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DIVISION II

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STATE OF WASHINGTON

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

BY  DEPUTY

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.

REPLY OF APPELLANT
STEVEN OLIVER

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ORIGINAL

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I. ARGUMENT

- a. Defendant Grays Harbor County's argument that only rules or policies enacted by legislative bodies fall within the failure to enforce exception of the Public Duty Doctrine would render all local agency rules moot.

Defendant Grays Harbor County argues that that the County has no legislatively-enacted County Code provisions regarding animal control enforcement, so the "failure to enforce" exception to the public duty doctrine does not apply. Br. of Resp. Grays Harbor County (GHC), at 9. As a result, the County's position is that its own policies, including those published on the dangerous and potentially dangerous dog notices given to the public, should carry no weight whatsoever. Even though the wording of the County's policies in place at the time of the dog attack were more stringent than those of the state animal control statute, the County maintains that should be completely irrelevant.

The County's argument, therefore, is that its published policies regarding dangerous dogs must simply be ignored. But under this reasoning, there would have been no need for the policies later to be amended expressly so that they would track with the state statute. CP at 60-61, 68-69. The public should have a right to rely on information they are given by law enforcement or other agencies, including information on what steps the County would take to address dangerous and potentially

dangerous dogs. Looking at the facts in the light most favorable to Mr. Oliver, Scrappy should have been designated a dangerous dog prior to the attack on Mr. Oliver. If this had happened, mandatory steps would have had to be followed which would have prevented the attack on Mr. Oliver. CP at 108-109. This is exactly the reason that dangerous dog statutes and regulations are implemented in the first place.

The County also argues that there is no proof of a policy violation by the County, because its animal control policies dictate that the Sheriff's Department enforce Chapter 16.08 RCW. Br. of Resp. GHC, at 12. Mr. Oliver concedes that under that state statute, Scrappy would not have fallen within the definition of dangerous dog. But the County argues that the state definition overrides the more strict language of the County's policies, and the Sheriff's Department's policy and practice had always been to enforce the state definition. Br. of Resp. GHC, at 12. It claims that there was never a policy decision made to deviate from the state's dangerous dog criteria. Br. of Resp. GHC, at 12. But somehow, the County's more strict definition came into existence. CP at 107-108. It was identified not only in its policies but also provided to the public when a potentially dangerous dog notice was issued. CP at 60, 68. The County Sheriff's Department should be bound by these stricter published requirements.

- b. Defendant Mero's reliance on landlord-tenant law to avoid liability for the dog attack ignores the business invitee relationship between Mr. Oliver and Mr. Mero, which creates a separate duty running from Mr. Mero to Mr. Oliver.

Not one of the cases that Mr. Mero relies upon to support his position that a landlord bears no liability to a third party for an animal attack involves a situation where the third party is a business invitee of the landowner. For example, *Clemmons v. Fidler*, 58 Wn. App. 32, 791 P.2d 257, *review denied*, 115 Wn.2d 1019 (1990), involved a landlord that had no direct relationship with the third party guest of his tenant. Similarly, in *Frobig v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994), the landlord had no relationship to the injured party. In *Markwood v. McBroom*, 110 Wn. 208, 188 P. 521 (1920), the injured party was a neighbor of a receiver who owned land where the dogs had been kept, unbeknownst to the receiver. But the dog attack occurred on the neighbor's property after one of the dogs had escaped. *Id.*, at 210. Again, there was no relationship whatsoever between that neighbor and the receiver. *Id.*, at 210-11.

That is not the set of circumstances in the present matter. The facts clearly support the position that Mr. Oliver was Mr. Mero's business invitee. CP at 206, 213, 215-216. As such, Mr. Mero had a duty to exercise ordinary care for Mr. Oliver's safety:

An [owner] [occupier] of premises owes to a [business] [or] [public] invitee a duty to exercise ordinary

care [for his or her safety]. [This includes the exercise of ordinary care] [to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use].

WPI 120.06 (emphasis in original).

