

No. 73927-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SHELLY CARR, individually,

Appellants/Plaintiffs,

vs.

JOSE AND LISA RIVEROS, individually and in their marital
capacity; STATE FARM FIRE & CASUALTY, an Illinois corporation;
and STATE FARM GENERAL INSURANCE COMPANY, an Illinois
corporation,

Respondents/Defendants,

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR..... 2

Assignments of Error 2

 No. 1 The trial court erred in granting summary dismissal of all claims on August 21, 2015..... 2

 No. 2 The trial court erred in denying reconsideration of summary dismissal of all claims on September 9, 2015..... 2

Issues Pertaining to Assignments of Error 2

 No. 1 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where the Riveros (1) knew about the inspection and that complete access to the house was needed, and (2) were asked to crate the dog but failed to do so? 3

 (*Assignment of Error No. 1, 2*)..... 3

 No. 2 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where there was no evidence that Carr was a trespasser? 3

 (*Assignment of Error No. 1, 2*)..... 3

 No. 3 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where a reasonable person in Carr’s shoes would have understood that they were permitted to be on the premises for the benefit of Sellers’ business or selling the home? 3

 (*Assignment of Error No. 1, 2*)..... 3

 No. 4 Whether the trial court erred in summarily dismissing Carr’s statutory strict liability claim where the undisputed

	evidence shows that the Riveros gave Carr implied permission to be on the premises? (<i>Assignment of Error No. 1, 2</i>).....	3
	No. 5: Whether the trial court erred in summarily dismissing Carr’s statutory strict liability claim where the Sellers gave implied permission to be on the premises? (<i>Assignment of Error No. 1, 2</i>).....	3
	No. 6: Whether the trial court erred in summarily dismissing Carr’s statutory strict liability claim where the undisputed evidence was that it was customary in the real estate industry for family members of prospective home buyers to attend home inspections? (<i>Assignment of Error 1, 2</i>)....	4
III.	STATEMENT OF THE CASE.....	4
	A. Relevant Facts.....	4
	B. Relevant Procedural History	9
IV.	ARGUMENT.....	11
	A. Standard of Review.....	11
	B. The Trial Court Erred In Dismissing Carr’s Common Law Claim Brought Under Restatement (Second) of Torts § 518..	12
	C. The Trial Court Erred In Dismissing Carr’s Strict Liability Claim Brought Under 16.08.040 RCW.....	18
V.	CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

<i>Arnold v. Laird</i> , 94 Wn.2d 867, 621 P.2d 138 (1980).....	13, 14
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	11
<i>Barber v. Bankers Life & Cas. Co.</i> , 81 Wn.2d 140, 500 P.2d 88 (1972).....	11
<i>Beeler v Hickman</i> , 50 Wn. App. 746, 750 P.2d 1282 (1988).....	12, 14
<i>Frobig v. Gordon</i> , 124 Wn.2d 732, 881 P.2d 226 (1994).....	18
<i>Hansen v. Sipe</i> , 34 Wn. App. 888, 664 P.2d 1295 (1983).....	20
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002).....	11
<i>Kleyer v. Harborview Med. Cntr. of University of Washington</i> , 76 Wn. App. 542, 887 P.2d 468 (1995).....	12
<i>McMilian v. King County</i> , 161 Wn. App. 581, 255 P.3d 739 (2011).....	20
<i>Schneider v. Strifert</i> , 77 Wn. App. 58, 888 P.2d 1244 (1995).....	14
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	12
<i>Singleton v. Jackson</i> , 85 Wn. App. 835, 935 P.2d 644 (1997).....	16, 20
<i>Sligar v. Odell</i> , 156 Wn. App. 720, 233 P.3d 914 (201).....	20
<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	16
<i>Westberry v. Blackwell</i> , 282 Or. 129, 577 P.2d 75 (1978).....	13
<i>White v. Kent Med. Ctr., Inc., PS</i> , 61 Wn.App. 163, 810 P.2d 4 (1991).....	15

