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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY No. 47645-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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Steven Oliver, an individual person,

Appellant,

v.

Eugene L. Mero and "Jane Doe" Mero, husband and wife, and their  
marital community comprised thereof; and Grays Harbor County, a  
political subdivision of the State of Washington,

Respondents.

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BRIEF OF RESPONDENT EUGENE MERO

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## I. STATEMENT OF THE CASE

### A. Facts

This matter arises out of an incident that occurred on August 23, 2010 when the appellant Steven Oliver was bitten by a dog owned by defendant Henry Cook. CP 11-12. The incident occurred at property jointly owned by defendant Lynn O'Conner and respondent Eugene Mero. CP 255.

Oliver operated an automotive repair business at the Mero property. CP 249. On the afternoon of August 23, Oliver went to the property to retrieve some painting supplies. CP 251. After parking his vehicle, Oliver walked along the passenger side of another parked vehicle, a truck he recognized as owned by Mero. CP 252. As he was walking, he heard a dog bark from the cab of the truck. CP 252. Plaintiff claims that as he turned to look, the dog lunged out from an open window and bit him. CP 252-253.

Mero's truck had been in the possession of defendant Cook, and was driven to the property on the day of the incident by Cook. CP 259. Mero was surprised to see Cook that day, as he had not expected him to come by the property. CP 263. Mero and Cook then left the property to purchase some supplies at Dell's, a farm supply store. CP 259-260. They left the truck and took another vehicle owned by Mero. CP 260-261.

Cook, without involvement of Mero, left Cook's dog, Scrappy, in the truck at the property. CP 261, 264. Mero testified that while he knew the dog was in the truck, he did not look at the truck where the dog was before he and Oliver left. CP 264. Before they reached the store, Mero received a call on his cell phone from another individual at the property who told him that Oliver had been bitten by a dog. CP 260. Oliver had arrived at the property sometime after Mero and Cook had left for the store. CP 260.

Appellant states in his brief at page 32 that "The truck that the dog Scrappy was located in at the time of the attack was also owned exclusively by Mr. Mero . . . Mr. Mero did not cede any control or authority over the property to Mr. Cook." This is not entirely true. Cook had been in possession of the truck. He had been using the truck and had driven it to Mero's property. CP 258 Cook left his personal property in the truck when he got to the Mero property, an indication that he intended to continue to use the truck.

Mero's testimony in this case, not contradicted by any other evidence, was that he had seen Scrappy only two to three times. CP 256. He did not accurately know its breed or weight. CP 262. The dog was always friendly with Mero; the dog would bark if he was in a vehicle. CP 256. Mero had no knowledge that Scrappy may have been aggressive or attacked people in the past; or that he may have had a reputation for that.

CP 256. Mero had no knowledge of any prior incidents involving Scrappy where he was aggressive. CP 256-258. There is no contrary evidence.

Appellant states at page three of his Brief: "In fact, Mr. Mero himself instructed Mr. Cook to make sure a window was left open for the dog." This is a misstatement of the testimony. Mero testified:

Basically, that's what he told me is the dog was in the truck because I didn't see it when it drove in, and I said, "Well, did you leave the window down a little bit so the dog can get some air?" And he said yes, he did.

CP 261. Mero **did not tell** defendant Oliver to leave a window down.

Further, Mero did not even **see** the dog in the truck or the position of the window. CP 264. He did not control the truck; it was in the possession of dog-owner Cook. And Mero did not control the presence of the dog in the truck.

Appellant states at page four of his Brief that: "Mr. Mero himself avoided going near Mr. Cook's vehicle when Scrappy was in it precisely because of Scrappy's aggressive nature." This is a misstatement of the testimony. Mero did not ever testify that he thought that Scrappy was aggressive. Mero refused to testify that Scrappy was aggressive:

Q When you say always make you aware, was the dog aggressive?

A If it was in a vehicle, it would bark and make you know that you shouldn't go near that vehicle.

Q And so you avoided going near Mr. Cook's vehicle when Scrappy was in there; is that right?

A Yes.

Q Why?

A I just stated that.

Q Do you think the dog would bite you if you'd get close enough?

A You're making an assumption.

Q I'm asking you what you think?

A No. I don't know.

CP 256.

B. Procedure

Plaintiff filed suit against Cook, Mero, O'Conner, the City of Chehalis, and Grays Harbor County in July 2012. CP 9. The trial court entered summary judgment in favor of Grays Harbor County on May 16, 2014. CP 241. The trial court entered summary judgment in favor of Eugene Mero on October 31, 2014. CP 244. Oliver has now appealed the dismissals of the County and Mero. CP 237-238.

