No. 91761-2

NO. 45792-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRYENT FINCH and PATRICIA FINCH,
a Marital Community

Appellants,

vs.

THURSTON COUNTY, THURSTON COUNTY SHERIFF'S OFFICE, ROD DITRICH and JANE DOE DITRICH, individually and as husband and wife and the marital community comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANTS BRYENT FINCH and PATRICIA FINCH

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I. INTRODUCTION

Respondents, Thurston County, Thurston County Sheriff's Office, Thurston County Deputy Rod Ditrich and Jane Doe Ditrich ("the County") argues that it is not liable under RCW 16.08.040 for the injuries to Officer Finch because the legislative waiver of sovereign immunity did not apply to strict liability claims. The County alternatively argues that even if the waiver is applicable to strict liability claims, the amendment to RCW 16.08.040 was curative and should be applied retroactively because sovereign immunity was not waived until twenty six years after the dog bite statute was enacted. However, the Legislature declared its intent to abrogate sovereign immunity for municipalities in 1869. Over one hundred years of case law underlines the abrogation of sovereign immunity for counties. Case law also makes clear that municipalities are subject to both common law and statutory strict liability claims.

The County also raises the argument that even if it was subject to strict liability under RCW 16.08.040(1), that the exception under RCW 16.08.040(2) applies because there was no Fourth Amendment violation. However, Officer Finch is not required to prove a Fourth Amendment violation. Rather, the County must prove that a lawful seizure under the Fourth Amendment occurred. Because there was

no seizure, the exception for police dogs under RCW 16.08.040(2) does not apply and the County is strictly liable for Officer Finch's injuries.

II. ARGUMENT

A. The government's waiver of sovereign immunity extends to strict liability claims.

In its briefing to this Court, the County erroneously argues that "imposing any type of strict liability on the government is completely unprecedented in our state court's jurisprudence." Respondents' brief at 15. This argument is disingenuous and fails to acknowledge a line of well-established case law where strict liability has consistently been applied to the state and municipalities following the abrogation of sovereign immunity pursuant to RCW 4.92.090 and 4.96.010. *See, e.g., PacifiCorp Envtl. Remediation Co. v. Washington State Dep't of Transp.*, 162 Wn. App. 627, 663, 259 P.3d 1115 (2011) (State held strictly liable for violation of Washington's Model Toxics Control Act RCW 70.105D *et seq.*); *Mayer v. City of Seattle*, 102 Wn. App. 66, 10 P.3d 408 (2000) (remanded for determination of attorney fees after City of Seattle held strictly liable under RCW 70.105D *et seq.*); *City of Seattle (Seattle City Light) v. Washington State Dep't of Transp.*, 98 Wn. App. 165, 172, 989 P.2d 1164 (1999) (State strictly liable under RCW 70.105D *et seq.*); *DiBlasi v. City of Seattle*, 136 Wn.2d 865,

879, 969 P.2d 10 (1998) ("a municipality may be liable for damages to an adjoining landowner's property caused by a street which acts to collect, channel and thrust water in a manner different from the natural flow.") *Burton v. Douglas County*, 14 Wn. App. 151, 154, 539 P.2d 97 (1975) ("Whether or not the road was negligently constructed is immaterial. The proximate cause of the damage was the initial wrong that occurred because Douglas County's road acted as a channel to collect and divert water from its natural course and ultimately discharge surface water upon Burton's property to his injury."); *Siegler v. Kuhlman*, 81 Wn.2d 448, 459, 502 P.2d 1181 (1972) ("we rejected the application of strict liability in Pacific Northwest Bell Tel. Co. v. Port of Seattle, [80 Wn.2d 59, 491 P.2d 1037 (1971)], solely because the installation of underground water mains by a municipality was not, under the circumstances shown, an abnormally dangerous activity. Had the activity been found abnormally dangerous, this court would have applied in that case the rule of strict liability."). In all of the above-cited cases strict liability was imposed against the state or municipality, or the propriety of such was discussed, without mention of sovereign immunity.

