to classify a dog, the county could consider prior complaints about other dogs that had previously belonged to the same owner. After classification, the dog's owner would be required to keep the dog confined, even during the pendency of an appeal. The county would be required to seize any potentially dangerous dog that violated any restriction imposed on potentially dangerous dogs.

During a three-week period in 2007, Pierce County received three more complaints about incidents involving Betty. On February 10, 2007, as Gorman returned from the grocery store, Betty chased Gorman and Misty, Gorman's service dog, into Gorman's house. Fifteen minutes later, Gorman tried to retrieve her groceries from the car but Betty again confronted her. Gorman commanded Betty to leave and kicked at her, but Betty bit Gorman's pant leg. Using a stick she grabbed from a pile in the yard, Gorman fended Betty off until retreating to safety inside her house. Gorman then called 911, but Betty left before a sheriff's deputy arrived an

hour later. Finding no one home at Wilson's house, the deputy advised Gorman to call animal control the following morning. Gorman testified that she called animal control and left a message, but she did not receive a return call and did not call again. Animal control had no record of Gorman's call.

The second complaint followed an incident on February 22, 2007. Russell called animal control to report Betty and another loose dog chasing a child on rollerblades.[1] An animal control officer arrived the following day but found no one at Wilson's home. The officer left a note on the door but Wilson and Martin did not respond. The officer also mailed Russell a form to provide a written statement. Russell did not provide a statement until six months later, after the dogs attacked Gorman.

Gorman made the third complaint on March 1, 2007. Betty chased Misty into Gorman's house and proceeded to jump aggressively at Gorman's sliding glass door. Gorman called 911, but Betty again had left by the time a deputy arrived. About 30 minutes later, the deputy and Martin appeared at Gorman's house; Martin then apologized to Gorman, denied Betty's involvement, and promised to fix Wilson's fence. The deputy had Gorman and Martin exchange phone numbers and encouraged Gorman to contact Martin directly in the future.

Wilson owned other dogs before Betty, and Pierce County records showed 10 complaints about Wilson's other dogs. Based on Wilson's prior history, an animal control expert later opined that Pierce County could have declared Betty potentially dangerous after the August 31, 2006, incident with Wilson's next-door neighbor. The expert also opined that Pierce County

[1] There was conflicting testimony on whether a second dog was present and, if so, whether it was Tank.

should have declared Betty potentially dangerous after any of the three incidents on February 10, February 22, and March 1, 2007.

Betty's aggressive behavior continued, but Pierce County did not receive further complaints. Gorman called Martin about 10 times regarding various incidents, but Martin never responded. During an incident in July 2007, Betty and Tank both entered Gorman's house through the open sliding glass door. Gorman believed Betty and Tank had come to confront Misty and Romeo, but Gorman got the dogs to leave peacefully.

On August 17, 2007, Evans-Hubbard, Tank's owner, left for two weeks. While she was gone, Evans-Hubbard left Tank with Wilson. At the time, Tank was six to eight months old.

At approximately 8:22 A.M. on August 21, 2007, Betty and Tank entered Gorman's house through the sliding glass door, which Gorman had left open for the night. Gorman, who was in her bedroom with Misty and Romeo, awoke to the sounds of Betty and Tank snarling. Misty, Gorman's service dog, ran outside to safety.

Betty and Tank then entered Gorman's bedroom and jumped onto her bed. Betty bit Gorman on the left arm. Romeo then jumped off the bed and was mauled by both Betty and Tank.

Gorman tried to protect Romeo. She tried to lift Romeo, but Betty and Tank bit both her hands. Gorman retrieved a gun from her nightstand, but the gun misfired. She threw the gun at the dogs and hit them with her walking stick to no avail. Gorman then managed to pick up Romeo, put him in the closet, and close the door, while Betty repeatedly bit Gorman's face, breasts, and hands. Tank forced the closet door open and, with Betty, began shaking Romeo. Gorman fled the house and closed the sliding glass door behind her to trap the dogs inside. She then called 911.

Gorman suffered serious injuries from 20 to 30 dog bites; she required hospitalization and multiple surgeries. Romeo, the Jack Russell terrier, died from his injuries. Betty and Tank were later euthanized. Wilson and Martin pleaded guilty to criminal charges. They were sentenced to probation and ordered to pay restitution.

II. PROCEDURAL FACTS

Gorman then filed this suit, claiming that (1) Wilson, Martin, and Evans-Hubbard were strictly liable for the harm their dogs caused Gorman[2] and (2) Pierce County negligently failed to take appropriate action in response to the complaints about the dogs before the attack. Wilson, Martin, and Evans-Hubbard admitted liability, but Pierce County did not. Pierce County raised comparative fault as an affirmative defense.

Before trial, Gorman sought permission to introduce Pierce County records showing 10 complaints about other dogs Wilson owned before she acquired Betty. The trial court allowed testimony that 10 complaints were made, but it prohibited any testimony about the incidents alleged in the complaints. However, during cross-examination of an animal control officer, counsel for Pierce County asked "why there wasn't sufficient evidence [in the 10 prior complaints] to declare those dogs potentially dangerous?" Report of Proceedings (RP) (Aug. 3, 2011) at 990. The officer's response suggested that the complaints involved leash law violations, rather than threatening behavior. But on re-direct examination, Gorman's counsel elicited testimony that, in three of these incidents, a dog unsuccessfully attempted to attack a person.

Pierce County moved for summary judgment dismissing it from the case, contending that the public duty doctrine shielded it from liability because the county owed no legal duty to Gorman individually. The trial court denied the motion, allowing the negligence claim to

[2] RCW 16.08.040(1) makes dog owners strictly liable for injuries their dogs cause.

proceed under the failure to enforce exception to the public duty doctrine.[3] When Gorman rested at trial, Pierce County unsuccessfully moved for judgment as a matter of law on the same grounds presented in the summary judgment motion.

When all defendants rested, Gorman moved for judgment as a matter of law, arguing that the evidence was insufficient to show that she breached a duty and, thus, her negligence could not have contributed to her injuries. The trial court denied the motion.

The jury found all defendants, including Pierce County, liable to Gorman. The jury also found that Gorman's fault contributed to her injuries.[4] After the verdict, Gorman renewed her earlier motion for judgment as a matter of law and argued that she had no legal duty to close her sliding door.

Pierce County appeals the denial of its motion for judgment as a matter of law, while also arguing instructional and evidentiary error. Gorman cross appeals the jury's verdict finding her at fault for contributing to her injuries.

ANALYSIS

I. THE PUBLIC DUTY DOCTRINE

Pierce County argues that the trial court erred by denying its motion for judgment as a matter of law on the negligence claim because, under the public duty doctrine, Pierce County owed no duty of care to Gorman. Gorman argues that (1) the public duty doctrine is contrary to law or, in the alternative; (2) the failure to enforce exception to the public duty doctrine applies

[3] Before trial, Gorman also argued, and the trial court agreed, that the special relationship exception to the public duty doctrine applied. But Gorman abandoned this theory by offering to withdraw her proposed jury instruction on the special relationship exception.

[4] The jury apportioned fault as follows: 52 percent to Wilson and Martin, 42 percent to Pierce County, 5 percent to Evans-Hubbard, and 1 percent to Gorman.

here. We hold that the public duty doctrine is not contrary to law and that the failure to enforce exception applies here.

We review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is proper only when, viewing the evidence in the light most favorable to the nonmoving party, substantial evidence cannot support a verdict for the nonmoving party. *Schmidt*, 162 Wn.2d at 491, 493.

Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care. *Osborn v. Mason County*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Under the public duty doctrine, a government's obligation *to the public* is not a legal duty of care; instead, a government can be liable only for breaching a legal duty owed *individually to the plaintiff*. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). However, the public duty doctrine is subject to four exceptions: (1) the legislative intent exception, (2) the failure to enforce exception, (3) the rescue doctrine, and (4) the special relationship exception. *Babcock*, 144 Wn.2d at 786. Whether, in light of the public duty doctrine and its exceptions, a government defendant owed the plaintiff a legal duty is a question of law reviewed de novo. *Vergeson v. Kitsap County*, 145 Wn. App. 526, 534, 186 P.3d 1140 (2008).

A. The Public Duty Doctrine Is Not Contrary to Law

Gorman asks us to abolish the public duty doctrine and instead to apply a different test.[5] We decline to do so because our Supreme Court precedent approving the public duty doctrine binds us.

Urging abolition of the public duty doctrine, Gorman contends that it is incompatible with the legislature's abrogation of sovereign immunity. But our Supreme Court has already rejected this contention. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 287-88, 669 P.2d 451 (1983).[6] Instead, our Supreme Court has repeatedly applied the public duty doctrine to define the duty owed by government defendants in negligence actions. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175Wn.2d 871, 886 n.3, 288 P.3d 328 (2012) (Chambers, J., concurring and joined by a majority of the justices) (listing 29 instances).[7] We are bound to follow our Supreme Court's precedents and have no authority to abolish them. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

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[5] Gorman proposes this argument as an alternative ground on which we may affirm the trial court. *See* RAP 2.5(a).

[6] "Abrogation of the doctrine of sovereign immunity did not *create* duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit." *Chambers-Castanes*, 100 Wn.2d at 288 (emphasis in original). Gorman ignores the majority's opinion in *Chambers-Castanes* but quotes the separate concurring opinion of Justice Utter, the only justice who would have rejected the public duty doctrine in that case.

[7] Our Supreme Court has often described the public duty doctrine as a "focusing tool" used to examine a fundamental element in any negligence action: whether the defendant owed a duty of care to the plaintiff. *Munich*, 175 Wn.2d at 878. But the public duty doctrine is treated as a rule of law. *See Munich*, 175 Wn.2d at 877-88.

Gorman next urges us to apply, instead of the public duty doctrine, the four-part test set out in *Evangelical United Bretheren Church of Adna v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1966).[8] But Gorman misapprehends the purpose of the *Evangelical* test, which recognizes limited grounds for governmental immunity flowing from the separation of powers. *See* 67 Wn.2d at 253-55. The *Evangelical* test determines whether a particular discretionary act is so rooted in governing that it cannot be tortious, no matter how "unwise, unpopular, mistaken, or neglectful [it] might be." 67 Wn.2d at 253. Thus, the *Evangelical* test prevents courts from deciding whether the coordinate branches of government have made the wrong policies. *King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997). The *Evangelical* test is inapposite to the issue here: whether Pierce County owed a legal duty to Gorman. Gorman's argument fails.

B. The Failure to Enforce Exception Applies

The parties dispute only whether the failure to enforce exception to the public duty doctrine applies in this case. We hold that it does.

Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The plaintiff has the burden to establish each element of the failure to

[8] The *Evangelical* test asks whether (1) an allegedly tortious act necessarily involves a basic governmental policy, program, or objective; (2) the act is essential to implementing or achieving such a policy, program, or objective; (3) the act requires the exercise of policymaking judgment or expertise; and (4) a constitution or law authorizes the government actor to do the act. 67 Wn.2d at 255.

enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Contesting only the second element, Pierce County argues that it had no statutory duty to take corrective action.[9] Gorman contends that former PCC 6.07.010(A) created a duty to classify potentially dangerous dogs. We agree with Gorman.

An ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated. *Pierce v. Yakima County*, 161 Wn. App. 791, 800, 251 P.3d 270, *review denied*, 172 Wn.2d 1017 (2011); *Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). Gorman argues that former PCC 6.07.010(A) creates a statutory duty because the word "shall" expresses a mandatory directive. Br. of Resp't at 38.

To determine whether the ordinance is mandatory, we must apply the rules of statutory interpretation to the ordinance. *See City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982). When interpreting a statute, our fundamental objective is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the statute's meaning is plain, then we must give effect to that plain meaning. *Campbell & Gwinn*, 146 Wn.2d at 9-10. But if the statute has more than one reasonable meaning, the statute is ambiguous and statutory construction is necessary. *Campbell & Gwinn*, 146 Wn.2d at 12.

[9] Pierce County does not argue that it took corrective action. Thus, if Pierce County had a duty to take corrective action, it failed to perform the duty and the second element is satisfied.

A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Campbell & Gwinn*, 146 Wn.2d at 11-12. We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wn.2d at 11.

Here, former PCC 6.07.010(A) provided:

> The County or the County's designee *shall* classify potentially dangerous dogs. The County or the County's designee *may* find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"[10]] set forth in [PCC] 6.02.010[T][11]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[T]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

(Emphasis added.)

Where a statute uses both "shall" and "may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). Here, the ordinance mandated some actions ("shall") and made others discretionary ("may"). For instance, after inquiry, Pierce County had discretion to classify a dog as potentially dangerous. Former PCC 6.07.010(A) ("The County . . . *may* find and declare an

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[10] Former PCC 6.02.010(T) defined a "Potentially Dangerous Dog" as

> any dog that when unprovoked: (a) Inflicts bites on a human, domestic animal, or livestock . . . (b) chases or approaches a person . . . in a menacing fashion or apparent attitude of attack, or (c) any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock . . . .

[11] The ordinance actually cites former PCC 6.02.010(Q) (2007), but that subsection defined "livestock."

animal potentially dangerous . . . .") (emphasis added). But, if the county received reports of a potentially dangerous dog, it had a duty to apply the classification process to that dog. Former PCC 6.07.010(A) ("The County . . . *shall* classify potentially dangerous dogs.") (emphasis added). The legislature's use of "shall" was a clear directive to apply the classification process to dogs that were likely potentially dangerous. Although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act.[12]

Division One has held that the failure to enforce exception applies in comparable circumstances. *Livingston v. City of Everett*, 50 Wn. App. 655, 659, 751 P.2d 1199 (1988). In *Livingston*, the city animal control department had received numerous complaints about three dogs running loose and behaving aggressively. 50 Wn. App. at 657. Animal control eventually impounded the dogs but released them to their owner the next day. *Livingston*, 50 Wn. App. at 657. A few weeks later, the dogs attacked a young boy. *Livingston*, 50 Wn. App. at 657. The Everett municipal code provided that animals in violation of the code may be impounded and that impounded animals shall be released to their owners only if the animal control officer determines that the animal is not dangerous. *Livingston*, 50 Wn. App. at 658. The officer never evaluated the dogs' dangerousness but released them to their owner anyway. *Livingston*, 50 Wn. App. at 657. The officer violated his statutory duty to exercise his discretion by evaluating the dogs' dangerousness before releasing them. *Livingston*, 50 Wn. App. at 659. Accordingly, the failure to enforce exception applied and the city could be found liable for injuries the dogs

[12] The dissent reads the ordinance as a whole to be discretionary, while our view is that certain provisions are mandatory and others discretionary.

caused after their release. *Livingston*, 50 Wn. App. at 659. Similarly, here, Pierce County received multiple complaints about Wilson's dogs but failed to evaluate the dogs' dangerousness despite a statute requiring it to act.

Pierce County argues that this case is similar to *Pierce*, 161 Wn. App. 791. In *Pierce*, Division Three held that the county did not have a mandatory duty to act despite the presence of "shall" in a county code provision. 161 Wn. App. at 801. There, the plaintiff sued the county for negligently inspecting his gas line after he was injured in a gas explosion. *Pierce*, 161 Wn. App. at 796. He argued that the following code provision imposed a mandatory duty on the county:

> [T]he building official . . . **shall** make or cause to be made any necessary inspections and **shall** either approve the portion of the construction as completed or **shall** notify the permit holder wherein the same fails to comply with this code.

