

FILED
Court of Appeals
Division III
State of Washington
1/17/2019 1:52 PM

No. 361128

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN AUSTIN,

Appellant,

JIMMY'S CONTRACTOR SERVICES, INC., ET AL,

Respondents.

RESPONDENT'S BRIEF

Gerald Kobluk
Attorney for Respondent
KSB Litigation, P.S.
221 North Wall St., Suite 210
Spokane, WA 99201

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR/ISSUES2

III. STATEMENT OF THE CASE2

IV. ARGUMENT6

A. Standard of Review6

B. Dog Bite Liability Generally7

**C. The Trial Court Properly Dismissed Austin’s Premises
 Liability Claim as a Matter of Law.10**

**D. Austin Did Not Assert a Cause of Action Against Jimmy’s
 Roofing for Common Law Negligence, Nor are There
 Facts to Support Such a Claim.13**

**E. There is No Evidence to Support a Vicarious Liability
 Claim.17**

V. CONCLUSION19

TABLE OF AUTHORITIES

Cases

<u>Arnold v. Laird</u> , 94 Wn.2d 867 (1980)	8
<u>Beeler v. Hickman</u> , 50 Wn. App. 746 (1988)	7, 8, 14, 17
<u>Briscoe v. McWilliams</u> , 176 Wn. App. 1010 (August 26, 2013)	9
<u>Clemmons v. Fidler</u> , 58 Wn. App. 32, <i>review denied</i> 115 Wn.2d 1019 (1990)	9, 14
<u>Frobig v. Gordon</u> , 124 Wn.2d 732 (1994)	9, 12, 14
<u>Harris v. Turner</u> , 1 Wn. App. 1023 (1970)	15
<u>Iwai v. State</u> , 129 Wn.2d 84 (1996)	11
<u>Johnson v. Ohls</u> , 76 Wn.2d 398 (1969)	9
<u>Kessinger v. Logan</u> , 113 Wn.2d 320 (1989)	7
<u>Markwood v. McBroom</u> , 110 Wash. 208 (1920)	9, 14, 15
<u>Melin-Schilling v. Imm</u> , 149 Wn. App. 588 (2009)	19
<u>Oliver v. Cook</u> , 194 Wn. App. 532 (2016)	10, 11, 13
<u>Repin v. State</u> , 198 Wn. App. 243 (2017)	7, 18
<u>Shafer v. Beyers</u> , 26 Wn. App. 442 (1980)	9, 14, 16
<u>Sligar v. Odell</u> , 156 Wn. App. 720 (2010)	7, 8, 14, 16, 17
<u>Younce v. Ferguson</u> , 106 Wn.2d 658 (1986)	10
<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216 (1989)	7

Statutes

RCW 16.08.040(1)	8
------------------------	---

Rules

CR 56(c)	6
GR 14.1	9
RAP 9.12	7

Other Authorities

W. Prosser, Handbook of the Law of Torts §76 (4 th ed. Hornbook Series 1971)	9
Restatement (Second) of Torts § 343	11

I. INTRODUCTION

Appellant, Austin, asserted one cause of action—premises liability—against Respondent, Jimmy’s Roofing, for an injury he sustained when he was bit on the hand by a puppy while on Jimmy’s Roofing’s premises. It is undisputed that Jimmy’s Roofing did not own the puppy. Austin offered no evidence that the puppy presented an unreasonable risk of harm and admits on appeal that “there is no evidence that Jimmy’s Roofing had knowledge that...the dog had known dangerous propensities.” The trial court correctly dismissed Austin’s premises liability claim as a matter of law.

In addition to challenging the dismissal of his premises liability claim, Austin also assigns error to the trial court’s “dismissal” of causes of action not pled against Jimmy’s Roofing: common law negligence and vicarious liability. Even if such unpled claims are considered by the Court at this time, they too fail as a matter of law. Jimmy’s Roofing was not the “owner, keeper or harbinger” of the puppy, nor did the puppy present a known danger. And while Austin makes a conclusory allegation that a question of fact exists as to whether the owner of the puppy, Ryan Erwin, was an employee or independent contractor of Jimmy’s Roofing, he

presents no evidence that Erwin's handling of his puppy was done in the course and scope of his sales management duties.

