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NO. 98221-0
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARIA JESUS SARALEGUI BLANCO,

Appellant,

vs.

**DAVID GONZALEZ SANDOVAL, ALEJANDRA MARTINEZ and the marital
community comprised thereof,**

Defendants,

and

**ERNESTO HERNANDEZ, TERI HERNANDEZ and the marital community
comprised thereof,**

Respondents.

**APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Janice E. Ellis, Judge**

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a lawsuit against a landlord by the guest of a tenant for injuries from the tenant's dog. The tenant's dog was on the tenant's property in a fenced area. The property and the dog were solely in the tenant's control. The undisputed record establishes that the landlord did not know, and had no reason to know, that the tenant's dog would escape the fence, attack, and injure anyone. The superior court granted summary judgment dismissing the lawsuit against the landlord. This Court should affirm.

Respondents/defendants Ernesto Hernandez and Teri Hernandez are the landlords. They respectfully request this Court to uphold the superior court's rulings because under established Washington law appellant/plaintiff Maria Saralegui Blanco lacks admissible proof to establish any claim against landlords Hernandez including a claim under a premises liability theory.

II. STATEMENT OF THE CASE

Ernesto and Teri Hernandez ("landlords Hernandez) own a single family home located at 6507 204th Street NE in Arlington, Washington ("rental home"). (CP 536) David Gonzalez Sandoval ("tenant Sandoval") has rented the home from landlords Hernandez since 2014. (CP 235, 301-03, 537) Although Mr. and Mrs. Hernandez own the rental property

together, Ernesto Hernandez (“Mr. Hernandez”) is in charge of anything relating to the rental properties. (CP 414, 539)

Tenant Sandoval, his mother, two siblings, and a small dog moved into the rental home. (CP 380-81) The written lease was signed on July 2, 2014. (CP 301-03) After the lease expired on July 1, 2016, tenant Sandoval remained in the rental home and continued to pay rent. (CP 380) In 2017, tenant Sandoval’s wife, Alexandra Barajas Gonzalez moved into the home. (CP 46, 381, 400)

Around September 2016, tenant Sandoval purchased a puppy named Enzo, the dog involved in this incident. (CP 382) Tenant Sandoval did not inform Mr. Hernandez about the dog until after it was purchased. (CP 383) Mr. Hernandez saw Enzo once in the summer of 2017 when the dog was still a puppy. (CP 421, 423, 537) Mr. Hernandez was aware that Enzo was a pit bull. (CP 423) The Hernandezes had no information that Enzo had exhibited vicious or aggressive behavior, and Mr. Hernandez did not receive any complaints about the dog. (CP 424-25, 430, 540, 537)

About the same time that tenant Sandoval purchased the puppy in September 2016, tenant Sandoval constructed a fence for Enzo. (CP 383-84, 537) Enzo was described as a “good dog” that would not bark at friends and family. Enzo got along well with tenant Sandoval’s other dog, a small dog. (CP 384)

On May 8, 2018, plaintiff Maria Saralegui Blanco (“plaintiff”), went to tenant Sandoval’s rental home to visit tenant Sandoval’s mother, Elvia Sandoval. (CP 291, 312, 319-22) Teresa Jimenez, Jaylene Lyman, and Katie Lyman accompanied plaintiff Blanco that day. (CP 291, 296, 566) Plaintiff Blanco had visited Ms. Sandoval about five times prior to May 8, 2018. (CP 312) Teresa Jimenez and Jaylene Lyman had accompanied plaintiff Blanco on prior visits. (CP 317-18)

Plaintiff Blanco had seen and was aware of the dog inside the fenced area. (CP 313-14) She testified Enzo did not bark all the time, but claimed she could “see he was violent” because he would jump and bark. (CP 314-15)

On the May 8 visit, Ms. Jimenez went to the door with plaintiff. Blanco. Jaylene and Katie Lyman stayed in the vehicle. (CP 321-22) Plaintiff Blanco and Ms. Jimenez stood on the patio with Ms. Sandoval. (CP 322) Ms. Jimenez and Ms. Sandoval stood with their backs towards the fence. (CP 291, 325) Plaintiff Blanco was facing the fence. *Id.*