Pierce, 161 Wn. App. at 799 (quoting Internal Residential Code (IRC) § R109.1 (2006)). In response, Yakima County cited other code provisions providing that, when an official observes a code violation, he *has authority* to authorize disconnection or serve a notice of violation. *Pierce*, 161 Wn. App. at 799 (citing IRC §§ R111.3, R113.2). Division Three held that the code did not create a mandatory duty to take a specific enforcement action. *Pierce*, 161 Wn. App. at 801. If officials observed a code violation, they had authority—but were not required—to authorize disconnection or serve notices of violation. *Pierce*, 161 Wn. App. at 799.

This case is distinguishable from *Pierce*. Unlike in *Pierce*, the county here is required to act if it observes a violation of the potentially dangerous dog restrictions. In *Pierce*, the ordinances only required Yakima County officials to make inspections and issue approvals or denials. The ordinances did not require the county to take any enforcement action. Here, while some of the steps in the process are discretionary, the code did require Pierce County to take action if certain conditions existed. If the county was made aware of a likely potentially

dangerous dog, it had a duty to evaluate the dog to determine if it was potentially dangerous. Then, if the dog was declared potentially dangerous, the code mandated that the county take corrective action, seizing and impounding any dog whose owner allowed it to violate the restrictions placed upon it. Former PCC 6.07.040 (2007) ("any potentially dangerous dog which is in violation of . . . this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded"). The *Pierce* case is not helpful where, as here, some mandatory duties exist.

We agree with Gorman and the trial court and hold that the failure to enforce exception applies here.

II. JURY INSTRUCTIONS ON PIERCE COUNTY'S DUTY TO GORMAN

Pierce County also argues that the trial court's instruction 5 misstated the law by stating the county had a legal duty to protect the public and a legal duty to confiscate and confine Betty. We hold that this argument misrepresents instruction 5 and that the jury instructions were proper.[13]

[13] In addition, Pierce County argues that jury instructions erroneously stated that (1) it also had a legal duty to "control" a potentially dangerous dog and (2) Gorman could carry her burden to prove Pierce County's liability by showing that her injury was proximately caused by Pierce County's negligence "and/or the fault of the [dog owners]." Br. of Appellant at 32, 35. But Gorman asserts that Pierce County did not preserve these arguments for appeal. We agree with Gorman. Pierce County concedes its failure to object to this portion of the duty of care instruction, and it does not contest its asserted failure to object to the burden of proof instruction. Without adequate objections at trial, the arguments are waived. *See* RAP 2.5(a); *Stewart v. State*, 92 Wn.2d 285, 298-99, 597 P.2d 101 (1979).

We review claimed errors of law in jury instructions de novo.[14] *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Jury instructions are not erroneous if they allow the parties to argue their theories of the case, they do not mislead the jury, and, when read as a whole, they properly state the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). Read as a whole, the jury instructions here properly state the applicable law.

Instruction 5 stated that it was "merely a summary of the claims of the parties." Clerk's Papers (CP) at 882. The instruction summarized Gorman's negligence claim as follows:

> The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:
> (1) failing to classify and control a potentially dangerous dog;
> (2) failing to protect the public from a potentially dangerous dog;
> (3) failing to confiscate and confine a potentially dangerous dog.

CP at 881. On its face, this instruction describes the claims Gorman presented during the trial, not Pierce County's legal duty. But other instructions correctly explained Pierce County's legal duty. Instruction 15 included the language from former PCC 6.07.010(A):

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control office [sic] has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [PCC] 6.02.010[(T)]. The finding must be based upon:
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
> 2. Dog bite reports filed with the County or County's designee; or
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
> 4. Other substantial evidence.

[14] Gorman asserts that the standard of review is whether the trial court's decision is manifestly unreasonable or based on untenable reasons or grounds. This assertion is incorrect. That standard applies when the appellant assigns error to the trial court's choices about the number of instructions to give or the particular words to use. *Hue*, 127 Wn.2d at 92 n.23.

CP at 892. Instruction 17 stated,

> The Pierce County Code provides that after a dog is declared to be potentially dangerous, the person owning or having care of such dog shall not allow the dog to be unconfined on the premises of such person, or go beyond the premises of such person unless the dog is securely leashed and humanely muzzled or otherwise securely restrained.
>
> A potentially dangerous dog in violation of these provisions shall be seized and impounded.

CP at 894.

In defining negligence, instruction 6 also defined the duty of ordinary care:

> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

CP at 883. In addition, the trial court clearly instructed the jury that Pierce County was liable only if it had been *negligent* by failing to act in one of the ways Gorman claimed. Thus, the instructions required the jury not just to decide whether Pierce County failed to act, but whether the failure was reasonable under the circumstances. Accordingly, we hold that the jury instructions properly stated the legal duty of ordinary care.

III. Evidence of Prior Complaints About Wilson's Other Dogs

Pierce County next argues that the trial court admitted evidence of prior complaints about Wilson's dogs other than Betty, even though this evidence was irrelevant and unfairly prejudicial. We disagree.

In general, we review a trial court's ruling on the admissibility of evidence to determine if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 283, 840 P.2d 860 (1992);

Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court may admit evidence only if it is relevant. ER 402. Relevant evidence has any tendency to make a fact of consequence more likely or less likely; this definition sets a low threshold. ER 401; *Kappleman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009). However, a trial court may exclude relevant evidence if the risk of unfair prejudice, confusion of the issues, misleading the jury, or waste of time substantially outweighs its probative value. ER 403.

The evidence here became admissible only after Pierce County opened the door to it. Before trial, the trial court permitted Gorman to elicit testimony that the county had received 10 complaints about Wilson's other dogs, but the trial court prohibited testimony about the reasons for those complaints. The trial court explained that the probative value was outweighed by the risks that (1) mini-trials on the veracity of each complaint would waste time and (2) the details of incidents involving other dogs would unfairly prejudice Pierce County.

But while questioning a county animal control officer, counsel for Pierce County asked why the prior complaints had not led the county to pursue a declaration of potential dangerousness. The officer explained that the prior complaints primarily concerned dogs off leash or excessive barking, but "[t]hey were not all dogs chasing individuals or anything of that nature." RP (Aug. 3, 2011) at 990. Counsel then elicited testimony that "a history of a dog owner who had previous complaints of leash law violations" would not support a declaration of potential dangerousness. RP (Aug. 3, 2011) at 991. The trial court ruled that this questioning opened the door to evidence rebutting the suggestion that the prior complaints did not involve dangerous dog behavior, but it still prohibited questioning about the details. Accordingly, Gorman elicited testimony from the same witness that three of the prior complaints involved attempted attacks.

The trial court did not err by admitting this testimony. The evidence was relevant to the county's knowledge that at least one of Wilson's dogs posed a risk. *See* ER 401. And the trial court's refusal to allow questioning on the details reduced the effect of any unfair prejudice, while admitting evidence that was probative of the reasonableness of the county's explanation for declining to pursue a potentially dangerous dog declaration. *See* ER 403. Accordingly, this argument fails.

IV. GORMAN'S LEGAL DUTY

In her cross appeal, Gorman argues that the trial court erred by denying her renewed motion for judgment as a matter of law, which sought to set aside the jury's finding of contributory fault on the ground that Gorman owed no legal duty. Evans-Hubbard asserts that Gorman waived this argument by failing to make it in her original motion for judgment as a matter of law. We agree with Evans-Hubbard.

We will not consider an appeal from a trial court's denial of a CR 50 motion for judgment as a matter of law unless the appellant has renewed the motion after the verdict. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 592, 283 P.3d 567 (2012), *review granted*, 176 Wn.2d 1010 (2013); *see* CR 50(b). To preserve the opportunity to renew a CR 50 motion after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury. *Hanks v. Grace*, 167 Wn. App. 542, 552-53, 273 P.3d 1029, *review denied*, 175 Wn.2d 1017 (2012); *see* CR 50(a).

On the issue of her own comparative fault, Gorman asserted in her original CR 50 motion that she bore no fault because the *evidence was insufficient* to show that leaving the door open was a breach of her legal duty. For the first time in her renewed motion, Gorman argued that, *as a matter of law*, she had no legal duty to close the door. This argument is not proper because a

renewed CR 50 motion cannot present new legal theories that were not argued before the verdict. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193 n.20, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Browne v. Cassidy*, 46 Wn. App. 267, 269, 728 P.2d 1388 (1986). Gorman did not preserve her argument for appeal, so it fails.

V. EMERGENCY DOCTRINE INSTRUCTION

Gorman next argues that the trial court erred by declining to instruct the jury on the emergency doctrine. We disagree because Gorman failed to preserve any challenge to the omission of this instruction.

To challenge the trial court's failure to give a jury instruction, an appellant must have proposed the instruction in the trial court. *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963). In general, a party requesting an instruction that appears in the Washington Pattern Instructions must propose the instruction in writing. CR 51(d)(1); *Balandzich v. Demeroto*, 10 Wn. App. 718, 722, 519 P.2d 994 (1974). However, a party may request a Washington Pattern Instruction simply by referring to the instruction's published number if the superior court has adopted a local rule permitting that procedure. CR 51(d)(3).

Gorman's request for the emergency doctrine instruction did not comply with CR 51(d). She did not propose the instruction in writing. *See* CP at 810-37, 1416-26. Instead, she orally requested 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.02, at 142 (5th ed. 2005), the pattern emergency doctrine instruction, and she took exception to the trial court's refusal to give it. But Gorman has not identified any applicable local rule allowing her request by reference to the published number. Therefore, Gorman failed to propose the instruction in a manner consistent with CR 51(d).

VI. SUFFICIENCY OF THE EVIDENCE

Lastly, Gorman argues that the evidence was insufficient to support the jury's verdict that (1) she breached her duty and (2) her negligence was a proximate cause of her injury. Br. of Resp't at 64-72. We disagree.

We cannot substitute our judgment for that of the jury. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). Accordingly, we cannot overturn the jury's verdict unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict. *Burnside*, 123 Wn.2d at 107-08 (quoting *O'Connell*, 83 Wn.2d at 839). When reviewing a jury verdict for substantial evidence, we must consider all evidence and draw all reasonable inferences in the light most favorable to the verdict. *Ketchum v. Wood*, 73 Wn.2d 335, 336, 438 P.2d 596 (1968).

In order to prove contributory negligence, the defendant must show that the plaintiff had a duty to exercise reasonable care for her own safety, that she failed to exercise such care, and that this failure is a cause of her injuries. *Alston v. Blythe*, 88 Wn. App. 26, 32 n.8, 943 P.2d 692 (1997). Contributory negligence is usually a factual question for the jury. *Jaeger v. Cleaver Constr., Inc.*, 148 Wn. App. 698, 713, 201 P.3d 1028 (2009).

Substantial evidence supports the jury's finding that Gorman breached her duty by failing to exercise the care a reasonable person would exercise under the circumstances. Although Gorman believed Betty was an aggressive and vicious dog and Gorman knew that Betty and Tank had previously entered her home through the open door, Gorman testified that she left the door open on the night of her attack. Pierce County also claimed that Gorman unreasonably chose to save Romeo rather than flee for her own safety. Because Gorman testified that she

indeed tried to save Romeo, there was sufficient evidence for the jury to consider whether this decision was reasonable.

Substantial evidence also supports the jury's finding that Gorman's conduct was a proximate cause of her injuries. Gorman testified that the pit bulls entered her house through the open door on the night of her attack. Gorman also testified that while trying to rescue Romeo, she suffered further injuries to her hands and wrists. Therefore substantial evidence supports the jury's verdict on contributory fault.

Although we are sympathetic to Gorman's argument that she did not owe a legal duty to close her door, as we discussed above, she did not preserve this argument for appeal. Nor does she make a supported argument on appeal that the trial court erred by instructing the jury on contributory negligence. Therefore, any contributory negligence instructions became the law of the case. *See Washburn*, 169 Wn. App. at 605 (stating that the failure to appeal an allegedly erroneous instruction makes that instruction the law of the case). Again, we cannot substitute our judgment for the jury's. Because contributory negligence became the law of the case and because the facts support the jury's finding of contributory negligence, Gorman's argument fails.

Affirmed.

Penoyar, J.

I concur:

Van Deren, J.

WORSWICK, C.J. (dissenting in part) — I concur with the majority's analysis in sections II through VI regarding jury instructions on Pierce County's duty, evidence of prior complaints, denial of Sue Ann Gorman's motion for judgment as a matter of law, the emergency doctrine instruction, and sufficiency of the evidence. But because the majority misconstrues the county ordinance and misapplies the public duty doctrine, I respectfully dissent from the majority's conclusion in section I.B that the failure to enforce exception to the public duty doctrine applies here.

When a governmental entity is sued for negligence, courts employ the public duty doctrine to determine whether a duty is owed to the general public or whether that duty is owed to a particular individual. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). A duty owed to the general public is not an actionable legal duty in a negligence suit. *Bailey v. Town of Forks*, 108 Wn.2d 262, 266, 737 P.2d 1257 (1987). But the public duty doctrine is subject to several exceptions, including the failure to enforce exception. *Bailey*, 108 Wn.2d at 268.

For the failure to enforce exception to apply, the plaintiff must prove, inter alia, that government agents have a statutory duty to take corrective action. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Thus, the failure to enforce exception "applies only where there is a mandatory duty to take a specific action to correct a known statutory violation." *Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). But no such duty exists if the statute confers broad discretion about whether and how to act. *Donohoe*, 135 Wn. App. at 849. In addition, we must construe the failure to enforce exception narrowly. *Atherton*, 115 Wn.2d at 531.

Here I disagree with the majority's conclusion that former Pierce County Code (PCC) 6.07.010(A) (2007) created a statutory duty to take the corrective action of classifying potentially dangerous dogs. The majority reaches this conclusion after (1) misinterpreting the ordinance and (2) misapplying case law on the failure to enforce exception. In my view, the failure to enforce exception does not apply because the ordinance did not *mandate* action by the county.

1. *Interpretation of the Ordinance*

First, the majority misinterprets the plain meaning of the ordinance and incorrectly concludes that it expresses a mandatory directive. Here, former PCC 6.07.010(A) provided:

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [former PCC] 6.02.010[(T)[15]]. The finding must be based upon:
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
> 2. Dog bite reports filed with the County or the County's designee; or
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
> 4. Other substantial evidence.

The majority correctly states the rules of plain meaning analysis. A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wn.2d at 11. Where, as here, a statute uses both "shall" and

[15] Apparently in error, former PCC 6.07.010(A) cited former PCC 6.02.010(Q) (2007). The current version of PCC 6.07.010(A) cites the definition of "potentially dangerous animal" in PCC 6.02.010(X).

"may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982).

But the majority's plain meaning analysis misapplies these rules. The majority appears to rely solely on the word "shall" to conclude that the ordinance "was a clear directive to apply the classification process to dogs that were likely potentially dangerous."[16] Majority at 13. But a plain meaning analysis requires us to consider "*all* that the Legislature has said in the statute." *Campbell & Gwinn*, 146 Wn.2d at 11 (emphasis added).

Read in its entirety with each word placed in context, the ordinance clearly *authorized*—but did not *require*—the county or its designee to classify potentially dangerous dogs. Former PCC 6.07.010(A). The ordinance stated that, when competent evidence supports a finding of probable cause to believe that a particular dog is a potentially dangerous dog, the county "*may* find and declare" the dog to be potentially dangerous. Former PCC 6.07.010(A) (emphasis added). But—as the majority concedes—the ordinance did not require the county to make a declaration; it gave the county discretion to do so. Accordingly, the ordinance did not mandate a specific action to correct a known statutory violation.

