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STATE OF WASHINGTON

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Washington State Court of Appeals
Division II

Docket No. 41055-9-II

Pierce Cy. Sup. Ct. Cause No. 10-2-07721-4

HEIDI I. DOWNEY, et al.,

Plaintiffs-Petitioners,

-against-

PIERCE COUNTY, et al.,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

ORIGINAL

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Incorporating her opening brief, Ms. Downey offers this strict reply:

I. REBUTTAL STATEMENT OF FACTS

At 3, Respondents assert, “No response was received from Downey.” At page 20, they claim, “Contrary to Downey’s assertions, it is not the County’s responsibility to inform her that she could or should respond to the proposed findings.” The County omits that it never filed a motion to amend findings, conclusions, or judgment, but included it as *sub rosa* attempt to cure procedural errors made in the original Examiner’s order. Neither the County nor the Examiner invited Ms. Downey to file a reply. Indeed, the rules do not expressly provide for a reply. *See* PCC 1.22.130 (Reconsideration).

II. REBUTTAL ARGUMENT

A. Standard of Review.

At 8, Respondents specify the standard of review in a declaratory judgment action as *de novo*, construing all relevant facts and inferences in the light most favorable to the nonmoving party. While true, this court must note that the trial court dismissed Ms. Downey’s declaratory judgment action on a cross-motion for summary judgment, making Ms. Downey the nonmoving party. CP 223 ¶ 18, 224 ¶¶ 20, 22.

B. Unchallenged Findings.

At this court level, Ms. Downey's very first issue pertaining to assignment of error was Judge Hickman's only finding of fact that touched upon the findings made by the Examiner (i.e., ¶ 8, stating, "The factual findings of the Hearing Examiner were each supported by substantial evidence.") Hence, Ms. Downey did challenge the trial court's findings of fact, not rendering them verities on appeal.

No rule requires a party to challenge findings made at the level of the hearing examiner when the appellant is not directly appealing from a final decision of an administrative agency to the Court of Appeals (as in RAP 2.1(c)), but from the trial court's order on review of the agency decision. Indeed, the trial court's finding says "each" agency finding was supported by substantial evidence. Ms. Downey properly assigned error to and identified that only finding as required by RAP 10.3. Had the trial court specified every finding of the Examiner instead of saying "each," Ms. Downey assuredly would have specified further.

As Respondents agree, like the superior court, this court evaluates the findings and conclusions made by the administrative body's decision subject to the writ of review standard. As Ms. Downey challenged the Examiner's findings at both the trial court and appellate level, the County cannot maintain the assertion that Ms. Downey's purported failure to

identify them “with particularity” renders the Examiner’s findings verities on appeal. Ms. Downey expressly challenged the initial dangerous animal declaration, the decision(s) of the Auditor’s designee, and the Examiner’s findings in the *Appeal* to superior court,¹ and in the opening appeal brief in superior court.²

CR 52(a)(1) notes that “[g]enerally” findings and conclusions are required “in all actions tried upon the facts without a jury or with an advisory jury.” This matter was not tried by the court, per CR 39(b). CR 52(a)(2) states that findings and conclusions are “[s]pecifically required” for (A) temporary injunctions, (B) in connection with domestic relation proceedings, and (C) when specifically required by statute or rule. Ch. 7.16 RCW (Writs of Review) does not specifically require findings and conclusions. This matter did not fit within the three categories of CR 52(a)(2).

CR 52(a)(5)(B) notes that findings and conclusions are “unnecessary” on “decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2).” This matter came before the trial court on summary judgment and motion for reversal.

¹ CP 14-16, ¶¶ 6, 26, 29, 30, 37, 39.

² CP 29, ¶ 1 (assigning error to Conclusion of Law 1 of Examiner; CP 29, ¶ 2 (assigning error to Findings 1 and 2, Conclusion 3, and Decision of Examiner and specifically those

Hence, no findings or conclusions were required. Therefore, they were superfluous. More importantly, when findings and conclusions are unnecessary, they need not be challenged on appeal and do not become verities if unchallenged.³

Findings of fact only become verities on appeal if unchallenged where they are mandated by law and there is no *de novo* nature to the proceedings. First, Ch. 7.16 RCW does not mandate findings. And a superior court's decision to grant or deny relief upon a writ of certiorari is reviewed *de novo*. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788 (1995)(repeating standards contained in RCW 7.16.120(3-5)(noting that standard of review is *de novo* on issues of law and substantial evidence on issues of fact)). In other words, this court is not bound to any finding made by the trial court.

