71947-5

No. 71947-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KARY L. CALDWELL,

Respondent,

vs.

CITY OF HOQUIAM, a governmental entity,

Appellant,

and

GRAYS HARBOR COUNTY, a governmental entity; JENNIFER M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; SHAWN M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; JAMES THOMPSON and JANE DOE THOMPSON, individually and the marital community composed thereof,

Defendants.

BRIEF OF RESPONDENT CALDWELL

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A. INTRODUCTION

Kary Caldwell was viciously attacked by a 100-pound pit bull, appropriately named Temper,[1] while she was visiting the apartment of a friend in Kent, Washington. The attack was unprovoked. The ferocity of the attack was evidenced by the fact that the animal crushed her left arm, breaking it in ten places.

Temper's attack should never have happened. Contrary to the City of Hoquiam's ("City") spurious argument on duty, it owed Caldwell a duty of care under its dangerous dog ordinance and state law where Temper was declared a potentially dangerous dog and later a dangerous dog while the dog was in Hoquiam, but the City took no steps to implement the protections mandated in connection with such designations. Had the City properly enforced its ordinance and state law, given Temper's history, Caldwell would not have been assaulted.

The trial court here properly concluded that the City was liable as a matter of law and the judgment on the jury's verdict, amply supported by the evidence, should be affirmed.

B. ASSIGNMENTS OF ERROR

Caldwell acknowledges the City's assignments of error, br. of

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[1] Temper was, at times, spelled "Tempur." For this brief, Caldwell references the dog as "Temper."

appellant at 2,[2] but believes that the issues pertaining to them are more appropriately formulated as follows:

> 1. Was the trial court correct in determining that a city owes a dog attack victim a duty of care where the city declares a dog "potentially dangerous" under its ordinance and the dog is subsequently involved in another altercation making it a dangerous dog under the city's ordinance and state law, but the city then takes no steps to address the dog's dangerousness?
>
> 2. Is the City's appeal frivolous or taken for purposes of delay under RAP 18.9?

C. STATEMENT OF THE CASE

The City's Statement of the Case, br. of appellant at 4-6, is deliberately misleading and hardly qualifies as a fair recitation of the facts in this case as required by RAP 10.3(a)(5). *The City omits any discussion of the events of February 26, 2009, an altercation between Temper and another dog that resulted in Temper's designation as a potentially dangerous dog under the City's code.* It is mystifying and troubling as to why the City seeks to hide this critical portion of the events in this case from this Court. Moreover, the City offers scant attention to the horrendous injuries Kary Caldwell experienced.

A more complete discussion of the facts in this case follows.

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[2] Given the City's assignments of error, it has *conceded* that the *only* issue before this Court is its duty to Caldwell. It has conceded three elements of a tort including breach of duty, causation, and harm, and it further conceded that the jury's verdict on the amount of Caldwell's damages is sustained by substantial evidence.

While residing in Hoquiam, Shawn Marie Smith owned two pit bulls, Temper and Yayo. On February 26, 2009, Smith called Grays Harbor County 911 because those two pit bulls were engaged in a savage fight and Smith believed that Temper was going to kill Yayo. CP 66, 115-16.

The City dispatched Police Officer Steve Wells and Animal Control Officer Bob Hill[3] to 2323 Aberdeen, a residence in the City. Wells arrived first and observed Smith "chasing the dogs around the front yard." CP 83. ACO Hill wrote in his report as follows:

> FEM SCREAMING IN CELL PHONE FOR HELP, POLICE
>
> On 02-26-09 at 1430 hours I, ACO Bob Hill responded to 2323 Aberdeen to assist first responder, 3S2 [Steve Wells] with an animal problem. At the scene, Shawn Smith, the owner of two male white pit bulls, was trying unsuccessfully to separate the dogs which were actively fighting in her front yard.
>
> I assisted in separating the dogs and advised Smith to seek veterinary help for the wounded dog named Yayo. This dog had several bite marks about the face, neck and legs and displayed much bleeding. The second dog, Temper showed no serious wounds from the fight but was also bloodied. While on the scene, Smith was told by Animal Control, the dog "Temper" would be declared potentially dangerous because it caused injury to another domestic animal. PDD, Section C.

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[3] ACO Hill did not have any experience in animal control prior to his appointment as the City's ACO; his only experience with animals was as an animal owner. CP 104-05.

> Smith indicated that she did not have the funds for vet care. I spoke with Raintree Vet on 02-27-09 regarding the incident and left a voice message with Smith to contact them if she felt it was necessary.
>
> According to licensing records, these two dogs are currently licensed to Jennifer Smith, 2323 Aberdeen. (Daughter of Shawn Smith) The number for Jennifer Smith has been disconnected.
>
> On 02-27-09 at 1145 hours, I spoke [with] William R. DeGarmo (Ocean Shores) who is an acquaintance of the Smith's [sic]. DeGarmo stated the the pit bull named "Temper" should be considered dangerous as it is the more aggressive of the two. DeGarmo also stated that "Temper" is kept caged within the house at 2323 Aberdeen.
>
> A Potentially Dangerous Dog declaration was prepared for issuance on 02-27-09 to Jennifer and Shawn Smith on the dog "Temper." The Smith's [sic] had vacated the premises and could not be located by Animal Control.

CP 66. ACO Hill determined that Temper was a potentially dangerous dog within the meaning of HMC 3.40.040(12)(c) (*see* Appendix) because it attacked Yayo. CP 66, 69.[4] Hill separated the dogs with a catch pole.

[4] Officer Wells testified that had law enforcement not intervened and separated the two pit bulls, Temper would have killed Yayo. CP 83-84. When asked why he believed Temper would have killed Yayo, he responded, "Because he was just so aggressive towards that small dog, and there was no giving up." CP 84. Officer Wells described the pit bulls as weighing at least 100 pounds and "they were big, stocky dogs, but the other dog was obviously the passive one, and the main problem was this Tempur [sic] dog." *Id.*

CP 116.[5] Hill actually recommended to Smith that she agree to have Temper immediately declared a dangerous dog. CP 84.

Although Hill told Smith that Temper would be declared a potentially dangerous dog,[6] he did not serve Smith with a potentially dangerous dog declaration while at the scene because "there needs to be a copy issued. I do not have carbon access in the truck. It was late in the day, near the end of my shift. I told her that I would be back the next day to do that." CP 116; RP (4/21/14):67-68. However, when Hill returned the next day he was informed by a woman at the door that Smith had vacated the premises and had taken Temper with her. *Id.* Smith fled intentionally to avoid formal service of the declaration. RP (4/22/14):4-5. Hill knew dog owners did this to avoid the impact of the law. *Id.* at 49-51. Hill did not ascertain the name of the woman who answered the door. CP 116. Hill was told to contact a person named William DeGarmo about Smith. *Id.* DeGarmo told Hill Temper was "dangerous," as he related in his report. CP 66, 116-17; RP (4/21/14):72-75.

After speaking with DeGarmo, Hill took no further steps with respect to the February 26, 2009 dog fight, including steps to obtain

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[5] A catch pole is a long aluminum pole with a wire that goes down the middle, and it has a loop on one end, and on the other end the user pulls on it and it cinches it down to capture an animal.

[6] The City admitted that "it prepared and tried to serve a potentially dangerous dog declaration" as a result of the February 26 incident. CP 31.

identifying information on Smith or photos of the animals; he did not seek to locate Smith, her daughter Jennifer Smith, or Temper. CP 117; RP (4/22/14):11-13.

Approximately five months after Temper was deemed a potentially dangerous dog, Grays Harbor County emergency dispatch received yet another frantic 911 call on August 11, 2009 from Shawn Smith because her pit bulls were fighting in her living room and Temper was again killing Yayo. CP 67, 97, 118. City Police Officers Dennis Luce and Jeremy Mitchell initially responded to the scene at 909 Wood, another City residence. CP 68, 89, 97. ACO Hill later responded as well. CP 67, 98, 117-18. Officer Luce testified that he observed the following:

> Officer Mitchell got there first, and then I came shortly after, and there was a female outside, and she was yelling about her dogs were killing each other, is what I believe she said. And we could hear the dogs in the house just breaking things and barking and growling and snarling, and so at that time we decided to wait until ACO Hill got there, because we didn't want to take any chances of anybody getting hurt by opening the door, and who knows what was beyond that door. So, we decided to wait until ACO Hill got there...

CP 89. Officer Mitchell reported that Shawn Smith was frantic, saying "her two 100 lb. pitbulls were killing each other." CP 68. Mitchell and Hill opened the front door, but did not enter the house and saw Temper with his jaws around Yayo's neck. CP 98. There was blood around Temper's mouth and Yayo's neck. CP 90, 98, 118.

Hill then tried, unsuccessfully, to separate Temper from Yayo by using a catch pole, but Temper's bite on Yayo's neck was too strong to get the rope of the pole between Temper's muzzle and Yayo's neck. CP 98, 118. Mitchell believed Temper would kill Yayo: "Because of his aggression towards the other dog. He was biting his neck. I'm not an Animal Control Officer, but I assume if someone's biting someone's neck, that it's very serious." CP 99.[7] Officer Mitchell was compelled to use his taser weapon to stop Temper. CP 89-90, 99.[8] Only after Temper was tased was ACO Hill then able to use his catch pole to control the animal and move him to the home's only bedroom, away from Yayo. CP 90, 100, 118-19. The two police officers then left the scene. CP 91, 100. Hill decided not to take either animal to the Grays Harbor animal shelter because it was full, RP (4/22/14):59-61, and Hill did not believe he had an obligation to impound Temper because it had not bitten a human. CP 120.[9]

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[7] Office Luce testified that Temper was sufficiently large and muscular that the dog could have taken him down if the officer did not have a weapon at his disposal; Luce is nearly six feet tall. CP 100.