The Complaint alleges that Mero was an owner of the real property and the truck where the accident occurred. CP 11. The Complaint alleges that as a result of "the negligence of the defendants" plaintiff sustained injuries, required and continues to require medical care, and that plaintiff's injuries are permanent. CP 12. The Complaint more specifically alleges that "Defendant, EUGENE L. MERO, breached his duty of reasonable care as the owner of the vehicle, premises, and business that housed a dangerous dog and failed to protect plaintiff STEVEN J. OLIVER, from the dangerous dog." CP 14.

## II. ARGUMENT

### A. The trial court correctly refused to apply premises liability law to this case.

The trial court properly analyzed and dismissed Oliver's claims against Mero based on long-standing common law regarding dangerous animals. The trial court ruled that premises liability theory did not apply and that under common law liability, Mero was not the owner, keeper or harboror of the dog at issue, and therefore, as a matter of law, not liable. Oliver argues that that was the wrong analysis, and that this court should reverse the trial court based upon premises liability law. Oliver's case against Mero is properly dismissed pursuant to either analysis. The trial court should be affirmed.

The only published law in the State of Washington regarding third party liability for injuries resulting from animals is found in landlord-tenant cases. There is no published law that applies premises liability law to determine such liability. The trial judge in this case did note an unpublished Division I case that considered other theories of law and then declined to extend the law. Referring to the unpublished case, the trial judge here noted: "This was not a common landlord-tenant situation as in *Clemmons [v. Fidler, 58 Wn.App. 32 (1990)]*, and yet the Court found that the common law was direct and clear that dog owners have the

responsibility for injuries, and it was hostile to the use of other theories to create liability.” CP (October 31, 2014) 24-25.

The public policy in this state that supports this limitation in the law was stated by Judge Stanley Worswick (joined by Judges Alexander and Petrich) in *Clemmons v. Fidler*, 58 Wn.App. 32 (1990): “Our rule also 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.” *Clemmons, id.* at 38. The Court was upholding long-standing law that it believed to be a beneficial public policy: to place responsibility for dog bites on the owner of the dog, and not to foster fishing expeditions for deep pockets.

Nevertheless, in this case, whether analyzed under landlord tenant law, or analyzed under premises liability law, Mero is not liable, as a matter of law, to Oliver.

B. The trial court correctly dismissed Oliver’s claims against Mero where there is no evidence that Mero owned, harbored, or cared for Cook’s dog at the time of the incident.

1. Mero did not owe any duty to Oliver.

Appellant Oliver argues that Mero owed him a duty with respect to Cook’s dog because Mero owned the real property, the truck, and a business at the property where the accident occurred. However, none of

these theories support the plaintiff's claims because Mero did not own, control, or harbor **the dog**. Oliver's theory of "ownership" is based on nothing more than the mere fact that Cook's dog happened to be on and in property owned by Mero at the time of the incident. However, there is no evidence that Mero had anything to do with Cook's dog being on the property. And there is no law to support liability based upon property ownership, versus dog ownership.

There is no support in law or fact for plaintiff's theory of liability against Mero. Because plaintiff cannot establish that Mero owed him any duty with respect to Cook's dog, his claims against Mero must be dismissed.

2. Property ownership does not support a claim.

Oliver alleges in his complaint that Mero "breached his duty of reasonable care as the owner of the vehicle, premises, and business that housed a dangerous dog . . ." CP 14. Whether a defendant owes a duty to the plaintiff is a question of law. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 128 (1994). Washington courts have consistently held that liability for a dog depends on ownership or direct control of the animal. See *Clemmons v. Fidler*, 58 Wn.App. 32, 37 (1990); *Frobig v. Gordon*, 124 Wn.2d 732, 735 (1994). Since Mero neither owned nor

controlled Cook's dog, Oliver's claims against him under property ownership fail as a matter of law.

### 3. Common law

Washington recognizes one statutory and two common law bases of liability for injuries by a dog.

Two theories of liability exist at common law; a dog *owner* who knows of vicious propensities may be strictly liable and an *owner* without such knowledge may be negligent if he fails to reasonably prevent harm. *Beeler v. Hickman*, 50 Wn. App. 746, 753-54, 750 P.2d 1282 (1988). RCW 16.08.040 makes the owner strictly liable without regard to knowledge.

*Frobig, id. at 735, n.1* (emphasis in original).

