NO. 89323-3

SUPREME COURT OF THE STATE OF WASHINGTON

SUE ANN GORMAN, Respondent/Plaintiff

v.

PIERCE COUNTY, et al., Petitioner/Defendant

PIERCE COUNTY'S PETITION FOR REVIEW

Court of Appeals, Division Two, No. 42502-5-II

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I. IDENTITY OF PETITIONER

Petitioner Pierce County requests this Court to accept review of the Court of Appeals published opinion designated in Part II.

II. COURT OF APPEALS DECISION

Pierce County seeks review of the Court of Appeals, Division Two, published opinion in *Gorman v. Pierce County et al.*, ___ Wn. App.___, ___ P.3d ____ (2013), 2013 WL 4103314 (Appendix A, slip opinion). A divided court filed this opinion on August 13, 2013. *See Gorman*, slip opinion, at 15 (Worswick, J., dissenting).

III. ASSIGNMENT OF ERROR

The Court of Appeals erred in holding that the failure to enforce exception to the public duty doctrine applied in this case. Under *Pierce v. Yakima County*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011), this exception applies only if a statute mandates a governmental agent to take a specific action to correct a violation, and no such mandate existed in this case.

IV. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the Court of Appeals err in holding that the failure to enforce exception to the public duty doctrine applied when under *Pierce v. Yakima County*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011), this exception

applies only if a statute mandates a governmental agent to take a specific action to correct a violation, and no such mandate existed in this case?

V. STATEMENT OF THE CASE

A. Facts

Defendant Shellie Wilson resided in Gig Harbor with her son, Defendant Zachary Martin. RP 1177. Martin was a high school student. Some friends gave Martin a pit bull puppy named "Betty." RP 1080-81; 1197.

Plaintiff Gorman lived near Wilson. RP 404-05. The Russells also lived near Gorman, and they had a dog named "Romeo." RP 405. The neighborhood had a culture of letting dogs run unleashed. RP 498, 1200, 1126. Romeo would enter Gorman's house through a sliding glass door that Gorman left open "most of the time." RP 409. The open door also allowed Gorman's dog, Misty, to go in and out. RP 410. This particular arrangement went on "for years." RP 410.

Betty had puppies. Martin gave a puppy named "Tank" to Defendant Evans-Hubbard's daughter. RP 900, 1085. During a three-week period from February 10, 2007, through March 1, 2007, Betty was the subject of three complaints to the County.

On February 10, 2007, Gorman parked her car in her driveway and let Misty out. RP 1263. Betty came running toward them. RP 1263.

Gorman and Misty ran into the house. RP 1263. Gorman called 911. RP 1265. When a deputy sheriff arrived, Betty had already left. RP 1266. The deputy sheriff went to Wilson's house, found no one home, and left a note at Wilson's house. RP 1266-67. The deputy sheriff returned to Gorman, explained his attempt to contact Wilson, and told Gorman that she might want to call Animal Control on Monday morning. RP 1324.

On February 22, 2007, Rick Russell reported two pit bulls running loose and chasing kids. The following day, an animal control officer attempted to make contact with Wilson. RP 653. The officer found no one home and posted a notice on the front door, to which neither Wilson nor Martin responded. RP 591, 653. The officer mailed forms to the Russell family to obtain their written statement, but the Russells delayed in responding. RP 653. The animal control officer did not witness any behavior by the dogs, had no indication a dog bite was involved, and lacked a written statement from a complainant. RP 654.

On March 1, 2007, Betty chased Misty into Gorman's house. RP 1270. Betty began jumping at the glass door. RP 1270. Gorman closed the door's curtain and called 911. RP 1270. A deputy sheriff arrived after Betty had left. The deputy sheriff talked to Gorman, went to Wilson's house, stayed for a half-hour, and returned to Gorman's house with Martin. RP 1271. Martin apologized and told Gorman he would "fix the fence

tomorrow." RP 1272. Martin and Gorman exchanged phone numbers. RP 1271. Gorman did not report any subsequent incidents to Animal Control or otherwise call 911. RP 1322. Gorman left her sliding door open.

On August 17, 2007, Evans-Hubbard left for an out-of-state trip. RP 1121. She left Tank with Wilson and Martin. On the morning of August 21, 2007, Martin's girlfriend opened a door and let Betty and Tank out. RP 1220. The dogs entered Gorman's house and went into her bedroom. RP 407. Misty got off the bed and ran outside. RP 407. Romeo was on the bed under the covers. RP 408. Betty and Tank jumped on Gorman's bed, and Betty bit Gorman on her arm. RP 410. When Romeo jumped off the bed, Betty and Tank went after him. RP 409-1. When Gorman tried to grab Romeo, Betty and Tank bit her hands. RP 411.

Gorman retrieved a gun from underneath her nightstand and pointed it at the dogs. RP 413. She pulled the trigger several times, but the gun never fired. RP 413. She grabbed a walking stick and tried to hit the dogs over the head, but the dogs paid no attention. RP 414. Gorman eventually picked up Romeo, put him in a closet, and pushed the closet door closed. RP 414. Betty then jumped at Gorman to bite her. RP 414. Tank reopened the closet door and resumed his pursuit of Romeo. RP

415-16. Betty also turned her attention back to Romeo. RP 416. Gorman grabbed her telephone, left the house, and shut the sliding glass door behind her to trap the dogs inside. RP 416. She called 911. RP 416. Betty and Tank were extracted from Gorman's house and euthanized. RP 1073-74, 1122.

B. Procedure

Gorman filed a lawsuit in Pierce County Superior Court naming as defendants Wilson, Martin, Evans-Hubbard, and Pierce County. Pierce County moved for summary judgment arguing that the public duty doctrine precluded Gorman's negligence action against the County. The trial court denied the motion. At the close of plaintiff's case, the County renewed its motion to dismiss under the public duty doctrine, and the trial court again denied the motion. RP 1448, 1456.

The three private dog owners each admitted liability under RCW 16.08.040, the strict liability dog bite statute. See RP 1463. The jury found each of the defendants liable including Pierce County. CP 904. The jury apportioned fault as follows: Wilson and Martin 52%, Pierce County 42%, Evans-Hubbard 5%, and Gorman 1%. CP 904.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. The Court of Appeals Erred in Holding that the Failure to Enforce Exception to the Public Duty Doctrine Applied, and its Decision Is in Conflict with *Pierce v. Yakima County*, 161 Wn. App. 791, 251 P.3d 270 (2011).

