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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Washington State Court of Appeals
Division III



Docket No. 299708

Spokane Cy. Sup. Ct. Cause No. 10-2-04835-3

CHERRYANN COBALLES, et al.,

Appellants

-against-

SPOKANE COUNTY, et al.,

Respondents.

APPELLANTS' BRIEF

ADAM P. KARP, ESQ.
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WSBA No. 28622

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I. ASSIGNMENTS OF ERROR

1. Refusing to hear certain constitutional questions.
2. Affirming Board's Decision declaring Gunnar dangerous.

Issues Pertaining to Assignments of Error

1. Were Board's findings of fact supported by substantial evidence?
2. Did Board commit errors of law warranting reversal, viz.:
 - a. Warrantless declaration and seizure of Gunnar as dangerous?
 - b. Applying county's "severe injury" definition in conflict with state law (Conclusion 2)?
 - c. Misapplying county's "severe injury" definition (Conclusions of Law 6)?
 - d. Misapplying term "provocation" (Conclusion of Law 7)?
 - e. Wrongly concluding Gunnar inflicted severe injury without provocation (Conclusion of Law 8)?
 - f. Wrongly concluding no willful trespass by E.C. (Conclusion of Law 9)?
 - g. Wrongly concluding no commission of other tort by E.C. (Conclusion of Law 10)?
 - h. Wrongly refusing to modify determination of Gunnar as dangerous dog (Conclusion of Law 12 and Recommendation 1)?
 - i. Wrongly requiring future owner anywhere in country to comply with SCC 5.04.035 (Recommendation 2)?
 - j. Applying the wrong standard of proof?

II. STATEMENT OF THE CASE¹

Ms. Coballes, her two sons Anthony and Connor, and E.C.'s father Josh Smith, over several visits to the Coballes home, repeatedly admonished three-year-old E.C. not to enter the room of Anthony Coballes (where Gunnar, a three-year-old neutered male Malamute mix was kept). Notwithstanding these admonitions, on Sept. 19, 2010, E.C. trespassed into Anthony's room, the door clipping Gunnar, startling Anthony and Gunnar, and unintentionally provoking at most a two-to-three second, flash reaction. Gunnar bit E.C. to protect himself, Anthony, and the other family dog, Sadie. When he perceived the threat abated, Gunnar stood down on his own volition without any evidence of post-bite aggression toward E.C. Further, at no time prior to the incident did Gunnar show any interest or aggression toward E.C. Ph.D.-level behaviorist Dr. James Ha confirmed that the incident represented a "perfect storm" of "stacked triggers" highly unlikely to be replicated and signified an unintentionally provoked bite.

The next day, Sept. 20, 2010, the County declared Gunnar "dangerous" under Ch. 5.04 SCC by issuing a dangerous dog declaration ("DDD") and seizing him from inside Ms. Coballes's residence without a

¹ The verbatim report of proceedings is referenced as "**VRP**" and the administrative record as "**AR**."

warrant. The DDD was issued the day after the incident by Ofc. Scheres without any investigation beyond receiving a bite report from the hospital. No officer with SCRAPs thought to conduct a thorough, even-handed investigation into the matter before issuing the DDD, including not once speaking to E.C. or seeking statements from any of the Coballeses, not photographing the scene, and not accounting for the undisputed protocol that everyone, including E.C. and her father, knew applied to interactions between E.C. and Gunnar.²

Finally, Ofc. Montano admittedly never investigated the possibility

² By Ofc. Scheres's own admission, he conducted no investigation prior to declaring Gunnar dangerous but merely relied on the bite report transmitted from the hospital. **VRP 31:10-14** (admitting "not involved in an investigation"); **VRP 36:6-11** (accord, did not conduct an investigation before declaring Gunnar dangerous); **VRP 36:12-21** (noting that he concluded Gunnar was dangerous "without any further inquiry" than reviewing the "bite report" from "The Health District"); **VRP 33:14-17** (admitting purpose of visiting Ms. Coballes on Sept. 20, 2010 was, in part, "to issue the dangerous dog declaration"); **VRP 39:1-10** (admitting he never interviewed Anthony Coballes or Connor Coballes about the alleged incident). **VRP 41:14-18** (noting he did not have a chance to consult with or speak to Ofc. Montano about information she allegedly gathered regarding the incident; which makes sense, since by Ofc. Montano's own admission, she was not even advised of the bite until the next day, Sept. 21, 2010 [**VRP 45:12-13**]). Ofc. Montano admits that she never offered to Ms. Coballes or Anthony the right to prepare a written statement, but did request one of E.C.'s father. **VRP 65:8-20**. Nor did Ofc. Montano ask to speak to Connor Coballes, who was present during the incident. **VRP 65:21-23**. Further, Ofc. Montano corrected errors in her statement only after Ms. Coballes filed her appeal notice. **VRP 63:9-14**. Although Ofc. Montano asserts she did not speak to Connor because Ms. Coballes said he did not witness anything, her report does not relate this expressly (see **AR**, Montano *Additional Narrative Report*, p. 4 ("Coballes was with her two children. I met Coballes outside and asked her if I could ask her if the son that was with her was the son that was present during the incident. Coballes stated yes and that I could ask him a couple of questions.")); but see **VRP 175:23—176:2** (CherryAnn testifying to Ofc. Montano's very intimidating demeanor and asking which of her sons was in the room, not which of her sons was present during the incident). Undisputedly, Connor was in his room, across the hallway from the location of the alleged incident. Lastly, Ofc. Montano never spoke to E.C. or even attempted to speak to her. **VRP 67:6-12**. Nor did Ofc. Montano take photographs of the scene. **VRP 67:18-19**.

of trespass by E.C. into Gunnar's room, adding, "I don't believe a three-year-old can trespass when invited into a home." **VRP 79:14-17**. Ms. Coballes's efforts to explain the circumstances further were met dismissively and resulted in a retaliatory criminal charge.³

Ms. Coballes timely requested an administrative appeal hearing pursuant to SCC 5.04.032 to the Hearing Examiner ("Examiner"). Docketed under SCRAPS and Examiner No. 2010-0549, the Examiner heard the matter on Oct. 6, 2010. On Oct. 20, 2010, the Examiner issued preliminary *Findings, Conclusions and Recommendation*, which he later corrected on Nov. 2, 2010 after reconsideration based, in part, on Ms. Coballes's *Memorandum Regarding Erroneous, Ambiguous, and Omitted Findings* dated Oct. 25, 2010. On Nov. 2, 2010, the Board of Commissioners ("Board"), in a 2 "YES" and 1 "NO" vote, upheld the Examiner's findings and conclusions without modification. This Decision

³ **VRP 178:7-19**. The day after seizure, Sept. 21, 2010, in retaliation for Ms. Coballes expressing dismay with the harried and incomplete investigation by SCRAPS to declare Gunnar dangerous, and her intent to seek a contested hearing, Ofc. Nicole Montano issued Ms. Coballes a criminal citation under SCC 5.04.070(f) for the purportedly strict liability crime of Dog Exhibiting Vicious Propensities, for which Ms. Coballes faced up to 90 days in jail and/or \$1000 in fines. Ms. Coballes explains the hostile manner in which Ofc. Montano treated her and her son, making the retaliation clear. **VRP 177:11—178:6**. With such timing, the County forced Ms. Coballes to risk self-incrimination by challenging the dangerous dog declaration and testifying at the hearing of Oct. 6, 2010, before resolution of her criminal case. Further, counsel for SCRAPS, David Hubert, who defended against Ms. Coballes's "appeal" before the Examiner, chose to also serve as her prosecutor in the related criminal action. Mr. Hubert also expressed his client's right to seek the death penalty for Gunnar upon conviction, under SCC 5.04.120(a) – notwithstanding the outcome of her appeal and regardless of Ms. Coballes's compliance (albeit under protest) with the restrictions imposed for keeping a dangerous dog

was docketed under Board No. 10-0950. **AR** (Decision). Ms. Coballes timely sought review by the superior court through a writ of review, issued on Nov. 30, 2010. On Apr. 19, 2011, the court denied the relief requested in a May 23, 2011 order timely appealed by Ms. Coballes.

III. SUMMARY OF ARGUMENT

This court should vacate the DDD, based on any or all of the following grounds, noting that a superior court's decision to grant or deny relief upon a writ of certiorari is reviewed *de novo*. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788 (1995); *Mansour v. King Cy.*, 131 Wash.App. 255, 262 (2006):

- A. Pure error of law:** Erroneous definition of “provocation.”
- B. Pure errors of fact:**
 - 1. Arbitrary and capricious findings of fact.
 - 2. Arbitrary and capricious omitted or absent findings of fact.
- C. Mixed errors of fact and law:** Erroneous application of law to facts with respect to provocation, willful trespass, severe injury, and other tort.
- D. Constitutional errors:**
 - 1. Warrantless seizure.
 - 2. Inadequate standard of proof.
 - 3. Conflict with Ch. 16.08 RCW.
 - 4. Subject matter jurisdiction – exporting restraints.

IV. ARGUMENT

- A. Pure Error of Law: Provocation**

Per SCC 5.04.032(a)(5), “the burden shall be on the director, or his/her designee, to establish by a preponderance of the evidence that the dog is a dangerous dog.” A “dangerous dog” is defined at SCC 5.04.020(8) as, in relevant part:

Any dog that (a) inflicts severe injury on a human being without provocation on public or private property... A dog shall not be declared dangerous if the threat, injury, or damage was sustained by a person who, at the time, was committing a willful trespass or other tort upon the premises occupied by the owner or keeper of the dog

Germane to this appeal are the terms “severe injury,” “without provocation,” “willful trespass,” and “other tort.” The County bears the burden of proving or disproving each term as the context indicates.

