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Litigating Dog Bite Claims Against Dog Owners and Third Parties

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Recent Trends in Dog Bite Law

By Attorney Kenneth M. Phillips, author of Dog Bite Law (dogbitelaw.com)

SLIDE 1

By far the hottest topic in dog bite law at the present time is the government's liability for dog bites.

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There are 4 broad grounds for governmental liability:

1. The governmental entity owned a dog that bit a person without justification. Usually, this will be a police dog that attacks an innocent bystander while the dog was not in the process of performing a duty for its handler. Another example is an attack that constitutes excessive force against a suspect. That's a civil rights case.

2. The governmental entity caused a dangerous condition. For example, a pedestrian walking next to a high school was attacked by vicious dogs that were living on the campus in shelters created by the school's employees. The school district was

successfully sued in my case called Cooney v. Parlier Unified School District (see Appendix for a copy of the Complaint).

3. A government shelter (or a private shelter or rescue group) adopted-out a shelter dog known to be vicious. This is referred to as a "shelter dog case." There are 4 varieties of this case which I will discuss at some length.

4. The animal control authority failed to impound a vicious dog despite all the complaints about it from the public.

My presentation shall focus on the ***shelter dog case***.

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Defining terms: "shelter dog" and "shelter dog case"

A "shelter dog" is a dog that is in the custody of a public or private animal shelter or rescue group. A dog in the pound.

A "shelter dog case" has 8 distinguishing features:

1. The defendant is a government shelter (such as those which are run by animal control departments in cities and counties) or a private shelter (often calling itself a rescue organization, adoption group, or humane association).

2. The victim is the person who adopted the shelter dog (or that person's family member), the person who fostered the shelter dog (or that person's family member), someone who is visiting the shelter to pick a dog, a shelter employee, or a shelter volunteer.

3. The dog is a vicious dog or what a number of laws refer to as a "potentially dangerous" dog.

4. The defendant knew or should have known that the dog was a vicious dog or potentially dangerous dog.

5. The dog is in the custody of the defendant at the time of the attack, or the defendant previously gave custody of the dog to the victim or the victim's family.

6. The defendant breached a duty to disclose the fact that the dog is vicious or dangerous. The duty can be based on a statute requiring disclosure, or a common law duty to warn.

7. The victim relied on the defendant to provide correct and complete information about the dog's suitability for adoption or fostering, and would not have taken custody of the dog if the truth were told.

8. The victim was injured or killed because of the dog's viciousness or dangerousness.

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The shelter dog problem

In the past several years, the shelter / rescue / foster industry has been wracked by scandal after scandal:

- Shelter dogs killed 7 of the 36 Americans killed by dogs in 2018. (https://blog.dogsbite.org/2019/05/2018-dog-bite-fatality-statistics-discussion.html).
- Shelters have been known to erase a vicious dog's history of biting by changing its name, misidentifing its breed, and moving it to a second or third shelter in order to eventually trick an unsuspecting family into adopting it. This is a practice I have referred to as "dog laundering" because it is very similar to money laundering. (Merritt Clifton, "Albuquerque City Shelter Released Dangerous Dogs," https://www.animals24-7.org/2015/09/06/albuquerque-city-shelter-released-dangerous-dogs/.)
- At least one shelter manager has been criminally prosecuted for rehoming vicious dogs. (https://www.animals24-7.org/2014/06/23/stamford-shelter-manager-is-first-in-u-s-to-be-charged-with-reckless-endangerment-for-rehoming-dangerous-dogs/).
- In another case, a shelter manager gave two vicious pit bulls back to their owner after learning that the court ordered the dogs euthanized. (https://www.animals24-7.org/2017/10/30/shelter-director-resigns-in-maine-lost-pit-bulls-case/).

This is a big problem because of the large number of shelter dogs. Of the 1.1 million dogs offered for sale or adoption in 2022, 180,000 (16%) are shelter dogs -- dogs being offered by animal shelters and rescue organizations. (https://www.animals24-7.org/2022/06/27/what-we-discovered-from-counting-1122465-dogs-over-the-weekend/).

Why has the shelter / rescue / foster industry gotten this scandalous? In a word, it is because of the unintended consequences of the "no-kill" movement, and because of misguided, sometimes downright evil people whom I call "humaniacs."

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The no-kill movement for dogs and cats began in the late 1980s and took off in the mid-1009s. It was based on a noble idea: no healthy dog or cat in the United States should be euthanized simply due to homelessness or a lack of shelter space. The target "save rate" became 90%, meaning that 90% of the animals were (and are) to be released alive; only 10% were (and are)

to be euthanized. ***The calculation excludes dogs and cats that are delivered to shelters for the specific purpose of being euthanized***.

To many, the no-kill movement has been a success because, according to some estimates, the nation is putting down only 10% of the dogs and cats that were put down in the 1970s. That sounds great and it has been used to raise hundreds of millions of dollars from the goodhearted public.

Unfortunately, however, it has produced an unintended effect. In order to achieve a 90% live release rate, shelters have been caught releasing dangerous and vicious dogs, decreasing their intake of animals, indefinately holding animals that otherwise would be euthanized, and simply manipulating the numbers. (Jennifer Woolf and Julie Brinker, *Has the no-kill movement increased animal suffering?*, https://news.vin.com/default.aspx?pid=210&Id=9390261#:~:text=The%20no%2Dkill%20movement%20for,of%20shelter%20space%20or%20homelessness.

For an example of a horrifying scheme to manipulate the numbers by killing healthy dogs, see Katie Kormann, *Audit says euthanasia rate is higher than reported at St. Louis County Animal Care & Control*, https://fox2now.com/news/audit-says-euthanasia-rate-is-higher-than-reported-at-st-louis-county-animal-care-control/.)

This article on dogbitelaw.com shows an advertisement by a shelter and proof that it was lying to the public about the dog in question: https://dogbitelaw.com/dog-bite-victims/seller-liability-for-dog-bites

The unintended consequences of the “no kill” movement have led organizations such as the Animal Humane Society to refuse to call themselves a “no kill” organization. (https://www.animalhumanesociety.org/news/what-does-it-mean-be-no-kill)

Grounds for shelter dog liability

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Deceit

A dog known to be vicious is in the custody of a public or private animal shelter. The shelter adopts-out the dog by misrepresenting it or failing to warn adequately. An innocent person is injured or killed. Brown v. Southside Animal Shelter, Inc. 158 N.E.3d 401 (Ind. App. 2020) was one of the first state supreme court cases to recognize deceit as a good cause of action against a shelter.

Also see the second Brown v. Southside Animal Shelter, Inc., case, Brown ex rel. Brown v. Southside Animal Shelter, Inc., 162 N.E.3d 1121 (Ind. App. 2021). In this follow-up to the first case, the shelter asked the Indiana Supreme Court to rehear the prior decision, based on the fact that the victim had signed a release. The court took the position that the terms of the release itself indicated deceit.

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Dog bite statute

Shelter dog cases often can be based on strict liability dog bite statutes because the entity transferring ownership of the dog uses an ***adoption contract where the shelter retains ownership of the dog or has a reversion clause***. This is a recent practice by private adoption groups that exposes them to strict liability in states with a strict liability dog bite statute. This ground also is applicable to government entities as well as private shelters when they place a dog with “fosters.” A “foster” is a person who has temporary custody of a dog as opposed to someone who adopts the dog.

Disclosure statute

Shelter dog cases also can be based on another recent development in dog bite law, namely the ***mandatory disclosure statute***. This is a duty to disclose the bite history of a dog plus the circumstances of the prior bite, including all relevant factors such as the nature and extent of the injuries inflicted on the prior victim. Virginia and California have recently enacted mandatory disclosure laws, and a number of the other states are considering doing the same. Violating these statutes will result in civil liability to the victims or even criminal charges against the shelters (see specifically the Virginia statute making "[v]iolation of this section . . . a Class 3 misdemeanor.").

Common law duty to warn

Another ground for a shelter dog claim is the ***common law duty to warn***. Cases going back hundreds of years recognize a duty to warn a person about a dangerous or vicious animal, including horses, mules and of course dogs. Brooke Brown v. Southside Animal Shelter, Inc. (Indiana) is required reading for its discussion of the common law duty to warn. As stated above, also important is the follow-up case in the same court, because it discusses how a release can deceive the person who adopts the dog. (Brown ex rel. Brown v. Southside Animal Shelter, Inc., 162 N.E.3d 1121 (Ind. App. 2021).)

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Distinguishing a shelter dog case from a failure to impound case

A shelter dog case has to be distinguished from a ***failure to impound case***, in which a governmental defendant contributed to the cause of a dog attack by not taking custody of a vicious dog, or by giving a vicious dog back to its owner. It is different from a shelter dog case because it involves a dog that never became a shelter dog, and it is always against the government, specifically the animal control authorities. Cases based on the failure to impound have recently become more common for a variety of reasons.

There are a number of defenses available to the government, chief of which is the lack of a duty, aka the public duty doctrine.

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The public duty defense

What the average person does not know is that animal control departments and law enforcement officers in general are not required to do anything for anyone unless there is a special relationship with that person or the duty is a mandatory one. This is referred to as the "public duty doctrine." It is also jeeringly called the "duty to all, duty to no one" doctrine.

The lack of either a special relationship or a mandatory duty was why an appellate court in California ruled against three brothers who sued the County of Los Angeles after being attacked by two roaming pit bulls. According to the Complaint, the County "had received numerous complaints about the . . . pit bulls yet failed to capture and take the pit bulls into custody pursuant to [Los Angeles County Code of Ordinances] § 10.12.090, knowing that they posed an immediate threat to public safety." The cited ordinance said "[t]he director [of the County Department of Animal Care and Control] ***shall*** capture and take into custody [¶] . . . [¶] [a]ny animal being kept or maintained contrary to the provisions of this Division 1, the Animal Control Ordinance, or any other ordinance or state statute." (LACC, § 10.12.090(C), italics added.)

Notice the word "shall," which normally means "must." The brothers argued that the pit bulls should have been impounded because the County knew about 9 prior incidents in which the same dogs jumped the same fence and ran loose, sometimes chasing people, in violation of another ordinance that prohibited dogs that "constitute or cause a hazard, or be a menace to the health, peace or safety of the community." (LACC, § 10.40.010(W).) However, the Court of Appeal felt that whether a dog was a hazard should be left to the discretion of the County's animal control officers. Something involving discretion is, by definition, not mandatory. This meant the Court was able to rule that the County did not have a mandatory duty that it could be sued for breaching. (See County of Los Angeles v. Superior Court (Kameron Faten), 209 Cal.App.4th 543, 147 Cal. Rptr. 3d 33 (Cal. Ct. App. 2012).)

Special relationship exception

Contrast Faten with Bowden v. Monroe County Commission (West Virginia, 2017). In Bowden, the plaintiff alleged that the dog warden was negligent in performing statutory duties which would have resulted in confiscating the vicious dogs that killed the decedent. The governmental defendants moved for summary judgment based on the public duty defense. By producing evidence that there was a special relationship between the decedent and the dog warden, plaintiff defeated the motion.

To establish a special relationship between a person and a local government entity or employee, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking. See, for example, the discussion in Tipton v. Town of Tabor, 567 N.W.2d 351 (S.D. 1997).

Failure to enforce exception

Another exception to the public duty doctrine is referred to as the "failure to enforce exception." It states that a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect.

In Gorman v. Pierce County, 307 P.3d 795 (Wash., 2013) a dog bite victim sued Pierce County as well as the owners of the attacking dogs. The case against Pierce County was for negligently failing to respond to numerous complaints about the dogs before the attack. Pierce County invoked the public duty doctrine but the trial court ruled that the failure to enforce exception applied.

The prosecution and defense of shelter dog cases

Here are examples of shelter dog cases that I recently handled, and how the cases are being prosecuted and defended:

Shelter Dog Case #1 (deceit vs. the waiver defense)

- A young woman went to a private shelter to inquire about adopting a dog. The shelter worker said, "go in that room and we will put the dog in there with you." The dog had been brought to the shelter because it has previously attacked its owner, putting her in the hospital. The dog immediately mauled my client as she entered the room.
- The plaintiff's case is based on negligence, concealment and misrepresentation.

- The shelter's primary defense is the waiver defense. My client signed a waiver when she got to the shelter. The waiver said she assumed the risk of injury. A defense based on a written waiver can be defeated by exposing the fraud that occurred.
- Tip: state law differs as to how much fraud, deceit, concealment, misrepresentation, or gross negligence must be proved to defeat a waiver. Research this thoroughly before getting too far into the case.
- Tip: don't take a shelter dog case without demanding that the potential client show you everything he or she signed before the incident. There will be something!
- Tip: if the defendant is a "no kill" animal control department or private shelter, make the case about the reasons behind the fraud.

Shelter Dog Case #2 (breach of mandatory disclosure law)

- A dad brings his teenage daughter to the shelter to inquire about adopting a dog. The shelter workers bring him a dog that previously attacked a jogger and inflicted injures that were so serious that the animal control officer flagged the dog for a "dangerous dog hearing." The shelter workers enter notes in their records that say they told this dad about a prior bite, but do not mention that they told him anything about the circumstances of the prior bite or the extent of the injuries inflicted in the prior incident. There is a law in that jurisdiction that requires to tell him these thing in writing, but they fail to do so. He takes the dog home and soon enough it chews off his mother's arm.
- The plaintiff's case is based on negligence and negligence per se. The negligence is failure to warn about what the shelter knew, namely the circumstances of the prior attack and the nature and extent of injuries. The negligence per se case is based on breaking the law which required a written disclosure of the circumstances of the prior attack.
- Tip: Virginia and California have laws that require a written disclosure. Other states are considering enacting similar laws. Research thoroughly the laws of your jurisdiction, including state statutes, county ordinances, and city ordinances. These are recent developments in dog bite law. (The California statute: https://law.justia.com/codes/california/2021/code-fac/division-14/chapter-1-5/section-30526/. The Virginia statute: https://law.lis.virginia.gov/vacode/title3.2/chapter65/section3.2-6509.1/.)
- Tip: as previously noted, if the defendant is a "no kill" animal control department or private shelter, one of the themes of the case should be the reasons behind the fraud.
- Tip: when the defendant is a governmental entity, you must thoroughly research (1) the time period to serve a notice of claim, (2) whether the victim's tender age triggers tolling of the time period to serve the notice of claim or file the lawsuit, (3) governmental privileges and immunities, and (4) monetary limits on the claim.

Shelter Dog Case #3 (strict liability based on retention of ownership)

- A young woman received a phone call from friend who worked for a private shelter that was in the process of moving. "Can you adopt one of our dogs, because we don't have

room for him yet?" The dog had no history of aggression and the shelter worker gushed about how sweet the dog was. Nevertheless, it attacked the young woman a few days after she brought it home. She had signed a fostering contract that did not transfer ownership of the dog to her and stated she assumed the risk of injury.
- Her case was based on the jurisdiction's strict liability dog bite statute. The defense was based on comparative negligence: the dog had no history of aggression so she must have done something to make it bite her. This defense failed because of the young woman's clear testimony at her deposition. The second defense was assumption of the risk. It too failed because the shelter worker's comments about the dog caused the victim to let down her guard.

Further reading: the shelter dog case

Background: animal control agencies in general

The enforcement of laws pertaining to animals is a police function. In many cities and counties, the responsibility is delegated to an animal control department, namely a limited law enforcement agency that is staffed by animal control officers. In some places, animal control is put into the hands of the local humane society which is not a governmental agency at all but which possibility could have some of the legal rights of one. (See Humane Society Liability for Dog Bites below.)

The authority of animal control officers to make arrests, conduct searches, and deal with animals varies widely from one jurisdiction to another. For example, officers in one city might carry guns, make arrests and have the ability to conduct dog court hearings and euthanize vicious dogs, while officers in an adjoining city might be unarmed, have the power to do nothing other than write tickets, and be authorized to quarantine a vicious dog that attacks a person, but not to put the dog down.

The government has a monopoly on animal control. It is illegal for an ordinary citizen to trap, exile or kill dogs that are vicious to people (unless a situation arises in which a dog is reasonably certain to inflict severe bodily injury on a human being, triggering the right to defend oneself or another person). If we shoot a dog in self-defense, we face the possibility that a wrong-headed local prosecutor might file charges against us of animal cruelty or discharging a firearm within the city limits.

Even though this monopoly is justified by the notion that the enforcement of animal control laws is a governmental function, many cities have abandoned it almost entirely. The department might lack the necessary number of officers, proper facilities, working trucks, safe equipment, and legal authority to actually do something in response to a vicious dog or a recidivist dog owner.

Even the adequately supported animal control officers have conflicting mandates: to protect animals from the negligence and cruelty of some people, and to protect people from the

dangerousness and viciousness of some animals. This contradiction itself frequently results in chronic under-enforcement of the laws.

"The Pit Bull Meat Grinder Case" (Alvarado v. City of Los Angeles)

In September 2020, 70-year-old Argelia Alvarado became another victim of our nation's animal shelters which, simply to boost their own reputations, trick people into adopting vicious dogs by engaging in a pattern of deception, a habit of NOT telling the truth, the whole truth, and nothing but the truth.

Los Angeles Animal Services, East Valley Shelter, impounded a vicious pit bull dog on May 25, 2020, because it had attacked a jogger and inflicted serious injuries on him. The circumstances of that incident moved a Shelter worker to recommend a formal administrative hearing to determine whether the dog should be put down. On June 20th, just 24 days afterwards, however, the Shelter adopted-out the dog to Brent Alvarado without disclosing the severity or circumstances of the May 25th attack, but just the opposite, "talking up" the dog and in different ways pressuring him to accept it. Just 99 days later, on Saturday, September 26, 2020, the dog attacked Brent's 70-year-old mother, Argelia Alvarado, in the backyard of their house. The attack was a savage mauling in which both of Mrs. Alvarado's arms were brutally shredded, with her right arm almost entirely chewed off. A Los Angeles Police Officer who was a first responder described it as "looking like it went through a meat grinder and the bones were broken." Doctors had to amputate it almost to her shoulder. She is unfortunately going to have to live out her Golden Years as a severely handicapped person.

This terrible accident happened for three reasons which were all the City's fault. First, a disclosure law was broken. In January 2020, California became the second state in the USA to require all public and private animal shelters to give people a written description of a dog's bite history including the circumstances of each bite, when the dog is being adopted-out. In this case, the pit bull would not have been adopted if the City made the mandatory disclosure. By not doing so, the City broke the law and caused this accident, and therefore must be held responsible.

Second, a rule of common decency was broken. When anything is wrong with a dog, whoever is giving it away to the new owner has to say what's wrong with it, whether the dog is crippled or has allergies or likes to jump on people or has bitten anyone. Courts everywhere have ruled for hundreds of years that giving this information is not discretionary, and failing to give it is negligent. So in this case, the City is responsible for this accident because employees of the shelter did not tell the pit bull's new owner about the circumstances of the attack on the jogger.

Third, the people in command dropped the ball. Los Angeles politicians want the City to have "no kill" shelters, which are those that find homes for at least 90% of the animals in custody. This is a wonderful but unrealistic goal because many dogs are impounded after hurting someone. An unintended consequence is that a number of vicious dogs get released to increase the City's "no kill" statistics at the expense of public safety. When this happens, it is not the result of making a bad decision but making no decision at all, just a slavish adherence to the "no kill" philosophy. We count on animal control departments to protect us, and when they drop the ball, as they did here, the City must be held responsible to compensate the people who get hurt.

This lawsuit is the first to be based on the mandatory statutory duty of any shelter, public or private, to provide an adopter with detailed written information about a dog's bite history, meaning each prior bite plus the circumstances of each prior bite, and to obtain the adopter's signature on an acknowledgement to confirm the information was given. The duty is established by California Food & Agricultural Code section 30526 subsection (b), which provides:

If an animal shelter or rescue group knows, to the best of the knowledge of the shelter or rescue group, that a dog, at the age of four months or older, bit a person and broke that person's skin, thus requiring a state-mandated bite quarantine, the animal shelter or rescue group shall, before selling, giving away, or otherwise releasing the dog, do both of the following:

(1) Disclose in writing to the person to whom the dog is sold, given away, or transferred, the dog's known bite history and the circumstances related to the bite.

(2) Obtain a signed acknowledgement from the person to whom the dog is sold, given away, or transferred that the person has been provided information about the dog as required by this section. The animal shelter or rescue group shall provide the person with a copy of the signed acknowledgment and retain the original copy in its files.

A copy of the Complaint in Alvarado v. City of Los Angeles is attached.

Further reading: liability of the transferor of a dog after completion of the transfer

Sellers of dogs (private or commercial), public or private animal shelters, and rescue organizations and adoption groups (including non-profits) (collectively referred to as "transferors") have certain legal obligations when they place a dog with a new owner. A breach of any of those obligations can result in civil liability and even criminal charges, and can lead to public mistrust.

The prior owner of a dog cannot normally be held responsible for harm caused after ownership is transferred, provided that the prior owner retained no further interest in the dog and did not misrepresent its temperament or warrant that it would not create the harm in the future. For an excellent discussion of various possible causes of action based on harm occuring after transfer of ownership of a dog, see Blaha v. Stuard (2002) 640 NW 2d 85 (South Dakota Supreme Court).

Civil liability will result from adopting out a dog that is known to be dangerous, is known to have dangerous propensities, or is misrepresented as being safe when the transferor has no reasonable basis to make that representation.

A dog known to be dangerous or vicious must be put down or cured of its potentially injurious tendency. (For definitions and a discussion of the concepts of dangerousness and viciousness, see Dangerous and Vicious Dogs at dogbitelaw.com.) The need to euthanize an animal is one of the foreseeable burdens of animal ownership. Even the jurisdictions that have a "no kill" policy acknowledge that some animals must be put down. For example, the State of California

has decreed that "[i]t is the policy of the state that no adoptable animal should be euthanized if it can be adopted into a suitable home." Cal. Civil Code sec. 1834.4. The state has also determined that "[i]t is the policy of the state that no treatable animal should be euthanized." (Ibid.) Despite these policies, however, section 1834.4 permits euthanizing an animal unless it has "no sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet...." There are other exceptions as well.

It should be noted that when mention is made of putting down a dog because of its dangerousness, we are referring to a particular dog that has manifested dangerous or vicious behavior. There is no law in the USA, either enacted or proposed, which would require the gathering up and methodical killing of dogs because of their breed. (For more about breed specific legislation, see Breed Specific Laws at dogbitelaw.com.)

A transferor may also be liable for breach of a promise, representation or warranty. These can be made orally or in writing, and can be express or implied. A common problem is the transferor who says a dog is safe with children and other animals when, in fact, the transferor has no reasonable basis for making the assertion. At the present time, there exist a number of temperament tests for evaluating whether a dog is suitable for placement, but despite the practical advantages of such tests, their use has not become so universal as to provide a reliable shield against liability. Therefore it is difficult under any circumstances to predict that a dog will be safe in a new environment.

All too often, transferors go so far as to lie about a dog's suitability, saying a dog is safe when they have not investigated its history, evaluated its temperament or observed it for a sufficient amount of time. This is especially egregious when the dog was received under circumstances that strongly indicate it was a potential danger to animals or humans.

Further reading: animal control as defendant

As a result of the under-enforcement of animal control laws, courts have held animal control departments responsible for the payment of compensation to victims of dog attacks that resulted in part from animal control negligence. For example:

The Jennifer Lowe case

On November 12, 2007, pit bulls belonging to Charles Smallwood of Knoxville, Tennessee, savagely attacked twenty-one year old Jennifer Lowe at the entry of Smallwood’s mobile home, from which Smallwood himself was absent. The pit bulls severely mauled Ms. Lowe during the attack, inflicting horrific injuries on her face and body which ultimately caused her death later that day. Attorneys Kenneth M. Phillips and Wayne A. Ritchie II, representing Ms. Lowe's family, uncovered evidence that the same dogs had repeatedly attempted to bite people, had attacked and bitten a sheriff's car, had been shot at by police officers in self-defense, and had actually been formally declared to be vicious by the Knox County Animal Control Department. Despite having the legal authority to confiscate the dogs, however, the animal control officers did not do

so, up to the time of Ms. Lowe's horrific death. As a result of the negligence of its animal control department, Knox County was forced to pay substantial monetary damages to her family.

The Krystal Cooney case

Attorney Phillips also represented Krystal Cooney, who was injured by a pack of dogs on June 15, 2008 in Parlier, California. The attack left her with permanent and disfiguring scarring on her left arm and both legs. These were wild, vicious dogs that had been living on the premises of Parlier High School. Numerous complaints to the city's animal control department were met with inaction. The county's animal control department took some measures to round up the packs of dogs in the area, but those measures were inadequate. As a result, the city and the county, as well as the school district, were forced to pay substantial monetary damages to Ms. Cooney.

Further reading: adoption contracts

On YouTube in 2007, there was a poignant example of what can go wrong when a person gets a dog from an adoption group that retains ownership of the dog being adopted-out. Comedienne Ellen DeGeneres and her partner, Portia de Rossi, "adopted" a Brussels Griffon mix on Sept. 20, 2007. When the dog did not fit into their household, they did what dog owners almost always do: they gave the dog to someone with kids, who seemed fit to provide the dog with a good home.

In doing so, however, they infuriated the person who "adopted out" the dog. The latter ran an "adoption agency" for dogs and, when she "adopted out" a pooch, she made people sign a contract that restricts what can be done with the dog in the future. On the basis of the concept of "adoption," and the wording of that contract, the "adoption agency" reclaimed the dog from the new family. The video showed a person rushing into the family's back yard, snatching the dog and then running off with it.

Causes of Action - Tips and Tricks

General negligence

- Taking a child from one place to another where there is a vicious dog.
- Duties owed to a child who is a guest are greater than to an adult.
- A broken promise to keep the dog locked up is actionable.

Negligence per se

- Animal control laws are federal, state, county, and municipal.
- Zoning laws pertaining to the number of dogs can support a negligence per se case.
- Sometimes negligence per se is a presumption, sometimes it is just evidence, and in Georgia it’s built into the dog bite statute.

Scienter (the “one bite rule”)

Must prove both elements:

1. Propensity to bite without justification
    a. No prior bite is required, just proof that the dog wanted to bite.
    b. A justified bite doesn’t satisfy this requirement.
    c. Bites in the distant path are unconvincing.
    d. Propensities aren’t assumed because of the breed or type of the dog.
2. The dog owner (or other defendant) knew about the propensity.

Statutory liability

- It’s “almost strict” liability
- It also can be “ordinance liability”
- It usually covers just bites but some include harm by any means
- It usually covers just the bite victim but some include harm to animals and property
- It usually applies just to dog owners but some impose liability on harborers and keepers
- Plead only the facts required by the statute
- Always plead negligence because sometimes you cannot prove all of the statute’s elements

Statutory liability case study: Alabama’s dog bite law

Alabama has a dog bite statute which covers bites and any other injuries that occur either on the dog owner's property or when the dog pursues the victim from the property. Alongside this liability statute is a limitation of damages statute which says the victim will recover only "actual expenses" if the dog owner "had no knowledge of any circumstances indicating such dog to be or to have been vicious or dangerous or mischievous."

The Alabama dog bite statute is section 3-6-1 of Alabama Statutes:

> If any dog shall, without provocation, bite or injure any person who is at the time at a place where he or she has a legal right to be, the owner of such dog shall be liable in damages to the person so bitten or injured, but such liability shall arise only when the person so bitten or injured is upon property owned or controlled by the owner of such dog at the time such bite or injury occurs or when such person has been immediately prior to such time on such property and has been pursued therefrom by such dog.

That's good so far, but look at the mitigation of damages statute, section 3-6-3, which is one of the things the adjuster is getting at:

> The owner of such dog shall, however, be entitled to plead and prove in mitigation of damages that he had no knowledge of any circumstances indicating such dog to be or to have been vicious or dangerous or mischievous, and, if he does so, he shall be liable

> only to the extent of the actual expenses incurred by the person so bitten or injured as a result of the bite or injury.

The effect of these two statutes was discussed in Rucker v. Goldstein, 497 So.2d 491, 493 (1986):

> Under those statutes, the injury must occur upon the property owned or controlled by the dog's master, or after the victim leaves this property and is immediately pursued therefrom by the dog. Additionally, the statute shifts the burden of proof of scienter. If the defendant is able to prove that he had no knowledge of his dog's vicious propensities, he will be liable only to the extent of the expenses actually incurred by the person so injured.

Landlord liability

The term “landlords” includes property owners and property managers.

- Some states distinguish between residential and commercial landlords. Example: California permits a landlord case based on constructive negligence only if the defendant is a commercial landlord; if it is a residential landlord, there must be proof of actual knowledge of the dangerous dog or dangerous condition.
- Some states are very restrictive so do a memo of law before beginning.
- Causes of action can be based on a variety of circumstances:
    - Failure to get rid of a stray dog that is harbored on the property.
    - Failure to get rid of a tenant’s vicious dog.
    - Failure to fix a broken gate despite knowing of the presence of dogs.
- Knowledge on the part of a manager of person collecting rent is attributed to the property owner.

Secondary causes of action

In addition to the dog bite victim’s usual causes of action in a dog bite case, there are the bite victim’s secondary causes of action:

- Intentional Tort ("siccing" a dog on a person)
- Failure to Provide Identity or Information About Rabies Vaccinations
- Intentional Infliction of Emotional Distress (forcing dog bite victim to encounter the attacking dog after the dog attack)
- Private Animal Control Cause of Action (in states that permit anyone to petition court for control of vicious dog)
- Private Nuisance (allowing vicious or noisy dog to interfere with neighbor's quiet enjoyment of property)
- Public Nuisance (allowing vicious dog to roam, causing neighbors to fear going outside)

Secondary plaintiffs

Secondary plaintiffs include the bite victim's close family members, rescuers ("good Samaritans"), and bystanders in the zone of danger. There are causes of action for secondary plaintiffs:

- Negligent Infliction of Emotional Distress on a Bystander ("Dillon" claims, rescuers, and zone of danger cases)
- Parental Cause of Action for Recovery of Medical Expenses for Child
- Loss of Consortium
- Wrongful Death

Defenses - Tips and Tricks for Beating Them

The airspace defense

In Johnson v. Gay, 2005 Ohio 6057 (Ohio Ct. App. 2005), the court applied the airspace defense against a dog bite victim whose hand was bit while it was on top of the dog owner's fence:

> A trespasser is defined as a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. Appellant admitted that his hand was on appellees' fence when their dog bit him. Appellant claims, however, that because he did not reach over appellees' fence or actually step onto their property, he was not a trespasser.
>
> We disagree. Appellant can be a trespasser without actually stepping onto appellees' property. See Misseldine v. Corporate Investigative Services, Inc., Cuyahoga App. No. 81771, 2003-Ohio-2740, at ¶ 26. A trespass may be committed by invading the airspace of the property of another. Id., citing Hannabalson v. Sessions (1902), 116 Iowa 457. This principle is based upon the concept that an owner of land owns so much of the space above the ground as he can occupy or make use of. Chance v. BP Chemicals, Inc. (1996), 77 Ohio St.3d 17, 25; see, also, Willoughby Hills v. Corrigan (1972), 29 Ohio St.2d 39, 50.
>
> Appellee, Kent Gay, stated in his affidavit in support of appellees' motion for summary judgment that his fence was installed around the backyard of his property. Appellant did not dispute that the fence enclosed appellees' backyard or that the fence was located on appellees' property. Appellant admitted that his palm was on top of appellees' fence when appellees' dog bit him.
>
> Therefore, appellant's hand was on appellees' property. It was undisputed that appellant did not have appellees' consent to access their property. This is sufficient, as a matter of law, to constitute a trespass.

Modern humane society as "public authority"

If a dog bite victim intends to file a claim against a humane society, an important issue arises as to whether the humane society is entitled to sovereign immunity and/or the protections given to governmental authorities under the law of the state where the accident happened. No court has expressed a clear view one way or another, but some -- including the United States Supreme Court -- have issued opinions which bear on the subject. Unfortunately, the victim has no clear answer at the present time.

The test most often used to determine whether a third party is entitled to immunity is referred to as the "arm-of-the-state test." (See, e.g., Savage v. Glendale Union High School, 343 F.3d 1036, 1044 (9th Cir. 2003); Mitchell v. Los Angeles County Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988).) Under this test, the decision is based on the following factors:

- Whether a money judgment would be satisfied from state funds
- Whether the entity performs central governmental functions
- Whether the entity may sue or be sued
- Whether the entity has the power to take property in its own name or only in the name of the State
- The corporate status of the entity

When considering the status of humane society, some of the answers to these questions usually would be positive, and others would be negative. Such an entity clearly performs central governmental functions, and does so as a not-for-profit corporation, factors tending to prove that it is an arm of the state. However, a judgment against it would be paid by the entity and not the state, it can be sued on its own, and it has the power to take property in its own name. Therefore, only two of the five factors are indicative of an arm of the state. It is not clear whether this showing would be sufficient for sovereign immunity.

In Richardson v. McKnight, 521 U.S. 399 (1997), the United States Supreme Court declined to extend sovereign immunity to prison guards employed by a private corporation managing a prison under contract with a state. Many analogies could be made between that kind of corporation and a humane society -- each performs central governmental functions, can sue or be sued, and has the power to take property in its own name. But the corporation in that case, however, was for profit, unlike the humane societies.

Despite the lack of a clear answer when the focus is on the sovereign immunity issue, it appears clear that, under specific circumstances, a humane society may have the status of a "public authority" under the laws of some states. Those circumstances result from a combination of the particular state law and the particular facts of the case. Those circumstances are, in fact, unique to humane societies because of their historical dual nature as private corporations and law enforcement entities.

In many states, a municipality is permitted to engage a local humane society to enforce criminal and penal laws pertaining to animal control that otherwise fall within the police power of the municipality. After being conferred these powers, a strong argument exists that a humane society becomes an instrumentality of the state. For example, in Menches v. Inglewood Humane Society (1942) 51 Cal. App. 2d 415, 418, the humane society was referred to as "an instrumentality of the state" which was acting "pursuant to statutory authority" by placing a dog that turned out to be dangerous.

Comparative negligence

- Ordinary conduct is not negligence
- Children below a certain age are not capable of negligence
- Provocation: the myth

Contributory negligence

- A double-edged sword
- Laws must be changed

Assumption of the risk

- Intervening in a dog fight
- Occupational assumption of the risk
    a. Veterinarians, kennel workers
    b. Pet sitters

Parental negligence

If the child cannot sue the parent, then neither can the dog owner. In some states, a child can sue his parents for negligence. (See, i.e., Gibson v. Gibson (1971) 3 Cal.3d 914.) The traditional rule is that a child *cannot* sue his parents for negligence.

If the negligence of a parent combines with the negligence of another person, and the result is injury to a child, some states hold that the other person is 100% liable for the child's injuries, and the parent is not liable for any of it. (See, i.e., Smelser v. Paul (2017) 398 P.3d 1086 (Washington Supreme Court).)

Statute of limitations

- Tolling often applies to minors only, which can be a disaster if the cause of action for recovery of the minor's medical expenses belongs only to the parents.
- Government claims have to be made within the time of the governmental claims statute, which does not toll for minority.

Defeating defense strategies

- Admitted liability often results in a lower verdict than usual, so try to plead and prove at least one extra cause of action that will enable you to introduce evidence of wrongdoing.
- There is a notion that friends, family, and neighbors shouldn't sue each other, which you should counter with the principle that our friends, family, and neighbors should keep us safe.
- The implication that the child's parents want to get rich from the child's dog bite injuries should be met with an instruction from the court that mentions the fact that the child and not the parents will be the owner of any damages that the jury awards.

