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Washington State Court of Appeals
Division III

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Docket No. 299708

Spokane Cy. Sup. Ct. Cause No. 10-2-04835-3

CHERRYANN COBALLES, et al.,

Plaintiffs-Petitioners,

-against-

SPOKANE COUNTY, et al.,

Defendants-Respondents.

APPELLANT'S REPLY BRIEF

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STATUTES AND REGULATIONS AND RULES

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SCC 5.04.02011, 12

SCC 5.04.0323, 8

SCC 5.04.0353

SCC 5.04.07011

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

I. REBUTTAL STATEMENT OF FACTS

At 3, Respondent claims “Gunnar is aggressive,” citing to **VRP 94:7-11, 97:13-22**. These passages never use the word “aggressive” or describe activities associated unmistakably with viciousness (as opposed to mischievousness). At most, Anthony claims he did not want Gunnar to “jump on Emmalin.”

At 4, Respondent claims:

Contrary to the repeated warnings to stay out of the room where the dog is kept, Emmalin was allowed into Anthony’s room with Anthony or Conner, in the dog’s absence, from time to time to look for games in Anthony’s room,

citing **VRP 143:10-20, 146:1-6**. This mischaracterizes Connor’s testimony. Never does Connor allege Emmalin was allowed in Anthony’s room “with Anthony.” Importantly, he prefaces that before Emmalin could enter, “I would make sure Gunnar wasn’t in there, and, if he wasn’t, I would – I’d – I’d walk in there with Emmalin...” **VRP 143:17-19**.

At 5, Respondent claims:

He attempted unsuccessfully to pull Gunnar from Emmalin, by placing his arms around Gunnar’s waist from behind Gunnar and pulling him away,

citing **VRP 103:2—104:4, 117:13-118:9**. Anthony never testified to placing “his arms around Gunnar’s waist.” He claims that he “tried to grab his hind legs,” but Gunnar “stopped on his own[.]” **VRP 103:25—**

104:1 (emphasized).

II. REBUTTAL ARGUMENT

A. Constitutional Questions Heard in Writ of Review.

At 9, Respondent argues a writ cannot permit judicial review of purely legislative, executive or ministerial acts of the agency (here, validity of SCC 5.04.032), citing *Chaussee v. Snohomish Cy. Council*, 38 Wash.App. 630, 634 (1984). Because Respondent never made this argument below, the court should disregard it. *Rismon v. State*, 75 Wash.App. 289, 294 (1994); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wash.App. 491, 512-13 (1993).

Nevertheless, the argument fails because *Chaussee* held, at 642-43, that the superior court properly determined the constitutional validity of municipal codes in the scope of the writ. *See Appellants' Brief*, 37 fn. 40. Respondent argues that SCRAPS had no discretion with respect to declaring Gunnar dangerous and impounding him without a warrant, attempting to convert the declaration and impound into nonreviewable purely ministerial, executive acts. However, it ignores the threshold discretionary determination of "sufficient information."

Calling it ministerial, however, transforms Respondent's assertion into a concerning admission that appears to endorse the practice of letting government seize a citizen's property on demand, presuming the dog

guilty before proven innocent, forcing the owner to incur costly boarding and impound fees until the Respondent fails to prove its case to the Board. Pending this determination, and while the owner may redeem her dog from SCRAPS, she must comply with onerous and costly restrictions. SCC 5.04.032(a)(6), 5.04.035(b). Failure to appeal or comply in fifteen days mandates the dog's death. SCC 5.04.032(a)(6).

Because the "appeal" seeks the remedy of not only reversing the initial dangerous dog designation, but also releasing a confiscated dog from impound, Ms. Coballes's writ properly challenges the validity of the Sept. 20, 2010 warrantless impound and the ongoing detention of Gunnar. SCC 5.04.035 requires that even if the dog owner timely appeals, if she cannot meet the requirements for a provisional release, the dog must remain incarcerated during the pendency of the appeal(s). As the Respondent aptly noted, once declared dangerous, confiscation and death (barring compliance or appeal) follow automatically; accordingly, an appeal of the former necessitates review of the latter.

