

NO. 36488-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

v.

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.

REPLY BRIEF OF APPELLANT

LORI MCCURDY
J. MICHAEL KOCH
Attorneys for Jennifer Lou Carr, Appellant

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Argument

Whether the dog at issue seemed friendly prior to this incident is immaterial to the issues on appeal of whether the Quesnells owed a duty of care to Joseph Carr under the rental contract or the doctrine of gratuitous assumption of duty. This accident was foreseeable based on other facts, and could have easily been prevented if the landlords had acted with reasonable care.

A. The Rental Contract

The rental contract in this case does not allow for any discretion on the landlord's part to remove pets that are in violation. It states in bold print: "**Any violation of these rules and regulations . . . will result in a requirement that the pet be removed from the community immediately.**"¹ This is one of only two sentences in the entire ten-page contract that are bolded and underlined. There are no exceptions for dogs who appear to be friendly. Nor is there any provision allowing for a waiver of the pet restrictions.

¹CP 35 (bold print and underlining in the original)

The pet restrictions in the contract are evidence of what the landlords believed could pose an unreasonable risk of harm to members of the community - specifically, large dogs, dogs that are not leashed or that are on too long of a leash, and dogs that are not in the total control of their owners while outside.

And Mr. Quesnell confirms this fact in his testimony explaining the basis for the strict size restrictions in the lease. 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."² Mr. Quesnell goes on to state that the rule serves to "limit the size of the animal that might jump on somebody, knock them down, injure them."³

This dog in particular was an unreasonable risk of harm, even though it had not shown vicious propensities in the past. First, it was a

²CP 44 (Dep. of Ed. Quesnell 19:5-15)

³CP 44 (Dep. of Ed. Quesnell 21:6-23)

large dog that obviously violated the size restrictions on pets. In addition, Mr. Quesnell had received multiple reports of Rules violations by the dog, including breaking off of its leash, being outside unsupervised, having a leash that was too long, and running loose in the community.⁴

The Quesnells' brief tries to downplay these violations as if they were not violations at all. But a large dog that is outside unsupervised, that runs away from its owner, and that is secured with a leash that is too long clearly poses a risk to people in the community, especially to the elderly residents and to 3-year old guests such as Joseph Carr.

The waiver that Mr. Quesnell signed regarding the dog's size is evidence of the lack of reasonable care the Quesnells exercised in carrying out their duties under the lease. Mr. Quesnell 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.⁵ Nevertheless, he entered into a one-time written agreement with this dog owner to allow her particular pet, despite its size, to remain in the mobile

⁴CP 41-42, 45 (Dep. of Ed. Quesnell 9:7 - 10:25; 24:12-15)

⁵CP 42, 43, 47 (Dep. of Ed. Quesnell 11:22-24; 14:11-19; 32:1-4)

home park.⁶ Mr. Quesnell had absolutely no explanation or justification for why the size requirement did not apply to the owner and her dog.⁷

Even if the size waiver were valid, under the terms of the contract the landlords should have had the dog removed from the community when they were notified of each of the dog's subsequent rule violations. Joseph Carr would not have been injured but for the Quesnells' repeated failures to comply with the terms of the contract.

B. The Gratuitous Assumption of Duty

The Quesnells seem to argue that the doctrine of gratuitous assumption of duty does not apply because the Quesnells did not enforce the pet regulations gratuitously, rather it was part of their contractual duty. Appellant agrees that they had a contractual duty based on the lease provisions. (See, Part A, above). However, the duty to follow through an undertaking with reasonable care also applies, whether the undertaking was gratuitous or for consideration.⁸

⁶CP 45 (Dep. of Ed. Quesnell 22:20 - 23:4)

⁷CP 46 (Dep. of Ed. Quesnell 26:3-6)

⁸The Restatement (Second) of Torts § 323 provides as follows:
One who undertakes, **gratuitously or for consideration**, to render

The Quesnells' attempts to distinguish *Alaskan Village, Inc. v. Smalley*⁹ fail. Here, as in that case, the Quesnells did have actual knowledge of prior incidents involving the dog that made it foreseeable that someone like Joseph Carr could be injured. Not only was it a large dog, but its owner did not always keep it in her control - it was left outside unsupervised, its leash was too long, it had run loose in the community.¹⁰

The Quesnells affirmatively undertook to enforce the safety regulations for the benefit of the community, as in the case of *Wright v. Schum*.¹¹ Mr. Quesnell cited two occasions in which he had a pet removed from the community immediately due to rules violations.¹² Yet after

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

⁹*The Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska, 1986)

¹⁰CP 41-42, 45 (Dep. of Ed. Quesnell 9:7 - 10:25; 24:12-15)

