NO. 42502-5-II

**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

SUE ANNE GORMAN,

Respondent and Cross-Appellant

vs.

PIERCE COUNTY, et al,

Appellant and Cross-Respondent

# REPLY BRIEF OF APPELLANT PIERCE COUNTY

MARK LINDQUIST
Prosecuting Attorney

By
DONNA MASUMOTO
Deputy Prosecuting Attorney
Attorneys for Pierce County

955 Tacoma Avenue South
Suite 301
Tacoma, WA 98402
PH: (253) 798-4289

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## I. ARGUMENT IN REPLY.

### A. The Court Should Reject Plaintiff's Challenge to the Public Duty Doctrine Because Her Argument is Contrary to Binding Precedent From the Washington Supreme Court.

The plaintiff argues the court should abolish the public duty doctrine as being inconsistent with prior law. Plaintiff's argument should be rejected as contrary to binding precedent from the Washington Supreme Court. *See Chambers-Castanes v. King County*, 100 Wn.2d 275, 287-88, 669 P.2d 451 (1983)(Court affirms applicability of public duty doctrine).

The courts do not "lightly set aside precedent." *State v. Kier*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008). Stare decisis promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997). The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society. *See In re Matter of Mercer*, 108 Wn.2d 714, 720-21, 741 P.2d 559 (1987).

A party seeking to overrule precedent must meet the heavy burden of showing that the precedent is **both** "incorrect" and "harmful." *Kier*,

164 Wn.2d at 804-05. Plaintiff fails to meet these burdens. Plaintiff argues that the public duty doctrine is incorrect and should be abolished because it "contravenes" the legislature's abrogation of sovereign immunity in RCW 4.96.010, which was enacted in the early 1960's. This same argument was considered and rejected by the Washington Supreme Court almost 30 years ago. *Chambers-Castanes*, 100 Wn.2d at 287-88. The court specifically found this argument "was not well founded." *Chambers-Castanes*, 100 Wn.2d at 287-88. The court rejects invitations to overrule prior decisions based on arguments that were adequately considered and rejected in the original decisions themselves. *Key Design Inc. v. Moser*, 138 Wn.2d 875, 883, 983 P.2d 653 (1999) (noting the various complaints against the decision were "not new" and had already been "considered and rejected"). The plaintiff's renewal of this argument should be rejected.

The legislature is presumed to be familiar with case law involving judicial interpretations of statutes. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Legislative inaction following a judicial decision is deemed to indicate legislative acquiescence to, or acceptance of, the decision. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n. 3, 971 P.2d 500 (1999). The legislature has had almost 30 years to take "corrective action" with regard to *Chambers-Castanes*.

The legislature's lengthy period of inaction strongly suggests that the court's opinion in *Chambers-Castanes* either does not contravene legislative intent or that the legislature has acquiesced to the court's decision.

Moreover, plaintiff fails to show that the public duty doctrine is "harmful" in this case. Dog owners are held strictly liable for damages when their dog bites a person who is either in a public place or who is lawfully in a private place at the time of the bite. RCW 16.08.040. This statute has been the law in Washington for over 70 years. See Laws of 1941, ch. 77 § 1; Rem. Supp. 1941 § 3109-1. A dog owner is strictly liable regardless of whether the dog has bitten before or whether the owner had any knowledge the dog would bite. RCW 16.08.040. The three dog owners in this case stipulated to this liability under this statute. Two of these owners, Wilson and Martin, were also found *criminally* liable arising from this incident and required to make restitution to the plaintiff as part of their criminal sentence. The plaintiff cannot show that application of the public duty doctrine leaves victims of dog bites uncompensated for their injuries. The plaintiff's challenge to the public duty doctrine should be rejected.

### B. Plaintiff Fails to Show That the Failure to Enforce Exception to the Public Duty Doctrine Applies To This Case.

### 1. Former PCC 6.07.010

Plaintiff fails to show that Former PCC 6.07.010 imposed a mandatory duty on Pierce County's Animal Control to declare Betty or Tank a "potentially dangerous dog." Plaintiff's argument centers on the first three sentences of that ordinance, which are as follows:

> 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 [for the term "potentially dangerous"]. 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 6.02.010Q.; 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.

