NO. 93265-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KARY L. CALDWELL,

Plaintiff-Petitioner,

v.

CITY OF HOQUIAM, a governmental entity;

Defendant-Respondent.

RESPONDENT CITY OF HOQUIAM'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

A. IDENTITY OF RESPONDENT

Respondent City of Hoquiam is the defendant in this civil action.

B. COURT OF APPEALS DECISION

The Court of Appeals decision is reported at *Caldwell v. City of Hoquiam,* 194 Wn. App. 209 (2016).

C. ISSUES PRESENTED FOR REVIEW

The substantive issues presented for review (assuming review criteria are met) are:

> 1) Does a City of Hoquiam animal code ordinance mandate immediate impoundment of a dog when its owner is served with a non-final City order imposing restrictive conditions on the dog and its owner?
>
> 2) Are municipal regulatory officials subject to common law tort actions or are tort actions against regulatory programs governed by the public duty doctrine?

D. STATEMENT OF THE CASE

Plaintiff[1] provides an elaborate statement of the case presenting a bounty of facts that are immaterial to the legal issues proposed for review. The facts leading to the City order and the process following the order are not disputed. The issues in the Court of Appeals and in this Petition for Review (PFR) are only legal issues – whether the City of Hoquiam ordinance or common law create a duty to act on behalf of Plaintiff. The

[1] Respondent City of Hoquiam (hereinafter City or Hoquiam) refers to Petitioner Caldwell as Plaintiff, her trial court designation.

only facts necessary for this Petition are the facts showing how the duty issues arise in this case and describing the trial and appellate court process that defined these issues now presented to this Court by Plaintiff's Petition.

1. Facts

On August 11, 2009, Hoquiam animal control Officer Hill assisted Plaintiff in separating two dogs fighting in her living room. CP 206. Officer Hill issued a "dangerous dog declaration" to the owner. *Id.* Under the Hoquiam Municipal Code (HMC), the declaration required certain actions such as special license, insurance, and dog restrictions. CP 219-20; HMC 3.40.080(5). If the owner "failed to comply," the ordinance mandated impoundment of the dog.[2] HMC 3.40.080(6).

The declaration became a final order if the owner did not appeal within ten days. HMC 3.40.080(4). The owner appealed the declaration. CP 207. On September 1, 2009, the Hoquiam Municipal Court heard the appeal. *Id.* The Court affirmed the declaration, directed that the dog remain with the owner, and ordered the owner to take the required actions by September 10, 2009. *Id.;* CP 222.

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[2] Plaintiff presents facts from outside the record to the effect that certain breeds of dogs are more dangerous than others and have been regulated more strictly in non-Washington jurisdictions. *See* PFR, pp. 8-10, n. 12, 13. Neither the Hoquiam ordinance nor the state dog law discriminate in their regulatory requirements among dog breeds. Plaintiff's facts and related arguments are irrelevant in this case.

After September 10, 2009, Officer Hill attempted to determine if the owner complied with the municipal Court order. CP 207. He could not locate the owner or the dog. *Id.*, at 207-08. A person at the owner's former residence stated that the owner left with the dog to find a new residence. *Id.* Unknown to the City, the dog's owner removed the dog to her daughter's residence in Olympia shortly after Officer Hill issued the August 11 declaration.[3] CP 283, 286-87. On September 10, 2009, the daughter moved with the dog to her boyfriend's apartment in Kent. CP 223-29. The dog later bit Plaintiff's arm during Plaintiff's visit with the daughter's boyfriend at his apartment while the daughter was absent. CP 2.

2. Procedure

a. Trial Court

Plaintiff filed a complaint alleging Hoquiam failed to enforce the municipal court order. CP 16. The City moved for summary judgment on the ground that the City had no "actual knowledge" of a violation of the

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[3] Plaintiff's statement of this case states throughout that the evidence showed Officer Hill knew the dog owner had not complied with conditions in the order and failed to confiscate the dog. (*See,* in particular, PFR, p. 7, n. 8). The evidence cited is only that the owner was not in compliance when the City served the initial order, not after the order became final and enforceable following appeal. Plaintiff's assertions beg the primary issue in their appeal – whether a non-final administrative order is enforceable. (*See* Issue 1, *supra*).

municipal court order.[4] CP 186-203. The City's motion also argued the City could not enforce the court order against a dog removed from the City's jurisdiction. *Id.* The trial court denied the City's motion. CP 186-202.

