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NO. 656791

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ONA DEANE-GORDLY AND TYRONE GORDLY

Appellants,

v.

AMERICAN MANAGEMENT SERVICES NORTHWEST LLC,
AND GFS MAPLE GLEN LLC,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR SNOHOMISH
COUNTY

THE HONORABLE ERIC Z. LUCAS

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Ona Deane-Gordly was walking on Respondent Maple Glen's property on her way to visit one of Maple Glen's tenants, when a dog owned by another Maple Glen tenant suddenly jumped out and attacked her, causing extensive injuries.¹ The attack took place on the Maple Glen Apartments' common area, and could have been prevented if Maple Glen had better fences and better safety rules. Based on these facts, a jury could find that Maple Glen failed in its duty to tenants and other invitees to take reasonable precautions to keep its common areas safe. The Superior Court therefore erred in granting summary judgment in favor of Respondent Maple Glen.

In its appellate brief, Maple Glen asks this Court to hold, as a matter of law, that it could not be deemed to have had any control over the dog's access to Mrs. Gordly. Mrs. Gordly agrees that duty and negligence liability require a degree of control. But Maple Glen had control: it maintained all structural features of the complex and specifically reserved control over the common areas.

Because Maple Glen had the requisite control, its reliance upon *Frobig v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994) is misplaced. In

¹ Respondents do not dispute that American Management Services Northwest, LLC shares any liability of GFS Maple Glen LLC, see *Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 456, 72 P.3d 230 (2003), so Mrs. Gordly will follow Respondents' convention of referring to them collectively as "Maple Glen."

Frobis, the Court dealt with injuries, due entirely to the tenant's negligence, to the tenant's own worker, on property under the tenant's sole control. Here, the dog got free because of factors within the landlord's control, and the attack took place on the landlord's premises, to an invitee of the landlord. The difference between these two sets of facts is neither subtle nor small.

The landlord in *Frobis* had given over all control to the plaintiff's host; Maple Glen had not. This Court should not go beyond *Frobis* and make new law by carving out a blanket exception to residential landlords' duties whenever a risk to tenants is presented by other tenants' animals.

Maple Glen also argues that it did not have to take any precautions on Mrs. Gordly's behalf, because her invitation from Maple Glen's tenants was supposedly not specific enough. (Respondent Br. 25-28). But Washington law does not require such a specific invitation: a tenant's mere licensees, including but not limited to social guests, enter common areas by the landlord's implied invitation.

Lastly, Maple Glen argues that it lacked knowledge of Cody's dangerous tendencies. That is a jury question; moreover, even if such precise foreknowledge may be required for strict liability, negligence liability requires only that Maple Glen failed to guard prudently against reasonably foreseeable risks. For the same reason, Maple Glen errs when

it argues that more discovery into its pet policies and history would have been futile. A jury could find Maple Glen liable because Maple Glen failed to act prudently in the face of reasonably foreseeable risk. A jury should have the opportunity to make that finding.

II. ARGUMENT

A. Summary of Facts and Parties' Initial Arguments.

As set forth in the parties' initial appellate briefs, Mrs. Gordly went to the Maple Glen Apartments to follow up on business contacts with two couples residing there as tenants.² While on Maple Glen's walkway, she was attacked by Cody, an unneutered, untrained, unrestrained, Pit-Bull Rottweiler cross without collar or leash belonging to Defendant Joy Willett, another tenant. Cody wriggled through the fence on the patio attached to Ms. Willett's apartment, a few feet above the walkway, to get at Mrs. Gordly. Cody proceeded to savage her in excess of fifteen minutes until he was shot by a police officer. Mrs. Gordly sustained grave injuries and lasting trauma to her arms, legs and head.

