

No. 47645-2-II

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

Thurston County Superior Court Cause No. 12-2-01524-1

STEVEN OLIVER, an individual person,

Appellant,

vs.

EUGENE L. MERO and "JANE DOE" MERO, husband and wife, and
their marital community comprised thereof; and GRAYS HARBOR
COUNTY, a political subdivision of the State of Washington,

Respondents.

BRIEF OF APPELLANT
STEVEN OLIVER

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REBECCA M. LARSON, WSBA# 20156
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253-620-1500

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I. ASSIGNMENTS OF ERROR

- a. The trial court erred in granting Defendant/Respondent Grays Harbor County's Motion for Summary Judgment, entered on May 16, 2014. CP at 182-184.
- b. The trial court erred in granting Defendant/Respondent Mero's Motion for Summary Judgment, entered on October 31, 2014. CP at 235-236.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- a. Whether the "failure to enforce" exception to the Public Duty Doctrine applies against a jurisdiction that fails to enforce its own published internal animal control policies, as opposed to only legislatively-passed statutes and ordinances. [Assignment of Error 1]
- b. Whether a property owner is liable to a business invitee under a theory of premises liability when the invitee is bitten by a dog owned by a second business invitee, but the property owner not only knew of the danger but also helped create the dangerous situation and failed to warn the first business invitee of the risk. [Assignment of Error 2]
- c. Whether the trial court erred in relying on an unreported Division I case in granting summary judgment in favor of Mr. Mero. [Assignment of Error 2]

III. STATEMENT OF THE CASE

a. Relevant Facts Regarding Mr. Mero:

Defendant/Respondent Eugene Mero owns commercial property located at 2340 East Beacon in Montesano, Washington. He uses the property primarily for storage, although he leases out portions to various

individuals. CP at 206. At all relevant times, Plaintiff/Appellant Steven Oliver operated an auto shop in space on Mr. Mero's property. CP at 206. In exchange, Mr. Oliver performed some repair work on Mr. Mero's vehicles. CP at 206. He also did maintenance work on various residential properties that Mr. Mero owned, as an independent contractor. CP at 206. He was allowed to drive Mr. Mero's vehicles as he needed. CP at 212. Mr. Oliver spent an average of six days a week at the Mero property, six to eight hours per day. CP at 217. Mr. Mero also rented out another portion of the shop building as an apartment to a residential tenant. CP at 206.

On August 23, 2010, Defendant Henry Cook came to the Mero property. He was driving a flatbed truck that was owned by Mr. Mero. CP at 206. Mr. Mero allowed Mr. Cook to drive the truck on multiple occasions to haul gravel for himself and for Mr. Mero. CP at 206. Mr. Cook and Mr. Mero then left the property in another vehicle to go to a store. CP at 209. While they were gone, Mr. Cook left his pit bull "Scrappy" in the cab of the flatbed truck owned by Mr. Mero. CP at 210. Mr. Cook left the truck window open at least part way. CP at 210.

Mr. Oliver had not yet arrived at the property when Mr. Mero and Mr. Cook drove off and left Scrappy in the cab of the truck. There was no indication or warning to him about Scrappy being left alone in one of Mr.

Mero's vehicles. CP at 222. Although Mr. Oliver from a distance had observed Scrappy at Mr. Cook's home across the street a few times, Mr. Oliver had never seen Scrappy on the Mero premises prior to the date of his attack. CP at 218.

Shortly after Mr. Mero and Mr. Cook drove away from the Mero property, Plaintiff Steven Oliver arrived there to pick up some painting supplies. Mr. Oliver, who is blind in his left eye, walked by the passenger side window of Mr. Mero's flatbed truck. CP at 219. As soon as Mr. Oliver passed by the truck window, Scrappy barked and Mr. Oliver turned his head to look. CP at 219. At that point, Scrappy lunged out of the open window and violently bit Mr. Oliver in the face. CP at 219. Scrappy bit Mr. Oliver so hard that a significant portion of Mr. Oliver's nose was ripped off. CP at 12.

Mr. Mero was aware when he drove off with Mr. Cook that Mr. Cook had left Scrappy in Mr. Mero's truck. CP at 210. He was also aware that Mr. Cook had left the window open. In fact, Mr. Mero himself instructed Mr. Cook to make sure a window was left open for the dog. CP at 210. Mr. Mero did not ask how far Mr. Cook left the window open, CP at 213, but understood it was down far enough to let the dog get some air. CP at 213. While Scrappy had not been aggressive directly towards Mr. Mero in the past, Mr. Mero had never been alone with the dog without

Mr. Cook present. CP at 207. But Mr. Mero was very aware that Scrappy would bark at anyone nearby when the dog was left in a vehicle “and make you know that you shouldn’t go near that vehicle.” CP at 207. Mr. Mero himself avoided going near Mr. Cook’s vehicle when Scrappy was in it precisely because of Scrappy’s aggressive nature. CP at 207. He described Scrappy as very “protective” when he was in a vehicle. CP at 208, 211.

b. Relevant Facts Regarding Defendant Grays Harbor County:

Prior to Scrappy’s biting Mr. Oliver, Mr. Cook had been cited numerous times for Scrappy’s behavior, which included biting and attacking other animals and people. CP at 148-149. On or around November 4, 2004, Scrappy viciously attacked a neighbor dog outside of defendant Cook’s property. CP at 63. The biting incident was reported to Deputy Brad Johansson of the Grays Harbor County Sheriff’s Department, and Deputy Johansson investigated the attack. CP at 56-63. Defendant Cook informed Deputy Johansson that Scrappy was trained to attack other dogs and that the next time Scrappy attacked the neighbor’s dog, he would allow Scrappy to kill the neighbor dog. CP at 57. Deputy Johansson issued Defendant Cook a potentially dangerous dog notification. CP at 34, 56-63. This potentially dangerous dog Notification expressly stated the following:

In the event your dog aggressively bites, attacks, or endangers the safety of people or domestic animals, it will be considered a dangerous dog under RCW 16.08.080 and must be registered with the Sheriff's Office and properly confined as required by RCW 16.08.080.