Austin's suit against Jimmy's Roofing was properly dismissed as a matter of law on summary judgment. The dismissal should be affirmed.

II. ASSIGNMENTS OF ERROR/ISSUES

Austin's assignments of error and issues presented can be boiled down to:

1. Did Austin sufficiently plead claims for a non-owner of a dog to be liable for injuries caused by a dog bite?

2. As to the claims pled and properly considered by the court, was summary judgment appropriate due to the lack of any material questions of fact?

III. STATEMENT OF THE CASE

Austin largely ignores uncontested facts pertaining to the circumstances that brought the owner of the dog, Ryan Erwin, president of Golden Exteriors' LLC, to Spokane to work with Jimmy's Roofing, or the relationship between those parties. The circumstances surrounding the dog bite itself are not materially contested. These undisputed facts were presented to the trial court at CP 46-48 and are summarized as follows:

Jimmy's Roofing is a roofing contractor company located in Spokane County, Washington. (CP 3 and 23). The Spokane area

experienced a significant windstorm in November 2015. (CP 5 and 24). In order to address the anticipated large volume of potential roofing work and insurance claims, Jimmy's Roofing contracted with another company, Golden Exteriors, LLC, to provide additional "sales and sales management services." (CP 24, 26 and 41).

The contract between Jimmy's Roofing and Golden Exteriors, LLC expressly provided "Golden Exteriors (and team they manage)" will provide "sales and sales management services to Jimmy's Roofing...as an independent contractor, covering all of their own taxes." (CP 25-26 and 41). Upon arrival in Spokane on December 2, 2015, the authorized representative of Golden Exteriors, LLC executed a subcontractor agreement and filled out an IRS form W9 on Golden Exteriors' behalf, providing that company's Employer Identification Number. (CP 27, 28, 29, 40 and 41). The authorized representative of Golden Exteriors LLC was its president, Ryan Erwin. (CP 27, 40, 41 and 43). Golden Exteriors' "team" consisted of Mr. Erwin and his assistant, Magdeline Byers. (CP 126, 164).

Jimmy's Roofing provided Golden Exteriors' two employees with an upstairs office at Jimmy's Roofing's place of business. (CP 29-30, 164). The office included one desk but no phone or computer. (Id.). All payments made by Jimmy's Roofing for services provided by Golden

Exteriors' employees Ryan Erwin and Magdeline Byers were made directly to Golden Exteriors and did not include any withholdings or taxes. (CP 20, 39 and 44).

When Erwin came to Spokane on Wednesday, December 2, 2015, he brought with him his dog, which was described as a lab mix puppy, less than a year old. (CP 17, 31-32, 38 and 39). Because Erwin was staying in a hotel and could not leave the puppy there alone, he brought the dog with him. (CP 31-32). The owner of Jimmy's Roofing, Jimmy Stroh, had no notice that Erwin was bringing his dog. (Id.).

Mr. Stroh permitted Erwin to have his dog at work but he emphasized the professionalism of the office. (CP 32-34). He advised Erwin to keep the puppy in the upstairs office that had been provided for Golden Exteriors, with the door closed. (Id.). Should the puppy need to go outside, Erwin was instructed to go out the back, through the shop to a fenced back yard. The puppy was not allowed to roam free through the offices. (CP 17, 33-34).

Erwin had his puppy with him in the Golden Exterior's upstairs office during working hours on Thursday and Friday, December 3 and 4, 2015. The puppy was "friendly and showed no signs of aggression." (CP 17, 35 and 38). Jimmy's Roofing was closed over the weekend. There were "no problems" with the puppy during those first two days. (CP 17).