In her initial brief, Mrs. Gordly showed that she was an invitee of Maple Glen, so that Maple Glen owed her a duty to exercise reasonable care to keep its premises safe, including the affirmative duty to make itself

² Details and Clerk's Papers citations at Appellant's Br. 3-10.

aware of likely problems and risks.³ A jury, she showed, could find that Maple Glen failed in this duty, because Cody was free to attack her, effectively unrestrained by Maple Glen's patio fence or safety rules.

In its defense, Maple Glen asserts three principal arguments (as well as subsidiary and incidental arguments with which Mrs. Gordly also disagrees but cannot specifically address due to space limitations). First, that under *Frobig v. Gordon*, there is a special, blanket exception to the landlord's usual duties, so that a landlord can never incur negligence liability arising from an attack by a tenant's animal. (Respondent Br. 9-25). Second, that Mrs. Gordly was not Maple Glen's invitee, so it owed her no affirmative duty of care. (*Id.* at 25-28). Third, that Maple Glen could not be liable unless it had actual knowledge of Cody's vicious propensities. (*Id.* at 28-31, 37-44). Maple Glen is mistaken on all points.

B. A Jury Could Find Maple Glen Liable Based On Its Control Of Access To The Common Areas.

1. Maple Glen Retained Control Of The Common Areas.

Maple Glen argues that it lacked any control over Cody's access to the common areas. (Respondent Br. 20-25). Washington has indeed recognized a connection between control and negligence liability. But no Washington court has reached the unlikely conclusion that a multi-unit

³ *Curtis v. Lein*, 150 Wn. App. 96, 103, 206 P.3d 1264 (2009); and see, e.g., WPI 130.02 Duty of Landlord—Common Areas: "landlord has a duty to use ordinary care to keep the [residential common areas] in a reasonably safe condition."

residential landlord lacks all control over tenants' pets' access to the common areas. Instead, this Court, as quoted by Maple Glen (Respondent Br. 21-22), explained that common law principles "impose a duty on the landlord to maintain common areas safely," even as to danger posed by other tenants, "when the landlord controls that space." *Faulkner v. Racquetwood Village Condo. Ass'n*, 106 Wn. App. 483, 486-87, 23 P.3d 1135 (2001).

Maple Glen recognized its duty when it expressly required tenants to leash their dogs in the common areas, and to remain on the premises when their dogs were on the patio. (CP 129). Clearly, Maple Glen realized that dogs might escape from the patio if not kept restrained and monitored, and that if they escaped, they could pose a danger to Maple Glen tenants and others on the common areas. But Maple Glen failed to satisfy its duty, because – as happened here – even when the owner obeyed the safety regulations, a dog left without a collar unleashed on the apartment patio could easily get free. A jury could find that Maple Glen should have taken common-sense precautions to avoid the known risk, such as better fencing, or requiring leashes on the patios.

Maple Glen's attempt to pass all the responsibility onto Ms. Willett fails. Maple Glen now states that when it required dogs leashed "outside the Apartment," it meant to include the patio, and Ms. Willett was in

violation. (Respondent Br. 36; CP 129). But the lease refers to the patio as part of the “Apartment,” so it seems unlikely any tenant ever did or should have read the Pet Addendum as Maple Glen now does. (CP 126 ¶ 8). Ms. Willett was not in the best position to realize that Maple Glen’s fence was inadequate or that it had not thought through its safety rules. More importantly, even intentional torts by a tenant may give rise to landlord liability. *Faulkner*, 106 Wn. App. at 486-87 (discussing *Griffin v. West RS, Inc.*, 97 Wn. App. 557, 568, 984 P.2d 1070 (1999), *rev’d on other grounds*, 143 Wn.2d 81, 90, 18 P.3d 558 (2001)). Maple Glen chose the business of housing hundreds of people and animals in close quarters; it had a responsibility to guard reasonably against foreseeable dangers caused by those conditions.

2. *Frobigo* Does Not Create A Blanket Exemption To Residential Landlords’ Duties To Tenants.