A plaintiff who raises a claim of negligence has the burden of proving: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, (3) the breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered legally compensable damages. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 378, 972 P.2d 475 (1999). To be actionable in negligence, the duty at issue must be owed to the injured plaintiff, and not owed to the public in general. *Fishburn v. Pierce County Planning and Land Services*, 161 Wn. App. 452, 464, 250 P.3d 146 (2011).

This basic principle of negligence law is expressed in the public duty doctrine. "Under the public duty doctrine, the government is liable for a public official's negligence *only if the official breaches a duty owed to the injured person as an individual*, rather than the public in general." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (emphasis added). The public duty doctrine reflects the policy that "legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." *Taylor*, 111

Wn.2d at 170. The public duty doctrine functions as a "focusing tool" used to determine whether the local government owed a specific duty to a particular individual, the breach of which is actionable, or merely a duty to the "nebulous public," the breach of which is not actionable. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting *Taylor*, 111 Wn.2d at 166).

The public duty doctrine is subject to several exceptions, including the failure to enforce exception. *See e.g., Bailey v. Town of Forks*, 108 Wn.2d 262, 266, 737 P.2d 1257 (1987). For the failure to enforce exception to apply, the plaintiff must prove that the governmental agent has 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). It is well-established that the failure to enforce exception applies only where there is a mandatory statutory duty to take a specific action to correct a known statutory violation, and no such duty exists if the statute confers broad discretion about whether and how to act. *See e.g., Pierce*, 161 Wn. App. at 799; *Donohoe v. State*, 135 Wn. App. 824, 848-49, 142 P.3d 654 (2006); *Ravenscroft v. WWPC*, 87 Wn. App. 402, 415-16, 942 P.2d 991 (1997), *rev. on other grounds*, 136 Wn.2d 911 (1999).

At issue in this case is Former PCC 6.07.010, which provides, in pertinent part[1], as follows:

> 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 [of "potentially dangerous dog[2]"]. 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 ["potentially dangerous dog"]; or
>
> 2. Dog bite reports filed with the County or the County's designees; 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 ....

Former PCC 6.07.010. The officer's written declaration must inform the dog's owner of the facts supporting the declaration. Former PCC 6.07.010(C). The dog's owner has the right to contest the facts at an evidentiary hearing, as well as the right thereafter to multiple levels of appellate review. Former PCC 6.07.010(D). During the pendency of the

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[1] The full text of Former PCC 6.07.010 is provided at Appendix B.

[2] A "potentially dangerous dog" is defined as:

> any dog that when unprovoked: (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or otherwise to threaten the safety of humans or domestic animals.

RCW 16.08.070(1); *see also* PCC 6.02.010(X).

appeal process, the ordinance does not grant animal control the authority to seize the animal. *See* Former PCC 6.07.010. The power to seize the dog is only granted when: (1) the dog has been declared potentially dangerous, (2) all of the owner's appeals have been exhausted, and (3) the dog and its owner are in violation of the permit and fee restrictions imposed under Former PCC 6.07.020, or in violation of the confinement provisions contained in Former PCC 6.07.030. *See* Former PCC 6.07.040.

Under the ordinance, when an officer has probable cause to believe that a particular dog falls within the definition of being potentially dangerous, he or she has the *discretion* to issue a written finding and declaration to the dog's owner: '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 definition [of "potentially dangerous dog"]. Former PCC 6.07.010.

Probable cause is the key to application of this ordinance. Probable cause exists when the facts and circumstances within the officer's knowledge "are sufficient to cause a person of reasonable caution to believe" that the dog is potentially dangerous. *State v. Huff,* 64 Wn. App. 641, 646, 826 P.2d 698 (1992) (defining probable cause in the criminal law context). The existence of probable cause triggers the officer's discretion to file a potentially dangerous dog declaration.

The Court of Appeals acknowledged that Former PCC 6.07.010 granted the County the "discretion to classify or not classify any particular dog as potentially dangerous ...." *Gorman*, slip op. at 11. The Court of Appeals erred, however, in concluding the ordinance nonetheless imposed a vague, non-specific "duty to act" or "duty to apply the classification process" that triggered the failure to enforce exception. *Gorman*, slip op. at 11. The Court of Appeals derived this duty from the "shall" in the ordinance's first sentence: "The County or the County's designee shall classify potentially dangerous dogs." The Court of Appeals reasoned as follows:

> 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 the duty to at least apply the classification process to any apparently valid report of a dangerous dog.*** **The county had a duty to act.**

Gorman, slip op. at 11 (emphasis added). Judge Worswick in dissent took issue with the majority's analysis on this point:

> 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." Majority at 13. But a plain meaning analysis requires us to consider "all that the Legislature has said in the statute." *Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (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.***

Gorman, slip op. at 16-17 (Worswick, J. Dissenting) (emphasis added).

The Court of Appeals' reasoning is unsound because it creates a mandatory "duty to apply the classification process" or "duty to act" that is separate and distinct from the process established in the ordinance itself. Former PCC 6.07.010 is entitled "Declaration of Dogs as Potentially Dangerous -- ***Procedure***," (emphasis added). As its name indicates, the ordinance establishes a specific procedure for animal control officers to go through if they seek to declare a dog potentially dangerous. The ordinance also provided the dog's owner with extensive rights to contest and challenge the governmental action, including the right to a fact hearing and multiple levels of appeals. Former PCC 6.07.010[3].

The only permissible way to "act" or to "classify" under this ordinance is by *following the procedure established in the ordinance itself*. The ordinance makes it clear that no dog may be declared potentially dangerous without probable cause, and the existence of probable cause with respect to any particular dog triggers the discretion to file the

[3] If the owner does not prevail at the fact hearing, he or she has the right to appeal to the Hearings Examiner, and then to appeal to the Superior Court. Former PCC 6.07.010. Thereafter, the owner may seek review with the Court of Appeals. *See* RAP 5.1(a); *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011).

declaration, not a mandatory duty. It does not matter under the language of the ordinance whether the officer develops this probable cause after a hundred hours of investigation or after no investigation whatsoever. Once probable cause exists, with or without extensive investigation, discretion is triggered.

This is significant because the Court of Appeals essentially held that a claim of negligent investigation now applies with regard to animal control activities. A claim of negligent investigation, however, is not cognizable under Washington law. *See Corbally v. Kennewick School Dist.*, 94 Wn. App. 736, 973 P.2d 1074 (1999); *Fondren v. Klickitat County*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995). As the dissent noted:

> 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.

Gorman, slip op. at 20, fn 16 (Worswick, J. Dissenting).

