NO. 89543-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET L. BRISCOE,

Petitioner,

vs.

RANDALL LAMONICUS McWILLIAMS,

Respondent,

and

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

Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Susan Craighead, Judge

ANSWER TO PETITION FOR REVIEW

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I. NATURE OF THE CASE.

Randy hired Levi to clean Randy's apartment, as Randy was moving out. Levi assured Randy he would be done the evening of July 16. Unbeknownst to Randy, who was out of town, Levi brought his dog to the apartment and both were still there on July 17. While on an errand, Levi left the dog loose in the apartment. Unbeknownst to Randy or Levi, the landlord asked plaintiff/petitioner to check the apartment. When she arrived, Levi's dog attacked her.

Plaintiff seeks to hold Randy liable, even though she does not claim he owned, harbored, or kept the dog, and even though Randy did not know it was at his apartment. In an unpublished decision, the Court of Appeals affirmed summary judgment for Randy.

II. ISSUES PRESENTED.

Does the panel's unpublished opinion—

A. Conflict with a long line of decisions from this Court and the Court of Appeals, which follow the common law rule that only an animal's owner, keeper, or harborer can be liable for personal injury inflicted by that animal?

B. Conflict with *Gorman v. Pierce County,* 176 Wn. App. 63, 307 P.3d 795 (2013), or *Livingston v. City of Everett,* 50 Wn. App. 655, 751 P.2d 1199, *rev. denied*, 110 Wn.2d 1028 (1988), where both decisions

were based on statute or municipal ordinance and the failure to enforce exception to the public duty doctrine, neither of which is involved in this case?

C. Present an issue of substantial public importance this Court should decide where there is no showing that the current established rule contributes to dog bites or substantially precludes recovery from the dog owner, keeper, or harborer?

III. STATEMENT OF THE CASE.

A. STATEMENT OF RELEVANT FACTS.

Defendant/respondent Randy McWilliams, rented an apartment in Seattle from his friend, Victor Greer. At some point, Greer decided to sell the apartment. Randy decided to move out. (CP 69, 84-85)

To prepare for the move, Randy moved out his furniture and cleaned the upstairs and the garage. However, to help out his unemployed younger brother, Levi McWilliams, Randy agreed to pay Levi $300 to clean the rest of the apartment and move Randy's remaining personal items to their mother's house. (CP 71-74, 92)

On July 14 Randy went to California. On July 16, while in Sacramento, Randy called Levi to find out how he was progressing on cleaning the apartment. Levi assured his brother that he would be done with the cleanup by that evening, *i.e.,* the evening of July 16. Accordingly,

Randy agreed to transfer the $300 into Randy's girlfriend's bank account. In addition, in reliance on Levi's representation, Randy told the landlord on July 16 that the apartment would be done by that evening. (CP 74-75, 85-86, 96-97)

Levi and his girlfriend owned a pit bull named Jersey. Unbeknownst to Randy, Levi not only brought Jersey with him to clean Randy's apartment, Levi did not finish cleaning by the evening of July 16 as he had promised. Unbeknownst to Randy, Levi *and* Jersey stayed overnight at the apartment and were still there on July 17. (CP 76, 77, 96, 99, 101, 114; Appellant's Amended Opening Brief 7, 21)

Although the apartment was for sale and had a realtor's lockbox, Randy understood that the real estate agent would call him before showing it. Randy had not received such a call. Moreover, unbeknownst to both Randy and Levi, the landlord asked plaintiff/petitioner Margaret Briscoe to go to the apartment to see if Randy had moved out. (CP 77, 86, 95)

On July 17, the day after Levi had assured Randy he would be done, plaintiff arrived at the apartment. Levi had gone out on an errand. When plaintiff opened the door, Levi's dog attacked, injuring her legs. (CP 82, 84, 86, 96-97, 113)

Contrary to plaintiff's claim (Petition 5) that when he heard of the attack, "Randall immediately knew the dog must have been Jersey," the evidence shows that what Randy really said was this (CP 97-98):

> A. ... And he [the landlord] told me, Hey, man, Mom got bit by a dog.
>
> Oh, wow. Really? And I'm like, is she going to be okay? He's like, Dude, got bit at your house. And I'm like, What? And he tells me, Yeah, she went over there in the morning and, you know, opened up the door, and dog bit her.
>
> Q. Did he say which dog?
>
> A. He said – he had got – he had talked to her, and it was a light tan dog. *And then first thing that went through my head was like, Oh, who could that be?* And I'm thinking, Don't tell me it is Jersey. And he's like, Yeah, I think it was Jersey.

