

73927-1

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No. 73927-I

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

SHELLY CARR, individually,

Appellants/Plaintiffs,

vs.

JOSE AND LISA RIVEROS, individually and in their marital
capacity; STATE FARM FIRE & CASUALTY, an Illinois corporation;
and STATE FARM GENERAL INSURANCE COMPANY, an Illinois
corporation,

Respondents/Defendants,

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS DIV I

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I. REPLY

A. The Dog Bite Was Foreseeable.

The Riveros' argue that the trial court properly dismissed Carr's claim under Restatement § 518 because the dog bite was unforeseeable as a matter of law. In support of this argument, the Riveros contend that their dog did not have any known dangerous propensities. This argument fails.

A dog owner has a duty to avoid failing to prevent harm from his or her dog, § 518, and the owner may be liable even if he or she does not know of any vicious or dangerous propensities of the dog. *Beeler v. Hickman*, 50 Wn. App. 746, 754, 750 P.2d 1282 (1988). To determine whether the scope of the duty extends to the facts here, the court engages in a foreseeability inquiry. In a dog bite case, "a negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence." *Arnold*, 94 Wn.2d at 871. "The amount of care required is commensurate with the character of the animal: 'The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.'" *Beeler*, 50 Wn. App. at 754.

Here, the Riveros knew that strangers were going to be accessing the home they were renting for a real estate inspection. As they readily admit, they also knew that their dog was deaf, blind, and immobile. Br. of Resp. at 3. The property owner's real estate agent, David Hogan, told the

Riveros that the inspection party would need access to the entire house and suggested crating the dog.¹ Rather than acting reasonably and following the advice, the Riveros left their deaf, blind, sick, and immobile dog in a laundry room that they knew would be accessed by complete strangers. The past behavior of the Riveros' dog being on good behavior is not determinative under these facts; a reasonable jury could conclude that the Riveros acted without the care commensurate with the facts that they had an old, sick, and dying dog who would be around complete strangers without its master. This is precisely why two real estate agents were talking about having the dog crated: They knew that leaving the animal on the premises while strangers were roaming through the house was a recipe for someone being bitten.

The Riveros had numerous options to leave the home accessible for the home inspection crew without creating the danger of a dogbite. They could have crated the dog, tied him to a tree, or temporarily removed him from the property all together. The danger of a bite was manifest and

¹ Appellants' opening brief mistakenly asserted that Shim contacted the Riveros when it was Hogan who contacted them. Hogan first emailed the Riveros on March 13, 2013, asking them whether it is possible to crate their dog and explaining that the buyers would need full access to the home. CP at 301. Hogan and the Riveros exchanged additional emails on March 15 about scheduling times. CP at 303. Then, on March 17, Shim emails Hogan asking whether the Riveros will crate their dog. CP at 305. Hogan responded that he had requested full access to the home and had suggested crating the dog. CP at 305. The Riveros now claim that they "understood Mr. Hogan would let everyone know not to disturb Kid, who was at all times contained in the laundry room." Br. of Resp't at 4. The Riveros also claim that they were "adamant Kid was not to be disturbed and the door to the laundry room be kept shut at all times." Br. of Resp't. at 3. No written record of these communications have been produced, so it stands to reason that the purported communications were oral. Flowing from this is the reasonable inference that Hogan had contact with the Riveros on more than one occasion about access to the house and crating the dog.

reasonably foreseeable given that a group of strangers would be roaming through the home and inspecting *all* rooms. Dogs are inherently territorial, and a reasonable jury could conclude that the failure to mitigate or guard against the danger of a stranger being bitten was a breach of the duty owed.

The Riveros also allege that they told Hogan to keep everyone out of the laundry room and to not disturb the dog who would be in there.² But this overlooks the fact that Hogan also told the Riveros in no uncertain terms that full access to “each room in the house” would be needed for the inspector. Without an assertion by the Riveros that they understood Hogan’s request and yet still insisted on excluding access to the laundry room, the Riveros’ argument that the laundry room was “restricted” is nothing more than a straw man. An issue of fact would remain as to whether the Riveros or Hogan had the “last word,” so to speak.³

B. Carr Was Not a Trespasser.

The Riveros argue that Carr was a trespasser because she did not have express or implied permission to be at the home and, more

² On March 13, 2013, Hogan emailed the Riveros, asking them to crate the dog and to provide full access to “each room in the house.” CP at 301. The next email from the Riveros was not until March 15, when they asked if the inspection could be done at 8:00 a.m. instead of 8:30 a.m. CP at 303. Conspicuously missing from these emails, of course, is any response from the Riveros concerning the dog. The Riveros now claim that it was their “understanding” that Hogan would let everyone know not to disturb the dog, but there is nothing in the record identifying when this “understanding” arose. The day before the inspection, Hogan wrote to Shim that he had asked the Riveros to give access to the entire house, giving rise to the inference that even if the Riveros asked Hogan to keep everyone out of the laundry room, Hogan had understood that the entire home would be accessible. CP at 305.