In order for a statute or ordinance to contain a mandatory duty to take corrective action, the statute or ordinance must contain a specific

directive to the government employee as to what should be done when faced with a specific situation. *Pierce v. Yakima County*, 161 Wn. App. at 799. Under *Pierce*, vague, nonspecific statutory language, such as the language relied on by the Court of Appeals here, is insufficient to trigger application of the failure to enforce exception.

In *Pierce*, the plaintiff alleged that Yakima County building officials were negligent in inspecting and approving his newly installed residential propane tank and fuel line, which exploded after the plaintiff attempted to ignite it. The *Pierce* Court held that the failure to enforce exception to the public duty doctrine did not apply, and it affirmed the dismissal of the plaintiff's suit against Yakima County.

The plaintiff in *Pierce* asserted the following code provision imposed a mandatory duty on the county's employee to correct a violation:

> ... [the 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 International Residential Code section R109.1) (emphasis added). The Pierce Court rejected this argument despite the presence of the word "shall" throughout the provision. The Pierce Court found this code provision lacked a direct mandate to the building official to serve a notice of violation and

disconnect the gas line, and other provisions in the code instead granted the official the discretion to take these actions:

> The statute does not provide a specific directive to the governmental employee as to what should be done. The statute merely vests discretion in the inspector in this situation. The [International Residential Code] gives the inspector authority to authorize disconnection and serve a notice or order when a violation is observed.

Pierce, 161 Wn. App. at 801.

As the opinion in *Pierce* indicates, the critical issue was: "not whether there were code violations which were ignored or passed over, but *whether the code mandated corrective action by the Building Official.*" *Pierce*, 161 Wn. App at 796 (quoting trial court's ruling granting summary judgment to Yakima County) (emphasis added). Similarly, the critical issue here is not whether a more vigorous investigation should have occurred, but whether the ordinance *mandated* this as a specific corrective action. It did not. What is missing in Former PCC 6.07.010 is a specific and direct mandate to declare a dog as potentially dangerous ***whenever there is probable cause to do so, as well as a mandate to investigate the existence of probable cause.*** A mere duty "to act" or "to classify" or to investigate is vague and lacking in specificity. These are not "duties" to perform a specific *corrective* action that would have effectuated a change of circumstances.

Even if more investigation resources had been expended in this case, the final question of whether to file a declaration remained discretionary. Therefore the "shall" language relied upon by the Court of Appeals is insufficient to trigger application of the failure to enforce exception.

The Washington Supreme Court has stated that courts are to "construe the failure to enforce exception narrowly." *Atherton Condo*, 115 Wn.2d at 531. *Pierce* applies this narrow construction and establishes that vague or general statutory language will not suffice for application of the failure to enforce exception even if the word "shall" is present. The Court of Appeals' analysis in this case conflicts with *Pierce*, and review is warranted on this basis. *See* RAP 13.4(b)(2).

The Court of Appeals decision also conflicts with *Ravenscroft v. Washington Power Company*, 87 Wn. App. 402, 942 P.2d 991 (1997), *rev. on other grounds*, 136 Wn.2d 911 (1999). In *Ravenscroft*, the plaintiff was injured when his recreational speed boat hit a submerged, rooted tree stump, and he sued Spokane County alleging negligence in failing to mark the stump. The plaintiff argued boating safety provisions in the Washington Administrative Code (WAC) contained directives to the government to mark water hazards.

The Court in *Ravenscroft* held that the plaintiff's suit was barred by the public duty doctrine, and the failure to enforce exception did not apply. *Ravenscroft*, 87 Wn. App. at 416. The court noted that the plaintiff's WAC provisions contained directives pertaining to water safety, *but none was specific enough* with regard to the partially-submerged tree stump to trigger the failure to enforce exception:

> **[N]either [WAC] provision contains specific directives as to exactly which hazards must be marked.** Nor does either provision direct corrective action when the buoys or markers are not in place or are removed where a hazard is present. ... *In the absence of a directive to undertake specific corrective action, the failure to enforce exception does not apply.*

Ravenscroft, 87 Wn. App. at 416 (emphasis added).

Numerous other cases illustrate the need for clear and precise language directed at a government employee in order to establish the specific mandate necessary for the failure to enforce exception to apply, and the Court of Appeals decision in this case conflicts with each of these cases. *See e.g., McKasson v. State of Washington*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989) (court holds no specific directive when the Securities Act statutes and regulations are "replete with 'mays' and vested broad discretion in the director to act" and plaintiff's suit was therefore barred by public duty doctrine); *Forest v. State of Washington*, 62 Wn. App. 363, 814 P.2d 1181 (1991) (court finds failure to enforce exception

inapplicable because no specific directive for State's corrections officers to violate offender's parole who later committed rape of plaintiff); *Smith v. City of Kelso*, 112 Wn. App. 277, 48 P.3d 372 (2002) (ordinance that requires that city engineer "**shall** prepare minimum ... design and construction standards appropriate to the ... soil conditions and geology of the area in which the plat is located" not specific enough for purposes of the failure to enforce exception to create mandatory duty to prepare development standards prior to plat approval); *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 716, 98 P.3d 52 (2004) (holding failure to enforce exception inapplicable because Securities Act does not contain specific directive to a governmental employee as to what should be done); *Donohoe v. State of Washington*, 135 Wn. App. 824, 142 P.3d 654 (2006) (court finds no mandatory duty to take a specific action, instead finds "government agent had broad discretion about whether and how to act"); *Fishburn v. Pierce County*, 161 Wn. App. 452, 250 P.3d 146 (2011), *rev. denied* 172 Wn.2d 1012 (2011) (failure to enforce exception did not apply because "[neither statute cited by plaintiff] creates a mandatory duty to take specific action to correct a septic system violation").

To support its decision, the Court of Appeals mistakenly relied on *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199, *rev. denied*, 110 Wn.2d 1028 (1988). *Livingston* was decided in 1988 without

the benefit of this Court's decisions in *Atherton Condo* (1990) and without the benefit of subsequent Court of Appeals cases including *Pierce* (2011) and *Ravenscroft* (1997). Consequently, the *Livingston* court failed to give the requisite narrow construction to the failure to enforce exception.

