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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39283-6 II

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

MARY SLIGAR, an individual, Appellant,

v.

KARA A. ODELL and "JOHN DOE" ODELL, wife and husband
and the marital community comprised thereof; Respondents.

APPELLANT'S BRIEF

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Table of Contents

A. Assignments of Error.....3

 No. 1.....3

 No. 23

 No. 33

B. Issues Pertaining to Assignments of Error.....3

 No. 1.....3

 No. 2.....4

 No. 3.....5

C. Statement of the Case5

D. Argument.....10

 1. Standard of Review and Summary Judgment
 standard.....10

 2. The trial court improperly dismissed Ms.
 Sligar’s claims for statutory strict dog bite
 liability..... 11

 a. Ms. Sligar at least had the defendants’
 implied permission to have her finger
 through her fence when the defendants’ dog bit
 it off, thus rendering the entry of her finger on

	the defendants' side of the fence a lawful entry	12
b.	Ms. Sligar's accidental fall and having her finger protrude through the fence removes her from the class of trespassers.....	15
c.	There is no evidence to prove that Ms. Sligar's finger was actually on the defendants' property when the defendants' dog bit it off.....	16
3.	The trial court misapprehended RCW 16.08.050 by concluding that, because there was a fence present, Ms. Sligar could not have lawfully been on the Odells' property when her finger went through the fence and was bitten off. But the unrebutted evidence is that Ms. Sligar had at least implied consent to have her hand through the fence. Thus the court erred.....	17
4.	Even if the court believes statutory strict liability does not lie, Ms. Sligar still has common law claims....	23
a.	Strict liability	23
b.	Negligence Claim.....	24
E.	<u>Conclusion</u>	27

INTRODUCTION

The plaintiff, Mary Sligar, is 76 years of age, disabled, and walks with a cane. She lives next door to the defendants, who moved next door to her in 2004. Ms. Sligar raises Miniature Schnauzers, which are small dogs. Her small dogs were often in her back yard bordering the defendants' back yard.

The defendants had two large dogs when they moved next door to Ms. Sligar in 2004. One was a dog named "Chico." That dog weighed 135 pounds and routinely barked viciously, foamed at the mouth and charged the chain link fence separating Ms. Sligar's back yard from the defendants' back yard. In fact, this aggressive dog exhibited his vicious behavior in the back yard of the defendants' residence approximately three times per week leading up to the events giving rise to this litigation.

In the summer of 2005, the defendants' aggressive dog attacked one of Ms. Sligar's small Miniature Schnauzers by grabbing the small dog's leg through the chain link fence and trying to pull the small dog through the fence. After that attack, Ms. Sligar attached chicken wire to her side of the fence so that her small dogs could not get their legs or paws through the bigger chain links. But a small section near the back of her back yard did not have chicken wire because Ms. Sligar ran out of said wire.

From the time that the defendants moved next door to Ms. Sligar, she would often pet the defendants' nicer dog, "Molly," through the chain

link fence. The defendants witnessed that and never objected. Ms. Sligar also often leaned on the fence to steady herself while talking to the defendants. In the course of those conversations, Ms. Sligar often put her hands over or through the fence while resting there. The defendants never objected to that either. And Ms. Sligar attached the chicken wire by pushing wire ties through the chain link fence, reaching through and pulling the end of the wire tie back from the defendants' side of the fence, and then tying off the chicken wire. The defendants never objected to that.

On October 10, 2006, the defendants' aggressive dog was barking viciously, foaming at the mouth and charging Ms. Sligar's fence near where Ms. Sligar's new Miniature Schnauzer puppy was playing. That area of fence was the small section that had no chicken wire. Fearful that the small dog would be attacked through the chain links, Ms. Sligar, using a cane, hobbled out toward her dog to retrieve her.

In the process of trying to gather her small dog, Ms. Sligar lost her balance and fell toward the chain link fence separating her yard from the defendants' yard. One of her fingers unfortunately protruded through the fence when she attempted to regain her balance, at which time the defendants' aggressive dog "Chico" bit it off.

Ms. Sligar filed this lawsuit for her injuries and disfigurement against her neighbors as the dog's owners. The defendants asserted the affirmative defense that Ms. Sligar was a trespasser and did not "lawfully" have her finger through the fence when it was bitten off. The trial court,

Judge Vicki Hogan of Pierce County Superior Court, summarily dismissed the case on that basis.

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its February 6, 2009, order on summary judgment, thereby dismissing Ms. Sligar's claims for dog bite liability.

2. The trial court erred in entering its April 10, 2009, order denying Ms. Sligar's motion for reconsideration of the summary judgment order entered on February 6, 2009.

