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DIVISION II

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STATE OF WASHINGTON

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NO. 47645-2-II
COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STEVEN OLIVER, an individual person

Appellant,

v.

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

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

BRIEF OF RESPONDENT GRAYS HARBOR COUNTY

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I. INTRODUCTION

An actionable duty of care is owed to a plaintiff under the “failure to enforce” exception to the public duty doctrine only if there is a mandatory duty to take enforcement action under a state statute or local, legislatively-adopted ordinance. Here, it is undisputed that the applicable state statute regulating dangerous and potentially dangerous dogs did not provide grounds for issuance of a dangerous dog notice prior to the dog bite which injured plaintiff, and it is undisputed that Grays Harbor County had never adopted a code provision or ordinance regulating dangerous or potentially dangerous dogs.

Instead, plaintiff pursued a negligence claim against Grays Harbor County based exclusively upon allegations that Grays Harbor County Sheriff’s Deputies and an Animal Control Officer failed to take enforcement actions against a dog owner which were allegedly required by language in a Grays Harbor County Sheriff’s Department policy manual. The trial court correctly granted summary judgment in favor of Grays Harbor County on this claim, holding that the duties a governmental entity is mandated to enforce must arise from a state statute or local ordinance. No case has authorized a “failure to enforce” claim to proceed based upon

provisions in a Sheriff's Department policy manual, and none could, since a Sheriff is only authorized to enforce laws, not enact them.

II. ISSUE PRESENTED FOR REVIEW

Whether the trial court correctly applied the "failure to enforce" exception to the public duty doctrine and granted summary judgment in favor of Grays Harbor County, when plaintiff's negligence claim was based upon enforcement actions allegedly imposed by language in a Sheriff's Department policy manual, rather than upon a state statute or local ordinance.

III. COUNTER-STATEMENT OF THE CASE

The Grays Harbor County Sheriff's Department (hereafter "GHCSO") is empowered to investigate animal complaints generated by citizens within its jurisdiction, and in doing so follows Ch. 16.08 RCW relative to the handling of potentially dangerous and dangerous dogs. CP 33, 37-38; CP 156, 158-159. Grays Harbor County has no code provision for determining whether a dog should be declared potentially dangerous or dangerous, and has not had any such code provision at any time since enactment of Ch. 16.08 RCW. CP 156.

The relevant definitions of these two categories of dogs are set

forth at RCW 16.08.070 as follow:

(1) “Potentially dangerous dog” means any dog that when unprovoked: (a) Inflicts bites on a human or a 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 to cause injury or otherwise to threaten the safety of humans or domestic animals.

(2) “Dangerous dog” means any dog that (a) inflicts severe injury on a human being without provocation on public or private property, (b) kills a domestic animal without provocation while the dog is off the owner’s property, or (c) has been previously found to be potentially dangerous because of injury inflicted on a human, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans.

(3) “Severe injury” means any physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery.

Here, it was undisputed that GHCSO received two complaints generated by citizens within its jurisdiction regarding defendant Henry Cook’s dog, Scrappy. In 2004 Scrappy was reported to have attacked (but not killed) a neighbor’s dog. The responding GHCSO Deputy determined that Scrappy’s actions met the definition of a potentially dangerous dog under RCW 16.08.070(1)(a) and issued a Notice accordingly. CP 34, 56-63. In 2007 Scrappy was reported to have chased (but not bitten or injured) a boy visiting a neighbor. The responding GHCSO Deputy

determined that Scrappy's actions met the definition of a potentially dangerous dog under RCW 16.08.070(1)(b) and issued a Notice accordingly. CP 34-35, 64-70.

In opposition to the County's Motion for Summary Judgment, plaintiff conceded these facts, specifically arguing that because of Scrappy's actions in 2004 the County allegedly had a mandatory duty to issue a dangerous dog notice following the 2007 incident by virtue of language in the GHCSO policy manual. CP 88-93. Plaintiff did not argue below that the 2008 incident involving Scrappy occurring within the City of Chehalis had any bearing upon his claim against Grays Harbor County, and his inclusion of that incident in his Statement of the Case (Brief of Appellant, p. 6) is irrelevant to the issue on appeal.¹

IV. ARGUMENT

A. The failure to enforce exception to the public duty doctrine requires proof of violation of a requirement imposed by statute or ordinance, not internal departmental policy as was alleged by plaintiff.

A plaintiff alleging a cause of action for negligence must establish

(1) the existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) a proximate cause between the breach and

¹ The City of Chehalis was also one of the five defendants originally named in plaintiff's Complaint for alleged negligence with regard to its animal control duties, but plaintiff stipulated to the dismissal of Chehalis by way of summary judgment, agreeing that the City was also not an at-fault entity for its actions in connection with the 2008 incident.

the injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law.