Protecting your client

- Don't let your client say "pitbull" or any other breed, because it might inadvertently trigger a denial of insurance coverage based on a breed exclusion.
- Don't let your client say "everyone knew the dog was vicious" because it could be interpreted to mean that the client assumed the risk of injury by the dog.
- Don't let the client tell the dog owner "I'll never sue you" because that is exactly what the dog owner's adjuster is going to be looking for, and it will result in a law offer of settlement.

Finding Insurance

Types of insurance

1. Homeowners
2. Renters
3. Mobile home
4. Canine liability insurance
5. General liability insurance (on a business)
6. Workers compensation
    a. Embedded into homeowners policy
    b. Failure to have workers compensation insurance leads to making the employer strictly liable under the labor law but open to a claim for full compensation.

Coverages

- Personal liability protection covers dog bites.
- Medical reimbursement (aka "guest medical")
    - Strict contractual liability.
    - Often applies outside the insured property.
- All residents except renters are covered by the personal liability provision.
- Stacking policies can produce double the monetary limits of one policy.

- Single limit provisions mean that the one monetary limit applies no matter how many plaintiffs there may be. This means:
    - Your client might not be fully compensated.
    - A parent who was injured while rescuing his or her child should pay a pro rata share of the costs of the case, or risk the wrath of the judge at the hearing to confirm the settlement.

Exclusions

- Animals causing harm are excluded from some homeowner policies.
- Certain breeds or types of dogs are excluded from some policies.
    - The insurance company has to prove the exclusion was sent to the policyholder.
    - It is possible to challenge the breed determination by DNA analysis.
- There is a common exclusion for a home-based business
    - Daycare.
    - Pet sitter.
- Renters are excluded.
- No person can make a claim against a policy that covers him or her.

Finding Defendants

1. Co-owner of attacking dog
    a. A current spouse or ex-boyfriend / girlfriend might be regarded as an owner of the dog no matter where the person lives, based on interactions with the dog.
    b. A former spouse or ex-boyfriend / girlfriend might have indices of ownership, such as being on the dog license, paying the veterinary bills, or having visitation privileges.
    c. Parents who care for the dog might have sufficient indices of ownership.
2. Principal and agent
    a. A person taking care of the dog or walking it is an agent.
    b. An employer is a principal.

The pit bull problem

- Pit bulls are disliked by most Americans
- Pit bulls are less than 6% of all dogs in the USA
- Pit bulls bite more humans than other breeds
- Pit bull bites are more deadly than those of other breeds
- When they attack, pit bulls kill or maul their owners and the owners' family members or visiting babies more than half the time
- Pit bulls are the No. 1 canine killers of other people's pets and animals, killing more than 75% of those killed by a dog
- Pit bull owners are more likely to be irresponsible

See Pit Bulls: Facts and Figures at dogbitelaw.com for details.

The confirmation process when the victim is a child

When the victim is a child, almost all states require the parties to get the court's approval of a settlement; when the case is resolved by judgment, the court still must approve the disposition of the settlement money.

The best type of settlement for a child is a structured settlement. However, in some cases a special needs trust is better because it preserves the child's ability to receive benefits from government programs. In a very few cases, the child's money can be put into a "qualified settlement fund" such as where there are multiple plaintiffs.

The best way to fund the structured payments is by an annuity obtained from a plaintiff-oriented structured settlement specialist (i.e., an annuity broker with a good deal of experience obtaining annuities for accident victims).

The steps in getting court approval almost always the following:

- The victim's attorney and the insurance adjuster or defense lawyer will enter into an agreement to resolve the claim or lawsuit one of two ways:
    - By a structured settlement if the child's net settlement amount is significant.
    - By a lump sum settlement.
- The confirmation of the settlement will be in writing and at a minimum will specifically recite:
    - That the parties will enter into a structured settlement agreement and will sign a qualified assignment agreement if required, and
    - The insurance company will issue one check solely to the annuity issuer and a second check to the victim and his or her attorney.
- The child's parents, their attorney and a structured settlement specialist will work together to determine:
    - The schedule of payments to the child
    - If necessary, how much of the net settlement should be deposited into a blocked bank account.
- The child's parents and the dog owner's insurance company will sign:
    - A structured settlement agreement (not a standard release).
    - A standard qualified assignment (except where the defendant is the source of the funds).
- In some jurisdictions, the parents serve as guardian ad litem, but in others there must be an independent guardian ad litem.
    - Tip: get the defendant to pay for the guardian ad litem
- The settlement will be conditioned upon court approval or, in Maryland, satisfying the statutory requirements for minors' settlements. This is variously referred to as court

approval, court confirmation, guardianship, friendly suit, or a minor's compromise proceeding, depending on the jurisdiction.

- In some instances, the process may not require an actual physical visit to court, while in others the parents will have to not only attend the court hearing but also meet with a court-appointed "guardian" who will review the settlement and recommend it to the judge. The court is primarily concerned with the disposition of the child's funds, not the amount of the settlement itself.

Structured settlements & the Internal Revenue Code

Generally speaking, compensation received as damages on account of personal injuries is not included in the victim's gross income and therefore is not taxable, per Internal Revenue Code section 104(a)(2):

> § 104. Compensation for injuries or sickness
>
> (a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—...
>
> (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness....

The exclusion in section 104(a)(2) applies whether the damages are received as a result of a lawsuit or settlement agreement, and whether they are received in a lump sum or periodic payments. The exclusion also extends to the portion of damages received as compensation for lost wages and lost income, even though the same would have been taxable if the plaintiff had earned them. (Burke, Therese A., 504 US 229 (Sup. Ct. 1992).) Loss of consortium damages also are not taxable when they result from a physical injury to a spouse. See the IRS ruling here: https://www.irs.gov/pub/irs-wd/9952080.pdf

When settlement proceeds are received and invested, the gain (i.e., the interest or profit) on the same is taxable as ordinary income. (Rozpad, Joseph S., 154 F3d 1 (1st Cir. 1998); Greer, Yancy D., TC Memo 2000-25 (2000).) However, the gain on a personal injury settlement excludable from income (i.e., tax free) if certain conditions are met. (See P.L. 97-473, Jan. 14, 1983 (97th Cong., 2d Sess.))

The most concise summary of these conditions appears in the definition of "structured settlement" contained in Internal Revenue Code section 5891(c)(1):

> The term "structured settlement" means an arrangement—
>
> (A) which is established by—

(i) suit or agreement for the periodic payment of damages excludable from the gross income of the recipient under section 104 (a)(2), or

(ii) agreement for the periodic payment of compensation under any workers' compensation law excludable from the gross income of the recipient under section 104 (a)(1), and

(B) under which the periodic payments are—

(i) of the character described in subparagraphs (A) and (B) of section 130 (c)(2), and

(ii) payable by a person who is a party to the suit or agreement or to the workers' compensation claim or by a person who has assumed the liability for such periodic payments under a qualified assignment in accordance with section 130.

According to the above definition, the structured settlement of a personal injury claim must be an arrangement (a) established by a suit or agreement, (b) for the periodic payment of damages to an accident victim, (c) under which the payments are of the character described in IRC section 130(c)(2)(A) and 130(c)(2)(B), and (d) under which the payer is a party to the suit or agreement, or an assignee of the liability under a "qualified assignment."

Suit or agreement

A "suit" means a lawsuit. An "agreement" usually means a settlement agreement. A bodily injury claim is resolved by a suit, which leads to a court judgment, or a settlement agreement. For this reason, ever use a standard release; always use a structured settlement agreement.

Periodic payment of damages

The "periodic payment of damages" refers to the payments to be received in the future. This is generally understood to mean at least two payments.

Damages for bodily injuries and not punitive damages or confidentiality

"[E]xcludable from the gross income of the recipient under section 104 (a)(2)" means that the money is being paid on account of bodily injuries. Punitive damages do not qualify. The settlement agreement and everything else should therefore say that the settlement is for personal physical injuries or physical sickness, and no part of the settlement is for punitive damages.

Consideration for a confidentiality clause also does not qualify for tax-free treatment. Therefore, make sure there is no confidentiality provision in the settlement agreement. If there is, make the insurer pay extra for it.

Who can make the payments

The payments have to be made by one of the following: a party to the suit, a party to the settlement agreement, or a person or entity that has assumed the liability under a "qualified assignment." It usually is a holding company owned by the life insurer who issues the annuity. Therefore, make sure the settlement agreement states that the defendant agrees to sign a “qualified assignment” document.

Appendix for Further Reading

Alvarado v. City of Los Angeles - Complaint

Bowden v. Monroe County Commission

Brooke Brown v Southside Animal Shelter, Inc. 1

Brooke Brown v Southside Animal Shelter, Inc. 2

California Food & Ag Code sec 30503

Cooney v. Parlier Unified School District - Complaint

Gorman v. Pierce County

Pit Bulls: Facts and Figures

Tipton v. Town of Tabor

Virginia § 3.2-6509.1. Disclosure of animal bite history; penalties

EXHIBIT 1

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ARGELIA ALVARADO, an individual, and JOSE ALVARADO, an individual, Plaintiffs, v. CITY OF LOS ANGELES, and DOES 1 through 10, Defendants.	Case No. 21STCV27837 **COMPLAINT FOR DAMAGES** 1. Negligence Per Se based on Public Animal Shelter's Violation of Mandatory Statutory Duty to Disclose Dog's Known Bite History and Circumstances Related to the Bite; 2. Negligent Failure to Warn Adopter of Dog's Known Bite History and Circumstances Related to the Bite; 3. Negligent Failure to Evaluate Whether Dog With History of Unjustified Biting of a Person Was Adoptable; 4. Loss of Consortium of Spouse. Unlimited Case.

COME NOW Plaintiffs Argelia Alvarado and Jose Alvarado, by their attorney of record Kenneth M. Phillips, and for their Complaint against Defendant City of Los Angeles and Does 1 through 10 allege the following.

///

///

FIRST CAUSE OF ACTION:

NEGLIGENCE PER SE BASED ON PUBLIC ANIMAL SHELTER'S VIOLATION OF MANDATORY STATUTORY DUTY TO DISCLOSE DOG'S KNOWN BITE HISTORY AND CIRCUMSTANCES RELATED TO THE BITE

(Plaintiff Argelia Alvarado against Defendant City of Los Angeles)

1. Plaintiff Argelia Alvarado ("Argelia") is an adult individual with legal capacity to bring this action.

2. Plaintiff Jose Alvarado ("Jose") is an adult individual with legal capacity to bring this action.

3. Defendant City of Los Angeles ("City") is a "public entity" as such term is defined in Government Code section 811.2.

4. On information and belief, Does 1 through 10 are individuals whose names are unknown to Plaintiffs, but who are liable for the damages prayed for herein as a result of the facts alleged. Each such defendant performed the acts attributed to one or more of the other defendants, and each alleged fact involved each such defendant.

5. Defendant City by its animal control department known as Los Angeles Animal Services maintains, owns and operates East Valley Shelter, which shall be referred to herein as the Shelter. At all times relevant hereto, the Shelter was an "animal shelter" as defined in California Food & Agricultural Code section 30526.

6. A male pit bull dog which was approximately three years of age was brought to the Shelter on May 25, 2020 after it attacked a jogger, biting both of his arms. The attack was unprovoked, the dog acted in an aggressive and vicious manner, and the injuries it inflicted were severe. The owner of the pit bull was unknown. The name of the victim in that incident also is unknown to Plaintiffs at this time and therefore he shall be referred to herein as “the Jogger."

7. The dog was put into rabies quarantine on May 25, 2020, given the name “O’Gee,” and details about the attack on the Jogger were entered into the Shelter's

records, including the circumstances related to the bite, the nature and extent of the injuries that O'Gee inflicted on the Jogger, and the absence of legal justification for the attack.

8. On June 13, 2020, a supervisor at the Shelter approved putting O'Gee in the main kennels. The Shelter supervisor who did this was an employee of Defendant City who was acting in the course and scope of his employment. This person's name is unknown to Plaintiffs, so this Shelter supervisor will be referred to herein as "Supervisor 1."

9. On June 14, 2020, a different Shelter supervisor approved adopting-out O'Gee to "regular adopters" meaning the public. He was an employee of Defendant City who was acting in the course and scope of his employment. The first name of this supervisor was "Shawn" but his last name is unknown to Plaintiffs, for which reason he will be referred to herein as "Supervisor 2."

10. Defendant City publicized the availability of O'Gee for adoption by the public by posting on the Internet the dog's photograph and description with no mention of the attack on the Jogger, the circumstances related to the bite, the nature and extent of the injuries that O'Gee inflicted on the Jogger, or the absence of legal justification for the attack.

11. Brent Alvarado ("Brent"), a son of the Plaintiffs, saw the photograph and publicity about O'Gee on the Internet and contacted the Shelter by telephone about O'Gee, about which he had no other information.

12. On or about Saturday, June 20, 2020, Brent adopted O'Gee, accompanied by his 14-year-old daughter. Nobody informed him about the circumstances of O'Gee's attack on the Jogger, the nature and extent of the injuries that O'Gee inflicted on him, or the absence of legal justification for the attack. Brent would not have adopted O'Gee had he been warned of those things.

13. On Saturday, September 26, 2020, 99 days after Brent took possession of O'Gee, it brutally attacked his mother, Plaintiff Argelia, at their home, 6610 Rubio Avenue,

Van Nuys, California 91406. On that date she was 70 years of age, having been born on February 10, 1950. There was neither warning of nor provocation for the attack.

14. The attack lasted at least 20 minutes and was a savage mauling in which both of Plaintiff Argelia's arms were brutally shredded, with her right arm broken into pieces and almost entirely severed above her elbow.

15. An animal control officer employed by Defendant City captured O'Gee after the mauling and brought it back to the Shelter.

16. The Shelter did not return O'Gee to Brent but euthanized the dog the same day.

17. Plaintiff Argelia's right arm was amputated because of this pit bull attack, and her left arm was severely injured, resulting in permanent disability of the left arm and the whole body. She also sustained numerous additional injuries in the attack.

18. As a sole proximate result of the facts alleged herein, Plaintiff Argelia sustained grave, permanent bodily injuries to her nervous system and person, and has suffered, and will continue to suffer, substantial general damages. The amount of said damages is subject to proof at trial.

19. As a further, sole proximate result of the facts alleged herein, Plaintiff Argelia will require the services of doctors, physical therapists and other professionals, and different prosthetics to substitute for her right arm. For these services and prosthetics, and similar things she will need in the future, she has incurred, and will continue to incur in the future, substantial medical treatment costs and other costs, losses and expenses related to her injuries, disability, care and quality of life. The full amount of all such damages is not known at this time and therefore is subject to proof at trial.

20. Defendant City was given notice of this claim on January 29, 2021, and gave it Claim Number C21-02963.

21. Before selling, giving away, or otherwise releasing O'Gee to Brent, Defendant City and its employees ("employees of the Shelter") knew that O'Gee, at the age of four

months or older, had bitten a person and broke that person's skin, thus requiring a state-mandated bite quarantine.

22. At all times relevant hereto, California Food & Agricultural Code section 30526 subsection (b) provided:

> If an animal shelter or rescue group knows, to the best of the knowledge of the shelter or rescue group, that a dog, at the age of four months or older, bit a person and broke that person's skin, thus requiring a state-mandated bite quarantine, the animal shelter or rescue group shall, before selling, giving away, or otherwise releasing the dog, do both of the following:
>
> (1) Disclose in writing to the person to whom the dog is sold, given away, or transferred, the dog's known bite history and the circumstances related to the bite.
>
> (2) Obtain a signed acknowledgment from the person to whom the dog is sold, given away, or transferred that the person has been provided information about the dog as required by this section. The animal shelter or rescue group shall provide the person with a copy of the signed acknowledgment and retain the original copy in its files.

23. Before selling, giving away, or otherwise releasing O'Gee to Brent, Defendant City did not do either of the things set forth in section 30526 subsection (b), to wit:

(1) Defendant City and its employees did not disclose in writing to Brent O'Gee's known bite history and the circumstances related to the bite inflicted on the Jogger.

(2) Defendant City and its employees did not obtain a signed acknowledgment from Brent that he was provided information about O'Gee as required by section 30526 subsection (b), and *a priori* did not provide Brent with a copy of the signed acknowledgment or retain the original copy in its files.

24. By reason of the facts alleged herein, Defendant City violated California Food & Agricultural Code section 30526.

25. California Food & Agricultural Code section 30526 was designed to prevent the very harm that Plaintiff Argelia sustained.

26. Plaintiff Argelia was a member of the class of persons that the law alleged herein was intended to protect. It was foreseeable that adopting-out a dog having a known bite history to one member of a family without providing the information set forth in California Food & Agricultural Code section 30526 subsection (b) would pose a risk of bodily injuries to not just the adopter but also other members of the family residing with the adopter.

27. The violation alleged herein was the sole proximate cause of Plaintiff Argelia's injuries, losses and damages as alleged in this Complaint.

28. In committing the acts and omissions alleged in this Cause of Action, Defendant City and its employees did not do what might reasonably be expected of a governmental entity or person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

29. California Food & Agricultural Code section 30526 created a mandatory duty on the part of Defendant City which it failed to discharge, making Defendant City liable for Plaintiff Argelia's injuries pursuant to Government Code section 815.6.

SECOND CAUSE OF ACTION:

NEGLIGENT FAILURE TO WARN ADOPTER OF DOG'S KNOWN BITE HISTORY AND CIRCUMSTANCES RELATED TO THE BITE

(Plaintiff Argelia Alvarado against Defendant City and DOES 1 through 10)

30. Plaintiff Argelia incorporates and repleads the allegations set forth in paragraphs 1 through and including 23 hereof.

31. The decision to authorize employees of the Shelter to adopt-out O'Gee to the public was made by Supervisor 2 as alleged in paragraph 9 of this Complaint. For the purpose of only this Cause of Action, Plaintiff alleges *arguendo* that this decision was reached by weighing the risks and benefits of such adoption, and thus was a discretionary act for which Shelter supervisors are immune from liability pursuant to Government Code section 820.2.

32. After Supervisor 2 authorized employees of the Shelter to adopt-out O'Gee to the public, they carried out a series of routine steps in the adoption process such as adding the dog's photograph and description to the Shelter website, arranging for O'Gee to be microchipped and vaccinated against rabies, scheduling one or more appointments for members of the public to meet O'Gee, filling out paperwork, making entries in Shelter records, and collecting the adoption fee. The steps in the adoption process of O'Gee were ministerial not discretionary.

33. Employees of Defendant City who carried out the adoption process of O'Gee, including but not limited to those Shelter employees who interacted with Brent during the steps of the adoption process, knew or should have known the circumstances of the bite the Jogger sustained from O'Gee, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack.

34. Employees of Defendant City who carried out the adoption process of O'Gee, including but not limited to those Shelter employees who interacted with Brent during the steps of the adoption process, had a duty to warn him about O'Gee, specifically to inform Brent about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack.

35. It was of critical importance to inform Brent about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack, because such information is essential for the proper, safe placement of a dog in a new home, and for the protection of the adopter, members of the adopter's family, people who reside in and near the adopter's

home, and people in the community where the dog will live, all of whom will come into contact with the dog, which might therefore need to be muzzled around people, prevented from interacting with certain people such as small children, or securely confined in a special manner.

36. Defendant City and its employees breached the duty alleged herein by not informing Brent about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack.

37. Brent did not know, and had no way of learning, about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, or the absence of legal justification for the attack.

38. Had Brent, prior to or during the adoption process, learned about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack, Brent would not have adopted O'Gee.

39. Brent agreed to adopt O'Gee based on the following factors: (1) the dog was offered to the public by the Shelter which was a governmental agency whose duties include ridding the jurisdiction of vicious dogs and placing "adoptable" dogs in suitable new households, (2) the advertised description of O'Gee did not state or imply that the dog had bit a person, (3) the verbal comments about the dog which employees of the Shelter made to Brent gave him the impression that O'Gee was a safe, friendly companion dog without a history of vicious attacks on people, (4) Brent felt pressure to take O'Gee because the Shelter emasculated the dog after just one or two phone calls with Brent, before he saw the dog, and (5) when he saw O'Gee for the first and only time at the Shelter, Brent was with his 14-year-old daughter and assumed that if O'Gee was inappropriate in a family setting the Shelter employees would tell him so.

40. The acts and omissions of the Shelter employees during the adoption process of O'Gee induced a false sense of security on Brent's part which would not have

existed had Shelter employees warned him about the circumstances of the bite the Jogger sustained, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack.

41. The acts and omissions of the Shelter employees during the adoption process of O'Gee occurred in the course and scope of their employment.

42. The decision as to what warning to give Brent about O'Gee did not constitute the type of basic policy decision that Government Code section 820.2 insulates from liability. After the decision to adopt-out O'Gee to the public, the determination as to whether to warn the adopter, Brent, of the latent danger facing him and his family presents no reason for immunity, and to the extent that the Shelter employees consciously considered pros and cons in deciding what information, if any, to give Brent, such determination was made at the lowest, ministerial rung of official action.

43. By reason of the ministerial acts and omissions of the Shelter employees alleged in this Cause of Action, O'Gee was accepted into and made a resident of the home which Brent shared with Plaintiff Argelia and Plaintiff Jose and other members of the Alvarado family, none of whom were aware of the circumstances of the bite the Jogger sustained from O'Gee, the nature and extent of the injuries that O'Gee inflicted on him, and the absence of legal justification for the attack.

44. The ministerial acts and omissions of the Shelter employees alleged in this Cause of Action were the sole proximate cause of Plaintiff Argelia's injuries, losses and damages as alleged in this Complaint.

45. Defendant City is liable to Plaintiff Argelia for her injuries, losses and damages pursuant to Government Code section 815.2(a) by reason of the facts alleged in this Cause of Action.

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THIRD CAUSE OF ACTION:

NEGLIGENT FAILURE TO EVALUATE WHETHER DOG WITH HISTORY OF UNJUSTIFIED BITING OF A PERSON WAS ADOPTABLE

(Plaintiff Argelia Alvarado against Defendant City of Los Angeles and Does 1 - 10)

46. Plaintiff Argelia incorporates and repleads the allegations set forth in paragraphs 1 through and including 21 hereof.

47. Supervisor 2 and any other employee of Defendant City who was involved in authorizing the adopting-out of O'Gee knew or should have known that O'Gee attacked and inflicted severe injuries on the Jogger in an aggressive manner without warning, provocation or legal justification.

48. Supervisor 2 and any other employee of Defendant City who was involved in authorizing the adopting-out of O'Gee knew or should have known that, by virtue of having attacked and inflicted severe injuries on the Jogger in an aggressive manner without warning, provocation or legal justification, O'Gee manifested a clear sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet.

49. Supervisor 2 and any other employee of Defendant City who was involved in authorizing the adopting-out of O'Gee knew or should have known that, by virtue of having attacked and inflicted severe injuries on the Jogger in an aggressive manner without warning, provocation or legal justification, O'Gee was a "vicious dog" as that term was defined in Food and Agricultural Code section 31603, to wit: "'Vicious dog' means ... [a]ny dog that, when unprovoked, in an aggressive manner, inflicts severe injury on ... a human being."

50. By reason of the foregoing, Supervisor 2 and each other Shelter supervisor who was involved in authorizing the adopting-out of O'Gee had a duty to make an evaluation, to wit, to consciously exercise discretion by balancing the risks and advantages of adopting-out O'Gee to an ordinary member of the public as opposed to other available

options, such as euthanizing O'Gee or adopting-out O'Gee to a nonprofit rescue organization which could humanely and safely house a potentially dangerous or vicious dog.

51. Supervisor 2 and any other employee of Defendant City who was involved in authorizing the adopting-out of O'Gee breached their duty alleged herein by failing to make an evaluation to determine whether O'Gee was adoptable to an ordinary member of the public as opposed to other available options, such as euthanizing O'Gee or adopting-out O'Gee to a nonprofit rescue organization which could humanely and safely house a potentially dangerous or vicious dog. Said Shelter supervisors did not abuse their discretion but failed to exercise it.

52. The failure to make the evaluation described herein was negligent.

53. The failure to make the evaluation described herein was an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or others because (a) O'Gee was a pit bull, (b) pit bull type dogs that become aggressive toward people inflict the most frequent, most severe, most costly and most deadly injuries on human beings as compared with other types and breeds of dog, (c) when pit bull type dogs kill a human being, approximately 50% of the decedents are the pit bull's owner or a member of the owner's family, (d) O'Gee was in the custody of Defendant City because O'Gee had actually attacked and inflicted severe injuries on the Jogger in an aggressive manner without warning, provocation or legal justification, and (e) the records of Defendant City stated clearly that O'Gee had attacked and inflicted severe injuries on the Jogger in an aggressive manner without warning, provocation or legal justification.

54. By reason of the facts alleged in this Cause of Action, the acts and omissions of Supervisor 2 and any other employee of Defendant City who was involved in authorizing the adopting-out of O'Gee constituted gross negligence.

55. By reason of the facts alleged in this Cause of Action, the acts and omissions of Supervisor 2 and any other employee of Defendant City who was involved in authorizing

the adopting-out of O'Gee but did not make the required evaluation were not protected by the "discretionary acts" immunity provisions of Government Code section 820.2 and each of them is responsible for their own negligence pursuant to Government Code section 820.8.

56. Defendant City is liable to Plaintiff Argelia for her injuries, losses and damages pursuant to Government Code section 815.2(a) by reason of the facts alleged in this Cause of Action.

FOURTH CAUSE OF ACTION:

LOSS OF CONSORTIUM OF SPOUSE

(Plaintiff Jose Alvarado against Defendant City of Los Angeles and Does 1 - 10)

57. Plaintiff Jose incorporates and repleads all of the allegations set forth in this Complaint.

58. Plaintiff Jose is the lawfully married husband of Plaintiff Argelia and has been married to her and lived with her for many years and has fathered children with her.

59. Plaintiff Argelia was tortiously injured and disabled as alleged throughout this Complaint.

60. As a sole proximate result of Plaintiff Argelia's injuries and disabilities, and continuously from the day thereof, Plaintiff Jose has suffered and will continue to suffer a loss or impairment of her support, services, love, companionship, comfort, affection, society, the moral support each spouse gives the other through the triumphs and despairs of life, and the deprivation of her physical assistance in operating and maintaining the family home.

61. Defendant City was given notice of this claim on January 29, 2021.

62. By reason of the facts alleged herein, Defendant City is liable to Plaintiff Jose for the payment of damages to compensate him for his loss of consortium in an amount to be proved at trial.

WHEREFORE Plaintiffs pray judgment against Defendants as follows:

1. For compensatory and general damages according to proof;

2. For past and future medical, incidental and service expenses related to Plaintiff Argelia according to proof;

3. For pre-judgment and post-judgment interest on all damages as allowed by law;

4. For costs of suit incurred herein; and,

5. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

The Law Offices of
Kenneth Morgan Phillips

By: 

Kenneth M. Phillips
Attorney for Plaintiffs

EXHIBIT 2

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2017 Term

No. 16-0597

FILED
May 18, 2017
released at 3:00 p.m.
RORY L. PERRY, II CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**DREAMA BOWDEN,
AS ADMINISTRATRIX OF THE ESTATE OF
LOWELL BOWDEN,
Plaintiff Below, Petitioner**

V.

**MONROE COUNTY COMMISSION,
A POLITICAL SUBDIVISION; AND
PATRICIA GREEN,
INDIVIDUALLY AND IN HER OFFICIAL CAPACITY,
Defendants Below, Respondents**

**Appeal from the Circuit Court of Monroe County
Honorable Robert A. Irons, Judge
Civil Action No. CC-32-2011-C-18
REVERSED AND REMANDED**

**Submitted: April 19, 2017
Filed: May 18, 2017**

**Michael A. Olivio
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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "*W. Va. Code*, 29-12A-5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for 'the failure to provide, or the method of providing, police, law enforcement or fire protection[,]' is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual." Syllabus point 8, *Randall v. Fairmont City Police Department*, 186 W. Va. 336, 412 S.E.2d 737 (1991).

2. "To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on

the local governmental entity's affirmative undertaking." Syllabus point 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989).

Davis, Justice:

The instant matter is before this Court on appeal by Mrs. Dreama Bowden (hereinafter "Mrs. Bowden"), as administratrix of the estate of her late husband, Lowell Bowden (hereinafter "Mr. Bowden"), plaintiff below and petitioner herein. Mrs. Bowden appeals two orders entered by the Circuit Court of Monroe County. The first order granted summary judgement in favor of respondents herein and defendants below, Patricia Green and the Monroe County Commission (hereinafter collectively "the County"), based upon the circuit court's conclusion that the evidence presented by Mrs. Bowden was insufficient to establish a disputed issue of material fact in relation to the special relationship exception to the public duty doctrine. In its second order, the circuit court, *sua sponte*, summarily dismissed all of Mrs. Bowden's remaining claims against all defendants. We find the circuit court's rulings in both orders to be erroneous. Accordingly, we reverse the orders and remand this case for further proceedings.

I.

FACTUAL AND PROCEDURAL HISTORY

It is undisputed that, on November 27, 2009, petitioner's decedent, Mr. Bowden, who was seventy years old at the time, was viciously attacked by four or five American Pit Bull Terriers (hereinafter "pit bulls") while he was taking a walk near Landside, Monroe County, West Virginia, an area in which he resided. Mr. Bowden later

died from his injuries. The pit bulls involved in the attack were kept at the home of Kim Blankenship.[1] Four of the dogs apparently were owned by her son, Justin Blankenship, who resided in her home.[2] The remaining dog, a black-and-white pit bull named Echo, was in the care of Justin Blankenship and was allegedly owned by Anna Hughes and Mose Christian.[3] At the time of the attack, Patricia Green (hereinafter "Dog Warden Green"), a defendant below and a respondent herein, served as the Monroe County Dog Warden.

Mrs. Bowden, as administratrix of her husband's estate, filed a complaint against the County and others[4] alleging, in relevant part, negligence in performing statutory duties imposed by W. Va. Code § 19-20-1 *et seq*. thereby allowing the vicious dogs to remain at large, and wrongful death. Dog Warden Green was sued both individually and in her official capacity as dog warden. Mrs. Bowden also sough punitive damages alleging willful, wanton, and reckless conduct by Dog Warden Green that was outside her scope of employment.

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[1]Kim Blankenship was tried and acquitted of criminal charges brought against her in relation to the attack.

[2]Justin Blankenship pled guilty to nine misdemeanors arising out of this incident, including involuntary manslaughter. *See Bowden v. Monroe Cty. Comm'n*, 232 W. Va. 47, 50 n.1, 750 S.E.2d 263, 266 n.1 (2013). He apparently was sentenced to a period of incarceration at the Anthony Center for Youthful Offenders.

[3]Ultimately, all of the dogs were euthanized after the attack.

[4]Mrs. Bowden also sued Justin Blankenship, Kim Blankenship, Anna Hughes, Mose Christian, and American Modern Home Insurance Company.

The County filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, asserting a defense based upon the public duty doctrine. Mrs. Bowden responded by asserting the special relationship exception to the public duty doctrine. Mrs. Bowden also sought leave from the circuit court to file an amended complaint to incorporate additional allegations of fact in support of the special relationship exception to the public duty doctrine. However, the circuit court granted the motion to dismiss that had been filed by the County without ruling on Mrs. Bowden's motion to amend her complaint. Mrs. Bowden appealed the dismissal to this Court. *See Bowden v. Monroe Cty. Comm'n*, 232 W. Va. 47, 750 S.E.2d 263 (2013). Finding the circuit court erred in dismissing the matter, this Court remanded for additional discovery and to allow Mrs. Bowden to file her amended complaint. *Id.* On remand, Mrs. Bowden filed her amended complaint, and the parties engaged in discovery.

Thereafter, the County filed a motion seeking summary judgment again based, in relevant part, upon the public duty doctrine. After receiving Mrs. Bowden's response and conducting a hearing, the circuit court granted summary judgment in favor of the County, by order entered on May 5, 2016. In doing so, the circuit court found that Mrs. Bowden had failed to produce facts sufficient to establish the special relationship exception. The parties asked the circuit court for a certification that the summary judgment ruling was final as to the parties and issues addressed therein pursuant to Rule 54(b) of the West Virginia Rules

of Civil Procedure. In response, the circuit court instead entered, *sua sponte,* a "Dismissal Order" dated June 2, 2016, which order dismissed the action in its entirety and removed it from the circuit court's docket. This appeal followed.

II.

STANDARD OF REVIEW

With respect to our consideration on appeal of a circuit court's summary judgment ruling, it is well established that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). It is equally clear that,

> [i]n reviewing a circuit court's order granting summary judgment this Court, like all reviewing courts, engages in the same type of analysis as the circuit court. That is "'we apply the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996), *quoting Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335-36 (1995), *citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538, 553 (1986).

Fayette Cty. Nat'l Bank v. Lilly, 199 W. Va. 349, 353 n.8, 484 S.E.2d 232, 236 n.8 (1997), *overruled on other grounds by Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 396 (2014). *See also Painter*, 192 W. Va. at 192, 451 S.E.2d at 758 (observing that, in deciding motion

for summary judgment, this Court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion" (citations omitted)).

We also are cognizant that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In other words, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). *See also* Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) ("Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."). Thus,

> [i]f the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. pt. 3, *id.*

With the foregoing standards in mind, we address the dispositive issues herein raised.

III.

DISCUSSION

Mrs. Bowden raises seven assignments of error that present two dispositive issues to this Court: (1) whether the circuit court erred in its application of the special relationship exception to the public duty doctrine;[5] and (2) whether the circuit court erred by

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[5]Specifically, Mrs. Bowden argues that the circuit court erred by misstating and misapplying the law regarding the relationship of the public duty doctrine and its special relationship exception to the law of immunities for political subdivisions; by finding that a meeting between Mrs. Bowden and Dog Warden Green would not amount to an assumption of a duty to act on behalf of Mrs. Bowden; and by finding that Mrs. Bowden failed to present evidence to support that the County had knowledge that its inaction would lead to harm.

In addition, Mrs. Bowden contends that the circuit court erred by misapplying the standards for granting summary judgment as follows: (1) performing credibility determinations and weighing evidence; (2) failing to consider the totality of the evidence presented in the light most favorable to the non-moving party; (3) holding that the meeting between Mr. and Mrs. Bowden and Dog Warden Green "would not amount to an assumption of a duty to act on behalf of Plaintiff" because such is a question of fact for the jury; (4) finding that Mrs. Bowden failed to present evidence to support that Respondents had knowledge that inaction would lead to harm; (6) erroneously finding that "[t]he only evidence presented by the Plaintiff is her own testimony, and under the standard for summary judgment established in *Gooch v. W. Va. Dep't of Pub. Safety*, this mere scintilla of evidence is not sufficient."; and (7) finding that "Plaintiff has not proven direct contact between the (continued...)

sua sponte entering a dismissal order disposing of the entire case when issues remained that were not addressed in the summary judgment order. We address these issues in turn.

A. Special Relationship Exception to the Public Duty Doctrine

The circuit court based its award of summary judgment on its conclusion that Mrs. Bowden failed to satisfactorily prove the elements of the special relationship exception[6] to the public duty doctrine. In other words, the circuit court ruled that Mrs. Bowden had failed to establish any genuine issue of material fact with respect to the existence of a special relationship so as to overcome a motion for summary judgment. Mrs. Bowden claims the circuit court erred. We agree.

Recently, this Court succinctly explained the public duty doctrine in this way:

> Under the public duty doctrine, a government entity or officer cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole. "Often referred to as the 'duty to all, duty to no one' doctrine, the public duty doctrine

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[5](...continued)
Defendants and the decedent prior to the attack on the decedent."

Finally, Ms. Bowen argues that the circuit court erred in entering a Dismissal Order on June 2, 2016, after finding that there was "nothing remaining to be done" because the Order granting summary judgment did not adjudicate all counts against Respondents."

