

No. 361128

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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No. 361128

JOHN AUSTIN,

Appellant,

v.

JIMMY'S CONTRACTOR SERVICES, INC., et al,

Respondents.

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**APPELLANT'S OPENING BRIEF**

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## I. SUMMARY OF ARGUMENT

Jimmy's Roofing, a roofing contractor, made arrangements with Ryan Erwin for him to serve as its "Field Sales Manager." Pursuant to that arrangement, Mr. Erwin was explicitly permitted to bring his dog to the premises occupied by Jimmy's Roofing, where Mr. Erwin then conducted business on behalf of Jimmy's Roofing. While Mr. Erwin was working on the premises, his dog attacked and injured Mr. Austin, an invitee.

Jimmy's Roofing avoided all liability on summary judgment by inconsistently arguing that it had no control over the dog, no control over the dog's owner, no control over the dog's activities on its premises, and no duty to exert control in any instance.

The trial court erred when it concluded, without any reference to Washington law, that an employer cannot incur vicarious liability for tortious actions by an employee with respect to dog bites as a matter of law. The trial court erred when it concluded that the dog did not create an unreasonable risk on the premises and dismissed Mr. Austin's claim based on premises liability. The trial court erred when it accepted the argument that Jimmy's Roofing had no control over the dog and dismissed Mr. Austin's claim based on common law negligence for dog bite.

Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the matter for trial.

## I. SUMMARY OF ARGUMENT

Jimmy's Roofing, a roofing contractor, hired Ryan Erwin to serve as its "Field Sales Manager." Pursuant to that arrangement, Mr. Erwin was explicitly permitted to bring his dog on the premises occupied by Jimmy's Roofing, where Mr. Erwin then conducted business on behalf of Jimmy's Roofing. While Mr. Erwin was working on the premises, his dog attacked and injured Mr. Austin, an invitee.

Jimmy's Roofing moved for summary judgment and avoided all liability by inconsistently arguing that it had no control over the dog, no control over the dog's owner, no control over the dog's activities on its premises, and no duty to exert control in any instance.

The trial court erred when it concluded, without any reference to Washington law, that an employer cannot incur vicarious liability for tortious actions by an employee with respect to dog bites as a matter of law. The trial court erred when it concluded that the dog did not create an unreasonable risk based on premises liability. The trial court erred when it accepted the argument that Jimmy's Roofing had no control over the dog and dismissed Mr. Austin's claim based on common law negligence for dog bite.

Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the matter for trial.

## II. ASSIGNMENTS OF ERROR

1. *The trial court erred when it dismissed Mr. Austin's claims against Jimmy's Roofing.*
2. *The trial court erred when it determined that an employer cannot be vicariously liable for a dog bite injury as a matter of law.*
3. *The trial court erred when it dismissed Jimmy's Roofing from the proceeding without ruling on Mr. Austin's vicarious liability claim.*
4. *The trial court erred when it concluded that there was no genuine issue of material fact as to whether Jimmy's Roofing was harboring its employee's dog on its business premises.*
5. *The trial court erred when it concluded that there was no genuine issue of material fact as to whether Jimmy's Roofing allowed an unreasonable risk to invitees.*

## III. ISSUES PRESENTED

- A. **Whether the trial court erred when it determined that an employer cannot be vicariously liable for a dog bite injury as a matter of law.**
- B. **Whether the trial court erred when it dismissed Mr. Austin's premises liability claim against Jimmy's Roofing.**
- C. **Whether the trial court erred when it dismissed Mr. Austin's common law negligence claim against Jimmy's Roofing.**

## IV. STATEMENT OF THE CASE

IDENTITY OF DEFENDANTS: Jimmy's Roofing is a roofing contractor company located in Spokane County, Washington, and owned by Jimmy Stroh. (CP 46.) Ryan Erwin was hired as a "Field Sales Manager" for Jimmy's Roofing, allegedly as an independent contractor. (CP 84, 166.)

