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No. 65679-1

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

ONA DEANE-GORDLY and TYRONE GORDLY,

Appellants,

v.

AMERICAN MANAGEMENT SERVICES NORTHWEST  
and GFS MAPLE GLEN, LLC,

Respondents.

BRIEF OF RESPONDENT

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## I. INTRODUCTION

Maple Glen is an apartment complex in Mountlake Terrace, Washington.<sup>1</sup> Maple Glen was sued by Ona Deane-Gordly after Gordly was injured by a dog owned by Maple Glen's tenant, Joy Willett.

Maple Glen moved for summary judgment, arguing that Maple Glen owed Gordly no duty as a matter of law. Gordly opposed the motion and requested a continuance to take additional discovery under CR 56(f).

The trial court granted Maple Glen's motion dismissing Gordly's claims as a matter of law. Gordly appealed the order, arguing she was owed a duty as Maple Glen's invitee. A landlord in Washington, however, cannot be held responsible as a matter of law for injuries caused by a tenant's vicious animal. The rule is absolute; it places responsibility for the animal on the tenant—the person in the best position to know about the animal's dangerous propensities and take action to control them.

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<sup>1</sup> The complex is owned and managed by AMS. Maple Glen and AMS will be collectively referred to as "Maple Glen."

Even if a landlord could be held responsible for a tenant's vicious animal, Maple Glen is not responsible for Gordly's injuries. Gordly was a licensee on the premises. Maple Glen had no knowledge of the dog's propensity to attack and owes no duty to a licensee to discover such a propensity. Indeed, the dog had never attacked anyone prior to Gordly. Even if Gordly were an invitee, as she argues on appeal, Maple Glen's lack of knowledge defeats any duty allegedly owed.

Further, regardless of Maple Glen's knowledge of the dog's viciousness, there is no evidence of unreasonableness on Maple Glen's part. With its summary judgment motion, Maple Glen offered evidence that it had acted reasonably and asserted there was no evidence to the contrary. The ultimate issue, therefore, is whether Gordly presented any actual evidence in response that raised a fact question. Although Gordly presented evidence that it disagreed with Maple Glen's management of the complex, Gordly failed to set forth any affirmative evidence tending to prove that Maple Glen's course of conduct was unreasonable.

Moreover, the evidence Gordly sought in her CR 56(f) motion for a continuance was immaterial to the question before the court (i.e., whether, if Maple Glen owed Gordly a duty, there is any evidence that Maple Glen breached that duty). The trial court properly granted summary judgment.

## **II. ASSIGNMENTS OF ERROR**

Gordly assigns error to the trial court's (1) Order Granting Defendants AMS and Maple Glen's Motion for Summary Judgment and (2) order denying Gordly a continuance under CR 56(f), which is found in the order on summary judgment. This brief addresses those orders.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Did the trial court err by granting Maple Glen summary judgment on the basis that no duty was owed?

Specifically:

1. Can a landlord, such as Maple Glen, be held responsible for the vicious propensities of a tenant's animal? (Assignment of Error #1)
2. Even if a landlord can be held responsible for the vicious propensities of a tenant's animal, can

Maple Glen be held responsible to Gordly as a licensee? (Assignment of Error #1)

3. Whether Gordly was a licensee or an invitee, did Maple Glen have a duty to act when it had no knowledge of the dog's propensity to attack? (Assignment of Error #1)

4. Did Maple Glen gratuitously assume a duty to act in the absence of a promise to act or induced reliance? (Assignment of Error #1)

B. Did the trial court abuse its discretion by denying Gordly additional discovery? (Assignment of Error #2)

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background**

Maple Glen is a multi-unit apartment complex situated on 15 acres in Mountlake Terrace, Washington. (CP 122)

Joy Willett has been a tenant of Maple Glen since June 2002. (CP 126-27) At the time she moved into the complex, Willett owned one dog named "Petey." (CP 120)

Willett's lease agreement includes a Pet Addendum in which Willett agreed that Petey "shall be kept on a leash at all times when outside the Apartment and inside the Apartment Community," and that Willett would "insure [*sic*] that the pet does not at any time disturb any other resident of the Apartment Community nor damage any property located in the Apartment or in the Apartment Community." (CP 129) Willett also agreed to obtain Maple Glen's approval before adopting any additional pets. (CP 129)

In late 2004 or early 2005, Willett adopted a second dog, a male pit bull puppy named "Cody," the dog that caused the injury in this case. (CP 120) Maple Glen gave Willett permission to keep Cody in the apartment, subject to the terms of the Pet Addendum Willett agreed to earlier. (CP 123)

Both Petey and Cody spent most of their time inside Willett's apartment because of Willett's medical problems. (CP 123) Prior to the accident at issue in this case, neither Maple Glen nor Animal Control had ever received any

complaints indicating that Willett's dogs were aggressive or vicious or had committed any other attacks.<sup>2</sup> (CP 120, 123)

On May 17, 2006, Gordly, a public research interviewer, was conducting a survey of couples in Woodinville. (CP 106, 107, 110) On her way to Woodinville, Gordly passed the Maple Glen complex and decided to stop to interview two couples residing there who were participating in the survey. (CP 110) Gordly did not know whether the couples were at home but decided to check. (CP 111) Gordly's husband, Tyrone, waited for her in the car while Gordly went to contact the couples. (CP 110)

As Gordly walked from the first unit to the second unit, Gordly encountered Willett who was standing and

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<sup>2</sup> In her opposition to summary judgment, Gordly relied on a letter from Maple Glen to Willett stating that Maple Glen was "unable to enter [Willett's] apartment without [Willett] there because of the dog." (CP 80) Gordly alleged the letter was evidence that Maple Glen's employees knew Cody was vicious. (CP 90) That letter, however, was written in 2002, before Cody was born and presumably refers to Petey's presence in the apartment. (CP 80) There is no evidence that Maple Glen had any indication of Cody's viciousness.

smoking on her balcony, one floor above. (CP 111)

Willett's dog, Cody, was on the balcony with her. (CP 120)

