

No. 45076-3-II

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COURT OF APPEALS  
DIVISION II  
SPokane, WA  
CA

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

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HAROLD RATH,

Plaintiff-Appellant,

v.

GRAYS HARBOR COUNTY

Defendants-Respondent.

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

On August 19, 2009, Appellant (Harold Rath) was bitten multiple times by Appellee's (Grays Harbor County) police dog while he was in his friends' residence with their permission. At that time RCW 16.08.040 imposed strict liability against all dog owners – including the County of Grays Harbor – when the owner's dog bit and injured an individual.

Mr. Rath sought partial summary judgment to impose strict liability against the County for the multiple dog bite injuries. The trial court denied Mr. Rath's motions for summary judgment, finding that if he "purposefully refused to leave a premise or submit to arrest when given a lawful order to do so," he would no longer be lawfully in his friends' home. *See* Court's Instruction to the Jury Number 10, which was issued over the objection of Plaintiff. CP 492; VRP 121, 122.

Mr. Rath files this appeal seeking to (1) reverse the trial court's denial of summary judgment on the issue of strict

liability; (2) find that the trial court's jury instruction number 10 misstated the law on the issue of being lawfully in a private residence; and, 3) direct a verdict on the issue of liability in favor of Plaintiff.

## II. ASSIGNMENT OF ERROR

1. The Superior Court of Thurston County, State of Washington, erred in denying Mr. Rath's Motions for Summary Judgment on the issue of strict liability. In particular, the trial court erred in not finding Mr. Rath was lawfully in his friends' trailer at the time the County's dog bit him multiple times.
2. The Superior Court of Thurston County, State of Washington, erred in giving jury instruction number 10, which misstates the law regarding lawful presence in private property under the strict liability dog bite statutes.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF  
ERROR**

Contrary to the denial of Mr. Rath's motions for summary judgment and jury instruction number 10 of the Superior Court, is the County, as the owner of the subject dog who bit Mr. Rath, strictly liable for his resulting injuries while he was in a private residence with the permission of the owner?

**IV. STATEMENT OF THE CASE**

**Grays Harbor County Owned a 'Bite and Hold' Police Dog Named Gizmo; Deputy R. Crawford is Gizmo's Handler**

Grays Harbor County was the owner of the police dog named 'Gizmo.' CP 241-42 (Crawford Dep. 12:22-25; 13:1-2).; VRP 12 (Direct Examination of Deputy Crawford). Gizmo was an 85-pound German Shepherd. CP 240-41 (Crawford Dep. p. 7:20-21; 9:23-24); VRP p. 6 (Direct Exam of Crawford). Gizmo was a 'bite and hold' police dog. That is, once he was given a particular command, he was trained to bite and not let go. CP 246 (Crawford Dep. p. 30: 12-25; 31: 1-4).

Gizmo was not trained to bite in any particular location on the body; rather, the dog would bite indiscriminately. CP 246, 249 (Crawford Dep. 31: 5-7; 41: 13-25; 42: 1). There are no gradations of the command to bite; for example, the dog cannot alter the pressure (i.e. more lightly, hard, violently) he asserts when and while biting an individual. CP 249 (Crawford Dep. 42: 2-6); VRP 12, 14 (Direct Examination of Crawford). Deputy R. Crawford was Gizmo's handler and had been working with Gizmo since 2004. CP 240 (Crawford Dep. 6: 20-25); VRP p. 6 (Direct Examination of Crawford).

**On August 19, 2009, Mr. Rath was in a Trailer in Hoquiam, WA with the Permission of the Owner**

On or about August 19, 2009, Mr. Rath received a call from his friend, Valerie Dixon, and it was determined he would go over to the trailer she lived in for a visit. CP 293-94 (Rath Dep. 19-22); VRP 30, 31, 32 . Ms. Dixon resided in the trailer with the owner and her boyfriend, Leonard Ver Valen. CP 293 (Rath Dep. 21:2-14); VRP 31. It was common for Mr. Rath to

visit Ms. Dixon and Mr. Ver Valen at their trailer. CP 294 (Rath Dep. 22); VRP 31. Both Ms. Dixon and Mr. Ver Valen were present at the trailer when Mr. Rath arrived on August 19, 2009. CP 293 (Rath Dep. 21:2-14.); VRP 32, 33.

