72622-6

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Division I
State of Washington

Washington State Court of Appeals
Division I

Docket No. 72622-6

King Cy. Sup. Ct. Cause No. 14-2-20857-0KNT

CLORRISSA ESTRELLA,

Petitioner-Appellant,

-against-

KING COUNTY, et al.,

Defendants-Respondents.

APPELLANT'S REPLY BRIEF

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I. FACTUAL REBUTTAL

Aside from directing the court to the extensive factual recitation in her opening brief, Ms. Estrella makes the following observations:

At 3, the County claims that at 4:26 p.m., Ms. Estrella "learned that Cortana had just returned home," citing Exh. R-2, p.1, the *Statement of Walter Weston,* a document to which Ms. Estrella objected strenuously and in which Mr. Weston relates an alleged conversation between *his mother Laura Weston* and *Ms. Estrella's boyfriend Leon Kellogg*. See *App. Brief,* Section III(E); **VRP 44:22—45:19; CP 322-29**. Not only did the statement draw from uncorroborated hearsay (as he did not have a conversation with Ms. Estrella at any time), but the County first provided it to Ms. Estrella after the parties direct- and cross-examined all witnesses permitted by the Board. The statement had not even been marked and presented to Walter Weston when he testified. **VRP 23:25—29:17** (Walter Weston's testimony); **VRP 44:22—47:8** (after all witnesses called, County offers his and Harrington's statements). Furthermore, the County never elicited testimony from either Laura Weston or Leon Kellogg to support this assertion. **VRP 43:16—44:20** (Laura Weston's testimony). The court should disregard Mr. Weston's statement and consider that three witnesses (Mr. Leon Kellogg, Ms. Estrella, and Ms. Cindy Moreno) confirmed that Cortana had returned to Ms. Estrella's home hours before

that phone call. **VRP 31:7-13; VRP 38:11-18; CP 176-77.**

At 3, the County claims that Mr. Ron Weston saw Godric and Cortana the previous summer chasing geese. Please recall that Mr. Weston and his wife were also certain that Godric and Cortana had killed a neighbor's cat – an accusation they later withdrew as false.

At 4, the County claims that Ms. Estrella failed to show how additional time would have altered the Board's decision. Offers of proof were made throughout the proceeding, and Ms. Estrella would have introduced her father's live testimony and evidence of coyotes in the area.[1]

II. LEGAL REBUTTAL

A. Insufficient Time Allotted

Ms. Estrella never argues that "imposing a time allotment violates due process." Rather, she stated that *the allotment she received* violated her constitutional rights – and Judge Chun agreed. The County has not cross-appealed that part of his ruling,[2] so it has no basis to urge this Court to affirm the Board's decision. *Resp. Brief,* at 11.

As both parties concede, there is no caselaw in Washington setting

[1] In October 2014, coyote killed three sheep on Vashon. Susan Riemer, *Coyote killings draw attention to local population,* Vashon-Maury Island Beachcomber (Sept. 10, 2014) www.vashonbeachcomber.com/news/274648561.html (viewed Mar. 11, 2015). In any rehearing, Declarant Amy Carey would also testify about an incident involving a dead coyote on the Westons' beach about one year before this incident. A year after the incident, the Westons called Vashon Island Pet Protectors to say they saw a coyote chasing their livestock.

[2] Ms. Estrella explicitly did not challenge the court's conclusion that the County denied her procedural due process. CP 353 fn. 1.

forth the constitutionally sound parameters for timekeeping during a contested evidentiary hearing. Accordingly, this presents a matter of first impression. Should this court embrace *Maloney v. Brassfield*, 251 P.3d 1097 (Colo.App.2010), the factors it sets forth favor Ms. Estrella (and all other citizens bringing their matters before the Board).

First, the failure to inform the dog owner in advance that she will be restricted to ten minutes to challenge a potentially hefty fine, a label that legally metamorphoses their dog from presumptively good to "vicious," and an order that may involve restrictive confinement or outright removal on pains of death and criminal prosecution, constitutes unfair surprise.

Second, that the Board does not require parties to divulge witness and exhibit lists prior to hearing ambushes the dog owner and forces her to make last-minute strategic decisions such as whether to forgo calling a defense witness or to curtail cross-examination of an anticipated prosecution witness. As noted in the hearing, Ms. Estrella intended to offer three live witnesses of her own. She did not expect that the County would offer four witnesses in its case.