On the morning of Monday, December 7, 2015, Appellant Austin came to Jimmy's Roofing to schedule an appointment. (CP 5). After doing so, Austin was walked to the front door by Jennifer Love, Jimmy's Roofing service coordinator. (CP5 and 17). As Ms. Love held open the front door, Erwin's puppy came down the stairs and ran toward the open front door. (CP 17). Ms. Love tried to stop Erwin's puppy from going outside. Likewise, Austin attempted to grab Erwin's puppy to keep it from running out the door or lunging at Ms. Love. (CP 17 and 81). During that process, the puppy turned and suddenly bit Austin on the left hand, then ran back up the hallway.¹ (CP 17 and 82).

Golden Exteriors provided sales services for Jimmy's Roofing for only about two weeks, after which the subcontractor agreement was cancelled, and presumably Ryan Erwin and his assistant returned to Colorado. (CP 36, 39 and 44).

PROCEDURE

On June 6, 2017, Austin filed suit against the owner of the puppy, Ryan Erwin, and against Jimmy's Roofing for the injury to his hand. (CP 3-8). Austin's "First Cause of Action" was against Jimmy's Roofing for alleged "negligence...as a result of their failure to maintain safe premises

¹ Counsel alleges Erwin entered the room and "pulled the dog off of Mr. Austin." (Appellant's Opening Brief, p. 4). That allegation is contrary to Austin's own testimony (CP 82) and is an obvious exaggeration to infer a prolonged vicious "attack" that is not supported by any evidence.

for the business invitee.” (CP 5). Counsel confirmed to the Trial Court that the only theory advanced against Jimmy’s Roofing was premises liability. After reading the cause of action from Austin’s Complaint, the Court then asked counsel:

THE COURT: ...So it’s evident to me that your theory against Jimmy’s Roofing is one of premises liability, correct?

MR. CASEY: Yes. Yes, it is.

(RP 24:18-25:7).

Counsel then confirmed to the Trial Court that the legal theories being advanced against the dog’s owner, Erwin, on the other hand, were “common law liability for his dog” as well as “strict liability under the statute.” (RP 25:8-23).

Jimmy’s Roofing filed for summary judgment to dismiss the claim asserted against it. The Court granted Jimmy’s Roofing’s summary judgment motion, and the Order was entered on May 4, 2018. (CP 203-4).

IV. ARGUMENT

A. Standard of Review

Summary judgment is to be granted if “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c);

Kessinger v. Logan, 113 Wn.2d 320, 325 (1989). A complete lack of proof concerning an element of Plaintiff's claim renders all other facts immaterial. Repin v. State, 198 Wn. App. 243, 262 (2017). An appellate review of a summary judgment order is *de novo*, with the Appellate Court making the same inquiry as the Trial Court. Young v. Key Pharm., Inc., 112 Wn.2d 216, 226 (1989).

While the standard of review on summary judgment is *de novo*, “the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. The Appellate Courts should not address legal theories not pled. See Sligar v. Odell, 156 Wn. App. 720, 733 (2010) (common law strict liability for a dog bite not pled, and therefore not considered on appeal); Beeler v. Hickman, 50 Wn. App. 746, 753 (1988) (common law strict liability for dog bite not considered on appeal because plaintiff “did not plead this particular theory.”).

B. Dog Bite Liability Generally

Washington's legislature determined that it is the owner of a dog who is strictly liable for injuries suffered by any person bitten by his/her dog:

The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person

bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

RCW 16.08.040(1).

“The use of the term ‘owner’ evidences a legislative intent to exclude from liability persons who are mere keepers or possessors of a dog.” Beeler v. Hickman, 50 Wn. App. at 752. It is undisputed that Jimmy's Roofing did not own the dog that bit Plaintiff. (*See* Appellant's Opening Brief, p. 18).

In addition to strict liability of the dog owner under the statute, at common law,

a negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of care required is commensurate with the character of the animal: ‘The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.’

Sligar v. Odell, 156 Wn. App. at 731-32, *citing* Arnold v. Laird, 94 Wn.2d 867, 871 (1980); Beeler, 50 Wn. App. at 754.