[8] Use of a taser to subdue an animal is rare. RP (4/22/14):19.

[9] This assessment was incorrect under HMC 3.40.080(1)(c) where Temper had previously been the subject of a potentially dangerous dog designation and HMC 3.40.080(6) and RCW 16.08.100(1) required Temper's immediate impoundment.

ACO Hill told Shawn Smith that because Temper was previously declared potentially dangerous, Temper would now be declared a dangerous dog. CP 67, 120, 214.[10] But Hill then left the premises, returning to the police station to gather the potentially dangerous dog declaration from the February 26, 2009 incident, and a dangerous dog declaration. CP 121.

Hill returned to the premises and served both declarations upon Shawn Smith on August 11, 2009. CP 121, 123-24; RP (4/22/14):22-23. The dangerous dog declaration stated in pertinent part:

> On 08-11-09, the Hoquiam Police Department received a complaint concerning the above-named dog [Tempur]. You have been identified as the owner or person in control of the dog. Based upon our investigation of the complaint, it has been determined that your dog should be classified as a "dangerous dog," as defined in Hoquiam Municipal Code (HMC) section 3.40.040(7). Therefore, **you are hereby notified that your dog is declared to be a dangerous dog** ...
>
> Effective immediately, you are required to comply with the restrictions set forth in HMC 3.40.080(5), if you intend to keep the dog within the limits of the City of Hoquiam. Those restrictions are as follows:
>
> (a) The owner shall provide and maintain a "proper enclosure" for the dangerous dog, as defined in Section 3.40.040(13); and

[10] The City has admitted Temper is a dangerous dog as defined under its ordinance. CP 32.

> (b) The owner shall post his or her premises with a clearly visible warning sign that states that there is a "Dangerous Dog" on the property. In addition, the owner shall conspicuously display a sign with a warning symbol approved by the animal control officer that informs children of the presence of a dangerous dog; and
>
> (c) The owner shall maintain a surety bond or liability insurance policy as defined by RCW Title 48, in an amount of Two Hundred and Fifty Thousand Dollars ($250,000) payable to any person injured by the dangerous dog; and
>
> (d) The owner of dangerous dog shall obtain a dangerous dog license from the city under HMC 3.40.050; and
>
> (e) The owner shall not permit the dangerous dog to be outside a proper enclosure unless the dog is muzzled and retrained by a substantial chain or leash and is under physical restraint of a responsible person. The muzzle shall be made in a manner that will not cause injury to the dog or interfere with its vision or respiration, but shall prevent it from biting any person or animal.
>
> Failure to comply with the above restrictions is a misdemeanor pursuant to HMC 3.40.080(7), and will result in the immediate impound and possible euthanizing of the dog.

CP 70-71 (bold in original).

Although Shawn Smith was not compliant with the dangerous dog restrictions outlined in the dangerous dog declaration as mandated by HMC 3.40.080(5), Hill did not tell Smith that she had to comply with the dangerous dog restrictions. RP (4/22/14):24. Instead, Hill left the premises without impounding Temper. CP 119-20. Hill knew that Smith was required to comply immediately with the five restrictions. RP

(4/22/14):40-46; CP 119, 121. Hill knew that Smith lived in a small single story 600 square foot home with just one bedroom. *Id.* The home did not have a fenced or enclosed back yard. *Id.* The home had a very small front yard, mostly gravel, with no enclosure. *Id.* He observed there were no "Dangerous Dog" signs posted anywhere on the property. *Id.* He also did not see a sign with a special symbol of a dangerous dog for Temper's owner to use to warn children of the presence of a dangerous dog on the property. *Id.*

Further, Hill did not ask Smith if she had liability insurance so he had no evidence that she had complied with this restriction; Hill knew that the owner of a dangerous dog must show proof of insurance coverage. CP 119. Hill also had the capability to verify whether Temper had been issued a dangerous dog license from the City; he knew Temper had not been issued such a license on the date he declared the animal dangerous. CP 124.

When asked whether Shawn Smith was ever in compliance with the City's dangerous dog restrictions,[11] Hill responded, "No." CP 122, 130-31. Hill also knew that under the City ordinance, once Smith was served with the dangerous dog declaration for Temper, that ordinance

[11] Hill testified that he only followed the City's ordinance, not State law. CP 115.

required Smith to comply with 5 conditions for the dog and that she had not done so. CP 126. Hill also admitted that a dangerous dog whose owners are in violation of the dangerous dog restrictions in the City's ordinance must be "immediately picked up":

> Q. What if you have a dog that's been declared dangerous and the owner is in violation of the Dangerous Dog restrictions?
> A. The dog is immediately picked up. If we can't pick it up, then we order the owner to bring it into the facility.
> Q. So, that's a situation where you would impound the dog?
> A. Yes.

CP 112.

Rather than comply with the City's ordinance, Smith filed an appeal of the dangerous dog designation to the City's municipal court that was heard on September 1, 2009; the court upheld the dangerous dog designation for Temper. CP 121-22, 222. But the City took no significant steps after August 11, 2009 to do anything more about Temper. CP 122, 125. As was their modus operandi, the Smiths left the City to avoid compliance with the City's dog ordinance. CP 127.

Late on September 26, 2009, Kary Caldwell went to the apartment of her friend, Jim Thompson, in Kent, Washington. CP 74. Jennifer Smith lived with Jim Thompson, as did Temper. CP 75.[12] Temper's

[12] According to King County's investigator, Sheriff Sergeant Dave Morris, Jennifer Smith told Jim Thompson "to keep the dog away from people." CP 228. Thompson told Morris: "The dog is bad! It needs to be killed." *Id.* Thompson related

presence in the apartment was contrary to the lease agreement and the landlord had ordered Thompson to vacate the premises as a result. CP 227, 1449.[13]

After Caldwell entered the apartment, she came face-to-face with Temper. CP 146. She put her hand out; Temper started growling. CP 147. She pulled her hand back and turned away from Temper. *Id.* Temper lunged and jumped onto Caldwell's back, biting her arm with a "vice grip." *Id.*[14] She fought back. *Id.* Caldwell blacked out. *Id.*

When Caldwell awoke, she was in shock, and was bleeding. CP 148, 149. Temper released her arm only when Jim Thompson struck it with an iron skillet:

> Q How was it that the dog released you at some point?
> A He ended up hitting the dog with a cast iron skillet. I was laying on his head, so he hit him somewhere on his backside after my -- I laid there for a little while trying to think of how I could get away from this. I bit the dog back. I tried to bite his back off. I tried to bite his ear off. Every time I would bite him, he would tug again, and I had to stop. So I tried to poke his eye out. This is the part where I start to freak out. I tried to poke his eye out. I tried to stick my finger up his nose. I tried to stick my finger down his throat. I'm sorry.

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that Smith knew Temper had bitten before and had been declared dangerous in Hoquiam. CP 229.

[13] Thompson later pleaded guilty to attempted possession of a dangerous dog. CP 1083-90.

[14] King County's investigation notes indicated that Thompson testified Temper "just attacked Caldwell for no reason." CP 229.

Id. Caldwell exited the apartment with Temper still growling at her. *Id.* Caldwell was treated at Auburn General Hospital. CP 74, 149. Her injuries were horrendous. CP 149. Her medical treatment was extensive. CP 149-52.

> Q Ultimately your arm was terribly broken. That's correct, isn't it?
> A In ten pieces, yes.
> Q Ten pieces, right.
> A One bite, ten pieces.

CP 148. *See also,* CP 79 (x-ray); CP 552-55 (recounting medicals).[15]

Caldwell filed the present action in the King County Superior Court against the Smiths and the Thompsons on July 11, 2012. CP 1-6. The complaint was subsequently amended to add further facts and claims against the City and Grays Harbor County. CP 7-18.[16] In August 2013, Caldwell filed a motion for partial summary judgment asserting that the City owed her a duty of care. CP 37-61. The City also filed its first motion for summary judgment asserting that it did not owe Caldwell a duty of care. CP 186-203. On September 6, 2013, the trial court, the Honorable LeRoy McCollough, granted Caldwell's motion for partial

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[15] Subsequent to the attack, Temper was taken to the Kent Shelter and placed under quarantine. CP 74. King County deemed Temper an "unredeemable animal," CP 77, and it was destroyed. CP 1247-48, 1270, 1302. Temper's destruction was not an issue for the jury. CP 1330.

[16] RCW 36.01.050 permits filing an action against a county in a neighboring county. Grays Harbor County was later dismissed from the case. CP 294-98.

summary judgment in part by ruling that "the City had a duty to impound Temper, the dangerous dog pursuant to HMC 3.40.080(6) on or after Aug. 11, 2009." CP 474. The court further noted: "The City also had a duty to protect [Kary Caldwell] under State law." *Id.* *See* Appendix. The same day, the trial court denied the City's motion for summary judgment. CP 470-72. The City filed a motion to reconsider or certify the order for review. CP 476-78. The trial court denied that motion. CP 510-12.[17]

The City sought interlocutory review of the trial court's September 6, 2013 summary judgment order, CP 515-26, which Commissioner Mary Neel denied in a January 8, 2014 ruling. CP 1209-13.[18]

The trial court subsequently concluded that on January 27, 2014 that breach and proximate cause were established as a matter of law. CP 1241-42, 1276-77, 1312, 1505.

