

73927-1

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No. 73927-1

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,

Respondents/Defendants,

RESPONDENTS' JOSE AND LISA RIVEROS' OPENING BRIEF

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I. OVERVIEW

Shelly Carr was bit by a dying dog when she tried to push him back into an off-limits laundry room during a home inspection at Jose and Lisa Riveros' home. Ms. Carr, mother of one of the home buyers, did not have the Riveros' permission to be in their home. Ms. Carr entered the Riveros' home. She then entered the restricted laundry room where the dog, Kid, was confined. Ms. Carr was then bit *after* the inspection when she or the inspector left the laundry room door open, which allowed Kid to crawl over the threshold. Noting her mistake, Ms. Carr tried to push and prod the dog back into the room in which he had been confined.

Ms. Carr sued tenants Jose and Lisa Riveros asserting they were negligent for failing to exercise proper control over their dog, causing her injury, and strictly liable for the bite under RCW 16.08.040, the dog bite statute.

On August 21, 2015, Judge Benton granted summary judgment for the Riveros' on Ms. Carr's negligence and strict liability claims. Upon agreed stipulation by the parties, Ms. Carr's negligent infliction of emotional distress claim was struck without prejudice based on the August 21, 2015 dismissal. Ms. Carr moved for reconsideration, which was denied on September 9, 2015 without request by Judge Benton for briefing from the Riveros'.

The trial court did not err in dismissing and denying reconsideration of Ms. Carr's common law claim. Reasonable minds cannot differ that the Riveros' acted reasonably by confining their dog, restricting access to the laundry room, and requesting their dog not be disturbed. Even under a premises liability theory, the Riveros' did not owe or breach a duty to Ms. Carr such that they can be held liable for negligence.

Similarly, the trial court did not err in dismissing and denying reconsideration of Ms. Carr's RCW 16.08.040 claim, because Ms. Carr was not lawfully on the Riveros' property at the time she was bit. Carr needed, but did not have, the Riveros' express or implied permission to be in their house or in their laundry room, or to disturb their dog. She also did not have the sellers' permission to be in the home, even if such permission were implied under the dog bite statute. Finally, the dog was confined in a closed, restricted room, tantamount to a fence or a reasonably posted warning whereby consent cannot be presumed.

II. STATEMENT OF THE CASE

Shelly Carr, a stranger to Jose and Lisa Riveros, was bit by their dying dog during a home inspection on March 18, 2013. CP 2-3.

Jose and Lisa Riveros rented a house owned by the Groenveld-Meijer's. CP 251, 255-256. Their lease ran from May 1, 2012 through

April 30, 2013. CP 251. The Riveros' had a Rottweiler-Lab mix named "Kid", as allowed by the Pet Addendum to their Lease. CP 266. At the time of Ms. Carr's injury, the Riveros' had owned Kid for over thirteen years. CP 291. It is undisputed Kid was a kind, sweet dog with a nice temperament. CP 291. He was never aggressive or vicious, nor had he ever exhibited mean, biting, or snarling tendencies even in his dying days. CP 291. He had never bit anyone. CP 291.

The Groenveld-Meijer's decided to sell the property. The Riveros' were notified the Groenveld-Meijer's were listing the house and that real estate agents would be showing the house to potential buyers. CP 251. The Riveros' were also informed by Mary Joyce, the property manager, that the seller's agent, David Hogan, would contact them to take pictures of the home and discuss details related to listing and showing the home. CP 299.

By this time, Kid was old, blind, deaf, and immobile. CP 251. He had cancer and was underweight, frail, and could barely walk. CP 291-292. Mr. Riveros told both the property manager (Mary Joyce) and the Groenveld-Meijer's agent (David Hogan) Kid should never be bothered and always be left alone in the laundry room which was strictly off limits. CP 251. Mr. Riveros was adamant Kid was not to be disturbed and the door to the laundry room be kept shut at all times. CP 251. No one was to

disturb their dog. CP 252, 272. Mr. Riveros understood Mr. Hogan would let everyone know not to disturb Kid, who was at all times contained in the laundry room behind a closed door. CP 292. There is no dispute as to the Riveros' testimony regarding that Kid be left alone or that the laundry room be restricted. Mr. Riveros' contact information was clearly set forth on the Northwest Multiple Listing Service Residential Agent Detail Report for the property and he was to be called first before viewing arrangements. CP 329

Brynn and Ryan Sutherland (Ms. Carr's daughter and son-in-law) offered to purchase the Groenveld-Meijer's home. CP 736. A home inspection was permitted as part of the purchase and sale agreement. CP 736, 742.

Mr. Hogan contacted the Riveros' about the inspection. CP 252. Neither Jose nor Lisa Riveros were told anyone other than the inspector, the buyers, and maybe the buyers' real estate agent would be in their home for the inspection. CP 252, 272. They were never told Shelly Carr would be there. CP 252, 272. Neither gave Shelly Carr permission to enter their home, let alone their laundry room. CP 252, 272.

The buyer's agent, Henry Shim, and Mr. Hogan coordinated the home inspection via email—never bothering to call Mr. or Mrs. Riveros to finalize any details or understandings, such as arrangements for Kid. CP

358. At no point in these emails did Mr. Shim inform Mr. Hogan that Ms. Carr would be attending the inspection along with the buyers. CP 328. Even in subsequent emails between Mr. Hogan and Mr. Shim regarding a septic inspection on a different date and time, Mr. Shim did not mention Ms. Carr would be present at the home inspection. CP 360-363.

Mr. Hogan emailed Mr. Riveros informing him that the only time “the buyers” could do the home inspection was on Monday, March 18, 2013 at 9:30 a.m. CP 301. Both the Riveros’ worked full time and no one tried to secure their availability at the inspection; Mr. Hogan even told Jose that he and Lisa did not need to be present for the inspection. CP 301. In his email, Mr. Hogan asked:

“is it possible to crate the dog? The buyers will need full access to each room in the house for their inspector.”

CP 301. Mr. Hogan and Mr. Riveros then engaged in a chain of email communications over the next few days regarding the home inspection and also a septic inspection. CP 303. In none of the emails did either of the Riveros’ ever confirm they would crate Kid or remove him from their house during the inspection. CP 303. Mr. Riveros never told anyone Kid would be crated or removed from the home on the day of the inspection. CP 292.