(Emphasis added.)

B. STATEMENT OF PROCEDURE.

Plaintiff sued the landlord, Levi, his girlfriend, and Randy. The claims against Randy were for negligence and agency liability.[1] (CP 1-5) The trial court granted Randy summary judgment. (CP 44-80, 167-69)

Plaintiff then obtained a default order against Levi and his girlfriend and voluntarily dismissed the landlord. CR 54(b) findings,

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[1] Plaintiff also claimed breach of the lease and that she was a third-party beneficiary of the lease. The trial court dismissed these claims, which have been abandoned on appeal. (CP 4, 43; Appellant's Amended Opening Brief 9)

declaring there was no just reason for delay and entry of final judgment were entered. (CP 170-78)

IV. ARGUMENT.

This Court will not grant every petition. Instead, it accepts review only if one or more of the criteria set forth in RAP 13.4(b) is present. Petitioner claims this case meets three criteria—RAP 13.4(b)(1)-(2) and (4). Petitioner is wrong. There is no reason for this Court to review.

A. A SHORT PRIMER ON WASHINGTON DOG LIABILITY LAW.

A short primer on Washington dog liability law will be helpful in understanding why this case is not appropriate for review. In Washington liability for a dog attack can be either statutory or under common law. The relevant statute, RCW 16.08.040(1), provides:

> The ***owner*** of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

(Emphasis added.) By its terms, the statute makes the ***owner*** of a dog strictly liable, without regard to knowledge. *Beeler v. Hickman*, 50 Wn. App. 746, 751-52, 750 P.2d 1282 (1988).

Under the common law, liability flows from ownership or direct control of the animal. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994). A person cannot be liable for an injury resulting from a dog

bite unless he or she is the owner, keeper, or harborer of the dog. *Markwood v. McBroom*, 110 Wash. 208, 211, 188 P. 521 (1920); *see generally* 4 AM. JUR. 2D *Animals* § 73.

A dog owner, keeper, or harborer may be strictly liable only if he or she knows of the animal's vicious propensities. *Frobig,* 124 Wn.2d at 735 n.1. Absent such knowledge, the dog owner, keeper, or harborer may be liable in negligence, but only if he or she failed to reasonably prevent harm. *Id.* In short, Washington courts have consistently refused to deviate from the rule that liability resulting from the ownership and management of an animal rests exclusively with the owner, harborer, or keeper.[2]

B. THE PANEL'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

1. The Panel's Decision Follows This Court's Decisions.

Although plaintiff cites RAP 13.4(b)(1) as a basis for her petition, she does *not* claim the panel's decision *conflicts* with this Court's animal cases she cites, *Markwood v. McBroom,* 110 Wash. 208, 188 P. 521 (1920), and *Frobig v. Gordon,* 124 Wn.2d 732, 881 P.2d 226 (1994). For that reason alone, review under RAP 13.4(b)(1) is not proper.

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[2] *See, e.g., Sligar v. Odell,* 156 Wash. App. 720, 233 P.3d 914 (2010), *rev. denied,* 170 Wn.2d 1019 (2011); *Beeler v. Hickman,* 50 Wn. App. 746, 750 P.2d 1282 (1988).

Plaintiff instead claims the panel here "misapplied" those decisions. As will be discussed, what plaintiff is really arguing is that this Court did not mean what it said in those cases.

In *Markwood* plaintiff sought to hold a lessee's receiver liable for a fatal dog bite. The receiver had taken possession of the leased land before the attack. Unbeknownst to the receiver, a third person was keeping dogs on the land, and one of the receiver's employees was feeding them.