Cody, who was neither leashed nor restrained at the time, suddenly attacked Gordly by leaping from the balcony onto Gordly. (CP 120) The attack continued until the police arrived and scared the dog off with gunshots. (CP 120) Cody was later euthanized with Willett's consent. (CP 82)

**B. Procedural History**

In March 2009, Gordly filed this lawsuit against Maple Glen seeking damages for the dog bite injuries caused by Willett's dog. (CP 178) Gordly alleged that Maple Glen, as Willett's landlord, was liable for negligence and strict liability. (CP 183, 185, 186) Gordly's husband, Tyrone, made a claim for emotional distress. (CP 187) Gordly also named Willett in the lawsuit but never served Willett with the Complaint. (CP 178)

Gordly served Maple Glen with a single set of discovery requests, to which Maple Glen responded on January 19, 2010. (CP 63) The responses included

Willett's entire tenant file. (CP 63) Gordly never sought any other discovery from Maple Glen. (CP 63)

Fifteen months after the lawsuit was filed and five months after Maple Glen responded to Willett's discovery requests, Maple Glen moved for summary judgment on all of Gordly's claims. (CP 132) Gordly opposed the motion and, in addition, requested a continuance to take additional discovery under CR 56(f). (CP 83) The trial court denied Gordly's motion for a continuance and granted Maple Glen summary judgment, dismissing Gordly's claims in their entirety.<sup>3</sup> (CP 4) Gordly timely filed a notice of appeal of those orders.

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<sup>3</sup> The parties then stipulated to the dismissal without prejudice of Tyrone's emotional distress claim pending this Court's decision on appeal. (CP 1)

## V. ARGUMENT

### A. The trial court correctly dismissed Gordly's claims against Maple Glen, ruling that Maple Glen does not owe Gordly a duty as a matter of law.

An order granting summary judgment is reviewed de novo, “with the reviewing court performing the same inquiry as the trial court.”<sup>4</sup>

#### 1. **A landlord, like Maple Glen, cannot be held responsible for the vicious propensities of a tenant's animal.**

##### *a. Frobis applies.*

Gordly argues that the trial court erred by granting Maple Glen summary judgment on the question of whether a landlord has a duty to protect third parties from injuries caused by a tenant's dog.

This question was resolved by the Washington Supreme Court's ruling in *Frobis v. Gordon*.<sup>5</sup> There, the court affirmed the rule in Washington that “landlords have no duty to protect third parties from a tenant's lawfully

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<sup>4</sup> *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992) (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987)).

<sup>5</sup> 124 Wn.2d 732, 881 P.2d 226 (1994).

owned but dangerous animals,”<sup>6</sup> such as the dog in this case. The *Frobig* court affirmed the summary judgment dismissal of a landlord couple, the Branches, after Frobig sued them for injuries caused by a tiger owned by a tenant on the Branches’ land.<sup>7</sup> The Branches owned a large piece of property in Bothell, Washington, and leased a rental home on the property to Anne Gordon.<sup>8</sup> Gordon owned a business that provided wild and domestic animals for demonstrations, film, and video projects.<sup>9</sup> Frobig was an employee of the Branches who, after finishing work one day on the Branches’ farm, went over to the area where Gordon’s animals were housed.<sup>10</sup> At the time of the accident, Gordon was filming a commercial video on the property and asked Frobig to participate.<sup>11</sup> Frobig was

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<sup>6</sup> *Id.* at 740-41.

<sup>7</sup> *Id.* at 741.

<sup>8</sup> *Frobig v. Gordon*, 69 Wn. App. 570, 572, 849 P.2d 676 (1993), *rev’d*, 124 Wn.2d 732, 881 P.2d 226 (1994).

<sup>9</sup> *Frobig*, 69 Wn. App. at 572.

<sup>10</sup> *Id.* at 573.

<sup>11</sup> *Id.*

injured when Sultan, a tiger belonging to Gordon, attacked Frobig during the filming.<sup>12</sup>

Frobig sued the Branches as Gordon's landlord for negligence and strict liability.<sup>13</sup> The trial court dismissed these claims,<sup>14</sup> and the Supreme Court affirmed.<sup>15</sup> The court followed the settled rule in Washington that "the owner, keeper, or harbinger of a dangerous or vicious animal is liable [for injuries]; *the landlord of the owner, keeper, or harbinger is not.*"<sup>16</sup> This rule is consistent with the Washington statute restricting liability for injuries caused by a vicious dog to the owner of that dog.<sup>17</sup> The *Frobig* court found that "[t]he wild animals were Anne Gordon's alone, and under Washington law liability resulting from the ownership and management of those animals *rests with*

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<sup>12</sup> *Id.* at 573-74.

<sup>13</sup> *Frobig*, 124 Wn.2d at 735.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 741.

<sup>16</sup> *Id.* at 735 (citing *Clemmons v. Fidler*, 58 Wn. App. 32, 35-36, 791 P.2d 257 (1990)) (emphasis added).

<sup>17</sup> *Id.* at 735 n.1.

*Anne Gordon alone.*<sup>18</sup> Liability under the rule “flows from ownership or direct control.”<sup>19</sup>

Gordly attempted to distinguish *Frobis* in the trial court by arguing that *Frobis* dealt with commercial, not residential, landlords. (CP 91-95). Gordly was mistaken. The landlords in *Frobis* “leas[ed] their *rental home* to Anne Gordon.”<sup>20</sup> Gordon specifically agreed she would “not use the premises for business purposes” and would “conduct no filming of the animals on the premises, nor permit any other commercial use of the animals on the premises.”<sup>21</sup> *Frobis*, then, concerned a residential lease, not a commercial lease as Gordly argued to the trial court.

On appeal, Gordly attempts to distinguish *Frobis* by arguing that the *Frobis* court did not address landlord liability in common areas.<sup>22</sup> This argument was not raised

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<sup>18</sup> *Id.* at 737 (emphasis added).

<sup>19</sup> *Id.* at 735 (citing *Clemmons*, 58 Wn. App. at 37; *Shafer v. Beyers*, 26 Wn. App. 442, 446, 613 P.2d 554 (1980)); RCW 16.08.040).