Tinacani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

Claims of negligence with regard to governmental regulation of potentially dangerous or dangerous dogs are subject to the public duty doctrine. See, *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999); *Champagne v. Spokane Humane Soc.*, 47 Wn. App. 887, 737 P.2d 1279 (1987). The court in *King v. Hutson* explained this doctrine and the only potentially relevant exception as follows:

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 523 (1987). 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.

King, 97 Wn. App. at 594 (emphasis added). Similarly, in *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013), another case involving a claim of negligence with regard to government regulation of

potentially dangerous or dangerous dogs, the court held:

Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing **statutory** requirements actually know of a **statutory** violation, (2) the government agents have a **statutory** duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the **statute** intended to protect.

Gorman, 176 Wn. App. at 77, citing *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (emphasis added). In addition, the plaintiff has the burden to establish each element of the failure to enforce exception, and the court "must construe the exception narrowly." *Gorman*, 176 Wn. App. at 77, citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Finally, as the local, legislatively-enacted equivalent of a state statute, an ordinance can create the requisite statutory duty under the failure to enforce exception if it mandates a specific action when the ordinance is violated. *Gorman*, 176 Wn. App. at 77.

In opposition to the County's Motion for Summary Judgment, plaintiff conceded application of the public duty doctrine, and conceded that the "failure to enforce" exception to the public duty doctrine provided the only potential basis for liability against the County. CP 88-89.

Plaintiff also conceded that Grays Harbor County did not owe a duty to take enforcement action under the applicable state statute, Ch. 16.08 RCW. At the hearing on the County's Motion, plaintiff's counsel conceded that neither the 2004 nor the 2007 incidents provided the necessary grounds for declaring Scrappy a "dangerous" dog within the definition at RCW 16.08.070(2). Verbatim Report of Proceedings, May 16, 2014 ("VRP"), p. 15, lns. 6-24. This concession was consistent with plaintiff's briefing, and with the opinion of plaintiff's liability expert, Denise McVicker, who agreed with this conclusion in her deposition. CP 171-173. Nor did plaintiff cite to any legislatively enacted Grays Harbor County Code provision to establish the requisite duty to take enforcement action, as no such Code provision exists. CP 156.

Instead, plaintiff argued below that the County owed a duty to take corrective enforcement action by virtue of language from the GHCSO Policies and Procedures manual. CP 89-92. In doing so, plaintiff attempted to gloss over the critical distinction between departmental policy on the one hand and statutes or legislatively-enacted local law on the other by variously describing the cited GHCSO policy section as the County's own animal control "rules and regulations" (CP 90, ln. 2), its

own “local regulations” (CP 92, ln. 11), and its “own laws” (CP 92, ln. 12). These inaccurate descriptions of GHCSO policy cannot create the necessary duty to take corrective action under a statute or ordinance where no such statute or local ordinance or code exists.

On appeal, plaintiff has continued to attempt to gloss over the dispositive distinction between statutes and ordinances on the one hand and departmental policy on the other by variously describing the cited Sheriff’s Department policy sections as “Grays Harbor County’s animal control ordinances” (Brief of Appellant, p. 14), “Grays Harbor County rules and regulations” (*Id.*, p. 15), “its [Grays Harbor County’s] own regulations” (*Id.*, p. 17), “its [Grays Harbor County’s] own laws” (*Id.*, p. 18), and “the Grays Harbor County regulation.” *Id.*, pp. 19, 20, 21. Ultimately, these inaccurate references are irrelevant, as plaintiff exclusively relies upon (and accurately cites to) sections of the “Grays Harbor Sheriff’s Department Policies and Procedures” manual (*Id.*, pp. 16, 21, 22), and he specifically assigns error to the trial court’s refusal to grant departmental “policies” the same status as “legislatively-passed statutes and ordinances” for purposes of application of the failure to enforce exception to the public duty doctrine. *Id.*, p. 1, Issue (a).

Plaintiff cites article 11, section 11 of the Washington Constitution and *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991) for the proposition that “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.” Brief of Appellant, pp. 17-18 (emphasis added). This proposition, while accurate, is wholly irrelevant to plaintiff’s negligence claim against the County, which is not based upon a County ordinance but rather language from the Sheriff’s Department policy manual. Contrary to plaintiff’s argument (*Id.*, p. 7-9), the superior court was correct in relying upon *Brown v. Yakima, supra*, and *Hass v. City of Kirkland*, 78 Wn.2d 929, 932-33, 481 P.2d 9 (1971) to distinguish between legislatively-enacted ordinances and policies of a department of local government for purposes of the failure to enforce exception. *See also, Joyce v. State, Dep’t of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (“[b]ut because the Department’s policy directives are not promulgated pursuant to legislative delegation, they do not have the force of law.”); *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990), (cited in *Joyce*, 155 Wn.2d at 323 for the proposition that “[u]nlike

administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law.”). In addition, it is only a “county, city, town or township” which is granted authority to enact local laws. Washington Constitution, art. 11, section 11. Although county sheriffs are authorized to enforce the laws in their respective jurisdictions (*see*, RCW 36.28.010), a sheriff is not authorized to enact law, by internal policy or otherwise.