Between 2012 and 2014, Mr. Stroh met Mr. Erwin through the website LinkedIn, and Mr. Stroh noticed that Mr. Erwin had roofing sales experience. (CP 25.) Mr. Stroh was active on the website in order to increase his network of business connections. (CP 25.)

In 2015, a violent windstorm swept through Spokane County and caused massive damage to residents' homes throughout the area. (CP 24.) As a result, Jimmy's Roofing was overwhelmed with requests for service. (CP 24.)

Mr. Stroh recalled that Mr. Erwin had experience in the windstorm roofing industry, so he reached out to Mr. Erwin by phone to "talk about the storm and its effects and get some advice" about "how to handle and best take advantage of a storm opportunity." (CP 26.)

Mr. Erwin gave Mr. Stroh "a few pointers" and suggested that he come to Spokane to work out of Jimmy's Roofing's office and "be focused on selling." (CP 26.) In 2015, Mr. Stroh had three people that worked for Jimmy's Roofing in sales; Mr. Stroh testified that two of them were "employees," and only Mr. Erwin was an "independent contractor." (CP 107-108.).

Mr. Stroh reached an agreement with Mr. Erwin on November 29, 2015, and Mr. Erwin arrived in Spokane on December 2, 2015. (CP 28.) Mr. Erwin signed a subcontractor's agreement and a W-9 on the same day. (CP 28-29.)

Mr. Erwin represented himself as an individual/sole proprietor or a single member LLC on the W-9 tax form he completed, and he referred to his business as "Golden Exteriors." (CP 27, 30.) Although Jimmy's Roofing did not have

any sort of lease agreement with Mr. Erwin, it provided Mr. Erwin an office on its premises and the use of one of its desks. (CP 30, 34, 141.)

On the day he arrived, Mr. Erwin brought his dog with him to Jimmy's Roofing's premises. (CP 32.). Mr. Erwin indicated that he could not leave his dog at the hotel where he was staying, and it is undisputed that Mr. Stroh gave him permission to keep the dog in the upstairs office and to use the back entrance to take his dog outside. (CP 32-35.) Mr. Stroh testified that he believed the dog was a puppy, which he inferred based on the fact that the dog had a lot of energy and was playing with dog toys, and because "[i]t seemed like I recall Erwin referring to him as a puppy." (CP 35, 38.)

**IDENTITY OF PLAINTIFF:** The plaintiff, John Austin, is an individual who was present on the business premises of Jimmy's Roofing for the purpose of setting up an appointment to obtain an evaluation of damage to his roof that had been caused by the severe windstorm. (CP 5, 17.)

**THE INCIDENT:** On December 7, 2015, after Mr. Austin met with Jennifer Love, the employee responsible for scheduling appointments on behalf of Jimmy's Roofing, Ms. Love was saying goodbye to Mr. Austin at the door, when Mr. Erwin's dog suddenly ran out of an adjacent room and attacked Mr. Austin, biting him on his left hand. (CP 5, 16-17, 81.)

Mr. Erwin entered the room shortly after and pulled the dog off of Mr. Austin. (CP 5.) Mr. Stroh looked at Mr. Austin's hand, and Mr. Erwin and Ms. Love searched for some bandages for Mr. Austin's hand, and found some

in a work truck outside. (CP 82, 133.) They bandaged his hand, and Mr. Austin drove to urgent care to have the bite examined. (CP 82.)

Several days later, when Mr. Erwin came to Mr. Austin's house to evaluate his roof, Mr. Erwin confirmed that he was the owner of the dog. (CP 82.) He told Mr. Austin that "his boss" was letting him keep the dog at the office because he had just adopted it, and it was still a little "skittish"; he apologized for Mr. Austin's injury. (CP 82.) Mr. Erwin then gave Mr. Austin a business card that indicated he was the "Field Sales Manager" for Jimmy's Roofing and listed an email address of "Ryan@JimmysRoofing.com." (CP 82.) Mr. Stroh admitted in his deposition that there would be no way to tell from the business card that Mr. Erwin was not an employee. (CP 129.) At no time did Mr. Erwin or anyone from Jimmy's Roofing indicate that Mr. Erwin was not an employee. (CP 82.)