Former PCC 6.07.010[1].

Plaintiff argues the "shall" in the first sentence imposes a mandatory duty because this interpretation was testified to by a witness during the jury trial: *"[a]s Ms. McVicker testified*, the word 'shall' created a mandatory duty to 'classify' potentially dangerous dogs which could not

[1] The remaining three sections of Former PCC 6.07.010 establish the procedures for: (1) including all the proper information in the declaration; (2) effecting proper service of the declaration on the dog's owner; and (3) the hearing and appeal procedures applicable when the dog owner contests the potentially dangerous dog declaration. See Former PCC 6.07.010.

be ignored. . . ." Brief of Respondent, at 38 (emphasis added). Ms. McVicker was employed by the local humane society. RP 953. Her organization formerly performed animal control services for Pierce County, but they got "out of the animal control business" in Pierce County by the end of 2004, about two-and-a-half years prior to the incident in question. RP 957-58. The plaintiff called Ms. McVicker as a witness below and relies heavily on her opinion testimony throughout her briefing. But a witness' opinion testimony on how the witness *personally* might interpret Former PCC 6.07.010 has no probative value here. The court derives a statute's meaning *from the wording of the statute itself*, unless the statute is ambiguous. *Hansen v. City of Everett*, 93 Wn. App. 921, 924–25, 971 P.2d 111 (1999). If a statute is ambiguous, the rules of statutory construction apply. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). The court's primary goal in interpreting statutes is to ascertain the legislature's intent. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). Statutory interpretation is a matter of law to be reviewed de novo. *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 228, 989 P.2d 569 (1999). Plaintiff provides no authority that a statute's meaning can be derived from opinion testimony taken at trial. The witness' testimony does not support plaintiff's interpretation of the ordinance.

Plaintiff nonetheless argues the "shall" in the first sentence imposed a mandatory duty to declare Betty and Tank as potentially dangerous dogs. But the ordinance specifies in its second sentence that Animal Control's ability to declare a dog potentially dangerous is contingent upon probable cause to believe a particular animal fits within that classification. The existence of probable cause triggers Animal Control's **discretion** to issue a declaration:

> 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 [for the term "potentially dangerous"].

Former PCC 6.07.010 (emphasis added).

Plaintiff argues that the **"may"** in this second sentence should **not** be read as creating discretion with regard to the contents of **this** sentence, *i.e.*, Animal Control's discretion to issue a finding and declaration once probable cause exists. Plaintiff instead argues that the "may" should be read as creating discretion with regard to the contents **of the third sentence,** which addresses the evidence required to support Animal Control's finding and declaration. In other words, plaintiff urges a misreading of the ordinance in which the 'may" in the second sentence somehow applies only to the third sentence. Plaintiff argues:

> [t]he use of the word 'may' later in the same ordinance did

> not cancel this duty or render it discretionary--the discretion only applied to the later clause regarding an officer's consideration of the evidence gathered.

Brief of Respondent, at 38.

The ordinance's language does not support plaintiff's interpretation. There is no basis for construing the "may" contained in the second sentence as conferring discretion with regards to an officer's consideration of the evidence in the third sentence. Instead, the "may" grants the discretion to initiate the "find and declare" process once the officer has probable cause to believe a dog is potentially dangerous. The ordinance's third sentence makes it clear that the officer's consideration of the evidence has no discretionary component. Instead, the officer's potentially dangerous dog finding "**must** be based upon" one of the four enumerated pieces of evidence, *i.e.*, a "written complaint of a citizen", a "dog bite report" filed with the County, etc. The plain language of the ordinance does not support the plaintiff's interpretation, and she fails to establish a mandatory duty arising from Former PCC 6.07.010.

**2. PCC 6.07.040.**

Plaintiff also asserts PCC 6.07.040 imposed a mandatory statutory duty to "seize and impound" Betty and Tank. However, she cannot show Animal Control had **any** authority to seize and impound the dogs under this ordinance, let alone a mandatory duty to take action.