<sup>20</sup> *Frobis*, 69 Wn. App. at 572 (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> Brief of Appellant at 24-25.

in the trial court and should not, therefore, be considered on appeal.<sup>23</sup>

The argument is, nevertheless, without merit. Gordly contends the Branches in *Frobig* were “absentee” landlords and that “the lessee leased the entire premises” such that “there **were** no common areas or other tenants.”<sup>24</sup> Gordly is again mistaken. The Branches’ property in *Frobig* “included ***their own home***, a horse ranch, and a small rental home.”<sup>25</sup> Gordon leased only the small rental home, but kept the animals on the property.<sup>26</sup> The court did not discuss whether the tiger was on leased premises or common areas when the injuries occurred. At the time of the injury, the tiger was roaming “outside of its cage”<sup>27</sup> and “through tall grass.”<sup>28</sup>

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<sup>23</sup> RAP 9.12; *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 790, 732 P.2d 1008 (1987).

<sup>24</sup> Brief of Appellant at 24 (emphasis in original).

<sup>25</sup> *Frobig*, 69 Wn. App. at 572 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 572 n.2.

<sup>28</sup> *Id.* at 573.

Contrary to Gordly's argument, the Court of Appeals' decision in *Coleman v. Hoffman*<sup>29</sup> did not confine *Frobigo* to injuries on leased premises.<sup>30</sup> The *Coleman* court cited *Frobigo* for its statement of the general rule that landlords are not liable for injuries caused by obvious defects.<sup>31</sup> The *Frobigo* court did not rely on this rule for its holding; the court merely noted that its holding was consistent with this rule.<sup>32</sup>

In addition, Gordly's attempt to confine *Frobigo* to liability for a tenant's tort against his own guest runs contrary to the facts of that case. Gordly mistakenly argues that a key factor in *Frobigo* was that Gordon, the tenant, was "the victim's employer."<sup>33</sup> In fact, *Frobigo*, the victim, was

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<sup>29</sup> 115 Wn. App. 853, 865, 64 P.3d 65 (2003).

<sup>30</sup> Brief of Appellant at 24.

<sup>31</sup> *Coleman*, 115 Wn. App. at 865.

<sup>32</sup> *Frobigo*, 124 Wn.2d at 735 ("The 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. . . . As the Court of Appeals observed in *Clemmons*, this rule is consistent with the analogous law governing liability of landlords to third parties for defects on leased premises.") (citing *Clemmons*, 58 Wn. App. at 35-37).

<sup>33</sup> Brief of Appellant at 24.

employed by the Branches—the landlord—and she simply agreed to participate in the tenant’s filming of the tiger.<sup>34</sup>

In any event, the Supreme Court did not discuss any of these facts, and they were not material to the court’s holding.<sup>35</sup> Washington courts follow the unqualified rule that “landlords have no duty to protect third parties from a tenant’s lawfully owned but dangerous animals.”<sup>36</sup> The trial court here correctly followed the same rule when it dismissed Gordly’s claims against Maple Glen.

***b. Cases from other jurisdictions do not override the Washington Supreme Court’s decision in Frobis.***

Courts in other jurisdictions have found landlord liability when the landlord (1) has prior knowledge of the

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<sup>34</sup> *Frobis*, 69 Wn. App. at 573.

<sup>35</sup> Likewise, and contrary to Gordly’s assertion (Brief of Appellant at 25-26), the Court of Appeals in *Clemmons* and *Shafer* did not discuss facts such as where the injury took place. Neither the *Clemmons* court nor the *Shafer* or *Frobis* courts make any attempt to confine their holdings.

<sup>36</sup> *Frobis*, 124 Wn.2d at 740-41. Gordly attempts to argue that this cannot be the rule in Washington because a landlord could certainly be liable for assault if the landlord “deliberately set a tenant’s dog on an intruder.” Brief of Appellant at 27. The *Frobis* rule specifically addresses the element of “duty” in a negligence claim. Gordly forgets that assault is an *intentional* tort, for which the plaintiff need not prove a specific duty. *Frobis* would not apply in that case.

viciousness of a tenant's animal and (2) has the right to exercise some degree of control over the animal or the tenancy.<sup>37</sup> Gordly asks this Court to ignore *Frobigo* and follow the rule from these other jurisdictions.<sup>38</sup> The Washington Supreme Court, however, expressly rejected that approach in *Frobigo*.<sup>39</sup>

In *Frobigo*, the court discussed the holdings in *Strunk v. Zoltanski* and *Uccello v. Laudenslayer*, two cases outside of Washington that first laid down the rule advanced by Gordly here.<sup>40</sup> In *Strunk*, the Court of Appeals in New York imposed a duty on landlords who have knowledge that a prospective tenant has a vicious dog.<sup>41</sup> The landlord must, at the time of the initial leasing, "take reasonable precautions for the protection of third persons, by provisions in the lease with respect to confinement or

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<sup>37</sup> See, e.g., *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 507, 514 (1975); *Strunk v. Zoltanski*, 62 N.Y.2d 572, 573-74 (N.Y. 1984).

<sup>38</sup> Brief of Appellant at 18-20, 32-33.

<sup>39</sup> 124 Wn.2d at 737-39.

<sup>40</sup> *Id.*

<sup>41</sup> 62 N.Y.2d at 574-75.

control of the dog or otherwise.”<sup>42</sup> The *Frobig* court disagreed with this rule and pointed out the observation in the *Strunk* dissent that “[l]iability should not be imposed upon one who has no control over the tort-feasor.”<sup>43</sup> The Washington Supreme Court agreed that “a landlord’s awareness of a dangerous condition existing when a tenant first takes possession should not create landlord liability when the tenant, who has the opportunity to protect others from the dangerous condition, fails to do so.”<sup>44</sup>

The majority in *Strunk* relied principally on *Uccello*. In *Uccello*, the California Court of Appeals imposed a duty on landlords “when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to remove the animal by retaking possession of the premises.”<sup>45</sup> The Washington Court of Appeals expressly

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<sup>42</sup> *Id.* at 577.

<sup>43</sup> *Frobig*, 124 Wn.2d at 738 (citing *Strunk*, 62 N.Y.2d at 579 (Kaye, J., dissenting)).

