

No. 45076-3-II

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

HAROLD RATH,

Plaintiff-Appellant,

v.

GRAYS HARBOR COUNTY

Defendant-Respondent.

APPELLANT'S RESPONSE BRIEF

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I. MR. RATH'S REPLY TO GRAYS HARBOR COUNTY'S RESPONSE TO MR. RATH'S APPEAL

A. Grays Harbor's Assertion that the Alleged Crime of Obstruction Amounts to Trespass is Unfounded - Mr. Rath was not Trespassing at the Time the Police Dog Bit Him – Instruction No. 10 Misstates the Law

The plain language and meaning of the pertinent strict liability dog bite statutes clearly and unambiguously provide that the owner of the dog is liable under the circumstances present in this case. Instruction number 10 misstates the law wherein it creates a general, broad 'criminal conduct' exception to their applicability, where one does not exist under the plain language of the statute.

RCW 16.08.040 provides that an owner is strictly liable if its dog bites another when lawfully on private property with the permission of the owner of said private property, even if the owner of the dog owns the private property. At the time of this occurrence, RCW 16.08.040 provided:

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 16.08.050 states in pertinent part:

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.

The statutes provide that a person is, for the purposes of the strict liability dog bite statute, lawfully on private property with the express or implied consent of the property owner. As stated and cited in Mr. Rath's Opening Brief, the dog Gizmo bit Mr. Rath while he was in the residence with the permission of the owners (Leonard Vervalen and Valerie Dixon).

Grays Harbor's reliance on *Hansen v. Sipe*, 34 Wn.App. 888 (Div. 3 1983)) does not change the proper legal analysis. First of all, it should be noted that the *Hansen* court was

interpreting a different version of the applicable statute. Prior to 1979, former RCW 16.08.050 stated:

A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 through 16.08.060 when he is on such property in the performance of any duty imposed upon him by the laws of the state of Washington or of the United States or the ordinances of any municipality in which such property is situated.

In 1979, the legislature amended RCW 16.08.050, because the former version stated that lawful presence meant that the bite victim must have been performing a statutory duty at the time of the bite on the dog owner's property. As the Washington courts have pointed out, this language could lead to absurd results. *Hansen v. Sipe*, 34 Wn. App. 888, 891 (Div. 3, 1983). The dog bite in the *Hansen* case occurred before the modification of the statute and the *Hansen* court was applying the old language—not the version of the statute applicable in this case. The *Hansen* court noted that “lawful” as defined in

the old RCW 16.08.050 could only apply when the owner of the dog was also the owner of the property where the bite occurred. *Hansen*, 34 Wn. App. at 891. To avoid absurd results, the *Hansen* court's reasoning noted that a bite victim on the victim's own front porch would not be performing a statutory duty; therefore, the victim would not be lawfully on his or her own property for purposes of the strict liability statute and strict liability would not attach. *Id.* The court went on to construe the language of the former version of the statute to reach a result that was not absurd.

RCW 16.08.050 now defines when a dog bite victim is lawfully on the property of another regardless of whether the property belongs to the dog owner's or a third party. Mr. Rath was in the trailer property lawfully under RCW 16.08 *et seq.*

Moreover, *Hansen* does not alter the common law definition of lawful presence in private property. As noted in Mr. Rath's Opening Brief, the Washington Pattern Jury Instructions provide:

WPIC 65.02 Enters or Remains
Unlawfully—Definition

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, **invited, or** otherwise privileged to so enter or remain.

WPIC 65.02 (Emphasis added.) Notwithstanding application of RCW 16.08.050, if Mr. Rath was in the trailer with the permission and consent of the residents, he was not trespassing or remaining “unlawfully.” *State v. Wilson*, 136 Wash.App. 596, 609 (2007). In *Wilson*, the Court held as a matter of law that the defendant had not committed burglary even if his entry into the home violated a no contact order, because he had permission to be there from the occupants.