[6]In its order, the circuit court repeatedly mixed up the terms "public duty doctrine" and "special relationship exception," apparently using one term when it actually intended to refer to the other.

> provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen." [John Cameron McMillan, Jr., "Government Liability and the Public Duty Doctrine," 32 Vill. L. Rev. 505, 509 (1987) (footnotes omitted)]. For example, under the public duty doctrine, "the duty to fight fires or to provide police protection runs to all citizens and is to protect the safety and well-being of the public at large[.]" [*Wolfe v. City of Wheeling*, 182 W. Va. 253, 256, 387 S.E.2d 307, 310 (1989)]. Generally, no private liability attaches when a fire department or police department fails to provide adequate protection to an individual. The public duty doctrine is restricted to "liability for nondiscretionary (or 'ministerial' or 'operational') functions[.]" [*Parkulo v. West Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 174, 483 S.E.2d 507, 520 (1996) (quoting *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336, 346, 412 S.E.2d 737, 747 (1991))].

West Virginia State Police v. Hughes, 238 W. Va. 406, ___, 796 S.E.2d 193, 199 (2017) (footnotes omitted).[7]

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[7]This Court also has made clear that

> [t]he public duty doctrine is separate and distinct from the principle of immunity. It "does not rest squarely on the principle of governmental immunity, but rests on the principle that recovery may be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery." *Parkulo v. West Virginia Board of Probation and Parole*, 199 W. Va. 161, 172, 483 S.E.2d 507, 518 (1996). In other words, the public duty doctrine "is not based upon immunity from existing liability. Instead, it is based on absence of duty in the first instance." *Holsten v. Massey*, 200 W. Va. 775, 782, 490 S.E.2d 864, 871 (1997). Where the public duty doctrine would apply, there is simply no duty and therefore no need to inquire as to the existence of immunity. The public duty doctrine is not a "doctrine of governmental immunity but one of

(continued...)

An exception to the public duty doctrine, which Mrs. Bowden seeks to apply in this case, "arises when a 'special relationship' exists between the government entity and a specific individual. 'The state may be liable where it has taken on a special duty to a specific person beyond that extended to the general public.'" *Id.* (quoting Barry A. Lindahl, *2 Modern Tort Law: Liability and Litigation* § 16:20 (2d ed. 2008)) (footnote omitted).

Although this Court in *Hughes* was addressing liability of the State, this Court has made clear that the special relationship exception to the public duty doctrine applies to political subdivisions:

> *W. Va. Code*, 29-12A-5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection[,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, *that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual*.

> [7](...continued)
> tort, based on the initial question applicable to any negligence action, that is, whether the defendant owes the plaintiff any judicially cognizable duty." *Reno v. Chung*, 220 Mich. App. 102, 559 N.W.2d 308, 311 (1996) (Ludington, Judge, dissenting).

Walker v. Meadows, 206 W. Va. 78, 83, 521 S.E.2d 801, 806 (1999) (per curiam).

Syl. pt. 8, *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336, 412 S.E.2d 737 (1991) (emphasis added).

The elements required to establish the special relationship exception to the public duty doctrine have been previously set forth by this Court as follows:

> To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Syl. pt. 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989). *Accord* Syl. pt. 5, *Bowden v. Monroe Cty. Comm'n*, 232 W. Va. 47, 750 S.E.2d 263. The foregoing elements for establishing a special relationship are joined with the conjunctive "and," signifying that all elements are required. *See, e.g., Browning v. Hickman*, 235 W. Va. 640, 652, 776 S.E.2d 142, 154 (2015) ("The three factors . . . are joined with the conjunctive 'and,' meaning they all must be present . . . .").[8] Thus, we examine the evidence relating to each factor to see if

[8]*See also Jan-Care Ambulance Serv., Inc. v. Public Serv. Comm'n of W. Virginia*, 206 W. Va. 183, 193 n.13, 522 S.E.2d 912, 922 n.13 (1999) ("Because of the use of the conjunctive 'and,' all of the services contained in Section 1206(b)(4)(C) of the 1973 Act are required of an emergency medical services system."); *Ooten v. Faerber*, 181 (continued...)

it was sufficient to establish a genuine issue of material fact. In examining this evidence, we are mindful that "'[t]he question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary . . . function is ordinarily a question of fact for the trier of the facts.' Syl. Pt. 3, in part, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989)." Syl. pt. 6, *Bowden*, 232 W. Va. 47, 750 S.E.2d 263.

1. An assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured. To support her assertion that the County had assumed a duty to Mr. and Mrs. Bowden, Mrs. Bowden provided deposition testimony that she had called 911 to complain about the pit bulls, was connected to Dog Warden Green to discuss her complaint, and, thereafter, Dog Warden Green visited the Bowden home. According to Mrs. Bowden's testimony, she shared with Mrs. Green her belief that the dogs were dangerous and explained her fear of them. She further testified that, in response, Dog Warden Green assured Mrs. Bowden that the "county would take care of it."[9]

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[8](...continued)
W. Va. 592, 597, 383 S.E.2d 774, 779 (1989) (observing that "'and' is a conjunctive, and the use of 'and' here clearly makes both conditions necessary, not merely either of the two.").

[9]Specifically, Mrs. Bowden testified as follows:

(continued...)

In support of its motion for summary judgment, the County attempted to show the absence of a question of fact by tendering the deposition testimony of Dog Warden Green, wherein she denied receiving a complaint from Mrs. Bowden, visiting the Bowden home, or making any assurances in relation to any pit bulls.

The circuit court concluded that Mrs. Bowden "failed to meet her burden of providing more than a scintilla of evidence that the defendants ever assumed an affirmative duty to act on behalf of [Mr. and Mrs. Bowden], by making a promise or assumption." The circuit court additionally concluded that,

> assuming, arguendo, that [Dog Warden Green] did go to [Mrs. Bowden's] home in response to her 911 complaint, the

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[9](...continued)

> Q. . . . [W]hen you spoke to [Dog Warden Green] about the dogs, what did you understand or believe that she was going to do about the dogs, if anything?
>
> A. That they would no longer be roaming around in my yard.
>
> Q. Did she tell you how she planned on accomplishing that?
>
> A. No.
>
> Q. Did she specifically tell you that she would make sure that they weren't roaming around in the neighborhood?
>
> A. She said – she assured me that the County would take care of it.

> conversation alleged to have occurred between the two would not amount to an assumption of an affirmative duty to act on [Mrs. Bowden's] behalf in a manner that would have prevented attack on the Plaintiff's decedent.

We find that the circuit court erred by finding no material question of fact was in dispute as to this factor of the special relationship test. The evidence pertaining to the existence of an assumption by the County of an affirmative duty to address Mrs. Bowden's complaint about dangerously vicious dogs amounts to testimony by Mrs. Bowden indicating that such an assumption was made, and testimony by Dog Warden Green indicating the opposite. Rather than exposing the absence of a disputed question of fact, the evidence offered by the County demonstrates a quintessential factual dispute, and the need for credibility determinations, both of which should be resolved by a trier of fact. *See Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015) ("'In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. at 59, 459 S.E.2d at 336)). The fact that Mrs. Bowden indicated in her deposition testimony that she understood Dog Warden Green's assurance to mean that "the dogs would no longer be in [the Bowden's] yard," is not dispositive insofar as her testimony

further indicated that Dog Warden Green additionally provided assurance that "the county would take care of" making sure the dogs were not roaming around in the neighborhood.[10]

2. Knowledge on the part of the local governmental entity's agents that inaction could lead to harm. In support of this second element of the special relationship exception to the public duty doctrine, Mrs. Bowden points to the evidence of Dog Warden Green's own personal experience with one of the pit bulls on November 8, 2009, the same month as the fatal attack on Mr. Bowden. Dog Warden Green testified that, on that day, she received a complaint from Mr. Mark Crook about the pit bull named Echo jumping aggressively on his car. Dog Warden Green related that, while she and her husband were in their vehicle at the Crook residence,[11] the pit bull named Echo appeared and jumped up on the side of her vehicle while growling and barking. She stated that the dog scared her and her husband, and she would not exit the vehicle. That same evening, she went to Justin Blankenship's home, issued him a citation for harboring a vicious dog, and instructed him to keep the dog chained and fenced.[12] Mrs. Bowden submits that a reasonable jury could find that a first-hand attack of this nature, coupled with Dog Warden Green's years of experience

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[10]*See* note 9, *supra*.

[11]Dog Warden Green's husband had driven her to the Crook residence.

[12]However, the dog, which had not yet returned to the residence, was not seized, and Dog Warden Green could not remember returning to the Blankenship residence to ensure that the dog had actually been chained and fenced as instructed.

as an animal control officer and the numerous complaints that had been made about the pit bulls, was sufficient to establish knowledge that inaction could lead to harm.

The County does not dispute this event, but, rather, disputes the inferences to be drawn therefrom. According to the County's reasoning, Dog Warden Green's experience with a single aggressive pit bull, along with reports of one or more pit bulls acting aggressively in the neighborhood, is insufficient to establish knowledge that inaction could result in a multi-dog attack such as that suffered by Mr. Bowden, especially when no one had been physically injured by any pit bull.

The circuit court similarly found that Ms. Bowden did "not meet her burden of providing substantial evidence that would allow a jury to find in her favor that Defendants knew inaction would lead to harm." To support its conclusion, the circuit court reasoned that the evidence established that Dog Warden Green had knowledge of only one pit bull in the neighborhood. With respect to the complaint by Mr. Crook, the circuit court commented that "the dog, Echo, did not attack or harm Mr. Crook." In addition, the circuit court incorrectly found that, when Dog Warden Green went to Justin Blankenship's home and issued a citation for harboring a vicious dog, she "confirmed that no other pit bulls were in his house or on his property." The portion of the record cited by the circuit court to support this finding contains Dog Warden Green's testimony that she had "*never seen*" any other pit bulls on the

Blankenship property. However, it is important to note that Dog Warden Green testified that when she went to the Blankenship home and issued the citation, she did not get out of her vehicle. Moreover, the citation indicates that it was issued at 9:30 p.m., when it would have been dark and difficult to observe the grounds while seated in a vehicle. Thus, the circuit court's conclusion that Dog Warden Green had *confirmed* the absence of multiple pit bulls located at the Blankenship residence is factually incorrect based upon the evidence in the record.

We find that the circuit court erred in concluding that Mrs. Bowden failed to establish that facts related to the knowledge factor of the special relationship test were in dispute. Contrary to the circuit court's findings and the County's arguments, the record on appeal contains numerous statements from neighbors living in the same rural community as the Bowdens detailing encounters with one or more of the pit bulls where the dogs were running loose and acting aggressively. For example, Philip Hunt, who characterized the *dogs* as running loose constantly, testified at the criminal trial of Kimberly Blankenship and described four incidents involving the pit bulls. One incident in 2009 occurred on Easter Sunday, when the *dogs* "came up after [his] kids" who were playing in the yard. Mr. Hunt and his brothers-in-law had to chase the *dogs* away. During another incident in 2009,[13] Mr.

[13]In a written statement, Mr. Hunt described this incident as occurring in July 2009.

Hunt's son was chased by one of the dogs when he went to get trash cans at the bottom of the driveway. The boy shot at the dog with his BB gun and was able to run into the house. On a third occasion the *dogs* chased Mr. Hunt's truck and prevented him and his wife from exiting the vehicle without first pulling into the garage. Finally, once when he was unable to pull into his garage, one of the pit bulls was in his driveway growling and barking at Mr. Hunt's vehicle so that he could not exit until the dog left. Mr. Hunt testified that he "called animal control" and "nothing was done."[14]

The various complaints, combined with Dog Warden Green's own experience with one of the dogs where she was too afraid to exit her vehicle, were sufficient to establish a question of fact with respect to the County's knowledge that its inaction could lead to harm. The rationale adopted by the circuit court and the County, that the absence of any actual physical harm prior to the attack on Mr. Bowden was sufficient to dispel such knowledge, improperly draws inferences in favor of the County and not Mrs. Bowden. *See Painter*, 192 W. Va. at 192, 451 S.E.2d at 758 (observing that, in deciding motion for summary judgment, a court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion" (citations omitted)). Indeed, a reasonable interpretation of the facts, properly viewed in the light most favorable to Mrs. Bowden, is

[14]The record contains additional statements by other neighbors describing similar experiences with one or more of the dogs, some of which indicate that complaints were made to "animal control" or to "the state" and nothing was done about the dogs.

that the lack of injury was fortuitous in that the victims of the aggressive dogs were either able to get away, or were safely inside their vehicles and refused to exit the same in the presence of the vicious dog or dogs.

3. Some form of direct contact between the local governmental entity's agents and the injured party. This Court has explained that "the requirement of direct contact serves as a basis for rationally limiting the class of individuals to whom the local governmental entity's 'special' duty extends." *Wolfe*, 182 W. Va. at 257-58, 387 S.E.2d at 311-12 (citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 261, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987)).

On the issue of direct contact, Mrs. Bowden again relies on her deposition testimony that, within a month prior to the attack on Mr. Bowden, she spoke to Dog Warden Green on the phone when making her complaint about the pit bulls and that, following the conversation, Dog Warden Green visited the Bowden home in response to the complaint. Mrs. Bowden argues that her assertion that Dog Warden Green had visited her home is supported by her testimony describing Dog Warden Green's uniform and the fact that she was accompanied by a man (the record demonstrates that Dog Warden Green's husband typically drove the truck for her when she went on calls). In addition, Mrs. Bowden points to other evidence in the record that, she asserts, also could be interpreted as corroborating her

testimony regarding the visit. Such evidence includes testimony by her daughter-in-law, Linda Ludwig,[15] that a Monroe County Animal Control vehicle stopped at the Ludwig home sometime before the fatal attack seeking directions to the *Blankenship* home. Mrs. Bowden contends that, because there was evidence that Dog Warden Green was familiar with the Blankenship home, having previously been there in response to prior complaints,[16] she should not have needed directions to the home. Thus, Mrs. Bowden reasons that a jury could conclude that Dog Warden Green was actually trying to find Mrs. Bowden's home. Mrs. Bowden also notes that an "Animal Control Expense Sheet" completed by Dog Warden Green in relation to the citation she issued to Justin Blankenship on November 8, 2009, provides additional evidence that could be interpreted by a jury as supporting her assertion that Dog Warden Green visited the Bowden home. The expense sheet contains a notation stating "called on (11-4-09) Justin Blankenship about the Blk & White pit Bull and ask him to pen and chain dog. Said he would do so, but the dog has been loose. So I issued a ticket to him [under W. Va. Code §] 19-20-20 for visious [sic] dog. . . ." Mrs. Bowden contends

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[15]Mrs. Bowden contends that her daughter-in-law, Linda Ludwig, also is Justin Blankenship's aunt. Thus, she asserts, the familial relationship casts a shadow of bias on Mrs. Ludwig's testimony that should be weighed by a jury. The County responds that Mrs. Bowden did not make this argument below, and the record on appeal contains no evidence of the relationship between Mrs. Ludwig and Justin Blankenship. Because we find no evidence of a family relationship between Mrs. Ludwig and Justin Blankenship in the record on appeal, we will not consider Mrs. Bowden's contentions in this regard.

[16]In her deposition, Dog Warden Green testified that, prior to the attack on Mr. Bowden, she had been to the Blankenship residence "a couple of times for dog complaints, and further, Blankenship's horses."

that a jury could find that it was her contact with Dog Warden Green that prompted her to call on Justin Blankenship on November 4, 2009.

The County responds by arguing that the evidence relied upon by Mrs. Bowden amounts to self-serving statements and conjecture, which are insufficient to overcome a motion for summary judgment. The County asserts that the "Animal Control Expense Sheet" simply evidences that Dog Warden Green called Mr. Blankenship on November 4, 2009, and provides nothing whatsoever to indicate any reason for the call. The County then submits that the following evidence demonstrates the absence of a disputed material fact: (1) the testimony of Dog Warden Green wherein she denied having ever visited the Bowden home or speaking to Mrs. Bowden by phone; (2) the absence of any office records documenting a visit to the Bowden home; and (3) testimony by Robert and Linda Ludwig that they had never seen animal control at the Bowden home.

In granting summary judgment, the circuit court found that Mrs. Bowden's testimony was insufficient to satisfy her burden of overcoming the County's motion for summary judgment insofar as it was disputed by at least three other people (Dog Warden Green, Robert Ludwig, and Linda Ludwig). The circuit court's ruling is erroneous.

The County is correct that self-serving statements and conjecture are insufficient to overcome a motion for summary judgment.

> [T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. . . . The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.

Williams, 194 W. Va. at 60, 459 S.E.2d at 337 (internal citation and footnote omitted). However, the County and the circuit court fail to recognize that, before any burden is imposed upon Mrs. Bowden to overcome summary judgment, the County had to make a properly supported motion demonstrating that there was no material question of fact in dispute. In other words, "the initial burden of production and persuasion is upon the party moving for a summary judgment." *Id.* With respect to the moving party's burden, this Court has held that, "[i]f the moving party makes a properly supported motion for summary judgment *and can show by affirmative evidence that there is no genuine issue of material fact,* the burden of production shifts to the nonmoving party . . . ." Syl. pt. 3, in part, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995) (emphasis added). The evidence relied upon by the County simply fails to "show by affirmative evidence that there is no genuine issue of material fact." *Id.* Rather, the testimony of Mrs. Bowden and Dog Warden Green was directly contradictory as to whether a meeting between them had occurred. The additional

evidence relied upon by the parties does not favor one party over the other on its own, but instead requires drawing inferences and making credibility determinations, which functions are not available to a circuit court ruling on a motion for summary judgment. *See* Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755 ("The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial."). *Accord Williams*, 194 W. Va. at 59, 459 S.E.2d at 336.

4. Mrs. Bowden's justifiable reliance on the local governmental entity's affirmative undertaking. This Court has recognized that

> [t]he injured party's reliance is as critical in establishing the existence of a "special relationship" as is the local governmental entity's voluntary affirmative undertaking of a duty to act toward the injured party. The element of reliance provides the essential causative link between the special duty assumed by the local governmental entity and the injury. *Cuffy* [*v. City of New York*], 69 N.Y.2d at 261, 505 N.E.2d at 940, 513 N.Y.S.2d at 375.

Wolfe, 182 W. Va. at 257, 387 S.E.2d at 311. We find the controverted evidence related to whether Dog Warden Green visited the Bowden home and gave assurances that"the county would take care of" making sure the dogs were not roaming around in the neighborhood[17]

[17]*See supra* note 9.

is sufficient to establish a question for the jury as to whether Mr. and Mrs. Bowden's reliance on those assurances was justifiable.

Because we find disputed evidence on each of the factors required to establish the special relationship exception to the public duty doctrine, we find the circuit court erred by granting summary judgment to the County. Indeed, this Court has emphasized that

> the question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function is ordinarily a question of fact for the trier of the facts. *Estate of Tanasijevich v. City of Hammond*, 178 Ind. App. 669, 675, 383 N.E.2d 1081, 1085 (1978); *De Long v. County of Erie*, 60 N.Y.2d 296, 306, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 616 (1983).

Wolfe, 182 W. Va. at 258, 387 S.E.2d at 312.

B. Dismissal Order

Mrs. Bowden submits that counsel for all parties to this appeal requested a certification from the circuit court pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure stating that the summary judgment order was final as to the parties and issues addressed therein. Rather than issue a Rule 54(b) certification, the circuit court, *sua sponte*, issued a two sentence dismissal order stating in full:

> On this day the Court reviewed the file, and it appearing proper to [do] so, and nothing remaining to be done, it is hereby **ORDERED and ADJUDGED** as follows:

> 1. The above styled action is hereby **DISMISSED.** The Clerk is directed to remove it from the docket and to provide a copy of this order to any pro se party, and counsel, not registered for electronic notification[.]

Mrs. Bowden contends that, insofar as the circuit court's summary judgment order did not address certain claims contained in her complaint,[18] it was error for the circuit court to dismiss those claims.

The County agrees that the summary judgment order did not address some of Mrs. Bowden's claims that were subsequently dismissed by the circuit court and, in addition, notes that the dismissal of some defendants is not relevant to the County. Nevertheless, the County contends that some of the dismissed issues were rendered moot by the summary judgment order and, therefore, dismissal of those issues was proper.

Because we have reversed the circuit court's summary judgment order, upon which the dismissal order apparently was based, we likewise summarily vacate the circuit court's dismissal order. *See, e.g., Napier v. Napier*, 211 W. Va. 208, 214 n.12, 564 S.E.2d

[18]Namely, Count VII of her complaint, pertaining to W. Va. Code § 29B-1-1 *et seq.* and the United States Freedom of Information Act, 5 USC § 552(a)(3); Counts VI and IX, concerning punitive damages and actions by Dog Warden Green that may have been outside the scope of her employment; and claims against additional defendants Anna Hughes and Mose Christian, who are not parties to the instant appeal.

418, 424 n.12 (2002) ("Because the circuit court based its decision to dismiss Ms. Napier's counterclaim on the fact that summary judgment was granted to Mr. Napier, we summarily reverse the dismissal of the counterclaim and remand that claim for further proceedings.").

IV.

CONCLUSION

Based upon the reasoning set out above, we reverse the May 5, 2016, and June 2, 2016, orders entered by the Circuit Court of Monroe County and remanding this case for further proceedings.

Reversed and Remanded.

EXHIBIT 3

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IN THE COURT OF APPEALS OF INDIANA

Brooke Brown, by next friend Mark Brown,

Appellant-Plaintiff,

v.

Southside Animal Shelter, Inc., Humane Society of Clinton County, Inc., and the City of Indianapolis,

Appellee-Defendant

October 15, 2020

Court of Appeals Case No. 20A-CT-66

Appeal from the Marion Superior Court

The Honorable Timothy Oakes, Judge

Trial Court Cause No. 49D02-1704-CT-15339

May, Judge.

[1] Brooke Brown ("Brooke"), by her next friend Mark Brown ("Brown"), appeals the trial court's grant of summary judgment in favor of Southside Animal

Shelter, Inc. ("Southside"). Brown presents multiple issues for our review, one of which we find dispositive: Whether Southside had a duty to inform the Browns of a dog's vicious characteristics so far as they were known or ascertainable by exercise of reasonable care. We reverse and remand.

Facts and Procedural History

[2] In December 2014, the Clinton County Humane Society ("CCHS") received a dog named Grieg,[1] who had been surrendered by his owner because Grieg did not get along with another dog in the household. Grieg was a Gordon Setter. On January 9, 2015, CCHS adopted Grieg out to Amy Dirks, who transported Grieg to Indianapolis. At some point shortly thereafter, Grieg attacked Amy's two-year-old son, Henry, causing significant injuries. After the bite incident, on February 16, 2015, the family surrendered Grieg to the Marion County Animal Control ("MCAC"). Amy reported on the intake form with MCAC, regarding the incident, "Nipped at son when he was giving dog a hug around neck later in day – lunged at son & bit him when toddler came up to pet the dog. Dog had been hugged before, but we didn't see the dog's stress. The dog had had enough." (Appellant's App. Vol. II at 204) (errors in original).

[3] After his arrival at the MCAC, Grieg was placed on a ten-day quarantine. At some point during that ten-day quarantine, representatives from CCHS and

[1] The record and the parties also refer to the dog as "Greg." (*See*, *e.g.*, Appellant's App. Vol. II at 94.)

MCAC spoke[2] about Grieg returning to CCHS. MCAC told CCHS that Grieg had bitten a child, and CCHS reacquired Grieg on February 23, 2015. At some point between that date and December 2015, CCHS adopted out Grieg to someone for a brief period of time. That person returned Grieg after the dog lunged at him.

[4] In December 2015, Darcie Kurtz, the Transport Coordinator at the Low Cost Spay and Neuter Clinic Animal Shelter in Brownsburg, visited CCHS. Kurtz had a pre-existing professional relationship with Southside.[3] She encountered Grieg and contacted Rosie Ellis, the founder and president of Southside. Kurtz asked Ellis if she could transport Grieg to Southside to be considered for adoption. Kurtz told Ellis that Grieg was "a nice boy." (*Id*. at 64.) At the time, Grieg was approximately six to eight years old.

[5] Kurtz transported Grieg to Southside on December 23, 2015. Sara Briening, a Southside employee, received Grieg. Briening testified in a deposition:

> When Gre[i]g was brought to our facility, the person that brought him said that he had been brought back. The man had said that he had lunged at him but that – I was told that there was [sic] no bite marks, there was not an actual bite. And that the general consensus was that it was miscommunication between human and animal or that it wasn't a factual incident.

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[2] MCAC indicated CCHS contacted them and asked for Grieg back; CCHS contends MCAC called them and asked if they wanted Grieg back.

[3] The parties dispute the nature of this relationship.

(*Id*. at 80-1.) Employees and volunteers at Southside observed and assessed Grieg for eight days, during which Grieg showed no signs of aggression. At some point during those eight days, Briening called CCHS to learn more information about Grieg. She testified during her deposition that the person she spoke to at CCHS did not mention the lunging incident and "that [CCHS] had had a behavior assessment done, but that he had passed that." (*Id*. at 84.) Briening asked for a copy of the assessment, which she did not receive until January 4, 2016.

[6] On December 29, 2015, the Browns came to the shelter to adopt a dog. The Browns visited with Grieg that day and came back on December 31, 2015. No one at Southside told Brown about the alleged lunging incident involving Grieg's former owner. On December 31, 2015, Brown paid Southside $275 to adopt Grieg and signed a release that stated, in relevant part:

> The undersigned agrees that the health and history of this animal is unknown and for that reason the adopter releases the Southside Animal Shelter and all it's [sic] representatives from all liability, claims and damages should the animal become ill or die, and from any situations that may arise by reason of the animal's actions, toward the person or property of the adopter or any other person. The undersigned owner agrees that all further medical care and bill [sic] are their responsibility as of the signing of this agreement.

(*Id*. at 115.)

[7] At approximately 1:00 a.m. on January 1, 2016, Grieg attacked six-year-old Brooke, who sustained injuries to her face. Brooke required surgery and has

permanent scarring. After the attack, MCAC retrieved Grieg and placed him on a bite quarantine. MCAC contacted Ellis at Southside and informed Ellis that Grieg was in bite quarantine. Ellis indicated Southside did not want Grieg back and refunded Mark the adoption fee he paid for Grieg. MCAC subsequently euthanized Grieg.

[8] On April 17, 2017, the Browns filed an action against Southside, alleging Southside was negligent. On May 19, 2017, Southside filed its answer and on June 13, 2017, Southside filed its amended answer naming CCHS, Indianapolis Animal Control Services ("IACS"), and MCAC[4] as nonparties whose fault proximately caused Brooke's injuries. Brown filed an amended complaint on August 17, 2017, adding CCHS as a defendant and alleged that CCHS was negligent. On May 16, 2018, Brown filed a second amended complaint, adding IACS and MCAC as defendants and alleging they also were negligent. Brown also added claims that Southside committed fraud and constructive fraud when it represented that Grieg's history was unknown on the adoption release.

[9] On May 24, 2019, Southside filed a motion for summary judgment, arguing it was not liable for Brooke's injuries because it was not Grieg's owner or keeper at the time of the incident, because Mark had released Southside from liability by signing the adoption release, and because Southside did not commit fraud when it told Mark that Grieg's history was unknown. On May 28, 2019, IACS

[4] As IACS and MCAC are both agencies of the City of Indianapolis, their filings were made jointly by the City of Indianapolis.

and MCAC filed their motion for summary judgment, arguing they were not liable for Brooke's injuries because neither was Grieg's owner or keeper at the time of the incident, because of a lack of proximate cause, and because of governmental immunity. On August 22, 2019, CCHS filed its motion for summary judgment, arguing it was not liable for Brooke's injuries because it was not Grieg's owner or keeper at the time of the incident. Mark answered all of the motions for summary judgment, and the parties filed their replies in a timely manner.

[10] The trial court held a hearing on the motions for summary judgment on December 9, 2019. The trial court heard parties' arguments and took the matter under advisement. On December 11, 2019, the trial court granted all motions for summary judgment, which the court memorialized in the Chronological Case Summary with the following entry: "Parties by counsel. Oral Argument heard on Defendants' motion for summary judgment. Motions GRANTED. Cause is DISMISSED. Parties may submit more formal orders if they wish." (*Id*. at 17.)

[11] On December 11, 2019, the trial court entered a written order granting IACS and MCAC's motion for summary judgment. On December 20, 2019, the trial court entered a written order granting Southside's motion for summary judgment. On December 26, 2019, the trial court entered a written order granting CCHS's motion for summary judgment. The written orders are virtually identical, and they indicate each relevant party's motion for summary judgment was granted by the trial court. The orders do not mention the

dismissal of the cause; nor do they provide any reasoning for the trial court's decisions. On January 8, 2020, the Browns filed an appeal challenging the trial court's grant of summary judgment for Southside. Brown does not appeal the trial court's orders granting summary judgment to IACS, MCAC, or CCHS.

Discussion and Decision

[12] We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Drawing all reasonable inferences in favor of the non-moving party, we will find summary judgment appropriate if the designated evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. *Id.*

[13] The initial burden is on the summary-judgment movant to demonstrate there is no genuine issue of fact as to a determinative issue, at which point the burden shifts to the non-movant to come forward with evidence showing there is an issue for the trier of fact. *Id.* While the non-moving party has the burden on appeal of persuading us a summary judgment was erroneous, we carefully assess the trial court's decision to ensure the non-movant was not improperly denied his day in court. *Id.*

[14] Our summary judgment policies aim to protect a party's day in court. *Id*. While federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, we impose a more onerous burden - to affirmatively negate an opponent's claim. *Id*. A self-serving affidavit is sufficient to preclude summary judgment if it demonstrates there are material facts in dispute, but a self-serving affidavit will not preclude summary judgment if it merely disputes a legal issue. *AM General LLC v. Armour*, 46 N.E.3d 436, 441 (Ind. 2015). Summary judgment is not a summary trial, and it is not appropriate just because the non-movant appears unlikely to prevail at trial. *Hughley*, 15 N.E.3d at 1003-04. We "consciously err[ ] on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id*. at 1004.

[15] Here, the dispositive issue is whether Southside owed a duty to the Browns and thus could have been liable for the injuries Brooke sustained when bitten by Grieg. The parties agree that it is well-established that the owner or keeper of an animal is liable when that animal injures someone. *See, e.g., Ross v. Lowe*, 619 N.E.2d 911, 914 (Ind. 1993) ("An owner or keeper who fails to exercise . . . reasonable care may be liable in negligence for the manner of keeping and controlling the dog."). The Browns also point to *Baker v. Weather ex rel. Weather*, 714 N.E.2d 740 (Ind. Ct. App. 1999), in which we held a landlord may be liable for the actions of an animal if the landlord owns or controls the property and has actual knowledge of the animal's dangerous tendencies. *Id*. at 741-2.

Finally, the Browns direct us to Indiana Model Civil Jury Instruction 1955, entitled, "Domestic Animals – Known to be Dangerous," which provides:

> A [person][entity] who knows or by reasonable care should have known that a domestic animal [he][she][it] [owns][has charge of] is vicious or dangerous to [people][other animals][property] must use reasonable care under the circumstances to prevent the animal from causing injury or damage.

The comments to the Civil Jury Instruction include reference to *Artificial Ice & Cold Storage Co. v. Martin*, 102 Ind. App. 74, 198 N.E. 446 (1935), which we find instructive here.

[16] In *Artificial Cold*, Benjamin Earl Martin, who sold and delivered ice, was contacted by Artificial Cold on August 11, 1931, to "exchange a mule which he had been working to one of said wagons for a certain horse which another one of said defendant's said delivery men had been working." *Id*. at 76, 198 N.E. at 447. Later that day, the horse kicked Benjamin and killed him. Benjamin's wife, Mary, as administratrix of Benjamin's estate, sued Artificial Ice, alleging:

> That said horse was a vicious and dangerous animal and was accustomed and in the habit of kicking and biting and was dangerous to work and handle, all of which said defendant then and there well knew when it ordered and requested said exchange and ordered and requested said decedent to use and work said horse in the place of said mule, but notwithstanding said vicious, and dangerous disposition and nature of said horse and defendant's knowledge thereof, said defendant carelessly and negligently ordered and requested said decedent to use and work said horse and carelessly and negligently failed and neglected to give said decedent any notice or warning of said vicious and

> dangerous disposition and nature of said horse and of his inclination to kick, all of which said defendant knew or could and should have known at the time it ordered and requested said decedent to work and use said horse in hauling and delivering said ice.

Id. Our court held that the complaint was "predicated upon the alleged negligent conduct of the appellant knowingly hiring a vicious and ugly mare to decedent without warning him of such characteristics." *Id*. at 77, 198 N.E. at 448. The claim went before a jury, which returned a verdict for Mary, as administratrix of Benjamin's estate. Artificial Ice appealed.

[17] Our court relied upon *Hosmer v. Carney et al.*, 228 N.Y. 73, 126 N.E. 650 (1920), which states in relevant part:

> He is not responsible for such injury unless the vicious propensities of the animal are known to him, or by the exercise of reasonable care the same could have been ascertained. If such animal be delivered by him to another, he must inform such person of the animal's vicious characteristics, so far as known, or ascertainable by the exercise of reasonable care. If such information be given, or the person to whom the animal is delivered knows, or before injury ascertains, the vicious character of the animal, the owner is not liable. The liability of the owner is predicated upon his omission of duty in not imparting the information, but such omission does not render him liable if the negligence of the injured party contributed to the injury.

Id. at 75, 126 N.E. at 651 (internal citations omitted).[5] This standard, now almost a century old, is still law. Thus, we hold Southside, as the owner and/or keeper of Grieg, had a duty to inform the Browns of Grieg's "vicious characteristics" so far as Southside knew, or to the extent such knowledge was ascertainable by the exercise of reasonable care.

[18] The parties disagree as to whether Southside knew, or should have known by exercise of reasonable care, of Grieg's past aggressions. For example, Southside contends Kurtz was not an employee or volunteer at the time of Grieg's arrival at Southside, and thus any information CCHS gave Kurtz could not be considered information given to Southside by virtue of Kurtz as Southside's agent. The Browns maintain Kurtz was a volunteer at Southside at the time relevant to this action. Further, there also remains a question of fact regarding whether Southside exercised reasonable care in ascertaining Grieg's behavioral history prior to allowing the Browns to adopt him. As we have determined Southside had a duty to Brown, significant issues of material fact preclude summary judgment in this action.[6]

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[5] Upon examination of the evidence, our court ultimately overturned the jury's verdict in favor of the estate because there existed evidence to suggest Benjamin had "watered the mare [in question] occasionally" and "she kicked at decedent previous to the exchange in August." *Artificial Ice*, 102 Ind.App. at 79, 198 N.E. at 449. Thus, our court held, "the decedent had notice of the vicious character of the mare before the exchange was made. This would relieve the appellant from the duty of imparting such knowledge to the decedent, assuming it possessed the same." *Id.*

[6] Southside contends that, should we reverse the trial court's decision and remand for further proceedings, it should be permitted to name IACS, MCAC, and CCHS again as non-parties despite the fact that the Browns' appeal challenges only the trial court's order as to Southside. However, this is an issue for determination by

Conclusion

[19] Because Southside had a duty to inform the Browns of Grieg's past bite history, and because there are issues of material fact regarding whether Southside breached that duty or proximately caused Brooks' injuries, the trial court erred when it granted summary judgment in favor of Southside. Accordingly, we reverse and remand for proceedings consistent with this opinion.

[20] Reversed and remanded.

Riley, J., and Altice, J., concur.