2. *Application of Case Law*

I also disagree with the majority's application of case law on the failure to enforce exception.

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[16] In the majority's interpretation, the ordinance (1) requires the county to conduct an "inquiry" whenever it receives an "apparently valid report" that a dog is likely potentially dangerous, but (2) gives the county discretion, after completing the inquiry, to classify a particular dog as potentially dangerous. Majority at 12-13. Because the ordinance says nothing about inquiries into reports of potentially dangerous dogs, I believe the majority's inquiry requirement derives from a misinterpretation of the ordinance's plain meaning.

First, the majority misplaces its reliance on *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988). In *Livingston*, the failure to enforce exception applied because the city violated a local law governing the release of impounded dogs to their owner. 50 Wn. App. at 658-59. There, the local law stated: "Any impounded animal shall be released to the owner . . . *if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.*'" 50 Wn. App. at 658 (quoting former Everett Municipal Code § 6.04.140(E)(1)) (emphasis added). Because an animal control officer released impounded dogs without judging their dangerousness or health, the court held that the officer failed to exercise his discretion as the law required. 50 Wn. App. at 657, 659.

The ordinance here is so different that this case is not comparable to *Livingston*. In *Livingston*, when a dog owner sought the release of his dog from the pound, the city law mandated that the city determine the dog to be neither dangerous nor unhealthy. 50 Wn. App. at 658. In contrast, Pierce County's ordinance articulated *no* circumstances under which the county must determine whether a dog is potentially dangerous. *See* former PCC 6.07.010(A). And, even if a particular dog meets the definition of a potentially dangerous dog, the ordinance's use of the word "may" clearly gave the county broad discretion to declare or not to declare the dog potentially dangerous. Former PCC 6.07.010(A) ("The County . . . may find and declare an animal potentially dangerous" when competent evidence establishes probable cause to believe the animal is a potentially dangerous dog under former PCC 6.02.010(T)). *Livingston* is inapposite.

Further, the majority emphasizes that this case and *Livingston* are similar because both involve dogs that were the subject of multiple complaints. But the existence of multiple complaints is irrelevant to the failure to enforce exception: if the statutory language truly is

mandatory, then a *single* failure to take required action will violate the government's duty to enforce the statute. *See Bailey*, 108 Wn.2d at 269 (police officer failed a single time to detain a person who appeared in public to be incapacitated by alcohol); *Campbell v. City of Bellevue*, 85 Wn.2d 1, 5, 530 P.2d 234 (1975) (electrical inspector failed a single time to "immediately sever" an electrical system after observing that it did not comply with city code); *Livingston*, 50 Wn. App. at 659 (animal control officer failed a single time to determine whether an impounded dog was dangerous or unhealthy before releasing the dog; multiple complaints about the dog had no bearing on the failure to enforce exception). By appearing to base its decision on the county's *repeated* failures to take a discretionary action, the majority muddles the failure to enforce exception.

For her own part, Gorman relies on *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999), but that case is also unavailing. In *King*, a state law required the county to immediately confiscate any dangerous dog that had bitten a person or another animal.[17] 97 Wn. App. at 595. Based on the record, a jury could have found that the dog in *King* became a "dangerous dog" under state law when it attacked a neighbor. 97 Wn. App. at 596. The neighbor reported the attack to the police and prosecutor, but the prosecutor merely called the owner and advised that he could be arrested if he had committed a criminal act. 97 Wn. App. at 593. Over one month later, a police officer visited the owner and asked him to turn over the dog to be destroyed, but the owner refused and the officer took no further action. 97 Wn. App. at 593. The court in *King* held that the county's failure to enforce the state law exposed it to liability for any injury occurring as a result of its failure to confiscate a dangerous dog after the attack. 97 Wn. App. at

[17] State law governs "dangerous dogs," but it also directs municipalities and counties to regulate "potentially dangerous dogs." RCW 16.08.070(2), .090(2).

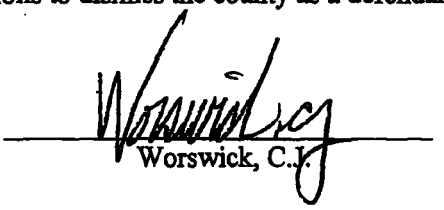
596. However, the county was not liable for the injuries the neighbor suffered during the attack, because the dog had not yet become a dangerous dog and therefore the state law imposed no mandatory duty on the county at that time. 97 Wn. App. at 595.

The situation here is similar to that *before* the attack in *King*. Because the two dogs here were not classified as potentially dangerous dogs, Pierce County had no mandatory duty. Accordingly, the failure to enforce exception does not apply and the county is not liable for injuries Gorman suffered during the attack.

For similar reasons, the majority fails to convincingly distinguish this case from *Pierce v. Yakima County*, 161 Wn. App. 791, 799-801, 251 P.3d 270, *review denied*, 172 Wn.2d 1017 (2011), a case in which a statute repeatedly used the word "shall" to confer authority and grant discretion, without creating a mandatory enforcement duty. The majority states that the county was required to seize and impound "'any potentially dangerous dog which is in violation of . . . [chapter 6.07 PCC] or restrictions imposed as part of a declaration as a potentially dangerous dog.'" Majority at 15 (quoting former PCC 6.07.040 (2007)). But this requirement applied only to dogs that have been declared potentially dangerous. Former PCC 6.07.040. Because the two dogs here were never declared potentially dangerous dogs, they did not "violate" restrictions applicable to potentially dangerous dogs. Therefore the county never had *the authority*—let alone a mandatory duty—to seize and impound the two dogs here under former PCC 6.07.040.

Finding otherwise, the majority accepts Gorman's contention that (1) the county *should have* declared Betty a potentially dangerous dog and (2) Betty violated restrictions that *would have applied if* the county had declared Betty a potentially dangerous dog. But this is a hypothetical, not actual, violation. Because former PCC 6.07.040 was never violated, I would hold that Gorman's contention fails.

Considering the plain meaning of former PCC 6.07.010(A) and controlling law on the public duty doctrine, I am convinced that the failure to enforce exception does not apply here. Therefore I would reverse and remand with instructions to dismiss the county as a defendant.



Worswick, C.J.

No. 42502-5-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SUE ANN GORMAN,

Plaintiff/Respondent/Cross-Appellant,

vs.

PIERCE COUNTY,

Defendant/Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON CONSTITUTION AND STATUTES

WASHINGTON COURT RULES

WASHINGTON PATTERN JURY INSTRUCTIONS

PIERCE COUNTY CODE

GIG HARBOR MUNICIPAL CODE

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

I. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW ON APPEAL

With the exception of the issues raised in Ms. Gorman's cross-appeal, the trial court did not err regarding the failure to enforce exception to the public duty doctrine, jury instructions, or admission of evidence, and the verdict against Pierce County should be affirmed.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

A. The trial court erred in denying Ms. Gorman's motion for directed verdict regarding comparative or contributory negligence.

B. The trial court erred in denying Ms. Gorman's motion for judgment notwithstanding the verdict regarding comparative or contributory negligence.

C. The trial court erred in instructing the jury on comparative or contributory negligence, including instruction nos. 7, 8, 11, 22, portions of instruction no. 5, and the special verdict form (see appendices).

D. Alternatively, the trial court erred in denying Ms. Gorman's request for a jury instruction on the emergency doctrine.

III. ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

1. Did the trial court err in allowing the jury to consider Ms. Gorman's comparative or contributory negligence when Ms. Gorman violated no duty of care in leaving her sliding door open at night for

ventilation and to allow her pets to enter and exit; Ms. Gorman's actions were reasonable, given that she had been leaving her sliding door open at night for approximately five years without incident, some of her neighbors also left their sliding doors open at night, putting a nail in the door frame to stop the sliding door from opening further would not have been effective to keep the pit bulls out, and Ms. Gorman had never before seen the subject pit bulls roaming loose in morning hours; Ms. Gorman was faced with an emergency once the pit bull attack began; and no evidence that Ms. Gorman's alleged comparative negligence was the proximate cause of her injuries was presented to the jury? (Assignments of Error A-D)

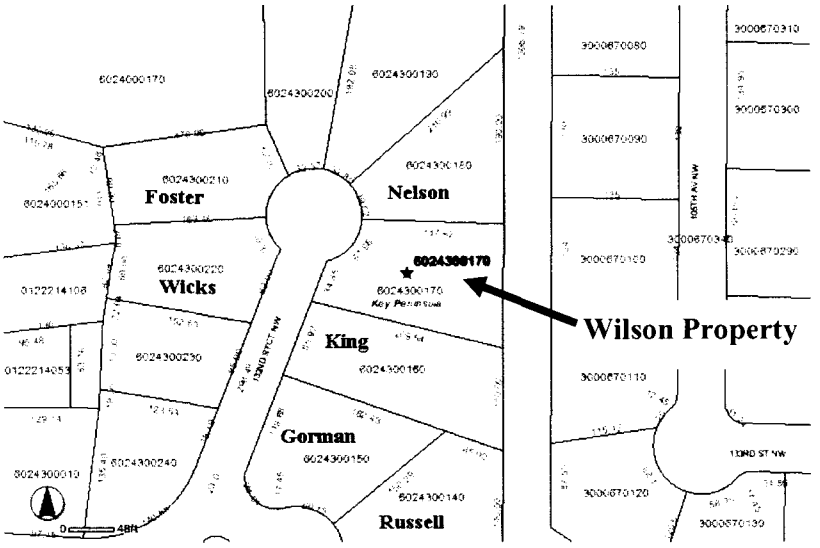
2. Alternatively, did the trial court err in failing to give a jury instruction on the emergency doctrine when Ms. Gorman did nothing to cause the pit bull attack, and once the attack had commenced, she did not have the opportunity to make a reasoned choice between alternative courses of action? (Assignment of Error D)

IV. COUNTER-STATEMENT OF THE CASE

A. FACTUAL HISTORY RELATING TO PIERCE COUNTY'S APPEAL

1. Pierce County had multiple notices of Ms. Wilson's irresponsibility as a dog owner and animal control violations by the pit bulls in her care.

On August 21, 2007, at approximately 8:22 a.m., Sue Gorman was awakened in her bed by the sound of two vicious pit bulls snarling at her from her bedroom doorway. RP 406-07. Known as "Betty" and "Tank," the pit bulls were supposed to be on the property of Defendant Shellie Wilson and her son, Zach Martin. RP 407; RP 405; RP 1177-78; Ex. 71 (shown below with Wilson's property identified).



However, Betty and Tank had left Ms. Wilson's property and boldly entered Sue's home through a "pet door" consisting of a hole cut in a sliding screen door and a sliding glass door that was left slightly ajar in the kitchen area. RP 409; RP 1400-1403.

Betty and Tank commenced attacking Sue, tearing at her flesh and ultimately inflicting 20-30 bite wounds to her arms, hands, face, and breasts over a 20- to 30-minute period. RP 407-17; RP 330; RP 287.

This was not the first time that dogs in Ms. Wilson's care had caused trouble in the neighborhood.

Ex. 41 (shown above); RP 299-303.

According to Pierce County's own records,[1] between 2000 and 2006 there had been ten prior complaints involving dogs (other than Betty and Tank) owned by Ms. Wilson. RP 616. Three of these prior complaints involved reports that Ms. Wilson's dogs had attempted to

[1] Prior to January 1, 2005, the Tacoma-Pierce County Humane Society was under contract with Pierce County to provide animal control services. RP 957-58. After January 1, 2005, the Pierce County Sheriff took over animal control, and the Humane Society's animal control records were available to Pierce County officers. RP 531; RP 599; RP 763-64. In 2006, animal control responsibilities were transferred to the Pierce County Auditor. RP 764.

attack humans. RP 1018-19. The prior reports were significant because they could have prompted a quicker response by animal control officers on subsequent complaints:

> Q Would you agree with me that – and I think you even testified under your direct – previous complaints about a dog owner's other dogs who were loose but didn't bite anybody is not substantial evidence to prove that a new dog is potentially dangerous?
>
> A Correct. We look at all evidence for the history with regard to, for example, if somebody had a dog declared potentially dangerous once and maybe they gave that dog up, they got another dog and that dog is creating similar type of nuisance. We would see that perhaps that individual had a history with us, and so we would be pretty quick to declare that dog, and, you based on prior history.
>
> Q So an officer might exercise their discretion quicker and take the harder action against a dog that meets the criteria based on the past history of that dog owner?
>
> A Correct.

RP 989 (testimony of Denise McVicker).

On August 31, 2006, Pierce County received a 911 call reporting an attack where two pit bulls (Betty and Tank) had barked and lunged at a neighbor who was inside his own garage. Ex. 11; RP 439-44; RP 490-91. Pierce County animal control officer Tim Anderson was dispatched to the scene. RP 714-15.

Unfortunately, at the time he investigated the report, Officer Anderson was unaware of the ten prior complaints against Ms. Wilson. RP 729. This was because the computerized complaint-tracking system used by the Pierce County Sheriff, known as "CAD," was not compatible with the computerized complaint-tracking system used by the Pierce County Auditor, "CALI." RP 738. Also, the records kept by the Tacoma-Pierce County Humane Society, including electronic records from its computerized complaint-tracking system, "Chameleon," had never been input into CALI. RP 531-32.

At the conclusion of his investigation of the August 31, 2006 attack report, Officer Anderson merely issued an infraction to Ms. Wilson for "animals at large" and "license required." Ex. 11. Animal control expert Denise McVicker, deputy director of the Tacoma-Pierce County Humane Society, testified that Officer Anderson could have issued a declaration of "potentially dangerous dog" based on the pit bulls' aggressive behavior during this incident. RP 972-73.

On the evening of February 10, 2007, Sue Gorman called 911 to report an attack where Betty chased her and her service dog, Misty, as Sue and Misty tried to get from Sue's car into the house. Ex. 12; RP 1262-64. After getting inside, Sue waited 15 or 20 minutes for Betty to leave, then went back outside to try and get her groceries from the car. RP 1264-65.

Betty was still on Sue's property, and immediately backed Sue up to the house, snarling and growling. *Id.* Betty bit Sue's pant leg. *Id.* Sue managed to fight Betty off with a stick and get back inside, where she called 911. *Id.*

The incident was investigated by Pierce County Sheriff Deputy Allen Myron, who arrived on scene nearly 1 ½ hours after the attack occurred. RP 1266. No infraction or paperwork relating to Betty being a "potentially dangerous dog" was issued. Ex. 12. But because Betty had been involved in a prior incident of threatening behavior, and because Ms. Wilson had a long history of being an "irresponsible dog owner," Denise McVicker opined that a declaration of potentially dangerous dog should have been issued after the February 10, 2007 incident. RP 728; RP 974.

On February 22, 2007, Pierce County animal control received another attack report where two pit bulls (Betty and Tank) had been loose in the neighborhood and had chased a 10-year-old boy who was rollerblading in the street. Ex. 13; RP 1251-52. The boy's father made a second call to Pierce County animal control on February 23, and Pierce County animal control officer Brian Boman followed up with him on that day. Ex. 13; RP 474; RP 570; RP 585; RP 587.