It is the consent, or lack of consent, of the residence possessor, not the State’s or court’s consent or lack of consent, that drives the burglary statute’s definition of a person who “is no then licensed, invited, or otherwise privileged to so enter or remain: in a building. RCW 9A.52.010(3). *See, e.g. Iowa v. Hagedorn*, 679 N.W.2d 666, 670-71 (2004). Here, Sanders

and Wilson, not the State, occupied the 1123 East Park Residence.

Id. The trial court in Rath used the same definition language of “unlawful remaining” in Instruction No. 9, but erroneously interpreted it to issue Instruction No. 10 in a way that allowed the jury to consider the State’s interest in allowing Mr. Rath’s presence, rather than the owner-occupants’ interests. The same legal error was made in the trial court’s decisions on summary judgment. Both are inconsistent with the strict liability dogbite statutes and the case law interpreting them.

Defendant does not claim Mr. Rath was trespassing. Mr. Rath was never charged with trespassing. Grays Harbor claims that he was unlawfully in the trailer because he was ‘obstructing’ law enforcement by not obeying law enforcement orders to leave. Defendant’s argument ignores the language in Instruction No. 9 (which was based on the above WPIC) and the case law that has interpreted the meaning of “unlawful entry and remaining.” He was never charged with obstructing or any crime in relation to his arrest in the subject trailer. Grays

Harbor's assertion, recognizing he was at a friend's residence trailer with their permission, and having not charged nor convicted Mr. Rath of any of the supposed 'unlawful' behavior they now (three years later) accuse him of, lacks merit and relevance. It is an effort, long after the fact, to avoid application of the strict liability dog bite statute. The definition of 'obstructing' as stated in Grays Harbor's memorandum in no way discusses or is applicable to lawful *presence* on private property. Grays Harbor's argument that the alleged commission of misdemeanor obstruction could revoke the permission of an invited guest to remain on the premises is unsubstantiated by any case law or statutory authority.

There is no legal authority for the novel proposition that alleged commission of misdemeanor obstruction or the existence of a warrant would negate the owner's permission to enter and remain on the property for purposes of defining lawful presence and thus render the guest a trespasser. Strict liability under the statute cannot be claimed by trespassers on

private land, but there is no factual or legal basis to argue that Mr. Rath was a trespasser at the time he was bitten.

Moreover, the legislature did not create a general “criminal conduct” exception in the strict liability dog bite statutes for private residences unless the victim was a trespasser therein. By confusing the definition of unlawful presence (trespassing) with criminal conduct, Grays Harbor seeks to create a new exception to strict liability. Grays Harbor’s assertion that Mr. Rath was ‘obstructing’ police by not responding to them does not impact the lawfulness of his presence in the trailer as it is defined in the statute, by case law, or the Washington Pattern Jury Instructions. Under the novel theory espoused by Grays Harbor and Instruction No. 10, even a home owner who is wanted by police but does not comply with their requests that he or she exit their home voluntarily would be deemed to be present in his or her home unlawfully. There is nothing in the law that renders an “obstructing” home owner or guest a “trespasser” and thus unlawfully present in

their own home. “Legal presence” and “trespasser” are legal terms of art and are unrelated to other criminal conduct, much like the difference between simple theft and burglary (unlawful presence on the property with the intent to commit theft). Mr. Rath was lawfully in the trailer at the time he was bitten by Grays Harbor’s dog as a matter of law according to the common law and under the strict liability statute because he had the owners’ permission to be there. The issue of whether or not he could have been (but was not) charged and convicted of obstructing is irrelevant to this analysis.

II. MR. RATH’S RESPONSE TO GRAYS HARBOR COUNTY’S CROSS-APPEAL

A. Grays Harbor’s Argument that the Legislature’s 2012 Change to RCW 16.08.040 is Retroactive is Erroneous

On the date that Mr. Rath was bitten by Grays Harbor’s dog, RCW 16.08.040 imposed strict liability against all dog owners – including the County of Grays Harbor – when the owner’s dog bit and injured an individual. RCW 16.08.040 provided:

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. (emphasis added)

The legislature recently changed this statute to explicitly exclude municipalities from future liability under this statute, but the amendment went into effect on June 7, 2012, after this lawsuit was filed. Grays Harbor asserts that the statute applies retroactively. That position is erroneous. The plain language of the statute controls the question of strict liability. There is no language in the 2012 amendment or its legislative history to indicate the intent to make its application retroactive. The legislature's new language, which now exempts police dogs, demonstrates that the statute did not exclude police dogs before June 7, 2012.