The case was tried to a jury over 4 days with the Honorable Marianne Spearman presiding. The only defendant at trial was the City.[19]

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[17] The City filed a second motion for summary judgment on causation, denied by the trial court on December 6, 2013. The City has not appealed that decision.

[18] Throughout its brief, the City makes reference to this Commissioner's ruling denying its motion for discretionary review as if that ruling was *precedential*. *E.g.*, Br. of Appellant at 22, 23, 24. First, the Commissioner *denied* the City's motion for discretionary review. Second, as this Court knows, the Commissioner's ruling is not precedential and this Court independently decides the legal questions before it.

[19] Caldwell obtained default judgments against the Smith and Thompson defendants. CP 513-14. In 1941, the Legislature enacted RCW 16.08.040(1) making dog owners strictly liable for dog bites inflicted by their dogs. Such strict liability for dog

The case was confined to the allocation of fault, if any, among the defendants, and Caldwell's damages. CP 1241, 1505. The City moved for judgment as a matter of law under CR 50, CP 1347-55, and the trial court denied the motion. The jury returned a verdict in Caldwell's favor for $435,000. CP 1491-92.[20] The trial court entered a judgment on the jury's verdict, CP 1493-95, and a supplemental judgment for costs, CP 1540-42, from which the City appealed. CP 1518-39, 1543-67.

D. SUMMARY OF ARGUMENT

Based on both state law and City ordinance, the City had a duty to immediately impound Temper once its Animal Control Officer designated Temper a "dangerous dog" and the dog owner did not comply with mandatory restrictions on the possession of such a dangerous dog designed to protect people from the animal's viciousness. Washington law, including most recently the Division II decision in *Gorman v. Pierce*

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owners has been recognized in numerous appellate decisions. *See Frobig v. Gordon*, 124 Wn.2d 732, 735 n.1, 881 P.2d 226 (1994) (owner, keeper, or harborer of dangerous or vicious animal is liable to persons harmed by that animal; statute makes owner strictly liable without regard to owner's knowledge of dog's viciousness); *Arnold v. Laird,* 94 Wn.2d 867, 870, 621 P.2d 138 (1980) (dog owner is strictly liable for harm inflicted by vicious or dangerous dog, regardless of owner negligence or negligence of injured person); *Johnston v. Otis*, 76 Wn.2d 398, 400, 457 P.2d 194 (1969) (one who owns or keeps vicious or dangerous dog had strict liability duty to kill or confine dog under common law); *Hansen v. Sipe*, 34 Wn. App. 888, 890, 664 P.2d 1295 (1983) (RCW 16.08.040 sets strict liability standard); *Rogers v. City of Kennewick*, 304 Fed. Appx. 599, 602 (9th Cir. 2008) (recognizing Washington strict liability standard in RCW 16.08.040).

[20] Caldwell's damages were amply sustained by her testimony and that of her expert witnesses.

County, discussed *infra,* a case the City neglects to cite, has long recognized that municipalities may have a duty of care towards persons attacked by vicious dogs and that the public duty doctrine does not bar such actions. The public duty doctrine is inapplicable here because the City's duty was to Caldwell individually and not the public generally. Caldwell was precisely the type of individual contemplated by RCW 16.08 and the City ordinance as within the class of individuals be protected from Temper's viciousness.

The Court should affirm the judgment on the jury's verdict.

In addition, the City's appeal is frivolous or taken for purposes of delay. This Court should sanction the City by awarding Caldwell her fees on appeal.

E. ARGUMENT

It has long been the rule in Washington that there are four elements to a plaintiff's negligence claim: (1) duty of care to the plaintiff; (2) breach of duty by the defendant;[21] (3) proximate cause;[22] and (4) resulting

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[21] The City *conceded* the issue of breach of duty below. CP 872-73. *See also,* CP 1158, 1195. It further conceded the factual predicate for breach when it proposed that the jury be instructed as follows:

> Defendant Hoquiam admits that, on August 11, 2009, Hoquiam Animal Control Officer Hill served a dangerous dog declaration on the owner of a dog that later bit plaintiff. Defendant Hoquiam further admits that the dog's owner had not complied with the conditions in the declaration at the time that Officer Hill served the declaration and admits that Officer Hill did not impound this dog when he served the declaration...

CP 1019.

injury to the plaintiff.[23] *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The existence of a defendant's duty of care to a plaintiff is generally a question of law. *Id.*

(1) The City Owed Kary Caldwell a Duty of Care

The City contends that under its dangerous dog ordinances it did not owe Kary Caldwell a duty of care or that the public duty doctrine precluded a duty to Caldwell. Br. of Appellant at 16-27. The City is wrong on both arguments. The issues of duty and the public duty doctrine are effectively intertwined. The latter is merely a "focusing tool" to determine if a duty was owed to a particular individual, as opposed to the nebulous public, as will be discussed *infra*. It is first necessary, however to establish that the City owed a duty of care. The City reverses the analysis, arguing the public duty doctrine first in the argument section of its brief.

Caldwell argued below that the City's duty to her was predicated both on common law principles and on the City's violation of its own ordinance and state law in addressing Temper's viciousness. CP 50-53.

The duty owed by the City to Kary Caldwell falls readily within

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[22] The City has not argued proximate cause as an issue on appeal in its brief.

[23] The City has not contended anywhere in its brief that Kary Caldwell was not harmed. In fact, the trial court barred the City from denying Caldwell was injured by Temper's attack. CP 1186. The City only cursorily references Temper's vicious attack on Caldwell in its brief at 5.

the ambit of the *Restatement (Second) of Torts* § 281, cmts. c, d (1965), as she noted below. CP 50-51. Parties have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. This duty means parties must avoid exposing others to harm from the foreseeable conduct of third parties. It was entirely foreseeable here that Kary Caldwell would be exposed to harm by Temper. Absent the City's proper enforcement of state law and its own ordinance on dangerous dogs, Shawn Smith would not take the necessary steps to restrain Temper. Temper was a ticking time bomb.

Moreover, the statutes and ordinances pertaining to dangerous dogs also created a statutory duty of care on the City's part.[24]

Washington law provides for civil liability for defendants whose dogs bite others or municipalities that fail to enforce their ordinances relating to dangerous dogs. This liability may be predicated on statute and/or ordinance.

The Legislature enacted much of RCW 16.08 relating to dangerous dogs in 1987. Laws of 1987, ch. 94.[25] These statutory provisions,

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[24] While Washington no longer recognizes the doctrine of negligence per se, RCW 5.40.050, a statute may nevertheless create a duty of care enforceable in tort. *Restatement (Second) of Torts* § 286 (1965). *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990); *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000).

[25] In analyzing both the statutes and ordinances at issue here, this Court must

particularly those found at RCW 16.08.070-.100 (*see* Appendix), address a municipality's responsibility for handling potentially dangerous and dangerous dogs. These statutory provisions do not occupy the field of regulation for dangerous dogs, however, and municipalities are free to enact more restrictive local ordinances regulating such animals, as our Supreme Court concluded in *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998).[26] The City enacted its own dangerous dog ordinance. HMC 3.40.

Washington courts have readily determined that a municipality's dangerous dog ordinance can establish the necessary predicate to that municipality's liability to dog bite victims for negligence on the municipality's part where it fails to properly handle a dangerous animal. In *Livingston v. City of Everett*, 50 Wn. App. 655, 658, 751 P.2d 1199,

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carry out the intent of the legislative body in enacting them. As our Supreme Court recently stated in *Eubanks v. Brown*, 180 Wn.2d 590, 597, 327 P.3d 635 (2014):

> We begin by looking at the "statute's plain language and ordinary meaning." *J.P.*, 149 Wn.2d at 450 (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Where the language of a statute is unambiguous, we "must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

[26] There, Seattle enacted an ordinance that banned the possession of vicious dogs in the city even though state law seemingly permitted ownership of dangerous dogs, some which might fall within Seattle's definition of a "vicious" dog. The Court stated that, under state law, potentially dangerous dogs are regulated locally. RCW 16.08.090(2) and observed that both state law and local law ordinances could address dangerous dogs. *Id.* at 289-90. The Court concluded that a local ordinance could be more restrictive than state law where both the ordinance and statute were prohibitory in nature. *Id.* at 292-93.

review denied, 110 Wn.2d 1028 (1988), a case not cited by the City, this Court based a duty of care on a provision in the City's code declaring it to be the City's policy to enforce animal control measures "for the protection of human health and safety" and making it illegal for any animal to be at large.

Subsequently, in *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999), the plaintiffs brought negligence claims based on Chapter 16.08 RCW against Stevens County for damages caused by a dog attack. The plaintiffs claimed the County should have confiscated the dog in question prior to the attack, relying on RCW 16.08.100(1), which states that the animal control authority of a county "shall...immediately confiscate" "any dangerous dog" if the dog is found in violation of the dangerous dog requirements. *Id.* at 594-95. Division III refused to dismiss the plaintiffs' claim for damages from the dog's attack on Mrs. King, stating:

> [W]e hold Mr. King's earlier reports to the sheriff's office about the threatening behavior of his neighbors' dogs, and evidence that Timmy was part of that pack, create a reasonable inference that Timmy also engaged in that behavior. The inference is sufficient to support a trier of fact finding he was a "potentially dangerous" dog that qualified as "dangerous" when he attacked Mrs. King in February 1997. That is, his prior behavior made him "potentially dangerous," so he did not have to inflict a severe injury on Mrs. King in 1997 to be deemed "dangerous." It was sufficient that he engaged in an unprovoked attack that threatened her safety. Evidence Mr. King reported the attack on his wife to the sheriff, and

> evidence the County did not confiscate Timmy, raise material issues concerning the County's liability to the Kings under the failure to enforce exception to the public duty doctrine.