Plaintiff moved for summary judgment against Hoquiam. CP 37-61. Plaintiff did not argue the City failed to enforce the municipal court order, but argued HMC 3.40.080 required the City to impound the dog when the City served its administrative order. CP 56-60, 416-22. The trial court granted Plaintiff's summary judgment motion. CP 527-29.

The case went to trial solely on damages and the allocation of liability between Hoquiam and several co-defendants. The City maintained its position that Plaintiff's action should have been dismissed on summary judgment. VRP 50, 64-65 (1/22/14), 3, 13-14, 18-19 (4/24/14); CP 1044-50, 1192-94, 1347-55. The jury returned a verdict for Plaintiff. CP 1493-95.

b. Court of Appeals

On appeal, the City raised only lack of duty to Plaintiff under both the Hoquiam animal ordinance and the state dog law. *Caldwell,* 194 Wn. App. 209. The Court of Appeals reviewed this issue *de novo* as a question

[4] Under the failure to enforce exception to the public duty doctrine, a regulatory agency must have actual knowledge of a violation for which corrective action is mandatory before the agency can be liable. *Smith v. State,* 59 Wn. App. 808, 802 P.2d 133 (1999).

of law. *Id.* at 214.

The Court held HMC 3.40.080 did not impose a mandatory impoundment duty at the time of service of the dog order because, (1) that construction was inconsistent with the terms of the ordinance and, (2) the order was not an enforceable final order until a ten day appeal period expired. [5] *Caldwell,* 194 Wn. App. at 213. The Court further held the dog was not subject to regulation under state law because the dog was not within the state law definition of a "dangerous dog." Finally, the Court held there was no common law duty because foreseeability limits the scope of a duty rather than creates a duty, and because any government duty to regulate dogs must arise from statute, ordinance, or regulation. *Id.* at 223.

E. ARGUMENT

Plaintiff first argues Supreme Court review is appropriate because, while the Court of Appeals addressed application of the public duty doctrine to dangerous dog ordinances, the Supreme Court has not done so since *Rabon v. Seattle,* 135 Wn.2d 278, 957 P.2d 621 (1998). A purported need to have a Supreme Court decision, as distinguished from a published Court of Appeals opinion, is not one of the criteria for Supreme Court review. *See* RAP 13.4(b). The rule requires an error or inconsistency by

[5] In this case, the dog owner appealed and the municipal court set the effective date of the order as ten days after the court hearing. *Caldwell,* 194 Wn. App. at 213.

the Court of Appeals, or the need to establish law on an issue of public importance. *Id.*

Plaintiff proposes four grounds for review under the RAP 13.4(b) review criteria:

> 1) Inconsistency of the *Caldwell* decision with prior Court of Appeals decisions on liability for animal regulation.
>
> 2) Error of law interpreting the impoundment requirement in HMC 3.40.080.
>
> 3) Error of law interpreting the effect of an appeal on an administrative order.
>
> 4) Error of law in not determining municipalities have a common law dog regulation duty.

PFR, p. 10. The *Caldwell* decision is not inconsistent with prior Court of Appeals decisions and does not err in its interpretation of HMC 3.40.080, administrative law, or municipal liability law.