The cases discussing governmental strict liability under the Model Toxics Control Act ("MTCA") are particularly relevant to the

arguments asserted by the County in three ways. First, the MTCA does not premise liability on the occurrence of "tortious conduct". *See* RCW 70.105D *et seq.*; Respondents' brief at 9 ("waiver of liability is limited to actions for damages arising out of 'tortious conduct'"). In a similar vein, the County also argues that it is immune to claims under RCW 16.08.040, because such claims are premised on mere ownership of a dog, regardless of any culpable "conduct" by the dog owner. *Id.* at 10. However, like the dog bite statute, the MTCA does not require tortious conduct on the part of the owner to incur liability. It simply requires ownership. RCW 70.105D.040(1)(a)-(b) ("strict liability for the "owner...of the facility" or for "[a]ny person who owned...the facility at the time of disposal or release of hazardous substances.").

Second, the MTCA, like RCW 16.08.040, provides a waiver of sovereign immunity unequivocally expressed in statutory text. Respondents' brief at 9 ("[A] waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." citing *Harrell v. State*, 170 Wn. App. 386, 403, 285 P.3d 159 (2012)). The Court has held that when the Legislature provides a cause of action for "any person" who has been injured by "any act in violation" of a statute, that this language is sufficiently unequivocal to waive sovereign immunity. *Id.*

at 404 n. 6. Like RCW 16.08.040, which applies to the "owner of *any* dog which shall bite *any* person" (emphasis added), RCW 70.105D *et seq*. applies to *any* "person", "owner" or "operator" who violates its provisions:

> (1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:
>
> > (a) The owner or operator of the facility;
> >
> > (b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;
> >
> > (c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;
> >
> > (d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

> (e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

RCW 70.105D.040. Even absent an express waiver of immunity in the statutory text, the fact that municipalities can be held liable under the MTCA or RCW 16.08.040 is consistent with the Supreme Court's prior ruling that the waiver of sovereign immunity "operates to make the State presumptively liable in all instances in which the Legislature has *not* indicated otherwise." *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (italics in original).

Third, the public duty doctrine was not even mentioned in determining governmental strict liability under the MTCA. *See* Respondents' brief at 14 ("The fact that strict liability cannot be reconciled with the public duty doctrine is further evidence that the Legislature never intended municipalities to be subject to strict liability."). As the County correctly notes, the public duty doctrine was adopted for application in negligence cases against state entities. *Johnson v. State,* 164 Wn. App. 740, 747, 265 P.3d 199 (2011). Because a negligence claim is not implicated in this case, the public duty doctrine does not apply. This is the conclusion that was reached by the federal court as it applies to RCW 16.08.040:

> Defendants' argument that plaintiff's claims are barred by the public duty doctrine is equally unpersuasive. The public duty doctrine applies to negligence claims. On the instant motion, plaintiff seeks a strict liability determination. Such determination does not depend on whether any duty of care existed between the City and plaintiff, or whether that duty was breached. Accordingly, plaintiff's motion for partial summary judgment is granted.

Peterson v. City of Fed. Way, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007).

Even if the public duty doctrine were to apply here, the special relationship exception would apply. This exception is stated as follows:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Taggart v. State, 118 Wn.2d 195, 218, 822 P.2d 243 (1992) (quoting Restatement (Second) of Torts § 315 (1965)). The court has recognized this exception in two factually similar situations.

First, a special relationship exists between a state psychiatrist and his or her patients, such that when the psychiatrist determines that a patient presents a reasonably foreseeable risk of serious harm

to others, the psychiatrist has a duty to take reasonable precautions to protect anyone who might foreseeably be endangered. *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983). The court stated that the scope of this duty was not limited to readily identifiable victims, but includes anyone foreseeably endangered by the patient's condition. *Id.*

Second, a special relationship exists between a parole officer and the parolees he or she supervises. *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm. *Id.* at 220. This duty arises because the parole officer has "taken charge" of the parolee and is therefore "under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.* at 219 (quoting Restatement (Second) of Torts §319 (1965)).

Likewise, a K-9 handler has "taken charge" of the police dog assigned to him or her, and has a duty to exercise reasonable care to control the dog to prevent it from doing harm to others. Therefore, a special relationship exists between the K-9 handler and anyone

foreseeably endangered by the canine. Officer Finch, as a fellow officer working with K-9 handler Ditrich, would come within this purview. On this basis, the public duty doctrine does not prevent Officer Finch from pursuing a damages claim against a governmental entity. This same conclusion was reached by the federal court in reviewing a claim of negligence in a police dog bite case. *Conely v. City of Lakewood*, No. 3:11-CV-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012) ("The public duty doctrine gives no relief to Defendants because any duty breached was owed to Plaintiff, not to the general public.").