At 12, Respondent claims Ms. Coballes understood her constitutional challenge fell outside the writ process, citing her *Motion to Amend Complaint*, at CP 531-40. Yet, the Respondent repeatedly misapprehends the purpose of the amendment – viz., to challenge the constitutionality of different code provisions (SCC 5.04.070(f), SCC

5.04.020(L), and SCC 5.04.120(a)) not considered by the Board, in the context of Ms. Coballes's later criminal¹ charge and Feb. 16, 2011 conviction.

B. Respondent Ignores *Hoesch* and Wrongly Analyzes *Rabon*.

At 13, Respondent cites *Rabon v. City of Seattle*, 135 Wn.2d 278, 290, 291-93 (1998) to argue no preemption and claim that state and local laws need not be exactly the same to be reconcilable. Without attempting to reconcile, it then conclusorily states, "There is no preemption or conflict." First, Ms. Coballes never claimed preemption. She asserted conflict. Further, at issue is whether "the two enactments can be harmonized" or "an ordinance ... prohibits that which state law permits." *Id.*, at 292. The Respondent fails to admit the obvious, that SCC 5.04.020 prohibits what RCW 16.08.070 permits – viz., keeping dogs without being subject to onerous restraints (or euthanasia) imposed by significantly expanding the definition of "severe injury," a key element in declaring a dog "dangerous." Analytically on point is *Hoesch*, a case Respondent completely ignores.

C. Default "Notification and Appeal" Procedure Does Not Excuse Constitutional Violations.

Respondent asserts RCW 16.08.080(1) justifies the "notification

¹ This action was RALJ-appealed and Ms. Coballes will be filing a petition for discretionary review with this court soon.

and appeal procedure” of SCC 5.04.032. However, RCW 16.08.080 does not, and cannot, condone violations of the Fourth and Fourteenth Amendments and State Constitution; nor does it allow Respondent to enact ordinances conflicting with Ch. 16.08 RCW, as argued above. Changing definitions does not concern notification or appeal procedure.

D. Respondent Makes Nonsensical Argument Regarding Waived Challenge.

At 15, Section D, Respondent claims Ms. Coballes does not challenge “the decision of the County Commissioners as violating her rights.” But see *Appellant’s Brief*, Section I(2) and Issue 2. Evidently, Ms. Coballes’s constitutional rights attach to her dog and her own liberty.

E. Substantial Evidence Does Not Exist.

Finding of Fact No. 16: Respondent melodramatically claims Ms. Coballes is attempting to offer new evidence. As with adding emphasis to a quotation from a published decision, or drawing a box around a relevant passage from a deposition transcript, Ms. Coballes has informed the court that she added emphasis to hand-drawn and photographic exhibits² in the form of a red box, orange line, and blue line (using the word

² Counsel for Ms. Coballes, Mr. Karp, took the color digital image offered as Exh. 4 and added the colored lines for illustrative purposes. After taking another look at the exhibit, Mr. Karp freely acknowledges that the admitted exhibit included a rounded silhouette of Gunmar drawn by Anthony. The Examiner’s clerk provide Mr. Karp a grainy, black and white image of Exh. 4 that would not have provided suitable for demonstrative purposes. Mr. Karp did not recognize the marking until after reviewing Respondent’s response brief. Nonetheless, Mr. Karp regrets this oversight. He intended absolutely no deception.

“emphasized”). No rule prohibits a party from using drawings instead of words to present argument. The exhibits referenced by the County show, in photo clarity, why the claimed measurements of 40” (edge of door-to-dog bed) and 70” (doorway-to-dog bed) are not supported by substantial evidence, and why the court must consider Ms. Coballes’s testimony in concert with **Exh. 11**. The County’s citation to **VRP 161:23—16:17** and **Exhs. 4, 6, 9, and 11** do not disturb this. Indeed, **Exh. 6** (referenced by the County) clearly shows that the dog bed cannot possibly be 40” away from the edge of the opened door, since the distance between the dog bed and the opened door is approximately one-third the width of the door.

Finding of Fact No. 21: The County admits the finding is “almost” a verbatim quote of Anthony’s testimony. The part not verbatim is precisely the part challenged – viz., that Gunnar stopped attacking only after being restrained by Anthony.