¹¹*Wright v. Schum*, 781 P.2d 1142 (Nev., 1989)

¹²CP 46-47 (Dep. of Ed. Quesnell 27:24 - 30:19)

receiving notice of each rule violation of the dog that later attacked Joseph Carr, Mr. Quesnell testified he would either talk to the dog's owner about the violation, or issue a written notice, but he never required removal of the dog.¹³ As a result the dog was outside unsupervised again when Joseph Carr encountered it on that fateful day, changing his life forever and leaving him with permanent disfigurement. As in *Wright v. Schum*, the landlord's inadequate undertaking to correct the problem with the dog is the basis for his liability.¹⁴

The case of *Braun v. York* is distinguishable.¹⁵ Like the Alaska Supreme Court in *Alaskan Village v. Smalley*, the *Braun* Court applied seven analytical factors to determine whether a duty should exist, but found that applying them to the facts of the case they weighed in favor of no duty on the part of the landlord. Here they weigh in favor of a duty.

The seven factors are:

(1) the foreseeability of harm to plaintiff, (2) the degree of certainty that plaintiff suffered injury; (3) the connection

¹³CP 41-42, 45 (Dep. of Ed. Quesnell 9:7 - 11:13; 24:1 - 25:8)

¹⁴ *Wright v. Schum*, 781 P.2d 1142, 1146-1147 (Nev., 1989)

¹⁵ *Braun v. York Properties, Inc.*, 230 Mich.App. 138; 583 N.W.2d 503 (1998)

between defendant's conduct and plaintiff's injury; (4) the moral blame attached to defendant's conduct; (5) the policy of preventing future harm, (6) the burden on the defendant and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk.¹⁶

In weighing the first factor, the Braun Court stated "it was no more foreseeable that plaintiff would be harmed by his neighbor's dog than by any other dog."¹⁷ In contrast, here the landlords knew that the dog was not only above the size limits, but that it had at times been left outside unattended, been left on a lease that was too long, and had broken away from its owner.

In addition, the *Braun* court noted that the purpose of the size restrictions was to protect against harm to the premises, more than to protect others from harm.¹⁸ Here Mr. Quesnell testified that the size restrictions were for the safety of the community, to lower his insurance

¹⁶*Braun*, 583 N.W.2d 503 at 508 (citing Prosser & Keeton, Torts (5th ed.), §53)

¹⁷*Braun*, 583 N.W.2d 503 at 508

¹⁸*Braun*, 583 N.W.2d 503 at 508

rates, and to “limit the size of the animal that might jump on somebody, knock them down, injure them.”¹⁹

Weighing the moral blame question, the pet size limits were put in the rental contract specifically to lower the Quesnells’ insurance rates. The Quesnells should not be allowed to benefit financially from putting these terms in the lease if they are not held accountable to enforce them.

Finally, the burden on the defendant to be held to a reasonable standard of care is not onerous, and the consequences to the community are only positive. Mr. Quesnell testified that he had removed dogs from the community in the past, and he had no explanation for why he didn’t remove this dog. Simply enforcing his own policy consistently would have prevented this tragic accident.

Conclusion

The Quesnells specifically promised to immediately remove pets such as this dog for the safety of the community residents and their guests, but repeatedly failed to do so. They undertook to enforce safety

¹⁹CP 44 (Dep. of Ed. Quesnell 21:6-23)

regulations regarding pets in the community, but made exceptions for this dog without any justification. Had they simply complied with their promises and/or enforced their own safety regulations consistently, 3-year old Joseph Carr would not have been attacked. The unique facts of this case raise issues that were not addressed in *Frobig v. Gordon*, and justify finding a duty on the part of the landlord.

Dated this 11th day of December, 2007.

Respectfully submitted,



LORI MCCURDY, WSBA #29801
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Attorneys for Appellants

Am

NO. 36488-3-II

**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.

AFFIDAVIT OF MAILING

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,
Defendants

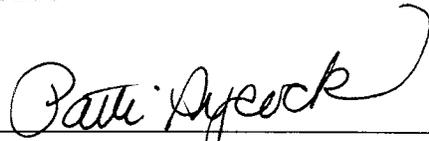
The undersigned, being first duly sworn on oath, deposes
and says:

On December 11, 2007, I mailed a copy of the attached

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REPLY 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
James Maloney, WSBA #16909
of Abel, Maloney & Bowers
19909 120th Avenue NE, Suite 201
Seattle, WA 98011-8233



Patti Aycock, Legal Secretary
J. Michael Koch & Associates

SUBSCRIBED AND SWORN to before me this 11th day of
December, 2007.



NOTARY PUBLIC in and for the
State of Washington

Residing at: Poulsbo

Commission Expires: 8/17/2011

Printed Name: Teresa Ann Struxness