A statutory amendment applies retroactively if the legislature intended it apply retroactively. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn. 2d 566, 584, 146 P.3d 423 (2006). An amendment to a statute applies retroactively if 1) the legislature intended it to do so, 2) the amendment is clearly curative, or 3) the amendment is remedial. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn. 2d 566, 584, 146 P.3d 423 (2006).

1. The Legislature did not Intend for the Statute to Apply Retroactively

The effective date of the legislation was specifically listed as June 7, 2012. 2012 Wash. Legis. Serv. Ch. 94 (S.H.B. 2191) (see attached). If the legislature had intended to apply the amendment retroactively, it would have given some indication that it intended to do so, rather than merely listing the date on which the legislation became effective. For example, when the legislature amended workers' compensation legislation with a specifically-listed effective date in 1988, it

also included references to the amendment affecting incidents that occurred between 1981 and 1985. *See Oestreich v. Dept. of Labor and Industries of State*, 64 Wn. App. 165, 169 (1992). In contrast, neither the new language to RCW 16.08.040 nor the legislative history materials mention retroactive application or refer to earlier dates or past incidents.

Second, the language of the statute does not support the inference that the legislature intended the old version of RCW 16.08.040 to exclude police dogs. The language of the statute is the first step in analyzing legislative intent. *Oestreich*, 64 Wn. App. at 169, 822 P.2d 1264. The plain language of the former version of RCW 16.08.040 (the current subsection 1 of the statute) is couched in extremely broad terms such as “[t]he owner of any dog” and “any person” (referring to the bite victims). If the legislature had intended to exclude categories of dogs or bite victims from the statute, it certainly would not use terms that obviously encompass all dogs and all owners and all bite victims.

Additionally, exclusion of police dogs from the former RCW 16.08.040 cannot be read consistently with the remainder of that chapter. Even though RCW 16.08.040 did not exclude police dogs, RCW 16.08.080(5) did specifically exclude police dogs from the requirement to register dangerous animals. The legislature specifically exempted police dogs from RCW 16.08.080, .090, and .100, which impose maintenance requirements for keeping dangerous dogs and expose the owner to criminal liability; yet, the legislature did not exempt municipal owners under RCW 16.08.040. Clearly, it would be inconsistent to read these subsections together and find that the legislature intended to exclude police dogs from both subsections. The legislature specifically mentions police dogs in one subsection and fails to mention them in the other subsection. The only fair conclusion is that the legislative intent was different—police dogs are excluded from one provision but not from the other. It is also clear and further evident when considering RCW 4.24.410. RCW 4.24.410(2)

provides immunity to a police dog handler, but the legislature did not provide such immunity to the municipal owner of the police dog. RCW 16.08.040's imposition of strict liability for all dog owners for dog bite injuries is clear and unambiguous and must be given its full effect. *Washington Public Ports Ass'n v. State Dept. of Revenue*, 148 Wn.2d 1, 9-10 (2002) (citation omitted).

2. The Amendment is not Curative

The amendment to RCW 16.08.040 is not curative. An amendment is curative only if it clarifies or technically corrects an ambiguous statute. *1000 Virginia Ltd. Partnership*, 158 Wn.2d at 584, 146 P.3d 423. A statute is ambiguous when it may be interpreted in two or more ways. *State v. Gonzalez*, 168 Wn. 2d 256, 263, 226 P.3d 131 (2010).

In this case, as discussed above, the language of the former version of the statute is not ambiguous and may only be interpreted in one way. Moreover, as noted above, the former version of RCW 16.08.040 cannot be interpreted consistently

with RCW 16.08.080(5) to support the conclusion that police dogs are excluded from both subsections when the legislature's approach in drafting them was so distinguishable. The amendment is not clearly curing an ambiguity because none exists. Moreover, courts consistently interpreted the former RCW 16.08.040 to include strict liability for the owners of police dog bites in numerous cases over many years. *E.g. Peterson v. City of Federal Way*, 2007 WL 2110336 at *3 (W.D. Wash. July 18, 2007); *Rogers v. City of Kennewick*, 2007 WL 2055038 at *7 (E.D. Wash. July 13, 2007); *Smith v. City of Auburn*, 2006 WL 1419376 at *7 (W.D. Wash. May 19, 2006).

