

**NO. 45076-3-II**

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**

**DIVISION II**

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**HAROLD RATH,**

**Plaintiff-Appellant/Cross-Respondent,**

**v.**

**GRAYS HARBOR COUNTY,**

**Defendant-Respondent/Cross-Appellant.**

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**On Appeal from Thurston County Superior Court  
Cause No. 12-2-00607-2**

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**RESPONDENT/CROSS-APPELLANT'S  
OPENING BRIEF**

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**John E. Justice, WSBA No. 23042  
Law, Lyman, Daniel, Kamerrer &  
Bogdanovich, P.S.  
P.O. Box 11880  
Olympia, WA 98508-1880  
(360) 754-3480  
Attorneys for Respondent/Cross-  
Appellant**

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**I. IDENTITY OF RESPONDENT/CROSS-APPELLANT**

Grays Harbor County is the Respondent/Cross-Appellant.

**II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

- A. Can the denial of Mr. Rath's motion summary judgment be appealed if the denial was based on a determination that there was a question of material fact regarding whether Mr. Rath was "lawfully" in the trailer of an acquaintance and that question was resolved against him? (Appellant's Assignment of Error No. 1)
  
- B. Did the Trial Court err in giving Instruction No. 10 when the law makes it unlawful to refuse to surrender to law enforcement when given a lawful order to do so? (Appellant's Assignment of Error No. 2)

**III. ASSIGNMENTS OF ERROR PERTAINING TO CROSS-APPEAL**

Did the Trial Court err as a matter of law in ruling that former RCW 16.08.040 applies to the lawful application of a police canine during an arrest to the intended target of the arrest?

**IV. STATEMENT OF ISSUES PERTAINING TO CROSS-APPEAL**

- A. Should the 2012 amendment to RCW 16.08.040, which clarified that the strict liability dog bite statute does not apply to the lawful application of a police dog be applied retroactively because its remedial and curative?

- B. Should RCW 16.08.040 be held inapplicable to the reasonable and lawful application of a police dog to avoid an absurd result and avoid a conflict with statutes permitting reasonable force?

**V. COUNTER-STATEMENT OF THE CASE**

**A. Factual Background.**

On January 7, 2010, the appellant, Harold Rath, pled guilty to the crimes of possession of a stolen motor vehicle, theft of a motor vehicle and unlawful possession of a firearm. CP 58-62. His August 19, 2009 arrest for those three crimes, which culminated in his guilty plea, was the precipitating event for this lawsuit. CP 3-7. Weeks prior to his arrest, Mr. Rath was seen by Grays Harbor County Sheriff's Deputy Kevin Schrader driving in a stolen vehicle. CP 16-17. Deputy Schrader first witnessed Mr. Rath doing circles (or donuts) in the middle of a roadway, creating a cloud of dust. VRP 62. He initiated a traffic stop by getting behind Mr. Rath's vehicle and activating his emergency lights. *Id.* Mr. Rath performed a radical steering maneuver that caused his vehicle to quickly turn 180 degrees and end up facing Deputy Schrader about 30 feet away. VRP 64.

As Deputy Schrader got out of his patrol car, Mr. Rath accelerated rapidly in his direction and passed by him within a couple of feet. VRP 64-65. Mr. Rath then performed another 180 degree maneuver and ended up behind Deputy Schrader, this time facing the rear of his patrol car, now about 20 feet away. VPR 65-66. Deputy Schrader assumed Mr. Rath was about to ram his patrol car. *Id.* Again Mr. Rath revved his engine and sped directly toward Deputy Schrader. Deputy Schrader moved his patrol car enough to avoid being rammed; but still Mr. Rath came within one to two feet of striking his vehicle. VRP 66-67. Deputy Schrader then followed Mr. Rath with his lights and sirens activated. VRP 67. Mr. Rath accelerated to about 80 m.p.h.. VRP 68.

Mr. Rath was able to elude capture by Deputy Schrader by going down a deeply rutted dirt road, jumping out of the stolen truck, jumping in a nearby river and swimming across. VRP 68-69; CP 17. Deputy Schrader confirmed that the truck Mr. Rath was driving was stolen and inside was located a stolen 12 gauge shotgun. VRP 71-72. Mr. Rath was a convicted felon and not allowed to possess a weapon; stolen or not. *Id.*

For the next several weeks, Mr. Rath avoided capture by law

enforcement by hiding out in the woods around Grays Harbor and moving frequently. CP 19. He believed he would be arrested if he came in contact with law enforcement. CP 20. In fact, Mr. Rath was the subject of an outstanding warrant for first degree felony kidnapping, in addition to his more recent theft of the truck, possession of the shotgun and eluding. CP 71.