This Court reversed a verdict for plaintiff and remanded for judgment in favor of the receiver, the possessor of the land. In so doing, this Court, relying on common law[3], held (110 Wash. at 211):

> ***We are quite unable to see any theory upon which the verdict and judgment in this case can be sustained without facts, or justifiable inference from facts, which would show that the receiver was the harborer, keeper, or had control of the dogs. This question being at the very threshold of the appeal, and being decisive thereof***, it is not necessary to discuss or determine any other question presented in the briefs.

Id. at 213 (emphasis added). Plaintiff's claims that none of the decisions cited by the panel stands for the proposition that only an owner, harborer, or keeper can be liable and that *Markwood* does not hold that *only* the

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[3] The *Markwood* court also held that the statute then in effect and a city ordinance did not apply because they too were limited to the owner, keeper, and harborer. 110 Wash. at 212. Contrary to what plaintiff claims at page 10 of her petition, this Court decided the case under the common law as well as under the statute and ordinance. *Id.* at 211-12.

owner, keeper, or harborer of a dog can be liable are baseless. (Petition 7, 10, 12)

Here, plaintiff claims that Randy, the absent possessor of land where the dog attack occurred, should be liable, even though he was not the dog's owner, keeper, or harborer. Far from conflicting with *Markwood,* the panel's decision that Randy cannot be liable follows *Markwood.*

Markwood did cite *McClain v. Lewiston Interstate Fair & Racing Ass'n,* 17 Idaho 63, 104 P. 1015 (1909), and *Decker v. Gammon,* 44 Me. 322 (1857), but solely for the proposition that under the common law, only the owner, harborer, or keeper of a dog can be liable for a dog bite. 110 Wash. at 211. Those cases are otherwise inapposite.[4]

As will be discussed, *Frobig* cited with approval Division II's decision in *Clemmons v. Fidler,* 58 Wn. App. 32, 791 P.2d 257, *rev. denied,* 115 Wn.2d 1019 (1990). *Clemmons* rejected a plaintiff's attempt to use common law landlord-tenant principles to hold a landlord liable for an attack by a tenant-owned dog. Noting that the common law and statutory law are consistent, *id.* at 35-37, the court declared:

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[4] Plaintiff's claim that *McClain* is similar to the instant case borders on the frivolous. Unlike the fair association, Randy McWilliams did not know the dog was on his premises. Unlike the fair association, which knew there would be horses on its race track, there is no evidence Randy knew the landlord had sent plaintiff to his apartment. (CP 76)

> We hold that the common law rule applies: ***only the owner, keeper, or harborer of the dog is liable for such harm.*** This rule is consistent with our case law, with our former criminal and present civil statutes on dogs ....
>
> ....
>
> [L]iability flows from ownership or direct control, and the ***owner*** of a danger dog is the person who must insure himself against such liability.

Id. at 34-35, 37 (emphasis added).

Although *Frobig* involved a tiger, the same rules applicable to a vicious dog are applicable to wild animals in Washington. 124 Wn.2d at 737. In *Frobig,* plaintiff sought to hold the landlords of the tiger owner liable. The Court of Appeals had ruled plaintiff was entitled to go to trial on common law landlord-tenant principles. In an unanimous opinion, this Court reversed and affirmed summary judgment for the landlords. Citing *Clemmons* with approval, *Frobig* explained:

> The rule in Washington is that ***the owner, keeper, or harborer of a dangerous or vicious animal is liable***; the landlord of the owner, keeper, or harborer is not. In short, ***liability flows from ownership or direct control.***
>
> ....
>
> The wild animals were [their owner's] alone, and under Washington law liability resulting from the ownership and management of those animals rests with [their owner] alone.

124 Wn.2d at 735, 737 (citing *Clemmons,* 58 Wn. App. at 35-36, 37) (citations omitted; emphasis added). In other words, *Frobig* reaffirmed the common law rule that only those with control of the animal—the owner, harborer, or keeper—can be liable.

