NO. 42502-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Sue Anne Gorman,

Appellant

v.

Pierce County, et al.,

Respondents

RESPONDENT EVANS-HUBBARD'S RESPONSE TO CROSS-APPEAL BY SUE ANN GORMAN

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I. INTRODUCTION

Plaintiff/Cross-Appellant Sue Ann Gorman (Gorman) is claiming that there had been so many problems with the aggressive and threatening behavior of her neighbor's pit bull, Betty, that Pierce County had a duty to protect her from possible attacks by declaring Betty a "dangerous animal." Simultaneously, Gorman claims that, even though Betty had entered her house through the sliding door only a month before the August 21, 2007 incident at issue, and had aggressively come onto her property "25 to 50 times" in the prior year, lunging at the windows and trying to attack Gorman's service dog, Gorman had no duty to use ordinary care to protect herself. Gorman contends that her decision to leave her door open at night to allow dogs to enter and leave at will, and not to insert a nail in the frame to prevent the door from opening too wide, which she had done in the past, or to take any other measure to protect herself from a pit bull she worried might enter her house and believed to be extremely dangerous, is not evidence of comparative fault. Ignoring decades of case law, Gorman argues because her "home is her castle," she had no duty to take any measures to protect herself from reasonably foreseeable harm.

Gorman's argument should be rejected for three reasons. First, she did not raise the lack of duty or "home as castle" argument before the case went to the jury. Her only argument from pre-trial motions through

arguments on the instructions and her motion for a directed verdict[1] was that defendants Wilson and Evans-Hubbard were not entitled to argue comparative fault because they were strictly liable under the 'dog bite statute,' relying on pre-Tort Reform case law. It was not until her post-trial motion for judgment notwithstanding the verdict (JNOV) that Gorman argued she had no duty to 'close her door,' and the other arguments raised in her appeal. She has apparently, wisely, now dropped the strict liability argument, which was incorrect as a matter of law, given the statutory mandate to apportion all fault with only a few exceptions, not applicable here. However, it is too late to raise an argument or issue for the first time on JNOV which is supposed to be a renewal of a prior motion filed under CR 50(a), not a second chance to raise issues and arguments not presented to the Court before the case went to the jury. Gorman was clearly trying to buttress her losing strict liability argument after the jury assigned comparative fault of 1%, negating joint and several liability. This is an improper use of a CR 50(b) motion. The new arguments should not be considered on appeal, leaving Gorman with no basis for arguing the comparative fault determination should be vacated.

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[1]Gorman used the pre-1993 terms 'motion for directed verdict' and motion for judgment notwithstanding the verdict below instead of the current terminology "judgment as a matter of law." The older terms they are used here simply for consistency and ease of reference.

Second, even if the Court considers Gorman's untimely arguments, they are meritless. It is well established in Washington law that every individual has a duty of ordinary care. Testimony at trial, including that of Gorman herself, provided sufficient evidence from which the jury could, and did, find comparative fault. It is not the role of the Court to substitute its findings of fact for those of the jury.

Third, there was no basis for an instruction on the emergency doctrine, and Gorman never proposed, or accepted to the failure to give, such an instruction. Further, the emergency doctrine should not be given as a matter of law when, as here, the person claiming the doctrine is responsible in part or in whole for being in the emergency situation. The trial court did not abuse its discretion in failing to give an instruction the plaintiff did not request and which was not warranted under existing law.

II. ISSUES PRESENTED

ISSUE ONE: Gorman's appeal on comparative fault should be denied because it is based solely on arguments that were not raised until the post-trial CR 50(b) motion and thus were not properly preserved for appeal.

ISSUE TWO: Everyone, including Gorman, has a duty to use ordinary care for their own safety. Gorman was at fault for choosing to leave her exterior bedroom door open at night when she believed that

Betty was "out to get" her dog, Misty, Betty had previously entered her home through the sliding door, Betty was in Gorman's yard "25 to 50 times" in the prior month, and Gorman was "worried" that Betty would come into her home

ISSUE THREE: The trial court did not abuse its discretion in failing to instruct the jury on the emergency doctrine when the plaintiff never requested or offered an instruction and the doctrine was inapplicable as a matter of law because plaintiff's negligence caused or contributed to the 'emergency' situation.

III. STATEMENT OF THE CASE

Defendants/Respondents Zach Martin and Shelley Wilson (Wilson) owned a pit bull named Betty. RP 870. When Betty had a litter of puppies, they gave one of the puppies, Tank, to their neighbor, Jacqueline Evans-Hubbard (Evans-Hubbard). RP 1108. Evans-Hubbard kept Tank in a kennel or on a chain when he was outside without her. RP 11109-11. There was no evidence offered at trial that Tank acted in an aggressive or dangerous manner before the August 2007 incident. Evans-Hubbard testified that she was not told of any aggressive or improper behavior by Betty or that Tank had ever been loose and entered Gorman's house while with Betty. RP 1115.

Gorman presented a variety of evidence in support of her claim that Betty was a vicious dog. A neighbor, Brad King, said he was "trapped in his house" by "Betty and another [unidentified] pit bull." RP 445-447. Rick Russell testified that his son was chased by a pit bull in 2007, RP 471, and that he once saw Betty jumping at Gorman's door. RP 475-6. Gorman's treating psychologist testified that Gorman told him of a "history of dogs attacking. They had targeted her dog and wanted to kill it and that this continued over quite a period of time." RP 819-20.

Gorman herself testified in detail about prior contacts with Betty. She described an incident on March 1, 2007 when Betty

> chased Misty into the house and slammed the door. So Misty was inside and I was outside. She began jumping at the windows with such force, with more force than ever before, and she was just throwing her body at the sliding glass door, and so hard that it was flexing and I was afraid it was going to break. I was really scared, and then she went around the front and started throwing herself, her body at the front window...

RP 1270. Gorman called 911 on that occasion and a deputy responded. RP 1270-1271. Despite this, Gorman testified that Betty continued to come over and "lunge" at her windows "about once every two or three weeks." RP 1272, l. 21-25. She added:

> She wasn't roaming around loose all the time but...so you never knew, but then she would come over once every two or three weeks.