In most circumstances, findings only become verities if credibility and demeanor are duly considered factors warranting an evidentiary hearing with live testimony, as opposed to a decision based solely on the pleadings.⁴ In this case, relying solely on written submissions, the court

findings relating to provocation and off-property).

³ *DeHaven v. Gant*, 42 Wash.App. 666, 674 (1986)(holding that judge's findings of fact granting dismissal in trial by jury, because not required by rule, did not become verities on appeal, because not required per CR 52(a)(1)).

⁴ The *Smith* court notes that where record consists entirely of written material and the court has not heard testimony requiring it to assess the credibility or competency of

entered an order denying Ms. Downey's writ relief on several grounds. Outcome-determinative credibility decisions were not at issue at the hearing. No live testimony was elicited. All evidence was documentary. Findings of fact and conclusions of law were not mandated by any statute or rule. Further, as the County notes, there is a *de novo* nature to these proceedings with respect to mixed questions of law and fact (e.g., provocation, off owner's property), so findings do not become verities.

The County cannot realistically complain that it did not know which findings Ms. Downey challenged. Indeed, *Appellant's Brief*, Section III(A)(8), states, "Insufficient evidence to prove lack of provocation or that Blizzard was off Ms. Downey's 'property,'" complete with two subsections devoted to each adverse finding. Further, Ms. Downey clearly challenged the conclusion that Blizzard was "dangerous," a term of art incorporating several undefined mixed questions of law and fact (e.g., unprovoked; off property). Ms. Downey also challenged the identification of Blizzard as the attacker. *Appellant's Brief*, at 2-4. The thrust of Ms. Downey's briefing repeatedly put at issue all thought processes of the Examiner and court denying her relief. Conclusions of

witnesses, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record *de novo*. *Smith v. Skagit Co.*, 75 Wn.2d 715, 718 (1969)).

law (e.g., unprovoked) erroneously denominated as findings of fact are subject to *de novo* review. *Robel v. Roundup Corp.*, 148 Wn.2d 35 (2002).

Even if Ms. Downey did not assign specific error to the trial court's findings in her Assignment of Error (or Issues) section, though she did, she substantially complied with this doctrine because her "briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding[s] can be found in the text of the brief." *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10 (1979); RAP 1.2(a). The court may exercise its discretion under the RAP to consider the merits of an issue despite a technical flaw with appellant's compliance therewith. *State v. Olson*, 126 Wn.2d 315, 323 (1995).⁵ Yet this court need not exercise discretion to permit alleged technical noncompliance, since the unchallenged findings doctrine does not apply here.

C. Substantial Evidence – Unprovoked.⁶

⁵ The *Olson* court stated that in "every case in which we have considered a technical noncompliance with the rules concerning appellate briefing or notice of appeal in light of RAP 1.2(a), we have decided to reach the merits of the case or issue." *Id.*, at 322-23. As to conditions for not exercising its discretion to exercise "substance over form," the court added:

In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id., at 323; see also *In re Marriage of Wayt*, 63 Wash.App. 510 (1991).

⁶ NOTE: The County failed to respond whatsoever to the legal arguments

The “evidence” disproving provocation amounts to Ms. Steiner hearing “something that sounded like a bark or a yip” while her back was turned, not aware of her dog’s specific location at all times, not having seen Blizzard in the area at any time before the alleged attack, and then allegedly witnessing Blizzard (a dog whom she could not identify clearly after several attempts) running down the street with Kayla in his mouth. Not only does “unprovoked” remain undefined, but we have no evidence of what transpired prior to the alleged attack. Provocation cannot be assessed without non-speculative, *ante hoc* evidence, of which the County offered none. *See VRP 48:2-8* (did not see or hear incident commence).

D. Substantial Evidence – Identity.

Where a witness provides self-contradictory or equivocal testimony, and where there is no other evidence corroborating the favorable portion of the equivocator’s self-contradictory testimony that supports the equivocator’s position, as happened here, can any part of the contradiction be used to support substantial evidence? *See AR 47, AR 51, AR 48, VRP 17:19—18:4*. No, and for this reason, the Examiner and trial court erred finding that Blizzard killed Kayla.

