No. 89323-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUE ANN GORMAN,

Plaintiff,

vs.

PIERCE COUNTY, et al.,

Defendants.

SUE ANN GORMAN'S ANSWER TO PIERCE COUNTY'S PETITION FOR DISCRETIONARY REVIEW

TROUP, CHRISTNACHT, LADENBURG, McKASY, DURKIN & SPEIR, INC., P.S.
Shelly K. Speir, WSBA # 27979
Of Attorneys for Sue Ann Gorman

6602 19th Street West
Tacoma, Washington 98466
(253) 564-2111

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

WASHINGTON CASES

CASES FROM OTHER JURISDICTIONS

WASHINGTON CONSTITUTION

WASHINGTON STATUTES

WASHINGTON COURT RULES

PIERCE COUNTY CODE

GIG HARBOR MUNICIPAL CODE

OTHER AUTHORITIES

A. IDENTITY OF RESPONDENT, CITATION TO DECISION, AND RELIEF REQUESTED

Respondent Sue Ann Gorman asks that this Court **deny** review of the portion of the Court of Appeals published opinion in *Gorman v. Pierce County et al.*, Washington State Court of Appeals No. 42502-5-II, consolidated with No. 42594-7-II, relating to the failure to enforce exception to the public duty doctrine. A copy of the Slip Opinion is attached. That portion of the opinion is in harmony with existing law.

However, Ms. Gorman asks that the Court **accept** review of the portion of the same decision relating to the Court of Appeals' analysis under CR 50.[1] Slip Op. at 19-20. The Court of Appeals wrongly concluded that Ms. Gorman failed to preserve her argument that she owed no duty to protect herself from vicious dogs attacking her in her bed. It thus failed to address the issue presented here: whether a homeowner owes the County a duty to prevent vicious pit bulls from entering her home and attacking her in bed, or to flee her home when they do.

B. ISSUES PRESENTED FOR REVIEW

1. Under CR 50, did Ms. Gorman preserve her argument that she had no duty to prevent vicious dogs from entering her house while she was sleeping and attacking her, where she brought her first CR 50 motion

[1] Ms. Gorman filed a separate petition for review on this issue, but in an abundance of caution she raises the issue again here as required by RAP 13.4(d).

under the "no legally sufficient evidentiary basis" standard required by the language of the rule, and re-raised the duty issue post-verdict?

2. Assuming that Ms. Gorman did preserve her duty argument, did she have a duty to prevent vicious dogs from entering her home and attacking her, or to flee her home? If not, should the jury's 1% contributory negligence verdict be reversed?

C. COUNTER-STATEMENT OF THE CASE

1. Two pit bulls entered Sue Gorman's home and viciously attacked her in her bedroom, seriously injuring her and killing a neighbor's dog.

On August 21, 2007, at approximately 8:22 a.m., Sue Gorman was awakened in her bed by the sound of two vicious pit bulls snarling at her from her bedroom doorway. RP 406-07. The pit bulls were supposed to be on the property of Defendant Shellie Wilson and her son, Zach Martin. RP 407; RP 405; RP 1177-78; Ex. 71. But the pit bulls had left Ms. Wilson's property and entered Sue's home through a "pet door" in the kitchen area. RP 409; RP 1400-1403. The pit bulls commenced attacking Sue, ultimately inflicting 20-30 bite wounds to her arms, hands, face, and breasts over a 20- to 30-minute period. RP 407-17; RP 299-303; RP 287; Ex. 41. During the course of their attack, the pit bulls also wounded a neighbor's Jack Russell terrier that had been sleeping on Sue's bed, inflicting injuries so severe that the terrier later died. RP 410-11; RP 417.

This was not the first time that dogs in Ms. Wilson's care had caused trouble in the neighborhood. RP 299-303. According to Pierce County's records,[2] ten prior complaints occurred between 2000 and 2006, involving dogs (other than the two involved in Sue's incident) owned by Ms. Wilson. RP 616. Three of these prior complaints involved reports that Ms. Wilson's dogs had attempted to attack humans. RP 1018-19.

Sue made the pet door herself approximately five years before the pit bulls attacked. RP 1400-01. She cut a hole approximately the size of a sheet of paper into an outer screen door, and would open her sliding door a few inches to expose the hole. *Id.* She drilled a hole in the frame of her sliding glass door and would insert a nail to keep the sliding door from opening beyond the hole in the screen.[3] RP 1402. Sue used the pet door to allow her service dog, her two cats, and the Jack Russell terrier to enter and exit. RP 1401-02. She also used the open sliding door for ventilation, as she did not have air conditioning. RP 1347.

---

[2] Prior to January 1, 2005, the Tacoma-Pierce County Humane Society was under contract with Pierce County to provide animal control services. RP 957-58. After January 1, 2005, the Pierce County Sheriff took over animal control, and the Humane Society's animal control records were available to Pierce County officers. RP 531; RP 599; RP 763-64. In 2006, animal control responsibilities were transferred to the Pierce County Auditor. RP 764.

[3] She could not have inserted a dowel into the frame because the frame had been installed backwards. *Id.*

Although the pit bulls had come into her house once before, Sue had never seen them running loose in the morning; she had only seen them loose in the late afternoon and evening. RP 1274-75; RP 1406; RP 1435. When she went to bed in the early morning before the August 21, 2007 attack, Sue did not put the nail in the sliding door. RP 1403. But early in the summer of 2007, some neighborhood boys were able to force their way in through the sliding door even though the nail was in position, so the pit bulls probably would have been able to enter her home even if she had put the nail in place. RP 1315, 1404.

2. Despite Ms. Gorman having raised the issue of her legal duty in pre-and post-verdict CR 50 motions, the Court of Appeals held that Ms. Gorman failed to preserve it for appeal.

During trial, Ms. Gorman objected to all jury instructions on comparative or contributory negligence, including the special verdict form. RP 1351-53. At the close of evidence, Ms. Gorman moved for a directed verdict on the issue of comparative or contributory negligence under CR 50. CP 1429-35. Ms. Gorman argued that she had no duty to act when her neighbors left their doors open, and having a nail in her sliding door would not have kept the pit bulls out. CP 1434-35; CP 1468-69; CP 1471-73. Ms. Gorman concluded (CP 1435):

> [T]he only reasonable conclusion that can be reached is that Ms. Gorman's failure to put a nail in her sliding door was

> not unreasonable and did not contribute to the cause of the pit bull attack. Accordingly, the Court should enter judgment as a matter of law finding that there was no comparative negligence on Ms. Gorman's part.

At the hearing on the motion, Pierce County responded with oral arguments directly addressing Ms. Gorman's legal duty:

> The standard for Ms. Gorman is the same for the other defendants—doing ordinary care, doing something that a reasonable person would not have done under the circumstances, and the facts allow that question to go to the jury.

RP 1464. Based on the parties' arguments, the trial court ruled, directly addressing Ms. Gorman's legal duty:

> . . . I agree with Mr. Williams that the jury could find that ordinary care of a reasonable person in Ms. Gorman's position was negligent by leaving that door open . . ..

RP 1465. The motion was denied. RP 1463-66.

In its verdict, the jury assessed 1% comparative fault to Ms. Gorman, taking the judgment out of the reach of RCW 4.22.070(1)(b). CP 902-04. The jury allocated 52% fault to Wilson and Martin, and 42% to Pierce County. *Id.*

Ms. Gorman brought a post-trial CR 50 motion on the issue of comparative negligence, again offering evidence that Ms. Gorman and her neighbors left their sliding doors open at night, and that having a nail in the sliding door would not have helped. CP 1468-69. Ms. Gorman argued

that under the circumstances, she had no legal duty to close her sliding door at night or to flee her home. CP 1471-73. *See also* 9/15/11 RP 5-14. The trial court denied the motion, refusing to rule on Ms. Gorman's duty:

> I will tell you that I find a lot of what Mr. McKasy says about leaving the door open rather compelling, not the – but it's not for this Court to decide policy decisions.

9/15/11 RP 27. *See also* CP 1532-34; 9/15/11 RP 26-30.

The Court of Appeals held that Ms. Gorman had raised a "new legal theory" in her second CR 50 motion, thereby failing to preserve the issue of her legal duty for appeal. Slip Op. at 19-20.

D. ARGUMENT WHY THE COURT SHOULD DENY PIERCE COUNTY'S PETITION FOR REVIEW

1. The Court should deny Pierce County's Petition because the Court of Appeals' decision is in harmony with relevant statutes and ordinances.

The failure to enforce exception to the public duty doctrine imposes a duty of care upon a governmental entity where (1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) they fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). This exception has been applied specifically in cases involving dangerous and potentially

dangerous dogs, and the failure to enforce animal control ordinances. *See, e.g., King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999); *Livingston v. City of Everett,* 50 Wn. App. 655, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988). Here, Pierce County does not dispute that the first and third elements of the exception were met; only the second element, the existence of a statutory duty to take corrective action, is at issue.

At the time of the attack, Pierce County Code ("PCC") § 6.07.010 A (2007) stated in pertinent part:[5]

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions set forth in Section 6.02.010 Q [sic]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 Q [sic]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

Ex. 58 (Appendix A—32-33).

[5] Pierce County amended its animal control ordinances in 2008. The ordinances admitted as Ex. 58 were the ordinances in effect at the time of Sue's August 21, 2007 attack. Copies of all relevant ordinances are attached to this Answer.