Plaintiff argues that “[t]here 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” Brief of Appellant, p. 25 (emphasis in original). To the contrary, because the failure to enforce cases have limited such claims to those based upon *only* statutes and ordinances (*see, e.g., King v. Hutson, supra; Gorman v. Pierce County, supra; Bailey v. Town of Forks, supra*), Washington case law does foreclose plaintiff’s claim.

In addition, as the name implies, the essence of a failure to enforce claim is that government agents who are responsible for enforcing requirements imposed upon citizens by statute or ordinance must have actual knowledge that a citizen has violated the state or local law. An

internal, sheriff's department policy which directs how deputies should respond to a violation of law by a citizen does not provide grounds for finding a violation of law by a citizen in the first place. Rather where, as here, it is undisputed that the two prior incidents occurring within Grays Harbor County involving Scrappy did not qualify Scrappy as a "dangerous dog" under Ch. 16.08 RCW, there was no violation of law by Scrappy's owner which the County could have taken action to enforce.

B. Even if a departmental policy violation could support a failure to enforce claim, there is no proof of a policy violation by the County.

Even if a departmental policy provision could create a mandatory duty to take enforcement action, no such policy provision exists here. Plaintiff relies exclusively upon language from a purported quotation of RCW 16.08.070(2) (definition of "dangerous dog") contained in the version of GHCSO Policy # 1753 as it existed during the GHCSO response to the complaints about Scrappy in 2004 and 2007, arguing that this quotation of what was by then an outdated definition constituted a Sheriff's Department policy "more restrictive" than the state law from which the quote was taken. Brief of Appellant, pp. 7, 16-17; *see also*, CP 153-154, ¶15.

Plaintiff's argument simply ignores the clear directive in the first two sections of Policy # 1753 which dictate that the Sheriff's Department enforces Ch. 16.08 RCW with regard to potentially dangerous and dangerous dogs. CP 156, ¶ 3. Since the amendment of the definition of "dangerous dog" at RCW 16.08.070(2) in 2002, a dog which endangers the safety of a human such as Scrappy did when he chased the neighbor's son in 2007 could only be declared dangerous if his owner had previously received notice that the dog was deemed potentially dangerous "because of injury inflicted on a human." CP 156, ¶ 4; CP 166, ¶ 2 and CP 168. The fact that the quote of RCW 16.08.070(2) in GHCS D Policy # 1753 was outdated between the effective date of the statutory amendment of June 13, 2002 and the revision of Policy # 1753 on October 29, 2008 did not create or reflect a change in the Sheriff's Department's policy relative to regulating potentially dangerous or dangerous dogs. Rather, at all times the Sheriff's Department's policy and practice has been to enforce the provisions of Ch. 16.08 RCW in effect as of the date of the potentially dangerous or dangerous dog determination being considered. There was never a policy decision made to deviate from or use dangerous dog criteria stricter than those set forth in the state statute, and there was no Grays

Harbor County code provision which would have given the Sheriff's Department authority to do so. CP 157, ¶ 5.²

V. CONCLUSION

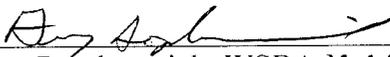
When determining the sufficiency of a claim based upon the failure to enforce exception to the public duty doctrine, the court “must construe the exception narrowly.” *Gorman*, 176 Wn. App. at 77, citing *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs.*, 115 Wn.2d at 531. It would have taken an unprecedented and vastly expansive construction of the failure to enforce exception, and would have distorted the exception beyond recognition, for the superior court to have accepted plaintiff’s argument and allow plaintiff’s claim against the County to proceed based upon departmental policy. Plaintiff has failed to establish that the superior court committed error by failing to hold that a duty arose under the failure to enforce exception to the public duty doctrine by virtue of GHCSO policy language. Based upon the foregoing, Grays Harbor County respectfully requests that this Court affirm the superior court’s Order

² Plaintiff’s expert lacked personal knowledge of the Grays Harbor County Sheriff’s Department policy decisions, and so was not qualified to express opinions on this subject. Her testimony that the GHCSO Policy # 1753 was intended to be stricter than the state statute it purports to quote is therefore inadmissible, and should be disregarded as contrary to CR 56(e). Similarly, her opinions regarding “standard practice,” animal control training, and record keeping (*see*, Brief of Appellant, pp. 19-21) are irrelevant and should be disregarded. These opinions might be relevant to the breach of duty element of a negligence claim, but they do not address the existence of a duty, which represents a

Granting Defendant Grays Harbor County's Motion for Summary Judgment.

Respectfully submitted this 21st day of October, 2015.

LAW, LYMAN, DANIEL,
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