<sup>44</sup> *Id.*

<sup>45</sup> 44 Cal. App. 3d at 507.

declined to follow *Uccello*.<sup>46</sup> The Washington Supreme Court, in *Frobig*, noted “the absence of case authority” in support of *Uccello* and the fact that the *Uccello* court’s ruling was based on a “public policy” of “moral blame.”<sup>47</sup> As recognized by the *Strunk* dissent, “it is difficult to determine just what policy is being furthered by creating this new duty. Landlords are made insurers of the conduct of dogs residing with their tenants, when they do not control the tenants or the dogs[.]”<sup>48</sup> Further, the duty is “equally unfair to tenants” who, “[i]n view of the low threshold of proof required to show that one has knowledge that a dog has vicious propensities, . . . will, by virtue of broad potential liability imposed on landlords, have difficulty obtaining suitable housing.”<sup>49</sup>

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<sup>46</sup> *Clemmons*, 58 Wn. App. at 38 (“Clemmons urges us to follow *Uccello*. We decline, for we see no reason to depart from our settled rule.”).

<sup>47</sup> *Frobig*, 124 Wn.2d at 739 (citing *Uccello*, 44 Cal. App. 3d at 512-14).

<sup>48</sup> *Strunk*, 62 N.Y.2d at 581 (Kaye, J., dissenting).

<sup>49</sup> *Id.*

Other jurisdictions have likewise rejected the approach Gordly advocates.<sup>50</sup> “[H]olding landlords liable for the actions of their tenants’ vicious dogs by requiring them to evict tenants with dangerous dogs would merely result in the tenants’ moving off to another location with their still dangerous animals.”<sup>51</sup> Courts have likened this approach “to the case of a ‘Typhoid Mary,’ who was outcast from one place only to continue her deadly disease-spreading activity at another place.”<sup>52</sup> Washington courts

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<sup>50</sup> See, e.g., *Wright v. Schum*, 781 P.2d 1142, 1143 (Nev. 1989) (“Although Jason invites us to extend the scope of landlord liability to include cases in which injuries are sustained by one who is bitten by a tenant’s dog under circumstances in which the landlord has actual knowledge of the presence of a dangerous animal on the premises and in which the landlord has the right to remove the animal by evicting the tenant, we decline to do so.”); *Colombel v. Milan*, 952 P.2d 941, 944 (Kan. Ct. App. 1998) (“Kansas follows the common law of injury-by-animal. Under the common law, no one but an owner, possessor, keeper, or harbinger of an animal can be held liable for its actions.” A landlord is not a “harborer” of the animal “[e]ven though the [landlord] has the power to expel an abnormally dangerous animal and chooses not to do so[.]”); *Richards v. Leppard*, 392 A.2d 588, 589 (N.H. 1978) (“[T]he plaintiff commenced a new action against [the landlord] claiming general negligence on his part in that he knew or should have known that the dog would roam and be potentially dangerous. . . . [W]e find no duty in this case breached by the lessor and therefore no cause of action lies.”).

<sup>51</sup> *Wright*, 781 P.2d at 1143.

<sup>52</sup> *Id.*

have avoided such a result by refusing to impose upon landlords the duty to become the insurer of a tenant's dangerous animal, regardless of the landlord's knowledge of the animal's viciousness.<sup>53</sup>

*c. Frobig recognizes the public policy favoring a rule that landlords do not owe a duty to protect invitees from harm caused by a tenant's animal.*

As the Washington Court of Appeals appreciated, the *Frobig* rule “recognizes the notion that a tenancy is equivalent to a conveyance; a lessor surrenders both possession *and* control of the land to the lessee during the term of the tenancy.”<sup>54</sup> Further, the rule “promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability.”<sup>55</sup>

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<sup>53</sup> *Frobig*, 124 Wn.2d at 736 (“The Court of Appeals found that the landlords here might be liable for third party injuries because they knew their tenant would have a dangerous animal on the premises before they rented their apartment to her. ***This prior knowledge of the landlords, however, has no significance.***”) (emphasis added).

<sup>54</sup> *Clemmons*, 58 Wn. App. at 38 (citations omitted) (emphasis in original).

<sup>55</sup> *Id.*

This policy applies equally whether the animal is on leased premises or common areas. In either case, the tenant, not the landlord, is in the best position to control the animal. Oftentimes, the landlord has no ability to observe the animal or monitor for signs that it may become vicious.

Indeed, a landlord's general duty to protect against dangers in common areas arises out of the landlord's ability to discover and control the instrumentality (or access to the instrumentality) that may cause injury. The common thread running through the cases finding a duty owed is that the landlord was in the best position to address the danger posed. This point is illustrated in many of the cases cited by Gordly. For example:

- In *Geise v. Lee*, the Washington Supreme Court recognized that a landlord's duty over common areas includes the duty to clear snow and ice because "the landlord is best situated to cope with [these] hazards."<sup>56</sup>
- In *Faulkner v. Racquetwood Village Condominium Ass'n*, the Washington Court of Appeals found that the rule requiring a landlord to protect tenants from criminal acts

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<sup>56</sup> 84 Wn.2d 866, 870, 529 P.2d 1054 (1975).

of others “is consistent with common law principles to impose a duty on the landlord to maintain common areas safely when the landlord controls that space: ‘[In *Griffin*, the landlord] controlled that space, not [the tenant]. It was not part of the premises leased by the tenant. The significance of this fact is that a landlord controls common areas and, consistent with common law principles, has a duty to maintain those common areas safely.’”<sup>57</sup>

- In *Martindale Clothing Co. v. Spokane & East Trust Co.*, the Washington Supreme Court concluded that the landlord had a duty to protect one tenant from water damage from a frozen pipe that burst in another tenant’s unit.<sup>58</sup> The court found that the landlord possessed the knowledge about the location of the water shut-off valve; the tenant did not.
- In *Uccello*, the California Court of Appeals recognized that “[a] common element in [the rules providing for landlord liability] is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury.”<sup>59</sup>
- In *Matthews v. Amberwood Associates Ltd. Partnership, Inc.*, the Maryland Court of Appeals recognized that “a common thread

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<sup>57</sup> 106 Wn. App. 483, 486-87, 23 P.3d 1135 (2001) (citing *Griffin v. West RS, Inc.*, 97 Wn. App. 557, 568, 984 P.2d 1070 (1999), reversed by 143 Wn.2d 281, 18 P.3d 558 (2001)).