Several months later, Mr. Austin underwent tendon repair surgery on his left hand as a result of damage inflicted by the dog bite. (CP 82.)

**PROCEDURAL HISTORY:** On June 6, 2017, Mr. Austin filed a *Complaint for Damages* against Jimmy's Roofing and Mr. Erwin. (CP 3-8.) In his complaint, Mr. Austin alleged his injuries had been caused by the negligence of Jimmy's Roofing or its agents in failing to maintain a safe premises for invitees. (CP 5.) Mr. Austin also alleged that his injuries had been caused by the negligence of Mr. Erwin in failing to effectively control his

dog where injury was reasonably foreseeable. (CP 6.) Mr. Austin specifically alleged that Mr. Erwin was an employee of Jimmy's Roofing. (CP 5.)

In its answer, Jimmy's Roofing admitted that Mr. Austin was an invitee on the premises and that Mr. Erwin owned the dog that bit Mr. Austin. (CP 10-11.) Jimmy's Roofing denied that Mr. Erwin was an employee. (CP 9-15.)

On February 22, 2018, Jimmy's Roofing moved for summary judgment dismissal of Mr. Austin's claims against it. (CP 45-60.) At hearing, counsel for Jimmy's Roofing stated on the record: "There's no question in Washington that the dog's owner, Mr. Erwin, is strictly liable," and later reiterated saying, "there's no question that the owner of the dog, Mr. Erwin, is strictly liable for injuries caused by the dog." (RP 3.)

At hearing, the trial court dismissed Mr. Austin's premises liability claim, saying: "I don't find that I have that kind of evidence here that would create a genuine issue of material fact that Jimmy's Roofing should have realized that allowing this puppy to be upstairs with its owner, Mr. Erwin, exposed Jimmy's Roofing to risk – unreasonable risk of harm." (RP 32.)

Counsel for Mr. Austin then asked the trial court whether it intended to dismiss Jimmy's Roofing entirely given that there had been an admission that Mr. Erwin was strictly liable, and the trial court had yet to make a finding on Mr. Austin's vicarious liability claim based on the employment relationship between Mr. Erwin and Jimmy's Roofing. (RP 35.)

The trial court then ruled:

So whether Mr. Erwin was an employee for whom there was vicarious liability or not, you would have had to – in order to meet the premises liability component, you would have to have a dangerous condition. And we know under the common law from *Markwood v. McBroom*, 1920 case, and we know from the statute RCW 16.08.040, it's only the owner or the one that controls or harbors the dog that would carry the strict liability. So that wouldn't apply to Jimmy's Roofing in my assessment.

(RP 36.)

On May 4, 2018, the trial court entered an order granting Jimmy's Roofing's motion for summary judgment. (CP 203.)

On July 3, 2018, the trial court entered an *Order of Default and Entry of Judgment*, determining that Mr. Erwin was liable for the injuries of Mr. Austin.

(Appendix I.)

Mr. Austin appealed.

## V. ARGUMENT

“Summary judgment procedure is not a catchpenny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth,” and “[i]ts purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.” *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960)(quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (1940)).

Summary judgment is only affirmed when there are no genuine issues of material fact requiring trial and the moving party is entitled to judgment as a matter of law. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 311, 358 P.3d 1153 (2015); CR 56(c). Evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in the nonmoving party's favor. *Id.* "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105, 68 U.S.L.W. 4480 (2000)(internal cites omitted). "Courts scrutinize with care the affidavits of the moving party and indulge in some leniency with respect to the affidavits of the opposing party." Passovoy v. Nordstrom, Inc., 52 Wn.App. 166, 173, 758 P.2d 524 (1988)(emphasis added).