As the three women finished talking, plaintiff Blanco saw Enzo jump the fence and run at and bite her. (CP 322-26) Jaylene and Katie Lyman were in the vehicle and did not see how Enzo escaped the fenced area. (CP 297, 568)

Plaintiff filed suit alleging negligence against tenants Sandoval and against landlords Hernandezes. (CP 555-63) Landlords Hernandez moved for summary judgment on the basis they are not liable under Washington statute, common law strict liability, or premises liability. (CP 504-43) Plaintiff opposed the summary judgment arguing there was liability under *Oliver v. Cook*. (CP 484-500) Landlords Hernandez filed a reply on September 3, 2019, distinguishing *Oliver* from the present case. (CP 221-25) The superior court concluded there were no genuine issues of material fact and landlords Hernandez were entitled to judgment as a matter of law. The superior court dismissed the lawsuit against landlords Hernandez. (CP 219-20) Plaintiff Blanco then filed a motion for Reconsideration and Motion to Certify. (CP 150-56 , 215-18) Both motions were denied. (CP 29-32, 37-39)

Plaintiff sought and this Court granted direct review solely on the landlord premises liability question. (CP 1-27)

III. ISSUES PRESENTED FOR REVIEW

1. Did the superior court correctly dismiss the suit against the Hernandezes because they as landlords owe no duty to plaintiff—a third party and tenant’s guest?

2. Did the superior court correctly dismiss the suit against the Hernandezes because they did not possess or control the rental property and therefore owed no duty to plaintiff?

3. Did the superior court correctly dismiss the suit against the Hernandezes because-assuming for sake of argument that plaintiff was an invitee and Restatement (Second) of Torts Sec. 343 applies, the Hernandezes neither possessed nor controlled the rental property and had knowledge of or any reason to know that the dog owned by the tenant was potentially dangerous?

4. Did the superior court correctly dismiss the suit against the Hernandezes because assuming for sake of argument that plaintiff was a licensee and Restatement (Second) of Torts Sec. 342 applies, the Hernandezes neither possessed nor controlled the rental property, and had no knowledge of or any reason to know that the dog owned by the tenant was potentially dangerous?

5. Did the superior court correctly dismiss the suit against the Hernandezes because plaintiff lacks admissible proof to create a genuine issue of fact to establish her negligence claim against the Hernandezes?

6. Did the superior court correctly dismiss the suit against the Hernandezes because (a) *Oliver v. Cook* did not create a “dog bite” exception to premises liability and (b) any premises liability claim requires

proof that the landowner was in possession or control of the property and the landowner knew or had reason to know of a dangerous condition on the land?

IV. ARGUMENT

A. STANDARD OF REVIEW.

On appeal from a summary judgment, appellate courts engage in de novo review and make the same inquiry as the trial court, looking to the documents presented to determine if there are any genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Here, there are no disputed issues of material fact, the Hernandezes are entitled to judgment as a matter of law, and this Court should affirm.

B. AS LANDLORDS, DEFENDANTS HERNANDEZ ARE NOT LIABLE TO THIRD PARTIES.

Washington law has established, and continues to hold, that landlords owe no greater duty to the invitees or guests of tenants than “he owes to the tenant himself.” *Frobig v. Gordon*, 124 Wn.2d. 732, 735, 881 P.2d 226 (1994); *Clemmons v. Fidler*, 58 Wn. App. 32, 37, 791 P.2d 257 (1990); *see also Regan v. Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969). *Frobig* demonstrates why summary judgment for landlords Hernandez should be affirmed.