After speaking with the boy's father about the attack, Officer Boman went to Ms. Wilson's residence and left a "notice of violation,"

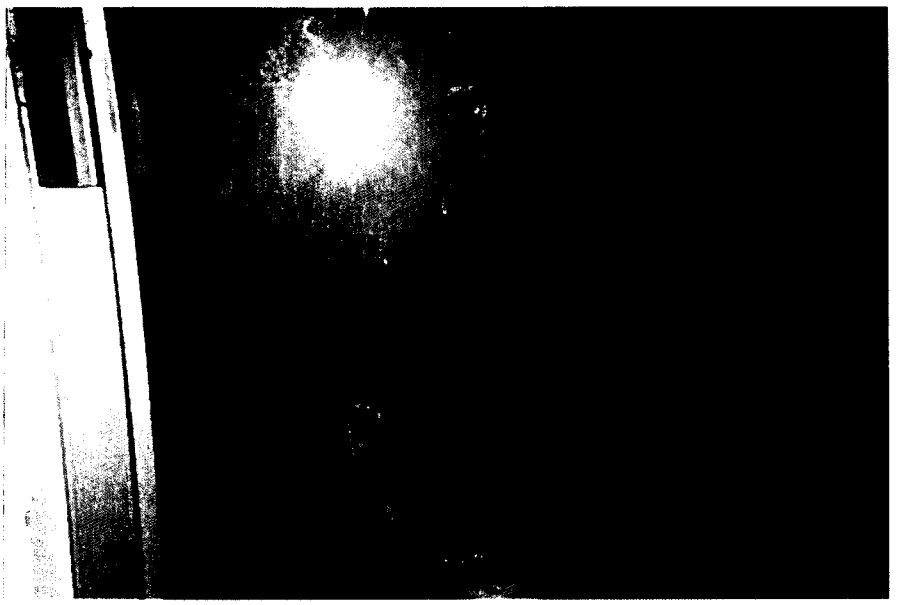
which instructed Ms. Wilson was to contact Pierce County animal control. RP 588. Ms. Wilson did not make contact, and Officer Boman did not follow up with her or speak with any of the neighbors. RP 590-91. Officer Boman was not aware of the incident that Sue Gorman had called in on February 10, 2007, or of the incident that occurred on August 31, 2006. RP 593; RP 596. **Although he agreed that he could have issued a declaration of potentially dangerous dog at that point, he did not do so**. *Id.*

Denise McVicker testified that because of the prior history of dogs in Ms. Wilson's care, and because of the recent history of incidents involving the pit bulls in question, a declaration of potentially dangerous dog should have been issued after the February 22-23 reports. RP 974-75.

On March 1, 2007, Sue Gorman again called 911 to report that Betty was outside her home, trying to break through the window and sliding glass door of her house to attack her and Misty. Ex. 14; RP 1269-70. Betty had jumped at the windows before, but this time she was using greater force, and Sue became afraid. *Id.* Pierce County Sheriff's Deputy Chad Redinbo responded at approximately 7:54 p.m. RP 1270-71; RP 796; RP 806. *See also* Ex. 76 (shown below); RP 1276.

Officer Redinbo looked for Betty but did not find her. RP 796. At the time of his investigation, Officer Redinbo was not aware of the prior

incidents that occurred on February 22-23 or February 10. RP 797-98.



Officer Redinbo did not know what a "potentially dangerous dog" was, and did not have any training regarding potentially dangerous dogs. RP 799-800. He did talk to Defendant Zach Martin (Defendant Shellie Wilson's son, a minor at the time), who came over and spoke to Sue. RP 1271-1272. Officer Redinbo then instructed Sue that if she had any further problems, she was to contact Mr. Martin directly. RP 1272. No declaration of potentially dangerous dog was issued. Ex. 14.

Again, Denise McVicker testified that because of the prior history of dogs in Ms. Wilson's care, and the more recent history with Betty and Tank, a declaration of potentially dangerous dog should have been issued after the March 1, 2007 incident. RP 976-77.

2. Pierce County was required to classify, seize, and impound potentially dangerous dogs.

Pierce County Code ("PCC") § 6.07.010 A (2007)[2] states in pertinent part:

> The County or the County's designee shall classify potentially dangerous dogs.[3] The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause[4] to believe that the animal falls within the definitions set forth in Section 6.02.010 Q [sic]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it

---

[2] Pierce County amended its animal control ordinances in 2008. The ordinances admitted as Ex. 58 were the ordinances in effect at the time of Sue's August 21, 2007 attack.

[3] PCC § 6.02.010 T (2007) defines "potentially dangerous dog" as

> any dog that when unprovoked: . . .
>
> (b) Chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or
>
> (c) Any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.

See Ex. 58.

[4] Officer Boman defined "probable cause":

> Q What does the term "probable cause" mean in that statute [PCC § 6.07.010 A (2007)]?
>
> A I believe it's 51 percent knowing that – 51 percent of what happened almost guarantees a case.

RP 645.

to fall within the definition of Section 6.02.010 Q [sic]; or

2. Dog bite reports filed with the County or the County's designee; or

3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or

4. Other substantial evidence.

Ex. 58.

Expert witness Denise McVicker, deputy director and 33 ½-year employee of the Tacoma-Pierce County Humane Society, explained how the "shall" and "may" clauses in PCC § 6.07.010 A (2007) were put into practice:

Q Ms. McVicker, you were asked about discretion earlier, and you were asked about the – this provision of the ordinance. And when we talk about discretion, are we talking about the fact that if there's substantial evidence like you've just testified to for all these incidents and that substantial evidence establishes in the mind of the committee that the dog is potentially dangerous, then does the animal control officer have the discretion not to classify the dog as potentially dangerous when the evidence is substantial?

A I believe they have the discretion to consider whether the evidence meets the criteria, but they do not have the discretion to ignore any of the previous information or evidence that came in.

Q And if the evidence meets the criteria and it's substantial evidence, they have to declare the dog potentially dangerous, don't they?

A Yes, if it meets the criteria.

Q Just as if there was a dog bite report, that would qualify and they can't ignore that; they should declare the dog potentially dangerous, should they not?

A Correct. They could do that. It would be based on facts because whether it's unprovoked or provoked, again, meeting the criteria with regard to the ordinance.

Q Sure. And if it meets the criteria as you have stated for us, then they shall classify the dog as potentially dangerous, right?

A Correct.

RP 1007-08.

Pierce County animal control officers Brian Boman and Tim Anderson both agreed with Ms. McVicker's analysis:

Q When it says, "The County or the County's designee shall classify potentially dangerous dogs," what's that mean? What's the definition of that statement, based on your experience as an animal control officer?

A To me, that would be that Animal Control is responsible for doing the investigation and classifying the animals as potentially dangerous.

RP 643 (testimony of Brian Boman).

Q So the statute says, "The County or the County's designee shall classify potentially dangerous dogs," period. "The County or the County designee may find and declare an animal potentially dangerous if an animal control officer has probable cause to believe . . ." and then there's some other stuff.

> Explain for the jury in your own words the mandatory and discretionary responsibilities of an animal control officer based on this statute. . . .
>
> A **I would take the "shall" as for the agency that is in charge of that, it's their duty for making those determinations.** So when you go down to the next part where it says "may find," that's at the discretion of the animal control officer or the investigator to make that determination whether or not that animal is potentially dangerous.

RP 743-44 (emphasis added) (testimony of Tim Anderson).

Pierce County Auditor Patrice A. McCarthy also agreed that the ordinance placed responsibility on Pierce County's animal control officers:

> Q Would you agree with me that Pierce County is responsible for controlling potentially dangerous dogs within the county jurisdiction? . . .
>
> A I would agree that Pierce County Animal Control officers have responsibility over animal related incidents that happen in our county.

Ex. 82 (Deposition of Patrice A. McCarthy) at 31:22 – 32:3.

Another of Pierce County's animal control ordinances provided that once a potentially dangerous dog declaration was issued, the dog owner was not permitted to allow the dog to remain unconfined or go beyond the owner's premises without a leash and muzzle. PCC § 6.07.030 (2007) (Ex. 58). Significantly, these requirements were enforced even if the owner of a dog that had been declared potentially dangerous appealed

the declaration. Ex. 55; RP 545-47; RP 707-09. Pierce County was required to seize and impound any potentially dangerous dog found in violation of these and other potentially dangerous dog requirements:

> Provided, that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 of this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, **shall be seized and impounded**. . . .

PCC § 6.07.040 (2007) (Ex. 58) (emphasis added).

B. FACTUAL HISTORY RELATING TO MS. GORMAN'S CROSS-APPEAL

1. Sue acted reasonably in leaving her pet door open.

On August 21, 2007, Betty and Tank got into Sue's house through a "pet door." RP 409; RP 1400-1403. Sue made the pet door herself approximately five years before the subject pit bull attack. RP 1401. She cut a hole in a sliding screen door and inserted a plastic doggie door that she purchased from the store. RP 1400. The screen was not heavy enough to support the doggie door, so the doggie door fell out a couple of months later and just the hole in the screen remained. RP 1400-01. The hole was approximately the size of a sheet of paper. RP 1401. Sue used the pet door to allow her service dog, Misty, her two cats, and a neighbor's dog ("Romeo") to enter and exit. RP 1401-02. She also used the open sliding door for ventilation, as she did not have air conditioning. RP 1347.

Later, Sue drilled a hole in the frame of her sliding glass door so she could insert a nail into the hole.[5] RP 1402. She thought that by inserting the nail she could keep the sliding glass door from opening beyond the nail. *Id.*

When she went to bed in the early morning before the August 21, 2007 attack, Sue did not put the nail in the sliding door. RP 1403. Although Betty and Tank had come into her house once before, Sue had never seen Betty or Tank running loose in the morning; she had only seen them loose in the late afternoon and evening. RP 1274-75; RP 1406; RP 1435. In addition, early in the summer of 2007, some neighborhood boys were able to force their way in through the sliding door even though the nail was in position. RP 1315. Because the boys were able to "cram[] their body in," Sue believed that Betty and Tank would have been able to enter her home even if she had put the nail in place. *Id.*; RP 1404.

Sue felt safe leaving the pet door open most of the time (except for when she saw Betty), because she lived in a safe neighborhood. RP 409. Sue's neighbors also felt safe leaving their doors open: Rick Russell, Sue's next-door neighbor and owner of Romeo, testified that his sliding glass door was usually open six to eight inches so Romeo could come and

[5] She could not have inserted a dowel into the frame because the frame had been installed backwards. *Id.*

go. RP 469. Defendant Zach Martin testified that the back slider at his house was typically open for Betty. RP 887.

2. Once the pit bull attack began, Sue was faced with an emergency.

Once Betty and Tank entered Sue's bedroom on August 21, 2007, they positioned themselves between her and the doorway, so Sue's only exit was blocked. RP 1316; RP 1317-18; RP 1319; RP 1333-34; Ex. 62 (shown below). Significantly, there was absolutely no evidence presented

that Sue could have escaped via some route other than the bedroom doorway.

On the morning of the attack, Sue had a neighbor's dog, Romeo,

sleeping with her in her bed. RP 408-09. Romeo liked to come to Sue's house around 5:00 a.m., when his owner, Rick Russell, went to work. RP 409.

Betty and Tank began their attack by jumping on the bed and biting Sue's arm, but shortly afterwards Romeo got out from under the covers and jumped off the bed. RP 410; Ex. 62 (shown below). At that point, Betty and Tank turned their attention to Romeo, inflicting injuries

so severe that he ultimately died as a result of his wounds. RP 410-11; RP 417. Sue got out of bed and tried to get Romeo to a safe place, but

couldn't because Betty and Tank were biting her hands. RP 411-412; Ex. 62 (shown above).

Sue was later asked about her attempts to save Romeo and the extent of her injuries:

Q Would you agree with me that when you first saw those two pit bulls on the morning of the attack –

A Yes.

Q – and Misty had gone out the door, if you had got up and run out the door first, you would have fewer injuries than you ended up having?

A I wouldn't be able to get out the door.

Q You couldn't get past these two pit bulls?

A No, the room was too small. . . .

RP 1316.

Q Are you telling me and the jury that there's no way you can – you couldn't have pushed your way through these pit bulls and out the door like Misty did?

A No. They were vicious. They started attacking me when I was laying in bed.

Q Even if they bit your legs or something, you could have headed out the door before they started doing the 20-minute attack that they did?

A No. I couldn't have got past them because they were between me and the door, and there wasn't that much room in my bedroom. . . .

Q All right. Would you agree that your injuries were greater because you were defending Romeo than if you had just tried to make it out the door?

A The injuries I sustained when I was defending Romeo were the more slight injuries. I didn't have any stitches in any of the injuries where I was defending Romeo.

RP 1318.

Q If you would have spent five or ten minutes to bull dog your way through that door and out the door and away from those dogs instead of 20 minutes in the room as part of the attack, do you think your injuries would have been less?

A Well, I couldn't get past them.

RP 1319.

C. PROCEDURAL HISTORY

1. Procedural facts relating to Pierce County's appeal

(a) The trial court properly admitted relevant evidence of prior complaints.

From the outset, the trial court made it clear that evidence of prior complaints made against Ms. Wilson's other dogs (not Betty or Tank) would be kept extremely limited. *See, e.g.*, RP 97-98. After Ms. Gorman brought deposition testimony to the trial court's attention showing that prior owner conduct **was** relevant to declaring a different dog potentially dangerous, the trial court still would not allow the reports of the prior complaints or their details to be admitted under ER 904. RP 151-60. After further argument regarding the proffered deposition testimony, the trial court allowed Ms. Gorman to ask two witnesses, Officers Tim Anderson and Brian Boman, whether the prior complaints would have affected their actions when they investigated subsequent incidents involving Betty and Tank.[6] RP 162. The trial court denied Ms. Gorman's request to pre-admit illustrative charts showing that there had been prior complaints. RP 196-99; RP 203-04.

Subsequently, after the trial court reviewed the reports of the prior

[6] Ms. Gorman's animal control expert, Denise McVicker, was also asked if an owner's history with other dogs had an effect on the decision to declare the owner's current dogs potentially dangerous, and she indicated that an officer would "exercise their discretion quicker and take the harder action" in that situation. RP 989.

complaints (Ex. 1-15) at Ms. Gorman's request, Ms. Gorman renewed her motion to be permitted to discuss the prior complaints during testimony. RP 237-48. At that point, the trial court permitted Ms. Gorman to reference the fact that there were prior complaints against dogs at Ms. Wilson's address, but Ms. Gorman was not permitted to go into the details of the prior incidents. RP 248. Ms. Gorman was allowed to modify a Powerpoint presentation that would be used in opening argument to reflect that there had been prior incidents. RP 256-57; RP 275; Ex. 69-A. But consistent with the trial court's ruling, certain witnesses that Ms. Gorman had intended to call to testify regarding the specific details of the prior incidents were excluded. RP 377-404; CP 1538-41; CP 1545.

During the testimony of Brian Boman, Pierce County objected when the prior complaints were mentioned. RP 600. At that point the trial court clarified its earlier ruling, but allowed Ms. Gorman to solicit testimony confirming that there had been prior complaints. RP 610-11. Ms. Gorman complied with the trial court's ruling, and Officer Brian Boman testified that there had been ten complaints against Ms. Wilson's other dogs between 2000-2006. RP 616. He was not asked to delve into the facts of each incident. *Id.* Based on the trial court's clarified ruling, Ms. Gorman was permitted to modify her illustrative chart (Ex. 78) to reflect the existence of prior complaints. RP 686-88.