Washington courts have consistently held that the term "shall" is synonymous with the term "must." *City of Wenatchee v. Owens,* 145 Wn. App. 196, 204, 185 P.3d 1218 (2008), *rev. denied* 165 Wn.2d 1021 (2009). Generally, the use of the word "shall" in a legislative enactment is presumptively mandatory, thus creating a duty. *Eugster v. City of Spokane,* 118 Wn. App. 383, 407, 76 P.3d 741 (2003), *rev. denied* 151 Wn.2d 1027 (2004).

> Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings. Especially is this true where 'shall' and 'may' are used in close juxtaposition in a statutory provision, under circumstances that would indicate that a different treatment is intended for the predicates following them.

State ex rel. Beck v. Carter, 2 Wn. App. 974, 978, 471 P.2d 127 (1970). *See also Stegriy v. King County Bd. of Appeals,* 39 Wn. App. 346, 353-54, 693 P.2d 183 (1984) ("When different words are used in the same statute or ordinance, it is presumed that a different meaning was intended to attach to each word.").

Under the above rules, the words "shall" and "may" contained in PCC § 6.07.010 A (2007) are given their ordinary, yet different, meanings. The word "shall" created a mandatory duty to "classify" potentially dangerous dogs which could not be ignored when evidence from one of

the four enumerated sources was present. Slip Op. at 12-13; PCC § 6.07.010 A (2007); PCC § 6.02.010 T (2007); RP 1007-08. *See also* RP 643; RP 743-44. The use of the word "may" later in the same ordinance did not cancel this duty or render it discretionary—the discretion only applied to the later clause regarding an officer's consideration of the evidence gathered. *Id.*

Furthermore, use of the word "shall" in PCC § 6.07.040 (2007) created a mandatory duty for Pierce County to take corrective action—to seize and impound—if a potentially dangerous dog was found in violation of the potentially dangerous dog requirements (*e.g.*, unlicensed, unconfined on the owner's premises, or off the owner's premises without a leash and muzzle). Slip Op. at 14-15. Pierce County's argument to the contrary is not supported by its own ordinance. *See* PFR at 8-9. These were not "do nothing" ordinances that allowed the County to sit back and decide on a case-by-case basis whether it would take any action in the presence of multiple complaints about potentially dangerous dogs.

2. The Court should deny Pierce County's Petition because the appellate decision is in harmony with precedent.

A four-year-old boy was attacked and bitten by a group of dogs, and his mother sued the City of Everett, claiming that the City failed to enforce its animal control ordinances, in *Livingston v. City of Everett,* 50

Wn. App. 655, 656-68, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988). Prior to the attack on the boy, there had been five complaints against the dogs reported to the City's animal control department within a five-week period. *Id.* at 657. The City had impounded the dogs, but then released them back to their owner. *Id.* Approximately three weeks after being released, the dogs attacked the boy. *Id.* The City's ordinance governing the release of impounded animals read as follows:

> Any impounded animal shall be released to the owner or his authorized representative upon payment of impoundment, care and license fees if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.

Id. at 658.

Significantly, even though the ordinance granted some discretion to the City's animal control officer, the appellate court found that the City had a mandatory duty to exercise its discretion. *Id.* at 659. The court held that based on the evidence presented, the plaintiff had satisfied all elements of the failure to enforce exception. *Id.* The *Livingston* decision has never been overruled and is still controlling law.

The Court of Appeals' decision here follows and is consistent with *Livingston.* PCC § 6.07.010 (2007) contains a clear and unambiguous directive—Pierce County "shall classify" potentially dangerous dogs. As *Livingston* teaches, the fact that officers are given discretion to consider

various types of evidence when performing their required classification does not render the duty to classify discretionary. *Id. See also King v. City of Seattle,* 84 Wn.2d 239, 246, 525 P.2d 228 (1974) ("(I)t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."). Similarly, the mandatory directive in PCC § 6.07.040 (2007), requiring that potentially dangerous dogs be seized and impounded, is not rendered discretionary by use of the word "may" in one provision of PCC § 6.07.010 (2007). The appellate decision is consistent with existing law.

3. Pierce County's cases are inapposite.

Pierce County relies on *Pierce v. Yakima County,* 161 Wn. App 791, 251 P.3d 270 (2011), as support for its argument that the duties created by PCC § 6.07.010 (2007) and 6.07.040 (2007) are discretionary. However, the case is easily distinguishable. First, *Pierce* has nothing to do with animal control.

Second, Yakima County adopted building standards which did not require the County to take specific corrective action, but merely said the County "shall have the authority" and "is authorized" to take corrective action. *Id.* at 799. The appellate court found that the building standards conferred discretion, but created no mandatory duty. *Id.* at 801. The

Pierce language stands in stark contrast to the language in these animal control ordinances: "shall classify" and "shall be seized and impounded" are clear, specific directives, requiring Pierce County to take corrective action. PCC § 6.07.010 (2007) and 6.07.040 (2007).

The County also relies on *Ravenscroft v. Washington Power Co.*, 87 Wn. App. 402, 942 P.2d 991 (1997), *rev. on other grounds* 136 Wn.2d 911, 969 P.2d 75 (1999), which is also distinguishable. Again, the case has nothing to do with animal control. Arising from a recreational boating accident, the case focused on certain administrative regulations which directed governmental agents to establish various programs for safety and educational purposes. *Id.* at 416. Notably, **no** regulations required that direct corrective action take place. *Id.* The appellate court found that the failure to enforce exception did not apply in that circumstance. *Id.*

The language in *Ravenscroft* is unlike the language in Pierce County's animal control ordinances, which state that Pierce County "shall classify" potentially dangerous dogs and that potentially dangerous dogs found in violation "shall be seized and impounded." PCC § 6.07.010 (2007) and 6.07.040 (2007). Again, the Court of Appeals did not err in finding that Pierce County's ordinances created mandatory duties.

The remainder of Pierce County's cited cases are too dissimilar to be helpful. *See* Pierce County's Petition at 16-17. Specifically, in

McKasson v. State of Washington, 55 Wn. App. 18, 25, 776 P.2d 971 (1989), and *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 716, 98 P.3d 52 (2004), the Securities Act made use of the term "may" rather than "shall." In *Forest v. State of Washington,* 62 Wn. App. 363, 814 P.2d 1181 (1991), the relevant statute provided that parole officers "may" arrest for parole violations, but did not require arrest. *Id.* at 370. In *Smith v. City of Kelso,* 112 Wn. App. 277, 48 P.3d 372 (2002), the ordinance in question required the city engineer to prepare design and construction standards, but did not require enforcement. *Id.* at 375. In *Donahoe v. State of Washington,* 135 Wn. App. 824, 142 P.3d 654 (2006), DSHS had a mandatory duty to take corrective action when a nursing home was out of compliance with certain regulations, but at the time the plaintiff's claim arose, the nursing home was in compliance. *Id.* at 849. Finally, in *Fishburn v. Pierce County,* 161 Wn. App. 452, 250 P.3d 146 (2011), the statute in question stated that "[d]iscretionary judgment will be made in implementing corrections." *Id.* at 469 n.13. Not surprisingly, this Court held that the County's duty there was discretionary. *Id.* at 469.

None of Pierce County's foregoing cases require this Court to reverse the Court of Appeals' determination that the failure to enforce exception applies. Accordingly, Ms. Gorman asks that the Court deny Pierce County's petition.

E. ARGUMENT WHY MS. GORMAN'S PETITION SHOULD BE GRANTED

1. Ms. Gorman's Petition should be granted because the Court of Appeals applied CR 50 hypertechnically, incorrectly, and unfairly.

In addition to the arguments stated in Ms. Gorman's Petition for Review (which are incorporated by reference and need not be repeated here), she also requests review of the Court of Appeals' highly technical preservation analysis under CR 50, which is incorrect and unfair. Interpreting the Court Rule in this manner could deprive many parties of their right to appeal a crucial legal issue, so this Court should grant review under RAP 13.4(b)(4), an issue of substantial public interest that should be decided by this Court.

The existence of a legal duty is a threshold question of law. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Once a duty is established, any issues of fact regarding breach of duty and whether the breach was a proximate cause of injury are normally left for the finder of fact. *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366 (1995), *rev. denied* 127 Wn.2d 1020 (1995). Because the Defendants herein were claiming that Ms. Gorman was comparatively negligent for failing to close her door or flee her home, Ms. Gorman attempted to argue, within the constraints of CR 50, that she had

no duty to act when her neighbors left their doors open, and having a nail in her sliding door would not have kept the pit bulls out. CP 1434-35; CP 1468-69; CP 1471-73.

Ms. Gorman's two CR 50 motions cited to CR 50(a) and (b), which provide in pertinent part:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . .
>
> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under rule 59. . . .

CR 50(a) and (b) (Appendix A—38). Ms. Gorman's motions both raised the same key facts, and both challenged the imposition of a legal duty under those facts. CP 1434-35; CP 1468.

In spite of the substantive equivalence of Ms. Gorman's motions, the appellate court held that she waived the duty issue because her first CR 50 motion was couched in terms of sufficiency of the evidence—as required by CR 50—whereas her second CR 50 motion was couched in

terms of legal duty. Slip Op. at 19-20. Without analyzing the language of CR 50 or the substance of Ms. Gorman's motions, the court held that Ms. Gorman had raised a "new legal theory" in her second CR 50 motion and that she had not preserved the issue of comparative fault for appeal. *Id.*

But the plain language of CR 50 required Ms. Gorman to frame the question of her duty in terms of sufficiency of the evidence: "there is no legally sufficient evidentiary basis for a reasonable jury to find . . . ." CR 50(a)(1). The appellate decision is hypertechnical in analyzing only the form, and not the substance, of Ms. Gorman's motions. The record demonstrates that the parties and the trial court believed that the issue of Ms. Gorman's legal duty was before the trial court for consideration on Ms. Gorman's first CR 50 motion. CP 1429-35; RP 1464-65.