Frobig involved landlords who leased their property to a business that provided wild and domestic animals for demonstrations. *Id.* at 733. The tenants kept various animals on the property, including a Bengal tiger. *Id.* The landowners received complaints from neighbors and were aware of the tiger. In response to those complaints, the landlord asked the tenants to cease their commercial business or vacate. *Id.* at 734. Soon after plaintiff, a guest of the tenant, was attacked by the tiger and claimed the landlord was liable for her injuries. *Id.*

This Court held landlords have no duty to protect third parties from “a tenant’s lawfully owned but dangerous animals.” *Id.* at 737-41. Further, a landlord is liable to a tenant—and therefore, to a tenant’s guest-- only for harm caused by latent defects that existed at the outset of the lease of which the landlord had actual knowledge and of which the landlord failed to inform the tenant. *Id.* at 735. It is a general rule that if a condition is developed or created after the property has been leased, “a landlord is not responsible, either to persons injured on or off the land, for any conditions which develop or are created by the tenant after possession has been transferred.” *Id.* at 736. This principle is supported by RCW 59.18.060, which provides in pertinent part:

No duty shall devolve upon the landlord to repair a defective condition under this section, nor shall any defense or remedy

be available to the tenant under this chapter, where the defective condition complained of was caused by the conduct of such tenant, his or her family, invitee, or other person acting under his or her control . . .

RCW 59.18.060(15).

More recently in *Phillips v. Greco*, the court again examined the question of a landlord's liability to third parties. *Phillips v. Greco*, 7 Wn. App.2d 1, 433 P.3d 509 (2018). In *Phillips*, the plaintiff was injured when a step on the deck to a rental single-family dwelling broke. Plaintiff was visiting her boyfriend, who was renting the home. *Id.* at 3. The deck was attached to the single-family dwelling, and was used only by the tenants of the single-family dwelling. *Id.* In analyzing whether the landlord was liable for the plaintiff's injuries, the court reaffirmed that a landlord owes no greater duty to third parties than he would owe to the tenant. *Id.* at 5; *Frobig*, 124 Wn.2d at 735. Further, under common law, a landlord has no duty to repair non-common areas and is not liable to a tenant for injuries caused by apparent defects after exclusive control has passed to the tenant, absent an express covenant to repair. *Id.* The court determined that not only was the deck not a common area, but that the landlord was not the possessor of the single-family dwelling and as such, did not owe the third party a duty of care. *Id.* at 8.

Phillips is distinguishable from *Rossiter v. Moore*. In *Rossiter, Rossiter v. Moore*, 59 Wn.2d 722, 723, 370 P.2d 520 (1962), the tenant's guest was injured when she fell from the back porch. Before the tenant moved in, the landlord removed the porch railing intending to replace the railing. The *Rossiter* court noted a landlord is liable to the tenant and the tenant's guest for the landlord's affirmative act of negligence. *Id.* at 725; *Phillips*, 7 Wn. App.2d at 8. In *Phillips*, however, the landlord did not lease the property in a dangerous condition and therefore, the landlord was not liable to third parties. *Id.* at 8. The courts' decisions regarding landlord liability promote the policy of "placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability." *Clemmons*, 58 Wn. App. at 38.

Here tenant Sandoval is the only one who owed a duty and has liability to plaintiff, the tenant's guest. This Court should reject petitioner's plea that liability should be imposed against landlords Hernandez merely because they have the financial means to pay a judgment. The rental property is a single family home with no common areas. Landlords Hernandez did not rent the property in a dangerous condition. Landlords Hernandez did not remove any fixtures from the rental property and there was no express covenant to repair. Tenant Sandoval brought Enzo onto the rental property. Tenant Sandoval built a fence after renting the property and

while in exclusive possession of the property. Any relevant conditions of the land were created by tenant Sandoval. Consequently, landlords Hernandez had no duty to either repair any allegedly defective condition – or repair any non-common areas. Following the holdings in *Phillips*, *Rossiter*, and the Landlord-Tenant Act,¹ landlords Hernandez are not liable to any third party – including the tenant’s guest, whether an invitee or licensee.

C. DEFENDANTS HERNANDEZ ARE NOT THE POSSESSORS OF LAND AND OWE NO DUTY TO PLAINTIFF.

Plaintiff argues a landlord has a duty to protect a tenant’s guest from an attack by a tenant’s dog if the landlord (a) retained control over the premises, and (b) the landlord knew or had reason to know the dog had dangerous propensities. Restatement (Second) of Torts, Sec. 342 and Sec. 343. (Pet. Br. at 31-3) Plaintiff argues the record creates material factual questions for both elements. Plaintiff misapprehends Washington law. Plaintiff mischaracterizes the record. No Washington court has held that a landlord owes a duty to protect a tenant’s guest from the tenant’s dog.