The trial court re-emphasized its order regarding the specific facts of the prior complaints before and during the testimony of Officer Tim Anderson. RP 695-96; RP 725. The trial court did not alter its ruling on prior complaints until the following exchange took place between animal control expert Denise McVicker and Pierce County's trial counsel:

> Q And are you aware – did you say that you reviewed the testimony of Patrice Aarhaus,[7] one of your animal control officers?
>
> A Yes, I did.
>
> Q Did you notice in her testimony why there wasn't sufficient evidence to declare those dogs potentially dangerous?
>
> A The biggest issue is those were potentially leash law violations, dogs running at large. They were not all dogs chasing individuals or anything of that nature. A few of the incidents were the owners leaving the dogs unattended over a weekend, perhaps, without food and water. So they were barking and causing a ruckus for the neighbors. . . .
>
> Q So you would agree with me, would you not that a history of a dog owner who had previous complaints of leash law violations is not a sufficient basis to declare a different dog potentially dangerous based on the action of a dog some other time?
>
> A Correct.

[7] Ms. Aarhaus was an employee of the Tacoma-Pierce County Humane Society who had investigated one of the prior complaints against Ms. Wilson's dogs. RP 990. Although Ms. Aarhaus was listed as one of Ms. Gorman's witnesses, she was excluded when the trial court ruled it would not allow testimony regarding the details of the prior complaints. RP 248; RP 386-387; CP 1538-41; CP 1545.

RP 990-91.

After this testimony, Ms. Gorman moved for permission to obtain testimony to rebut the inference that Ms. Wilson's prior complaints were all leash law violations. RP 995-96. The trial court ruled:

> Okay. I do think that to a limited extent there has been testimony with respect to the prior complaints that may leave the jurors with the impression that these were basically loose dogs.
>
> To the extent that you can inquire on redirect of her, if there were complaints that were beyond simply dogs running loose, I'm going to allow that. I'm still going to stick by my prior ruling, though, that the incident reports are not admissible; that we're not going to get into mini trials, but you can redirect her as to whether there was something else that happened.

RP 996. *See also* RP 1013-16. Based on that ruling, Ms. McVicker testified that on three prior occasions, complaints were made that Ms. Wilson's other dogs (not Betty or Tank) attempted to attack humans. RP 1017.

(b) The trial court did not commit prejudicial error in instructing the jury on Ms. Gorman's claims and burden of proof (instruction nos. 5 and 11).

Pierce County took exception to portions of instruction no. 5, the summary of the parties' issues and claims, arguing that it contained a misstatement of the law. RP 1356. *See also* WPI 20.01; WPI 20.05.

However, Pierce County agreed that Ms. Gorman's first numbered claim in that instruction ("failing to classify and control a potentially dangerous dog") was a correct statement of the law. *Id.*

During oral argument on Pierce County's CR 50 motion, the trial court agreed that the County had no duty to any specific individual to establish an effective animal control system, and granted the County's motion on that issue. RP 1456-57. This issue was then deleted from jury instruction no. 5. CP 881; RP 1457. The trial court found that the failure to enforce exception to the public duty doctrine applied to Ms. Gorman's remaining claims, and denied the remainder of Pierce County's motion. RP 1456.

With regard to jury instruction no. 11, the trial court was very concerned that the jury not be confused by the distinction between negligence and strict liability. RP 1479; RP 1483-85. To alleviate the trial court's concerns, Pierce County proposed new language to be included in the instruction:

> MR. WILLIAMS: Starting on Instruction No. 11 . . .
>
> > Fourth would be that the Plaintiff –
> >
> > "That the negligence of Pierce County and/or the fault of the other defendants was a proximate cause of the injury to the plaintiff," and then in a special verdict form, so we do not confuse them, we do it as I proposed; we make separate questions for each.

RP 1486-87 (emphasis added). Pierce County's proposed language was added to the instruction without objection from Pierce County. RP 1488-89.

2. Procedural facts relating to Ms. Gorman's cross-appeal

After working through the parties' proposed jury instructions, the trial court queried whether an emergency doctrine instruction should be given, based on Ms. Gorman's testimony of what occurred during the August 21, 2007 attack. RP 1380-82. Ms. Gorman's trial counsel argued that an emergency doctrine instruction should be given, since Ms. Gorman had no choice of alternative courses of action after the pit bull attack commenced. RP 1466; RP 1472. *See also* WPI 12.02. After hearing discussion from all parties, the trial court ultimately decided not to give an emergency doctrine instruction, and Ms. Gorman took exception. RP 1466-73. Ms. Gorman also took exception to the other jury instructions given on comparative or contributory negligence, including the special verdict form. RP 1351-53.

At the close of the evidence, Ms. Gorman moved for a directed verdict on the issue of comparative or contributory negligence. CP 1427-51. The motion was denied. RP 1463-66.

In its verdict, the jury assessed 1% comparative negligence to Sue

Gorman. CP 902-04.

After the verdict was entered, Ms. Gorman moved for judgment notwithstanding the verdict on the issue of her comparative negligence, asking that the jury's determination of 1% fault be stricken. CP 1467-94. Ms. Gorman argued specifically that she was under no statutory or common law duty to keep her pet door closed, and that her actions once the pit bull attack commenced were reasonable. *Id.*; 9/15/11 RP 5-14. The trial court denied the motion. CP 1532-34; 9/15/11 RP 26-30. The trial court simply refused to rule on the purely legal issue of Ms. Gorman's duty:

> I will tell you that I find a lot of what Mr. McKasy says about leaving the door open rather compelling, not the – but it's not for this Court to decide policy decisions.

9/15/11 RP 27 (emphasis added).

V. ARGUMENT AGAINST PIERCE COUNTY'S APPEAL

A. THE PUBLIC DUTY DOCTRINE IS INCONSISTENT WITH PRIOR WASHINGTON LAW AND SHOULD NOT HAVE BEEN APPLIED IN THIS CASE.

The public duty doctrine began as a nineteenth-century common law concept first recognized by the United States Supreme Court in *South v. Maryland,* 59 U.S. 396, 402-03, 18 How. 396, 15 L.Ed. 433 (1855). The doctrine springs from the archaic notion that "the king can do no wrong." *Kelso v. City of Tacoma,* 63 Wn.2d 913, 914, 390 P.2d 2 (1964).

Forty years after *South,* the framers of the Washington constitution implicitly recognized the doctrine in article II, § 26: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Thus, in Washington it has always been understood that the legislature has the power to alter the common law doctrine of sovereign immunity. *See, e.g., Billings v. State,* 27 Wn. 288, 290-91, 67 P. 583 (1902).

Prior to 1961, in order for a claim against the state to lie, the claimant had to present clear evidence that the legislature intended to waive the state's sovereign immunity. This proved to be a significant challenge, and in two cases the Washington Supreme Court found that the legislature's authorization of a right to "begin an action" against the state was not sufficient to avoid sovereign immunity. *Billings,* 27 Wn. at 292-93; *Riddock v. State,* 68 Wn. 329, 332-40, 123 P. 450 (1912). The liability of local governmental entities was even less clear, with immunity often turning on the particular nature of the entity. Counties and school districts were often found immune, whereas cities and towns were treated differently because of their independent corporate status. Debra L. Stephens and Bryan P. Harnetiaux, "The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability," 30 SEATTLE L. REV. 35, 38 (Fall 2006).

But in 1961, the legislature enacted a clear, unambiguous, and complete waiver of the state's sovereign immunity:

> The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: *Provided*, That this section shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state.

RCW 4.92.090 (1961).[8]

Significantly, the Washington Supreme Court recognized the passage of this waiver as a shift in public policy and determined that the waiver should also extend to local governmental entities. *Kelso v. City of Tacoma,* 63 Wn.2d 913, 390 P.2d 2 (1964).

> A review of cases and legal literature dealing with the governmental immunity defense in the intervening years offers convincing evidence of a growing demand for *legislation* that would require municipal corporations, if not the state itself, to bear the same responsibility for their negligence as do private corporations; but it is generally recognized, as we indicated in the Hagerman case, supra, that the rule of governmental immunity has become so firmly fixed as a part of the law of municipal corporations that it is not to be disregarded by the courts until the legislature announces a change in public policy.'
>
> The legislature made this announcement of a

[8] The current version of the statute reads: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

> change in the public policy of Washington by enacting Laws of 1961, chapter 136, § 1 (codified as RCW 4.92.090). . . .
>
> The legislature has clearly indicated its intention to change the public policy of the state. The doctrine of governmental immunity was not preserved to the municipal branches of government. The city of Tacoma was liable for its tortious conduct, if any, at the time of the automobile collision in which the plaintiff was injured.

Kelso, 63 Wn.2d at 915-19 (emphasis in original). *See also Evangelical United Brethren Church of Adna v. State,* 67 Wn.2d 246, 407 P.2d 440 (1965) (holding that the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity in this state).

The legislature validated the *Kelso* decision in 1967 when it passed a statutory waiver of sovereign immunity for local government entities:

> All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: Provided, That the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

RCW 4.96.010 (1967).[9]

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[9] The current version of the statute reads:

> (1) All local governmental entities, whether acting in a governmental or

Within four years of passage of the state's waiver of sovereign immunity, courts perceived a need to place limits on governmental liability. In *Evangelical United Brethren Church of Adna v. State,* 67 Wn.2d 246, 407 P.2d 440 (1965), the Washington Supreme Court opined that the statutes abrogating sovereign immunity should

> not render the state liable for every harm that may flow from governmental action. . . . [T]here must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability. . . .

Evangelical, 67 Wn.2d at 253-54. The Washington Supreme Court formulated a four-part test:

> [I]t would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be

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> proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.
>
> (2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.
>
> (3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

> concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Id. at 255. Under this test, if a governmental act were determined to be "ministerial" (done at the operational level) rather than "discretionary," then the governmental entity was not immune from suit and a court could proceed with a traditional tort law analysis of liability. *Id.* at 259-60.

The *Evangelical* test was further refined in *King v. City of Seattle,* 84 Wn.2d 239, 525 P.2d 228 (1974). There, the Washington Supreme Court examined in more detail what "discretionary" governmental acts were. The Court held:

> In further refining what process must be entered

> into by the court in determining whether an act is discretionary or not, the court in Johnson v. State, 69 Cal.2d 782, 788, 790, 793, 794, 73 Cal.Rptr. 240, 245, 246, 248, 248-249, 447 P.2d 352, 357, 358, 360, 360-361, (1968), rejected a semantic inquiry into the meaning of 'discretionary' inasmuch as "(I)t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." The court recognized that "Since obviously no mechanical separation of all activities in which public officials may engage as being either discretionary or ministerial is possible, the determination of the category into which a particular activity falls should be guided by the purpose of the discretionary immunity doctrine." It stressed that judicial abstention should be assured in areas in which the responsibility for 'basic policy decisions has been committed to coordinate branches of government.' The court directed those seeking to determine whether an act is discretionary or not to 'find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.'
>
> Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision.

King, 84 Wn.2d at 245-46.

In spite of the precedent set forth in *Evangelical* and *King,* the Washington Supreme Court took a radical departure in *Campbell v. City of*

Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975). In a case involving negligent enforcement of a city's electrical code, the Court did not follow the four-part *Evangelical* test. *Campbell,* 85 Wn.2d at 12. Instead, it adopted with virtually no analysis a rule borrowed from New York common law:

> The City relies principally upon cases from the State of New York, from whence our statutes, RCW 4.92.0906 and RCW 4.96.010, abrogating sovereign immunity were drawn. . . .
>
> **We have no particular quarrel at this time with the general premise on which the cases relied upon by the City stand, i.e. negligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public.** Nevertheless, we note that running either explicitly or implicitly through some of the leading cases cited by the City is the thread of an exception to the general rule they espouse, i.e., where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons, then tort liability may arise.[10]

Id. at 9-10 (emphasis added). Thus, Washington's public duty doctrine was born.

Since *Campbell,* the public duty doctrine has been the subject of ongoing criticism by Washington jurists. "The public duty doctrine is in reality merely a not so subtle and limited form of sovereign immunity."

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[10] Note that even in this seminal case, the Court declined to do a "straight" application of the public duty doctrine. The Court instead adopted and applied what is now known as the special relationship exception. *Id.* at 10-13.

Chambers-Castanes v. King County, 100 Wn.2d 275, 291, 669 P.2d 451 (1983) (Utter, J., concurring in result).

> The modern public duty doctrine ignores Washington's legislative waiver of sovereign immunity by creating a backdoor version of government immunity unintended by the legislature. It directs this court's attention away from its proper considerations of policy, foreseeability, and proximate cause in favor of a mechanistic test that will inevitably lead us to absurd results. The public duty doctrine undercuts legislative intent, is harmful, and should either be abandoned or restored to its original limited function.
>
> Although it began its life with a legitimate purpose, the public duty doctrine is now regularly misunderstood and misapplied. Its original function was a focusing tool that helped determine to whom a governmental duty was owed. It was not designed to be the tool that determined the actual duty.

Cummins v. Lewis County, 156 Wn.2d 844, 861, 133 P.3d 458 (2006) (Chambers, J., concurring).

Sue Gorman respectfully submits that the public duty doctrine is inconsistent and incompatible with RCW 4.92.090, RCW 4.96.010, *Evangelical,* and *King*, is not needed to determine governmental liability in this case, and should be abolished. If this case had been analyzed using the four-part *Evangelical* test, the trial court would have concluded that Pierce County's duty to classify potentially dangerous dogs was ministerial in nature, as the animal control officers' and sheriff deputies' actions in making potentially dangerous dog determinations did not

implicate higher-level policy-making decisions. *See Evangelical,* 67 Wn.2d at 255; *King,* 84 Wn.2d at 245-46. Pierce County would still be liable for Sue's injuries, because after 14 prior complaints regarding Ms. Wilson's animal control violations (four of which related to Betty and/or Tank, and two of which were reported by Sue herself) Sue would have been an entirely foreseeable plaintiff. Thus, the trial court's rulings regarding Pierce County's duty could be affirmed on alternative grounds.

B. THE TRIAL COURT CORRECTLY RULED THAT THE FAILURE TO ENFORCE EXCEPTION APPLIED TO SUE'S CLAIMS AND CORRECTLY DENIED THE COUNTY'S CR 50 MOTION.

If the public duty doctrine is not to be abolished, then the trial court did not err in finding that the failure to enforce exception applied.

The failure to enforce exception imposes a duty of care upon the governmental entity where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, they fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks,* 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). This exception has been applied specifically in cases involving dangerous and potentially dangerous dogs, and the failure to enforce animal control ordinances. *See, e.g., King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999); *Livingston v.*

potentially dangerous dogs.[11] "The same rules of construction apply to interpretations of municipal ordinances as to state statutes." *Stegriy v. King County Bd. of Appeals,* 39 Wn. App. 346, 353, 693 P.2d 183 (1984). Washington courts have consistently held that the term "shall" is synonymous with the term "must." *City of Wenatchee v. Owens,* 145 Wn. App. 196, 204, 185 P.3d 1218 (2008), *rev. denied* 165 Wn.2d 1021 (2009). Generally, the use of the word "shall" in a legislative enactment is presumptively mandatory, thus creating a duty. *Eugster v. City of Spokane,* 118 Wn. App. 383, 407, 76 P.3d 741 (2003), *rev. denied* 151 Wn.2d 1027 (2004).

> Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings. Especially is this true where 'shall' and 'may' are used in close juxtaposition in a statutory provision, under circumstances that would indicate that a different treatment is intended for the predicates following them.

State ex rel. Beck v. Carter, 2 Wn. App. 974, 978, 471 P.2d 127 (1970). *See also Stegriy,* 39 Wn. App. at 353-54 ("When different words are used in the same statute or ordinance, it is presumed that a different meaning

[11] Pierce County was required under RCW 16.08.090(2) to regulate potentially dangerous dogs. The statute states in pertinent part: "Potentially dangerous dogs **shall** be regulated only by local, municipal, and county ordinances. Nothing in this section limits restrictions local jurisdictions may place on owners of potentially dangerous dogs." (Emphasis added.)

City of Everett, 50 Wn. App. 655, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988).

Here, there is no dispute that the elements requiring actual knowledge and the failure to take corrective action were met. Pierce County had available in its own records reports of 14 complaints before August 21, 2007 regarding dogs in Ms. Wilson's care, including three prior reports that dogs other than Betty and Tank had attempted to attack humans, and four prior reports that Betty and/or Tank had attempted to attack humans. According to Ms. McVicker, knowledge of the prior complaints could have prompted a quicker and more harsh response by Pierce County's designated agents upon continued violations by Ms. Wilson, had Pierce County's agents actually reviewed the records. Yet there is no question that Pierce County did nothing to review prior records, declare Betty and Tank potentially dangerous, or to seize and impound the dogs. Pierce County's animal control agents were not aware of the prior complaints, did not understand the criteria for declaring a dog potentially dangerous, and sometimes did not even know what a potentially dangerous dog was.

With regard to the duty to take corrective action, there is no question that Pierce County was required to classify, seize, and impound

was intended to attach to each word.").

Under the above rules, the words "shall" and "may" contained in PCC § 6.07.010 A (2007) are given their ordinary, yet different, meanings. As Ms. McVicker testified, the word "shall" created a mandatory duty to "classify" potentially dangerous dogs which could not be ignored when evidence from one of the four enumerated sources was present.[12] PCC § 6.07.010 A (2007); PCC § 6.02.010 T (2007); RP 1007-08. *See also* RP 643; RP 743-44. The use of the word "may" later in the same ordinance did not cancel this duty or render it discretionary—the discretion only applied to the later clause regarding an officer's consideration of the evidence gathered.[13] *Id.* Use of the word "shall" in PCC § 6.07.040 (2007) also created a mandatory duty for Pierce County to take corrective action—to seize and impound—if a potentially dangerous dog was found in violation of the potentially dangerous dog requirements (*e.g.,* unlicensed, unconfined on the owner's premises, or off the owner's

[12] Officers only had to be "51 percent sure" to have sufficient probable cause to make a potentially dangerous dog declaration. RP 645.

[13] Interestingly, PCC § 6.02.020 (2007) states: "Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff." Ex. 58. If Pierce County had not intended for PCC § 6.07.010 and 6.07.040 to create actual legal duties, PCC § 6.02.020 would make no sense. An ordinance should be construed to make it effective and to avoid a strained, unreasonable, or illogical result. *Stegriy,* 39 Wn. App. at 353. The "duty" language was not deleted from the amended version of the ordinance. *See* PCC § 6.02.020 (2008).

premises without a leash and muzzle). The trial court did not err in finding that Pierce County had mandatory duties under these ordinances.

Turning to the final element of the failure to enforce exception, Sue and her neighbors were within the class of individuals that Pierce County's animal control ordinances were intended to protect. "[A] governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct." *Livingston v. City of Everett,* 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), quoting *Bailey v. Town of Forks,* 108 Wn.2d 262, 737 P.2d 1257 (1987). All of the complaints against Ms. Wilson were centered around the properties in and adjacent to the cul de sac where she lived. Sue, just two doors away from the Wilson property and having called in two of the four prior complaints regarding Betty, was within the "ambit of risk." Ex. 71. Sue was a member of the protected class.

Based on the evidence presented, the trial court did not err in finding that the failure to enforce exception applied in the present case or in denying Pierce County's CR 50 motion.

The case of *Livingston v. City of Everett,* 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), is instructive. There, a four-year-old boy was attacked and bitten by a group of dogs, and

his mother sued the City of Everett, claiming that the City failed to enforce its animal control ordinances. *Id.* at 656-68. Prior to the attack on the boy, there had been five complaints against the dogs reported to the City's animal control department within a five-week period. *Id.* at 657. The City had impounded the dogs, but then released them back to their owner. *Id.* Approximately three weeks after being released, the dogs attacked the boy. *Id.*

The City's ordinance governing the release of impounded animals read as follows:

> Any impounded animal **shall** be released to the owner or his authorized representative upon payment of impoundment, care and license fees **if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.**

Id. at 658 (emphasis added). Significantly, even though the ordinance granted some discretion to the City's animal control officer, the appellate court found that the City had a mandatory duty to exercise its discretion. *Id.* at 659. The court held that based on the evidence presented, the plaintiff had satisfied all elements of the failure to enforce exception. *Id.*

In the present case, PCC § 6.07.010 (2007) contains a clear and unambiguous directive—Pierce County "shall classify" potentially dangerous dogs. As *Livingston* teaches, the fact that officers are given discretion to consider various types of evidence when performing their

required classification does not render the duty to classify discretionary. *Id. See also King v. City of Seattle,* 84 Wn.2d 239, 246, 525 P.2d 228 (1974) ("(I)t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."). Similarly, the mandatory directive in PCC § 6.07.040 (2007), requiring that potentially dangerous dogs found in violation of potentially dangerous dog requirements be seized and impounded, is not rendered discretionary by use of the word "may" in one provision of PCC § 6.07.010 (2007).

The case of *King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999), is also comparable. In that case, the Kings brought negligence claims against Stevens County based on Chapter 16.08 RCW (governing dangerous dogs). The Kings claimed that Stevens County should have confiscated the dog in question prior to its attack on Mrs. King, relying on RCW 16.08.100(1), which stated that the animal control authority of a county "shall . . . immediately confiscate" "any dangerous dog" if the dog is found in violation of dangerous dog requirements. *Id.* at 594-95. Finding that there was no evidence that the Kings notified the Stevens County sheriff of the dog's alleged prior attacks on the Kings' animals, the Court of Appeals found that the dog was not dangerous and affirmed dismissal of that portion of the Kings' lawsuit. *Id.* at 595.

Nevertheless, the Court of Appeals reinstated the Kings' claim for damages that occurred after the dog attacked Mrs. King. *Id.* at 596. The Court reasoned:

> We hold Mr. King's earlier reports to the sheriff's office about the threatening behavior of his neighbors' dogs, and evidence that Timmy was part of that pack, create a reasonable inference that Timmy also engaged in that behavior. The inference is sufficient to support a trier of fact finding he was a "potentially dangerous" dog that qualified as "dangerous" when he attacked Mrs. King in February 1997. That is, **his prior behavior made him "potentially dangerous**," so he did not have to inflict a severe injury on Mrs. King in 1997 to be deemed "dangerous." It was sufficient that he engaged in an unprovoked attack that threatened her safety. **Evidence Mr. King reported the attack on his wife to the sheriff, and evidence the County did not confiscate Timmy, raise material issues concerning the County's liability to the Kings under the failure to enforce exception to the public duty doctrine.**

Id. at 596 (emphasis added).

In the present case, Denise McVicker testified that the August 31, 2006 incident where Betty and Tank tried to attack a neighbor in his garage could have resulted in a potentially dangerous dog declaration. Ms. McVicker testified that after the second incident (Betty's February 10, 2007 attempt to bite Sue), Betty should have been declared potentially dangerous. Again, after the third incident (Betty and Tank's attempt to attack the rollerblading boy), Betty and Tank both should have been declared potentially dangerous. Yet again, after the fourth incident

(Betty's March 1, 2007 attempt to break in through Sue's window), Betty should have been declared potentially dangerous. Thus, Betty and Tank had a prior history which should have resulted in a potentially dangerous dog classification no later than February 10, 2007. This would have invoked the requirements that Betty and Tank be properly confined when on Ms. Wilson's property, and leashed and muzzled when off her property. PCC § 6.07.020 and 6.07.030 (2007). These restrictions would have gone into effect even if Ms. Wilson had decided to challenge the potentially dangerous dog declaration. Ex. 55; RP 545-47; RP 707-09.

Moreover, after the third incident where Betty and Tank tried to attack the boy on the rollerblades on February 22, 2007, Pierce County should have found that Betty and Tank were in violation of the potentially dangerous dog requirements and seized and impounded the dogs. PCC § 6.07.040 (2007). However, like Stevens County in *King,* Pierce County did not seize or impound Betty or Tank, or take any other action to ensure that Ms. Wilson complied with the potentially dangerous dog requirements. Consequently, Betty and Tank continued to behave aggressively and Sue was attacked on August 21, 2007. The trial court did not err in finding that the failure to enforce exception applied in this case.

Pierce County points to post-attack amendments to its animal control ordinances as support for its argument that it had no mandatory

duty to classify, seize, or impound Betty and Tank. Pierce County's Opening Brief at 28. Yet the amended version of PCC § 6.07.010 A is even more similar to the ordinance discussed in *Livingston v. City of Everett,* 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), than the 2007 version. *See id.* at Appendix B. Although the second clause grants discretion with respect to the existence of probable cause, the first clause still uses the mandatory "shall" when describing the duty to declare animals potentially dangerous when probable cause is present.[14] *Id.* Again, under *Livingston*, the inclusion of a discretionary clause in one section of an ordinance does not cancel or modify a mandatory clause in another section of the ordinance. *Id. See also Stegriy v. King County Bd. of Appeals,* 39 Wn. App. 346, 353-54, 693 P.2d 183 (1984); *State ex rel. Beck v. Carter,* 2 Wn. App. 974, 978, 471 P.2d 127 (1970). Rather, the Court is required to give each word its ordinary meaning. *Id.* The amended version of PCC § 6.07.010 actually undercuts the County's interpretation of the "shall" and "may" language used in the 2007 ordinance.

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[14] PCC § 6.02.020 (2008) states, "Wherever a power is granted to **or a duty imposed** upon the Sheriff, the power may be exercised or **the duty may be performed** by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff. . . ." (Emphasis added.) If Pierce County had not intended for PCC § 6.07.010 (2008) to create an actual legal duty, PCC § 6.02.020 (2008) would be superfluous. An ordinance should be construed to make it effective and to avoid a strained, unreasonable, or illogical result. *Stegriy,* 39 Wn. App. at 353.

Pierce County relies on *Pierce v. Yakima County,* 161 Wn. App 791, 251 P.3d 270 (2011), as support for its argument that the duties created by PCC § 6.07.010 (2007) and 6.07.040 (2007) are discretionary. However, the case is easily distinguishable. First, *Pierce* has nothing to do with animal control. Second, Yakima County adopted building standards which did not require the County to take specific corrective action, but merely stated that the County "shall have the authority" and "is authorized" to take corrective action. *Id.* at 799. The appellate court found that the building standards conferred discretion, but did not create a mandatory duty. *Id.* at 801.

The language in *Pierce* stands in stark contrast to the language used by Pierce County in its animal control ordinances: "shall classify" and "shall be seized and impounded" are clear, specific directives requiring Pierce County to take corrective action. PCC § 6.07.010 (2007) and 6.07.040 (2007). The trial court correctly held that the ordinances created mandatory duties.

Pierce County also relies on *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.,* 115 Wn.2d 506, 531, 799 P.2d 250 (1990). However, the Washington Supreme Court did not reach any issues of statutory construction in that case because it found that the plaintiffs had failed to satisfy the "actual knowledge" element of the

failure to enforce exception. *Id.* The case is not helpful here, where there is no question that Pierce County had actual knowledge of 14 prior complaints against Ms. Wilson and dogs in her custody.

The case of *Ravenscroft v. Washington Power Co.,* 87 Wn. App. 402, 942 P.2d 991 (1997), *rev. on other grounds* 136 Wn.2d 911, 969 P.2d 75 (1999), is also distinguishable. There, certain administrative regulations directed governmental agents to establish various programs for safety and educational purposes, but no regulations required that direct corrective action take place. *Id.* at 416. The appellate court found that the failure to enforce exception did not apply in that circumstance. *Id.*

The language in *Ravenscroft* is unlike the language in Pierce County's animal control ordinances, which state that Pierce County "shall classify" potentially dangerous dogs and that potentially dangerous dogs found in violation "shall be seized and impounded." PCC § 6.07.010 (2007) and 6.07.040 (2007). Again, the trial court did not err in finding that the ordinances created mandatory duties.

The remainder of Pierce County's cited cases are too dissimilar to be helpful. *See* Pierce County's Opening Brief at 27-28. Specifically, in *McKasson v. State of Washington,* 55 Wn. App. 18, 25, 776 P.2d 971 (1989), and *Halleran v. Nu West, Inc.,* 123 Wn. App. 701, 716, 98 P.3d 52 (2004), the Securities Act made use of the term "may" rather than "shall."

In *Forest v. State of Washington,* 62 Wn. App. 363, 814 P.2d 1181 (1991), the relevant statute provided that parole officers "may" arrest for parole violations, but did not require arrest. *Id.* at 370. In *Smith v. City of Kelso,* 112 Wn. App. 277, 48 P.3d 372 (2002), the ordinance in question required the city engineer to prepare design and construction standards, but did not require enforcement. *Id.* at 375. In *Donahoe v. State of Washington,* 135 Wn. App. 824, 142 P.3d 654 (2006), DSHS had a mandatory duty to take corrective action when a nursing home was out of compliance with certain regulations, but at the time the plaintiff's claim arose, the nursing home was in compliance. *Id.* at 849. Finally, in *Fishburn v. Pierce County,* 161 Wn. App. 452, 250 P.3d 146 (2011), the statute in question stated that "[d]iscretionary judgment will be made in implementing corrections." *Id.* at 469 n.13. Not surprisingly, this Court held that the County's duty there was discretionary. *Id.* at 469.

None of Pierce County's foregoing cases require this Court to reverse the trial court's finding that the failure to enforce exception applies, or the trial court's denial of Pierce County's CR 50 motion. Accordingly, Ms. Gorman asks that the Court affirm the trial court on those issues.

C. THERE WAS NO PREJUDICIAL ERROR CREATED BY THE JURY INSTRUCTIONS.

1. Pierce County has waived its objections to jury instruction no. 11 and portions of instruction no. 5.

CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." The failure to object, before the jury is instructed in order to enable the trial court to avoid error, violates CR 51(f). *Peterson v. Littlejohn,* 56 Wn. App. 1, 11, 781 P.2d 1329 (1989). This Court can refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); *Ryder's Estate v. Kelly-Springfield Tire Co.,* 91 Wn.2d 111, 114, 587 P.2d 160 (1978) (where exception is not taken, the alleged error will not be considered on appeal).

Here, Pierce County argues that the trial court's instruction no. 11 (burden of proof) resulted in prejudicial error. *See* Pierce County's Opening Brief at 34-36. However, Pierce County's trial counsel proposed the language complained of, and did not take exception when the trial court incorporated Pierce County's proposed language into the instruction. RP 1483-89. Pierce County failed to object to instruction no. 11 before it was read to the jury, and must therefore be deemed to have waived its objections on appeal.

