69103-1

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ORIGINAL

No. 69103-1

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

MARGARET l. BRISCOE,

Appellant

v.

RANDALL LAMONICUS McWILLIAMS, LEVITICUS JADE McWILLIAMS, ELIZABETH ANN ROWLAND, and VICTOR GREER,

Respondent

APPELLANT'S REPLY BRIEF

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I. Introduction

Respondent's Brief relies upon a slanted version of the facts and clearly distinguishable case law in arguing for affirmance. It ignores the important maxim that factual issues should be resolved by a jury trial, a fundamental right which is to be "inviolate" (Washington State Constitution, Article I, Section 21; *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 638, 771 P.2d 711 (1989)) and that all facts and inferences are to be resolved in favor of the party resisting summary judgment. The record amply refutes Respondent's factual misstatement and is cited in Section II below.

Beyond the factual errors in its brief, Respondent argues that the general principles underlying the law of premises liability, agency, an employer's respondeat superior liability, and negligent entrustment (all of which being clearly at play in this case) should be abandoned wholesale in a case where a dog or a dog bite is involved. The cases the Respondent relies upon do not stand for this novel proposition and accordingly the case should be remanded to the trial court to allow Ms. Briscoe her day in court.

II. Reply to Respondent's Factual Assertions

A. It is disputed whether Randy had actual or constructive knowledge that Levi brought his pit bull Jersey with him on the job.

Respondent's Brief at p. 15 states:

> "There is no dispute that Randy did not even know the dog was there. Further, it would never occur to any reasonable person that a person hired to clean an apartment would bring a dog."

In fact there is a factual dispute as to what a jury could reasonably conclude about what Randy really "knew" about his brother and Jersey. Randy's position seems to be that a confession that he knew Levi would bring the dog and leave it unattended is required for liability to be imposed.[1] That is not true. It may be a sufficient condition for liability, but not a necessary one. As discussed below, the test is one of the foreseeability of harm, and constructive knowledge, not subjective knowledge of a risk. Under the evidence presented and all inferences drawn in favor of Appellant, it would be reasonable for a juror to conclude Randy knew:

(1) That his brother, Levi was homeless (and thus did not have a place to leave Jersey, the pit bull Levi owned);

(2) That Levi was not trustworthy;

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[1] Of course, even then the defense would revert to its position that only the "owner, keeper or harborer" of the dog can be liable and thus there is no recourse against Randy!

(3) That on prior occasions when Levi's long term girlfriend worked for Randy, Levi was allowed to come to the premises and bring Jersey with him;

(4) That the pit bull was virtually inseparable from Levi;

(5) From personal experience that Jersey needed to be isolated from persons he did not know;

(6) That the rent he owed depended on how soon he vacated the premises and

(7) That when he told the owner, Victor Greer, that the premises were clean and vacated as of the evening of July 16, he knew there was likelihood that in fact Levi would not have completed the job by that time.

It is undisputed that Levi was on an errand to buy supplies to finish the job Randy hired him to do and left Jersey unattended and untethered when the attack on Margaret occurred (CP 98). It is undisputed that Levi relied upon information communicated to him by Randy that no one would be coming to the apartment otherwise he would have taken precautions as to the pit bull (CP 102-103). Randy endeavors to portray this case as if he and Levi were strangers and he had no knowledge as to Levi's personal situation, his irresponsible nature or his attachment to Jersey, the pit bull. This is clearly not true. This is not a situation where

Randy had hired Acme Cleaning Service to clean the premises and remove his property and one of its employees brought a pit bull with him. In that case, Randy's argument would be much more compelling. But here, Randy hired his brother to do him a favor since he knew he was homeless and unemployed and no doubt to save him some money. He was well aware Levi and Jersey were inseparable. Crucial facts and reasonable inferences that a jury could draw from them are laid out in detail at pp. 10-12 of Appellant's Amended Opening Brief and will not be repeated again here. But none of the facts of record are such that a court could possibly say that say "no reasonable juror" could draw such an inference from this evidence.