Maple Glen mistakenly infers from *Frobigo* that a landlord has no control over a tenant’s animal’s access to common areas and the threat it poses there. (Respondent Br. 20-23 & n.61). In *Frobigo*, Clara Frobigo was mauled by a tiger belonging to the petitioners’ tenant, Anne Gordon, while wrangling the tiger for Gordon’s commercial video shoot. *Frobigo*, 124 Wn.2d at 733. The Supreme Court, reversing the Court of Appeals, held that “landlords have no duty to protect third parties from a tenant’s

lawfully owned but dangerous animals.” *Id.* at 740-41. As set forth in Mrs. Gordly’s initial brief, this holding did not create an exception to the usual scope of landlord liability for foreseeable threats in common areas, because *Frobis* was wholly concerned with events on the leased premises. The *Frobis* Court merely followed the well-established rule that a landlord’s duty and liability “do not, as a rule, extend to matters having to do merely with the *lessee’s management or operation of premises* which would be safe except for such management or operation, *at least where the lessee is in sole actual control.*” *Id.* (quoting *Peterick v. State*, 22 Wn. App. 163, 170-71, 589 P.2d 250 (1977) *review denied*, 90 Wn.2d 1024 (1978), *overruled on other grounds by, Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985)).

Maple Glen correctly states that the *Frobis* Court refused to apply strict liability to the landlord as the tiger’s owner, keeper or harbinger, because a landlord typically lacks control over a tenant’s pet on the tenant’s premises. *Frobis*, 124 Wn.2d at 736. But Maple Glen errs when it suggests the *Frobis* attack actually took place on the landlord’s own premises. (Respondent Br. 13). The *Frobis* intermediate appellate opinion had described the leased premises as a “rental home” on the landlord’s property; Maple Glen erroneously concludes that because the attack did not happen indoors, it must have happened off of the leased

premises. (*Id.* (citing *Frobigo v. Gordon*, 69 Wn. App. 570, 572, 849 P.2d 676, *rev'd*, 124 Wn.2d 732, 881 P.2d 226 (1994))). Maple Glen misreads “home” to mean the same as ‘house,’ although a standalone, non-condominium rental home invariably includes surrounding grounds.⁴ Notably, the appellate court later refers to part of Gordon’s leased premises as an “animal compound” that was “next door” to the landlord’s ranch; clearly, the filming and the attack were on the leased grounds at the compound. *Frobigo v. Gordon*, 69 Wn. App. at 573).

The Supreme Court opinion, which reversed and obviated the intermediate appellate opinion, describes these particular facts more precisely: “The Branches own *a large piece of property* in Bothell, Washington. In 1988, the Branches leased *this property* to Anne Gordon.” *Frobigo*, 124 Wn.2d at 733 (emphasis added).⁵ The attack took place when “Gordon began filming a commercial video for The Boeing Company *on*

⁴ Less centrally, Maple Glen asserts that *Frobigo* dealt with a residential lease because Gordon supposedly agreed not to conduct business on the premises. (Respondent Br. 12). In fact, however, those terms were not included in the actual written lease. *Frobigo*, 124 Wn. 2d at 734. Gordon, whose business included supplying animals to other film producers, kept her stock on the premises, and the opinion does not relate that anyone lived there. *Id.* at 733. This appears to have been a commercial lease, not a residential one, so it did not implicate the special duties of a residential landlord.

⁵ To the extent the Supreme Court’s fact description differs, or appears to differ, from that of the reversed intermediate appellate opinion, the Supreme Court’s description is authoritative. “In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant,” because later courts must consider “not only the rule announced, but also the facts giving rise to the dispute” as described therein. *Hart v. Massanari*, 266 F.3d 1155, 1170, 1176 (9th Cir. 2001); and see *Continental Mut. Sav. Bank v. Elliot*, 166 Wash. 283, 300, 6 P.2d 638 (1932) (“An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.”)

the premises.” *Id.* at 734 (emphasis added). It is precisely because the attack took place on the rental premises, that the Court drew support from the “law governing liability of landlords to third parties for defects *on leased premises,*” and from the Residential Landlord-Tenant Act of 1973, under which “it is the tenant's duty not to permit a nuisance *on the rental premises.*” *Id.* at 735 (citing RCW 59.18.130) (emphasis added).

