

NO. 656791

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ONA DEANE-GORDLY AND TYRONE GORDLY

Appellants,

v.

AMERICAN MANAGEMENT SERVICES NORTHWEST LLC,
AND GFS MAPLE GLEN LLC,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR SNOHOMISH
COUNTY

THE HONORABLE ERIC Z. LUCAS

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE.....	3
A. MRS. GORDLY WAS ATTACKED WHILE VISITING MAPLE GLEN.	3
B. RESPONDENTS PERMITTED MS. WILLETT TO KEEP PIT BULLS ON SUFFERANCE.....	6
C. RESPONDENTS GAVE INCOMPLETE DISCOVERY RESPONSES.....	8
D. THE SUPERIOR COURT DENIED APPELLANTS' CR 56(F) REQUEST AND GRANTED SUMMARY JUDGMENT TO RESPONDENTS.....	9
IV. ARGUMENT	10
A. SUMMARY JUDGMENT IS NOT AFFIRMED WHERE GENUINE ISSUES OF MATERIAL FACT REMAIN.....	10
B. RESPONDENTS OWED MRS. GORDLY A DUTY TO KEEP THE COMMON AREAS SAFE.	11
1.Mrs. Gordly Was Respondents' Invitee.....	13
2.Respondents Owed Mrs. Gordly An Affirmative Duty To Seek Out And Prevent Hazards On The Walkway Caused By Or Related To Other Tenants.....	14
3.Respondents' Duty Extends To Harm Caused By Another Tenant's Dog.....	15
C. MATERIAL ISSUES OF FACT REGARDING RESPONDENTS' BREACH OF THEIR DUTY PRECLUDE SUMMARY JUDGMENT ON NEGLIGENCE.	18

1.Respondents Should Have Foreseen And Prevented The Attack.....	18
2.The ‘One-Bite’ Rule Does Not Apply In Negligence.....	20
D. <i>FROBIG</i> DOES NOT APPLY TO ANOTHER TENANT’S GUEST’S INJURIES INCURRED ON THE COMMON AREAS.	22
E. <i>FROBIG</i> SHOULD NOT BE EXTENDED.....	27
F. ALTERNATIVELY, RESPONDENTS ARE STRICTLY LIABLE AS “HARBORERS” WITH RESPECT TO THE COMMON AREAS.	32
G. THE GORDLYS SHOULD BE ALLOWED TO COMPLETE DISCOVERY.....	33

TABLE OF AUTHORITIES

	Page
Washington Cases	
<i>Atherton Condo. Ass’n v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	10
<i>City of Seattle v. Davis</i> , 32 Wn. App. 379, 647 P.2d 536 (1982)	23
<i>City of Seattle v. McCready</i> , 124 Wn.2d 300, 877 P.2d 686 (1994).....	13
<i>City of Seattle v. Rice</i> , 93 Wn.2d 728, 612 P.2d 792 (1980)	23
<i>Clemmons v. Fidler</i> , 58 Wn. App. 32, 791 P.2d 257 (1990)	25, 27
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	11, 32
<i>Coleman v. Hoffman</i> , 115 Wn. App. 853, 64 P.3d 65 (2003).....	24
<i>Curtis v. Lein</i> , 150 Wn. App. 96, 206 P.3d 1264 (2009).....	14
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 914 P.2d 728 (1996).....	14, 15, 19
<i>Faulkner v. Racquetwood Village Condo. Ass’n</i> , 106 Wn. App. 483, 23 P.3d 1135 (2001).....	17
<i>Firth v. Lu</i> , 146 Wn.2d 608, 49 P.3d 117 (2002).....	10
<i>Frobig v. Gordon</i> , 124 Wn.2d 732, 881 P.2d 226 (1994).....	passim
<i>Geise v. Lee</i> , 84 Wn.2d 866, 529 P.2d 1054 (1975)	15
<i>Griffin v. West RS, Inc.</i> , 97 Wn. App. 557, 568, 984 P.2d 1070 (1999), <i>rev’d on other grounds</i> , 143 Wn.2d 81, 90, 18 P.3d 558 (2001)..	16
<i>Harris v. Turner</i> , 1 Wn. App. 1023, 466 P.2d 202 (1970)	25, 31
<i>In re Estate of Sherwood</i> , 122 Wn. 648, 211 P. 734 (1922)	24
<i>Johnston v. Ohls</i> , 76 Wn.2d 398, 457 P.2d 194 (1969).....	20
<i>Markwood v. McBroom</i> , 110 Wash. 208, 188 P. 521 (1920)	25, 31

<i>Martindale Clothing Co. v. Spokane & Eastern Trust Co.</i> , 79 Wash. 643, 140 P. 909 (1914).....	17
<i>Matter of Estate of Burns</i> , 131 Wn.2d 104, 113, 928 P.2d 1094 (1997) ..	23
<i>McCutcheon v. United Homes Corp.</i> , 79 Wn.2d 443, 486 P.2d 1093 (1971).....	15, 28
<i>McLeod v. Grant County Sch. Dist. No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	18
<i>Mucsi v. Graoch Assocs. Ltd. P'ship No. 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001).....	15
<i>Nivens v. 7-11 Hoagy's Corner</i> , 133 Wn.2d 192, 200, 943 P.2d 286 (1997)	13, 16, 17
<i>Owen v. Burlington No. & Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).....	11, 18
<i>Peterson v. Hagan</i> , 56 Wn.2d 48, 351 P.2d 127 (1960).....	23
<i>Pruitt v. Savage</i> , 128 Wn. App. 327, 115 P.3d 100 (2005)	35
<i>Seeberger v. Burlington Northern R. Co.</i> , 138 Wn.2d 815, 982 P.2d 1149 (1999).....	18
<i>Shafer v. Beyers</i> , 26 Wn. App. 442, 613 P.2d 554 (1980).....	25
<i>Sjogren v. Props. of Pac. Nw., LLC</i> , 118 Wn. App. 144, 75 P.3d 592 (2003).....	13, 14
<i>State ex rel. Wittler v. Yelle</i> , 65 Wn.2d 660, 399 P.2d 319 (1965).....	24
<i>Tellevik v. Real Property Known As 31641 West Rutherford Street</i> , 120 Wn.2d 68, 91, 838 P.2d 111 (1992).....	11, 32, 33
<i>Turgren v King County</i> , 104 Wn. 2d 293, 312, 705 P.2d 258 (1985).....	10
<i>Williamson v. Allied Group, Inc.</i> , 117 Wn. App. 451, 72 P.3d 230 (2003)	12
<i>Yong Tao v. Heng Bin Li</i> , 140 Wn. App. 825, 166 P.3d 1263, (2007).....	18