At 6:01 p.m. on March 17, 2013, the night before the inspection, Mr. Shim, the Sutherlands' agent, emailed Mr. Hogan, the seller's agent, and asked if the Riveros' confirmed Kid would be crated or in the garage for the inspection the following day. CP 305. Mr. Hogan responded:

“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.**”

CP 305. In this email Mr. Shim never informed Mr. Hogan Ms. Carr would be present at the inspection. CP 305. No further email communication occurred prior to March 18, 2013. CP 305.

On March 18, 2013, both Jose and Lisa Riveros' had to work. CP 292. They secured Kid in the laundry room. CP 292.

Brynn Sutherland had asked Ms. Carr to come to the home inspection. CP 737. Shelly Carr had not been to the Riveros' house before. CP 308. However, she was aware of Kid because her daughter told her. CP 308, 311. When Ms. Carr (and her husband) arrived at the Riveros' house, the Sutherlands (the buyers), Mr. Shim (the buyer's agent), and the home inspector Michael Linde, were already present. CP 310.

Mr. Linde met the Sutherlands for the first time the morning of the inspection. CP 377. It was not uncommon for Mr. Linde to have his *clients* (i.e. the Sutherlands) present at his inspections. CP 373. Only

about 50 percent of Mr. Linde's clients bring other family members with them to an inspection. CP 377. Mr. Linde did not know a dog was in the house prior to arriving on March 18th. CP 377. Mr. Linde refused to do inspections if dogs were present. CP 377.

Upon discovering Kid, Mr. Shim emailed Mr. Hogan at 9:30 a.m. asking if Mr. Hogan could contact the Riveros' and have them remove Kid to access the utility (laundry) room. CP 305. If they were not able to do so, the inspector would charge another fee to come back to conclude his inspection. CP 305. There was no further communication between Mr. Hogan and Mr. Shim until after the dog bite.

Jose Riveros' phone number was listed on the Northwest Multiple Listing Service Residential Agent Detail Report for the property. CP 329. Yet no one ever contacted Mr. or Mrs. Riveros about Kid. CP 292. He received no email, phone call, text message, or communication of any kind from anyone. CP 292.

The laundry room door was closed and Kid secured inside when Mr. and Mrs. Riveros left for work. CP. 292. They had specifically communicated to Hogan that Kid should never be bothered in the laundry room. CP 292. Despite knowing Kid was in the laundry room, Ms. Carr took it upon herself to enter the restricted laundry room. CP 311, 318-319. Although Ms. Carr knew dogs and strangers could make for a potentially

dangerous situation, CP 315, she nonetheless entered the laundry room to assess Kid's demeanor, CP 311, 312. Ms. Carr talked to Kid, lowered her arm, and Kid sniffed at her. CP 313. Kid did not get up from where he was laying on his blankets when Ms. Carr entered. CP 313. Ms. Carr noticed he looked old. CP 313. Ms. Carr let Kid smell her and she pet his neck and head. CP 315. Because she was "familiar with dogs" she placed herself between Mr. Linde and Kid. CP 737. Mr. Linde inspected the laundry room without incident. CP 316-317. After the laundry room inspection was complete both Mr. Linde and Ms. Carr left the room. CP 319. One of them failed to close the laundry room door behind them. CP 319.

Ms. Carr later noticed Kid had sprawled himself just outside of the laundry room on the hardwood floor and was laying on the floor unable to get up. CP 320. Kid's head was facing back into the laundry room like he was trying to go back in. CP 321-322. It was as if he had come out of the laundry room, turned around, and slipped down. CP 321-322.

Ms. Carr took it upon herself to try and lift Kid up. CP 321. He made a noise. CP 321. Ms. Carr acknowledged her error. CP 321. She said to herself, "No, I'm not—I don't know this dog. I'm out" because she did not feel it was safe to proceed. CP 321.

Despite this internal monologue, Ms. Carr then went back to Kid to see if she could prod Kid into the laundry room. CP 323. She crouched down, got about six to eight inches from Kid, and extended her hand, at which point the dog bite occurred. CP 323-324. This entire interaction occurred after the inspection of the laundry room was complete.

The laundry room was always off limits to visitors. CP 292. Mr. Riveros had been assured this request would be honored. CP 292. Mr. Riveros never give Ms. Carr permission to enter his home, or to enter the laundry room, or to leave the laundry room door open, or to push his dying dog back into the room he had been safely secured in. CP 252, 292. The Riveros' had no business connection to the sales transaction involving the home, nor any business connection to Ms. Carr. CP 292.

III. 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, 1073 (2002) (citing Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124, 1127 (2000)). “An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party.” Sligar v. Odell, 156 Wn. App. 720,

726, 233 P.3d 914, 917 (2010) (internal quotation omitted). The court may grant summary judgment “if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Lybbert, 141 Wn.2d at 34 (citation omitted).

The Court of Appeals reviews a trial court's denial of a motion for reconsideration for “a manifest abuse of discretion.” Sligar, 156 Wn. App. at 734 (footnote omitted). A trial court abuses its discretion “when its decision is manifestly unreasonable or based on untenable grounds.” Id. (footnote omitted).

B. THE TRIAL COURT DID NOT ERR IN DISMISSING SHELLY CARR'S COMMON LAW CLAIM.

1. THE RIVEROS' DID NOT FAIL TO PREVENT HARM TO MS. CARR.

The trial court did not err in dismissing Ms. Carr's claim under Restatement (Second) of Torts § 518 (1977).¹

¹ Contrary to Ms. Carr's assertion, the Riveros' *did* address duty under § 518 in their Motion for Summary Judgment. The § 518 duty is essentially “failure to prevent the harm”. They devoted an entire section in their Motion for Summary Judgment to this argument. CP at 245-246. Specifically, as addressed in the Riveros' Summary Judgment Reply Brief because Ms. Carr had not identified what negligence theories she was relying on until her Response brief, CP 395, 401-403, the Riveros' intentionally addressed a potential claim under failure to prevent the harm (*i.e.* § 518) and a potential claim under premises liability. CP 497.

If a dog owner does not know of any vicious or dangerous propensities, the owner is liable only if they are “negligent in failing to prevent the harm.” Beeler v. Hickman, 50 Wn. App. 746, 754, 750 P.2d 1282, 1286 (1988) (citing Arnold v. Laird, 94 Wn.2d 867, 871, 621 P.2d 138, 141 (1980); Restatement (Second) of Torts § 518 (1977)).

Restatement § 518 provides:

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.

The section at issue is (b), whether the Riveros’ negligently failed to prevent harm to Ms. Carr.