Strict liability for municipalities, whether derived from the common law or legislative enactment, is far from unprecedented in our state court's jurisprudence. It is unsurprising then that no federal court even considered the County's argument that municipalities are immune from strict liability dog bite claims based upon the doctrine of sovereign immunity. *See e.g.*, *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003); *Rogers v. City of Kennewick*, CV-04-5028-EFS, 2007 WL 2055038 (E.D. Wash. July 13, 2007) aff'd, 304 Fed.Appx. 599 (9th Cir. 2008); *Peterson v. City of Fed. Way*, C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007); *Terrian v. Pierce County*, No. C08-5123 BHS, 2008 WL 2019815 (W.D. Wash. May 9, 2008);

Beecher v. City of Tacoma, No. C10-5776 BHS, 2012 WL 1884672 (W.D. Wash. May 23, 2012); *Saldana v. City of Lakewood*, No. 11-CV-06066 RBL, 2012 WL 2568182 (W.D. Wash. July 2, 2012); *Conely v. City of Lakewood*, No. 3:11-CV-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012).[1]

B. Counties were liable for injuries caused in the performance of governmental functions when RCW 16.08.040 was enacted in 1941.

The County argues that RCW 16.08.040 was not intended to apply to police dogs when it was originally enacted in 1941 because sovereign immunity had not yet been waived. Respondents' brief at 7. However, counties were subject to liability long before 1941. This liability arose pursuant to RCW 4.08.120 (formerly section 951, Rem. Code) which originally stated as follows:

> An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

This statute was passed in 1869. Laws of 1869 p 154 § 602.

[1] Copies of all unpublished federal decisions cited herein were included in the appendix to Appellants' opening brief pursuant to General Rule 14.1.

Pursuant to this statute, liability was imposed upon counties where injury occurred through the negligent performance or omission of performance in governmental functions. *See, e.g., Kirtley v. Spokane Cnty.*, 20 Wash. 111, 113, 54 P. 936 (1898) (county liable for failure to maintain bridge that collapsed while plaintiff was crossing it); *Redfield v. Sch. Dist. No. 3, in Kittitas Cnty.*, 48 Wash. 85, 92 P. 770 (1907) (plaintiff permitted to maintain suit against county school district for burns caused to student by overturned bucket of scalding water); *Archibald v. Lincoln Cnty.*, 50 Wash. 55, 96 P. 831 (1908) (plaintiff permitted to maintain suit for county's failure to keep highway in repair); *Bergen v. Lewis Cnty.*, 95 Wash. 499, 164 P. 73 (1917) (county liable for the mismanagement of ferries).

Despite the clear statutory provision for municipal liability, it had become apparent to the Court by 1915 that the statute was being applied inconsistently with respect to cities and towns on the one hand, and counties and school districts on the other:

> Clearly we have two lines of decisions, in one of which **the statute** is either denied or ignored, and in the other of which it **is recognized and held to abrogate the common-law rule of immunity**. The first line we have constantly followed in dealing with cities and incorporated towns, and the second in dealing with school districts and counties. A majority of the court are averse to overruling either line. To overrule the first would be to unsettle the law of damages as it has been applied to corporations purely municipal almost from the

> beginning of statehood. To overrule the second would be judicially to repeal the statute, the obvious purpose of which, as it would seem inadvertently, has already been much impaired. The only other course is to uphold both lines of precedent as applied respectively to the two classes of corporations in the adjudicated cases.

Howard v. Tacoma Sch. Dist. No. 10, Pierce Cnty., 88 Wash. 167, 177-78, 152 P. 1004 (1915) (emphasis added). Citing the doctrine of *stare decisis*, the *Howard* court went on to uphold the abrogation of common law sovereign immunity for counties and school districts. *Id.* at 178.