Under the common law, the *owner* of a dog who knows of the animal's dangerous propensities is strictly liable for any harm inflicted by the dog. *Clemmons v. Fidler*, 58 Wn.App. 32, 34-35 (1990). In addition, an *owner* of a dog may be liable under the common law, regardless of knowledge, if he exercises "ineffective control of an animal in a situation where it would reasonably be expected that injury could occur[.]" *Arnold v. Laird*, 94 Wn.2d 867, 871 (1980). In both cases though, it is the *owner* of the dog who is responsible.

4. Statutory basis

RCW 16.08.040, is another form of strict liability. That statute provides that the *owner* of a dog which bites a person “while such person is in or on a public place or lawfully in or on a private place” shall be liable for damages “regardless of the former viciousness of such dog or the owner’s knowledge of such dog.”

No matter the form of liability, Washington courts have long recognized that *only* “the owner, keeper, or harborer” of the dog can be held liable for harm inflicted by the dog. *Frobig v. Gordon*, 124 Wn.2d 732, 735(1994); *Clemmons v. Fidler*, 58 Wn.App. 32, 34 (1990).

Further, it is well established under Washington law that a land owner is not liable to a third person who is injured on the owner’s property by another person’s dog. In *Frobig*, the plaintiff was injured by a Bengal tiger owned by the defendant landlord’s tenant and kept by the tenant on the landlord’s premises. *Frobig v. Gordon*, 124 Wn.2d 732, 734 (1994). The plaintiff brought suit against the landlord alleging, as Oliver does here, that the landlord was negligent in “harboring” a dangerous animal. The trial court dismissed the claims against the landlord on summary judgment. *Frobig, id.* at 735. The Supreme Court affirmed the trial court’s grant of summary judgment in favor of the landlord.

In its analysis of the case, the Supreme Court began with this statement: “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.” *Frobig, id.* at 735 (and cases cited therein). The court concluded that the issue of whether the landlord owed a duty is not a question of fact. *Frobig, id.* at 740. “Rather, the issue is a matter of law, and we conclude that landlords have **no duty** to protect third parties from a tenant’s lawfully owned but dangerous animal.” *Frobig, id.* at 740-741 (emphasis added).

Under Washington law, the landlords would not be liable to the tenant for the tiger’s attack so should not be liable to third parties for injuries inflicted by the animal. . . The wild animals were [the owner’s] alone, and under Washington law liability resulting from the ownership and management of those animals rests with [the owner] alone.

*Frobig, id.* at 737.

The landlord’s prior knowledge of a dangerous animal on their premises “has no significance.” *Frobig, id.* at 737. “Clemons contends that because the landlord Fidler knew or had reason to know of the dog’s vicious tendencies, he is liable for the harm to Anthony. We disagree; the landlord’s knowledge is immaterial.” *Clemmons v. Fidler*, 58 Wn.App. 32, 34 (1990). This rule has been the law in Washington for nearly 90 years. See *Clemmons, id.* at 35 citing *Markwood v. McBroom*, 110 Wn.

208 (1920) and others. Nevertheless, Mero had no knowledge regarding the dog's propensities or his history.

Also in *Frobig*, the landlord attempted to verbally impose conditions on the tenants regarding their keeping of wild animals, including the tiger at issue. The conditions included keeping a dart gun handy, building appropriate cages, and not permitting the animals to be outside of their cages. This demonstrates some effort by the landlord to control the animals. Even so, the court refused to impose liability on the landlord. In the case at bar, there was absolutely no effort by Mero to exercise control over the animal. Mero's question about whether a window was left open for the dog cannot be construed as "control" pursuant to *Frobig*. Mero's question does not support a case of liability against him pursuant to the facts and holding of *Frobig*.

As the *Clemmons* court stated, "Our rule also 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." *Clemmons v. Fidler*, 58 Wn.App. 32, 38 (1990).

The *Markwood* case is also illustrative. In *Markwood*, the plaintiff sought to hold the receiver of a motion picture corporation liable for injuries inflicted by a dog that, unbeknownst to the receiver, was being

kept on the property. The court noted that only the “owner, keeper, or harborer” of the dog could be liable at common law for resultant injury. *Markwood v. McBroom*, 110 Wn. 208, 211 (1920). After concluding it was “obvious” the receiver was neither the owner nor the keeper of the dog, the court considered whether the receiver could be held liable under the theory that he “harbored” the dog because it was on the receiver’s property.