Non-Washington Cases

Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (1986).....30

Baker v. Pennoak Props., Ltd., 874 S.W.2d 274 (Tex. Ct. App. 1994).... 30

Castillo v. County of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988)..... 29

Decker v. Gammon, 44 Me. 322 (1857).....26

Fouts ex rel. Jensen v. Mason, 592 N.W.2d 33 (Iowa 1999).....29

Gentle v. Pine Valley Apartments, 631 So.2d 928 (Ala. 1994)29

Giacalone v. Housing Auth. of Town of Wallingford, 122 Conn. App. 120,
--- A.2d ---, 2010 WL 2365559 (Conn. Ct. App. 2010) 29

Linebaugh v. Hyndman, 213 N.J. Super. 117, 516 A.2d 638 (N.J. Super.
Ct. App. Div. 1986)..... 31

Matthews v. Amberwood, 351 Md. 544, 719 A.2d 119 (1998)..... 30, 36

McClain v. Lewiston Interstate Fair & Racing Ass’n, 17 Idaho 63, 104
Pac. 1015 (1909) 26

Park v. Hoffard, 315 Or. 624, 847 P.2d 852 (1993)..... 29

Ramirez v. M.L. Management Co., Inc., 920 So.2d 36 (Fla. Ct. App. 2006)
..... 29

Uccello v. Laudenslayer, 44 Cal. App.3d 504, 118 Cal. Rptr. 741 (1975)
..... 25

Wright v. Schum, 105 Nev. 611, 781 P.2d 1142 (1989)36

Statutes, Ordinances and Rules

RCW 16.08.04020

RCW 59.18.060 12, 24

Yakima City Code 6.18.010-6.18.02621

CR 56 32

Other Sources

Centers for Disease Control and Prevention, *Dog Bites: Fact Sheet*, online
at <http://www.cdc.gov/HomeandRecreationalSafety>.....28

Lori Tobias, *Astoria-area mauling death shows how instincts can change
dogs from friendly to ferocious*, *The Oregonian*, March 3, 2010,
online at www.oregonlive.com/news 21

Restatement (Second) of Property: Landlord & Tenant § 17.3 13

Restatement (Second) of Torts § 343 (1965)..... 18

Restatement (Second) of Torts § 344 (1965)..... 17

Restatement (Second) of Torts § 383 (1965)..... 12

3A Wash. Prac., Rules Practice CR 30 (5th ed.) 34

WPI 130.02 Duty of Landlord—Common Areas 12

I. INTRODUCTION

The question before this Court is straightforward: can a residential landlord ever be liable when one tenant's dog bites another tenant or his guest on the landlord's reserved common areas? Or, as Respondents argue, are landlords uniquely free to ignore this particular danger even though they must keep the common areas safe from all other reasonably foreseeable threats to life and limb? To put it another way, can it possibly be Washington law that a tenant can sue her landlord if he ignores an attack by another tenant, but not if he ignores attacks by another tenant's dog? Because that is not the law, summary judgment was not justified.

Appellant Ona Deane-Gordly was injured and nearly killed due to the negligence of Respondents GFS Maple Glen LLC ("Maple Glen") and American Management Services Northwest LLC ("AMSN") at the Maple Glen Apartments, an apartment complex owned by Maple Glen and managed by AMSN. Mrs. Gordly, Maple Glen's invitee, was peacefully walking on the common area premises controlled by Maple Glen and AMSN, when she was attacked by one of Maple Glen's tenants' dogs. The dog broke her teeth and her ankle, scalped her, and ripped completely through her arms, and stopped only when shot.

There is no dispute that the dog had unhindered access to the common areas – and to Mrs. Gordly – because the railing bars on Maple

Glen's apartment patio were too far apart. The large dog, a Rottweiler-Pit Bull mix, dove right through the railing to attack Mrs. Gordly.

There is good evidence that AMSN knew its tenant, Defendant Joy Willett, kept dangerous dogs. Because Ms. Willett was too ill to train or control her dog, it was effectively uncontrolled as well as loose.

Yet even though Mrs. Gordly was injured on Respondents' property because of their negligence, the Superior Court of Snohomish County erroneously entered summary judgment for Maple Glen and AMSN, on the theory that only a dog's owner can be liable for dog bite injuries. The Superior Court wrongly extended a rule that limits lessor liability for torts **on the leased premises**, to torts that take place on residential common areas controlled by the landlord. The Superior Court did not even allow Mrs. Gordly to complete discovery as to whether Respondents had prior knowledge of the dog's viciousness. The decision of the Superior Court should be reversed, and this case should be remanded for further discovery and trial.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by awarding summary judgment to Respondents on Mrs. Gordly's negligence and premises liability claims, where she was injured by their tenant's dog due to their negligence, while she was lawfully on their premises.

2. The Superior Court erred to the extent that it implicitly held that as a matter of law, a landlord can never under any circumstances be liable in negligence for injuries caused by a tenant's dog to another tenant's guest, despite governing Washington precedent establishing a landlord's duty to maintain the common areas in a safe condition.
3. The Superior Court erred by denying Mrs. Gordly's request under CR 56(f) for time to complete written discovery and depositions at least as to:
 - a. The reasons for AMSN's refusal to enter Ms. Willett's apartment while her Pit Bull dog was present;
 - b. AMSN employees' actions during the attack on Mrs. Gordly; and
 - c. Respondents' prior knowledge of the risk to their invitees.

III. STATEMENT OF THE CASE

A. Mrs. Willett Was Attacked While Visiting Maple Glen.

On March 17, 2006, Appellant Ona Deane-Gordly arrived at the Maple Glen Apartments, a large residential complex in Mountlake Terrace, Washington owned by Maple Glen and managed by AMSN. CP 148. At the time, Mrs. Gordly, age 61, was an interviewer for a company called Headway, which gathers research data for corporate and

government studies. CP 69 ¶ 2. Mrs. Gordly was there to conduct follow up research interviews with two couples who were tenants at the Maple Glen Apartments. *Id.* ¶ 3.

No warning signs regarding dogs were posted at the complex. CP 70 ¶ 15. While her husband, Plaintiff Tyrone Gordly, waited in the car, Mrs. Gordly went to the first couple's apartment, and then set out towards the second couple's apartment on a walkway built and maintained by Respondents for the use of residents and visitors. CP 68 ¶¶ 2-4. She never arrived.