Thus, in holding Randy not liable as a matter of law, the panel assumed this Court meant what it said in *Frobig* and *Markwood*: only the owner, keeper, or harborer of the animal in question can be liable. Randy McWilliams was not the owner, keeper, or harborer of Levi McWilliams' dog. There is no conflict between the panel's decision and any decision by this Court.

Plaintiff attempts to distinguish these cases as involving whether a landlord, not a tenant, can be liable for a dog he or she did not own, harbor, or keep. But *Markwood* involved an attempt to impose liability on a tenant's receiver, not the landlord. And although the *Frobig* and *Clemmons* defendants were landlords, the holdings in both cases were unequivocal: because liability flows from ownership or direct control of the animal, only the owner, harborer, or keeper of the animal can be liable.

Plaintiff's reliance on cases from other jurisdictions at page 13, n.2, of her petition cannot support review. RAP 13.4(b). In any event, plaintiff's cases do not support her position. Some did not even involve animals or if they did, the animals had no owner, keeper, or harborer.[5] Some involved defendants who were the owners of the dog.[6]

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[5] *See Burrell v. Meads,* 569 N.E.2d 637 (Ind. 1991) (fall from map balanced on rafter); *Hammond v. Allegretti,* 262 Ind. 82, 311 N.E.2d 821 (1974) (slip and fall in icy parking lot); *Beard v. Fender,* 179 Ga. App. 465, 346 S.E.2d 901 (1986) (fall off ladder while trying to eradicate wasps' nest); *Landings Ass'n, Inc. v. Williams,* 309 Ga. App. 321, 711

Langan v. Valerie Wilson Travel, Inc., No. 9:06-cv-03511-CWH (D.S.C. July 21, 2008) (2008 U.S. Dist. LEXIS 55323), an unpublished decision, involved a completely different fact pattern than the instant case. There the employee/dog owner had a written contract with her employer allowing her to keep her dog *in her private office*. Despite this agreement, the dog was left to roam. Prior to the attack in question, senior management had been told the dog was not being kept in its owner's office as required by the contract and was causing problems with clients and employees. Indeed, before the attack, the dog had behaved aggressively towards various persons at least 10 times.

Schrum v. Moskaluk, 655 N.E.2d 561 (Ind. App. 1995), also involved a different fact pattern. Unlike here, the defendant landowners were holding open their property *to the public* for a garage sale.[7] In addition, the opinion, which has not been cited by any other dog bite decision, fails to cite a single fact suggesting that defendant landowner—who had no actual knowlede of the dog's presence—*reasonably should*

S.E.2d 294 (2011) (resident killed by wild alligator), *rev'd on other grounds,* 728 S.E.2d 577 (2012).

[6] *See Garrett v. Overland Garage & Parts, Inc.*, 882 S.W.2d 188 (Mo. App. 1994); *Savory v. Hensick*, 143 S.W.3d 712 (Mo. App. 2004).

[7] Although the landlord in the instant case was trying to sell the premises, the real estate agent was supposed to contact Randy McWilliams if and when the property was to be shown. The real estate agent did not contact Randy before the incident at issue here. (CP 77)

have known it was there. Absent such a fact, *Schrum* would be contrary to Washington premises liability law, which requires plaintiffs to show a landowner's "actual or constructive notice of the unsafe condition." *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

2. Even if Agency, Premises Liability, or Negligent Entrustment Rules Were Otherwise Applicable, No Evidence Supports Them Here.

Plaintiff claims this Court should abandon the well-established rule that only the owner, harborer, or keeper of the dog can be liable, in favor of common law agency, premises liability, and negligent entrustment law. Plaintiff implies that common law agency, premises liability, and negligent entrustment principles somehow trump equally well-established common law animal law principles and that she has somehow been deprived of a remedy that previously existed. But plaintiff cites no authority for this argument, because there is none. *See generally* 4 AM. JUR. 2D *Animals* § 73; RESTATEMENT (SECOND) OF TORTS §§ 509, 518 (1977).

In any event, even if plaintiff's theories could otherwise be applicable in dog bite cases, they cannot help her here, because there is no evidence to support them.