<i>Winter v. Mackner</i> , 68 Wn.2d 943, 416 P.2d 453 (1966).....	16
--	----

STATUTES

RCW 16.08.040	1, 2, 9, 10, 18, 19, 23
RCW 16.08.050	18, 19, 20
RCW 59.18.150(1).....	5
RCW 59.18.150(a).....	22

RULES

CR 56(c).....	11
---------------	----

OTHER AUTHORITIES

<i>Black’s Law Dictionary</i> (9th Ed. 2009).....	20
Restatement (Second) of Torts § 330.....	16
Restatement (Second) of Torts § 332.....	10, 13
Restatement (Second) of Torts § 342.....	13
Restatement (Second) of Torts § 509.....	13
Restatement (Second) of Torts § 513.....	13
Restatement (Second) of Torts § 518..	1, 2, 3, 10, 12, 13, 14, 15, 16, 18

I. INTRODUCTION

Shelly Carr was bit in her right, dominant hand by a Rottweiler-Labrador mix while she was visiting a prospective home purchase with her daughter during a duly authorized home inspection. Her daughter—a first time home buyer—had invited Carr to come along with her to the home inspection. As a result of the dog bite, Carr spent several days at the hospital fighting an infection, and she still suffers permanent disfigurement in the form of “trigger finger,” a condition whereby her right middle finger sometimes gets stuck open and never closes completely. In addition to the pain and suffering, Carr incurred almost \$50,000 in medical bills for treatment of her dog bite injuries.

The home in which Carr was bit was owned by Nicholaas and Lisa Groenveld-Meijer, who were renting the premises to Jose and Lisa Riveros. The undisputed evidence is that the Riveros knew about the home inspection, did not object, did not attempt to limit those in attendance, and did not attempt to limit their access. The Riveros owned the Rottweiler-Labrador mix who bit Carr, and were asked to crate the dog by a real estate agent because full access to the home was needed for the inspection. But the Riveros did not crate the dog, and Carr was bit as a result when she attempted to help the property inspector work around the dog.

The trial court dismissed both Carr’s common law claim brought under Restatement (Second) of Torts § 518 and her statutory strict liability claim brought under RCW 16.08.040. Carr appeals this summary

dismissal, arguing that her common law claim should remain because the duty under § 518 is clear and issues of fact remain as to whether the Riveros acted reasonably in failing to crate their Rottweiler-Labrador mix as requested. Carr was not a trespasser but rather had implied permission to be on the property as part of the business of the property owners and per real estate custom. Carr also argues that the trial court erred in dismissing her statutory strict liability claim brought under RCW 16.08.040, maintaining that she was “lawfully” on the premises, as defined in RCW 16.08.050, after having received implied consent to be there. Alternatively, Carr argues that the statutory definition of “lawful” under RCW 16.08.050 does not apply because the third party owners of the premises are the parties upon whose permission depends, and the owners of the premises unquestionably gave implied permission for Carr’s presence given the facts generally and real estate custom.

For these reasons, more fully explained below, Carr respectfully asks this court to reverse summary dismissal of this case and remand for trial.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1 The trial court erred in granting summary dismissal of all claims on August 21, 2015.
- No. 2 The trial court erred in denying reconsideration of summary dismissal of all claims on September 9, 2015.

Issues Pertaining to Assignments of Error

- No. 1 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where the Riveros (1) knew about the inspection and that complete access to the house was needed, and (2) were asked to crate the dog but failed to do so?
(Assignment of Error No. 1, 2)
- No. 2 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where there was no evidence that Carr was a trespasser?
(Assignment of Error No. 1, 2)
- No. 3 Whether the trial court erred in summarily dismissing the common law claim brought under Restatement (Second) of Torts § 518 where a reasonable person in Carr's shoes would have understood that they were permitted to be on the premises for the benefit of Sellers' business or selling the home?
(Assignment of Error No. 1, 2)
- No. 4 Whether the trial court erred in summarily dismissing Carr's statutory strict liability claim where the undisputed evidence shows that the Riveros gave Carr implied permission to be on the premises? *(Assignment of Error No. 1, 2).*
- No. 5: Whether the trial court erred in summarily dismissing Carr's statutory strict liability claim where the Sellers gave implied permission to be on the premises? *(Assignment of Error No. 1, 2).*

No. 6: Whether the trial court erred in summarily dismissing Carr’s statutory strict liability claim where the undisputed evidence was that it was customary in the real estate industry for family members of prospective home buyers to attend home inspections? (*Assignment of Error 1, 2*).