Id. at 596. *King* is plainly on point here.

Recently, in *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013), *review denied*, 179 Wn.2d 1010 (2014), a case not cited by the City although it is also plainly on point, the county ordinance, as here, commanded that its animal control personnel *shall* classify potentially dangerous dogs. Despite receiving numerous complaints about a pit bull, the county failed to declare the dog to be potentially dangerous. The dog and its puppy entered the plaintiff's home and viciously attacked her. A jury found for the plaintiff and Division II affirmed the judgment on the jury's verdict, upholding the trial court's duty instructions based on the county ordinance and stating:

> Where a statute uses both "shall" and "may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wash.2d 701, 704, 648 P.2d 435 (1982). Here, the ordinance mandated some actions ("shall") and made others discretionary ("may"). For instance, after inquiry, Pierce County had discretion to classify a dog as potentially dangerous. Former PCC 6.07.010(A) ("The County ... *may* find and declare an animal potentially dangerous...") (emphasis added). But, if the county received reports of a potentially dangerous dog, it had a duty to apply the classification process to that dog. Former PCC 6.07.010(A) ("The County ... *shall* classify potentially dangerous dogs.") (emphasis added). The legislature's use

> of "shall" was a clear directive to apply the classification process to dogs that were likely potentially dangerous. Although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act.

Id. at 79.[27]

In sum, it is unambiguous that Washington courts have discerned a duty of care predicated upon state law or local ordinances on dangerous dogs.

Turning to state law and the City's ordinance at issue here, it first is clear, as the City has conceded, that Hoquiam's officers had the authority to declare Temper a potentially dangerous dog on February 26, 2009, given his vicious conduct at that time. RCW 16.08.070(1); RCW 16.08.090(2) (leaving regulation of potentially dangerous dogs to local authorities);[28] HMC 3.40.040(12); HMC 3.40.080(2). The fact that Temper was a potentially dangerous dog and *repeated* his vicious behavior made him a dangerous dog. RCW 16.08.070(2)(c); HMC 3.40.080(1). This decision on Temper's dangerousness was affirmed by the municipal court. Again, the City concedes Temper's dangerousness.

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[27] As will be noted *infra*, Division II rejected the application of the public duty doctrine.

[28] A local government may even prohibit possession of dangerous dogs. *Rabon*, 135 Wn.2d at 292-94.

A distinct issue is presented by the implications of such a decision. HMC 3.40.080(5) and RCW 16.08.100(1). To continue the possession of such a dangerous animal, the owner must take steps to protect people from its potential harmfulness.

A further distinct issue is presented as to whether such a potentially harmful animal must be immediately impounded to keep it from harming humans. The City had a duty to *immediately* confiscate and impound Temper as a dangerous dog on August 11, 2009 under both state law and its own ordinance. RCW 16.08.100(1) could not be any clearer when it states:

> (1) Any dangerous dog *shall* be *immediately confiscated* by an animal control authority if the: (a) Dog is not validly registered under RCW 16.08.080; (b) owner does not secure the liability insurance coverage required under RCW 16.08.080; (c) dog is not maintained in the proper enclosure;..... The animal control authority shall destroy the confiscated dangerous dog in an expeditious and humane manner if any deficiencies required by this subsection are not corrected within twenty days of notification. In addition, the owner shall be guilty of a gross misdemeanor punishable in accordance with RCW 9A.20.021.

(emphasis added). HMC 3.40.080(6),[29] is equally unambiguous when it states: "A dangerous dog *shall be immediately impounded* by a police officer or an animal control officer if the owner of the dangerous dog fails

[29] The full text of HMC 3.40.080 is in the Appendix.

to comply with any of the restrictions set forth in subsection 5(a), (b), (c), (d), or (e) of this section."[30]

The City attempts to argue that it was not under any obligation to immediately impound Temper, and alternatively, it contends that Smith's appeal of Temper's dangerous dog designation effectively stayed any obligation to impound the dog. Br. of Appellant at 21-23. The City is wrong on both arguments.[31]

The statute's and ordinance's plain language controls.[32] RCW 16.08.100(1) and HMC 3.40.080(6) require *immediate* impoundment of a dangerous dog not meeting the legal restrictions attendant upon such a designation. The language could not be plainer.[33] The City's argument would permit a dangerous animal to roam unrestricted, free to do further harm to humans, just as Temper did here. Shawn Smith never complied, nor had the capability or intent of complying, with either state law or the

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[30] The mandatory restrictions on a dangerous dog in HMC 3.40.080(5) mirror those found in RCW 16.08.080(6).

[31] The City also asserts in its brief at 15-16 that it could not enforce its ordinances or RCW 16.08 outside of the City. This is a non-issue here. Temper was declared a potentially dangerous dog and later a dangerous dog while he was in Hoquiam. The City could have, and should have, impounded him while he was in Hoquiam for this reason, thereby avoiding the attack on Caldwell.

[32] *See* n.25 *supra*.

[33] The language of HMC 3.40.150 on impoundment further reinforces this interpretation.

City ordinance on dangerous dogs. There was no admissible evidence that Smith would have met the specific protective requirements that would have allowed her to keep Temper. Instead, Smith simply absconded with her dogs whenever their dangerousness was identified.

With respect to the City's stay argument pending appeal, br. of appellant at 21-23,[34] just as it does with the requirement of *immediate* impoundment of non-compliant dangerous dogs, the City ignores its own ordinances. *Nothing* in HMC 3.40.080(4) provides for an automatic stay of the dangerous dog designation on appeal. Quite to the contrary, HMC 3.40.080(4) indicates the designation is *final*, unless appealed. HMC 3.40.080(6) directs immediate impoundment if the dog is dangerous and the owner is not meeting the requirements of HMC 3.40.080(5). HMC 3.40.150(5) allows the City to enter private premises to impound the dog. HMC 3.40.150(3) mandates that a dangerous dog failing to comply with the restrictions in HMC 3.40.080(5) is not to be released until the municipal court holds its hearing.

The City instead makes an argument about the finality of any obligation to impound Temper based on the state Administrative

[34] The trial court barred the City from raising this contention below, CP 1193, and the City did not seek review of the trial court's rulings in limine on this point. Br. of Appellant at 2.

Procedures Act, RCW 34.05 ("APA"). Br. of Appellant at 23-24. The APA does not even apply to the interpretation of Hoquiam's ordinance.

Hoquiam's dangerous dog ordinance provides for distinct decisions. One is whether the dog actually meets the criteria of HMC 3.40.080(1) to establish it is dangerous. That decision is appealable to municipal court, HMC 3.40.080(4); the hearing on that issue is expedited where the dog has been impounded. *Id.* A distinct question relates to the impoundment of a dangerous dog. The dog must be immediately impounded under HMC 3.40.080(6) unless the dog owner takes steps mandated by HMC 3.40.080(5) to protect people from the dog. HMC 3.40.150(5) even allows City police or its animal control officer to enter private premises to impound a dangerous dog. The dog owner is entitled to a hearing on the release of a dangerous dog. HMC 3.40.150(3). HMC 3.40.150(3) further provides that when a dangerous dog is impounded, even if the dog's owners are in compliance with the ordinance, the hearing judge may still order the animal's destruction, if the dog is vicious and constitutes a threat to humans in the City. Temper should have been immediately impounded on August 11, 2009.

In sum, the City had a duty to enforce both RCW 16.08.100 and HMC 3.40.080/.150 on August 11, 2009 by immediately impounding Temper because his owners were in violation of the dangerous dog

restrictions in statute and in City ordinance. The trial court did not err in granting summary judgment to Caldwell on the duty issue, particularly in light of *Livingston*, *King,* and *Gorman*.

(2) The Public Duty Doctrine Does Not Foreclose the City's Duty to Kary Caldwell

At its core, the City misunderstands the public duty doctrine, equating it with immunity. Br. of Appellant at 10-12. The City contends that *government immunity* is the starting point for this Court's analysis and the public duty doctrine creates "exceptions" to such immunity. *Id.* at 10. That analysis is wrong. As interpreted by the City, the doctrine is nothing more than a backdoor device to restore sovereign immunity despite legislative actions to abolish that immunity.[35] But "governmental entities in Washington are liable for their 'tortious conduct' to the 'same extent' as a private person or corporation." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013).[36]

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[35] "The doctrine of governmental immunity springs from the archaic concept that 'The King Can Do No Wrong.'" *Kelso v. City of Tacoma,* 63 Wn.2d 913, 914, 390 P.2d 2 (1964).

[36] In 1961, the Legislature enacted RCW 4.92.090 abolishing state sovereign immunity. That waiver quickly extended to municipalities in 1967. RCW 4.96.010; *Kelso,* 63 Wn.2d at 918-19; *Hosea v. City of Seattle*, 64 Wn.2d 678, 681, 393 P.2d 967 (1964). Local governments have since been "liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation." RCW 4.96.010. These statutes operate to make state and local government "presumptively liable in all instances in which the Legislature has *not* indicated otherwise." *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (emphasis in original).