Findings of Fact 31 and 32: Ms. Coballes cautiously assigned error to any assertion that E.C. “accidentally opened the door.” Respondent appears to acknowledge the finding was intended only to authenticate a document, not to regard the quote as a verity.

Finding of Fact 79: This finding misquotes SCC 5.04.020 by omitting the word “other” and placing the words “willful trespass” and “tort” in quotations.

Finding of Fact 98: The “actual instruction” is material to establishing trespass, particularly since the Board goes to pains to discredit Ms. Coballes by distinguishing the purported from the “actual” instruction, neither of which is supported by substantial evidence. By describing the “actual instruction” as one requiring proof that E.C. knew Gunnar was in the room, it appears to excuse entry (and conclusion of trespass) if E.C. opened the door and entered to see if Gunnar was in the room. Entry, however, was never conditioned on such knowledge. Rather, she was told not to enter the room (described as the dog’s room) when closed. Without dispute, E.C. confessed to “open[ing] the dog’s room” and “open[ing] the dog’s door.” *Appellant’s Brief*, fn. 10. Notably, Respondent did not cite to the record to support this finding.

Finding of Fact 99: It is a *non sequitur* to assert that if Anthony could see E.C. but not what she was doing, then E.C. did not see Anthony or Gunnar, who was beside him. Without E.C. (or those with personal knowledge not speculating) testifying to what she saw prior to entering the room, there is not a shred of evidence that she did not know Gunnar was in Anthony’s bedroom when she opened the door. Nor would it create an inference she did not commit willful trespass or another tort.

Nor does the record support the unconditional assertion at page 20 that E.C. could “go into Anthony’s room from time to time to find a game

to play.” As noted above, entry was conditioned on Connor’s escort and then only after he confirmed Gunnar was not in the room. Undisputedly, neither of these conditions was met and cannot serve to excuse her trespass. That she was allegedly (and entirely speculatively):

not thinking about disobeying the instruction to stay out of the dog’s room but instead was thinking about finding a game to play in a place that she had been shown before that games were kept

is irrelevant, for the reasons stated in *Appellant’s Brief*, Section IV(C)(4).

Finding of Fact 100: With 20/20 hindsight, the Board criticizes Ms. Coballes’s decision to leave Gunnar in Anthony’s room instead of outside in the rain when E.C. was present. But these *ex post facto* opinions do not constitute findings of fact. Nor was there any evidence that Gunnar was ever kept in another room, nor that Anthony found the burden of locking the door when company present “impossible.”

Finding of Fact 102: Critically, Respondent identifies no evidence contradicting Anthony’s assertion of being startled. The passages cited by Respondent include not one question calling for an answer that would reveal his demeanor (i.e., being startled), though he does admit having no warning before she opened the door. **VRP 103:9-11**. As for calling his testimony in doubt because Ms. Coballes allegedly told him that Gunnar might be euthanized if declared dangerous, this threat is published in the county code – see SCC 5.04.032(a)(6). Respondent, therefore,

hypocritically attempts to discredit Anthony's testimony despite never having impeached him on the stand merely because he was informed about a consequence of applying SCC 5.04.032.

Respondent next claims the door could not have hit Gunnar lying on the floor as the door would not have opened all the way. This conclusion does not follow from the premise. The relevant moment occurred just before Gunnar made contact with E.C., before the door opened fully into the room, and only after forcing Gunnar to stand up. This is because after rising from a prone position, in which he remained until the door opened, he and E.C. maneuvered themselves to allow the door to swing past him.³ In other words, there is no evidence the door opened fully before Gunnar bit E.C. And given that Anthony heard no noise prior to the door opening, it means Gunnar did not get up from that position and the door opened fully only after he bit her. **VRP 161-163**. Whether the door hit Gunnar before he rose from a prone position is what matters, and this occurred since E.C.'s injuries were on the top of her

³ See **VRP 101:7-12** (indicating "Gunnar laid down right here and then Sadie laid down like right there"); **VRP 101:13-22** (locating Gunnar "between the bed and the door" "on the floor"); **VRP 102:20-24 and VRP 111:15-22** (marking with an X and circle the location of Gunnar and a silhouette of his body); **VRP 104:16-19** (Gunnar was "laying, like, right in front of the door, about next to the dog bed, so it could've clipped him").

head, feet off the floor and above his muzzle when lying on the ground.⁴

Finding of Fact 104: As stated, this is a Conclusion masquerading as a Finding and was challenged in the latter portion of *Appellant's Brief* under the segments of provocation and omitted findings.

