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NO. 36488-3-II

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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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Jennifer Lou Carr, individually and as Limited Guardian for Joseph  
Michael Carr, Appellant,

v.

Margaret A. Koeplin and John Doe Koeplin, wife and husband, and the  
marital community composed thereof, and Ruth Thompson and Herbert  
Thompson, wife and husband and the marital community composed  
thereof, and Ed Quesnell and Jane Doe Quesnell, husband and wife, and  
the owners of Berry Lake Mobile Home Park, and the marital community  
composed thereof.

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**BRIEF OF APPELLANT**

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**ORIGINAL**

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**I. Introduction**

Three-year old Joseph Carr was attacked and bitten on the face by a dog while playing outside his grandparents' home in Berry Lake Mobile Home Park. The dog was owned by a neighbor. The landlords, the Quesnells, had notified the dog owner in the past of multiple violations of the contractual Rules and Regulations of the Mobile Home Park, including the dog being outside unsupervised, having a leash that was too long, and breaking off of its leash. Furthermore, the dog was in clear violation of the size limits on pets as stated in the Rules and Regulations, and the landlords were aware of this.

Generally, under Washington law, a landlord has no duty to protect a tenant or a tenant's invitee from the tenant's own animal. However, there are situations where a duty arises where none existed before, including: 1) where the landlord expressly contracts to perform a duty in the rental contract; and 2) where the landlord gratuitously acts to protect another's person or things. In both cases the landlord must act with reasonable care, and may be liable for resulting injuries if he/she fails to do so.

Here, the trial court incorrectly found that the Quesnells owed no duty to Joseph Carr, despite an express provision in the rental contract that for the safety of tenants and their guests the landlord would remove any dogs in violation of the pet rules, and despite the fact that the landlords had undertaken to enforce safety rules and regulations regarding pets against the offending dog and dog owner.

**II. Assignment of Error**

**A. Assignment of Error**

1. The trial court erred by granting Defendant's Motion for Summary Judgment heard in open court on May 25, 2007.

**B. Issues Pertaining to Assignment of Error**

1. Does an express covenant in a rental contract stating that a landlord will immediately remove pets in violation of the Rules and Regulations create a duty on the part of the landlord to act with reasonable care in carrying out such a promise?
2. Does a landlord who undertakes to protect his tenants and

their guests by enforcing rules governing the size and conduct of tenants' pets have a duty to carry out such undertaking with reasonable care?

**III. Statement of the Case**

**A. Procedural History**

Appellant Jennifer Carr filed a complaint against Respondents Quesnell in the Superior Court of Washington in Kitsap County on November 1, 2005.<sup>1</sup> Respondents Quesnell brought a Motion for Summary Judgment that was heard on May 25, 2007.<sup>2</sup> The trial judge granted Respondent's Motion, finding that the landlords owed no duty to Joseph Carr.<sup>3</sup> This appeal followed.<sup>4</sup>

**B. Factual History**

The following facts were undisputed for the purpose of the Defendant's Motion for Summary Judgment.

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<sup>1</sup> CP 1-7

<sup>2</sup> CP 8-11; RP 1-8

<sup>3</sup> CP 127

<sup>4</sup> CP 128-130

**1. The Attack on Joseph Carr**

On August 13, 2005, three-year-old Joseph Carr was attacked and bitten on the face by a dog owned by defendant Margaret Koeplin. On that date, Joseph was visiting his grandparents, Ruth Davis-Thompson and Herbert Thompson, who were residents of Berry Lake Mobile Home Park. Defendants Mr. and Mrs. Ed Quesnell were the owners of Berry Lake Mobile Home Park, and Mr. Robert Hill was the Mobile Home Park Manager. Joseph Carr's grandparents lived across the street from defendant Margaret Koeplin. Joseph Carr and his sister had gone outside to play when the attack occurred.