Surprisingly, no appellate Washington court has ever defined “provocation” in the civil, criminal, or regulatory context despite its ambiguity. Reasonable minds differ on what acts sustain a conclusion that a dog inflicts severe injury on a human unprovoked, whether the term is objective or subjective, from the human’s or dog’s perspective, intentional or unintentional. Case law in other jurisdictions embraces both intentional and unintentional acts as alternative bases for provocation, particularly in the context of personal injury to children of tender years.⁴ For instance, a

⁴ See *Toney v. Bouthillier*, 129 Ariz. 402, 405-6 (1981) (three-year-old punching dog may constitute provocation, irrespective of intent to provoke); *Nelson v. Lewis*, 36 Ill.App.3d 130 (1976) (provocation where 2.5 year old accidentally stepped on dog’s tail); *Nicholes v. Lorenz*, 396 Mich. 53 (1976) (determination whether six-year-old inadvertently stepping on dog’s tail constituted provocation was jury question); *Porter v. Allstate Ins.*

party may assume the risk of being bitten by approaching a dog without permission or introduction by the dog's handler, invading his personal space and threatening him (and from the dog's standpoint, his guardian).⁵

While E.C. did not intentionally provoke Gunnar, a stranger was encroaching into the enclosed space where Gunnar was kept, without warning or supervision by a person known to Gunnar; Gunnar was struck by the door, startling him; Anthony was startled when E.C. entered the room while he was half-naked and in the middle of changing; and Sadie, a dog whom Gunnar regarded as a bonded family member, was present. A reasonable canine in this context, especially given other evidence presented at trial, would consider E.C.'s actions (and those imputed to her father, who was placed in control of his daughter) to be provocative, thereby excusing his brief contact with her.⁶ Accordingly, the County erred in adopting a definition of "provocation" that did not encompass

Co., 497 So.2d 927 (Fla.App.1986)(four-year-old provoked dog by pulling up on dog's ears).

⁵ In this regard, see *Stehl v. Dose*, 83 Ill.App.3d 440 (1980) (evidence supported jury verdict that dog provoked into attacking where prospective new owner came near dog to feed and pet, but when he turned back dog bit him; jury could regard crossing perimeter of dog's chain, entering protected territory and remaining while dog ate as provocation).

⁶ See *Parker v. Hanks*, 345 So.2d 194 (La.App.1977)(dogbite victim approached back of dog owner's home unannounced to buy fish, ignored "Beware of Dog" sign, opened door startling dog; *held*: contributory negligence); *Benton v. Aquarium Inc.*, 62 Md.App. 373 (1985) (driver assumed risk of bite by ignoring warning signs like "Trespassers Will Be Eaten" and "Guard Dog on Duty" and opening door).

unintentional acts. Incidentally, Ms. Coballes need not prove provocation as an affirmative defense, but the county must disprove it.⁷

B. Pure Errors of Fact

1. Findings Lacking Substantial Evidence.

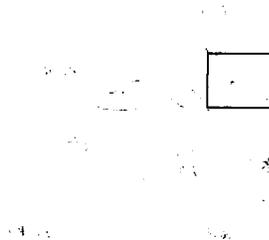
The following findings lack substantial evidence:

Finding 16: Anthony’s bedroom is approximately 11 feet by 11.5 feet in dimensions. The dog bed in the room sits on a frame that is approximately 40 inches square, elevated approximately one (foot) above the rug, and situated approximately six (6) feet, i.e., 70 inches, directly inside the door opening to the room. The door to the room is approximately 2.5 feet long, i.e. 30 inches. See testimony of CherryAnn Coballes, and Exhibit 4.

AR (Decision). Ms. Coballes testified, and the photographs depict clearly, that the dog bed was situated about 40” from the doorway, not 70”. She never states that the frame on which the dog bed sits is 40” by 40”. Rather, she claims that the area between the dog bed and the doorway and the area between the dog bed and the closet wall was 40”. The reference to Anthony’s hand-drawn exhibit makes this clear, as Mr. Karp asks Ms. Coballes to state the dimensions of the space containing the outline of Gunnar’s body and the letter “E” – both markers clearly situated in the

⁷ In *State v. Acosta*, 101 Wn.2d 612 (1984), the Supreme Court held that the State has the burden of proving the absence of self-defense in prosecutions for assault, citing both a statutory and constitutional basis. *State v. Camara*, 113 Wn.2d 631, 638 (1989) discusses when the absence of a defense is an ingredient of the offense. SCC 5.04.020 (“dangerous dog”) satisfies the first *Camara* test by expressly including the defense of provocation as an ingredient of the offense. That SCC 5.04.020 includes the “willful trespass or other tort” passage as part of the definition of “dangerous dog” upon which the county bears the burden also compels this interpretation.

area between the outermost edge of the opened door and the entrance, a distance not much greater than the 30” estimate for the door’s width. **VRP 161:23—162:17**. Anthony indicated Gunnar’s location “immediately before [he] saw him biting Emmalin” by an X and outline. **VRP 111:15-17**. The word “door” points directly to the doorway, not the opened door’s edge farthest from the hinge. The region referenced in Mr. Karp’s question is depicted by the red box in Exh. 11.



AR (*Exhibit 11*(emphasized))

To interpret Ms. Coballes’s testimony otherwise makes no sense, unless one calculates the distance between the dog bed and the closet wall as equidistant to that between the dog bed and the edge of the door farthest from the hinge – a measurement that defies photographic evidence and ignores Anthony’s illustration.

Further, the photograph taken in line of sight to the dog bed through Anthony’s open door (**Exh. 4**, below) plainly shows that the distance between the outer edge of the fully-opened door and the dog bed is roughly one third the width of the door, not a full door’s width plus ten

inches. In other words, when the door is fully opened at a 90-degree angle, it invades 30" into the 40" space spanning the edge of the dog bed closest to the door and the threshold to the room, not 30" into a 70" space. This is a critical factual finding, for it leaves the erroneous impression of a minimum distance of 3'4" from the dog bed to the door when opened, four times larger than the actual 10".



AR (*Exhibit 4* (emphasized))

Lastly, if the room is 11' by 11.5', with the shorter distance (132 inches) spanning the doorway to the rear wall of Anthony's room, then to place the dog bed 70" from the doorway would require the factfinder to locate the closest edge of the dog bed nearly six feet from the doorway. And if the court accepts that the Examiner had substantial evidence to support a dog bed frame measurement of 40" by 40" (though nowhere contained in the record), then that would mean the rear of the dog bed would be set back 110" from the doorway, or 22" from the back wall. As the court can see in *Exh. 4*, Anthony has a refrigerator against the rear

wall. Standard portable refrigerators are at least 18” deep, and require door clearance of at least another 17”. Even the smallest portable refrigerator would require more than 22” clearance from the rear wall. Hence, the Defendant arbitrarily and capriciously concluded that the door to the room, when opened, would at most invade 30” into a 70” space and not make contact with Gunnar or startle him. The exhibits make this measurement impossible.

Finding 21: When Anthony saw “Gunnar” attacking Emmalin, he grabbed “Gunnar” around the dog’s back legs near the closet and tried to pull the dog back. At this time, “Gunnar” stopped attacking Emmalin. During the incident, Sadie rose up to a standing position, but did not participate in the attack in any way. See testimony of Anthony Coballes.

AR (Decision). Undisputedly, Gunnar stopped biting E.C. on his own before Anthony or Ms. Coballes touched him.⁸ This is important to assess provocation and proportionality as discussed herein.

Finding 31: On September 20, 2010, an “animal bite incident report” on a Spokane Regional Health District form was completed by Sacred Heart Hospital, based on information provided by Josh Smith, CherryAnn Coballes and the hospital. See attachment to SCRAPS report, and testimony of Nancy Hill.

Finding 32: The animal bite incident report identified the victim of the dog bite as 3-year old Emmalin Champion, the dog involved as an Alaskan Malamute/Rottweiler named “Gunnar”, and the dog owner as CherryAnn Coballes. The report stated that “Emmalin accidentally

⁸ VRP 47:6-9 (Ofc. Montano remarking she did not recall if Anthony’s actions stopped Gunnar or if Gunnar stopped on his own); VRP 103:24—104:2 (Gunnar stopped on his own after realizing she wasn’t doing any harm to him; Anthony tried to grab his legs); VRP 105:8-11 (accord).

opened the door (at friend's home) to the dogs room when dog bit her."

AR (Decision). These findings leave the impression that Mr. Smith or Ms. Coballes supplied the statement that "Emmalin accidentally opened the door." Yet nowhere in the record does the testimony support that either so claimed. Nor did any third party with personal knowledge make this statement. This was no accident but a conscious decision to disregard repeated warnings. Hence, it lacks substantial evidence.

Finding 79: SCC 5.04.020 defines a "dangerous dog", in pertinent part, as follows:...

AR (Decision). The use of the word "pertinent" and the excerpted definition mandated a challenge to avoid a claim that Ms. Coballes waived a claim that certain omitted "pertinent" elements applied (viz., trespass, tort).

Finding 98: The Caballes family members testified at the hearing that Emmalin was told numerous times by them and Josh Smith not to open the door to Anthony's bedroom when it is locked. However, based on the testimony of Josh Smith, and the statement given to Officer Scheres by CherryAnn Caballes, the actual instruction to Emmalin and Josh was not to open the door to a room when "Gunnar" is inside.