¹ As this Court recently held in *Gerlach v. The Cove Apartments, LLC*, ___ Wn.2d ___ (No. 97325-3 August 27, 2020), a tenant’s guest does not have a cause of action against the landlord under the RLTA.

Assuming arguendo that this Court were to adopt a new rule of law that a landlord owes a duty to protect a tenant's guest from the tenant's dog, plaintiff has not and cannot establish the two-part test she has proposed. The Hernandezes did not have control of the rental property. Tenant Sandoval had control and was in sole possession of the rental property. "Except as limited by the terms of the leasehold, a tenant has a present interest and estate in the property . . . , which gives him *exclusive possession against everyone, including the lessor.*" *Aldrich v. Olson*, 12 Wn. App. 665, 667, 531 P.2d 825 (1975) (emphasis added); *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949). A sole tenant's right to possession is exclusive for the duration of the leasehold. *City of Bellevue v. Jacke*, 96 Wn. App. 209, 212, 978 P.2d 1116 (1999). The right to possession is the basis for various Washington statutes and case law. *FPA Crescent Associates, LLC v. Jamie's, LLC*, 190 Wn. App. 666, 675, 360 P.3d 934 (2015). In fact, it is a landlord's burden to prove his or her right to possession in an unlawful detainer action. *Id.* The Hernandezes and Mr. Sandoval entered into a lease in 2014. When the lease expired, Mr. Sandoval continued as a month to month tenant. As tenant, Mr. Sandoval had exclusive possession and control of the premises. The Hernandezes are mere landlords with no possession. Because the Hernandezes did not

possess the land, no analysis under the Restatements (Second) of Torts applies to the Hernandezes.

Plaintiff cites various cases in support of her argument that the Hernandezes had control. (Pet. Br. at 32-37) *Geise v. Lee*, 84 Wn.2d 866, 529 P.2d 1054 (1975) and *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996) involved a landlord's liability for common areas. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996), merely cited the common area statements from *Geise*; and *Sjogren v. Props. of the Pac. N.W.*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003), merely cites the same portion of *Degel* referencing *Geise* about common areas which are under the landlord's control. There are no commons areas involved here. Tenant Sandoval had exclusive control and possession of the single family home.

Plaintiff cites cases from other jurisdictions which also recite the principle that a landlord has responsibility for common areas on rental property. *Fouts ex rel. Jensen v. Mason*, 592 N.W. 2d 33, 38 (Iowa 1999) and *Linebaugh v. Hyndman*, 213 N.J. Super. 117, 121-22 (Super. Ct. App. Div. 1986), and *Twogood v. Wentz*, 634 N.W. 2d 514, 2001 ND 167 (2001). *Fouts* and *Linebaugh* both involved a common backyard; there is no common area involved here. *Twogood* supports the superior court's order here. In *Twogood*, a utility meter reader was bit by the tenant's dog. She

sued the landlord. The case was dismissed on summary judgment. The North Dakota Supreme Court affirmed. Under North Dakota premises liability law, similar to Washington law, a property owner must have control over the property before he or she has a duty to an injured party. 634 N.W. 2d at 518. The landlord did not have control of the property. Without that, the landlord owed no duty to the injured meter reader.² Here it is undisputed that landlords Hernandez neither possessed nor controlled the property.

Plaintiff argues the right to control is equivalent to control. (Pet. Br. at 34-35) She argues a jury could find landlords Hernandez did not surrender control over the rental property, particularly the fence, because the lease agreement required tenant Sandoval to obtain permission from the landlord to have a pet and to make improvements to the property. (Pet. Br. at 35-36) She cites to non-Washington cases none of which apply here. *Holcomb v. Colonial Associates, LLC*, 358 N.C. 501, 597 S.E. 2d 710

² The North Dakota Supreme Court in *Twogood* also addressed the question of whether the landlord had knowledge of the dangerous propensity of the tenant's dog. 634 N.W.2d at 519-20. The *Twogood* court looked at the California decision of *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975), the Nebraska case of *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989), and the Indiana Court of Appeals decision in *Goddard v. Weaver*, 558 N.E.2d 853 (Ind. Ct. App. 1990). Each of the three courts concluded to hold a landlord liable for a dog injury, the landlord had to have control of the property and know of the dangerous propensity of the dog.