Testimony of a party offering himself as a witness on his own behalf must be construed strongly against him when it is self-contradictory, vague, or equivocal and he is not entitled to a finding in his favor if that version of his testimony most unfavorable to him shows that a verdict should be against him. *Bufford v. Bufford*, 223 Ga. 133 (1967); *Everett v. Goodloe*, 602 S.E.2d 284 (Ga.App.2004). Contradictory testimony of a single witness relied on to prove a particular fact does not constitute substantial evidence and is not probative of that fact in the absence of an explanation or other circumstances tending to explain the contradiction. *Lagud v. Kansas City Bd. of Police Com'rs*, 136 S.W.3d 786 (Mo.2004).

Washington does not appear to have directly addressed the impact of self-contradictory or equivocal testimony, uncorroborated by other witnesses or documentary evidence, on constituting substantial evidence, though the policies invoked by Georgia and Missouri reflect a proper balance. *See Dalton v. State*, 130 Wash.App. 653 (III, 2005)(noting that substantial evidence not made less substantial by contradictory testimony offered by other witnesses, but does not address self-contradictory or equivocal testimony of a single witness). Here, none of the identifications made by Ms. Steiner was sufficient for Page to even proclaim a match to

Blizzard (*see* **AR 38** (“None matched the description in Tina Steiner’s written statement, so I did not declare any of the dogs.”)), who had to go back several times to obtain additional detail, and when she did, the color spectrum shifted from gold to cream to brown (**AR 47, 48, 51**), concluding pre-hearing with a completely biased and highly suggestive photographic presentation of only Ms. Downey’s dogs to Ms. Steiner.⁷

At the hearing, despite this prepping, Ms. Steiner added concessions making her pre-trial identifications even less reliable. **VRP 17:19—18:4**. Ms. Downey also consistently testified that Blizzard was on her property in her sight at the time of the alleged attack. And, as can be clearly seen in the photograph of Blizzard embedded in the *Downey Decl.* (**CP 194**), Blizzard is predominantly white with hardly any gold, orange,

⁷ Due process attaches to the pretrial identification procedures because the “vagaries of eyewitness identification are well-known” to the courts. *U.S. v. Wade*, 388 U.S. 218, 228 (1967); *State v. Burrell*, 28 Wash.App. 606, 609 (1981). A pretrial identification procedure violates due process if the procedure is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *State v. Hilliard*, 89 Wn.2d 430, 438 (1977)(quoting *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)). The showing of a single photograph is impermissibly suggestive. *State v. Maupin*, 63 Wash.App. 887, 896 (1992). Where the line-up is formed with the defendant appearing as the only potential suspect, as the “only possible choice,” the procedure is unnecessarily suggestive. *State v. Traweek*, 43 Wash.App. 99, 103 (1986). Amplifying the risk of error of eyewitness identification, at a level of magnitude beyond the scientifically-proved problems with cross-race identification (*see State v. Jaime*, 168 Wn.2d 857, 870-71 (2010)(noting relevance of cross-racial identification on accuracy of witness identification), is the difficulty of cross-species identification.

or brown.⁸ How can such manipulated, equivocal testimony meet the substantial evidence standard?

E. Substantial Evidence – Off-Property.⁹

If Ms. Steiner allegedly first saw Blizzard with Kayla in his mouth while running away, then she cannot confidently state where the incident commenced. Situating the memorial cross at the edge of her property and associating that with the location of first sighting does not provide any admissible evidence as to Blizzard’s location when he allegedly first bit Kayla. By not watching, Ms. Steiner permitted Kayla to roam into the easement road, where the two allegedly encountered one another – on property where Ms. Downey resides for the reasons stated in the opening appeal brief.

F. Probable Cause regarding Identification – Untimely.

As to the county’s position that not having challenged lack of probable cause through verbatim objection results in waiver on this appeal, Ms. Downey notes that constitutional infirmities warrant applying the “manifest error” doctrine, since the deficiencies alleged have practical

⁸ Though the court did strike this declaration, this is the only color photograph of Blizzard available for this court to review, as the Examiner’s record, while containing numerous black and white photos of Blizzard, was photocopied at poor resolution (see AR 22-25, 78-82). The County should not deny that the dog contained in declaration is the same as the one offered in evidence at hearing.

⁹ **NOTE: The County failed to respond whatsoever to the legal arguments**

and identifiable consequences, as described herein (viz., Blizzard would not be deemed dangerous). But manifest error affecting a constitutional right is not the only exception to the waiver on appeal doctrine:

A party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right.