Stated another way, when CR 50 requires a party to argue that no *legally sufficient* evidentiary basis exists, that phrase encompasses an argument that the facts alleged do not support the imposition of a legal duty. The rule is, after all, "Judgment as a Matter of Law." A party who simply—and correctly—follows the precise language of the Rule should not have her appeal thrown out on the ground that she allegedly failed to argue the other side of the same coin: if the evidence is not legally sufficient, it is insufficient to impose a duty; *i.e.*, no duty arises under the insufficient evidence.

The appellate decision deprives Ms. Gorman of her right to appeal an issue that she properly raised at trial. The Court of Appeals' misapplication of CR 50 is an issue of substantial public interest. This Court should grant review on this issue.

2. Ms. Gorman had no legal duty to keep her door closed or to flee her own home, and the jury's 1% attribution of comparative fault should be reversed.

A showing of negligence requires proof of the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach and (4) proximate cause. *Christensen v. Royal School Dist. No. 160,* 156 Wn.2d 62, 66, 124 P.3d 283 (2005). The existence of a legal duty is a question of law and "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Id.* at 67. Ms. Gorman could find no Washington case directly discussing the duty to keep one's door closed to protect against marauding pit bulls; it appears that this is a case of first impression.

In criminal law, it has long been recognized that a person's home is her "castle." This rule has its basis in the Washington Constitution, article I, § 7, which provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." *See also State v. Young,* 76 Wn.2d 212, 214, 455 P.2d 595 (1969) ("It would unduly extend this opinion and serve no useful purpose to discuss the

historical background and development of the doctrine, 'A man's home is his castle'—as embodied in the federal and state constitution and statutory provisions quoted supra."). As Justice Cardozo once explained: "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat." 2 William L. Burdick, *The Law of Crime,* § 436h (1946). Most jurisdictions adhere to the concept that there is no duty to retreat in one's home, even if the attacker is a spouse, invitee, or member of the family. *Cannon v. State,* 464 So.2d 149, 150 (D. Ct. App. Fla. 1985), *rev. denied* 471 So.2d 44 (Fla. 1985).

A similar respect for private property rights exists in the civil context. Under RCW 64.04.030, a fee simple owner of land receives a covenant of "quiet and peaceable possession" of the premises. When the "use and enjoyment" of property is interfered with, she has a common law cause of action for nuisance. *See, e.g., Vance v. XXXL Development, LLC,* 150 Wn. App. 39, 42, 206 P.3d 679 (2009). Common law similarly provides that a property owner has no duty to fence her property to protect against trespassing domestic animals unless there is a statutory requirement to do so.[10] *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 504 (1977); RESTATEMENT (FIRST) OF TORTS § 504 (1938); *Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911) ("If for his own protection

[10] Ms. Gorman had no statutory duty to fence her back yard. *See* Gig Harbor Municipal Code § 17.01.080(B) ("Conformance required—Fence or shrub height").

[the landowner] would be required to fence at all, he would only be required to fence against cattle running at large upon public highways, the public domain, or uninclosed private lands.").

Where a duty to protect oneself from harm is contrary to public policy, this Court has found that the defense of comparative negligence is not available. *See, e.g., Gregoire v. City of Oak Harbor,* 170 Wn.2d 628, 641, 244 P.3d 924 (2010) (duty of jail to protect inmates includes duty to protect inmate from self-inflicted harm, so defense of contributory negligence not available); *Christensen,* 156 Wn.2d at 67 (as a matter of public policy, student does not have a duty to protect herself from sexual abuse at school by her teacher).

At trial, the Defendants presented absolutely no legal authority supporting the position that Ms. Gorman was required by statute, common law, or otherwise to keep her sliding door closed or to flee her home to protect herself from marauding pit bulls. Ms. Gorman respectfully submits that she had no duty to keep her door closed or to flee her home, as such a duty would violate public policy.

To hold that Ms. Gorman had a duty to keep her door shut while she was inside her home would be inconsistent with her duty in other circumstances. For example, if Ms. Gorman had been attacked while doing yard work on her own property, she would not have had a duty to

protect herself with a fence. *Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911). Similarly, if Ms. Gorman had been attacked while walking down her driveway to get to her mailbox, or walking on a public street, she would not have had a duty to protect herself with a fence or other barrier. *See id.* If no duty arises in the above situations, none arises here.

Under the facts presented, there was no duty for Ms. Gorman to breach. Ms. Gorman could not have been negligent, and the issue of comparative or contributory negligence should never have gone to the jury. The Court of Appeals should have reviewed the trial court's rulings on duty, found that no duty was owed, reversed the trial court's denial of Ms. Gorman's CR 50 motions, and reversed the jury's 1% attribution of comparative fault.

F. CONCLUSION

The Court should deny the County's petition, but grant Ms. Gorman's petition regarding CR 50 and comparative negligence.

Respectfully submitted this 7th day of October, 2013.

TROUP, CHRISTNACHT, LADENBURG, McKASY, DURKIN & SPEIR, INC., P.S.

SHELLY K. SPEIR, WSBA # 27979
Of Attorneys for Sue Ann Gorman

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUE ANN GORMAN, a single person, Respondent/Cross Appellant, v. PIERCE COUNTY, a county corporation; SHELLIE R. WILSON and "JOHN DOE" WILSON, husband and wife and the marital community composed thereof; ZACHARY MARTIN and "JANE DOE" MARTIN, husband and wife and the marital community composed thereof; and JACQUELINE EVANS-HUBBARD and "JOHN DOE" HUBBARD, husband and wife and the marital community composed thereof, Appellants/Cross Respondents.	No. 42502-5-II consolidated with No. 42594-7-II PUBLISHED OPINION

PENOYAR, J. — Two dogs entered Sue Ann Gorman's house through an open door and mauled her in her bedroom. Invoking a statute imposing strict liability for dog-bite injuries, Gorman sued the dog owners, Shellie Wilson, Zachary Martin, and Jacqueline Evans-Hubbard. Gorman also sued Pierce County for negligently responding to complaints about the dogs before the attack. Pierce County invoked the public duty doctrine and sought dismissal of the claims against it, but the trial court ruled that the failure to enforce exception applied. A jury found all defendants liable and also found that Gorman's actions contributed to her injuries. Pierce County appeals, arguing that (1) the "failure to enforce" exception to the public duty doctrine does not apply, (2) the jury instructions misstated Pierce County's duty of care, and (3) the trial court erroneously admitted evidence of prior complaints about Wilson's other dogs. Gorman cross appeals, arguing that (4) the trial court erred by denying her motions for judgment as a matter of law, (5) the trial court erred by failing to give the emergency doctrine instruction, and

(6) insufficient evidence supports the jury's verdict on contributory fault. Because Pierce County had a mandatory duty to act, we affirm the trial court's determination that the failure to enforce exception applies. Additionally, the jury instructions properly stated the law and Pierce County opened the door to evidence about Wilson's other dogs. We further hold that Gorman failed to properly renew her motion for judgment as a matter of law and this argument is waived, Gorman failed to properly present the emergency doctrine instruction to the trial court, and there is sufficient evidence to support the jury's verdict that Gorman was contributorily negligent in incurring her injuries.

FACTS

I. SUBSTANTIVE FACTS

Shellie Wilson lived in Gig Harbor with her 16-year-old son, Zachary Martin. In 2006, they acquired a pit bull named Betty. Betty later had a litter of mixed-breed puppies, including one named Tank. In February 2007, Wilson and Martin gave Tank to Jacqueline Evans-Hubbard.

Two houses away from Wilson, Sue Gorman lived with her service dog, Misty. Gorman's next-door neighbor, Rick Russell, owned a Jack Russell terrier named Romeo.

On the cul-de-sac where Wilson, Gorman, and Russell lived, residents frequently let their dogs roam outdoors without a leash. Gorman left her sliding glass door open so that Misty and Romeo could come and go as they pleased.

Betty was the subject of several complaints to police and animal control officers. On August 31, 2006, Betty and another dog named Lola, belonging to Martin's houseguest, aggressively confronted Wilson's next-door neighbor in his yard, preventing the neighbor and his son from leaving their house for approximately 90 minutes. The neighbor called 911 and an

animal control officer contacted Wilson. On the basis of Wilson's admissions, the officer cited Wilson for allowing the dogs to run loose and failing to have a dog license. Wilson demanded that Martin's houseguest remove Lola from the house, and the houseguest complied.

A Pierce County ordinance allowed the county to classify a dog as "potentially dangerous" if the county had probable cause to believe the dog (1) bit a person or animal, (2) chased or approached a person "in a menacing fashion or apparent attitude of attack," or (3) was known to otherwise threaten the safety of humans or animals. Former Pierce County Code (PCC) 6.02.010(T) (2007). The county had a duty to evaluate a dog to determine if the dog was potentially dangerous if it had (1) a complainant's written statement that the dog met the code's definition, (2) a report of a dog bite, (3) testimony of an animal control or law enforcement officer who observed the dog, or (4) "other substantial evidence." RP at 964; Former PCC 6.07.010(A) (2007). In deciding to classify a dog, the county could consider prior complaints about other dogs that had previously belonged to the same owner. After classification, the dog's owner would be required to keep the dog confined, even during the pendency of an appeal. The county would be required to seize any potentially dangerous dog that violated any restriction imposed on potentially dangerous dogs.