At some point after arriving at the trailer, Mr. Rath went to sleep. CP 294 (Rath Dep. 23:20-22); VRP 34. Mr. Rath had not slept the two previous nights because he had been using methamphetamine. VRP pp. 29-30 (Direct Examination of Harold Rath). When the drug wears off, Mr. Rath cannot stay awake; it is like the body running out of gas. VRP p. 26 (Direct Examination of Harold Rath). CP 299-300 (Rath Dep. 45:18-25; 46:1-10). The bed in the trailer had a storage container under it which was approximately 6 1/2 feet in length. CP 294 (Rath Dep. 24:18-25; 25). Mr. Rath went to sleep in the storage container. CP 294 (Rath Dep. 23:17-22.); VRP 34, 36 (Direct Exam of Harold Rath). Mr. Rath went to sleep in the storage container because a lot of people come in and out of the trailer and, he was paranoid, and he did not want others who might

enter the trailer to take his property while he slept and he would not wake up when coming off of methamphetamine. VRP 37 (Direct Exam of Harold Rath). Mr. Rath was in the premises of the trailer with Ms. Dixon and Mr. Ver Valen's permission on August 19, 2009 and that permission was never revoked. *See* CP 423-25 (Dixon Decl.); 426-27 (Ver Valen Decl.).

**Law Enforcement Officers and Gizmo Arrive at the Trailer to Arrest Mr. Rath**

Mr. Rath was wanted by law enforcement for an incident that occurred sometime prior to August 19, 2009. CP 292 (Rath Dep. 14:3-10); VRP 37, 38 (Direct Exam of Harold Rath). Mr. Rath did not know there was an Arrest Warrant out for his arrest. CP 292 (Rath Dep. 17: 23-25); VRP 37 (Direct Exam of Harold Rath). Mr. Rath did not know that the police would be looking for him at his friends' trailer. *Id.*

Law enforcement received information that Mr. Rath was at a trailer park on the Hoquiam River. VRP 83 (Second Direct Exam of Dep. Crawford). Ultimately the officers made their

way to the trailer in which Mr. Rath was present. CP 242-43 (Crawford Dep.15: 15-21; 17:7-14); VRP 83. Deputy Crawford arrived at the trailer with Gizmo. CP 243 (Crawford Dep. 18:1-9). VRP 83.

Mr. Rath testified that he was unaware the police were outside and attempting to contact him as he slept. CP 294 (Rath Dep. 22: 20-25; 23: 1-22); VRP 38, 39, 54 (Direct Exam of Harold Rath). The officers did not have nor obtain a search warrant for the trailer. CP 243 (Crawford Dep. 20:18-21); *see also* VRP p. 15 (Direct Examination of Deputy Crawford).

**Deputy Crawford, Gizmo and Other Officers Entered the Trailer to Detain Mr. Rath**

Several officers entered the trailer. CP 242 (Crawford Dep. 23: 20); VRP 95 (Second Direct Exam of Dep. Crawford). Deputy Crawford opened the door to the bedroom and deployed Gizmo to locate him. CP 244 (Crawford Dep. 24: 23-25); VRP 10. Gizmo indicated on the bed. CP 245 (Crawford Dep. 25:1-5); VRP 10, 100 (Direct Exams of Dep. Crawford). As noted

above, Mr. Rath was asleep in the storage area under the bed. Deputy Crawford knew from experience that trailers often had a storage area underneath the bed and thought Mr. Rath was in that area. CP 245 (Crawford Dep. 25: 7-11); VRP 101.

Deputy Crawford lifted up the bed to reveal the storage area. CP 245 (Crawford Dep. 25: 7-11); VRP 10, 11, 18 (Direct Exam of Crawford). Mr. Rath was lying on his stomach, was not making any movements and was non-responsive. CP 246 (Crawford Dep. p. 29: 3, 19-21; 30: 2-5); VPR 11, 12. Deputy Crawford deployed Gizmo to bite Mr. Rath. CP 246 (Crawford Dep. 30:8-13); VRP 6 (Direct Exam of Dep. Crawford).

**Deputy Crawford Deploys Gizmo to ‘Bite and Hold’ Mr. Rath; Mr. Rath is Bitten Multiple Times**

Deputy Crawford gave the verbal command “Packen!” for Gizmo to bite and hold Mr. Rath. CP 246 (Crawford Dep. 30: 11-25; 31: 1-12). As instructed, Gizmo began to bite Mr. Rath. CP 246 (Crawford Dep. p. 31:8-16). Prior to deploying

Gizmo, Deputy Crawford did not believe Mr. Rath was actively in the commission of a felony. CP 248 (Crawford Dep. p. 37: 3-7); VRP pp. 15-16 (Direct Examination of Deputy Crawford).