3. The trial court erred by not dismissing the defendants' affirmative defense of trespass.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. Whether the trial court erred by summarily dismissing Ms. Sligar's claim for strict dog bite liability when 1) Ms. Sligar had, before the dog bite attack at issue in this case and in the presence of the defendants, petted the defendants' dog through the fence dividing her yard from the defendants' yard with no objection from the defendants, thereby giving Ms. Sligar at least implied permission to have her finger through the fence when it was bitten off, 2) Ms. Sligar had, before the dog bite attack at issue in this case and in the presence of the defendants on numerous occasions, put her hands over the fence dividing their yards with no objection from the defendants, thereby giving Ms. Sligar at least implied permission to have her finger through the fence when it was bitten

off, 3) Ms. Sligar had, before the dog bite attack at issue in this case and with the knowledge of the defendants, put up chicken wire on her side of the fence by putting wire ties through the fence, reaching through the fence and pulling the wire ties back from the defendants' side of the fence, and then tying the wire ties off on Ms. Sligar's side of the fence, thereby giving Ms. Sligar at least implied permission to have her finger through the fence when it was bitten off by the defendants' dog, 4) Ms. Sligar, at the time the defendants' dog bit off her finger, had her finger lawfully through the fence when she was standing in her yard, accidentally fell and, while trying to regain her balance, had one of her fingers protrude through the fence, 5) the defendants knew or should have known that their dog was vicious when their dog foamed at the mouth, charged Ms. Sligar's fence and viciously barked three times per week for two years before the dog attack at issue in this case, and 6) Ms. Sligar who was disabled, was not a "trespasser" when she accidentally fell while in her own back yard and had her finger protrude through the fence while trying to regain her balance, at which time her finger was bitten off by the defendants' dog?

2. Whether the trial court erred by summarily dismissing Ms. Sligar's claims for negligence with respect to the dog bite attack when the defendants failed to 1) construct a fence that prohibited their dog from attacking people on Ms. Sligar's side of the fence until after the subject attack occurred or 2) tie up or otherwise restrain their dog within their back yard so it could not attack people on Ms. Sligar's side of the fence.

3. Whether the trial court erred by not dismissing the defendants' affirmative defense of trespass when 1) the defendants have the burden of proving all elements of trespass, 2) the defendants presented no evidence establishing that Ms. Sligar's finger was actually on the defendant's property when their dog bit Ms. Sligar's finger off, 3) the defendants presented no evidence that Ms. Sligar intentionally put her finger through the fence when it was bitten off, and 4) the defendants presented no evidence that Ms. Sligar did not have at least the implied permission or consent of the defendants to have her finger through the fence.

C. STATEMENT OF THE CASE

1. Ms. Sligar and the defendants live next to each other and have dogs in both back yards. One of the defendants' dogs was very large and routinely acted vicious and aggressive in the years leading up to this dog attack.

Ms. Sligar is 76 years of age, disabled and walks with a cane. CP 64. She lives in a single family residence in Bonney Lake next to the defendants' home. Id. When Ms. Sligar moved into her home in 2001, her property was completely fenced on both sides and the front with a chain link fence, and on the back side by a wooden fence. Id. The defendants' property was unfenced when they moved next door to Ms. Sligar in 2004, other than Ms. Sligar's chain link fence on one side and a wooden fence at the back of their property. CP 65.

Ms. Sligar raised Miniature Schnauzers and had three of them at the time of the dog attack at issue in this case. CP 66; CP 35. Her dogs were small dogs weighing between 10 and 20 pounds. CP 35.

When the defendants moved in to their home next to Ms. Sligar,

they had two large dogs. RP 4 (April 10, 2009, trial court hearing). One of the dogs was a very aggressive, vicious dog that weighed 135 pounds and was named "Chico." CP 36; CP 39. The other was a much gentler dog, which was a Golden Retriever named "Molly." CP 39; CP 65. Chico routinely foamed at the mouth, charged at the chain link fence separating Ms. Sligar's yard from the defendants' yard, and barked menacingly. CP 65-66. In fact, Ms. Sligar saw Chico engaging in that vicious behavior approximately three times each week in the years before the subject dog attack. Id.

During the summer of 2005, which was over one year before the dog attack at issue here, one of Ms. Sligar's small dogs got its leg caught in the chain link fence separating her yard from the defendants' yard. CP 66. The defendants' vicious dog, Chico, attacked and injured Ms. Sligar's dog on that occasion by biting Ms. Sligar's dog through the chain link fence and trying to pull it to the defendants' side of the fence. Id.

After the attack on Ms. Sligar's dog by the defendants' vicious dog, Ms. Sligar attached chicken wire to the fence separating her yard from the defendants' yard. Id. Ms. Sligar attached the chicken wire by pushing "wire ties" through the fence to the Odells' side, pulling the "wire ties" back to her side of the fence, and then tying off the chicken wire. CP 66. But because Ms. Sligar did not have enough chicken wire to cover the entire fence, a small portion toward the back of her back yard was without chicken wire. Id.

2. Ms. Sligar routinely put her hands and fingers over and through the fence dividing her yard from the defendants' yard, thereby giving her at least implied permission to accidentally have her finger through the fence

when she fell and had it bitten off by the defendants' dog.