III. STATEMENT OF THE CASE

A. Relevant Facts

On March 13, 2013, Shelly Carr’s daughter, Brynn Sutherland, and her husband, Ryan Sutherland (hereinafter, the “Sutherlands”), made an offer to purchase a home owned by Nicholaas and Lisa Groenveld-Meijer (hereinafter, the “Sellers”).¹ The Sellers’ home was then being rented by Jose and Lisa Riveros (hereinafter, “Riveros”).² The Riveros’ had a 12 year-old Rottweiler-Lab mix.³

In the purchase and sale agreement, the Sellers agreed to permit home inspections that the buyer’s lender required:

INSPECTION. Seller agrees to permit inspections required by the Buyer’s lender, including but not limited to structural, pest, heating, plumbing, roof, electrical, septic, and well inspections. Seller is not obligated to pay for such inspections unless otherwise agreed.⁴

The lease also allowed for such an inspection, and provided, “The Landlord will make periodic inspection of the interior and exterior of the property. Proper notice will be given prior to any inspection. Failure to

¹ CP 736, ¶2.

² CP 736, ¶4.

³ CP 736.

⁴ CP 641.

allow any such inspection after proper notice shall be a material violation of this agreement.”⁵ Moreover, not only did the lease allow the Sellers to make periodic inspections of the leased property,⁶ but also Washington landlord tenant law provided: “The tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.” RCW 59.18.150(1).

As the Riveros’ admitted in their motion for summary judgment, the Sellers were communicating with the Riveros’ about the inspection date and the dog,⁷ per the requirements of the lease and Washington Landlord Tenant Law. Specifically, the Riveros’ were informed that the inspection group would consist of the inspector, the Sutherlands, and the Sutherlands’ agent.⁸ There is no evidence in the record that the Riveros’ expressly limited their permission for entry into the residence to this group.⁹

On March 13, 2013, the Sutherlands’ agent, Henry Shim, informed the Sellers’ agent, David Hogan, by email that the only day the Sutherlands could do the inspection was March 18.¹⁰ In that email, Shim

⁵ CP 108.

⁶ CP 108.

⁷ CP 233.

⁸ CP 233.

⁹ CP 233.

¹⁰ CP 611-636.

also asked for the dog to be crated and specifically pointed out that he and the Sutherlands were not able to get into the laundry room on the first visit because of the dog:

The earliest my clients could get time off of work was this Monday (3/18) at 9:30 a.m. for the inspection. I know that is cutting it close but both are in the middle of projects at work. Is there any way we can get the dog crated for the inspection? We actually weren't able to go into the laundry room or the backyard (the door was open for the dog to roam) on our first visit.¹¹

As the Riveros' have admitted, on that same day, Hogan emailed the Riveros', informing them of the March 18 inspection date.¹²

On March 17, Shim emailed Hogan and again asked that the Riveros's dog be crated.¹³ The email stated: "Any chance they'll have that dog crated or in the garage tomorrow so we can check out the whole house?"¹⁴ Hogan responded shortly thereafter, "I have asked them to make sure you have access to the entire house. Suggested crating the dog but don't know their exact plans admittedly."¹⁵

On March 18, at 9:30 a.m., Shim emailed Hogan again asking about the dog:

Can you have the tenants remove the dog? It's in the utility room and we won't have access to the furnace, water heater, and w/d.

If the inspector comes back, he said they will charge another fee.¹⁶

¹¹ CP 611-636.

¹² CP 233; CP 301.

¹³ CP 234; CP 305.

¹⁴ CP 234; CP 305.

¹⁵ CP 234; CP 305.

¹⁶ CP 234; CP 305.

Sometime on the same day, Carr arrived at the home inspection with the Sutherlands.¹⁷ The designated inspector was Michael Linde.¹⁸ In his deposition, Linde testified that he had performed “thousands” of home inspections.¹⁹ According to Linde, it was common for family members of potential buyers, especially parents, to attend home inspections.²⁰ In fact, he stated that “[a] lot of people like to have their parents or children see the house,” and such non-buying family members attended approximately 50 percent of the inspections he had performed.²¹ Linde also testified that it was his understanding that the inspection group had permission from “either the owner and/or the tenants” to be there, as “[t]hat’s the only way we can gain access to the house” for the inspection.²²

Buyer’s agent Shim agreed that the custom in the real estate industry was to allow relatives onto the property during the inspection unless they were specifically excluded:

In coordinating the inspection with David Hogan, I remember telling him that parents would be coming to the home inspection as well. David Hogan never said that the inspection was limited to Brynn and Ryan only, and for a good reason. In the real estate industry, it is standard practice for those close in relation to the buyers to join at a home inspection. Parents often want to be there for children buying their first homes, as they bring a wealth of experience and knowledge to the buying experience. Adult children are also sometimes joining parents to bring

¹⁷ CP 737, ¶3.