On the day of his arrest, Mr. Rath reportedly went to the trailer of Valerie Dixon. CP 21. While there, law enforcement received a report that Mr. Rath was hiding out in a trailer park in the vicinity of the Hoquiam River. VRP 83. In the course of a systematic check of local RV parks, two Grays Harbor County deputies arrived at the trailer where the Mr. Rath was hiding. VRP 83-84.

An occupant of the trailer, Leonard Vervalen, answered the door and initially indicated that only he and his girlfriend, Ms. Dixon, were inside, but his hesitation in answering led the deputies to ask him to step outside the trailer. VRP 85; CP 36-37. Once outside, Mr. Vervalen indicated that Mr. Rath was inside the trailer. *Id.* He was not sure if Mr. Rath was armed. CP 37. The deputies then asked Ms. Dixon to come outside, which she did. VRP 86-87.

Ms. Dixon told the deputies that Mr. Rath was hiding inside and knew law enforcement was outside. CP 38; 76. The owner of the trailer consented to law enforcement entering the trailer to arrest Mr. Rath. VRP 18.<sup>1</sup>

The two deputies waited for back up officers to arrive. CP 38. Mr. Rath was wanted for a felony, and he had recently been armed with a stolen shotgun. CP 32-34. He was known to have made statements that he would not go back to Jail and would shoot police. *Id.* At the trailer, the deputies made numerous efforts to get Mr. Rath to come out voluntarily, including shouting orders to surrender and deploying OC (pepper) spray into the small trailer. VRP 91-93. An entry and arrest team was formed once it was clear Mr. Rath was not voluntarily coming out. VRP 95. The team included Grays Harbor K-9 Deputy Rob Crawford and his police dog Gizmo. VRP 95-96.

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1. Mr. Rath raises the issue of the absence of a search warrant without explaining its relevance to this case. *Appellant's Brief*, pg. 7. However, consent of the owner is an exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). Further, Mr. Rath failed to present evidence or argument that he had standing to assert the need for a search warrant. *State v. Link*, 136 Wn. App. 685, 693, 150 P.3d 610 (2007). Finally, he failed to argue below that the lack of a search warrant invalidated the entry. RAP 2.5(a). This issue is a classic red herring.

Deputy Crawford entered the trailer behind another officer carrying a ballistic (bullet-proof) shield. *Id.* All members of the entry team were also wearing Kevlar helmets. *Id.* The entry team continued to shout orders to surrender as they advanced, including Deputy Crawford's issuance of the standard K-9 announcement two or three times:

“Grays Harbor Sheriff's K-9 . . . This trailer will be searched by a K-9. Come out now or you will be bitten.”

VRP 97.

Gizmo led the officers to the bedroom in the trailer and Gizmo alerted to the bedroom area, although Mr. Rath could not be seen. VRP 99-100. Deputy Crawford was aware that there were often storage spaces under beds inside such trailers, and he lifted the bed while keeping Gizmo on lead. VRP 101. Once the bed was lifted, Deputy Crawford saw Mr. Rath lying under the bed in the storage space. VRP 102.

Deputy Crawford described Mr. Rath's appearance as follows:

He was positioned or oriented face down, head toward

us, towards the foot of the bed, and arms up tucked underneath his body.

VRP 103.

Deputy Crawford explained that the main concern at that point was not being able to see Mr. Rath's hands and to make sure he did not have a concealed weapon. *Id.* Deputy Crawford shouted at Mr. Rath to show his hands. VRP 104. Deputy Crawford witnessed Mr. Rath bracing. *Id.* He did not surrender or show his hands. *Id.* Gizmo was then utilized to extract Mr. Rath from beneath the bed, so that he could be safely placed under arrest. VRP 105. Mr. Rath struck out at Gizmo during the encounter. *Id.*

Mr. Rath's only cause of action was against Grays Harbor County for strict liability under the state's strict liability dog bite statute, RCW 16.08.040. CP 5. At the time of Mr. Rath's encounter with Gizmo, that statute read as follows:

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. (Emphasis

added).<sup>2</sup>

### **B. Procedural Background.**

The parties filed cross-motions for summary judgment on the question of RCW 16.08.040's application to this case. CP 79-90; 355-379. Grays Harbor County contended that RCW 16.08.040 did not apply to the lawful use of a police canine to arrest a suspect and the person bitten is the intended target of the canine. CP 82-88. It also argued that Mr. Rath was not “lawfully” in a private place at the time he was bitten because he was unlawfully refusing orders to surrender to arrest. CP 88. Mr. Rath argued that all he needed to show was that he had the consent of the trailer owners to be in the trailer and liability was established regardless of his clearly unlawful behavior inside the trailer. CP 369-70. The trial court ruled that the statute applied to this situation. However, it also found that there was a genuine issue of material fact as to whether Mr. Rath “lawfully” remained in the trailer at the time he was bitten by Gizmo in the course of being arrested. CP 228-230. Both summary judgment motions were thus denied and the case

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2. RCW 16.08.040 was amended after this incident to clarify that it does not apply to the “lawful application of a police dog, as defined in RCW 4.24.410.” RCW 16.08.040(2).

proceeded to trial. *Id.*

The trial court bifurcated the trial into a liability phase and a damage phase. *Appellant's Brief*, pg. 12. The liability trial was to answer the question of whether Mr. Rath was "lawfully" in the trailer when he was bitten. *Id.* After two days of evidence, the jury was asked:

Was the Plaintiff lawfully on the premises when he was bitten by Defendant's dog?

The jury answered this question: No.

CP 224.

There being no need for a damage phase, the trial court entered judgment for Grays Harbor County on the jury's verdict. CP 225-26. Mr. Rath appealed the judgment. CP 482. Grays Harbor County cross-appealed from the denial of its motion for summary judgment solely on the legal issue of the applicability of RCW 16.08.040 to the lawful use of a police canine on the intended individual being arrested. CP 227-230.

**VI. GRAYS HARBOR COUNTY'S RESPONSE TO MR. RATH'S APPEAL.**

**A. Standards of Review Applicable to Mr. Rath's Appeal of Instruction No. 10.**

Mr. Rath appeals from the denial of its motion for summary judgment. *Appellant's Brief*, pg. 2. He also appeals the giving of Instruction No. 10 at trial. To the extent that the trial court's denial of summary judgment was based on its determination that a question of material fact existed regarding the issue of lawful presence, that cannot be appealed. *See, Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988) (“[D]enial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact.”)

As explained below, Mr. Rath has conceded that a person can unlawfully *remain* in a location and lose the benefit of RCW 16.08.040 by not objecting to Instruction No. 9. Thus, the only legal question involved in Mr. Rath's appeal is whether a person unlawfully *remains* in a location, under RCW 16.08.040, when they purposely refuse to leave or submit to arrest when given a lawful

order to do so as stated in the trial court's Instruction No. 10. CP 496. If instruction No. 10 did not misstate the law, the jury verdict must be affirmed because Mr. Rath offers no other challenge to the verdict. The wording of instruction No. 10 presents a legal question this court reviews de novo. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)

**B. The meaning of “lawfully” under RCW 16.08.040 requires that both the entering and the remaining on the premises be lawful under the law of the case doctrine.**

RCW 16.08.040 provides for strict liability against, “[t]he 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 . . .” (emphasis added). “RCW 16.08.040 is in derogation of the common law and must be strictly construed.” *Beeler v. Hickman*, 50 Wn. App. 746, 751, 750 P.2d 1282 (1988). The trial court instructed the jury in instruction no. 8 that being “lawfully” on the property could be established by proof of consent of the owner:

**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.

CP 496.

However, it also instructed the jury in instructions 9 and 10 that:

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 496. (emphasis added)

As noted, the Verdict Form asked the jury to determine whether Mr. Rath was “lawfully” on the premises when he was bitten. CP 224.

Mr. Rath objected only to Instruction No. 10. VRP 121. Instruction No. 9 and the verdict form therefore became the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Mr. Rath thus cannot claim that it was erroneous to submit to the jury the issue of whether he lawfully *remained* in the trailer

despite the alleged consent of the trailer occupants to his entry and presence prior to law enforcement arrival.

To establish that he had consent to be in the trailer, Mr. Rath cites two declarations submitted to the trial court in support of his motion for summary judgment, but not admitted at trial. CP 423-27. Neither declaration states that Mr. Rath had consent to remain in the trailer after being ordered out by law enforcement. He also cites his own trial testimony which does not actually say that the trailer owners consented to his remaining in the trailer after law enforcement arrived and ordered him out. VRP 30-33. More importantly, Mr. Rath has cited no authority for the proposition that a person can consent to another's unlawful conduct and thereby make it lawful.

Mr. Rath claims on appeal that RCW 16.08.050 provides the *only* test of what it means to be "lawfully in or on a private place."