The Court subsequently confirmed this decision in the following years stating, "It is now the settled and fixed law in this state that a county may become, and a city is not, liable for damages done while engaged in the performance of a strictly governmental function." *Whiteside v. Benton Cnty.*, 114 Wash. 463, 466, 195 P. 519 (1921); *State v. Collins*, 94 Wash. 310, 311, 162 P. 556 (1917) ("the city, in providing for police and fire protection, is exercising governmental functions"). This language from *Whiteside* was again cited with approval by the Supreme Court in 1953, twelve years after RCW 16.08.040 was enacted. *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 378, 261 P.2d 407 (1953).

Given that both the Legislature and the courts permitted counties to be held liable for damages caused during the performance

of "strictly governmental" functions for 72 years prior to the enactment of RCW 16.08.040, it becomes clear that the Legislature did not intend to exclude police dogs from the statute's reach. *Little v. Little*, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981) ("[T]he legislature is presumed to be aware of its past legislation and judicial interpretations thereof."). Therefore, because counties were always liable under the statute, the legislative revision of RCW 16.08.040 in 2012 was an amendment, rather than a clarification of existing law, and should thus be applied prospectively only. *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976) ("There is a presumption, well established, that a new legislative enactment is an amendment rather than a clarification of existing law."); *Olesen v. State*, 78 Wn. App. 910, 913, 899 P.2d 837 (1995) (statutory amendments presumed to operate prospectively only).

C. RCW 16.08.040(2) is not clearly curative and should not be applied retroactively because the original statute was unambiguous.

In its briefing, the County fails to acknowledge, much less address the requirement that a statute must be "ambiguous" before retroactive application can be applied. *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988) (An amendment is curative only if it clarifies or technically corrects an ambiguous statute.). To determine whether

a statute is ambiguous, the Court looks to the plain language of the statute itself. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000) ("On its face, the statute is not ambiguous. It defines precisely the range of activity that falls within its purview—the transmission of telephonic, video, data, or similar communication by telephone line or microwave."); *Yuan v. Chow*, 96 Wn. App. 909, 913, 982 P.2d 647, 649 (1999) ("the plain language of former U.C.C. section 3–401(1), "[n]o person is liable on an instrument unless his signature appears thereon," and its official comment from 1964 indicate [sic] that the statute was not ambiguous.").

As stated in the Finches' opening brief, RCW 16.08.040 was unambiguous prior to the 2012 amendment. Prior to its amendment, the statute read in its entirety as follows:

> The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

Former RCW 16.08.040. The plain language of the statute provided no exception for police dogs.

Even where the plain language is clear, intent to clarify a statute may be manifested by the legislature's enactment of new legislation soon after a controversy arose about interpretation of the statute said to be clarified. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). But as the County concedes, no Washington court has ever published a decision applying strict liability based on a police dog bite. Respondents' brief at 19. Thus, there was no controversy giving rise to the amendment of RCW 16.08.040.

Because the plain language of RCW 16.08.040 was unambiguous prior to 2012, the addition of subsection two should be construed as an amendment rather than a clarification, and therefore, it should be applied prospectively only. *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002) (The "court generally disfavors retroactive application of a statute.").

D. RCW 16.08.040(2) would be unnecessary if sovereign immunity protected municipalities from dog bite liability in the first instance.

The County argues that municipalities have never been subject to liability under RCW 16.08.040 because the waiver of sovereign immunity was limited to claims involving only tortious conduct. Respondents' brief at 8. As discussed above, this argument is

contravened by prior statute and case law, but it also ignores the fact that the amendment itself would be wholly unnecessary if this argument were true. If the Legislature never consented to allowing counties to be subject to strict liability under RCW 16.08.040, then counties would already be exempt from liability in the limited circumstance where a police dog is lawfully applied. *Little* 96 Wn.2d at 189 ("the legislature is presumed to be aware of its past legislation"). And as conceded by the County, there are no reported Washington cases applying strict liability to a municipality under RCW 16.08.040. The only reasonable interpretation of RCW 16.08.040(2) is that the Legislature intended to narrow the scope of dog bite liability for municipalities.

E. The dog bite injury to Officer Finch did not result from the lawful application of a police dog.

The County falsely states in its brief that "the Finches concede that use of K-9 Rex was lawful under the Fourth Amendment...". Respondents' brief at 21. In point of fact, the Finches stated in their opening brief that "the dog bite injury to Officer Finch ***did not*** result from the 'lawful application of a police dog[,]'" because no seizure occurred. Appellants' brief at 26 (emphasis added). No seizure occurred because Deputy Ditrich did not intend to seize Officer Finch.