³ The Riveros also argue that the Sutherlands are to blame because they did not confirm with Shim that the dog would be in a crate. Br. of Resp’t at 13-14. But this empty chair argument does nothing to change the foreseeability analysis here.

specifically, in the laundry room. They further argue that even if she had permission to be in the laundry room, the permission ended when the inspection of the laundry room was complete. The Riveros' argument is not persuasive.

The question before the court is whether a reasonable person in Carr's position have believed that she was permitted to be at the home. *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997). Permission may be granted through "conduct, *omission*, or *by means of local custom*." *Id.*

Carr acknowledges that she was not given express permission to be on the premises; however, the facts certainly would have lead a reasonable person in Carr's shoes to believe that she had implied permission to be there. It is undisputed that the Riveros knew about the inspection and never objected to the process or the scope of the inspection. The Riveros now claim for the purposes of this lawsuit that they excluded access to the laundry room, but Hogan told them that full access to the home was necessary and there is not a single piece of evidence showing that the Riveros objected at the time. Hogan first told the Riveros about the inspection and access to the entire house on March 13. CP at 301. A week passed by with the Riveros emailing only about coordinating the inspection time. The night before the inspection, Hogan wrote to Shim and said that he had asked the Riveros "to make sure you have access to the entire house." The Riveros' now claim that they "understood no one would go in the laundry room" and yet cannot point to any evidence

during the time period in question showing that they objected, even though they had been in contact with Hogan. The Riveros' claim is dubious at best.

Moreover, whether the Riveros knew the specific identities of all those in attendance at the inspection is a distinction without difference. They knew that an inspection would occur and that the entire house would be accessed. It would be an absurd result if the inspector was given implied permission to access the entire house but a third party accompanying the buyers was not. Such a result would erroneously ignore the fact that it was standard practice to have a family member of the prospective purchaser join the inspection.

Taken in the light most favorable of Carr, as well as drawing all reasonable inferences in her favor, the record shows that the Riveros were on actual notice about the inspection, knew that strangers were going to be in the home, knew that complete access would be needed, and yet never objected to the inspection. Instead, the Riveros attempted to negotiate the start time of the inspection with Hogan, actively participating in the process. Their failure to properly quarantine or remove their old, sick, and dying dog was negligent in light of the foreseeable risks.⁴

C. Carr Was Lawfully On the Premises Under RCW 16.08.040.

The Riveros concede that “certain individuals had implied permission to be on the property during the inspection,” but then argue

⁴ § 518 defines the duty owed in this case. Carr provides a trespasser analysis to the extent that it would serve as a threshold bar to bringing a claim under § 518.

that Carr did not fall under the “umbrella” of the implied permission because the Riveros did not actually know about her. This argument is unavailing.

The parties do not dispute that implied consent can be determined based on “conduct, omission, or by means of local custom.” Here, the Riveros knew about the home inspection, knew that complete access to the home was needed, and yet through omission never objected to the inspection. The identities of those in attendance is irrelevant: the Riveros knew and understood that they were to give access to the complete home for an inspection. It is undisputed on the record that the custom in the real estate industry is to allow non-purchasing family members, especially parents, to attend the inspection along with the actual buyers.

Similarly, nothing about the Riveros’ conduct was aimed at permitting the presence of some at the inspection but not others. While the Riveros shut the door to the laundry room, that alone does not constitute conduct denying permission as a matter of law in light of evidence that they knew complete access was needed and that they never objected to the scope of the inspection. In light of evidence that the Riveros knew or should have known that the whole house was going to be accessed, reasonable minds can differ as to whether they were at the same time excluding or limiting access to certain areas merely by shutting a door. The analysis should end here because implied permission satisfies RCW 16.08.040 and .050. *Sligar v. Odell*, 156 Wn. App. 720, 727, 233 P.3d 914 (2010).

To the extent that the Court disagrees with the foregoing, Carr argues that she had implied consent from the property sellers to be on the property, which is all that was required under RCW 16.08.040. *Hansen v. Sipe*, 34 Wn. App. 888, 890-91, 664 P.2d 1295 (1983). The Riveros first distinguish *Hansen* by arguing that it considered a different definition of lawful under RCW 16.08.050. But *Hansen* was concerned with the language “such owner,” which remained unchanged to the current version of the statute. The *Hansen* Court held that RCW 16.08.050’s restrictive definition of “lawful” did not apply to private property owned by third persons. Here, it is beyond dispute that the Sellers owned the property in question, and this court should reject the Riveros’ argument that they are somehow the third person owners of the property. *See, e.g., Br. of Resp’t.* at 30.