On her way, Mrs. Gordly saw Defendant Joy Willett, whom she did not know, standing on a second-story apartment patio with a large, unleashed and uncollared dog that was barking loudly. CP 68 ¶¶ 4-5. Mrs. Gordly asked Ms. Willett for directions but could not hear her response clearly over the barking, so she continued along the walkway. *Id.* ¶ 5.

At that point, as she later described it, "a boulder fell out of the sky" onto her head. CP 112:20-21. Ms. Willett's dog, Cody, a 1½ year-old, unneutered, 70-80 pound Pit Bull-Rottweiler mix, had shimmied through the patio railing and leapt on top of her. CP 69 ¶ 6; CP 120-21.

The impact knocked Mrs. Gordly off her feet and drove her face onto one of the Maple Glen Apartment staircases, slicing her face open

and cracking off teeth down to the gum. CP 112:22-23. The dog then mauled Mrs. Gordly's head, neck, face, arms and legs. CP 69 ¶ 6.

Cody attacked her for 15 minutes. CP 69 ¶ 6. During that time, Mrs. Gordly sustained at least 30 separate bites. CP 70 ¶ 11. Pieces of her scalp flew several feet away. *Id.* Her arms were torn open so that daylight showed through them. *Id.* The dog also bit through her legs, her ankles and one wrist to the bone and cracked her ankle bone. *Id.*; CP 117:8-24.

Ms. Willett tried to call Cody off, but was too ill even to stand after reaching the walkway. CP 113:13-16. Cody bit her as well and then returned to worrying at Mrs. Gordly. CP 69 ¶ 7. Finally, a police officer arrived on the scene. *Id.* ¶ 9. He too was attacked by Cody. *Id.* After being shot at point-blank range by the officer, Cody ran off. *Id.* Ms. Willett eventually found him, leashed him and muzzled him. *Id.* ¶ 10. He was later euthanized. CP 82.

Mrs. Gordly, suffering severe blood loss and shock, was rushed to the Harborview Hospital Trauma Unit. CP 69 ¶ 11. She underwent several bouts of extensive reconstructive surgery and lengthy, painful physical rehabilitation. CP 70 ¶ 11. Pain and post-traumatic stress disorder has made it impossible for her to work ever since. *Id.* ¶ 71.

B. Respondents Permitted Ms. Willett To Keep Pit Bulls On Sufferance.

During pre-trial proceedings, additional facts came to light about the background to Cody's attack. Ms. Willett had been living at the Maple Glen Apartments on a month-to-month lease since at least June 2002. CP 126. Ms. Willett leased from Maple Glen through AMSN "the premises known as Apartment #G101," and was required by her lease, among other things, to refrain from keeping personal effects "in the halls, stairways, elevators, decks, patios or other public areas." CP 127 ¶ 20(3). The lease also provides that Ms. Willett may not keep pets without Respondents' written permission. *Id.* ¶ 20(1).¹ As Respondents later admitted, however, they routinely granted permission for tenants to keep "all breeds of dogs." CP 82. In a Pet Addendum, Respondents gave her permission to keep a dog (or dogs), for which privilege she had to pay a \$150 fee and a further \$350 supplementary deposit. CP 129 ¶¶ 1, 5. If AMSN determined, based on "the Manager's sole opinion and discretion," that her dog was disturbing other residents or causing property damage, Maple Glen reserved the right to require Ms. Willett to remove it permanently from the Maple Glen Apartments within ten days. *Id.* ¶ 4.

Maple Glen also required Ms. Willett to keep her dogs on a leash at all times "when outside the Apartment and inside the Apartment

¹ The lease refers to AMSN by its d/b/a name, Pinnacle Realty.

Community,” and never to leave the dogs on a patio or balcony while she was away. CP 129 ¶ 4. Ms. Willett had soon violated the terms of the Pet Addendum: a month after she moved in, AMSN reprimanded her for failing to pick up after her dog and leaving it off leash in the common areas. CP 131. A few months later, in September 2002, AMSN sent Ms. Willett a note asking to schedule a repair visit since “we are unable to enter your apartment without you there because of the dog.”² CP 80. AMSN’s onsite manager stated that it was customary practice to record notices of any violations and any complaints in the tenant’s file, that Ms. Willett’s tenant file contains no further violation notices, and that to her knowledge, no employee had received a complaint about Ms. Willett’s dogs. CP 122-23 ¶¶ 3, 8, 9.

At the time of the attack, Ms. Willett kept at least two pit bull dogs in her apartment with Respondents’ permission: a six-year old spayed bitch, and the juvenile, unneutered Cody. CP 120-21. Ms. Willett denied that Cody ever bit another person, but admitted she owned a choke collar and a muzzle for him because he had already been “aggressive towards other people.” CP 120. In the year before the attack, while Cody was very young, Ms. Willett had been recovering from cancer. CP 120,

² These two incidents obviously did not involve Cody, who was not yet born, but they indicate Respondent’s knowledge of Ms. Willett’s unsafe dog handling.

123 ¶ 6. She admitted that because of this, she may not have trained Cody well enough. CP 120.

C. Respondents Gave Incomplete Discovery Responses.

In this action, Mrs. Gordly sued Ms. Willett in negligence, common law strict liability, and statutory strict liability. Mr. Gordly sued all the Defendants for tortious infliction of emotional distress. And Mrs. Gordly brought claims against Maple Glen and AMSN in common law strict liability and negligence.

The Gordlys served written discovery requests on Respondents the same month the action began, March 2009. CP 13, 17 ¶ 2. Despite repeated requests, Respondents did not even partially answer the Gordlys' interrogatories and requests for production until January 2010. CP 13, 15, 52. Their responses were facially incomplete: Respondents merely promised to state at some future date the origin of their standards and safety codes for keeping pets at the Maple Glen Apartments, violations of those standards and safety codes, the basis for contending that the attack could have been prevented or was caused by someone else, the names of people with discoverable information regarding the attack, and witness statements, and to produce in the future their accident investigation reports and other internal or contractor documents about the attack, and documents supporting their denials and defenses. CP 34-35, 38-41, 49-50.

They failed to clearly identify which witnesses had knowledge about the dog that attacked Mrs. Gordly, and failed to disclose whether they had documents regarding claims against AMSN arising from dog bites at other properties. CP 35-36, 50-51.