AR (Decision). The Board erred finding that the "actual instruction" was not to open the door to a room when "Gunnar" is inside. The Board also erred characterizing the Coballes family's testimony as instructing E.C. not to open the door to Anthony's bedroom when locked. Critically, Ms.

Coballes, Anthony, Connor, and even Mr. Smith straightforwardly and repeatedly told E.C. to “not open the dog’s door” – whether or not Gunnar was inside, and whether or not the door was locked.⁹ Undisputedly, Gunnar was behind a closed door and E.C. violated the actual instruction.

Finding 99: The record does not preponderate that Emmalin knew that “Gunnar” was in Anthony’s bedroom at the time she opened the door, and that she intended to violate the instructions not to open the door when “Gunner” was in the room; particularly given the fact that the door was unlocked at the time, and the Caballes family members all testified that the door is kept locked when Emmalin is a guest in the home and “Gunnar” is kept inside the room. Connor Caballes testified that he and Emmalin have been in Anthony’s room when it was vacant on more than one occasion, to allow Connor to pick out a game for Emmalin from Anthony’s closet. Connor was looking for a game in his room for Emmalin to play when Emmalin left the room to

⁹ **VRP 94:7-23** (testimony of Anthony). E.C. would reply to her father sarcastically when he told her “more than a few times not to go in [Gunnar’s] room,” “‘I’m not.’ And she – so she knew not to go into that room.” **VRP 94:20-23**; **VRP 95:1-12** (noting that Anthony repeatedly confirmed with E.C. not to open the bedroom door, and she agreed). At no time before Sept. 19, 2010 had E.C. tried to open the closed door. **VRP 95:12-16**. Connor confirms having a similar discussion with E.C. on five or six prior occasions. **VRP 139:14-23** (not to open closed doors, and E.C. acknowledged this). Connor also overheard Mr. Smith admonish his daughter similarly. **VRP 139:24—140:3**. On a prior occasion, E.C. even taunted Connor by threatening to open the door to Connor’s room while Gunnar was inside, as “she knew that Gunnar was in the room.” **VRP 140:8-13**; **141:15-22**. Yet, she did not open the door.

Mr. Smith acknowledged that the protocol was “when Gunnar is behind a closed door, you do not open the door.” **VRP 149:3-6** (Smith). Mr. Smith admitted that he communicated this rule to his daughter probably every time they came to the Coballes home and that his daughter understood him and would answer him, “or I would’ve kept telling her.” **VRP 149:7-24**. Mr. Smith testified that he heard Ms. Coballes tell E.C. “to stay out of a room where Gunnar was at” probably “more than [he] did, but every time that [they] showed up,” she gave the instruction. **VRP 156:20-25**. Mr. Smith also notes that both Connor and Anthony “were very good about telling” E.C. not to enter the room. **VRP 157:1-4**. Ms. Coballes testified similarly. **VRP 164:8-18**. E.C. would become a bit rebellious and sarcastic when Mr. Smith informed her of the rule, saying “I know!” **VRP 164:23-25**. E.C. was described as “sassy and smart-alecky,” getting in trouble a lot, with many time-outs initiated by her father. **VRP 165:4-9**. Thus, the undisputed evidence is not that there was a locked-door condition on E.C.’s entry.

open Anthony's door.

AR (Decision). First, there was no absolutely no evidence that E.C. did not know Gunnar was in Anthony's room at the time she opened the door, not from E.C. herself, nor from any of the witnesses who testified. Nor is there any evidence that E.C. was permitted to open a closed door to Anthony's room if it were unlocked. Indeed, there is no evidence that she ever once did this.¹⁰ Nor is there evidence in the record that E.C. and Connor opened a closed or locked door to enter Anthony's room to retrieve a game. Rather, the evidence was that E.C. would not enter Anthony's room unescorted.¹¹ E.C. entered on Sept. 19 without Connor.

Finding 100: Given the overly protective/aggressive nature and size of "Gunnar", and the tender age and small size of Emmalin, "Gunnar" should have been kept outside the house while Emmalin was a guest in the home; rather than place impossible burdens on Anthony to always lock the door to his bedroom, and on 3-year Emmalin to detect each time "Gunnar" was in the bedroom or another room with a closed door.

AR (Decision). The opinions that Gunnar should have been kept out of the

¹⁰ Rather, without dispute, E.C. admitted "that she'd opened the dog's room, so she knew what she did and she wasn't crying." **VRP 130:1-2** (Anthony). Connor also heard her "tell on herself saying, 'I opened the dog's door.'" **VRP 139:4-6; VRP 169:5-7** (CherryAnn, accord). Mr. Smith added that Emmalin "admitted that she opened the dog's door," and that, "she'll still say that to this day that she opened the dog door." **VRP 155:18-22**.

¹¹ **VRP 143:16-20** (noting Connor would walk in with E.C. after confirming Gunnar was not present); **VRP 146:1-6** (accord). Further, there is no evidence in the record that E.C. and Connor entered Anthony's room when it was vacant "on more than one occasion." **VRP 143:10-14** (Connor answering that it happened, but not how many times).

house when E.C. was over; and that requiring Anthony to lock his door and E.C. to detect when Gunnar was in the bedroom behind a closed door were part of their “impossible burdens” are not factual findings and should be eliminated on that basis alone.¹² There was no evidence that E.C. had opened the door (locked or unlocked) whether Gunnar was present or absent therein on any prior occasion. Nor was there any evidence in the record that Gunnar was kept in any other room than Anthony’s behind a closed door. In other words, there was no precedent of a counterexample (door closed, Gunnar absent) upon which E.C. could rely. The undisputed evidence, including the live testimony of Mr. Smith, was that E.C. was not allowed in the room when Anthony’s (or the “dog’s”) door was closed.

Finding 102: There is no evidence in the record that Anthony was “startled” when Emmalin opened the door, since he turned away to finish putting on his shirt when he became aware that the door was being opened. Nor is there any evidence that the door struck “Gunnar” when Emmalin opened the door; considering the position of the dog next to the dog bed, a clearance of at least three (3) feet between the dog bed and the door, and the experience of “Gunnar” in the distance the door projected into the room.

AR (Decision). Undisputedly, Anthony was startled when E.C. came into the room while he was half-dressed.¹³ Hence, that finding lacks substantial evidence. The conclusion that there is not “any evidence that the door

¹² If regarded as a mixed question of fact and law, then this court examines them *de novo*.

¹³ **VRP 104:24—105:1** (answering “Yes” to, “[W]ere you startled? Were you surprised when she came in the room?”). Sadie was “kind of frightened, too[.]” **VRP 105:3**.

struck ‘Gunnar’ when Emmalin opened the door” is based on the faulty premise that there was clearance of at least “three (3) feet between the dog bed and the door.” First, Anthony testified that Gunnar was lying right in front of the door and it could have “clipped him.” **VRP 104:18-19**. As also noted above, the clearance was less than one foot, and the evidence is undisputed that Gunnar was lying not on the dog bed, but in front, on the floor, sprawled out and close to the door. Findings as to Gunnar’s size, a large dog by all accounts, are necessary in this context, as the evidence more than preponderates in favor of him being hit and/or startled by the door when opened.¹⁴ Whether Anthony saw the door strike or clip Gunnar is irrelevant to whether his unchallenged testimony as to Gunnar’s positioning on the floor in front of the door provided nearly incontrovertible evidence that the door made contact with his body.

Finding 104: The violent reaction of “Gunnar” to the sudden appearance of a helpless 3-year old child, who stood approximately the same height as the dog is standing on all fours, was excessive and unreasonable. The child posed no imminent threat to the dog, Anthony or “Sadie”. Though “Gunnar” had not been introduced to Emmalin, he had seen the child and Josh Smith inside the home on numerous recent occasions at the home.

Ms. Coballes challenges this finding as a wrongly designated Finding of Fact, due to its many legal conclusions, under the sections

¹⁴ Gunnar is about four to five feet in length. **VRP 130:15-19**. His head reaches about three feet off the ground. **VRP 130:20-25**. When he stands, he is taller than Ms. Coballes (**VRP 162:18-21**). He weighs 110-115 pounds. **VRP 159:25**.

concerning “provocation” herein. Ms. Coballes disputes that the reaction was “excessive and unreasonable” or “violent.” This “finding” bespeaks why omissions concerning pre- and post-bite aggression were germane to the question of provocation, since the Board focuses on proportionality, and even comments on pre-bite interactions.

Finding 105: The evidence does not preponderate that Emmalin Champion was acting either negligently or recklessly when she opened the door to Anthony’s room.

As with Finding 104, this is more properly treated as a Conclusion of Law, challenged under the sections concerning “other tort” herein. The operative legal conclusions are “negligently” and “recklessly.”

2. Improperly Omitted Findings.

Absence of a finding of fact entered by the trial court in favor of a party carrying the burden of proof about a disputed issue is equivalent to a finding against the party on that issue. *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wash.App. 537 (1994). Accordingly, the following omitted findings should be construed in Ms. Coballes’s favor, warranting reversal for the reasons stated herein.

Omission Concerning Prior Aggression/Animus Toward E.C.:

In support of the conclusions of unintentional provocation, trespass, and tort, the court must assess Gunnar’s reactions to E.C. before and after the incident to properly index his “dangerousness” and determine if this

situation was, as Dr. Ha stated, a “perfect storm” of “stacked triggers” highly unlikely to repeat, or innate viciousness. **VRP 204:12—208:21; see AR, Exh. 11 (CV)**. Undisputedly, Gunnar showed no aggression toward E.C. at any time and in any manner prior to that day.¹⁵ Indeed, Gunnar showed no real interest in E.C. when they could see one another.¹⁶ Gunnar did not bark or growl before the incident (further evidencing his being startled by her sudden entry), and there was no warning to Anthony from Gunnar before E.C. opened the door. **VRP 103:2-11**.