RP 1273. There was no mention of Tank being involved in any of these incidents. However there was one occasion in mid-July, 2007, where Gorman claimed that Betty and Tank actually entered her house. RP 1273-4. Gorman was in her yard with the sliding door open and "Betty and Tank burst in, Betty leading, of course." RP 1274. This was the same sliding glass door through which the dogs entered on August 21, 2007. Although Betty was growling and snarling, "Tank was just kind of lingering around..." RP 1274. Gorman thought Betty was attempting to "go after" Misty and Romeo, the neighbor's dog who frequently visited Misty and Gorman. RP 1276.

Shortly after that incident Betty "came after Misty again." RP 1277, l.2. Gorman said she "was constantly in fear for Misty's life, ... because Misty seemed to be the target, the main target..." RP 1277, l. 2-5. Gorman talked to Wilson that day, and told her Betty was "extremely dangerous." RP 1278. Even though Wilson said she would confine the dog, Gorman didn't think that would actually happen. RP 1279. Gorman testified on cross examination that Betty "went after Misty" "at least" 25 to 50 times in 2007. RP 1390. She did not feel safe even though Wilson had promised to watch Betty. RP 1405. She knew the dogs could get through the sliding door and "worried about it." RP 1405.

On August 17, 2007, Gorman was sleeping in her bedroom with the sliding door open so that her dog, and the neighbor's dog, could enter and leave the house at will. RP 1402. At some point about five years earlier Gorman attempted to install a small plastic doggie door in the screen covering the sliding door. RP 1400. The screen was not strong enough to hold the doggie door and it fell out. After that, there was just a hole in the screen that the dogs could use to go in through the open sliding door. The hole ripped and thus got larger over the years. RP 1401. Gorman drilled a hole in the door so she could insert a nail to stop the door from opening wider. RP 1402. However, the door was open and the nail was not in the door on August 21, 2007. RP 1403. Gorman testified that she only put it in place about ¾ of the time. RP 1403. After the incident, Gorman told the press that it was a mistake on her part not to have the nail in place. RP 1316.

Gorman awoke about 8:20 a.m. on August 21, 2007 when Betty and Tank came into the bedroom through the open sliding door. CP 843, RP 407. Misty jumped off the bed and ran out the door. RP 407. Betty jumped on the bed and bit Gorman, then Romeo (the neighbor's dog) got off the bed and the two dogs went after Romeo. RP 409. Gorman got out of bed while the dogs were focused on Romeo, but elected to attempt to save her "little doggie friend ...Misty's puppyhood friend..." instead of

trying to leave the room. RP 411. She tried to grab Romeo "but he wasn't being very cooperative..." and the dogs bit her hands while she tried to get him. RP 411. Gorman then went for her gun to shoot the dogs, but the gun would not fire. RP 413. Romeo was still the focus of attention for the dogs at that point. *Id.* Eventually, Gorman was able to pick up Romeo and put him in a closet, but she did not choose to get into the closet herself. RP 414. Betty attacked her again at that point, biting her breasts and arms. RP 415. Gorman left the bedroom when Betty turned her attention back to Romeo. RP 416.

Gorman filed suit against Pierce County and the dog-owners, alleging negligence. She did not allege violation of RCW 16.08.040 (the dog-bite statute) until the pre-trial motions, when she was given leave to amend her complaint to add a new cause of action. CP 838 (Order Authorizing Plaintiff to Amend); CP 840-845 (Amended Complaint). The amended complaint alleged both negligence and violation of RCW 16.08.040 against the dog-owner defendants. CP 843-44. The dog-owner defendants admitted liability at that point, but asserted that damages should be apportioned among all at-fault parties as required by RCW 4.22.070. CP 872.

Gorman moved at different times to strike the affirmative defense of comparative fault, arguing that the dog-owner defendants were strictly

liable and thus not entitled to apportionment. CP 1434 (Motion for Directed Verdict); CP 848 (Supplemental Trial Brief Re: Strict Liability and Comparative Negligence); RP 43-44 (arguing motions in limine); RP 113 (arguing contributory negligence is not a defense to strict liability); RP 219 (renewing argument that dog-owners cannot argue contributory negligence); RP 1351-1352 (arguing jury instructions, claiming contributory fault not applicable to strict liability). It was not until the post-trial motion for JNOV that Gorman argued, as she does on appeal, that she "had no legal duty to close her sliding door at night or to flee her home;" and that there was "insufficient evidence that [she] breached a legal duty." CP 1472, 1474. The claim that Gorman was entitled to an instruction on the sudden emergency doctrine was not raised in the motion for a directed verdict at all, although it appears in the motion for JNOV. CP 1472-3.

The motion for JNOV was denied on September 15, 2011. CP 1532-54. This appeal follows.

IV. ARGUMENT

ISSUE ONE: **Gorman's appeal on comparative fault should be denied because it is based solely on arguments that were not raised until the post-trial CR 50(b) motion, depriving the trial court of the opportunity to rule on these arguments before the case went to the jury. The issue was therefore not properly preserved for appeal.**

CR 50(b) provides

> **Renewing Motion for Judgment After Trial**: Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of 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....

The language of the Court rule makes clear that a CR 50(b) motion is a renewal of a prior motion, not a new motion on issues and arguments not previously raised before the case went to the jury. Comments to the 2005 amendment of the rule emphasize the importance of the motion initially being brought before the verdict:

> Third, the suggested amendments to CR 50(b) replace the existing section with the language of Fed. R. Civ. P. 50(b) regarding motions for judgment as a matter of law after trial. This suggested amendment changes Washington practice and **requires that a motion for judgment as a matter of law be made before submission of the case to the jury as a condition to renewing the motion post-verdict. The Committee concluded that requiring a motion for judgment as a matter of law before the case is submitted to the jury enhances the administration of justice because the parties and/or the court can correct possible errors before verdict.** Absent such a motion before submission of the case to the jury, a party may not bring a motion for judgment as a matter of law thereafter. In addition, it is beneficial in this situation to have Washington and federal practice be the same.