Applying usual and ordinary meaning of “lawful,” which is not restricted to the dog owners’ consent, it was the Sellers’ permission that was necessary. Here, the Sellers had sought and invited the home inspection. They gave express consent for the inspection to occur, as well as expressly authorized them to access the entire home. The Sellers’ agent, Hogan, communicated this to the Riveros. Under the terms of the rental agreement and Washington law, the Riveros were required to allow access for the Sellers’ business. Furthermore, Shim told Hogan that Carr would be coming to the inspection, and there was no objection or limitation imposed. CP 687.

Even if the express consent did not include Carr, she had implied

consent under the local real estate custom, which is not disputed in this record.⁵ The home inspector, Michael Linde, testified that he has about 50 percent of his clients bringing a family member to the inspection, which for the purposes of summary judgment creates an issue of material fact. The Riveros attack Linde's deposition was neither challenged nor stricken from the record and was before the trial court for consideration. It was before the trial court, CR 56; not stricken from the record; and challenged for the first time on this appeal.

Further support for the real estate custom is found in the declaration of Shim. Carr provided this to the trial court in a motion for reconsideration under CR 59(a)(4), (7), (8), (9). The Riveros argue that the declaration was not "newly discovered" under CR 59(a)(4), but the trial court did not make any findings on the "reasonable diligence" standard, and therefore this court should not consider the Riveros' argument. As to the other subsections, the Riveros do not raise any procedural argument so that is not addressed in this reply.

On the substance, Shim's declaration does establish a genuine issue of material fact as to the custom in the real estate industry. Shim testified that "[i]n the real estate industry, it is standard practice for those close in relation to the buyers to join at a home inspection." The Riveros' argument that this is insufficient to create a question of fact is misplaced

⁵ The Riveros appear to raise evidentiary concerns with regard to Lind's deposition for the first time on appeal. Br. of Resp't at 35. His deposition was neither challenged nor stricken from the record and was before the trial court for consideration. CR 56.

and misinterprets the standards of CR 56. Carr was not required to submit expert testimony as to real estate custom and practice; this is not a medical malpractice case and is distinguishable.

D. The Laundry Room Door Is Not a Fence.

The Riveros' last argument is that the laundry room door should constitute a fence under RCW 16.08.050. "Statutory interpretation begins with the statute's plain meaning." *Sligar*, 156 Wn. App. at 727. "Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* "To determine the plain meaning of a word not defined by the state, this court may look to its dictionary definition." *Id.* "If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end." *Id.* "RCW 16.08.040 is in derogation of the common law and must be strictly construed." *Id.*

Here, RCW 16.08.050 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.

The Riveros' argue that the term "fence" should include a door. This is a stretch.

Mirriam-Webster defines a "fence" as "a structure like a wall built outdoors usually of wood or metal that separates two areas or prevents people or animals from entering or leaving." It also defines a "door" as "a

movable piece of wood, glass, or metal that swings or slides open and shut so that people can enter or leave a room, building, vehicle, etc.” The critical difference, of course, is that a fence is a stationary barrier, whereas a door is movable and allows entrance. To read “fenced” in RCW 16.08.050 to include a “door” would not give rise to the plain meaning of the statute.

The Riveros also argue that the laundry room was “reasonably posted,” even though they concede that the record is devoid of any evidence of a posting. Instead, they argue that the Riveros said that the room was “off-limits.” But the statute says nothing about verbal warnings and instead says “posting,” meaning that there must be a physical warning that is posted.

In addition, the Riveros’ position is contrary to the evidence. Hogan asked the Riveros to crate the dog and explained that the entire house would need to be accessed. There is no evidence of an objection from the Riveros. On the day before the inspection, Hogan told Shim that he had told the Riveros about the inspection and its scope, as well as requested them to crate the dog. It can therefore be inferred from the evidence is that Hogan was able to convince the Riveros that they needed to provide access everywhere, or that the Riveros understood this and just ignored the request. Either way, there is not a single piece of evidence suggesting that the Riveros took steps to “restrict” access, except for the declaration that they filed in support of a motion for summary judgment, which runs contrary to the written record that was created around the time

of the inspection, and which does not specifically refute the inference that they never objected (but rather just “understood” something).

II. CONCLUSION

For the foregoing reasons, Carr respectfully asks this court to reverse summary dismissal and remand for trial.

RESPECTFULLY SUBMITTED this 27th day of June, 2016.

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CERTIFICATE OF SERVICE

Kim Snyder, being first duly sworn upon oath, deposes and says:

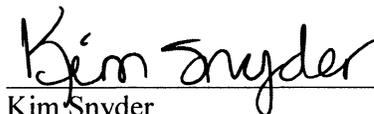
I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on June 27, 2016, I personally delivered, a true and correct copy of the above document, directed to:

Shellie McGaughey
McGaughey Bridges Dunlap, PLLC
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Seattle, WA 98121

VIA EMAIL AND ABC LEGAL MESSENGER

DATED this 27th day of June 2016.



Kim Snyder
Legal Assistant to Darrell Cochran

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