Prior to the dog attack at issue here, Ms. Sligar often reached her fingers or hand through the chain link fence to pet the defendants' gentle dog, Molly. CP 65. The defendants personally saw Ms. Sligar reaching through the fence and petting their other dog, but they never complained or otherwise objected. CP 41. Before the dog bite, Ms. Sligar often put her hand through the fence and onto the Odells' side of the fence while leaning on the fence and talking to one or both of the Odells. CP 65. The Odells never objected to Ms. Sligar having her hand through or over the fence on those occasions either. Id. Finally, The Odells never objected to Ms. Sligar reaching through the fence to grab the wire ties so she could attach chicken to wire to her fence after the defendants' vicious dog attacked Ms. Sligar's small Miniature Schnauzer over one year before the dog attack at issue in this case. CP 66.

3. Ms. Sligar's finger was bitten off by the Odells' dog, Chico.

On October 10, 2006, Ms. Sligar's three month old puppy was in Ms. Sligar's back yard near the area of the chain link fence where there was no chicken wire. CP 66. The defendants' vicious dog, Chico, was on the defendants' side of the fence foaming at the mouth, barking ferociously, and charging the fence near Ms. Sligar's small puppy. CP 36-37.

Fearful that the puppy would be attacked by Chico, Ms. Sligar hobbled out with her cane to where her puppy was playing to move it away

from the fence. CP 66. Ms. Sligar, while on her side of the fence in her own back yard, and through no fault of her own, lost her balance and fell as she tried to gather her puppy. Id. In the course of falling, Ms. Sligar put out her hand, at which time her finger accidentally protruded through the fence and was immediately bitten off by the defendants' vicious dog, Chico. Id.

4. After the attack, the defendants built a solid wood fence separating their back yard from Ms. Sligar's back yard.

After the attack that severed Ms. Sligar's finger, the defendants built a solid wooden fence on their side of the chain link fence separating their back yard from Ms. Sligar's back yard. CP 67. The fence now prohibits the defendants' dogs from biting or attacking any person or animal on Ms. Sligar's side of the fence because the fence is solid and does not allow the dogs' snouts through the fence. CP 67.

The defendants' wood fence is approximately nine inches from the chain link fence at the front of Ms. Sligar's back yard, and thirteen inches from the chain link fence at the back corner of Ms. Sligar's back yard. Id. Thus, the chain link fence near where Ms. Sligar's finger was bitten off is from nine to thirteen inches toward Ms. Sligar's side of the property and away from the newly constructed fence placed on the defendants' property. Id.

5. The trial court dismissed Ms. Sligar's case on summary judgment.

In answering the complaint in this case, the defendants asserted the affirmative defense of trespass as a bar to Ms. Sligar's claims. CP 9. On

February 6, 2009, the trial court heard oral argument on the defendants' summary judgment motion, in which the defendants moved for dismissal because Ms. Sligar's finger was "unlawfully" across the fence when her finger was bitten off, thereby rendering her a trespasser.

Ms. Sligar responded to the summary judgment motion and pointed out that the defendants have the burden to prove trespass because it is their affirmative defense. CP 28. Because the defendants have never even submitted evidence of where the actual property boundaries are or whether Ms. Sligar's finger was actually on the defendants' property when she fell and it accidentally protruded through the fence, Ms. Sligar asked the court to dismiss the defendants' affirmative defense of trespass. CP 28-29.

The trial court granted the defendants' summary judgment motion and declined to dismiss the trespass affirmative defense. In so doing, the court stated as follows:

It's undisputed that the dog who bit the Plaintiff was on the Defendant's[sic] own property. It was private property. It's undisputed that the Plaintiff was on her own property. . . . It's undisputed that her hand went through the chain link fence. The fence presumes no consent. Summary judgment is granted on the two issues requested strict liability and negligence.

On the strict liability under 16.08.040 under the negligence, there has been no standard of care established as to what was breached by the Defendant keeping their dog on their property in a fenced yard, other than the plaintiff falling through the fence with her fingers.
RP 13(2-6-09 summary judgment hearing).

Ms. Sligar timely filed a Motion for Reconsideration on Tuesday, February 17, 2009, which was the day after President's Day. CP 77. The

motion was set to be heard on February 27, 2009. CP 77. However, because of the trial court judge's continuous unavailability, the trial court set the motion over several times until the Motion for Reconsideration was finally heard on April 10, 2009. CP 78. The trial court denied that motion. CP 84-85. This appeal follows.

D. ARGUMENT

1. Standard of review and summary judgment standard.

When an appellate court reviews an order granting summary judgment, it must engage in the same inquiry as did the trial court. Barr v. Day, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). For a trial court to properly grant summary judgment, the facts must demonstrate that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to that relief as a matter of law. CR 56(c); Bruns v. PACCAR, Inc., 77 Wn. App. 201, 208, 890 P.2d 469, review denied, 126 Wn.2d 1025, 896 P.2d 64 (1995). The court must also consider the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). The appellate court must reverse an order of summary judgment if the evidence could lead reasonable persons to reach more than one conclusion. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 325, 971 P.2d 500, 504 (1999).