Because *Frobis* did not involve an attack on the landlord’s reserved premises, it does not imply that Maple Glen lacks control over the risks posed by a tenant’s animal on its reserved premises. *Frobis* had no occasion to address that issue, and did not address it.

Maple Glen also erroneously asserts that Mrs. Gordly failed to distinguish *Frobis* on this ground in the trial court. In opposing summary judgment, however, Mrs. Gordly argued in so many words: “The cases cited by the defendants relate to [dog attacks] within the lease[d] premises, however, the attack that occurred in this case happened on the common area.” (CP 91). The argument was raised. Certainly, Mrs. Gordly focused and amplified her discussion on appeal, but that presents no barrier to consideration, quite the reverse. This Court will hear new legal support and related arguments on issues raised in the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000) (Court of Appeals erred in refusing under RAP 9.12 to consider ordinances not cited

to trial court, because “any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law”); *and see State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329 (1988) (where “basic reasoning” was presented in summary judgment brief without any legal support, appellate court will consider relevant cases and code). Moreover, RAP 9.12 does not prevent a party from raising or this Court from considering, as further support of a negligence claim, evidence brought out in a different context in the trial court. *Stenger v. State*, 104 Wn. App. 393, 398, 16 P.3d 655 (2001) (although petitioner may not generate new, separate nondisclosure claim based on evidence in the record, he may raise nondisclosure for first time on appeal as “simply additional evidence of the State’s negligence,” which was the central summary judgment issue).

Indeed, this Court may consider any issue “arguably related” to issues raised in summary judgment briefs. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007); *and see In re Estate of McKiddy*, 47 Wn. App. 774, 780, 737 P.2d 317 (1987) (same for bench trial judgment) *abrg’d on other grounds by, Matter of Estate of Hansen*, 128 Wn.2d 605, 910 P.2d 1281 (1996). Even if this Court deems Mrs. Gordly’s arguments slightly different from those she made in the trial court, they are at the very least closely related.

C. Mrs. Gordly Was A Tenant’s Licensee, So She Was Maple Glen’s Invitee.

As set forth in Mrs. Gordly’s opening brief, she was at Maple Glen to follow up with two couples who had already been contacted, in order to schedule full interviews for a paid research survey. (CP 69 ¶ 3, CP 108, CP 111-12). As those tenants’ licensee, she was Maple Glen’s invitee on the common areas. See *Curtis v. Lein*, 150 Wn. App. 96, 103, 206 P.3d 1264 (2009) (tenant’s social guest is landlord’s invitee); *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003) (same). Maple Glen owes a heightened duty of care to its invitees, including an “affirmative duty” not only to guard against known dangers, but also to “exercise reasonable care to discover dangerous conditions.” *Curtis*, 150 Wn. App. at 103 (emphasis added).

Maple Glen does not dispute the high degree of care it owes to invitees, but it denies that a jury could find Mrs. Gordly was an invitee. Perhaps it would have been liable if Cody had torn the scalp off of somebody else, it says, but Mrs. Gordly was fair game. Maple Glen is wrong.

There are two overlapping tests for whether a person is an ‘invitee’: he may be a member of some segment of the public on land held open to that segment, or a “business visitor,” a person coming onto the

land for purposes directly or indirectly connected with business dealings with the land's possessor. *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 649-50, 414 P.2d 773 (1966) (citing Restatement (2d) of Torts § 332 (1965)). A landowner owes a higher duty to an invitee than to a mere licensee, who may have express or implied permission to enter, but whose entrance is unconnected to the landowner's business and there is no expectation of general public use. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991(1986).