¹⁸ CP 711, 6:6-8.

¹⁹ CP 711, 6:3-5.

²⁰ CP 712, 12:17-21.

²¹ CP 712, 12:19-21.

²² CP 712, 12:22-13:1.

particular knowledge and help their elders make an informed decision. Even friends may join, particularly if the friend has a special area of expertise, like in construction or building. In my experience, an array of people come to the inspections when they are connected to the potential buyer, and I have never had any experience of someone being excluded, either expressly or otherwise, from an inspection.

The point of the inspection is that the homeowner opens the house for people to be there to satisfy a contractual obligation. The way in which the house is opened is more like an “open house” where no exact set of invitations go out, but rather the house is simply made available.²³

The Riveros’ were not present during the inspection, and despite requests, they had left their Rottweiler-Labrador mix uncrated in the utility room.²⁴ Property inspector Linde needed to access the utility room to inspect the hot water heater and furnace and, as Carr was familiar with dogs, she placed herself between the dog and the home-inspector.²⁵ At this time, the dog appeared to be friendly and allowed Carr to pet it.²⁶

After inspecting the utility room, the group moved on to inspect other areas of the home. Carr later noticed that the dog had left the utility room and was having troubles getting up on the hardwood floor in the hallway.²⁷ Thinking the dog was friendly from her earlier encounter with it, Carr attempted to help the dog back into the utility room.²⁸ As Carr reached out to let the dog smell her hand again, the dog bit her right

²³ CP 687-688.

²⁴ CP 737, ¶¶5, 6.

²⁵ CP 737, ¶¶5, 6.

²⁶ CP 737, ¶6.

²⁷ CP 737, ¶7.

²⁸ CP 737, ¶8.

hand.²⁹

Carr was taken to an emergency room immediately after she was bit.³⁰ The injuries from the bite led to an infection, which caused flexor tenosynovitis in her right, long finger, requiring surgery.³¹ She continues to suffer from a permanent injury diagnosed as a finger tendon pulley rupture, more commonly known as trigger finger.³²

B. Relevant Procedural History

On July 24, 2014, Carr filed a complaint for damages alleging, among other claims, strict liability under RCW 16.08.040 and common law negligence.³³ The Riveros' answered, raising affirmative defenses of contributory negligence and comparative fault.³⁴

The Riveros' moved for summary dismissal of all claims on July 24, 2015.³⁵ The motion was noted for August 21, 2015.³⁶ The Riveros' argued that Carr's common law claims should be dismissed because she was a trespasser, and regardless, no duties under Washington premise liability law were breached.³⁷ The Riveros' also argued that Carr's statutory strict liability claim should be dismissed because she had no express or implied permission to be on the property and, thus, was not

²⁹ CP 737, ¶8.

³⁰ CP 737, ¶9.

³¹ CP 737, ¶9.

³² CP 737, ¶9.

³³ CP 1. Carr also sued State Farm for failure to pay her medical bills under the policy; however, that portion of the case was settled.

³⁴ CP 714.

³⁵ CP 232.

³⁶ CP 232.

³⁷ CP 238-246.

“lawfully” there under RCW 16.08.040.³⁸

Carr responded by arguing that genuine issues of material fact remained as to her common law claim of whether the Riveros’ acted reasonably in failing to crate their Rottweiler-Labrador.³⁹ Carr maintained this question remained under the duty prescribed in Restatement (Second) of Torts § 518, and that the duty analysis under Restatement (Second) of Torts § 332 (invitees) and § 332 (licensees) did not apply.⁴⁰ She further argued that she was not a trespasser because the only evidence was that she was permitted onto the premises.⁴¹ Finally, Carr opposed summary judgment of her statutory strict liability claim, arguing that the constrained definition of “lawful” under RCW 16.08.040 did not apply where a third party owned the property and where that third party gave her implied permission to be on the property.⁴²

On August 21, 2015, the trial court summarily dismissed this lawsuit after hearing oral argument.⁴³ On August 31, 2015, Carr moved for reconsideration, adding to the record the Declaration of Henry Shim, who testified as to the custom in real estate practice.⁴⁴ The trial court denied this motion on September 9, 2015, without hearing argument.⁴⁵

³⁸ CP 239-248.