Additionally, when the facts are undisputed, summary judgment may be entered for the non moving party. Impecoven v. Department of

Revenue, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (“Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party. See Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1967); Washington Ass'n of Child Care Agencies v. Thompson, 34 Wn. App. 225, 660 P.2d 1124 (1983); see generally 4 L. Orland, Wash.Prac., Rules § 5656 (1983 & Supp.1991)).”

In the case at bar, Ms. Sligar is the party who responded to summary judgment. Thus, the court must construe all of the facts and the reasonable inferences therefrom in her favor. If this court finds that the defendants did not meet their burden to prove their affirmative defense of trespass, then this court should not only reverse the summary dismissal of Ms. Sligar’s claims, but it should also summarily dismiss the defendants’ affirmative defense of trespass.¹

2. The trial court improperly dismissed Ms. Sligar’s claims for statutory strict dog bite liability.

In Washington, the owner of a dog is strictly liable by statute to any person bitten by that dog 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.
RCW 16.08.040.

The statutory test for whether a person is lawfully in a private place is as

1

The elements of trespass will be briefed below.

follows:

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.

RCW 16.08.050.

Thus, even though the presence of a fence negates a presumption of permission, the victim of a dog bite may still prove that she had express or implied permission to be on the dog owner's property through direct or even extrinsic evidence of such permission. Similarly, the statutes governing dog bite liability do not make what is otherwise a lawful entry onto land, i.e., inadvertently falling against a neighbor's fence, an unlawful entry onto that land.

A. Ms. Sligar at least had the defendants' implied permission to have her finger through the fence, thus rendering the entry of her finger on the defendants' side of the fence a lawful entry.

The trial court's ruling implies that, because of fence was present, Ms. Sligar could never have had her finger lawfully through the fence. That ruling ignores the fact that Ms. Sligar 1) had put her hand and fingers through and over the fence numerous times before this incident with the knowledge of the defendants and with no objections thereto, and 2) fell down through no fault of her own in her own back yard while trying to catch her small dog and save it from the defendants' vicious dog. In other words, the trial court must have concluded that Ms. Sligar was a trespasser when she fell and had her finger accidentally protrude through the fence

while she was falling.

A person entering another's property is either an invitee, a licensee or a trespasser.² See, e.g., Kamla v. Space Needle Corp. 147 Wn.2d 114, 125, 52 P.3d 472 (2002). A landowner's duties to the person entering her property are determined by whether the person is an invitee, licensee or trespasser. Id.

A licensee is entitled to enter someone else's land by virtue of the landowner's consent. Singleton v. Jackson, 85 Wn. App. 835, 839, 935 P.2d 644 (Div. 2, 1997). A licensee is **lawfully** on the landowner's property by virtue of that invitation or consent. Botka v. Estate of Hoerr, 105 Wn. App. 974, 983, 21 P.3d 723 (2001). "The possessor of property may consent to a licensee's entry through conduct, omission, or by means of local custom, as well as through oral or written consent." Singleton, 85 Wn. App. at 839. Thus, if a person enters another's land with the invitation or consent of the private property's landowner, express or implied, then that person is a licensee, is lawfully on that private property, and is not committing a trespass.

A trespass, on the other hand, is "[a]n unlawful interference with one's person, property or rights. . . . Doing of unlawful act or of lawful act in unlawful manner to injury of another's person or property." Black's Law Dict., at 1502-03 (6th ed., 1990). Similarly, a "trespasser" is defined as

2

Ms. Sligar will not further address the status of invitee and will instead agree that she was a licensee.

“[o]ne who intentionally and without consent or privilege enters another's property. One who enters upon property of another without any right, lawful authority or express or implied invitation, permission, or license, not in performance of any duties to owner, but merely for his own purpose, pleasure or convenience.” Black’s Law Dict., at 1504 (6th ed., 1990).

Against the above backdrop, it is clear that Ms. Sligar was a licensee when she fell and had her finger accidentally go through the fence. The facts are undisputed that Ms. Sligar had permissively put her hands and fingers over and through the chain link fence on numerous occasions before being bitten. In fact, Ms. Sligar had previously petted the defendants’ dog through the fence. Defendant Kara Odell expressly saw Ms. Sligar petting her dog through the fence, but the defendants never objected in any way, shape or form. Ms. Sligar had often leaned on the fence with her hand over or through the fence while talking to the defendants. The defendants never objected to that either. And Ms. Sligar had put up chicken wire, which necessitated that she reach through the fence toward the defendants’ side, grab the end of several wire ties, and thread them back through the fence to attach the chicken wire.

In short, it is clear that Ms. Sligar had the defendants’ consent to have her finger through the fence when she accidentally fell on the date of the subject dog bite. As a licensee, Ms. Sligar’s finger was lawfully through the fence when it was bitten off. At a minimum, Ms. Sligar has put forth evidence to at least create a question of fact that she had at least

implied consent, thereby making summary judgment in favor of the Odells inappropriate.