Third, were this even a swift one-day trial, a court might inform the parties of remaining time over the breaks. Here, there was no meaningful opportunity to communicate reserve time. Indeed, there was

not even time to take a break. The Board's abridged hearing[3] in no way compares to the shortest civil or criminal trial.

Fourth, the Board's failure to implement pre-hearing procedures alerting all parties to the anticipated documentary and testimonial presentation of each side, without making any provision to extend the time limit on demand (resulting in an inflexible, private Board custom[4] that categorically refuses to even contemplate granting a request for further allotment), is *per se* impractical.

Fifth, it should be remembered that this Court already found the Board's procedures constitutionally wanting. *Mansour v. King Cy.*, 131 Wash.App. 255 (I, 2006) righted the standard and burden of proof, and further required that the Board permit depositions and issuance of hearing subpoenae and subpoenae *duces tecum*. Unlike a criminal, infraction, or civil case, comparable discovery rules (such as CrR 4.7; CrRLJ 4.7; IRLJ 3.1(b), CR 26-37, CRLJ 26-37) do not exist in Board proceedings. No statute or rule requires the County to lay down discovery, such as under FRCP 26(a)(1), or automatically share its submissions with the dog owner

[3] Note that Mr. Karp had asked in advance for a double-slot, meaning that the hearing would last 60 minutes (giving Ms. Estrella 30, not 15, minutes). The dog owner who does not ask in advance is stuck with a 22.5 minute hearing. Using the Board's computation of 15 minutes per side and 15 minutes for cross and closing (in a 45-minute, "double slot" hearing), it follows that each side would receive 7.5 minutes to put on their main case in a "single slot," 22.5-minute hearing, an amount of time that *Hernandez-Canton v. Miami City Comm'n*, 971 So.2d 829 (2008) found insufficient.

[4] Note that the Board Rules do not alert the petitioner to any time limits. See Rule 25, attached to *App. Brief.*

prior to the hearing.[5] This means that a dog owner must either incur significant expense to depose County witnesses or save that cost and time for cross-examination at the hearing itself. While it might be more efficient *at the hearing* to have conducted several depositions beforehand, the time involved to *take depositions* would be much greater and more inconvenient to the deponents and parties. Ms. Estrella did not have the resources to pay for depositions. Neither she nor other citizens should be required to engage in such costly prehearing discovery in order avoid timing out at the contested hearing.

The County argues that time allotment should be bestowed in proportion to the stakes. It then characterizes the dispute as merely restricting the movement of a dog. However, Cortana's ability to roam unconfined is hardly all at issue. Ms. Estrella must face the stigma of having a "vicious" dog, which has been known to result in denial of homeowner's, renter's, and umbrella insurance coverage (not just for the dog, but the entire policy unless the dog is removed), and could prevent Cortana from even entering other jurisdictions. For instance, the City of Seattle might deem Cortana "dangerous" under SMC 9.25.020(G)(1) or

[5] While a dog owner might request public disclosure, most citizens are not sophisticated enough to invoke Ch. 42.56 RCW and simply appear at the hearing without any prior documentary submission provided to them except for the initiating complaint. Recently, the Board changed its hearing notices to explain that citizens may request public disclosure to obtain the departmental file. Such notice did not exist in Ms. Estrella's case, however.

set her up with a first strike under SMC 9.25.020(G)(4), so that if Cortana were to inflict a bite without provocation causing less than severe injury or to chase or menacingly approach a person in a public place, she would be banished or seized and killed. And refusal to remove her might result in prosecution of a gross misdemeanor and mandatory euthanasia under SMC 9.25.083.

Pierce County, for instance, declares it unlawful to introduce an animal deemed "vicious by any other agency, animal control authority, Hearing Examiner, municipality or court" into unincorporated Pierce County and subjects the owner to a gross misdemeanor. PCC 6.03.030(E). Furthermore, Ms. Estrella faces an $1100 fine, and criminal repercussions and risk of Cortana being killed should she violate the confinement order. KCC 11.04.290(A)(3) (failure to comply is misdemeanor and animal must leave jurisdiction in 48 hours or be killed).