Finding of Fact 105: As with the previous “finding of fact,” the court has no basis to construe legal conclusions of “negligence” and “recklessness” as a verity when Ms. Coballes clearly challenged it in the section on “other tort” (not responded to by the Respondent) and this court must review it *de novo*. *American Legion Post #32 v. City of Walla Walla*, 116 Wn.2d 1, 7 (1991) makes no contrary holding. Indeed, the case does not even involve a writ or findings of fact.

F. Omitted Findings.

The omitted findings go directly to the *de novo* determinations of provocation and trespass and deserve appellate consideration. Respondent's claim that *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wash.App. 537 (1994) allegedly does not require the fact finder to enter findings of fact is irrelevant, since SCC 5.04.032(b)(2) does. So bound, omitted findings render *Kampanos* apposite.

G. Lenity and Ambiguity.

⁴ See also **VRP 131:23—132:6** (height of E.C. estimated at two and a half to three feet off the ground, about the same as Gunnar but only when standing up). **VRP 104:25** (Anthony noting that silhouette is smaller than Gunnar's actual size).

Respondent argues lenity would apply if the:

fact that a dog is dangerous under the definition of dangerous dog in SCC 5.04.020(8) or the act of owning a dangerous dog

would, in and of itself, without additional requirements, subject the dog's owner to criminal prosecution,⁵ yet none of the cited cases requires such a broad and complete premise. Rather, lenity applies piecemeal, giving meaning to a particular word, definition, or element of the civil claim, regulation, or cause of action. Where that piece has criminal application and is ambiguous, the court invokes lenity. *Thompson/Center Arms Co.*, interpreted a single word "make," *Clark* evaluated the phrase "crime of violence," and *Plaza Health Laboratories* clarified the definition of "point source." Thus, the threshold for applying lenity is not determining whether the entire definition of dangerous dog under SCC 5.04.020(8) has a criminal application, but whether ambiguous terms therein do.

Respondent failed to rebut Ms. Coballes's assertions that the terms "provocation" and "severe injury" have criminal applications under RCW 16.08.100(3) and RCW 16.08.100(1), the extent to which the determination of Gunnar as "dangerous" is the predicate for the

⁵ As an aside, Ms. Coballes did face criminal prosecution for the identical incident, under SCC 5.04.070(f), for Gunnar allegedly "exhibiting vicious propensities," a prosecution that did not require Gunnar being previously declared "dangerous." SCC 5.04.020 defines "exhibits vicious propensities" by referencing RCW 16.08.100(2) and RCW 16.08.100(3), sections using the terms "provocation" and "severe injury."

compound criminal offense of violating “dangerous” dog restraints; and also fails to address the strict construction rule applicable to forfeitures.

1. Severe Injury and Lenity.

Respondent quotes SCC 5.04.020(25) in fn. 6 by adding the phrase “or multiple bites requiring medical treatment.” This 2009 amendment was not part of Finding of Fact 80, nor argued by either party. See *SCRAPS Memorandum*, at 5 (AR). The phrase “multiple bites requiring medical treatment” is not found in RCW 16.08.070(3), proving further conflict with state law. Ms. Coballes’s conceding puncture wounds and surgery does not alone prove severe injury, since the definition requires proof of broken bones, disfigurement, or lacerations requiring surgery, elements not satisfied by admission nor from the speculative, and foundationless testimony of Hill, Scheres, and Montano.

2. Provocation and Lenity.

For the first time on appeal, Respondent argues that this court must defer to the Board’s legal interpretation of the term “provocation,” citing *City of Olympia v. Thurston Cy. Bd. of Comm.*, 131 Wash.App. 85, 94 (2005). This court should disregard the new argument. Indeed, the Respondent took a contrary position at the trial level, claiming:

Legal issues are determined by the court de novo while factual issues are determined on a deferential review under the substantial evidence test.