Maple Glen argues that Mrs. Gordly would be an invitee only if its tenants had specifically invited her on that occasion. (Respondent's Br. 26-28). To the extent the record is ambiguous as to whether Mrs. Gordly's research subjects expected her to drop by around that date, this court should draw inferences on summary judgment in her favor and find they specifically invited her to do business and/or socialize with them. *See Beebe v. Moses*, 113 Wn. App. 464, 468, 54 P.3d 188 (2002) (whether Tupperware party guest was host's invitee presents a jury question). But at the very least, she presumptively had the tenants' permission to attempt a contact for legitimate purposes. Either as an invited guest, or a legitimate caller making a business proposal for them to participate in the study, she was their licensee, so she was Maple Glen's invitee.

Maple Glen fails to recognize that an invitation can be implied, not express. *McKinnon*, 68 Wn.2d at 649. A business visitor's invitation is implied by mutuality of interest between the visitor and the landowner. *Gasch v. Rounds*, 93 Wash. 317, 321, 160 P. 962 (1916). That is, a person is an invitee when she enters in the landowner's usual course of business, "although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Id.* (quoting *Plummer v. Dill*, 156 Mass. 426, 427, 31 N.E. 128, 129 (1892)). A person visiting an invitee, for a purpose related to the invitee's business with the land's possessor, is also an invitee. For example, a driver picking up an airplane passenger is the airport's invitee even though the driver herself does not transact with the airport. *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 869, 82 P.3d 1175 (2003); and see *Heckman v. Sisters of Charity of House of Providence in Terr. of Wash.*, 5 Wn.2d 699, 706, 106 P.2d 593 (1940) (student nurses' guests at capping ceremony are hospital's invitees as well). This is one reason why courts deem a tenant's licensees the landlord's invitees: the tenant's ability to receive visitors and callers is a service provided by the landlord for money. *Taneian v. Meghrihian*, 15 N.J. 267, 281-82, 104 A.2d 689 (N.J. 1954) (as to "all lawful users," of common areas, landlord "may be liable as such to a gratuitous licensee of the tenant, though the

tenant would be under no liability.”);⁶ *and see* Dan Dobbs, *The Law of Torts* (2000) 627-28 (landlord owes duty to “tenants and others lawfully on the land” to keep common areas safe for use.)

A business invitee does not need a specific appointment; for example, the lessor of a repair shop was liable where a customer was injured by a latent defect, although the customer had no appointment with the lessee. *Pagarigan v. Phillips Petroleum Co.*, 16 Wn. App. 34, 36-37, 552 P.2d 1065 (1976). *Holm v. Inv. & Sec. Co.*, 195 Wn.2d 52, 59, 79 P.2d 708 (1938), cited by *Maple Glen*, is not to the contrary: the Court there held that a specific invitation was a sufficient condition for hotelier liability, but did not hold it was a necessary condition.⁷ Moreover, hotels, unlike ungated residential complexes, generally do not allow members of the public to come and go freely past the lobby without a specific invitation. A person paying an unannounced visit to a hotel guest would have to sneak past the front desk, so he could not infer that the hotel had

⁶ In *Taneian*, a tenant’s visitor fell in a dark stairway after she left the tenant’s apartment; the New Jersey Supreme Court reasoned that she was the landlord’s invitee before and after she became the tenant’s social guest, because the landlord necessarily held out an implied invitation to use the common areas coming to or from a tenant’s premises. *Id.*

⁷ Relatedly, *Maple Glen* misreads *Frobig* when it suggests that Clara Frobig was the landlord’s employee and invitee. Frobig had already finished her day’s work for the landlord, and of her own accord decided to go to the tenant’s premises and work (or possibly volunteer) there for the tenant. *Frobig*, 124 Wn.2d at 734. If she had been injured on the job for the landlord, her sole redress would have been under the Workers’ Compensation Act, and *Frobig* would have been much simpler. But she was on the tenant’s premises only as the tenant’s invitee, which is why the *Frobig* Court reasoned, “[a] landlord owes no greater duty to the invitees or guests of his tenant than he owes to the tenant himself.” *Id.* at 735.

invited him in. Maple Glen, in contrast, gave all visitors unrestricted access to call upon tenants for any legitimate purpose.