Pierce County also argues that instruction no. 5 (summary of the parties' claims) resulted in prejudicial error. *See* Pierce County's Opening Brief at 31-34. But Pierce County's trial counsel conceded that Ms. Gorman's first numbered claim, "failing to classify and control a potentially dangerous dog," was a correct statement of the law. RP 1356. Because Pierce County did not object to this language before it was read to the jury, Pierce County has waived its objection to this language on appeal.

2. Any remaining error in instruction no. 5 was harmless.

"Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hudson v. United Parcel Service, Inc.*, 163 Wn. App. 254, 261, 258 P.3d 87 (2011). The trial court has considerable discretion regarding the wording of instructions and how many instructions are necessary to present each litigant's theories fairly, and the Court reviews these matters for an abuse of discretion. *State v. Reay,* 61 Wn. App. 141, 146, 810 P.2d 512 (1991), *rev. denied* 117 Wn.2d 1012 (1991).

Even if a jury instruction is misleading, the burden is on the objecting party to establish consequential prejudice. *Griffin v. West RS,*

Inc., 143 Wn.2d 81, 91-92, 18 P.3d 558 (2001) (jury concluded that defendant breached its duty of care but found no proximate cause, so instruction on duty of care was not prejudicial). In a multitheory case, a defendant cannot claim prejudice on one theory if he did not propose a special verdict form that segregates the theories. *See Davis v. Microsoft Corp.,* 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (because defendant proposed a special verdict form in a multitheory case, remand was required when one of the theories was found invalid and jury had used a general verdict form); *McCluskey v. Handorff-Sherman,* 125 Wn.2d 1, 10-11, 882 P.2d 157 (1994) (court rejected defendant's argument that one theory of liability was improperly before the jury, where defendant did not propose a special verdict form segregating the plaintiff's theories and conceded that there was no way to determine on which theory the jury found liability).

Pierce County argues that Ms. Gorman's second and third numbered claims in instruction no. 5 were prejudicial. *See* Pierce County's Opening Brief at 32; CP 881. Even *assuming arguendo* that these two claims were misleading to the jury, the jury could still have found that Pierce County breached its duty under Ms. Gorman's first numbered claim ("failing to classify and control a potentially dangerous dog"). Significantly, Pierce County conceded that the first numbered

claim correctly stated the law and offered no objection to its submission to the jury. CP 881; RP 1356. Pierce County did not propose a verdict form that segregated the various theories submitted by Ms. Gorman. CP 757-59. *See Davis*, 149 Wn.2d at 539-40; *McCluskey*, 125 Wn.2d at 10-11. The jury did in fact find that Pierce County breached its duty of care, although the specific theory on which the jury based its finding cannot be determined. CP 902. Under the circumstances, Pierce County's arguments regarding the second and third claims must be rejected. The jury's consideration of Ms. Gorman's second and third claims was not prejudicial. *Griffin,* 143 Wn.2d at 91-92.

Ms. Gorman would also submit that her second and third claims were not misleading under the circumstances. Given the testimony regarding Pierce County's failure to bridge the records gap between CAD, CALI, and Chameleon; sheriff's deputies' and animal control officers' lack of knowledge and/or understanding of the potentially dangerous dog ordinances; and the failure to seize and impound dogs that should have been declared potentially dangerous long before Sue Gorman was attacked, the trial court was well within its discretion to word the second and third numbered claims as it did.

Furthermore, the jury received a specific instruction (no. 14) on Pierce County's duty, to which Pierce County offered no objection. The

jury was also instructed on negligence (instruction no. 6), proximate cause (instruction no. 9), PCC § 6.07.010 (2007) and 6.07.040 (2007) and related definitions (instruction nos. 15-18), and damages (instruction no. 19). CP 883-97. Thus, the jury was fully instructed on common law negligence. CP 891; RP 1357-58. Read as a whole, the jury instructions properly stated the parties' claims and applicable law, allowed Ms. Gorman to argue her various theories of the case, and were not misleading. *See State v. Reay,* 61 Wn. App. 141, 146, 810 P.2d 512 (1991), *rev. denied* 117 Wn.2d 1012 (1991) (the test of sufficiency is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law). The trial court did not abuse its discretion and there was no prejudicial error as a result of the jury instructions, so the jury's verdict against Pierce County should be affirmed.

D. THE TRIAL COURT CORRECTLY RULED THAT EVIDENCE OF PRIOR COMPLAINTS WAS RELEVANT AND ADMISSIBLE.

Under the "invited error" doctrine, a party may not set up an error at trial and then complain of it on appeal. *Casper v. Esteb Enterprises, Inc.,* 119 Wn. App. 759, 771, 82 P.3d 1223 (2004). The doctrine applies when a party takes an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal. *Id.*

When a party introduces evidence that would be inadmissible if offered by the opposing party, the party "opens the door" to explanation or contradiction of that evidence. *State v. Ortega,* 134 Wn. App. 617, 626, 142 P.3d 175 (2006), *rev. denied* 160 Wn.2d 1016 (2007). A trial court's decision to allow testimony under the open-door rule is reviewed for abuse of discretion. *Id.*

Here, the trial court consistently ruled that evidence of the specific details of the ten prior complaints which did not involve Betty and Tank would not be admitted. RP 97-98; RP 151-60; RP 196-99; RP 203-04; RP 248; RP 610-11; RP 695-96; RP 725. The trial court did not change its mind on that issue until Pierce County's trial counsel violated the trial court's prior rulings, making a specific reference to the details of one prior complaint (investigated by Ms. Aarhaus) and soliciting testimony from Ms. McVicker which inferred that all of the prior complaints were mere "leash law" violations. RP 990-91. Only after Pierce County's trial counsel "opened the door" did the trial court allow rebuttal testimony to inform the jury that three of the prior complaints involved attempted attacks on humans. RP 996; RP 1013-19.

Pierce County's violation of the trial court's prior rulings was an "affirmative and voluntary action" which required the trial court to allow

Ms. Gorman to offer rebuttal testimony.[15] Thus, Pierce County invited the error that it now complains of on appeal. Pierce County solicited testimony on a subject that had previously been ruled inadmissible, so the trial court acted well within its discretion in allowing rebuttal testimony under the "open-door rule."

The trial court also did not abuse its discretion in admitting evidence of the fact of the prior complaints (*i.e.*, the number of prior complaints and the range of dates over which they occurred). All "relevant" evidence is admissible. ER 402. "Relevant" evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence. ER 401.

Here, evidence of the fact of the prior complaints was relevant to the issues of notice to Pierce County, Pierce County's actual knowledge of prior violations, and whether Pierce County's investigations of the complaints against Ms. Wilson, Betty, and Tank and failure to declare the dogs potentially dangerous were reasonable under the circumstances. Ms. McVicker testified:

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[15] Had the trial court not allowed Ms. Gorman to solicit rebuttal testimony, it would have been unfairly prejudicial to Ms. Gorman because the witnesses she had intended to call regarding details of the prior complaints, such as Ms. Aarhaus and Mr. Foster, had been excluded. RP 377-404; CP 1538-41; CP 1545.

Q Would you agree with me that – and I think you even testified under your direct – previous complaints about a dog owner's other dogs who were loose but didn't bite anybody is not substantial evidence to prove that a new dog is potentially dangerous?

A Correct. We look at all evidence for the history with regard to, for example, if somebody had a dog declared potentially dangerous once and maybe they gave that dog up, they got another dog and that dog is creating similar type of nuisance. We would see that perhaps that individual had a history with us, and so we would be pretty quick to declare that dog, and, you based on prior history.

Q So an officer might exercise their discretion quicker and take the harder action against a dog that meets the criteria based on the past history of that dog owner?

A Correct.

RP 989. The testimony of Officer Anderson also supported the trial court's determination that the evidence of prior complaints was relevant and admissible:

Q . . . It may not have been the same dogs, but it's the same owner, is it not?

A It's the same owner, yes.

Q And to the extent that you would consult that report [Ex. 10] or have that before you, it would have helped in August of '06; is that correct?

A I would have been – at that point, I would have been aware that there were some prior contacts with her; that she was an irresponsible pet owner, I guess.

That would have helped that much. . . .

RP 728. *See also* RP 701; RP 712. Pierce County Auditor Patrice A. McCarthy believed that "more information is better than less." Ex. 82 (Deposition of Patrice A. McCarthy) at 15:12-23.

The trial court did not abuse its discretion in admitting evidence of the fact that there were ten prior complaints against dogs (other than Betty and Tank) in Ms. Wilson's care during the years 2000-2006. The testimony by Ms. McVicker established that prior complaints against Ms. Wilson's other dogs should have had an effect on the County's response to the current complaints against Betty and Tank. Consequently, there was no prejudice to Pierce County as a result of the trial court's admission of this evidence. Ms. Gorman respectfully requests that the Court affirm the jury's verdict against Pierce County.

VI. ARGUMENT SUPPORTING MS. GORMAN'S CROSS-APPEAL

A. THE TRIAL COURT ERRED IN FAILING TO FIND THAT MS. GORMAN HAD NO DUTY TO SHUT HERSELF IN HER HOME INDEFINITELY TO PROTECT HERSELF FROM MARAUDING PIT BULLS.

This Court reviews a trial court's rulings on motions for directed verdicts and judgment notwithstanding the verdict *de novo*, viewing the facts in a light most favorable to the non-moving party. *Davis v.*

Microsoft Corp., 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003) (judgment as a matter of law at the close of plaintiff's case); *Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC,* 139 Wn. App. 743, 767 n.12, 162 P.3d 1153 (2007) (judgment notwithstanding the verdict).

A showing of negligence requires proof of the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach and (4) proximate cause. *Christensen v. Royal School Dist. No. 160,* 156 Wn.2d 62, 66, 124 P.3d 283 (2005). The existence of a legal duty is a question of law and "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Id.* at 67. Ms. Gorman could find no Washington case directly discussing the duty to keep one's door closed to protect oneself from marauding dogs; it appears that this is a case of first impression.

In criminal law, it has long been recognized that a person's home is her "castle." This rule has its basis in the Washington Constitution, article I, § 7, which provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." *See also State v. Young,* 76 Wn.2d 212, 214, 455 P.2d 595 (1969) ("It would unduly extend this opinion and serve no useful purpose to discuss the historical background and development of the doctrine, 'A man's home is his castle'—as embodied in the federal and state constitution and statutory

provisions quoted supra."). As Justice Cardozo once explained: "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat." 2 William L. Burdick, *The Law of Crime,* § 436h (1946). Most jurisdictions adhere to the concept that there is no duty to retreat in one's home, even if the attacker is a spouse, invitee, or member of the family. *Cannon v. State,* 464 So.2d 149, 150 (D. Ct. App. Fla. 1985), *rev. denied* 471 So.2d 44 (Fla. 1985).

A similar respect for private property rights exists in the civil context. Under RCW 64.04.030, a fee simple owner of land receives a covenant of "quiet and peaceable possession" of the premises. A landowner who believes that the "use and enjoyment" of her property has been interfered with has a common law cause of action for nuisance. *See, e.g., Vance v. XXXL Development, LLC,* 150 Wn. App. 39, 42, 206 P.3d 679 (2009).

Common law also provides that a property owner has no duty to fence his or her property to protect against trespassing domestic animals unless there is a statutory requirement to do so.[16] RESTATEMENT (SECOND) OF TORTS § 504 (1977); RESTATEMENT (FIRST) OF TORTS § 504

[16] Sue Gorman was under no statutory requirement to fence her back yard. *See* Gig Harbor Municipal Code § 17.01.080(B) ("Conformance required—Fence or shrub height").

(1938). *See also Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911) ("If for his own protection [the landowner] would be required to fence at all, he would only be required to fence against cattle running at large upon public highways, the public domain, or uninclosed private lands."). *Accord, Rayner v. Lowe,* 572 N.E.2d 245, 247 (Ct. App. Ohio 1989) (state statute construed to mean that a person has no duty to fence his land in order to protect it from a trespassing animal, and is not contributorily negligent if he fails to protect his property); *Ricca v. Bojorquez,* 473 P.2d 812, 813 (Ct. App. Ariz. 1970) ("In a no-fence district an owner of land is not required to fence out trespassing livestock in order to recover the damage they cause; rather, as at common law, the owner of the livestock has a duty to prevent their trespass . . .."); *Tate v. Ogg,* 195 S.E. 496, 498 (S. Ct. Va. 1938) ("As a general principle of law, every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another. This rule applies to acts of trespass by domestic animals, unless some provision of law requires the landowner to actually fence out such animals.").

Where a duty to protect oneself from harm is contrary to public policy, the Washington Supreme Court has found that the defense of comparative negligence is not available. *See, e.g., Gregoire v. City of Oak*

Harbor, 170 Wn.2d 628, 641, 244 P.3d 924 (2010) (duty of jail to protect inmates includes duty to protect inmate from self-inflicted harm, so defense of contributory negligence not available); *Christensen,* 156 Wn.2d at 67 (as a matter of public policy, student does not have a duty to protect herself from sexual abuse at school by her teacher).

At trial, the Defendants presented absolutely no legal authority supporting the position that Ms. Gorman was required by statute, common law, or otherwise to keep her sliding door closed or to flee her home to protect herself from marauding pit bulls. Ms. Gorman respectfully submits that she had no duty to keep her door closed or to flee her home, as such a duty would violate public policy.

To hold that Ms. Gorman had a duty to keep her door shut while she was inside her home would be inconsistent with her duty in other circumstances. For example, if Ms. Gorman had been attacked while doing yard work on her own property, she would not have had a duty to protect herself with a fence. *Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911). Similarly, if Ms. Gorman had been attacked while walking down her driveway to get to her mailbox, she would not have had a duty to protect herself with a fence or other barrier. *Id.* If Ms. Gorman had been attacked while walking on a public street or in a public park, she would not have had a duty to maintain barriers around herself as she

walked. If another human had attacked Ms. Gorman inside her house, Ms. Gorman would not have had a duty to flee. If no duty arises in the above situations, how then could a duty to protect herself from marauding pit bulls arise when Ms. Gorman was inside her house, asleep in her own bed?

Finding that Ms. Gorman had a duty to keep her door closed would also be problematic because the scope of the duty would be impossible to define. For example, when would Ms. Gorman's duty to keep her door closed have begun—back in 2000 when the first complaint against Ms. Wilson was reported? In 2006 when the first complaint against Betty and Tank was reported? How long would Ms. Gorman be required to keep her door closed to satisfy her duty? A few hours a day? All day? As long as Betty lived on the Wilson property? Forever? Would she ever be permitted to leave her door open? Would she also be required to keep her windows closed? Would the duty be different if Ms. Gorman were awake? How long would Ms. Gorman be required to assume that Ms. Wilson would continue violating animal control ordinances? How long would Ms. Gorman be required to assume that Pierce County would not enforce its animal control ordinances? Would Ms. Gorman be held to a higher standard of care because she had pets inside her house? Would Ms. Gorman be held to a higher standard of care because she was disabled? At

what point would Ms. Gorman's duty to keep her door closed infringe on her constitutional rights to liberty and the pursuit of happiness? *See, e.g.*, Ellen M. Bublick, "Comparative Fault to the Limits," 56 VANDERBILT L. REV. 977, 1029-33 (May 2003) (some courts have restricted comparative fault defenses where there is infringement on personal autonomy); Ellen M. Bublick, "Citizen No-Duty Rules: Rape Victims and Comparative Fault," 99 COLUM. L. REV. 1413, 1484-85 (Oct. 1999) (author argues that courts should be reluctant to permit comparative fault defenses where rape victim "fault" alleged is an activity that involves significant citizenship interests).