PCC 6.07.040 provides in relevant part:

> . . . 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**. . . .

PCC 6.07.040 (emphasis added). Animal Control's ability to "seize[] and impound[]" under this ordinance only applies if the dog is in violation of either: (1) the restrictions contained in Section 6.07.020", or (2) the restrictions imposed as part of a potentially dangerous dog declaration. Betty and Tank were **never** in violation of either set of restrictions. A dog can only be in violation of the restrictions contained in PCC 6.07.020 if a potentially dangerous dog declaration has first been issued against the dog. PCC 6.07.020.[2] Once a declaration is filed, the dog's owner must obtain a permit to own a potentially dangerous dog. If the dog's owner fails to obtain the permit or fails to renew it annually, the dog is in violation. This

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[2] PCC 6.07.020 provides:

> **Following a declaration of a potentially dangerous dog and the exhaustion of the appeal there from,** 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. . . **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.

PCC 6.07.020(emphasis added).

violation would trigger Animal Control's authority to seize and impound the dog under PCC 6.07.040. The dog owners in this case were never required to obtain permits since declarations were not filed against Betty and Tank. The dogs were never subject to the permit requirement. Consequently, Animal Control never had authority to seize and impound the dogs under this ordinance.

Nor did Animal Control ever have the authority to seize and impound Betty and Tank pursuant to the second set of violations, which arise under PCC 6.07.030. This ordinance also requires the filing of a dangerous dog declaration as a prerequisite before a dog can be found in violation:

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

PCC 6.07.030 (emphasis added). As indicated in the ordinance, the requirement that a dog be "securely leashed and humanely muzzled" is applicable only **after** the filing of a "declaration of a potentially dangerous dog and the exhaustion of the appeal there from." Betty and Tank were not subject to these restrictions because a declaration was never filed

against them. Plaintiff cannot show that Pierce County ever had lawful authority to seize and impound either dog under PCC 6.07.040, let alone a mandatory duty to take any such action. Plaintiff cannot show that the failure to enforce exception applied in this case.

Plaintiff nonetheless argues that Pierce County "should have" issue a potentially dangerous dog declaration and "should have" seized and impound Betty and Tank. These arguments should be rejected. "No Washington court has ever recognized a separate and distinct cause of action for negligent investigation." *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237, 824 P.2d 1237 (1991)(affirming trial court's CR 12(b)(6) dismissal of plaintiff's negligent investigation claim against municipality and individually named fire department investigator).

The issue here is not whether the dogs "should have" been declared potentially dangerous or "should have" been seized and impounded. Instead, the issue is whether Pierce County had a mandatory duty to take these specific actions to correct a statutory violation under the failure to enforce exception. *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004). The failure to enforce exception only applies if a statutory duty to take corrective action exists. *See Halleran*, 123 Wn. App. At 714. Such a duty does not exist if the government agent has broad discretion about whether and how to act. *Smith v. City of Kelso*, 112

Wn. App. 277, 282, 48 P.3d 372 (2002). In this case, Former PCC 6.07.010 granted Animal Control the discretion to declare a dog as potentially dangerous whenever there was probable cause to do so. Animal Control had no mandatory duty to seize and impound Betty and Tank under PCC 6.07.040 because they were not in violation of that ordinance. The plaintiff has not shown the existence of a mandatory statutory duty necessary for application of the failure to enforce exception. Plaintiff's case against Pierce County is barred by the public duty doctrine.

Plaintiff argues that this case is "comparable" to *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999). It is not. In *King*, Stevens County failed to confiscate a dangerous dog after it participated in an attack on the plaintiff. The court affirmed the dismissal of the plaintiff's claim arising from the attack itself because the dog did not fit the definition of "dangerous dog" contained in RCW 16.08.070(2) at the time of the attack, but the court allowed the plaintiff's claim arising from the County's failure to confiscate the dog *after* the attack to go forward.