B. Ms. Sligar’s accidental fall and having her finger catch the fence removes her from the class of trespassers.

A person who unintentionally and without negligence enters the land of another is not a trespasser. Restatement (Second) of Torts § 166 (accidental entries on land).³ Indeed, this doctrine of accidental entry onto another’s land “removes the actor from the class of trespassers and relieves him from the burdens incident thereto, including the . . . possessor’s immunity from liability to trespassers stated in § 333.” Id. The general rule set forth in the Restatement at § 333 is that a landowner is not generally liable to trespassers for the landowner’s failure to exercise reasonable care.

The Restatement cites several examples of unintentional entry on another’s land where the accidental entry is not a trespass. One example is a person who is walking on an icy roadway who slips and accidentally falls onto the property of a landowner abutting the icy road, thereby breaking the landowner’s plate glass window. The person who lands on that property is not a trespasser under the doctrine of unintentional entry onto land and is, therefore, lawfully on the land. Restatement (Second) of Torts § 166, comment b. 1. Similarly, a person who is driving her car and

3

§ 166 of the Restatement (Second) of Torts has been cited with approval by various Washington courts, including the court in Fradkin v. Northshore Utility Dist., 96 Wn. App. 118, 123, 977 P.2d 1265 (1999).

suffers a stroke, loses control of her car, and damages a landowner's lawn is not a trespasser. *Id.*, comment b. 2. Finally, a person who is driving a horse and buggy is not a trespasser even if the horses are frightened by a train and damage a lamp post on a nearby landowner's property. *Id.*, comment b. 4.

In the case at bar, there is no evidence to rebut Ms. Sligar's assertion that she accidentally and without negligence fell while trying to save her puppy from the defendants' ferocious dog, at which time her finger went through the fence and was bitten off. Under those facts, Ms. Sligar is not even a trespasser and had her finger lawfully through the fence. The trial court erred in concluding otherwise and should be reversed on appeal.

C. There is no evidence to prove that Ms. Sligar's finger was on the defendants' property when the defendants' dog bit it off.

As mentioned above, the defendants asserted as an affirmative defense that Ms. Sligar was trespassing when this attack occurred. The defendants' entire summary judgment motion was premised on the notion that Ms. Sligar's finger was not lawfully on the defendants' property, i.e., that she was a trespasser. It is the defendants' burden to prove their affirmative defenses. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976).

The defendants cannot meet their burden of proof. There is no survey in this record demarcating the actual property boundaries, nor is

there any other evidence to prove that Ms. Sligar's finger, when it was bitten off, was actually on or over the defendants' property. While there was a fence present where the dog attack occurred, a fence itself is not proof of actual property boundaries. Lamm v. McTighe, 72 Wn.2d 587, 592, 434 P.2d 565 (1967).

Once again, there is no evidence in this record to prove that Ms. Sligar's finger was even on the defendants' property when she was attacked. To the contrary, the evidence that is in the record shows that Ms. Sligar was standing on her side of the fence when she fell. And the evidence at least tends to show that her finger was actually on her own property when it caught the fence and was bitten off. Specifically, the defendants built a solid wood fence from nine to thirteen inches on their side of Ms. Sligar's chain link fence after this dog attack occurred. The reasonable inference to be drawn from this new fence is that the property boundary is actually nine to thirteen inches away from where the dog bite took place. If that is true, then Ms. Sligar would have had to extend her finger at least nine to thirteen inches through the chain link fence to have been on the defendants' property. The defendants simply cannot prove that Ms. Sligar's finger was past her own property boundary and onto or over the defendants' property. The trial court's order dismissing Ms. Sligar's lawsuit should be reversed, and the trial could should be directed to dismiss the defendants' affirmative defense of trespass with prejudice.

3. The trial court misapprehended RCW 16.08.050 by concluding that, because there was a fence present, Ms. Sligar could not have lawfully been

on the defendants' property when her finger went through the fence and was bitten off. But the un rebutted evidence is that Ms. Sligar had at least implied consent to have her hand through the fence. Thus, the court erred.

“When construing a statute, the goal is to carry out the intent of the Legislature. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 6, 721 P.2d 1 (1986). The trial court's interpretation must make the statute purposeful and effective. Seven Gables, at 6, 721 P.2d 1. If a statute does not define a word, it must be given its plain and ordinary meaning unless a contrary intent appears. Dennis v. Department of Labor & Indus., 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987).” Beeler v. Hickman, 50 Wn. App. 746, 751, 750 P.2d 1282 (1988)

Applying the above rules of statutory construction, it is clear that the trial court erred in the case at bar. The strict liability dog bite statute holds a dog owner responsible for any dog attack that occurs to a person lawfully on the dog owner's property. RCW 16.08.040. The person attacked is deemed to be lawfully on the dog owner's property if she meets the following test:

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.
RCW 16.08.050.⁴

¹ The facts are undisputed that the Odells had not fenced their side of the property abutting Ms. Sligar's property when this dog bite occurred. The only fence present was the one on Ms. Sligar's side of the property that existed before the Odells even moved into their home, plus an existing wood fence at the back of the Odells' property. It was not until after this dog bite that the Odells fenced their property abutting Ms. Sligar's fence. Thus, the Odells' property was not truly "fenced"

Another way to read the above statute is to determine what the words “said consent” in the last sentence modifies. The first sentence states that a person is lawfully on another’s property with “the express or implied consent of the owner.” In the last sentence, the Legislature shortened the phrase “express or implied consent of the owner” by using the words “said consent.” It is clear that “said consent” refers to both express and implied consent. Thus, the last sentence means that “[express or implied] consent shall not be presumed” if the property is fenced.