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the trial court, which has discretion to allow Southside to amend its responsive pleadings to include nonparties who have been previously dismissed in the same action. *See Osterloo v. Wallar ex rel. Wallar*, 758 N.E.2d 59, 64-5 (Ind. Ct. App. 2001) (trial court abused its discretion when it denied defendant's motion to add previously-dismissed co-defendant as nonparty in defendant's answer to plaintiff's complaint).

EXHIBIT 4

162 N.E.3d 1121 (2021)

Brooke BROWN, by next friend Mark Brown, Appellant-Plaintiff,

v.

SOUTHSIDE ANIMAL SHELTER, INC., Humane Society of Clinton County, Inc., and the City of Indianapolis, Appellees-Defendants.

Court of Appeals Case No. 20A-CT-66.

Court of Appeals of Indiana.

Filed January 13, 2021.

Appeal from the Marion Superior Court, Trial Court Cause No. 49D02-1704-CT-15339, The Honorable Timothy Oakes, Judge.

Attorneys for Appellant: Robert D. King, Jr., David R. Thompson, The Law Office of Robert D. King, Jr., P.C., Indianapolis, Indiana.

Attorney for Appellee southside animal shelter, inc.: Laura S. Reed, Riley Bennett Egloff LLP, Indianapolis, Indiana.

1122 *1122 # Opinion on Rehearing

May, Judge.

[1] On October 15, 2020, we held the trial court erred when it granted summary judgment because Southside Animal Shelter "had a duty to inform the Browns of Grieg's past bite history, and because there are issues of material fact regarding whether Southside breached that duty[.]" *Brown by Brown v. Southside Animal Shelter, Inc.*, 158 N.E.3d 401, 407 (Ind. Ct. App.2020). Southside requested rehearing, alleging our opinion did not address "the issues of the Release and the lack of evidence of fraud that entitle Southside to summary judgment even if it had a duty to the Browns[.]" (Appellant's Br. on Rehearing at 5.) While those issues were implicitly addressed when we held dispositive the legal issue of whether Southside could be held liable for Brooke's injuries, we grant rehearing to clarify our opinion and explicitly state that there exist issues of material fact regarding the matters raised in Southside's petition for rehearing. We reaffirm our original opinion in all respects.

[2] Southside's petition for rehearing first directs us to the release language in the adoption contract signed by Mark Brown when adopting Grieg. That contract states:

> The undersigned agrees that the health and history of this animal is unknown and for that reason the adopter releases the Southside Animal Shelter and all it's [sic] representatives from all liability, claims and damages should the animal become ill or die, and from any situations that may arise by reason of the animal's actions, toward the person or property of the adopter or any other person. The undersigned owner agrees that all further medical care and bill [sic] are their responsibility as of the signing of this agreement.

(Appellant's App. Vol. II at 115.) Southside claims there existed no fraud, but nonetheless, the language therein relieves "Southside from liability from situations arising from Grieg's actions." (Appellant's Br. on Rehearing at 6.) However, we noted in our opinion that "there also remains a question of fact regarding whether Southside exercised reasonable care in ascertaining Grieg's behavioral history prior to allowing the Browns to adopt him." *Brown,* 158 N.E.3d at 406.

[3] This determination about the actions taken, or not taken, by Southside prior to Mark signing the release directly relates to whether Southside misrepresented its knowledge regarding Grieg's history when reporting Grieg's history was "unknown" in the release. (Appellant's App. Vol. II at 115.) As Southside notes in its brief on rehearing, this is the only theory under which Mark can proceed with his fraud claim. There exist issues of material fact regarding the information communicated to Southside prior to Grieg's adoption.

[4] For example, Clinton County Humane Society ("CCHS") office manager Cassandra Tate testified in a deposition that she told Darcie Kurtz "the fact that [Grieg] did not get along with other dogs or small children" and "that there was a bite
1123 previously to a child, and that he was not to be with younger children." (*Id.* at *1123 163.) Tate also testified that she gave Kurtz a "Behavior History Form" (*id.* at 204), which she summarized as saying, "[t]hat [Grieg] was not good with small children, that there was a previous bite history, and that he was not good with other dogs." (*Id.* at 176.) Southside contends it was first aware of Grieg's bite history on January 2, 2016, after Grieg bit Brooke because Indianapolis Animal Care and Control ("IACC") employee Julie Zink "looked up his microchip number" and told Southside owner Rosalyn Ellis that "he had been involved in biting a child in February of `15." (*Id.* at 68.) Ellis also testified at a deposition that she did not "personally notice any signs of aggression of any nature" and that she would not "have adopted [Grieg] if [she] had known of his prior bite history[.]" (*Id.* at 69.)

[5] These questions of material fact are also related to the other issue Southside claims we did not address in our original opinion — the relationship between Kurtz and Southside, and whether that relationship means Kurtz's knowledge regarding Grieg can be imputed to Southside. As we noted in our original opinion:

> Southside contends Kurtz was not an employee or volunteer at the time of Grieg's arrival at Southside, and thus any information CCHS gave Kurtz could not be considered information given to Southside by virtue of Kurtz as Southside's agent. The Browns maintain Kurtz was a volunteer at Southside at the time relevant to this action.

Brown, 158 N.E.3d at 406.

[6] Specifically, Southside owner Ellis testified that she, at one point in time, was "hired to manage the [Southside] shelter" and then Kurtz and another employee had "a falling-out" and Kurtz left. (Appellant's App. Vol. II at 59.) Ellis also testified, "Darcie Kurtz was not — during the week, the eight days that I had [Grieg] at the shelter, Darcie Kurtz did not work for me. Darcie Kurtz was working for the Low Cost Spay Neuter clinic in Brownsburg transporting animals back and forth to Clinton County for spays and neuters." (*Id.* at 61.) Brown points us to Tate's testimony that Kurtz "was working with Brownsburg Low Cost Spay Neuter" but that "she was affiliated with Southside as well." (*Id.* at 163-4.) When asked about Kurtz's relationship with Southside, Tate testified she "knew she had either worked or volunteered there." (*Id.* at 164.)

[7] As noted in our original opinion, these issues of material fact preclude summary judgment. Having clarified the issues raised in Southside's petition for rehearing, we reaffirm our original opinion in all respects.

[8] Riley, J., and Altice, J., concur.

EXHIBIT 5

State of California

FOOD AND AGRICULTURAL CODE

Section 30503

30503. (a) (1) Except as otherwise provided in subdivision (b), no public animal control agency or shelter, society for the prevention of cruelty to animals shelter, humane society shelter, or rescue group shall sell or give away to a new owner any dog that has not been spayed or neutered.

(2) For the purposes of this section a "rescue group" is a for-profit or not-for-profit entity, or a collaboration of individuals with at least one of its purposes being the sale or placement of dogs that have been removed from a public animal control agency or shelter, society for the prevention of cruelty to animals shelter, or humane shelter or that have been previously owned by any person other than the original breeder of that dog.

(b) (1) If a veterinarian licensed to practice veterinary medicine in this state certifies that a dog is too sick or injured to be spayed or neutered, or that it would otherwise be detrimental to the health of the dog to be spayed or neutered, the adopter or purchaser shall pay the public animal control agency or shelter, society for the prevention of cruelty to animals shelter, humane society shelter, or rescue group a deposit of not less than forty dollars ($40), and not more than seventy-five dollars ($75).

(2) The entity shall establish the amount of the deposit at the level it determines is necessary to encourage the spaying or neutering of dogs.

(3) The deposit shall be temporary, and shall only be retained until the dog is healthy enough to be spayed or neutered, as certified by a veterinarian licensed to practice veterinary medicine in this state.

(4) The dog shall be spayed or neutered within 14 business days of that certification.

(5) The adopter or purchaser shall obtain written proof of spaying or neutering from the veterinarian performing the operation.

(6) If the adopter or purchaser presents proof of spaying or neutering to the entity from which the dog was obtained within 30 business days of obtaining the proof, the adopter or purchaser shall receive a full refund of the deposit.

(c) Public animal control agencies or shelters, society for the prevention of cruelty to animals shelters, humane society shelters, and rescue groups may enter into cooperative agreements with each other and with veterinarians in lieu of requiring spaying and neutering deposits to carry out this section.

(d) Any funds from unclaimed deposits made pursuant to this section, as it read on January 1, 1999, and any funds from deposits that are unclaimed after January 1, 2000, may be expended only for programs to spay or neuter dogs and cats, including

agreements with a society for the prevention of cruelty to animals or a humane society or licensed veterinarian to operate a program to spay or neuter dogs and cats.

(e) This section only applies to a county that has a population exceeding 100,000 persons as of January 1, 2000, and to cities within that county.

(Amended (as amended by Stats. 1998, Ch. 747, Sec. 2) by Stats. 2004, Ch. 253, Sec. 1. Effective January 1, 2005.)

EXHIBIT 6

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF FRESNO

Krystal Cooney, a minor, by and through her Guardian Ad Litem, Darin Cooney, Plaintiff, **v.** **Parlier Unified School District, a public entity; City of Parlier, California, a public entity; County of Fresno, California, a public entity; Carmen Galvan, an individual; J Solorio, an individual,** and Does 1 - 100, Defendants	Case No. **COMPLAINT FOR DAMAGES** Unlimited Case

First Cause of Action:

Dangerous Condition of Public Property - Negligent Creation of Condition

(Plaintiff Krystal Cooney against Defendant Parlier School District)

1. Defendant Parlier School District ("District") is a "public entity" as such term is defined in Government Code section 811.2.

2. At all times relevant hereto, the District owned and maintained the property and school located at 603 3rd St, Parlier, California, known as Parlier High School ("High School").

3. On June 15, 2008, at approximately 6:45 A.M., Plaintiff Krystal Cooney was taking a walk along the dirt strip ("Strip") on the south side of East South Avenue, between Fig Avenue and South Newmark Avenue, north of the fence ("Fence") which borders the High School at that location, and south of the paved road of East South Avenue on which vehicles travel. She was using all due care for her own safety, was unaware of the presence of the vicious, wild dogs described herein, and was doing nothing to attract or provoke an attack by them. She was 16 years old at that time.

4. At said time and place, 5 vicious, wild dogs approached Plaintiff. At first the dogs were south of the Fence, upon High School property. However, they quickly ran through one of several holes in the Fence, and commenced a lengthy, brutal attack upon Plaintiff. The entire attack and mauling took place on the Strip. Although she tried desperately to protect herself from the dogs and to summon aid, Plaintiff incurred many dog bites, and consequently sustained major injuries to her legs and arms. Her blood loss was so severe that police officers who responded to the scene found her losing consciousness, with lacerations so deep and gaping that significant quantities of tissues from inside her arms and legs were hanging outside of her wounds.

5. For at least two years prior to June 15, 2008, the District, acting through its officers, agents and employees, including but not limited to students under the direction and supervision of High School teachers, negligently created and maintained a dangerous condition on the premises of the High School by attracting a large number of vicious, wild

dogs to the High School, feeding and watering them there, harboring them there, and permitting or suffering them to run at large there.

6. The negligent actions and omissions of the officers, agents and employees referred to herein were performed within the course and scope of their agency and employment by the District.

7. The negligent actions and omissions of the students resulted from negligent direction and negligent supervision of those students by teachers who were acting within the course and scope of their employment by the District.

8. The Strip was and is adjacent to the High School. The dangerous condition created a substantial risk of injury when the Strip was used with due care in a manner in which it was reasonably foreseeable that it would be used, specifically by pedestrians walking past the High School.

9. The dangerous condition alleged herein existed on June 15, 2008, when Plaintiff was injured as complained of in this pleading.

10. The dangerous condition alleged herein created a reasonably foreseeable risk of the kind of injuries which Plaintiff incurred, specifically dog bite injuries inflicted on pedestrians walking on the Strip, by the vicious, wild dogs herein described.

11. The sole and proximate cause of Plaintiff's injuries and damages alleged herein was the dangerous condition of public property alleged herein.

12. Plaintiff sustained grave bodily injuries to her nervous system and person. The bodily injuries have resulted in permanent scarring. As a result of these injuries, she has suffered general damages. The amount of said damages is subject to proof at trial.

13. Plaintiff has incurred, and will continue to incur in the future, medical treatment costs. The full amount of all such damages is not known at this time and therefore is subject to proof at trial.

14. The District was given notice of this claim on December 11, 2008, and rejected it on January 15, 2009 (which was the date it was mailed, not the date appearing on the rejection letter itself). A true and correct copy of the notice and rejection are attached hereto as **Exhibit "A"** and **Exhibit "B"**.

Second Cause of Action:

Dangerous Condition of Public Property - Actual Knowledge

(Plaintiff Krystal Cooney Against Defendant Parlier School District)

15. Plaintiff incorporates and repleads herein all of the allegations of the First Cause of Action except paragraph 5.

16. A dangerous condition of High School property existed by virtue of the presence of vicious, wild dogs that ran at large there, in conjunction with the holes in the Fence, which holes gave the dogs access to pedestrians walking on the Strip.

17. The District knew or should have known of the dangerous character of the condition, because of the number of dogs, their pack mentality, lack of training, lack of socialization, need for food, hunting behavior, and lack of veterinary care.

18. Despite having knowledge of the dangerous condition, and of the probability and gravity of potential injury to pedestrians on the Strip foreseeably exposed to the risk, in sufficient time to have prevented the mauling of Plaintiff, the District unreasonably took

no action, or took unreasonably inadequate action, to prevent pedestrians including Plaintiff from being attacked and mauled.

Third Cause of Action:

Dangerous Condition of Public Property - Constructive Knowledge

(Plaintiff Krystal Cooney Against Defendant Parlier School District)

19. Plaintiff incorporates and repleads herein all of the allegations of the First Cause of Action except paragraph 5, and incorporates and repleads paragraph 16 of the Second Cause of Action.

20. The dangerous condition existed for approximately two years prior to the attack on Plaintiff. Throughout the two prior years, wild dogs ran at large upon the High School premises, and killed sheep and goats on High School property, and the Fence around the High School had numerous holes in and under it which needed repair, which holes gave the dogs free access to the Strip.

21. The dangerous condition was of an obvious nature throughout the two years prior to the attack on Plaintiff. The wild dogs, dead sheep and goats, and holes in and under the Fence could be easily seen.

22. By reason of the facts alleged in the immediately preceding paragraphs, the District, in the exercise of due care, should have discovered the condition and its dangerous character.

Fourth Cause of Action:

Dangerous Condition of Public Property - Negligent Creation of Condition

(Plaintiff Krystal Cooney Against Defendants Parlier School District, City of Parlier, and County of Fresno)

23. Plaintiff incorporates and repleads herein all of the allegations of the First Cause of Action except paragraph 5.

24. The City of Parlier ("City"), and County of Fresno ("County") are "public entities" as such term is defined in Government Code section 811.2.

25. Plaintiff does not know which Defendant(s) named in this cause of action owned, controlled and/or was responsible for repairing and maintaining the Fence. Plaintiff is informed and believes, and on such information and belief alleges, that the Fence was owned and controlled, or was to be repaired, by one or some combination of them. This pleading will be amended when the identity of the proper Defendant(s) is established in these proceedings.

26. On June 15, 2008, the Fence had numerous holes in and under it, large enough to permit vicious, wild dogs which were running at large upon High School property to easily pass from there to the Strip.

27. The presence of wild dogs on High School property made the Fence a dangerous condition of public property because it permitted the vicious, wild dogs to attack pedestrians on the Strip.

28. The dangerous condition existed on June 15, 2008.

29. The dangerous condition was caused by the negligent omissions of one or more agents and employees acting within the scope of his, her or their employment by the District, City and/or County.

30. The City was given notice of this claim on December 12, 2009, and did not respond to the notice. A true and correct copy of the notice of this claim is attached hereto as **Exhibit "C"**.

31. The County was given notice of this claim on December 12, 2008, rejected it on March 24, 2009, and mailed to Plaintiff's attorney the notice of rejection on April 2, 2009. A true and correct copy of the notice and rejection are attached hereto as **Exhibit "D"** and **Exhibit "E"**.

Fifth Cause of Action:

Dangerous Condition of Public Property - Actual Knowledge

(Plaintiff Krystal Cooney Against Defendants Parlier School District, City of Parlier, and County of Fresno)

32. Plaintiff incorporates and repleads herein all of the allegations of the First Cause of Action except paragraph 5, and incorporates and repleads all of the allegations of the Fourth Cause of Action except paragraph 29.

33. The District, City and/or County had actual knowledge of the dangerous condition alleged herein.

34. The District, City and/or County knew or should have known of the dangerous character of the condition, because of the number of dogs, their pack mentality, lack of training, lack of socialization, need for food, hunting behavior, and lack of veterinary care.

35. Despite having knowledge of the dangerous condition, and of the probability and gravity of potential injury to persons on adjacent property foreseeably exposed to the risk, in sufficient time to have prevented the mauling of Plaintiff, the District, City and/or County unreasonably took no action, or took unreasonably inadequate action, to repair the Fence and thereby prevent pedestrians including Plaintiff from being attacked and mauled.

Sixth Cause of Action:

Dangerous Condition of Public Property - Constructive Knowledge

(Plaintiff Krystal Cooney Against Defendants Parlier School District, City of Parlier and County of Fresno)

36. Plaintiff incorporates and repleads herein all of the allegations of the First Cause of Action except paragraph 5, and incorporates and repleads all of the allegations of the Fourth Cause of Action except paragraph 29.

37. The dangerous condition existed for approximately two years prior to the attack on Plaintiff. Throughout the two prior years, the Fence around the High School had numerous holes in and under it which needed repair, which holes gave the dogs free access to the Strip.

38. The dangerous condition was of an obvious nature throughout the two years prior to the attack on Plaintiff. The holes in and under the Fence could be easily seen or discovered in the exercise of due care.

39. By reason of the facts alleged in the immediately preceding paragraphs, the District, City and/or County, in the exercise of due care, should have discovered the condition and its dangerous character.

Seventh Cause of Action:

Dangerous Condition of Public Property - Actual Knowledge

(Plaintiff Krystal Cooney Against Defendants City of Parlier and County of Fresno)

40. Plaintiff incorporates and repleads herein paragraphs 3, 4, 10, 12, 13, 24, 30, and 31 of this pleading.

41. At all times relevant hereto, and on June 15, 2008, the City and County owned and controlled the public roads and other public property adjacent to the High School ("Surrounding Property"), meaning not only the Strip but all of the surrounding, adjacent, public property within one mile of the High School.

42. For at least two years prior to June 15, 2008, and on said date, the Surrounding Property was in a dangerous condition because vicious, wild dogs ran at large there. One reason it was dangerous was because of the presence of the dogs on the Surrounding Property itself. The second reason was because the dogs were able to get onto High School property where, because of the presence of livestock, the dogs had food and water. The third reason was that the dogs, after gathering at the High School, were able to access and attack pedestrians on the Strip, as they did when Plaintiff was attacked.

43. The dangerous condition created a substantial risk of injury when the Strip was used with due care in a manner in which it was reasonably foreseeable that it would be used, specifically by pedestrians walking past the High School.

44. The City and County had actual knowledge of existence of the dangerous condition alleged herein.

45. The City and County knew or should have known of the dangerous character of the condition, because of the number of dogs, their pack mentality, lack of training, lack of socialization, need for food, hunting behavior, and lack of veterinary care.

46. Despite having knowledge of the dangerous condition, and of the probability and gravity of potential injury to persons on adjacent property foreseeably exposed to the risk, in sufficient time to have prevented the mauling of Plaintiff, the City and County unreasonably took no action, or took unreasonably inadequate action, to capture and relocate or kill the wild, vicious dogs, to prevent them from running at large on Surrounding Property, to stop them from getting onto High School property, to prevent them from running at large and accessing and attacking pedestrians on the Strip, to educate and warn students such as Plaintiff and others as to the presence of the vicious, wild dogs on the Surrounding Property and the Strip, to monitor pedestrian activity on the Strip so that the police could respond immediately without being summoned in the event that the dogs attacked a pedestrian, or otherwise eliminate or lessen the risk of dog attack and serious injury to pedestrians on the Strip.

47. The dangerous condition herein alleged was the sole proximate cause of Plaintiff's losses and damages.

Eighth Cause of Action:

Dangerous Condition of Public Property - Constructive Knowledge

(Plaintiff Krystal Cooney Against Defendants City of Parlier and County of Fresno)

48. Plaintiff incorporates and repleads all of the allegations of the Seventh Cause of Action except paragraphs 44 and 45.

49. The dangerous condition existed for approximately two years prior to the attack on Plaintiff. Throughout the two prior years, the vicious, wild dogs ran at large over the entire Surrounding Property.

50. The dangerous condition was of an obvious nature throughout the two years prior to the attack on Plaintiff. The vicious, wild dogs could be easily seen or discovered in the exercise of due care.

51. By reason of the facts alleged in the immediately preceding paragraphs, the City and County, in the exercise of due care, should have discovered the condition and its dangerous character.

Ninth Cause of Action:

Negligence

(Plaintiff Krystal Cooney Against Defendants Galvan, Solorio and Does 1-100)

52. Plaintiff incorporates and repleads paragraphs 3, 4, 12 and 13 of this pleading.

53. Defendants Carmen Galvan, and J Solorio, and Does 1 - 100 are individuals or entities who, at all times relevant hereto, owned, controlled and/or resided at 14082 East South Avenue.

54. The true names and capacities of the persons or entities sued herein as Does 1 through 100 are unknown to Plaintiff.

55. Each Defendant sued herein was the agent, co-conspirator or employee of each other Defendant, and, in doing the things complained of herein, was acting within the course and scope of said agency, conspiracy or employment.

56. Plaintiff Krystal Cooney is informed and believes, and thereon alleges, that each Defendant who is sued in this Complaint under a fictitious name is responsible, in some manner, for the acts, omissions and occurrences alleged herein, and that Plaintiff's damages as herein alleged were proximately caused by those Defendants, as well as the named Defendants.

57. For at least two years prior to June 15, 2008, Defendants Galvan, Solorio and Does 1 - 100 and each of them provided food, water and shelter for wild dogs in and around 14082 East South Avenue, which was and is located near the High School.

58. The result of the actions of the Defendants sued herein and each of them was that wild dogs were attracted to 14082 East South Avenue and the property near and adjacent to the High School, and the Strip. As a further result of said actions, wild dogs reproduced and thrived in the same area.

59. The feeding, watering, keeping and harboring of wild dogs by Defendants and each of them was negligent because it created a foreseeable risk that pedestrians in the vicinity of 14082 East South Avenue and the property near and adjacent to the High School, and the Strip itself, would encounter groups of wild dogs that, because of the

number of dogs, their pack mentality, lack of training, lack of socialization, need for food, hunting behavior, and lack of veterinary care, would present a clear and present danger to pedestrians that the latter would be attacked and mauled by the dogs.

60. Defendants and each of them had a duty to prevent the dogs they were attracting, feeding, watering, keeping and harboring from inflicting bodily injuries upon Plaintiff.

61. Each Defendant's unreasonable actions and omissions with respect to the attracting, care and control, feeding, watering, keeping and harboring of the dogs constituted a breach of said Defendant's duty to prevent the dogs from inflicting bodily injuries upon Plaintiff.

62. The sole and proximate cause of Plaintiff's injuries and damages alleged herein was each Defendant's negligent breach of duty to prevent injury to said plaintiff.

Tenth Cause of Action:

Common Law Strict Liability Based on Known Dangerous Propensities

(Plaintiff Krystal Cooney Against

Defendants Galvan, Solorio and Does 1-100)

63. Plaintiff incorporates and repleads all of the paragraphs of the Ninth Cause of Action except paragraphs 59 through and including 62.

64. Prior to and on June 15, 2008, the dogs which were kept and harbored by the Defendants Galvan, Solorio and Does 1-100 and each of them had the dangerous propensity to viciously bite people.

65. Prior to and on June 15, 2008, the Defendants and each of them knew or had reason to know that the dogs which were kept and harbored by these Defendants had the dangerous propensity to viciously bite people.

66. The sole and proximate cause of Plaintiff Krystal Cooney's injuries as alleged herein was each Defendant's keeping and harboring of the dogs with knowledge that they had the dangerous propensity to viciously bite people.

Eleventh Cause of Action:

Statutory Strict Liability Based on the Dog Bite Statute

(Plaintiff Krystal Cooney Against

Defendants Galvan, Solorio and Does 1-100)

67. Plaintiff incorporates and repleads all of the paragraphs of the Ninth Cause of Action except paragraphs 57 through and including 62.

68. On June 15, 2008, Defendants Galvan, Solorio and Does 1-100 and each of them were the owners of the dogs that attacked and mauled Plaintiff.

69. When bitten by the dogs owned by the Defendants and each of them, Plaintiff was on public property, to wit, on the Strip.

70. The Defendants and each of them are strictly liable for the injuries and damages of Plaintiff pursuant to California Civil Code section 3342.

Twelfth Cause of Action:

Negligence per Se Based on Violation of Animal Control Law

(Plaintiff Krystal Cooney Against

Defendants Galvan, Solorio and Does 1-100)

71. Plaintiff incorporates and repleads all of the paragraphs of the Ninth Cause of Action except paragraphs 57 through and including 62.

72. On June 15, 2008 there existed in the County of Fresno the following ordinances ("Ordinances"):

9.04.250 Running at large.

It is unlawful, in the unincorporated areas of the county of Fresno, for any person to permit a dog owned by him or in his possession to be off the property of the owner or possessor thereof unless such dog is on a leash or is otherwise under the immediate control of some responsible person.

73. On June 15, 2008, Defendants Galvan, Solorio and Does 1-100 and each of them violated the Ordinance by permitting the dogs in the possession of each said Defendant to run at large. The Defendants' violation of the Ordinances and each of them was the sole and proximate cause of injury to Plaintiff Krystal Cooney on June 15, 2008.

74. The Ordinance was intended and designed to prevent the injury which Plaintiff suffered as alleged herein.

75. Plaintiff was a member of the class of persons for whose protection the Ordinance was adopted.

Thirteenth Cause of Action:

Negligence of Owners or Possessors of Residential Real Property

(Plaintiff Krystal Cooney Against

Defendants Galvan, Solorio and Does 1-100)

76. Plaintiff incorporates and repleads all of the paragraphs of the Ninth Cause of Action except paragraphs 57 through and including 62.

77. On June 15, 2008, Defendants Galvan, Solorio and Does 1-100 and each of them were the owners, lessors and/or managers of the premises located at 14082 East South Avenue.

78. Prior to June 15, 2008, the Defendants and each of them had actual knowledge that a large number of wild dogs were being fed, watered, kept and harbored upon those premises.

79. Prior to and on June 15, 2008, the Defendants and each of them possessed the right, authority, means and opportunity to control the premises and rid the same of the wild dogs, or prevent them from being fed, watered, kept and harbored upon those premises, and thereby to have prevented the same from inflicting bodily injuries on Plaintiff as alleged in this pleading.

80. By reason of their knowledge that large numbers of wild dogs were being fed, watered, kept and harbored on the said premises, and that the same were dangerous and vicious to people, the Defendants and each of them had the duty to rid the premises of the dogs, and their unreasonable failure to do so constituted breach of that duty and was the proximate cause of the injuries and damages suffered by Plaintiff.

WHEREFORE judgment is prayed for, providing that each Defendant, jointly and severally, pay the following, in amounts subject to proof at trial:

1. Medical treatment costs, psychological treatment costs, and other treatment costs previously incurred and to be incurred in the future for the benefit of Krystal Cooney.

2. General damages for pain, suffering, physical disfigurement and other intangible losses sustained by her.

3. Costs of suit herein.

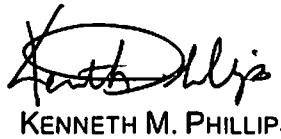
4. Prejudgment and postjudgment interest allowed by law.

5. Such other and further relief as the Court may deem proper.

July 13, 2009

Respectfully submitted,

Law Offices of Kenneth M. Phillips



KENNETH M. PHILLIPS
Cal. Bar No. 72251
Attorney for Plaintiff
Krystal Cooney

LAW OFFICES OF
Kenneth Morgan Phillips
9107 Wilshire Blvd., Suite 450
Beverly Hills, California 90210

(310) 858-7460 tel
(310) 858-7469 fax

kphillips@dogbitelaw.com
www.dogbitelaw.com

December 11, 2008

Parlier Unified School District
Superintendent Rick Rodriguez
900 Newmark
Parlier, CA 93648

Re: Notice of Claim

Dear Sirs:

As required by Government Code section 910, please be advised of the following claim:

1. Name and post office address of claimants: Krystal Cooney, Darin Cooney, and Connie Cooney, 540 Almond Street, Parlier, CA 93648

2. Place to send correspondence related to this claim: all correspondence is to be sent to the undersigned at the address on this letterhead. The undersigned is the attorney for the claimant.

3. Date, place and circumstances of the occurrences which gave rise to the claim:

This claim results from a dog attack upon Krystal Cooney which took place between 6:45 AM and 7:00 AM on Father's Day, June 15, 2008. The location of the attack was East South Avenue, directly behind and north of Parlier High School in Parlier, California. Krystal was attacked by a pack of dogs that had been a constant presence at and around Parlier High School and in fact had emerged from the grounds of Parlier High School.

People who were familiar with the actions of these wild dogs during the several years prior to this attack came to the inescapable conclusion that their roaming, number, pack mentality, lack of training, lack of socialization, need for food, and lack of veterinary care added up to a clear and present danger to human beings. For at least two years, officials at Parlier High School were aware of the presence and predatory habits of these dogs, which had at least a two-year history of killing sheep and goats located in a nearby pen. For at least two years, the Parlier Police Department knew that the dogs were a danger to human beings in this area, and that it was only a matter of time before someone was hurt. For at least two years, the Parlier City Council was aware that the dogs were dangerous, having discussed the problem at meetings. And again, for at least two years, Fresno County Animal Control was aware of the wild dog problem, having previously removed a large number of them from the area.

EXHIBIT "A"

Despite knowledge of the problem on the part of these entities, however, not one of them took effective action to control the dogs, keep them out of the area and off high school property, prevent people from feeding and watering them, study their movements and propagation, or eliminate them. Nothing was done to warn the public, instruct the public as to bite prevention, prevent the public from encountering the dogs, or protect the public from the dogs. To this day, many such dogs remain present, uncontrolled and a danger to animals and people – including children at the child care facility which is located south of the animal pen on the grounds of Parlier High School.

4. General description of the injury, damage or loss incurred:

Krystal sustained severe dog bites on her legs and arms. She has permanent scars and other permanent conditions as a result of these dog bites. She was hurt and injured in her health, strength and activity, sustaining injury to the nervous system and person, and extreme and severe emotional distress, all of which have caused, and continue to cause, her great mental, physical and nervous pain and suffering, resulting in general and special damages, including medical expenses.

Darin Cooney and Connie Cooney have incurred special damages for the care and treatment of their daughter, Krystal.

5. Names of employees causing the injury: unknown at the present time.

6. Amount claimed: The amount claimed by the three claimants, combined, exceeds $10,000.00 and jurisdiction would rest in the Superior Court for an unlimited civil case.

Please do not hesitate to call if you have any questions or comments.

Sincerely,

Kenneth Morgan Phillips
Attorney at Law

cc: clients

EXHIBIT "A"

NOTICE OF REJECTION OF CLAIM

CERTIFIED MAIL RETURN RECEIPT REQUESTED

January 14, 2009

To: Kenneth Morgan Phillips, Esq.
9107 Wilshire Blvd., Suite 450
Beverly Hills, CA 90210

Re: Claim of Krystal Cooney, Darin Cooney
and Connie Cooney against the Parlier Unified School District

Dear Mr. Phillips:

NOTICE IS HEREBY GIVEN that the claims which you presented to the Parlier Unified School District on December 15, 2008 were REJECTED on January 13, 2009.

WARNING

Subject to certain exceptions, you have only (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. (See Government Code 945.6).

Please also be advised that, pursuant to Sections 128.5 and 1038 of the California Code of Civil Procedure, the District will seek to recover all costs of defense in the event an action is filed in the matter and it is determined that the action was not brought in good faith and with reasonable cause.

Sincerely,

Rick Rodriguez
Superintendent
Parlier Unified School District

EXHIBIT "B"

LAW OFFICES OF
Kenneth Morgan Phillips
9107 Wilshire Blvd., Suite 450
Beverly Hills, California 90210

(310) 858-7460 tel
(310) 858-7469 fax

kphillips@dogbitelaw.com
www.dogbitelaw.com

December 11, 2008

City of Parlier
Lou Martinez, City Manager
1100 E. Parlier Avenue
Parlier, CA 93648

Re: Notice of Claim

Dear Sirs:

As required by Government Code section 910, please be advised of the following claim:

1. Name and post office address of claimants: Krystal Cooney, Darin Cooney, and Connie Cooney, 540 Almond Street, Parlier, CA 93648

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People who were familiar with the actions of these wild dogs during the several years prior to this attack came to the inescapable conclusion that their roaming, number, pack mentality, lack of training, lack of socialization, need for food, and lack of veterinary care added up to a clear and present danger to human beings. For at least two years, officials at Parlier High School were aware of the presence and predatory habits of these dogs, which had at least a two-year history of killing sheep and goats located in a nearby pen. For at least two years, the Parlier Police Department knew that the dogs were a danger to human beings in this area, and that it was only a matter of time before someone was hurt. For at least two years, the Parlier City Council was aware that the dogs were dangerous, having discussed the problem at meetings. And again, for at least two years, Fresno County Animal Control was aware of the wild dog problem, having previously removed a large number of them from the area.

EXHIBIT "C"

Despite knowledge of the problem on the part of these entities, however, not one of them took effective action to control the dogs, keep them out of the area and off high school property, prevent people from feeding and watering them, study their movements and propagation, or eliminate them. Nothing was done to warn the public, instruct the public as to bite prevention, prevent the public from encountering the dogs, or protect the public from the dogs. To this day, many such dogs remain present, uncontrolled and a danger to animals and people – including children at the child care facility which is located south of the animal pen on the grounds of Parlier High School.

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5. Names of employees causing the injury: unknown at the present time.

6. Amount claimed: The amount claimed by the three claimants, combined, exceeds $10,000.00 and jurisdiction would rest in the Superior Court for an unlimited civil case.

Please do not hesitate to call if you have any questions or comments.

Sincerely,

Kenneth Morgan Phillips
Attorney at Law

cc: clients

EXHIBIT "C"

LAW OFFICES OF
Kenneth Morgan Phillips
9107 Wilshire Blvd., Suite 450
Beverly Hills, California 90210

(310) 858-7460 tel
(310) 858-7469 fax

kphillips@dogbitelaw.com
www.dogbitelaw.com

December 11, 2008

County of Fresno
Clerk to the Board's Office
2281 Tulare, Room 301
Fresno, CA 93721

Re: Notice of Claim

Dear Sirs:

As required by Government Code section 910, please be advised of the following claim:

1. Name and post office address of claimants: Krystal Cooney, Darin Cooney, and Connie Cooney, 540 Almond Street, Parlier, CA 93648

2. Place to send correspondence related to this claim: all correspondence is to be sent to the undersigned at the address on this letterhead. The undersigned is the attorney for the claimant.

3. Date, place and circumstances of the occurrences which gave rise to the claim:

This claim results from a dog attack upon Krystal Cooney which took place between 6:45 AM and 7:00 AM on Father's Day, June 15, 2008. The location of the attack was East South Avenue, directly behind and north of Parlier High School in Parlier, California. Krystal was attacked by a pack of dogs that had been a constant presence at and around Parlier High School and in fact had emerged from the grounds of Parlier High School.