In *Livingston*, an animal control officer released an impounded dog back to its owner, and the dog subsequently attacked a child. At issue was an ordinance that provided an impounded animal "shall be released ... if, *in the judgment* of the animal control officer in charge, such animal is not dangerous or unhealthy." *Livingston*, 50 Wn. App. at 658 (quoting Everett Municipal Code § 6.04.140(E)(1)) (emphasis added). The *Livingston* court paradoxically held that this ordinance imposed a duty **not** to release a dog back to its owner, even though the ordinance's plain language **directs** release where the officer finds the animal is not dangerous or unhealthy. *See Livingston*, 50 Wn. App. at 659. The *Livingston* court reasoned that the animal control officers "had a **duty to exercise their discretion** when confronted with a situation which posed a danger to particular persons or a class of persons." *Livingston*, 50 Wn. App. at 659. Under *Atherton* and *Pierce*, a "duty to exercise discretion" is insufficient to support application of the failure to enforce exception. *Livingston* is not sound precedent because the court construed the existence of a mandatory duty from discretionary language. Under the plain language of the

ordinance, the animal control officer in *Livingston* did not have a mandatory statutory duty to take corrective action. The Court of Appeals erred in relying on *Livingston*.

Former PCC 6.07.010 did not impose a mandatory duty to perform a corrective action. The Court of Appeals erred in holding that the failure to enforce exception to the public duty doctrine applied in this case.

V. CONCLUSION

Pierce County respectfully requests that this Court accept review and reverse the Court of Appeals decision. This case should be remanded to the Superior Court for dismissal as to Pierce County.

DATED this 12th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MOTION TO MODIFY COMMISSIONER'S RULING was delivered this 12th day of September, 2013, by electronic mail and to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to counsel of record as follows:

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PIERCE COUNTY PROSECUTOR

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APPENDIX A

Gorman v. Pierce County
2013 WL 4103314
Slip Opinion

--- P.3d ----, 2013 WL 4103314 (Wash.App. Div. 2)
(Cite as: 2013 WL 4103314 (Wash.App. Div. 2))

H
Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 2.
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.

Nos. 42502–5–II, 42594–7–II.
Aug. 13, 2013.

Background: Dog attack victim brought action against county alleging that county negligently failed to take appropriate action in response to complaints about dogs before the attack. The Superior Court, Pierce County, Stephanie A. Arend, J., entered judgment on a jury verdict finding county liable, but also finding that victim's actions contributed to her injuries.

Holdings: On cross-appeals, the Court of Appeals, Penoyar, J., held that:
(1) failure to enforce exception to the public duty doctrine applied to county's failure to apply dangerous dog classification process to dogs following reports by neighbors;
(2) evidence of reasons for prior complaints regarding dogs was admissible in dog attack victim's action; and
(3) evidence was sufficient to support jury's finding of contributory negligence.

Affirmed.

Worswick, C.J., filed opinion dissenting in part.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Court of Appeals reviews a trial court's denial of a motion for judgment as a matter of law in a jury trial de novo, engaging in the same inquiry as the trial court. CR 50.

[2] Trial 388 ⚿139.1(9)

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k139.1 Evidence
388k139.1(5) Submission to or Withdrawal from Jury
388k139.1(9) k. Substantial Evidence. Most Cited Cases

Trial 388 ⚿178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases
Judgment as a matter of law in a jury trial 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. CR 50.

|3| Municipal Corporations 268 ⚿723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care.

|4| Municipal Corporations 268 ⚿723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
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.

|5| Municipal Corporations 268 ⚿742(6)

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k742 Actions
268k742(6) k. Trial, Judgment, and Review. Most Cited Cases
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.

|6| Courts 106 ⚿91(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(1) k. Highest Appellate Court. Most Cited Cases
Court of Appeals is bound to follow the Supreme Court's precedents and has no authority to abolish them.

|7| Animals 28 ⚿66.5(2)

28 Animals
28k66 Injuries to Persons
28k66.5 Dogs
28k66.5(2) k. Vicious Propensities and Knowledge Thereof. Most Cited Cases
Failure to enforce exception to the public duty doctrine applied to county's failure to apply dangerous dog classification process to dogs following reports by neighbors; under ordinance 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.

|8| Municipal Corporations 268 ⚿735

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k735 k. Failure to Enact or Enforce Ordinances or Regulations. Most Cited Cases
Under the failure to enforce exception to the public duty doctrine, 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.

|9| Municipal Corporations 268 ⚿735

268 Municipal Corporations
268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General
268k735 k. Failure to Enact or Enforce Ordinances or Regulations. Most Cited Cases
The plaintiff has the burden to establish each element of the failure to enforce exception to the public duty doctrine, and the court must construe the exception narrowly.

|10| Municipal Corporations 268 ⚖735

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k735 k. Failure to Enact or Enforce Ordinances or Regulations. Most Cited Cases
An ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated.

|11| Statutes 361 ⚖1407

361 Statutes
361IV Operation and Effect
361k1407 k. Mandatory or Directory Statutes. Most Cited Cases
Where a statute uses both "shall" and "may," court presumes that the clause using "shall" is mandatory and the clause using "may" is permissive.

|12| Evidence 157 ⚖155(1)

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k155 Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party
157k155(1) k. In General. Most Cited Cases
Evidence of reasons for prior complaints regarding dogs was admissible in dog attack victim's action against county, alleging that county negligently failed to take appropriate action in response to complaints about dogs before the attack, after county's counsel elicited testimony from animal control officer that the majority of complaints related to leash law violations or excessive barking; the questioning opened the door to evidence rebutting the suggestion that the prior complaints did not involve dangerous dog behavior. ER 401.

|13| Appeal and Error 30 ⚖223

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k223 k. Judgment. Most Cited Cases
Dog attack victim failed to preserve on appeal her claim 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 victim owed no legal duty to keep her sliding door shut, where victim's original motion argued only that she bore no fault because the evidence was insufficient to show that leaving the door open was a breach of her legal duty. CR 50.

|14| Appeal and Error 30 ⚖237(5)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k234 Necessity of Motion Presenting Objection
30k237 At Trial or Hearing
30k237(5) k. Direction of Verdict. Most Cited Cases
Court of Appeals will not consider an appeal from a trial court's denial of a motion for judgment as a matter of law unless the appellant has renewed the motion after the verdict. CR 50(b).

|15| Appeal and Error 30 ⚖230

30 Appeal and Error
30V Presentation and Reservation in Lower

Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 k. Necessity of Timely Objection. Most Cited Cases
To preserve the opportunity to renew a motion for judgment as a matter of law after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury. CR 50(a).

|16| Judgment 228 ⚿199(5)

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(5) k. Motion for Judgment in General. Most Cited Cases
A renewed motion for judgment as a matter of law cannot present new legal theories that were not argued before the verdict. CR 50.

|17| Appeal and Error 30 ⚿216(7)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k216 Requests and Failure to Give Instructions
30k216(7) k. Sufficiency of Requests and Questions Raised. Most Cited Cases
Dog attack victim failed to preserve on appeal her claim that trial court erred by declining to instruct the jury on the emergency doctrine, where she failed to propose the instruction in writing. CR 51(d).