Where a landowner expects and wants some portion of the public to come and go freely, he makes an “implied assurance” that he has taken reasonable care to make the land safe for their use. *Younce*, 68 Wn.2d at 649. That is exactly Maple Glen’s situation – its business model depends on having a great number of people come and go freely on their common areas to make ordinary contacts with their tenants. It holds those areas open to the public for that purpose, and benefits from it, so it implicitly assures the public that it has taken prudent steps to make the common areas safe. Thus, under either prong of the *McKinnon* test, Mrs. Gordly was Maple Glen’s invitee.

D. Maple Glen Had Sufficient Warning Of The Risk To Invitees.

1. Maple Glen Was Negligent Whether Or Not It Knew Cody Was Especially Dangerous.

A landlord need not be physically on the spot, or be aware of the specific, immediate cause of injury, to incur liability. For example, this Court held a residential landlord could be liable for a guest’s fall down a dark stairway, because the landlord was responsible for maintaining light on the staircase whether or not it actually knew that particular light bulb had blown. *Sjogren*, 118 Wn. App. at 148. Likewise here, Maple Glen’s

liability does not depend on knowing Cody had escaped, but rather on its failure to take reasonable precautions to keep dogs off the common area.

Maple Glen mistakenly argues that it cannot be liable unless it specifically knew that Cody was dangerous. (Respondent Br. 28-30). Maple Glen has confused negligence with strict liability. Under the common law strict liability doctrine, the owner, keeper or harbinger of a vicious dog is liable for its attacks even if not negligent. *Frobig*, 124 Wn.2d at 735; *and see* RCW 16.08.040 (abrogating viciousness requirement for owners' strict liability). Whether Maple Glen truly lacked enough knowledge about Cody is a question for the jury, but in any event, that rule has no bearing on Mrs. Gordly's **negligence** claim. Just as the property owner in *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202-03, 943 P.2d 286 (1997), was liable to his invitees for failing to take reasonable precautions against muggers in general, not just one particular mugger, so Maple Glen's duty is not limited to guarding against particular dogs.

For this reason, Maple Glen's argument that it would be unduly burdensome to adapt each patio fence to each tenant's dog misses the point. Analogously, Maple Glen has a duty to fence in patios so small children will not fall through, but it would be highly irresponsible to try to adjust the fences to the size of each child. Instead, Maple Glen should

maintain fences good enough to reasonably restrain all children. Likewise, its fences should be good enough to reasonably restrain all dogs.

Similarly, Maple Glen errs in supposing that Mrs. Gordly seeks to undo the *Frobig* Court's rejection of *Strunk v. Zoltanski*, 479 N.Y.S.2d 175, 62 N.Y.2d 572, 468 N.E.2d 13 (N.Y. 1984) or *Ucello v. Laudenslayer*. 44 Cal. App.3d 504, 118 Cal. Rptr. 741 (1975). (See Respondent Br. 16-18). Those cases held landlords liable for attacks by a tenant's vicious animal on the tenant's premises, because the landlords failed to exercise their specific power to evict owners of vicious animals. *Strunk*, 479 N.Y.S.2d at 177; *Ucello* 44 Cal. App.3d at 508, 512. That is not the issue here, and Mrs. Gordly does not rely on that doctrine. In fact, she expressly repudiated *Uccello* in her initial brief. (Appellant Br. 25).