In *King*, the statutory duty at issue *after* the attack on the plaintiff arose under RCW 16.08.100, which requires that a county "shall . . . immediately confiscate[]" any "dangerous dog" that is in violation of the statutory requirements imposed on such dogs. *See King*, 97 Wn. App. At 594-95. Also at issue was the statutory duty to "confiscate, quarantine,

and thereafter destroy a dangerous dog that attacks or bites a person or other domestic animal." *King*, 97 Wn. App. At 595 (citing RCW 16.08.100(2). This case is distinguishable.

The statutory duties at issue in *King* to confiscate and impound a "dangerous dog" are not at issue here. RCW Chapter 16.08 contains regulations governing only "dangerous dogs" as opposed to "potentially dangerous dogs." The legislature specifically declined to enact legislation regulating "potentially dangerous dogs," and instead provided that "[p]otentially dangerous dogs shall be regulated only by local, municipal, and county ordinances." RCW 16.08.090(2). The Pierce County Code is the source for the relevant regulations pertaining to *potentially* dangerous dogs, not RCW Chapter 16.08. Plaintiff has failed to show any code provision that authorized Animal Control to seize and impound Betty and Tank prior to the incident in question, let alone any code provision that imposed a mandatory duty to take such an action. Moreover, unlike in *King*, Betty and Tank were seized and impounded immediately after the incident in question. *King* does not support plaintiff's argument.

### C. The Trial Court's Error in Instructing the Jury on Pierce County's Duty of Care Necessitates Reversal.

#### 1. Jury Instruction Number 5 Contained a Clear Misstatement of the Law Requiring Reversal under *Keller v. City of Spokane.*

The plaintiff argues that the trial court's error in instructing the jury on Pierce County's duty of care should be deemed harmless. Plaintiff's argument should be rejected. A jury instruction that contains "[a] clear misstatement of the law. . . is presumed to be prejudicial." *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). The trial court instructed the jury that it could find Pierce County liable in negligence for breaching a duty "to protect the public from a potentially dangerous dog." CP 881. It is well-settled that only a duty owed specifically to the plaintiff is actionable in negligence:

> Whether the defendant is a governmental entity or a private person, *to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general.*

*Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)(emphasis added). The court's instruction was a clear misstatement of the law and was presumptively prejudicial under *Keller*.

In *Keller*, the court overturned a jury verdict in a negligence case because the jury had not been properly instructed on the scope of the defendant's duty of care. Specifically, the court found the instructions concerning the scope of the defendant's duty "inherently misleading and legally erroneous" to the extent that they allowed the jury to premise the scope of the defendant's duty of care on the absence of negligence by the plaintiff. *Keller*, 146 Wn.2d at 251.

As in *Keller*, this case also involves a negligence cause of action and a defective jury instruction that misstated the defendant's duty of care, an essential element of a negligence case. In *Keller*, the erroneous instruction unduly diminished the scope of the defendant's duty. Here, the erroneous instruction unduly expanded the scope of the defendant's duty to include a duty owed to the public as a whole. Under *Keller*, the trial court's clear misstatement of the law is presumed prejudicial, and a new trial is required. *See Keller*, 146 Wn.2d at 255 (reversing and remanding for new trial based on clear misstatement of the law in jury instruction).

Plaintiff submitted this misstatement of the law in her jury instruction to the trial court. CP 817. Pierce County specifically took exception to this misstatement. RP 1356. The trial court nonetheless gave the instruction. CP 881. Plaintiff has failed to present to this Court any argument defending the legal basis for the giving of this instruction. Reversal is required under the Washington Supreme Court's decision in *Keller*.

### 2. Jury Instruction Number 5 Requires Reversal Because No Evidence Supports the Instruction that Pierce County Had a Duty "To Confiscate and Confine a Potentially Dangerous Dog."

Reversal is also required because, in addition to the error cited above, the trial court also instructed the jury that Pierce County had a duty

"to confiscate and confine a potentially dangerous dog." Plaintiff requested this instruction. CP 817. Pierce County specifically took exception to it. RP 1356. There is no evidence in the record supporting the giving of this instruction. As explained above, Pierce County did not have the lawful authority, let alone a mandatory duty, to seize and impound either Betty or Tank under PCC 6.07.040. The dogs had not been declared potentially dangerous, and they were never in violation of the requirements at issue in PCC 6.07.040.