Mr. Rath recalls Gizmo biting him first on the wrist, then on his arm, and then on his shoulder. CP 295-296 (Rath Dep. 29:7-8, 19-22; 30:1-14); VRP 39-42 (Direct Exam of Harold Rath). Mr. Rath attempted to protect his face, but his arms were grabbed by the officers, allowing Gizmo to begin biting his head. *Id.*

The arresting officers, including Deputy Crawford, had Tasers. CP 246 (Crawford Dep. 30: 6-7). Tasers cause neuromuscular incapacitation where the suspect is not able to move. CP 249 (Crawford Dep. p. 44: 3-8). According to Deputy Crawford, there was no reason the Taser was not used instead of Gizmo. CP 247 (Crawford Dep. 36:6-10).<sup>1</sup>

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<sup>1</sup> Deputy Crawford, after adjourning the deposition for a break, later offered contradictory testimony about why a Taser use might not have been indicated, but this contradiction to his previous sworn testimony cannot be the basis for finding a disputed material fact. *See McCormick v. Lake Washington School District*, 99 Wn. App. 107 (1999). And since

Gizmo bit Mr. Rath several times. CP 295-96 (Rath Dep. 29:5-31:18); VRP 39, 40. (Direct Exam of Harold Rath). Mr. Rath suffered significant injuries. CP 296-97 (Rath Dep. 31-36); VRP 43 (Direct Exam of Harold Rath). He was eventually taken to Harborview Medical Center for treatment. CP 296 (Rath Dep. 33:13-25); VRP 43 (Direct Exam of Harold Rath). Mr. Rath did not have any weapons on him when the dog was deployed and bit him. CP 248 (Crawford Dep. 37:12-14).

### **Procedural History**

Mr. Rath filed a lawsuit against Grays Harbor County pursuant to Washington's strict liability dog bite statute, which provides:

The owner of any dog which shall bite a person while such person is lawfully in a private place shall be liable for such damages as may be suffered by the person bitten.

RCW 16.08.040.

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fault is not at issue in this strict liability claim, any argument over which intervention was most appropriate is irrelevant.

Both parties moved for summary judgment on the issue of whether the strict liability dog bite statute applies to this case. Plaintiff also moved to strike portions of the declaration in support of defendant's motion for summary judgment. After oral argument on January 25 2013, the Court properly held that the dog bite statute was applicable to this case, and that as a matter of law Mr. Rath did not provoke the dog to bite him under RCW 16.08.060, but reserved ruling on liability as to whether Mr. Rath was 'lawfully on' the premises when he was bitten. The Court informed the parties that it would hold a bifurcated trial proceeding to first determine whether Plaintiff was lawfully on the premises, and if so, then proceed to a determination of damages.

Thereafter, Plaintiff obtained and filed Declarations from the trailer's owners confirming that he was lawfully on the premises of the trailer with their permission when he was bitten by Defendant's dog and that said permission was never revoked. *See* CP 423-25 (Dixon Decl.); 426-27 (Ver Valen

Decl.). Plaintiff moved for summary judgment again prior to trial, providing said declarations and additional authority for the definition of “lawful presence” under the statute and common law supporting Plaintiff’s requested finding of liability against the Defendant as a matter of law. The testimony from the trailer’s owners that Mr. Rath was in the trailer with their permission was not disputed by the Defendant. The trial court denied the summary judgment motion.

The case proceeded to a bifurcated trial on June 3 & 4, 2013 to first determine whether Plaintiff was lawfully on the premises, and if so, would then proceed to a determination of damages. After the parties rested, the trial court gave the jury the following instructions:

INSTRUCTION NO. 2

The Plaintiff has the burden of proving each of the following propositions:

First, that the plaintiff has bitten by defendant Grays Harbor County’s police dog.

Second, that the plaintiff was lawfully in the private residence at the time he was bitten.

If you find from your consideration of all the evidence that each of these propositions has been proved against defendant Grays Harbor County, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these propositions has not been proved against the defendant, your verdict should be for the defendant.

INSTRUCTION NO. 7

Washington law provides:

The owner of any dog which shall bite a person while such person is lawfully in a private place shall be liable for such damages as may be suffered by the person bitten.

INSTRUCTION NO. 8

A person is lawfully upon the private property of such owner when such person is upon the property of the owner with the express or implied consent of the owner.

INSTRUCTION NO. 9

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 10

A person remains unlawfully in a private place when he or she purposefully refuses to leave a premises or submit to arrest when given a lawful order to do so.

CP 490-92 (Court's Instructions to the Jury).

The trial court did not provide authority from which it based its jury instruction number 10. Plaintiff objected to jury instruction number 10 being given to the jury. VRP 121, 122. The jury returned a verdict finding that Mr. Rath was bitten by the police dog, but that he was not lawfully in the trailer when he was bitten. Plaintiff requests that this court reject instruction No. 10 and direct a verdict on liability in favor of Plaintiff since it is undisputed that he was bitten by Defendant's dog on premises where he had permission from the owners to be.

## V. STANDARD OF REVIEW

### **Summary Judgment**

In reviewing a summary judgment matter, the appellate court engages in the same inquiry as the trial court. *Jones v. Allstate Ins.*, 146, Wn.2d 291, 300 (2002). The standard of review is thus de novo. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708 *cert. denied*, 552 U.S. 1040 (2007).

Summary judgment is a procedural device designed to avoid the time and expense of trial when no trial is necessary. Karl B. Tegland & Douglas J. Ende, *Washington Handbook on Civil Procedure* § 69.1 (2004 Edition). Summary judgment should be granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn. 2d 506, 516 (1990). Once the moving party demonstrates that there is no genuine issue of material fact present and that

the party is entitled to judgment as a matter of law, the opposing party must demonstrate that a triable issue remains. CR 56(e).