<sup>58</sup> 79 Wn. 643, 647-48, 140 P. 909 (1914).

<sup>59</sup> 44 Cal. App. 3d at 511.

running through many of our cases involving circumstances in which landlords have been held liable (i.e., common areas, pre-existing defective conditions in the leased premises, a contract under which the landlord and tenant agree that the landlord shall rectify a defective condition) is the landlord's ability to exercise a degree of control over the defective or dangerous condition and to take steps to prevent injuries arising therefrom."<sup>60</sup>

Thus, Washington courts recognize that, absent the ability to effect some control over the danger, a landlord's duty does not arise.<sup>61</sup> "[T]he landlord is not a guarantor of safety."<sup>62</sup>

Here, the dangerous instrumentality (i.e., the dog) was outside Maple Glen's control. The dog was owned and controlled by Willett. The dog was kept primarily on leased premises. (CP 120) Maple Glen specifically imposed on Willett the duty to control her dog. (CP 129)

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<sup>60</sup> 719 A.2d 119, 125 (Md. 1998) (citations omitted).

<sup>61</sup> See *Frobig*, 124 Wn.2d at 736 ("The duty and liability of the invitor-lessor do not, as a rule, extend to matters having to do merely with the lessee's management or operation of premises which would be safe except for such management or operation, at least where the lessee is in sole actual control.") (citing *Peterick v. State*, 22 Wn. App. 163, 170-71, 589 P.2d 250 (1970)).

<sup>62</sup> *Mucsi v. Graoch Assocs. Ltd. P'ship #12*, 144 Wn.2d 847, 859, 31 P.3d 684 (2001) (citing *Geise*, 84 Wn.2d at 871).

Maple Glen required that the dog be kept on a leash and prohibited Willett from leaving the dog unattended on the balcony or allowing the dog to disturb other residents. (CP 129) Maple Glen did not know that Willett would fail in her duty to control Cody on the day of the accident.

Courts in other jurisdictions that have found landlord liability for dog bite injuries do so on the ground that the landlord has the right to control the tenancy, as opposed to the dog.<sup>63</sup> That is, the landlord can evict the dog or the tenant. But, as discussed above, Washington has expressly rejected this theory of liability,<sup>64</sup> and there is no reason to adopt it under the facts of this case. Here, the dog was kept indoors (CP 120), and Maple Glen was unaware of any prior incidents in which the dog exhibited signs of viciousness (CP 123). To require that landlords control or evict their tenants' dogs who become vicious would impose upon landlords a duty to continually inspect their tenants'

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<sup>63</sup> See, e.g., *Uccello*, 44 Cal. App. 3d at 507; *Strunk*, 62 N.Y.2d at 573-74.

<sup>64</sup> *Frobig*, 124 Wn.2d at 737-39.

homes for signs of vicious animals. The burden is unwarranted.

**2. Even if a landlord can have responsibility for a tenant's vicious animal, Maple Glen cannot be held responsible to Gordly as a licensee.**

**a. Gordly is a licensee, not an invitee.<sup>65</sup>**

In Washington, “[t]he legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.”<sup>66</sup> With respect to both invitees and licensees, Washington follows the Second Restatement of Torts.<sup>67</sup>

Gordly argues she was owed a duty as Maple Glen’s invitee.<sup>68</sup> Gordly is wrong. To qualify as an invitee under

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<sup>65</sup> Although not specifically addressed below, Gordly’s status as a licensee is one of the alternative bases upon which this Court can decide the issue before it. *Lamon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (“[A]n appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.”) (citations omitted).

<sup>66</sup> *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996) (citing *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986)).

<sup>67</sup> *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002) (citing *Iwai*, 129 Wn.2d at 93); *Younce*, 106 Wn.2d at 667.

<sup>68</sup> Brief of Appellant at 13-17.

the Restatement, the individual must be *invited* onto the premises.<sup>69</sup> A licensee, by contrast, enters or remains on the premises by mere *permission*.<sup>70</sup> The comments to the Restatement confirm the distinction between a landowner's invitation and his mere permission: "[A]n invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so."<sup>71</sup> Gordly, here, was on the premises by mere permission and not by invitation.

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<sup>69</sup> The Restatement (Second) of Torts § 332 (2010), provides:

(1) An invitee is either a public invitee or a business visitor. (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

*See also id.* at cmt b ("Although invitation does not in itself establish the status of an invitee, it is essential to it.").

<sup>70</sup> Restatement (Second) of Torts § 330 (2010) ("A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.").

<sup>71</sup> Restatement (Second) of Torts § 332 cmt b (2010).

Gordly testified in her deposition that she was not invited to Maple Glen; she simply decided to stop there on her way elsewhere.

A: You see, that day, I was on my way to another area, and I noticed the building. And I knew I had two contacts in that building. You know, we're right there, let me go in, contact that building.

Q: What was the area you were on your way to?

A: Woodinville.

...

Q: But you also knew you had contacts in this building, so you just decided to stop there?

A: Yeah.

...

A: But, saying that, I made contact with the first building. I walked around to my left, down some steps, left the literature on the building – or, rang the bell, of course, to see if they were home – were home.