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.”” Sligar, 156 Wn. App. at 731-32 (quoting 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 (citing Arnold, 94 Wn.2d at 871; Restatement (Second) of Torts § 518 (1977)). Thus, the known character of the animal is relevant under this theory of liability. “Foreseeability is a question of fact for the jury unless reasonable persons could reach but one conclusion.” Schneider v. Strifert, 77 Wn. App. 58, 63, 888 P.2d 1244, 1247 (1995) (citations omitted).

Ms. Carr’s entire argument is that despite being asked to crate the dog “several times” and despite knowing that complete access to the house would be needed, the Riveros’ simply ignored those requests and are therefore negligent. Ms. Carr claims not crating Kid was “negligent under the circumstances, particularly given the breed.” Appellant’s Brief at 15. She essentially attempts to morph the “negligent failure to prevent the harm” standard of § 518 into a “failure to crate” standard. Yet in doing so, she demonstrates no dangerous propensities Kid allegedly had and no effective communications with the Riveros whereby they agreed to do anything with Kid other than what they had already agreed to do (confine him in the laundry room behind a closed door). Ms. Carr also cites no authority where the failure to crate a dog was found to be a violation of § 518.

The Riveros’ had no duty to crate Kid. Crating a dog is not, in and of itself, a duty a dog owner even has. The Riveros’ only obligation was

to use the amount of care commensurate with the character of their dog. The Riveros' did so.

Kid did not have a violent history. The Riveros' did not know of any vicious or dangerous propensities. CP 291. Kid had never injured or bit another person. CP 291. There is nothing in the record to the contrary. Ms. Carr has never argued Kid had any sort of violent history or dangerous propensities, or indicated the Riveros' knew or should have known that Kid had such propensities. There is likewise no evidence Kid's breed, a Rottweiler-Labrador mix, made Kid more or less dangerous or gave him any particular propensities. Reasonable minds cannot differ that the Riveros' exercised an amount of control over Kid that a reasonable person would have given Kid's past behavior when they confined Kid in the closed, restricted laundry room and advised the real estate agent no one was to enter the laundry room. CP 292.

Ms. Carr also asserts Mr. Shim contacted the Riveros' "several times" and requested they crate Kid as a "safety precaution." Appellant's Brief at 15. This assertion is flawed for several reasons. First, there is no evidence Mr. Shim ever contacted the Riveros'. He did not. Ms. Carr has no citation for this bald and incorrect assertion. Second, emails exchanged between Mr. Shim and Mr. Hogan indicate Shim asked Hogan if the Riveros' could crate the dog. However, Mr. Hogan never indicated the

Riveros' would be crating Kid or that they even had a crate. If the Sutherlands did not follow up with their agent to ensure the dog would be crated, or if Mr. Shim did not follow up to Mr. Hogan's later email that he did not know what the Riveros' plans for the dog were, that is on those individuals—not the Riveros'. There is no evidence that the Riveros' ever agreed to crate their dog.

Even if there were a question of fact as to whether the Riveros' exerted ineffective control over Kid, ineffective control only gives rise to a negligence cause of action where "it would reasonably be expected that injury could occur, and injury does proximately result from the negligence." Sligar, 156 Wn. App. at 731-32. Reasonable minds cannot differ this situation is not one where it would be reasonably expected injury could occur.

A dog with no known violent propensities', restricted in a confined area with the agreement he was not to be disturbed, is not a situation in which injury could be reasonably expected to occur or was foreseeable. For any injury to be "reasonable expected" in this situation, the Riveros' would have to have foreseen that Ms. Carr, a complete stranger to them, would (a) attend the home inspection, (b) enter the restricted area (the laundry room), (c) leave the laundry room door open after the inspection was complete, and (d) try to prod and force a crippled, sick dog back into

a room the group was not even supposed to enter in the first place. Mr. and Mrs. Riveros would have to be practically clairvoyant to anticipate or foresee a stranger they do not know doing exactly what everyone was instructed not to do. It was a shock that a complete stranger, unknown to the Riveros', would do such a thing.

Everyone knew not to enter a restricted area with a dog. Mr. Linde refused to do inspections with dogs as he knew the risks involved, CP 377, as did Carr, CP 315. Yet Ms. Carr, who was "familiar with dogs", assured the group she could control the dog so Mr. Linde could go into the laundry room and an additional inspection charge could be avoided. There is not one fact to support a common law negligence claim. A mere allegation of "failing to crate" does not create a question of fact as to negligent failure to prevent the harm. The trial court correctly concluded based on the totality of the facts reasonable minds simply could not differ. The Riveros' exercised an amount of control over Kid that a reasonable person would and were not negligent in failing to prevent harm to Ms. Carr. Further, no facts support the Riveros' should have foreseen injury to Ms. Carr in this situation. Summary judgment was appropriate on Ms. Carr's negligence claim and the trial judge did not abuse its discretion in denying reconsideration.

2. THE RIVEROS' WERE NOT NEGLIGENT UNDER A PREMISES LIABILITY THEORY.

The Riveros' motion for summary judgment argued for dismissal of Ms. Carr's negligence claim under two theories: premises liability (trespasser/licensee/invitee analysis) and failure to prevent the harm (Restatement § 518 analysis). At the time of filing their Motion, the Riveros' had been unable to discern what negligence theory Ms. Carr was pursuing. For example, Ms. Carr's Amended Complaint stated for her negligence cause of action: "Defendants knew or should have known about their dog's propensity for danger, and failed to train, handle, and utilize the dog in a reasonable manner. Defendants owed Ms. Carr a duty of care not to cause bodily harm and a duty to *follow the law of the State of Washington*". CP 4. Attempts to clarify this cause of action during discovery were unsuccessful. CP 497. When Ms. Carr responded to summary judgment electing to pursue under § 518, the Riveros' replied accordingly, as they had in their moving motion. CP 497, 500-501.

Ms. Carr's opening brief again argues the typical invitee/licensee analysis does not apply to dog bite cases. Appellant's Brief at 13. Yet, in her brief, Ms. Carr proceeds to argue she was not a trespasser but an invitee/licensee. *Id.* at 16-18.

There is no indication the trial court granted summary judgment or denied reconsideration based on premises liability. However, at this point, even if any theory of premises liability is at issue, it is meritless.

a) Ms. Carr was a trespasser and the Riveros' breached no duty owed to her as such.