### **Jury Instruction**

Review of a jury instruction is de novo if based on the trial court's view of the law. *State v. Lucky*, 128, Wn.2d 727, 731 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544 (1997).

## **VI. LEGAL ARGUMENT**

### **THE COUNTY IS STRICTLY LIABLE FOR THE INJURIES CAUSED BY THE BITES FROM ITS DOG AS A MATTER OF LAW**

#### **1. Washington's Strict Liability Dog Bite Statute**

At all times material to Mr. Rath<sup>2</sup>, Washington law imposed strict liability on all dog owners when their dogs bite and injure people, stating:

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<sup>2</sup> RCW 16.08.040 was changed by the legislature in 2012, signed by the governor, and became effective June 7, 2012. The statute was changed to exclude police dogs; however, the changes were not in effect when Gizmo bit Mr. Rath or at the time that his lawsuit was filed.

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

RCW 16.08.040.

Viewing the evidence in the light most favorable to the County, including all reasonable inferences, no genuine issues of material fact exists regarding whether (1) the County owned Gizmo, (2) whether Gizmo bit Mr. Rath, and (3) whether Mr. Rath was lawfully at the subject residence with permission at the time he was bitten under the strict liability dog bite statutes. Consequently, the County is strictly liable for Mr. Rath's injuries as a matter of law.

2. **There are No Genuine Issues of Material Fact that the County is Strictly Liable for the Injuries Mr. Rath Sustained from the Dog Gizmo For The Purposes Of Liability Under RCW 16.08.040**
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**A. The County Owned the Police Dog Gizmo  
and RCW 16.08.040 Applies to Municipal  
Police Dog Owners**

RCW 16.08.040 provides that any dog owner is strictly liability if their dog bites another person. “‘Owner’ means any person, firm, corporation, organization, or department possessing, harboring, keeping, having an interest in, or having control or custody of an animal.” RCW 16.08.070(7). The rule of statutory interpretation is that “[i]f the statute’s meaning is clear on its face, [the Court] must give effect to that plain meaning as an expression of legislative intent.” *Washington Public Ports Ass’n v. State Dept. of Revenue*, 148 Wn.2d 1, 9-10 (2002) (citation omitted). Moreover, RCW 16.08.040 is in derogation of the common law and must be strictly construed. *Beeler v. Hickman*, 50 Wn.App. 746, 751 (1988) (citations omitted). Deputy Crawford confirmed at his deposition and in trial testimony that the County owned Gizmo. CP 241-42 (Crawford Dep. 12-13); VRP 37, 38 (Direct Exam of Harold Rath).

The County owned Gizmo. The broad definition of “owner” under RCW 16.08.070(7) clearly encompasses a municipal owner such as the County and Deputy Crawford confirmed it. The County owned Gizmo for the purposes of liability under RCW 16.08.040 as a matter of law under the plain meaning of the statute and by admission of its agent. The County has never challenged it would not fall under the definition in RCW 16.08.070. There is no dispute between the parties that the County owned Gizmo. Moreover, there is no dispute that the police dog bit Mr. Rath.

Numerous rulings by Washington courts confirm and support that the strict liability dog bite statute applies to police dogs and does not preclude liability against municipal owners. *See Peterson v. City of Federal Way, et al*, 2007 WL 2110336 at \*3 (W.D. Wash. July 18, 2007) (not reported) (citing *Rogers v. City of Kennewick, et al*, 2007 WL 2055038 at \*7 (E.D. Wash. July 13, 2007) (not reported), *aff'd*, *Rogers v. City of Kennewick, et al.*, 2008 WL 5383156 (9th Cir. Dec. 23, 2008)

(not selected for publication); *Smith v. City of Auburn*, 2006 WL 1419376, at \*7 (W.D. Wash. May 19, 2006) (not reported)).<sup>3</sup> CP 312-47 (Harris Decl. Exhibits C, D, E, F, & G).

In *Peterson, supra*, the Court held the City of Federal Way strictly liable under RCW 16.08.040 when a police dog bit a bystander during the course of a police chase of a suspect. 2007 WL 2110336, at \*3. In *Rogers, supra*, the Court held the City of Kennewick strictly liable when the City's police dog bit the plaintiff, who was sleeping in the backyard of his stepson's home. 2007 WL 2055038, at \*7. In *Smith, supra*, the Court

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<sup>3</sup> We note that citation to unpublished opinions from jurisdictions other than Washington State is allowed 'if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.' GR 14.1(b)." *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 68 n.54, 199 P.3d 991 (Wn. App. Div. 1 2008). Under the Federal Appellate Rules, "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007." Fed. R. App. P. 32.1(a). Consequently, Fed. R. App. 32.1(a) permits citations to "not reported" or "not for publication" judicial opinions issued after January 1, 2007, and therefore, such citations are permitted in Washington under GR 14.1(b).

held the City of Auburn strictly liable when the City's police dog bit a suspect. 2006 WL 1419376, at \*7.