(2004); *Gallick v. Barto*, 828 F. Supp. 1168 (M.D. Pa. 1993) *Brotko v. U.S.*, 727 F. Supp. 78 (D.R.I. 1989)

In *Brotko*, one tenant's dog bit another tenant. The tenants both lived at Navy housing. Summary judgment dismissing the case against the government was reversed on appeal based on factual issues about the government's knowledge of the dog's dangerous propensities. The appellate court concluded the government had sufficient control over the situation because Navy regulations required it to enforce pet control regulations at rental properties. The *Brotko* court stated: "[T]he regulations give the Housing and Security personnel sufficient control over the premises to require the exercise of due care when they acquire knowledge that the dog has become an actual or potential menace to other tenants." 727 F. Supp. at 84-85. A lease provision requiring the landlord's permission for pets or for making improvements is a far cry from *Brotko* where Navy regulations imposed on the property owner the obligation to enforce pet control laws.

Holcomb involved a lease containing an express provision that the tenant must remove any pet on written notice from the landlord that the pet created a nuisance, disturbance, or in the landlord's discretion was undesirable. The majority concluded the lease provision gave the landlord

sufficient control for a jury to find the landlord had control over the tenant's dog. Two of the seven justices dissented; the dissent maintained an animal is not a condition of the premises and the lease provision was too remote to constitute landlord control. 358 N.C. at 511-12. The lease provisions here do not reserve to the landlord the power to control animals or enforce animal regulations.

Gallick involved a ferret bite to a tenant's guest. The tenant's lease prohibited pets. The landlord was aware that the ferret was at the rental property. The court, applying Pennsylvania law, determined a ferret is a wild animal for whom an owner or person in control could be liable. The court concluded the landlord's knowledge that the tenants owned a ferret and the lease provision prohibiting animals created sufficient factual basis for a jury to conclude the landlord had knowledge of dangerous propensities and sufficient control to be liable. Again, here there is no similar lease provision. And plaintiff lacks proof landlords Hernandez knew or had reason to know that the dog had dangerous propensities.³

³ Plaintiff refers to the Pierce County Superior Court order in *Hambrick v. Clark*. (Pet. Br. at 42-43) The superior court decision is not precedential nor is it persuasive. There is no explanation of why the superior court denied defendants' summary judgment motion. Moreover, the record in *Hambrick v. Clark* are distinctly different. Plaintiff there appears to have presented evidence establishing the defendant knew the dog was dangerous. (CP 182-183) This Court should disregard any reference to the superior court case.

Similarly, assuming for sake of argument that this Court were to adopt a new rule of law that a landlord owes a duty to protect a tenant's guest from the tenant's dog, there is no evidence establishing that Mr. Hernandez knew or had reason to know that Enzo had dangerous propensities. Mr. Hernandez saw Enzo once in the summer of 2017 when the dog was still a puppy. (CP 421, 423, 537) While Mr. Hernandez was aware that Enzo was a pit bull, The Hernandezes had no information that Enzo had exhibited vicious or aggressive behavior as no neighbors had complained about the dog. (CP 424-25, 430, 540, 537) These undisputed facts, even construed in the light most favorable to plaintiff, the non-moving party, establish that landlords Hernandez had no reason to believe the dog was dangerous. Plaintiff contends that Mr. Hernandez had knowledge that the dog had dangerous propensities because he had heard in media reports that pit bulls can be dangerous. (Pet. Br. at 43-44) Whatever landlord Hernandez might have heard, read, or seen in media reports about pit bulls, it does not equate to knowledge that tenant Sandoval's dog had dangerous propensities. She argues that a jury should be allowed to consider that pit bulls are considered by some organizations to be dangerous. In essence, plaintiff contends that there is a legal presumption of dangerousness for certain dog breeds. Washington's legislature expressly rejected such a presumption when it enacted RCW 16.08.110, adopted in 2019 and

effective on January 1, 2020. The statute prohibits local jurisdictions from adopting breed specific laws unless express conditions are met. Among those conditions is a process to exempt dogs which pass a “canine good citizen test.”