**1. The trial court erred when it concluded that an employer cannot be vicariously liable for a dog bite injury as a matter of law.**

AUTHORITY: "It is the general rule that a master may be held liable for the tortious acts of his servant, although he may not know or approve of them, if such acts are done within the scope of the employment." Titus v. Tacoma Smeltermen's Union Local #25, 62 Wn.2d 461, 469, 383 P.2d 504 (1963)(citing RESTATEMENT, AGENCY (2d) § 219); See also, Bratton v. Calkins, 73 Wn.App. 492, 498, 870 P.2d 981 (1994). "The negligence of the agent is imputed to the principal because he has the right to control the acts of

the agent”; importantly, “[i]t is the existence of the right of control, not its exercise, that is decisive.” O’Brien v. Hafer, 122 Wn.App. 279, 283, 93 P.3d 930 (2004)(quoting Pagarigan v. Phillips Petroleum Co., 16 Wn.App. 34, 37, 552 P.2d 1065 (1976)). “[A] written contract provision disclaiming control is not determinative on the question of control.” Jackson v. Standard Oil Company, 8 Wn.App. 83, 93, 505 P.2d 139 (1972).

APPLICATION: The trial court did not indicate on the record why it believed that an employer cannot, as a matter of law, be vicariously liable for the tortious acts of its employee done within the scope of employment with respect to dog bites (on either a strict liability theory or a negligence theory). The trial court cited no legal authority for this conclusion.

Here, it is undisputed that Mr. Erwin is liable for Mr. Austin’s injuries on all common law theories (strict liability and negligence). It is undisputed that Mr. Erwin is liable on a strict liability theory; Jimmy’s Roofing stipulated on the record that Mr. Erwin is strictly liable for the injuries suffered by Mr. Austin. (RP 3.) It is undisputed that Mr. Erwin is liable on a negligence theory because the trial court subsequently entered a judgment finding Mr. Erwin liable for the injuries caused to Mr. Austin on that basis. (Appendix 1.)

Therefore, pursuant to Washington case law, if Mr. Austin can prove (1) that Mr. Erwin was an employee of Jimmy’s Roofing, and (2) that his tortious acts were committed within the scope of his employment, then Jimmy’s Roofing is vicariously liable for Mr. Austin’s injuries. Titus, 62 Wn.2d at 469;

*Bratton*, 73 Wn.App. at 498; *O'Brien*, 122 Wn.App. at 283; *Pagarigan*, 16 Wn.App. at 37; RESTATEMENT, AGENCY (2d) § 219).

Here, the trial court did not even consider whether there were genuine issues of material fact because it explicitly concluded that strict liability for a dog bite cannot be vicariously incurred, and it implicitly concluded that negligent liability for a dog bite cannot be vicariously incurred, either.

The trial court's ultimate conclusion that dog bite liability cannot be vicariously incurred is particularly puzzling in light of its preceding conversation with counsel for Mr. Austin, who specifically brought the matter to the trial court's attention:

THE COURT: So what's your point?

[COUNSEL]: Is that the strict liability that applied to [Mr. Erwin] would apply to Jimmy's Roofing if the employee-agent relationship applies.

THE COURT: If I were to find on summary judgment that he was an employee and that the liability gets imputed to the employer?

[COUNSEL]: Yes.

THE COURT: I don't debate that with you.

(RP 34-36.)

The trial court erred as a matter of law when it concluded that liability for dog bite injuries cannot be vicariously incurred. There is no basis in Washington law for this conclusion, nor does the trial court reference any.

The trial court made no assessment regarding whether there was a genuine issue of material fact as to the nature of the employment relationship between Mr. Erwin and Jimmy's Roofing or as to the scope of Mr. Erwin's employment.

The determination of the nature of the relationships between the parties is to be resolved by the jury. *Hollingbery v. Dunn*, 68 Wn.2d 75, 80-81, 411 P.2d 431 (1966). See also, *Jackson*, 8 Wn.App. at 91; *O'Brien*, 122 Wn.App. at 281-84; *Chapman v. Black*, 49 Wn.App. 94, 99, 741 P.2d 998 (1987).