The trial court’s interpretation of RCW 16.08.050 would mean that a person who has the landowner’s express consent to come on the property to, for example, feed the dog would be barred from asserting a claim for statutory strict liability if that property is fenced. The same goes for a person to impliedly come on the property to, for example, visit the dog owner’s children. If the visitor routinely visits the children by entering the dog owner’s fenced yard and coming to the door, the visitor is clearly entitled to the benefits of strict liability if he is bitten by a dog on one of those visits. While there may be no “presumption” of consent by virtue of a fence, the visitor does need the benefit of the presumption because she has direct facts to support at least implied permission to continue coming on the property.

The trial court in the underlying summary judgment motion

when the dog bite occurred, thus obviating the need to apply the “presumption” language in this statute.

ignored the direct, un rebutted evidence that Ms. Sligar had at least implied consent to have her finger through her fence. The trial court instead ruled that, because a fence was present around Ms. Sligar's property, Ms. Sligar could not have been lawfully on the Odells' property under any circumstances because the presumption of consent is barred by RCW 16.08.050. That was error because no "presumption" is necessary in light of Ms. Sligar's direct evidence of consent. Also, the trial court's ruling renders a nullity the statutory directive that a person is lawfully on the dog owner's property if the person has the express or implied consent to be there. The trial court interpreted the dog bite statutes in such a way that consent can never be present, express or implied, if there is a fence around the dog owner's property.

The rules of statutory construction further require a court to interpret a statute to avoid absurd, unlikely or strained results. State v. Chhom, 162 Wn.2d 451, 464, 173 P.3d 234 (2007). In the case at bar, RCW 16.08.050 directs that a person is lawfully on the dog owner's property if that person has the express or implied consent from the land owner. It would be absurd for a person with such consent to be barred from recovery simply because the property over which the person has such consent happens to be fenced. For example, if a person routinely crosses a fence to take a shortcut across some land owned by another person, and the landowner knows about the fence crossing and never objects, or she gives express consent to take the shortcut, then the person taking the

shortcut has implied consent to be on the land.⁵ Under those facts, that person is entitled to the benefits of strict liability if the landowner's dog bites the shortcutting person. Thus, while that person is not entitled to a "presumption" of lawfulness to be on the property, the direct evidence of consent obviates the need for such a presumption. But the shortcutting person's implied consent does not change simply because there is a fence.

In short, the trial court's interpretation of RCW 16.08.050 violates the Legislature's directive that a person with implied consent is entitled to the benefit of strict liability. If the Legislature wanted to bar strict liability every single time a fence is present around all or part of the dog owner's property, then it would have stated that no person is entitled to a finding of consent, express or implied, if a fence is present. The Legislature instead wrote that, if a fence is present, no "presumption" of being on the dog owner's property will arise. The word "presumption" in the statute is different than the phrase "implied consent."

In the case at bar, Ms. Sligar has presented the trial court with un rebutted evidence that she had at least the implied consent of the defendants to have her hand or fingers through the fence. The defendants had personally witnessed Ms. Sligar put her hand or fingers through the fence to pet their dog prior to the dog bite, and the defendants never objected. The defendants personally witnessed Ms. Sligar have her hand

5

Indeed, the person crossing the land without permission may be entitled to a prescriptive easement as well.

through or over the fence while leaning on the fence and talking to the defendants prior to the dog bite, and the defendants never objected. While Ms. Sligar was talking to the defendants through the fence before the dog bite, she often leaned her body on the fence, which then allowed her body to be past the fence posts and enter the defendants' property. The defendants never objected. Finally, Ms. Sligar attached chicken wire to the fence prior to the dog bite by pushing wire ties through the fence to the defendants' side, pulling the wire ties back to Ms. Sligar's side, and twisting the ties around the chicken wire. The defendants never objected to that either.

The only reasonable conclusion to be drawn from the above evidence is that Ms. Sligar had at least implied permission to have her fingers, hands and part of her body past the fence dividing the two parcels of property. With that direct evidence of implied consent, the court need not make a presumption as to whether Ms. Sligar was lawfully on the dog owner's property.⁶ The trial court should have instead taken all facts and reasonable inferences therefrom in Ms. Sligar's favor, and then denied summary judgment when that evidence provides substantial proof that Ms. Sligar had at least implied consent to have her finger accidentally protrude through the fence.

6

If Ms. Sligar had no evidence to support implied consent to be on the defendants' property, then the court may be barred from presuming such consent in light of the existence of a fence. But a presumption in the case at bar is unnecessary in light of the un rebutted evidence of consent.