....

This notification may be issued to you at the time of the initial investigation in order for you to take prompt action. If upon review of the investigation it is determined that your dog has had prior complaints of significance or that this complaint was serious enough to warrant, you will be issued Notification of Dangerous Dog as mentioned above.

CP at 60.

On or around August 11, 2007, Scrappy aggressively chased down a young boy that was visiting a friend in Mr. Cook's neighborhood. CP at 71. The aggressive behavior was again reported to Grays Harbor County Sheriff's Department. CP at 64-71. This time, Deputy S.C. Larson investigated. CP at 68. Deputy Larson was informed by witnesses of additional aggressive behavior by Scrappy in the neighborhood, including biting people and aggressively charging people. CP at 66-67. Deputy Larson issued Mr. Cook a citation for a potentially dangerous dog, containing the same language as the 2004 notice. CP at 68-69. However, Deputy Larson failed to investigate and ascertain whether Scrappy had any previous citations as a potentially dangerous dog. CP at 34-35, 64-71.

Thus, Scrappy was not designated as a dangerous dog after the August 11, 2007 event.

On or around November 23, 2008, Scrappy lunged out of an open window of Mr. Cook's Chevrolet van and bit the arm of a pregnant woman who was walking by the van. CP at 45, 52-55. Scrappy violently shook the woman, causing a scar on her arm. This matter was investigated by Chehalis Animal Control Officer Angie Elder. CP at 52. Mr. Cook told Deputy Elder that he trained Scrappy to bark, growl, and bite any individuals that came anywhere near the vehicle. CP at 125. Defendant Cook also informed Chehalis Animal Control that Scrappy had been known to chase individuals, bite at pant legs, and attack any animal that came onto defendant Cook's property. CP at 126. Grays Harbor County was made aware of the 2008 Chehalis incident. CP at 51-55, 134. Grays Harbor County Sheriff's Officer Nichole Pollard monitored Scrappy in quarantine for the Chehalis Police Department. CP at 41. Mr. Cook completed a witness statement for the Grays Harbor Sheriff's Department stating that "I normally close the windows when I leave him [Scrappy] alone in the van." CP at 45.

Plaintiff Steven Oliver was attacked by the dog Scrappy on August 23, 2010 in Montesano, Grays Harbor County. CP at 12. In effect at the time of the earlier attacks in November 2004 and August 2007 were

animal control rules and regulations that Grays Harbor County had enacted and adopted. CP at 162-165. The Grays Harbor County rules and regulations, while based upon the Washington State animal control statute contained in Chapter 16.08 RCW, were more restrictive in their terms than the state statute.

Plaintiff brought the present suit for damages from the 2010 attack against multiple defendants, including Grays Harbor County and Eugene Mero. CP at 9-16. As to Defendant Grays Harbor County, Plaintiff argued that the County was not immune from liability under the public duty doctrine, because the County's actions in failing to designate Scrappy as a dangerous dog after the 2007 incident (which would have prevented the later 2010 incident in which Plaintiff was injured) fell within the "failure to enforce" exception to the public duty doctrine. CP at 83-101. In response, the County argued, among other things, that the failure to enforce exception to the public duty doctrine applied only to legislatively enacted statutes or ordinances, and did not apply to adopted rules and regulations or policies and procedures such as Grays Harbor County's Potentially Dangerous/Dangerous Dogs Polies and Procedures in effect during the material period. CP at 25-31, 176-181.

The trial court granted Defendant Grays Harbor County's Motion for Summary Judgment and dismissed Mr. Oliver's claims against it on May 16, 2014. CP at 182-184. In its ruling, the court stated the following:

Setting apart the issue for a moment of whether or not the policy did mirror state law and assuming that the policy did not mirror state law, the Court's analysis of this question really focused on an issue that I raised with counsel, which is: What is the purpose of the failure-to-enforce exception and why wouldn't the failure-to-enforce exception apply in this case construing facts favorably to the plaintiff here? Why wouldn't they apply, if you had a policy here that appeared to have been breached in some fashion?

The Court turned to those cases that discussed why an ordinance is like a statute. There was a case cited by Plaintiff, *Brown v. City of Yakima*, 116 Wn.2d 556, for the proposition that an ordinance is like a statute. That case, on page 559, in discussing why an ordinance is like a statute, conveyed the principle that it is a direct delegation from the Legislature of the police power.

A case that Brown cites, which was not cited by the parties directly, is *Hass v. City of Kirkland*, 78 Wn.2d 929. These are not dog cases, but these are cases in which the Court is discussing ordinances vis-à-vis statutes. The Court says on page 932, "Ordinances are presumed to be constitutional when they are regularly enacted."

So the Court is left with the impression that the reason ordinances are considered similar to statutes for the purposes of a failure-to-enforce exception is because they come from, or are rooted in, a delegation of legislative authority. Legislative authority, in the Court's view, requires an element of procedure and formality to its enactment. When an exception to as broad a doctrine of the Public Duty Doctrine is contemplated, it seems fair to the Court that there be a similar sense of formality to an exception.

There is no case law that says a policy of legislative authority is not appropriate to use for the failure-to-enforce exception, but in looking at the basis behind those authorities, I cannot conclude that the regulations or

policies that were at issue here, even if they said what they said and did not float with the statute, I cannot conclude that these regulations can be evidence used as a basis to support a failure-to-enforce exception. I will grant motion for the County on their summary judgment.

RP (May 16, 2014) at 29 – 31.