This duty running from Mr. Mero to Mr. Oliver exists separate and apart from any duty Mr. Mero might have had as an owner, keeper or harbinger of a dangerous animal at common law. None of the cases that hold a landlord is not liable to a third party for injury from a tenant's animal, *supra.*, addresses the independent duty that a landowner owes to a business invitee. A breach of a duty to a business invitee may not be ignored or excused simply because the harm was caused by a dangerous animal owned by someone else. Mr. Mero is asking the court to use landlord-tenant principles to circumvent clear landowner-invitee law. There is no justification to support this.

Mr. Mero does not dispute that he owned the property where the attack occurred. CP at 255. He does not dispute that he owned the truck in which the dog was left. CP at 213. He does not dispute that he was aware that the dog was left in the truck with the window down. CP at 213, He does not dispute that he would avoid a vehicle in which the dog was left. CP 256. All of this is relevant and supports landowner liability. It

makes no difference that Mr. Mero himself was not the owner, keeper, or harbinger of the dog.

Mr. Mero argues that even if premises liability law does apply, there is still no liability on the part of Mr. Mero because the elements establishing a duty have not been met. Br. of Resp. Mero, at 13. As Mr. Mero pointed out, three elements must be met for a land owner to be liable to an invitee:

An [owner of premises] [occupier of premises] [operator] is liable for any [physical] injuries to its [business invitees] [public invitees] [customers] caused by a condition on the premises if the [owner] [occupier] [operator]:

(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such [business invitees] [public invitees] [customers];

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and

(c) fails to exercise ordinary care to protect them against the danger.

WPI 120.07(emphasis in original); *See also, Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 138-139, 875 P.2d 621 (1994); *See also*, Br. of Resp. Mero, at 13-14.

The first element clearly is met: Mr. Mero was aware of and had knowledge that the dog was left in his truck with the window open. CP at

213, 261. Mr. Mero uses semantics in an attempt to obscure the fact that he knew the dog posed a hazard or that he told Mr. Cook to leave a window open for the dog. But his testimony, when viewed in the light most favorable to Mr. Oliver as it must be on summary judgment, shows that Mr. Mero was well-aware that Scrappy posed a threat of biting someone. Mr. Mero testified:

Q What did you know about Scrappy? What kind of experience did you have with Scrappy before the dog attacked Steve Oliver?

A Well, the dog was always friendly with me. In fact, it would hump my leg and lick my face, but I was always around that dog when Henry was around, and I had seen the dog in Henry's vehicle and that dog would always make you aware that it was in that dog or in that vehicle because it would bark, and so --

Q When you say always make you aware, was the dog aggressive?

A If it was in a vehicle, it would bark and make you know that you shouldn't go near that vehicle.

Q And so you avoided going near Mr. Cook's vehicle when Scrappy was in there; is that right?

A Yes.

Q Why?

A I just stated that.

Q Do you think the dog would bite you if you'd get close enough?

A You're making an assumption.

Q I'm asking you what you think?

A No. I don't know.

CP at 207, 256.

Mr. Mero avoided even going near Mr. Cook's vehicles if Scrappy was left in them, because the dog "would make you know you shouldn't

go near that vehicle.” *Id.* While Mr. Mero was careful to avoid using the word “aggressive”, there is a genuine factual question as to whether Mr. Mero knew Scrappy was dangerous to be near, especially when it was in a vehicle. Yet that is exactly the condition that Mr. Mero allowed to exist on his property when he and Mr. Cook drove away and left Scrappy unattended in a vehicle on Mr. Mero’s property. In doing so, Mr. Mero failed to exercise any care to protect his business invitee.

Similarly, Mr. Mero argues that he did not tell Mr. Cook to leave a window open for the dog. Br. of Resp. Mero, at 3. Rather, he simply asked if a window had been left open. *Id.* Again, this is just semantics. Mr. Mero’s deposition testimony demonstrates that he wanted a window to be left open for the dog:

Q Did you know Scrappy was in the truck?

A Yes.

Q How did you know Scrappy was in the truck?

A Cook told me.

Q Under what circumstances did Mr. Cook tell you that Scrappy was in the flatbed truck?

A Basically, that's what he told me is that the dog was in the truck because I didn't see it when it drove in, and I said, "Well, did you leave the window down a little bit so the dog can get some air?" And he said, yes, he did.