1. *If Officer Finch were seized, that seizure would be unlawful under the Fourth Amendment.*

However, assuming for the purpose of argument that Officer Finch was seized, Deputy Ditrich would have had absolutely no justification for doing so under the Fourth Amendment. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) ("As a general rule, warrantless searches and seizures are per se unreasonable."). Officer Finch was not committing a crime at the time he was bitten, and there was no probable cause to arrest him. If the Fourth Amendment analysis were applied in this case, reasonable minds could not differ in concluding that ordering K-9 Rex to bite Officer Finch would have constituted an unreasonable use of force and would be unlawful under the Fourth Amendment. *Baumgartner v. State Dept. of Corrections*, 124 Wn. App. 738, 743, 100 P.3d 827 (2004) (A court properly grants summary judgment when reasonable minds could not differ that the moving party is entitled to judgment as a matter of law). Whether K-9 Rex intended to seize Officer Finch or viewed him as a threat is immaterial.[2]

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[2] *Andrade v. City of Burlingame, 847 F.Supp. 760, 764 (N.D.Cal.1994)* ("In the instant case, it is undisputed that Officer Harman did not intend to use his police dog to subdue the plaintiffs. Indeed, the officer had already halted the plaintiffs' movement when the dog escaped from the car and bit Rocio Andrade and Jackie Marquez. The plaintiffs had already been seized. Plaintiffs attempt to argue that because the *dog* intended to bite the two girls, its actions were "intentional" and thus a seizure within the meaning of *Brower*. The dog is not a defendant in this suit nor could it be. Nor

2. *The Legislature did not intend to leave innocent dog bite victims without a remedy at law.*

The County attempts to argue that absent a seizure, there can be no Fourth Amendment violation and, therefore, no strict liability under RCW 16.08.040. Respondents' brief at 23. In terms of policy implications, this argument completely fails to address the possibility that a police canine could bite and injure someone whom the canine handler did not intend to be bitten. For example, the plaintiff in *Peterson v. City of Federal Way* was a pregnant woman who was bitten because she happened to be standing in the line of scent that the police dog was tracking. C06-0036 RSM, 2007 WL 2110336 (W.D. Wash. July 18, 2007). It was surmised that because the plaintiff screamed and jumped backward upon seeing the dog, this action was perceived by the dog as "furtive" which caused him to lunge and engage her. *Id.* She was an innocent victim who had no apparent connection to the suspect or the crime being investigated. *Id.* Under the County's, and Judge Sheldon's, interpretation of the statute, this bite would qualify as the "lawful application of a police

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is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no.""") (emphasis in original).

dog" because the canine was on duty and actively tracking a suspect. *See* RP 14-15. Surely the Legislature did not intend to provide a free pass for a police dog to bite anyone in its path without consequence or remedy to the victims by virtue of the fact that the dog was "on duty" and the officer did not intend the bite injury. On the contrary, the Legislature was simply trying to eliminate a cause of action for criminals who were properly seized by a police canine. CP 197.

The Legislature's intent in retaining a remedy for innocent victims of police dog bites is further evidenced by the requirement that "[i]t is the handler's responsibility to keep their canines under control at all times." WAC 139-05-915(5). No distinction is made between on duty versus off duty. If a K-9 handler has the police dog under control, and does not order the dog to bite, then presumably there would never be an innocent dog bite victim. Prohibiting such innocent victims from recovering for their injuries under the guise that the police dog was lawfully applied would contravene legislative intent.