Contrary to Maple Glen's unfounded assertions, (Respondent Br. 19, 20-21) there is no public policy interest in giving landlords a free pass in this area. Maple Glen's attempts to conjure up a public policy concern, by raising the specter of hapless dog owners hounded from home to home, falls flat. Nobody has proposed banning Man's best friend from public life, merely that multifamily landlords in Washington should take, or should continue taking, the same kind of prudent, common-sense precautions that landlords take in the many states that recognize landlord liability in this context. One of Maple Glen's selling points is that it

accepts any breed of dog. (CP 82). However laudable this policy may be, it must be carried out responsibly.

In contrast, RCW 16.08.040 shows a real public policy concern with the potential danger posed by all dogs, whether or not they previously acted viciously. The Residential Landlord-Tenant Act encodes another relevant public policy by requiring landlords to take prudent care to keep “any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident.” RCW 59.18.060(3). In modern society, tenants in a large multifamily complex are entitled to depend on their landlord to take reasonable precautions against foreseeable dangers in the common areas. *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 447, 486 P.2d 1093 (1971). These public policy considerations reinforce the conclusion that Maple Glen bears liability for its negligence in failing to secure its common areas from its tenants’ dogs.

2. Further Discovery Would Have Helped Prove Maple Glen’s Negligence.

To help prove negligence, Mrs. Gordly sought permission under CR 56(f) to pursue further discovery. (CP 96-98). Maple Glen erroneously argues that Mrs. Gordly had to prove Maple Glen knew that Cody was vicious. (Respondent Br. 42-43). Although that would certainly be relevant evidence – and Mrs. Gordly should have the chance

to depose other tenants on this point – it would not be the only relevant evidence. Mrs. Gordly also sought the opportunity to discover among other things why and how Maple Glen decided to allow dangerous dog breeds on site generally, and records of other attacks by pets on Maple Glen’s common areas. (CP 97). That evidence would go directly to Maple Glen’s awareness of the risk, and its imprudence.

3. Maple Glen Was Aware Of The Risk.

Even without further discovery, a jury could find that Maple Glen was aware of the risk posed by tenants’ dogs to other invitees, and specifically of the danger that dogs might escape from the patios and pose a threat on the walkways. Maple Glen took inadequate precautions clearly aimed at those risks, by requiring dogs to be leashed on the common areas, and requiring owners not to leave their apartment while their dogs were on the patio. A jury could also find that these measures were patently inadequate, and that a dog-bite injury was an accident waiting to happen. A jury should have the opportunity to weigh the evidence and make those findings.

III. CONCLUSION

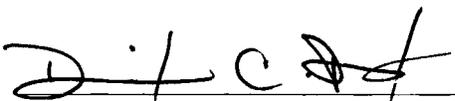
Because Respondents fail to show why they should not be held to their duty, Appellant respectfully renews her request for this Court to

reverse the Superior Court, vacate the summary judgment, and remand this case for further proceedings and a jury trial.

DATED this 13th day of December, 2010.

RESPECTFULLY submitted,

WARD SMITH PLLC

By: 

J.D. SMITH, WSBA No. 28246
DAVID C. REED, WSBA No. 24663
Attorneys for the Appellants

CERTIFICATE OF SERVICE

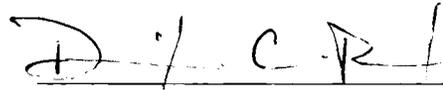
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the foregoing:

APPELLANT'S REPLY BRIEF

TO:

Janis C. Puracal Jerret E. Sale Lisa Grimm Richard Whittemore Bullivant Houser Bailey PC 1601 5 th Ave., Suite 2300 Seattle, WA 98101-1618 <i>Attorneys for Respondent</i>	VIA FEDERAL EXPRESS [] VIA REGULAR MAIL [] VIA CERTIFIED MAIL [] VIA EMAIL [X] VIA FACSIMILE [X]
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Dated at Seattle, Washington, this 13th day of December, 2010.



David C. Reed, WSBA #24663