State v. Kronich, 160 Wn.2d 893, 899 (2007) (citing RAP 2.5(a)). The probable cause prerequisite to issuance of a dangerous dog designation is a procedural step imposed by statute to ensure due process, avoid unreasonable seizures, and classify officer action as not *ultra vires*. It also serves as condition precedent to bestowing jurisdiction upon the Auditor and the Hearing Examiner to hear the dangerous dog “appeal.” When Page declared Blizzard dangerous under PCC 6.02.010(N), a necessary precondition was a probable cause determination under PCC 6.07.015(A). Hence, when Ms. Downey contested the designation, she contested that precondition. Further, jurisdictional questions may be raised at any point, even *sua sponte* by the court.¹⁰ Thus, the probable cause challenge meets the first and third exceptions stated in *Kronich*.

pertaining to the definition of “off the property.”

¹⁰ “Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power.” *In re Adoption of Buehl*, 87 Wn.2d 649, 655 (1976). A judgment is void if entered without subject matter jurisdiction. *In re Marriage of Ortiz*, 108 Wn.2d 643, 649 (1987). “[A] party may raise the following claimed error[] for the first time in the appellate court: (1) lack of trial court jurisdiction[.]” RAP 2.5(a)(1). “A party or the court may raise at any time the question of appellate court jurisdiction.” RAP 2.5(a). “Thus, a judgment may be vacated if there was no subject matter jurisdiction, even though a mandate has been issued.” *Bour v. Johnson*, 80 Wash.App. 653, 647 (II, 1996).

Ms. Downey's appeal (AR 54) embellished upon the foundation for her challenge to the designation of Blizzard as dangerous. Among the "circumstances upon which review is based" were:

I request the declaration be cancelled due to ... **the inability to identify the declared dog.** ... The occurrence was not witnessed, seen or heard by anyone as admitted by the accuser to P/C A/C Officer Page. The accuser has **never been able to identify the declared dog**, who is white. In the original statement to A/C, the accuser described a brown and white dog. After physically viewing my dogs **Officer Page could not match that description to any of my dogs.**

Id. (emphasis added). Whether drafted by an attorney or not, this "appeal" statement amply demonstrates that Ms. Downey exhausted all her administrative remedies. Using magic words (here, "probable cause") is not required and would improperly elevate form over substance, particularly for a *pro se* party. Recall also, per *Mansour*, that the hearings before Greer and McCarthy were contested, evidentiary proceedings, not misnomered appeals. It was not Ms. Downey's obligation to assign errors for appellate review at those stages. Nevertheless, she raised the issues and challenged the underlying designation as a general demurrer (including all conditions precedent to declaration) and specifically.

At time of issuance, could Page recite such objective facts and circumstances that would lead a neutral and detached person to conclude, on a more probable than not basis, that Blizzard killed Kayla? *Detention*

of *Peterson*, 145 Wn.2d 789, 797 (2002)(defining probable cause). The matter should have been dropped before a declaration was ever issued, since she had no probable cause to believe Blizzard was the culprit. In failing to procure the declaration from a magistrate through a procedure akin to swearing out an affidavit in support of search warrant, the avoidable error, of constitutional magnitude, led to considerable expense and time wasted by all involved.

G. Declaratory Judgment Challenge - WAPA

Preliminarily, the County cites to the old and new Washington Administrative Procedure Act (WAPA). *Response Brief*, at 14, 15. WAPA does not apply to non-state administrative proceedings. The County offers no evidence that the County legislature intended to adopt findings or provisions of WAPA, and no case law requires turning to the WAPA for interpretive guidance of county administrative procedures.

H. Declaratory Judgment Challenge – Review of Administrative Official’s Decision by Examiner

The court should be concerned with the haphazard fashion in which the Auditor and Examiner empower themselves. Sourced only by statute, they cannot act outside its parameters. Yet this is precisely how the County reads the code, defying statutory mandates while regarding the first hearing as a costly nullity.

Record Destruction: The County states, on the one hand, that the Examiner must conduct a public hearing under PCC 1.22.110, but ignores PCC 1.22.120(A), requiring the Examiner to “make and enter findings of fact from the record and conclusions of law thereof which support that decision,” a record most logically comprised of the testimonial and documentary evidence considered by the administrative official whose decision the aggrieved party seeks to overturn (see PCC 1.22.090(A)(*Right to Appeal*)). Live testimony comprises the “record.” Not recording it is tantamount to destroying it. PCC 1.22.110 does not supplant the record before the administrative official nor excuse destroying that part relied upon by the administrative official.

Burden of Proof: The County states, on the one hand, that PCC 1.22.090(G), in placing the burden of proof on the appellant and substantial weight on the decision of the administrative official, is a statute of “general applicability” and does not apply to dangerous dog appeals. Yet PCC 1.22.080(B)(2)(b) specifically states that the Examiner:

shall receive and examine relevant information, ..., conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for: Non Land Use Matters. Appeals of potentially dangerous dog declarations. (6.07).