RCW 16.08.050 provides:

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.  
(Emphasis added)

In *Hansen v. Sipe*, 34 Wn. App. 888, 891, 664 P.2d 1295 (1983), the court held that the express or implied consent of the owner provision in RCW 16.08.050 does *not* apply to property which is *not owned by the same person who owned the dog*. *Id.* It based its holding on the fact that the legislature used the terms “of such owner” which the Court held refers back to the previous use of the word ‘owner’ in RCW 16.08.040, i.e., the owner of the dog.”

*Hansen* went on to rule that:

“[s]ince the Legislature does not define ‘lawful’ presence as it relates to persons on private property *owned by third persons*, the usual and ordinary meaning of that term applies. (citation omitted). Webster's Third New International Dictionary (1969), defines ‘lawful’ as ‘allowed or permitted by law.’”

*Hansen* 34 Wn. App. at 891 (emphasis added).

Mr. Rath relies on a 2010 case, *Sligar v. Odell*, 156 Wn.App. 720, 724 (2010), in which the plaintiff's finger was bitten by her neighbor's dog after she put her finger through the neighbor's fence. At issue was whether the plaintiff's finger was lawfully on her neighbor's property, *who was also the owner of the dog*. *Id.* at 727-28. *Sligar* noted that “RCW 16.08.050 defines when entry on the private property *of a dog owner* is lawful for purposes of liability.”

*Id.*, at 728. The obvious concern when the situation involves a property owner whose own dog bites someone is to avoid rewarding a trespasser or someone on the property without the consent of the property/dog owner. That concern is not present in this case, i.e. when the dog is not owned by the property owner. Mr. Rath was not on the property *of the dog owner*. Under *Hansen*, RCW 16.08.050 does not apply to this case. *Sligar* does not overrule *Hansen* or otherwise alter its holding. Thus, Mr. Rath had to show that his presence in the trailer at the time he was bitten was “allowed or permitted by law.” The trial court in this case determined that the law does not permit a person to remain on a premises or refuse to submit to arrest when given a lawful order to do so.

It is undisputed that, at the time he was bitten, Mr. Rath was the subject of an arrest warrant for a felony kidnapping, and was, by his own admission, avoiding law enforcement for several additional crimes related to possessing a stolen vehicle, eluding a deputy and possessing a stolen shotgun. He was found hiding under a bed. Mr. Rath claimed he was sleeping. VRP 38. Deputy Crawford testified that he did not hear any snoring and witnessed Mr. Rath bracing his

body. VRP 103-104. This was plainly a fact dispute and the jury was free to disregard Mr. Rath's self-serving testimony. *Safeco Ins. Co. Of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 14, 680 P.2d 409 (1984). Mr. Rath was ordered to voluntarily surrender and pepper spray had already been applied to the inside of the trailer. Mr. Rath did not surrender and exit the trailer. This conduct was unlawful.

RCW 9A.16.020(1) makes it unlawful to obstruct a police officer. "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." *Id.* Mr. Rath's refusal to surrender clearly constitutes obstruction of a police officer. Put another way, the law did not "allow or permit" him to remain inside the trailer at the time Gizmo was utilized. *State v. Steen*, 164 Wn. App. 789, 265 P.3d 901 (2011).

In *State v. Steen, supra*, 164 Wn. App. at 798-801, the Court held that the defendant's conduct of "ignoring the officers' lawful orders to exit the trailer with his hands up while the officers were performing their community caretaking functions—was willful

conduct that amounted to obstruction.” The defendant’s claim in *Steen* was that he “did not know that the officers were discharging their official duties” and thus could not have willfully obstructed them. Like Mr. Rath, the defendant in *Steen* claimed he was sleeping. The Court rejected a challenge to the conviction for obstruction, explaining:

the facts show that the deputies, who arrived in patrol cars and wore police uniforms, repeatedly knocked “very loudly” on the trailer’s door, “yell[ed]” out “Sheriff’s department,” and asked any occupants to exit the trailer. CP at 325, 346. The trailer was small—between 7 to 8 feet wide and 12 to 30 feet long—and had “open windows,” making it easier to hear the officers’ commands. CP at 346. A woman had recently exited the trailer and was visibly upset. A jury could have reasonably inferred from these facts that Steen (1) had heard the officers’ identification and commands but had decided not to comply and (2) knew that the officers wanted to look inside the trailer to investigate a recent disturbance involving the woman. Accordingly, this argument fails.

*Id.* at 799.