³⁹ CP 401-403.

⁴⁰ CP 401-403.

⁴¹ CP 401-402.

⁴² CP 403-406.

⁴³ CP 589-591.

⁴⁴ CP 592.

⁴⁵ CP 740-741.

IV. ARGUMENT

A. Standard of Review

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate only when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). “Summary judgment procedure . . . is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.” *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir.1940)); *see also Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972) (“The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.”); *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991) (“Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial.”).

In a summary judgment proceeding, the burden is on the moving party to show an absence of evidence supporting the nonmoving party’s case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182

(1989). After the moving party meets this burden, the nonmoving party must set forth specific facts rebutting the moving party's contentions and demonstrating that a genuine issue of material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). "Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden" under summary judgment. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 89, 272 P.3d 865 (2012). The trial court views the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). "The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party." *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

The standard of review for a denial of a motion for reconsideration is abuse of discretion. *Kleyer v. Harborview Med. Cntr. of University of Washington*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Id.*

B. The Trial Court Erred In Dismissing Carr's Common Law Claim Brought Under Restatement (Second) of Torts § 518

The common law recognizes two separate causes of action for injuries by animals. *Beeler v Hickman*, 50 Wn. App. 746, 753, 750 P.2d 1282 (1988). "First, if a dog owner knows the dog has vicious or

dangerous propensities, the owner is strictly liable for any injuries the dog causes. Second, if a dog owner does not know of any vicious or dangerous propensities, the owner is liable only if negligent in failing to prevent the harm.” *Id.*, 753-754; *see also Arnold v. Laird*, 94 Wn.2d 867, 621 P.2d 138 (1980) (adopting Restatement (Second) of Torts § 509 (strict liability) and Restatement (Second) of Torts § 518 (negligent failure to prevent)).

Contrary to the Riveros’ suggestion at summary judgment, the common law does not apply the typical invitee/licensee analysis for dog bite cases. *See Westberry v. Blackwell*, 282 Or. 129, 577 P.2d 75 (1978). For example, Restatement (Second) of Torts § 513 pertains to strict liability in licensee situations and states:

The possessor of a wild animal or an abnormally dangerous domestic animal who keeps it upon land in his possession, is subject to strict liability to persons coming upon the land in the exercise of a privilege whether derived from his consent to their entry or otherwise.

Emphasis added. By its clear language, § 513 gives rise to a duty independent of that found in Restatement (Second) of Torts § 332 (invitees) or § 342 (licensees). This is clear not only from its plain language, but also from the fact that the Riveros’ can offer no case applying the invitee/licensee duty analysis that they claim applies here.

The same is true for negligent failure to prevent, of which the common law states the following:

Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason

to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,

(a) he intentionally causes the animal to do the harm, or

(b) he is negligent in failing to prevent the harm.

Restatement (Second) of Torts § 518. Like the Restatement's pronouncement of strict liability for dog bites at the common law, anyone who "possesses or harbors" a domestic animal may be subject to liability if he or she is "negligent in failing to prevent the harm." This section applies regardless of any knowledge of the dog's dangerous propensities. § 518 clearly circumscribes the duty owed, and turning to other Restatement sections discussing invitees and licensees is misguided.

In a dog bite case, "a negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence." *Arnold*, 94 Wn.2d at 871. "The amount of care required is commensurate with the character of the animal: 'The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.'" *Beeler*, 50 Wn. App. at 754. Foreseeability of a possible injury is generally a question within the province of the jury. *Schneider v. Strifert*, 77 Wn. App 58, 63, 888 P.2d 1244 (1995).