Our Supreme Court has *repeatedly* made it clear that the doctrine[37] is merely a tool to properly apply traditional tort duty principles. The doctrine "began its useful life as a tool to assist courts in determining the intent of legislative bodies when interpreting statutes and codes." *Cummins v. Lewis County*, 156 Wn.2d 844, 863, 133 P.3d 458 (2006) (Chambers, J. concurring). If a court determined that the Legislature "intended to protect certain individuals or a class of individuals to which the plaintiff belonged," a duty to that plaintiff attached. *Id.* at 864.

The public duty doctrine analysis is not triggered simply because the defendant happens to be a public entity. *Id.* It is not an immunity: "The public duty doctrine does not serve to bar a suit in negligence against a government entity." *Cummins*, 156 Wn.2d at 853. Rather, it is an analytical tool designed to determine if a traditional tort duty of care, the threshold determination in a negligence action, is owed. In other words, the doctrine is a "focusing tool" to determine "whether a duty is actually owed [to] an individual claimant rather than the public at large." *Munich v. Skagit Emergency Communication Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). Justice Chambers made the extent of the doctrine clear in his concurrence in *Munich*, joined by a majority of the Court that confined the

[37] The public duty doctrine has been criticized by jurists and scholars alike. *J&B Development Co. v. King County*, 100 Wn.2d 299, 311, 669 P.2d 468 (1983) (Utter, J., concurring); Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, 414-17 (1989).

doctrine only to duties imposed by statute, ordinance, or regulation, rather than by common law:

> Some think the public duty doctrine is a tort of its own imposing a duty on any government that gives assurances to someone. Some view it as providing some sort of broad limit on all governmental duties so that governments are never liable unless one of the four exceptions to the public duty applies, thus largely eliminating duties based on the foreseeability of avoidable harm to a victim. In fact, the public duty doctrine is simply a tool we use to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business.

Id. at 886.

Here, the City owed an individual duty to Kary Caldwell.

First, insofar as Caldwell contended below that the City owed her a common law duty of care, the doctrine is inapplicable. *Id.* at 886-87.[38]

Second, the doctrine does not apply to Caldwell's ordinance/statute-based argument. There are at least four exceptions to the public duty doctrine that assist in developing a court's duty focus: (1) legislative intent, (2) failure to enforce, (3) special relationship, and (4) rescue doctrine. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). These exceptions have "virtually consumed the rule," *id.* at 267. The "public duty doctrine" does not apply if *any* of the four

[38] The trial court did not reference common law duty in its order below, CP 474, but this Court may affirm on any grounds within the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

"exceptions" are in play.

The City argues in its brief at 12-15 that the failure to enforce exception to the public duty doctrine does not apply. It is wrong. That exception applies where "governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation" and "fail to take corrective action despite a statutory duty to do so[.]" *Bailey*, 108 Wn.2d at 268; *Campbell v. City of Bellevue,* 85 Wn.2d 1, 13, 530 P.2d 234 (1975).[39] The classic case is *Bailey*. There, a police officer knew the driver of a vehicle was drunk, but failed to arrest him. The officer is not required to realize a crime is being committed to trigger liability; "knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself, is all that is required." *Coffel v. Clallam County*, 58 Wn. App. 517, 523, 794 P.2d 513 (1990). Here, there is no question that the City was fully aware of Temper's vicious propensities from the events of February 26 and August 11, 2009.

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[39] The public duty doctrine was first discussed in Washington in *Campbell.* There, a city inspector failed to disconnect a nonconforming lighting system running under a local stream, a failure which later resulted in the electrocution of the plaintiff downstream. 85 Wn.2d at 2-6. On appeal, Bellevue argued that its enactment of "electrical safety regulations and provisions for inspection and enforcement" gave rise only to a "broad general responsibility to the public at large rather than to individual members of the public." *Id.* at 9. Our Supreme Court applied the public duty doctrine as developed in New York cases, but it went on to hold that liability would be imposed "*where a relationship exists or has developed between an injured plaintiff and agents of the municipality* creating a duty to perform a mandated act for the benefit of particular persons or class of persons." *Id.* at 10 (emphasis added). The *Campbell* court affirmed liability as to the city, noting that the Bellevue inspector had knowledge of this particular nonconforming wiring system and the danger it posed to nearby residents. *Id.* at 13.

In the specific context of dangerous dogs, the *Livingston, King,* and *Gorman* courts concluded that the failure to enforce exception to the public duty doctrine applied. 176 Wn. App. at 79-80.[40] The City cannot meaningfully distinguish these cases declining to apply the public duty doctrine.

In sum, this is not like the cases where the enforcement officer lacked knowledge of a statutory violation, *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 98 P.3d 52 (2004), *review denied*, 154 Wn.2d 1005 (2005) or general violations of law were at stake, *McKasson v. State*, 55 Wn. App. 18, 776 P.2d 971, *review denied,* 113 Wn.2d 1026 (1989). Here, a clear and mandatory directive by statute and ordinance, was present. ACO Hill was abundantly aware that Temper was a potentially dangerous dog and later a dangerous dog. The failure to enforce exception applies.[41] The

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[40] As the Gorman court noted: "Pierce County received multiple complaints about Wilson's dogs but failed to evaluate the dogs' dangerousness despite a statute requiring it to act." 176 Wn. App. at 80. Hoquiam's ordinance and state law also required it to act in this case regarding Temper. Both contained mandatory impoundment language.

[41] Insofar as review of the duty issue is de novo, this Court could also conclude that the legislative intent exception applies. The public duty doctrine does not apply where the Legislature has evidenced a clear intent to protect a particular class of persons. *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). Where this "legislative intent" exception applies, a member of the identified class may bring a tort action against the governmental entity for its violation of the statute. As the *Donaldson* court stated:

> It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the statute is violated and the injured party was one of the persons designed to be protected. If the legislation evidences a clear

public duty doctrine does not forestall the City's duty of care to Caldwell.

(3) This Court Should Disregard the City's Belated and Baseless Constitutional Argument

Recognizing that its ordinance imposes a duty on it to immediately impound dangerous dogs where their owners fail to comply with the ordinance's mandate that the owners protect people from their dog's viciousness, the City has the audacity to claim in its brief at 27-28, that its own ordinance, HMC 3.40.080, is unconstitutional as violative of the rights of dangerous dog owners. The City failed to preserve this issue for appellate review. Moreover, the City is wrong on the merits. Due process principles clearly permit government to take necessary police powers

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intent to identify a particular and circumscribed class of persons, such persons may bring an action in tort for violation of the statute.

65 Wn. App. at 667-68.

The legislative intent exception has been addressed in a variety of cases involving the statutory duty to investigate and handle reports of child abuse or neglect. Beginning with *Lesley v. Dep't of Social & Health Services,* 83 Wn. App. 263, 921 P.2d 1066 (1996), *review denied,* 131 Wn.2d 1026 (1997), Washington courts have recognized that children harmed by the government's failure to protect them from abuse state a cause of action based on RCW 26.44. The courts even recognize a duty based on that statute to parents wrongfully accused of child abuse. *Tyner, supra.* Recently, in *Washburn,* our Supreme Court applied the legislative intent exception to the public duty doctrine to conclude the city owed a duty with regard to the service of anti-harassment orders in a case where the harasser killed the victim. The court specifically rejected the notion that the enactment at issue must impose a specific duty on the governmental entity. 178 Wn.2d at 756-57.

In this case, the clear intent of RCW 16.08 and HMC 3.40 is to protect people who come into contact with dangerous dogs. Kary Caldwell was certainly within the class of persons the Legislature and Hoquiam's City Council intended to protect when enacting RCW 16.08.070-.100 and HMC 3.40.080(5). Thus, the public duty doctrine does not foreclose the City's duty of care to Kary Caldwell here.

actions immediately to protect the public, subject to appropriate procedural protections, just as the City's dangerous dog ordinance authorized.

First, the City did not properly preserve its constitutional argument for review by this Court. The City raised the constitutionality of its ordinance for the first time in the case on reply to its motion for summary judgment, CP 427, compelling Caldwell to offer a sur-reply to that newly-raised argument. CP 434-44. This Court does not consider an issue raised for the first time in a reply on summary judgment. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991).[42]

Second, the City never pleaded the unconstitutionality of its own ordinance. CP 29-35. A complaint or an answer puts the opposing party on notice that an issue has been raised. The City's answer here did not do so, foreclosing a tardy raising of the issue. *Trask v. Butler*, 123 Wn.2d 835, 846, 872 P.2d 1080 (1984); *Dewer v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) ("A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later asserting the theory into trial briefs and contending it was in the case all along.").

[42] The City later reargued the issue in its motion for reconsideration, CP 482-84, but issues raised for the first time on reconsideration are disregarded as well. *Bldg. Indus. of Wash. v. McCarthy*, 152 Wn. App. 720, 738, 218 P.3d 196 (2009).

Third, regardless of the City's patently self-interested argument that its own dangerous dog ordinance violates due process if dangerous dog owners must immediately comply with its provisions,[43] the argument is unavailing to the City. The trial court here also based its ruling on state law grounds. CP 474. RCW 16.08.100 requires "immediate confiscation" of any dangerous dog not meeting safety and liability requirements for the animal. The City did not challenge the constitutionality of that statute below. CP 427. Nor could it. The City failed to notify the Attorney General of this constitutional challenge as RCW 7.24.110 mandates. *See Jackson v. Quality Loan Serv. Corp. of Wash.*, __ Wn. App. __, ___ P.3d ___, WL 2015 1542060 (2015).