(CP 110-111) In order to qualify as Maple Glen's invitee, it is necessary that Gordly be "*specifically invited* by tenants to come into the building."<sup>72</sup> At the time of her

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<sup>72</sup> *Holm v. Inv. & Sec. Co.*, 195 Wn. 52, 59, 79 P.2d 708 (1938) (emphasis added).

visit, Gordly was unaware of whether the tenants she planned to see were even home. (CP 111) She was not invited onto the premises by either the tenants or Maple Glen. She was merely a licensee.<sup>73</sup>

***b. Maple Glen had no knowledge of a dangerous condition and owed Gordly no affirmative duty to discover hidden dangers.***

“Generally, a landowner owes trespassers and licensees only the duty to refrain from willfully or wantonly injuring them.”<sup>74</sup> There is a limited exception to this general rule when “there is a known dangerous

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<sup>73</sup> In addition, contrary to Gordly’s contention, she was not a business invitee because she did not come onto the land “for a business or economic purpose that benefits both entrant [Gordly] and occupier [Maple Glen].” *Thompson v. Katzer*, 86 Wn. App. 280, 286, 936 P.2d 421 (1997). Maple Glen derives its business and economic benefit from allowing its *tenants* to be present on the land. Maple Glen does not receive any business or economic benefit from Gordly’s ability to conduct her survey. There was no “real or supposed mutuality of interest in the subject to which [Gordly’s] business or purpose relates.” *Id.* (citations omitted).

<sup>74</sup> *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996) (citing *Ertl v. Parks & Recreation Comm’n*, 76 Wn. App. 110, 113, 882 P.2d 1185 (1994), *review denied*, 126 Wn.2d 1009, 892 P.2d 1088 (1995)); *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993)).

condition on the property.”<sup>75</sup> The exception does not apply here.

Maple Glen had no knowledge of the dangerous condition (i.e., Cody’s propensity to attack). The knowledge necessary to impose a duty requires that the landlord know of other *attacks*.<sup>76</sup> Knowledge of barking or lunging at strangers and other “normal canine behavior” is insufficient.<sup>77</sup> It is also insufficient to simply rely on

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<sup>75</sup> *Younce*, 106 Wn.2d at 667 (citing *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975)).

<sup>76</sup> *Uccello*, 44 Cal. App. 3d at 508 (landlord could be liable only if it had actual knowledge of previous attacks); *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 948 (Alaska 1986) (landlord held liable because it had actual knowledge of prior incidents involving the dog in question); *Matthews*, 719 A.2d at 121-22, 131 (landlord had actual knowledge of several incidents involving the dog, including an incident in which the dog viciously chased a boy).

<sup>77</sup> *Gill v. Welch*, 524 N.Y.S.2d 692 (N.Y. App. Div. 1988) (“The facts that the dog was kept enclosed in a yard or chained, particularly in view of the town’s leash law, and that it strained on its chain and barked when people approached the premises, are insufficient to create an inference that the dog was vicious.”); *Plowman v. Pratt*, 684 N.W.2d 28, 32 (Neb. 2004) (“Normal canine behavior, such as a dog barking at a stranger, is not sufficient to infer that a landlord has actual knowledge of a dog’s dangerous propensities.”); *Yuzon v. Collins*, 10 Cal. Rptr. 3d 18, 30 (Cal. Ct. App. 2004) (“Pushing, barking, and jumping at the screen door would not have given [the landlord] actual notice of [the dog’s] vicious propensities.”).

knowledge of the dog's breed<sup>78</sup> or the fact that the dog fought with other dogs.<sup>79</sup>

Here, Maple Glen and its employees never received any complaints about Cody. (CP 129) Likewise, no incidents had ever been reported to Animal Control. (CP 120) According to Willett, Cody had never bitten anyone and Willett took precautions to prevent any problems with him. (CP 120) Willett herself had no idea that Cody would attack as he did. (CP 120)

Gordly failed in her opposition to summary judgment to raise any affirmative evidence indicating that Maple Glen had knowledge of prior attacks. Moreover, as discussed in section B below, the discovery Gordly sought in her CR 56(f) continuance would not have produced any such evidence.<sup>80</sup>

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<sup>78</sup> See, e.g., *Carter v. Metro N. Assocs.*, 255 A.D.2d 251, 251 (N.Y. App. Div. 1998) (holding that the trial court “erred in circumventing the requirement for evidence concerning the particular animal by purporting to take judicial notice of the vicious nature of the breed as a whole.”).

<sup>79</sup> *Klitzka v. Hellios*, 810 N.E.2d 252, 259 (Ill. App. Ct. 2004).

<sup>80</sup> See pp. 41-44 below.

Because Maple Glen had no knowledge of the dangerous condition, it owed no affirmative duty to protect Gordly, a licensee.

*c. Regardless of Maple Glen's knowledge, there is no evidence that Maple Glen failed to exercise reasonable care.*

When a landowner has knowledge of a dangerous condition that the landowner expects licensees will not discover or will fail to recognize the risks involved, the landowner must “exercise reasonable care to make the condition safe or to warn the licensees of the condition and the risk involved.”<sup>81</sup> The difference between the duty of care owed to licensees and that owed to invitees is that, with respect to licensees, a landowner has no duty to discover dangerous conditions and satisfies his duty with respect to known conditions by warning about the condition or taking corrective action.<sup>82</sup> This is in contrast to the affirmative duty owed to invitees to discover dangerous

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<sup>81</sup> *Younce*, 106 Wn.2d at 668.

<sup>82</sup> *See Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 133-40, 875 P.2d 621 (1994).

conditions and take corrective measures to protect the safety of invitees.<sup>83</sup>

Gordly argues that the trial court erred by granting Maple Glen summary judgment on the question of whether Maple Glen's actions were reasonable.<sup>84</sup> Gordly mistakenly contends that the trial court improperly resolved a question of fact by deciding reasonableness on summary judgment.

The trial court did not resolve a question of fact regarding reasonableness; rather, the trial court properly granted summary judgment because Maple Glen set forth evidence to show its conduct was reasonable and Gordly failed to satisfy her burden to submit affirmative evidence to rebut this fact.

Summary judgment is appropriate whenever “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”<sup>85</sup> A moving party may satisfy its initial burden by pointing out to the trial court that “there is an absence of evidence to

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<sup>83</sup> *Id.*

<sup>84</sup> Brief of Appellant at 18-20.

<sup>85</sup> CR 56(c).

support the nonmoving party's case."<sup>86</sup> Once the moving party has satisfied its initial burden, the nonmoving party must make a sufficient showing, by going beyond the pleadings and through the submission of competent admissible evidence, that there are genuine issues for trial.<sup>87</sup> Here, Gordly failed to satisfy her burden as the nonmoving party.