The right to appeal specifically refers to decisions of an administrative official as set forth in PCC 1.22.080(B). PCC 1.22.090(A). Therein, the burden of proof lies. PCC 1.22.090(G). As predicted, the County cannot cite to any statute or rule deviating from PCC 1.22.090(G) for purposes of appeals of dangerous dog declarations. Indeed, by stating that the dog owner may appeal the Auditor's decision to the Examiner "pursuant to Pierce County Hearing Examiner Code Chapter 1.22 PCC," the County clearly intended to invoke PCC 1.22.090(G). PCC 6.07.015(E)(3).

That Greer and McCarthy chose to ignore the code at the insistence of Mr. O'Connor does not render such "off-label" jurisprudence any more constitutional or within the scope of the powers granted each under PCC 6.07.015 (Auditor) and PCC 1.22.080-.090 (Examiner).

I. Ultra Vires.¹¹

Is it mere "procedural irregularity" to ignore a clear dictate? The County responds that nothing requires quasi-judicial officers to disregard state law. While true, the court must consider the scope of *Mansour*, involving the King County Code in relation to a "vicious," not a "dangerous" dog, with the sanction of removal from the county, no option

¹¹ **NOTE: The County fails to address the constitutional argument mandating reversal despite "courtesy" compliance with the constitution, per *Phillips v. San***

to keep a dog within the county under onerous conditions. While Ms. Downey agrees that the holding of *Mansour* should extend to these facts, *Mansour* interpreted the law of a different county, using different definitions, resulting in different sanctions. Indeed, even the County recognizes this at pages 34-35 of its response brief.

As for McCarthy, while PCC 1.22.120(A) (emphasis added) says that the Examiner's conclusions of law shall be based on many authoritative sources, including statutory and common law, the county has left out the first requirement that "findings of fact shall be supported by *substantial evidence* in the record" – a scope of appellate review, not consistent with a trial *de novo* in a court of original jurisdiction. And, as for the hearing held by Greer, PCC 1.22.120(A) plainly does not apply. No provision similar to PCC 1.22.120(A) exists within Ch. 6.07 PCC.

Furthermore, conclusions of law do not recite burdens and standards of proof. Rather, the latter calibrate the intensity of evidentiary scrutiny to produce findings which, when sieved by law, become conclusions. Furthermore, a common canon of statutory interpretation (e.g., *ejusdem generis*) grants deference to a specific over a general

Luis Obispo Cy. of Dep't of Animal Regs., 183 Cal.App.3d 372 (1986) and *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-25 (1915)).

provision, and a more-recent over an older provision. *See State v. J.P.*, 149 Wn.2d 444, 453-54 (2003). Hence, PCC 1.22.090(G), titled “Burden of Proof,” prevails over any misreading of PCC 1.22.120(A), as the County urges upon this court.

As for Greer, the county knows better than to plead ignorance when it comes to the legal term of art “insufficient evidence.” Sufficient means substantial. And as explained in the opening brief, PCC 6.07.015(E)(2-3) requires that the evidence only support *probable cause*, a standard contravening *Mansour* and the constitutions.

The County also misrepresents the evidence. While on Oct. 8, 2009, Ms. Downey did check the box for \$500 appeal fee (see **AR 64**), but she also expressed confusion by placing a question mark above the two boxes indicating, in fact, was being appealed, and circling the box pertaining to the \$250 appeal fee for a PDA decision. **AR 64**. The day she filed the appeal, she paid \$250 (PDA decision). **AR 65** (C12 – LHS). Six days later, after being threatened by animal control with having Blizzard impounded and her potentially arrested, Ms. Downey paid another \$250. **AR 65** (C12 (*rhs*)). This occurred twelve days before Greer amended his decision, at which time he lost any jurisdiction to revise his earlier ruling deeming Blizzard a PDA (not a DA). Thus, if “any challenge to Greer’s

amended decision is moot,” then this means that McCarthy only had jurisdiction to declare Blizzard a PDA, not a DA (as stated in the amended order).

J. Bias

Ms. Downey did not need to adhere to the level of formality implied by the County. CR 46 provides that “Formal exceptions to rulings or orders of the court are unnecessary[.]” While CR 46 applies to superior court, given the county’s position that administrative hearings maximize informality, it follows that Ms. Downey’s reluctance to refuse to answer a direct question from the Examiner, or argue points of law with him, cannot be used against her. Important is not her lack of a formal exception, but that the examiner asked the exceptionable questions, revealing his internal agenda. Omitting Janelle Downey evidences his bias.