CP 335 (*Respondents' Response Brief*).

Nonetheless, it does not apply here, since the Board has no professed “special expertise in the area” of dangerous dog regulation. Not even lawyers, the Board is comprised of legislative officers who tend to many more matters than the occasional dog dispute. Citing to *City of Olympia* attempts to place the Board in the company of the Department of Ecology or the Pollution Control Hearings Board. Besides:

an agency’s view of the statute will not be accorded deference if it conflicts with the statute ... Ultimately, it is for the court to determine the meaning and purpose of a statute.

Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 77 (2000).

Further, there is no evidence the Board is “charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field[.]” *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555 (1981). Nor has the Board enacted regulations to administer the code. Nothing in state or local statute provides that the Board has the experience or training in pertinent matters pertaining to dangerous dogs for which this court must grant any deference.⁶ Indeed,

⁶ In assessing whether the Board has requisite expertise to garner it, the court must determine if it has adequate experience through trial-and-error in regulating the subject so that the court should not casually interfere with its judgments based thereon. It must also consider whether the Board has technical knowledge traceable to employees within the agency with appropriate, specialized education and training, who apply same to the specific factual situation. Deference in this respect in essence yields to statements of fact and opinions offered by those experts – yet the only expert who had a say in this entire matter is Ph.D.-level certified applied animal behaviorist Dr. James Ha (offered by Ms.

that the Board's interpretation involved turning to a common dictionary proves it has no "special expertise." Besides, the agency deference doctrine only applies if the term is ambiguous, yet the County claims the term is "unambiguous." *Postema, id.*

In any event, Respondent agrees that one assesses provocation from the reasonable dog's standpoint, not the injured party's. It appears to concede that the ambiguous term "provocation" includes *unintentional* acts, not just taunting, teasing, and beating. In stating that various factors contributed to Gunnar's reaction (i.e., isolation, home invasion), the Respondent only proves why E.C. unintentionally provoked Gunnar by defying a clear prohibition not to enter the space where he was kept, a decision prudently made by Ms. Coballes – particularly given that over the several prior visits, this sequestration strategy produced no harm to E.C. To follow Respondent's logic would require this court to find that citizens who choose to keep unsocialized dogs intended solely for home protection and to deter crime – i.e., guard dogs, are estopped from claiming provocation when the dog does what he has been trained to do. If any deference is to be given, it should be to Dr. Ha, the only person

Coballes). Lastly, deference may be appropriate if the agency balances a wide variety of legal, technical, and policy factors in a complex process to decide how to regulate in individual situations, but there is no evidence the Board undertook such a project in assessing terminology used in Ch. 5.04 SCC.

with specialized expertise in the subject matter.

Respondent provides no authority contradicting the case law of provocation presented by Ms. Coballes.

3. Willful Trespass.

As with provocation, Respondent fails to cite any case law contradicting the holdings of those cited by Ms. Coballes. Instead, at 30, it states, without any basis, that willful trespass requires “that there must also be a wrongful intent to trespass.” In claiming consistency with SCC 5.04.020(8) because the definition allegedly focuses on “a wrongdoer’s actions,” it ignores that earlier the Respondent accepted provocation may be unintentionally induced (i.e., not wrongfully). For the reasons above, no deference is due the Board.

At 31, Respondent sets forth “undisputed facts,” including that when Anthony noticed the door opening, he did not react with a start or indicate fear, but this relies on a finding lacking substantial evidence. See, *supra*, discussion of Finding of Fact 102.

At 32, Respondent speculates as to E.C.’s state of mind, and then concludes she did not form any intent to willfully trespass. However, as argued in *Appellant’s Brief*, Washington is a single-intent state; the burden is on Respondent to disprove willful trespass; it produced no evidence E.C. did not intend to open the door to the “dog’s room”; it

produced no evidence that E.C. entered pursuant to privilege; and the reason why she entered is irrelevant if she knew (and there is no evidence to contradict this point) she was not allowed to enter.