|18| Appeal and Error 30 ⚿216(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k216 Requests and Failure to Give Instructions
30k216(1) k. In General. Most Cited Cases
To challenge the trial court's failure to give a jury instruction, an appellant must have proposed the instruction in the trial court.

|19| Trial 388 ⚿228(1)

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k228 Form and Language
388k228(1) k. Form and Arrangement. Most Cited Cases

Trial 388 ⚿259(1)

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k259 Written Requests or Prayers
388k259(1) k. In General. Most Cited Cases
In general, a party requesting an instruction that appears in the Washington Pattern Instructions must propose the instruction in writing; 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)(1), 51(d)(3).

|20| Animals 28 ⚿74(5)

28 Animals
28k66 Injuries to Persons
28k74 Actions
28k74(5) k. Weight and Sufficiency of Evidence. Most Cited Cases
Evidence was sufficient to support jury's find-

ing of contributory negligence in dog attack victim's negligence action against county alleging that county negligently failed to take appropriate action in response to complaints about dogs before the attack; victim breached her duty by failing to exercise the care a reasonable person would have exercised in leaving her sliding glass door open on the night of the attack even though she knew that neighbor's dogs had previously entered her home through the door and by attempting to save other dog during attack rather than flee, and her injuries were proximately caused by her negligence since the dogs entered her home through the door and she admitted to sustaining additional injuries when she attempted to rescue other dog.

|21| Appeal and Error 30 ⚿1001(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) k. In General. Most Cited Cases

Court of Appeals cannot overturn the jury's verdict unless it is clearly unsupported by substantial evidence.

|22| Appeal and Error 30 ⚿930(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k930 Verdict
30k930(1) k. In General. Most Cited Cases

When reviewing a jury verdict for substantial evidence, Court of Appeals must consider all evidence and draw all reasonable inferences in the light most favorable to the verdict.

|23| Negligence 272 ⚿452

272 Negligence
272XIII Proximate Cause
272k450 Plaintiff's Fault as Cause
272k452 k. Necessity of Causal Connection. Most Cited Cases

Negligence 272 ⚿503

272 Negligence
272XVI Defenses and Mitigating Circumstances
272k501 Plaintiff's Conduct or Fault
272k503 k. Care Required in General. Most Cited Cases

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.

|24| Negligence 272 ⚿1717(1)

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1715 Defenses and Mitigating Circumstances
272k1717 Fault of Plaintiff or Third Persons
272k1717(1) k. In General. Most Cited Cases

Contributory negligence is usually a factual question for the jury.

Appeal from Pierce County Superior Court; Hon. Stephanie A. Arend, J.Donna Yumiko Masumoto, Pierce Co Prosec Atty Office, Tacoma, WA, for Appellant.

David P. Lancaster, Hollenbeck Lancaster & Miller, Bellevue, WA, Nancy Katherine McCoid, Soha & Lang PS, Bradley Dean Westphal, Lee Smart PS Inc, Seattle, WA, for Respondent.

Shelly K. Speir, Troup ChristnachtLadenburg McKasy et al, Tacoma, WA, for Appellant/

Cross–Respondent.

Michael Joseph McKasy, Attorney at Law, Tacoma, WA, for Respondent/Cross–Appellant.

PUBLISHED OPINION

PENOYAR, J.

*1 ¶ 1 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

¶ 2 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.

¶ 3 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.

¶ 4 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.

¶ 5 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.

*2 ¶ 6 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.

¶ 7 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.

¶ 8 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.[FN1] 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.

¶ 9 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.

***3** ¶ 10 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 *should* have declared Betty potentially dangerous after any of the three incidents on February 10, February 22, and March 1, 2007.

¶ 11 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.

¶ 12 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.

¶ 13 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.

¶ 14 Betty and Tank then entered Gorman's bedroom and jumped onto her bed. Betty bit Gor-

man on the left arm. Romeo then jumped off the bed and was mauled by both Betty and Tank.

¶ 15 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.

¶ 16 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

¶ 17 Gorman then filed this suit, claiming that (1) Wilson, Martin, and Evans–Hubbard were strictly liable for the harm their dogs caused Gorman [FN2] 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.

*4 ¶ 18 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 redirect examination, Gorman's counsel elicited testimony that, in three of these incidents, a dog unsuccessfully attempted to attack a person.

¶ 19 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 proceed under the failure to enforce exception to the public duty doctrine.[FN3] 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.

¶ 20 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.

¶ 21 The jury found all defendants, including Pierce County, liable to Gorman. The jury also found that Gorman's fault contributed to her injuries.[FN4] 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.

¶ 22 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

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

[1][2] ¶ 24 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 Wash.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 Wash.2d at 491, 493, 173 P.3d 273.

***5** [3][4][5] ¶ 25 Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care. *Osborn v. Mason County,* 157 Wash.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 Wash.2d 774, 785, 30 P.3d 1261 (2001) (quoting *Taylor v. Stevens County,* 111 Wash.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 Wash.2d at 786, 30 P.3d 1261. 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 Wash.App. 526, 534, 186 P.3d 1140 (2008).

A. The Public Duty Doctrine Is Not Contrary to Law

¶ 26 Gorman asks us to abolish the public duty doctrine and instead to apply a different test.[FN5] We decline to do so because our Supreme Court precedent approving the public duty doctrine binds us.

[6] ¶ 27 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 Wash.2d 275, 287–88, 669 P.2d 451 (1983).[FN6] 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 Commc'ns Ctr.,* 175Wn.2d 871, 886 n. 3, 175 Wash.2d 871, 288 P.3d 328 (2012) (Chambers, J., concurring and joined by a majority of the justices) (listing 29 instances).[FN7] 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 Wash.2d 566, 590, 146 P.3d 423 (2006).

¶ 28 Gorman next urges us to apply, instead of the public duty doctrine, the four-part test set out in *Evangelical United Bretheren Church of Adna v. State,* 67 Wash.2d 246, 255, 407 P.2d 440 (1966).[FN8] But Gorman misapprehends the purpose of the *Evangelical* test, which recognizes limited grounds for governmental immunity flowing from the separation of powers. *See* 67 Wash.2d at 253–55, 407 P.2d 440. 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 Wash.2d at 253, 407 P.2d 440. 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 Wash.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume,* 134 Wash.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

***6** [7] ¶ 29 The parties dispute only whether

the failure to enforce exception to the public duty doctrine applies in this case. We hold that it does.