Omission Concerning Duration and Post-Bite Aggression/Animus Toward E.C.: The entire incident lasted “three or four seconds.”¹⁷ No finding as to Gunnar’s post-bite behavior is acknowledged or even discussed – viz., that the incident lasted but a few seconds, at most; that Gunnar desisted on his own without any voice, signal, or physical command or correction; that Gunnar did not vocalize, growl, bare teeth, raise hackles, or show any sign of aggression at any time after he withdrew, before Anthony grabbed his legs, before Ms. Coballes

¹⁵ **VRP 96:1—97:8** (Anthony: no effort to growl, bark, jump up at, or scratch or ram door to get at E.C.); **VRP 119:4-10** (never jumped on or growled at or bore teeth toward E.C. before); **VRP 142:8-18** (Connor: accord); **VRP 156:17-19** (Smith: accord); **VRP 161:2-20** (CherryAnn: accord).

¹⁶ **VRP 142:19-21** (Connor); **VRP 161:15-20** (CherryAnn).

¹⁷ **VRP 105:7** (Anthony); **VRP 153:15-17** (Smith: all happened in course of a few seconds).

grabbed his collar, and even while Mr. Smith was bending over E.C. briefly. Gunnar did not bark, snap, growl, or threaten to harm E.C. after he released on his own accord.¹⁸ Gunnar vocalized once, a mix of a bark and a growl in one uninterrupted vocalization that lasted mere seconds, long enough to make contact with E.C. and release. **VRP 152:11—153:3**. All other witnesses testified to a single vocalization that ended immediately upon his release. See, e.g., **VRP 168:2-6**.

C. Errors of Application of Law to Fact

1. Rule of Lenity

In an effort to properly construe the ambiguous terms “provocation,” “severe injury,” “broken bone,” “requiring,” and “disfigurement/disfiguring,” which have hybrid civil-criminal applications, the court must apply the rule of lenity and interpret any ambiguity strictly in favor of Ms. Coballes. “A statute is ambiguous if it is subject to two or more reasonable interpretations.” *State v. McGee*, 122 Wn.2d 783, 787. “Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant.” *Id.* While true that the lenity rule traditionally applies to criminal, not civil, proceedings, civil lenity applications have been endorsed by the United States Supreme

¹⁸ **VRP 106:1-2; VRP 129:15-19** (Anthony); **VRP 137:11—138:20** (Connor); **VRP 152:5-10** (Smith heard no barking or growling); **VRP 168:7-8** (CherryAnn).

Court¹⁹ and Washington Court of Appeals.²⁰ Strict construction and lenity canons also apply in forfeiture, quasi-criminal, and criminal settings, reaching the same result – construing ambiguities against government.

The county code cites to RCW 16.08.100(3) at SCC 5.04.020, RCW 16.08.100(1) at SCC 5.04.032(d), and county officers enforce Ch. 16.08 RCW. See SCC 5.04.050(a-c), SCC 5.04.0791(a), and SCC 5.04.0792. Hence, the state criminal code is linked in various respects to Title 5 SCC. RCW 16.08.100(3) renders a dog owner strictly criminally liable where the dog “aggressively attacks and causes severe injury or death of any human[.]” Provocation is an affirmative defense. *Id.* The SCC uses similar terms “severe injury” and “provocation,” though it has altered the definition of “severe injury” from state law. Still, it kept the words “broken” in the context of bone, “requiring,” and a variation of

¹⁹ In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the United States Supreme Court applied the lenity canon to a civil statute that had criminal applications, interpreting the term “make” as used in the National Firearms Act, which provided for a \$200 tax on anyone “making” a “firearm.” A “maker” of “firearms” failing to comply with any of the NFA’s other requirements could be subjected to a \$10,000 fine and/or ten years imprisonment. See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (applying lenity to resolve whether a state DWI conviction was a “crime of violence” within meaning of relevant immigration statute that had both civil and criminal applications); *Clark v. Martinez*, 543 U.S. 371 (2005)(applying lenity rule in civil case when interpreting immigration statute and concluding that “lowest common denominator . . . must govern”); *United States v. Plaza Health Laboratories*, 3 F.3d 643 (2nd Cir.1993)(applying lenity rule to Clean Water Act’s ambiguous statutory definition for “point source”).

²⁰ *Internet Community & Entertainment Corp. v. State*, 148 Wash.App. 795, 809 (II, 2009), *rev’d o.g.*, 168 Wn.2d 687 (2010)(Court of Appeals agreeing nature of statute at issue determines whether lenity applies, not civil posture of case).

“disfiguring” (i.e., “disfigurement”).²¹ Accordingly, those terms have a related criminal application under RCW 16.08.100(3) and RCW 16.08.100(1), which makes it a gross misdemeanor to fail to correct deficiencies pertaining to registration and control of a dangerous dog.

Further, violating the terms of keeping a dog declared “dangerous” is a gross misdemeanor under SCC 5.04.032(h), SCC 5.04.035(h), and SCC 5.04.071(b)(1). The definition of “dangerous” furnishes the necessary predicate for the compound offense related to control of a dangerous animal. In this regard, the dangerous dog statutory regime has an express criminal application. Ms. Coballes’s only opportunity to challenge that underlying facet of a control-related crime pertaining to a dog whose legal classification has shifted to “dangerous” is in this quasi-criminal proceeding, not simply because of criminal sequelae but due to potential forfeiture of Gunnar.

Forfeiture proceedings are quasi-criminal in nature only with respect to the need to protect certain Fourth and Fifth Amendment rights.

Rozner v. City of Bellevue, 116 Wn.2d 342, 351 (1991).²²

²¹ If the court finds that the county law conflicts with state law (as described herein), then the entire definition has a hybrid application.

²² *Deeter v. Smith*, 106 Wn.2d 376 (1986)(Fourth Amendment exclusionary rule applies in civil forfeiture setting); *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 349 (2006)(quasi-criminal proceedings subject to rule of strict construction); *Alby v. Banc One Financial*, 119 Wash.App. 513, 523 (III, 2003) (forfeitures highly disfavored and language of limitation that could lead to forfeiture strictly construed). A similar rationale was employed by the Court of Appeals in Virginia in *Hoye v. Commonwealth*, 405 S.E.2d

The practical effect of an adverse, final ruling that a dog is “dangerous” is tantamount to a forfeiture if the owner cannot comply with the onerous restraints imposed by county and state law. Lenity and strict construction thus secure not only Fourth Amendment rights but Fifth Amendment due process rights by clarifying ambiguous terms in a way that provides sufficient notice of proscribed conduct. Accordingly, for purposes of statutory interpretation, strict construction is warranted.

2. **“Severe Injury.”**

Should this court not find the County definition unconstitutional (as argued below), Ms. Coballes notes that absent admissible medical expert testimony, the County could not meet its burden of proving E.C. sustained any injury resulting in a “broken bone [or] disfigurement.”²³ The County’s late-submitted medical records (**AR** (Exh. 1)) do not cure this, since “depressed bone fragments” created by extremely superficial 4-5 mm penetration into the skull do not constitute a “broken bone.” The term “broken” is not defined. Plainly understood, a broken bone is one requiring splinting, pinning, plating, or casting to heal. There is no evidence that E.C.’s skull required immobilization for healing, which

628 (Va.App.1991) (habitual offender faced civil proceedings to revoke his driver’s license; strict construction applied). Ch. 5.04 SCC includes a forfeiture provision, SCC 5.04.032(d), in addition to criminal provisions, SCC 5.04.032(h) and SCC 5.04.035(h)(gross misdemeanor to violate terms of keeping dog deemed “dangerous”).

²³ Hill, Montano, and Scheres lack medical training to render them experts in this regard.

brings into focus the remainder of the definition of “severe injury” – viz., that the “broken bone ... requir[es] suture(s) or surgery.” No evidence exists that the skull itself required sutures or surgery. To the contrary, Dr. Hirschauer, the neurosurgeon, stated that the muscle, connective tissue, and skin were the only structures subjected to surgery or sutures:

bone openings, which measured perhaps 5 mm in size on each of these, **were not opened to suture the dura.** Instead, the muscle was sutured over the top of the temporal laceration, and the galea was closed in all lacerations, and then the scalp was closed with a subgaleal 4-0 PDS and a running 4-0 nylon simple suture in the multiple incisions.

AR, Exh. 1, Dr. Hirschauer 9/19/10, pg. 1.

The term “disfigurement,” undefined, also creates ambiguity. As the definition of “severe injury” includes the word “laceration,” to avoid superfluity, the word “disfigurement” must require marring one’s appearance or beauty (i.e., beyond merely tearing or cutting). There is no evidence that the bites to the skull affected E.C.’s face or in any way impaired the functionality or integrity of her eyes, nose, or lips. Though her hair was shaved, it will grow back, and the bites will heal. There was no evidence she would suffer disfigurement of any permanence, much less disfigurement requiring surgery or sutures.