A trespasser is one who enters the premises of another without invitation or permission, either express or implied, but goes rather for his own purpose or convenience. Singleton v. Jackson, 85 Wn. App. 835, 839, 935 P.2d 644, 646 (1997). Generally, a landowner owes no duty to an adult trespasser except to refrain from causing willful or wanton injury to him. Zuniga v. Pay Less Drug Stores, N.W., 82 Wn. App. 12, 13, 917 P.2d 584, 585 (1996). “[W]ilful misconduct is characterized by intent to injure, while wantonness implies indifference as to whether an act will injure another.” Adkisson v. City of Seattle, 42 Wn.2d 676, 684, 258 P.2d 461, 466 (1953) (quoting 38 Am. Jur. 693 *Negligence* § 48). Wanton misconduct is the intentional doing of an act or failure to do an act “in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another.” Adkisson, 42 Wn.2d at 687 (quoting 38 Am. Jur. 693 *Negligence* § 48).

Ms. Carr had no invitation or permission, express or implied, to enter the Riveros' home on March 18. Instead, she entered for her own purpose and convenience—to accompany her daughter on a home inspection. CP 737. Similarly, Ms. Carr did not have permission, express or implied, to be in the laundry room at any time. CP 292. Yet Ms. Carr chose to enter the laundry room to engage with Kid and place herself between the dog and Mr. Linde. CP 316-318, 737. She was a trespasser.

Even assuming Ms. Carr had permission to be in the laundry room for purposes of the inspection—which she did not—that permission ended when the inspection of the laundry room was complete. Ms. Carr did not have permission to leave the door to the laundry room open after the inspection. CP 292, 318-319. She did not have permission to go *back* to the laundry room and try to push Kid back into the room. CP 292, 320-322. Thus, to the extent she was not already, Ms. Carr was certainly a trespasser when she tried to prod Kid back into the laundry room and was subsequently bit while doing so.

It was impossible for Jose and Lisa Riveros to anticipate an individual, without express or implied permission, would enter a restricted area and bother their pet, then leave the laundry room door open, which was a fence of sorts, and then against better judgment try to push the dog back into the laundry room. Ms. Carr was a trespasser in the

Riveros' home at all times on March 18, but particularly at the time she was bit—when she returned to the laundry room and interacted with Kid a second time.

As a trespasser, the Riveros' only owed Ms. Carr a duty to not engage in willful or wanton conduct. There is no evidence of a breach. How could the Riveros' have intended to injure Ms. Carr when they did not even know who she was or that she would be at their home that day? Nor is there evidence the Riveros' intentionally acted or failed to act in reckless disregard for probable injuries to Ms. Carr so as to show wanton misconduct. Kid was nonviolent, old, and sick. CP 291-292. The Riveros' had confined Kid in the laundry room, and insisted people not to enter or disturb the dog. CP 251, 292. None of their conduct was in "reckless disregard" for the consequences to Ms. Carr. The Riveros' neither engaged in willful nor wanton misconduct with regard to Ms. Carr and therefore, to the extent Ms. Carr was a trespasser, no material issues of fact exist to support a breach of the duty owed to trespassers.

b) Even if a licensee, the Riveros' did not breach any duty owed to Ms. Carr.

A licensee is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991, 996 (1986) (quoting Restatement

(Second) of Torts § 330 (1965)). This includes social guests, that is, someone who has been invited onto the land but does not meet the legal definition of an invitee. Id. Permission to enter the property can be express or implied. McMilian v. King Cnty., 161 Wn. App. 581, 601, 255 P.3d 739,750 (2011) (citing Kunkel v. Fisher, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)).

In Memel v. Reimer, the Washington Supreme Court specifically adopted the standard of care for licensees outlined in Restatement (Second) of Torts § 342 (1965). Memel v. Reimer, 85 Wn.2d 685, 689, 538 P.2d 517, 519 (1975). Section 342 provides:

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

(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.***

(emphasis added).

Even if Ms. Carr were considered a licensee, the Riveros' breached no duty owed to her.

First, the presence of an old, sick dog in a house, confined to a single room, and which everyone is aware of, does not, in and of itself, present a condition that “involves an unreasonable risk of harm” to anyone. Restatement (Second) § 342(a). All involved knew Kid was in the house when they chose to go inside. CP 311. In fact, Ms. Carr knew about the dog before she even came to the house. CP 308. Her daughter asked Carr to come to the inspection to potentially “help with” the dog. CP 308-309.

Even considering Kid an “unreasonable risk of harm”, the Riveros’ had no reason to expect Ms. Carr would not discover or realize the “danger”. Ms. Carr was aware that dogs and strangers could be a dangerous situation. CP 315. Further, she even realized the danger when she tried to lift Kid up, he made a noise, and she remarked “No, I’m not—I don’t know this dog. I’m out” because she did not feel it was safe to proceed. CP 321, 323. Kid was by no means a “condition” on the land that involves an unreasonable risk of harm and that Ms. Carr, would not discover or realize the danger of. Thus Restatement (Second) § 342(a) is not met.

Prong (b) Restatement § 342 test is also not met. The Riveros’ did not fail to exercise reasonable care to make the “condition safe”, nor did they fail to warn of the condition. The Riveros’ confined Kid to the

laundry room, an enclosed, restricted location, for the inspection, effectively making the condition “safe”. CP 292. They had always communicated that Kid was not to be disturbed, and the doors to the laundry room be kept shut. CP 251, 271, 292. They effectively warned all who entered. The Riveros’ understood Mr. Hogan would put everyone on notice the dog would be confined in the laundry room at all times and was not to be disturbed. CP 292. Emails between Mr. Shim and Mr. Hogan show those involved in the inspection knew the dog was in the laundry room, indicating the Riveros’ gave plenty of warning about the dog’s presence. CP 305.

Finally, Ms. Carr knew of the alleged “condition” and the risks involved. CP 308-309, 311, 315. She was aware that dogs and strangers could be a dangerous situation. CP 315. When she tried to pick up the dog and it made a noise at her, she responded “No, I’m not—I don’t know this dog. I’m out” because she knew it was not safe to proceed and realized that the situation was potentially dangerous. CP 321, 323. Ms. Carr knew of the dog and the risks involved in approaching a dog, thus Restatement § 342 prong (c) is not satisfied.

No part of the Restatement § 342 test is met. The Riveros’ breached no duty owed to Ms. Carr even if she is considered a licensee.

c) Ms. Carr was not an invitee and the Riveros' owed no duty to her as such.

Ms. Carr argues she was a “private invitee” because she was on the property due to the Groenveld-Meijer’s business dealings. Appellant’s Brief at 17 n. 47. She does not define “private invitee” or develop this argument, but regardless it fails.