“So far as the common law is concerned, **dogs are usually regarded as harmless and in order to recover ‘it must be shown that the defendant knew, or had reason to know, of a dangerous**

propensity in the one animal in question.” Shafer v. Beyers, 26 Wn. App. 442, 448 (1980) *citing* W. Prosser, Handbook of the Law of Torts §76, at 500 (4th ed. Hornbook Series 1971). *Accord* Johnson v. Ohls, 76 Wn.2d 398, 404 (1969). Appellant admits: “[i]n this case, there is no evidence that Jimmy’s Roofing had knowledge that Mr. Ervin’s dog had known dangerous propensities.”² (Appellant Opening Brief, p. 17).

Further, such common law liability “flows from ownership or direct control” of the dog. Clemmons v. Fidler, 58 Wn. App. 32, 37 *review denied* 115 Wn.2d 1019 (1990). As such, “[a]t common law a person would not be liable for an injury resulting from the bite of a dog unless he was the owner, keeper, or harbinger of the dog.” *Id.* at 335-36; Markwood v. McBroom, 110 Wash. 208, 211 (1920); Frobig v. Gordon, 124 Wn.2d 732, 735 (1994).

Under the longstanding common law rule announced in Markwood, and reiterated in Frobig and Clemmons, a plaintiff injured by an animal must seek recovery from the owner, keeper or harbinger of that animal. The common law precludes ...alternative theories of liability.

Briscoe v. McWilliams, 176 Wn. App. 1010 (August 26, 2013)
(Unpublished and cited in accordance with GR 14.1) (according to that

² Appellant claimed that after the incident that the owner of the puppy mentioned it was “skittish” (CP 8) but there is no evidence that the puppy acted skittish prior to the incident, nor would that equate to a “known dangerous propensity”—which Appellant admits was not present in in this case in any event.

Division 1 case, alternative theories of liability—including liability to a “business invitee (premises liability theory)” —for dog bites are precluded by the longstanding common law rule limiting liability only to the “owner, keeper or harbinger” of the dog.).

Contrary to these authorities, Division 2 recently ruled that the victim of a dog bite might also consider a premises liability theory in the appropriate case. Oliver v. Cook, 194 Wn. App. 532, 543 (2016). Appellant Austin’s single cause of action against Jimmy’s Roofing is one for “premises liability.” (CP 5-6; RP 25). Austin cited Oliver v. Cook as “the controlling case.” (CP 69; Appellant’s Opening Brief, p. 11).

C. The Trial Court Properly Dismissed Austin’s Premises Liability Claim as a Matter of Law.

The legal duty a landowner owes to a person entering the premises depends on the status of the entrant: trespasser, licensee or invitee. Oliver, 194 Wn. App. at 544, *citing* Younce v. Ferguson, 106 Wn.2d 658, 662 (1986). It is uncontested that Austin was an invitee on Jimmy’s Roofing’s property. For invitees, a possessor of land is subject to liability for harm caused to the invitee “by a condition of the land” if, but only if, the possessor:

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

- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Oliver, at 544, *citing Iwai v. State*, 129 Wn.2d 84, 93-94 (1996), *quoting* Restatement (Second) of Torts § 343 (1965). For purposes of this analysis, Erwin’s dog “is the relevant ‘condition’ on the land.” Oliver, at 544.

The Oliver case involved an attack by the proverbial “junkyard dog:” a pit bull kept in an automobile repair shop. The dog had “a history of aggressive and violent behavior” that included attacks on other dogs and people, for which the Sheriff’s Department previously responded and issued Potentially Dangerous Dog Notifications on two prior occasions. Oliver, at 536. The owner of the shop admitted he knew the dog was aggressive and he himself avoided “approaching vehicles when he knew [the dog] was in them.” Id. at 535. Accordingly, there was no question in Oliver that the property owner knew the dog kept on his premises was dangerous and “involved an unreasonable risk of harm” to his invitees.

There is no similar evidence in the instant case. On the contrary, the undisputed evidence was that Erwin’s puppy was “friendly,” had shown “no signs of aggression” and presented “no problems” during the two days it was at the office with Erwin prior to the incident with Austin.