D. The Superior Court Denied Appellants' CR 56(f) Request And Granted Summary Judgment To Respondents.

The Gordlys expected to receive supplementary discovery responses from Respondents, and notified Respondents that they intended to take their depositions after the full responses arrived. CP 17, 18. Instead, in May 2009, Respondents moved for summary judgment on Mrs. Gordly's claims against them. They primarily argued that, supposedly, governing Washington law confines liability for dog-bite injuries to the dog's owner and under no circumstances creates liability for a landlord or property manager. CP 132-46. Therefore, they argued, further proceedings with or without discovery would be pointless. *Id.*

In opposing the motion, the Gordlys also asked the trial court, if it should find that there was insufficient evidence to support their claims, to grant a continuance for additional discovery, including the depositions they had postponed while waiting for Respondents' complete written discovery. CP 94-96. They specifically asked for the opportunity to explore, among other things: why AMSN refused to enter Ms. Willett's

apartment without her while her dog was there; what actions AMSN employees took during the attack on Mrs. Gordly; and Respondents' prior knowledge of the risk to their invitees posed by Ms. Willett's dogs under the circumstances. *Id.*

After briefing and a motion hearing, the Superior Court denied the Gordlys' CR 56(f) request and entered summary judgment for Maple Glen and AMSN on Mrs. Gordly's claims. CP 4-6. Mr. Gordly then by stipulation voluntarily dismissed his claims without prejudice to reinstating them after remand. CP 1-3. The Gordlys timely filed a notice of appeal to this Court.

IV. ARGUMENT

A. **Summary Judgment Is Not Affirmed Where Genuine Issues Of Material Fact Remain.**

This Court reviews a summary judgment *de novo*, making the same inquiry the trial court did: summary judgment should not be granted unless the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002). The burden of proof is on the Respondents as the moving party, and any doubt as to the existence of a genuine issue of material fact is resolved against summary judgment. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). All facts are considered in the light most

favorable to the Gordlys and all reasonable inferences are drawn in their favor. *Id.* Judgment should issue only if reasonable persons could reach but one conclusion from the evidence. *Turgren v King County*, 104 Wn. 2d 293, 312, 705 P.2d 258 (1985). In particular, “issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Owen v. Burlington No. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

If this Court reaches the Superior Court’s denial of the Gordlys’ CR 56(f) request for time to complete discovery, that denial is reviewed for abuse of discretion. *Cogle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). The standard is whether discretion was exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion. *Id.* In making this determination, this Court views all facts in the light most favorable to the Gordlys and draws all reasonable inferences in their favor. *Tellevik v. Real Prop. Known As 31641 West Rutherford St.*, 120 Wn.2d 68, 91, 838 P.2d 111 (1992).

B. Respondents Owed Mrs. Gordly A Duty To Keep The Common Areas Safe.

The Superior Court, in granting summary judgment on negligence, implicitly held either that Respondents owed no duty as a matter of law, or that there was no evidence they had breached their duty and caused Mrs.

Gordly's injury. Respondents take the position that regardless of their carelessness, they could not have been negligent because they had no duty to take any effort at all to protect Mrs. Gordly from their tenant's dog. This conclusion flies in the face of well-established principles of Washington landowner-tenant law.

Black letter Washington law reflected in the State's pattern jury instructions provides that a "landlord has a duty to use ordinary care to keep the [residential common areas] in a reasonably safe condition." WPI 130.02 Duty of Landlord—Common Areas. This principle of Washington State public policy was embraced by the Legislature in the Residential Landlord-Tenant Act, RCW 59.18.060(3): a residential landlord must "Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident." For these purposes, AMSN as Maple Glen's premises manager "is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land." *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 456, 72 P.3d 230 (2003) (quoting Restatement (Second) of Torts § 383 (1965)). For the reasons that follow, Respondents' duty extended to Mrs. Gordly, and to the danger she faced on their walkway that day in March 2006.

1. Mrs. Gordly Was Respondents' Invitee.

Mrs. Gordly went onto the Maple Glen Apartment complex to visit some of Respondents' tenants who had previously conducted business with her, for a routine, expected follow up interview. Because she was Respondents' tenants' guest, she was Respondents' invitee while on the common areas. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003). This special relationship was created because Respondents make their money by renting and managing the apartments, which are accessed through the common areas. *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 200, 943 P.2d 286 (1997) ("special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business") *and see City of Seattle v. McCready*, 124 Wn.2d 300, 306, 877 P.2d 686 (1994) ("In order to admit visitors to an apartment, the tenant must necessarily possess the authority to permit guests to pass through the common areas leading to that apartment.") Mrs. Gordly was "entitled to enter by the right of the tenant, who is entitled under the lease to use the part of the leased property within the control of the landlord not only for himself, but also for the purpose of receiving any persons whom he chooses to admit." Restatement (Second) of Property: Landlord & Tenant, § 17.3 com. g.

2. Respondents Owed Mrs. Gordly An Affirmative Duty To Seek Out And Prevent Hazards On The Walkway Caused By Or Related To Other Tenants.

While Mrs. Gordly was their invitee, Respondents owed her the “highest duty of care” to protect her from hazards on the common areas. *Curtis v. Lein*, 150 Wn. App. 96, 103, 206 P.3d 1264 (2009). For instance, where a tenant’s guest slipped and fell in a dark common staircase, Division 2 held it was error to enter summary judgment in negligence for the defendant landlord. *Sjogren*, 118 Wn. App. at 150 (reversing and remanding for trial).

Division 1 of this Court recently reaffirmed the sweeping extent of a residential landlord’s duty in *Curtis*, where a tenant’s girlfriend was injured on the landlord’s dock, to which the tenant had access. *Curtis*, 150 Wn. App. at 103. The landlord owed “an affirmative duty to invitees,” whether tenants or tenants’ guests, to “use ordinary care to keep the premises in a reasonably safe condition ” – not only by guarding against known hazards, but also by “exercis[ing] reasonable care to **discover** dangerous conditions.” *Id.* (emphasis added); and see *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 53, 914 P.2d 728 (1996) (tenant is “entitled to expect such care not only in the original construction of the premises...but also in inspection to discover their actual condition.”)

The Washington Supreme Court recognizes that in a modern multi-family dwelling complex like the Maple Glen Apartments, tenants are “almost wholly dependent upon the landlord” to reasonably inspect and secure the common areas, and are entitled to expect the landlord to do so. *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 447, 486 P.2d 1093 (1971) (reversing summary judgment for landlord where tenant was injured by defective common stairway). Washington has expressly adopted “[t]he general rule in the United States,” that a landlord must exercise reasonable care to keep safe all the “entrances and **walkways**” reserved for common use, as the Maple Glen Apartment walkway was. *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975) (emphasis added) (reversing Court of Appeal and remanding negligence claim for trial.)