K. Equitable Estoppel

The County focuses on lack of detrimental reliance, but ignores the injury suffered by Ms. Downey as a result of Greer’s revisory ruling (and McCarthy’s upholding same) twelve days after she appealed his original decision: (1) Ms. Downey had the benefit of the administrative official downclassifying Blizzard from dangerous to potentially dangerous. That she appealed the PDA designation does not mean she was acquiescing to

the Examiner upgrading Blizzard from potentially dangerous to dangerous; (2) Ms. Downey had the benefit of paying \$250 (instead of \$500) to seek review of the order declaring Blizzard potentially dangerous. When she first paid \$250, the county threatened her with immediate confiscation of Blizzard and other serious repercussions to her liberty and property unless she paid another \$250, additional sums not required had Greer not amended his order without any notice, hearing, or input from Ms. Downey.

L. Unconstitutional Statute – Seizure/Warrant

A municipality may indubitably exercise its police power to regulate or destroy dogs in order to protect citizens, as stated in *ADOA v. Yakima*, 113 Wn.2d 213, 217 (1989), provided that it is done “legitimate[ly].” Law enforcement frequently wields the police power against the citizenry, but when used illegitimately (e.g., by contravening the warrant requirements of the Fourth Amendment and Wash. Const. Art. I, § 7), cases are dismissed, evidence excluded, suspects released, and convictions vacated. Whether Ms. Downey’s property interest in Blizzard is imperfect or qualified does not mean that the County can throw due process out the window. The court need not invoke *Sentell* to resolve this

dispute, nor should it since Blizzard's status as qualified or absolute is immaterial to whether the county disregarded the constitutions.

Ms. Downey recognizes that the United States Supreme Court has asserted that dogs have, "from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states." *Sentell*, at 702. Yet it concluded:

Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.

Id., at 704.¹² To put *Sentell* in proper context, consider *Rabon v. City of Seattle*, 107 Wash.App. 734, 743-44 (2001)(emphasis added), stating:

Most courts recognize dog ownership as being "of an imperfect or qualified nature" and therefore subject to police power. The state may use its power to destroy or regulate dogs in order to protect human citizens. *See American Dog Owners Ass'n v. Yakima*, 113 Wn.2d 213, 217, 777 P.2d 1046 (1989) (rejecting vagueness and overbreadth challenge to a Yakima ordinance banning all breeds of pit bulls). **But the fact that an exercise of police power is permissible does not, in itself, answer the question as to the nature of the interest at stake.**

And this Division declared the interest at stake as "great." *Rhoades v. City of Battle Ground*, 115 Wash.App. 752 (2003). In short, while *Sentell* defers to the legislature in dictating what property rights inhere in animal

¹² To sharpen the point, the *Sentell* court explained how the police power could be similarly wielded against the most sacred property – "one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a

companions and, therefore, defines the permissible reach of the police power, it in no way speaks to the legitimacy of the enforcement agency's noncompliance with the law – here, the constitutions.

To show legitimacy of action, the county cites to *Leibowitz v. City of Mineola*, 660 F.Supp.2d 775 (E.D.Tex.2009), at 784, where the district court discusses the plaintiff's 42 U.S.C. § 1983 claim for a substantive and procedural due process violation arising from the city's animal control ordinance. In granting summary judgment to the city, the court merely concludes that the ordinance satisfied rational basis analysis and did not impair substantive due process by regulating dogs for the safety, health, and welfare of the public, and, further, in the barking dog context, that no procedural due process complaints are merited so long as an adequate and meaningful post-deprivation remedy exists. Neither of these Fifth Amendment rights apply to the Fourth Amendment seizure analysis here, making the county's citation to *Leibowitz* inapposite and nonresponsive.