These courts unanimously recognize that Washington's strict liability dog bite statute applies to police dogs, even during the course of police work, and render municipal owners strictly liable for injuries caused by the dog's bites.

Illustratively, in *Rogers v. City of Kennewick*, *supra*,

Judge Shea stated in pertinent part:

Plaintiffs highlight that the dog bite statute [RCW 16.08.040] does not contain an exception for police dogs. The Court agrees with Plaintiffs that RCW 16.08.040 applies to police dogs as the plain language of the statute does not include any exceptions...

A finding that § 16.08.040 applies to police dogs is also consistent with RCW 4.24.410(2). This statute states, '[a]ny dog handler who uses a police dog in the line of duty in good faith is immune from civil action for damages arising out of such use of the police dog or accelerant detection dog.' Accordingly, when these two statutes are read together a police dog handler is exempt for liability under RCW 16.08.040.

However, this police dog handler immunity statute does not protect the police dog owner from suit. In

1988, the Washington Court of Appeals discussed the meaning of 'owner' in the dog bite statute in Beeler v. Hickman, 50 Wash. App. 746 (1988). The court stated the term 'owner' was not limited to the person who purchased the dog but may also apply to an individual who had control and custody of the dog for over a three year period. Accordingly, two individuals/entities could be determined to be an 'owner' under RCW 16.08.040. In the context of a police dog, the dog is owned by the municipality, however, it is the dog handler who controls and takes care of the dog on a daily basis. Therefore, both the dog handler and the municipality could be considered an 'owner.' The legislature only protects a police dog handler from suit and not the municipality. Therefore, the Court finds Kennewick can be sued under RCW 16.08.040.

*Order Den. In Part and Granting In Part Def.'s Mot. for Summ. J. and Granting Def.'s Motion for Recons., 2:04-cv-05028, Doc. 109 at 42-44, Mar 21, 2005. See CP 312-17 (Harris Decl. Exhibit C).*

Similar to Judge Shea's reasoning in the *Rogers* case, quoted above at pages 16 & 17, Judge Martinez in the *Peterson* case held:

[T]his Court determined that had the legislature meant to except police dogs from the reach of the statute [RCW 16.08.040], it could have done so.

Furthermore, this Court is not persuaded that RCW 4.24.410 supersedes the statute [RCW 16.08.040].

Indeed, there is not conflict between the two because plaintiff does not contend that [the dog handler] owns [the police dog], and has not pursued a strict liability claim against him. Accordingly, the Court finds that the strict liability statute imposes liability on the City as the owner of [the police dog].

*Peterson, supra*, at \*3.

The Court in *Smith v. City of Auburn* reached the same decision, stating:

Had the Legislature meant to except police dogs from the reach of the statute [RCW 16.08.040], it could have done so. Moreover, the conclusion that police dogs are covered under the statute is consistent with a separate statute which provides immunity from suit under the state law to the handler, but not the owner, of a police dog. RCW 4.24.410(2). Thus, the court finds that the strict liability statute does impose liability on the City, as the owner of a police dog. Accordingly, defendants' motion for summary judgment on this issue is denied.

*Smith, supra*, at \*7.

In 2012, the legislature added language to RCW 16.08.040 and the governor signed into law subsequent to Mr.

Rath's injuries at the teeth of Gizmo and his commencement of this lawsuit. The law became effective June 7, 2012 and states:

(1) The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

(2) This section does not apply to the lawful application of a police dog, as defined in RCW 4.24.410.

*Id.* (emphasis added).

The legislature's new language, which now exempts police dogs, further demonstrates that the statute did not exclude police dogs before June 7, 2012. That is in accord with the prior plain language of the statute and the courts' interpretation of it. At the time Gizmo bit Mr. Rath, the strict

liability dog bite statute imposed strict liability against the County as a matter of law.<sup>4</sup>

The trial court correctly determined that the strict liability dog bite statutes apply to Grays Harbor County. That decision is supported by the unambiguous language of the statutes and court precedent. However, in drafting instruction number 10, the trial court created a new definition of “lawfully on the premises” without supporting legal authority and in contrast to previous dog bite cases that had defined lawfulness as being in the private premises with implied or express permission of the owners. See argument at Section B., *infra*. This newly created instruction was a clear error of law and should be reversed with a directed verdict on liability.

**B. Gizmo Bit Mr. Rath while He was Lawfully on Private Property Under RCW 16.08.040 as A Matter of Law**

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<sup>4</sup> There is no indication in the language of the statute or its legislative history that the added immunity to law enforcement agency dog owners was intended to be retroactive. The trial court correctly determined that the statutory change did not apply retroactively. In addition, Mr. Rath filed his lawsuit before the law was changed.