As to Mr. Mero, Mr. Oliver argued that Mr. Mero was liable to Mr. Oliver as his business invitee. CP at 226-228. Mr. Mero participated in creating a hazard and failing to warn Mr. Oliver about this hazard, which renders him liable under general landowner principles. CP at 226-228. Mr. Mero moved for summary judgment arguing that, merely as Plaintiff's "landlord" and as a person who did not own Scrappy himself, he could not be held liable for injuries from Scrappy's attack on Plaintiff. CP at 193-200. The Court granted Mr. Mero's Motion for Summary Judgment and dismissed Plaintiff's case against him on October 31, 2014. CP at 235-236. The Court gave the following reasons for its decision:

Just a quick summary of the parties' positions, the defendant has moved for summary judgment to remove Mr. Mero from this case on the basis of principally the *Frobig* case, 124 Wn.2d 732, and the *Clemmons* case, 58 Wn. App. 32, and that as a matter of law under both common law and statutory law, liability for dangerous dogs is essentially limited to the owner, keeper, or harbinger of the animal, and Mr. Mero represents none of the above. Mr. Mero was not the owner, and, furthermore, he had no knowledge of any dangerous characteristics.

The plaintiff responds that those are not the appropriate cases to analyze this; that this case should be analyzed under premises liability theory, not a dog liability theory or landlord-tenant construct of dog liability theories; that Mero's actions create a jury question as to control of

the animal, specifically pointing to the dog being left in the defendant's truck; that the dog owner was not attendant, the plaintiff was; that the dog was left on the defendant's property; that the defendant had actual knowledge of the danger presented by the dog; that, in fact, defendant helped create the unsafe condition by allowing the dog to remain in the truck, and, plaintiff contends, encouraging the leaving of an open window.

A duty is owed to the plaintiff, according to the plaintiff, because he is a business invitee, and under the law of liability to business invitees, a business owner is liable for an unsafe condition on the premises if the condition was caused by the proprietor or its employees or the proprietor had actual or constructive knowledge of the unsafe condition.

The defendant essentially says, well, even if you apply a premises liability theory, there is still no question for the jury as a matter of law; Mr. Mero did not have sufficient knowledge of the dangerousness of this condition, i.e., the dog, to have this go to a jury.

With any summary judgment decision, the Court must construe all factual inferences in favor of the non-moving party, here the plaintiff. So, with that in mind, this Court spent some time going through the deposition transcripts. I think I read every deposition transcript that was submitted to me for my review to try and understand whether or not the factual circumstances gave rise to a jury question if premises liability should be applied.

Defendant has also said, of course, that that's not the proper analysis. So with that argument, I spent more time with the language of the *Frobig* case and the *Clemmons* case I previously cited to try to discern whether the strength of the language in those cases forecloses alternative theories of recovery, and that is, indeed, a question I asked of plaintiff's counsel here today.

Clemmons, in particular, discusses the common law liability in terms that one can conclude would preclude other theories of recovery. Plaintiff again argues that you cannot separate the *Clemmons* holding from the circumstances of a landlord-tenant situation. I'm not necessarily convinced of that. While there is no binding case law on this issue, no reported cases that I could find extends *Clemmons* to situations not involving landlord-tenant. Division I in an unreported decision has.

I cite to *Briscoe v. McWilliams*, August 26, 2013, just over a year-old decision. The WestLaw cite is 2013 WL 4607608. Before I start quoting from this case, I want to pause to make it clear that I do not view *Briscoe* as binding authority on this Court. For reasons known only to Division I, they chose not to report this decision. But I find that the analysis within it is persuasive, and it essentially answers the question presented to the Court today.

That case involved, indeed, a tenant, but it was the tenant being sued, not the landlord being sued by the tenant. In fact, it wasn't the tenant's dog. The dog was in an apartment being left there by someone who was cleaning the apartment, and a visitor was bit. The plaintiff in that case sued under a series of theories, including respondeat superior, premises liability, and negligent entrustment.

Division I, in a clear and straightforward analysis, said that Washington common law makes it clear that only an owner, keeper, or harbinger of a dog is liable for injuries caused by the dog. It cites to *Clemmons* specifically and talks about the strength of *Clemmons*' recitation of the common law rule.

It says within the opinion, "Common law liability for injuries caused by a vicious or dangerous dog is based upon a form of strict liability. Any injury caused by such an animal subjects the owner to prima facie liability without proof of negligence. Issues of negligence and contributory negligence, fault and comparative fault, therefore, have no application. The rationale rejecting

landlord liability for a tenant's dog expressed in *Clemmons* and *Frobig* applies equally to Randall's liability for Levi's dog, regardless of whether Levi was Randall's agent or business invitee (premises of liability theory) nor does the narrowly-drawn common law rule permit a claim for negligent entrustment. The common law restricts liability to the owner, keeper, or harbinger, because they own and have direct control of the animal."

In the following paragraph, the Court concludes, "The common law precludes Briscoe's alternative theories of liability. Because Randall does not fall within the class of people subject to common law liability, we affirm the dismissal of Briscoe's claim against him."

This was not a common landlord-tenant situation as it is in *Clemmons*, and yet the Court found that the common law was direct and clear that dog owners have the responsibility for injuries, and it was hostile to the use of other theories to create liability.

This is an unfortunate circumstance. There is no question that this was a vicious attack by a dangerous dog. This Court has heard other motions about this dog, and this dog, I believe, has been destroyed, and it should have been. The plaintiff is, without question, injured, but sympathy for the plaintiff cannot create liability where the law doesn't provide it.

Consistent with the rationale expressed in *Briscoe v. McWilliams*, I do find that premises liability theory does not apply and that under the common law liability, Mr. Mero was not an owner, harbinger, or keeper of this dog. Accordingly, I will grant the motion for summary judgment.

RP (October 31, 2014) at 20-25.

Mr. Oliver now appeals the orders of summary judgment entered on behalf of Defendant Grays Harbor County and Defendant Eugene Mero. CP at 237-245.

IV. ARGUMENT

a. Standard of Review:

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment only if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); see also CR 56(c). On summary judgment, however, the court does not weigh the evidence presented or make witness credibility determinations. *American Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012).

b. The Trial Court Erred In Granting Defendant/Respondent Grays Harbor County's Motion For Summary Judgment, Entered On May 16, 2014.