Finally, on the merits, the City's challenge fails. Procedural due process requirements are analyzed in accordance with *Mathews v.*

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[43] The City's argument is self-serving because the City enacted amendments to its ordinance prior to the service of the potentially dangerous and dangerous dog declarations on Shawn Smith.

On April 27, 2009, the Hoquiam City Council unanimously voted to adopt the dangerous dog declaration form which was served upon Shawn Marie Smith. CP 450-51. On April 13, 2009, prior to the vote, City Attorney Steve Johnson provided a written report to the Council on proposed amendments to the dangerous dog ordinance. CP 455-56. In his report, Johnson noted that the designation of a dog as dangerous was final unless the owner appealed to the municipal court. CP 460. A dangerous dog could be impounded if the owner did not comply with the conditions for keeping such a dog. *Id.* Attached to City Attorney Johnson's report was the dangerous dog declaration form which stated: "Effective immediately you are required to comply with the restrictions set forth in HMC 3.40.080(5)." CP 46. Presumably, the Council did not enact an unconstitutional ordinance. Indeed, such ordinance is presumptively constitutional. *Didlake v. Wash. State*, __ Wn. App. ___, ___ P.3d ___, 2015 WL 1205011 (2015).

Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333 (emphasis added). The *Mathews* framework for determining the extent of necessary procedural due process is as follows:

> Determining what process is due in a giving situation requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved.

Id. at 335. A balancing of interests suggests that a full post-impoundment hearing on the dangerousness of an animal satisfies *Mathews*, particularly where the dangerousness of the animal is manifest. Here, Temper *twice* engaged in bloody, vicious behavior requiring immediate impoundment to protect humans when Shawn Smith refused to take *any* steps to exert control over the animal or to protect people from its vicious propensities.

Under HMC 3.40.080, Shawn Smith was first provided notice of the City's dangerous dog restrictions when she was told in February 2009 that her dog was going to be declared potentially dangerous; she fled rather than address Temper's viciousness. CP 658, 667. HMC 3.40.080(1)(c) clearly states that a dog previously declared potentially dangerous which again harms another domestic animal will be declared dangerous and immediately subject to the dangerous dog restrictions.

Smith was again provided notice of the dangerous dog restrictions when ACO Hill served her with the potentially dangerous dog declaration and the dangerous dog declaration on August 11, 2009. The notices not only informed Smith of the dangerous dog designation, but also of the dangerous dog restrictions with which she would have to comply.

Ultimately, the essence of due process requires notice to the affected person and a meaningful opportunity to be heard. *Soundgarden v. Eikenberry,* 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). RCW 16.08.080 and HMC 3.40.080(4)/HMC 3.40.150(3) satisfy this requirement.[44] The *Mathews* protocol informs the analysis of how much process is due.

A procedure for prehearing impoundment of a dangerous dog, subject to subsequent full procedural hearings, is not unconstitutional. A prehearing deprivation of a property interest does not violate procedural due process. *Johnson v. Wash. Dep't of Fish & Wildlife*, 175 Wn. App. 765, 305 P.3d 1130, *review denied,* 179 Wn.2d 1009 (2013). There, Johnson applied two months late to renew his 2007 Dungeness crab coastal fisher license. By failing to renew his license by December 31, 2007, Johnson's license permanently expired as of the beginning of 2008. On March 14, 2008, three months after depriving Johnson of his crab

[44] HMC 3.40.080(4) actually provides for expedited hearings when a dog has been impounded.

license, the Department sent Johnson a letter containing the reasons for the license rejection and information that he could request an administrative hearing to contest the denial. A hearing was held. Johnson argued that "this process was inadequate because he should have received pre-deprivation notice and opportunity for a hearing." Division II rejected Johnson's argument finding the Department's procedures to be adequate. *Id.* at 774.

In *Ritter v. Board of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 637 P.2d 940 (1981), our Supreme Court upheld a hospital district's procedure for summary suspension of hospital privileges with a post-suspension hearing process. In applying the *Mathews* due process protocol, the Court commented: "While Ritter's protected liberty interest is not a matter of life or death, the interest of the Board in insuring competent, careful medical attention at all times might be." *Id.* at 511.

Thus, as in *Ritter,* the governmental interest in protecting people from vicious animals like Temper weighs powerfully in favor of a procedure that imposes safety and control measures on such a dog owner *immediately* to protect humans, subject to a later hearing on the animal's dangerousness within the meaning of state law or municipal code. In fact, here it is clear that Smith had a right to appeal Temper's dangerousness designation to court, HMC 3.40.080(4), a right she claimed, and she would

have had a right to seek Temper's release under HMC 3.40.150(3) had the City impounded him.

Downey v. Pierce County, 165 Wn. App. 152, 267 P.3d 445 (2011), *review denied,* 174 Wn.2d 1016 (2012), does not help the City's position. Br. of Appellant at 27. The court there recognized that a dog owner has a property interest in his/her dog that is subject to due process principles. Under Pierce County's dangerous animal ordinance, an owner challenging that designation was required to pay a $250 fee to obtain an evidentiary hearing before the county auditor and $500 for further review before a hearing examiner. *Id.* at 156. Division II invalidated the ordinance, not because of the lack of a pre-impoundment hearing, but because the fees imposed to obtain a hearing precluded appropriate access to the hearing process. *Id.* at 167-68.

The City collaterally attacks its own ordinances yet again by asserting that any requirement of immediate compliance with the ordinance would make a dog owner subject to a misdemeanor penalty under HMC 3.40.080(8). Br. of Appellant at 28-29. In addition to the fact that this issue is irrelevant to the City's duty to Caldwell, the City offers a tortured reading of its own ordinances. A dangerous dog determination, not the restrictions on such an animal's possession, is the subject of HMC 3.40.080(4). That determination is final unless appealed. *Id.* The

misdemeanor penalties of HMC 3.40.080(8) follow only if a dog is dangerous and the owner fails to adhere to the requirements of HMC 3.40.080(5).

Here, Temper was a dangerous dog. The municipal court agreed, but it gave Smith additional time to address the requirements of HMC 3.40.080(5). Given the obvious potential harm to humans of a dangerous dog, nothing in these procedures prevents the City from impounding a dangerous dog under the distinct provisions of HMC 3.40.080(5) until its conditions for an owner to possess a dangerous dog are met or until the municipal court determines the dangerous declaration was erroneous. *See* HMC 3.40.080(6), 3.40.150(5).

In sum, this Court need not address the City's belated due process argument. It if does, the immediate impoundment of Temper was mandated by RCW 16.08.100, a statute the City has not, and cannot, challenge. HMC 3.40.080/.150, with their procedure for immediate impoundment of Temper and subsequent hearings on dangerousness and release of the dog, satisfies procedural due process principles.

(4) The City's Appeal Is Frivolous or Taken for Purposes of Delay

Washington appellate courts have the authority under RAP 18.9(c) to sanction a party for filing a frivolous appeal or for using the appellate

process for purposes of delay. A frivolous appeal was first defined by this Court in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980) as an appeal in which "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal." *See also, Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (approving of *Streater* criteria).

As early as *Harvey v. Unger*, 13 Wn. App. 44, 533 P.2d 403 (1975), Washington courts have sanctioned appeals filed solely for purposes of delay. In *Harvey*, the defendant appealed an adverse personal injury judgment, but only sought review of the trial court's summary judgment ruling on liability. The facts clearly demonstrated the defendant was at fault for the automobile accident, and the defendant apologized to the plaintiff at the accident scene. This Court found after a careful review of the record that the appeal was taken only for delaying payment of the judgment, a judgment that was stayed during the appeal's pendency. *Id.* at 48 ("... we are satisfied that the appeal was taken only for delay."). This Court imposed monetary sanctions against the appellant. *Id.* In *Trohimovich v. Dep't of Labor & Indus.*, 21 Wn. App. 243, 249, 584 P.2d 467 (1978), the court sanctioned appellants who claimed paper money was not "real" in refusing to pay industrial insurance premiums, stating they

had "appealed from the Superior Court judgment solely for the purpose of delaying payment of legitimately incurred premiums.[45]

Here, the City's appeal was frivolous. It deliberately chose to ignore the critical events of February 29, 2009 and controlling decisions on duty in cases like *Livingston* and *Gorman*. It even goes so far as to advance a belated and spurious argument that its own recently enacted dangerous dog ordinance is unconstitutional. Its position on appeal is baseless.

Further, the City has delayed the resolution of this case by filing its baseless appeal. In addition to the above, it failed *for months* to perfect the record, delaying the filing of its brief.[46] A report of proceedings was not even necessary where the City only advanced a duty argument. As a municipality, the City is not subject to the financial imperatives that might deter a normal appellant from delaying its appeal. It does not need to post security to stay enforcement, RCW 4.96.050, so it does not incur a bond premium or a finance charge. As a "public agency," it pays only the

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[45] *See also, Watson v. Maier*, 64 Wn. App. 889, 901, 827 P.2d 311, *review denied,* 120 Wn.2d 1015 (1992) (appellate court sanctioned attorney who had been sanctioned by trial court under CR 11; court's sanction was for filing an appeal for purpose of delay, for "using the appellate process solely as a means to delay the inevitable."). *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 540, 762 P.2d 356 (1988), *review denied*, 112 Wn.2d 1006, *cert. denied,* 493 U.S. 873 (1989) (in determining if appeal is brought for purpose of delay, appellate court looks to whether issues raised are frivolous -- whether it presents no debatable issue and is so devoid of merit that there is no reasonable possibility of reversal).