[8][9] ¶ 30 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 Wash.2d 262, 268, 737 P.2d 1257 (1987). The plaintiff has the burden to establish each element of the failure to enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 531, 799 P.2d 250 (1990).

¶ 31 Contesting only the second element, Pierce County argues that it had no statutory duty to take corrective action.[FN9] Gorman contends that former PCC 6.07.010(A) created a duty to classify potentially dangerous dogs. We agree with Gorman.

[10] ¶ 32 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 Wash.App. 791, 800, 251 P.3d 270, *review denied*, 172 Wash.2d 1017, 262 P.3d 63 (2011); *Donohoe v. State*, 135 Wash.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.

¶ 33 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 Wash.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 Wash.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 Wash.2d at 9–10, 43 P.3d 4. But if the statute has more than one reasonable meaning, the statute is ambiguous and statutory construction is necessary. *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4.

¶ 34 A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Campbell & Gwinn*, 146 Wash.2d at 11–12, 43 P.3d 4. We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wash.2d at 11, 43 P.3d 4.

¶ 35 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" [FN10]] set forth in [PCC] 6.02.010[T] [FN11]. The finding must be based upon:
>
> *7 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.)

[11] ¶ 36 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 Wash.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 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. [FN12]

¶ 37 Division One has held that the failure to enforce exception applies in comparable circumstances. *Livingston v. City of Everett*, 50 Wash.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 Wash.App. at 657, 751 P.2d 1199. Animal control eventually impounded the dogs but released them to their owner the next day. *Livingston*, 50 Wash.App. at 657, 751 P.2d 1199. A few weeks later, the dogs attacked a young boy. *Livingston*, 50 Wash.App. at 657, 751 P.2d 1199. 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 Wash.App. at 658, 751 P.2d 1199. The officer never evaluated the dogs' dangerousness but released them to their owner anyway. *Livingston*, 50 Wash.App. at 657, 751 P.2d 1199. The officer violated his statutory duty to exercise his discretion by evaluating the dogs' dangerousness before releasing them. *Livingston*, 50 Wash.App. at 659, 751 P.2d 1199. Accordingly, the failure to enforce exception applied and the city could be found liable for injuries the dogs caused after their release. *Livingston*, 50 Wash.App. at 659, 751 P.2d 1199. 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.

***8** ¶ 38 Pierce County argues that this case is similar to *Pierce*, 161 Wash.App. 791, 251 P.3d 270. 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 Wash.App. at 801, 251 P.3d 270. There, the plaintiff sued the county for negligently inspecting his gas line after he was injured in a gas explosion. *Pierce*, 161 Wash.App. at 796, 251 P.3d 270. 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 Wash.App. at 799, 251 P.3d 270 (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 Wash.App. at 799, 251 P.3d 270 (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 Wash.App. at 801, 251 P.3d 270. If officials observed a code violation, they had authority—but were not required—to authorize disconnection or serve notices of violation. *Pierce*, 161 Wash.App. at 799, 251 P.3d 270.

¶ 39 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.

¶ 40 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

¶ 41 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. [FN13]

*9 ¶ 42 We review claimed errors of law in jury instructions de novo. [FN14] *Hue v. Farmboy Spray Co.*, 127 Wash.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 Wash.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Starwood*, 130 Wash.2d 726, 732, 927 P.2d 240 (1996)). Read as a whole, the jury instructions here properly state the applicable law.

¶ 43 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.

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.

¶ 44 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.
>
> ***10** 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

[12] ¶ 45 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.

¶ 46 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 Wash.2d 246, 283, 840 P.2d 860 (1992); *Wilson v. Horsley*, 137 Wash.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 Wash.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.

¶ 47 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.

¶ 48 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 ques-

tioning about the details. Accordingly, Gorman elicited testimony from the same witness that three of the prior complaints involved attempted attacks.

***11** ¶ 49 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

[13] ¶ 50 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.

[14][15] ¶ 51 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 Wash.App. 588, 592, 283 P.3d 567 (2012), *review granted,* 176 Wash.2d 1010, 297 P.3d 709 (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 Wash.App. 542, 552–53, 273 P.3d 1029, *review denied,* 175 Wash.2d 1017, 290 P.3d 133 (2012); *see* CR 50(a).

[16] ¶ 52 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 Wash.2d 172, 193 n. 20, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.,* 157 Wash.2d 214, 137 P.3d 844 (2006); *Browne v. Cassidy,* 46 Wash.App. 267, 269, 728 P.2d 1388 (1986). Gorman did not preserve her argument for appeal, so it fails.

V. EMERGENCY DOCTRINE INSTRUCTION

[17] ¶ 53 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.

[18][19] ¶ 54 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 Wash.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 Wash.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).

***12** ¶ 55 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

[20] ¶ 56 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.

[21][22] ¶ 57 We cannot substitute our judgment for that of the jury. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell*, 83 Wash.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 Wash.2d at 107–08, 864 P.2d 937 (quoting *O'Connell*, 83 Wash.2d at 839, 523 P.2d 872). 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 Wash.2d 335, 336, 438 P.2d 596 (1968).

[23][24] ¶ 58 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 Wash.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 Wash.App. 698, 713, 201 P.3d 1028 (2009).

¶ 59 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.

¶ 60 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.

***13** ¶ 61 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 Wash.App. at 605, 283 P.3d 567 (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.

¶ 62 Affirmed.

I concur: VAN DEREN, J.

WORSWICK, C.J., dissenting in part.

¶ 63 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 LB that the failure to enforce exception to the public duty doctrine applies here.

¶ 64 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 Wash.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 Wash.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 Wash.2d at 268, 737 P.2d 1257.

¶ 65 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 Wash.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 Wash.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 Wash.App. at 849, 142 P.3d 654. In addition, we must construe the failure to enforce exception narrowly. *Atherton*, 115 Wash.2d at 531, 799 P.2d 250.

¶ 66 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*

***14** ¶ 67 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) [FN15]]. 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.

¶ 68 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 Wash.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 Wash.2d at 11, 43 P.3d 4. Where, as here, 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 Wash.2d 701, 704, 648 P.2d 435 (1982).

¶ 69 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." [FN16] Majority at 13. But a plain meaning analysis requires us to consider " *all* that the Legislature has said in the statute." *Campbell &*

Gwinn, 146 Wash.2d at 11, 43 P.3d 4 (emphasis added).

¶ 70 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*

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

***15** ¶ 72 First, the majority misplaces its reliance on *Livingston v. City of Everett*, 50 Wash.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 Wash.App. at 658-59, 751 P.2d 1199. 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 Wash.App. at 658, 751 P.2d 1199 (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 Wash.App. at 657, 659, 751 P.2d 1199.