During a three-week period in 2007, Pierce County received three more complaints about incidents involving Betty. On February 10, 2007, as Gorman returned from the grocery store, Betty chased Gorman and Misty, Gorman's service dog, into Gorman's house. Fifteen minutes later, Gorman tried to retrieve her groceries from the car but Betty again confronted her. Gorman commanded Betty to leave and kicked at her, but Betty bit Gorman's pant leg. Using a stick she grabbed from a pile in the yard, Gorman fended Betty off until retreating to safety inside her house. Gorman then called 911, but Betty left before a sheriff's deputy arrived an

hour later. Finding no one home at Wilson's house, the deputy advised Gorman to call animal control the following morning. Gorman testified that she called animal control and left a message, but she did not receive a return call and did not call again. Animal control had no record of Gorman's call.

The second complaint followed an incident on February 22, 2007. Russell called animal control to report Betty and another loose dog chasing a child on rollerblades.[1] An animal control officer arrived the following day but found no one at Wilson's home. The officer left a note on the door but Wilson and Martin did not respond. The officer also mailed Russell a form to provide a written statement. Russell did not provide a statement until six months later, after the dogs attacked Gorman.

Gorman made the third complaint on March 1, 2007. Betty chased Misty into Gorman's house and proceeded to jump aggressively at Gorman's sliding glass door. Gorman called 911, but Betty again had left by the time a deputy arrived. About 30 minutes later, the deputy and Martin appeared at Gorman's house; Martin then apologized to Gorman, denied Betty's involvement, and promised to fix Wilson's fence. The deputy had Gorman and Martin exchange phone numbers and encouraged Gorman to contact Martin directly in the future.

Wilson owned other dogs before Betty, and Pierce County records showed 10 complaints about Wilson's other dogs. Based on Wilson's prior history, an animal control expert later opined that Pierce County could have declared Betty potentially dangerous after the August 31, 2006, incident with Wilson's next-door neighbor. The expert also opined that Pierce County

[1] There was conflicting testimony on whether a second dog was present and, if so, whether it was Tank.

should have declared Betty potentially dangerous after any of the three incidents on February 10, February 22, and March 1, 2007.

Betty's aggressive behavior continued, but Pierce County did not receive further complaints. Gorman called Martin about 10 times regarding various incidents, but Martin never responded. During an incident in July 2007, Betty and Tank both entered Gorman's house through the open sliding glass door. Gorman believed Betty and Tank had come to confront Misty and Romeo, but Gorman got the dogs to leave peacefully.

On August 17, 2007, Evans-Hubbard, Tank's owner, left for two weeks. While she was gone, Evans-Hubbard left Tank with Wilson. At the time, Tank was six to eight months old.

At approximately 8:22 A.M. on August 21, 2007, Betty and Tank entered Gorman's house through the sliding glass door, which Gorman had left open for the night. Gorman, who was in her bedroom with Misty and Romeo, awoke to the sounds of Betty and Tank snarling. Misty, Gorman's service dog, ran outside to safety.

Betty and Tank then entered Gorman's bedroom and jumped onto her bed. Betty bit Gorman on the left arm. Romeo then jumped off the bed and was mauled by both Betty and Tank.

Gorman tried to protect Romeo. She tried to lift Romeo, but Betty and Tank bit both her hands. Gorman retrieved a gun from her nightstand, but the gun misfired. She threw the gun at the dogs and hit them with her walking stick to no avail. Gorman then managed to pick up Romeo, put him in the closet, and close the door, while Betty repeatedly bit Gorman's face, breasts, and hands. Tank forced the closet door open and, with Betty, began shaking Romeo. Gorman fled the house and closed the sliding glass door behind her to trap the dogs inside. She then called 911.

Gorman suffered serious injuries from 20 to 30 dog bites; she required hospitalization and multiple surgeries. Romeo, the Jack Russell terrier, died from his injuries. Betty and Tank were later euthanized. Wilson and Martin pleaded guilty to criminal charges. They were sentenced to probation and ordered to pay restitution.

II. PROCEDURAL FACTS

Gorman then filed this suit, claiming that (1) Wilson, Martin, and Evans-Hubbard were strictly liable for the harm their dogs caused Gorman[2] and (2) Pierce County negligently failed to take appropriate action in response to the complaints about the dogs before the attack. Wilson, Martin, and Evans-Hubbard admitted liability, but Pierce County did not. Pierce County raised comparative fault as an affirmative defense.

Before trial, Gorman sought permission to introduce Pierce County records showing 10 complaints about other dogs Wilson owned before she acquired Betty. The trial court allowed testimony that 10 complaints were made, but it prohibited any testimony about the incidents alleged in the complaints. However, during cross-examination of an animal control officer, counsel for Pierce County asked "why there wasn't sufficient evidence [in the 10 prior complaints] to declare those dogs potentially dangerous?" Report of Proceedings (RP) (Aug. 3, 2011) at 990. The officer's response suggested that the complaints involved leash law violations, rather than threatening behavior. But on re-direct examination, Gorman's counsel elicited testimony that, in three of these incidents, a dog unsuccessfully attempted to attack a person.

Pierce County moved for summary judgment dismissing it from the case, contending that the public duty doctrine shielded it from liability because the county owed no legal duty to Gorman individually. The trial court denied the motion, allowing the negligence claim to

[2] RCW 16.08.040(1) makes dog owners strictly liable for injuries their dogs cause.

proceed under the failure to enforce exception to the public duty doctrine.[3] When Gorman rested at trial, Pierce County unsuccessfully moved for judgment as a matter of law on the same grounds presented in the summary judgment motion.

When all defendants rested, Gorman moved for judgment as a matter of law, arguing that the evidence was insufficient to show that she breached a duty and, thus, her negligence could not have contributed to her injuries. The trial court denied the motion.

The jury found all defendants, including Pierce County, liable to Gorman. The jury also found that Gorman's fault contributed to her injuries.[4] After the verdict, Gorman renewed her earlier motion for judgment as a matter of law and argued that she had no legal duty to close her sliding door.

Pierce County appeals the denial of its motion for judgment as a matter of law, while also arguing instructional and evidentiary error. Gorman cross appeals the jury's verdict finding her at fault for contributing to her injuries.

ANALYSIS

I. THE PUBLIC DUTY DOCTRINE

Pierce County argues that the trial court erred by denying its motion for judgment as a matter of law on the negligence claim because, under the public duty doctrine, Pierce County owed no duty of care to Gorman. Gorman argues that (1) the public duty doctrine is contrary to law or, in the alternative; (2) the failure to enforce exception to the public duty doctrine applies

[3] Before trial, Gorman also argued, and the trial court agreed, that the special relationship exception to the public duty doctrine applied. But Gorman abandoned this theory by offering to withdraw her proposed jury instruction on the special relationship exception.

[4] The jury apportioned fault as follows: 52 percent to Wilson and Martin, 42 percent to Pierce County, 5 percent to Evans-Hubbard, and 1 percent to Gorman.

here. We hold that the public duty doctrine is not contrary to law and that the failure to enforce exception applies here.

We review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is proper only when, viewing the evidence in the light most favorable to the nonmoving party, substantial evidence cannot support a verdict for the nonmoving party. *Schmidt*, 162 Wn.2d at 491, 493.

Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care. *Osborn v. Mason County*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Under the public duty doctrine, a government's obligation *to the public* is not a legal duty of care; instead, a government can be liable only for breaching a legal duty owed *individually to the plaintiff*. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). However, the public duty doctrine is subject to four exceptions: (1) the legislative intent exception, (2) the failure to enforce exception, (3) the rescue doctrine, and (4) the special relationship exception. *Babcock*, 144 Wn.2d at 786. Whether, in light of the public duty doctrine and its exceptions, a government defendant owed the plaintiff a legal duty is a question of law reviewed de novo. *Vergeson v. Kitsap County*, 145 Wn. App. 526, 534, 186 P.3d 1140 (2008).

A. The Public Duty Doctrine Is Not Contrary to Law

Gorman asks us to abolish the public duty doctrine and instead to apply a different test.[5] We decline to do so because our Supreme Court precedent approving the public duty doctrine binds us.

Urging abolition of the public duty doctrine, Gorman contends that it is incompatible with the legislature's abrogation of sovereign immunity. But our Supreme Court has already rejected this contention. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 287-88, 669 P.2d 451 (1983).[6] Instead, our Supreme Court has repeatedly applied the public duty doctrine to define the duty owed by government defendants in negligence actions. *Munich v. Skagit Emergency Comme'ns Ctr.*, 175Wn.2d 871, 886 n.3, 288 P.3d 328 (2012) (Chambers, J., concurring and joined by a majority of the justices) (listing 29 instances).[7] We are bound to follow our Supreme Court's precedents and have no authority to abolish them.. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

---

[5] Gorman proposes this argument as an alternative ground on which we may affirm the trial court. *See* RAP 2.5(a).

[6] "Abrogation of the doctrine of sovereign immunity did not *create* duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit." *Chambers-Castanes*, 100 Wn.2d at 288 (emphasis in original). Gorman ignores the majority's opinion in *Chambers-Castanes* but quotes the separate concurring opinion of Justice Utter, the only justice who would have rejected the public duty doctrine in that case.

[7] Our Supreme Court has often described the public duty doctrine as a "focusing tool" used to examine a fundamental element in any negligence action: whether the defendant owed a duty of care to the plaintiff. *Munich*, 175 Wn.2d at 878. But the public duty doctrine is treated as a rule of law. *See Munich*, 175 Wn.2d at 877-88.