B. Randy did not believe Levi would be out of the premises on July 16.

Although it is repeatedly asserted that Randy was "assured" by Levi that he'd be out of the premises he controlled as of the night of July 16 (Brief of Respondent at pp. 1, 2, 3, 26, and 30), this is not what Randy testified to. What Randy actually testified to was that he believed that only the "majority of the job was done" and that Levi would go back to the premises the next day—July 16th, for some cleaning supplies. He had called Levi from California and had a conversation:

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25 Q. So as I recall your testimony -- and you

should correct me if I'm wrong -- you did talk to Levi on the 16th of July.
A. Correct.
Q. And can you tell me again what the conversations were?
A. How's things coming along with the cleaning? I'm planning to go down to Los Angeles. We're going to go to this concert. Our buddy, Tim Stallworth, is down there. I'm sure you got ahold of Mom, because she told me you dropped the TVs off.
You know, Are you getting close? Are you finished? What's going on?
Yeah, I should be done by this evening. I should be all -- all wrapped up.
Q. So as far as you were thinking, then, by the evening of the 16th, the town house would have been done?
A. Yes.
Q. Levi would have been finished?
A. Yes. I presumed that he was going to be done. I anticipated he'd probably have to go back and get some cleaning supplies, but the majority of the job was going to be done.

(Emphasis added). CP 96-97. What Randy knew was that that Levi told him he "should" be done by that night but Randy anticipated that Levi might return to townhouse even after that night. However, Randy did not convey that information to Victor. A juror could infer and find that what was true was that the longer Randy controlled the premises, the more rent he would pay. Thus he had a financial interest in conveying to his landlord, Victor, that the premises were going to be vacated by that evening, July 16. According to Victor, the owner/landlord, what he was

told by Randy was that "his [Randy's] property had been removed and he had 'cleared out.'" CP 85-86. This was not true. Victor had no reason to suspect that Margaret might encounter a person, much less a pit bull, when she went on July 17, to check out the premises. Thus, Randy's assertion to Victor was not the true state of his knowledge as shown in the quoted questions and answers above. Whether Randy negligently misrepresented to Victor so as not to owe more rent or for other reasons, he did not convey accurately what he knew as to the state of vacating the premises.

III. Owners, Harborers or Keepers Are Not the Only Persons Who Can Be Liable for a Dog Bite (Reply to Respondent's Argument B)

Defendant Randy McWilliams continually relies upon *Clemmons v. Fidler,* 58 Wn. App. 32, 791 P.2d 257, *rev. denied,* 115 Wn.2d 1019 (1990), and *Frobig v. Gordon,* 124 Wn.2d 732, 735, 881 P.2d 226 (1994), for the proposition that only an "owner, keeper or harborer" and no other person or entity can ever be held liable for a dog bite under RCW 16.08.040 **or** at common law. Those two cases and the others cited by the defendant deal with a claim made against the landlord of the premises **for the acts of a tenant,** solely because of his/her status as landlord and regardless of whether the landlord knew of the presence of the dangerous

animal or not. The landlords in those cases were clearly not the possessor who controlled the premises, nor did they play a role in creating the hazardous condition. Here, Randy was not a landlord, he was the possessor and controller of the premises, and Levi was not a tenant, he was an employee of Randy's. This is not a case of landlord liability for the negligence of a tenant. It is, in part, a premises liability claim based upon an unsafe condition which was itself created by an agent/employee of the person who possessed and controlled the premises. It is a case of vicarious liability for the acts of Randy's employee/agent.

As argued in Appellant's Amended Opening Brief at pp. 30-31, in such circumstances the knowledge or actions of the agent/employee (here, Levi) is attributed to the person in control of the premises, and no proof that such person had actual or constructive notice of the unsafe condition is necessary.

Clemmons and *Frobig,* the cases Respondent places great reliance upon, are therefore distinguishable. If plaintiff were making that claim against Defendant Victor Greer, the argument would have merit absent some further connection of landlord Greer to the events. Having developed no nexus to Victor beyond his being the landlord, Plaintiff dismissed Victor from the case.