Gizmo bit Mr. Rath while he was in the residence with the permission of the owners (Leonard Ver Valen and Valerie Dixon). The statutory scheme of the strict liability dog bite statute defines what it means to be lawfully upon private property in RCW 16.08.050, which states:

A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said consent shall not be presumed when the property of the owner is fenced or reasonably posted.

Plainly, Mr. Rath is a person. The statute does not discriminate against who the “person” being bitten is; i.e., it does not matter that, in this case, the police were attempting to locate Mr. Rath in the trailer or demanding that he leave the trailer. There are no genuine issues of material fact that Mr. Rath was in the trailer with the permission of the property owners.

The definition of lawful presence in Chapter RCW 16.08 is focused on the permission to be on the property, whether express or implied. *Sligar v. Odell*, 156 Wn.App. 720 (2010). In *Sligar*, the plaintiff stuck her finger through a fence without the permission of the property owner and was bitten by a dog. *Id.* at 725. The Court upheld the granting of summary judgment dismissing the claim because the plaintiff did not have permission to be on the private property. *Id.* at 730. The Court explicitly stated that the definition for lawful presence on private property under RCW 16.08.040 was covered by RCW 16.08.050<sup>5</sup>:

RCW 16.08.050 defines when entrance on private property is lawful for purposes of the above statute: A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner.

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<sup>5</sup> The statute does not preclude trespassers on public property from strict liability recovery. RCW 16.08.040.

*Id.* at p. 727. The *Sligar* court’s focus was on the consent to enter and remain on the property. It is undisputed that Mr. Rath had permission from the private property owners to enter and remain on their property at the time he was bitten by Defendant’s dog. Because he was lawfully on private property, the County is strictly liable for his injuries.

The common law definition of being lawfully on the premises is equally dispositive in favor of Mr. Rath. One is lawfully in a private residence when he or she is in that home as “allowed or permitted by law.” *Hansen v. Sipe*, 34 Wn.App. 888 (1983). The Washington Pattern Jury Instructions provide a similar definition:

WPIC 65.02 Enters or Remains  
Unlawfully—Definition

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, **invited**, **or** otherwise privileged to so enter or remain.

WPIC 65.02 (emphasis added). It is undisputed that Mr. Rath was invited to enter and remain on the premises by the trailer owners. Thus, he retained the status of “lawful presence” under a common law definition even if he was accused by deputies of violating their orders to leave the trailer. At most the deputies could have accused him of violating the law while he was in the trailer, but they had no legal basis to accuse him of trespassing or otherwise being unlawfully present in the trailer at the time that their dog bit him<sup>6</sup>. The only persons who could grant or revoke permission for Plaintiff to be in the trailer were its owners; Mr. Rath was therefore lawfully on the premises at the time he was bitten by the County’s dog and subject to the strict liability protection of RCW 16.08.040.

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<sup>6</sup> The County’s deputies never charged Mr. Rath with any unlawful conduct in the trailer. Even if he had been charged with crimes allegedly committed in the trailer this would not have changed his status of lawfully being there with permission of the owners. This distinction is exemplified in the burglary statutes that find an additional crime of unlawful entry or remaining in addition to any other crimes committed on the property. 11A See Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02.01 (Definition of residential burglary).

According to jury instruction number 10, ignoring police officer demands to exit a private home revokes the express permission of an invited guest to remain on the premises. CP 492. This position is unsubstantiated by any case law or statutory authority. The only question regarding lawful presence is one of permission by the private property owner, whether implied or express. *Sligar v. Odell*, 156 Wn.App. 720 (2010); *Hansen v. Sipe*, 34 Wn.App. 888 (1983); and *WPIC 65.02*; and *WPIC 120.01* (defining a trespasser as a person who enters or remains upon the premises of another without permission or invitation, express or implied).

The sworn and admissible<sup>7</sup> testimony of the trailer owners establishes that Mr. Rath had the owners' permission to be in the trailer and that permission was never revoked. Mr. Rath meets both the statutory and common law definitions of

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<sup>7</sup> Sworn declaration testimony based on personal knowledge is admissible in a summary judgment proceeding pursuant to CR 56(e). Although the owners did not testify at trial, Defendants failed to offer any evidence contradicting Mr. Rath's testimony that he entered and remained in the trailer with their knowledge and consent. VRP 32-34

“lawful presence” in the trailer. There is no legal authority that ignoring officer demands or allegedly committing misdemeanor obstruction or the existence of an arrest warrant would negate the owner’s express permission to enter and remain on the property for purposes of defining trespass, and thus render him a trespasser. Strict liability under the statute cannot be claimed by trespassers on private land, but there is no factual or legal basis to argue that Mr. Rath was a trespasser at the time he was bitten.