Gorman next urges us to apply, instead of the public duty doctrine, the four-part test set out in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1966).[8] But Gorman misapprehends the purpose of the *Evangelical* test, which recognizes limited grounds for governmental immunity flowing from the separation of powers. *See* 67 Wn.2d at 253-55. The *Evangelical* test determines whether a particular discretionary act is so rooted in governing that it cannot be tortious, no matter how "unwise, unpopular, mistaken, or neglectful [it] might be." 67 Wn.2d at 253. Thus, the *Evangelical* test prevents courts from deciding whether the coordinate branches of government have made the wrong policies. *King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997). The *Evangelical* test is inapposite to the issue here: whether Pierce County owed a legal duty to Gorman. Gorman's argument fails.

B. The Failure to Enforce Exception Applies

The parties dispute only whether the failure to enforce exception to the public duty doctrine applies in this case. We hold that it does.

Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The plaintiff has the burden to establish each element of the failure to

[8] The *Evangelical* test asks whether (1) an allegedly tortious act necessarily involves a basic governmental policy, program, or objective; (2) the act is essential to implementing or achieving such a policy, program, or objective; (3) the act requires the exercise of policymaking judgment or expertise; and (4) a constitution or law authorizes the government actor to do the act. 67 Wn.2d at 255.

enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Contesting only the second element, Pierce County argues that it had no statutory duty to take corrective action.[9] Gorman contends that former PCC 6.07.010(A) created a duty to classify potentially dangerous dogs. We agree with Gorman.

An ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated. *Pierce v. Yakima County*, 161 Wn. App. 791, 800, 251 P.3d 270, *review denied*, 172 Wn.2d 1017 (2011); *Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). Gorman argues that former PCC 6.07.010(A) creates a statutory duty because the word "shall" expresses a mandatory directive. Br. of Resp't at 38.

To determine whether the ordinance is mandatory, we must apply the rules of statutory interpretation to the ordinance. *See City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982). When interpreting a statute, our fundamental objective is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the statute's meaning is plain, then we must give effect to that plain meaning. *Campbell & Gwinn*, 146 Wn.2d at 9-10. But if the statute has more than one reasonable meaning, the statute is ambiguous and statutory construction is necessary. *Campbell & Gwinn*, 146 Wn.2d at 12.

[9] Pierce County does not argue that it took corrective action. Thus, if Pierce County had a duty to take corrective action, it failed to perform the duty and the second element is satisfied.

A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Campbell & Gwinn*, 146 Wn.2d at 11-12. We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wn.2d at 11.

Here, former PCC 6.07.010(A) provided:

> The County or the County's designee *shall* classify potentially dangerous dogs. The County or the County's designee *may* find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"[10]] set forth in [PCC] 6.02.010[T][11]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[T]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

(Emphasis added.)

Where a statute uses both "shall" and "may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). Here, the ordinance mandated some actions ("shall") and made others discretionary ("may"). For instance, after inquiry, Pierce County had discretion to classify a dog as potentially dangerous. Former PCC 6.07.010(A) ("The County . . . *may* find and declare an

---

[10] Former PCC 6.02.010(T) defined a "Potentially Dangerous Dog" as

> any dog that when unprovoked: (a) Inflicts bites on a human, domestic animal, or livestock . . . (b) chases or approaches a person . . . in a menacing fashion or apparent attitude of attack, or (c) any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock . . . .

[11] The ordinance actually cites former PCC 6.02.010(Q) (2007), but that subsection defined "livestock."

animal potentially dangerous . . . .") (emphasis added). But, if the county received reports of a potentially dangerous dog, it had a duty to apply the classification process to that dog. Former PCC 6.07.010(A) ("The County . . . *shall* classify potentially dangerous dogs.") (emphasis added). The legislature's use of "shall" was a clear directive to apply the classification process to dogs that were likely potentially dangerous. Although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act.[12]

Division One has held that the failure to enforce exception applies in comparable circumstances. *Livingston v. City of Everett*, 50 Wn. App. 655, 659, 751 P.2d 1199 (1988). In *Livingston*, the city animal control department had received numerous complaints about three dogs running loose and behaving aggressively. 50 Wn. App. at 657. Animal control eventually impounded the dogs but released them to their owner the next day. *Livingston*, 50 Wn. App. at 657. A few weeks later, the dogs attacked a young boy. *Livingston*, 50 Wn. App. at 657. The Everett municipal code provided that animals in violation of the code may be impounded and that impounded animals shall be released to their owners only if the animal control officer determines that the animal is not dangerous. *Livingston*, 50 Wn. App. at 658. The officer never evaluated the dogs' dangerousness but released them to their owner anyway. *Livingston*, 50 Wn. App. at 657. The officer violated his statutory duty to exercise his discretion by evaluating the dogs' dangerousness before releasing them. *Livingston*, 50 Wn. App. at 659. Accordingly, the failure to enforce exception applied and the city could be found liable for injuries the dogs

[12] The dissent reads the ordinance as a whole to be discretionary, while our view is that certain provisions are mandatory and others discretionary.

caused after their release. *Livingston*, 50 Wn. App. at 659. Similarly, here, Pierce County received multiple complaints about Wilson's dogs but failed to evaluate the dogs' dangerousness despite a statute requiring it to act.

Pierce County argues that this case is similar to *Pierce*, 161 Wn. App. 791. In *Pierce*, Division Three held that the county did not have a mandatory duty to act despite the presence of "shall" in a county code provision. 161 Wn. App. at 801. There, the plaintiff sued the county for negligently inspecting his gas line after he was injured in a gas explosion. *Pierce*, 161 Wn. App. at 796. He argued that the following code provision imposed a mandatory duty on the county:

> [T]he building official . . . **shall** make or cause to be made any necessary inspections and **shall** either approve the portion of the construction as completed or **shall** notify the permit holder wherein the same fails to comply with this code.

Pierce, 161 Wn. App. at 799 (quoting Internal Residential Code (IRC) § R109.1 (2006)). In response, Yakima County cited other code provisions providing that, when an official observes a code violation, he *has authority* to authorize disconnection or serve a notice of violation. *Pierce*, 161 Wn. App. at 799 (citing IRC §§ R111.3, R113.2). Division Three held that the code did not create a mandatory duty to take a specific enforcement action. *Pierce*, 161 Wn. App. at 801. If officials observed a code violation, they had authority—but were not required—to authorize disconnection or serve notices of violation. *Pierce*, 161 Wn. App. at 799.

This case is distinguishable from *Pierce*. Unlike in *Pierce*, the county here is required to act if it observes a violation of the potentially dangerous dog restrictions. In *Pierce*, the ordinances only required Yakima County officials to make inspections and issue approvals or denials. The ordinances did not require the county to take any enforcement action. Here, while some of the steps in the process are discretionary, the code did require Pierce County to take action if certain conditions existed. If the county was made aware of a likely potentially

dangerous dog, it had a duty to evaluate the dog to determine if it was potentially dangerous. Then, if the dog was declared potentially dangerous, the code mandated that the county take corrective action, seizing and impounding any dog whose owner allowed it to violate the restrictions placed upon it. Former PCC 6.07.040 (2007) ("any potentially dangerous dog which is in violation of . . . this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded"). The *Pierce* case is not helpful where, as here, some mandatory duties exist.

We agree with Gorman and the trial court and hold that the failure to enforce exception applies here.

II. JURY INSTRUCTIONS ON PIERCE COUNTY'S DUTY TO GORMAN

Pierce County also argues that the trial court's instruction 5 misstated the law by stating the county had a legal duty to protect the public and a legal duty to confiscate and confine Betty. We hold that this argument misrepresents instruction 5 and that the jury instructions were proper.[13]

[13] In addition, Pierce County argues that jury instructions erroneously stated that (1) it also had a legal duty to "control" a potentially dangerous dog and (2) Gorman could carry her burden to prove Pierce County's liability by showing that her injury was proximately caused by Pierce County's negligence "and/or the fault of the [dog owners]." Br. of Appellant at 32, 35. But Gorman asserts that Pierce County did not preserve these arguments for appeal. We agree with Gorman. Pierce County concedes its failure to object to this portion of the duty of care instruction, and it does not contest its asserted failure to object to the burden of proof instruction. Without adequate objections at trial, the arguments are waived. *See* RAP 2.5(a); *Stewart v. State*, 92 Wn.2d 285, 298-99, 597 P.2d 101 (1979).

We review claimed errors of law in jury instructions de novo.[14] *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Jury instructions are not erroneous if they allow the parties to argue their theories of the case, they do not mislead the jury, and, when read as a whole, they properly state the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). Read as a whole, the jury instructions here properly state the applicable law.

Instruction 5 stated that it was "merely a summary of the claims of the parties." Clerk's Papers (CP) at 882. The instruction summarized Gorman's negligence claim as follows:

> The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:
> (1) failing to classify and control a potentially dangerous dog;
> (2) failing to protect the public from a potentially dangerous dog;
> (3) failing to confiscate and confine a potentially dangerous dog.

CP at 881. On its face, this instruction describes the claims Gorman presented during the trial, not Pierce County's legal duty. But other instructions correctly explained Pierce County's legal duty. Instruction 15 included the language from former PCC 6.07.010(A):

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control office [sic] has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [PCC] 6.02.010[(T)]. The finding must be based upon:
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
> 2. Dog bite reports filed with the County or County's designee; or
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
> 4. Other substantial evidence.

---

[14] Gorman asserts that the standard of review is whether the trial court's decision is manifestly unreasonable or based on untenable reasons or grounds. This assertion is incorrect. That standard applies when the appellant assigns error to the trial court's choices about the number of instructions to give or the particular words to use. *Hue*, 127 Wn.2d at 92 n.23.