3. The Amendment is not Remedial

The amendment to RCW 16.08.040 is not remedial. An amendment is remedial if "it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *1000 Virginia Ltd. Partnership*, 158 Wn. 2d at 586, 146 P.3d 423. The amendment to RCW 16.08.040 has no relation to

practice, procedure, or remedies, and it affects both a substantive and a vested right.

RCW 16.08.040 imposes strict liability for dog bites. Strict liability abrogates the traditional tort element of breach of a duty under a common law negligence theory. If the incident occurred and it proximately caused injury, then there is need for the claimant to prove breach. The elements of a claim are not procedural. They are substantive. Furthermore, the elements that must be shown do not affect the available remedies. Whether or not Mr. Rath must show breach to recover a remedy affects neither the amount nor the nature of that remedy.

The amendment affects a substantive right, because HB 2191 was clearly enacted as part of a larger effort to modify the rules governing interaction with police dogs. *See* 2012 Wash. Legis. Serv. Ch. 94 (S.H.B. 2191). In addition to amending RCW 16.08.040, the bill created a new substantive rule that imposed civil penalties on persons who harm police dogs. *Id.* Reading the entire bill together shows that the legislature

sought to overhaul major substantive rights regarding police dogs.

The amendment affects a vested right. A vested right is one arising from contract or the principles of the common law. *1000 Virginia Ltd. Partnership*, 158 Wn.2d at 587, 146 P.3d 423. The rule that every normal dog gets one bite was a well-known rule of the common law prior to enactment of RCW 16.08.040. The former version of the statute abrogated the common law. The amendment to the statute further modified the rules on dog bites that obviously arose from common-law rules that have existed for many years. Therefore, Mr. Rath's rights under the former version of the law were vested rights.

B. Grays Harbor's Argument that it is Absurd to Apply of Strict Liability to Municipal Police Dog Owners is Erroneous – Public Policy Supports Strict Liability for Injuries Caused by Police Dogs

Strict liability imposes liability on a party without a finding of fault. In strict liability cases, the plaintiff need only show that the injury was caused by Grays Harbor's conduct and

that such conduct falls into a category covered by strict liability. The law imputes strict liability to situations considered to be inherently dangerous. At all times material to this action, RCW 16.08.040 unambiguously imposed strict liability on all dog owners. Dogs that bite, in general, are dangerous. As discussed below, bite-and-hold police dogs are even more dangerous.

The legislature expressly chose not to exclude municipal dog owners from RCW 16.08.040. This is abundantly clear when reviewing the entirety of RCW 16.08 *et seq*, wherein the legislature specifically exempted police dogs from RCW 16.08.080, .090, and .100 in 1987 (RCW 16.08.080(5)); yet did not exempt municipal dog owners from liability for injuries caused by police dogs. It is also clear and further evident when considering RCW 4.24.410. RCW 4.24.410(2) provides immunity to a police dog handler, but the legislature did not provide such immunity to the municipal owner of the police dog. *See also, Peterson v. Federal Way*, No. C06-0036RSM,

2007 WL 2110336, at *3 (W.D. Wash. July 18, 2007); *Smith v. City of Auburn*, No. C04-1829RSM, 2006 WL 1419376, at *7 (W.D. Wash. May 19, 2006), which are discussed in Mr. Rath's Opening Brief.