1. Plaintiff Relies On Cases That Do Not Analyze The Hoquiam Ordinance Or The Effect Of Non-Final Administrative Orders

Plaintiff contends this decision is inconsistent with three earlier cases in which the Court of Appeals concluded municipalities were liable for failure to enforce a statute regulating dogs. *See* PFR, pp. 10-12 (citing *Livingston v. Everett,* 50 Wn. App. 655, 751 P.2d 1199 (1988); *King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999); *Gorman v. Pierce County,* 176 Wn. App. 63, 307 P.3d 795 (2013)). Plaintiff's three cases do

not resolve, or even discuss, the legal issues presented by the Hoquiam ordinance in this case. *Livingston* , *Gorman,* and *King* used the failure to enforce exception to the public duty doctrine to determine if local animal regulations created a duty to confiscate a dog. The legal doctrine was the same as this case, but the decision about the existence of the duty in those cases depended on the terms of the local ordinances, *i.e.,* whether language in each ordinance created mandatory enforcement duty satisfying the criteria for the failure to enforce exception. This is precisely what the Court of Appeals decided in this case. *See Caldwell,* 194 Wn. App. at 221.

The issue here is whether HMC 3.40.080 creates a mandatory duty to impound immediately when the City serves an initial, non-final order imposing conditions on the dog and its owner. *Livingston, Gorman,* and *King* did not decide whether a non-final dog order is enforceable or whether a dog can be impounded for an owner's failure to comply with conditions in an order before service of the order. These issues are unique to this case.

Gorman interpreted Pierce County animal code requirements, *Livingston* interpreted Everett animal code requirements, and *King* interpreted state dog code requirements (chapter 16.08 RCW), which

applied in Stevens County in the absence of a county animal code.[6] Plaintiff makes no showing the particular provisions in the state and local codes interpreted in *Livingston, Gorman,* and *King* are the same as those on which the Court of Appeals relied in deciding this case. Therefore, Plaintiff has demonstrated no inconsistency between this case and the earlier Court of Appeals decisions.

2. The Court Of Appeals Correctly Interpreted The Hoquiam Ordinance

Plaintiff argues the Court of Appeals erred by interpreting HMC 3.40.080 as allowing the dog owner time to comply with conditions imposed by a dangerous dog order, before impounding the dog for failure to comply with the order. PFR, pp. 13-14. Plaintiff asserts the Hoquiam ordinance requires a dog owner to comply with the order before service of the order. *Id.*

As a preliminary matter, Plaintiff's alleged error in interpreting a local ordinance does not meet the standard of review in RAP 13.4(b)(4). The interpretation of an ordinance which affects citizens in only one jurisdiction should not present an issue of substantial public interest absent some sort of showing that the features of the ordinance are common in

[6] In rejecting Plaintiff's argument the state dog code applied to Hoquiam (no longer made in her Petition), the Court of Appeals held the August 11, 2009 incident underlying this claim did not place the offending dog within the state definition of a dangerous dog.

many jurisdictions or involve principles with broad applications. Plaintiff makes no such showing.

On the merits, Plaintiff claims immediate impoundment of a dog upon service of an order imposing restrictions is the "plain language" of HMC 3.40.080. PFR, pp. 13-14. The Court of Appeals rejected this argument for three reasons. One, the ordinance does not state a dog must be impounded on service of an order, but only if the owner "fails to comply" with the order. *Caldwell,* 194 Wn. App. at 217. Two, the order's conditions require time to accomplish, such as obtaining special dog insurance, so dog owners cannot have their dog impounded for "failure to comply" until they have had an opportunity to comply. *Id.* at 219. Three, processes in HMC 3.40.080 are inconsistent with an interpretation requiring immediate impoundment (specifically service of the order by mail or posting, and scheduling of hearing on later dates if a dog is not impounded), indicating impoundment is not mandated when an order is served.[7] *Id.* at 220-21.