(emphasis added). Allowing a party to raise new issues or arguments in a CR 50(b) post-trial motion would defeat the purpose of the rule because the trial court does not have an opportunity to correct errors raised by the new arguments that are not raised until after the verdict.

Although there are no Washington state cases addressing this specific issue, there are numerous federal decisions holding that new issues and arguments cannot be raised in a post-trial motion for judgment as a matter of law. When a Washington Court Rule is the same as the corresponding federal rule, the Washington courts look to federal case law for guidance in interpreting the Washington rule. See, e.g., *Young v. Key Pharmaceuticals, Inc.*, 112 Wash. 2d 216, 770 P.2d 182 (1989). CR 50 is virtually identical to Federal Rule of Civil Procedure (FRCP) 50, thus, cases interpreting FRCP are valuable in applying CR 50.

Wright & Miller offer a detailed discussion of FRCP 50, then state that:

> The district court only can grant the rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter.

9B Wright & Miller, Federal Practice and Procedure, ₱2537 at p. 603-4. The authors go on to state:

> since the post-submission motion is nothing more than a renewal of the earlier motion made at the close of the presentation of the evidence, the case law makes it quite

> clear that the movant cannot assert a ground that was not included in the earlier motion.

Id. at p. 606 (citing) *Unitherm Food Sys. Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S.Ct. 980 (2006).

The precise claim made in the CR 50(b) motion *must* have been made in the motion for directed verdict. A motion for directed verdict based on other grounds does not satisfy Rule 50(b). *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980); *Wall v. United States*, 592 F.2d 154, 159-60 (3d Cir. 1979); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976); *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935); *U. S. Industries, Inc. v. Blake Const. Co., Inc.* 671 F.2d 539, 548, 217 U.S.App.D.C. 33, 42 (C.A.D.C., 1982).

In *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 -368 (2d Cir., 1988), the court followed the general rule and denied a motion for JNOV stating:

> First, so far as we can determine from the record, defendants are procedurally barred from relying on this contention in their attack on the judgment. Generally a party is not entitled to judgment n.o.v. on any ground that he has not raised in a motion for a directed verdict, see, e.g., *Baskin v. Hawley*, 807 F.2d 1120, 1129-30 (2d Cir.1986); 5A Moore's Federal Practice ¶ 50.08, at 50-74 to 50-75 (2d ed. 1988), and the directed verdict motion must have "state[d] the specific grounds therefor," Fed.R.Civ.P. 50(a). The purpose of the requirement of specificity is to

> give the claimant a fair "opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury." 5A Moore's Federal Practice ¶ 50.08, at 50-77.

The Second Circuit explained that there was no evidence the defendants moved for a directed verdict on the basis that there was a lack of proof of a misrepresentation about their financial condition. The argument that there was "no intent to deceive" and the statement "I don't believe there is any evidence before this Jury of fraud" were insufficient to raise the issue of lack of a misrepresentation before the case went to the jury and thus could not be raised in a post-trial motion.

Similarly, Gorman did not raise the arguments presented on appeal and at the post-trial motion for judgment as a matter of law in her motion for directed verdict. Only 15 lines of the 18 page motion for directed verdict were devoted to arguing for a directed verdict on comparative fault as to all defendants. CP 1434 l. 17-23, 1435, l. 1-8. Gorman's argument, in its entirety, was that Rick Russell and Zachary Martin testified that they also left their doors open for their dogs and that defendants did not put on any testimony "suggesting that Ms. Gorman's practice of leaving her sliding door open was unreasonable under the circumstances." CP 1435. Gorman also cited to her testimony that a nail in the door probably would not have kept the dogs out. The 'argument' concluded with a statement

that "the only reasonable conclusion...is that Ms. Gorman's failure to put a nail in her sliding door was not unreasonable..." CP 1436.

There was no mention of duty of any kind, much less of absence of a duty to keep the door closed, or of any of the other arguments raised in the posttrial motion and this appeal. Gorman essentially argued there was insufficient evidence of comparative fault, never raising the question of whether there was a duty "to shut herself in her home indefinitely," a "duty to retreat," no duty to fence property or keep animals off property, no duty to protect oneself from harm, or a public policy against requiring homeowners to take common sense measures to avoid danger, as argued in the posttrial motion and in this appeal. Gorman claims that 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." Brief at 62. The problem with this request is that it was never made to the trial court. Gorman never argued absence of duty at any point during the trial, including the motion for directed verdict. By waiting until after the verdict was entered, Gorman prevented the trial court from having an opportunity to rule on the issue of duty, just as she prevented defendants for arguing to the court that there was a duty of ordinary care and presenting the arguments and evidence that Gorman violated that duty. Gorman's appeal from the CR 50(b) order denying her motion for

judgment as a matter of law should be denied because her motion was improper as a matter of law. She was not entitled to have comparative fault dismissed on the basis of grounds not raised until after the verdict was entered.

Gorman did not argue absence of a duty at any time during the case until the post-trial motion. From her motion for partial summary judgment to motions in limine to arguing jury instructions, she took the position that the dog-owner defendants were not entitled to raise comparative fault because they were strictly liable under the dog-bite statute. She has not raised that argument on appeal, presumably because RCW 4.22.070 requires apportionment among *all* potential at-fault parties excepting exempt employers, with no exemption for dog-bite cases. Having failed to include the "strict liability precludes apportionment" argument in her opening brief on her cross-appeal, she cannot raise it in this appeal at all. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); *State v. Peerson*, 62 Wash.App. 755, 778, 816 P.2d 43 (1991) (a reviewing court need not address issues of constitutional magnitude first raised in a reply brief); *Dang v. Ehredt*, 95 Wash.App. 670, 677, 977 P.2d 29, 34 (1999)

(refusing to consider issue raised for first time in reply and not raised before trial court).