4. Even if the court believes statutory strict liability does not lie, Ms. Sligar still has claims for common law strict liability and negligence.

The trial court also dismissed Ms. Sligar's common law claims. That was error because there is ample evidence to conclude that the defendants knew or reasonably should have known of their dog's vicious propensities. Even if they did not know, they were negligent in failing to prevent harm to Ms. Sligar.

A. Strict Liability.

The common law applies two theories of liability against the owner of a dog that bites another person. First, the dog owner is strictly liable for a dog bite if the owner knew or reasonably should have known that his dog has vicious or dangerous propensities. Arnold v. Laird, 94 Wn.2d 867, 870, 621 P.2d 138 (1980).

The defendants' primary argument on their summary judgment motion was that they are not strictly liable under the common law because they did not know that their dog was dangerous. But the test is not only whether they knew of the dog's dangerous propensities; it was also whether the defendants' **should have known**. Id.

Ms. Sligar has submitted a wealth of unrebutted evidence proving that the defendants' dog, Chico, was routinely foaming at the mouth, charging the fence and barking viciously approximately three times per week in the years leading up to this dog bite. Ms. Sligar has submitted unrebutted evidence that the defendants' dog attacked Ms. Sligar's dog about one year before he attacked Ms. Sligar. After the defendants' dog

attacked Ms. Sligar's other dog over one year before biting off Ms. Sligar's finger, Ms. Sligar attached chicken wire to the fence to keep her dogs' legs from going through the fence and being attacked again. The defendants knew that the chicken wire had been attached. It is reasonable to infer from that knowledge that the defendants knew Ms. Sligar attached the chicken wire to her own fence to protect herself and/or her animals from further attacks. At a minimum, the defendants should have inquired as to why the chicken wire was present. If they had, they would have been given direct notice of their dog's prior attack on Ms. Sligar's little dog. Ms. Sligar has at least created a question of fact as to what the defendants knew or should have known about their vicious dog's propensities.

B. Negligence Claim.

Second, even if the dog owner did not know or should not have known of his dog's vicious or dangerous propensities, he is still liable if he is negligent in failing to prevent the victim's harm. Arnold v. Laird, 94 Wn.2d 867, 871, 621 P.2d 138 (1980). Thus, the defendants are also liable under the other common law theory of liability for dog bites, which sounds in negligence.

A case involving allegations of negligence against a dog owner and similar allegations of trespass against the victim of a dog bite is Brewer v. Furtwangler, 171 Wash. 617, 18 P.2d 837 (1933). In that case, a woman walked down a private road on private property with no knowledge that she was trespassing. While on that private property without permission,

she was attacked by the defendants' dog. The dog was chained up on the defendants' private property, but attacked the trespassing plaintiff within the radius of the chain.

The jury ruled in favor of the plaintiff in Brewer, so the dog owner appealed. The dog owner argued that he was not liable because the plaintiff was a trespasser. Id. at 618. The Supreme Court affirmed the trial court's ruling awarding damages to the trespassing plaintiff. In so doing, the Supreme Court stated as follows:

The mere fact of trespassing upon the grounds of another is not, in and of itself, contributory negligence which will defeat an action to recover damages for injuries inflicted by a vicious animal belonging to the defendant and allowed to be at large upon the premises. . . The respondent was a mere technical or unintentional trespasser upon the land of the appellants. . . A dog chained on the unfenced property of his owner is as much at large on the premises of his owner within the arc of his chain as an unchained dog permitted to run at large on fenced property of his owner. The one is confined to all of the premises inclosed by the fence. The chained dog is confined to the area within the radius of his chain. One is no more justified in keeping a vicious dog chained on uninclosed land in the daytime, as in the case at bar, than he is in keeping a vicious dog untied on fenced land in the daytime. In either case, for any injury thereby occasioned to a voluntary or involuntary trespasser who chances to be exposed to its ferocity, he is responsible.

Brewer v. Furtwangler, 171 Wash. 617, 622-23, 18 P.2d 837 (1933) (emphasis added).

In the case at bar, even assuming that Ms. Sligar's finger was actually on the defendants' property and that Ms. Sligar was trespassing, she was at worst a "technical or unintentional trespasser." The plaintiff in Brewer volitionally walked down a road that turned out to be private. To

the contrary, Ms. Sligar's falling down after losing her balance while trying to grab her puppy involved no volition to put her hand through the fence. As such, she is still entitled to recover her damages.

As to the negligence claim, whether the defendants knew or should have known about their dog's dangerous propensities is irrelevant. The only relevant inquiry is whether the defendants were negligent in failing to protect Ms. Sligar from harm. Ms. Sligar has at least raised a question of fact as to whether the defendants failed to take reasonable steps to protect her from harm. Indeed, since this dog bite occurred, the defendants erected a solid wooden fence that prohibits Ms. Sligar's hands from penetrating to the defendants' side of the fence. The fence also prohibits the defendants' dogs from biting a person or animal on Ms. Sligar's side of the fence. But in the two years that the defendants lived next to Ms. Sligar before this attack, they failed to change anything about the fence abutting Ms. Sligar's side of the property and failed to erect their own fence. If the defendants could build a fence after the attack to protect Ms. Sligar from being bitten, then they could have done so before the attack.