(CP 17, 35 and 38). In his Complaint, Austin alleged only that Jimmy’s Roofing “knew or should have known of the…dog on the premises,” (CP 6), and made no allegation that the dog was dangerous or was known to present an “unreasonable risk of harm.” Appellant now admits on appeal: **“[i]n this case, there is no evidence that Jimmy’s Roofing had knowledge that Mr. Erwin’s dog had known dangerous propensities.”** (Appellant’s Opening Brief, p. 17). Without evidence—or even an allegation—that the “condition on the land” (the puppy) involved a known “unreasonable risk of harm” to invitees, there can be no premises liability as a matter of law.

Further, it is undisputed that Jimmy’s Roofing instructed Erwin to keep his puppy in Golden Exterior’s upstairs office with the door closed, and to take him out only through the shop in back. (CP 17, 32-34). The puppy was not allowed to roam free through the office. Those instructions were intended to promote the “professionalism” of the office by keeping the dog out of sight from customers. (CP 33-34). Had Erwin adhered to these instructions, his dog would not have injured Austin. *See Frobigh v. Gordon*, 124 Wn.2d at 739. (No liability for failing to protect third person from animal attacks where the injury would not have occurred had the owner of the animal followed the property owner’s instructions: “Had

Gordon adhered to these precautions, her tiger would not have injured [plaintiff] under the circumstances presented here.”).

Given the undisputed facts of our case, the Trial Court was correct in ruling at RP 32:

I don't find that I have that kind of evidence here [similar to the facts in Oliver] 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['s invitees] to risk—unreasonable risk of harm.

The trial court correctly ruled that Austin failed to allege or present evidence necessary to establish elements required for a premises liability claim against Jimmy's Roofing. With no genuine issue of fact, that claim fails as a matter of law.

D. Austin Did Not Assert a Cause of Action Against Jimmy's Roofing for Common Law Negligence, Nor are There Facts to Support Such a Claim.

Austin's Complaint contained only one cause of action against Jimmy's Roofing: premises liability. (CP 5-6). Austin's counsel confirmed during oral argument that his “theory against Jimmy's Roofing is one of premises liability.” (RP 25). This was contrasted with the claims asserted against the owner of the dog, Erwin: for “common law liability” and “strict liability under the statute.” (RP 25). At no time did Austin's counsel amend his Complaint to add a claim against Jimmy's Roofing

based on common law negligence. Contrary to the Complaint and the acknowledgement of counsel in open court, Austin now argues on appeal that the “trial court erred when it dismissed Mr. Austin’s common law negligence claim against Jimmy’s Roofing.” (Appellant’s Opening Brief, p. 2, 16).

As an initial matter, this Appellate Court need not address claims not pled below. Sligar v. Odell, 156 Wn. App. 720, 733 (2010); Beeler v. Hickman, 50 Wn. App. 746, 753 (1988). But even if considered, such a common law negligence claim fails as a matter of law.

Appellant admits that “the common law rule is that liability attaches to an **owner, keeper or harbinger of a dog.**” (Appellant’s Opening Brief, p. 17, *citing* Clemmons, v. Fidler; Beeler v. Hickman; and Frobig v. Gordon, supra.). Stated the opposite way, “at common law, a person who is not the owner, keeper or harbinger of a dog is not liable for an injury caused by the dog.” Shafer v. Beyers, 26 Wn. App. 442, 447 (1980), *citing* Markwood v. McBroom, 110 Wash. at 211. Appellant argues that there is a question of fact whether Jimmy’s Roofing “is a ‘harbinger’ of Mr. Erwin’s dog.” (Appellant’s Opening Brief, p. 18). But that conclusory allegation is not supported by any facts and is contrary to Washington case authority.

“Harboring” was first defined by Washington’s Supreme Court in 1920:

“Harboring” means protecting, and one who treats a dog as **living at** his house, and undertakes to control his actions, is the owner or harbinger thereof, affecting liability for injuries caused by it.