Here, Mr. Rath does not challenge the lawfulness of the orders he was given to come out of the trailer and submit to arrest. The officers had an arrest warrant - that is undisputed. The act of wilfully not coming out of the trailer and submitting to arrest was

unlawful under state law, including RCW 9A.16.020(1). The trial court ruled that if Mr. Rath purposefully refused to follow a lawful order to leave the trailer, he was not lawfully in the trailer at the time he was bitten. CR 496. The jury apparently concluded that his claim of being asleep and not hearing the multiple orders to surrender and exit the trailer were not believable. Mr. Rath was thus not lawfully in the trailer when bitten and not entitled to the benefit of RCW 16.08.040.

Mr. Rath argues that because he was not charged with obstruction, or another crime, for his conduct in the trailer, he could not have been acting unlawfully. *Appellant's Brief*, pg. 29, n. 6. Instruction No. 10, however, told the jury that it was unlawful to remain in the trailer by purposefully refusing to submit to arrest when given a lawful order to do so. This is the embodiment of RCW 9A.16.020(1) in the context of remaining in a place after being lawfully order to leave by police. The jury did not have to determine if Mr. Rath committed a *crime* by doing so refusing. All they had to determine was that he acted in a way that Washington law does not

permit - which they did by their verdict.<sup>3</sup> The jury, however, did hear Deputy Crawford testify that Mr. Rath was committing several misdemeanor's at the time of his arrest, including obstruction. VRP 105-106.

The jury determined that Mr. Rath was not lawfully on the property and thus strict liability under RCW 16.08.040 did not apply. The jury verdict should therefore be affirmed.

**C. Public Policy is Not a Basis to Reverse the Trial Court.**

Mr. Rath claims that public policy supports strict liability in this case regardless of the fact that his deliberate actions created the need for the use of a police dog in his arrest. First of all, the legislature has indicated that it is not the public policy of this state to apply the strict liability dog bite statute to police dogs. RCW 16.08.040(2). It is quite likely that prior to the amendment the legislature simply overlooked the fact that the statute did not contain an *express* exclusion for police dogs. After all, Mr. Rath

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3. Mr. Rath is presumed to know the law. *Retired Public Employees Council of Washington v. State Dept. Of Retirement Systems*, 104 Wn. App. 147, 152, 16 P.3d 65 (2001) ("A reasonable person is deemed to know the law, or, as the old cliché puts it, 'ignorance of the law is no excuse.'")

cannot point to a single *state* court decision applying this statute to police dogs. Nor can he point to any external reason why the legislature amended RCW 16.08.040 to expressly exclude police dogs other than to remedy this apparent oversight.

Finally, Mr. Rath's formulation of public policy would certainly not be served in this case. He claims that the legislature wanted all dog owners to pay for injuries caused by their dogs. However, the legislature used the words "lawfully in or on a private place" as an express limitation on the application of strict liability. It did not use the word "trespasser." Thus, clearly the legislature recognized that persons who are not "lawfully in or on a private place" should not be compensated for dog bite injuries. Mr. Rath has conceded that he may have lawfully entered but unlawfully *remained* in the trailer. If he unlawfully remained, he has conceded the statute would not support his claim. Public policy, as expressed by the criminal obstruction statute, makes it unlawful to refuse to comply with lawful police orders. Mr. Rath was given a lawful order to surrender and exit the trailer. The jury determined he purposefully refused to comply. No public policy would be served by rewarding Mr. Rath for his intentional and criminal decision

which was the only reason Gizmo was needed in the first place.

In sum, Mr. Rath cannot appeal the denial of his summary judgment motion to the extent that it was denied due to the presence of an issue of material fact. Regarding his challenge to Instruction No. 10, he has not established that the instruction erroneously stated the law. Mr. Rath's appeal should be rejected and the jury verdict should be affirmed. If the verdict is affirmed, there is no need for the Court to consider Grays Harbor County's cross-appeal.

## **VII. ARGUMENT PERTAINING TO CROSS-APPEAL**

### **A. Denial of summary judgment.**

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted if it appears from the record 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).

A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

**B. The Use of a Police Dog to Arrest a Suspected Felon Should Not Trigger Strict Liability under RCW 16.08.040.**

At the time of Mr. Rath's arrest, RCW 16.08.040 provided as follows:

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.

The statute was amended in 2012 to clarify that the statute does not apply in cases such as this:

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

Grays Harbor County moved for summary judgment on the issue of whether Mr. Rath, who was the intended target of the lawful application of a police dog during an arrest, should be allowed to assert a claim for strict liability under RCW 16.08.040 as

a matter of law, when the arrest occurred prior to the 2012 amendment. CP 79-90. The trial court denied the motion. CP 209. Grays Harbor County filed a notice of cross-appeal of this denial. CP 227-230.