"Whether conduct is inside or outside the scope of employment is ordinarily a question for the jury." *Gilliam v. DSHS*, 89 Wn.App. 569, 585, 950 P.2d 20 (1998).

The trial court erred as a matter of law when it dismissed Mr. Austin's claim based on vicarious liability contrary to Washington law. Mr. Austin respectfully requests that this Court reverse the trial court's decision and remand the matter for trial.

**2. The trial court erred when it dismissed Mr. Austin's premises liability negligence claim.**

AUTHORITY: Premises liability creates a separate theory of recovery for a plaintiff injured by a dog bite. *Oliver v. Cook*, 194 Wn.App. 532, 545-46, 377 P.3d 265 (2016).

The scope of the duty owed by one who possesses land is determined by the common law classification of the person entering on it. *Younce v. Ferguson*, 106 Wn.2d 658, 666-67, 724 P.2d 991 (1986). "As to an invitee, a

possessor of land has a duty to maintain its premises in a reasonably safe condition.” *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980)). In invitee cases, “the occupier, by his arrangement of the premises or other conduct, has led the entrant to believe that the premises were intended to be used by visitors, as members of the public, for the purpose which the entrant was pursuing, and that reasonable care was taken to make the place safe for those who enter for that purpose.” *Younce*, 106 Wn.2d at 668)(citing *McKinnon v. Washington F. Sav. & Loan Ass’n*, 68 Wn.2d 644, 649, 414 P.2d 773 (1996)).

The duty owed by an occupier of land to an invitee has at least two components: one related to physical conditions on the premises (and is described in Restatement (Second) of Torts §§ 343-343A (1965)), and the other related to activities on the premises (and is described in Restatement (Second) of Torts §6 341A and 344 (1965)). *Nivens*, 83 Wn.App. at 41-42.

The Restatement (Second) of Torts, §344 (1965) states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) Discover that such acts are being done or are likely to be done, or
- (b) Give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Passovoy, 52 Wn.App. at 172-73 (emphasis added).

A dog can be a condition on the land. Oliver, 194 Wn.App. at 544. Whether a duty is owed is generally characterized as a question of law, but the scope of the duty owed by a particular defendant in a particular case turns on whether the injury or damage is foreseeable.” Tao v. Li, 140 Wn.App. 825, 833, 166 P.3d 1263 (2007)(citing Rasmussen v. Bendotti, 107 Wn.App. 947, 955, 29 P.3d 56 (2001) and Seeberger v. Burlington N.R.R., 138 Wn.2d 815, 823, 982 P.2d 1149 (1999)(quoting Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989)); Nivens, 83 Wn.App. at 41.

“The concept of foreseeability determines the scope of one’s duty.” Schneider v. Strifert, 77 Wn.App. 58, 62, 888 P.2d 1244 (1995)(citing Christen, 113 Wn.2d at 493. “Foreseeability depends on whether the injury should have been recognized by common experience, the special experience of the alleged wrongdoer, or by a person of ordinary prudence and foresight.” Schneider, 77 Wn.App. at 62 (citing Gordon v. Deer Park Sch. Dist. 414, 71 Wn.2d 119, 124-25, 426 P.2d 824 (1967)). “It is not necessary that the defendant should have foreseen the extent of the harm or the manner in which it occurred.” Schneider, 77 Wn.App. at 62. “The harm sustained need only be within the general field of danger covered by the defendant’s duty.” Schneider, 77 Wn.App. at 62.

APPLICATION: Here, it is undisputed that Jimmy’s Roofing, as an occupier of the property, owed a duty to Mr. Austin, an invitee, to maintain the premises in a reasonably safe condition as a matter of law.

The question before the trial court turned on the scope of the duty specifically owed by Jimmy's Roofing to Mr. Austin, and the question of whether it was breached when Mr. Austin was attacked by Mr. Erwin's dog. These are questions of fact.