4. Promissory Estoppel.

As explained in the opening brief, Ms. Coballes reasonably relied on repeated promises by E.C. not to enter Gunnar's room. Resultantly, she kept Gunnar in the room instead of outside in the rain or disallowing E.C. from entering and remaining on her private property. This appeal is testament to the damage suffered as a result of E.C.'s contrary actions.

5. Other Tort is Not Addressed.

Respondent fails to respond to this argument at Section III(C)(5).

H. Other Issues.

1. Preponderance of the Evidence.

At 33-34, Respondent claims this challenge is not properly before the court on a writ of review. For the reasons stated above, this objection should be disregarded. It also ignores the holding of *Mansour v. King Cy.*, 131 Wash.App. 255 (I, 2006), a case with very similar procedural posture. *Mansour* specifically addresses the proper standard of proof at the quasi-judicial Board hearing. Respondent cites to *Mansour* to assert that loss of custody of a child only requires evidentiary preponderance, but it ignores the footnote, which states, "We recognize that permanent

termination of the parent/child relationship requires clear and convincing proof.” *Id.*, at 267 fn. 30. As for *Sentell*, see, *infra*, Section II(H)(5).

2. *Ultra Vires.*

Had she waited, Ms. Coballes would have failed to exhaust administrative remedies and missed the strict 30-day window within which to appeal. This is because the restraint was in effect the moment the Board issued its Decision. Respondent does not contradict the legal position taken by Ms. Coballes but merely calls it “harmless error.”

3. *Substantive Due Process*

Ms. Coballes does not assert SCC 5.04.032 violates substantive due process.

4. *Procedural Due Process*

Ms. Coballes does not assert SCC 5.04.032 violates procedural due process, except with respect to the burden of proof.

5. *Seizure.*

Attempting to legitimize the warrantless declaration of Gunnar (coupled with order of immediate impoundment), in addition to *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705-06 (1897), the county cites *Garcia v. Village of Tijeras*, 108 N.M. 116, 122-23 (1998), *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972), *Rabon v. City of Seattle*, 107 Wash.App. 734, 748 (2001), and *City of Everett v. Slade*, 83 Wn.2d 80,

83-85 (1973).

Sentell should be disregarded but not just for the reason that dogs are allegedly imperfect or qualified property since:

1. No case or passage from the constitution in any way limits to reach of the Fourth Amendment to only property or effects in which a person has a perfect or unqualified property interest. *Sentell* only addressed the Fourteenth Amendment, not the Fourth Amendment. *Id.*, at 705. Even so, a dog's purported doctrinal imperfection or qualification (derived from the anachronistic holding of *Sentell* at a time in our country when the value of animals turned not on their companionship but on agricultural and economic value, which is why people could have perfect and unqualified property interests in bovines and horses (*Id.*, at 701)) is a red herring⁷; and

2. *Sentell* did not factually involve impoundment of a dog under the police power. Rather, it evaluated a claim by a dog owner against a railroad company whose train killed the dog. Finding that the plaintiff failed to license the dog, which the court construed as denuding the dog of any property value or interest whatsoever, the court merely reiterated a truism – that when dogs behave badly without legal justification, the

⁷ Time has come to retire the antiquated logic of *Sentell*, particularly in light of recent Washington decisions repeatedly acknowledging the special value of animal companions, such as *Womack v. von Rardon*, *Mansour v. King Cy.*, *Sherman v. Kissinger*, *Pickford v. Mason*, and *Rhoades v. City of Battle Ground*.

police power allows legislatures to enact legitimate laws to manage them.

A municipality may indubitably exercise its police power to regulate or destroy dogs in order to protect citizens, as stated in *ADOA v. Yakima*, 113 Wn.2d 213, 217 (1989), provided that it is done “legitimate[ly].” Whether Ms. Coballes’s property interest in Gunnar is imperfect or qualified⁸ does not mean Respondent can ignore constitutional mandates. The court need not invoke *Sentell* to resolve this dispute.

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

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

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

⁸ *Sentell* explained how the police power could be similarly wielded against the most sacred property – “one’s home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass.” *Id.*, at 705. In other words, perfect or not, merely acknowledging that the police power may act upon a dog does not begin to answer whether an unreasonable seizure has taken place.