This leaves the term “laceration.” Admittedly, Gunnar’s teeth contributed to a laceration. Did the laceration require surgery or sutures? Absent medical records from experts with percipient knowledge, the

answer is speculative, for neither Hill, Montano, nor Scheres can offer this nexus with any degree of confidence. That sutures exist in photographs says nothing about whether they were required or merely precautionary. Moreover, in considering whether this injury warrants a declaration that Gunnar is dangerous, and applying the rule of lenity to ambiguous terms as the court must, the following facts reconcile in Ms. Coballes's favor:

- There was no penetration into E.C.'s brain.
- There was no clear evidence of abscess or fluid collection at the time of surgery (AR, Gillum at 1).
- E.C. had normal neurological status and respiratory status and was acting reasonably normal, awake and alert, though tired at intake, with no clear noticeable change in mental status; no intracranial hemorrhage; and no loss of consciousness (AR, Horning).
- The CT showed no involvement of the brain itself (AR, Sokoloff at 1).
- E.C. was released after a few days at Children's Hospital. There was no evidence of lingering trauma, any neurological defect, or any disability.

3. "Without Provocation."

The County conceded it had no policy to determine what constitutes provocation; instead, it is left to officer whim. **VRP 75:4-17**. The conflicting positions of the County and Ms. Coballes illustrate the ambiguity requiring statutory interpretation. In essence, the question is whether "provocation" includes unintentional acts. Below, the County approvingly cited to *Wade v. Rich*, 249 Ill.App.3d 581, 590 (1993),

making Ms. Coballes's case in confirming Illinois routinely has found unintentional acts constitute provocation. *Id.*, at 589.

The *Random House Dictionary* (2010) defines provocation as "the act of provoking; something that incites, instigates, angers, or irritates." Note that intent is not part of the definition. Even if this court accepts *Webster's Online Collegiate Dictionary* (AR (Decision: Conc. 7)), the definition favors Gunnar in that the act of E.C. (entering a room from which she was prohibited and potentiating the stacked triggers to create this "perfect storm," which expert Dr. James Ha described as an "isolated incident" (VRP 205:8, 208:11 and VRP 230:11-16)) indeed "incited" Gunnar to bite. Moreover, E.C.'s acts "arouse[d], move[d], call[ed] forth, cause[d], or occasion[ed]" this reaction from Gunnar. Also, *Webster's* and *Black's* do not state that provocation only lies where the provocateur intended to cause the reaction. After "provocation" is the definition for "provoke," which states, "To excite; to stimulate; to arouse. To irritate, or enrage." It is undisputed that E.C.'s actions did all of this to Gunnar.

Thus, if the court believes that E.C. accidentally or unintentionally provoked Gunnar, the County loses. It may argue, through *Wade*, that proportionality determines whether unintentional acts constitute provocation. However, a searching analysis of the testimony proves that this was not a vicious attack, in the sense that Gunnar did more than issue

a correction to E.C. using the only tool at his disposal (viz., his mouth).

The following undisputed facts show proportionality:

- The entire incident lasted 3-4 seconds by everyone's estimate, including Mr. Smith, who claimed to have heard a short string of canine vocalizations that abated after Gunnar released E.C.
- Gunnar released E.C. and backed away on his own accord and showed no aggression toward her after the initial surprise faded. There was no evidence of growling, baring teeth, barking, snapping, or lunging after he released.
- As Dr. Ha explained, Gunnar regarded Anthony's room as his safe place. He never "met" E.C. before, but was kept at a considerable distance under controlled circumstances at all times. It was in this safe place that Gunnar was present during two home invasions, replete with disturbing alarms, incidents that according to Dr. Ha heightened Gunnar's sensitivity at the threshold of Anthony's room.
- Gunnar was touched or startled by the door opening without warning by a person who was, in his mind, a stranger and one to be avoided. At the time of being contacted by the door, Anthony was in the middle of changing and not expecting anyone to enter. Further, Sadie, of whom Gunnar was protective, was near him. Gunnar responded immediately to the intrusion of an unwarranted stranger in an effort to protect Anthony and Sadie and repel the invader.
- That Gunnar, a dog of prodigious size biting a girl of relatively diminutive size with a softer skull, did not cause any intracranial hemorrhage, brain damage, disability, or permanent injury, lasted a few seconds, after which he withdrew, shows remarkable bite inhibition (i.e., non-vicious self-regulation and control not out of proportion). Were this a truly vicious attack, it would have required forcible separation and resulted in far more significant injuries.²⁴
- In determining whether this was a vicious attack, the court should also

²⁴ Ms. Coballes testified that a nurse said if E.C. were older, there would likely have not been nearly the same damage, and that even so, the impact of Gunnar's teeth resulted in only superficial compression. **VRP 169:21—170:9.**

consider Gunnar's pre-bite behavior. There was no evidence that he was naturally vicious, in that he would bark, growl, bare teeth, or otherwise threaten E.C. when he saw her or she passed by the door on several occasions over the past five or six visits to the Coballes home. Nor was there evidence he tried to knock down or scratch at the door when she was present. Had the dog possessed vicious tendencies, he would have manifested same while in E.C.'s presence. That he did not further confirms that this was an incident related to his protecting Anthony and Sadie and defending his safe territory from the intrusion by a prohibited invader. Importantly, his repelling efforts were limited in time and force and terminated nearly as fast as they commenced, negating a claim of viciousness.

Remember that the burden is on the County to disprove provocation, aided in interpretation by the dog owner-favoring rule of lenity.²⁵ The county failed to investigate the issue of provocation and put on no expert testimony disproving it, failing to meet its burden.

Judicious is *Kayser v. Foster*, 138 Wash. 484 (1926), involving an unwarranted attack by a dog on a minor as she passed the place at which the dog was lying. In upholding the award, the Supreme Court relied on the minor's evidence that "tended to show that the dog was naturally vicious[.]" *Id.*, at 485. No admissible evidence of natural viciousness was presented at this hearing, nor even viciousness directed toward E.C. Nor did E.C. merely walk past Gunnar. She intruded upon a space from which she was barred and assumed the risk of provoking him.

The only admissible expert testimony on provocation came from

²⁵ This proportionality test is not articulated in any Washington case.

Dr. Ha, whose credentials speak for themselves. **AR, Exh. 10 (CV)**. Neither Hill, Scheres, nor Montano ventured to opine on whether provocation existed in this case. Importantly, Dr. Ha determined that this was a provoked bite and that Gunnar's reaction was not unusual but isolated to a specific situation resulting from a stacking of triggers.²⁶ Importantly, Ms. Coballes had no duty to provide expert testimony, and the only admissible evidence was that E.C. provoked Gunnar.²⁷

As the Board found lack of provocation due to disproportional response to stimulus (a stimulus they found did not include the door striking or glancing Gunnar and startling him and Anthony, to which Ms. Coballes has assigned error), the failure to make findings as to pre- and post-bite aggression directly impacts the question of proportionality. The County makes much about the physical disparities between E.C. and

²⁶ In reaching this conclusion, he relied on all the testimony and exhibits submitted, as well as his training as one of 25 Ph.D.-level behaviorists in the entire country, and that there would be no dispute among his colleagues as to the soundness of his methods or forensic conclusions. Describing this as a "perfect storm," Dr. Ha remarked that Gunnar exhibited no aggression toward E.C. or other people outside Anthony's room, and he specifically referenced the testimony of boarding facility co-owner Janette Hosford, who stated that over three years and twenty-two boarding sessions ranging from a three to ten days in length, Gunnar never showed aggression, bit, injured, or otherwise threatened a person or animal. Nor did he engage in behavior that would have warranted his removal from the premises and termination as a client. As Dr. Ha said, when out of the room, he shuts off. Dr. Ha also relied on Gunnar's post-bite behavior, his standing down on his own, without any signaling of aggression, nearly instantly after Gunnar deflected the intruder and realized she posed no further threat. **CP 193-207**.

²⁷ The County failed to offer any admissible evidence from a qualified expert on the question of provocation.

Gunnar, but this only proves that, much like a large, strong man who does not know his own strength, the injuries were actually far less substantial than would be expected if Gunnar had not exercised bite inhibition and deescalated the situation as soon as he perceived that any threat had abated in this “perfect storm” of stacked triggers. This accords with a reasonable dog’s reaction of his relative size, *supra fn. 26-27*.

The courts have consistently pointed out that it is not the view of the person provoking the dog that must be considered, but rather it is the reasonableness of the dog's response to the action in question that actually determines whether provocation exists.²⁸

Under the evidence adduced, there was no substantial evidence negating the finding-conclusion of unintentional provocation. Given the arbitrary finding pertaining to the measurement of the room and Gunnar’s positioning therein, the court should make a *de novo* determination of provocation.

4. “Willful Trespass.”

A possessor of realty generally owes no duty to a trespasser. Relevant to the inquiry of duties owed to infant trespassers is *Curtis v. Tenino Stone Quarries*, 37 Wash. 355 (1905), where defendant maintained a quarry power house on its own premises but there was nothing about the premises or machinery deemed an attractive nuisance to children. The

²⁸ *Kirkham v. Will*, 311 Ill.App.3d 787, 791-94 (2000), citing various cases supporting this rule.

Supreme Court held the defendant not liable to a six-year-old who trespassed on the premises and was injured by slipping his foot through an opening in a platform where he was caught and injured in the cogwheels. Notably, the child was injured after the engineer in charge drove him and his older brother from the engine room. While an invitee to the remainder of Ms. Coballes's home until told to leave, E.C.'s invitation at all times ended at the door to Gunnar's (and Anthony's) room.²⁹ Entry into that space constituted trespass.