The court defined “harboring” as “protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harbinger thereof, as affecting liability for injuries caused by it.” *Markwood, id.* at 211. There is no evidence in this case that Mero “protected” Cook’s dog, treated Cook’s “dog as living at his house,” or “undertook to control its actions.” As in *Markwood*, this court should affirm the dismissal of this action against Mero.

As in *Frobig, Clemmons*, and *Markwood*, Mero’s only connection – and it is a tenuous connection at best – to Cook’s dog is the mere fact that the dog happened to be on property co-owned by Mero at the time of the incident. This does not create liability under well-established Washington law and public policy. “[P]ossession of the land on which the animal is kept . . . is not enough to make its possessor liable as a harbinger

of the animal. *Harris v. Turner*, 1 Wn.App. 1023, 1030 (1970) (quoting *Restatement (Second) of Torts*, Sec. 514).

It is undisputed that Mero did not own, or claim ownership of Cook's dog. Mero did not have possession of or care for Cook's dog. Mero did not treat Cook's dog as his own or undertake to control the dog's actions. Under Washington law, "liability flows from ownership or direct control" of the dog. *See Frobis v. Gordon*, 124 Wn.2d 732, 735 (1994). It is undisputed that Mero did not own or have direct control (or any control, for that matter) over Cook's dog. Therefore, Mero did not owe any duty to the plaintiff. Oliver's claims against Mero were properly dismissed.

C. The trial court correctly dismissed Oliver's claims against Mero where there is no evidence that Mero knew or should have known of a dangerous condition on his property under premises liability law.

Oliver claims that he was a business invitee on Mero's property, and that Mero owed him the highest duty of care.

A *[business]* . . . invitee is a person who is either expressly or impliedly invited onto the premises of another [for some purpose connected with a business interest or business benefit to the *[owner]* . . .

6A *Washington Practice Series, Washington Pattern Jury Instructions - Civil*, 6<sup>th</sup> Ed., 2012, Section 120.05 (WPI 120.05); *McKinnon v. Washington Federal Sav. & Loan Ass'n*, 68 Wn.2d 644 (1966).

An *[owner of premises]* . . . is liable for any *[physical]* injuries to its *[business invitees]* . . . caused by a condition on the premises if the *[owner]* . . . :

(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such *[business invitees]* . . . ;

(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 ordinary care to protect them against the danger.

WPI 120.07. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121 (1994). All three elements of the test must be met. Here, there is no material issue of fact – none of the elements required as the basis of a duty are met.

If it is said that Scrapy the dog is the “condition” on the property, the analysis fails. While Mero did know of the presence of Scrapy on the property on the day of the accident, there is no evidence at all in this case that Mero had any knowledge whatsoever that Scrapy involved “an unreasonable risk of harm” to Oliver, or anyone else. There is no evidence that Mero knew that Scrapy had any dangerous propensities at all. Mero’s prior experience with Scrapy was that the dog had been friendly to Mero. The proposition that knowing Scrapy would bark if he

were in a vehicle indicated any danger is preposterous. Dogs bark; that does not make them dangerous. Oliver fails to meet the first element required to establish a duty owed. Because there must be evidence to prove all three elements of the test, and because there is no evidence to support proof of the first element, no duty is established. Oliver's claims against Mero were properly dismissed.

Nevertheless, Oliver also fails to meet the second element, that he would fail to discover or realize the danger, or would fail to protect himself. Again, there is no evidence that defendant Mero knew that Scrappy presented a "danger," as discussed above. Oliver saw the truck and heard Scrappy bark. There was nothing dangerous about that. That the dog then bit Oliver was completely outside of any knowledge of Mero. Oliver cannot meet this element. There is no contrary evidence.

Finally, the last element of the test for a duty is not met. Mero cannot protect against something of which he had no knowledge.

Oliver's claims against Mero were properly dismissed by the trial court under a premises liability analysis.

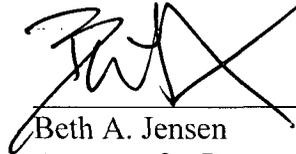
### III. CONCLUSION

Mero, a real property owner, and not the dog owner, owed no duty to Oliver pursuant to Washington's strong public policy of holding only the owners of dangerous animals responsible for their behavior. No

Washington court or statute has extended responsibility to owners of real property pursuant to premises liability theory, because of the strong public policy to hold the animal owner responsible. Respondent Mero respectfully requests this court AFFIRM the trial court's dismissal of Oliver's claims against Mero.

Dated this 22<sup>nd</sup> day of October, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Beth A. Jensen", is written over a horizontal line. The signature is stylized and somewhat cursive.

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DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

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