People who were familiar with the actions of these wild dogs during the several years prior to this attack came to the inescapable conclusion that their roaming, number, pack mentality, lack of training, lack of socialization, need for food, and lack of veterinary care added up to a clear and present danger to human beings. For at least two years, officials at Parlier High School were aware of the presence and predatory habits of these dogs, which had at least a two-year history of killing sheep and goats located in a nearby pen. For at least two years, the Parlier Police Department knew that the dogs were a danger to human beings in this area, and that it was only a matter of time before someone was hurt. For at least two years, the Parlier City Council was aware that the dogs were dangerous, having discussed the problem at meetings. And again, for at least two years, Fresno County Animal Control was aware of the wild dog problem, having previously removed a large number of them from the area.

Despite knowledge of the problem on the part of these entities, however, not one of them took effective action to control the dogs, keep them out of the area and off high school property, prevent people from feeding and watering them, study their movements and propagation, or eliminate them. Nothing was done to warn the public, instruct the public as to bite prevention, prevent the public from encountering the dogs, or protect the public from the dogs. To this day, many such dogs remain present, uncontrolled and a danger to animals and people – including children at the child care facility which is located south of the animal pen on the grounds of Parlier High School.

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Darin Cooney and Connie Cooney have incurred special damages for the care and treatment of their daughter, Krystal.

5. Names of employees causing the injury: unknown at the present time.

6. Amount claimed: The amount claimed by the three claimants, combined, exceeds $10,000.00 and jurisdiction would rest in the Superior Court for an unlimited civil case.

Please do not hesitate to call if you have any questions or comments.

Sincerely,

Kenneth Morgan Phillips
Attorney at Law

cc: clients

EXHIBIT "D" Pg. 2

Kenneth Phillips
Attorney at Law
9107 Wilshire Blvd., Suite 450
Beverly Hills, CA 90210

On Behalf of Krystal Cooney, Darin Cooney and Connie Cooney
Claim No. 8355

Clerk, Board of Supervisors
Room 301, Hall of Records
Fresno CA 93721 488-3529

NOTICE OF REJECTION OF CLAIM

NOTICE IS HEREBY GIVEN that the claim, which you presented to the Fresno County Board of Supervisors on December 15, 2008, was rejected on March 24, 2009.

WARNING

Subject to certain exceptions, you have only (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. (See Government Code Section 945.6) "The six month time limit referred to in this notice applies only to claims or causes of action which are governed by the California Tort Claims Act." You may seek the advice of attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

Exhibit "E" pg. 1

RESOLUTION 09-106

IN THE MATTER OF A CLAIM FOR)
DAMAGES AGAINST FRESNO COUNTY)
FILED ON BEHALF OF KRYSTAL COONEY,)
DARIN COONEY, CONNIE COONEY)

DENIED

Acting upon the recommendation of the Claims Review Committee and upon motion duly made, seconded and carried, IT IS ORDERED that the claim for damages submitted by Attorney, Kenneth Phillips, 9107 Wilshire Blvd., Suite 450, Beverly Hills, CA 90210, on behalf of Krystal Cooney, Darin Cooney, and Connie Cooney, the amount within Superior Court limits, filed on December 15, 2008, is hereby DENIED.

THE FOREGOING was passed and adopted by the following vote of the board of Supervisors of the County of Fresno this 24th day of March, 2009, to-wit:

AYES: Supervisors Perea, Larson, Case, Poochigian, Anderson
NOES: None
ABSENT: None

Susan B. Anderson

CHAIRMAN, Board of Supervisors

ATTEST:
BERNICE E. SEIDEL
Clerk, Board of Supervisors

By Vanessa Kane
Deputy

Agenda Item #34
RESO # 09-106

Claim No. 8355

EXHIBIT "E" Pg. 2

CERTIFICATE OF DELIVERY OF DOCUMENT

I am employed by the County of Fresno as a Deputy Clerk of the Board of Supervisors. On **March 24, 2009** I delivered a copy of **Resolution No. 09-106** (Item no. 34) to the Chairman of the Fresno County Board of Supervisors.

Hafeesa Lane
Deputy Clerk

EXHIBIT "E" pg. 3

PROOF OF MAIL

(1013z, 2015.5 C. C. P.)

STATE OF CALIFORNIA)
COUNTY OF FRESNO)

I am a citizen of the United States of America and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2220 Tulare Street, 21st Floor, Fresno, California 93721.

On the 2nd day of April 2009, I served a copy of the

Attached Notice of Regular Rejection and Denial

on the Claimant(s)/Attorney

in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box in the City of Fresno, County of Fresno, State of California, addressed as follows:

Kenneth Phillips
Attorney at Law
9107 Wilshire Blvd., Suite 450
Beverly Hills, CA 90210

that there is delivery service by United States mail at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

I hearby certify under penalty of perjury that the above is a true and correct statement.

Signed at Fresno, California, this 2nd day of April 2009.

Debbie Zavala
Personnel Technician III/C

///

///

EXHIBIT "E" Pg. 4

EXHIBIT 7

307 P.3d 795 (2013)

Sue Ann GORMAN, a single person, Respondent/Cross Appellant,

v.

PIERCE COUNTY, a county corporation; Shellie R. Wilson and "John Doe" Wilson, husband and wife and the marital community composed thereof; Zachary Martin and "Jane Doe" Martin, husband and wife and the marital community composed thereof; and Jacqueline Evans-Hubbard and "John Doe" Hubbard, husband and wife and the marital community composed thereof, Appellants/Cross Respondents.

Nos. 42502-5-II, 42594-7-II.

Court of Appeals of Washington, Division 2.

August 13, 2013.

798 *798 Donna Yumiko Masumoto, Pierce Co Prosec Atty Office, Tacoma, WA, for Appellant.

David P. Lancaster, Hollenbeck Lancaster & Miller, Bellevue, WA, Nancy Katherine McCoid, Soha & Lang PS, Bradley Dean Westphal, Lee Smart PS Inc, Seattle, WA, for Respondent.

Shelly K. Speir, Troup Christnacht Ladenburg McKasy et al, Tacoma, WA, for Appellant/Cross-Respondent.

Michael Joseph McKasy, Attorney at Law, Tacoma, WA, for Respondent/Cross-Appellant.

PENOYAR, J.

¶ 1 Two dogs entered Sue Ann Gorman's house through an open door and mauled her in her bedroom. Invoking a statute imposing strict liability for dog-bite injuries, Gorman sued the dog owners, Shellie Wilson, Zachary Martin, and Jacqueline Evans-Hubbard. Gorman also sued Pierce County for negligently responding to complaints about the dogs before the attack. Pierce County invoked the public duty doctrine and sought dismissal of the claims against it, but the trial court ruled that the failure to enforce exception applied. A jury found all defendants liable and also found that Gorman's actions contributed to her injuries. Pierce County appeals, arguing that (1) the "failure to enforce" exception to the public duty doctrine does not apply, (2) the jury instructions misstated Pierce County's duty of care, and (3) the trial court erroneously admitted evidence of prior complaints about Wilson's other dogs. Gorman cross appeals, arguing that (4) the trial court erred by denying her motions for judgment as a matter of law, (5) the trial court erred by failing to give the emergency doctrine instruction, and (6) insufficient evidence supports the jury's verdict on contributory fault. Because Pierce County had a mandatory duty to act, we affirm the trial court's determination that the failure to enforce exception applies. Additionally, the jury instructions properly stated the law and Pierce County opened the door to evidence about Wilson's other dogs. We further hold that Gorman failed to properly renew her motion for judgment as a matter of law and this argument is waived, Gorman failed to properly present the emergency doctrine instruction to the trial court, and there is sufficient evidence to support the jury's verdict that Gorman was contributorily negligent in incurring her injuries.

FACTS

I. SUBSTANTIVE FACTS

¶ 2 Shellie Wilson lived in Gig Harbor with her 16-year-old son, Zachary Martin. In 2006, they acquired a pit bull named Betty. Betty later had a litter of mixed-breed puppies, including one named Tank. In February 2007, Wilson and Martin gave Tank to Jacqueline Evans-Hubbard.

¶ 3 Two houses away from Wilson, Sue Gorman lived with her service dog, Misty. Gorman's next-door neighbor, Rick Russell, owned a Jack Russell terrier named Romeo.

¶ 4 On the cul-de-sac where Wilson, Gorman, and Russell lived, residents frequently let their dogs roam outdoors without a leash. Gorman left her sliding glass door open so that Misty and Romeo could come and go as they pleased.

¶ 5 Betty was the subject of several complaints to police and animal control officers. On August 31, 2006, Betty and another dog named Lola, belonging to Martin's houseguest, aggressively confronted Wilson's next-door neighbor in his yard, preventing the neighbor and his son from leaving their house for approximately 90 minutes. The neighbor called 911 and an animal control officer contacted Wilson. On the basis of Wilson's admissions, the officer cited Wilson for allowing the dogs to run loose and failing to have a dog license. Wilson demanded that Martin's houseguest remove Lola from the house, and the houseguest complied.

799 ¶ 6 A Pierce County ordinance allowed the county to classify a dog as "potentially dangerous" *799 if the county had probable cause to believe the dog (1) bit a person or animal, (2) chased or approached a person "in a menacing fashion or apparent attitude of attack," or (3) was known to otherwise threaten the safety of humans or animals. Former Pierce County Code (PCC) 6.02.010(T) (2007). The county had a duty to evaluate a dog to determine if the dog was potentially dangerous if it had (1) a complainant's written statement that the dog met the code's definition, (2) a report of a dog bite, (3) testimony of an animal control or law enforcement officer who observed the dog, or (4) "other substantial evidence." RP at 964; Former PCC 6.07.010(A) (2007). In deciding to classify a dog, the county could consider prior complaints about other dogs that had previously belonged to the same owner. After classification, the dog's owner would be required to keep the dog confined, even during the pendency of an appeal. The county would be required to seize any potentially dangerous dog that violated any restriction imposed on potentially dangerous dogs.

¶ 7 During a three-week period in 2007, Pierce County received three more complaints about incidents involving Betty. On February 10, 2007, as Gorman returned from the grocery store, Betty chased Gorman and Misty, Gorman's service dog, into Gorman's house. Fifteen minutes later, Gorman tried to retrieve her groceries from the car but Betty again confronted her. Gorman commanded Betty to leave and kicked at her, but Betty bit Gorman's pant leg. Using a stick she grabbed from a pile in the yard, Gorman fended Betty off until retreating to safety inside her house. Gorman then called 911, but Betty left before a sheriff's deputy arrived an hour later. Finding no one home at Wilson's house, the deputy advised Gorman to call animal control the following morning. Gorman testified that she called animal control and left a message, but she did not receive a return call and did not call again. Animal control had no record of Gorman's call.

¶ 8 The second complaint followed an incident on February 22, 2007. Russell called animal control to report Betty and another loose dog chasing a child on rollerblades.[1] An animal control officer arrived the following day but found no one at Wilson's home. The officer left a note on the door but Wilson and Martin did not respond. The officer also mailed Russell a form to provide a written statement. Russell did not provide a statement until six months later, after the dogs attacked Gorman.

¶ 9 Gorman made the third complaint on March 1, 2007. Betty chased Misty into Gorman's house and proceeded to jump aggressively at Gorman's sliding glass door. Gorman called 911, but Betty again had left by the time a deputy arrived. About 30 minutes later, the deputy and Martin appeared at Gorman's house; Martin then apologized to Gorman, denied Betty's involvement, and promised to fix Wilson's fence. The deputy had Gorman and Martin exchange phone numbers and encouraged Gorman to contact Martin directly in the future.

¶ 10 Wilson owned other dogs before Betty, and Pierce County records showed 10 complaints about Wilson's other dogs. Based on Wilson's prior history, an animal control expert later opined that Pierce County could have declared Betty potentially dangerous after the August 31, 2006, incident with Wilson's next-door neighbor. The expert also opined that Pierce County *should* have declared Betty potentially dangerous after any of the three incidents on February 10, February 22, and March 1, 2007.

¶ 11 Betty's aggressive behavior continued, but Pierce County did not receive further complaints. Gorman called Martin about 10 times regarding various incidents, but Martin never responded. During an incident in July 2007, Betty and Tank both entered Gorman's house through the open sliding glass door. Gorman believed Betty and Tank had come to confront Misty and Romeo, but Gorman got the dogs to leave peacefully.

800 ¶ 12 On August 17, 2007, Evans-Hubbard, Tank's owner, left for two weeks. While she *800 was gone, Evans-Hubbard left Tank with Wilson. At the time, Tank was six to eight months old.

¶ 13 At approximately 8:22 A.M. on August 21, 2007, Betty and Tank entered Gorman's house through the sliding glass door, which Gorman had left open for the night. Gorman, who was in her bedroom with Misty and Romeo, awoke to the sounds of Betty and Tank snarling. Misty, Gorman's service dog, ran outside to safety.

¶ 14 Betty and Tank then entered Gorman's bedroom and jumped onto her bed. Betty bit Gorman on the left arm. Romeo then jumped off the bed and was mauled by both Betty and Tank.

¶ 15 Gorman tried to protect Romeo. She tried to lift Romeo, but Betty and Tank bit both her hands. Gorman retrieved a gun from her nightstand, but the gun misfired. She threw the gun at the dogs and hit them with her walking stick to no avail. Gorman then managed to pick up Romeo, put him in the closet, and close the door, while Betty repeatedly bit Gorman's face, breasts, and hands. Tank forced the closet door open and, with Betty, began shaking Romeo. Gorman fled the house and closed the sliding glass door behind her to trap the dogs inside. She then called 911.

¶ 16 Gorman suffered serious injuries from 20 to 30 dog bites; she required hospitalization and multiple surgeries. Romeo, the Jack Russell terrier, died from his injuries. Betty and Tank were later euthanized. Wilson and Martin pleaded guilty to criminal charges. They were sentenced to probation and ordered to pay restitution.

II. PROCEDURAL FACTS

¶ 17 Gorman then filed this suit, claiming that (1) Wilson, Martin, and Evans-Hubbard were strictly liable for the harm their dogs caused Gorman[2] and (2) Pierce County negligently failed to take appropriate action in response to the complaints about the dogs before the attack. Wilson, Martin, and Evans-Hubbard admitted liability, but Pierce County did not. Pierce County raised comparative fault as an affirmative defense.

¶ 18 Before trial, Gorman sought permission to introduce Pierce County records showing 10 complaints about other dogs Wilson owned before she acquired Betty. The trial court allowed testimony that 10 complaints were made, but it prohibited any testimony about the incidents alleged in the complaints. However, during cross-examination of an animal control officer, counsel for Pierce County asked "why there wasn't sufficient evidence [in the 10 prior complaints] to declare those dogs potentially dangerous?" Report of Proceedings (RP) (Aug. 3, 2011) at 990. The officer's response suggested that the complaints involved leash law violations, rather than threatening behavior. But on re-direct examination, Gorman's counsel elicited testimony that, in three of these incidents, a dog unsuccessfully attempted to attack a person.

¶ 19 Pierce County moved for summary judgment dismissing it from the case, contending that the public duty doctrine shielded it from liability because the county owed no legal duty to Gorman individually. The trial court denied the motion, allowing the negligence claim to proceed under the failure to enforce exception to the public duty doctrine.[3] When Gorman rested at trial, Pierce County unsuccessfully moved for judgment as a matter of law on the same grounds presented in the summary judgment motion.

¶ 20 When all defendants rested, Gorman moved for judgment as a matter of law, arguing that the evidence was insufficient to show that she breached a duty and, thus, her negligence could not have contributed to her injuries. The trial court denied the motion.

¶ 21 The jury found all defendants, including Pierce County, liable to Gorman. The jury also found that Gorman's fault
801 contributed *801 to her injuries.[4] After the verdict, Gorman renewed her earlier motion for judgment as a matter of law and argued that she had no legal duty to close her sliding door.

¶ 22 Pierce County appeals the denial of its motion for judgment as a matter of law, while also arguing instructional and evidentiary error. Gorman cross appeals the jury's verdict finding her at fault for contributing to her injuries.

ANALYSIS

I. THE PUBLIC DUTY DOCTRINE

¶ 23 Pierce County argues that the trial court erred by denying its motion for judgment as a matter of law on the negligence claim because, under the public duty doctrine, Pierce County owed no duty of care to Gorman. Gorman argues that (1) the

public duty doctrine is contrary to law or, in the alternative; (2) the failure to enforce exception to the public duty doctrine applies here. We hold that the public duty doctrine is not contrary to law and that the failure to enforce exception applies here.

¶ 24 We review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wash.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is proper only when, viewing the evidence in the light most favorable to the nonmoving party, substantial evidence cannot support a verdict for the nonmoving party. *Schmidt*, 162 Wash.2d at 491, 493, 173 P.3d 273.

¶ 25 Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care. *Osborn v. Mason County*, 157 Wash.2d 18, 27-28, 134 P.3d 197 (2006). Under the public duty doctrine, a government's obligation *to the public* is not a legal duty of care; instead, a government can be liable only for breaching a legal duty owed *individually to the plaintiff*. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wash.2d 774, 785, 30 P.3d 1261 (2001) (quoting *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988)). However, the public duty doctrine is subject to four exceptions: (1) the legislative intent exception, (2) the failure to enforce exception, (3) the rescue doctrine, and (4) the special relationship exception. *Babcock*, 144 Wash.2d at 786, 30 P.3d 1261. Whether, in light of the public duty doctrine and its exceptions, a government defendant owed the plaintiff a legal duty is a question of law reviewed de novo. *Vergeson v. Kitsap County*, 145 Wash.App. 526, 534, 186 P.3d 1140 (2008).

A. The Public Duty Doctrine Is Not Contrary to Law

¶ 26 Gorman asks us to abolish the public duty doctrine and instead to apply a different test.[5] We decline to do so because our Supreme Court precedent approving the public duty doctrine binds us.

¶ 27 Urging abolition of the public duty doctrine, Gorman contends that it is incompatible with the legislature's abrogation, of sovereign immunity. But our Supreme Court has already rejected this contention. *Chambers-Castanes v. King County*, 100 Wash.2d 275, 287-88, 669 P.2d 451 (1983).[6] Instead, our Supreme Court has repeatedly applied the public duty doctrine to define the duty owed by government defendants in negligence actions. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175
802 Wash.2d 871, 886 n. 3, 288 P.3d 328 (2012) (Chambers, J., concurring and *802 joined by a majority of the justices) (listing 29 instances).[7] We are bound to follow our Supreme Court's precedents and have no authority to abolish them. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566, 590, 146 P.3d 423 (2006).

¶ 28 Gorman next urges us to apply, instead of the public duty doctrine, the four-part test set out in *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 255, 407 P.2d 440 (1966).[8] But Gorman misapprehends the purpose of the *Evangelical* test, which recognizes limited grounds for governmental immunity flowing from the separation of powers. *See* 67 Wash.2d at 253-55, 407 P.2d 440. The *Evangelical* test determines whether a particular discretionary act is so rooted in governing that it cannot be tortious, no matter how "unwise, unpopular, mistaken, or neglectful [it] might be." 67 Wash.2d at 253, 407 P.2d 440. Thus, the *Evangelical* test prevents courts from deciding whether the coordinate branches of government have made the wrong policies. *King v. City of Seattle*, 84 Wash.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wash.2d 243, 947 P.2d 223 (1997). The *Evangelical* test is inapposite to the issue here: whether Pierce County owed a legal duty to Gorman. Gorman's argument fails.

B. The Failure to Enforce Exception Applies

¶ 29 The parties dispute only whether the failure to enforce exception to the public duty doctrine applies in this case. We hold that it does.

¶ 30 Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). The plaintiff has the burden to establish each element of the failure to enforce exception, and the court must construe the exception narrowly. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 531, 799 P.2d 250 (1990).

¶ 31 Contesting only the second element, Pierce County argues that it had no statutory duty to take corrective action.[9] Gorman contends that former PCC 6.07.010(A) created a duty to classify potentially dangerous dogs. We agree with Gorman.

¶ 32 An ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated. *Pierce v. Yakima County,* 161 Wash.App. 791, 800, 251 P.3d 270, *review denied,* 172 Wash.2d 1017, 262 P.3d 63 (2011); *Donohoe v. State*, 135 Wash.App. 824, 849, 142 P.3d 654 (2006). Gorman argues that former PCC 6.07.010(A) creates a statutory duty because the word "shall" expresses a mandatory directive. Br. of Resp't at 38.

¶ 33 To determine whether the ordinance is mandatory, we must apply the rules of statutory interpretation to the ordinance. *See City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982). When interpreting a statute, our fundamental objective is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146
803 Wash.2d 1, *803 9-10, 43 P.3d 4 (2002). If the statute's meaning is plain, then we must give effect to that plain meaning. *Campbell & Gwinn,* 146 Wash.2d at 9-10, 43 P.3d 4. But if the statute has more than one reasonable meaning, the statute is ambiguous and statutory construction is necessary. *Campbell & Gwinn,* 146 Wash.2d at 12, 43 P.3d 4.

¶ 34 A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Campbell & Gwinn,* 146 Wash.2d at 11-12, 43 P.3d 4. We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn,* 146 Wash.2d at 11, 43 P.3d 4.

¶ 35 Here, former PCC 6.07.010(A) provided:

> The County or the County's designee *shall* classify potentially dangerous dogs. The County or the County's designee *may* find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"[10]] set forth in [PCC] 6.02.010[T][11]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[T]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

(Emphasis added.)

¶ 36 Where a statute uses both "shall" and "may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle,* 97 Wash.2d 701, 704, 648 P.2d 435 (1982). Here, the ordinance mandated some actions ("shall") and made others discretionary ("may"). For instance, after inquiry, Pierce County had discretion to classify a dog as potentially dangerous. Former PCC 6.07.010(A) ("The County ... *may* find and declare an animal potentially dangerous....") (emphasis added). But, if the county received reports of a potentially dangerous dog, it had a duty to apply the classification process to that dog. Former PCC 6.07.010(A) ("The County ... *shall* classify potentially dangerous dogs.") (emphasis added). The legislature's use of "shall" was a clear directive to apply the classification process to dogs that were likely potentially dangerous. Although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act.[12]

¶ 37 Division One has held that the failure to enforce exception applies in comparable circumstances. *Livingston v. City of Everett,* 50 Wash.App. 655, 659, 751 P.2d 1199 (1988). In *Livingston,* the city animal control department had received numerous complaints about three dogs running loose and behaving aggressively. 50 Wash.App. at 657, 751 P.2d 1199. Animal control eventually impounded the dogs but released them to their owner the next day. *Livingston,* 50 Wash.App. at 657, 751 P.2d 1199. A few weeks later, the dogs attacked a young boy. *Livingston*, 50 Wash.App. at 657, 751 P.2d 1199. The Everett municipal code provided that animals in violation of the code may be impounded and that impounded animals
804 shall *804 be released to their owners only if the animal control officer determines that the animal is not dangerous. *Livingston,* 50 Wash.App. at 658, 751 P.2d 1199. The officer never evaluated the dogs' dangerousness but released them to

their owner anyway. *Livingston,* 50 Wash.App. at 657, 751 P.2d 1199. The officer violated his statutory duty to exercise his discretion by evaluating the dogs' dangerousness before releasing them. *Livingston,* 50 Wash.App. at 659, 751 P.2d 1199. Accordingly, the failure to enforce exception applied and the city could be found liable for injuries the dogs caused after their release. *Livingston,* 50 Wash.App. at 659, 751 P.2d 1199. Similarly, here, Pierce County received multiple complaints about Wilson's dogs but failed to evaluate the dogs' dangerousness despite a statute requiring it to act.

¶ 38 Pierce County argues that this case is similar to *Pierce,* 161 Wash.App. 791, 251 P.3d 270. In *Pierce,* Division Three held that the county did not have a mandatory duty to act despite the presence of "shall" in a county code provision. 161 Wash.App. at 801, 251 P.3d 270. There, the plaintiff sued the county for negligently inspecting his gas line after he was injured in a gas explosion. *Pierce,* 161 Wash.App. at 796, 251 P.3d 270. He argued that the following code provision imposed a mandatory duty on the county:

> [T]he building official ... shall make or cause to be made any necessary inspections and shall either approve the portion of the construction as completed or shall notify the permit holder wherein the same fails to comply with this code.

Pierce, 161 Wash.App. at 799, 251 P.3d 270 (quoting Internal Residential Code (IRC) § R109.1 (2006)). In response, Yakima County cited other code provisions providing that, when an official observes a code violation, he *has authority* to authorize disconnection or serve a notice of violation. *Pierce,* 161 Wash.App. at 799, 251 P.3d 270 (citing IRC §§ R111.3, R113.2). Division Three held that the code did not create a mandatory duty to take a specific enforcement action. *Pierce,* 161 Wash.App. at 801, 251 P.3d 270. If officials observed a code violation, they had authority — but were not required — to authorize disconnection or serve notices of violation. *Pierce,* 161 Wash.App. at 799, 251 P.3d 270.

¶ 39 This case is distinguishable from *Pierce.* Unlike in *Pierce,* the county here is required to act if it observes a violation of the potentially dangerous dog restrictions. In *Pierce,* the ordinances only required Yakima County officials to make inspections and issue approvals or denials. The ordinances did not require the county to take any enforcement action. Here, while some of the steps in the process are discretionary, the code did require Pierce County to take action if certain conditions existed. If the county was made aware of a likely potentially dangerous dog, it had a duty to evaluate the dog to determine if it was potentially dangerous. Then, if the dog was declared potentially dangerous, the code mandated that the county take corrective action, seizing and impounding any dog whose owner allowed it to violate the restrictions placed upon it. Former PCC 6.07.040 (2007) ("any potentially dangerous dog which is in violation of ... this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded"). The *Pierce* case is not helpful where, as here, some mandatory duties exist.

¶ 40 We agree with Gorman and the trial court and hold that the failure to enforce exception applies here.

II. JURY INSTRUCTIONS ON PIERCE COUNTY'S DUTY TO GORMAN

¶ 41 Pierce County also argues that the trial court's instruction 5 misstated the law by stating the county had a legal duty to protect the public and a legal duty to confiscate and confine Betty. We hold that this argument misrepresents instruction 5 and that the jury instructions were proper.[13]

805 *805 ¶ 42 We review claimed errors of law in jury instructions de novo.[14] *Hue v. Farmboy Spray Co.,* 127 Wash.2d 67, 92, 896 P.2d 682 (1995). Jury instructions are not erroneous if they allow the parties to argue their theories of the case, they do not mislead the jury, and, when read as a whole, they properly state the applicable law. *Keller v. City of Spokane,* 146 Wash.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood,* 130 Wash.2d 726, 732, 927 P.2d 240 (1996)). Read as a whole, the jury instructions here properly state the applicable law.

¶ 43 Instruction 5 stated that it was "merely a summary of the claims of the parties." Clerk's Papers (CP) at 882. The instruction summarized Gorman's negligence claim as follows:

> The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:
>
> (1) failing to classify and control a potentially dangerous dog;

(2) failing to protect the public from a potentially dangerous dog;

(3) failing to confiscate and confine a potentially dangerous dog.

CP at 881. On its face, this instruction describes the claims Gorman presented during the trial, not Pierce County's legal duty. But other instructions correctly explained Pierce County's legal duty. Instruction 15 included the language from former PCC 6.07.010(A):

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control office [sic] has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [PCC] 6.02.010[(T)]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
>
> 2. Dog bite reports filed with the County or County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

CP at 892. Instruction 17 stated,

> The Pierce County Code provides that after a dog is declared to be potentially dangerous, the person owning or having care of such dog shall not allow the dog to be unconfined on the premises of such person, or go beyond the premises of such person unless the dog is securely leashed and humanely muzzled or otherwise securely restrained.
>
> A potentially dangerous dog in violation of these provisions shall be seized and impounded.

CP at 894.

¶ 44 In defining negligence, instruction 6 also defined the duty of ordinary care:

> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

CP at 883. In addition, the trial court clearly instructed the jury that Pierce County was liable only if it had been *negligent* by failing to act in one of the ways Gorman claimed. Thus, the instructions required the jury not just to decide whether Pierce
806 County failed *806 to act, but whether the failure was reasonable under the circumstances. Accordingly, we hold that the jury instructions properly stated the legal duty of ordinary care.

III. EVIDENCE OF PRIOR COMPLAINTS ABOUT WILSON'S OTHER DOGS

¶ 45 Pierce County next argues that the trial court admitted evidence of prior complaints about Wilson's dogs other than Betty, even though this evidence was irrelevant and unfairly prejudicial. We disagree.

¶ 46 In general, we review a trial court's ruling on the admissibility of evidence to determine if its decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 283, 840 P.2d 860 (1992); *Wilson v. Horsley,* 137 Wash.2d 500, 505, 974 P.2d 316 (1999). A trial court may admit evidence only if it is relevant. ER 402. Relevant evidence has any tendency to make a fact of consequence more likely or less likely; this definition sets a low threshold. ER 401; *Kappelman v. Lutz,* 167 Wash.2d 1, 9, 217 P.3d 286 (2009). However, a trial court may exclude relevant evidence if the risk of unfair prejudice, confusion of the issues, misleading the jury, or waste of time substantially outweighs its probative value. ER 403.

¶ 47 The evidence here became admissible only after Pierce County opened the door to it. Before trial, the trial court permitted Gorman to elicit testimony that the county had received 10 complaints about Wilson's other dogs, but the trial court prohibited testimony about the reasons for those complaints. The trial court explained that the probative value was outweighed by the risks that (1) mini-trials on the veracity of each complaint would waste time and (2) the details of incidents involving other dogs would unfairly prejudice Pierce County.

¶ 48 But while questioning a county animal control officer, counsel for Pierce County asked why the prior complaints had not led the county to pursue a declaration of potential dangerousness. The officer explained that the prior complaints primarily concerned dogs off leash or excessive barking, but "[t]hey were not all dogs chasing individuals or anything of that nature." RP (Aug. 3, 2011) at 990. Counsel then elicited testimony that "a history of a dog owner who had previous complaints of leash law violations" would not support a declaration of potential dangerousness. RP (Aug. 3, 2011) at 991. The trial court ruled that this questioning opened the door to evidence rebutting the suggestion that the prior complaints did not involve dangerous dog behavior, but it still prohibited questioning about the details. Accordingly, Gorman elicited testimony from the same witness that three of the prior complaints involved attempted attacks.

¶ 49 The trial court did not err by admitting this testimony. The evidence was relevant to the county's knowledge that at least one of Wilson's dogs posed a risk. *See* ER 401. And the trial court's refusal to allow questioning on the details reduced the effect of any unfair prejudice, while admitting evidence that was probative of the reasonableness of the county's explanation for declining to pursue a potentially dangerous dog declaration. *See* ER 403. Accordingly, this argument fails.

IV. GORMAN'S LEGAL DUTY

¶ 50 In her cross appeal, Gorman argues that the trial court erred by denying her renewed motion for judgment as a matter of law, which sought to set aside the jury's finding of contributory fault on the ground that Gorman owed no legal duty. Evans-Hubbard asserts that Gorman waived this argument by failing to make it in her original motion for judgment as a matter of law. We agree with Evans-Hubbard.

¶ 51 We will not consider an appeal from a trial court's denial of a CR 50 motion for judgment as a matter of law unless the appellant has renewed the motion after the verdict. *Washburn v. City of Federal Way,* 169 Wash.App. 588, 592, 283 P.3d 567 (2012), *review granted,* 176 Wash.2d 1010, 297 P.3d 709 (2013); *see* CR 50(b). To preserve the opportunity to renew a CR 50 motion after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to
807 the jury. *Hanks v. Grace,* 167 Wash.App. 542, 552-53, *807 273 P.3d 1029, *review denied,* 175 Wash.2d 1017, 290 P.3d 133 (2012); *see* CR 50(a).

¶ 52 On the issue of her own comparative fault, Gorman asserted in her original CR 50 motion that she bore no fault because the *evidence was insufficient* to show that leaving the door open was a breach of her legal duty. For the first time in her renewed motion, Gorman argued that, *as a matter of law,* she had no legal duty to close the door. This argument is not proper because a renewed CR 50 motion cannot present new legal theories that were not argued before the verdict. *Hill v. BCTI Income Fund-I,* 144 Wash.2d 172, 193 n. 20, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.,* 157 Wash.2d 214, 137 P.3d 844 (2006); *Browne v. Cassidy,* 46 Wash.App. 267, 269, 728 P.2d 1388 (1986). Gorman did not preserve her argument for appeal, so it fails.

V. EMERGENCY DOCTRINE INSTRUCTION

¶ 53 Gorman next argues that the trial court erred by declining to instruct the jury on the emergency doctrine. We disagree because Gorman failed to preserve any challenge to the omission of this instruction.

¶ 54 To challenge the trial court's failure to give a jury instruction, an appellant must have proposed the instruction in the trial court. *McGarvey v. City of Seattle,* 62 Wash.2d 524, 533, 384 P.2d 127 (1963). In general, a party requesting an instruction that appears in the Washington Pattern Instructions must propose the instruction in writing. CR 51(d)(1); *Balandzich v. Demeroto,* 10 Wash.App. 718, 722, 519 P.2d 994 (1974). However, a party may request a Washington Pattern Instruction simply by referring to the instruction's published number if the superior court has adopted a local rule permitting that procedure. CR 51(d)(3).

¶ 55 Gorman's request for the emergency doctrine instruction did not comply with CR 51(d). She did not propose the instruction in writing. *See* CP at 810-37, 1416-26. Instead, she orally requested 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.02, at 142 (5th ed.2005), the pattern emergency doctrine instruction, and she took exception to the trial court's refusal to give it. But Gorman has not identified any applicable local rule allowing her request by reference to the published number. Therefore, Gorman failed to propose the instruction in a manner consistent with CR 51(d).

VI. SUFFICIENCY OF THE EVIDENCE

¶ 56 Lastly, Gorman argues that the evidence was insufficient to support the jury's verdict that (1) she breached her duty and (2) her negligence was a proximate cause of her injury. Br. of Resp't at 64-72. We disagree.

¶ 57 We cannot substitute our judgment for that of the jury. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell*, 83 Wash.2d 797, 839, 523 P.2d 872 (1974)). Accordingly, we cannot overturn the jury's verdict unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict. *Burnside*, 123 Wash.2d at 107-08, 864 P.2d 937 (quoting *O'Connell*, 83 Wash.2d at 839, 523 P.2d 872). When reviewing a jury verdict for substantial evidence, we must consider all evidence and draw all reasonable inferences in the light most favorable to the verdict. *Ketchum v. Wood*, 73 Wash.2d 335, 336, 438 P.2d 596 (1968).

¶ 58 In order to prove contributory negligence, the defendant must show that the plaintiff had a duty to exercise reasonable care for her own safety, that she failed to exercise such care, and that this failure is a cause of her injuries. *Alston v. Blythe*, 88 Wash.App. 26, 32 n. 8, 943 P.2d 692 (1997). Contributory negligence is usually a factual question for the jury. *Jaeger v. Cleaver Constr., Inc.*, 148 Wash.App. 698, 713, 201 P.3d 1028 (2009).

¶ 59 Substantial evidence supports the jury's finding that Gorman breached her duty by failing to exercise the care a reasonable person would exercise under the circumstances. Although Gorman believed Betty was an aggressive and
808 vicious dog and Gorman knew that Betty and Tank had previously entered her home through the open door, *808 Gorman testified that she left the door open on the night of her attack. Pierce County also claimed that Gorman unreasonably chose to save Romeo rather than flee for her own safety. Because Gorman testified that she indeed tried to save Romeo, there was sufficient evidence for the jury to consider whether this decision was reasonable.

¶ 60 Substantial evidence also supports the jury's finding that Gorman's conduct was a proximate cause of her injuries. Gorman testified that the pit bulls entered her house through the open door on the night of her attack. Gorman also testified that while trying to rescue Romeo, she suffered further injuries to her hands and wrists. Therefore substantial evidence supports the jury's verdict on contributory fault.