Plaintiff argues only by assertion that the plain meaning of the ordinance requires immediate impoundment, without providing any

[7] Other Hoquiam ordinances provide for immediate impoundment in three emergency situations, attack on a human, rabid dog, and unsupervised or stray dog. *See* HMC 3.40.130(2), 3.40.140, and 3.40.150 (4). These circumstances are not present where the incident is a fight between two dogs confined in a house and presenting no threat to the public.

analysis of the language used and the process set out in this ordinance as the Court of Appeals did.[8] *See* PFR, pp. 15-16. Plaintiff provides no response to the three reasons given by the Court of Appeals for concluding HMC 3.40.080 does not require immediate impoundment of all dogs whose owners are served with orders under the ordinance. *Id.*

3. The Court Of Appeals Correctly Held A Non-Final Administrative Order Is Not Enforceable

Plaintiff argues the August 11, 2009 Order was an enforceable final order, citing an APA statute, RCW 34.05.473, which states orders are effective immediately unless stayed. *See* PFR, pp. 14-17. Plaintiff asserts the failure to impound the dog immediately on service of the order is an automatic stay not authorized by the Hoquiam code. *Id.*

Plaintiff fails to acknowledge language in the ordinance providing such an order is *not* final if there is an appeal within ten days of service of the order. Thus, the City cannot know if an order is final until the appeal period runs. The Court of Appeals explicitly rejected Plaintiff's arguments the order was final when served and that the dog must be impounded unless the City stayed the order:

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[8] Plaintiff does note that the standard order drafted by the City Attorney Steve Johnson (who also drafted the ordinance) stated "effective immediately." PFR, p. 14, n. 19. However, the City Attorney would also know the actual ordinance provided the order became final only if there was no appeal and that public employees cannot change legislative enactments through administrative interpretation. *See Murphy v. State,* 115 Wn. App. 297, 62 P.3d 533 (2003). Thus, since the ordinance controls, "effective immediately" inherently includes "if no appeal."

> . . . we conclude that a dangerous dog declaration that may be timely appealed is not final. Thus, there is no duty to enforce such a declaration upon service by immediately impounding a dog under HMC 3.40.080(6)'s provisions.
>
> Here, the dangerous dog declaration was the subject of a timely appeal by Smith. The City did not owe Caldwell a duty based on its failure to enforce HMC 3.40.080 on August 11, 2009 *because the declaration was not then final.*
>
> Caldwell argues HMC 3.40.080 does not provide a stay pending appeal. But this argument begs the question--*a stay is necessary only if the dangerous dog declaration is final when served.*
>
> Here, the relevant question is whether a dangerous dog declaration is final immediately when served. For the reasons explained earlier, it is not. Thus, lack of a "stay" is immaterial--*the declaration does not need to be stayed because it is not yet final.*

Caldwell, 194 Wn. App. at 221 (emphasis added). While Plaintiff asserts that the order was final, and required a stay, she makes no response to the Court of Appeals' holding that the Hoquiam ordinance explicitly provides that an order is not final until the appeal period expires.[9]

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[9] Plaintiff does contend in another long footnote (PFR, pp. 15-16, n. 20) that due process does not require the City to give dog owners an opportunity for hearing before seizure of their property, but only after seizure. The contention due process would not require the Hoquiam ordinance to provide a pre-seizure hearing does not change the reality that, as the Court of Appeals held, the Hoquiam ordinance does provide for a pre-seizure hearing, absent emergency seizures based on human attacks, etc. Moreover, Plaintiff's due process contention is wrong. Due process normally requires opportunity for hearing before deprivation of property, with emergency orders being the major exception. *See, e.g., Clement v. City of Glendale,* 518 F.3d 1090, 1094 (9th Cir. 2009). Plaintiff cites several state and federal cases but they are inapposite, involving no property right in a non-animal context (*Johnson* and *Ritter*) or emergency (*O'Keefe* and *Wall* – strays; *Wilson* - severe animal neglect).

Plaintiff cites the APA for the proposition that an order is effective when entered, so is final when served, contrary to what HMC 8.40.080 actually says. Plaintiff's statement of APA law is also wrong. The APA defines "order" as a "written statement of particular applicability that *finally* determines the legal rights, duties, [etc.]. . ." of a person, *i.e.*, a "final" order. RCW 34.05.010(11)(a) (emphasis added). Under the APA, the August 11, 2009 order could not finally determine the dog owner's obligation to comply with the order until the ten day appeal period expired without an appeal. *Caldwell,* 194 Wn. App. at 220.