The trial court properly denied Gorman's CR 50(b) motion because it raised new issues and thus did not comply with the requirements of the rule. Gorman's appeal based on denying the CR 50(b) motion must therefore be denied. Because Gorman has no other basis for her argument relating to comparative fault, having failed to raise the arguments actually advanced to the trial court on this appeal, her appeal as to the comparative fault issue must be denied.

ISSUE TWO: **Everyone, including Gorman, has a duty to use ordinary care for their own safety. Gorman was at fault for choosing to leave her exterior bedroom door open at night when she believed that Betty was "out to get" Gorman's dog, Betty had previously entered her home through the sliding door, Betty was in Gorman's yard "25 to 50 times" in the prior month, and Gorman was "worried" that Betty would come into her home and attack her or her dog.**

A. Standard for Granting a CR 50(b) Motion and Standard of Review on Appeal

Gorman's cross-appeal should be denied even if the Court decides to consider the untimely arguments first presented in the CR 50(b) motion because there was sufficient evidence of negligence by Gorman to take the case to the jury. In ruling on a motion for judgment as a matter of law,

> the moving party's evidence will be disregarded and the nonmoving party's evidence and all reasonable inferences therefrom will be accepted as true. *Davis v. Early Construction Co.*, 63 Wn.2d 252, 386 P.2d 958 (1963). Further, it has been said that the nonmoving party is not bound by his or her own unfavorable evidence and "is entitled to have his case submitted to the jury on the basis of the evidence which is most favorable to his contention."

Spring v. Department of Labor and Industries, 96 Wn.2d 914, 640 P.2d 1 (1982). The standard of review on appeal is de novo:

> We review a trial court's decision on a motion for judgment as a matter of law using the same standard as the trial court. *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997). A motion for judgment as a matter of law admits the truth of the opponent's evidence and all inferences that can reasonably be drawn from it. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wash.2d 50, 98, 882 P.2d 703 (1994). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing*, 134 Wash.2d at 29, 948 P.2d 816. If any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury. *Queen City Farms*, 126 Wash.2d at 98, 882 P.2d 703.

Mega v. Whitworth College, 138 Wash.App. 661, 668, 158 P.3d 1211, 1214 - 1215 (2007). As with the pre-verdict CR 50(a) motion, the CR 50(b) post-trial motion for judgment as a matter of law is granted only when the court can find as a matter of law that there is no evidence to support the verdict. *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140

Wn.2d 517, 529, 998 P.2d 856 (2000). Evidence is sufficient to support the verdict if it would persuade a "fair-minded, reasonable person of the truth of the declared premise." *Bishop of Victoria Corp. Sale v. Corporate Business Park, LLC*, 138 Wn.App. 443, 158 P.3d 1183 (2007). It is error to grant a CR 50(b) motion where evidence presented by the non-moving party, even if inconsistent, contains inferences the jury is entitled to believe and which support the verdict. *Weitz v. Wagner*, 67 Wn.2d 300, 487 P.2d 456 (1965).

B. Gorman Had a Duty to Use Reasonable Care for Her Own Safety

Gorman mischaracterizes the issue in stating that "there is no duty to keep one's door closed to protect oneself from marauding dogs..." Brief at 57. Duty is not so narrowly or so specifically defined. Gorman's duty, like that of every plaintiff and every defendant, was to use ordinary care for her own safety. Washington adopted contributory fault as the method for apportioning damages between a negligent plaintiff and a negligent defendant in 1981. RCW 4.22.005 et. seq. "Fault" is defined as including "unreasonable failure to avoid an injury...." RCW 4.22.015. In using this language the legislature clearly recognized that there is a duty to use reasonable care to avoid injury. Failure to do so is contributory negligence. Determining the percentage of total fault attributable to each

party, "including the claimant or person suffering personal injury," is specifically reserved for the trier of fact. *Id.*

This same duty is expressed in WPI Civil Instruction 10.2, which was given to the jury in this case without objection:

> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

The Committee on pattern instructions recommends that no additional instruction be given as to the duty of ordinary care of a plaintiff because:

> Under Washington law, the contributory negligence of a plaintiff constitutes an affirmative defense. The subject is adequately covered by the use of WPI 10.02, Ordinary Care—Adult—Definition, and WPI 11.01, Contributory Negligence—Definition.

The jury was properly asked to evaluate the evidence using this standard and concluded that there was evidence of negligence by Gorman, awarding 1% comparative fault.

In determining whether a person was contributorily negligent, the inquiry is whether or not the person exercised that reasonable care for his or her own safety that a reasonable person would have used under the existing facts or circumstances, and, if not, whether such conduct was a legally contributing cause of the injury. *Rosendahl v. Lesourd Methodist Church*, 68 Wn.2d 180, 182, 412 P.2d 109 (1966); *Huston v. First Church of God, of Vancouver*, 46 Wn.App. 740, 747, 732 P.2d 173 (1987). A

plaintiff's negligence relates to a failure to use due care for his or her own protection whereas a defendant's negligence relates to a failure to use due care for the safety of others. See *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993) and the cases cited therein; see also *Honegger v. Yoke's Washington Foods, Inc.*, 83 Wn.App. 293, 296, 921 P.2d 1080 (1996).

"Ordinarily, the existence of contributory negligence is a factual question to be resolved by the jury." *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834, 672 P.2d 1267 (1983); *Geschwind*, supra. Consequently, a finding of contributory negligence as a matter of law should be made only in the clearest of cases and when reasonable minds could not differ in interpreting a factual pattern. *Bordynoski v. Bergner*, 97 Wash.2d 335, 340, 644 P.2d 1173 (1982); *Browning v. Ward*, 70 Wash.2d 45, 48-49, 422 P.2d 12 (1966).