[46] *See* Caldwell's motion to dismiss City's appeal.

exceedingly low tort judgment interest rate. RCW 4.56.110(3). It had every financial incentive to delay paying Kary Caldwell what she was due for Temper's vicious attack. This Court should not condone such behavior.

F. CONCLUSION

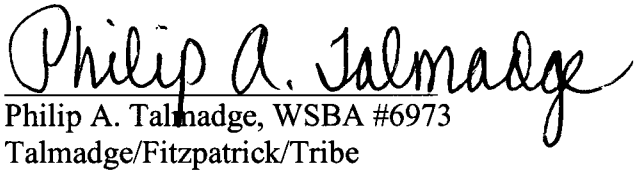
The trial court did not err in determining that the City owed a duty to Kary Caldwell for the vicious pit bull attack on her. Under its own dangerous dog ordinance and state law, the City owed Caldwell a duty of care to Caldwell to impound Temper, an animal the City designated a potentially dangerous dog and later a dangerous dog because of vicious acts, known to the City, in which Temper was involved. Had the City impounded Temper, he never would have attacked Caldwell.

The City's appeal is taken solely to delay the inevitable and is baseless under RAP 18.9(a).

This Court should affirm the judgment on the jury's verdict. Costs on appeal, including reasonable attorney fees, should be awarded to appellant Caldwell.

DATED this 22nd day of April, 2015.

Respectfully submitted,



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APPENDIX

RCW 16.08.080:

(1) Any city or county that has a notification and appeal procedure with regard to determining a dog within its jurisdiction to be dangerous may continue to utilize or amend its procedure. A city or county animal control authority that does not have a notification and appeal procedure in place as of June 13, 2002, and seeks to declare a dog within its jurisdiction, as defined in subsection (7) of this section, to be dangerous must serve notice upon the dog owner in person or by regular and certified mail, return receipt requested.

(2) The notice must state: The statutory basis for the proposed action; the reasons the authority considers the animal dangerous; a statement that the dog is subject to registration and controls required by this chapter, including a recitation of the controls in subsection (6) of this section; and an explanation of the owner's rights and of the proper procedure for appealing a decision finding the dog dangerous.

(3) Prior to the authority issuing its final determination, the authority shall notify the owner in writing that he or she is entitled to an opportunity to meet with the authority, at which meeting the owner may give, orally or in writing, any reasons or information as to why the dog should not be declared dangerous. The notice shall state the date, time, and location of the meeting, which must occur prior to expiration of fifteen calendar days following delivery of the notice. The owner may propose an alternative meeting date and time, but such meeting must occur within the fifteen-day time period set forth in this section. After such meeting, the authority must issue its final determination, in the form of a written order, within fifteen calendar days. In the event the authority declares a dog to be dangerous, the order shall include a recital of the authority for the action, a brief concise statement of the facts that support the determination, and the signature of the person who made the determination. The order shall be sent by regular and certified mail, return receipt requested, or delivered in person to the owner at the owner's last address known to the authority.

(4) If the local jurisdiction has provided for an administrative appeal of the final determination, the owner must follow the appeal procedure set forth by that jurisdiction. If the local jurisdiction has not provided for an administrative appeal, the owner may appeal a municipal authority's final determination that the dog is dangerous to the municipal court, and may appeal a county animal control authority's or county sheriff's final

determination that the dog is dangerous to the district court. The owner must make such appeal within twenty days of receiving the final determination. While the appeal is pending, the authority may order that the dog be confined or controlled in compliance with RCW 16.08.090. If the dog is determined to be dangerous, the owner must pay all costs of confinement and control.

(5) It is unlawful for an owner to have a dangerous dog in the state without a certificate of registration issued under this section. This section and RCW 16.08.090 and 16.08.100 shall not apply to police dogs as defined in RCW 4.24.410.

(6) Unless a city or county has a more restrictive code requirement, the animal control authority of the city or county in which an owner has a dangerous dog shall issue a certificate of registration to the owner of such animal if the owner presents to the animal control unit sufficient evidence of:

(a) A proper enclosure to confine a dangerous dog and the posting of the premises with a clearly visible warning sign that there is a dangerous dog on the property. In addition, the owner shall conspicuously display a sign with a warning symbol that informs children of the presence of a dangerous dog;

(b) A surety bond issued by a surety insurer qualified under chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least two hundred fifty thousand dollars, payable to any person injured by the dangerous dog; or

(c) A policy of liability insurance, such as homeowner's insurance, issued by an insurer qualified under Title 48 RCW in the amount of at least two hundred fifty thousand dollars, insuring the owner for any personal injuries inflicted by the dangerous dog.

(7)(a)(i) If an owner has the dangerous dog in an incorporated area that is serviced by both a city and a county animal control authority, the owner shall obtain a certificate of registration from the city authority;

(ii) If an owner has the dangerous dog in an incorporated or unincorporated area served only by a county animal control authority, the owner shall obtain a certificate of registration from the county authority;

(iii) If an owner has the dangerous dog in an incorporated or unincorporated area that is not served by an animal control authority, the owner shall obtain a certificate of registration from the office of the local sheriff.

(b) This subsection does not apply if a city or county does not allow dangerous dogs within its jurisdiction.

(8) Cities and counties may charge an annual fee, in addition to regular dog licensing fees, to register dangerous dogs.

(9) Nothing in this section limits a local authority in placing additional restrictions upon owners of dangerous dogs. This section does not require a local authority to allow a dangerous dog within its jurisdiction.

RCW 16.08.090:

(1) It is unlawful for an owner of a dangerous dog to permit the dog to be outside the proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and under physical restraint of a responsible person. The muzzle shall be made in a manner that will not cause injury to the dog or interfere with its vision or respiration but shall prevent it from biting any person or animal.

(2) Potentially dangerous dogs shall be regulated only by local, municipal, and county ordinances. Nothing in this section limits restrictions local jurisdictions may place on owners of potentially dangerous dogs.

(3) Dogs shall not be declared dangerous if the threat, injury, or damage was sustained by a person who, at the time, was committing a willful trespass or other tort upon the premises occupied by the owner of the dog, or was tormenting, abusing, or assaulting the dog or has, in the past, been observed or reported to have tormented, abused, or assaulted the dog or was committing or attempting to commit a crime.

RCW 16.08.100:

(1) Any dangerous dog shall be immediately confiscated by an animal control authority if the: (a) Dog is not validly registered under RCW 16.08.080; (b) owner does not secure the liability insurance coverage required under RCW 16.08.080; (c) dog is not maintained in the proper enclosure; or (d) dog is outside of the dwelling of the owner, or outside of the proper enclosure and not under physical restraint of the responsible person. The owner must pay the costs of confinement and control. The animal control authority must serve notice upon the dog owner in person or by regular and certified mail, return receipt requested, specifying the reason for the confiscation of the dangerous dog, that the owner is responsible for payment of the costs of confinement and control, and that the dog will be destroyed in an expeditious and humane manner if the deficiencies for which the dog was confiscated are not corrected within twenty days. The animal control authority shall destroy the confiscated dangerous dog in an expeditious and humane manner if any deficiencies required by this subsection are not corrected within twenty days of notification. In addition, the owner shall be guilty of a gross misdemeanor punishable in accordance with RCW 9A.20.021.

(2) If a dangerous dog of an owner with a prior conviction under this chapter attacks or bites a person or another domestic animal, the dog's owner is guilty of a class C felony, punishable in accordance with RCW 9A.20.021. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that he or she was in compliance with the requirements for ownership of a dangerous dog pursuant to this chapter and the person or domestic animal attacked or bitten by the defendant's dog trespassed on the defendant's real or personal property or provoked the defendant's dog without justification or excuse. In addition, the dangerous dog shall be immediately confiscated by an animal control authority, placed in quarantine for the proper length of time, and thereafter destroyed in an expeditious and humane manner.

(3) The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether or not the dog has previously been declared potentially dangerous or dangerous, shall, upon conviction, be guilty of a class C felony punishable in accordance with RCW 9A.20.021. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the human severely injured or killed by the defendant's dog: (a) Trespassed on the defendant's real or personal

property which was enclosed by fencing suitable to prevent the entry of young children and designed to prevent the dog from escaping and marked with clearly visible signs warning people, including children, not to trespass and to beware of dog; or (b) provoked the defendant's dog without justification or excuse on the defendant's real or personal property which was enclosed by fencing suitable to prevent the entry of young children and designed to prevent the dog from escaping and marked with clearly visible signs warning people, including children, not to trespass and to beware of dog. In such a prosecution, the state has the burden of showing that the owner of the dog either knew or should have known that the dog was potentially dangerous as defined in this chapter. The state may not meet its burden of proof that the owner should have known the dog was potentially dangerous solely by showing the dog to be a particular breed or breeds. In addition, the dog shall be immediately confiscated by an animal control authority, quarantined, and upon conviction of the owner destroyed in an expeditious and humane manner.

(4) Any person entering a dog in a dog fight is guilty of a class C felony punishable in accordance with RCW 9A.20.021.

HMC 3.40.040(12):

> (12) "Potentially dangerous dog" means a dog that without provocation:
>
> > (a) Inflicts bites on a human or a domestic animal, either on public or private property;
> >
> > (b) Chases or approaches a person upon the streets, sidewalks, or public ground in a menacing fashion or apparent attitude of attack; or
> >
> > (c) Causes injury or otherwise threatens the safety of humans or domestic animals.