3. Respondents’ Duty Extends To Harm Caused By Another Tenant’s Dog.

Despite Respondents’ attempt to carve out a unique dog-bite exception to the landlord’s duty of diligence and care, the Washington Supreme Court has consistently refused to exempt any particular type of hazards in the common areas. For instance, in *Degel*, 129 Wn.2d at 60, the Court reversed the Court of Appeals and remanded a negligence claim for trial, rejecting the landlord’s argument that it was not responsible for protecting tenants from falling into a naturally attractive body of water

abutting the property. Similarly, in *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684 (2001), the Court reversed the Court of Appeals and rejected the landlord's claim that it was not liable to protect its tenants from the patent and temporary risk posed by icy pavement.

The duty to protect invitees applies where the hazard is caused by a third party, even intentionally. For example, a business owner may be liable to his invitees if he fails to take reasonable precautions against muggers foreseeably lurking on the premises. *Nivens*, 133 Wn.2d at 202-03 (“We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.”) Notably, this principle applies even – or especially – where the danger to the plaintiff is posed by another tenant, such as Ms. Willett. In *Griffin v. West RS, Inc.*, 97 Wn. App. 557, 568, 984 P.2d 1070 (1999), *rev'd on other grounds*, 143 Wn.2d 81, 90, 18 P.3d 558 (2001), Division 1 held that it was error to grant summary judgment for the landlord of a residential complex who had failed to protect one tenant from repeated home invasion by another tenant. Although the Supreme Court reversed that decision because causation was lacking, Division 1 later expressly reaffirmed the key holding that the landlord's control of common areas

instills a duty to protect one tenant from another tenant on the common areas. *Faulkner v. Racquetwood Village Condo Ass'n*, 106 Wn. App. 483, 486-87, 23 P.3d 1135 (2001) (discussing *Griffin*, 97 Wn. App. at 568).

All the more so, a landlord may be liable where, as here, the danger merely emanated from another tenant or her apartment without the other tenant's intent. For instance, the Washington Supreme Court upheld a jury verdict against a landlord who failed to show a tenant the water cutoff switch, which led to another tenant getting flooded by water from the first tenant's apartment. *Martindale Clothing Co. v. Spokane & Eastern Trust Co.*, 79 Wash. 643, 140 P. 909 (1914). Indeed, Washington has expressly adopted the Restatement (Second) of Torts § 344 (1965), which specifies that a land owner's duty to safeguard invitees applies to the risk of "physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons **or animals**." *Nivens*, 133 Wn.2d at 203-204 (quoting Restatement) (emphasis added).

In short, Respondents had a duty of reasonable care to find out and protect Mrs. Gordly from physical hazards on their walkway caused by Ms. Willett's dog.

C. Material Issues Of Fact Regarding Respondents' Breach Of Their Duty Preclude Summary Judgment On Negligence.

1. Respondents Should Have Foreseen And Prevented The Attack.

Summary judgment on negligence is not proper where material issues of fact remain as to whether the defendant breached its duty. *Owen*, 153 Wn.2d at 788. In particular, the jury, not the court, must determine whether the plaintiff's injury was reasonably foreseeable, unless the circumstances of the injury are "so highly extraordinary or improbable" as to be "wholly beyond the range of expectability." *Seeberger v. Burlington Northern R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)); accord *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 833, 166 P.3d 1263 (2007).

The scope of a landlord's duty to its tenants is summarized in the Restatement (Second) of Torts § 343 (1965):

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, [the possessor]

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.³

Degel, 129 Wash.2d at 49-50 (quoting and adopting Restatement in landlord-tenant context). A jury could properly find that all of these conditions apply here:

(a) Respondents knew that tenants, including Ms. Willett, kept dogs. CP 82, 129. Respondents knew dogs should not run loose on the common areas, and expressly prohibited that conduct in their lease. CP 129. They knew dogs could “disturb” other people and cause property damage, so it may reasonably be inferred that they shared the common knowledge that pet dogs sometimes bite and even kill people. CP 129. They knew or could and should easily have learned that their patio railings posed no real barrier to large dogs – indeed, their lease also expressly prohibits leaving a dog alone on the patio. CP 69, 129. They knew Ms. Willett was careless, having been caught at least once leaving her dog off-leash in the common area. CP 131. They would not enter her home in her absence to perform repairs, “because of the dog” (of the same notorious breed and trained by the same owner). CP 80. They may even have known that Ms. Willett was too ill to properly train a puppy in 2005. CP 120, 123.

³ As shown above, in Washington law, a “condition on the land” includes risks posed by third parties or animals, and includes conditions that emanate from or lurk off of the common areas but pose a threat while the tenant or guest is on the common areas.

(b) A jury could properly find that the danger posed by tenants' dogs would not be obvious to another tenant or guest, who would see dogs behind a railing, and in some cases know about Respondents' pet policies, and expect these restraints to be effective. A jury could also reasonably doubt that Mrs. Gordly or other persons at risk could have effectively protected themselves – Mrs. Gordly did not know Cody was there and unleashed and uncollared until a few seconds before he attacked her, while she was moving away from him.

(c) Respondents posted no warning signs, kept no effective barriers, did little in response to pet policy violations, and allowed tenants to keep all breeds of dogs, and to keep them unleashed on the poorly-fenced patios.⁴ CP 69-70, 131, 82, 129. They even failed to stay informed of the size and breed of their tenants' dogs: they accepted Ms. Willett's Pet Addendum although she did not fill in the spaces for size and breed. CP 129.

These facts raise at least a genuine issue as to Respondents' breach of duty, which precludes summary judgment.

2. The 'One-Bite' Rule Does Not Apply In Negligence.

Respondents have suggested that they would be liable only if the Gordlys proved that Respondents actually knew Cody was particularly

⁴ Moreover, there is at least a material issue of fact as to whether the patio itself was part of the common areas, because Respondents' lease defines it as a "public area."

dangerous. But Washington has not adopted a ‘one-bite’ rule for negligence claims against non-owners, only for strict liability claims against a dog’s owners, keepers or harborers.⁵ See *Johnston v. Ohls*, 76 Wn.2d 398, 401, 457 P.2d 194 (1969) (common law claim for dog bite injury against owner does not sound in negligence). If the owner, keeper or harborer of the dog is to be strictly liable for its attacks, he must at least have had a specific reason to be watchful. *Id.* at 400.