C. There was Ample Evidence Establishing That Gorman Failed to Use Ordinary Care for Her Own Safety

Gorman claims there was no evidence of negligence and that it was therefore error to deny her CR 50(a) and (b) motions. Gorman is wrong. There was substantial evidence that Gorman failed to use "the care a reasonable person would use under the same circumstances. Gorman testified to the following:

- She believed based on her experiences with Betty, that Betty was aggressive and vicious
- Betty and Tank entered her house through the open sliding door a month before the August incident
- It was "utterly clear" that Tank and Betty could get in through the hole in the screen and the sliding door, and Gorman was "worried" about that (RP 1406)
- She did not believe that Wilson would control Betty despite assurances that she would do so
- In the month between Betty's July invasion of her home and August 21, Gorman was worried about the possibility of Betty getting into her house
- Gorman believed that Betty was "out to get Misty" and that Misty was Betty's "target"
- Betty had approached aggressively when Gorman was unloading groceries and heading to her house and trapped Misty in the house, then kept lunging at the door and "foaming at the mouth"
- Betty came onto Gorman's property "25 to 50 times" in the year before August 21, 2007, acting aggressively and lunging at the window, trying to get Misty and Gorman
- Gorman presented evidence of other instances where Betty chased neighbors and acted aggressively
- Gorman drilled a hole so she could insert a nail in the doorframe to prevent the door from opening too wide but that nail was not in place the night of the incident despite her worry and fear about Betty possibly entering the house and knowing that Betty and Tank had entered the house through that door in the past
- The door was definitely open the night and morning of August 21, 2007
- The dogs would not have been able to get into the house if the door was shut
- The dogs might have been unable to get into the house if the nail was in place

- Gorman told the media after the event that "it was a mistake" not to have the nail in the door although she now claims that it might not have helped because a ten year old boy was able to enter the house with the nail in place (but there was no evidence that the pit bulls could have entered the house with the nail in place)
- Gorman intentionally chose to attempt to save Romeo rather than trying to leave the room when the dogs were focused on Romeo instead of on her
- Gorman suffered the injuries to her hands and wrists while trying to defend Romeo (RP 1338)
- Gorman never tried to get to the door by climbing on the bed and heading to the door or by trying to push past the dogs
- When Gorman eventually got Romeo and put him in the closet she did not enter the closet herself to get away from the dogs
- Gorman admitted she had "slightly more" injuries as a result of her decision to stay in the room and try to save Romeo
- Gorman's therapist testified that Gorman told him about a "history of dogs attacking. They had targeted her dog and wanted to kill it and that this continued over quite a period of time," showing that Gorman had reason to believe that leaving the door open could lead to exactly the problem that occurred

All of this evidence was admitted at trial, and established that Gorman believed that Betty was vicious and dangerous, that Betty was "out to get" Misty and Gorman, that Betty was on Gorman's property 25-50 times the year before the attack, and had even gotten into the house, that Betty was constantly trying to get into the house (lunging at the windows and sliding door) but could not do so when the door was shut. Gorman was worried

that Betty would get into her house and did not believe that her owner would follow-through on keeping her under control. Gorman had a 'safety system' in place—the nail in the door—to keep the door from opening more than a few inches but, despite her professed concern about Betty and knowledge about Betty's behavior, she did not use the nail on August 21. Gorman believed Betty was intent on getting to Misty and had no reason to believe that status had changed when she went to bed on August 20, 2007.

A reasonably prudent person in the same situation, believing that Betty was the threat Gorman made her out to be, would not have left her door open to allow her own dogs to wander in and out because, clearly, Betty could use the same method of entry. Gorman herself realized this before she was involved in this litigation when she told the press that it was a mistake not to have the nail in the door. Betty was unable to get into the house, on her prior "25 to 50" attempts, when the sliding door was closed, despite 'lunging' at the door and windows. It is indisputable therefore that she would not have been able to get into the house on August 21 had Gorman simply closed the sliding door. A homeowner may not be legally required to close exterior doors at night, but the homeowner faces the risk of being found at fault for failing to do so when there is a known risk in the neighborhood.

Gorman relies on inapplicable cases and uses inappropriate hypotheticals in support of her argument that her "home is her castle" and she has no duty to use reasonable care for her own safety. She argues, for example, that a property-owner has a right of "quiet enjoyment" and can sue for nuisance if that right is breached. This is true, but the issue before the Court was not whether Gorman could bring a nuisance suit for Betty and Tank's disturbance of her peaceful enjoyment, but whether she should have taken elementary precautions to keep Betty out of her home, given her knowledge of, and opinions about, Betty's threat level.

Similarly, the criminal cases relating to "no duty to retreat from attack in one's home," are inapposite. These cases involve whether an assault, manslaughter, or murder charge is appropriate when a defendant uses force to protect him or herself during a home invasion. *Cannon v. State*, 464 S.2d 149 (D. Ct. App. Fla 1985), *review denied* 471 So.2d 44 (Fla. 1985), one of the cases cited by Gorman, was a wife's appeal of a manslaughter conviction for killing her husband in their marital home. The issue on appeal was whether the defendant "initiated the fatal battle with her husband" and whether his status was invitee or guest, which the court found to be a jury question. The central issue is such cases is generally whether a self-defense plea is justified, which is simply not an issue here. Even if Gorman's gun had fired and she had killed Tank and

Betty, she would not be looking at assault or manslaughter charges, and surely defendants would never have sued her for destroying their property under these circumstances.

The cases on "fencing property" are similarly irrelevant. The only Washington case cited, *Kobayashi v. Strangeway*, 64 Wn.2d 36, 116 P. 461 (1911) analyzed whether a 1909 fencing statute required a property owner to build a partition fence next to a neighbor's partition fence—an issue clearly not present here. The out of state cases stand for the proposition that a property owner is not barred from recovering the cost of damage to property simply because the owner had not fenced the property. A property owner is not required to pay the cost of fencing to protect against incursions by animals owned by others, particularly when there is no reason to believe the animals will trespass onto his or her property. Here, however, Gorman need not have incurred any costs at all to protect herself, and it was reasonably foreseeable that Betty would enter her room given that Gorman believed Betty was "out to get Misty" and had not only attempted to get into the room 25 to 50 times in the prior year and chased Misty and Gorman into the house, but had actually succeeded in getting into the house on a prior occasion. Whether it was reasonable to leave the door open at night under these circumstances was a question of fact for the jury to decide.