Furthermore, instructing the dog owner to obey the law as written (described as a "remedial requirements order"), but not issuing a citation, filing a criminal charge, or transmuting the legal classification of the dog from normal to abnormal (e.g., dangerous), is nothing more than a

general conflagration, and that, too, without recourse against such authorities for the

warning, utterly unlike a notice declaring a dog dangerous and mandating immediate restraints on control (not imposed on any other person in Pierce County with a non-dangerous dog), including the threat of criminal prosecution if those dog-specific restraints are disregarded, as well as confiscation and euthanasia, and the requirement to pay money to register the dog or “appeal.” And the county cites no authority negating Ms. Downey’s right to invoke the Fourth Amendment for discrete constitutional analysis. Even in non-criminal, administrative contexts, warrants are required before property is seized or homes searched.¹³

M. Unconstitutional Statute – Fees

To plead confusion over this section and ask for the court to decline to consider the issue completely misreads *State v. Johnson*, 119 Wn.2d 167, 171 (1992), where the court refused to consider arguments not briefed, adding “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Id.* (quoting *In re Rosier*, 105 Wn.2d 606, 616 (1986)(quoting *U.S. v. Phillips*,

trespass.” *Id.*, at 705.

¹³ *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overturned conviction for refusing to allow inspectors to enter his home without a warrant); *In re Quackenbush*, 49 Cal.Rptr. 147, 150 (Cal.App.1996)(accord in context of animal control officer demanding surrender of dog for rabies quarantine without a warrant and then prosecuting owner for failure to produce animal on demand); *See v. City of Seattle*, 387 U.S. 541 (1967)(reversing conviction for refusal to permit fire department representative to enter and inspect locked commercial warehouse without a warrant).

433 F.2d 1364, 1366 (8th Cir.1970)). In this context, how can eleven pages of argument be deemed “passing” and unreasoning? *App. Brief*, at 51-62. To reiterate: this is a facial challenge; it is wholly unconstitutional to require payment of any fee as a condition for a contested hearing. That Ms. Downey did not raise the impropriety of appeal fees in the hearings before Greer and McCarthy is impertinent.

In citing to an out-of-state district-court-level decision, *American Canine Foundation v. City of Aurora*, 618 F.Supp.2d 1271 (2009), to state that owning a dog is not a fundamental right, the County mistakes the nature of this constitutional challenge. Ms. Downey does not assign substantive due process error to the fact that the County regulates dangerous dogs. Rather, she contests the charging of exorbitant fees (more than the fee to even file a lawsuit in superior, appeals, or supreme court) solely to have the right to be heard and contest the unilateral, otherwise permanent decision of an animal control officer, imposing immediate restraints carrying potentially irreversible consequences (e.g., euthanizing Blizzard, jail time). Even the United States Supreme Court acknowledged that the contested evidentiary hearing properly cost the petitioner nothing; only the appeal therefrom permitted collection of fees. *Ortwein*, at 659.

Besides, due process does not confer the right to contest a government order exclusively to acts seeking to deprive the person of fundamental property or liberty rights. Traffic tickets do not involve fundamental rights, yet one may contest them in municipal court at no charge. While some jurisdictions allow the judge to award costs to an unsuccessful petitioner, no precedent allows a jurisdiction to require the citizen to, in essence, post a cash bond in advance of a contested hearing, forfeited whether or not she prevails.¹⁴

U.S. v. Kras, 409 U.S. 434 (1973) can be distinguished on the basis that the person seeking to discharge his debts in bankruptcy asks for affirmative relief, no differently than a plaintiff seeking compensation for personal injury. In this case, however, without needing to first obtain a warrant or order fixing Blizzard's status as dangerous, and without needing to obtain the equivalent of a TRO or preliminary injunction altering the *status quo* (and, posting a bond in the case the injunction were wrongfully sued out), by unilateral and permanent state action, the County simply asserts its right to affirmative relief in the form of compulsory order fundamentally altering the legal status of Blizzard and the manner in

¹⁴ Note that PCC 6.07.015(E) does not provide for a refund of the appeal fee under any circumstance.

which he could be kept by Ms. Downey, and triggering the predicate status for a later criminal charge if she failed to comply with the restraints.

In every other context where the government threatens to infringe, or as here (immediately infringes on) the constitutional rights of a citizen through state action, the citizen has a right to contest the seizure, deprivation, fine, penalty, or criminal charge at no expense. Why should dangerous dogs be treated any differently?¹⁵ And why should a person have to pay to defend against a future criminal charge arising therefrom?