There is no sound reason to think that a person who is not an "owner, keeper or harborer" but who negligently allows a dangerous dog to severely injure someone cannot be liable under any other scenario. The defendant asserts as to the liability of an "owner, keeper or harborer," the "only exception to this rule in Washington is for public agencies or their contractors in their role as animal control agencies." The cases of *King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999); *Livingston v. City of Everett,* 50 Wn. App. 655, 751 P.2d 1199, *rev. denied,* 110 Wn.2d 1028 (1988); *Champagne v. Spokane Humane Society,* 47 Wn. App. 887, 737 P.2d 1279, *rev. denied,* 108 Wn.2d 1035 (1987), are referenced as support for this assertion. (Brief of Respondent at p. 8). However, the "exception" discussion in those cases concerns the exception from the public duty doctrine of governmental immunity and the cases held it a jury question as to whether or not the claimant came within the risk created by the officer's asserted negligent conduct. The cases do not discuss creating an exception to the "owner, keeper or harborer" proposition that defendant asserts is an absolute limitation on liability on other grounds. Plaintiff in the instant case asserts that the appropriate question is whether or not the injuries to Margaret came within the foreseeable risk created by the negligence of defendant Randy's brother, Levi.

If this Court believes the defense position that under no circumstances can one who is not an "owner, keeper or harborer" be liable for a dog attack, then it can put the matter to rest and so state. Plaintiff cannot believe that such a result was intended by Washington courts in their discussion contained in dog bite cases nor by Washington's Legislature in enacting the strict liability dog bite statute. There is simply no reason to believe the intent of the Legislature was to "preempt the field" of dog bite liability in such a restrictive way. No legislative history is cited by Defendant for this proposition. Nor would it make any sense. For hypothetical example: Randy McWilliams is out walking with his brother Levi and is asked by Levi to hold the pit bull's leash for a moment. Randy, knowing the dog could not be loose around strangers, decided that it would be nice for the pit bull to be able to run free and lets him loose. If the dog attacked a bystander, would Randy face no liability because he was not the "owner, keeper or harborer" of the dog? Only under the most strained of definitions of "keeper" would such a result obtain. Another hypothetical: If 7-11 hired a man to clean and check on its store at night and 7-11 knew or should have known that it was likely that the man hired would bring his pit bull or guard dog and the dog was not restrained, got loose and attacked a patron getting gasoline, would not 7-11 face potential liability even though it was not the "owner, keeper or harborer"? The fact

that the appropriate case has not made its way to the appellate courts of Washington does not mean there can be no such claim under a negligence analysis. Other state courts have, in a variety of circumstances, imposed liability on parties other than the owners, keepers, or harborers of dogs or other potentially dangerous animals (including in cases of premises liability). See, Appellant's Amended Opening Brief at pp. 34-38. There is no reason for Washington courts to not follow suit.

IV. Jury Questions Are Presented Under Plaintiff's Assertions of Agency/Respondeat Superior Liability (Reply to Argument C. 1.)

Levi was not in the business of cleaning homes or businesses. He was not in the business of anything. This is not a situation where Randy hired Acme Cleaning Service to come in and clean the premises or Mayflower Van Lines to come in and move his property out. Such a hiring would create an independent contractor situation and under such circumstances, Randy would have no reason to expect a pit bull to be left unattended on the premises. But such is simply not the case here. Additionally such an independent hiring would not leave Appellant trying in vain to seek recovery from an irresponsible, empty pocket. Affirmance of the lower court's dismissal would encourage persons to hire irresponsible and/or untrustworthy "independent contractors" who

presumptively would charge less since they need no license, insurance or bond. That would be contrary to the policy of tort law--to hold negligent parties accountable.

Randy hired his unemployed brother, Levi, and was doing Levi a favor (CP 73, 94); Randy told Levi what to do and to get it done while Randy was in California (CP 94-95); Randy checked on the progress of Levi (CP 95); and Randy expected that if Levi needed to buy additional supplies, Randy would reimburse him (CP 96). None of these are signs of an independent contractor situation. They are instead indicia of a traditional employer/employee, master/servant relationship. A rational jury could certainly so find.