Here, Carr is not proceeding under strict liability for common

law⁴⁶ but rather is pursuing claims under § 518 for negligent failure to confine. In anticipation of the home inspection, Carr's daughter's real estate agent contacted the Riveros' several times and requested them to crate their dog. This was requested as a safety precaution, and it made sense to ensure that the dog—particularly a Rottweiler-Labrador mix—was crated before strangers entered the premises for the home inspection. Despite being asked several times, and despite knowing that complete access to the interior of the home would be needed, the Riveros' chose to ignore the reasonable requests to crate the Rottweiler. Carr alleges that doing so was negligent under the circumstances, particularly given the breed. A jury should have been permitted to decide whether the Riveros' failed to exercise care in maintaining adequate control over their Rottweiler by crating him, and the trial court erred in summarily dismissing Carr's common law claim.

Notably, the Riveros did not address duty under § 518 in their motion for summary judgment and instead argued that they did not owe a duty under premise liability law. It is incumbent upon the moving party in a summary judgment hearing to properly frame the issues before the court, otherwise the responding party is prejudiced in its ability to respond. *White v. Kent Med. Ctr., Inc.*, PS, 61 Wn.App. 163, 168, 810 P.2d 4 (1991) (“It is the responsibility of the moving party to raise in its summary

⁴⁶ Accordingly, the Riveros's argument in their summary judgment briefing regarding the absence of the Rottweiler-Labrador's dangerous propensities is moot, as this is a consideration only under § 513.

judgment motion all of the issues on which it believes it is entitled to summary judgment.”). The Riveros’ never explained how they did not owe a duty under § 518, and it can only be assumed that they—and the trial court—implicitly relied on the Riveros’ argument that Carr was a trespasser in the utility room. Even assuming *arguendo* that premises liability principles such as trespasser/licensee status override or overlay onto the duty imposed by § 518, this argument fails.

“A ‘trespasser,’ for purposes of premises liability, is one ‘who enters the premises of another without invitation or permission, express or implied, but goes, rather, for his own purposes or convenience, and not in the performance of a duty to the owner or one in possession of the premises.’” *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997) (quoting *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966)). “A ‘licensee,’ on the other hand, is ‘a person who is privileged to enter or remain on land only by virtue of the possessor's consent.’” *Id.* (quoting *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994)). “[T]he determination of whether a person is a trespasser or a licensee hinges on whether the possessor has granted consent or permission to enter the property.” *Id.*

“The possessor of property may consent to a licensee’s entry through conduct, omission, or by means of local custom, as well as through oral or written consent.” *Id.* Comment “e” of the Restatement (Second) of Torts § 330 states:

The consent which is necessary to confer a license to

enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation *which a reasonable [person] would put upon the possessor's acts*. Thus one who constructs and opens a roadway across his land for the benefit of his friends and neighbors may thereby express his willingness to permit the entry of strangers who wish to cross the land, unless he posts a notice to the contrary; and this is true although the possessor in fact intends to permit the entry only of particular individuals.

Emphasis added.

Here, a reasonable person in Carr's shoes would have believed that, at a minimum, permission to enter the premises had been granted.⁴⁷ The real estate agents planned and setup a home inspection. The inspection was for the benefit of Sellers, whose business it was to sell the home. The Riveros' knew about the inspection and responded to emails organizing it. The Riveros' never objected to the process, or the scope of the inspection. The Riveros' never stated that those in attendance were limited from going into the utility room, even though the Riveros' were put on actual notice that the group needed complete access. Placing the dog inside a utility room without further instruction, such as that no one was to disturb the animal, is not enough to put a reasonable person on notice that entering the room would be a trespass, particularly when the Riveros' knew that strangers would be present and needed access to the entire home. Furthermore, local real estate custom shows that it was standard practice to have a family member of the prospective purchaser

⁴⁷ To the extent that the licensee/invitee analysis applies, Carr is best characterized as a private invitee because she was there due to the Seller's business dealings.

join on the inspection.⁴⁸ Under these facts and Washington law, Carr was not a trespasser, and the trial court erred in summarily dismissing the common law claim that Carr was advancing under § 518.

C. The Trial Court Erred In Dismissing Carr's Strict Liability Claim Brought Under 16.08.040 RCW

RCW 16.08.040 imposes strict liability on a dog's owners for damages suffered by the victim where its criteria are met. *Frobig v. Gordon*, 124 Wn.2d 732, 735 n.1, 881 P.2d 226 (1994). It states, in pertinent part:

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.