**2. The Rules and Regulations of the Mobile Home Park**

The Rules and Regulations of Berry Lake Mobile Home Park, which are a part of the rental agreement of every tenant, contain the following provisions:

**- BERRY LAKE MANOR, a 55+ Manufactured Housing Community ("BERRY LAKE MANOR" AND/OR "COMMUNITY") is a desirable and attractive place for persons 55 and older to live. The purpose of these rules and regulations is to help maintain an environment enjoyable, attractive and safe for all residents of BERRY LAKE MANOR. "Resident" shall be defined as the person who holds title to any home on the park**

**premises and all legal occupants and guests.** [Emphasis added].

- Park manager is responsible for on-site supervision of the park and activities on park property.

**-PETS:** No potentially aggressive/vicious pets, farm/barnyard, exotic, or wild pets are allowed. Only one indoor pet per each rental agreement and each resident with a pet shall be required to complete and sign a Pet Rider Agreement in addition to complying with the rules and regulations respecting “Pets”. Each unauthorized pet must be immediately removed from the community within 12 hours after receiving notice. **Any violation of these rules and regulations, the Pet Rider Agreement, and/or signed complaints from other residents relating to a pet will result in a requirement that the pet be removed from the community immediately.** The animal shall not **exceed 10 inches at the shoulder top and will not exceed 15 pounds in weight when fully grown.** Pet feeding is not allowed outdoors as it may attract rodents and/or other stray animals. [Emphasis in the original].

...

Any pet that interferes with the health, welfare, safety, or peaceful enjoyment of others, is the sole decision of management, exercising it’s absolute discretion, shall be promptly removed within 12 hours from the community by the resident after the written demand. Indoor pets shall not be kept outside the home in doghouses, pens, fenced runs, or tied up. When resident has pet outside the home, pet must be kept on a line/leash no longer than five feet in length and in total control of resident.<sup>5</sup>

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<sup>5</sup> CP 31-37

### **3. The Testimony of Landlord Ed Quesnell and Mobile Home Park Manager Mr. Robert Hill**

In his deposition testimony, Defendant Ed Quesnell stated that he handles all the management duties for the community, including collecting rent, handing out notices, the office work, and enforcing the Rules and Regulations.<sup>6</sup> He agreed the purpose of the Rules and Regulations is as stated in the document itself, for the health, safety, and welfare of residents and guests. He testified that he is responsible for enforcing the rules, and agreed that he has an obligation to enforce the Mobile Home Park Rules and Regulations for the safety of everybody in the park, including residents and their guests.<sup>7</sup>

When asked the purpose of the Rule limiting a resident's pet height and weight Mr. Quesnell stated, "We run a 55+ community, and there's a lot of older people that are not that steady of walking. That was one of the reasons. Second reason is for insurance reasons. Larger animals draw a larger, in a lot of cases draw a larger insurance rate."<sup>8</sup> He

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<sup>6</sup> CP 38-41

<sup>7</sup> CP 42; CP 47; CP 43

<sup>8</sup> CP 44

went on to state that the rule serves to “limit the size of the animal that might jump on somebody, knock them down, injure them” and that he had spent time discussing the clause with legal counsel and insurance counsel.<sup>9</sup>

He testified that he tries to strictly adhere to the rules and regulations, rather than using discretion on when they should or should not be enforced.<sup>10</sup> When asked “If you have a pet that exceeded 10 inches at the shoulder top and would not exceed 15 pounds in weight, would you have that pet removed from the community immediately?” Mr. Quesnell replied, “Yes.”<sup>11</sup> Mr. Quesnell cited two occasions in which he had a pet removed from the community immediately, based on Rules violations.<sup>12</sup>

Despite the testimony cited above, Mr. Quesnell testified that he believed Margaret Koeplin’s dog that attacked Joseph Carr was 12 inches tall at the shoulder and 22 pounds, clearly above the 10 inch and 15 pound limits stated in the Rules and Regulations.<sup>13</sup> In addition, he testified to at

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<sup>9</sup> CP 44

<sup>10</sup> CP 42

<sup>11</sup> CP 45

<sup>12</sup> CP 46-47

<sup>13</sup> CP 45

least three reports of Rules violations by Ms. Koeplin's dog, including breaking off of its leash, being outside unsupervised, having a leash that was too long, and running loose in the community.<sup>14</sup> After each incident he would either talk to Ms. Koeplin about the violation, or issue a written notice, but he never required removal of the dog.<sup>15</sup> He stated that he entered into a one-time written agreement with Ms. Koeplin to allow her particular pet, despite its size, to remain in the mobile home park.<sup>16</sup> When asked if he had any explanation why the size requirement did not apply to Ms. Koeplin and her dog, Mr. Quesnell's response was "No."<sup>17</sup>