When enacting RCW 16.08.110, the legislature recognized that local jurisdiction retain authority to enact breed specific regulations. The legislature was concerned about overly broad and presumptive regulations. The legislature found a dog’s breed does not make it inherently dangerous. Instead, a dog’s behavior should be the focus. The legislative finding states:

(1) A number of local jurisdictions have enacted ordinances prohibiting or placing additional restrictions on specific breeds of dogs. While the legislature recognizes that local jurisdictions have a valid public safety interest in protecting citizens from dog attacks, **the legislature finds that a dog’s breed is not inherently indicative of whether or not a dog is dangerous and that the criteria for determining whether or not a dog is dangerous or potentially dangerous should be focused on the dog’s behavior.**

(2) The legislature further finds that **breed-specific ordinances fail to address the factors that cause dogs to become aggressive and place an undue hardship on responsible dog owners who provide proper socialization and training.** The legislature intends to encourage local jurisdictions to more effectively and fairly control dangerous dogs and enhance public safety by focusing on dogs’ behavior rather than their breeds.

2019 c 199 (emphasis added).

Plaintiff has no admissible proof to establish that landlord Hernandez knew or should have known that Enzo was dangerous or potentially dangerous. Furthermore, plaintiff's reliance on Restatement Second of Torts, Sec. 509 is misplaced. (Pet Br. at 39-40) It does not apply here. Section 509 deals with the knowledge of the possessor of the dog. Landlords Hernandez did not possess Enzo. Tenant Sandoval owned and possessed the dog. Plaintiff's alternative argument that the fence was a dangerous condition is equally faulty. Plaintiff contends that a section of the fence had deteriorated. Plaintiff surmises that the allegedly deteriorated section of the fence is causally linked to Enzo's escape from the fenced area. The record is devoid of any admissible proof that the condition of the fence contributed to the dog attack. Even viewed in the light most favorable to plaintiff, nothing in the record creates a reasonable inference that the fence condition is a proximate cause of the injury to plaintiff. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (nonmoving party may not rely on speculation, opinions, or conclusory statements to establish genuine issue of material fact), *abrogated on other grounds by Mikkelsen v. PUD No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017). Plaintiff's submissions were nothing more than allegation. CR 56(e).

Attempting to draw an analogy to work place safety, plaintiff argues the landlord is in the “best” position to have prevented harm from the dog. (Pet. Br. at 27-28) She contends landlords Hernandez were in the “best position to ensure safety.” Surely tenant Sandoval, the dog owner and exclusive possessor and occupier of the rental property, was in the best position to prevent harm and ensure safety. The tenants’ apparent lack of financial resources does not justify shifting responsibility to another entity. The workplace injuries cases (*Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 452 P.3d 1205 (2019); *Afoa v. Port of Seattle (I)*, 176 Wn.2d 460, 296 P.3d 800 (2013); *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), and *Kelley v. Howard Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978)) address an entirely different scenario involving a special body of case law for workplace safety. These case holdings were premised on the property owner’s right of control of the work site location and are inapplicable here. Here the Sandovals had exclusive possession and control of the premises; landlords Hernandez did not, therefore, the workplace cases would not change the outcome here.

D. *OLIVER V. COOK* DOES NOT EXTEND LIABILITY TO A LANDOWNER WHO DOES NOT POSSESS THE LAND.

Plaintiff argues that *Oliver v. Cook* created new law of liability for landlords involving injuries from dogs. *Oliver* did not create new law. The

Court applied recognized Washington law to a property owner who had possession of the property and knowledge of a dog's dangerous propensities. Based on the record, the *Oliver* court concluded there were questions of material fact about whether the property owner had violated his duty to keep the premises reasonably safe from damages that the invitee might not anticipate.