The Riveros' argued at summary judgment that they are not strictly liable under RCW 16.08.040 because Carr was not lawfully on the premises. In making this argument, the Riveros' relied on RCW 16.08.050, which states:

A person is lawfully upon the private property *of such owner* within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said

⁴⁸ This evidence was before the trial court on the motion for summary judgment by way of Linde's testimony. Linde's testimony itself was sufficient to defeat summary judgment, as it was direct evidence—or at the very least, evidence creating the inference—that family members such as Carr had permission to attend home inspections under local custom. Subsequently, additional evidence was brought before the trial court on reconsideration with Henry Shim's declaration. It was an abuse of discretion to disregard this evidence on reconsideration, to the extent that it was necessary to sustain Carr's arguments at the summary judgment hearing.

consent shall not be presumed when the property of the owner is fenced or reasonably posted.

Emphasis added.

Here, the Riveros' failed to put forth sufficient evidence to create the absence of a material fact to sustain summary judgment on the issue of implied consent. *Young*, 112 Wn.2d at 225 (the moving party must show an absence of evidence supporting the nonmoving party's case). Instead of showing that their conduct did not provide implied consent as a matter of law, the Riveros' argued that they did not give express consent. But RCW 16.08.050 clearly allows one to be "lawfully" on the premises if he or she has implied consent, the Riveros's conflation of express and implied consent fails, and the trial court erred in adopting that conflation.

The undisputed facts here are (1) the Riveros' knew about the home inspection and coordinated the date and time, (2) the Riveros' never limited anyone from entry onto the premises, (3) the Riveros' never warned about the dog or said that the utility room was off limits, and (4) local custom in the real estate industry was to allow those related or known to the prospective buyers to enter the premises for the inspection. Under these facts, Carr reasonably believed that she had the Riveros's implied consent to enter onto the premises. The Riveros' failed to offer evidence to the contrary, specifically with regard to the custom in the real estate industry.

Alternatively, Carr had the implied consent from the Sellers to be on the property, which is all that was required under RCW 16.08.040. As the Court of Appeals has explained, the phrase "such owner" in RCW

16.08.050 refers to the term “owner” as used in RCW 16.08.040, meaning the *dog’s owner*. *Hansen v. Sipe*, 34 Wn. App. 888, 890-91, 664 P.2d 1295 (1983). Thus, “private property owned by third persons” is excluded from RCW 16.08.050’s “restrictive definition of ‘lawful’”—including its requirement of the dog owner’s consent to be on the premises. *Id.* at 891. Consequently, the proper inquiry for whether Carr was lawfully on the premises must utilize the broader, inclusive usage of the ordinary definition of “lawfully.” *Id.* at 891 (applying the ordinary meaning of “lawful” to analyze whether an individual was permissibly upon land owned by a third party).

[S]ince the Legislature does not define ‘lawful’ presence as it relates to persons on private property owned by third persons, the usual and ordinary meaning of that term applies.” *Id.* at 891. One such usual and ordinary meaning of defining “lawful” is in terms of express or implied consent of the actual third party owners of the property, in this case, the Sellers. *See, e.g., McMilian v. King County*, 161 Wn. App. 581, 601, 255 P.3d 739 (2011) (person lawfully enters premises of another with express or implied consent). “Implied consent,” in its ordinary usage, means “[c]onsent inferred from one’s conduct rather than from one’s direct expression.” *Sligar v. Odell*, 156 Wn. App. 720, 728, 233 P.3d 914 (201) (quoting *Black’s Law Dictionary*, at 346 (9th Ed. 2009)). “Case law is consistent with this view that implied consent may be communicated based on ‘conduct, omission, or by means of local custom.’” *Sligar*, 156 Wn. App. at 728 (quoting *Singleton*, 85 Wn. App. at 839).

As first time homebuyers, the Sutherlands invited Carr, the buyers' mother, to join them on the inspection as a guest. Only the Sellers had authority to object to the nature and scope of the inspection. If the Riveros' had a concern, their remedy was to address it with the Sellers, the party with whom they had privity.⁴⁹ The Riveros' did not have any problems, as it is apparent, because they admit to never objecting to the inspection.

In the real estate industry, it is customary and understood that non-purchasing family members, especially parents, may attend the inspection along with the actual buyers. Linde testified in his deposition that he had performed "thousands" of home inspections and it was common for family members of potential buyers, especially parents, to attend home inspections. In fact, he stated that "[a] lot of people like to have their parents or children see the house," and such non-buying family members attended approximately 50 percent of the inspections he had performed.