HMC 3.40.080:

3.40.080 Dangerous and potentially dangerous dogs.
(1) The chief of police, the deputy chief of police, or the animal control officer shall have the authority to declare a dog to be a dangerous dog upon receiving a report and making a determination by a preponderance of the evidence that a dog:

> (a) Has inflicted severe injury on a person without provocation on public or private property, unless it can be shown by a preponderance of the evidence that the injury was sustained by a person who, at the time, was committing a willful trespass or other tort upon the premises occupied by the owner of the dog, was tormenting, abusing, or assaulting the dog, in the past has been observed or reported to have tormented, abused, or assaulted the dog, or was committing or attempting to commit a crime; or
> (b) Has killed a domestic animal without provocation while off the owner's property; or
> (c) Has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of persons or domestic animals.

(2) The chief of police, the deputy chief of police, or the animal control officer shall have the authority to declare a dog to be potentially dangerous upon receiving a report and making a determination by a preponderance of the evidence that a dog:

> (a) Has inflicted bites on a human or a domestic animal, either on public or private property;
> (b) Has chased or approached a person upon the streets, sidewalks, or public ground in a menacing fashion or apparent attitude of attack; or
> (c) Has caused injury to or otherwise threatened the safety of humans or domestic animals.

(3) A declaration that a dog is potentially dangerous puts the owner on notice that the dog has exhibited behavior described in subsection (2)(a), (b), or (c) of this section, but does not impose greater restrictions upon the dog or the owner, and therefore the declaration that a dog is potentially dangerous is final and may not be appealed. A declaration that a dog is potentially dangerous shall be served upon the owner or person in control

of the dog by mail, by posting upon the premises where the dog resides, or by personal service upon the owner or person in control of the dog.

(4) A declaration that a dog is dangerous shall be served upon the owner or person in control of the dog by mail, by posting upon premises where the dog resides, or by personal service upon the owner or person in control of the dog. A declaration that a dog is dangerous shall be final unless appealed by the owner or person in control of the dog within ten days of service. A notice of appeal form shall be attached to the dangerous dog declaration, and shall be completed and filed with the Hoquiam municipal court. The Hoquiam municipal court shall schedule and conduct a hearing within thirty days of receipt of the notice of appeal unless the dog has been impounded by the city, in which case the hearing shall be scheduled and conducted within ten days of receipt of the notice of appeal. At the hearing, the court may consider written statements, reports of the animal control officer, and police reports as well as the testimony of witnesses in determining whether the dog was properly declared to be a dangerous dog. The court will affirm the dangerous dog declaration if it finds by a preponderance of the evidence that the dog has exhibited behavior described in subsection (1)(a), (b), or (c) of this section.

(5) The following restrictions shall apply to a dog that has been declared dangerous:

(a) The owner shall provide and maintain a proper enclosure for the dangerous dog, as defined in HMC 3.40.040(13); and
(b) The owner shall post his or her premises with a clearly visible warning sign that states that there is a "Dangerous Dog" on the property. In addition, the owner shall conspicuously display a sign with a warning symbol approved by the animal control officer that informs children of the presence of a dangerous dog; and
(c) The owner shall maintain a surety bond or liability insurance policy, as defined by RCW Title 48, in an amount of two hundred fifty thousand dollars payable to any person injured by the dangerous dog; and
(d) The owner of the dangerous dog shall obtain a dangerous dog license from the city under HMC 3.40.050; and
(e) The owner shall not permit the dangerous dog to be outside a proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and is under physical restraint of a responsible person. The muzzle shall be made in a manner that will

not cause injury to the dog or interfere with its vision or respiration, but shall prevent it from biting any person or animal.

(6) A dangerous dog shall be immediately impounded by a police officer or an animal control officer if the owner of the dangerous dog fails to comply with any of the restrictions set forth in subsection (5)(a), (b), (c), (d), or (e) of this section.

(7) The provisions of this section shall not apply to any police canine used by a law enforcement agency.

(8) A violation of this section is a misdemeanor and subject to punishment as provided in HMC 3.40.190. (Ord. 09-04 § 1, 2009; Ord. 95-11 § 1, 1995; Ord. 91-17 § 5, 1991).

HMC 3.40.150:

(1) Upon seizing and impounding an animal, if the identity of the owner is known or can be readily determined by the animal control officer, the animal control officer shall make reasonable attempts to notify the owner by note, telephone, or mail that the animal has been impounded and, if subject to redemption, may be redeemed as provided.

(2) Unless specific provisions of this chapter require impounding for a longer period of time, an impounded animal may be redeemed by the owner or an authorized representative of the owner from the animal control officer upon proof that the following conditions have been met:

(a) On the first impoundment of an animal, an impounding fee of twenty dollars shall be paid, and a boarding fee of six dollars for each calendar day or portion of a day that the animal has been confined. On subsequent impoundment of the same animal within a one-year period, the impounding fee is forty dollars;

(b) If the animal has no valid license tag and a license is required by the provisions of this chapter, the owner shall obtain a license tag or duplicate for the current year.

(3) Notwithstanding subsection (2) of this section, no animal impounded under this chapter as a dangerous dog may be released or redeemed until the municipal court holds a hearing to determine whether the animal should be released. Notice of the hearing shall be given to the owner by one of the methods specific in subsection (1) of this section at least twenty-four hours before the hearing. If the judge determines that the animal has or exhibits vicious or dangerous propensities and would, if released, constitute a threat to the welfare of the residents of the city, the judge may direct the governmental agency having jurisdiction over the animal to destroy or otherwise satisfactorily dispose of the animal.

(4) Any dog which has bitten a person may be immediately impounded by the city pursuant to HMC 3.40.130. The provisions of this section shall not apply to any police canine used by a law enforcement agency.

(5) Whenever a dog has previously been declared dangerous or has bitten a person and is subject to impoundment pursuant to HMC 3.40.080(6) or 3.40.130, the animal control officer or a police officer has the authority to enter private or public property to impound the dog. If the owner or person in control of the dog will not cooperate with the city in effecting the impoundment or allow access into the premises where the dog resides, the city may seek a court order authorizing the city to enter the premises to impound the dog. The court shall issue a court order based upon a showing of probable cause that the owner of the dog has violated HMC 3.40.080(6), or has bitten a person. Ord. 09-04 § 2, 2009; Ord. 06-20 § 2, 2006; Ord. 91-17 § 12, 1991.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KARY L. CALDWELL,

Plaintiff,

vs.

GRAYS HARBOR COUNTY, a governmental entity; CITY OF HOQUIAM, a governmental entity; JENNIFER M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; SHAWN M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; JAMES THOMPSON and JANE DOE THOMPSON, individually and the marital community composed thereof,

Defendants.

NO. 12-2-23481-7 KNT

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

~~[proposed]~~

THIS MATTER having come on regularly for hearing pursuant to CR 56 on Plaintiff's Motion for Partial Summary Judgment, and the Court having heard the argument of counsel and considered the following:

1. Plaintiff's Motion for Partial Summary Judgment;

2. Declaration of Gregory S. Colburn and exhibits thereto;

3. Def. City's Motion for Summary Judgment

4. Declaration of Robert Hill

5. Declaration of Bradford Borselli with exhibits

(CLD)

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6. Declaration of Sgt. Dave Morris with exhibits
7. Declaration of Michael Tardiff with exhibits
8. Defendant City of Hoquiam's Response to Plaintiff's Motion for Partial Summary Judgment;
9. Defendant City of Hoquiam's Response to Plaintiff's Motion for Partial Summary Judgment;
10. Declaration of Mike Folkers with exhibits
11. Plaintiff's Reply;
12. Declaration of Christopher M. Davis with exhibits;
13. Plaintiff's Sur-Reply to City's Motion;
14. Supplemental Declaration of Gregory S. Colburn
15. Def. City's Reply with Appendix; and,
16. Plaintiff's Sur Reply with Appendix
~~16.~~ The files and records herein;
17. Supp. Decl. of Greg Colburn

and the Court being otherwise fully advised in the premises, the Court finds that there is no genuine issue of material fact that the City of Hoquiam owed the plaintiff, Kary Caldwell, a duty of care and that the City of Hoquiam's failure to confiscate and impound the dog, Tempur, constitutes a breach of said duty of care.

NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is hereby GRANTED, in part, denied in part. *

DONE IN OPEN COURT on this 6th day of September, 2013.

JUDGE LEROY MCCULLOUGH

* The City had a duty to impound Tempur, the dangerous dog pursuant to HMC 3.40.080(G) on or after Aug. 11 2009. The issue of breach shall be decided by the jury.
* The City also had a duty to protect it under State law.

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Presented by:

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9/10/2013

By: Christopher M. Davis, WSBA #23234
By: Gregory Colburn, WSBA #41236
Attorneys for Plaintiff

Approved as to form, notice of presentation waived:

FREIDMUND JACKSON TARDIF & BENEDICT GARRATT, PLLC

By: Michael E. Tardif, WSBA No. 5833
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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Brief of Respondent Caldwell in Court of Appeals Cause No. 71947-5-I to the following parties:

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Michael E. Tardif
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Original and copy delivered by legal messenger to:

Court of Appeals, Division I
Clerk's Office
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: April 22nd, 2015 at Seattle, Washington.

Matt J. Albers

Matt J. Albers, Legal Assistant
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