The trial court should have ruled as a matter of law that just as Ms. Gorman had no legal duty to fence her yard, she also had no legal duty to keep her sliding door closed. Because there was no duty for her to breach, Ms. Gorman could not have been negligent, and the issue of comparative or contributory negligence should never have gone to the jury. Ms. Gorman respectfully requests that the Court reverse the denial of Ms. Gorman's motions for directed verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury.

B. THE TRIAL COURT ERRED IN FAILING TO FIND THAT ONCE THE PIT BULL ATTACK COMMENCED, MS. GORMAN WAS FACED WITH AN EMERGENCY.

"The sudden emergency doctrine recognizes that when placed in a

position of danger, one does not always act as prudently as one might have had there been time for deliberation." *Kappelman v. Lutz,* 167 Wn.2d 1, 9, 217 P.3d 286 (2009). The doctrine comprehends the availability of and a possible choice between courses of action after the peril arises. *Id.* at 10. The doctrine holds that a person who is suddenly confronted by an emergency through no fault of her own and chooses a damaging course of action in order to avoid the emergency is not liable for negligence although the particular act might constitute negligence had no emergency been present. *Id.* Even where there is conflicting evidence, the emergency instruction may be proper. *Id.*

Here, if the Court concludes that the jury should have been instructed on comparative negligence, then the trial court erred in failing to find that Ms. Gorman was faced with a sudden emergency once the pit bull attack commenced. The undisputed evidence was that Ms. Gorman was asleep in her bed when Betty and Tank entered her bedroom, and the dogs began their attack by jumping up on Ms. Gorman's bed and biting her. Ms. Gorman was placed in a position of danger through no fault of her own.[17] Assuming, as the Defendants argued, that Ms. Gorman had a

[17] Prior to trial, the trial court had granted Ms. Gorman's motion for partial summary judgment on the affirmative defense of provocation. RP 976-89. There was also insufficient evidence presented that established Ms. Gorman acted unreasonably or that her actions were a proximate cause of her injuries. *See* Parts C-D below.

choice between fleeing the room and staying to defend Romeo, the fact that she had a choice between possible courses of action meant that the emergency doctrine applied. *Kappelman,* 167 Wn.2d at 9. The trial court should have given an emergency doctrine instruction and erred in declining to do so. *See* WPI 12.02.

Because the jury was not properly instructed on Ms. Gorman's duty during an emergency, the trial court's error was prejudicial. The jury evaluated Ms. Gorman's conduct using the ordinary comparative or contributory negligence standard, and Ms. Gorman was ultimately found 1% at fault. Ms. Gorman respectfully requests that the Court strike the jury's finding of comparative fault against Ms. Gorman.

C. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THERE WAS INSUFFICIENT EVIDENCE OF A BREACH OF A DUTY.

The Defendants carried the burden of proving that Sue was comparatively or contributorily negligent. WPI 21.03. The Defendants were therefore required to establish not only that Sue owed a duty to exercise reasonable care for her own safety, but also that she failed to exercise such care. *Alston v. Blythe,* 88 Wn. App. 26, 31-32, 943 P.2d 692 (1997). Here, even if the Court is not persuaded by Ms. Gorman's arguments regarding the duty and the emergency doctrine, the Defendants failed to present sufficient evidence of a "breach" at trial.

> A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct, when so judged, appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.
>
> This is not only the rule applicable generally to contributory negligence, but it has peculiar force and application to conditions which are the creations of a defendant relying upon the contributory negligence of the injured person to escape responsibility, when such conditions would naturally influence the action of the person charged with contributory negligence.

Hines v. Chicago, M. & St. P. Ry. Co., 105 Wn. 178, 184-85, 177 P. 795 (1918).

The undisputed evidence at trial was that Sue's neighborhood was safe enough for people to leave their sliding doors open at night, and her neighbors, including Rick Russell and Defendant Zachary Martin, did leave their doors open. Sue had been able to leave her pet door open during the five years prior to the August 21, 2007 attack without incident. Because Sue had never seen Betty or Tank roaming loose in the morning hours, she did not expect Betty and Tank to enter her home in the morning. Although Sue did not put a nail in the frame of the sliding door when she went to bed in the early morning hours before the attack, she testified that the pit bulls would probably have been able to push their way through even with the nail in place, because some neighborhood boys had

done the same thing.

The evidence also established that Sue was asleep in bed when Betty and Tank entered her bedroom, and that Sue began trying to defend herself immediately by raising her arm as Betty and Tank blocked her escape through the bedroom door. The Defendants presented no evidence suggesting that Sue had some other escape route available or that she could have gotten past the pit bulls. To the contrary, Sue stated that she felt herself getting weaker during the attack and that her first chance to get out of the house was when Betty and Tank turned from her to kill Romeo. RP 415-17; RP 1313-14; RP 1319-20.

Viewing the attack from the circumstances surrounding Sue at the time she was being attacked, there is not "substantial" evidence to support a finding of comparative negligence. At best, there is only a "scintilla" of evidence, which is not enough to support a verdict. *Hojem v. Kelly,* 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The trial court should have granted judgment notwithstanding the verdict on this issue.

This conclusion is supported by comparable cases involving allegations of contributory or comparative negligence. In *Amrine v. Murray,* 28 Wn. App. 650, 626 P.2d 24 (1981), a case in which a guest passenger brought a personal injury action against a host driver, the Court of Appeals discussed what would constitute contributory negligence by a

passenger:

> Evidence of plaintiff's contributory negligence in failing to warn defendant that his wheel was about the leave the highway surface was clearly insufficient to present that theory to the jury. A passenger is not required to maintain the same degree of attention as is a driver. [citations omitted] **Nor is a passenger required to anticipate negligent acts on the part of the driver.** [citation omitted] In the absence of circumstances that would serve to put him on alert, a passenger is not required to keep a constant lookout for dangers or pay attention to ordinary road or traffic conditions. Id. He cannot be charged with contributory negligence unless, when the accident became imminent, there was something he might have done that he failed to do. [citation omitted] If knowledge of peril comes too late to warn the driver and avoid the accident, failure to communicate cannot constitute contributory negligence.

Id. at 656-57 (emphasis added). Like the passenger in *Amrine*, Sue should not have been required to anticipate that her neighbors would allow Betty and Tank to leave their property without supervision in the early morning hours on August 21, 2007. In leaving her pet door open the night before, she acted as reasonably as Rick Russell, her neighbor. She was not negligent.

In *Rollins v. King County Metro Transit,* 148 Wn. App. 370, 199 P.3d 499 (2009), *rev. denied* 166 Wn.2d 1025, 217 P.3d 336 (2009), the Court of Appeals found that passengers on a bus were not contributorily negligent for their actions prior to an assault:

> Metro argues an instruction on contributory

> negligence was justified by the following evidence: Rollins and Hendershott did not alert the driver of their fears about the other passengers, did not move to the front of the bus, did not call for assistance, and did not get off the bus.
>
> We see no material issue of fact on contributory negligence on this evidence. It is undisputed that Rollins and Hendershott tried to avoid confrontation with the group, that their companion tried to alert the driver to the fight in the bus, which generated a violent response from the teens and no apparent reaction from the driver. There is no evidence that Hendershott and Rollins could have moved forward, which would have required making their way through the majority of the intimidating crowd. Nor is there evidence that moving forward would have kept them safe. Finally, even if it would have been reasonable for the teenagers to disembark and walk along Rainier Avenue late at night, Metro fails to explain how that constituted an avenue of escape, for it was when Hendershott and Rollins tried to leave the bus that the assault began in earnest. We agree with the trial court that the evidence leaves no doubt that Rollins and Hendershott acted reasonably under the circumstances. The evidence did not merit an instruction on contributory negligence.

Id. at 382-83. Like Metro in *Rollins,* the Defendants herein failed to present evidence supporting their alleged defense. The Defendants failed to show on a more probable than not basis that having the nail in Sue's door would have kept Betty and Tank out; that Sue had an available escape route other than her bedroom door; that Sue could have fought her way past the pit bulls that blocked the way to the bedroom door; that Sue would not have sustained further injury if she had tried to run away from the pit bulls; or that Sue would have sustained fewer injuries if she had not

tried to protect Romeo.[18] The Defendants' allegations of contributory negligence do not rise above speculation, and should not have gone to the jury.

In *Zukowsky v. Brown,* 1 Wn. App. 94, 459 P.2d 964 (1969), *rev. granted* 77 Wn.2d 961 (1970), *remanded* 79 Wn.2d 586, 488 P.2d 269 (1971), a guest passenger on a boat was injured when the helm seat on which she was sitting collapsed. *Id.* at 96. At the time of the collapse, the plaintiff was trying to swivel the seat around to look behind her. *Id.* at 97-98. The defendant argued that this constituted contributory negligence. The Court of Appeals disagreed:

> Not every action by a plaintiff, even though it be a cause of the mishap, can be characterized as negligent action. . . .
>
> There was neither substantial evidence nor circumstance in the record to support a conclusion that Mrs. Zukowsky's conduct under existing circumstances fell below the standard to which she should have conformed for her own protection. The instructions on contributory and comparative negligence should not have been given, and it was error to have submitted those issues to the jury.

Id. at 99-100. Here, Sue's act of leaving the pet door open did not fall below the standard to which she should have conformed for her own

[18] The undisputed testimony is that Sue was only able to escape her bedroom when Betty turned away from her to join Tank, who had managed to open the bedroom closet door and get Romeo. RP 415-17; RP 1313-14; RP 1319-20. Had Ms. Gorman not tried to save Romeo, he would not have been in the closet and the pit bulls may not have turned their attention away from Ms. Gorman to attack him. Thus, Ms. Gorman's attempts to

protection; her neighbors testified that they left their doors open at night, so there is no reason that Sue should not have been permitted to do the same. Similarly, Sue's act of trying to protect Romeo from attack did not fall below the standard to which she should have conformed for her own protection. The evidence established that the only reason Betty turned away from Sue was to help kill Romeo, who Sue had placed in the closet. Had Sue not placed Romeo in the closet, Betty and Tank may not have left her to finish Romeo off; Betty and Tank could very well have stayed focused on Sue and killed her instead. Her actions did not constitute negligence.

In *La Lone v. Smith,* 39 Wn.2d 167, 234 P.2d 893 (1951), a man assaulted a friend when the friend refused to loan him money for beer. In finding that there was no contributory negligence, the Washington Supreme Court stated:

> The findings do not afford any factual basis for this contention but, even if the findings had included in substance the statements quoted above, it does not seem to us to warrant a holding that respondent's acts amounted to contributory negligence because respondent was under no duty to placate Trask by loaning him money and thereby avoid a possible assault, regardless of previous loans to him. We cannot hold that respondent was guilty of contributory negligence in this case.

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save Romeo were just as likely to have decreased her injuries, perhaps even preserving her life.

Id. at 173. In the present case, Sue was under no duty to avoid a possible attack while she was laying asleep in her bed, regardless of Betty's prior attempts to lunge at her window and door. Sue's actions were reasonable and did not constitute negligence.

In *Reiboldt v. Bedient,* 17 Wn. App. 339, 562 P.2d 991 (1977), *rev. denied* 89 Wn.2d 1017 (1978), a tavern patron brought an action against the tavern owner for injuries the patron sustained when he was assaulted by another intoxicated patron. The Court of Appeals found that "[a] careful review of the record indicates no evidence upon which to base an instruction on contributory negligence." *Id.* at 345. Just as the tavern patron was not negligent relative to the assault on him, Sue was not negligent relative to the pit bull attack on her.

Pierce County may argue that Ms. Gorman was contributorily negligent in leaving the pet door open because Betty and Tank had come in her house through that door before. However, that incident involved very different facts than what occurred on August 21, 2007. In the middle of July 2007, Sue was playing with Misty and Romeo in her back yard. RP 1273-74. Misty and Romeo were barking and "having a lot of fun." *Id.* It was early evening and starting to get dark. RP 1274. As Sue, Misty, and Romeo came inside the house, Betty and Tank appeared and followed them in before Sue could get the sliding glass door closed. *Id.*

Sue was able to back Betty out of the sliding door, and Tank became very meek at that point. RP 1275. Tank would not go out the front door, so Sue put him out the back through the sliding glass door. *Id.*

Notably, the time period of this event, early evening, was consistent with Sue's testimony that she usually saw Betty and Tank loose in the afternoon or evenings. She had never seen Betty or Tank loose in the early morning prior to August 21, 2007. Also, Sue had been outside playing with dogs that were barking and making a commotion immediately before Betty and Tank came in, whereas on the morning of August 21, 2007, Sue was laying in her bed asleep. The fact that Betty and Tank followed her in after she played with Misty and Romeo during early evening hours would not have put Sue on notice that Betty and Tank would enter her home in the morning while she was sleeping. She was not comparatively or contributorily negligent in leaving her sliding glass door open.

D. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THERE WAS INSUFFICIENT EVIDENCE THAT ANY ALLEGED COMPARATIVE NEGLIGENCE WAS THE PROXIMATE CAUSE OF ANY INJURY.

Assuming arguendo that Ms. Gorman was somehow negligent, the Defendants still failed to present sufficient evidence that her negligence proximately caused her injuries and damages.

While Ms. Gorman stated that she did not put a nail in her door to stop it from opening wider, she explained that she did not think the presence of the nail would have mattered on August 21, 2007. Some neighborhood boys had been able to push the door open while the nail was in place, and Ms. Gorman felt that Betty and Tank could probably have done the same. The Defendants presented no evidence to contradict this.

Furthermore, Ms. Gorman testified that when the attack began, Betty and Tank were between her and her bedroom door and she could not get past them. She got weaker as the attack progressed. Her first opportunity to escape was when Betty and Tank turned to kill Romeo.

Based on this undisputed testimony, Ms. Gorman's actions could not have been the proximate cause of her injuries or damages. "But for" the Defendants' failure to follow or enforce Pierce County's animal control ordinances, the August 21, 2007 attack would not have occurred and Ms. Gorman would not have been injured. The trial court erred in failing to grant Ms. Gorman's motion for judgment notwithstanding a verdict on the issue of Ms. Gorman's comparative negligence.

VII. CONCLUSION

Based on the foregoing, Ms. Gorman respectfully requests that the Court affirm the jury's verdict against Pierce County. She also requests that the Court reverse the trial court's rulings on her motions for a directed

verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury.

In making these requests, Ms. Gorman wishes to make clear if her cross-appeal is granted, only the issue of comparative or contributory negligence will be affected; damages will not. *Heilman v. Wentworth,* 18 Wn. App. 751, 756, 571 P.2d 963 (1977), *rev. denied* 90 Wn.2d 1004 (1978). If the Court grants the relief requested, Ms. Gorman is willing to waive recovery of the 1% unallocated damages so that a retrial would not be necessary. The Defendants would be jointly and severally liable for the remaining 99% of Ms. Gorman's damages.

Respectfully submitted this 15th day of March, 2012.

TROUP, CHRISTNACHT, LADENBURG, McKASY & DURKIN, INC., P.S.

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