CP at 892. Instruction 17 stated,

> The Pierce County Code provides that after a dog is declared to be potentially dangerous, the person owning or having care of such dog shall not allow the dog to be unconfined on the premises of such person, or go beyond the premises of such person unless the dog is securely leashed and humanely muzzled or otherwise securely restrained.
>
> A potentially dangerous dog in violation of these provisions shall be seized and impounded.

CP at 894.

In defining negligence, instruction 6 also defined the duty of ordinary care:

> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

CP at 883. In addition, the trial court clearly instructed the jury that Pierce County was liable only if it had been *negligent* by failing to act in one of the ways Gorman claimed. Thus, the instructions required the jury not just to decide whether Pierce County failed to act, but whether the failure was reasonable under the circumstances. Accordingly, we hold that the jury instructions properly stated the legal duty of ordinary care.

III. EVIDENCE OF PRIOR COMPLAINTS ABOUT WILSON'S OTHER DOGS

Pierce County next argues that the trial court admitted evidence of prior complaints about Wilson's dogs other than Betty, even though this evidence was irrelevant and unfairly prejudicial. We disagree.

In general, we review a trial court's ruling on the admissibility of evidence to determine if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 283, 840 P.2d 860 (1992);

Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court may admit evidence only if it is relevant. ER 402. Relevant evidence has any tendency to make a fact of consequence more likely or less likely; this definition sets a low threshold. ER 401; *Kappleman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009). However, a trial court may exclude relevant evidence if the risk of unfair prejudice, confusion of the issues, misleading the jury, or waste of time substantially outweighs its probative value. ER 403.

The evidence here became admissible only after Pierce County opened the door to it. Before trial, the trial court permitted Gorman to elicit testimony that the county had received 10 complaints about Wilson's other dogs, but the trial court prohibited testimony about the reasons for those complaints. The trial court explained that the probative value was outweighed by the risks that (1) mini-trials on the veracity of each complaint would waste time and (2) the details of incidents involving other dogs would unfairly prejudice Pierce County.

But while questioning a county animal control officer, counsel for Pierce County asked why the prior complaints had not led the county to pursue a declaration of potential dangerousness. The officer explained that the prior complaints primarily concerned dogs off leash or excessive barking, but "[t]hey were not all dogs chasing individuals or anything of that nature." RP (Aug. 3, 2011) at 990. Counsel then elicited testimony that "a history of a dog owner who had previous complaints of leash law violations" would not support a declaration of potential dangerousness. RP (Aug. 3, 2011) at 991. The trial court ruled that this questioning opened the door to evidence rebutting the suggestion that the prior complaints did not involve dangerous dog behavior, but it still prohibited questioning about the details. Accordingly, Gorman elicited testimony from the same witness that three of the prior complaints involved attempted attacks.

The trial court did not err by admitting this testimony. The evidence was relevant to the county's knowledge that at least one of Wilson's dogs posed a risk. *See* ER 401. And the trial court's refusal to allow questioning on the details reduced the effect of any unfair prejudice, while admitting evidence that was probative of the reasonableness of the county's explanation for declining to pursue a potentially dangerous dog declaration. *See* ER 403. Accordingly, this argument fails.

IV. GORMAN'S LEGAL DUTY

In her cross appeal, Gorman argues that the trial court erred by denying her renewed motion for judgment as a matter of law, which sought to set aside the jury's finding of contributory fault on the ground that Gorman owed no legal duty. Evans-Hubbard asserts that Gorman waived this argument by failing to make it in her original motion for judgment as a matter of law. We agree with Evans-Hubbard.

We will not consider an appeal from a trial court's denial of a CR 50 motion for judgment as a matter of law unless the appellant has renewed the motion after the verdict. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 592, 283 P.3d 567 (2012), *review granted*, 176 Wn.2d 1010 (2013); *see* CR 50(b). To preserve the opportunity to renew a CR 50 motion after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury. *Hanks v. Grace*, 167 Wn. App. 542, 552-53, 273 P.3d 1029, *review denied*, 175 Wn.2d 1017 (2012); *see* CR 50(a).

On the issue of her own comparative fault, Gorman asserted in her original CR 50 motion that she bore no fault because the *evidence was insufficient* to show that leaving the door open was a breach of her legal duty. For the first time in her renewed motion, Gorman argued that, *as a matter of law*, she had no legal duty to close the door. This argument is not proper because a

renewed CR 50 motion cannot present new legal theories that were not argued before the verdict. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193 n.20, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Browne v. Cassidy*, 46 Wn. App. 267, 269, 728 P.2d 1388 (1986). Gorman did not preserve her argument for appeal, so it fails.

V. EMERGENCY DOCTRINE INSTRUCTION

Gorman next argues that the trial court erred by declining to instruct the jury on the emergency doctrine. We disagree because Gorman failed to preserve any challenge to the omission of this instruction.

To challenge the trial court's failure to give a jury instruction, an appellant must have proposed the instruction in the trial court. *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963). In general, a party requesting an instruction that appears in the Washington Pattern Instructions must propose the instruction in writing. CR 51(d)(1); *Balandzich v. Demeroto*, 10 Wn. App. 718, 722, 519 P.2d 994 (1974). However, a party may request a Washington Pattern Instruction simply by referring to the instruction's published number if the superior court has adopted a local rule permitting that procedure. CR 51(d)(3).

Gorman's request for the emergency doctrine instruction did not comply with CR 51(d). She did not propose the instruction in writing. *See* CP at 810-37, 1416-26. Instead, she orally requested 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.02, at 142 (5th ed. 2005), the pattern emergency doctrine instruction, and she took exception to the trial court's refusal to give it. But Gorman has not identified any applicable local rule allowing her request by reference to the published number. Therefore, Gorman failed to propose the instruction in a manner consistent with CR 51(d).

VI. SUFFICIENCY OF THE EVIDENCE

Lastly, Gorman argues that the evidence was insufficient to support the jury's verdict that (1) she breached her duty and (2) her negligence was a proximate cause of her injury. Br. of Resp't at 64-72. We disagree.

We cannot substitute our judgment for that of the jury. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). Accordingly, we cannot overturn the jury's verdict unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict. *Burnside*, 123 Wn.2d at 107-08 (quoting *O'Connell*, 83 Wn.2d at 839). When reviewing a jury verdict for substantial evidence, we must consider all evidence and draw all reasonable inferences in the light most favorable to the verdict. *Ketchum v. Wood*, 73 Wn.2d 335, 336, 438 P.2d 596 (1968).

In order to prove contributory negligence, the defendant must show that the plaintiff had a duty to exercise reasonable care for her own safety, that she failed to exercise such care, and that this failure is a cause of her injuries. *Alston v. Blythe*, 88 Wn. App. 26, 32 n.8, 943 P.2d 692 (1997). Contributory negligence is usually a factual question for the jury. *Jaeger v. Cleaver Constr., Inc.*, 148 Wn. App. 698, 713, 201 P.3d 1028 (2009).

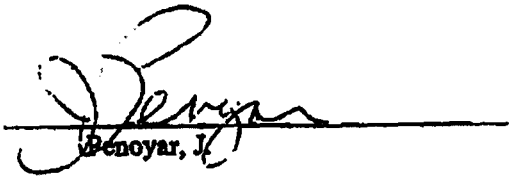
Substantial evidence supports the jury's finding that Gorman breached her duty by failing to exercise the care a reasonable person would exercise under the circumstances. Although Gorman believed Betty was an aggressive and vicious dog and Gorman knew that Betty and Tank had previously entered her home through the open door, Gorman testified that she left the door open on the night of her attack. Pierce County also claimed that Gorman unreasonably chose to save Romeo rather than flee for her own safety. Because Gorman testified that she

indeed tried to save Romeo, there was sufficient evidence for the jury to consider whether this decision was reasonable.

Substantial evidence also supports the jury's finding that Gorman's conduct was a proximate cause of her injuries. Gorman testified that the pit bulls entered her house through the open door on the night of her attack. Gorman also testified that while trying to rescue Romeo, she suffered further injuries to her hands and wrists. Therefore substantial evidence supports the jury's verdict on contributory fault.

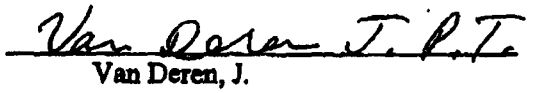
Although we are sympathetic to Gorman's argument that she did not owe a legal duty to close her door, as we discussed above, she did not preserve this argument for appeal. Nor does she make a supported argument on appeal that the trial court erred by instructing the jury on contributory negligence. Therefore, any contributory negligence instructions became the law of the case. *See Washburn*, 169 Wn. App. at 605 (stating that the failure to appeal an allegedly erroneous instruction makes that instruction the law of the case). Again, we cannot substitute our judgment for the jury's. Because contributory negligence became the law of the case and because the facts support the jury's finding of contributory negligence, Gorman's argument fails.

Affirmed.



Penoyar, J.

I concur:



Van Deren, J.

WORSWICK, C.J. (dissenting in part) — I concur with the majority's analysis in sections II through VI regarding jury instructions on Pierce County's duty, evidence of prior complaints, denial of Sue Ann Gorman's motion for judgment as a matter of law, the emergency doctrine instruction, and sufficiency of the evidence. But because the majority misconstrues the county ordinance and misapplies the public duty doctrine, I respectfully dissent from the majority's conclusion in section I.B that the failure to enforce exception to the public duty doctrine applies here.