Lastly, *General Signal Corp. v. MCI Telecom. Corp.*, 66 F.3d 1500 (9th Cir.1995) does not support the County's position for here, no additional time was offered, considered, or given, no adequate notice was provided, and there is no evidence of mismanagement, particularly given the County's concession that Mr. Karp was an "experienced, skilled advocate," and, in fact, "quite skilled." *Resp. Brief,* at 7. The Court should declare guidelines for the Board (and other judicial and quasi-judicial fora

hearing similar cases through Washington) to follow and find that the Board's custom has been facially unconstitutional.

B. KCC 11.04.230(H)

1. Dangerous Decedents and County Confusion.

At 11, the County admits that this provision would not apply if the animal "has been rendered lame, for instance, or has been moved out of the jurisdiction" before a citation is issued. By this time-of-citing standard, no $500 citation as to Godric should ever have issued as he was dead before animal control even learned of the alleged incident. Yet, in the next breath, the County takes an inconsistent position by stating that "[s]ome time passed between Godric and Cortana killing the Westons' livestock and Godric being shot by Mr. Weston," so "Godric constituted a danger, right up until the moment of his death[.]" The County's confusion over its own proposed standard, which it has *read into* the statutory language, proves its ambiguity.

As for Cortana, ignoring that the NVOC never alleged any facts that Cortana *still constituted* a danger at the time the citation was issued, and that it presented *no evidence* at hearing supporting the same element, the County contends that the mere fact "she is still alive and could be involved in another such attack" suffices. Yet such a reading renders the phrase "and constitutes a danger to the safety of persons or property off

the animal's premises or lawfully on the animal's premises" superfluous. As noted in the opening brief, if the County wanted to declare dogs as nuisance for past misconduct, it simply could have drafted the code to encompass "any animal that has exhibited vicious propensities," and left it at that. That way, whether or not the animal was shot, became lame, or vanished beyond county limits, the county could issue a $500 fine and declare the animal "vicious." But merely being alive and able-bodied hardly supports the view, *without inadmissible speculation and lack of personal knowledge*, that the animal "constitutes a danger." Time matters. Incidents must be examined under specific facts and circumstances, not fortune-telling. Opportunities to cure and take corrective action are also legitimately presumed.

In light of the County's illustration of the statute's ambiguity, *State v. Ankney,* 53 Wash.App. 393 (I, 1989), proves that it is subject to rule of lenity because it evaluated the identical ordinance in a criminal application. That Ankney did not raise Ms. Estrella's arguments certainly does not mean that this court has rejected them, or related issues to which error was never previously assigned. That the court said "the ordinance is sufficiently definite," at 400, pertained to Ankney's void-for-vagueness arguments that spoke to the question of the phrase "lawfully on," not the exhibited/constitutes distinction presented here.

2. Want of Evidence to Prove Viciousness.

Last year, Division II of this Court decided *Morawek v. City of Bonney Lake*, 337 P.3d 1097 (2014). In reversing a dangerous dog designation concerning a dog who admittedly killed a cat on the cat owner's property, the court found that the City failed to present substantial evidence that the incident occurred without provocation. As nobody saw how the fight between Scout and Oriel began, no direct or satisfactory circumstantial evidence existed to disprove the contention that Oriel provoked Scout. That Oriel likely inflicted a scratch to Scout's nose and that Oriel shrieked under the porch prior to being seen carried away in Scout's mouth, did not persuade the court of nonprovocation, either, for such arguments are "rooted in speculation." *Id.*, at 1101.

Facts here compel a similar conclusion.[6] No witness saw either dog touch any goat or goose. No witness found blood or feathers anywhere on the bodies of Godric or Cortana. The County's contention that each of these dogs caused the mayhem claimed is based on speculation, for it must resort to guesswork as to whether Godric acted alone, Cortana acted

[6] While the argument certainly applies to the element "without provocation" as contained in KCC 11.04.020(BB), it preliminarily applies to the question of whether substantial evidence exists to support that claim that Cortana and Godric, individually, bit or killed the Westons' animals.

alone,[7] both acted in concert, or neither was to blame (and instead a third animal was run off after inflicting harm).