"Washington cases consistently hold that it is prejudicial error to submit an issue to the jury when there is *no substantial evidence* concerning it." *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011)(*quoting Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962). "The supporting facts for a theory and [jury] instruction must rise above speculation and conjecture." *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978)).

As the Washington Supreme Court explained:

> the giving of the [jury] instruction [unsupported by evidence*]* indicates to the jury that the court must have thought there was some evidence on the issue; **and we have consistently followed the rule that it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it.**

*Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) (emphasis added). In *Albin*, the court found "a complete lack of evidence" supported the giving of a jury instruction on assumption of risk principles, and the court reversed and remanded for a new trial. *Albin*, 60 Wn.2d at 753-54. Similarly, in this case, there is no evidence supporting the instruction that Pierce County had a duty "to confiscate and confine a potentially dangerous dog." The trial court committed reversible error in giving this instruction to the jury.

### 3. Pierce County Preserved Its Objection to Jury Instruction Number 5.

Instruction Number 5 contained three statements with regard to Pierce County's duty of care. In addition to instructing the jury that Pierce County had a duty "to protect the public from a potentially dangerous dog," and the duty "to confiscate and confine a potentially dangerous dog," the court also instructed the jury that Pierce County had the duty to "classify and control a potentially dangerous dog." CP 881. Pierce County took exception to the first two statements, but did not enter an objection below to the language of this last statement. RP 1356. Plaintiff argues that the error she injected into the first two parts of this jury instruction should be deemed waive because Pierce County did not request a special verdict. Plaintiff relies on *Davis v. Microsoft*, 149 Wn.2d 521,

70 P.3d 126 (2003). Plaintiff's arguments based on *Davis* should be rejected.

In *Davis*, the plaintiff sued his employer alleging that it failed to accommodate his disability in two respects: (1) when the employer removed the plaintiff from his original position as systems engineer for allegedly not being able to perform the essential functions of that position, and (2) during the reassignment process in allegedly failing to take affirmative steps to assist him in finding another position within the company. The employer proposed a special verdict, which was not given by the trial court, and the jury entered a general verdict for the plaintiff. The court reversed, finding insufficient evidence to support the verdict on the plaintiff's first theory, and it remanded for a new trial on the second theory. In so doing, the court stated that:

> where a general verdict is rendered in a multitheory case *and one of the theories is later invalidated*, remand must be granted if the defendant proposed a clarifying special verdict form. To rule otherwise would be to give the plaintiff the benefit of the uncertainty that the defense actively sought to prevent.

Davis, 149 Wn.2d at 539-40 (emphasis added). In *Davis*, there was no dispute that the jury instructions presented accurate statements of the law of accommodation. The evidence at trial was insufficient to support a verdict on the one of the theories. The law was not misstated to the jury.

In contrast, in this case, Jury Instruction Number 5 contained a clear misstatement of the law with regard to Pierce County owing an actionable duty of care to the public at large, as opposed to the plaintiff. "A clear misstatement of the law. . . is presumed to be prejudicial." *Keller*, 146 Wn.2d at 249-50. This clear misstatement was given at plaintiff's request and over Pierce County's objection. Pierce County preserved its objection. Under *Keller*, the trial court's error is presumptively prejudicial and reversal is required.

## II. ARGUMENT IN RESPONSE TO MS. GORMAN'S CROSS APPEAL

### A. The Plaintiff has Failed to Show Error with Regard to the Jury's Finding of Comparative Fault.

#### 1. Sufficient Evidence in the Record Supports the Jury's Finding of Comparative Fault.

A claimant is contributorily negligent if she fails to exercise the care for her own safety that a reasonable person would have used in the same situation. *Jaeger v. Cleaver Constr., Inc.*, 148 Wn. App. 698, 201 P.3d 1028 (2009). Assessing the contributory fault in an action for negligence is generally a factual question for the jury. *See Bauman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985).