Washington has adopted the Restatement (Second) of Torts § 332 (1965) definition of invitee. See McKinnon v. Washington Fed. Sav. & Loan Ass'n, 68 Wn.2d 644, 650, 414 P.2d 773, 777 (1966); Younce, 106 Wn.2d at 667. Under Section 332, “invitees” are “limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception.” Restatement (Second) of Torts § 332, comment *a* (1965). An invitee is owed a duty of ordinary care. McKinnon, 68 Wn.2d at 650 (1966).

An invitee can be either a public invitee or a business visitor. Younce, 106 Wn.2d at 667 (quoting Restatement (Second) of Torts § 332(3)). A public invitee is a person who is “invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.” Id. A business visitor is a “person who is

invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” *Id.*

Clearly Ms. Carr was not a public invitee. See Younce, 106 Wn.2d at 667. However, Ms. Carr was also not a business visitor. She was not “directly or indirectly connected” with the possessors of the land: the Riveros’. *Id.* (emphasis added). The Riveros’ were merely tenants with no privity to the Purchase and Sale Agreement (PSA) between the Sutherlands and the Groenveld-Meijer’s. CP 251, 271, 292. The Riveros’ had no “business dealings” with Ms. Carr. CP 292. They had no “business dealings” with the Sutherlands (the buyers). CP 292. The *only* “business dealings” were between the Groenveld-Meijer’s and the Sutherlands, who were not the possessors of the land. Even if Ms. Carr could be considered “indirectly connected” with the Sutherland’s business dealings, *the Riveros’* were the possessors of the land at the time of Ms. Carr’s injury and had no “business dealings” with the Sutherlands. Ms. Carr was not a business visitor and the Riveros’ had no duty to Ms. Carr as such.

C. **THE TRIAL COURT DID NOT ERR IN DISMISSING SHELLY CARR’S STRICT LIABILITY CLAIM BROUGHT UNDER RCW 16.08.040.**

The dog bite statute, RCW 16.08.040, provides in relevant 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.

RCW 16.08.040(1).

This statute is in derogation of the common law and must be strictly construed. Beeler, 50 Wn. App. at 751.

There are essentially three ways a person can come within the strict confines of the dog bite statute: if they are bit in a public place, if they are bit while lawfully in a private place, or if they are bit while lawfully on the private place of the dog owner. For this latter category, RCW 16.08.050 defines what it means to be lawfully on the private property of the dog owner:

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

There is no contention the house in which Ms. Carr was bit was a “public place” under RCW 16.08.040. To properly invoke the dog bite statute, Ms. Carr must show she was “lawfully in or on a private place” which can include the property of the dog owners (the Riveros’). This is where the parties differ.

The Riveros' contend Carr was bit on their property, a home they possessed and which Carr was not lawfully on. Ms. Carr knowing she did not have the consent of Mr. and Mrs. Riveros asserts she merely needed the consent of the seller's, the Groenveld-Meijer's, to be lawfully on the property to come within the protection of the dog bite statute.

1. RCW 16.08.050 APPLIES AND MS. CARR MUST SHOW SHE WAS LAWFULLY ON THE RIVEROS' PROPERTY.

a) As lawful tenants, the house in which Ms. Carr was bit was the Riveros' property.

RCW 16.08.050 applies because Ms. Carr was bit while on the Riveros', the dog owners, property. As tenants, the Riveros' right of possession was exclusive for the duration of their leasehold. "Except as limited by the terms of the leasehold, a tenant has a present interest and estate in the property for the period specified, which gives him exclusive possession against everyone, including the lessor." Aldrich v. Olson, 12 Wn. App. 665, 667, 531 P.2d 825, 827 (1975) (holding tenant was "locked out" of the premises under circumstances constituting an unlawful actual eviction). So while a landlord may have a right to enter the property for certain limited purposes, this does not negate that the tenant is the "possessor" of the property. A "landlord's retention of the right to enter, inspect and repair is not inconsistent with a full surrender of possession to

the tenant.” 49 Am. Jur. 2D *Landlord and Tenant* § 386 (2006). RCW 59.18.150 of the Residential Landlord-Tenant Act further signifies that a landlord’s right of entry is not absolute.

In Washington the separate terms “owner” and “occupier” allow for relief from the appropriate person in situations where the owner and occupier of land are different. See WPI 120.00

The Court’s fundamental objective in construing a statute is to “ascertain the legislature’s intent”. Sligar, 156 Wn. App. at 727. To discern the legislative intent, the Court begins by “looking at the ‘statute’s plain language and ordinary meaning.’” Eubanks v. Brown, 180 Wn.2d 590, 597, 327 P.3d 635, 638 (2014) (internal quotation marks omitted) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). If the statute’s meaning is plain on its face, “then the court must give effect to that plain meaning as an expression of legislative intent.” State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4, 9 (2002).

The Riveros’ were lawful tenants. They lived in the home and had the right to possess and use the property pursuant to a lease agreement with the Groenveld-Meijer’s. They had a right to exclude people from their property (with exceptions for their landlord entering pursuant to RCW 59.18.150). While the Riveros’ home was “owned by third persons”

the property was possessed by the Riveros' as lawful tenants. Nothing in the plain language of RCW 16.08.050 requires the dog owner be the legal "owners" of the property, rather than lawful tenants, before a dog bite victim can be lawfully on the dog owners' property under RCW 16.08.050. The plain language of the RCW 16.08.050 should prevail.

Ms. Carr's position would render RCW 16.08.050 meaningless for anyone who occupies, but does not own, the property on which their dog bites someone—such as tenants. The Legislature did not intend this tortured interpretation. RCW 16.08.050's definition of lawfully applies because Ms. Carr was on the Riveros', the dog owners, property at the time she was bit. To invoke the dog bite statute, Ms. Carr must show she was on the Riveros' property with their express or implied consent per RCW 16.08.050.

b) Hansen v. Sipe is distinguishable and does not apply to this factual situation.

Ms. Carr relies on Hansen v. Sipe to argue private property owned by a third person (*i.e.* the Groenveld-Meijer's) is excluded from RCW 16.08.050's restrictive definition of "lawful". Hansen v. Sipe, 34 Wn. App. 888, 664 P.2d 1295 (1983). In Hansen, Mrs. Hansen was bit by the Sipe's dog while walking along a railroad right-of-way that abutted the dog owner's unfenced property. Id. at 889.

Ms. Carr uses Hansen to make the untenable argument that because the house was legally owned by the Groenveld-Meijer's, the restrictive definition of "lawful" in RCW 16.08.050, and its requirement of needing the dog owners' consent to be lawfully on the property, does not apply to this case. Instead, Carr posits, a "broader" definition of "lawfully" must be used where one is lawfully on private property with the express or implied consent of the third party owners of the property, here, the Groenveld-Meijer's. Carr's reliance on Hansen and interpretation thereof is illogical. Even if a broader definition were applied, there is no evidence the Groenveld-Meijer's knew Ms. Carr would be there as no one was ever told or asked about her presence.