1. The "Failure to Enforce" exception to the Public Duty Doctrine Applies in the Present Case.

Mr. Oliver alleges that Defendant Grays Harbor County is liable, in part, for the injuries he sustained when Scrappy attacked him because the County had a duty to protect the public and Mr. Oliver from dog attacks and failed to do so in his case. The actions of the Sheriff's Department deputies enforcing Grays Harbor County's animal control ordinances fell below the appropriate standard of care for animal control officers, CP at 154, and this failure was a direct and proximate cause of Plaintiff's injuries.

Defendant Grays Harbor County argued below that it is immune from any liability for Plaintiff's injuries and damages under the Public Duty Doctrine.

The public duty doctrine generally provides that, to recover from a governmental entity in tort, a party must show that the entity breached a duty it owed to the injured person as an individual rather than an obligation it owed to the public at large.

Bailey v. Town of Forks, 108 Wn.2d 262, 265; 737 P.2d 1257, 753 P.2d 1259 (1987).

There are exceptions to the public duty doctrine, however, including a failure to enforce exception:

The “failure to enforce” exception to the public duty doctrine applies when a government agent responsible for enforcing a statutory requirement possesses actual knowledge of a statutory violation, fails to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the Legislature intended to protect.

Bailey, 108 Wn.2d at 268.

All elements of the failure to enforce exception were met in the present case, and therefore Defendant Grays Harbor County was not immune from liability to Mr. Oliver. As a result, the County’s motion for summary judgment should have been denied by the trial court.

A. Defendant Grays Harbor County Had Actual Knowledge of a Statutory Violation.

Mr. Oliver was attacked by the dog Scrappy on August 23, 2010 in Montesano, Grays Harbor County. At the time of the earlier attacks in November 2004 and August 2007, Grays Harbor County had in force a set of animal control rules and regulations that they had expressly adopted and were to enforce. The Grays Harbor County rules and regulations, while based upon the Washington State animal control statute contained in Chapter 16.08 RCW, were more restrictive in their terms than the state law, and would have resulted in Scrappy being designated as a “dangerous dog” prior to the attack on Mr. Oliver in 2010.

The Grays Harbor County Sheriff's Department had the following Policies and Procedures in effect from March 5, 1993 to October 29, 2008 relating to Potential Dangerous/Dangerous Dogs:

POTENTIALLY DANGEROUS/DANGEROUS DOGS

C. Definitions

RCW 16.08.070 sets out the various definitions relative to this chapter, two of which are quoted here:

- "(1) 'Potentially Dangerous Dog' means any dog that when unprovoked:
- a. Inflicts bites on a human or domestic animal either on public or private property, or
 - b. Chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or otherwise to threaten the safety of humans or domestic animals.
- "(2) 'Dangerous Dog' means any dog that according to the records of the appropriate authority,
- a. Has inflicted severe injury upon a human being without provocation on public or private property,
 - b. Has killed a domestic animal without provocation while off the owner's property, or
 - c. Has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, **or endangers the safety of humans or domestic animals.**

Grays Harbor Sheriff's Department Policies and Procedures – Potentially Dangerous/Dangerous Dogs, § C(2)(c) (Effective date: March 5, 1993)(emphasis added). CP at 107-108.

Under the Washington statute upon which Grays Harbor County based its own regulations, when a dog aggressively bites, attacks, or endangers the safety of a human, and that dog previously had been found

potentially dangerous because of injury inflicted on a human, that dog was then considered “dangerous.” RCW 16.08.070(2)(c). However, the Grays Harbor County policy in effect at the time of the 2004 and 2007 attacks mandated that if a dog previously had been found “potentially dangerous” for any reason, and the dog then again aggressively bit, attacked, or endangered the safety of a human, it fell within Grays Harbor County’s definition of “dangerous.” § C(2)(c). CP at 107-108. Because of this, after the 2007 attack Grays Harbor County, in accord with its own regulations, should have issued Mr. Cook a dangerous dog notification, but it failed to do so.

Defendant Grays Harbor County argued in its motion for summary judgment that because Scrappy did not inflict injury on a human in the 2004 event, the 2007 incident did not trigger a requirement to issue a dangerous dog notification under the State statute. But this fails to take into account that the 2004 event *did* in fact trigger the requirement to issue a dangerous dog notification in 2007 under the terms of Grays Harbor County’s own policies and procedures. Grays Harbor County failed to comply with its own regulations.

Under article 11, section 11 of the Washington Constitution, local governmental entities have the right to enact ordinances prohibiting the same acts state law prohibits so long as the state enactment was not

intended to be exclusive and the city ordinance does not conflict with the general law of the state. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). A local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity. *Id.*, at 562. At the time of the 2004 and 2007 dog attacks, Grays Harbor County was subject to its own local regulations that were more restrictive than the State statute upon which they were based. These local regulations were intentionally more restrictive, as shown by the fact that in late 2008, Grays Harbor County expressly amended the language of its policies and procedures to match those of the State. CP at 112-115. But while the more restrictive policies were in place, the County was required to abide by its own laws. It failed to do so.

As discussed above, prior to the attack on Mr. Oliver, Scrappy had been involved in several other incidents involving aggression or attacks toward people or animals:

November 2004 Incident (Buchanan): Grays Harbor County received a report that Scrappy had attacked but not killed a neighbor's dog. Deputy Brad Johansson of the Grays Harbor County Sheriff's Office issued a Potentially Dangerous Dog Notification.

August 2007 Incident (Gilpin): Grays Harbor County received a report that Scrappy had chased a young boy visiting a neighbor. Deputy SC Larson of the Grays Harbor County Sheriff's Office issued a Potentially Dangerous Dog Notification.

November 2008 Incident (Bickel): City of Chehalis received a report that Scrappy had bitten a woman in that city. Chehalis issued a criminal citation to the dog owner but no dangerous or potentially dangerous dog notification was issued. During that investigation, Chehalis Animal Control Officer Angie Elder contacted Grays Harbor County Animal Control Officer Nichole Pollard requesting information regarding whether Scrappy was current on his rabies vaccination and whether he had been involved in any incidents in Grays Harbor County. Officer Pollard advised Officer Elder of the two prior incidents in Grays Harbor County.