**1. The Legislature's 2012 Amendment Should Be Applied Retroactively Because its Remedial and Curative.**

The legislature's 2012 amendment makes it abundantly clear that the strict liability statute does not apply to situations like the one in this case. If the amendment is determined to apply retroactively then Mr. Rath's claim was subject to summary judgment because he did not proceed under any other theory.

Statutes that are remedial in nature may apply retroactively if such application furthers its remedial purpose. *Macumber v. Shafer*, 96 Wash.2d 568, 570, 637 P.2d 645 (1981). "A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *Miebach v. Colasurdo*, 102 Wash.2d 170, 181, 685 P.2d 1074 (1984). A curative amendment is one that clarifies or technically corrects an ambiguous statute and can also be applied retroactively.

*Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007). This is true even if the legislature did not expressly state the amendment applies retroactively. *Johnson v. Continental West*, 99 Wn. 2d 555, 559, 663 P.2d 482 (1983).

RCW 16.08.040(2) is remedial because it relates to remedies, i.e. a strict liability cause of action for dog bites. It also does not affect a vested right because the “abolition of a statutory cause of action does not impair any vested right.” *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). *See, also, Haddenham v. State*, 87 Wn. 2d 145, 550 P.2d 9 (1976) (“[A] tort cause of action is not vested until it is reduced to judgment.”)

RCW 16.08.040(2) is also curative because it clarifies the application of a statute that was, prior to the amendment, ambiguous as police dogs. The statute does not define “owner” to specifically include the government.<sup>4</sup> *Beeler v. Hickman, supra*, 50 Wn. App. at 751. A statute is ambiguous when it is susceptible to

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4. RCW 16.08.070 includes a definition of “owner” which does not specifically include municipalities. Further, while the plaintiff argues the definition found in RCW 16.08.070 applies to RCW 16.08.040, it only states that its definitions apply to RCW 16.08.070 and RCW 16.08.100. It is therefore not clear that the definition of “owner” in RCW 16.08.070 applies to RCW 16.08.040.

two or more reasonable interpretations. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). It is certainly reasonable to interpret the statute as not applying to police dogs given that state law expressly permits their use in this situation. (*See next section*).

Thus, the amendment of RCW 16.08.040 should have been applied retroactively by the trial court. Application of the amendment retroactively would further its remedial purpose, to exclude strict liability in cases of lawful application of a police dog.

In order to be applied retroactively, it is also necessary that the amendment “contravenes no construction placed on the original statute . . .” *State v. Jones*, 110 Wn. 2d 74, 82, 750 P.2d 620 (1988). While there are a few unreported federal cases cited by Mr. Rath that have construed RCW 16.08.040<sup>5</sup> to apply to a *bystander* and non-intended target, the defendant has found no state appellate cases applying RCW 16.08.040 to a police dog. The unreported

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5. See *Smith v. City of Auburn, et al.*, No. 04-cv-1829-RSM, 2006 WL 1419376, (W.D.Wash. May 19, 2006)(applying RCW § 16.08.040 to police dog bite of a man who claimed he was innocent of any crime); *Rogers v. City of Kennewick, et al.*, No. 04-cv-5028-EFS, 2007 WL 2055038 (E.D.Wash. July 13, 2007) (applying RCW § 16.08.040 to man mistakenly bitten by police dog); *Terrian v. Pierce County*, 2008 WL 2019815 (W.D.Wash., 2008) (finding statute did not apply to reasonable use of police dog); *Peterson v. City of Federal Way*, 2007 WL 2110336 (W.D.Wash., 2007) (person *mistakenly* bitten by police dog may pursue strict liability).

federal district court cases are not binding on this court. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn. 2d 27, 47, 204 P.3d 885 (2009). The only *reported* federal decision that applied the statute to an arrestee is *Miller v. Clark County*, 340 F.3d 959 (9<sup>th</sup> Cir. 2003). In *Miller*, the 9<sup>th</sup> Circuit Court of Appeals affirmed the district court's summary judgment that RCW 16.08.040 **did not** apply when, "the officers's ordering the dog to bite was reasonable under the United States Constitution's Fourth Amendment." *Id.* at n. 14.

In sum, the amendment should be applied retroactively as a remedial and clarifying amendment. It if is applied retroactively, summary judgment would have been appropriate because the application of Gizmo complied with RCW 4.24.410. CP 77-78.