First, plaintiff presented no facts that Levi was Randy's agent, as opposed to an independent contractor. One who retains an independent

contractor is generally not liable for the contractor's negligence. *Rogers v. Irving,* 85 Wn. App. 455, 464, 933 P.2d 1060 (1997). Plaintiff failed to produce a shred of evidence that Randy maintained the right of control over Levi's work, a critical factor in establishing agency. *See Larner v. Torgerson,* 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980).

Second, even if Levi had been Randy's agent, he was so only with respect to cleaning the house. Randy did not authorize the dog to be there and did not know it was there. (CP 76) A tort committed by an agent while in the principal's employment is not chargeable to the principal when it emanates from a wholly personal motive and was done solely to gratify the agent's objectives or desires. *Thompson v. Everett Clinic,* 71 Wn. App. 548, 553, 860 P.2d 1054 (1993), *rev. denied,* 123 Wn.2d 1027 (1994); *see also Deep Water Brewing, LLC v. Fairway Resources Ltd.,* 152 Wn. App. 229, 269, 215 P.3d 990 (2009), *rev. denied,* 168 Wn.2d 1024 (2010). In fact, courts elsewhere have ruled an employer is not liable for a dog bite where, as here, the employee brings the dog to work for his own convenience. *Dickson v. Graham-Jones Paper Co.,* 84 So. 2d 309 (Fla. 1955); *Hackett v. Dayton Hudson Corp.,* 191 Ga. App. 442, 382 S.E.2d 180 (1989); *Croley v. Moon Enterprises, Inc.,* 118 Ohio Misc. 2d 151, 770 N.E.2d 148 (2001).

Plaintiff's premises liability theory also has no evidence to support it. Washington follows RESTATEMENT (SECOND) OF TORTS § 343 in non-animal premises liability cases. Section 343(a) provides:

> A possessor of land is subject to liability for physical harm caused to *his* invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> ....

(Emphasis added.)

Plaintiff was not Randy's invitee, as the first sentence of section 343 requires. But even if she had been, and even, assuming *arguendo,* that an animal can be a "condition on the land,"[8] there is no evidence that fulfills section 343(a). Randy did not know, nor by the exercise of reasonable care, could he have known, that—

1) Levi would bring the dog to the apartment he was supposed to clean; *or*

2) the dog was at the apartment the day *after* Levi assured him he would be finished; *or*

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[8] The RESTATEMENT (SECOND) OF TORTS contains separate sections for animals, making an animal's possessor or harborer liable for harm inflicted by the animal under certain circumstances. *See* RESTATEMENT (SECOND) OF TORTS §§ 509, 518.

3) someone with a key would be coming to the apartment without giving him prior notification, *or*

4) Levi would leave the dog alone and loose in the apartment.

Plaintiff's failure to produce any evidence as to any one of these is fatal to her premises liability claim.

Finally, for the same reasons, there is no evidence to support the negligent entrustment theory. Even if negligent entrustment could apply to allowing a cleaning person to enter premises, negligent entrustment "is based on the foreseeability of harm when one knew or should have known that the person to whom materials were entrusted was unable to safely handle the materials." *Hickle v. Whitney Farms, Inc.,* 148 Wn.2d 911, 925, 64 P.3d 1244 (2003). Here, as detailed in the previous paragraph, there is no evidence that harm was reasonably foreseeable by a reasonable person in Randy's shoes. This unforeseeability defeats plaintiff's negligent entrustment claim.

C. THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE COURT OF APPEALS.

Contrary to plaintiff's claim, the panel's decision does not conflict with either *Gorman v. Pierce County,* 176 Wn. App. 63, 307 P.3d 795 (2013), or *Livingston v. City of Everett,* 50 Wn. App. 655, 751 P.2d 1199, *rev. denied*, 110 Wn.2d 1028 (1988). In those cases, the defendant was the

city or county, which allegedly failed to fulfill its statutory or ordinance-created duty to control vicious dogs. Although governmental entities are liable for torts to the same extent as if they were a private person or corporation, RCW 4.96.010, a plaintiff must still overcome the public duty doctrine, which requires that the duty breached be owed to the injured person as an individual, not merely to the public in general. *Livingston,* 50 Wn. App. at 658; *see Gorman,* 176 Wn. App. at 75.