The general rules as to vicarious liability are set out in *Stout v. Johnson*, 159 Wn. App. 344, 350-51, 244 P. 3d. 1039 (2011):

> Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). But in general, an employer who hires an independent contractor is not vicariously liable for the actions of its independent contractor. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976)); *see also* RESTATEMENT (SECOND) OF TORTS § 409 (1965) ("[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Respondent's Brief at p. 15 states:

> "There is no dispute that Randy did not even know the dog was there. Further, it would never occur to any reasonable person that a person hired to clean an apartment would bring a dog."

But there is a factual dispute as to what a jury could reasonably conclude about what Randy really "knew" about his brother and Jersey. See the factual analysis in Section II A above. However, it is undisputed that Levi was on an errand to buy supplies to finish the job Randy hired him to do when the attack on Margaret occurred (CP 98) and that Levy relied upon information from Randy that no one would be coming to the apartment otherwise he would have taken precautions as to the pit bull (CP 102-103).

Randy claims that *Kuehn v. White,* 24 Wn. App. 274, 600 P.2d 679 (1979) is factually analogous to the instant case even though, as Respondent noted, that case involved an intentional tort. The rule cited in *Kuehn* deals with intentional torts and criminal acts done solely for the servant's own ends and thus will not create respondeat superior liability. It is clearly not analogous to the instant case. Here the act that resulted in the injury to Margaret was neither intentional nor criminal. The negligent act was departing the premises while leaving the pit bull unrestrained inside[2]. That act had at least a mixed purpose: while it was convenient for

[2] Respondent's Brief at p. 24 asserts that Levi was not authorized to bring the dog, but Ran 76). The logical inference is that it was not discussed but in light of what Randy

Levi to leave the dog on the premises while he went on this short errand[3], the errand was to purchase supplies to enable him to complete the job and Jersey was there to guard the premises if necessary. It thus served the master, at least in part.

The defense cites *Dickson v. Graham-Jones Paper Co.,* 84 So.2d 309 (Fla. 1955), and *Hackett v. Dayton Hudson Corp.,* 191 Ga. App. 442, 382 S.E.2d 180 (1989) as examples of cases where the employer was held not to be liable where the employees brought animals to work that injured invitees. In both those cases the bringing of the animal by the employee was unknown to the employer and there is no hint of any reason to believe from the facts that the employer had any reason to believe that the employee might bring the animal to the premises. Logic says that Randy knew or should have known that under the circumstances, it was foreseeable that his brother Levi would have his dog with him. This fact issue is for the jury to decide. Apparently the trial court merely accepted Randy's bald assertions that he did not know Levi brought his dog with him. Such "knowledge" testimony is uniquely for the jury to resolve

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knew about Levi, a juror could reasonably conclude that Randy knowing his brother was homeless and was likely to have the dog with him when he was cleaning the premises.

[3] We asserted that leaving the guard dog while Levi went on the work related errand, protected the premises. That is not an unreasonable assertion since the fact of Levi cleaning and removing property from those premises over the course of the several days he worked there could well give notice to would be burglars or trespassers that the premises were being vacated. We do not believe that such a determination is necessary for a liability finding but it is reasonable.

because the known facts, summarized above, point to a different conclusion. It is hornbook law that knowledge can be inferred from surrounding facts, irrespective of an actor's subjective assertion. See, e.g. *State v. R.H.S.,* 94 Wn. App. 844, 847, 974 P.2d 1253 (1999); S*tate v. Harris,* 164 Wn. App. 377, 391, 263 P.3d 1276 (2011). Randy's credibility on this key material question of fact should not be decided by a court on summary judgment. It is for the jury to determine if it was foreseeable to Randy that Levi would bring Jersey given all the facts and circumstance, and based upon the jury's ability to assess the demeanor of the witnesses on the witness stand. See generally *Arras v. McCabe,* 68454-0-I (Wash. App. 11-5-2012) at p. 4; *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Likewise, *Croley v. Moon Enterprises, Inc.,* 118 Ohio Misc. 2d 151, 770 N. E.2d 148 (2001) relied upon by the defense is inapposite. The decision is a published opinion of a trial court and thus not of any precedential value to a Washington appellate court. But more importantly the plaintiff, a dog bite victim who was a business invitee, sued the corporate employer and the employee on strict liability (Ohio has a statute similar to Washington's imposing strict liability on the owner, keeper or harborer) and common law negligence theories. The defense in the instant case relies upon discussion that there is no vicarious liability of the