When a governmental entity is sued for negligence, courts employ the public duty doctrine to determine whether a duty is owed to the general public or whether that duty is owed to a particular individual. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). A duty owed to the general public is not an actionable legal duty in a negligence suit. *Bailey v. Town of Forks*, 108 Wn.2d 262, 266, 737 P.2d 1257 (1987). But the public duty doctrine is subject to several exceptions, including the failure to enforce exception. *Bailey*, 108 Wn.2d at 268.

For the failure to enforce exception to apply, the plaintiff must prove, inter alia, that government agents have a statutory duty to take corrective action. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Thus, the failure to enforce exception "applies only where there is a mandatory duty to take a specific action to correct a known statutory violation." *Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). But no such duty exists if the statute confers broad discretion about whether and how to act. *Donohoe*, 135 Wn. App. at 849. In addition, we must construe the failure to enforce exception narrowly. *Atherton*, 115 Wn.2d at 531.

Here I disagree with the majority's conclusion that former Pierce County Code (PCC) 6.07.010(A) (2007) created a statutory duty to take the corrective action of classifying potentially dangerous dogs. The majority reaches this conclusion after (1) misinterpreting the ordinance and (2) misapplying case law on the failure to enforce exception. In my view, the failure to enforce exception does not apply because the ordinance did not *mandate* action by the county.

1. *Interpretation of the Ordinance*

First, the majority misinterprets the plain meaning of the ordinance and incorrectly concludes that it expresses a mandatory directive. Here, former PCC 6.07.010(A) provided:

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [former PCC] 6.02.010[(T)[15]]. The finding must be based upon:
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
> 2. Dog bite reports filed with the County or the County's designee; or
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
> 4. Other substantial evidence.

The majority correctly states the rules of plain meaning analysis. A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wn.2d at 11. Where, as here, a statute uses both "shall" and

[15] Apparently in error, former PCC 6.07.010(A) cited former PCC 6.02.010(Q) (2007). The current version of PCC 6.07.010(A) cites the definition of "potentially dangerous animal" in PCC 6.02.010(X).

"may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982).

But the majority's plain meaning analysis misapplies these rules. The majority appears to rely solely on the word "shall" to conclude that the ordinance "was a clear directive to apply the classification process to dogs that were likely potentially dangerous."[16] Majority at 13. But a plain meaning analysis requires us to consider "*all* that the Legislature has said in the statute." *Campbell & Gwinn*, 146 Wn.2d at 11 (emphasis added).

Read in its entirety with each word placed in context, the ordinance clearly *authorized*—but did not *require*—the county or its designee to classify potentially dangerous dogs. Former PCC 6.07.010(A). The ordinance stated that, when competent evidence supports a finding of probable cause to believe that a particular dog is a potentially dangerous dog, the county "*may* find and declare" the dog to be potentially dangerous. Former PCC 6.07.010(A) (emphasis added). But—as the majority concedes—the ordinance did not require the county to make a declaration; it gave the county discretion to do so. Accordingly, the ordinance did not mandate a specific action to correct a known statutory violation.

2. *Application of Case Law*

I also disagree with the majority's application of case law on the failure to enforce exception.

---

[16] In the majority's interpretation, the ordinance (1) requires the county to conduct an "inquiry" whenever it receives an "apparently valid report" that a dog is likely potentially dangerous, but (2) gives the county discretion, after completing the inquiry, to classify a particular dog as potentially dangerous. Majority at 12-13. Because the ordinance says nothing about inquiries into reports of potentially dangerous dogs, I believe the majority's inquiry requirement derives from a misinterpretation of the ordinance's plain meaning.

First, the majority misplaces its reliance on *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988). In *Livingston*, the failure to enforce exception applied because the city violated a local law governing the release of impounded dogs to their owner. 50 Wn. App. at 658-59. There, the local law stated: "Any impounded animal shall be released to the owner . . . *if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.*'" 50 Wn. App. at 658 (quoting former Everett Municipal Code § 6.04.140(E)(1)) (emphasis added). Because an animal control officer released impounded dogs without judging their dangerousness or health, the court held that the officer failed to exercise his discretion as the law required. 50 Wn. App. at 657, 659.

The ordinance here is so different that this case is not comparable to *Livingston*. In *Livingston*, when a dog owner sought the release of his dog from the pound, the city law mandated that the city determine the dog to be neither dangerous nor unhealthy. 50 Wn. App. at 658. In contrast, Pierce County's ordinance articulated *no* circumstances under which the county must determine whether a dog is potentially dangerous. *See* former PCC 6.07.010(A). And, even if a particular dog meets the definition of a potentially dangerous dog, the ordinance's use of the word "may" clearly gave the county broad discretion to declare or not to declare the dog potentially dangerous. Former PCC 6.07.010(A) ("The County . . . may find and declare an animal potentially dangerous" when competent evidence establishes probable cause to believe the animal is a potentially dangerous dog under former PCC 6.02.010(T)). *Livingston* is inapposite.

Further, the majority emphasizes that this case and *Livingston* are similar because both involve dogs that were the subject of multiple complaints. But the existence of multiple complaints is irrelevant to the failure to enforce exception: if the statutory language truly is

mandatory, then a *single* failure to take required action will violate the government's duty to enforce the statute. *See Bailey*, 108 Wn.2d at 269 (police officer failed a single time to detain a person who appeared in public to be incapacitated by alcohol); *Campbell v. City of Bellevue*, 85 Wn.2d 1, 5, 530 P.2d 234 (1975) (electrical inspector failed a single time to "immediately sever" an electrical system after observing that it did not comply with city code); *Livingston*, 50 Wn. App. at 659 (animal control officer failed a single time to determine whether an impounded dog was dangerous or unhealthy before releasing the dog; multiple complaints about the dog had no bearing on the failure to enforce exception). By appearing to base its decision on the county's *repeated* failures to take a discretionary action, the majority muddles the failure to enforce exception.

For her own part, Gorman relies on *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999), but that case is also unavailing. In *King*, a state law required the county to immediately confiscate any dangerous dog that had bitten a person or another animal.[17] 97 Wn. App. at 595. Based on the record, a jury could have found that the dog in *King* became a "dangerous dog" under state law when it attacked a neighbor. 97 Wn. App. at 596. The neighbor reported the attack to the police and prosecutor, but the prosecutor merely called the owner and advised that he could be arrested if he had committed a criminal act. 97 Wn. App. at 593. Over one month later, a police officer visited the owner and asked him to turn over the dog to be destroyed, but the owner refused and the officer took no further action. 97 Wn. App. at 593. The court in *King* held that the county's failure to enforce the state law exposed it to liability for any injury occurring as a result of its failure to confiscate a dangerous dog after the attack. 97 Wn. App. at

[17] State law governs "dangerous dogs," but it also directs municipalities and counties to regulate "potentially dangerous dogs." RCW 16.08.070(2), .090(2).

596. However, the county was not liable for the injuries the neighbor suffered during the attack, because the dog had not yet become a dangerous dog and therefore the state law imposed no mandatory duty on the county at that time. 97 Wn. App. at 595.

The situation here is similar to that *before* the attack in *King*. Because the two dogs here were not classified as potentially dangerous dogs, Pierce County had no mandatory duty. Accordingly, the failure to enforce exception does not apply and the county is not liable for injuries Gorman suffered during the attack.

For similar reasons, the majority fails to convincingly distinguish this case from *Pierce v. Yakima County*, 161 Wn. App. 791, 799-801, 251 P.3d 270, *review denied*, 172 Wn.2d 1017 (2011), a case in which a statute repeatedly used the word "shall" to confer authority and grant discretion, without creating a mandatory enforcement duty. The majority states that the county was required to seize and impound "'any potentially dangerous dog which is in violation of . . . [chapter 6.07 PCC] or restrictions imposed as part of a declaration as a potentially dangerous dog.'" Majority at 15 (quoting former PCC 6.07.040 (2007)). But this requirement applied only to dogs that have been declared potentially dangerous. Former PCC 6.07.040. Because the two dogs here were never declared potentially dangerous dogs, they did not "violate" restrictions applicable to potentially dangerous dogs. Therefore the county never had *the authority*—let alone a mandatory duty—to seize and impound the two dogs here under former PCC 6.07.040.

Finding otherwise, the majority accepts Gorman's contention that (1) the county *should have* declared Betty a potentially dangerous dog and (2) Betty violated restrictions that *would have applied if* the county had declared Betty a potentially dangerous dog. But this is a hypothetical, not actual, violation. Because former PCC 6.07.040 was never violated, I would hold that Gorman's contention fails.

Considering the plain meaning of former PCC 6.07.010(A) and controlling law on the public duty doctrine, I am convinced that the failure to enforce exception does not apply here. Therefore I would reverse and remand with instructions to dismiss the county as a defendant.

Worswick, C.J.

Chapter 6.02

ANIMAL CONTROL - GENERAL PROVISIONS

Sections:

6.02.010 Definitions

As used in this Title, the following terms shall have the following meanings:

A. "Adult" means any animal over the age of seven months.

B. "Altered" shall mean to permanently render incapable of reproduction (spayed or neutered).

C "Animal" means any nonhuman mammal, bird, reptile or amphibian excluding livestock and poultry as defined herein.

D. "Animal Control Agency" means that animal control organization authorized by Pierce County to enforce its animal control provisions.

E. "Animal Shelter" means that animal control facility authorized by Pierce County.

F. "At large" means off the premises of the owner or keeper of the animal, and not under restraint by leash or chain or not otherwise controlled by a competent person.