Mr. Robert Hill, the manager/caregiver of Berry Lake Mobile Home Park also testified that he believed Ms. Koeplin's dog exceeded the size limits in the Rules and Regulations.<sup>18</sup> He recalled talking to the

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<sup>14</sup> CP 41-42; CP 45

<sup>15</sup> Id.

<sup>16</sup> CP 45

<sup>17</sup> CP 46

<sup>18</sup> CP 44

owner, Mr. Quesnell about the dog's leash that was 10-15 feet long at least, in violation of the leash limit of 5 feet.<sup>19</sup>

#### **IV. Argument**

##### **A. The Landlords Owed A Duty to Joseph Carr Under the Rental Contract**

A landlord may be liable for a tenant's injury either through (a) a violation of the rental agreement, (b) a violation of a common law duty, or (c) a violation of the various statutes regulating the landlord-tenant relationship and that help to define the implied warranty of habitability in all rental housing.<sup>20</sup>

Washington cases addressing landlord liability for a breach of the rental agreement generally address a landlord's failure to repair or maintain the premises. Where a landlord has made an explicit covenant in the rental agreement to repair or maintain the premises, a landlord may be held liable for negligent performance or negligent nonperformance of that

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<sup>19</sup> CP 45

<sup>20</sup>See, *Howard v. Horn*, 61 Wn.App. 520 (1991); *Lian v. Stalick*, 106 Wn.App. 811 (2001), 115 Wn.App. 590 (2003). Washington statutes include the Residential Landlord-Tenant Act (RCW 59.18) and the Manufactured/Mobile Home Landlord Tenant Act (RCW 59.20).

duty.<sup>21</sup> This contractual duty arises despite the fact that a landlord is generally not liable for personal injuries to the tenant or his guest for injuries caused by a defective condition in the premises.<sup>22</sup> Because the duty arises out of contract, the contract defines the extent of the duty owed.<sup>23</sup>

This contract-based tort liability should apply to any affirmative contractual duty under the lease agreement. Restatement, Torts § 357

Comment (b) explains and justifies the obligations as follows:

The lessor's duty under the rule stated in this Section is not merely contractual, although it is founded upon a contract. It is a tort duty. It extends to persons on the land with the consent of the lessee, with whom the lessor has made no contract. The lessor is not an insurer of the safety of the premises, and is not liable for harm caused even to his lessee by a failure to make the land absolutely safe. He is liable only if his failure to do so is due to a failure to exercise reasonable care to that end.

...

Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. . . In any

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<sup>21</sup>*Mesher v. Osborn*, 75 Wash. 439, 446 (1913); *Teglo v. Porter*, 65 Wn.2d 772, 774 (1965); *Brown v. Hauge*, 105 Wn. App. 800, 804 (2001).

<sup>22</sup>*Brown v. Hauge*, 105 Wn. App. 800, 804 (2001).

<sup>23</sup>*Brown*, 105 Wn. App. at 804.

case [the landlord's] obligation is only one of reasonable care.<sup>24</sup>

### **1. The Contract Language is Unambiguous**

The rental contract language is unambiguous as to the landlord's duties. **“Any violation of these rules and regulations . . . will result in a requirement that the pet be removed from the community immediately.”** [Emphasis in original.] This language is in stark contrast to the contractual provision for violations of other rules within the rental agreement, which requires that before a landlord can take action a tenant has a right to notice of the alleged violation, a time to cure, as well as mediation over any dispute.<sup>25</sup>

### **2. The Policy Reasons for Enforcing a Tort Duty Based on the Rental Contract Apply Here: the Pet Clause is a Bargained-for Term of the Agreement, and Tenants Rely on the Landlord's Promises and Are Induced to Forego Safety Efforts They Otherwise Would Have Made**

One consideration justifying landlord liability for negligent performance of a rental contract promise is the fact that the landlord