Even as to dog owners, keepers and harborers, the status of this rule is in doubt. In RCW 16.08.040, the Legislature partially abrogated the rule by making dog owners strictly liable regardless of its dangerous propensities. Although the Legislature chose not to extend this rule to keepers, harborers, or other liable persons, this statute shows that the one-bite rule is at odds with public policy. The one-bite rule is a relic of the rural past when dogs ordinarily roamed free and owners were not expected to keep them under supervision or close control most of the time. In modern America, exemplified by the high-density Maple Glen Apartments, urban residents rightly expect all dogs – whether they have a history of biting people or not – to be kept secured so they cannot exercise their natural territorial instinct to attack passers-by. See, e.g., Lori Tobias, *Astoria-area mauling death shows how instincts can change dogs from*

⁵ Every dog, the old saying goes, gets one bite. The rule does not literally require a bite, however, merely demonstrable vicious propensities.

friendly to ferocious, The Oregonian, March 3, 2010, online at www.oregonlive.com/news.

A jury could find, moreover, that Respondents knew Cody was a Pit Bull dog, which are widely recognized as especially likely to attack humans. Various local governments including the City of Yakima therefore prohibit Pit Bulls altogether. Yakima City Code 6.18.010-6.18.026; *and see American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 215-16, 777 P.2d 1046 (1989) (upholding Pit Bull ban as legitimate public safety measure). The jury would be entitled to conclude that Respondents knew Cody posed a danger.

D. *Frobig* Does Not Apply To Another Tenant's Guest's Injuries Incurred On The Common Areas.

Respondents hang their hat on *dicta* that purportedly exempt landlords from liability for tenants' dogs' attacks. Respondents misread the opinions in question, applying them beyond their facts instead of harmonizing them with the common law principles set forth above.

In *Frobig v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994), a film producer leased a large property for the purpose of filming wild animals. *Frobig*, 124 Wn.2d at 733. A Bengal tiger that the lessee brought onto the leased premises savaged one of its employees, who sued both the lessee

and the lessor. *Id.* at 734. The *Frobigo* Court held that the tiger's owner, not the absentee lessor, was liable. *Frobigo*, 124 Wn.2d at 741.

In reaching this unsurprising conclusion, the Court opined, “[t]he rule in Washington is that the owner, keeper, or harbinger of a dangerous or vicious animal is liable, the landlord of the owner, keeper or harbinger is not.” *Frobigo*, 124 Wn.2d at 735. Respondents take this general statement out of context and apply it to themselves. This over-reading cannot be justified by the facts and reasoning of *Frobigo*.

As the Washington Supreme Court has repeatedly cautioned, “one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.” *Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960); *Matter of Estate of Burns*, 131 Wn.2d 104, 113, 928 P.2d 1094 (1997). For example, the Peterson Court declined to follow its oft-repeated dictum that the equal protection clause and the due process clause do not apply to legislation enacted under the police power. *Peterson*, 56 Wn.2d at 52-53 (declining to follow four prior opinions upholding other statutes). Likewise, in *Burns*, the Court refused to apply in the lien enforcement context, its broadly-stated holding that the state “may, if it so chooses, take to itself the whole of [estate] property ... without regard to the

[decendent's] wishes or direction.” *Burns*, 131 Wn.2d at 113 (quoting *In re Estate of Sherwood*, 122 Wn. 648, 654, 211 P. 734 (1922); and see *State ex rel. Wittler v. Yelle*, 65 Wn.2d 660, 670, 399 P.2d 319 (1965) (limiting broadly-stated definition of state debt to the facts). This Court too applies common sense to cabin apparently broad holdings of the Supreme Court – such as a holding that an ordinance was “void” and “it is our duty to strike it down.” *City of Seattle v. Rice*, 93 Wn.2d 728, 732, 612 P.2d 792 (1980), *dist'd by City of Seattle v. Davis*, 32 Wn. App. 379, 384, 647 P.2d 536 (1982) (ordinance was not entirely invalidated by *Rice*).

As this Court has recognized, *Frobig* is based on well-established common law doctrines that are confined to the leased premises and that do not apply to conditions in the common areas. *Coleman v. Hoffman*, 115 Wn. App. 853, 865-66, 64 P.3d 65 (2003) (distinguishing *Frobig*, landlord may be liable even for patent defects in the common areas). In *Frobig*, the lessee leased the entire premises – there **were** no common areas or other tenants. The lessee was the sole tenant, the animal's owner and also the victim's employer. These were all key factors in the *Frobig* Court's reasoning, which drew on (1) the common-law doctrine that a landlord “owes no greater duty to the invitees or guests of his tenant than he owes to the tenant himself,” (2) the common-law rule that a landlord is not liable for defects to the rented premises caused by the tenant, and (3) the

Residential Landlord Tenant Act, which exempts landlords from liability for defects to the rented premises caused by the tenant. *Frobig*, 124 Wn.2d at 735-36 (citing RCW 59.18.060).

Clearly, the lessor could not be liable to the lessee for injuries caused by the lessee's own animal, and therefore it was not liable to the lessee's invitee; just as clearly, the invitee was not injured on the lessor's property, because the lessor held merely a reversionary interest during the term of the lease. *Frobig*, 124 Wn.2d at 735-36. The Court wisely refused to create an entirely new field of landlord liability, for the tenant's torts against his own guests on the leased premises, merely because the lessor retained the right to terminate the lease. *Id.* at 38 (declining to follow *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741, 743 (1975)). But *Frobig* did not even consider whether a landlord would be liable for injury to a **different** tenant, on the landlord's **own** premises.

The same is true of the two intermediate appellate cases which *Frobig* chiefly followed. In *Clemmons v. Fidler*, 58 Wn. App. 32, 33-34 791 P.2d 257 (1990), just as in *Frobig*, the animal's victim was the owner/lessee's own guest, and the attack took place on the rented premises. In *Shafer v. Beyers*, 26 Wn. App. 442, 444, 613 P.2d 554 (1980), again, the whole premises were leased out, and the victim was

attacked on a public sidewalk, not on property reserved by the landlord.⁶ The Court of Appeals correctly held that the absentee lessor was not somehow vicariously liable for the lessee's torts. *Id.* at 447 (citing *Harris v. Turner*, 1 Wn. App. 1023, 1038, 466 P.2d 202 (1970)). None of these cases apply to the facts here.