August 2010 Incident (Oliver): Scrappy attacked Steve Oliver in 2010 in Grays Harbor County.

CP 148-149.

Grays Harbor County issued a “potentially dangerous” dog notice regarding Scrappy after the November 2004 attack on a neighbor’s dog. Because Scrappy had been found to be potentially dangerous in 2004, when the 2007 attack occurred Scrappy became, by definition, a dangerous dog under the Grays Harbor County regulation. CP at 151. But Grays Harbor County never issued a Dangerous Dog notification to Scrappy’s owner, which would have triggered further safety requirements regarding the dog.

Standard practice for animal control officers when investigating potentially dangerous/dangerous dogs is to determine the history of the animal and see if any previous dangerous or potentially dangerous dog

notices have been issued. CP at 151-152. The Potentially Dangerous Dog Notification that Deputy Larson issued to Scrappy's owner Henry Cook after the August 2007 incident contains a checklist of items to be addressed by the investigation, and one item is whether the dog owner has previously received a potential dangerous dog notice. Deputy Larson wrote "Unknown" in response on this form. CP at 68. Failure to make this determination was below the standard expected of an officer working animal control. CP at 151-152.

The Grays Harbor County regulation expressly required follow up action be taken by the Sheriff's Department when a potentially dangerous/dangerous dog complaint was received:

D. Department Response

1. Upon receiving a Potentially Dangerous/Dangerous Dog complaint, the assigned officer will proceed to investigate. The investigating officer will see that all relative complaints are recorded via the Service Request process. An Offense Report along with a Potentially Dangerous Dog/Dangerous Dog Checklist form will be completed in each case.
2. All relative reports, etc. will be forwarded via the chain of command to the Chief Criminal Deputy of Field Operations. Officers will thoroughly photograph all Potentially Dangerous/Dangerous Dogs.
3. The Chief Criminal Deputy of Field Operations, or other competent authority, **will review all relative data in order to determine if, in fact, a Potentially Dangerous/Dangerous Dog exists.**
4. Should it be determined that a Potentially Dangerous/Dangerous Dog does exist, the Chief Criminal Deputy of Field Operations, or other competent authority, will see that

the dog's owner is subsequently served with the appropriate notification form, i.e.:

- a. Potentially Dangerous Dog Notification.
- b. Dangerous Dog Notification.

Proof of service will be retained and included in the Offense Report file.

5. Upon the owner's compliance with requirements of Chapter 16.08 RCW as quoted in the Dangerous Dog Notification form, a Dangerous Dog Certificate of Registration will be issued to said owner.

6. If the dog owner does not immediately comply with the requirements of Chapter 16.08, **the dog shall be seized under the provisions of this statute.**

...
When confiscating/seizing a dog, outside resources (i.e., veterinarian, animal control officer from another agency) may be used if necessary. The dog will be taken to a licensed veterinarian or a proper shelter to be kept there until released by the Court having jurisdiction in the matter or by the Sheriff.

...
8. Destruction of any dog confiscated/seized under Chapter 16.08 may become necessary. Authorization will be by written order of the Sheriff, a Court Order, or combination thereof.

Grays Harbor Sheriff's Department Policies and Procedures – Potentially Dangerous/Dangerous Dogs, § D. (Effective date: March 5, 1993) (emphasis added). CP at 108-109.

The Grays Harbor regulation also required that appropriate records be kept when potentially dangerous dog or dangerous dog notifications were issued:

- E. Complete documentation is required in every case. All relative documentation, inclusive of photographs, copies of forms issued to the dog owner, relative billings, surety bond, etc. will be retained in the Offense Report file.

Steno –Clerks will identify every Offense Report file relative to Potentially Dangerous Dogs and/or Dangerous Dogs. . . .

- F. Personnel are encouraged to consult with their supervisors any time questions arise, and to keep such supervisor apprised of all facets of the investigation as it progresses.

Grays Harbor Sheriff's Department Policies and Procedures – Potentially Dangerous/Dangerous Dogs, §§E-F. (Effective date: March 5, 1993). CP at 108-109.

The Grays Harbor County Sheriff's Department issued a potentially dangerous dog notification after the November 2004 incident. It was required to keep this information on file, pursuant to § D(1) and § E of its policies and procedures. When the next incident was reported in August 2007, the County was required to fully review all relevant data to see if a dangerous dog existed, pursuant to § D(3). Part of that relevant data included whether the dog had previously been found to be potentially dangerous, as Scrappy had been. § C(2)(c). The County failed to review the history of Scrappy's prior attacks. Grays Harbor County had all the information necessary for it to determine that a dangerous dog violation had occurred under the terms of its own rules and regulations, but it chose to ignore this information. Thus, the first element of the "failure to enforce" exception to the public duty doctrine, knowledge of a statutory violation, is met.

It is worth noting that neither Deputy Johansson nor Deputy Larson of the Grays Harbor Sheriff's Department was an animal control officer at the time of the events they investigated in 2004 and 2007. CP at

129-130 The County earlier had eliminated its animal control officer position, and this position was not reinstated until Deputy Nichole Pollard was re-hired in July 2007. CP at 129-130. Because Nichole Pollard was the Animal Control Officer for the Department, Deputy Larson should have forwarded the report and all investigative materials and findings regarding the August 2007 attack to Officer Pollard for further review. CP at 138-139, 152-153. Officer Pollard admitted in her deposition that this report was never forwarded to her for her review. CP at 133. This fell below the standard of care for animal control officers. CP at 152-153.