Additionally, the defendants did nothing with their vicious dog other than keep him in their back yard. That back yard was bounded only by a chain link fence on Ms. Sligar's side, which fence had openings large enough for the defendants' dog to bite Ms. Sligar's small puppy and to bite off Ms. Sligar's finger. The defendants could have chained the dog to keep it away from the fence line or put the dog in an outdoor dog run. At a

minimum, a jury should be entitled to hear the evidence on this issue because Ms. Sligar has created a question of fact sufficient to defeat summary judgment.

In the case at bar, the defendants are liable for the dog bite attack even though their dog was enclosed in their back yard at the time. The fact that the dog was enclosed does not obviate common law liability for a dog bite.

E. CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the trial court, reinstate Ms. Sligar's causes of action, and dismiss the defendants' affirmative defense of trespass with prejudice.

DATED this 9 day of September, 2009.

**THE LAW OFFICES OF
WATSON & GALLAGHER, P.S.**

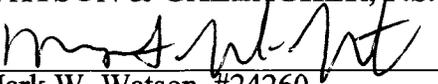

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Table of Authorities

Washington Cases

4 L. Orland, Wash.Prac., Rules § 5656 (1983 & Supp.1991).....	11
<u>Arnold v. Laird</u> , 94 Wn.2d 867, 870, 621 P.2d 138 (1980).....	23, 24
<u>Barr v. Day</u> , 124 Wn.2d 318, 324, 879 P.2d 912 (1994).....	10
<u>Beeler v. Hickman</u> , 50 Wn. App. 746, 751, 750 P.2d 1282 (1988).....	18
<u>Botka v. Estate of Hoerr</u> , 105 Wn. App. 974, 983, 21 P.3d 723 (2001)	13
<u>Brewer v. Furtwangler</u> , 171 Wash. 617, 18 P.2d 837 (1933).....	24, 25
<u>Bruns v. PACCAR, Inc.</u> , 77 Wn. App. 201, 208, 890 P.2d 469, <u>review denied</u> , 126 Wn.2d 1025, 896 P.2d 64 (1995).....	10
<u>Dennis v. Department of Labor & Indus.</u> , 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987).....	18
<u>Fradkin v. Northshore Utility Dist.</u> , 96 Wn. App. 118, 123, 977 P.2d 1265 (1999).....	15
<u>Hansen v. Friend</u> , 118 Wn.2d 476, 485, 824 P.2d 483 (1992).....	10
<u>Haslund v. City of Seattle</u> , 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)	16
<u>Impecoven v. Department of Revenue</u> , 120 Wn.2d 357, 365, 841 P.2d 752 (1992)	10
<u>Kamla v. Space Needle Corp.</u> 147 Wn.2d 114, 125, 52 P.3d 472 (2002).....	13
<u>Lamm v. McTighe</u> , 72 Wn.2d 587, 592, 434 P.2d 565 (1967).....	17

<u>Leland v. Frogge</u> , 71 Wn.2d 197, 427 P.2d 724 (1967).....	11
<u>Seven Gables Corp. v. MGM/UA Entertainment Co.</u> , 106 Wn.2d 1, 6, 721 P.2d 1 (1986).....	18
<u>Singleton v. Jackson</u> , 85 Wn. App. 835, 839, 935 P.2d 644 (Div. 2,1997)	13
<u>Soproni v. Polygon Apartment Partners</u> , 137 Wn.2d 319, 325, 971 P.2d 500, 504 (1999)	10
<u>State v. Chhom</u> , 162 Wn.2d 451, 464, 173 P.3d 234 (2007)	20
<u>Washington Ass'n of Child Care Agencies v. Thompson</u> , 34 Wn. App. 225, 660 P.2d 1124 (1983).....	11

Washington Court Rules

CR 56(c).....	10
RCW 16.08.040.....	9, 11, 18
RCW 16.08.050.....	12, 17, 18, 19, 20, 21

Other Authority

Black's Law Dictionary (6th ed., 1990).....	13, 14
<u>Restatement (Second) of Torts § 166</u>	15
Restatement at § 333.....	15

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

MARY SLIGAR, an individual,
Appellant,
v.
KARA A. ODELL and "JOHN DOE"
ODELL, wife and husband and the marital
community comprised thereof;
Respondents.

NO. 39283-6-II
DECLARATION OF SERVICE

Marie Ekstrand hereby declares and states as follows:

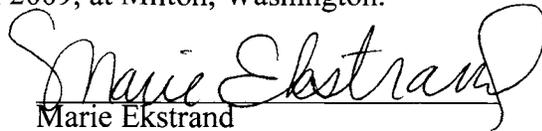
On September 9, 2009, I delivered a copy of the Appellant's Brief, to ABC Legal Services, with the intention of having the same hand-delivered to the following recipients:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of September, 2009, at Milton, Washington.


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