This same evidentiary question of identification of the alleged assailant (among multiple suspects) resulted in reversals in *People v. Noga,* 168 Misc.2d 131 (N.Y.App.1996) and *Hobbs v. Kent Cy. SPCA, Inc.,* No. CPU5-10001252, 2011 WL 773448 (Del.Com.Pl.2011). In *Noga,* there was no dispute that only Jasmine had attacked the complainant's poodle, while Thor stood to the side. Yet animal control declared both dogs dangerous and ordered their destruction. The appellate court spared Thor's life because eyewitness testimony confirmed Jasmine's, but not Thor's involvement. By that same logic, the total absence of eyewitness testimony should spare both Godric and Cortana.

Similarly, in *Hobbs,* the court properly reversed the dangerous dog order because no person testified that a particular, identifiable dog bit Ms. Pryor and there was confusion as to which dog may have been the culprit. In sparing Raven's life, the *Hobbs* court recognized the defect of insufficient, speculative evidence. The Westons never saw either dog attack. They have no evidence proving same, whether by blood or feathers in the muzzle or on the hair of either dog, or DNA evidence of saliva around the bite wounds. With greater force, the facts at bar fail to make

[7] Again, Ms. Estrella reiterates that Cortana was at home when Mr. Weston allegedly found two dogs in his enclosure.

either or both Godric and Cortana responsible for biting or killing any goats or geese.

3. Culpable Mental State.

First, the County fails to discuss or refute *Atherton. Further*, the County fails to respond to Ms. Estrella's assertion that the words "allow" and "maintain," as used in KCC 11.04.190 (i.e., the code authorizing filing of a criminal charge), and the word "maintain," as used in KCC 11.04.200 and KCC 11.04.260(A) (i.e., the codes that authorizes issuance of a notice and order and civil penalties), impose a mental state requirement. Failure to cite authority constitutes a concession that the argument lacks merit. *State v. McNeair,* 88 Wash.App. 331, 340 (I, 1997). This court need not consider arguments undeveloped in the briefs and for which a party has cited no authority. *Bercier v. Kiga,* 127 Wash.App. 809, 824 (II, 2004). Where no authorities are cited, this court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle PI,* 60 Wn.2d 122, 126 (1962).

Second, while *Bash* was a felony case, strict liability remains disfavored where imprisonment *of any duration* (not just more than one year) is possible. KCC 11.04.190 authorized up to 90 days in jail for *each* alleged violation – here, four.

Third, it must be considered that nothing in Ch. 11.04 KCC actually permits the manager to declare a dog vicious. While KCC 11.04.170(A) provides that the manager may "take such lawful action as may be required to enforce this chapter[,]"no provision in the chapter actually permits a dog to be "declared vicious." Although KCC 11.04.290 explains what "corrective action" may be taken once an animal is "declared by the manager of the regional animal services section to be vicious," no provision in the chapter sets forth the procedure by which an animal may be so declared. KCC 11.04.290 does not actually indicate when and how a manager may declare a dog vicious. Rather, it speaks to compliance requirements, skirting the antecedent question of by what authority such a declaration may be made. KCC 11.04.290(A)(1). Accordingly, it follows that the County lacked jurisdiction to even declare Cortana "vicious" in the first place.

The County may struggle to derive such authority through the notice and order (KCC 11.04.260) or criminal information (KCC 11.04.190) route, as there is no stand-alone mechanism by which Cortana or Godric could have been declared "vicious," but such attempt should be rejected. *Cf.* RCW 16.08.080 (describing default procedure for declaring dogs dangerous, none of which is ever followed in King County); and, e.g., SMC 9.25.035-.036 (describing Seattle's administrative declaration

of dangerous animal procedure). Nevertheless, under either route, a specific code violation must be stated, such as KCC 11.04.230(H). Only if found guilty of a criminal charge under KCC 11.04.230(H) or if the Board upheld an NOV citing KCC 11.04.230(H) could the dog at issue be found "vicious." And because a mental state must be proved to support either approach, the County and Board lacked the evidentiary and legal basis to deem Cortana vicious and impose any restraints.

C. <u>Evidentiary Rulings.</u>

The County has ignored this entire section.

Dated this Mar. 11, 2015

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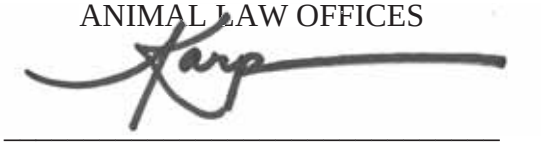

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Mar. 11, 2015, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

[x] Email (stipulated)

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