¶ 61 Although we are sympathetic to Gorman's argument that she did not owe a legal duty to close her door, as we discussed above, she did not preserve this argument for appeal. Nor does she make a supported argument on appeal that the trial court erred by instructing the jury on contributory negligence. Therefore, any contributory negligence instructions became the law of the case. *See Washburn*, 169 Wash.App. at 605, 283 P.3d 567 (stating that the failure to appeal an allegedly erroneous instruction makes that instruction the law of the case). Again, we cannot substitute our judgment for the jury's. Because contributory negligence became the law of the case and because the facts support the jury's finding of contributory negligence, Gorman's argument fails.

¶ 62 Affirmed.

I concur: VAN DEREN, J.

WORSWICK, C.J., dissenting in part.

¶ 63 I concur with the majority's analysis in sections II through VI regarding jury instructions on Pierce County's duty, evidence of prior complaints, denial of Sue Ann Gorman's motion for judgment as a matter of law, the emergency doctrine instruction, and sufficiency of the evidence. But because the majority misconstrues the county ordinance and misapplies the public duty doctrine, I respectfully dissent from the majority's conclusion in section LB that the failure to enforce exception to the public duty doctrine applies here.

¶ 64 When a governmental entity is sued for negligence, courts employ the public duty doctrine to determine whether a duty is owed to the general public or whether that duty is owed to a particular individual. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wash.2d 871, 878, 288 P.3d 328 (2012). A duty owed to the general public is not an actionable legal duty in a negligence suit. *Bailey v. Town of Forks*, 108 Wash.2d 262, 266, 737 P.2d 1257 (1987). But the public duty doctrine is subject to several exceptions, including the failure to enforce exception. *Bailey*, 108 Wash.2d at 268, 737 P.2d 1257.

¶ 65 For the failure to enforce exception to apply, the plaintiff must prove, inter alia, that government agents have a statutory duty to take corrective action. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 531, 799 P.2d 250 (1990). Thus, the failure to enforce exception "applies only where there is a mandatory duty to take a specific action to correct a known statutory violation." *Donohoe v. State*, 135 Wash.App. 824, 849, 142 P.3d 654 (2006). But no such duty exists if the statute confers broad discretion about whether and how to act. *Donohoe*, 135 Wash.App. at 849, 142 P.3d 654. In addition, we must construe the failure to enforce exception narrowly. *Atherton*, 115 Wash.2d at 531, 799 P.2d 250.

¶ 66 Here I disagree with the majority's conclusion that former Pierce County Code (PCC) 6.07.010(A) (2007) created a statutory duty to take the corrective action of classifying potentially dangerous dogs. The majority reaches this conclusion after (1) misinterpreting the ordinance and (2) misapplying case law on the failure to enforce exception. In my view, the failure to enforce exception does not apply because the ordinance did not *mandate* action by the county.

1. *Interpretation of the Ordinance*

¶ 67 First, the majority misinterprets the plain meaning of the ordinance and incorrectly concludes that it expresses a
809 mandatory *809 directive. Here, former PCC 6.07.010(A) provided:

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog"] set forth in [former PCC] 6.02.010[(T)[15]]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[(T)]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

¶ 68 The majority correctly states the rules of plain meaning analysis. A statute's plain meaning derives from all words the legislature has used in the statute and related statutes. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11-12, 43 P.3d 4 (2002). We may also consider background facts that were presumably known to the legislature when enacting the statute. *Campbell & Gwinn*, 146 Wash.2d at 11, 43 P.3d 4. Where, as here, a statute uses both "shall" and "may," we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. *Scannell v. City of Seattle*, 97 Wash.2d 701, 704, 648 P.2d 435 (1982).

¶ 69 But the majority's plain meaning analysis misapplies these rules. The majority appears to rely solely on the word "shall" to conclude that the ordinance "was a clear directive to apply the classification process to dogs that were likely potentially dangerous."[16] Majority at 803. But a plain meaning analysis requires us to consider "*all* that the Legislature has said in the statute." *Campbell & Gwinn*, 146 Wash.2d at 11, 43 P.3d 4 (emphasis added).

¶ 70 Read in its entirety with each word placed in context, the ordinance clearly *authorized* — but did not *require* — the county or its designee to classify potentially dangerous dogs. Former PCC 6.07.010(A). The ordinance stated that, when competent evidence supports a finding of probable cause to believe that a particular dog is a potentially dangerous dog, the county "*may* find and declare" the dog to be potentially dangerous. Former PCC 6.07.010(A) (emphasis added). But — as the majority concedes — the ordinance did not require the county to make a declaration; it gave the county discretion to do so. Accordingly, the ordinance did not mandate a specific action to correct a known statutory violation.

2. *Application of Case Law*

¶ 71 I also disagree with the majority's application of case law on the failure to enforce exception.

¶ 72 First, the majority misplaces its reliance on *Livingston v. City of Everett,* 50 Wash.App. 655, 751 P.2d 1199 (1988). In *Livingston,* the failure to enforce exception applied because the city violated a local law governing the release of impounded dogs to their owner. 50 Wash.App. at 658-59, 751 P.2d 1199. There, the local law stated: "Any impounded animal shall be released to the owner ... *if in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy*:" 50 Wash.App. at 658, 751 P.2d 1199 (quoting former Everett Municipal Code § 6.04.140(E)(1)) (emphasis added). Because an animal control officer released impounded dogs without judging their dangerousness or health, the
810 court held that the officer failed to exercise his discretion *810 as the law required. 50 Wash.App. at 657, 659, 751 P.2d 1199.

¶ 73 The ordinance here is so different that this case is not comparable to *Livingston.* In *Livingston,* when a dog owner sought the release of his dog from the pound, the city law mandated that the city determine the dog to be neither dangerous nor unhealthy. 50 Wash.App. at 658, 751 P.2d 1199. In contrast, Pierce County's ordinance articulated *no* circumstances under which the county must determine whether a dog is potentially dangerous. *See* former PCC 6.07.010(A). And, even if a particular dog meets the definition of a potentially dangerous dog, the ordinance's use of the word "may" clearly gave the county broad discretion to declare or not to declare the dog potentially dangerous. Former PCC 6.07.010(A) ("The County... may find and declare an animal potentially dangerous" when competent evidence establishes probable cause to believe the animal is a potentially dangerous dog under former PCC 6.02.010(T)). *Livingston* is inapposite.

¶ 74 Further, the majority emphasizes that this case and *Livingston* are similar because both involve dogs that were the subject of multiple complaints. But the existence of multiple complaints is irrelevant to the failure to enforce exception: if the statutory language truly is mandatory, then a *single* failure to take required action will violate the government's duty to enforce the statute. *See Bailey,* 108 Wash.2d at 269, 737 P.2d 1257 (police officer failed a single time to detain a person who appeared in public to be incapacitated by alcohol); *Campbell v. City of Bellevue,* 85 Wash.2d 1, 5, 530 P.2d 234 (1975) (electrical inspector failed a single time to "immediately sever" an electrical system after observing that it did not comply with city code); *Livingston,* 50 Wash.App. at 659, 751 P.2d 1199 (animal control officer failed a single time to determine whether an impounded dog was dangerous or unhealthy before releasing the dog; multiple complaints about the dog had no bearing on the failure to enforce exception). By appearing to base its decision on the county's *repeated* failures to take a discretionary action, the majority muddles the failure to enforce exception.

¶ 75 For her own part, Gorman relies on *King v. Hutson,* 97 Wash.App. 590, 987 P.2d 655 (1999), but that case is also unavailing. In *King,* a state law required the county to immediately confiscate any dangerous dog that had bitten a person or another animal.[17] 97 Wash.App. at 595, 987 P.2d 655. Based on the record, a jury could have found that the dog in *King* became a "dangerous dog" under state law when it attacked a neighbor. 97 Wash.App. at 596, 987 P.2d 655. The neighbor reported the attack to the police and prosecutor, but the prosecutor merely called the owner and advised that he could be arrested if he had committed a criminal act. 97 Wash.App. at 593, 987 P.2d 655. Over one month later, a police officer visited the owner and asked him to turn over the dog to be destroyed, but the owner refused and the officer took no further action. 97 Wash.App. at 593, 987 P.2d 655. The court in *King* held that the county's failure to enforce the state law exposed it to liability for any injury occurring as a result of its failure to confiscate a dangerous dog after the attack. 97 Wash.App. at 596, 987 P.2d 655. However, the county was not liable for the injuries the neighbor suffered during the attack, because the dog had not yet become a dangerous dog and therefore the state law imposed no mandatory duty on the county at that time. 97 Wash.App. at 595, 987 P.2d 655.

¶ 76 The situation here is similar to that *before* the attack in *King.* Because the two dogs here were not classified as potentially dangerous dogs, Pierce County had no mandatory duty. Accordingly, the failure to enforce exception does not apply and the county is not liable for injuries Gorman suffered during the attack.

¶ 77 For similar reasons, the majority fails to convincingly distinguish this case from *Pierce v. Yakima County,* 161 Wash.App. 791, 799-801, 251 P.3d 270, *review denied,* 172 Wash.2d 1017, 262 P.3d 63 (2011), a case in which a statute repeatedly used the word "shall" to confer authority and grant discretion, without creating a mandatory enforcement duty.
811 The majority states that the county was required to seize and impound *811 "`any potentially dangerous dog which is in violation of ... [chapter 6.07 PCC] or restrictions imposed as part of a declaration as a potentially dangerous dog.'" Majority

at 804 (quoting former PCC 6.07.040 (2007)). But this requirement applied only to dogs that have been declared potentially dangerous. Former PCC 6.07.040. Because the two dogs here were never declared potentially dangerous dogs, they did not "violate" restrictions applicable to potentially dangerous dogs. Therefore the county never had *the authority* — let alone a mandatory duty — to seize and impound the two dogs here under former PCC 6.07.040.

¶ 78 Finding otherwise, the majority accepts Gorman's contention that (1) the county *should have* declared Betty a potentially dangerous dog and (2) Betty violated restrictions that *would have applied if* the county had declared Betty a potentially dangerous dog. But this is a hypothetical, not actual, violation. Because former PCC 6.07.040 was never violated, I would hold that Gorman's contention fails.

¶ 79 Considering the plain meaning of former PCC 6.07.010(A) and controlling law on the public duty doctrine, I am convinced that the failure to enforce exception does not apply here. Therefore I would reverse and remand with instructions to dismiss the county as a defendant.

[1] There was conflicting testimony on whether a second dog was present and, if so, whether it was Tank.

[2] RCW 16.08.040(1) makes dog owners strictly liable for injuries their dogs cause.

[3] Before trial, Gorman also argued, and the trial court agreed, that the special relationship exception to the public duty doctrine applied. But Gorman abandoned this theory by offering to withdraw her proposed jury instruction on the special relationship exception.

[4] The jury apportioned fault as follows: 52 percent to Wilson and Martin, 42 percent to Pierce County, 5 percent to Evans-Hubbard, and 1 percent to Gorman.

[5] Gorman proposes this argument as an alternative ground on which we may affirm the trial court. *See* RAP 2.5(a).

[6] "Abrogation of the doctrine of sovereign immunity did not *create* duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit." *Chambers-Castanes*, 100 Wash.2d at 288, 669 P.2d 451 (emphasis in original). Gorman ignores the majority's opinion in *Chambers-Castanes* but quotes the separate concurring opinion of Justice Utter, the only justice who would have rejected the public duty doctrine in that case.

[7] Our Supreme Court has often described the public duty doctrine as a "focusing tool" used to examine a fundamental element in any negligence action: whether the defendant owed a duty of care to the plaintiff. *Munich*, 175 Wash.2d at 878, 288 P.3d 328. But the public duty doctrine is treated as a rule of law. *See Munich*, 175 Wash.2d at 877-88, 288 P.3d 328.

[8] The *Evangelical* test asks whether (1) an allegedly tortious act necessarily involves a basic governmental policy, program, or objective; (2) the act is essential to implementing or achieving such a policy, program, or objective; (3) the act requires the exercise of policymaking judgment or expertise; and (4) a constitution or law authorizes the government actor to do the act. 67 Wash.2d at 255, 407 P.2d 440.

[9] Pierce County does not argue that it took corrective action. Thus, if Pierce County had a duty to take corrective action, it failed to perform the duty and the second element is satisfied.

[10] Former PCC 6.02.010(T) defined a "Potentially Dangerous Dog" as

any dog that when unprovoked: (a) Inflicts bites on a human, domestic animal, or livestock... (b) chases or approaches a person... in a menacing fashion or apparent attitude of attack, or (c) any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock....

[11] The ordinance actually cites former PCC 6.02.010(Q) (2007), but that subsection defined "livestock."

[12] The dissent reads the ordinance as a whole to be discretionary, while our view is that certain provisions are mandatory and others discretionary.

[13] In addition, Pierce County argues that jury instructions erroneously stated that (1) it also had a legal duty to "control" a potentially dangerous dog and (2) Gorman could carry her burden to prove Pierce County's liability by showing that her injury was proximately caused by Pierce County's negligence "and/or the fault of the [dog owners]." Br. of Appellant at 32, 35. But Gorman asserts that Pierce County did not preserve these arguments for appeal. We agree with Gorman. Pierce County concedes its failure to object to this portion of the duty of care instruction, and it does not contest its asserted failure to object to the burden of proof instruction. Without adequate objections at trial, the arguments are waived. *See* RAP 2.5(a); *Stewart v. State*, 92 Wash.2d 285, 298-99, 597 P.2d 101 (1979).

[14] Gorman asserts that the standard of review is whether the trial court's decision is manifestly unreasonable or based on untenable reasons or grounds. This assertion is incorrect. That standard applies when the appellant assigns error to the trial court's choices about the number of instructions to give or the particular words to use. *Hue*, 127 Wash.2d at 92 n. 23, 896 P.2d 682.

[15] Apparently in error, former PCC 6.07.010(A) cited former PCC 6.02.010(Q) (2007). The current version of PCC 6.07.010(A) cites the definition of "potentially dangerous animal" in PCC 6.02.010(X).

[16] In the majority's interpretation, the ordinance (1) requires the county to conduct an "inquiry" whenever it receives an "apparently valid report" that a dog is likely potentially dangerous, but (2) gives the county discretion, after completing the inquiry, to classify a particular dog as potentially dangerous. Majority at 803-04. Because the ordinance says nothing about inquiries into reports of potentially dangerous dogs, I believe the majority's inquiry requirement derives from a misinterpretation of the ordinance's plain meaning.

[17] State law governs "dangerous dogs," but it also directs municipalities and counties to regulate "potentially dangerous dogs." RCW 16.08.070(2), .090(2).

EXHIBIT 8

Pit Bulls: Facts and Figures

By Attorney Kenneth M. Phillips, author of Dog Bite Law (dogbitelaw.com)

Note: click the "Print" button to print this page on your printer.

Pit bulls are disliked by most Americans

Americans believe that pit bulls are at least somewhat dangerous and that a family with small children should not harbor a pit bull. (YouGov.us, Poll Results: Pit Bulls (https://today.yougov.com/news/2014/07/24/poll-results-pit-bulls/), July 24, 2014, https://today.yougov.com/news/2014/07/24/poll-results-pit-bull (https://today.yougov.com/news/2014/07/24/poll-results-pit-bull).)

More than 50% of all pit bulls in the USA are up for sale or adoption. (Merritt Clifton, Breed Survey (https://www.animals24-7.org/2019/07/09/breed-survey-2019-more-puppies-yet-fewer-homes-for-pit-bulls/) 2019, cited above.)

Most of the pit bulls offered for sale or adoption have been given up by their former owners. (Merritt Clifton, "Rescued" pit bulls now outnumber pit puppies (http://www.animals24-7.org/2017/06/14/rescued-pit-bulls-now-outnumber-pit-puppies/), http://www.animals24-7.org/2017/06/14/rescued-pit-bulls-now-outnumber-pit-puppies (http://www.animals24-7.org/2017/06/14/rescued-pit-bulls-now-outnumber-pit-puppies))

Between 19% and 32% of all dogs taken to shelters are pit bulls. (Emily Weiss, Rising from the Pitt (https://www.aspcapro.org/blog/2017/05/19/rising-pit) [19%]; Merritt Clifton, "Rescued" pit bulls now outnumber pit puppies (http://www.animals24-7.org/2017/06/14/rescued-pit-bulls-now-outnumber-pit-puppies/) [32%], cited above.)

Pit bulls remain in shelters approximately three times as long as other breeds. (Lisa M. Gunter, Rebecca T. Barber, Clive D. L. Wynne, What's in a Name? Effect of Breed Perceptions & Labeling on Attractiveness, Adoptions & Length of Stay for Pit-Bull-Type Dogs, http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0146857 (http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0146857)).

Forty percent of pit bulls in shelters are euthanized every year. (Emily Weiss, Rising from the Pitt, ASPCAPro, https://www.aspcapro.org/blog/2017/05/19/rising-pit (https://www.aspcapro.org/blog/2017/05/19/rising-pit)). (https://www.aspcapro.org/blog/2017/05/19/rising-pit)

Pit bulls are less than 6% of all dogs in the USA

There are approximately 4.5 million pit bulls in the United States, making approximately 5.8% of the country's canine population. (Merritt Clifton, Breed Survey (https://www.animals24-7.org/2018/06/18/2018-dog-breed-survey-at-least-41-of-u-s-pit-bull-population-are-seeking-homes/) 2019: More Puppies Yet Fewer Homes for Pit Bulls, https://www.animals24-7.org/2019/07/09/breed-survey-2019-more-puppies-yet-fewer-homes-for-pit-bulls/ (https://www.animals24-7.org/2019/07/09/breed-survey-2019-more-puppies-yet-fewer-homes-for-pit-bulls/).)

Pit bulls bite more humans than other breeds

From February 2013 to present, animal control agencies and health departments in 19 U.S. states report that pit bulls are leading all breeds in biting incidents. The studies are summarized and linked at Dogsbite.org, Pit Bulls Lead "Bite" Counts Across U.S. Cities and Counties (https://blog.dogsbite.org/2009/07/pit-bulls-lead-bite-counts-across-us.html), http://blog.dogsbite.org/2009/07/pit-bulls-lead-bite-counts-across-us.html (http://blog.dogsbite.org/2009/07/pit-bulls-lead-bite-counts-across-us.html).

In the 10 years from 2009 to 2018, pit bulls killed or maimed 3,569 people in the USA and Canada. (Merritt Clifton, Dog Attack Deaths & Maimings, U.S. & Canada, 1982-2018 (https://www.animals24-7.org/2019/01/03/dog-attack-deaths-maimings-u-s-canada-1982-2018-log/) Log.) They killed over 80% of all Americans who are killed by dogs. (Colleen Lynn, 2015 U.S. Dog Bite Fatalities, at http://www.dogsbite.org/dog-bite-statistics-fatalities-2015.php (http://www.dogsbite.org/dog-bite-statistics-fatalities-2015.php).)

In the 13-year period from 2005 to 2017, pit bulls killed 283 Americans. (Colleen Lynn, 12-Year U.S. Dog Bite Fatality Chart (https://www.dogsbite.org/pdf/12-year-dog-bite-fatality-chart-dogsbiteorg.pdf)and Colleen Lynn, 2017 U.S. Dog Bite Fatalities (https://www.dogsbite.org/dog-bite-statistics-fatalities-2017.php).)

Pit bull bites are more deadly than those of other breeds

From 2011 to 2019, 14 peer-reviewed retrospective medical studies from Level 1 trauma centers spanning all major geographical regions in the United States -- Northeast, Southeast, South, Southwest, Midwest, West Coast and Northwest -- all report similar findings: pit bulls are inflicting a higher prevalence of injuries than all other breeds of dogs. The majority of these studies (12 of 14) also report that pit bulls are inflicting the most severe injuries, requiring a higher number of operative interventions -- up to five times higher -- than other dog breeds. Four studies from this period -- all from Level 1 trauma centers in the Denver metro area -- show a mixture of results, possibly due to Denver and the surrounding metropolitan regions enforcing pit bull bans for the last 3 decades. (See compilation of studies with citations by Lynn, Colleen, Level 1 Trauma Center Studies, https://www.dogsbite.org/dog-bite-statistics-studies-level-1-trauma-table-2011-present.php (https://www.dogsbite.org/dog-bite-statistics-studies-level-1-trauma-table-2011-present.php).)

Studies by health care providers establish that pit bull attacks are associated with higher median Injury Severity Scale scores, a higher number of hospital admissions, higher hospital charges, and a higher risk of death. (Bini, John K. MD; Cohn, Stephen M. MD; Acosta, Shirley M. RN, BSN; McFarland, Marilyn J. RN, MS; Muir, Mark T. MD; Michalek, Joel E. PhD, Mortality, Mauling, and Maiming by Vicious Dogs, Annals of Surgery: April 2011, vol. 253, iss. 4, pp. 791–797, cited at http://journals.lww.com/annalsofsurgery/Abstract/2011/04000/Mortality,_Mauling,_and_Maiming_by_Vicious_Dogs.23.aspx (http://journals.lww.com/annalsofsurgery/Abstract/2011/04000/Mortality,_Mauling,_and_Maiming_by_Vicious_Dogs.23.aspx).)

Another study authored entirely by physicians concludes that injuries from pit bulls are both more frequent and more severe. (Essig Jr., Garth F., et al., Dog Bite Injuries to the Face: Is There Risk with Breed Ownership? A Systematic Review with Meta-Analysis, Int. J. of Ped. Otorhinolaryngology 117 (2019) 192-188; accessed 3/25/2019 at https://bit.ly/2HShg80. (https://bit.ly/2HShg80.))

Similarly, an additional study found that pit bulls inflict "more complex wounds, were often unprovoked, and went off property to attack" and that "[t]he probability of a bite resulting in a complex wound was 4.4 times higher for pit bulls compared with the other top-biting breeds." (Khan K, Horswell B and Samanta D, Dog-Bite Injuries to the Craniofacial Region: An Epidemiologic and Pattern-of-Injury Review at a Level 1 Trauma Center, J Oral Maxillofac Surg, November 2019, https://www.ncbi.nlm.nih.gov/pubmed/31816277 (https://www.ncbi.nlm.nih.gov/pubmed/31816277).)

Pit bull owners are more likely to be irresponsible

In nearly all of the cases in which I have been consulted, where a pit bull killed a person the pit bull owners had no insurance and therefore the victim's family received no justice in the form of compensation.

Published, peer-reviewed studies in authoritative journals of psychology and forensic science establish that pit bulls owners as a whole -- statistically -- are more likely to be socially deviant, engage in crimes involving children, domestic violence, alcohol abuse and violent crimes against other persons. (Jaclyn E. Barnes, Barbara W. Boat, Frank W. Putnam, Harold F. Dates, and Andrew R. Mahlman, Ownership of High-Risk ("Vicious") Dogs As a Marker for Deviant Behaviors, J. Interpersonal Violence, Volume 21 Number 12, December 2006 1616-1634, abstract at http://www.ncbi.nlm.nih.gov/pubmed/17065657 (http://www.ncbi.nlm.nih.gov/pubmed/17065657); Laurie Ragatz M.A., William Fremouw Ph.D., Tracy Thomas M.A., Katrina McCoy B.S., Vicious Dogs: The Antisocial Behaviors and Psychological Characteristics of Owners, Journal of Forensic Sciences, Volume 54, Issue 3, pages 699–703, May 2009, abstract at http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2009.01001.x/abstract (http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2009.01001.x/abstract); Allison M. Schenk, B.A.; Laurie L. Ragatz, M.S.; and William J. Fremouw, Ph.D, A.B.P.P., Vicious Dogs Part 2: Criminal Thinking, Callousness, and Personality Styles of Their Owners, J Forensic Sci, January 2012, Vol. 57, No. 1, doi: 10.1111/j.1556-4029.2011.01961.x, available online at: onlinelibrary.wiley.com (http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2011.01961.x/full).)

Pit bull owners have engaged in extremely bizarre and vicious behavior, including these examples:

- Laquandra Kinchen Ligons stabbed to death a neighbor who poked Ligons' pit bull with a metal rod to protect the victim's cats. (Pablo Lopez for The Fresno Bee, Fresno woman sentenced to 12 years for killing woman in dispute over pets, http://www.fresnobee.com/news/local/crime/article19643112.html#storylink=cpy (http://www.fresnobee.com/news/local/crime/article19643112.html#storylink=cpy).)
- Matthew Thomas Oropeza killed a man who asked Oropeza to put a leash on his pit bull. (See the article in the Inquirer at Philly.com (http://www.philly.com/news/drew-justice-south-philly-dog-walker-charges-matthew-oropeza-20190110.html).)
- Rashawn T. Washington-Clark ordered his pit bull to bite an officer and then attempted to bite the latter himself. (Charles Winokoor, Taunton police say man sicced pit bull on them, then tried to bite officer himself, https://bit.ly/37eIJcR (https://bit.ly/37eIJcR).)

When they attack, pit bulls kill or maul their owners and the owners' family members or visiting babies more than half the time

In the years 2016 through 2019, pit bulls killed 110 Americans, and 57 of those 110 victims were either the owner of the pit bull or a member of the owner's family. (See below.)

In 2016, of the 31 Americans killed by dogs, 23 were killed by pitbulls and their mixes, and 12 of those 23 victims were either the owner of the pit bull or a member of the owner's family. (See details given by Colleen Lynn, http://www.dogsbite.org/dog-bite-statistics-fatalities-2016.php (http://www.dogsbite.org/dog-bite-statistics-fatalities-2016.php).)

In 2017, of the 39 Americans killed by dogs, 29 were killed by pitbulls and their mixes, and 18 of those 29 victims were either the owner of the pit bull or a member of the owner's family (including a relative). (See Colleen Lynn, https://www.dogsbite.org/dog-bite-statistics-fatalities-2017.php (https://www.dogsbite.org/dog-bite-statistics-fatalities-2017.php).)

In 2018, of the 34 Americans killed by dogs, 25 were killed by pit bulls and their mixes, and 14 of those 25 victims were their owner, the owner's family member, or babies that the pit bull owners were watching. (Phillips, Kenneth, Pit Bull Killings - 2018, https://bit.ly/2Wubi1j (https://bit.ly/2Wubi1j).)

In 2019, pit bulls killed their owners and the owners' family members 40% of the time. That year, of the 48 Americans were killed by dogs, 33 were killed by pit bulls and their mixes, and 13 of the 33 victims were their owner or the owner's family member. In one additional case, the victim was a visiting baby. (Phillips, Kenneth, Pit Bull Killings - 2019, https://bit.ly/2S5zcko (https://bit.ly/2S5zcko).)

In 2021, of the 51 Americans killed by dogs, 37 were killed by one or more pit bulls and their mixes (in some cases in combination with one or more other breeds), and 21 of those victims were either the owner of the pit bull or member of the owner's family.

Pit bulls also have been known to eat their owners. In 2019, when the police went in search for Freddie Mack (57, Johnson County, TX), they could not find him, but they found bits of his bones and clothes in the excrement of his 15 pit bulls. (Sheriff: Missing North Texas man was eaten by his own dogs (https://bit.ly/2YR4BrD), Fox4News.com, July 10, 2019, https://bit.ly/2YR4BrD (https://bit.ly/2YR4BrD).) In 2017, police looking for Bethany Stephens (22, Goochland County, VA) found her two pit bulls eating her rib cage. (Goochland County Sheriff James Agnew, press conference (https://www.facebook.com/CBS6News/videos/10155308818567426/?multi_permalinks=1750659965228787), Dec. 18, 2017)

Common sense leads to the conclusion that when they attack, pit bulls bite (without necessarily killing) their owners and their owners' family members and visiting babies in the same relative numbers, namely more than half the time.

Pit bulls are the No. 1 canine killers of women and girls, killing more than half of the females killed by a dog

In 2018, 28 American females were killed by dogs, and 19 of the killings were by pit bulls. (Phillips, Kenneth, Pit Bull Killings - 2018, https://bit.ly/2Wubi1j (https://bit.ly/2Wubi1j).)

In 2019, 26 American females were killed by dogs, and 16 of the 26 were killed by pit bulls. (Phillips, Kenneth, Pit Bull Killings - 2019, https://bit.ly/2S5zcko (https://bit.ly/2S5zcko).)

Keep in mind: pit bulls are less than 6% of all the dogs in the USA. Yet they are responsible for more than half of the fatal attacks on women and girls.

Pit bulls are the No. 1 canine killers of children, killing more than half of the children killed by a dog

As of 2021, pit bulls have killed 249 American children in recent memory. (See Colleen Lynn, https://www.fatalpitbullattacks.com/children-killed-by-pit-bulls.php (https://www.fatalpitbullattacks.com/children-killed-by-pit-bulls.php).) Yet there are few laws requiring the muzzling of pit bulls in public, even though we require children to wear masks for the prevention of COVID, which has killed far fewer kids (just 172 as of December 2020, per Academy of Pediatrics, https://www.aappublications.org/news/2020/12/29/covid-2million-children-122920 (https://www.aappublications.org/news/2020/12/29/covid-2million-children-122920)).

In 2017, dogs killed 15 children out of the 39 total human fatalities. Pit bulls kllled 8 of the 15 youths. (See Colleen Lynn, https://www.dogsbite.org/dog-bite-statistics-fatalities-2017.php (https://www.dogsbite.org/dog-bite-statistics-fatalities-2017.php).)

In 2018, dogs again killed 15 children, and pit bulls killed at least 9 of those 15 ("at least" because the authorities have concealed the breed of one of the dogs that killed a child.) (See Colleen Lynn, 2018 Dog Bite Fatalities (https://www.dogsbite.org/dog-bite-statistics-fatalities-2018.php?gclid=EAIaIQobChMIqvuS4cmP4AIVWh-

tBh2sjQavEAAYASAAEgIrAvD_BwE) and Phillips, Kenneth, Pit Bull Killings - 2018, https://bit.ly/2Wubi1j (https://bit.ly/2Wubi1j).)

In 2019, dogs killed 16 children, and pit bulls killed 10 of the 16. (Phillips, Kenneth, Pit Bull Killings - 2019, https://bit.ly/2S5zcko (https://bit.ly/2S5zcko).)

As stated above, pit bulls are less than 6% of all the dogs in the USA. Yet they are responsible for killing most of the children who get killed by a dog.

Pit bulls are the No. 1 canine killers of other people's pets and animals, killing more than 75% of those killed by a dog

In 2017, pit bulls killed 13,000 dogs, 5,000 cats and 20,000 horses and other farm animals. (See Merritt Clifton, 'Pit Bull Roulette' killed 38,000 other animals in 2017 (http://www.animals24-7.org/2018/01/17/pit-bull-roulette-killed-38000-other-animals-in-2017/).) Having destroyed more than 90% of other animals killed by dogs, the breed became the number one killer of other people's pets, horses and farm animals.

In 2019, pit bulls accounted for 91% of all reported fatal attacks on other animals, 91% of all fatal attacks on other dogs, 76% of all fatal dog attacks on cats, and 82% of all fatal dog attacks on other pets, poultry and hoofed species. (Clifton, Merritt, Record Pit Bull Attacks on Other Animals in 2019, https://www.animals24-7.org/2020/01/13/record-pit-bull-attacks-on-other-animals-in-2019-pro-football/ (https://www.animals24-7.org/2020/01/13/record-pit-bull-attacks-on-other-animals-in-2019-pro-football/).)

Pit bulls engage in home invasions more often than any other dog

Approximately once per month during 2015, 2016 and 2017, a pit bull has entered the home of a person not its owner for the purpose of killing or injuring people or pets. In addition to homes, the invaded premises have included apartments, schools and even a police station. There were 16 such incidents in 2015, 17 in 2016, and 11 in 2017, with the first recorded one in 1912. (See Safety Before Pit Bulldogs, Extreme Attacks: List of Invasion Attacks by Pit Bulls (http://safetybeforebulldogs.blogspot.com/2014/03/collection-of-home-invasion-pit-bull.html), at http://safetybeforebulldogs.blogspot.com/2014/03/collection-of-home-invasion-pit-bull.html (http://safetybeforebulldogs.blogspot.com/2014/03/collection-of-home-invasion-pit-bull.html).)

Pit bull attacks (deaths and disfigurements) are on the rise

Fatal and disfiguring attacks by pit bulls have risen 830% since 2007. (Merritt Clifton, Record 33 fatal pit bull attacks & 459 disfigurements in 2015, at http://www.animals24-7.org/2016/01/04/record-33-fatal-pit-bull-attacks-459-disfigurements-in-2015/ (http://www.animals24-7.org/2016/01/04/record-33-fatal-pit-bull-attacks-459-disfigurements-in-2015/))

Repealing their pit bull ban was a disaster for Youngstown, Ohio

Youngstown banned pit bulls from 2007 to 2015, but repealed the ban in November 2015 under activist pressure. At least two disfiguring pit bull attacks on humans occurred in Youngstown since then, while a pit bull influx has overwhelmed the Mahoning County dog pound, which serves Youngstown. “Currently, 98% of the dogs at the Mahoning County dog pound fall under pit bull breeds,” reported Molly Reed of WKBN earlier in 2018. (Clifton, Merritt, “Educate yourself”: pit bulls in schools run amok, https://www.animals24-7.org/2018/12/16/educate-yourself-pit-bulls-in-schools-run-amok/ (https://www.animals24-7.org/2018/12/16/educate-yourself-pit-bulls-in-schools-run-amok/).)

The pit bull attack cover-up is on the rise

The authorities either unwittingly or purposely are engaging in a cover-up pertaining to pit bull violence. In the three decades from 1982 t0 2013, only 45 canine homicides or disfigurements were by dogs of an unidentified breed, but in 2014 there were 36 and in 2015 there were 78. (Merritt Clifton, Record 33 fatal pit bull attacks & 459 disfigurements in 2015, at http://www.animals24-7.org/2016/01/04/record-33-fatal-pit-bull-attacks-459-disfigurements-in-2015/) (http://www.animals24-7.org/2016/01/04/record-33-fatal-pit-bull-attacks-459-disfigurements-in-2015/))

Breeding pit bulls adds to the pit bull problem

Over 40% of the USA's pit bulls are homeless, according to the latest survey (Merritt Clifton, 2018 Dog Breed Survey: At Least 41% of U.S. Pit Bull Population Are Seeking Homes (https://www.animals24-7.org/2018/06/18/2018-dog-breed-survey-at-least-41-of-u-s-pit-bull-population-are-seeking-homes/), at https://www.animals24-7.org/2018/06/18/2018-dog-breed-survey-at-least-41-of-u-s-pit-bull-population-are-seeking-homes/ (https://www.animals24-7.org/2018/06/18/2018-dog-breed-survey-at-least-41-

of-u-s-pit-bull-population-are-seeking-homes/)). The percent of homeless pit bulls is probably over 50% because rescues and shelters falsely advertise two out of ten pit bulls as being some other breed. This means half or nearly half of the nation's pit bulls are seeking homes. Breeding pit bulls potentially adds to that number.

"Pit bull" is a term that describes all descendents of the Old English Bulldog

The Old English Bulldog was adapted into a fighting dog referred to as the "Bull and Terrier," which then became the Bull Terrier, Staffordshire Terrier, Pit Bull Terrier, Staffordshire Bull Terrier, English Bull Terrier, American Pit Bull Terrier, American Staffordshire Terrier, etc. All such varieties are referred to as "pit bulls" or "pit bulls and their mixes." (See, i.e., Staffordshire Bull Terrier from The Book of the Dog (http://www.staffordmall.com/phildrabble.htm), http://www.staffordmall.com/phildrabble.htm (http://www.staffordmall.com/phildrabble.htm).)