Trespass is the intentional or negligent intrusion onto or into the property of another. While consent is a complete defense to trespass, *Restatement (2nd) of Torts* § 167 (1965), § 892A (1979), where the scope of consent is exceeded, trespass lies. *See Mielke v. Yellowstone Pipeline Co.*, 73 Wash.App. 621, 624 (1994). It does not matter what reason is given to withhold consent, however fanciful or even unreasonable. Nor is it required that the prohibited area be locked or defended with firearms, guards, or barbed wire. This is because the tort centers on property rights, and E.C. had none in Anthony's room. That she knowingly entered without permission establishes the violation. Trespass occurs when one:

²⁹ Furthermore, repeatedly before the incident, Ms. Coballes told Mr. Smith that he and his daughter needed to leave so she and her sons could go to church, thereby revoking the invitation and rendering their stay in the home a trespass. **VRP 135:14-17** (Connor); **VRP 150:9—151:1, 156:2-7** (Josh Smith); **VRP 166:10-167:7** (CherryAnn Coballes).

intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.

Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677, 681-82 (1985)(citing *Restatement (2nd) of Torts* § 158 (1965)).³⁰ Children of tender years are routinely liable for their intentional acts and infancy serves as no shield against tort liability. *See also Am. Jur. 2d, Infants* § 140; *Restatement (2nd) of Torts* § 895I.

The Washington Supreme Court in *Garratt v. Dailey*, 46 Wn.2d 197 (1955) adopted the single-intent approach to intentional torts like the tort of battery. In *Garratt*, a minor pulled a lawn chair out from under his aunt as she began to sit down. In analyzing the elements of battery, the court noted that if the child intended to cause his aunt to come in contact with the ground:

the mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability...

Id., at 202. In other words, if defendant intended the contact, “plaintiff [would] be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff.” *Id.*; *see also* 16 Wash.Prac., Tort Law & Practice § 13.4 (“It is the conduct that must be intended, not the result.”)

The knowledge required was the knowledge that the aunt would sit, not

³⁰ *See also Brutsche v. City of Kent*, 164 Wn.2d 664 (2008)(discussing exceeding scope of privilege to execute search warrant in terms of trespass).

that she would get hurt. The Court of Appeals in *Doty* also endorsed the single-intent approach.³¹ That the boy was under six years of age when the alleged battery occurred was of no legal significance. *Id.*, at 203.³²

The Nebraska Supreme Court answered the question, “But what of the age of the alleged trespasser?” this way:

“While the age of the child will not protect him from liability if his act is denominated a trespass, yet as trespass is an intentional tort an initial determination must be made whether the child concerned**903 formed the intent to do the physical act which released the harmful force.” *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (Mun.App.D.C.1960).

In an action for damages resulting from a trespass, it is not necessary that the trespasser intended the injury resulting from his unauthorized invasion, but only that such person intended to commit the physical act constituting the trespass. “Accordingly, where the only intention necessary to the commission of the tort is to perform the physical act in question, as in trespass to property or person, it seems settled that even an infant of quite tender years may be held liable....” *Brown v. Dellinger*, 355 S.W.2d 742, 746 (Tex.Civ.App.1962).

Kenney v. Barna, 215 Neb. 863, 866 (1983). *Kenney* approvingly cited to the Minnesota case of *Matson v. Kivimaki*, 294 Minn. 140 (1972),³³ where

³¹ *New York Underwriters Ins. Co. v. Doty*, 58 Wash.App. 546, 549 fn.1 (1990)(citing *Prosser and Keeton on Torts* § 8, at 36-37 (5th ed.1984)(in defining the term intent as it relates to intentional torts, “The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff’s own good.”)

³² See *Seaburg v. Williams*, 16 Ill.App.2d 295 (1958)(six-year-old liable for nonnegligent or “pure” tort); *Brown v. Dellinger*, 355 S.W.2d 742 (Tex.App.1962)(trespass by two children between 7 and 8 years of age); *Horton v. Reaves*, 186 Colo. 149 (1974)(brothers, aged 3 and 4, fatally injuring 5-week-old infant capable of committing intentional tort and liable if possessed some awareness of the natural consequence of their acts); *Bailey v. C.S.*, 12 S.W.3d 159 (Tex.App.2000)(four-year-old child’s minority, alone, insufficient as matter of law to state he lacked requisite intent to commit battery).

the Supreme Court found error allowing a jury to consider whether the boy aged 2 ½ years, who leaned through lower boards of defendant's rear fence and waved his hand at defendant's dog, whereupon it jumped up and bit him, where there was "no evidence that would justify a finding that Erik was lawfully in a place he was entitled to be at the time of the incident." *Id.*³⁴

Even where one acts "out of neighborly concern for the dog," as in the case of a trespasser who "reached over the fence, cradled the dog in her arms, and scratched him behind the ear[,]" when "a loud firecracker suddenly exploded, and the dog 'lashed out' at plaintiff and bit off the end of her nose," the dog owner was not liable. *Colmus v. Sergeeva*, 175 Or.App. 131, 134, 136 (2001)(affirmed summary judgment for the defendants on basis of trespass). Thus, even if E.C. intended to enter the room for benevolent purposes, she still willfully trespassed.

The phrase "willful trespass" is not defined, but one may distinguish it from unintentional and involuntary trespass, as described in

³³ *Matson* cited to *Fullerton v. Conan*, 87 Cal.App.2d 354 (1948), holding the owner of a dog who bit a 5-year-old not liable when the child opened the gate in defendant's fence, walked into the backyard, and was bitten, finding the child was a "trespasser."

³⁴ "A person can trespass on another's property by extending his arm over the boundary fence. *Hannabalson v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902); *Restatement (2nd) of Torts* § 159, Illus. 3 to subsection (1) (1965)." *Kenney*, at 871.

Brewer v. Furtwangler, 171 Wash. 617, 619-20 (1933).³⁵ Unlike Ms. Brewer, E.C. knew precisely which boundary not to cross and willfully entered Gunnar's room without permission, express or implied. Every witness with personal knowledge, and who spoke to E.C., confirmed that E.C. knew and admitted (over and over) that she was not allowed in that room. Even after the incident, E.C. confessed to all the Coballeses and Mr. Smith that she erred by opening the "dog's door." The County does not provide any authority contradicting the clear holding of *Garratt* that minors, including those of tender years, can commit intentional torts, and all evidence confirms that E.C. intentionally opened the door and entered despite being instructed by everyone, repeatedly, not to.

Second, Defendants claim that E.C. opened the door to retrieve a game and not to defy the undisputed rule that she not open the door to Gunnar's room. But the reason for entry is legally immaterial if, as noted above, she intended to enter an area known as off-limits. Further, the Board had no substantial evidence to support the claim that E.C. did not willfully trespass into Gunnar's room as she never testified, and no witness indicated that she accidentally or involuntarily opened the door. Under *de novo* review, the court should conclude that the County did not

³⁵ See also *Arnold v. Laird*, 94 Wn.2d 867 (1980) (no liability where Great Dane inflicted severe disfiguring injuries to four-year-old climbing on cyclone fence separating plaintiffs' from defendants' yards).

disprove trespass by an extremely wide margin.

5. “Other Tort.”

While a child under six is not capable of contributory negligence as a matter of law, per *Arnold v. Laird*, 94 Wn.2d at 869 fn.2, this is not a common law civil action for damages. Rather, it is a purely statutory, quasi-criminal action to change a dog’s legal status to dangerous, imposing constitutional restraints on Ms. Coballes’s liberty and property. The County never defining “dangerous dog” to exclude acts of children younger than six,³⁶ it follows that no such presumption arises.³⁷ Rather, SCC 5.04.020 excludes from the definition of “dangerous dog” circumstances where “a person” (meaning, adult or child of tender years) commits a “willful trespass or other tort upon the premises occupied by the owner or keeper of the dog[.]” Absent a legislative declaration referencing age or other disability of the person committing the act, the County rejected the common law civil rule in this special proceeding.

³⁶ See Seattle Muni. Code 9.25.024, stating: “An animal is not ‘provoked’ if the victim is alleged to have provoked the animal and the victim is less than six (6) years old.”

³⁷ See *Porter v. Allstate Ins. Co.*, 497 So.2d 927, 929-30 (Fla.App.1986)(agreeing with dissent in *Harris v. Moriconi*, 331 So.2d 353 (Fla.App.1976), that though common law rule renders child under six legally incapable of negligence, because legislature declared that affirmative defense of careless provocation was available without reference to age, it modified common law and child fell within the statute’s proscription).

Thus, the “other tort” exception applies to those of all ages and includes such torts as negligence, recklessness, and estoppel.³⁸

Had Mr. Smith been a responsible father and his daughter not reneged on prior representations, the alleged altercation would not have occurred. As with trespass, the County must disprove an “other tort.” The tort incarnation of estoppel³⁹ is not nullified by the defense of infancy. However, this is not a matter of E.C.’s inattentiveness and breaching a duty of care. Rather, it concerns her conscious decision to renege on a prior promise and representation that she would not enter the room. Her promises, actions, and statements led the Coballes family to believe and rely upon the fact that she would not enter Anthony’s room. Whether the decision by E.C. to repudiate was the result of carelessness or intent is immaterial to whether she in fact reneged, establishing tort liability and causing the County to fail to establish an element of the definition for “dangerous dog.”

D. Errors of Constitutional Magnitude

³⁸ See *Shafer v. State*, 83 Wn.2d 618, 623 (1974)(equitable estoppel elements); *Corbit v. J.I. Case Co.* 70 Wn.2d 522, 539 (1967)(promissory estoppel elements).