Carr has overlooked Hansen was decided under the old version of RCW 16.08.050 which defined when a person was lawfully on the private property of the dog owner as "when he is on such property in the performance of any duty imposed upon him by the laws of the state of Washington or of the United States or the ordinances of any municipality in which such property is situated." 34 Wn. App. at 889 (quoting RCW 16.08.050).

The prior RCW 16.08.050 was narrower in its application than its current version. The Hansen Court noted that in 1979, after the bite at issue in Hansen, the Legislature "amended RCW 16.08.050 and expanded

the definition of ‘lawful presence’ to include persons on ‘the property of the owner’ with the owner’s “express or implied consent.”” *Id.* at 892 n. 1. (citing Laws of 1979, ch. 148, § 1). The version of the statute under which Hansen was decided, and on which Carr relies, was not in even in effect at the time Carr was bit. It had not been for over 30 years.²

Second, in Hansen, the trial court erred because they interpreted the restrictive definition of “lawful” presence contained in the prior RCW 16.08.050 (“performance of a duty imposed by law”) as applying to all private property, not just the property of a dog owner. *Id.* at 890. Instead, the Court of Appeals found that under the prior version of RCW 16.08.050, the Legislature clearly intended to exclude private property owned by third parties from the (restrictive) definition of lawful in RCW 16.08.050. *Id.* at 891. So someone bit on the private property of a *third person* would not have to show they were on that property in performance of a duty imposed by law to successfully utilize the dog bite statute—just that they were lawfully on the private property under the usual, ordinary meaning of “lawful”. *Id.* at 891. But someone bit on the *dog owners* property still would have to show they were on the dog owner’s property in performance of a duty imposed by law. The Hansen Court’s

² Even if the prior version of RCW 16.08.050 had been in effect, Ms. Carr would not meet it. There is no evidence she was on the property performing a duty imposed by law.

interpretation makes sense, because, as the Court noted, otherwise it would lead to incongruous results: a victim bit on their own property by someone else's dog would never be able to hold the dog owner strictly liable under RCW 16.08.040 because the victim would never be able to show they were on their own property in performance of a duty imposed by law. *Id.* at 891. Such concern is clearly not present here, where the current RCW 16.08.050 no longer includes any requirement about performance of a duty imposed by law. Hansen does not apply and does not help Ms. Carr's position.

Ms. Carr was bit while on private property leased by the Riveros' from the Groenveld-Meijer's. There is no doubt the property on which Ms. Carr was bit was the "property of the owner[s]" of the dog. Thus the definition of "lawful" found in RCW 16.08.050 applies. To invoke the dog bite statute Ms. Carr has to show she was on the Riveros' property with the *Riveros'* express or implied consent. Ms. Carr had neither. Further, under RCW 16.08.050, confining Kid to a closed, restricted room was tantamount to a fence with a warning which means implied consent may not be presumed.

**2. MS. CARR HAD NO CONSENT AND WAS NOT
LAWFULLY ON THE RIVEROS' PROPERTY.**

a) Ms. Carr did not have consent.

It is undisputed Ms. Carr did not have express consent to be on the Riveros' property or in their home. How could she, as Riveros' did not know Ms. Carr. They had never heard of her until after she was bit. They had never given her permission to be in their home. CP 252, 272, 292. There is no such thing as retroactive permission, and if there were, the Riveros' did not give it. Ms. Carr was without consent or permission and strictly prohibited from entering the Riveros' laundry room or disturbing their dog. CP 252, 272, 292.

Ms. Carr also did not have implied consent to enter the Riveros' property.³ The term "implied consent" is not defined in RCW 16.08.050. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning." Sligar, 156 Wn. App. at 728. Black's Law Dictionary defines implied consent as "Consent inferred from one's conduct rather than from one's direct expression. — Also termed *implied permission*." Black's Law Dictionary (10th ed. 2014). In Sligar the Court noted case law was

³ Ms. Carr asserts the Riveros' never argued implied consent. This is false. In both the Riveros's moving brief for Summary Judgment and Reply brief, they argued Ms. Carr did not have implied consent. CP 247-248, 498-500.

consistent with the 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).

Nothing leading up to the inspection even hints that Ms. Carr had implied permission to enter based on the Riveros’ conduct or omission. Acquiescence to certain other individuals to attend the inspection does not create permission for Ms. Carr. The Riveros’ do not deny knowledge of the inspection any more than they deny their house was sale or that they were tenants. While an argument can be made certain individuals had implied permission to be on the property during the inspection, *i.e.*, the inspector himself, the buyer’s agent who had the key to the house to let people in, and the buyers who were purchasing the house, Ms. Carr can never fit within the umbrella of implied permission. Permission does not implicitly or explicitly extend to someone like Ms. Carr, who the Riveros’ neither knew of nor were told about.⁴ Not even the sellers/owners knew of Shelly Carr; someone who had no contractual duty, privity, or other relationship with the Riveros’ or the Groenveld-Meijer’s. Ms. Carr was

⁴ Appellant argues the Riveros’ never expressly limited permission for entry to only the inspector, buyer’s agent, and buyers. Appellant’s Brief at 23. It is illogical to think tenants, who would have no way of knowing who might attend a home inspection, were required to somehow anticipate more people might attend the inspection than those they were told about and then expressly deny them entrance. The Riveros’ not expressly limiting entry to someone they had never heard of and had no way of knowing about is not evidence of the Riveros’ implicit consent to Carr.

not lawfully on the Riveros' property at the time she was bit and nothing in the Riveros' conduct supports Ms. Carr's theory of implied permission.

Further, even with implied permission, the Riveros limited entry onto their premises to exclude the laundry room and insisted their dog not be disturbed. CP 292. No conduct or actions by the Riveros' suggested that those present for the home inspection were welcome in the laundry room or were welcome to disturb the dog within at any time. Nothing in the Riveros' conduct or actions shows they implicitly gave consent to *Ms. Carr specifically* to enter their laundry room, or to disturb their dog, or to leave the laundry room door open and prod and push a dying dog.