Dogs that attack other dogs are dangerous to people

A study in Orange County, Florida, established that in a 12-month period 7% of all bites to humans occurred when two dogs met. (WKMG 6 News, Web Extra: Animal Bite Statistics," June 2, 2015, cited at http://www.webcitation.org/6Z1dDCYdp (http://www.webcitation.org/6Z1dDCYdp).)

EXHIBIT 9

567 N.W.2d 351 (1997)
1997 SD 96

Daniel G. TIPTON, Conservator of the Estate of Crystal R. Tipton, A Minor; Daniel G. Tipton, Conservator of the Estate of Daniel E. Tipton, A Minor; Daniel G. Tipton, Individually, and Lisa M. Tipton, Plaintiffs and Appellants,

v.

TOWN OF TABOR, South Dakota and Bon Homme County, South Dakota and Their Officers, Agents and Employees; N.L. Mach; Leonard Cimpl; Donald Fejfar; Donald Koranda; Alvin Sternhagen; Doris F. Muller; Eugene Sutera and Lyle O'Donnell, Defendants and Appellees.

No. 19631.

Supreme Court of South Dakota.

Argued December 4, 1996.
Decided July 23, 1997.
Rehearing Denied August 28, 1997.

353 *353 Gerald L. Reade of Brady & Reade, Yankton, for Plaintiffs and Appellants.

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KONENKAMP, Justice.

[¶ 1] We are again faced with the question whether city and county officials owed a "special duty" to protect four-year-old Crystal Tipton who was severely mauled when she strayed into an nearby yard and approached a cage holding two wolfdog hybrids. Following remand in the earlier appeal, the circuit court, applying our new standard, granted summary judgment, concluding as a matter of law no special duty affixed. Although existence of a special duty is a question of law, ordinarily breach of duty is a question of fact for a jury. Nonetheless, we conclude summary judgment was proper as none of the required special duty factors were established here.

Procedural Background

[¶ 2] Daniel G. Tipton, his wife, Lisa Tipton, and their children, Crystal and Daniel E. Tipton, sued the Town of Tabor, Bon Homme County, and certain government employees after Crystal was mauled by Kenneth Holland's wolfdogs. Summary judgment was granted to the defendants on the issue of liability. On appeal, we reversed and remanded "for further consideration by the trial court" in view of our revised test. *Tipton v. Town of Tabor,* 538 N.W.2d 783, 788 (S.D.1995)(*Tipton I*).

Facts

[¶ 3] In 1987, Kenneth Holland purchased two wolf-German Shepherd hybrids (*Canis lupus* crossed with *Canis familiaris*). They were reputedly close to ninety-five percent wolf, the product of six or seven generations of crossbreeding. From their appearance and behavior, it was evident they had wolf-like characteristics. For almost three years, Holland kept them in his back yard in Tabor in a secure, fenced enclosure. This pen was constructed of chain link fence on two sides and livestock panels on the other two sides. It had wire buried under the surface to prevent the animals from digging out. Three feet of wire all around the top prevented them from jumping or climbing over. As they had a "nervous" disposition, the hybrids were never allowed to run free, and Holland recommended to persons interested in seeing them that they visit only when he was

present. Openings in the fencing were wide enough to allow the wolfdogs to stick at least part of their heads out in some places and fully out in others. Holland believed his wolfdogs would never attack anyone unless provoked. He kept them in the secure cage for "bonding" purposes. The animals were male and female; their pups lived in an adjoining cage.

[¶ 4] Some people in the community had concerns about the safety of their children, but for a variety of reasons, no one complained to law enforcement authorities, including Chief of Police Eugene Sutera or County Sheriff Lyle O'Donnell, about anything other than being disturbed by howling.[1] In February 1989, Doris Muller, the town Finance Officer, issued licenses for "wolf hybrids" to Teresa Holland, Kenneth's wife, in accordance with a town ordinance and based on a veterinarian's rabies vaccination receipt for six animals: "3 wolf & 3 dogs." Muller informed the Town Board of the licensure. At the end of 1989, the licenses expired, and, in 1990, Kenneth Holland appeared before the Board to declare he would no longer license his animals because he believed the licensing ordinances were not being enforced.[2] Both Sutera and O'Donnell examined
355 the pen and the wolfdogs at some point *355 before the mauling, but did so only in response to concerns about howling. Both looked into state and local enactments covering possession of such animals, but felt no laws precluded keeping wolfdogs, especially as they were securely controlled in their pen.

[¶ 5] On November 12, 1990, the Tiptons were in Tabor visiting relatives who lived near the Hollands. Crystal, four years old at the time, wandered into Hollands' yard, over to the hybrids' pen. The animals apparently grabbed her as she stood near their enclosure. She was severely mauled. The Tiptons, who were uninsured, incurred over $33,000 in medical expenses for Crystal's care. Soon after the incident, the Hollands discharged their liability through bankruptcy. In their suit, the Tiptons assert (1) Tabor was negligent in licensing the hybrids, violating town ordinances, which increased the risk of harm to others and created a nuisance; (2) Tabor was negligent in allowing the hybrids to remain in town knowing of the danger; and (3) the county was negligent in not abating the nuisance the hybrids presented as witnessed by Sheriff O'Donnell who had actual knowledge of the hybrids' vicious proclivities.

[¶ 6] In *Tipton I,* we modified the bright-line test in *Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 399 (S.D.1990), which relied solely upon statutory language to ascertain the existence of a special duty to protect a person or class of persons. *Tipton I,* 538 N.W.2d at 787. For the *Hagen* analysis, we substituted the four-part test found in *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn.1979), making "any combination" of the following four factors determinative in assessing the existence of a special duty: (1) actual knowledge of the dangerous condition; (2) reasonable reliance by persons on official representations and conduct; (3) an ordinance or statute setting forth mandatory acts clearly for the protection of a particular class of persons rather than the general public; and (4) failure to use due care to avoid increasing the risk of harm. *Id.* (citing *Cracraft*, 279 N.W.2d at 806-07). "Whether a special duty has been breached is generally a question for the jury to decide." *De Long v. County of Erie*, 60 N.Y.2d 296, 469 N.Y.S.2d 611, 616, 457 N.E.2d 717, 722 (1983). The trial court again granted summary judgment to the defendants and the Tiptons appeal.

Standard of Review

[¶ 7] "In reviewing a grant of summary judgment, we must decide whether the moving party has shown there is no genuine issue of material fact and is entitled to judgment as a matter of law; the evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *Great West Cas. Co. v. Bergeson*, 1996 SD 73, ¶ 5, 550 N.W.2d 418, 419 (citing *Nelson v. WEB Water Development Ass'n., Inc.*, 507 N.W.2d 691, 693-94 (S.D.1993); *Pickering v. Pickering*, 434 N.W.2d 758, 760 (S.D.1989)); *Klatt v. Continental Ins. Co.*, 409 N.W.2d 366, 368 (S.D.1987); *Wilson v. Great Northern Ry.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968). "When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials" in the pleadings, but must present specifics showing genuine, material fact issues for trial. SDCL 15-6-56(e). Our task on appeal is to determine only whether issues of material fact exist and whether the law was correctly applied. *Moss v. Guttormson*, 1996 SD 76, ¶ 5, 551 N.W.2d 14, 16; *Flynn v. Lockhart*, 526 N.W.2d 743, 745 (S.D.1995). If any legal basis emerges to support summary judgment, we must affirm. *Sparagon v. Native American Publishers, Inc.*, 1996 SD 3, ¶ 33, 542 N.W.2d 125, 133.

Analysis and Decision

[¶ 8] The Public Duty Doctrine—Rationale

[¶ 9] Recognizing a need for redress when local government torts result in injury, our Legislature conditionally waived sovereign immunity. "To the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance ... the public entity shall be deemed to have waived the common law doctrine of sovereign
356 immunity...." SDCL 21-32A-1. Despite this waiver, however, South Dakota continues to observe the public *356 duty rule, as do most jurisdictions abrogating immunity. *Catone v. Medberry,* 555 A.2d 328, 331 (R.I.1989)(citing cases).

[¶ 10] Essentially, the rule declares government owes a duty of protection to the public, not to particular persons or classes. [3] Sound reasons support this doctrine. Furnishing public safety always involves allocating limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good.[4] The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments. A "public duty" conception acknowledges that many "enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm." *Restatement (Second) of Torts* § 288 cmt. b (1965).

[¶ 11] Some have criticized this doctrine for perpetuating formerly repealed immunity.[5] A few courts have taken it upon themselves to repudiate the rule.[6] To be sure, competing policy considerations are at stake.[7] Upholding this rule,
357 however, involves matters *357 altogether different from a mere litigation cost-benefit analysis, a function our Legislature has now apparently resolved by waiving immunity where insurance coverage exists. Yet absent legislative preemption, courts still decide the existence of duty, as it is "entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law...." W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 37, at 236 (5th ed 1984); *City of Colton v. Schwebach,* 1997 SD 4, ¶ 8, 557 N.W.2d 769, 771; *Restatement (Second) of Torts* § 328B (1965). In carrying out our responsibility to ascertain duty, we must ponder the nature of government's relation to its citizens and ask to what extent it should and can tolerate accountability for the negligence and misdeeds of third persons.[8] Logically, without restriction on the scope of responsibility, local governments could be exposed to potential liability for every failure to appropriately enforce some enactment. Law enforcement officials would be put in the position of guaranteeing protection to each community member. "[S]o vast an expansion of the duty of protection should not emanate from the judicial branch." *Kircher v. City of Jamestown,* 74 N.Y.2d 251, 544 N.Y.S.2d 995, 1000, 543 N.E.2d 443, 448 (1989).

[¶ 12] Though some consider this doctrine a form of immunity, we view the rule principally within the framework of duty—if none exists, then no liability may affix.[9] When our Legislature waived immunity for public entities, it created no new causes of action, but only imposed upon those entities basically the same liability in tort individuals bear. Local governments will not ordinarily be liable for the conduct of third parties where private persons are not.[10] Generally, the law imposes "no duty to prevent the misconduct of a third person." *Cracraft,* 279 N.W.2d at 804. Tort liability depends upon the existence and breach of duty, and unless a specific statute creates a legal obligation, ascertaining a duty and defining its limitations, as we have said, remain a function of the courts. "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Keeton et al., *supra,* § 53, at 356.[11]

358 *358 [¶ 13] A widely accepted corollary to the public duty doctrine is the "special duty" or "special relationship" rule.[12] *See Restatement of Torts (Second)* § 315 (1965). To establish liability under this restrictive template, plaintiffs must show a breach of some duty owed to them as individuals. The reason justifying this exception holds that when a public entity acts on behalf of a particular person actively causing injury, the law may impose liability because the government has by its conduct already made a policy decision to deploy its resources to protect such individual.[13] This exception is not peculiar to the public duty rule; it follows the tort principle, most suitable with respect to rendering service to another, that persons are generally not liable for failure to act, but once having acted, must proceed without negligence. *See generally Restatement (Second) of Torts* § 324A (1965); *Davidson v. City of Westminster,* 32 Cal.3d 197, 185 Cal.Rptr. 252, 649 P.2d 894 (1982). While many plaintiffs have invoked the special duty rule to support claims against public entities, most courts have found no liability for matters such as failure to adequately inspect a structure for violations of fire and building codes,

Benson v. Kutsch, 181 W.Va. 1, 380 S.E.2d 36, 40 (1989)(citing cases); failure to solve crime, *Von Batsch v. American Dist. Telegraph Co.*, 175 Cal.App.3d 1111, 222 Cal.Rptr. 239 (1985); or failure to apprehend drunk drivers who later injure others. James L. Isham, Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer,* 48 A.L.R.4th 320 (1986).

[¶ 14] Application of the Rule

[¶ 15] On remand, the circuit court applied our four-element analysis from *Tipton I*— actual knowledge, reliance, ordinance enacted for the protection of a particular class of persons, aggravation of harm—and concluded the Tiptons failed to satisfy any factor with requisite "strong evidence." *See Tipton I,* 538 N.W.2d at 787 ("Strong evidence concerning any combination of these [*Cracraft*] factors may be sufficient to impose liability on a government entity."). We now examine each of the four elements in a light most favorable to plaintiffs.

[¶ 16] 1. Actual Knowledge of Dangerous Condition

[¶ 17] "Actual knowledge" means knowledge of "a violation of law constituting a dangerous condition." *Hage v. Stade,* 304 N.W.2d 283, 288 n. 2 (Minn.1981). Constructive knowledge is insufficient: a public entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed. *Arnold v. Village of Chicago Ridge,* 181 Ill. App.3d 778, 130 Ill.Dec. 494, 497, 537 N.E.2d 823, 826 (1989). It means knowing inaction could lead to harm. *See Lorshbough v. Township of Buzzle,* 258 N.W.2d 96, 99-102 (Minn.1977)(decided before Minnesota's present public duty rule as espoused in *Cracraft;* county's actual knowledge of dangerous condition in government-operated dump created a special relationship between city and injured property owners). Actual knowledge goes beyond simple failure to perceive a violation. *Runkel v. New York,* 282 A.D. 173, 359 *359 123 N.Y.S.2d 485, 488 (1953)(pre-*Cuffy* rule case defining actual knowledge: specific knowledge of code violations and failure to abate abandoned open structure "so rotted and dilapidated" it was in "imminent danger of collapse," forming a trap or a "dangerous instrumentality" which is in the "same class as an explosive substance, inflammable material, a live electric wire or a spring gun"— also ordinance created mandatory duty for benefit of particular class).

[¶ 18] As foreseeability is a necessary element in the duty formulation, actual knowledge denotes a foreseeable plaintiff with a foreseeable injury. *Mid-Western Elec., Inc. v. DeWild Grant Reckert,* 500 N.W.2d 250, 254 (S.D.1993). Public officers must have subjective knowledge of the violation, but "knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself, is all that is required." *Coffel v. Clallam County,* 58 Wash.App. 517, 794 P.2d 513, 517 (1990)(police are presumed to know the penal law). In *Livingston v. City of Everett,* 50 Wash. App. 655, 751 P.2d 1199 (1988), a four-year-old boy was bitten and scratched by Doberman Pinschers. In reversing summary judgment for the city, the court found genuine issues of material fact on whether the city had breached a special duty to protect the child based on evidence the Animal Control Department had received complaints about the dogs biting and lunging at persons and running loose. With these reports, the city had notice at least one dog was dangerous, thus its animal control officers may have possessed "actual knowledge of a statutory violation" and failed "to take corrective action despite a statutory duty to do so, and the plaintiff was within the class the statute intended to protect...." *Id.,* 751 P.2d at 1200 (citations omitted). Although actual knowledge may be shown by both direct and circumstantial evidence, it may not be established through speculation. *Uccello v. Laudenslayer,* 44 Cal.App.3d 504, 118 Cal.Rptr. 741, 748 n. 4 (1975)(referring to knowledge necessary to put landlord on notice of a vicious dog on leased premises). "Only where the circumstances are such that the defendant `must have known' and not `should have known' will an inference of actual knowledge be permitted." *Id. See also Minick v. Englert,* 84 S.D. 73, 79, 167 N.W.2d 551, 555 (1969)(detour warning signs, barricades and flares gave actual knowledge: "There was no obstruction or impairment of visibility and no reasonable excuse for defendant's failure to see the signs and the approaching hazard."). In sum, actual knowledge imports "knowing" rather than "reason for knowing."

[¶ 19] The circuit court found, as a matter of law, defendants had no actual knowledge about the hybrids' dangerous propensities. As we noted in *Tipton I,* the existence of actual knowledge is in "sharp dispute" and is perhaps the overarching consideration here, most bolstered by evidentiary support. The Tiptons allege several circumstances became apparent to Sutera and O'Donnell through their investigations, generating actual knowledge about the wolfdogs' viciousness. Solidly reinforced and over seven feet tall, the very structure of the pen suggested contact with the creatures it held may be dangerous.[14] *Ford v. Steindon,* 35 Misc.2d 339, 232 N.Y.S.2d 473, 474 (1962)(citing cases)(manner in which dog tied up and precautions taken to restrain it evince knowledge of its vicious propensities). *See also Radoff v. Hunter,* 158 Cal.App.2d

770, 323 P.2d 202, 204 (1958)(animal confined in a manner appropriate for dangerous beast); *Barger v. Jimerson*, 130 Colo. 459, 276 P.2d 744 (1954); *Layman v. Atwood,* 175 Ind.App. 176, 370 N.E.2d 933 (1977). These cases all refer to knowledge on the part of owners. Yet can we advance this as actual knowledge by defendants? They did not build the cage, and other than their observations of it and the animals within, had no subjective information on why the cage was so constructed. Holland had previous experience in raising wolfdogs and represented them to be safe.

360 *360 [¶ 20] The hybrids were never allowed to run loose, although they could stick their heads out of the cage through the livestock panels. They looked somewhat like wolves and, to a certain extent, behaved as wolves. Neighbors were verbally discouraged from approaching the pens, although there was no yard fence or guard rail around the pen preventing close contact. Neighborhood and community discussion about the animals centered on keeping children away from the pen, but no one ever made a complaint about any danger the animals posed.

[¶ 21] Tabor's licenses described the animals as "wolf hybrids," yet the rabies receipt witnessed by Muller referred to each as a "wolf." Muller understood the animals to be wolf hybrids, not wolves, and she so informed the Town Board: "I told them just what [Mrs. Holland] had told me. They were called wolf hybrids." Shortly before the attack, Tabor sought to change its licensing ordinance to specifically address wild animals, but there is contradictory evidence on whether this was in response to the wolfdogs.[15] Nonetheless, of those who said the new ordinance was in part a reaction to the wolfdogs, the only concern they raised was the annoyance from howling. No one expressed to the Town Board any concern about safety. Although controversy persists over what subjectively prompted O'Donnell and Sutera to investigate the hybrids, they insist it was only in response to complaints about howling.[16]

[¶ 22] To Tabor and Bon Homme's knowledge, the hybrids had never bitten or snapped at anyone who had approached the cage. Before the attack on Crystal, the animals were nothing more than a community curiosity and annoyance. If their ancestry engendered concerns about viciousness, the record reflects no history of problems with these particular animals. "Warning flags," as the Minnesota Supreme Court has noted, are not enough for actual knowledge under *Cracraft. Andrade v. Ellefson,* 391 N.W.2d 836, 842 (Minn.1986). At least at the time of the attack, there is no support in the record for the assertion there was actual knowledge wolfdog hybrids were more dangerous than other dogs. Nonetheless, the Tiptons offered information about the special dangers of wolf hybrids from such sources as *Newsweek, The Sioux Falls Argus*

361 *Leader,* and *Wolftracks,* a publication of Wolf Haven America.[17] These articles raise serious concerns *361 about keeping wolfdogs as pets, particularly in town. However, our quandary with this is twofold: (1) the articles were all published sometime after the attack on Crystal Tipton; and (2) there is no showing that Sutera, O'Donnell, or other employees of Tabor or Bon Homme were ever aware of this information. In truth, only in recent years has public awareness been raised about the hazards of maintaining wolf hybrids, especially by irresponsible owners.

[¶ 23] Tabor's ordinance in effect at the time forbade keeping dogs of fierce, dangerous or vicious propensities. Owning or keeping vicious dogs also constitutes a public nuisance under state law. SDCL 40-34-13. South Dakota law provides the following definition:

> For the purposes of §§ 40-34-13 to 40-34-15, inclusive, a vicious dog is:
>
> (1) Any dog which, when unprovoked, in a vicious or terrorizing manner approaches in apparent attitude of attack, or bites, inflicts injury, assaults or otherwise attacks a human being upon the streets, sidewalks or any public grounds or places; or
>
> (2) Any dog which, on private property, when unprovoked, in a vicious or terrifying manner approaches in apparent attitude of attack, or bites, or inflicts injury, or otherwise attacks a mailman, meter reader, serviceman, journeyman, delivery man, or other employed person who is on private property by reason of permission of the owner or occupant of such property or who is on private property by reason of a course of dealing with the owner of such private property.

SDCL 40-34-14. *But see* SDCL 40-34-15 ("No dog may be declared vicious if an injury or damage is sustained to any person who was committing a willful trespass ...."). Other jurisdictions have arrived at similar definitions:

> The terms "vicious propensities" and "dangerous propensities" have been defined as "[a]ny propensity on the part of the dog, which is likely to cause injury under the circumstances in which the person controlling the dog places it ... and a vicious propensity does not mean only the type of malignancy exhibited by a biting

> dog, that is, a propensity to attack human beings." 3A CJS *Animals* § 199, at page 701 (1973); *Dansker v. Gelb,* 352 S.W.2d 12, 16-17 (Mo.Sup.1961). It "`includes as well a natural fierceness or disposition to mischief as might occasionally lead him to attack human beings without provocation.'" (Citation omitted.) *Frazier v. Stone,* [515 S.W.2d 766,] 768 [(Mo.App.1974)].

Farrior v. Payton, 57 Haw. 620, 562 P.2d 779, 785 (1977). Some courts even allow a jury to reason *a posteriori,* to decide from the nature and result of the attack on a plaintiff, whether an animal had vicious propensities. *Lynch by Lynch v. Nacewicz,* 126 A.D.2d 708, 511 N.Y.S.2d 121, 122 (N.Y.App.Div.1987)(citing cases); *Carlisle v. Cassasa,* 234 A.D. 112, 254 N.Y.S. 221, 226 (N.Y.App.Div.1931)("The very viciousness of the attack upon plaintiff ... clearly demonstrates that the defendant's dog was of a vicious and ferocious disposition...."). This is not the law in South Dakota. *Bauman v. Auch,* 539 N.W.2d 320 (S.D.1995).

[¶ 24] If we regard these animals as simply "dogs," then at least until the attack on Crystal, they would not fit within the vicious category. The problem here though is trying to define whether these wolfdogs were domestic or wild. An owner's liability often depends upon the distinction. If an animal is domesticated, the owner must know of its dangerous tendencies to be strictly liable: "But the notice necessary to hold an owner of an animal strictly liable for an attack on a human being is notice that the animal had a propensity to attack human beings, and notice that it had a ferocious disposition toward other
362 animals may not be sufficient." 3 F. Harper et al., *The Law of Torts* § 14.11, at 274 (2d ed 1986)(citing *Restatement* *362 *(Second) of Torts,* § 509 cmt g (1977)). On the other hand, "It is well known that wild animals born in captivity are untrustworthy and, although seemingly gentle, will on occasion revert to their savage propensities." 3 Harper et al., *supra,* § 14.11, at 270. Dogs, however, are presumed tame and docile and the burden is on plaintiffs to show otherwise. *See Lucas v. Kriska,* 168 Ill.App.3d 317, 119 Ill.Dec. 74, 522 N.E.2d 736 (1988); 7 Speiser et al., *supra,* § 21:46, at 456.

[¶ 25] These wolfdogs were part German Shepherd. Some courts have suggested in *dicta* that German Shepherds are a vicious breed as a matter of law: "vicious propensities" may be *implied* from the fact the dog was a German Shepherd, said to have inherited "wild and untamed" tendencies from its "wolf ancestors." *Kelley v. Hitzig,* 71 Misc.2d 329, 336 N.Y.S.2d 122, 126 (N.Y.Nassau Cty. Ct.1972) (citations omitted); *contra Lundy v. California Realty,* 170 Cal.App.3d 813, 216 Cal.Rptr. 575, 580 (1985)(viciousness of German Shepherds not an appropriate subject of judicial notice).[18] Here, of course, liability is more attenuated as we are measuring accountability for law enforcement officials who purportedly failed to control the animals or their owner. Even owners are ordinarily not liable for injury caused by a dog unless the owner knows or should have known of the particular dog's vicious tendencies. *Restatement (Second) of Torts* § 509 (1965); SDCL 40-34-14 (definition of "vicious dog"). *See also Arcara v. Whytas,* 219 A.D.2d 871, 632 N.Y.S.2d 349 (1995)(summary judgment should have been granted in case of undisputed proof dog had never before bitten anyone and had never growled or bared its teeth when someone approached). An owner of a wild animal, on the other hand, is liable for damage resulting from dangerous propensities characteristic of its class, even when the owner is unaware of any specific vicious tendencies of the particular animal. *Restatement (Second) of Torts* § 507 (1977).

[¶ 26] What distinguishes a wild from a domesticated animal when crossbreeding the two occurs? Consider *Restatement (Second) of Torts* § 506 (1977):

> (1) A wild animal ... is an animal that is not by custom devoted to the service of mankind at the time and in the place where it is kept.
>
> (2) A domestic animal ... is an animal that is by custom devoted to the service of mankind at the time and in the place where it is kept.

Traditional or "customary service" signifies domestication of a species, but this may be of little assistance in categorizing a particular crossbreed. 3 Harper et al., *supra,* § 14.11, at 266. *See also* SDCL 40-1-1(5):

> "Domestic animal," any animal that through long association with man, has been bred to a degree which has resulted in genetic changes affecting the temperament, color, conformation or other attributes of the species to an extent that makes it unique and different from wild individuals of its kind....

Some courts recognize a third category: wild animals capable of domestication. *Spring Company v. Edgar,* 99 U.S. 645, 25 L.Ed. 487 (1878)(buck deer attacked plaintiff; deer though *ferae naturae* may be domesticated, and if so owner must have notice animal was vicious); *Pate v. Yeager,* 552 S.W.2d 513 (Tex.App.1977)(four-year-old's finger bitten after sticking it in pet monkey's cage). Wolves obviously would not fit in this category as they are considered unsafe no matter how

"domesticated" their owners may consider them. *Hays v. Miller,* 150 Ala. 621, 43 So. 818 (1907); *Collins v. Otto,* 149 Colo. 489, 369 P.2d 564 (1962)(coyote, or "prairie wolf," *Canis latrans*). Can wolfdogs be included in the "capable of
363 domestication" category?[19] *363 Certainly, the owner here thought so. Perhaps all that can be said is that the results of breeding wild with domesticated dogs is unpredictable. This brings us back to the question at hand: How much "actual knowledge" did defendants possess?

[¶ 27] Compare actual knowledge in other private duty situations: In *Corridon v. City of Bayonne,* 129 N.J.Super. 393, 324 A.2d 42, 44 (App.Div.1974), an off-duty police officer was required to carry a service revolver. It was well known the officer had frequent bouts of intoxication in public places. "[A] municipality has a plain duty of care in its supervision of those whom it arms." *Id.* In *Campbell v. City of Bellevue,* 85 Wash.2d 1, 530 P.2d 234 (1975), a landowner electrically lit a creek running through his property. The electrical inspector knew the wiring was nonconforming, and a dead raccoon was found in the creek, presumably electrocuted. Knowing this dangerous condition, the inspector failed to disconnect the system as required by ordinance. In both cases the public entity had certain knowledge of a dangerous violation—a frequently drunk police officer who the city required to be armed even while off-duty and a lethal wiring violation of the electrical code which directed immediate disconnection. How can those instances compare with public officials faced with assessing the potential danger of a crossbred pet? Not one person in Tabor ever voiced a public complaint about any danger these animals posed. Even assuming public officers carry more acute awareness of dangerous violations, to imbue them with "must have known" cognizance of potentially dangerous characteristics of crossbred species goes beyond rational expectations. Danger of escape would have been a foremost concern; however, their cage was so secure escape was unlikely, as the officers' inspection verified. As Holmes reflected in *The Common Law,* "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." O. Holmes, *The Common Law* 50 (Dover 1991) (1881). Rumors of danger and fears of mixing dog species creates no actual, but constructive knowledge. Constructive knowledge is too remote to sustain a special duty. What we now know about wolfdogs in general, and these animals in particular, was not available to the city and county officials under scrutiny here. Only with the aid of hindsight can one justly say, "they should have known," but that is not enough. We conclude no strong evidence of actual knowledge has been shown.[20]

[¶ 28] Let us proceed for a moment with the assumption the Tiptons have sufficient evidence to support the actual
364 knowledge factor. Is proof satisfying this element *364 enough to establish a special duty? In *Andrade,* the Minnesota Supreme Court noted, "We might add, too, as to the four *Cracraft* factors, that while they should all be considered, all four need not necessarily be met for a special duty to exist." 391 N.W.2d at 841. Chief Justice Miller restated the same observation in *Tipton I* when writing "any combination" of factors may be sufficient. 538 N.W.2d at 787. It may be conceivable for some other factor by itself to create liability; we need not decide that question today. No matter the proof on actual knowledge, however, alone it is inadequate to establish a private duty. To impose tort liability upon local law enforcement for failure to protect an individual solely upon actual knowledge of imminent danger directly conflicts with the principal rationale behind the public duty rule: it judicially intrudes upon resource allocation decisions belonging to policy makers. For a rudimentary illustration on this point, one need only imagine a variety of simultaneous public emergencies. Only when actual knowledge is coupled with one or more of the other factors, can we uphold both the spirit and substance of the private duty exception. Consider, for example, actual knowledge of a dangerous violation of an enactment protecting a special class, or such knowledge accompanied by reasonable reliance, or local entity conduct aggravating danger. In each of these combinations, the rationale appears to remain intact.

[¶ 29] We are unaware of any "public duty" jurisdiction which pins special duty liability solely upon actual knowledge. Minnesota courts have yet to decide this question. Washington cases link actual knowledge with violation of an enactment protecting a special class. *See Campbell, supra; Livingston,* 751 P.2d at 1200 (although Washington liberally defines special class). *But see, e.g., Mullin v. Municipal City of South Bend,* 639 N.E.2d 278, 283 (Ind.1994)(foreseeability not the only consideration under Indiana's private duty test). As Prosser states, "`duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff...." Keeton et al., *supra,* § 53, at 356. No government should carry a burden of protection based purely on foreseeability; or to state it another way, with foreseeability as the sole standard, the public duty rule vanishes. Even if the Tiptons established actual knowledge, this element must be coupled with another of the four factors.[21] We proceed to the remaining factors.

[¶ 30] 2. Reasonable Reliance

[¶ 31] The Tiptons state they relied upon the defendants "to keep the Town of Tabor safe from dangerous conditions [because people] should be able to visit relatives in a town and not be exposed to dangers such as wolf-hybrids."

> The primary purpose of dog ordinances and statutes is protection of the public from injury or damage ... [D]ogs because of their propensities are, and from time immemorial have been ... peculiarly subject to rigorous police regulation.
>
> Dogs have been viewed as constituting nuisances, at least where they are ferocious or have the habit of jumping and biting at children or other people. Indeed, such a dog is a nuisance of the worst sort.

7 E. McQuillin, *The Law of Municipal Corporations* § 24.284, at 195 (3d ed. 1989). The licensing enactment here was created for the general well being of the community, not for any particular persons or classes. Even if plaintiffs could assume the wolfdogs' presence in Tabor was legally sanctioned through licensing, it would not be adequate to create personal reliance. Dogs bite, licensed or not. For reasonable reliance to occur, the Tiptons must have depended on "specific
365 actions or representations which [caused them] to forgo other alternatives of protecting themselves." *365 *Andrade,* 391 N.W.2d at 842 (citing *Cracraft,* 279 N.W.2d at 806-07). *See also Lorshbough,* 258 N.W.2d at 99 (noting reliance occurs from "some sort of contact between the governmental unit and the plaintiff which usually induces detrimental reliance by the individual"). Not only is licensing insufficient for reliance, but the fact that law enforcement officials investigated the pens is also an inadequate basis for the type of reliance that creates a special duty. *Cracraft,* 279 N.W.2d at 807 ("[R]eliance on the inspection in general is not sufficient."); *see also Andrade,* 391 N.W.2d at 841 ("The regulatory and licensing presence of the state and its political subdivisions in the affairs of the public is pervasive. If there were blanket liability, it would be a rare lawsuit where some unit of government would not be sued.").

[¶ 32] Reliance must be based on personal assurances. Instructive of this axiom is *Champagne v. Spokane Humane Society,* 47 Wash.App. 887, 737 P.2d 1279 (1987), where a child was attacked by pit bulldogs. Over a five-month period, people complained about these dogs "running loose and threatening the neighborhood." *Id.,* 737 P.2d at 1283. In response, the Humane Society, regarded as a government agency under the public duty rule, "assured [complainants it] would patrol the area and apprehend any stray dogs." *Id.* at 1284. On the day before the attack, the Society assured the parent of the child later injured that the area would be patrolled. Consequently, a material issue of fact arose over whether the Society breached a private duty after creating reliance upon assurances of protection. *Id.; see Meaney v. Dodd,* 111 Wash.2d 174, 759 P.2d 455 (1988)(overruling earlier cases and holding a governmental duty cannot arise from implied assurances). Similar types of direct assurances have created reasonable reliance. *See, e.g., De Long, supra* (911 caller assured of help coming "right away"). In contrast, no direct promises were given here. Not even townsfolk, much less visitors in Tabor, were assured of any protection from the wolfdogs, except in so much as they were always penned. Licensing the animals only warranted they had vaccinations and perhaps obliquely assured they would not be allowed to roam free.

> At the heart of most of these "special duty" cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced the injured party either to relax his or her own vigilance or to forego other available avenues of protection.

18 McQuillin, *supra,* § 53.04.50, at 179.

[¶ 33] Nothing in the record suggests that when the Tiptons arrived in town, they knew of the local enactments or practices regarding animal licensure. They arrived only minutes before the attack. No representations were made to them about the safety of the wolfdogs caged in the neighbor's yard. Trusting upon some feeling they would be safe wherever they went in Tabor is perhaps comprehensible; however, it does not rise to the level of reliance causing them to forgo self-precaution.[22] We detect no facts to support reasonable reliance within this record.

[¶ 34] 3. Enactment for Protection of Particular Class

[¶ 35] Here we consider as only one factor what once was the entire test in *Hagen.*

> [A] legislative enactment ... whose purpose is found to be exclusively (a) to protect the interests of the state or any subdivision of it as such, or (b) to secure to individuals the enjoyment of rights or privileges to which

> they are entitled only as members of the public, ... [does not create a standard of conduct to be used to impose tort liability].

Restatement (Second) of Torts § 288 (1965). This element "permits recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular
366 and circumscribed *366 class of persons." *Tipton I,* 538 N.W.2d at 786; *Wilson v. Nepstad*, 282 N.W.2d 664, 667 (Iowa 1979)("Duty can be created by statute if the Legislature purposed or intended to protect a class of persons to which the victim belongs against a particular harm which the victim has suffered."). In *Tipton I,* we recognized the illogic of using this factor as a single test, for a class denoted in an ordinance may have been inserted purely by happenstance. *Tipton I*, 538 N.W.2d at 787. *But see Campbell,* 530 P.2d at 241 (allowing a broad definition of special class, including person killed after inspector failed to disconnect blatant electrical safety violation; safety ordinance was for the benefit of special class, persons residing within the ambit of the danger involved); *Halvorson v. Dahl,* 89 Wash.2d 673, 574 P.2d 1190, 1193 (1978)(hotel fire death; declaration of purpose in Seattle Housing Code specified it was "enacted for the benefit of a specifically identified group of persons as well as, and in addition to, the general public"). Although Washington recognizes a broad definition of special class, we follow the *Cracraft* standard, which narrowly includes only "a particular and circumscribed class of persons." *Tipton I,* 538 N.W.2d at 786. *See also Andrade*, 391 N.W.2d at 842 (ordinance enacted wholly for protection of small children in licensed daycare facilities). If we were to adopt Washington's definition—"all persons and property who come within the ambit of the risk"—then we ought candidly to announce the demise of *Tipton I,* as it would control nothing. Notably, the Washington Supreme Court admits that under its concept of the public duty doctrine, "its myriad exceptions may well reveal that the exceptions have virtually consumed the rule." *Bailey v. Town of Forks*, 108 Wash.2d 262, 737 P.2d 1257, 1260 (1987).