³⁹ Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 Seattle U.L. Rev. 45, 45-48, 68, 77 (1996)(34 American jurisdictions create a “contextually corrective remedy” by imposing tort liability in fashioning equitable promissory estoppel relief; noting its emergence from the “womb of tort,” as “a syncretistic doctrine of civil liability” and evolving blend of contract, tort, and equity; adding that Washington grants monetary relief for promissory estoppel)

The court can resolve this case on constitutional grounds. In its Apr. 19, 2011 letter ruling, the superior court claimed its:

belief that issues relating to unconstitutional actions in effect is reviewing the legislative activity and that the Superior Court does not have appellate jurisdiction in that regard when reviewing an administrative decision.

CP 527. In this belief, the court plainly erred.⁴⁰

1. Warrantless Seizure.

County law mandates impoundment of a dog declared (but not found) dangerous by an animal control officer, without requiring a warrant or even probable cause.⁴¹ SCC 5.04.032(a) and (a)(6)(using phrases “sufficient information” instead of probable cause; and series of mandates - “shall declare,” “shall be immediately impounded,” “will be euthanized”). Moreover, failure to comply with an order to turn over the dog to animal control for euthanasia (permitted by SCC 5.04.032(a)(6)) is a misdemeanor. SCC 5.04.120(c). The County intentionally refuses to use the well-settled standard of “probable cause,” choosing the vague

⁴⁰ See *Chaussee v. Snohomish County Council*, 38 Wash.App. 630, 642-43 (1984) (“The superior court properly determined that SCC 20A and the minimum road standards incorporated by reference therein are constitutionally valid. RCW 7.16.120(3).”); see also *Responsible Urban Growth Gp. v. City of Kent*, 123 Wn.2d 376, 384 (1994)(cit. om.) (“When the petition involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions, the court may consider evidence outside the record. ... Here, the writ of review specifically raised constitutional and procedural irregularities as well as the appearance of fairness; therefore, the trial court correctly considered evidence outside the record.”); see also RCW 7.16.120(3) (“any rule of law”).

⁴¹ *City of Seattle v. McCready*, 123 Wn.2d 260, 273(1994)(neither common law nor constitution allow superior court to issue search warrants on less than probable cause absent statute or court rule; noting that probable cause in criminal law sense is required, citing *Alverado v. WPPSS*, 111 Wn.2d 424, 435 (1988)).

“sufficient information” standard, engineered to err on the side of declaring a dog dangerous as it mandates declaration; upon declaration, immediate impound; and, absent registration or appeal in fifteen days, euthanasia. At no point in the process, however, does it mandate a probable cause determination prior to declaring, impounding, and euthanizing – with any involvement by a neutral magistrate. *In pari materia*, the code dictates immediate seizure based on less than probable cause. Such language cannot withstand constitutional scrutiny.

In addition to due process protection, Ms. Coballes deserves protection against unreasonable seizures, for neither Montano nor Scheres issued the DDD or seized Gunnar with a warrant. The Fourth Amendment provides that:

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Washington’s Constitution, Art. I § 7 provides that, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Art. I § 7 offers protections “qualitatively different from, and in some cases broader, than those provided by the Fourth Amendment.” *City of Seattle v. McCready*, 123 Wn.2d 260, 267 (1994). While the Fourth Amendment guards a reasonable expectation of privacy, Washington’s

Art. I § 7 goes further to protect one's private affairs. *State v. Young*, 123 Wn.2d 173, 181-82 (1997).

Ms. Coballes's ownership of Gunnar constitutes her private affairs in which she enjoys the right to be free from governmental trespass absent a warrant. *See also Rhoades, Rabon, Mansour, infra*. Gunnar is regarded as a personal effect, the seizure of whom violates the Fourth Amendment. People's "effects" include their personal property. *United States v. Place*, 462 U.S. 696, 701 (1983)(luggage is "effect"). Domestic animals are "effects" under the Fourth Amendment.⁴²

A seizure of property occurs whenever there is some meaningful interference with an individual's possessory interest in that property. *Soldal v. Cook Cy.*, 506 U.S. 56, 61 (1992). Failing to contest the DDD, Ms. Coballes would be obligated to surrender Gunnar or conform to the requirements for keeping a DDD within Spokane County – including the costly "proper enclosure" and \$250,000/\$500 maximum deductible insurance requirement. SCC 5.04.035. Failure to comply with the DDD requirements would result in mandatory impound and euthanasia. Further, Ms. Coballes could face prosecution for a gross misdemeanor if found in violation of any provision of SCC 5.04.032(h) and SCC 5.04.035(h).

⁴² *Fuller v. Vines*, 36 F.3d 65, 67-68 (9th Cir. 1994)("A dog is an 'effect' or 'property' which can be seized."), *overruled on o.g., Robinson v. Solano Cy.*, 278 F.3d 1007, 1013 (9th Cir.2002).

The DDD – contested or defaulted – constitutes a meaningful interference with Ms. Coballes’s property and liberty interest in Gunnar, as well as her own liberty interests that would arise from criminal prosecution and incarceration, all constituting a seizure under the Fourth Amendment. It is undisputed that Gunnar was seized by completely dispossessing Ms. Coballes without a warrant.

Under the Fourth Amendment, absent specific exceptions, a seizure of personalty is “per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause.” *Place*, at 701. A warrant requires a determination of probable cause by a neutral and detached magistrate. *State v. Hatchie*, 161 Wn.2d 390, 398 (2007). A magistrate is defined as

(1) The justices of the supreme court. (2) The judges of the court of appeals. (3) The superior judges, and district judges. (4) All municipal officers authorized to exercise the powers and perform the duties of district judges.

RCW 2.20.020. In addition, the magistrate must possess neutrality, detachment and the capability to determine probable cause. *State v. Porter*, 88 Wn.2d 512, 515 (1977). In this case there was never a determination of probable cause by a neutral and detached magistrate. Instead, the DDD was issued by animal control officer Chad Scheres.

Nothing indicates that any SCRAPS officer possessed the requisite neutrality, detachment or capability to determine probable cause.

Under Art. I, § 7, a warrant may not issue without an authorizing statute or court rule. *State v. McCready*, 123 Wn.2d 260 (1994). Moreover, municipal warrants must allege the violation of a crime. *State v. McCready*, 124 Wn.2d 300, 310 (1994). Nothing in Ch. 5.04 SCC authorizes a warrant based upon probable cause in relation to a dangerous animal designation. Nor does the DDD actually issued by Officer Scheres make any reference to the violation of a crime. Thus, the DDD fails to meet the requirements for a warrant under Art. I, § 7.

2. Conflict with Ch. 16.08 RCW.

The County declared Gunnar “dangerous” under SCC 5.04.020, which virtually mimics RCW 16.08.090(3)(except it adds “or keeper”) and RCW 16.08.090(3). “Severe injury” is defined as “any physical injury which results in a broken bone, disfigurement, or laceration requiring suture(s) or surgery.” SCC 5.04.020. This significantly broadens the types of trauma beyond the definition of “severe injury” under RCW 16.08.070(3), which means “any physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery.” While RCW 16.08.080(9) allows local authorities to place “additional restrictions upon the owners of dangerous dogs,” including the

right to ban possession, that does not extend to defining dogs dangerous.

An ordinance violates Wash. Const. Art. XI, § 11 if it directly and irreconcilably conflicts with a state statute. *Rabon v. City of Seattle*, 135 Wn.2d 278, 287 (1998)(citing *King Cy. v. Taxpayers of King Cy.*, 133 Wash.2d 584, 611 (1997)); *Brown v. City of Yakima*, 116 Wn.2d 556, 561 (1991). Unconstitutional conflict is found where an ordinance permits that which is forbidden by state law, or prohibits that which state law permits. *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 269 (1994).

In *Rabon v. City of Seattle*, the Supreme Court determined that Ch. 16.08 RCW does not preempt in the case of potentially dangerous dogs, nor limits localities from imposing restrictions on potentially dangerous dogs or adding restrictions to dogs declared dangerous under state law. *Rabon*, 135 Wn.2d at 288-290 (citing RCW 16.08.090(2)) (emphasis added). While RCW 16.08.080(9) allows cities to add restrictions to owners of dangerous dogs, this language concerns sanctions that follow a dog once found “dangerous,” not the procedures and definitions that precede such finding. *Rabon* never answered the antecedent question of whether a county broadening the constituent terms of what makes a dog “dangerous” presents an impermissible conflict. However, the Florida Court of Appeals did:

Broward ordinance section 4-12(j)(2), however, regulates an area that is covered by state law. By requiring the destruction of a dog that has killed a single animal, Broward has vitiated the framework for dealing with dog attacks on other domestic animals that is set forth in chapter 767. See 767.11(1)(b); 767.13. If killing a single animal is insufficient to merit the designation of a dog as dangerous per chapter 767, then Broward cannot require a dog's destruction for that same act. By enacting an ordinance requiring the destruction of such dogs, Broward circumvented the clear procedural requirements of chapter 767. Accordingly, section 4-12(j)(2) is in conflict with state law.

Hoesch v. Broward Cy., 53 So.3d 1177, 1181 (Fla.App. 4 Dist. 2011) (CP 324). Using the identical logic of *Hoesch*, if causing a single broken bone or single laceration requiring a suture or a “disfigurement” is insufficient to declare a dog dangerous under Ch. 16.08 RCW, then Spokane County cannot add restrictions (per RCW 16.08.080(9)) such as euthanasia or more onerous restraints than those imposed by state law for that same act. Instead, the county seeks to convert virtually any bite into a “severe injury,” resulting in an impermissibly overbroad extension of the definition of dangerous dog under state law, circumventing and conflicting with clear procedural requirements of state law. That it then exports its county restraints beyond its jurisdiction (as challenged separately by Ms. Coballes), with statewide application, only exacerbates the unconstitutionality. Accordingly, use of SCC 5.04.020(“severe injury”) in lieu of RCW 16.08.070(3) is unconstitutional.