There is a genuine issue of material fact as to whether Mr. Austin's injury was foreseeable. Mr. Stroh knew there was a dog on the premises, because it was present by his permission. He made no effort to inquire about or investigate the dog's temperament before facilitating its presence in his place of business. There is evidence in the record that the dog was described as "skittish." (CP 82.) Mr. Stroh made no effort to confirm that Mr. Erwin had enacted measures to keep the dog away from invitees, and he made no effort himself to ensure that the dog was prevented from contact with invitees despite recognizing the importance of doing so.

It is foreseeable that a very young "puppy" would not be sufficiently trained to reliably obey commands, and without a leash or other containment system, it is easily foreseeable that such an animal might evade control and come into contact with invitees. It is further easily foreseeable that an untrained, unsocialized animal "with a lot of energy" acting without restraint might cause injury to the individuals with whom it comes in contact.

As Mr. Austin argued to the trial court, the evidence for the foreseeability of injury is demonstrated by reference to Spokane County's leash laws, which are explicitly "designed to protect public health and safety." *Spokane County*

*Code 5.04.070 (Control of Dogs)*. The owner of a dog is not permitted to allow the dog to “run at large” which is defined as being “physically off the premises of the owner, handler, or keeper of the dog” without a leash. *Spokane County Code 5.04.020(6)*. The basis for this rule is the implicit conclusion that dogs that are unrestrained and “at large” constitute a foreseeable danger to public health and safety.

Interestingly, in addressing this argument at hearing, counsel for Jimmy’s Roofing unintentionally illustrated the inconsistency in its representations to the trial court, which shifted with each type of liability at issue. Counsel argued that Jimmy’s Roofing could not be liable for Mr. Erwin’s dog being “at large,” because the dog was inside “private offices.” (RP 26.) Counsel argued that “at large” means outside of “any private dwelling” and argued that the suggestion that one has to “have a dog leashed inside of private premises” is “simply not the law.” (RP 26.) But that is an inaccurate summary of the relevant authority. A dog may be off a leash without being “at large” if the dog is on the “premises” of “the owner, handler, or keeper of the dog.” *Spokane County Code 5.04.020(6)*. But it is undisputed that this incident took place on the premises occupied by Jimmy’s Roofing, and Jimmy’s Roofing has adamantly argued it is *not* the owner, handler, or keeper of the dog (discussed below); therefore, this argument does not avoid the conclusion that Mr. Erwin’s dog was “at large” when allowed to roam freely without a leash on Jimmy’s Roofing’s property. Pursuant to statute, a dog “at large” creates an inherent threat to

public health and safety; therefore, there is a genuine issue of material fact as to whether Jimmy's Roofing should have foreseen the risk that Mr. Erwin's dog would create an unsafe condition on its premises when it permitted Mr. Erwin's dog to run "at large."

Foreseeability is question of fact for the jury. Schneider, 77 Wn.App. at 62 (citing Hansen v. Friend, 118 Wn.2d 476, 483-84, 824 P.2d 483 (1992); Christen, 113 Wn.2d at 492. "[W]hether or not ordinary care could have guarded against the violation is a question for the trier of fact." Schneider, 77 Wn.App. at 62.; Tao, 140 Wn.App. at 833 (citing Seeberger v. Burlington N.R.R., 138 Wn.2d 815, 823, 982 P.2d 1149 (1999)(quoting McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953))).

The trial court erred as a matter of law when it determined there was no genuine issue of material fact and dismissed Mr. Austin's premises liability claim. Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the matter for trial.

**3. The trial court erred when it dismissed Mr. Austin's common law negligence claim.**

AUTHORITY: Two theories of liability exist at common law: (1) strict liability if the animal has known dangerous propensities, and (2) negligence liability where there are no known dangerous propensities. Schneider, 77 Wn.App. at 61 (citing Arnold v. Laird, 94 Wn.2d 867, 871, 621 P.2d 138

(1980); Frobig v. Gordon, 124 Wn.2d 732, 735, n.1., 881 P.2d 226 (1994); Restatement (Second) of Torts §518 (1977).

In this case, there is no evidence that Jimmy's Roofing had knowledge that Mr. Erwin's dog had known dangerous propensities; the only issue alleged was negligence liability.