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

Garcia v. Village of Tijeras never once discusses the Fourth Amendment or unlawful seizure. It has no bearing on this argument.

Fuentes v. Shevin only aids Ms. Coballes. In striking down as unconstitutional two states' prejudgment replevin statutes, the U.S. Supreme Court addressed the Fourteenth Amendment, never the Fourth. *Id.*, at 71 fn. 2 (“We do not, however, reach [the Fourth Amendment challenge].”) The actual section paraphrased by Respondent shows that the law permits dispensing with a predeprivation hearing only in “extraordinary situations.” Of the limited number cited by the U.S. Supreme Court, none concerns dog impoundments. Further, the Respondent does not even attempt to justify why the need to remove a dog from a person's home a full day after the alleged incident took place (contrary to a dog menacing a civilian while running-at-large and requiring imminent action to protect public safety) is a “truly unusual” and “extraordinary” situation justifying the dramatic decision to dispense with the opportunity for a hearing:

There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U.S., at 379, 91 S.Ct., at 786. These situations, however, must be truly unusual.^{FN22}

Only in a few limited situations has this Court allowed outright seizure^{FN23} without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States,^{FN24} to meet the needs of a national war effort,^{FN25} to protect against the economic disaster of a bank failure,^{FN26} and to protect the public from misbranded drugs^{FN27} and contaminated food.^{FN28}

FN22. A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, supra, 402 U.S., at 540-541, 91 S.Ct., at 1589-1590; Goldberg v. Kelly, supra, 397 U.S., at 261, 90 S.Ct., at 1016. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken. ...

FN23. Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. ...Seizure under a search warrant is quite a different matter, see n. 30, infra.

Id., at 91-92 (cit.om.; emphasized). None of the enumerated cases cited by the court involve or discuss the Fourth Amendment, much less the right to do so without a warrant.

Ms. Coballes recognizes that a warrant may permit dispossession without a predeprivation hearing, pursuant to the Fourth Amendment. Hence, if the Respondent sincerely believes that a dog must be impounded before scheduling a predeprivation hearing, it can procure a

warrant. Indeed, warrants are intended to be obtained *ex parte*, proving that the predeprivation hearing and warrant procurement process are not mutually exclusive. Accordingly, even if it does not offend the Fourteenth Amendment to seize a dog without a predeprivation hearing, it does offend the Fourth Amendment if done without a warrant or pursuant to a valid exception to the warrant requirement. *Fuentes* acknowledges that where summary seizure is necessitated by the standards outlined by the Respondent in quoting *Fuentes*, the proper avenue is to seek a search warrant, precisely Ms. Coballes's argument:

FN30. The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need-e.g., the apprehension and conviction of criminals-rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

Id., at 93.

City of Everett v. Slade offers nothing, for like *Fuentes*, it never addresses the Fourth Amendment. Rather, it held part of the drug

forfeiture statute, RCW 69.50.505(b)(4), facially unconstitutional as violating due process. *Id.*, at 85. The court otherwise affirmed the trial court result of dismissing the city's forfeiture action, which it initiated two months after seizing Mr. Slade's car and claiming that it now owned it. The Respondent does itself no favors citing to *Slade* as an example of a case justifying warrantless impoundment of a dog from inside a person's home (n.b., Ofc. Scheres ordered Ms. Coballes to remove him from inside the house). Unlike *Slade*, Respondent purports to have the right to confiscate a person's dog without probable cause, then forcing the dog owner to either initiate a misnomered "appeal" (instead of the county initiating a forfeiture proceeding) or comply with the onerous and costly requirements of obtaining the dog's release (including daily boarding and impound expenses). Such a system inverts the natural constitutional order in circumstances that are far from "truly unusual" or "extraordinary," pursuant to a blanket mandate that is hardly "narrowly drawn" without any searching discrimination by the animal control officer as to the case-by-case circumstances.

Lastly, *Rabon v. City of Seattle* speaks past Ms. Coballes's argument. *Rabon* held that failure to provide a predeprivation hearing did not vindicate "Rabon's final due process argument." It, like *Slade* and *Fuentes*, never once addresses the constitutional question under the

Fourth Amendment. *Id.*, at 748 (citing *Slade* and *Fuentes*).