employer corporation under the strict liability statute for the employee's dog biting the invitee. The last sentence of the defense quote from that case (Respondent's Brief at p. 20) is: "Thus, MEI [the employer] is not liable . . . by virtue of vicarious liability." The rather important omitted words represented by ". . ." are "under the statute". The court was obviously premising their holding on how it interpreted the statute, a highly relevant legal distinction that the Respondent curiously chose to delete from their citation to that case. In the instant case, Appellant has never asserted that the possessor of the premises, Randy, was vicariously liable under the Washington strict liability dog bite statute. He is liable on other valid legal theories, however.

Interestingly, the next sentence in the *Croley* case after the quoted passage relied upon by the defense reads as follows:

> Additionally, even if MEI might fit within the common-law vicarious-liability test (because Ms. Moon was engaged in furthering MEI's business on the telephone even though "Rebecca's" presence did not further MEI's business interests), the court finds that MEI would not be liable under the statute.

770 N. E.2d at 157. The other theory asserted in *Croley* for imposing liability was common law negligence for the dog bite. This theory was advanced only as to the individual defendants who were owners of the dog and not as to MEI. There was no evidence that the owners knew the dogs were vicious, as was required under Ohio case law. It was on this basis

that summary judgment was also granted as to the individual defendants. The common law negligence claim was not made as to the corporation presumptively because if the owners of the dog did not have notice of viciousness, certainly the employer corporation would not, and a necessary element under Ohio law was therefore not present. However, it seems obvious from the court's comment that the Ohio trial court left open the possibility of vicarious liability for common law negligence under appropriate facts. In the instant case the jury can reasonably conclude that Randy knew the dog was vicious and had to be separated from those he was not familiar with and knew that Levi was likely to have the dog with him at the premises.

Respondent seems to think that plaintiff's citation to *McNew v. Puget Sound Pulp & Timber Co.,* 37 Wn.2d 495, 497, 224 P.2d 627 (1950), is misplaced and that the case supports his position. (Brief of Respondent at p. 23.) *McNew* was cited because it contains a good discussion of the principles of when the employer is liable for the employee's negligence and when not. The court then reviewed the evidence and found that no reasonable juror could conclude other than that the trip in question was wholly unrelated to his work and the fact that he had supplies for the employer in the vehicle did not convert the private journey into one for his employer or even one of mixed purpose. 37

Wn.2d at 499. In the instant case the sole purpose of Levi leaving Randy's premises was to purchase supplies for cleaning those premises which was why Levi was employed.

Thus as we argued in Appellant's Amended Opening Brief at pp. 25-26, the policy as noted in *Rahman v. State,* 170 Wn.2d 810, 246 P.3d 182 (2011), is that the master is liable even if the employee actually violates workplace rules, something Levi did not do here. Tellingly, there is no evidence that Randy affirmatively forbade Levi from bringing Jersey to the work site or imposed that as a workplace rule. Given Randy's knowledge of the history of Levi's affinity for Jersey and the foreseeability that Levi would bring Jersey to the job site, it was negligent for Randy to NOT impose and enforce such a rule. But even if he had, it would make no difference under master servant principles, because the act of going to get supplies and leaving Jersey to guard the premises served the master's interests, at least in part.