Overturning a jury verdict is appropriate only if "it is clearly unsupported by substantial evidence." *Burnside v. Simpson Paper Co.*,

123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The "substantial evidence" test is met where there is sufficient evidence to persuade a rational, fair-minded person of the truth of the premise. *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). Where "[r]easonable minds could differ" on the question, the appellate court will not overrule the jury's decision. *See Winbun*, 143 Wn.2d at 217.

The record contains sufficient evidence to support the jury's verdict. The record reflects that on the day of the incident, plaintiff left her sliding glass door open to allow Romeo, a neighbor's dog, to enter Gorman's home during the morning hours. RP 409. The door was also left open to also allow Gorman's own dog Misty and Gorman's two cats to come in and out as necessary. RP 409-410. Plaintiff admitted that Betty and Tank entered her house through the open sliding door. RP 1403.

On the day of the incident, Gorman knew that Betty and Tank were capable of entering her home through the sliding glass door. Five months earlier, Betty had chased Misty into Gorman's house, and Gorman prevented Betty from entering the house by closing the door. RP 1269-70. Gorman testified that after this incident, Betty came to her house on other occasions. RP 1273. Gorman did not report any of these other instances to animal control or 911. RP 1273. She instead called defendant Zachary Martin, Betty's owner. RP 1273. Martin had promised earlier to Gorman

he would "fix the fence [in his backyard] tomorrow" but apparently never followed through on this promise. RP 1272.

During one of these unreported instances, Betty and Tank gained actual entry into Gorman's home through the sliding glass door, which Gorman had left open. RP 1274. This occurred in July 2007, about a month prior the incident in question. RP 1274. Betty got about ten feet into the house before Gorman got her out and shut the door. RP 1275. Thereafter, Gorman opened the door and Tank ran outside. RP 1275. Gorman's testimony reflects that she was aware of an apparent animosity Betty was developing for Misty and/or Romeo. Gorman believed Betty and Tank entered her house in July 2007 with the intent to attack Misty and Romeo:

> Q: . . .[O]n that occasion, did you think [Betty and Tank] were attempting to go after your dog Misty and Romeo?
>
> A: Yes. Misty was hiding under the couch and Romeo was in there yapping around the whole time. . . .

RP 1276.

Gorman's testimony reflects that, at a minimum, she had notice Betty could gain actual entry into her home through the open sliding door, and that she **would** gain entry if given the opportunity. She was also aware of Betty's apparent motive to gain entry, *i.e.,* the apparent animosity

developing between Betty on the one hand, and Misty and Romeo on the other. Yet despite this knowledge, Gorman continued to leave her door open. This evidence is sufficient to support the jury's determination that Gorman failed to exercise the care for her own safety that a reasonable person would have used in the same situation, and that this failure was a proximate cause of her injury. The jury's finding that Gorman was *one percent* contributorily negligent should be affirmed.

Plaintiff argues that the evidence is insufficient because she had been able to leave her sliding door open for five years without incident, and that she did not believe Betty or Tank had been out and about in the morning before. In raising these argument, the plaintiff is asking this court to reweigh the evidence and substitute its judgment for that of the jury. The court should decline plaintiff's request. In a challenge to the sufficiency of the evidence, the appellate court cannot reweigh the evidence, draw its own inferences, or substitute its judgment for that of the jury:

> The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, *the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.*

*Burnside*, 123 Wn.2d at 108, (emphasis added)(citations omitted). The evidence in the record supports the determination that plaintiff was contributorily negligent. The verdict would be affirmed.

### 2. The Trial Court Acted Within Its Discretion in Declining to Give an Emergency Doctrine Jury Instruction.

"It is a well-established principle that the emergency doctrine does not apply where a person's own negligence put him in the emergency situation." *McCluskey v. Handorff Sherman*, 68 Wn. App. 96, 111, 841 P.2d 1300 (1992*) aff'd,* 125 Wn.2d 1. An emergency doctrine instruction is appropriate only when the trier of fact is presented with evidence from which it can conclude that the emergency arose through no fault of the party seeking to invoke the doctrine. *Brown v. Spokane County Fire Prot. Dist. No. 1,* 100 Wn.2d 188, 197, 668 P.2d 571 (1983). An instruction regarding the sudden emergency doctrine should not be given "if the emergency is brought about by the negligence, in whole or in part, of the person seeking its benefit." *Haynes v. Moore*, 14 Wn. App. 668, 669, 545 P.2d 28 (1975).