**2. Applying RCW 16.08.040 to this case produces an absurd result.**

State law specifically contemplates the use of police dogs to apprehend suspects. RCW 4.24.410. Further, state law allows a police officer to "use all necessary means to effect" an arrest if the arrestee should "either flee or forcibly resist." RCW 10.31.050. *See also*, RCW 9A.16.020(1) (use of force lawful "[w]henver

necessarily used by a public officer in the performance of a legal duty . . .”) and RCW 9A.16.020(2) (use of force lawful when “necessarily used by a person arresting one who has committed a felony . . .”) If State law specifically allows the use of police dogs to apprehend suspects it would be absurd to subject the government agency that owns the police dog to *strict liability* at the same time. “When interpreting a statute, [courts] must avoid unlikely, absurd, or strained results.” *In re Det. of Coppin*, 157 Wn. App. 537, 552, 238 P.3d 1192 (2010). Legislative history also suggests that such a result was not contemplated by the legislature. CP 75. (1989 legislative testimony on police dog handler immunity statute indicating that police dog’s owner could be liable for *negligence* to *innocent bystander* injured by a police dog.)

As noted in *Miller, supra*, which was issued prior to the 2012 amendment, the Court rejected the application of RCW 16.08.040 to the use of a police dog in arresting a subject if the use was reasonable under the Fourth Amendment. *Miller* cited another Washington case, *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000), which held that a police officer is not liable for state law assault and battery if the force used to make an arrest was

reasonable under the Fourth Amendment. *Id.*, 340 F.3d at n. 14.

Mr. Rath did not allege excessive force under the Fourth Amendment, but *Miller's* holding is instructive nonetheless. In that case, the plaintiff was a wanted felon who was hiding from law enforcement and refusing orders to surrender. *Miller*, 340 F.3d at 964-65. The plaintiff was bitten by a police dog for up to one minute, and suffered severe injuries:

Miller's skin was torn in four places above the elbow, and the muscles underneath were shredded. Miller's biceps muscle was 'balled up' in the antecubital space. His brachialis muscle-- the muscle closest to the bone and alongside the brachialis artery--was torn. Miller's injury went as deep as the bone. He underwent surgery by an orthopedic surgeon and spent several days in the hospital.

*Miller*, 340 F.3d at 961.

The Court concluded, that the "use of a police dog to bite and hold Miller until deputies arrived on the scene less than a minute later was a reasonable seizure that did not violate Miller's Fourth Amendment rights." *Id.* at 966, *citing*, *Mendoza v. Block*, 27 F.3d 1357, 1362-63 (9th Cir. 1994) (holding that police did not violate a suspect's Fourth Amendment rights under the circumstances by ordering a police dog to bite him).

In this case, Mr. Rath was wanted on a warrant for a felony, first degree kidnapping, as well as for additional felony crimes to which he later pled guilty. Deputy Crawford had heard that the plaintiff may be armed.<sup>6</sup> In fact, he had earlier been in possession of a stolen shot gun found in the stolen truck from which he fled. Plaintiff had also reportedly made comments “that he was not going to go back to jail, that he would shoot cops.” CP 32. Mr. Rath had already fled and eluded law enforcement once before by swimming across a river and was hiding out from law enforcement at the time. Due to Mr. Rath’s repeated refusal to surrender, officers had to make a high-risk entry into a trailer to carry out the arrest. They found Mr. Rath hiding under a bed, refusing to show his hands. He ignored repeated orders to surrender before Gizmo was utilized. CP 40-48. Deputy Crawford testified that other uses of force, such as a taser or pepper spray, would have been more dangerous for law enforcement because they did not know if Mr. Rath was armed, and neither a taser nor pepper spray guarantees incapacitation. CP 54-55. In particular, pepper spray in close quarters also risks affecting

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6. Deputy Crawford testified that Mr. Vervalen told him he was “not aware if he [plaintiff] had any weapons.” CP 37.

the officers present. *Id.*

**3. Applying RCW 16.08.040 to this case results in a conflict with specific statutes permitting the use of force to make an arrest.**

If RCW 16.08.040 applies to police dogs in this case, then it also creates a conflict with RCW 10.31.050, and RCW 9A.16.020(1) and (2). That is because RCW 10.31.050 and RCW 9A.16.020 (1) and (2) permit law enforcement officers to utilize force when making an arrest. When “statutes conflict, specific statutes control over general ones.” *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 869, 271 P.3d 381 (2012), citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146–47, 18 P.3d 540 (2001). RCW 16.08.040 is a statute of general application. RCW 10.31.050 and RCW 9A.16.020(1) and (2) are specific statutes that apply to the use of force to effect an arrest. In this case, specific statutes make the use of Gizmo lawful. The conflicting general statute which, if applied, creates strict liability for damages for the lawful use of force should be held inapplicable due to the conflict.