¶ 73 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 Wash.App. at 658, 751 P.2d 1199. 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.

¶ 74 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 Wash.2d at 269, 737 P.2d 1257 (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 Wash.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 Wash.App. at 659, 751 P.2d 1199 (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.

¶ 75 For her own part, Gorman relies on *King v. Hutson*, 97 Wash.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.[FN17] 97 Wash.App. at 595, 987 P.2d 655. 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 Wash.App. at 596, 987 P.2d 655. 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 Wash.App. at 593, 987 P.2d 655. 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 Wash.App. at 593, 987 P.2d 655. 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 Wash.App. at 596, 987 P.2d 655. 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 Wash.App. at 595, 987 P.2d 655.

*16 ¶ 76 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.

¶ 77 For similar reasons, the majority fails to convincingly distinguish this case from *Pierce v. Yakima County*, 161 Wash.App. 791, 799–801, 251 P.3d 270, *review denied*, 172 Wash.2d 1017, 262 P.3d 63 (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.

¶ 78 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.

¶ 79 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.

FN1. There was conflicting testimony on whether a second dog was present and, if so, whether it was Tank.

FN2. RCW 16.08.040(1) makes dog owners strictly liable for injuries their dogs cause.

FN3. 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.

FN4. The. jury apportioned fault as fol-

lows: 52 percent to Wilson and Martin, 42 percent to Pierce County, 5 percent to Evans–Hubbard, and 1 percent to Gorman.

FN5. Gorman proposes this argument as an alternative ground on which we may affirm the trial court. *See* RAP 2.5(a).

FN6. "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 Wash.2d at 288, 669 P.2d 451 (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.

FN7. 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 Wash.2d at 878, 288 P.3d 328. But the public duty doctrine is treated as a rule of law. *See Munich*, 175 Wash.2d at 877–88, 288 P.3d 328.

FN8. 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 Wash.2d at 255, 407 P.2d 440.

FN9. 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.

FN10. 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....

FN11. The ordinance actually cites former PCC 6.02.010(Q) (2007), but that subsection defined "livestock."

FN12. The dissent reads the ordinance as a whole to be discretionary, while our view is that certain provisions are mandatory and others discretionary.

FN13. 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 Wash.2d 285, 298–99,

597 P.2d 101 (1979).

FN14. 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 Wash.2d at 92 n. 23, 896 P.2d 682.

FN15. 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).

FN16. 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.

FN17. State law governs "dangerous dogs," but it also directs municipalities and counties to regulate "potentially dangerous dogs ." RCW 16.08.070(2), .090(2).

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Case Name: Gorman v. Pierce County

Court of Appeals Case Number: 42502-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Appendix A

Comments:

Appendix A to Petition for Discretionary Review

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APPENDIX B

FORMER PIERCE COUNTY CODE:

CHAPTER 6.02
"Animal Control--General Provisions"

CHAPTER 6.07
"Potentially Dangerous Dogs"

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 (i.e., 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 judgement 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 incudes 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 either on public or private property, or (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. 87-40S § 1 (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. 87-40S § 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)

6.02.030 Authority to Pursue.

Those employees or agents of the County charged with the duty of seizing animals running at large may pursue such animals onto County-owned property, vacant property, and unenclosed private property, and seize, remove, and impound the same. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.040 Notice of Impounding Animal.

Upon the impoundment of any animal under the provisions of this Title, the animal control agency shall immediately notify the owner, if the owner is known, of the impounding of such animal, and of the terms upon which said animal can be redeemed. The impounding authority shall retain said animal for 48 hours following actual notice to the owner. The notifying of any person over the age of 18 who resides at the owner's domicile shall constitute actual notice to the owner. If the owner of said animal so impounded is unknown, then said animal control agency shall make a reasonable effort to locate and notify the owner of said animal. (Ord. 99-17 § 1 (part); 1999; Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.050 Hindering an Officer.

It shall be unlawful for any person to interfere with, hinder, delay, or impede any officer who is enforcing the provisions of this Title as herein provided. (Ord. 87-40S § 1 (part), 1987)

6.02.060 Interference With Impounding.

It is unlawful for any person to willfully prevent or hinder the impounding of any animal, or to by force or otherwise remove any animal from the animal shelter without authority of the person in charge of the animal shelter, or without payment of all lawful charges against such animal, or to willfully resist or obstruct any officer in the performance of any official duty. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.070 Redemption of Dogs.

The owner of any dog impounded under this Title may redeem said dog within 48 hours from time of impounding by paying to the animal control agency the appropriate redemption fee. The first time a dog is impounded within a one year period, the redemption fee is $25.00; for the second impound within a one year period the redemption fee is $50.00; for the third and subsequent impounds within a one year period the redemption fee is $75.00. If a dog is wearing a current pet license at the time of the first impound, no redemption fee will be collected. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such dog, the sum of $6.00 per day for each day, including the first and last days, that the dog is retained by the impounding authority. This boarding charge will be collected for the first time impound whether the animal is wearing a pet license or not. If an impounded dog is not redeemed by the owner within 48 hours, then any person may redeem it within the next 48 hours by complying with the above provision. In case such dog is not redeemed within 96 hours, it may be humanely destroyed or otherwise disposed of within the discretion of the animal control agency. (Ord. 99-17 § 1 (part), 1999; Ord. 97-111 § 2, 1997; Ord. 88-138 § 1, 1988; Ord. 87-40S § 1 (part), 1987)

6.02.075 Redemption of Livestock.

The owner of livestock impounded under this Title may redeem said livestock within 48 hours from time of impounding by paying to the impounding authority a redemption fee of $35.00 per animal for small livestock (i.e., goats, sheep, swine, ostriches, rhea, emu, etc.) and a redemption fee of $75.00 per animal for larger livestock (i.e., cattle, horses, mules, llamas, etc.). In addition, the cost of a private livestock hauler, if one is used, is to be paid at the time of redemption. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such animal, the sum of $6.00 for each day, including the first and last days, that the animal is cared for at the impounding authority. The livestock may be cared for by a private boarding facility, in which case that facility's boarding fees shall be paid at the time of redemption. (Ord. 99-17 § 1 (part), 1999)

6.02.080 Redemption of Animals Other Than Dogs and Livestock.

The owner of any animal other than a dog or livestock impounded under the provisions of this Title may redeem it within 48 hours from the time of impounding by paying to the animal control agency a redemption fee of $15.00. In addition to the redemption fee, the redeemer shall pay, as a boarding charge for the caring and keeping of such animal, the sum of $4.00 per day for each day, including the first and last days, that the animal is retained by the impounding authority. If such animal is not redeemed by the owner within 48 hours, it may be humanely destroyed or otherwise disposed of at the discretion of the animal control agency; provided, however, that any animal so impounded less than two months of age, at the discretion of the animal control agency, may be humanely destroyed or otherwise disposed of at any time after impounding. (Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 88-138 § 2, 1988; Ord. 87-40S § 1 (part), 1987)

6.02.085 Mandatory Spay/Neuter for Impounded Dogs and Cats - Deposit - Refund - Exception.

A. **Mandatory Spay/Neuter - Deposit.** No unaltered dog or cat that is impounded more than once in any 12-month period may be redeemed by any person until the sum of $35.00 is deposited with the Auditor, or to the Auditor's designated licensing agent, to cover the cost of spaying or neutering the animal.