Markwood, v. McBroom, 110 Wash. at 211. It is undisputed that Erwin and his puppy did not reside or live at Jimmy’s Roofing’s offices. The puppy was present only temporarily with Erwin while he was at work.

More recently, in Harris v. Turner, 1 Wn. App. 1023, 1030 (1970), the court determined that “harboring” means more—as a matter of law—than simply giving permission to someone to have a dog temporarily on his/her premises. In that case, “the trial court erred in instructing the jury that words ‘harbor’ or ‘harboring’ could consist of ‘allowing the dog to resort about one’s premises.’”

[T]he possession of the land on which the animal is kept, even when coupled with permission given to the third person to keep it thereon, is not enough to make its possessor liable as a harbinger of the animal.

Harris, 1 Wn. App. at 1030.

In the case at hand, Austin alleges only that Jimmy’s Roofing permitted Erwin to keep his puppy in the upstairs office during work hours. Austin makes no allegation and presents no evidence that the dog

was “living” at Jimmy’s Roofing, or that Jimmy’s Roofing fed, licensed, groomed, or cared for the health of the puppy in any way. Jimmy’s Roofing’s control of its premises (i.e., instructions to Erwin pertaining to where he could have his puppy) is not the same as control over the animal itself, or the puppy’s actions, sufficient to become the “harborer” of the animal for liability purposes. Since Jimmy’s Roofing was not the “owner, keeper or harborer” of the puppy, it cannot be liable under a common law theory for a dog bite as a matter of law.

Further, even if the court were to expand the definition of “harborer” to include the present circumstances, Appellant’s admission that “there is no evidence that Jimmy’s Roofing had knowledge that Mr. Erwin’s dog had known dangerous propensities” is fatal to his claim. For common law negligence (as opposed to strict liability) the duty to control an animal is “commensurate with the character of the animal...including the past behavior of the animal and the injuries that could have been reasonably foreseeable.” Sligar v. Odell, 156 Wn. App. at 732. Dogs are “usually regarded as harmless and in order to recover ‘it must be shown that the defendant knew or had reason to know of a dangerous propensity in the one animal in question.’” Shafer v. Byers, 26 Wn. App. at 448. Without evidence that the dog was known to be dangerous, there can be no breach of a duty. As the court ruled in Sligar:

Here, Sligar did not produce any evidence to demonstrate that the Odells either knew or should have known that their dog had any dangerous propensities. ...Absent a showing that the Odells knew of the alleged dangerous propensities of their dog, Sligar fails to show any genuine issue of material fact regarding a breach of any duty they owed to her.

Sligar, 156 Wn. App. at 732. *See also*, Beeler v. Hickman, 50 Wn. App. at 754 (claim of common law negligence for a “sudden” dog bite properly dismissed as a matter of law where owner of the dog “had no reason to know the dog would bite” plaintiff.).

Likewise, because Appellant admits that there is no evidence of the puppy’s dangerous propensities, there is no genuine issue of material fact regarding a breach of a duty Jimmy’s Roofing allegedly owed to Austin.

E. There is No Evidence to Support a Vicarious Liability Claim.

Austin argues an employer may be vicariously liable “for the tortious acts of its employee done within the scope of employment with respect to dog bites.”³ (Appellant’s Opening Brief, p. 9). He further argues that a question of fact exists as to whether Erwin was an employee as opposed to an independent contractor. (Id. at p. 11). It is undisputed that Golden Exteriors, LLC and the “team they manage” expressly contracted to provide “sales and sales management services” as “an

³ Appellant cites no case in which an employer has been held vicariously liable for an injury caused by an employee’s dog.

independent contractor.” (CP 41). Erwin, the president of Golden Exteriors, signed the services agreement as Golden Exteriors “authorized representative”, filled out a W9 for Golden Exteriors and provided that company’s tax identification number. (CP 24-29, 40-43). All payments made for sales services provided were made to Golden Exteriors (for Erwin and his assistant), with no tax withholding. (CP 20, 39 and 44). Given this uncontroverted evidence, Erwin was not an employee but was an independent contractor. (*See* argument and authorities at CP 197-98).