The facts of *Oliver* are as follows: the defendant owned property and plaintiff used the defendant's property to operate an auto shop. *Oliver v. Cook*, 194 Wn. App. 532, 535, 377 P.3d 265 (2016). The defendant's friend, Henry Cook, owned a dog who had at least two potentially dangerous dog notifications. *Id.* at 536; *see also* RCW 16.08.070(2)(c) (A dangerous dog is defined as "any dog that according to the records of the proper authority . . ." has inflicted severe injury without provocation or has been previously found to be potentially dangerous, *Id.* at 537 n.4). The defendant knew the dog was dangerous and avoided cars when the dog was in the vehicle. *Id.* at 544. Henry Cook arrived at the defendant's property with the dog and when they left, the dog was left in defendant's truck with the window partially open. *Id.* at 535. The plaintiff arrived on the property and as he walked by the defendant's truck, the dog bit him. *Id.* at 535-36. Prior to the incident, the plaintiff had never seen the dog at the auto shop. The court analyzed whether the defendant owed a duty to the plaintiff as an

invitee looking to the Restatement (Second) of Torts Sec. 343. *Id.* at 544-45. Based on the defendant's knowledge of the dog's aggression, that the plaintiff had not seen the dog prior, and that the defendant left the dog unsupervised with the window down, (in effect exercising some form of control or possession of the dog), the court held the defendant owed the plaintiff a duty. *Id.*

There is no dispute that section 343 applies only to the possessor of land. *Oliver* held that a landowner *in possession of the property* was liable to invitees. This did not deviate from well settled law. Here landlords Hernandez were not in possession of the rental home. Enzo was not a dangerous dog under the plain language of the statute. Plaintiff had been to the rental home on several occasions and saw Enzo on the property, and had multiple opportunities to realize the potential danger. Following the holding in *Oliver*, there is but one conclusion, landlords Hernandez did not owe plaintiff a duty. This Court should affirm.

E. LANDLORDS HERNANDEZ DID NOT OWE A DUTY TO PLAINTIFF AS AN INVITEE.

Despite the fact that tenant Sandoval was in possession of and had exclusive control of the rental property, plaintiff argues a jury could find landlords Hernandez liable under Restatement (Second) of Torts Sec. 343.

Plaintiff contends she was an invitee and the dog was a condition of the land.

Restatement (Second) of Torts Sec. 343 sets forth the elements of a land possessor's liability to an invitee. It states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (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 reasonable care to protect them against the danger.

(Emphasis added.)

On its face, section 343 only applies to someone who is a possessor of land. *Phillips*, 7 Wn. App.2d at 6; *Pruitt v. Savage*, 128 Wn. App. 327, 331, 115 P.3d 1000 (2005). A landlord is not the possessor of non-common areas. *Id.* The *Phillips* court analyzed and differentiated its facts from the facts in *Tincani v. Inland Empire Zoological Soc'y*. *Tincani* involved a landowner in possession of the land, and *Phillips* involved an owner who was not a possessor. *Id.* at 7; *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 875 P.2d 621 (1994). Therefore, the land owner in *Phillips* was not liable to the tenant's invitee. *Id.* at 8.

Assuming plaintiff could be considered an invitee under Restatement (Second) of Torts Sec. 332 (adopted in *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986)), she was an invitee of the tenants, who were in exclusive possession and control of the property.⁴ Landlords Hernandez owed no duty to plaintiff under Restatement (Second) of Torts Sec. 343 because they did not possess the land.

Furthermore, plaintiff's theory of liability against the Hernandezes under Restatement (Second) of Torts Sec. 343 also fails because she cannot establish a condition that posed an unreasonable risk of harm that landlords Hernandez knew or should have known about. Plaintiff contends the dog was a condition of the land. Whether a dog can be a condition of the land, there is nothing in the record to establish a triable issue of fact about

⁴ Plaintiff argues that a person can be an invitee without conferring an economic benefit to the occupier of the land. She contends that a jury could conclude she was an invitee under the test discussed in *Thompson v. Katzer*, 86 Wn. App. 280, 936 P.2d 421 (1997), because she was at the rental property for a religious purpose. (Pet. Br. at 29-30) She cites to *Huston v. First Church of God of Vancouver*, 46 Wn. App. 740, 732 P.2d 173 (1987), for the principle that a church member is considered the church's invitee. To the extent the *Thompson* case expanded the test for an invitee, an invitee's status depends on what benefit is bestowed to the occupier of the land. Here the occupier of the land was tenant Sandoval, not landlords Hernandez. And whether or not plaintiff's visit to tenant Sandoval's property was for a religious purpose, *Huston* involved a church member who was injured at the church and was suing the church, the occupier and possessor of the property. Plaintiff's status depends on her relationship with tenant Sandoval, the occupier and possessor of the property.

landlords Hernandez knowing or have reason to know that the dog was dangerous.