The legislature did not create a general ‘criminal conduct’ exception in the strict liability dog bite statutes for private residences unless the victim was a trespasser therein. Mr. Rath was not trespassing at the time he was bitten by Defendant’s dog as a matter of law. Jury instruction number 10 creates a new exception to the strict liability dog bite statutes. The assertion that Mr. Rath was illegally in the private residence by not responding to police does not impact the lawfulness of his presence in the trailer as it is defined in the

statute, by case law, or the Washington Pattern Jury Instructions.

Mr. Rath was lawfully in the trailer at the time he was bitten by Defendant's dog as a matter of law according to the common law and under the strict liability statute because he had the owners' permission to be there. The issue of whether or not he could have been (but was not) charged and convicted of obstructing or some other crime is irrelevant to this analysis as a matter of law.

**3. Public Policy Supports Strict Liability for Injuries Caused by Police Dogs – The Legislature's 2012 Change Places the Public at Increased Risk of Serious Dog Bite Injuries**

Imposition of strict liability when a bite-and-hold police dog injures somebody is in accord with rational public policy. Strict liability imposes liability on a party without a finding of fault. In strict liability cases, the plaintiff need only show that the injury was caused by the defendant's conduct and that such conduct falls into a category covered by strict liability. The law

imputes strict liability to situations considered to be inherently dangerous. At all times material to this action, RCW 16.08.040 unambiguously imposed strict liability on all dog owners. Dogs that bite, in general, are dangerous. As discussed below, bite-and-hold police dogs are even more dangerous.

The legislature expressly chose not to exclude municipal dog owners from RCW 16.08.040. This is abundantly clear when reviewing the entirety of RCW 16.08 *et seq*, wherein the legislature specifically exempted police dogs from RCW 16.08.080, .090, and .100 in 1987 (RCW 16.08.080(5)); yet did not exempt municipal dog owners from liability for injuries caused by police dogs. It is also clear and further evident when considering RCW 4.24.410. RCW 4.24.410(2) provides immunity to a police dog handler, but the legislature did not provide such immunity to the municipal owner of the police dog. *See also, Peterson v. Federal Way*, 2007 WL 2110336, at \*3 (W.D. Wash. July 18, 2007); *Smith v. City of Auburn*, 2006 WL 1419376, at \*7 (W.D. Wash. May 19, 2006).

Imposing strict liability on municipal owners, as the law did until it was changed by the legislature in 2012, makes rational public policy sense. Bite-and-hold police dogs, like Gizmo, are very dangerous. Police dog bite injuries are more serious than domestic dog bit injuries. P.C. Meade, "Police Dog and Domestic Dog Bite Injuries: What are the Differences?" 37 *Injury Extra* 395 (2006); *see also*, H. Range Hutson et al., "Law Enforcement K-9 Dog Bites: Injuries, Complications and Trends", 29 *Annals of Emergency Med.*, 637, 638 (1997) ("K-9 dog bites are associated with significant injuries."). Police dog bites result in a higher rate of hospitalization, multiple bites, operations, and invasive procedures than domestic dogs. *Id* at 399. Police dogs also bite their victims more on the head, upper arms, and chest. *Id.* Bite-and-hold police dogs are larger breeds, like German Shepherds, and the forces of their bites can be as high as 1,500 PSI. Hudson, *supra*, at 638. As the victim is bitten by a bite-and-hold police dog, the suspect often struggles to avoid pain

and injury, prompting the dog to re-grasp and hold with greater forces. *Id.* “Injury is almost inevitable.” *Id.*

Under the common law and the applicable version of RCW 16.08.040 (strict liability dog bite statute), dogs are recognized as useful in society, but with tendencies to bite people in ways not easily controllable by owners and thus subject to strict liability for the injuries they cause. As noted above, bite-and-hold police dogs are particularly dangerous and often cause serious injuries. Mr. Rath’s serious injuries are an example of the damage a bite-and-hold police dog can cause that is not related to locating a suspect and preventing him from using a weapon. No witness has stated that the serious injuries Defendant’s dog caused Mr. Rath were intended, or reasonable under any legal standard. Until 2012, the burden on all dog owners in Washington was to pay for dog bite damages when they occurred. Owners of dog, including municipal owners, could deploy dogs to assist them in their work – but they owed damages if their dog injured somebody. In essence, the law

shifted the burden of proof away from the dog bite victim to the owner.

Deputy Crawford candidly admitted at his deposition that he had other reasonable options to subdue Mr. Rath other than a dog, whose biting behavior would be difficult to manage. The following are some pertinent excerpts from Deputy Crawford's deposition:

**Q. [Breean Beggs]. Okay. Is there a particular location on the body that they try to bite...?**

**A. [Deputy Crawford]. No.**

**Q. Okay. So Gizmo was deployed to apprehend him by biting and holding him?**

**A. Mm-hm.**

**Q. Is that a "yes"?**

**A. Mm-hm, yes.**

*See CP 246 (Crawford Dep. 31: 3-12).*

**Q. Okay. So I asked you earlier if you had a – if TASERS were available. Any reason why a TASER – you didn't use a TASER or someone didn't use a TASER instead of a dog?**

**A. No reason.**

**Q. Any reason why, once you saw him there, you didn't spray some more OC at him?**

**A. No reason.**

CP 247 (Crawford Dep. 36:6-13).