Similarly, sweeping *dictum* in *Markwood v. McBroom*, 110 Wash. 208, 211-12, 188 P. 521 (1920) that only a dog's owner, keeper or harborer can be liable for dog bites, cannot apply here, because *Markwood* does not even consider landlord liability. In *Markwood*, the defendant was the receiver for a defunct corporation, and the dog had been kept on corporate property without the receiver's knowledge by a squatter, with the assistance of a watchman acting beyond his scope of duty, so there was no basis to hold the receiver liable. *Markwood*, 110 Wash. at 211. It should also be noted that *Markwood* gives no reason for its purported general rule, and erroneously cites it to *Decker v. Gammon*, 44 Me. 322 (1857), which does not address non-owner liability, and to *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 Pac. 1015

⁶ See *Frobig*, 124 Wn.2d at 736("[w]ith regard to conditions on the land that develop or are created after the property has been leased, the general rule is that a landlord is not responsible, either to persons injured on or off the land, for conditions which develop or are created by the tenant after possession has been transferred.") Presumably, this refers to facts like those in *Shafer*, and does not mean a landlord may allow one tenant to endanger other tenants (to whom he owes a special duty of care) by, for example, methamphetamine production or firearms practice in his apartment.

(1909), which held exactly the opposite, *see id.* at 1027, that a Washington State racetrack owner was liable in negligence for injuries inflicted by a customer's dog. *See Markwood*, 110 Wash. at 211. *Markwood* is best understood as holding merely that the special common law strict liability cause of action for dog bites is confined to owners, harborers and keepers, not that there are no other possible causes of action against other parties. Indeed, it is absurd on its face to suppose that there could never be a tort cause of action related to a dog bite against any other party – for example, if an AMSN employee were to deliberately set a tenant's dog on an intruder to protect AMSN's property, he and AMSN would doubtless be liable for assault. *Markwood*, like *Frobig*, must be read in the context of the facts and issues then before the court.

E. *Frobig* Should Not Be Extended.

Respondents ask this Court to dramatically extend *Frobig*. This Court should decline that invitation, for several reasons. Or, if this Court deems the scope of *Frobig* unclear, *Frobig* should be cabined for several reasons.

First, because the law should be consistent. Treating tenants' dogs the same as any other potential hazard simplifies landlords' responsibilities, makes commercial liability coverage more predictable, and fulfills the reasonable expectations of most tenants – who would

doubtless be surprised to learn that they could sue their landlord for ignoring another tenant's own attacks on them, but not for ignoring the tenant's dog's attacks.

Second, because there is no good reason to extend *Frobig*. In *Clemmons*, 58 Wn. App. at 38, this Court alluded to the "salutary effect of placing responsibility where it belongs," to explain why an absentee landlord is not liable for the tenant's conduct towards his own guests in his own home. Equally, responsibility should remain where it belongs – onsite residential landlords should not be given a free pass as to this particular risk to their other tenants and their guests on the property the landlords do control. Mrs. Gordly could not have lowered her risk on that walkway, but Respondents could have and should have.

As the Washington Supreme Court reasoned, the scope of landlord liability must be viewed in light of the realities of modern life. "We no longer live in an era of the occasional rental of rooms in a private home or over the corner grocery...a business which once had a minor impact upon the living habits of the citizenry has developed into a major commercial enterprise directly touching the lives of hundreds of thousands of people who depend upon it for shelter." *McCutcheon*, 79 Wn.2d at 449. The federal Centers for Disease Control and Prevention estimates that 800,000 Americans seek medical attention each year for dog bites; half of them are

children; and nearly half require emergency room treatment. Centers for Disease Control and Prevention, *Dog Bites: Fact Sheet*, online at <http://www.cdc.gov/HomeandRecreationalSafety/Dog-Bites/dogbite-factsheet.html>, last visited September 14, 2010. Generally, apartment complexes are intentionally designed with limited space and for dense population. It behooves residential landlords to manage their properties accordingly. This need not mean drastic measures such as banning all dogs from the premises, but merely taking the kind of reasonable, prudent precautions that most residential landlords already take as a matter of course.

Lastly, for all the reasons set forth above, liability for dog attacks on third-party tenants or their guests on the common areas, is the majority rule in those states that have addressed similar facts. The *Frobig* Court correctly recognized that few courts had extended landlord liability to the sort of facts before it. In contrast, few if any states have refused to hold landlords responsible for avoiding the sort of attack Mrs. Gordly suffered. Notable cases include:

- *Giacalone v. Housing Auth. of Town of Wallingford*, 122 Conn. App. 120, --- A.2d ---, 2010 WL 2365559 (Conn. Ct. App. 2010), reversing dismissal, landlord may be liable in negligence where one tenant's dog bit another tenant "at or near" dog owner's leased premises;

- *Ramirez v. M.L. Management Co., Inc.*, 920 So.2d 36, 36 (Fla. Ct. App. 2006), reversing summary judgment, landlord may be liable in negligence where one tenant's dog bit another tenant in adjacent park that was advertised as amenity for tenants' use);
- *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33 (Iowa 1999): reversing summary judgment, where tenant's sublessee was attacked by other tenant's dog in common area, landlord was liable in negligence;
- *Gentle v. Pine Valley Apartments*, 631 So.2d 928, 932-33 (Ala. 1994), reversing summary judgment, apartment complex landlord and manager could be liable in negligence where tenant's dog attacked another tenant in the common area;
- *Park v. Hoffard*, 315 Or. 624, 847 P.2d 852, 855-56 (1993), reversing summary judgment, landlord can be liable in negligence where he knew of dog's dangerous propensities and had power to terminate lease at will;
- *Castillo v County of Santa Fe*, 107 N.M. 204, 207, 755 P.2d 48 (1988): reversing dismissal, landlord of housing project can be liable in negligence where one tenant was bitten by another tenant's dog, because "dogs roaming loose upon the common grounds of a government-operated residential complex could represent an unsafe condition.";

- *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (1986), jury verdict against landlord in negligence upheld where tenant's dog bit another tenant in the common areas of mobile home park, because landlord had a duty to exercise reasonable care in administering pet policy;
- *Linebaugh v. Hyndman*, 213 N.J. Super. 117, 516 A.2d 638 (N.J. Super. Ct. App. Div. 1986), reversing summary judgment, where tenant was attacked by another tenant's dog in their common yard, landlord could be liable based on common law duty to maintain common facilities in a reasonably safe condition;

See also Baker v. Pennoak Properties, Ltd., 874 S.W.2d 274, 276 (Tex. Ct. App. 1994) (landlord could be liable where one tenant's dog bit another tenant in the common area, if defendants knew of dog's dangerous propensities); *and see Matthews v. Amberwood*, 351 Md. 544, 719 A.2d 119, 124 (1998) (where tenant's Pit Bull dog killed guest's child, jury verdict against complex owner for negligence and intentional infliction of emotional distress upheld, because landlord retained control over whether to allow animals in the tenant's apartment, and knew of dog's prior vicious behavior).