An exception to the public duty doctrine is the failure to enforce exception. Under that exception, a plaintiff within the class a statute is intended to protect can sue the government where its agents responsible for enforcing that statute actually know of its violation, yet fail to take corrective action despite a statutory duty to do so. *Gorman,* 176 Wn. App. at 77; *Livingston,* 50 Wn. App. at 658. It was this exception that created liability in both *Gorman* and *Livingston.*

Defendant Randy McWilliams is not a governmental entity. No statute provides a basis for imposing liability upon him. Randy did not actually know Levi's dog was even in his apartment, let alone that it was there a day after he expected Levi to have finished cleaning. The panel's decision here does not conflict with *Gorman* or *Livingston* or any other Court of Appeals decision, as required by RAP 13.4(b)(2). Review should be denied.

D. THE PANEL'S DECISION DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THIS COURT SHOULD REVIEW.

In an effort to prove the substantial public interest required by RAP 13.4(b)(4), plaintiff presents nearly 6-year-old nationwide statistics. None of these statistics breaks out the state of Washington and, in fact, one of plaintiff's sources explains that dog bite-related emergency room visits and hospitalizations are signifcantly lower in the west than in other parts of the country. L. Holmquist & A. Elixhauser, *Emergency Department Visits & Inpatient Stays Involving Dog Bites* (2008), pp. 1, 13-14, http://www.dogsbite.org/pdf/2008-ed-visits-inpatient-stays-dog-bites.pdf. Further, the authors concede their cost estimates may be overstated because "the cost per stay and encounter may involve costs associated with other diagnoses and procedures." *Id.* at 2 n.5. They also admit that while the rate of dog bite-related hospitalizations has increased between 1993 and 2008, the peak was in 1995. *Id.* at 1-2.

Perhaps more importantly, plaintiff has also failed to show that the current Washington rule limiting liability to owners, keepers, or harborers either contributes to the incidence of dog bites or causes a substantial portion of those bitten to go uncompensated. Indeed, plaintiff's statement that "those in physical possesion of premises" "are in the best position to prevent injury from dangerous animals" is simply untrue. (Petition 18)

The person in the best position to prevent injury from a dangerous animal is the owner, keeper, or harborer of that animal. *See Clemmons,* 58 Wn. App. at 38.

Plaintiff's assumption that "those in physical possession of premises" are "in the best position, through their homeowner's or tenant's insurance, to bear the cost" is also not true, if they are not the owners, harborers, or keepers of the dog.. First, plaintiff is trying to impose liability on a tenant. Only 34 percent of American tenants have rental insurance. http://abcnews.go.com/Business/survey-shows-renters-insurance/story?id=18685618. Second, there is no showing that a dog owner, keeper, or harborer is any less likely to have some form of applicable insurance than those in physical possession of premises.

V. CONCLUSION

This Court meant what it said when it said, "The rule in Washington is that ***the owner, keeper, or harborer of a dangerous or vicious animal is liable*** ...." *Frobig,* 124 Wn.2d at 735 (emphasis added); *accord, Markwood,* 110 Wash. at 211. Plaintiff has not cited a single Washington case that is contrary to the panel's unpublished decision here. Nor has she demonstrated that this case presents an issue of substantial public importance that this Court should review.

Moreover, even if plaintiff's theories of recovery—agency, premises liability, and negligent entrustment—were otherwise applicable to dog bite cases, they would not apply here since plaintiff failed to produce any evidence that would support those theories.

Division II was correct when it said:

> [W]e see no reason to depart from our settled rule [that only the owner, keeper, or harborer of a dog can be liable.] . . . Our rule also promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability.

Clemmons, 58 Wn. App. at 38, *cited with approval in Frobig,* 124 Wn.2d at 735.

Under these circumstances, there is no reason for this Court to review. The petition should be denied.

DATED this 6 **day of** December **, 2013.**

REED McCLURE

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