The duty to use ordinary care when one believes a dangerous animal will attack if given an opportunity is not contrary to public policy as alleged by Gorman. Strong public policy considerations prevent a jail from avoiding its duty to protect inmates by claiming that the inmate is at fault for self-inflicted harm, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), or a school from avoiding responsibility for sexual abuse by a teacher by blaming the student, *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005). As the *Christensen* court stated:

> First, we are satisfied that the societal interests embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena when a child seeks to obtain redress for harm caused to the child by an adult perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator. Second, the idea that a student has a duty to protect herself from sexual abuse at school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care. We elaborate on this reasoning hereafter.

Christensen at 67. No similar considerations apply here. There is no strong public policy that adults who are aware of a potential danger should nonetheless be free from any obligation to take even the most rudimentary precautions for their own safety, such as shutting their exterior door at night.

Gorman's straw man hypotheticals are no more persuasive. It is correct that Gorman would not have a duty to "erect barriers around herself as she walked" and would not have a duty to flee if a stranger attacked her in her home. That is, however, irrelevant. A reasonably prudent person does not exist inside a cone of protective barriers simply because a neighbor's dog is on the loose. A reasonably prudent person does, however, close the door at night when there is reason to believe that an aggressive and violent dog will use that door to enter and attack. A reasonably prudent person also attempts to leave the room or hide in the closet, rather than defending a neighbor's dog, when under attack.

The scope of the duty of ordinary care is not as difficult to define as Gorman postulates. As with all tort situations, the duty is evaluated in light of foreseeability and the circumstances presented by the case. "When a duty is found to exist ... then concepts of foreseeability serve to define the scope of the duty owed." *Christen v. Lee*, 113 Wash.2d 479, 492, 780 P.2d 1307 (1989); *Burkhart v. Harrod*, 110 Wash.2d 381, 395, 755 P.2d 759 (1988); *Joyce v. State. Dept. of Correction,* 155 Wash.2d 306, 315, 119 P.3d 825, 830 (2005). Existence of a duty is a legal question, while foreseeability is a question of fact for the jury. *Joyce* at 315.

The jury evaluates the evidence and determines whether, under the facts presented, the individual met the duty of ordinary care. It is not necessary to define how long Ms. Gorman would be "required to keep her door closed" or "to assume that Ms. Wilson would continue violating animal control ordinances" as Gorman asks in her brief. There is no per se requirement that the door be kept closed. The requirement here, as in every tort case, is to use ordinary care. Whether the plaintiff used ordinary care is generally a question of fact for the jury. *Id.* This situation is no more difficult or unusual than that presented by other tort cases. The case was properly submitted to the jury to determine whether, under the evidence presented, the plaintiff failed to use ordinary care.

D. There was Also Ample Evidence of Breach of Duty, Proximate Cause and Damages

Gorman next claims that, even if she had a duty, there is no evidence of breach, proximate cause, or damages. This argument, like the prior arguments, is not supported by applicable case law, analysis, or common sense. Gorman had a duty to use ordinary care. She breached the duty by failing to take any steps to protect herself from what she perceived to be a dangerous dog: she did not close the door, barricade the door, or insert the nail to keep the door from opening. She chose to try to wrest Romeo from Betty's jaws rather than to try to leave the room or hide

in the closet. And it is indisputable that, had she simply closed the door, this tragic event would never have occurred. Obviously, had the dogs been unable to enter the house, there would have been no injury at all.

The fact that Gorman had left her door open at night for the "past five years" does not mean that she was free of comparative fault as a matter of law. First, the situation with Betty was not present during the entirety of the five years. Second, Gorman testified that she put a nail in the door to block it from opening about 75% of the time. Third, continuing a negligent behavior for five years does not cleanse it of negligence. As Justice Holmes famously said in *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903):

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard *519 of reasonable prudence, whether it usually is complied with or not.

Similarly, in *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), Justice Hand stated:

> (I)n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. **Courts must in the end say what is required; there are precautions so imperative that**

> **even their universal disregard will not excuse their omission.**

(emphasis added). The Washington Court quoted both cases with approval in *Helling v. Carey,* 83 Wash.2d 514, 518-519, 519 P.2d 981, 983 (1974) in holding that even a universal standard of practice did not set the standard of care, and finding a duty to administer a glaucoma test which was easy, safe, and inexpensive.

Similarly, it would have been easy, safe, and inexpensive for Gorman to shut her door at night to prevent access from what she calls marauding pit bulls. The fact that one or two other neighbors (including Zach Martin, Betty's owner) left their doors open for the convenience of their dogs, does not mean that it was not negligent to do so, only that three of the people living on the block were equally negligent. Additionally, there was no evidence that Zach Martin or any other neighbor had suffered from a neighbor's dog entering their homes and attacking them or their dogs, lunging at their windows, or any of the other behaviors that caused Gorman to fear Betty. Because Gorman believed Betty was "out to get" Misty, and knew she had entered the house before, she reasonably should have expected that Betty could, and would, take the open door as an invitation to enter. Gorman's argument that "she acted as reasonably as Rick Russell" does not save her argument because, if Rick Russell feared

Betty and Betty had lunged at his windows and doors 25 to 50 times in the prior months, then he too acted without due care.

Betty's prior entry was in the afternoon, thus Gorman argues she could not have expected Betty to enter in the morning. Gorman testified, however, that she had disturbed Circadian rhythms and stayed up late at night and slept in late in the morning. RP 1415. Thus, there was no foundation for Gorman to testify about whether or not Betty was "usually" out at night or in the morning: she simply wasn't awake to see if Betty was doing. Further, given that Gorman is claiming Martin kept his door open to allow Betty to come and go, she should have expected that Betty would do just that at any time of day or night.