G. "Auditor" means Pierce County Auditor.

H. "Cat" means and includes female, spayed female, male and neutered male cats.

I. "Competent person" means a person who is able to sufficiently care for, control, and restrain his/her animal, and who has the capacity to exercise sound judgment regarding the rights and safety of others.

J. "County" means Pierce County.

K. "Court" means District Court or the Superior Court, which courts shall have concurrent jurisdiction hereunder.

L. "Dog" means and includes female, spayed female, male and neutered male dogs.

M. "Gross Misdemeanor" means a type of crime classification, while not a felony, is ranked as a serious misdemeanor. The maximum penalty for a gross misdemeanor is 365 days in jail and/or a $5,000.00 fine.

N. "Humane trap" means a live animal box enclosure trap designed to capture and hold an animal without injury.

O. "Impound" means to receive into the custody of the Animal Control Shelter, or into the custody of the Director or his/her authorized agent or deputy.

P. "Juvenile" means any animal from weaning to seven months of age.

Q. "Livestock" means all cattle, sheep, goats, or animals of the bovidae family; all horses, mules, other hoof animals, or animals of the equidae family; all pigs, swine, or animals of the suidae family; llamas; and ostriches, rhea, and emu.

R. "Misdemeanor" means a maximum penalty of 90 days in jail and/or a $1,000.00 fine, pursuant to Section 1.12.010 of this Code.

S. "Owner" means any person, firm, or corporation owning, having an interest in, or having control or custody or possession of any animal.

T. "Potentially Dangerous Dog" means any dog that when unprovoked:

(a) Inflicts bites on a human, domestic animal, or livestock on public or private property,

(b) Chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or

(c) Any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.

U. "Poultry" means domestic fowl normally raised for eggs or meat, and includes chickens, turkeys, ducks and geese.

V. "Securely enclosed and locked" means a pen or structure which has secure sides and a secure top. If the pen or structure has no bottom secured to the sides, then the sides must be embedded in the ground no less than one foot.

W. "Unconfined" means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal. (Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 92-35 § 1 (part), 1992, Ord. 89-235 § 3, 1990; Ord. 87-408 § 1 (part), 1987)

Chapter 6.07

POTENTIALLY DANGEROUS DOGS

Sections:

6.07.010 Declaration of Dogs as Potentially Dangerous - Procedure

A. The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions set forth in Section 6.02.010 Q. The finding must be based upon:

1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 Q.; or
2. Dog bite reports filed with the County or the County's designee; or
3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
4. Other substantial evidence.

B. The declaration of a potentially dangerous dog shall be in writing and shall be served on the owner in one of the following methods:
1. Certified mail to the owner's last known address; or
2. Personally; or
3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation.

C. The declaration shall state at least:
1. The description of the animal.
2. The name and address of the owner of the animal, if known.
3. The whereabouts of the animal if it is not in the custody of the owner.
4. The facts upon which the declaration of potentially dangerous dog is based.
5. The availability of a hearing in case the person objects to the declaration, if a request is made within ten days.
6. The restrictions placed on the animal as a result of the declaration of a potentially dangerous dog.
7. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.

D. If the owner of the animal wishes to object to the declaration of a potentially dangerous dog:
1. The owner may request a hearing before the Director's designee County, or the County's designee, by submitting a written request and payment of a $25.00 administrative review fee to the Auditor or the Auditor's designee within ten days of receipt of the declaration, or within ten days of the publication of the declaration pursuant to Section 6.07.010 B.3.
2. If the County or the County's designee finds that there is insufficient evidence to support the declaration, it shall be rescinded, and the restrictions imposed thereby annulled.
3. If the County or the County's designee finds sufficient evidence to support declaration, the owner may appeal such decision pursuant to Pierce County Hearing Examiner Code; provided that the appeal and the payment of an appeal fee of $75.00 must be submitted to the Auditor or the Auditor's designee within ten working days after the County or the County's designee finds sufficient evidence to support the declaration.
4. An appeal of the Hearing Examiner's decision must be filed in Superior Court within 30 days of the date of the Hearing Examiner's written decision.
5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of potentially dangerous dogs to allow or permit such dog to:
a. Be unconfined on the premises of the owner; or
b. Go beyond the premises of the owner unless such dog is securely leashed and humanely muzzled or otherwise securely restrained. (Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-408 § 4 (part), 1987)

6.07.030 Confinement and Identification of Potentially Dangerous Dogs

A. Following a declaration of a potentially dangerous dog and the exhaustion of the appeal there from, it shall be unlawful for the person owning or harboring or having care of such potentially dangerous dog to allow and/or permit such dog to:
1. Be unconfined on the premises of such person; or
2. Go beyond the premises of such person unless such dog is securely leashed and humanely muzzled or otherwise securely restrained.

B. Potentially dangerous dog(s) must be tattooed or have a microchip implanted for identification. Identification information must be on record with the Pierce County Auditor. (Ord. 2005-108 § 1 (part), 2005; Ord. 97-111 § 5, 1997; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.07.040 Penalty for Violation

Any person who violates a provision of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. In addition, any person found guilty of violating this Chapter shall pay all expenses, including shelter, food, veterinary expenses for identification or certification of the breed of the animal or boarding and veterinary expenses necessitated by the seizure of any dog for the protection of the public, and such other expenses as may be required for the destruction of any such dog. Provided, that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 of this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded. Furthermore, any potentially dangerous dog which attacks a human being, domestic animal, or livestock may be ordered destroyed when, in the court's judgment, such potentially dangerous dog represents a continuing threat of serious harm to human beings or domestic animals. (Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

6.02.020 Authorized Agents May Perform Duties

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff. (Ord. 87-408 § 1 (part), 1987)

6.02.025 Licenses Required

Licenses required are for regulation and control. This entire Title shall be deemed an exercise of the power of the State of Washington and of the County of Pierce to license for regulation and/or control and all its provisions shall be liberally construed for the accomplishment of either or both such purposes. (Ord. 2005-108 § 1 (part), 2005)

6.02.020 Authorized Agents May Perform Duties.

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff.

A. The animal control authority shall be a division of the Pierce County Auditor. The duly elected auditor of Pierce County shall be the director of the animal control authority.

B. The animal control authority is authorized to enforce the provisions of the Pierce County Code and the laws of the State of Washington as they pertain to animals.

C. All animal control officers must be special deputies commissioned by the Pierce County Sheriff.

(Ord. 2008-14 § 1 (part), 2008; Ord. 87-40S § 1 (part), 1987)

answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(c) Discharge of Jury.

(1) *Without Verdict.* [Reserved. See RCW 4.44.330.]

(2) *Effect of Discharge.* [Reserved. See RCW 4.44.340.]

(d) Court Recess During Deliberation. [Reserved. See RCW 4.44.350.]

(e) Proceedings When Jurors Have Agreed. [Reserved. See RCW 4.44.360.]

(f) Manner of Giving Verdict. [Reserved. See RCW 4.44.370.]

(g) Ten Jurors in Civil Cases. [Reserved. See RCW 4.44.380.]

(h) Jury May Be Polled. [Reserved. See RCW 4.44.390.]

(i) Correction of Informal Verdict. [Reserved. See RCW 4.44.400.]

(j) Jury to Assess Amount of Recovery. [Reserved. See RCW 4.44.450.]

(k) Receiving Verdict and Discharging Jury. [Reserved. See RCW 4.44.460.]

(l) Any Juror Verdict. When a jury decides a verdict, any juror may vote on any of the questions posed. It is not necessary that the same ten jurors agree on every answer, as long as each answer is agreed to by any ten or more jurors.

[Amended effective September 1, 2001.]

RULE 50. JUDGMENT AS A MATTER OF LAW IN JURY TRIALS; ALTERNATIVE MOTION FOR NEW TRIAL; CONDITIONAL RULINGS

(a) Judgment as a Matter of Law.

(1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

(2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand.

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Alternative Motions for Judgment as a Matter of Law or for a New Trial—Effect of Appeal. Whenever a motion for a judgment as a matter of law and, in the alternative, for a new trial shall be filed and submitted in any superior court in any civil cause tried before a jury, and such superior court shall enter an order granting such motion for judgment as a matter of law, such court shall at the same time, in the alternative, pass upon and decide in the same order such motion for a new trial; such ruling upon said motion for a new trial not to become effective unless and until the order granting the motion for judgment as a matter of law shall thereafter be reversed, vacated, or set aside in the manner provided by law. An appeal to the Supreme Court or Court of Appeals from a judgment granted on a motion for judgment as a matter of law shall, of itself, without the necessity of cross appeal, bring up for review the ruling of the trial court on the motion for a new trial; and the appellate court shall, if it reverses the judgment entered as a matter of law, review and determine the validity of the ruling on the motion for a new trial.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment,

OFFICE RECEPTIONIST, CLERK

To: Kelsey Frey
Subject: RE: Case No.: 89323-3

Rec'd 10-7-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kelsey Frey [mailto:kwfrey@tclmd.com]
Sent: Monday, October 07, 2013 10:01 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Case No.: 89323-3

Re: Gorman v. Pierce County
Case No.: 89323-3

Dear Sirs,

Attached please find Sue Gorman's Answer to Pierce County's Petition for Discretionary Review along with the Certificate of Service.

Please confirm receipt.

Thanks!

Kelsey Frey
Paralegal to Michael McKasy
Troup, Christnacht, Ladenburg, McKasy, Durkin & Speir, Inc., P.S.
6602 19th St. W.
Tacoma, WA 98466
253-564-2111
253-566-9343 FAX
www.tclmd.com