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<sup>24</sup>Restatement (Second) Torts § 357 Comment (b); *See also*, Restatement § 357 Comment (a) cited in *Teglo v. Porter*, 65 Wn.2d 772, 774-775 (1965)

<sup>25</sup> CP 33

agreed to the contractual duty for consideration.<sup>26</sup> In this case the Mobile Home Park Rules are designed, at least in part, to attract seniors with promises of a safe environment for residents and their guests. The Rules and Regulations state explicitly that, “The purpose of these rules and regulations is to help maintain an environment enjoyable, attractive and safe for all residents.” In addition, Mr. Quesnell testified that one the reasons for the pet regulations was because it affected his insurance rates.<sup>27</sup> Providing an environment free from large and/or dangerous pets was a bargained-for term of the contract that the Quesnells voluntarily obligated themselves to in order to attract tenants and lower their insurance rates.

The Comments to the Restatement also explain that in the landlord-tenant context there is a special relation between the parties, and a peculiar likelihood that the lessee will rely upon the lessor’s promises.<sup>28</sup> Based on the landlord’s contractual promises, the lessee is induced to

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<sup>26</sup> Restatement (Second) Torts § 357 Comment (b)(1)

<sup>27</sup> CP 44

<sup>28</sup> Restatement (Second) Torts § 357 Comment (b)(2)

forego efforts which he would otherwise make to remedy conditions dangerous to himself and to others who enter the land with his consent.<sup>29</sup>

Here, 3-year old Joseph Carr was allowed to go outside and play with his older sister. Had his grandparents suspected that there might be any vicious dogs in their community they surely would have taken more precautions to protect Joseph. Instead they acted in reliance on the landlord's promises to maintain a safe community, free from vicious pets or pets in violation of the Rules in any way.

**B. The Landlords Owed A Duty to Joseph Carr Under the Gratuitous Assumption of Duty Doctrine**

Under Washington common law, one who undertakes to act in a given situation has a duty to follow through with reasonable care, even if one had no duty to act in the first place.<sup>30</sup> This is know as the gratuitous assumption of duty doctrine, and it has been adopted, used or acknowledged in a number of landlord liability cases in this state.<sup>31</sup>

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<sup>29</sup>Restatement (Second) Torts § 357 Comment (b)(2)

<sup>30</sup>*Pruitt v. Savage*, 128 Wn.App 327 (2005); *Borden v. Olympia*, 113 Wn.App. 359, 369 (2002).

<sup>31</sup>*See i.e., Rossiter v. Moore*, 59 Wn.2d 722, 725 (1962); *Regan v. City of Seattle*, 76 Wn.2d 501, 506 (1969); *Williamson v. The Allied Group, Inc.*, 117 Wn.App. 451, 455-56 (2003); *see also* W. Prosser, *The Law of Torts* § 56, at 343-48 (4th ed. 1971).

The Restatement (Second) of Torts § 323 summarizes the doctrine as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if  
(a) his failure to exercise such care increases the risk of such harm, or  
(b) the harm is suffered because of the other's reliance upon the undertaking.<sup>32</sup>

This section of the Restatement has been cited in numerous Washington cases.<sup>33</sup>

The Washington Supreme Court's opinion in *Rossiter v. Moore*, explains how a landlord's duty may arise from the landlord's affirmative actions where none existed before. In that case, the Supreme Court

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<sup>32</sup>Restatement of the Law, Second, Torts, § 323 (1965)

<sup>33</sup>See i.e., *Herskovits v. Group Health Coop.*, 99 Wn.2d 609 (1983); *Estes v. Lloyd Hammerstad*, 8 Wn. App. 22 (1972); *Webstad v. Stortini*, 83 Wn. App. 857 (1996); *Doyle v. Planned Parenthood*, 31 Wn. App. 126 (1982); *Brown v. Macpherson's, Inc.*, 86 Wn.2d 293 (1975). The gratuitous assumption of duty doctrine has been applied in Washington in the landlord-tenant context, although not yet in any cases involving pets. The doctrine has been applied in other states in dog-bite cases, where a common-law duty did not otherwise exist. See, *Wright v. Schum*, 781 P.2d 1142 (Nev., 1989); *The Alaskan Village Inc., v. Smalley*, 720 P.2d 945 (Alaska, 1986)

overturned a summary judgment in favor of a landlord, where the trial court had found that no duty existed under the lease agreement nor under the common law of landlord and tenant. The Supreme Court stated:

But this overlooks the controlling principle that, **independent of the law of landlord and tenant, a landlord is liable to his tenant or the tenant's guest for his affirmative acts of negligence.** The rights and liabilities of the parties under the law of landlord and tenant and negligence are not mutually exclusive. ...  
' . . . No man is bound to aid or benefit another, in the absence of some peculiar relationship or an express agreement given upon a sufficient consideration. Therefore mere inaction cannot create liability, but liability for the consequence of action is a very different matter. **If a man chooses to act, he must so act as not to create an undue risk of injury to others. If he consciously interjects himself into the affairs of others, he must take care that his interference shall not unduly endanger them, and while he is not bound to protect or benefit his neighbor, he must not so act as to change his position for the worse.**<sup>34</sup>

The Court reversed the summary judgment, holding that "the trier of the fact may conclude that the removal of the railing by the respondent implied an obligation to replace it after completion of the moving."<sup>35</sup>

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<sup>34</sup> *Rossiter v. Moore*, 59 Wn.2d 722, 725 (1962) quoting 35 Harv.L.Rev. 633, 650-51.

<sup>35</sup> *Id.*, 59 Wn.2d at 727 (1962) (emphasis added)

In *Alaskan Village, Inc. v. Smalley*, with facts strikingly similar to the present case, the Alaska Supreme Court cited the Restatement (Second) of Torts § 323, the gratuitous assumption of duty doctrine, and found that a mobile home park owner “undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring [the tenant] to immediately remove annoying pets.”<sup>36</sup> In addition, “one of the trailer park managers agreed that he had ‘an obligation to enforce the rules . . . concerning pets for the safety and well-being of the tenants in that park.’” Based on these facts, the Court held that the plaintiff was entitled to rely on the mobile home park owner to perform its duty.<sup>37</sup>

The same facts that the Alaska Supreme Court relied upon in making its decision are also present here. In both fact patterns the mobile home park owner “undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring [the tenant] to immediately remove annoying pets [or pets

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<sup>36</sup>*The Alaskan Village Inc., v. Smalley*, 720 P.2d 945, 948 (Alaska, 1986)

<sup>37</sup>*Id.* at 948, CP at 25

otherwise in violation].”<sup>38</sup> And in both cases the mobile home park owner or manger agreed that he had “an obligation to enforce the rules . . . . concerning pets for the safety and well-being of the tenants in that park.”<sup>39</sup>

The Washington Supreme Court’s decision in *Frobig v. Gordon* is distinguishable as it did not address a landlord’s duty under the rental contract nor the gratuitous assumption of duty doctrine.<sup>40</sup> In *Frobig*, a tiger injured a commercial tenant’s business invitee. In that context, the Court held there was no landlord liability to the invitee because the landlord had no duty to the invitee that it did not have to the invitor, and the landlord had no duty to protect the tenant against her own animal.<sup>41</sup> The Court stated that their holding was “consistent with the analogous law

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<sup>38</sup>*The Alaskan Village Inc.*, 720 P.2d at 948; CP 31

<sup>39</sup>*The Alaskan Village Inc.*, 720 P.2d at 948; CP 47

<sup>40</sup>Defendants’ Motion at 4, *Frobig v. Gordon*, 124 Wn.2d 732 (1994).

<sup>41</sup>*Frobig v. Gordon*, 124 Wn.2d 732 (1994), citing *Clemmons v. Fidler*, 58 Wn.App 32

governing liability of landlords to third parties for defects on leased premises.”<sup>42</sup>

However, as explained above, Washington also recognizes that a duty to a tenant or a tenant’s guest may arise from a landlord’s gratuitous undertaking, as well as by negligent performance of duties arising out of the rental contract. The *Frobig* Court’s conclusion that a landlord has no duty under the common law rule regarding latent defects did not address the gratuitous assumption of duty doctrine, nor a duty arising out of the rental contracts, and it did not eliminate these potential theories of liability against a landlord.