As noted in *Rahman*, to hold otherwise would mean that employers would simply demand that employees act only in accordance with workplace rules and thus escape vicarious liability. 170 Wn.2d at 818-819. Had Levi given Margaret a ride while going to purchase cleaning supplies and negligently caused an accident and injured her, then under the precedent of *Rahman*, Randy as the employer would be liable for her

injuries. It would seem an odd result that Levi's injuring Margaret in a different manner, even if arguably in violation of Randy's workplace rules, would not result in Randy being liable. This view supports Appellant's argument that even had Randy forbidden Levi from bringing the dog; a jury issue is still presented. In our view it matters not that the instrumentality that injured plaintiff while Levi was away on a work related errand was a dog as opposed, for example, to noxious fumes from a misused cleaning substance.

V. Whether Randy is Liable Under a Premises Liability Analysis Is a Question for the Jury. (Reply to Argument C. 2.)

As to Appellant's assertion that Randy need not have specific knowledge that the dog was at the premises, this is Appellant's vicarious liability argument as detailed above and in Appellant's Amended Opening Brief and will not be repeated or detailed again here. An alternate theory of liability properly pleaded in this case is the common law of premises liability. This theory turns upon the duty imposed on an owner or controller of premises to maintain those premises in a manner that is safe for invitees. Randy's position seems to be that he entrusted the premises to a reputable cleaning/moving outfit and then left the state and therefore he cannot be culpable. As to that theory, it is Appelant's position that one

cannot forget that Randy had a close relationship to the person he hired to clean and remove his property from the premises. The nature of that relationship is such that a juror would be entitled to conclude that Randy knew or should have known (constructive notice) under RESTATEMENT (SECOND) OF TORTS § 343 (1965), that Levi would have his dangerous dog with him in performing the job for which Randy hired him and that Levi was a person of questionable responsibility.

Randy's reliance upon *Shafer v. Beyers*, 26 Wn.App. 442, 613 P.2d 554 (1980) is misplaced. First, the defendant who was granted summary judgment in *Shafer* was the owner of the premises and thus the case might have some relevance to the instant case if the dismissal being appealed related to Victor Greer, the owner. However, as noted *supra* at p. 5, having developed no nexus connecting Victor Greer to the negligent cleaning operation of Randy and Levi, Victor was dismissed as a defendant.[4] And in *Shafer*, the defendant owner had no reason to believe that the dog in question which she saw on the premises for the first time two days before the biting incident was dangerous.

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[4] While the defense repeatedly asserts there can be no dog bite liability for a person who is not an "owner, keeper, or harborer of the dog, it is interesting to note that the Court in *Shafer*, did review the landlord defendant's potential liability under a premises liability argument and simply found that there was no evidence that the landlord knew of any dangerous nature of the dog. 26 Wn. App at 447.

As to Randy, who possessed and controlled the premises, the evidence is clear that he knew that Levi's dog was dangerous to persons the dog was not familiar with. The Declaration of Leon Billingsly, a non-party friend of Randy's makes clear that Randy knew that the pit bull Jersey needed to be isolated from strangers. (CP 90.) According to Levi, Randy's brother, Randy knew that he (Levi) and the dog were inseparable. (CP 102.) The deposition of defendant Elizabeth, Levi's long term girlfriend with whom Randy and Levi had lived for six to eight months together with Jersey, the pit bull, makes it clear that Randy knew that precautions needed to be taken with the dog, including muzzling the dog if taken outside. (CP 109.) She also had worked for Randy at the premises where the attack occurred and Randy knew that Levi would bring Jersey around and did not prohibit it (CP 110 - 113). Randy also knew that Levi was homeless. (CP 113.) Per the owner, Victor Greer, the lease prohibited pets from the premises (CP 85). The month after the attack Victor saw the premises and noted scratches and teeth marks in the kitchen made by a dog. (CP 87.) The jury does not have to operate in the vacuum that Randy wants it to. It can consider all of the relevant facts and circumstances and properly conclude that Randy's credibility in claiming he didn't know Levi would bring the dog to the premises is suspect. Credibility determinations are for the trier of fact, here a jury, (see *Arras v.*

McCabe, supra) which has the opportunity to assess the demeanor of a witness, not a court on summary adjudication based upon paper submissions.