3. Inadequate Standard of Proof.

Due process rights attach to dog ownership.⁴³ In Washington:

[T]he private interest involved is the owners' interest in keeping their pets ... is greater than a mere economic interest, for pets are not fungible. So the private interest at stake is great."

Rhoades v. City of Battleground, 115 Wash.App. 752, 766 (II, 2003). An essential principle of due process is the right to notice and a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). A meaningful opportunity to be heard means "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. At such a hearing, the governmental decision must be tested against a defined standard that comports with due process. Here, because the County code prescribes an insufficient standard of proof (i.e., evidentiary preponderance vs. clear and convincing), no adequate standard against which the County's decisions may be tested exists. In *Mansour*, the Court of Appeals evaluated the sufficiency of a first, contested fact-finding hearing before the King County Board of Appeals following issuance of a Notice of Violation and Order to Remove Mr. Mansour's dog from the jurisdiction. The Court concluded that lack of a clearly ascertainable,

⁴³ See *Rabon v. City of Seattle*, 107 Wash.App. 734, 743-44 (I, 2001) (intimating that Fifth Amendment (and hence, Article I, § 3 of State Constitution) protection against *deprivations of liberty* may more appropriately address the nature of the right infringed when a companion animal has been killed or withheld by government after being declared dangerous ("There may be merit to the argument that a person's relationship with a dog deserves more protection than a person's relationship with, say, a car."); *Mansour v. King County*, 131 Wash.App. 255, 263-64 (I, 2006) (citations omitted).

adequate standard and burden of proof in upholding a removal order (*Id.*, at 264 (“An adequate standard of proof is a mandatory safeguard.”)), violated procedural due process (*Id.*, at 272). It added that appellate review cannot cure a deficient standard and burden of proof. *Id.*, at 267-68.

Notably, *Mansour* did not address due process protections calibrated to an order that does not banish the dog outside the jurisdiction, but, rather, offers the owner a choice of obeying onerous restrictions (and then exporting those restrictions statewide) or euthanasia. Banishment alone (as in *Mansour*) was simply not an option, particularly after they seized Gunnar and refused to release him until all requirements were met. Under such conditions, more than just a geographic prohibition is at stake, rendering evidentiary preponderance insufficient. Although the interest of the county in protecting public safety from allegedly vicious dogs is of course legitimate, it is the magnitude of the penalty (termination of quasi-parental rights or compulsory relocation of the owner-guardian and his home) and its potential irreversibility (in the event of euthanasia) that outweighs the slightly increased burden imposed on the government.

The DDD leveled at Ms. Coballes constitutes a legal challenge not at the “low end of the spectrum” of adjudications, as in a “civil case involving a monetary dispute between private parties,” who must share the risk of error “in roughly equal fashion.” *Nguyen v. DOH*, 144 Wn.2d 516,

524 (2001). Nor is this the “high end” criminal case where the beyond-a-reasonable-doubt standard of proof is “designed to exclude as nearly as possible the likelihood of an erroneous judgment.” *Id.* The intermediate standard of clear, cogent, unequivocal, and convincing evidence applies where more than mere money judgment and less than a generic criminal proceeding outcome is at stake. *Id.*

For example, the burden of proof in parental rights termination proceedings is constitutionally greater than that necessary for awarding money damages in a typical civil action, based on the *Mathews* factors. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982). There is no dispute that Ms. Coballes has a property interest in her dog, Gunnar. The clear and convincing standard also applies in quasi-criminal proceedings, where the action is brought for the protection of the public “or where the proceedings threaten the individual involved with a significant deprivation of liberty or with a stigma.” *Nguyen*, at 529.

Decisions by the County to seize citizens’ nonhuman family members on pains of prosecution or seizure and summary euthanasia constitute an inchoate and predicate quasi-criminal proceeding for both the animal and guardian. Furthermore, they are tantamount to a parental termination proceeding for which the intermediate standard of proof applies. When facing the execution or forced exile of a beloved family

member, or the severe emotional dislocation experienced by an animal's guardian based on these threats, the standard and burden of proof should reflect the gravity of the deprivation.⁴⁴ In applying a standard of evidentiary preponderance, Ch. 5.04 SCC utilizes an unconstitutional standard of proof that cannot be cured by appellate review.

While *Mansour* acknowledged that a temporary deprivation of a child in a dependency hearing only requires proof by evidentiary preponderance, the court goes on to “recognize that permanent termination of the parent/child relationship requires clear and convincing proof.” *Id.*, at 267 fn. 31. Furthermore, at issue in *Mansour* was a “determination of removal,” not, as here, a determination of death or compliance with dangerous dog restraints under SCC 5.04.035(a)(1-6) to achieve the dog's release from the government.⁴⁵

⁴⁴ The clear and convincing standard applies in quasi-criminal hearings, license revocations, involuntary commitments, denaturalization, deportation, and termination of parental rights.

⁴⁵ SCC 5.04.035(a) expressly prohibits the county from releasing an impounded, declared-dangerous dog without a certificate of registration of dangerous dog. Thus, contrary to *Mansour* (in that Mr. Mansour's dog remained in Mr. Mansour's care at all times and was never impounded), here and in all cases under the County code, at issue is a determination of death-or-compliance, including payment of daily boarding and impound fees following the warrantless, non-probable cause-based seizure and confiscation of a dog; proof of insurance with at least \$250,000 limits and \$500 maximum deductible (a premium of several hundreds of dollars every six months); construction of a proper enclosure; payment of spaying/neutering at owner expense; registration of the dog as dangerous with the county at additional expense; and an affirmative obligation to provide written, 10-day advanced notice prior to moving the dog outside the jurisdiction on pains of criminal prosecution pursuant to SCC 5.04.035(d, h).

As the court can appreciate, the burden of proof relevant to these facts begs for a more demanding standard given the numerous criminal conditions and onerous financial restraints imposed by default (i.e., without a finding of dangerousness by an impartial arbiter, without probable cause, and on threat of euthanasia) if the owner does not appeal. Unlike *Mansour*, Ms. Coballes’s “relationship with [Gunnar] [could not] continue uninterrupted” simply by moving out of Spokane County – unless she was willing to pay boarding fees *ad infinitum* or let them kill him. And because the entire process commences with less than probable cause or order from a magistrate, the county derives the benefit of what amounts to a preliminary injunction, which could only be issued with proof of a “clear” legal or equitable right to relief and likelihood of success, a standard that best translates into clear and convincing evidence.⁴⁶

4. *Ultra Vires* Exportation of Restraints/Jurisdiction.

The *Decision*, (iii) states:

CherryAnn Coballes, the owner of the dog, and any future owner of such dog in the State of Washington, should be required to comply with all the provisions of Spokane County Code Section 5.04.035.

The attempt to extrajurisdictionally restrain Ms. Coballes and future owners of Gunnar outside County limits renders this part of the order

⁴⁶ See CR 65 and *Rabon v. City of Seattle*, 135 Wn.2d 278, 284-85.

illegal in two respects. First, not having declared Gunnar dangerous under state law, restrictions imposed under Ch. 16.08 RCW cannot apply anywhere within Washington, much less without. Second, the County has imposed unenforceable future restraints on use and alienation of property outside its jurisdictional limits. The Commissioners “only have such powers as have been granted to them, expressly or by necessary implication, by the constitution and statutes of the state.” *State ex rel. King County v. Superior Court for King County*, 33 Wn.2d 76, 81 (1949). No provision of state law or our constitutions allows the County to regulate the keeping of dogs outside its boundaries. Indeed, even county law does not permit this. At most, SCC 5.04.035(a) lists six conditions for registering a dangerous dog in the county. Not one condition addresses relocation outside the county.⁴⁷ Hence, this ruling is *ultra vires* and illegal.

E. RAP 18.1 Fee Request

Plaintiff requests attorney’s fees under RAP 18.1 on the equitable basis that she is conferring a substantial benefit to an ascertainable class (taxpayers and dog owners) by protecting constitutional principles.

⁴⁷ While SCC 5.04.035(d) does impose a duty to notify prior to relocation or change in ownership, “all conditions imposed under this section shall be in place for the new owner and at the new location prior to such change” when the change “is within Spokane County[.]”

Dempere v. Nelson, 76 Wash.App. 403, 407 (1994); *Weiss v. Bruno*, 83 Wn.2d 911 (1974)(constitutional protection variant of common fund).

V. CONCLUSION

Finding that E.C. unintentionally provoked Gunnar, trespassed willfully into Gunnar's room, and did not suffer a severe injury as strictly construed merely resolves the question of whether Ms. Coballes and Gunnar should be saddled by substantial financial and physical restraints, exposing Ms. Coballes to the threat of criminal charges and Gunnar's death, thereby divesting the Coballes family (a single, widowed mother raising two young boys with straight A's in school⁴⁸) of their animal companion. Such a determination leaves open questions of civil or criminal liability, to be managed through other fora. For the reasons stated, the court should vacate *ab initio* Gunnar's dangerous designation, clarify the law, and cure constitutional infirmities present in the SCC.

Dated this Aug. 12, 2011

ANIMAL LAW OFFICES

Digitally signed by Adam

P. Karp

Location: Bellingham, WA

Date: 2011.08.12 14:15:08

-07'00

Adam P. Karp, WSB No. 28622
Attorney for Plaintiff-Petitioner

⁴⁸ VRP 92:3 (Anthony); VRP 132:24 (Connor).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Aug. 12, 2010, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served upon the following person(s) in the following manner:

[x] First-class Mail

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