3. *K-9 Rex was not "applied" within the meaning of RCW 16.08.040(2) because Deputy Ditrich did not intend for Officer Finch to be bitten.*

Nor can this interpretation be reconciled with the express language of the statutory amendment which excepts the owners of police dogs from strict liability, but only in situations involving the

lawful "application" of the police dog. Every word in a statute must be given effect whenever possible, and every word not defined in the statute must be given its ordinary meaning. *State v. Hovrud*, 60 Wn. App. 573, 576, 805 P.2d 250 (1991). "Application" is defined as "[t]he use or disposition made of a thing." Black's Law Dictionary 51 (5th ed.1983). As the Ninth Circuit observed, "a police officer is not liable under Rev.Code Wash. § 16.08.040 for a police dog's bite if the *officer's ordering the dog to bite* was reasonable under the Fourth Amendment." *Miller v. Clark Cnty.*, 340 F.3d 959, 968 n. 14 (9th Cir. 2003) (emphasis added). Here, Deputy Ditrich did not "apply" K-9 Rex to Officer Finch within the meaning of RCW 16.08.040(2) because he did not order the dog to bite anyone, a fact admitted to by the County. Respondents' brief at 28 ("Deputy Ditrich did not intend for the dog to apprehend the suspect, much less Officer Finch."). Because K-9 Rex was not "applied" by Deputy Ditrich within the meaning of RCW 16.08.040(2), the County cannot claim immunity under that subsection.

4. *The County does not qualify for the exception under RCW 16.08.040(2) because it cannot prove that K-9 Rex was lawfully applied to Officer Finch.*

The County misinterprets the statute as requiring Officer Finch to prove a Fourth Amendment violation, whereas the burden is

actually on the County to prove that a lawful seizure under the Fourth Amendment occurred. Officer Finch's only burden in establishing the County's liability under RCW 16.08.040 is to prove that he was bitten by a dog owned by the County. RCW 16.08.040(1). The County bears the burden under RCW 16.08.040(2) of proving the affirmative defense that the bite resulted from the lawful application of a police dog. *Asplundh Tree Expert Co. v. Washington State Dep't of Labor & Indus.*, 145 Wn. App. 52, 61, 185 P.3d 646 (2008) (A statutory exception is an affirmative defense for which the defendant bears the burden of proof.).

However, by the County's own admission, no seizure, lawful or otherwise, occurred in this case. Respondents' brief at 28. As discussed above, there can be no lawful application of a police dog, or lawful seizure under the Fourth Amendment, absent the intent of the K-9 handler for the dog bite to occur. Because there was no lawful seizure of Officer Finch under the Fourth Amendment, the County cannot meet its burden in proving that K-9 Rex was lawfully applied to Officer Finch.

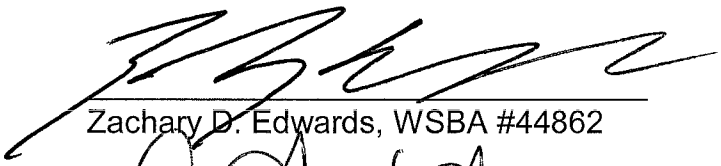
III. CONCLUSION

On the basis of the foregoing, Appellants respectfully request that the Court of Appeals reverse the trial court's Order Granting

Defendants' Motion for Partial Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment and hold that Thurston County is strictly liable under RCW 16.08.040 for the dog bite injuries suffered by Officer Finch.

Respectfully submitted this 12th day of June, 2014.

HAGEN & BATES, P.S.
Attorneys for Appellants



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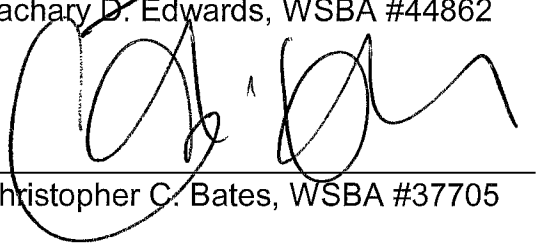

Christopher C. Bates, WSBA #37705

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that I am over the age of 18 and not a party to the above-captioned action. On the date set forth below I served in the manner noted a true and correct copy of the foregoing Reply Brief of Appellants on the following persons:

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DATED: June 12, 2014.

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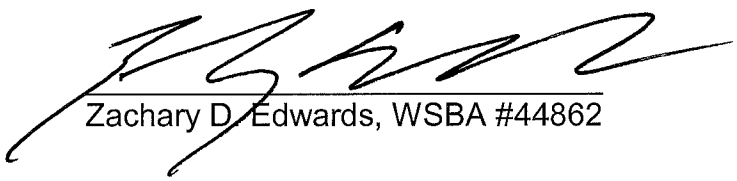

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