Had Randy simply said to Victor that he did not yet know if the premises were cleaned and vacated, there would have been no reason for Victor to ask Margaret to check. But Randy had the motive of wanting to keep his rent for that month as low as he could and so he told Victor the job was complete as of July 16, whereas in actuality he really knew only that "the majority of the job was going to be done". (CP 96.) A jury could certainly conclude that a reasonable person in Randy's position could expect that having told the owner the place was clean and vacated as of July 16, such that his rent was determined as of that date, the owner might well send someone to check the premises to prepare to rent it to others. Combine this with the knowledge that Randy had about his brother and the dog as set out in Section II A above and you have what plaintiff contends clearly presents a jury question.

Some hypothetical illustrate this point: What if Levi had decided that the townhouse would be improved if he redid the front entry and he had removed some concrete and put a rug over it temporarily while he ran to the store for more materials? Thereafter, Margaret comes to inspect the premises and steps on what appears to be a rug, but is not, falls through

and is seriously injured. Or what if Levi decided to use an acid to clean an appliance, left to go to the store, and then the fumes built up? Liability would clearly attach if Margaret enters the premises, inhales the toxic fumes and suffers respiratory injuries. It makes no sense to contend that the analysis should somehow be different merely because the instrumentality of harm that made the premises unsafe for a person lawfully entering was a dog. Yet, reduced to its essence, such is the position of the Respondent here. It is untenable.

VI. Whether Randy is Liable for Negligently Entrusting the Premises to Levi Is a Question for the Jury (Reply to Argument C. 3)

Negligent entrustment in this case is a variant of premises liability and another legitimate theory for the jury to consider in determining whether or not Randy should be liable for the injuries sustained by Margaret. The evidence relied upon for this argument is the same as set forth in Section V, above, and in the facts as detailed in Appellant's Amended Opening Brief. There is no reason presented in the Brief of Respondent as to why negligent entrustment cannot apply beyond automobile entrustment situations. As noted in Appellant's Amended Opening Brief at p. 31, there is no reason to believe that Washington would not adopt RESTATEMENT (SECOND) OF TORTS §308 (1965)

which does not limit negligent entrustment to only automobile entrustment cases. Instead Randy's argument turns on "foreseeability" and his assertion that he could not have foreseen these events. This is for the jury unless reasonable jurors could reach but one conclusion from the evidence.

VII. Conclusion

Of course Appellant is looking to attach liability to a financially responsible actor. That is what tort law is all about. Appellant's counsel would commit legal malpractice not to determine whether there are potentially liable parties who have the financial wherewithal, or insurance coverage, to pay a judgment. But that doesn't alter the facts upon which Randy's liability is premised. The defense assertion that financial solvency, through insurance, is the only basis to connect Randy McWilliams to liability here is false and devoid of relevance to the issues at hand. However, it is of note that Appellant dismissed the landlord (Victor Greer) who presumptively as the landlord and owner of the townhouse would also have "affluence" i.e., insurance. There was no viable claim against Victor that would authorize the case to go to the jury; Appellant believes there is a viable claim and jury question presented as to Randy.

The summary judgment entered by the trial court deprived Appellant of the constitutional right to have factual issues resolved by a jury of her peers. As such the judgment should be reversed and remanded to the trial court to conduct such a trial.

RESPECTFULLY SUBMITTED this 5th day of December 2012.

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DECLARATION OF SERVICE

I, AJ Rei-Perrine, declare as follows: on this date, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S REPLY BRIEF

Alice C. Brown c/o McLean & Associates 720 Olive Way, Suite 1600 Seattle, WA 98101	_x_ via WA Legal Messenger ___ via Facsimile ___ via E-mail ___ via US Mail
Pamela A. Okano Marilee C. Erickson c/o Reed McClure Two Union Square 601 Union Street, Suite 1500 Seattle, WA 98101-1363	_x_ via WA Legal Messenger ____ via Facsimile ___ via E-mail ___ via US Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 5th day of December 2012.

AJ Rei-Perrine