It is also worth noting that Officer Pollard was contacted by Officer Angie Elder of the Chehalis Police Department after the November 2008 incident in Chehalis. CP at 41, 48. Officer Elder requested information on whether Scrappy had any previous incidents. Officer Pollard advised Officer Elder that there were two reports from 2004 and 2007, each of which resulted in a potentially dangerous dog notification being issued by Grays Harbor County. CP at 134-135. At that point, when Officer Pollard was providing information to Officer Elder regarding Scrappy's previous incidents in Grays Harbor County, Office Pollard expressly became aware that Scrappy had two previous potentially dangerous dog notifications within Grays Harbor County. At that time, Officer Pollard should have but failed to ascertain that the second

notification, in 2007 had not been appropriately acted upon by issuing a Notice of Intent to Declare Scrappy a Dangerous Dog. CP at 153. Officer Pollard failed again to conduct a complete investigation of past citations for Scrappy, and this too fell below her standard of care for animal control officers. CP at 153.

B. There Is No Reason That The “Failure To Enforce” Exception To The Public Duty Doctrine Should Apply To Legislatively-passed Statutes and Ordinances But Not To A Jurisdiction’s Own Published Animal Control Policies.

Defendant Grays Harbor County argued at summary judgment that the failure to enforce exception to the Public Duty Doctrine could not apply to its failure to follow its own policies and procedures regarding dangerous and potentially dangerous dogs, because those policies and procedures did not fall within the definition of “statutes” necessary to trigger an entity’s statutory duty under the failure to enforce exception. The trial court believed that municipal ordinances were considered similar to statutes for purposes of the failure to enforce exception, because they were rooted in a formal delegation of legislative authority. RP (May 16, 2014) at 29-30. Due to this, the trial court felt that some “sense of formality” was necessary to create any duty that could exist under the failure to enforce exception. *Id.*, at 30. But the trial court held that Grays Harbor County’s animal control policies and procedures were not formally

enacted by a legislative body and therefore could not create such a duty. RP (May 16, 2014) at 31.

There is no Washington case law specifically on point that states that *only* statutes and ordinances can create a duty that might fall within the failure to enforce exception, however. If the purpose of the failure to enforce exception is to protect people from foreseeable risks that arise when a governmental entity abrogates its stated duties – that is, actions that a person would reasonably expect a governmental entity to take to protect it from very particular risks – then there is no reason that Grays Harbor County’s Policies and Procedures regarding dangerous and potentially dangerous dogs should not apply and have the same required enforcement as required by a statute or ordinance.

Grays Harbor County not only adopted specific policies and procedures on how to handle dogs, but it expressly amended its policies and procedures when it found out that they were not in accordance with the Washington State statute. Those policies were then published on the Potentially Dangerous Dog Notifications that the Grays Harbor County Sheriff’s Department issued. CP at 60-61, 68-69. Grays Harbor County expressed its policies and procedures regarding potentially dangerous and dangerous dogs to the public. It later amended these policies and again formalized them in writing. There are no grounds to treat this differently

from any municipal ordinance when it serves the same purpose. Therefore, Grays Harbor County should be forced to comply with its own rules and regulations, and Mr. Oliver's claim against the County should have been allowed to go forward.

C. Grays Harbor County Failed to Take Corrective Action Pursuant to Its Statutory Duty.

Under Grays Harbor County's animal control regulations, once it determined that Scrappy previously had been declared potentially dangerous, the County was *required* to give a dangerous dog notification to the owner after a second event. If Scrappy was found to be a dangerous dog, his owner was required by the County to comply with the terms of the State statute and obtain a certificate of registration and comply with certain safety requirements:

- (6) Unless a city or county has a more restrictive code requirement, the animal control authority of the city or county in which an owner has a dangerous dog shall issue a certificate of registration to the owner of such animal if the owner presents to the animal control unit sufficient evidence of:
 - (a) A proper enclosure to confine a dangerous dog and the posting of the premises with a clearly visible warning sign that there is a dangerous dog on the property. In addition, the owner shall conspicuously display a sign with a warning symbol that informs children of the presence of a dangerous dog;
 - (b) A surety bond issued by a surety insurer qualified under chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least two hundred fifty thousand dollars, payable to any person injured by the dangerous dog; or

(c) A policy of liability insurance, such as homeowner's insurance, issued by an insurer qualified under Title 48 RCW in the amount of at least two hundred fifty thousand dollars, insuring the owner for any personal injuries inflicted by the dangerous dog.

RCW 16.08.080(6).

If Scrappy's owner did not immediately comply with these State requirements, then Grays Harbor County was required to seize the dog under its own regulations. § D(6) (“[T]he dog shall be seized under the provisions of this statute.”). CP at 108-109.

Had Deputy Larson issued a Notice of Intent to Declare Dog Dangerous to Scrappy's owner after the August 2007 incident, Mr. Cook would have had to either prove that Scrappy was not dangerous or comply with statutory requirements including posting warning signs, keeping the dog muzzled and leashed when outside of a secure enclosure, and maintaining \$250,000 in liability insurance or a bond in place should the dog injure anyone. Because Grays Harbor County failed to take steps to have Scrappy declared dangerous after the August 2007 incident, Scrappy's owner was never required to comply with RCW 16.08.080(6), nor could Grays Harbor County take steps to seize Scrappy. The failure on the part of Grays Harbor County to conduct a complete investigation of past citations for Scrappy and issue a Notice of Intent to Declare Dog Dangerous in 2007 pursuant to its own regulations fell below the standard required for animal control officers. CP at 152.

Grays Harbor County failed to take the appropriate corrective action after the 2007 attack, despite having a statutory duty to do so. Therefore, the second element of the “failure to enforce” exception to the public duty doctrine is met.

D. Mr. Oliver is Within the Class the Legislature Intended to Protect

The final element of the “failure to enforce” exception to the public duty doctrine is that Plaintiff must have been within the class of people that the legislature intended to protect by enacting the statute. Neither the state statute nor the Grays Harbor County regulations specifically states whom they are intended to benefit or protect, although the local regulation does point out that the Grays Harbor County Sheriff is responsible for enforcement of the statute in the unincorporated areas of Grays Harbor County. CP at 107. But there can be no argument that both the State legislature and the local Grays Harbor County government intended to protect members of the public from vicious dogs when they enacted their dangerous dog statutes. The statutes and regulations require dog owners to take affirmative steps to protect the public from attacks by dangerous dogs, or at the very least have sufficient liability insurance limits to cover any damages caused by a dangerous dog attack. Therefore, the third element of the failure to enforce exception to the public duty doctrine is met.