**Q. Did you have any reason to believe prior to deploying Gizmo that Mr. Rath was in the commission of a felony actively at that time?**

**MR. JUSTICE: Object to the form.**

**THE WITNESS: No.**

CP 248 (Crawford Dep. 37:3-7).

**Q. I'm handing you what's been marked as Exhibit 5. Do you recognize that as Mr. Rath at all?**

**A. I mean, I know what it is.**

**Q. Okay. All right. So it is your understanding that it's photos of Mr. Rath after this incident?**

**A. Yes.<sup>8</sup>**

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<sup>8</sup> This photograph is one identified in Exhibit 5 to Deputy Crawford's deposition. See CP 248 (Crawford Dep. 39:14-19. Exhibit 5.)



**Q. ...And going back to Exhibit 5, are those wounds that you see in photos of Exhibit 5, are those consistent with what Gizmo could do to someone if he was in contact with them?**

**A. Yes.**

CP 248 (Crawford Dep. 39:14-19; 40: 14-17).

**Q. Can you direct Gizmo to go just for the arms or just for the leg? Or does – when he's going to bite and apprehend someone, does he use his own judgment?**

**A. The best way to answer that would be typically the K-9 is going to engage a subject on any portion of a body part that is available.**

**Q. Okay. And there's – I'm assuming there's not a way to say, "Okay. Just" – you know, "Just bite him lightly," or, "Bite him hard"? It's just – it's one command? There's not gradations of the command are there?**

**A. Right.**

CP 249 (Crawford Dep. 41: 21-25; 42: 1-6).

The County chose to use the subject police dog, notwithstanding that multiple courts had previously ruled that using the dog would subject the municipal owner to liability for the injuries inflicted on the dog bite victim. There was nothing illegal about using the dog; the law simply imposed the burden of use on the municipal owner. Because Deputy Crawford had personal immunity, he was free to make his best judgment about the costs and benefits of using the dog. While the legislature allowed immunity to police dog handlers acting in good faith and making decisions in the field, it expressly chose not to grant immunity to the municipal owner for the damages

caused by police dogs. It was Defendant County's choice to use bite-and-hold police dogs; Deputy Crawford was using the dangerous tool provided to him by Defendant. *See* VRP 112 (Second Direct Exam of Dep. Crawford). The law at the time of this event placed the burden on the municipal owner to compensate the person injured by such an abnormally dangerous tool.

## **VII. CONCLUSION**

“For purposes of strict liability, lawful entry either through express or implied consent upon the property where the dog bite occurred is all that is necessary to have the statute apply.” DeWolf & Allen. *Washington Practice. Tort Law and Practice. Sec. 2.12, p. 86 (2006)*. As a matter of law, Mr. Rath was lawfully in the trailer for the purposes of RCWs 16.08.040 and 16.08.050 when Gizmo bit him multiple times therein. There are only two ways a dog owner can escape liability under the statute. The first is when the bite victim is committing a trespass. The second is when the bite victim is teasing or

abusing (provoking) the dog to bite him. Neither applies here as a matter of law based on the undisputed facts. The statutory requirements were met to impose strict liability on the County for the dog bite injuries as a matter of law. Mr. Rath respectfully requests that the Court reverse the trial court, impose strict liability as a matter of law, and remand this case to trial on the issue of Mr. Rath's damages.

Respectfully submitted this 15<sup>th</sup> day of November, 2013.

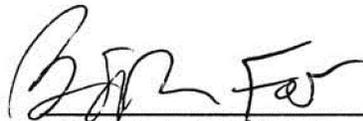
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PLLC



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MAXEY LAW OFFICES, P.S.



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COURT OF APPEALS  
NOV 20 2013 11:20  
STATE OF WASHINGTON  
BY         

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

HAROLD RATH,  
  
Plaintiff-Appellant,  
  
v.  
  
GRAYS HARBOR COUNTY  
  
Defendant-Respondent.

NO. 45076-3-II  
  
DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury pursuant to the laws of the State of Washington, I am now and at all times herein mentioned have been, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 15, 2013, I caused the original and one copy of Appellant's Opening Brief and this Declaration of Service to be

mailed to the Clerk, Court of Appeals, Division II, State of Washington, for filing in the above-captioned matter, and served on counsel for Defendant-Respondent, by placing same in the United States Mail, postage prepaid, and properly addressed to the following:

John E. Justice  
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Kamerrer & Bogdanovich, P.S.  
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