"[A] negligence cause of action arises when there is ineffective control of an animal in a situation where injury is reasonably foreseeable." Schneider, 77 Wn.App. at 62. "The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time." Schneider, 77 Wn.App. at 62. "Negligence is a question for the jury unless we can say, as a matter of law, that no negligence was shown." Falconer v. Safeway Stores, Inc., 49 Wn.2d 478, 480, 303 P.2d 294 (1956).

The common law rule is that liability attaches to an owner, keeper, or harbinger of a dog. Clemmons v. Fidler, 58 Wn.App. 32, 34, 791 P.2d 257 (1990). It is not sufficient merely to conclude that a defendant did not purchase the animal or "own" it in a property sense. Beeler v. Hickman, 50 Wn.App. 746, 753, 750 P.2d 1282 (1988). "[L]iability flows from ownership or direct control." Frobig, 124 Wn.2d at 735 (emphasis added).

The case law with respect to the definition of a "keeper" or "harborer" of a dog (which are treated as synonymous) is not directly on point. "Harboring means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of

the law.” *Harris v. Turner*, 1 Wn.App. 1023, 1030, 466 P.2d 202 (1970). Pursuant to the Restatement of Torts §514, “a person harbors a dog by permitting his wife, son, or household to keep it in the house or on part of his land which is occupied by the family as a group.” *Id.* On the other hand, the possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it thereon, is not enough to make its possessor liable as a harbinger of the animal. *Id.* “Thus, a father, on whose land his son lives in a separate residence, does not harbor a dog kept by his son therein, although he has the power to prohibit the dog from being kept and fails to exercise the power or even if he presents the dog to his son to be kept.” *Id.*

APPLICATION: It is undisputed that Jimmy’s Roofing is not the owner of the dog in this case; however, there are several questions that raise a genuine issue of material fact as to whether Jimmy’s Roofing is a “harborer” of Mr. Erwin’s dog. Did Jimmy’s Roofing allow the dog to be kept on part of its premises that is occupied by the company as a group? Doing so would comport with the first part of §514 of the Restatement of Torts and would support the conclusion that Jimmy’s Roofing was a harborer of Mr. Erwin’s dog. Or did Jimmy’s Roofing allow the dog to live in a “separate” area more similar to the example given about a father whose son lives in a “separate residence” on his property, which would support the conclusion that Jimmy’s Roofing was *not* a harborer of Mr. Erwin’s dog. These are questions of fact.

Ultimately, the controlling question is whether Jimmy's Roofing had direct control over the dog. That is a question of fact, and in this case, the answer to *that* question controls the outcome of the issue; therefore, it is a genuine issue of material fact that requires trial.

The trial court erred as a matter of law when it determined there was no genuine issue of material fact and dismissed Mr. Austin's common law negligence claim. Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the matter for trial.

## VI. CONCLUSION

The trial court erred when it dismissed Mr. Austin's claims against Jimmy's Roofing. Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand this matter for trial.

RESPECTFULLY SUBMITTED this 20th day of DECEMBER, 2018,

  
\_\_\_\_\_  
JULIE C. WATTS/WSBA #43729  
Attorney for Appellant

# ***Appendix 1***

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FILED  
JUL 03 2018

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

JOHN AUSTIN, individually  
Plaintiff,

Case Number: 17-2-02153-3

vs.

JIMMY'S CONTRACTOR SERVICES,  
INC. d/b/a JIMMY'S ROOFING; RYAN  
ERWIN and JANE DOE, individually and/or  
as a martial community.

~~PROPOSED~~ ORDER OF  
DEFAULT AND ENTRY OF  
JUDGMENT PURSUANT TO CR  
54(b)

Defendants.

THIS MATTER having come before the court on the motion of plaintiff JOHN AUSTIN for an Order of Default and Certification pursuant to CR 54(b); the court having reviewed the files and records herein and having determined that defendant RYAN ERWIN and JANE DOE ERWIN failed to answer Complaint of Plaintiff or to file any pleading in this matter whatsoever within the statutory time period; now, therefore, it is hereby

ORDERED that defendant RYAN ERWIN and JANE DOE ERWIN are in default.