Defendant Grays Harbor County's motion for summary judgment of dismissal based on the public duty doctrine should have been denied by the trial court.

2. Defendant Grays Harbor County's Failure to Enforce its Own Ordinance Was a Proximate Cause of Mr. Oliver's Damages.

Grays Harbor County argued that it is speculative whether Scrapy's owner would have complied with the requirements of RCW 16.08.080(6) had a dangerous dog notice been issued after the 2007 attack, and therefore it is speculative whether the County ever would have been required to seize Scrapy. But it is not speculative that, had a dangerous dog notification been issued, the owner either would have had to comply *immediately* with the statutory requirements, or the County would have had to seize the dog. One or the other of these two outcomes was mandatory, and either would have protected Mr. Oliver. The owner's requirements would have included the need to keep Scrapy confined within a proper enclosure on his property with a warning sign, rather than leaving Scrapy in a truck with an open window and no warning. It also would have required that Scrapy's owner maintain \$250,000 in insurance or a bond to compensate Mr. Oliver for his injuries. None of these safeguards were in place, nor did the County seize the dog. Any of these steps would have either prevented the attack on Mr. Oliver or at least

provided for recovery of his damages, as set forth by the statute. It is not speculative that Defendant Grays Harbor County's failure to act is a proximate cause of harm to Mr. Oliver.

Defendant Grays Harbor County's motion for summary judgment sought dismissal on the basis of the public duty doctrine. However, Mr. Oliver demonstrated that all three elements of the failure to enforce exception to the public duty doctrine were present in this matter. Grays Harbor County is not immune from liability to Mr. Oliver, and the County's motion for summary judgment should have been denied.

c. The trial court erred in granting Mr. Mero's Motion for Summary Judgment, entered on October 31, 2014.

1. Mr. Mero is not a "landlord" as contemplated in the cases cited by Defendant.

In his motion for summary judgment, Mr. Mero argued that he cannot be held responsible for the injuries that Scrappy caused because he did not own, control, or harbor the dog. Mr. Mero maintains that he falls within the category of mere landlord, who has no duty or responsibility to protect third parties from vicious animals. But Mr. Mero's status in the present matter is easily distinguished from that of a landlord, and additionally his actions demonstrate control over the animal. As such, he had a duty to Mr. Oliver, which he clearly breached.

In Washington, mere ownership of property does not in and of itself make a landlord “liable for persons thereon who own or possess, harbor or keep a dangerous dog.” *Shafer v. Beyers*, 26 Wn. App. 442, 447, 613 P.2d 554, review denied, 94 Wn.2d 1018 (1980). Both Mr. Mero in making his argument and the trial court in rendering its ruling relied primarily on *Clemmons v. Fidler*, 58 Wn. App. 32, 791 P.2d 257, review denied, 115 Wn.2d 1019 (1990) and *Frobige v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994), to argue that this rule applies to Mr. Mero. But these cases are distinguishable.

In *Clemmons v. Fidler*, 58 Wn. App. 32, tenants rented a home from Defendant Fidler, who was aware they kept a dog at the premises. The tenants’ dog subsequently injured Plaintiff Clemmons, and Clemmons brought suit against Fidler, arguing that because the landlord had been aware that a dangerous dog was being kept on the premises, he should be held liable. But the court held that knowledge of a dangerous dog on the part of a landlord did not change the rule. Only an owner, keeper, or harbinger of a dangerous dog can be liable; the landlord of an owner, keeper, or harbinger cannot be liable. *Id.*, at 35-36.

Similarly, in *Frobige v. Gordon*, 124 Wn.2d 732, defendant landlords leased property to a tenant whom they were aware kept exotic animals on the premises. A visitor to the property was attacked by the

tenant's Bengal tiger and sued the landlords. The court held that the same rule that applied to dangerous dogs also applied to other dangerous animals, and the landlords could not be held responsible. *Frobig*, 124 Wn.2d 737.

The cases relied upon by Defendant involve distinct landlord/tenant relationships between a tenant animal owner and the property owner, with injury to a third party. They deal specifically with injuries that happened to third parties having no relationship to the landlord. "A landlord owes no greater duty to the invitees or guests of his tenant than he owes to the tenant himself." *Frobig v. Gordon*, 124 Wn.2d at 733. But that is not the situation in the present matter. Mr. Mero was not Mr. Cook's landlord. The property where the attack occurred belonged to Mr. Mero. The truck that the dog Scrappy was located in at the time of the attack was also owned exclusively by Mr. Mero. Mr. Cook was not Mr. Mero's tenant; he resided across the street from the Mero property. Mr. Mero did not cede any control or authority over the property to Mr. Cook. Mr. Oliver, a business invitee, was injured by an animal that Mr. Mero knew to be dangerous and aggressive, and which he knowingly allowed to remain in *his* open vehicle, on *his* property. There is no justification to shield Mr. Mero from liability as a "landlord" under these circumstances.

2. Mr. Mero owed Mr. Oliver a Duty of Care as a Business Invitee:

The case at issue is actually a premises liability matter between Mr. Mero as the landowner and Mr. Oliver as a business invitee, rather than a third-party landlord-tenant matter. The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 188-89, 127 P.3d 5, 8 (2005), *Younce v. Ferguson*, 106 Wn.2d 658, 662, 724 P.2d 991 (1986). Here, Mr. Oliver bartered vehicle repair services and some property maintenance work for shop space in a building Mr. Mero owned, located on property that Mr. Mero owned. CP at 215-216. Mr. Oliver also did maintenance work for Mr. Mero for which he was paid money. CP at 215-216. Thus, Mr. Oliver was a business invitee of Mr. Mero. See *McMann v. Benton County, Angeles Park Communities, Ltd.*, 88 Wn. App. 737, 741, 946 P.2d 1183 (1997).