The *Fuentes-Slade-Rabon* line of cases do not stand for the proposition that by providing a reasonably prompt postseizure hearing, the Respondent can let the Fourteenth Amendment eclipse the Fourth. For all the above reasons, any implicit holding pertaining to the Fourth Amendment by use of the word “seizure” is pure *dictum*, perpetuated by misreading *Fuentes* and ignoring its clear refusal to address the Fourth Amendment. *Fuentes*, at 71 fn.2. Indeed, none of the cases cited by Respondent even discusses a warrantless exception.

To humor Respondent, if one considers the four *Fuentes* “extraordinary situation” factors, it cannot satisfy the test for these reasons: (1) there is no “special need for prompt action” where the dog is contained in a private residence and the alleged bite occurred more than 24 hours prior; (2) there is hardly “strict control by the government” when it mandates “immediate impoundment” based only on “sufficient information” to be decided by an animal control officer and not a judge; and (3) without requiring compliance with “standards of a narrowly drawn statute” to determine that the impound is “necessary and justified in the particular instance,” the statute is not calibrated to the incident facts but just compels the officer to seize first and ask questions later. Even in non-criminal, administrative contexts, warrants are required

before property is seized or homes searched.⁹ The Washington Constitution requires that any administrative warrant only be issued in the context of criminal activity and with statutory authority.¹⁰ Under all these cases, that the Respondent thought it could seize a dog for a non-crime, without probable cause, and without a warrant is plainly unconstitutional.

I. Fee Request.

Respondent's last paragraph asks for reimbursement of fees and costs "[i]f the Court deems it lawful," but provides no authority for same, and does not invoke RAP 18.1. The request should be summarily denied.

III. CONCLUSION

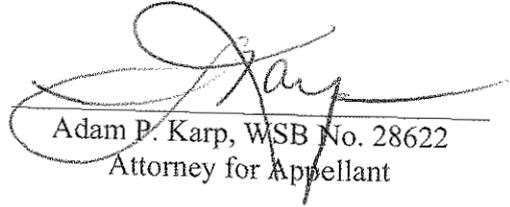
This court should emancipate Gunnar, liberate Ms. Coballes, clarify the law of provocation and trespass, and bestow upon all Spokane County citizens the right to a constitutional dangerous dog process.

⁹ *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overturned conviction for refusing to allow inspectors to enter home without an administrative warrant); *In re Quackenbush*, 49 Cal.Rptr. 147, 150 (Cal.App.1996)(accord in context of animal control officer demanding surrender of dog for rabies quarantine without warrant and then prosecuting owner for failure to produce animal on demand); *See v. City of Seattle*, 387 U.S. 541 (1967)(reversing conviction for refusal to permit fire department representative to enter and inspect locked commercial warehouse without an administrative warrant). "[A]dministrative searches generally require warrants." *Michigan v. Clifford*, 464 U.S. 287, 291 (1984). "[P]rivacy interests are especially strong in a private residence." *Id.*, at 296-97.

¹⁰ *See City of Seattle v. McCready (McCready I)*, 123 Wn.2d 260 (1994)(quashing administrative search warrants issued in housing inspection context as violating Wash. Const. Art. I, § 7 in that a magistrate issuing a warrant without statutory authority to do so is invalid just as in the case of a private citizen signing a warrant, and invalidating on basis that warrant issued with less than probable cause); *City of Seattle v. McCready (McCready II)*, 124 Wn.2d 300 (1994)(finding that municipal court may not issue administrative search warrant premised on belief that civil infraction, rather than crime, occurred).

Dated this Oct. 13, 2011

ANIMAL LAW OFFICES



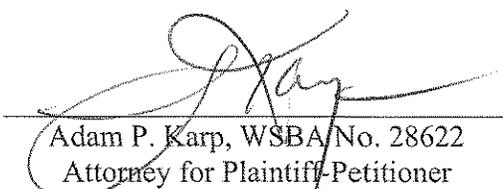
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct. 13, 2010, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served upon the following person(s) in the following manner:

[x] First-class Mail

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