The trial court's decision on whether or not to give an emergency instruction in a negligence case is reviewed under the abuse of discretion standard. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). In deciding whether to give the emergency instruction, the trial court is not

required to draw any legal conclusions to determine whether the doctrine applies; instead, the trial court "must merely decide whether the record contains the kind of facts to which the doctrine applies." *Kappelman*, 167 Wn.2d at 6.

The trial court acted within its discretion in declining to give an emergency doctrine instruction. The trial court observed that sufficient evidence was presented at trial to support the contention that the plaintiff had been negligent "by leaving that door open, however far it was left open, knowing that the dogs have, in fact, gone loose in the neighborhood in the past and have attempted to attack, if not attacked anyone before. RP 1465-66. The trial court's ruling is supported by evidence in the record. It is uncontested that Gorman left the door open, and that the dogs gained entry through this door. Five months before the incident in question, Betty had chased Misty into Gorman's house, and Gorman prevented Betty from entering the house by closing the door. RP 1269-70. In July 2007, one month before the incident in question, Betty and Tank gained actual entry into Gorman's home through the sliding glass door. RP 1274. Gorman believed Betty and Tank entered her house in July 2007 with the intent to attack Misty and Romeo. RP 1276. Despite this belief, Gorman continued to leave her door open, and it was open in the day in question. RP 409. The trial court acted well within its discretion in denying the

emergency instruction. The trial court's ruling should be affirmed.

### 3. The Court Should Reject Plaintiff's Argument That She Had No Duty As a Matter of Law To Ever Close Her House Door.

The plaintiff could not leave her door "almost always open" to allow one neighbor's dog (Romeo) free access to her home without running the risk that other neighbors' dogs would also gain entry into the home. Plaintiff argues that the court should hold she had no duty as a matter of law to close the sliding door to her home despite her knowledge that other dogs could also gain entry. Pierce County joins in the arguments presented on this issue by Respondent Evans-Hubbard in opposition to Ms. Gorman's cross-appeal. Under RAP 10.1(g)(2), Pierce County adopts these arguments by reference. The court should reject plaintiff's argument and hold that the trial court properly submitted the comparative fault issue to the jury under the facts of this case.

## III. CONCLUSION

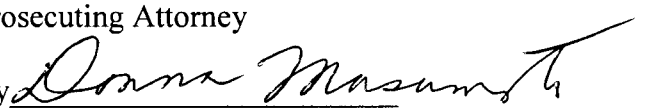
Pierce County requests that the court hold that the public duty doctrine precludes Ms. Gorman's case against the County. This case should be remanded for dismissal as to Pierce County.

In the alternative, the trial court committed reversible error in instructing the jury with regard to Pierce County's duty of care. The trial court's errors necessitate reversal and vacation of the jury's verdict.

Plaintiff's cross-appeal should be denied. The trial court properly submitted the issue of Ms. Gorman's comparative fault to the jury.

DATED: April 16, 2012

MARK LINDQUIST
Prosecuting Attorney

By 

DONNA Y. MASUMOTO
Deputy Prosecuting Attorney
Attorneys for Pierce County
Ph: (253)798-4289 / WSB # 19700

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Pierce County was delivered this 16th day of April, 2012, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to counsel of record as follows:

Michael J. McKasy and Shelly K. Speir
TROUP, CHRISTNACHT, LADENBURG,
McKASY & DURKIN, INC., P.S.
6602 – 19th Street West
Tacoma, WA 98466

Bradley D. Westphal
LEE SMART PS INC
701 Pike Street, Suite 1800
Seattle, WA 98101-3929

David P. Lancaster
HOLLENBECK,LANCASTER, MILLER & ANDREWS
15500 Southeast 30th Place, Suite 201
Bellevue, WA 98007-6347

Nancy McCoid
Soha & Lang, P.S.
1325 Fourth Avenue, Suite 2000
Seattle, WA 98101

CHANDRA ZIMMERMAN