Mr. Oliver had to park on Mr. Mero's property and walk from the parking area to reach the shop. There is no dispute that Mr. Mero knew that Mr. Oliver had to cross a common area of the property to reach the shop. Mr. Oliver had essentially free access to the property, including access to any of the vehicles he might need to use or service. CP at 212.

The general rule in the United States is that where an owner divides his premises and rents certain parts to various tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is his duty to exercise reasonable care and maintain these common areas in a safe condition.

Mucsi v. Graoch Associates Ltd. P'ship No. 12, 144 Wn.2d 847, 855, 31 P.3d 684, 687 (2001), citing *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975).

Mr. Mero, in letting the shop to Mr. Oliver, had a duty to exercise reasonable care to keep the premises safe for Mr. Oliver (as well as for his residential tenant in the apartment). Generally, a business owner is liable to an invitee for an unsafe condition on the premises if the condition was “caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe condition.” *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 460, 805 P.2d 793 (1991) (quoting *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 40, 49, 666 P.2d 888 (1983)). In the present case, it is clear that Mr. Mero had *actual knowledge* of the danger existing on his property, since he admits he spoke to Mr. Cook about it. CP at 210. Mr. Mero did not warn Mr. Oliver of this hazard or take any steps to protect him, and thus he breached his duty.

Beyond merely being aware of the hazard, however, Mr. Mero actually helped cause or create the unsafe condition. He allowed Mr. Cook to leave his dog alone in the truck, and specifically made sure that

Mr. Cook left the truck window open for the dog. He *told* him to do it. CP at 210, 213. Mr. Mero could reasonably anticipate that Mr. Oliver would arrive, since Mr. Oliver was on site almost every day. Mr. Mero knew Mr. Oliver kept his shop there, and he had given Mr. Oliver free access to all of the vehicles on the property. CP at 212. It was easily foreseeable to Mr. Mero that Mr. Oliver might pass by or approach any of the various vehicles, including the flatbed truck holding the aggressive dog. Because he helped create the hazard, Mr. Mero should not avoid liability to his invitee, Mr. Oliver, by arguing he is a landlord.

3. The Trial Court Erred by Relying on Unpublished Authority from Division I.

In rendering its ruling on Mr. Mero's Motion for Summary Judgment, the trial court cited an unpublished Division I case, *Briscoe v. McWilliams*, 2013 WL 4607608, August 26, 2013. GR 14.1 prohibits a party from citing as an authority an unpublished opinion of the Court of Appeals. Thus, neither of the parties referenced *Briscoe* in their summary judgment briefing or arguments, but the trial court discussed it in detail. While the trial court stated that it did not view *Briscoe* as binding authority, RP (October 31, 2014) at 23, it claimed that it found its analysis persuasive, "and it essentially answers the question presented to the Court

today.” RP (October 31, 2014) at 23 . As with the other cases, though, the facts in *Briscoe* can be distinguished.

In *Briscoe*, an apartment tenant (Randall) would pay his brother (Levi) to come and clean his apartment. Levi had a large dog that he would bring with him. If other people were present at the apartment when he was there, he would lock the dog in a separate room. Randall planned on moving out of the apartment, and he was aware that his landlord’s real estate agent would have access to the apartment. Randall hired his brother Levi to clean it for him. Randall left for California on July 14th, before Levi completed the cleaning. He called Levi on July 16th, and Levi advised that he would have the cleaning completed by that evening. That same day, Randall contacted the landlord and told him the cleaning was done and the apartment was vacant. The landlord then sent his aunt, Ms. Briscoe, to the apartment on July 17th to verify it was vacant. It turned out, though, that Levi was still cleaning the apartment on July 17th, and he left his dog in the apartment while he ran to the store. While he was gone, Ms. Briscoe entered the apartment and was bitten by Levi’s dog.

The Briscoe plaintiff alleged causes of action including respondeat superior (agency), premises liability, and negligent entrustment. Randall moved for summary judgment on the argument that only the owner, keeper, or harbinger of a dog could be held liable for injuries caused by the

dog. “He specifically argued that no Washington case had ever permitted a dog bit victim to recover based on agency law.” The trial court granted summary judgment, and plaintiff appealed.

After a discussion of the *Clemmons* and *Frobig* cases, Division I affirmed, stating the following:

The rationale rejecting landlord liability for a tenant’s dog expressed in *Clemmons* and *Frobig* applies equally to Randall’s liability for Levi’s dog, regardless of whether Levi was Randall’s agent (respondeat superior) or business invitee (premises liability theory). . . . The common law restricts liability to the owner, keeper, or harbinger because they own or have direct control of the animal. CP at 24.

Again, though, *Briscoe* is not a case where a landlord (or in that case, a tenant), took any affirmative action to create a hazard. The present matter is different. Mr. Mero knew Mr. Cook had placed a dangerous dog in a vehicle Mr. Mero owned, and he affirmatively instructed Mr. Cook to make sure a window to that vehicle was left open. This created an unreasonable risk to anyone walking by that open window. Mr. Mero should be held responsible for creating, at least in part, that risk. To follow the trial court’s reasoning that the owner, keeper, or harbinger of an animal is the only party who *ever* can be held liable for injury from an animal or that a property owner *never* can be at fault insulates property owners from every form of negligence that might arise involving an

animal on the premises. There is no reason that Mr. Mero as a property owner, under the present circumstances, should be shielded for harm from his express act and negligence. The trial court erred in relying on the reasoning from *Briscoe*, and it was error to grant summary judgment in favor of Mr. Mero.

V. CONCLUSION

For the reasons set forth above, Appellant Steven Oliver respectfully requests that this court reverse the trial court's rulings of May 16, 2014 and October 31, 2014 dismissing Plaintiff's claims against Defendant Grays Harbor County and Defendant Eugene Mero, respectively, and remand this matter for trial.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

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STATE OF WASHINGTON
BY _____
DEPUTY

SIGNED this 23 day of September, 2015, at Tacoma, Washington.

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