In sum, the use of Gizmo to assist in arresting Mr. Rath was constitutionally reasonable and permitted by state law. Applying

the strict liability statute to police dogs being lawfully utilized to arrest a dangerous subject, would lead to the absurd result that government is strictly liable for damages for the use of force that is expressly permitted by other state law and allowed by the U.S. Constitution. It would also conflict with specific statutes that permit that level of force. The conflict, and its absurd result are avoided by interpreting the statute as the Court in *Miller* did, i.e. it does not apply to the reasonable application of a police dog to apprehend the intended suspect. The trial court erred as a matter of law in denying Grays Harbor County's summary judgment on this issue and that denial should be reversed with direction to enter summary judgment for Grays Harbor county.

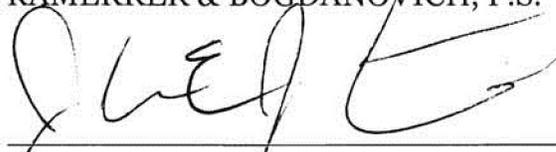
### **VIII. CONCLUSION**

Grays Harbor County requests that this Court affirm the jury verdict. Such a result is appropriate because the trial court correctly instructed the jury on the issue of lawful presence and jury found Mr. Rath's presence in the trailer was unlawful. If this Court reaches the cross-appeal, the trial court's denial of Grays Harbor County's summary motion should be reversed because RCW 16.08.040 did not apply to this case as a matter of law. The trial

court should, in that event, be instructed to enter summary judgment for Grays Harbor County.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of December, 2013.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

A handwritten signature in black ink, appearing to read "John E. Justice", written over a horizontal line.

John E. Justice, WSBA N<sup>o</sup> 23042  
Attorneys for Respondent/Cross-Appellant

**SUPERIOR COURT OF WASHINGTON FOR THURSTON  
COUNTY**

HAROLD RATH,

Plaintiff,

vs.

GRAYS HARBOR COUNTY, a  
municipal corporation and  
political subdivision of the State  
of Washington,

Defendant.

**COURT OF APPEALS**

**NO. 45076-3-II**

**GRAY HARBOR COUNTY  
SUPERIOR COURT**

**NO. 12 2 00607 2**

**CERTIFICATE OF  
SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served via electronic service by agreement of the parties, and by U.S. Mail, Respondent/Cross-Appellant's Opening Brief; and this Declaration of Service, upon counsel for plaintiff, as follows:

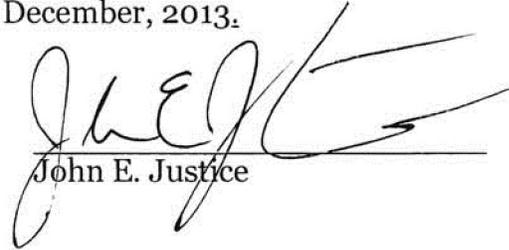
William C. Maxey, [sharonk@maxeylaw.com](mailto:sharonk@maxeylaw.com)  
Mark R. Harris, [markh@maxeylaw.com](mailto:markh@maxeylaw.com)  
Andren Moyer, [andren@maxeylaw.com](mailto:andren@maxeylaw.com)  
1835 W Broadway Avenue  
Spokane, WA 99201 - 1819

CERTIFICATE OF SERVICE - 1

**LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.**  
ATTORNEYS AT LAW  
2674 RW JOHNSON BLVD SW, TUMWATER, WA 98512  
PO BOX 11880, OLYMPIA, WA 98508-1880  
(360) 754-3480 FAX: (360) 357-3511

Breean L Beggs, [bbeggs@pt-law.com](mailto:bbeggs@pt-law.com)  
Paukert & Troppman, PLLC  
522 W Riverside Avenue, Suite 560  
Spokane, WA 99201-0519

DATED this 13<sup>th</sup> day of December, 2013.



John E. Justice

CERTIFICATE OF SERVICE - 2

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.  
ATTORNEYS AT LAW  
2674 RW JOHNSON BLVD SW, TUMWATER, WA 98512  
PO BOX 11880, OLYMPIA, WA 98508-1880  
(360) 754-3480 FAX: (360) 357-3511