Alternatively plaintiff contends the weathered fence was a dangerous condition for purposes of Restatement (Second) of Torts Sec. 343. Plaintiff has failed to prove the weathered fence caused plaintiff harm. Therefore, the only condition of the land was Enzo, and plaintiff had discovered this “danger” as she had been to the home five times prior, had seen Enzo, and thought he was violent. Despite this concern, she continued to return to the property. Based on established Washington law, landlords Hernandez were not in possession and did not owe Plaintiff a duty.

F. LANDLORDS HERNANDEZ DID NOT OWE PLAINTIFF A DUTY IF SHE WAS A LICENSEE.

Section 330 of the Restatement (Second) of Torts defines licensee as “a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.” Restatement (Second) of Torts Sec. 330 (1965).

Section 342 outlines when a possessor of land is liable to licensees:

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts Sec. 342 (1965).

Licensees include social guests. Further, in *Younce*, this Court determined that social guests are licensees and explained that a guest “is expected to take the premises as the possessor himself uses them . . .” *Younce*, 106 Wn.2d at 668; *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975); *see also* comment *h*(3) Restatement (Second) of Torts § 330. Ultimately, this Court found that the possessor of land did not owe a duty to the licensee as no dangerous condition existed of which the licensee was not aware of or did not realize the risks involved. *Id.* at 669. *Tincani* analyzed a licensee’s knowledge and held that a licensee’s full understanding that a condition is dangerous ends any liability for the condition and the land possessor – the zoo – did not owe the plaintiff a duty. *Tincani*, 124 Wn.2d at 135-38.

The Restatement and subsequent case law make it clear that liability only attaches to a possessor of land, not simply a land owner or landlord. As stated previously, tenant Sandoval had possession of the land as the tenant. Therefore, if Plaintiff was in fact a licensee, tenant Sandoval would be the one—and the only one-- subject to liability for any injury sustained by the dog. In addition, similarly to the analysis for invitee, no duty is owed

to plaintiff as she was aware of the “dangerous condition” due to her prior visits. Plaintiff had knowledge of the risks involved by returning to the property. Based on the holding in *Younce* and *Tincani*, landlords Hernandez owed no duty to plaintiff.

Plaintiff argues if she is a licensee, landlords Hernandez owe her a duty under *Singleton v. Jackson*, 85 Wn. App. 835, 935 P.2d 644 (1997). (Pet. Br. at 30-31) In *Singleton*, the main issue was whether a Jehovah’s Witness visiting a rental home was a trespasser or licensee. The court determined a door-to-door solicitor is a licensee unless or until the land occupier or possessor specifically declines permission to come onto the land. Based on the facts in *Singleton*, the court concluded plaintiff was a licensee. The court then held, without addressing whether Jackson the owner of the home who did not live there full time was the land occupier or possessor, that Jackson did not breach any duty to plaintiff because Jackson had no notice. *Singleton* does not stand for the proposition that landlords Hernandez have any duty to plaintiff, let alone that plaintiff has presented admissible proof that any such duty was breached.

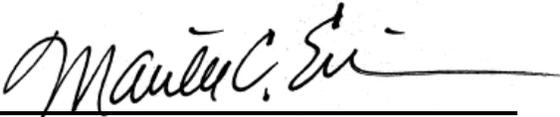
V. CONCLUSION

Defendants Hernandez were simply landlords, not land possessors. Therefore, they have no duty to plaintiff under a premise liability theory nor

under any other theory. Liability rests solely with codefendants and, as such, the superior court's ruling should be affirmed.

DATED this 18th day of September, 2020.

REED McCLURE

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, a copy of the foregoing *Brief of Respondents*, was served on counsel below, and a copy was filed, pursuant to RAP 9.6(a), via the Washington State Appellate Court's Electronic Filing portal:

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DATED this 18th day of September, 2020.



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