B. **Refund.** The alteration deposit shall be refunded upon a showing of proof of alteration from a licensed veterinarian.

C. **Exception.** The alteration deposit shall not be required if the owner or other person redeeming the animal provides a written statement from a licensed veterinarian that the spay or neuter procedure would be harmful to the animal.

(Ord. 2005-108 § 1 (part), 2005; Ord. 92-35 § 1 (part), 1992)

6.02.088 Conditions of Release.

The animal control agency is authorized to refuse to release to its owner any animal which has been impounded more than once in a 12-month period unless satisfied that the owner has taken steps that the violation will not occur again. The agency may impose reasonable conditions which must be satisfied by the owner before release of the animal, including conditions assuring that the animal will be confined. Any violation of the conditions of release is unlawful and shall constitute a Class 3 Civil Infraction pursuant to Chapter 1.16 PCC. (Ord. 99-17 § 1 (part), 1999)

6.02.090 Injured or Diseased Animals.

Any animal suffering from serious injury or disease may be humanely destroyed by the animal control agency; provided, that the animal control agency shall immediately notify the owner, if the owner is known, and if the owner is unknown, make a reasonable effort to locate and notify the owner. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.100 Duties Upon Injury or Death to an Animal.

The operator of a vehicle involved in an accident resulting in injury or death to an animal or livestock, shall immediately stop the vehicle at or as near to the scene of the accident as possible, and return thereto, and shall give to the owner or other competent person having custody of the animal, the name and address of the operator of the vehicle and the registration number of the vehicle involved in the accident. If the owner or other competent person is not the person at the scene of the accident, the operator shall take reasonable steps to locate the owner or custodian of

the said animal and shall supply the information herein above required. If the animal is injured to the extent that it requires immediate medical attention and there is no owner or custodian present to look after it, the operator of said vehicle shall immediately report the situation to the Pierce County Sheriff's Office. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.110 Poisoning of Animals.

No person shall place or expose or cause to be placed or exposed in any yard or lot of vacant or enclosed land, or on any exposed place or public place, or on any street, alley, or highway, or other place where the same may be taken internally by a child, person, or by any domestic animal, or fowl, any poisonous substance which, if taken internally may cause death or serious sickness. The provisions of this Section shall not apply to the killing by poison of any domestic animal, or fowl in a lawful and humane manner by its owner or by a duly authorized agent of such owner or by a person acting pursuant to instructions from a duly constituted public authority. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.120 Abatement of Nuisances.

Any person convicted of a misdemeanor for violating any of the provisions of this Title in the keeping or maintenance of any nuisance as herein defined shall, in addition to any fine or imprisonment imposed by the Court in such action, be ordered to forthwith abate and remove the nuisance; and if the same is not done by the offender within 24 hours, the same shall be abated and removed under the direction the officer authorized by the order of said Court, which order of abatement shall be entered upon the docket of the Court and made a part of the judgement in the action.

Any such person shall be liable for all costs and expenses of abating the same when the nuisance has been abated by any officer of Pierce County or the animal control agency of Pierce County, which costs and expenses shall be taxed as part of the costs of the prosecution against the party, liable to be recovered as other costs are recovered; and in all cases where the officer is authorized by the Court, shall abate any nuisance and he/she shall keep an account of all expenses attending the abatement; and in addition to other powers herein given to collect the costs and expenses, Pierce County may bring suit for the same in any Court of competent jurisdiction against the person keeping or maintaining the nuisance so abated.
(Ord. 87-40S § 1 (part), 1987)

6.02.130 Penalty for Violation.

A person who violates any of the provisions of Sections 6.02.050, 6.02.060, 6.02.100, and 6.02.110 of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. (Ord. 87-40S § 1 (part), 1987)

6.02.140 Severability.

If any provision of this Title or its application to any person or circumstances are held to be invalid, the remainder of this Title or the application of the provisions to other persons or circumstances shall not be affected. (Ord. 87-40S § 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. 87-40S § 4 (part), 1987)

6.07.020 Permits and Fees.

Following a declaration of a potentially dangerous dog and the exhaustion of the appeal therefrom, the owner of a potentially dangerous dog shall obtain a permit for such dog from the animal control agency, and shall be required to pay the fee for such permit in the amount of $250.00 to the Auditor or the Auditor's designee. In addition, the owner of a potentially dangerous dog shall pay an annual renewal fee for such permit in the amount of $50.00 to the Auditor or the Auditor's designee.

Should the owner of a potentially dangerous dog fail to obtain a permit for such dog or to appeal the declaration of a potentially dangerous dog, the County or the County's designee is authorized to seize and impound such dog and, after notification to the owner, hold the dog for a period of no more than five days before destruction of such dog.

(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 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 therefrom, 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)

6.07.035 Notification of Status of a Potentially Dangerous Dog.

A. The owner of a dog that has been classified as a potentially dangerous dog shall immediately notify the Auditor and Sheriff when such dog:
   1. Is loose or unconfined; or
   2. Has bitten or otherwise injured a human being or attacked another animal or livestock.

B. The owner of a dog that has been classified as a potentially dangerous dog shall immediately notify the Auditor or the Auditor's designee when such dog:
   1. Is sold or given away or dies; or
   2. Is moved to another address.

Prior to a potentially dangerous dog being sold or given away, the owner shall provide the name, address, and telephone number of the new owner to the Auditor or the Auditor's designee. The new owner shall comply with all of the requirements of this Chapter.
(Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990)

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 judgement, 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)

PIERCE COUNTY PROSECUTOR

September 12, 2013 - 1:40 PM

Transmittal Letter

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Comments:

Appendix B to Petition for Discretionary Review

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