Nevertheless, Ms. Carr went into the laundry room, despite the fact it was a restricted area. Any consent that could be implied for Ms. Carr to enter the house generally did *not* extend to the laundry room. When she returned to the laundry room to try and rectify the error of leaving the door open, she had no consent to be in the laundry room or interact with the dog at the time she was bit. Carr was not "lawfully in or on a private place" of the Riveros' regardless of consent as she never had consent to enter the laundry room or disturb their dog.

b) There is no evidence of “custom” to create implied permission for Ms. Carr.

Ms. Carr asks this Court to implicitly extend permission to Ms. Carr on the idea that it is customary and understood in the real estate industry that non-purchasing family members may attend inspections and that such inspections are akin to an “open house”. Appellant’s Brief at 21.

Ms. Carr’s first attempt to argue custom was to submit the deposition testimony of Michael Linde, the home inspector. When asked at deposition what percentage of *his* clients bring other family members with them, he indicated that it varied and that “[a] lot of people like to have their parents or children see the house, so it’s approximately 50 percent.” CP 377. In other words, about 50 percent of *Mr. Linde’s* clients bring another family member to the inspection. Ms. Carr attempts to extrapolate Mr. Linde’s personal experience. Mr. Linde’s personal opinion lacks foundation. See ER 901. Mr. Linde is not an industry expert. He was not asked at deposition to speak to or describe what is “customary” during a home inspection locally or generally. He was only asked about his own personal experience. The experience of one home

inspector with his own clients does not establish a “local custom” of having non-disclosed, non-family members attend home inspections.⁵

Mr. Linde was also never designated as an expert witness. Ms. Carr’s primary witness disclosure, submitted on April 9, 2015, designates Mr. Linde as a lay witness—not an expert. CP 209. Her August 5, 2015 Amended Primary Witness disclosure again listed Mr. Linde as a lay witness. CP 332. Mr. Linde has been known and available to Ms. Carr since before this litigation commenced; had she wanted to designate him as expert witnesses to establish evidence of custom, she could have timely done so.

With her motion for reconsideration Ms. Carr submitted a new declaration—from Henry Shim, the buyers’ agent—to argue Ms. Carr’s presence at the home inspection was customary. CP 596, 686-688. Ms. Carr claims it was an abuse of discretion for the trial court to deny reconsideration based on this “newly discovered evidence”. Appellant’s Brief at 22. This evidence is not “newly discovered”. Nor was it an

⁵ See Swartley v. Seattle Sch. Dist. No. 1, 70 Wn.2d 17, 21, 421 P.2d 1009, 1012 (1966) (“Although, where negligence is in issue, the usual conduct or general custom of others under similar circumstances is relevant and admissible, such custom may **not** be established by evidence of conduct of single persons or businesses.” (quoting Miller v. Staton, 58 Wn.2d 879, 885, 365 P.2d 333, 336 (1961) (emphasis added)) (not error for the trial court to overrule appellant’s objection to testimony as to method of storing plywood at 14 other junior high schools in the district).

abuse of discretion for the court to deny reconsideration based on this declaration.

In Sligar, Sligar sought reconsideration after Odell's motion for summary judgment was granted. 156 Wn. App. at 724. In seeking reconsideration, Sligar too submitted a new declaration, arguing the trial court erred in its application of the law and that substantial justice had not been done. Id. at 733.

The Court of Appeals found the declaration was not "newly discovered evidence" under CR 59(a)(4), as it "could have been presented at the time the trial court was considering the original summary judgment motion" and there was "no showing that it could not have been presented then." Id. at 734. The same is true here. Ms. Carr shows no reason either in her Motion for Reconsideration or her Opening Brief to this Court why Mr. Shim's declaration could not have been presented prior to the summary judgment hearing or why she was unable to obtain the declaration prior to the hearing.⁶

Realizing that a first declaration is insufficient does not qualify the second declaration as newly discovered evidence. Adams v. W. Host, Inc., 55 Wn. App. 601, 608, 779 P.2d 281, 285 (1989) (motion for

⁶ If Mr. Shim's declaration were truly unobtainable before the hearing on the Riveros' motion for summary judgment, Ms. Carr's remedy may have been a motion to continue the hearing under CR 26(f). She did not request one.

reconsideration properly rejected where Adams' contention that she was unable to obtain a second declaration from Vern Gill, an electrical engineer, in the time between receipt of U.S. Elevator's opposing memorandum and the date of the hearing did not satisfy the definition of "newly discovered" evidence. Mr. Gill's testimony, as set forth in his second declaration, was available to Adams at the time Gill's first declaration was presented to the court in Adams' opposition to summary judgment). Ms. Carr's realization that Mr. Linde's declaration, or her other declarations and evidence, were insufficient to survive summary judgment dismissal does not qualify Mr. Shim's late declaration as "newly discovered evidence." Denial of reconsideration by the trial court was proper.

Even if Mr. Shim's declaration were considered, it too does not establish evidence of custom in the real estate industry. Ultimately, the majority of Mr. Shim's declaration is still regarding his own personal experiences with home inspections and does not actually establish a custom the Riveros' could or should have known about. See Swartley v. Seattle Sch. Dist. No. 1, 70 Wn.2d at 21. Using the phrase "in the real estate industry, it is standard practice", without more, does not establish a real estate custom. CP 687. Mr. Shim's declaration does not provide any details about this alleged custom's potential nature, scope, or applicability,

such as whether this a custom in just the Issaquah real estate industry, in the greater Seattle industry, or beyond, or who is considered a “close relation” under this custom (just parents and children or also aunts, cousins, best friends, or others?).

Further, like Mr. Linde, Mr. Shim was never designated as an expert witness in Ms. Carr’s primary witness disclosure or amended primary witness disclosure. CP 209, 332. Mr. Shim was Ms. Carr’s daughters’ real estate agent, well-known to Ms. Carr. Had she wanted to designate expert witnesses to establish evidence of custom, she could have.⁷

⁷ Ms. Carr’s Motion for Reconsideration was denied without the trial court requesting briefing from the Riveros’. CP 740-741. Although the Riveros’ did not have an opportunity to respond to the Motion for Reconsideration, they would note that Mr. Shim’s allegedly “newly discovered” declaration contradicts his deposition testimony. At deposition, Mr. Shim recalled knowing Ms. Carr would be coming to the home inspection, but “did not believe” he told the Riveros’ and did not know whether he told Mr. Hogan. However in his later declaration he apparently now remembers telling Mr. Hogan Ms. Carr would be attending. CP 687. “When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” Marshall v. AC & S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107, 1109 (1989) (citations omitted). Marthaller v. King Cty. Hosp. Dist. No. 2, 94 Wn. App. 911, 919, 973 P.2d 1098, 1102 (1999) (expert witness affidavit was contradictory to his deposition testimony). Mr. Shim’s subsequent declaration contradicts his previous deposition testimony. Denial of reconsideration was proper and Mr. Shim’s declaration should not be considered here.