On summary judgment, Maple Glen argued that Gordly had no evidence to support her contention that Maple Glen acted unreasonably. (CP 142) Maple Glen submitted the declaration of Alison Wetmore and the statement of Animal Control Officer Dawson in support of its motion. (CP 120, 122-23) This evidence established that Maple Glen had no reason to know that Cody would become vicious but that Maple Glen nonetheless required Willett to keep Cody under her control. Cody had never bitten anyone and Willett "took precautions to prevent any problems with him." (CP 120) Willett, in fact, "clearly

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<sup>86</sup> *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 255 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

<sup>87</sup> *Young*, 112 Wn.2d at 225-26.

had no idea that [Cody] would do what he did.” (CP 120) Indeed, Animal Control had never received a single complaint about Cody. (CP 120) Nonetheless, Maple Glen required that Willett abide by the restrictions in the Pet Addendum. (CP 129) The Addendum directed that Willett keep Cody “in [Willett’s] Apartment,” and “on a leash at all times when outside the Apartment and inside the Apartment Community.” (CP 129) The Addendum also prohibited Willett from “leav[ing] the pet on a patio or balcony while away from the Apartment” and obligated Willett to “insure [*sic*] that the pet does not at any time disturb any other resident of the Apartment Community.” (CP 129)

Once Maple Glen established an absence of unreasonableness, the burden shifted to Gordly to submit affirmative evidence to show a material issue for trial. Gordly failed to do so. Gordly disagreed with Maple Glen’s course of conduct, but this disagreement, in and of itself, does not establish *unreasonableness*. Gordly’s reliance on what she believes Maple Glen should have done

is insufficient to defeat summary judgment. It is well-established that “[a]rgumentative assertions, speculative statements, and conclusory allegations do not raise material fact issues.”<sup>88</sup>

For example, in the trial court, Gordly suggested that Maple Glen should have done more in response to pet policy violations. (CP 89-90) Gordly did not raise any evidence of violations by Cody, but Gordly nonetheless argued that Maple Glen should have terminated the lease agreement or not allowed Gordly to keep Cody in the first place. (CP 89-90) Gordly’s bare allegations are insufficient to establish unreasonableness. Furthermore, Maple Glen had no record of violations with respect to Cody and was unaware of Cody’s viciousness before the attack. (CP 123) There was no basis for Maple Glen to deny Willett the right to keep the dog or to evict Willett from the apartment.

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<sup>88</sup> *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006) (citing *Ruffer v. St. Francis Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990)).

On appeal, Gordly expands her argument with additional steps she alleges Maple Glen should have taken. She argues that Maple Glen should have posted a warning sign.<sup>89</sup> Again, Gordly's bare allegation regarding the necessity of a warning sign is insufficient to establish unreasonableness. Moreover, there was nothing to warn against. Maple Glen specifically required that Cody be kept on a leash when outside Willett's apartment. (CP 129) It is not unreasonable to fail to put up a sign warning licensees of the potential that a tenant would violate the terms of the Pet Addendum. Further, Gordly herself argues she was unaware that Cody was unleashed until a few seconds before he attacked her.<sup>90</sup> A warning sign could not have prevented the sudden attack.

Gordly also argues that Maple Glen should have kept more effective barriers on the balcony.<sup>91</sup> To impose such a duty on Maple Glen would require that landlords alter balcony railings depending upon the size of the pet living

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<sup>89</sup> Brief of Appellant at 20.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

in the unit. Gordly cannot prove Maple Glen acted unreasonably because it failed to undertake such an undue burden.

Gordly's opposition to summary judgment illustrates Willett's unreasonableness in failing to control her dog. Nowhere, however, does Gordly raise any evidence to show unreasonableness *on the part of Maple Glen*. Summary judgment was proper.

**3. Whether Maple Glen owed Gordly a duty as a licensee or an invitee, that duty would arise only if Maple Glen had knowledge of the dog's dangerous propensities, which it did not.**

Whether a licensee or an invitee, Gordly must prove that Maple Glen had actual knowledge that Cody had attacked other humans and was likely to do so again.<sup>92</sup> As discussed above, there is no such evidence.

Maple Glen and its employees never received any complaints about Cody. (CP 129) Likewise, no incidents had ever been reported to Animal Control. (CP 120) According to Willett, Cody had never bitten anyone and

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<sup>92</sup> See discussion at pp. 29-30 above.

Willett took precautions to prevent any problems with him. (CP 120) Even Willett had no indication that Cody would attack Gordly as he did. (CP 120) Mere aggression toward strangers and other normal canine behavior is insufficient.<sup>93</sup> There is no evidence that Maple Glen had knowledge of prior attacks. Indeed, there were no prior attacks. Summary judgment was proper.

**4. Maple Glen did not gratuitously assume a duty to Gordly.**

Gordly argues that Maple Glen gratuitously assumed a duty to protect Gordly from Willett's dog.<sup>94</sup> Gordly is mistaken. The gratuitous assumption of duty doctrine, also termed the "voluntary rescue doctrine," applies when a person undertakes "to render aid to or warn a person in danger."<sup>95</sup> The doctrine requires that the defendant promise to perform a service, thereby inducing reliance and preventing the plaintiff from seeking help elsewhere, and then that the defendant either fail to perform that duty or

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<sup>93</sup> *See id.*

<sup>94</sup> Brief of Appellant at 36.

<sup>95</sup> *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998).

perform it poorly.<sup>96</sup> The doctrine does not apply in this case.

Maple Glen did not promise to perform a service. At the trial court level, Gordly failed to articulate how Maple Glen allegedly undertook a duty to Gordly. (CP 92-93) On appeal, Gordly mistakenly argues that Maple Glen undertook the duty to evict vicious dogs by virtue of the right retained in the Pet Addendum.<sup>97</sup> Maple Glen, in that Addendum, reserved to itself the right to evict Willett's dog if the dog disturbed other residents. (CP 129) Maple Glen, however, made no promise to do so. Gordly confuses the *right* to act with the *duty* to do so. Moreover, Gordly attempts to translate Maple Glen's rules requiring that Willett control her dog (CP 129) into Maple Glen's assumption of that duty for itself. This argument fails. Maple Glen specifically disavowed the duty to control Willett's dog by expressly requiring that Willett do so. (CP 129)

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<sup>96</sup> *Id.* (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975)).