Again, the cases relied on by Gorman do not support her argument. She claims that, like the passenger in *Amrine v. Murray*, 28 Wn. App. 650, 626 P.2d 24 (1981), she "should not have been required to anticipate" that Betty and Tank would "be allowed" to leave the property in the morning. *Amrine* is totally distinguishable however. It involved an accident which happened when the wheel of a car went off the road. The driver originally said his passenger was not at fault for the accident. The trial court dismissed the contributory fault claim based on that statement, which was held on appeal to be error because contributory fault can be based on any

evidence introduced at trial, and can be established from plaintiff's testimony alone. The *Amrine* court stated that

> If an automobile passenger fails to give such a warning or objection to the driver as would a reasonably prudent person under the circumstances and the failure to warn or object contributes as a proximate cause to the accident, then the passenger is guilty of contributory negligence. *Bauer v. Tougaw*, 128 Wash. 654, 224 P. 20 (1924). **Whether a passenger in any particular case has satisfied the standard of care for his own safety is ordinarily a question of fact for the jury**. *Alexiou v. Nockas*, 171 Wash. 369, 17 P.2d 911 (1933); 5 D. Blashfield, Automobile Law and Practice ss 215.4, .16, .19 (1966). Before a trial court can remove an issue of contributory negligence from the jury's consideration, the evidence must be such that all reasonable minds must reach the same conclusion.

(emphasis added, some citations omitted). *Amrine* at 656. Unlike Gorman, the plaintiff in *Amrine* had no reason to believe an accident was imminent. There was no evidence that she was worried the driver would go off the road, that he had done so many times before, or that there was a simple, cost-free action she could have taken to prevent the accident. The other cases cited by Gorman are equally distinguishable and irrelevant to the issue before this Court.

There was sufficient evidence to take this issue to the jury. It was the function of the jury to weigh the evidence, including the credibility of the witnesses, and determine whether Gorman was at fault. *Herriman v. May*, 142 Wash.App. 226, 234, 174 P.3d 156, 160 (2007) (trial court erred

in granting new trial because "The credibility of the witnesses and the weight of the evidence was a question for the jury alone.").

ISSUE THREE: The trial court did not abuse its discretion in failing to instruct the jury on the emergency doctrine when the plaintiff never requested or offered an instruction and the doctrine was inapplicable as a matter of law because plaintiff's negligence caused or contributed to the 'emergency' situation.

E. The Standard of Review is Abuse of Discretion

The standard of review for giving, or failing to give, an emergency doctrine instruction is abuse of discretion because the decision involves a factual, rather than a legal, question. "The trial court must merely decide whether the record contains the kind of facts to which the doctrine applies. Therefore, we review the trial court's decision to give an emergency instruction for abuse of discretion." *Kappelman v. Lutz*, 167 Wash.2d 1, 6, 217 P.3d 286, 288 - 289 (2009). A trial court's ruling constitutes abuse of discretion when the ruling is "manifestly unreasonable or based on untenable grounds." *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

F. The Trial Court Did Not Abuse Its Discretion in Failing to Give an Instruction Which Was Never Requested

Gorman argues that "the trial court should have given an emergency doctrine instruction and erred in declining to do so." Brief at

64. This argument should be rejected because Gorman never requested or proposed an instruction on the emergency doctrine. CP 810-837 (Plaintiff's Proposed Jury Instructions). The only time Gorman mentioned the emergency doctrine was during discussion of the jury instructions when counsel argued that the instruction outlining "the claims and the allegations of the defendants against the plaintiff" should not include the statement that Gorman was at fault for attempting to rescue Romeo. Counsel argued:

> It seems to me—and you tell me if you think that this analysis is incorrect. It seems to me that they have to find the door open was either the negligence or not the negligence and not go beyond that, and the reason I say that is because if they found that that was not negligence, her leaving the door open, which allowed the pit bulls to enter the home, then doesn't the idea of one confronted with an emergency and having choices, as I think the County has tried to argue, between two alternatives, we don't find them responsible if the alternative they chose—if the emergency was of no creation of their own, we don't fault them for choosing the wrong thing. **So—but that instruction regarding the emergency situation is only applicable if they're confronted with the emergency through no negligence of their own.** If we put both of those factual scenarios in as a potential basis to find the plaintiff comparatively negligent, do we not give the jury an opportunity to have determined that opening the door is not negligent but nevertheless being confronted with the emergency she acted in a negligent manner in contradiction to the case law regarding the emergency doctrine?
>
> So it seems to me that the comparative negligence is either on leaving the door open or not.

(emphasis added) CP 1381-1382. Counsel then moved on to argue about the special relationship exception to the public duty doctrine. CP 1382. He did not then, or later, asked that the jury be instructed on the emergency doctrine. When the parties were placing their exceptions to the instructions on the record, he did not except to the failure to instruct on the emergency doctrine. RP 1351-1353. He did except to giving instructions on comparative fault, but cited pre-Tort Reform case law on strict liability in support of that exception. RP 1351.

It is well established that failure to submit an instruction on a theory precludes a subsequent appeal for failing to give the instruction:

> However, appellant did not submit an instruction on this theory. Having failed to request such an instruction, appellant cannot predicate error on its omission. *Gerberg v. Crosby*, 52 Wash.2d 792, 329 P.2d 184 (1958); *Atkins v. Churchill*, 30 Wash.2d 859, 194 P.2d 364 (1948).

McGarvey v. City of Seattle, 62 Wash.2d 524, 532-533, 384 P.2d 127, 132- 133 (1963). As explained in *Heitfeld v. Benevolent & Protec. Order of Keglers*, 36 Wash.2d 685, 707, 220 P.2d 655, 18 A.L.R.2d 983 (1950):

> There is a distinction between misdirection and nondirection in the giving of instructions. The former may be taken advantage of by a proper exception to the instruction, but to take advantage of the latter, **the trial court's attention must be called to the particular matter and a request made for an instruction on it.**

> **An appellate court will review the omission of an instruction only if the objecting party proposed the desired instruction to the trial court.**

(emphasis added). Counsel's discussion of his theories about comparative fault and the emergency doctrine do not rise to the level of requesting an instruction on the emergency doctrine or an exception to the failure to give the instruction. First, Gorman never asked, even verbally, for an instruction on the emergency doctrine. It was discussed in the context of modifying the comparative fault instructions, not proposing an additional instruction. Second, instructions must be proposed in writing, a mere oral request is insufficient. *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966) (where an instruction was not presented to trial judge in writing, judge's failure to give orally requested instruction was not improper). Error cannot be predicated upon oral motions to give instructions. *Heggelund v. Nordby*, 48 Wn.2d 259, 292 P.2d 1057 (1956).