Finally, even if Linde's testimony *or* Shim's declaration were considered evidence of "custom" for non-purchasing family members to attend home inspection, there is no evidence the Riveros' knew or had any reason to know this supposed "custom". There is no evidence Shim, or anyone else, informed the Riveros of this "custom". The Riveros' were not members of the real estate industry with knowledge of its customs; they were simply tenants renting a house. Appellant seeks to hold the Riveros' to a supposed custom with no evidence they even knew or should have known of such custom.

3. MS. CARR WAS NOT ON THE PROPERTY WITH THE SELLERS' PERMISSION.

Instead of needing the Riveros' permission to lawfully be on the property, Ms. Carr asserts she only needed the seller's permission to come within the confines of dog bite statute. Ms. Carr argues the Groenveld-Meijer's permission to the buyers, either directly or through (David Hogan), to enter the premises is implicitly extended to Ms. Carr.

Even if permission were the Groenveld-Meijer's to give, no facts support Ms. Carr had their express or implied permission. No facts indicate the Groenveld-Meijer's were aware of Ms. Carr or her presence at the home inspection, much less granted her express permission to be in the home. Further, Ms. Carr's argument that Ms. Carr had implied permission

because of “custom” is insufficient because Ms. Carr has provided no evidence of any “custom.” See supra Respondent’s Brief Section II.C.2.b.

Ms. Carr also suggests only the sellers had authority to object to the nature and scope of the inspection, and if the Riveros’ had a concern, their remedy was to address it with the sellers. Appellant’s Brief at 21. There is no evidence the Groenveld-Meijer’s even knew who would be attending the home inspection, much less anything about Ms. Carr. How could the Riveros’ object to or address a concern about Ms. Carr with the Groenveld-Meijer’s if neither the Riveros’ nor Groenveld-Meijer’s knew who Ms. Carr was, or that she would be attending?

Ms. Carr’s only “evidence” she had the Groenveld-Meijer’s permission is her assertion that Henry Shim informed David Hogan that Ms. Carr would be joining the inspection. However, there is no evidence this information was communicated to the Groenveld-Meijer’s (or the Riveros’), or that the Groenveld-Meijer’s gave any permission to Ms. Carr. Ms. Carr claims that no one ever objected to Ms. Carr attending, but ignores the fact that no one—including the Riveros’ and the Groenveld-Meijer’s—knew Ms. Carr or that she would be at the inspection. The Groenveld-Meijer’s gave neither express nor implied permission to Ms. Carr, if permission were even theirs to give, to attend them inspection such that Carr was lawfully on the property when she was bit.

4. CONFINING KID IN THE LAUNDRY ROOM WAS TANTAMOUNT TO A FENCE OR A REASONABLY POSTED WARNING THUS NO PERMISSION CAN BE PRESUMED.

Under RCW 16.08.050, consent of a dog owner shall not be presumed when the property of the owner is “fenced or reasonably posted.” See also Sligar, 156 Wn. App. at 729 (no presumption of consent to be on the dog owner’s property when the property is fenced). “Fence” is not defined in the statute, so it is given its ordinary meaning, and the Court may look to a dictionary for such meaning. Id. at 728. A “lawful fence” is defined as a “strong, substantial, and well-suited barrier that is sufficient to prevent animals from escaping property and to protect the property from trespassers.” Black’s Law Dictionary (10th ed. 2014).

In Sligar, a six foot fence separated the Odells' property from Sligar's property, containing the Odell’s dog on their side of the fence. Sligar, 156 Wn. App. at 729. Thus, RCW 16.08.050 mandated there be no “presumption—no legal inference—of the Odells' consent to Sligar being on their property at the time of her injury.” Sligar, 156 Wn. App. at 729. Sligar failed to show how she was lawfully on their property at the time of her injury. Id. As such, there was no strict liability under the statute. Id.

Like Sligar, Kid was restricted, obvious to all, and acknowledged by Carr herself. The laundry room was tantamount to a fence. It was a

“strong, substantial, and well-suited barrier” sufficient to prevent Kid from getting out by himself. Black's Law Dictionary (10th ed. 2014). Kid was in an area of the premises the tenants had full control of and which was off limits to everyone. CP 292. Kid was contained when Ms. Carr arrived. CP 737. Just like an outdoor boundary and restriction, the Riveros’ “fenced” Kid. CP 251, 271, 292. Under RCW 16.08.050, consent shall not be presumed when the property of the dog owner is fenced.

Alternatively, the laundry room restriction was “reasonably posted”. While there was no physical paper posting, Mr. Riveros made it clear the laundry room was off limits and Kid was not to be disturbed. CP 292. He had been assured this restriction would be honored. CP 292. All understood the laundry room was a restricted area, otherwise the entry would not have been such a bone of contention.

While there was no physical fence around Kid nor beware of dog sign posted, this was a private home with limited access to a restricted area (the laundry room) that everyone was warned not to enter. There can be no presumption or legal inference the Riveros’ consented for Ms. Carr to be in their laundry room under RCW 16.08.050. Ms. Carr fails to show she was lawfully on the property at the time of her bite.

IV. CONCLUSION

The trial court did not err in granting the Riveros' motion for summary judgment nor in denying reconsideration. Reasonable minds cannot differ the Riveros' were not negligent in failing to prevent harm to Ms. Carr and such harm was not foreseeable. Even under a premises liability theory, the Riveros' neither owed nor breached a duty to Ms. Carr. Finally, Ms. Carr cannot meet the requirements of RCW 16.08.040, which must be strictly construed, as she did not have the express or implied consent of the Riveros' to be on their property, enter their laundry room, or disturb their dog. For the foregoing reasons, the Riveros' respectfully ask this Court to affirm the summary judgment dismissal and the denial of reconsideration.

DATED this 21st day of April, 2016.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: Shellie McGaughey WSBA #49870 for
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Attorneys for Respondents

CERTIFICATE OF SERVICE

Natalie Reid, 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 April 27, 2016, I personally delivered, a true and correct copy of the above document, directed to:

Darrell L. Cochran
Kevin Hastings
PFAU Cochran Vertetis Amala
911 Pacific Avenue, Suite 200
Tacoma, WA 98402

VIA EMAIL AND ABC LEGAL MESSENGER

Dated this 27th day of April, 2016


Natalie Reid

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