Regardless, while Austin attempts to argue that there is a factual question whether Erwin should be treated as an employee, such factual question cannot be material, as he completely ignores the second element necessary for vicarious liability: the alleged tortious acts must be done **within the scope of employment**. (Appellant’s Opening Brief, p. 8-9 and cases cited therein). A complete lack of proof as to that element renders all other facts immaterial. Repin v. State, *supra*. Austin provides no argument or evidence whatsoever that Erwin’s handling of his puppy was in any way related to the “sales and sales management” services his company was retained to perform for Jimmy’s Roofing. While not all actions need be expressly known or approved to be “acting within the scope of employment,” the employee must be

performing services for which [he] has been [employed], or when [he] is doing anything which is **reasonably incidental** to [his employment]. The test is not necessarily whether this specific conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been **fairly foreseen from the nature of the [employment] and the duties relating to it.** (Emphasis added).

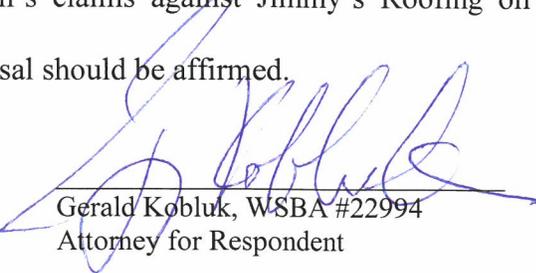
Melin-Schilling v. Imm, 149 Wn. App. 588, 593 (2009).

Erwin’s handling of his puppy was not “reasonably incidental” to the “sales and sales management” Erwin provided for Jimmy’s Roofing, had no relationship whatsoever to Jimmy’s Roofing’s business, and was not undertaken to further Jimmy’s Roofing’s interest. Because the handling of his puppy—even if negligent—was not done by Erwin “within the scope of employment,” no vicarious liability can attach as a matter of law.

CONCLUSION

Under the circumstances presented in this case, there are no genuine issues of material fact which could result in liability to Jimmy’s Roofing for an injury caused by a dog belonging to someone else. The trial court correctly dismissed Austin’s claims against Jimmy’s Roofing on summary judgment. That dismissal should be affirmed.

Dated: 1/17/19


Gerald Kobluk, WSBA #22994
Attorney for Respondent

CERTIFICATE OF SERVICE

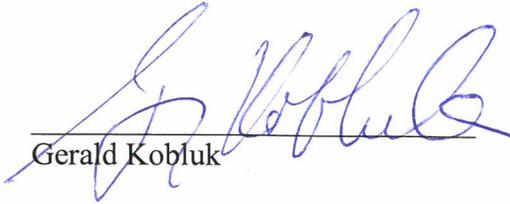
I hereby certify that on this 17th day of January, 2019, I caused to be served a true and correct copy of the foregoing **Respondent's Brief**, on the Appellant via the Washington State Appellate Court's Secure Portal Electronic Filing System for the Court of Appeals, Division III, as well as to the following:

Julie C. Watts Counsel for Appellant Cebert	julie@watts-at-law.com
--	--

In addition, I caused the above-referenced pleading to be mailed via U.S.

Mail this 17th day of January, 2019, to the following:

Julie C. Watts The Law Office of Julie c. Watts, PLLC 505 W. Riverside, Ave. Suite 210 Spokane, WA 99201


Gerald Kobluk

KSB LITIGATION

January 17, 2019 - 1:52 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

The following documents have been uploaded:

- 361128_Briefs_20190117135026D3837126_8516.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondents Brief.pdf

A copy of the uploaded files will be sent to:

- julie@watts-at-law.com

Comments:

Sender Name: Michelle Hernandez - Email: mhernandez@ksblit.legal

Filing on Behalf of: Gerald Kobluk - Email: gkobluk@ksblit.legal (Alternate Email:)

Address:
221 N Wall Street
Suite 210
Spokane, WA, 99201
Phone: (509) 624-8988

Note: The Filing Id is 20190117135026D3837126