Q Did he tell you how far he left it down or just that, "Yes, I left it down"?

A No.

CP at 261.

- Q Okay. And as I understand, before you and Mr. Cook left the property you knew that Mr. Cook had his dog in the vehicle, but you didn't go over there and look at the vehicle and the positioning of the window?
- A No.
- Q And as I understand what you said, you told him, you know, there's a window cracked such that the dog could get some air?
- A Yes.

CP at 213.

Again, a jury could reasonably find that Mr. Mero intended that Mr. Cook leave the window of the truck open so that the dog could get some air, and instructed him to do so. *See Id.* But even if he had not instructed Mr. Cook to do so, however, Mr. Mero was still aware that the window was left open. *Id.* He confirmed that Mr. Cook had done this. CP at 261. But Mr. Mero did not bother to check how far the window was open, even though he knew the dog was likely to be aggressive when left in a vehicle. CP at 256. Taking the facts and reasonable inferences therefrom in favor of Mr. Oliver, Mr. Mero was aware of a hazardous condition on his property and failed to take any steps whatsoever to protect Mr. Oliver from that risk. Under these circumstances, **his fault was a jury question**, and the claim against him should not have been dismissed on summary judgment.

Mr. Mero claims that “there is no evidence that Mero knew that Scrappy had any dangerous propensities at all”, and the fact that the dog

might bark did not make it dangerous. Br. of Resp. Mero, at 14-15. But in reality, Mr. Mero knew better. As discussed above, he knew the dog became aggressive when it was left in a vehicle. CP at 256, 258. He himself would not go near a vehicle when the dog was in it. *Id.* He also knew that the window had been left open. CP at 213, 261. He knew the truck was parked in a common area of the property and that Mr. Oliver had to cross by that area to reach his shop. He knew Mr. Oliver would regularly come and go on the property, that Mr. Oliver was allowed to use any of Mr. Mero's vehicles at any time, and that the keys were usually available in the vehicles themselves. CP at 212. There was nothing out of the ordinary in Mr. Oliver being on the premises that day or walking to or near the truck; Mr. Mero testified that Mr. Oliver was probably on the property more than Mr. Mero himself. CP at 264. Conversely, it was unusual for Mr. Cook to be at the property. CP at 263. Mr. Mero should have expected that Mr. Oliver would be arriving on the property, that he would be unaware that Mr. Cook had been there earlier that day, and that he had left his dog in an open truck. Under these circumstances, it was unreasonable for Mr. Mero to allow a dangerous dog to remain in his truck, with the window open, parked on a common area of the property.

Similarly, there was no reason for Mr. Oliver to expect that a dangerous dog would be left in a truck he had to pass by to reach his shop.

There is no evidence that the dog Scrappy, or any dog, had ever been left in one of Mr. Mero's vehicles prior to the date of the attack. *See, e.g.*, CP at 264. In fact, Mr. Mero had only interacted with Mr. Cook or seen Scrappy two or three times prior to the date of the attack, so it was unusual for Mr. Cook to have been present that day at all. CP at 256, 258. Nothing existed to put Mr. Oliver on notice of a potential hazard, and he was unable to take any steps to protect himself. Thus, the second element for Mr. Mero's liability is met. *See Supra.*

The third element is also met. Although Mr. Mero was aware of the dangerous condition and should have expected that Mr. Oliver would not be aware, **it is undisputed that Mr. Mero took no steps whatsoever to protect Mr. Oliver or warn him about the dog left in the truck.** He simply drove away from his property with Mr. Cook, knowing the dog was left behind in a vehicle with an open window – which created a dangerous condition. Viewed in the light most favorable to Mr. Oliver, these facts were sufficient to preclude summary judgment. Dismissal of Mr. Oliver's claims against Mr. Mero was granted in error. The trial court's summary judgment ruling should be reversed and remanded for trial

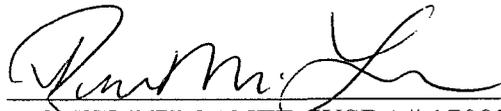
II. CONCLUSION

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 20TH day of November, 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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