ORDER OF DEFAULT AND ENTRY OF  
JUDGMENT PURSUANT TO CR 54(b) - I

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FURTHERMORE, this Court finds:

1. Plaintiff filed a summons and complaint for damages on June 6, 2017 alleging that RYAN ERWIN was an agent of JIMMY'S CONTRACTOR SERVICES, INC. d/b/a JIMMY'S ROOFING (here after JIMMY'S ROOFING); that RYAN ERWIN owned a dog and that the dog bit Plaintiff at JIMMY'S ROOFING; that JIMMYS ROOFING was vicariously liable because of employment or agency and/or liable under a premise liability theory. Plaintiff's complaint alleges both economic and non-economic damages.
2. On July 11, 2017 Defendant JIMMY'S ROOFING filed a notice of appearance.
3. On December 20, 2017 JIMMY'S ROOFING filed an Answer to Plaintiff's complaint.
4. On May 4, 2018 JIMMY'S CONTRACTOR SERVICES, INC. d/b/a JIMMY'S ROOFING, was dismissed with prejudice as a party to this action on May 4, 2018.
5. On June 4, 2018 Plaintiff filed a Notice of Appeal with the Division III Court of Appeals.
6. Defendant RYAN ERWIN has not filed a notice of appearance nor an answer to Plaintiff's complaint. This has granted Plaintiff's motion for default against Defendant RYAN ERWIN.

ORDER OF DEFAULT AND ENTRY OF JUDGMENT PURSUANT TO CR 54(b) - 2

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7. CR 55(b)(2) requires that a hearing, findings of fact and conclusions of law or a jury determination of Plaintiff's damages before a final judgment be entered upon default.

8. After considering the declaration of Roger Ermola and the problems that will arise should this court enter finding regarding damages, and should Plaintiff prevail on appeal. For example (assuming Plaintiff prevails on appeal), if the court were to determine that all of Plaintiff's alleged medical bills were medically necessary and were related to the dog bite, then after remand JIMMY'S ROOFING would need to move to vacate the judgment or JIMMY'S ROOFING would be deprived of its right to trial of Plaintiff's damages.

9. This court finds that hearing or jury determination regarding damages at this time would cause unjust delay and use of judicial resource, which would be better expended after a final determination of Plaintiff's appeal.

10. There is no just reason for the delay in entry of judgment

Based upon the above findings IT IS ORDERED that there is no just reason for further delay of this action AND pursuant to CR 54(b) enters final judgment dismissing as a party in this matter JIMMY'S ROOFING as well as any claims against JIMMY'S ROOFING; AND a default judgment against RYAN ERWIN and JANE DOE ERWIN with further determination of damages upon motion of Plaintiff after the resolution of the Plaintiff's Appeal.

ORDER OF DEFAULT AND ENTRY OF JUDGMENT PURSUANT TO CR 54(b) - 3

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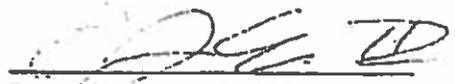
DONE IN OPEN COURT this 2<sup>d</sup> day of July, 2018.

  
\_\_\_\_\_  
JUDGE RAYMOND F. CLARY

Presented By:  
CASEY LAW OFFICES, P.S.

CRAIG SWAPP & ASSOCIATES

  
\_\_\_\_\_  
Brandon Casey WSBA 35050  
Attorney for Plaintiff

  
\_\_\_\_\_  
Roger J. Ermola, II WSBA 46228  
Attorney for Plaintiff

ORDER OF DEFAULT AND ENTRY OF  
JUDGMENT PURSUANT TO CR 54(b) - 4

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**December 20, 2018 - 4:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36112-8  
**Appellate Court Case Title:** John Austin v. Jimmy's Contractor Services, Inc., et al  
**Superior Court Case Number:** 17-2-02153-3

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