If the county were forced to abide by the same rules that private citizens must, it would pay a filing fee to start a civil case under the UDJA (if it wanted to declare Blizzard “dangerous”) and, if it wanted a preliminary injunction, then to post a bond for same relief, after giving Ms. Downey an opportunity to be heard – all at no expense to her. In this context, how can it ever be constitutional to impose a prepayment regime simply to force the county to prove its case, as it must under *Mansour*? And, further, how can it be equitable to deny the prevailing petitioner, who has paid \$750, a refund? Indigent or not, the very notion of paying

¹⁵ Assuming for the sake of argument that owning a dog does not constitute a fundamental right, then what rational basis warrants such discriminatory treatment to compel a party to pay as much as \$750 to contest a dangerous dog designation but pay nothing to contest a parking ticket, where the former jeopardizes far more than just paying a fine and having a “committed” finding on a civil infraction, but includes the distinct threat of criminal prosecution, forfeiture of the dog, destruction of the dog, and

for due process to defend against government efforts to deprive a person of liberty and property (and later prosecute that person based on the underlying determination) undermines the very notion of a republican form of government. Furthermore, state law's default dangerous dog notification and appeal procedure does not require payment of any fee for a contested hearing.¹⁶

As for the claim that the *Ramirez* case is not part of the record on appeal, the court never struck Ms. Downey's reference to Ramirez at the trial court level, including the email correspondence attached to the reply brief. CP 150, 152-153.¹⁷

N. Unconstitutional Statute—Subpoena Powers.

That this issue was raised for the first time in superior court is irrelevant.¹⁸ Exhaustion doctrine does not apply to this facial taxpayer

costly, onerous burdens to keep one's member of the family.

¹⁶ See RCW 16.08.080(3)(opportunity to meet before final designation required, but no charges indicated); RCW 16.08.080(4)(right to appeal to municipal court or district court guaranteed, with no charge indicated). Assuming *arguendo* that the district court could even charge to open a "petition to contest dangerous dog designation," the cost is \$73.

¹⁷ Incidentally, though Ramirez's criminal charge was dismissed on oral ruling, the trial court never entered a written order. Even if a written order were available, referencing it would not violate GR 14.1(a) for the simple reason that a district court judge ruling is not an "unpublished opinion of the Court of Appeals."

¹⁸ Repeatedly, the County misunderstands that this action has two independent parts – the first set of claims pertain to the appeal from the Examiner; the second set of claims pertain to a declaratory and injunctive challenge to the Pierce County Code. Even if the county never declared Blizzard dangerous, Ms. Downey could have simply filed the second part of this action as a taxpayer questioning the legality and validity of the Pierce County Code. This she did.

challenge, but even if it did, the county is estopped from claiming lack of standing having never assigned error to the trial court's finding, "Plaintiffs have standing to seek the declaratory and injunctive relief requested under taxpayer derivative suit doctrine and the UDJA." **CP 223 ¶ 16.**

For purposes of the subpoena right, no relevant dissimilarity exists between ordering the removal of a dog (as in *Mansour*) and ordering compliance with onerous restrictions, or, tacitly, removal from the jurisdiction (where those restrictions would not apply). To allow subpoena powers at the Examiner stage but not the Auditor stage lacks rational basis, in essence forcing the owner to pay for subpoena powers after wasting time and money in a first hearing that foreseeably deprives her of the ability to fully defend her case.

O. RAP 18.1.

In *Weiss*, the Supreme Court awarded attorney's fees to plaintiffs who protected constitutional principles by successfully challenging the expenditure of public funds made pursuant to patently unconstitutional legislative and administrative actions after refusal by the appropriate official and agency to maintain such a challenge. In finding that Ms. Downey had standing under taxpayer derivative principles, the court necessarily decided that public funds were implicated. Ms. Downey also

requested intervention by the appropriate individual, the Attorney General, conferring upon her both standing and the right to attorney's fees. And if the court agrees that parts of Ch. 6.07 PCC are patently unconstitutional, fee entitlement follows.¹⁹

III. CONCLUSION

For the reasons stated herein, this court should emancipate Blizzard, liberate Ms. Downey, and bestow upon all Pierce County citizens the right to a constitutional dangerous animal process.

Dated this Jan. 10, 2011

ANIMAL LAW OFFICES

Digitally signed by Adam P.

Karp
Location: Bellingham, WA
Date: 2011.01.10 13:55:00
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¹⁹ Additionally, and perhaps analogously, under federal law, any prospective injunctive relief sought to correct a violation of federally-protected rights (such as the constitution) entitle the prevailing plaintiff to reasonable attorney's fees under 42 U.S.C. § 1988. *Parmelee v. O'Neel*, 168 Wn.2d 515 (2010)(prisoner's successful litigation in challenging constitutionality of criminal libel statute forming basis for infraction and retaliation entitled him to prevailing party fees under § 1988 even in absence of any monetary damages).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Jan. 10, 2011, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF, to be served upon the following person(s) in the following manner:

[x] Email (by agreement)

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