<sup>97</sup> Brief of Appellant at 35-36.

In addition, Maple Glen's rules in the Pet Addendum did not induce Gordly's reliance. Indeed, Gordly did not know about the rules before this lawsuit. Gordly cannot reasonably argue that she was induced into relying on Maple Glen to control Willett's dog.

**B. The trial court did not abuse its discretion when it correctly denied Gordly's CR 56(f) motion for a continuance.**

The denial of Gordly's CR 56(f) motion is reviewed for an abuse of discretion.<sup>98</sup> A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons" and "where no reasonable person would take the position adopted by the trial court."<sup>99</sup> Not only did the trial court not abuse its discretion in denying Gordly's CR 56(f) motion, it was correct in doing so.

The trial court may deny a CR 56(f) motion for continuance where: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired

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<sup>98</sup> *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990) (citations omitted).

<sup>99</sup> *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 148-49, 768 P.2d 998 (1989) (citations omitted).

evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.”<sup>100</sup> The trial court’s decision to deny Gordly’s motion is supported on two separate grounds.

**1. The discovery Gordly sought would not raise a genuine issue of material fact.**

All the discovery Gordly said in her CR 56(f) motion that she wanted to pursue had reference to Cody’s vicious propensities. None of the evidence sought was material.

First, under authority of *Frobig*, Maple Glen can owe no duty, or have any liability, to Gordly regardless of Cody’s viciousness or what it knew about Cody’s viciousness. All the evidence sought by Gordly was immaterial.

Second, even if *Frobig* did not apply, Maple Glen could be liable only if Maple Glen had knowledge of Cody’s viciousness—i.e., only if Maple Glen knew Cody

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<sup>100</sup> *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

had bitten some other person before he bit Gordly. None of the discovery identified by Gordly would produce such evidence.

Gordly sought:

- depositions and written discovery of Maple Glen to determine “the circumstances leading to [Maple Glen’s] refusal to enter into the tenants’ apartment for fear of the dog.” (CP 96) Gordly refers to Maple Glen’s 2002 letter to Willett requesting entry to complete repairs and stating that management could not enter without Willett present “because of the dog.” (CP 80) That letter was written two years before Cody was born and presumably refers to Petey’s presence in the apartment. The letter has no bearing on Maple Glen’s knowledge of Cody’s propensity to attack.
- document requests to Maple Glen regarding enforcement of Maple Glen’s pet policies with respect to other tenants. (CP 96) Maple Glen’s enforcement of its pet policies against other tenants has no bearing on Maple Glen’s knowledge of Cody’s propensity to attack.
- depositions of Maple Glen employees who may have witnessed the attack on Gordly. (CP 96) Gordly must establish Maple Glen’s knowledge *prior* to the attack. Employee testimony regarding the attack itself is irrelevant to Maple Glen’s prior knowledge.

- depositions of other tenants to determine their knowledge of Cody's viciousness. (CP 96) The knowledge of other residents cannot be imputed to Maple Glen. Furthermore, Gordly must prove more than mere aggression. She must prove that Cody had attacked other humans and was likely to do so again. Cody had never attacked anyone prior to Gordly. (CP 120) Willett herself "had no idea that [Cody] would do what he did." (CP 120)
- deposition of Maple Glen regarding Maple Glen's initial decision to allow Willett to keep Cody at the apartment. Maple Glen already testified that it was unaware of Cody's propensity to become vicious. (CP 123) Maple Glen was not required to "either prepare a safe place" or "affirmatively seek out and discover hidden dangers."<sup>101</sup> It had no duty to determine whether Cody would become vicious in the future.
- deposition of Animal Control regarding the accuracy of Animal Control's records showing that there were no prior complaints about Cody. (CP 96) The knowledge of Animal Control cannot be imputed to Maple Glen.
- subpoena of Cody's veterinarian to obtain treatment records. (CP 96) As with Animal Control, the knowledge of the veterinarian cannot be imputed to Maple Glen.

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<sup>101</sup> *Memel*, 85 Wn.2d at 689.

Absent prior knowledge, Maple Glen owed no any affirmative duty to protect Gordly from harm.

**2. Gordly does not offer a good reason for the delay in obtaining the desired evidence.**

Gordly filed this lawsuit in March 2009. (CP 178) She had the police report for this accident even before the lawsuit was filed. (CP 63) After filing, Gordly served a single set of discovery requests on Maple Glen, to which Maple Glen responded in January 2010. (CP 63) Maple Glen's responses included Willett's entire tenant file. (CP 63)

Maple Glen's motion for summary judgment was not filed until five months later, on May 28, 2010. (CP 132) During that five-month period, Gordly failed to note any depositions, serve any subpoenas, or issue any interrogatories or document requests. (CP 63) The trial court did not abuse its discretion in finding that Gordly had ample opportunity to pursue discovery and failed to do so.

**VI. CONCLUSION**

For the reasons set forth above, Maple Glen respectfully requests that the trial court's dismissal of

Gordly's claims against Maple Glen on summary judgment  
be AFFIRMED.

DATED: November 10, 2010.

BULLIVANT HOUSER BAILEY PC

By   
\_\_\_\_\_  
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Attorney for Respondents American  
Management Services Northwest and GFS  
Maple Glen, LLC

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 10<sup>th</sup> day of November,

2010, I caused to be served Brief of Respondent to:

J.D. Smith  
David C. Reed  
Ward Smith PLLC  
1000 2nd Ave., Ste. 4050  
Seattle WA 98104

<input type="checkbox"/>	via hand delivery.
<input checked="" type="checkbox"/>	via first class mail.
<input type="checkbox"/>	via facsimile.

I declare under penalty of perjury under the laws of the state of  
Washington this 10<sup>th</sup> day of November, 2010, at Seattle, Washington.

  
Tracy Horan

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