Having failed to request an instruction on the emergency doctrine or to except to failure to give the instruction, and not having included the issue in the CR 50(a) motion, Gorman is precluded from raising the issue on appeal from the denial of the CR 50(b) motion.

G. The Emergency Doctrine Does Not Apply Here Because Gorman Was Not Fault Free

Even if the Court overlooks Gorman's failure to request an instruction on the emergency doctrine, the appeal should be denied because the emergency doctrine is inapplicable when the "emergency" is caused in part by the conduct of the party seeking the instruction. As Gorman's counsel acknowledged while discussing the emergency doctrine at the trial court (see section A supra), the emergency doctrine applies when the party asserting the doctrine finds him or herself in an emergency situation "through no fault of their own." RP 1382.

> ... the **doctrine cannot be invoked by one whose own negligence brought about, in whole or in part, the emergency with which he is confronted**. *Anderson v. Davis*, 1922, 151 Minn. 454, 187 N.W. 224 (citing supporting authority from nine other states); *Trudeau v. Sina Contracting Co.*, Minn.1954, 62 N.W.2d 492; *Saeger v. Canton City Lines,* 1946, 78 Ohio App. 211, 69 N.E.2d 533; *Casey v. Siciliano*, 1933, 310 Pa. 238, 165 A. 1; *Kins v. Deere,* 1948, 359 Pa. 106, 58 A.2d 335; 1, part 2, Blashfield, Cyclopedia of Automobile Law & Practice (Perm. ed.) 547, § 669. In *Anderson v. Davis*, supra, 151 Minn. at page 457, 187 N.W. at page 225, it is said:
>
> 'But this rule does not apply where a person's own negligence has put him in a position of danger. **If he is in the place of danger as a result of his own negligence, he cannot invoke this rule to escape the consequences of such negligence.** In order to bring him within the rule, the emergency which required him to act must not have been brought about, in whole or in part, by his own fault.'

(emphasis added). *Sandberg v. Spoelstra*, 46 Wash.2d 776, 782-783, 285 P.2d 564, 568 (1955). This rule has been followed consistently since it

was adopted by the Washington Supreme Court in *Allen v. Schultz*, 107 Wash. 393, 397, 181 P. 916, 918 (1919), which stated, "it must be clear that an emergency existed, that it was brought about by **no negligent act of the person in the perilous situation.**" (emphasis added). See, e.g., S*onnenberg v. Remsing*, 65 Wash.2d 553, 556, 398 P.2d 728, 731 (1965)(defendant could not invoke emergency doctrine because jury could have found failure to slow down under adverse driving conditions put him in danger); *Tobias v. Rainwater*, 71 Wash.2d 845, 859, 431 P.2d 156 (1967); *Hinkel v. Weyerhaeuser Co.*, 6 Wash.App. 548, 554, 494 P.2d 1008, 1012 (1972); *Zook v. Baier*, 9 Wash.App. 708, 714, 514 P.2d 923 (1973); *Brown v. Spokane County Fire Protection Dist. No. 1,* 100 Wash.2d 188, 197, 668 P.2d 571, 577 (1983); *Kappelman v. Lutz*, 167 Wn.2d 1, 217 P.3d 286 (2009)(stating rule).

Gorman is not entitled to invoke the emergency doctrine because she was not fault free: her decision not to close her exterior door despite her claimed fear of Betty and her worries that Betty would continue to try to attack Misty and Gorman herself, coupled with her failure to use the nail to keep the door from opening wide enough to allow Betty to enter, placed her in the perilous situation. Had Gorman simply shut the door, the events of August 21 would never have happened. Because Gorman was not free from negligence, she was not entitled to an instruction on the

emergency doctrine. The trial court did not abuse its discretion in failing to give an instruction that was not requested by Gorman or warranted by the evidence.

V. CONCLUSION

Gorman's appeal is based on nothing more than her dissatisfaction with the jury's award of 1% comparative fault. She failed to preserve any of the issues for appeal, improperly raised new issues in her CR 50(b) motion which had never been considered by the trial court, and failed to propose an instruction on the emergency doctrine. Gorman, like all members of society, had a duty to use ordinary care for her own safety. It was a question of fact for the jury to decide whether Gorman met that duty under the facts presented at trial. Gorman's decision to leave her door open, knowing that an aggressive dog which she believed was "out to get" her had entered in the past and could enter again, coupled with failing to insert the nail to prevent the door from opening, and choosing to attempt to save Romeo rather than hiding in the closet or getting out of the room while the dogs were focused on Romeo, constituted substantial evidence requiring that the issue of comparative fault be submitted to the jury. The trial court properly denied the CR 50(a) and CR 50(b) motions because comparative fault is generally a question for the jury. It would have been

error to take the case from the jury given the evidence presented at trial.

The motion to reverse the 1% fault attributed to Gorman should be denied.

DATED this 13th day of April, 2012.

SOHA & LANG, P.S.

By: Karen S Weaver 11979
Nancy McCoid, WSBA # 13763
Attorneys for Respondent Evans-Hubbard

CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On April 13, 2012, I served a true and correct copy of the above RESPONDENT EVANS-HUBBARD'S RESPONSE TO CROSS-APPEAL BY SUE ANN GORMAN on parties in this action via Legal Messenger and via Email to the following:

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Executed on April 13, 2012, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington and Oregon that the above is true and correct.

Angela Murray
Legal Secretary to Nancy McCoid