Imposing strict liability on municipal owners for police dog injuries is not absurd, as Grays Harbor argues. It could be equally argued that the legislature's recent change to exempt municipalities from such liability is absurd. As discussed in Mr. Rath's Opening Brief, bite-and-hold police dogs, like Gizmo, are very dangerous. Police dog bite injuries are more serious than domestic dog bite injuries. P.C. Meade, "Police Dog and Domestic Dog Bite Injuries: What are the Differences?" 37 *Injury Extra* 395 (2006); *see also*, H. Range Hutson et al., "Law Enforcement K-9 Dog Bites: Injuries, Complications and Trends", 29 *Annals of Emergency Med.*, 637, 638 (1997) ("K-9 dog bites are associated with significant injuries."). Police dog bites result in a higher rate of hospitalization, multiple bites, operations, and invasive

procedures than domestic dogs. *Id* at 399. Police dogs also bite their victims more on the head, upper arms, and chest. *Id*. Bite-and-hold police dogs are larger breeds, like German Shepherds, and the forces of their bites can be as high as 1,500 psi. Hudson, *supra*, at 638. As the victim is bit by a bite-and-hold police dog, the suspect often struggles to avoid pain and injury, prompting the dog to re-grasp and hold with greater forces. *Id*. “Injury is almost inevitable.” *Id*. Until 2012, the burden on all dog owners in Washington was to pay for dog bite damages when they occurred. Owners of dog, including municipal owners, can deploy dogs to assist them in their work – but they owe damages if their dog injures somebody.

Grays Harbor cites *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003) with regards to RCW 16.08.040 not applying to police dogs. *Miller* only dealt with the issue in passing in a footnote. *Id* at n. 14. There was no true legal analysis or discussion on the subject issue in that case. The *Miller* decision was concerned with a Fourth Amendment reasonableness

analysis. The case was about a 42 USC §1983 reasonableness standard analysis under federal law.

In contrast, the several cases cited in Mr. Rath's Opening Brief that were decided after *Miller* have provided a detailed analysis of this issue and have determined that the strict liability dog bite statute applies to municipal owners of police dogs. See *Peterson v. City of Federal Way, et al*, No. C06-0036RSM, 2007 WL 2110336, at *3 (W.D. Wash. July 18, 2007) (not reported,) (citing *Rogers v. City of Kennewick, et al*, No. C04-5028EFS, 2007 WL 2055038, at *7 (E.D. Wash. July 13, 2007) (not reported), *aff'd*, by *Rogers v. City of Kennewick, et al.*, Nos. 07-35645, 07-35679, 2008 WL 5383156 (9th Cir. Dec. 23, 2008) (not selected for publication); *Smith v. City of Auburn*, No. C04-1829RSM, 2006 WL 1419376, at *7 (W.D. Wash. May 19, 2006) (not reported)).

In accordance with the statute's plain meaning and the courts' holdings which have specifically analyzed the matter,

the County remains strictly liable for the dog bite injuries as a matter of law.

III. CONCLUSION

The County owned Gizmo, and Gizmo bit Harold Rath while he was he was in the trailer with the permission of the owners on August 19, 2009. At the time of these dog bites, RCW 16.08.040, RCW 4.24.410(2), and pertinent Washington court decisions necessitate the conclusion that although the dog handler may be immune from liability, the County is not. There are not any genuine issues of material fact regarding the above predicate facts to prevent imposition of strict liability against the County under RCW 16.08.040 as a matter of law.

Therefore, Plaintiff Harold Rath respectfully requests that the Court reverse the trial court, impose strict liability as a matter of law, and remand this case to trial on the issue of Mr. Rath's damages.

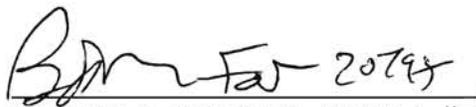
Respectfully submitted this 13th day of January, 2014.

PAUKERT & TROPPEMANN, PLLC

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NO. 45076-3-II
DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury pursuant to the laws of the State of Washington, I am now and at all times herein mentioned have been, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On January 13, 2014, I caused the original and one copy of Appellant's Response Brief and this Declaration of Service to be

mailed to the Clerk, Court of Appeals, Division II, State of Washington, for filing in the above-captioned matter, and served via email by agreement of the parties on counsel for Defendant-Respondent, John E. Justice.

DATED January 13, 2014.

A handwritten signature in black ink, appearing to read 'B. Beggs', is written over a horizontal line.

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