Here, the landlord expressly covenanted to require immediate removal of any pet in violation of any of the Rules and Regulations, the Pet Rider Agreement, and/or signed complaints from other residents.<sup>43</sup> Furthermore, the landlords testified that they undertook to immediately

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<sup>42</sup>*Frobig v. Gordon*, 124 Wn.2d at 735. The Court cites the common law rule that a landlord is liable to a tenant for harm caused by (1) latent or hidden defects in the leasehold (2) that existed at the commencement of the leasehold, (3) of which the landlord had actual knowledge, (4) and of which the landlord failed to inform the tenant. *Id.* (citations omitted).

<sup>43</sup> CP 31

remove several pets from the community who were in violation of the safety Rules. Therefore, they had a duty of reasonable care to carry out the contractual promises and gratuitous undertakings that the residents were relying on. Yet, the evidence shows that they did not exercise reasonable care in carrying out their obligations with the dog that bit Joseph Carr. They knew of the dog's size violation as well as three or four other violations including being outside unsupervised, breaking off of it's leash, and having a leash that was too long. Despite the repeated violations the landlords let the dog remain in the Mobile Home Park rather than requiring immediate removal as promised in the rental agreement.

**C. Fees and Costs**

Pursuant to RAP 18.1, Appellant requests fees and costs for copies of the clerk's papers; preparation of this brief and any reply brief if filed (pursuant to RAP 14.3(b)); transmittal of the record on review; the filing fee; such other sums as provided by statute.

**VI. CONCLUSION**

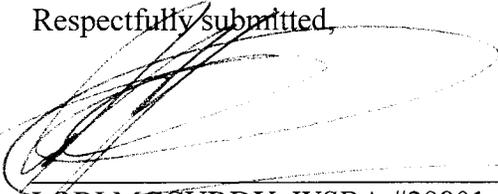
Under well-established Washington law, a landlord's duty may

arise where none existed before based on covenants within the rental contract, and based on the landlord's affirmative undertakings. The Quesnells contractually promised to provide a mobile home park free from large and/or dangerous pets, and they affirmatively undertook to enforce rules against large and/or dangerous pets for the safety of the tenants and guests. Therefore, they had a duty of reasonable care in carrying out these promises and undertakings, which their tenants had bargained for and acted in reliance on.

The trial court's ruling that the landlords owed no duty to Joseph Carr was incorrect, and the decision granting the Defendant's Motion for Summary Judgment should be reversed. The case should be remanded to Superior Court for trial on the remaining issues.

Dated this 12 day of October, 2007.

Respectfully submitted,

  
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J. Michael Koch & Associates, P.S., Inc.  
Attorneys for Appellants

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

JENNIFER LOU CARR,  
individually and as Limited  
Guardian for JOSEPH  
MICHAEL CARR, a minor,  
Plaintiffs,

vs.

MARGARET A. KOEPPLIN,  
and JOHN DOE KOEPPLIN,  
wife and husband, and the marital  
community composed thereof,  
and RUTH THOMPSON and  
HERBERT THOMPSON wife  
and husband, and the marital  
community composed thereof,  
and  
ED QUESNELL, and JANE  
DOE QUESNELL, husband and  
wife, and the OWNERS of Berry  
Lake Mobile Home Park, and the  
marital community composed  
thereof,

Defendants

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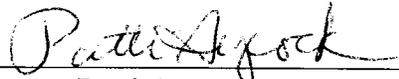
The undersigned, being first duly sworn on oath, deposes  
and says:

On October 12, 2007, I mailed a copy of the attached

**ORIGINAL**

**BRIEF OF APPELLANT** with proper postage prepaid to  
Defendants' attorneys, Steven L. Abel and James Maloney,  
whose name and address is as follows:

Steven L. Abel, WSBA #12076  
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Patti Aycock, Legal Secretary  
J. Michael Koch & Associates

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of  
October, 2007.



NOTARY PUBLIC in and for the  
State of Washington

Residing at: Paulsbo

Commission Expires: 8/17/2011

Printed Name: Teresa Ann Struxness