Washington should clearly and unambiguously join this growing national consensus.

F. Alternatively, Respondents Are Strictly Liable As “Harborers” With Respect To The Common Areas.

If this Court were to extend *Frobig* and affirm summary judgment on the negligence claim, which it should not, it should reverse summary judgment on the common law strict liability claim. At common law, the “owner, keeper, or harborer” of a dog, if aware of the dog’s dangerous propensities, is strictly liable for injuries caused by the dog. For this narrow class of tortfeasors, there is no need to prove negligence. Respondents clearly did not own or keep Cody, but a jury could find they did harbor him.

In this context, harboring means “protecting,” and “one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harborer thereof, as affecting liability for injuries caused by it.” *Markwood*, 110 Wash. at 211 (quoting *Words and Phrases*, vol. 2, p. 820). Although a landlord does not “harbor” an animal merely by allowing his tenant to keep it on the leased premises, *Harris*, 1 Wn. App. at 1028, no Washington published opinion has considered whether a landlord who retains control over the common areas of a complex, as here, and gives dogs limited access to those areas – or, as here, effectively unlimited access – harbors the dog for these purposes. By maintaining the right to evict the dog, by purportedly requiring leashes and collars, and possibly in

other ways to be established by further discovery, Respondents at the least created a material issue of fact as to whether they “harbored” Cody.

G. The Gordlys Should Be Allowed To Complete Discovery.

Under CR 56(f), a party opposing summary judgment may show reasons why it cannot yet present facts justifying its opposition, and seek a continuance at the discretion of the trial court to obtain further discovery. The motion should not be denied, unless 1) the moving party does not offer a good reason for the delay in obtaining the evidence; 2) the moving party does not state what evidence would be established through the additional discovery; or 3) the evidence sought will not raise a genuine issue of fact. *Cogle*, 56 Wn. App. at 559. The party requesting a continuance need not prove that the evidence it seeks exists, however. *See Tellevik*, 120 Wn.2d at 91 (continuance justified where party hopes to discover that other party was residing where and when the wrongful conduct took place and that she had joint control over finances). Here, none of the three conditions that could have justified the Superior Court’s denial of a continuance were present.

The Gordlys filed a brief and a supporting declaration by counsel explaining that they had not yet deposed Respondents because they were still waiting for Respondents to complete their written discovery responses, as Respondents had promised to do in their much-delayed

initial responses. CP 13, 17, 34-35, 38-41, 49-50. Respondents' counsel had consistently indicated that scheduling depositions after the completion of written discovery would be acceptable. CP 13, 17. Depositions "are, in most cases, the most important discovery device," so it is not surprising that the Gordlys are still seeking evidence on various points. 3A Wash. Prac., Rules Practice CR 30 (5th ed.) But the Gordlys should not be punished for their generosity – or naïveté – in giving Respondents additional time to complete their responses. *See Tellevik*, 120 Wn.2d at 91 (moving party's failure to complete discovery is good reason for adverse party's delay in obtaining evidence).

Respondents' insistence that the court grant summary judgment without even a brief continuance is at odds with the relaxed, not to say lackadaisical, attitude they displayed towards discovery deadlines and completion. The Gordlys concede (CP 96) that they could have moved more quickly in obtaining third-party discovery from fellow tenants and Animal Control – but because they would still have lacked essential information from Respondents, there seemed no reason for haste. Certainly, a continuance would not have prejudiced or harmed Respondents. The Superior Court had not yet even set a discovery deadline or a trial date, so a continuance would not have delayed trial or unduly extended the discovery period. If Respondents had wanted to end

the process faster, they could simply have completed their responses timely.

The Gordlys also set forth with specificity what material evidence they sought to obtain in follow up written discovery and deposition. CP 95-96. They had discovered that AMSN refused to enter Ms. Willett's apartment without her there because of her other Pit Bull dog, CP 80; now they wanted to know why. This evidence would shed light on Respondents' foreknowledge of the risk presented by Ms. Willett's dogs. The Gordlys had discovered that Respondents' employees "may have witnessed some of the incident" from which this action arose, CP 35; now the Gordlys wanted to depose those employees as to what they saw and what they did or failed to do to help Mrs. Gordly, pursuant to their duty to her as an invitee. The Gordlys had discovered that Respondents' records on Ms. Willett's dogs were incomplete, CP 129; so they wanted to depose Respondents as to the decision to permit Cody to live at the Maple Glen Apartments, and generally as to whether and how Respondents had considered the risk to persons such as Mrs. Willett posed by their tenants' dogs – all of which would have gone to Respondents' breach of duty.

Time for depositions and third-party discovery would also have generally filled out the picture of what went wrong at the Maple Glen Apartments. For example, the evidence discovered so far, particularly

Respondents' reservation of rights to withhold and withdraw permission to keep dogs, CP 127, 129, suggests that Respondents may have gratuitously assumed a duty greater even than Washington law clearly imposes on them. *See Pruitt v. Savage*, 128 Wn. App. 327, 333, 115 P.3d 1000 (2005) (landlord who undertakes additional duties to his tenants may become liable if he fails to fulfill it); *and see Matthews*, 351 Md. at 448 (landlord gratuitously assumed duty to monitor tenants' dogs on premises); *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142 (1989) (same). Complete discovery may well bring out additional support for this and other theories.

Because the Gordlys had a good reason for the delay in completing discovery, and sought specific, material evidence in discovery, the Superior Court abused its discretion when it denied a continuance under CR 56(f).

VI. CONCLUSION

Because Respondents had a duty to Mrs. Gordly under applicable Washington law, and because a reasonable jury could have found that Respondents breached that duty, summary judgment was improperly granted, so the decision of the trial court should be reversed and this case remanded for further discovery and trial.

DATED this 21st day of September, 2010.

RESPECTFULLY submitted,

WARD SMITH PLLC

By: 

J.D. SMITH, WSBA No. 28246
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Attorneys for the Appellants

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

APPELLATE BRIEF

TO:

Lisa Grimm Richard J. Whittemore Bullivant Houser Bailey PC Westlake Tower 1601 Fifth Avenue, Suite 2300 Seattle, WA 98101-1618 <i>Attorney for Defendants</i> Lisa.grimm@bullivant.com Richard.whittemore@bullivant.com	VIA FEDERAL EXPRESS [] VIA REGULAR MAIL [] VIA CERTIFIED MAIL [] VIA E-MAIL [X] HAND DELIVERED [X]
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Dated at Seattle, Washington, this 21st day of September, 2010.


David C. Reed, WSBA #24663

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