⁴⁹ The only material permission is that between the Sellers and the prospective Buyers, as they are the ones in privity with each other. They entered an agreement for purchase and sale of real property, a contract that required the property owner to permit an inspection. Nothing in the agreement limited who could be on the premises, and real estate custom is to treat these inspections more akin to an "open house," in the sense that not everyone present needs explicit permission. Rather, it is implied that those related or close to the prospective buyers may be on the premises. This is an opportunity for the prospective buyers to inspect the home for defects.

As renters, the Riveros' were in privity with the Sellers only, and therefore, any objections to the home inspection must have been communicated within that channel. Such objections would have been dealt with under the Washington State landlord tenant act. Here, it is undisputed that the Riveros' did not once object to the home inspection because they thought—correctly—that they were required to make the home available for an inspection. The Riveros' knew that the entire home needed to be accessed and were asked to crate the dog several times.

The Sutherlands' agent here, Shim,⁵⁰ agreed with Linde. Shim testified that he informed the Seller's agent, Hogan, that Carr would be joining on the home inspection. No one ever objected to the proposed roster of those who would attend the inspection. Further, Shim testified that

In the real estate industry, it is standard practice for those close in relation to the buyers to join at a home inspection. Parents often want to be there for children buying their first homes, as they bring a wealth of experience and knowledge to the buying experience. Adult children are also sometimes joining parents to bring particular knowledge and help their elders make an informed decision. Even friends may join, particularly if the friend has a special area of expertise, like in construction or building. In my experience, an array of people come to the inspections when they are connected to the potential buyer, and I have never had any experience of someone being excluded, either expressly or otherwise, from an inspection.

There can be no dispute that Carr had implied consent from the Sellers to enter the residence. The Sutherlands had a right to be on the premises because they contracted for an inspection in the purchase and sale agreement. The Sellers had authority in law to permit such an inspection, RCW 59.18.150(a), and notified their renters. Similarly, only the Sellers had authority to object to the nature and scope of the inspection. Thus, it is undisputed that the Sutherlands had the Sellers' permission—either directly or through the Sellers' agent—to enter the premises on the date in question.

⁵⁰ Shim's declaration was provided to the trial court on reconsideration. To the extent that this is the only evidence that created a genuine issue of material fact, or to the extent that it was otherwise necessary to sustain Carr's arguments at summary judgment, Carr contends that it was an abuse of discretion for the trial court to deny reconsideration based on this newly discovered evidence that was not stricken from the record.

Accordingly, the Sellers' express permission to the Sutherlands to enter the property during the inspection implicitly extended to Carr, the mother of one of the Buyers.⁵¹ Therefore, Carr was lawfully within the residence when she was bitten by the Riveros's dog. Reasonable minds cannot differ that Carr was on the Seller's property with full authority of the law. As a result, no genuine issues of material fact exist regarding the elements of RCW 16.08.040, and the trial court erred in dismissing this claim on summary judgment.

V. CONCLUSION

For the foregoing reasons, Carr respectfully asks this court to reverse summary dismissal and remand for trial.

RESPECTFULLY SUBMITTED this 25th day of February, 2016.

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⁵¹ In the same vein, even if the Court determines that the Riveros' permission was required for Carr to be lawfully on the premises, the Riveros' do not argue that they denied permission for the Sutherlands to be part of the inspection group or expressly made an attempt to limit attendance. Accordingly, because it is customary and understood within the context of home inspection that buyers may bring family members along, especially parents, the Riveros' express consent to the Sutherlands implicitly extended to Carr.

CERTIFICATE OF SERVICE

Kim Snyder, being first duly sworn upon oath, deposes and says:

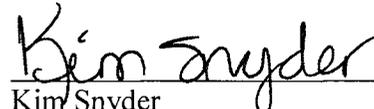
I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on February 25, 2016, I personally delivered, a true and correct copy of the above document, directed to:

Shellie McGaughey
McGaughey Bridges Dunlap, PLLC
3131 Western Avenue, Suite 410
Seattle, WA 98121

VIA EMAIL AND ABC LEGAL MESSENGER

DATED this 25th day of February 2016.



Kim Snyder
Legal Assistant to Darrell Cochran

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