4. The Court Of Appeals Addressed And Properly Rejected Plaintiff's Argument That The City Has A Common Law Duty

Plaintiff claims the Court of Appeals erred by failing to recognize a common law cause of action against the City. *See* PFR, pp. 17-19. For the first time, Plaintiff argues in her PFR: "The public policy [duty] doctrine does not apply here as a statute or ordinance is not involved." *Id.*, p. 17, n. 21.

A statute or ordinance is involved because, except for this final argument in her Petition, Plaintiff argues the City's liability is based on its failure to enforce a provision in its ordinance purportedly requiring the City to impound immediately any dog whose owner has been served with an order imposing conditions on the dog. *See* PFR, pp. 1-17. Plaintiff's

common law duty argument does not recognize public agencies and programs are creatures of statute rather than common law. *Murphy,* 115 Wn. App. 297. In areas where public employees perform activities unique to government, municipal tort duties are determined by the responsibilities assigned to the particular government programs by statute or ordinance. *Id.* Washington courts recognize police, regulatory, and social welfare functions of government create duties to benefit the public overall, but duties to benefit individuals are very limited.

Plaintiff claims the narrow duty applicable to government regulatory activities is the re-imposition of sovereign immunity. *See* PFR, p. 11, n. 16. Washington Courts long ago rejected the argument the public duty doctrine is a vestige of sovereign immunity rather than a way to protect regulatory programs from liability for broad governmental functions intended to improve public welfare but not to ensure the safety of every individual. *Chambers-Castanes v. King Co.*, 100 Wn.2d 275, 289-90, 669 P.2d 451 (1983). There are only four narrow liabilities permitted, and those are based on legislative intent, explicit statutory language, or commitments to individuals within the scope of official authority. *Atherton Condo Apartment-Owners Ass'n. Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990); *Smith*, 59 Wn. App. 808. Government is a product of and controlled by statute (and

constitution) rather than by judicially-created common law.[10] *Wark v. Nat'l Guard*, 87 Wn.2d 864, 557 P.2d 844 (1979). Regulation of animals, and government regulations generally, have no analogue in private activity. State and municipal regulation is not governed by common law.

The focus of Plaintiff's common law liability argument is liability arises from the foreseeability that, if the city does not act, there might be an injury. *See* PFR, pp. 18-19. Plaintiff ignores law establishing "Foreseeability determines the scope of a duty. But foreseeability does not create a duty." *Caldwell*, 194 Wn. App. at 223 (footnote omitted).

Lack of foreseeability limits liability that might otherwise exist based on a statute, or based on a relationship between private parties which courts have found creates a duty for one party to protect another. *See Halleran v. Nu. W., Inc.*, 123 Wn. App. 701, 98 P.3d 52 (2004); *Taggert v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). The Court of Appeals correctly concluded here that "any [City] duty is created by statute, ordinance, or regulation. There is no separate common law duty."

[10]The courts do interpret statutory law controlling government functions, but do not create that law. The government also engages in routine operational functions, such as vehicle driving and property management, that are the same as private activities and governed by the same common or statutory law governing the private activity. Under waivers of immunity, government is liable only for activities of government analogous to private activity, not for government activities and functions that have no analogy in private activities. *See generally* chaps. 4.92 and 4.96 RCW.

Caldwell, 194 Wn. App. at 223 (citing *Munich v. Skagit Emergency Commc'ns Ctr.,* 175 Wn.2d 871, 288 P.2d 328 (2012)).

F. CONCLUSION

The City of Hoquiam respectfully asks this Court to deny Plaintiff's Petition for Review of the Court of Appeals' published opinion.

RESPECTFULLY SUBMITTED this 27th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 27th day of July, 2016.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of July, 2016, at Olympia, WA.

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Good afternoon,
Attached for filing in *Caldwell v. City of Hoquiam,* Supreme Court No. 93265-4, please find the City of Hoquiam's Answer to Petition for Review. This Answer is submitted my Michael E. Tardif, WSBA No. 5833, phone: (360) 534-9960, email: MikeT@fjtlaw.com.
Thank you.

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