[¶ 36] Does SDCL 7-12-29, which empowers a sheriff to take possession of dangerous animals, create a special duty?[23] This statute delineates no particular class to be protected, nor does it create a mandatory obligation. The general nuisance law, SDCL 21-10-1, another statute the Tiptons raise, creates no special class or a mandatory duty, either.[24] SDCL 21-10-3 names no "particular and circumscribed class," but general classes, and only for the purpose of defining the difference between public and private nuisances. Tabor's vicious dog ordinance mentions no particular class. We believe the generality of these enactments is determinative. Simply because certain laws give Tabor and Bon Homme authority to act does not mean that a special class is created and needs to be protected. These enactments have no particular applicability to children, visitors to town, or anyone in particular. The record fails to support this element.

[¶ 37] 4. Failure To Avoid Increasing Risk of Harm

[¶ 38] Under this factor official action must either cause harm itself or expose plaintiffs to new or greater risks, leaving them in a worse position than they were before official action. Could Tabor have aggravated the risk of harm by licensing the
367 hybrids?[25] Failure to diminish harm is not *367 enough. *Andrade*, 391 N.W.2d at 843 (county's negligent licensing, inspecting and supervising day care home sufficient to create liability under third factor, ordinance for a special class (children), but it did not satisfy fourth factor). Though wolves are federally protected, no South Dakota law specifically prohibits keeping them, much less wolf hybrids: private ownership of wild animals is statutorily sanctioned. SDCL 43-2-3: "Animals, wild by nature, are the subjects of ownership when tamed or taken and held in possession, or disabled and immediately pursued." *But see* SDCL 40-3-26 (regulations and permits for captive nondomestic mammals); ARSD § 12:68:18:03 (last amendment effective December 31, 1993)(permit required to possess any nondomestic mammal or any of its hybrids of the family *Canidae).* The risk after licensing the animals was no greater than the risk before they were licensed. The Hollands kept the dogs in town two years before they were licensed and at the time of the attack on Crystal, the licenses had expired. Nor can inspection of the pen by law enforcement officials support this element. *See Cracraft*, 279 N.W.2d at 808 ("[W]e refuse to impose a duty of care merely because an inspection is undertaken, for it would create a new tort.").

[¶ 39] Neither licensing the wolfdogs nor inspecting their pens were affirmative acts increasing the risk of harm to those approaching the hybrids. *See Von Batsch, supra,* in which investigating officers failed to find evidence of intruders, and, after the police left, the intruders killed a businessperson. "The officers did not create the peril to decedent. They took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed. At most they merely failed to eliminate the danger of unknown intruders." 222 Cal. Rptr. at 246-47. *See also Lopez v. City of San Diego*, 190 Cal.App.3d 678, 235 Cal.Rptr. 583, 585 (1987)(McDonald's restaurant massacre: "The police can in no way be charged

with lulling [the killer's] victims into a false sense of security, nor can the alleged inaction by police reasonably be said to have increased the risk of harm to which the victims were subject.").

[¶ 40] In *Sampson v. City of Lynn*, 405 Mass. 29, 537 N.E.2d 588 (1989), the chief of police issued a pistol permit to a so-called "disreputable person," who was "unfit," "improper," and "not competent" to carry a gun. *Id.,* 537 N.E.2d at 588. The permittee later shot and killed someone. In finding no special duty, the court wrote:

> The plaintiff has not pointed us to any statutes or ordinances which establish that the city owed the decedent, as a member of an identifiable subclass, a special duty of care.... The [permit] statute does not evince a legislative intent to protect a particular group of individuals. Rather, the beneficiaries of the statute are members of the general public....
>
> The plaintiff has not alleged any foreseeable risks, the knowledge of which would have enabled the city to prevent the harm which ultimately occurred.... The allegations in this case do not support a claim that the city's purported negligence created a risk of immediate and foreseeable injury.

Id. at 589 (citations omitted). Failure to diminish potential harm is insufficient. Defendants cannot bear liability under this element.

[¶ 41] In summary, we conclude as a matter of law no private duty liability exists here, as none of the four *Cracraft* elements have been met.

[¶ 42] Affirmed.

[¶ 43] MILLER, C.J., and AMUNDSON and GILBERTSON, JJ., concur.

[¶ 44] SABERS, J., dissents.

SABERS, Justice (dissenting).

[¶ 45] Genuine issues of material fact regarding the exceptions to the public duty doctrine permeate this case and the trial court should have allowed it to go to a jury. "The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law." *State, Dep't of Revenue v. Thiewes*, 448 N.W.2d
368 1, 2 (S.D. 1989) (citation omitted). Since the defendants did not meet their burden, summary *368 judgment was improperly granted and we should reverse.

[¶ 46] 1. THERE ARE GENUINE ISSUES OF MATERIAL FACT WHETHER DEFENDANTS HAD ACTUAL KNOWLEDGE OF THE POTENTIAL FOR AN ATTACK BY THE WOLVES.

[¶ 47] Tabor Police Chief Sutera and Bon Homme County Sheriff O'Donnell both visited the Holland residence and personally observed the wolves and their cage. The animals' genetic makeup may include a small percentage of German Shepherd, but by all accounts their appearance[26] and behavior were undeniably characteristic of wolves, not dogs.[27] Additionally, the Town employee responsible for the licensing the wolves classified them as "wolf hybrids" based solely upon information provided by Mrs. Holland; however, the veterinarian's rabies certificate upon which the employee relied clearly identified the animals as "wolves."

[¶ 48] As noted by the conference opinion, the pen in which the wolves were kept "suggested contact with the creatures it held may be dangerous." *Supra* ¶ 19.

> Furthermore, the owner's treatment of the wolf dogs could be interpreted as proof that they were dangerous, wild animals. Evidence showed that Holland *never* released the animals from their pens. He also took extraordinary precautions to prevent their escape. In constructing the animals' pen, Holland used fence which was seven to eight feet tall, with an additional three feet of wire all the way around the pen. He installed wire under the surface of the ground, approximately four feet into the pen, so that the animals could not dig an escape hole along the edge of the pen. He also asked neighbors to refrain from visiting the pen

> unless he was present. In addition to having no yard fence, there was no exterior guard rail or secondary fence surrounding the cage that prevented visitors from coming into physical contact with the animals.

Tipton v. Town of Tabor, 538 N.W.2d 783, 787 (S.D.1995) (*Tipton I*) (emphasis in original).

[¶ 49] The manner in which Holland caged his animals was observed by Sutera and O'Donnell. While escape may have been unlikely, the wolves were able to stick their heads through openings in the livestock panels,[28] which ultimately facilitated this attack. It is for the jury, not the trial court or this court, to decide whether an attack could be anticipated based
369 upon the defendants' observations of the cage and whether that constitutes actual knowledge of the potential *369 danger. *See, e.g., Barger v. Jimerson,* 130 Colo. 459, 276 P.2d 744, 746 (1954) ("[T]he proof offered as to the nature and disposition of the dog as appearing to be savage and ferocious was equivalent to express notice. Moreover, the fact that defendants kept the dog confined is persuasive in concluding that they considered it unsafe for the dog to be at large."); *Machacado v. City of New York,* 80 Misc.2d 889, 365 N.Y.S.2d 974, 979 (N.Y.Sup. Ct.1975) ("Danger and physical harm are not of necessity screened out by the presence of a barrier if that barrier is in some way surmountable or permits the threat of danger."); *cf. Uccello v. Laudenslayer,* 44 Cal. App.3d 504, 118 Cal.Rptr. 741 (1975) (listing reasons landlord should have known of dog's dangerous propensities and including "Beware of Dog" signs).

[¶ 50] The conference opinion states that "Holland had previous experience in raising wolfdogs and represented them to be safe." *Supra* ¶ 19. It is unclear to whom he made such representations. He told the neighbors never to approach the cage unless he was present. Even if he told Sutera and O'Donnell that the wolves were safe, it is essentially irrelevant. An owner of a dangerous animal can not be expected to be objective about its dangerousness. "Wolves ... are considered unsafe no matter how `domesticated' their owners may consider them." *Supra* ¶ 26 (citing *Hays v. Miller,* 150 Ala. 621, 43 So. 818 (1907)). If an owner were objective, there would be no need for ordinances and statutes such as the ones at issue here. *See* SDCL 7-12-29:

> The sheriff may take possession of any animal suspected of being dangerous. The sheriff may hold such animal until a formal determination can be made of the extent of the danger such animal poses. If the animal has attacked or bitten a human or an animal pet, the formal determination shall include consultation with the department of health for the purposes of rabies control. The sheriff may dispose of any animal so determined to be dangerous.

See also Town of Tabor Ordinance § 8-1108, which provides: "No dog of fierce, dangerous or vicious propensities, licensed or not, shall be harbored or kept within the town." As noted in *Champagne v. Spokane Humane Society,* 47 Wash.App. 887, 737 P.2d 1279, 1282 (1987), "The protection of the public against marauding animals, whether wild or domestic, is similar in nature to the protection furnished by a police department against the lawless and depraved elements among men." (Citation omitted).

[¶ 51] As for the ordinance which became effective the day after the attack on Crystal Tipton, reproduced *supra* at note 15, even the conference opinion acknowledges that "there is contradictory evidence" as to whether it was enacted in response to Holland's wolves. Obviously, if it were enacted for that reason, it constitutes strong evidence that the Town of Tabor had actual knowledge of the likelihood of an attack by the wolves. "Contradictory evidence" on a material factual issue precludes summary judgment.[29] Sorting out the truth is the jury's function. *Bauman v. Auch,* 539 N.W.2d 320, 325 (S.D. 1995).

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the
370 facts. The very essence of its function is to select from among conflicting *370 inferences and conclusions that which it considers most reasonable.

Fajardo v. Cammack, 322 N.W.2d 873, 878 (S.D.1982) (Wollman, C.J., concurring specially) (citations omitted).

[¶ 52] 2. REASONABLE RELIANCE.

[¶ 53] Although there is no evidence of any direct representation to Crystal Tipton, one could argue that she and other similarly situated children should be able to reasonably rely, without evidence, on government authorities to maintain towns free from attractive, public nuisances which viciously attack unsuspecting children. As noted, this attack occurred within the community of the Town of Tabor, not in a rural or secluded area.

[¶ 54] At any rate, a plaintiff's inability to prove reliance is not a bar to suit. *Andrade v. Ellefson*, 391 N.W.2d 836, 843 (Minn.1986) (finding a special duty when first factor only partially met and third factor conclusively established); *Tipton I*, 538 N.W.2d at 787 ("Strong evidence concerning any combination of these factors may be sufficient to impose liability on a government entity.").

[¶ 55] 3. THERE ARE GENUINE ISSUES OF MATERIAL FACT WHETHER CRYSTAL TIPTON WAS A MEMBER OF THE CLASS PROTECTED BY THE STATUTES.

[¶ 56] The plain language in *Tipton I* instructs that the language of a statute is not dispositive of whether there is a duty to any particular class of persons:

> Sole reliance on statutory language in determining whether a duty exists is needlessly restrictive and arbitrary. A statutory reference to a particular class of persons could very well be inadvertent rather than the result of any reasoned analysis of municipal or county responsibility. We require an analytical framework that more accurately measures a public entity's culpability for the harm suffered.

538 N.W.2d at 787. Despite this language, the conference opinion concludes that, since the statutes and ordinances at issue do not mention a particular class, they were not intended to protect Crystal Tipton. It is not disputed that SDCL 7-12-29 and Tabor's ordinance § 8-1108 gave the Town and the County the authority to act.

[¶ 57] Sutera and O'Donnell were satisfied after their visit to the cage that the animals could not escape. Therefore, the only persons who could foreseeably be injured by the wolves were those persons who did not comprehend the danger of approaching the cage. Compare *Machacado,* 365 N.Y.S.2d at 976, where the court noted, "Experience and common sense dictate that a person, believing herself to be in imminent danger of attack by a feral animal, will take immediate and precipitous action to avoid injury." Children are not and can not be held to that level of experience and common sense:

> Generally, a minor is not held to the same standard of conduct as that of an adult unless he engages in an activity normally only undertaken by adults. *Wittmeier v. Post,* 78 S.D. 520, 105 N.W.2d 65 (1960). The objective standard of the reasonable prudent person does not apply to a minor, but rather a special (subjective) standard of care is used which takes into account his age, intelligence, experience and capacity. *Finch v. Christensen,* 84 S.D. 420, 172 N.W.2d 571 (1969).

Alley v. Siepman, 87 S.D. 670, 674, 214 N.W.2d 7, 10 (1974); *cf. Hofer v. Meyer,* 295 N.W.2d 333, 336 (S.D.1980) (attractive nuisance case) ("A child of three, indeed even older children, would not perceive the horse as being imminently dangerous.").

[¶ 58] Additionally, the Tiptons raise SDCL 21-10-1, which defines what acts and omissions constitute nuisances:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
>
> ...
>
> (4) In any way renders other persons insecure in life, or in the use of property.

As noted by the conference opinion, *supra* ¶ 31, ferocious or biting dogs are "a nuisance of the worst sort."

371 *371 [¶ 59] The Town of Tabor had the power to remove the wolves under this statute. *See* SDCL 9-29-13: "Every municipality shall have power to declare what shall constitute a nuisance and prevent, abate, and remove the same." *See also Wynkoop v. Mayor & City Council of Hagerstown,* 159 Md. 194, 150 A. 447, 449 (1930) ("[W]here the municipality is authorized by the Legislature to abate nuisances, the authority carries with it the duty to exercise it, and where it either fails to adopt such ordinances as may be necessary to the reasonable performance of that duty, or to exercise reasonable diligence in enforcing them when adopted, it will be answerable to any private individual injured as a result of its default.").

[¶ 60] A nuisance such as Holland's wolves constitutes a "public" nuisance. *See* SDCL 21-10-3:

> A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal. Every other nuisance is private.

Cf. SDCL 40-34-4 (failure to keep one's dogs confined is public nuisance when more than five dogs involved). The significance of the wolves constituting a public nuisance is that the statute narrows the class of persons intended to be protected by its provisions. If it were meant to extend a duty of protection to the public as a whole, it would not make sense to list the three categories of persons to whom it is directed. "[T]his court must assume that the Legislature meant what the statute says and therefore give its words and phrases a plain meaning and effect." *In re Estate of Gossman,* 1996 SD 124, ¶ 6, 555 N.W.2d 102, 104 (citing *Nilson v. Clay County,* 534 N.W.2d 598, 601 (S.D.1995)). SDCL 2-14-1 provides that when construing and giving effect to our statutes, "words used are to be understood in their ordinary sense...." As the plain language of SDCL 21-10-3 states, the persons to be protected are a "community," a "neighborhood," or "any considerable number of persons."

[¶ 61] Clearly, the duty to declare something a nuisance and to then remove it is owed, not to the public generally but rather to neighbors and adjoining landowners.[30] Surely a child visiting a neighbor or adjoining landowner is included in the class of persons intended to be protected by the nuisance statutes.[31] It is undisputed that defendants had the power to remove the animals. Nuisance liability may be imposed on non-owners if they have control over "the instrumentality alleged to constitute the nuisance." 58 AmJur2d *Nuisances* § 117, at 761 (1989). "The person whose duty it is to abate a nuisance should answer for the consequences resulting from its continuance." *Id.* § 118; *cf. Cochrane v. Mayor of City of Frostburgh,* 81 Md. 54, 31 A. 703, 705 (1895) (holding city liable for failure to control animals running at large, and stating that when a statute confers a power upon a corporation to be exercised for the public good, "the exercise of the power is not merely discretionary, but imperative, and the words `power and authority' in such case may be construed `duty and obligation'").

372 *372 [¶ 62] As noted, the Town employee who licensed the wolves had actual knowledge that they were wolves. She testified by deposition that she relayed this information to the Town Board. The ordinance granting the Town the power to license dogs did not include the power to license wild animals. "A municipality or other political subdivision licensing or authorizing the creation or maintenance of a nuisance is liable for resulting damages[.]" 57 AmJur2d *Municipal, County, School, & State Tort Liability* § 165, at 177 (1988).[32]

[¶ 63] Children in the neighborhood certainly came within the "ambit of the risk" created by any negligent failure to act on the potential danger of an attack by the wolves. *See Livingston v. City of Everett,* 50 Wash. App. 655, 751 P.2d 1199, 1201 (1988) (citations omitted):

> When statutes intend to insure the safety of the public highways, a governmental officer's knowledge of an actual violation creates a duty of care to *all persons and property who come within the ambit of the risk created by the officer's negligent conduct.*

(Emphasis added) (finding that persons entering an apartment where dangerous dogs were released to owner by City Animal Control came within "ambit of the risk" created by release of the dogs). It was only a matter of time before a child wandering into the unfenced yard and near the cage would be attacked by the wolves.[33] Whether the defendants should have acted to protect Crystal Tipton and other children in the neighborhood is a question for the jury.

[¶ 64] There are genuine issues of material fact whether Crystal and similarly situated children should have been the object of the defendants' duty to act on the potential danger of an attack by these wolves. As noted, Crystal may have been a reasonably foreseeable plaintiff in light of the knowledge the defendants possessed after visiting the cage. *See Champagne,* 737 P.2d at 1283 (noting that under these exceptions, "an entity performing governmental functions may be held liable where the plaintiff demonstrates that an otherwise general duty to the public has focused on the particular plaintiff and the entity breaches that duty"). Furthermore, the nuisance statutes clearly delineate a duty, not to the general public but to three classes of persons.

[¶ 65] The conference opinion, *supra* note 16, states that the jury can consider the defendants' resources and its resource allocation policy in answering the question whether the defendants owed a duty to Crystal and other similarly situated children. However, this is really a non-issue under the nuisance statutes because the defendants had the opportunity to remove these wolves at *no cost* to the municipality. *See* SDCL 21-10-6, which provides, in relevant part:

373 *373 A public nuisance may be abated without civil action by any public body or officer authorized thereto by law.... Every municipality may defray the cost of abating a public nuisance by taxing the cost thereof by special assessment against the real property on which the nuisance occurred. When the nuisance abated is an unsafe or dilapidated building, junk, trash, debris or similar nuisance arising from the condition of the property, the municipality may commence a civil action against the owner of the real property for its costs of abatement in lieu of taxing the cost by special assessment.

The public duty rule stems, at least in part, from a concern that individuals could affect the manner in which limited public resources are utilized. *See supra* ¶ 10. As this statute makes clear, the defendants are afforded an opportunity to carry out their duty without depleting *any* resources. Therefore, this concern is not present in a suit brought under the nuisance statutes, and *should be considered* by the jury—as stated by the majority—*not withheld* from the jury as done by the trial court.

[¶ 66] 4. THERE ARE GENUINE ISSUES OF MATERIAL ACT WHETHER DEFENDANTS' FAILURE TO ACT CONSTITUTED A BREACH OF DUTY.

[¶ 67] As noted, the Defendants had the authority to remove the wolves from the residence. They were apparently under no duty to visit Holland's home on the basis of complaints concerning the howling.[34] However, as stated by the conference opinion, *supra* ¶ 13, "persons are generally not liable for failure to act, *but once having acted, [they] must proceed without negligence*." (Emphasis added). If the jury finds that the defendants possessed actual knowledge of the likelihood of an attack by the wolves, whether they were *obligated* to act is another question for the jury. *See* *Andrade*, 391 N.W.2d at 841 ("Actual knowledge of a dangerous condition tends to impose a special duty to do something about that condition."); *see also id.* at 844 (Wahl, Justice, concurring specially) ("[Defendants] had actual knowledge of a dangerous condition ... such that a special duty was imposed on them to do something about the condition."). Whether a defendant breached a duty and whether his breach resulted in injury to the plaintiff are questions for the jury. *Laber v. Koch*, 383 N.W.2d 490, 493 (S.D.1986).[35]

[¶ 68] Whether the removal of the wolves would have diminished the risk of harm to Crystal and other children is yet another jury question. The conference opinion states that "[f]ailure to diminish harm is not enough." *Supra* ¶ 38 (citing *Andrade*, 391 N.W.2d at 843). It is true that *Andrade* stands for the proposition that failure to *decrease* the risk of harm can not be the grounds upon which duty is *imposed.* However, *Andrade* goes on to state that failure to decrease the risk of harm "goes to whether, assuming the legal duty exists, it was *breached.*" 391 N.W.2d at 843 (emphasis added). As *Andrade* states, the
374 duty can be established *374 by the knowledge of the dangerous condition. It is axiomatic that questions of breach, proximate cause, and damages are resolved by the jury in all but the rarest of cases.

[¶ 69] Imposing liability for a person's failure to act when that person has knowledge of the dangerousness of an animal, coupled with the power to remove the animal from the premises is not a novel concept. Analogous are the cases where liability was imposed when a landlord's knowledge of the dangerous propensity of a tenant's dog was combined with his power to prevent the animal's presence on the premises:

> [I]f a landlord has such a degree of control over the premises that it fairly may be concluded that he can obviate the presence of the dangerous animal and he has knowledge thereof, an enlightened public policy requires the imposition of a duty of ordinary care. To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed to be socially and legally unacceptable.
>
> ....
>
> There is a moral blame attached to a landlord's conduct under these circumstances; he cannot be permitted to knowingly stand aside where it is shown that he has the power to remove the animal from the premises without incurring a liability for his failure to act.

Uccello, 118 Cal.Rptr. at 746, 747-48; *accord* *Donchin v. Guerrero*, 34 Cal.App.4th 1832, 41 Cal.Rptr.2d 192 (1995); *Linebaugh v. Hyndman*, 213 N.J.Super. 117, 516 A.2d 638 (App. Div.1986).

[¶ 70] The essence of Tipton's claim is that an attack should have been reasonably anticipated by the defendants, that it became their duty to protect Crystal against it, and that their failure to perform that duty was negligence. There is "strong evidence" on three of the four factors, which is more than *Tipton I,* 538 N.W.2d at 787 or *Cracraft v. City of St. Louis Park,* 279 N.W.2d 801 (Minn. 1979), require. Since resolution of this action hinges on the jury's determination of sharply disputed issues, i.e., whether the defendants had actual knowledge of the likelihood of an attack, and if so, whether they breached a duty by not acting, summary judgment was improper. We should reverse and remand for trial on the merits.

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[1] Some of the neighbors were new to town and felt uncomfortable about complaining. Depositions from town residents and officials reveal that residents would not complain to the Board about their fears regarding the hybrids because they were concerned about "rocking the boat" or being known as troublemakers.

[2] Holland had made a written complaint about a dog running at large, and he believed nothing had been done about it.

[3] The public duty doctrine seemingly has its origin in the United States Supreme Court decision of *South v. Maryland,* 59 U.S. (18 How) 396, 403, 15 L.Ed. 433 (1855)(powers and duties of sheriff are by nature public duties "for neglect of which [the sheriff] is amenable to the public, and punishable by indictment only"). *See also Shearer v. Town of Gulf Shores,* 454 So.2d 978, 979 (Ala. 1984); *Commerce & Industry Ins. v. Toledo,* 45 Ohio St.3d 96, 543 N.E.2d 1188, 1194 (1989); *Sorichetti v. City of New York,* 65 N.Y.2d 461, 492 N.Y.S.2d 591, 596, 482 N.E.2d 70, 75 (1985); *Riss v. City of New York,* 22 N.Y.2d 579, 293 N.Y.S.2d 897, 898-99, 240 N.E.2d 860, 861 (1968); *Braswell v. Braswell,* 330 N.C. 363, 410 S.E.2d 897, 901 (1991); John H. Derrick, Annotation, *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory that Only General, not Particular, Duty Was Owed Under Circumstances,* 38 A.L.R.4th 1194 (1985). "[A] public official's duty is owed to the public and not to any specific individual in society." *Makris v. City of Grosse Pointe Park,* 180 Mich. App. 545, 448 N.W.2d 352, 358 (1989). This is not to be confused with "run of the mill" officer negligence. *Arnold v. Village of Chicago Ridge,* 181 Ill.App.3d 778, 130 Ill.Dec. 494, 537 N.E.2d 823 (1989)(child injured by police car involved in high speed chase of stop sign violator; special duty need not be shown to establish municipal liability); *Boyer v. State,* 323 Md. 558, 594 A.2d 121 (1991)(no private duty exception in not apprehending drunk driver, but public duty rule inapplicable to operating motor vehicle negligently).

[4] *See Ezell v. Cockrell,* 902 S.W.2d 394, 398 (Tenn.1995).

[5] Critics of the rule state, "A duty to all ... is a duty to none." *Leake v. Cain,* 720 P.2d 152, 159 (Colo.1986)(abolishing the public duty rule, but finding no negligence); *see also Catone v. Medberry,* 555 A.2d 328, 331 n. 1 (R.I.1989)(quoting Lambert, *Governmental Immunity and Liability— Police Liability for Negligent Failure to Prevent Crime,* 27 ATLA LRep 386, 387 (Nov 1984)).

[6] *See, e.g., Ryan v. State,* 134 Ariz. 308, 656 P.2d 597, 599 (1982); *Leake,* 720 P.2d at 160; *Commercial Carrier Corp. v. Indian River Cty.,* 371 So.2d 1010, 1016 (Fla.1979)(public duty rule does not survive legislative abrogation of sovereign immunity); *Jean W. v. Commonwealth,* 414 Mass. 496, 610 N.E.2d 305, 307 (1993)(announcing doctrine to be abrogated in the future); *Doucette v. Town of Bristol,* 138 N.H. 205, 635 A.2d 1387, 1390 (1993)(abolishing the defense for cities); *Brennen v. City of Eugene,* 285 Or. 401, 591 P.2d 719, 725 (1979)(public duty rule falls with abrogation of immunity). Some of these jurisdictions nonetheless have limits on the right to sue. *Benson v. Kutsch,* 181 W.Va. 1, 380 S.E.2d 36, 38 (1989)(citing cases).

[7] *See Shore v. Town of Stonington,* 187 Conn. 147, 444 A.2d 1379, 1382 (1982)(public—private duty rule borne of many policy considerations leading law to decide if certain interests are entitled to protection against official conduct). A countervailing policy consideration holds:

[I]mposing liability on police merely provides an incentive for law enforcement officers to perform their preexisting job responsibilities adequately.... By modifying their practices where necessary, police will increase public confidence in law enforcement agencies.

Note, *Government Liability and the Public Duty Doctrine,* 32 VillLRev 505, 530, 538-40 (1987).

[8] "The rule embodies the conclusion that a police department's negligence—its oversights, blunders, omissions—is not the proximate or legal cause of harms committed by others. Proximate cause is duty's twin: each concept may be restated in terms of the other, and expressing the problem in terms of duty underscores the policy issues underlying the decision whether to find a duty. The existence of a duty ultimately depends upon choices between competing policies." 2 S. Speiser, et al., *The American Law of Torts* § 6:11 n45 (1985 & 1997 Supp) (citations and internal citations omitted).

[9] "Absence of duty is a particularly useful and conceptually more satisfactory rationale where, absent any `special relationship' between the officers and the plaintiff, the alleged tort consists merely in police nonfeasance." *Davidson v. City of Westminster,* 32 Cal.3d 197, 185 Cal.Rptr. 252, 254, 649 P.2d 894, 896 (1982). "The public duty rule is not technically grounded in government immunity, though it achieves much the same results. Unlike immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was an enforceable duty to the plaintiff in the first place." 18 E. McQuillin, *The Law of Municipal Corporations* § 53.04.25, at 165 (3d ed 1993)(citing *Benson, supra; Davidson, supra.*) [*See also White v. Beasley,*] 453 Mich. 308,

552 N.W.2d 1 (1996); *Sawicki v. Village of Ottawa Hills*, 37 Ohio St.3d 222, 525 N.E.2d 468 (1988); *but see Adams v. State*, 555 P.2d 235, 241 (Alaska 1976)(doctrine is a form of immunity).

[10] As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if `(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' (Rest. 2d Torts (1965) § 315; *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 751-752, 167 Cal.Rptr. 70, 614 P.2d 728; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334.).

Davidson, 185 Cal.Rptr. at 255, 649 P.2d at 897.

[11] Yet Prosser concedes duty is not a concept capable of precise definition: "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 359 (5th ed 1984).

[12] Different tests have been formulated to determine special duty. Several jurisdictions follow the four-part analysis in *Cuffy v. City of New York*, 69 N.Y.2d 255, 513 N.Y.S.2d 372, 374-75, 505 N.E.2d 937, 940 (1987)(all four elements must be met); *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861, 863 (1993)(modified Cuffy test where three elements must be met); *White, supra* (Cuffy test); *Campbell v. City of Bellevue*, 85 Wash.2d 1, 530 P.2d 234 (1975)(four separate exceptions to public duty rule, liability may arise under a single factor such as actual knowledge; but only where agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and plaintiff is within the class the statute is intended to protect ("failure to enforce" exception)). Unlike many tests, the *Cracraft* analysis allows considerable flexibility, if less predictability, by not requiring all four factors in order to sustain private duty liability. *Cracraft's* factors create "no bright line," as each situation requires its own analysis and "other relevant factors" may be helpful. *Andrade v. Ellefson*, 391 N.W.2d 836, 841 (Minn.1986).

[13] Cardozo enunciated a similar principle: "If conduct has gone forward to such a stage that in action [sic] would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward." *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896, 898 (1928).

[14] "Danger and physical harm are not of necessity screened out by the presence of a barrier if that barrier is in some way surmountable or permits the threat of danger." *Machacado v. City of New York*, 80 Misc.2d 889, 365 N.Y.S.2d 974, 979-80 (N.Y.Sup.Ct.1975)(German Shepherd).

[15] The new ordinance read, in part, "It shall be unlawful for any person to raise, keep or maintain, or permit to run at large, ... any wild animal or animals, within any area of the city ... notwithstanding the fact that any such animals or poultry may be maintained in an enclosed area on private property." Town of Tabor Ordinance § 8-1101. The old ordinance, the one which we determined in *Tipton I* was in force at the time of the attack, read, "No dog of fierce, dangerous or vicious propensities, licensed or not, shall be harbored or kept within the town." Ordinance § 8-1108. *See Tipton I*, 538 N.W.2d at 786 n2 *and* SDCL 9-29-12: "Every municipality shall have power to regulate or prohibit the running at large of dogs, animals, and poultry, to establish pounds, appoint poundmasters, and regulate the impounding of animals, and to impose a tax or license on dogs running at large." As we noted in *Tipton I,* "These laws present two related issues: (1) whether Town assumed a special duty to enforce its prohibition on dogs `of fierce, dangerous or vicious propensities' and (2) whether County assumed a special duty to `take possession of any animal suspected of being dangerous.'" *Tipton I*, 538 N.W.2d at 786 (considering SDCL 7-12-29 and Ordinance § 8-1108).

[16] With actual knowledge of a violation constituting a dangerous condition, liability will not attach for "failure to enforce" unless the officer failed to take action "`commensurate with the risk involved.'" *Campbell*, 530 P.2d at 240 (quoting *Runkel, supra*). City and county officials would have "only a limited duty of care to act reasonably within the framework of the [governing ordinances] and the economic resources available.... In determining whether a municipality's act or failure to act was unreasonable, the trier of fact can take into account the municipality's available resources and its resource allocation policy." *Bailey v. Town of Forks*, 108 Wash.2d 262, 737 P.2d 1257, 1261 (1987).

[17] The April 29, 1991, *Newsweek* article quoted wolf expert, Steve Kuntz, saying wolfdogs "make horrible pets," often "schizophrenic—sometimes Lassie, sometimes Cujo. Getting too close to one is a gamble. This animal is going to make the pit bull seem like a puppy." *Newsweek* on August 12, 1991, reported that Randall Lockwood, a wolf behavior expert, stated wolf hybrids are "predators at heart." The same article reported that in the three prior years, six children had been killed by wolfdog pets and many more were mauled. *Wolftracks* (Spring 1991), a publication of Wolf Haven America, a nonprofit educational and scientific organization promoting wolf survival, stated:

There is no such thing as a "safe" animal to cross with a wolf. The wolf is first and foremost a formidable predator, and if not even thousands of years of domestication have made him thoroughly safe (as evidenced by the many unsafe dogs we have all known), how can anyone expect to undo in one generation, or several, what nature spent millions of years perfecting.

[18] We now know that virtually all domesticated dog breeds are descended from the wolf. However, "[s]ome dogs can be more vicious and dangerous than others. For example, German Shepherds are large, intelligent and strong and, if trained properly, can serve as trusted

guard dogs and police dogs. Without proper training, however, German Shepherds can be vicious, indeed...." *Nardi v. Gonzalez*, 165 Misc.2d 336, 630 N.Y.S.2d 215, 217 (Younkers City Ct.1995)(citing various German Shepherd cases).

[19] In some states, wolfdog hybrids are classified as wild animals and private ownership is either prohibited or owners are required to obtain permits to possess them. This now appears to be the law in South Dakota, at least to the extent a permit is required. In other jurisdictions, these hybrids are apparently regulated as dogs, needing only proper vaccinations and licenses. At least eight states outlaw hybrids and sixteen others restrict ownership or require a permit. *See, e.g.,* Ga.CodeAnn.§ 27-5-5 (Harrison 1990)(requiring license for wild animals); Me.Rev.Stat. Ann. tit 7, § 3921 (West 1996 Supp)(license necessary for dog or wolf hybrid) *and* § 3907 (defining "wolf hybrid" as "any canine, regardless of generation, that has resulted from the interbreeding of a dog and a wolf"); 1997 Supp. Mass.Ann. Laws ch. 131 § 77A (Law Co-op)(bans possession and sale of a "wild canid hybrid" after certain date; subject to wild animal laws); N.H.Rev. Stat.Ann. § 466-A:1 et seq. (Michie 1996 Supp)(bans wolf hybrids after June 6, 1994, unless spayed or neutered; mandates confinement "sufficient to prevent escape"); N.D.Cent.Code § 36-01-08.2 (Michie 1995 Supp)("Any person who keeps a mountain lion, wolf, or wolf hybrid in captivity must obtain an identification number from the [state board of animal health]."); Vt. Stat.Ann. tit. 20 § 3541(8) (Michie 1996 Supp)("Wolf hybrid means an animal which is the progeny or descendant of a domestic dog (Canis familiaris) and a wolf (*Canis lupus* or *Canis rufus*).") *and* § 3545 (right to kill pet or wolf hybrid if necessary if it assaults human); Va.CodeAnn. § 3.1-796.93:1(B) (Michie 1994)(defines a "dangerous dog" subject to municipal authority as "canine or canine crossbreed").

[20] Courts have had little experience in dealing with the legal aspects of animal hybridization. A "beefalo," for example, is considered by many to be a successful cross between a Bison (buffalo) and any domestic or exotic cattle breed, blending the outstanding qualities of both. Likewise, with wolfdogs, breeders hoped to combine the feral beauty of wolves with the congenial qualities of domesticated dogs. Perhaps owners ought to bear responsibility for experimenting with nature, but it is another thing to hold local governments accountable when a third person's experiment goes awry.

[21] "The *Cracraft* court did not specify how many of the four factors must be proven for a plaintiff to survive a summary judgment motion, nor did the court state the relative importance of the factors. Elucidation of the use made of the four factors would greatly aid trial courts facing summary judgment motions in similar cases.... Although the *Cracraft* court did not specify the weight to be given each of the four factors, a close reading of *Lorshbough* and *Cracraft* indicates that the single most important factor is that of actual knowledge on the part of the municipality." Note, *Municipal Tort Liability and the Public Duty Rule: A Matter of Statutory Analysis,* 6 WmMitchellLRev 391, 404-05, n95 (1980).

[22] Victims of domestic violence who have obtained protection orders may fit within this category. *See Sorichetti, supra;* Caroll J. Miller, Annotation, *Governmental Tort Liability for Failure to Provide Police Protection to Specifically Threatened Crime Victim,* 46 A.L.R.4th 948 (1986).

[23] SDCL 7-12-29 provides:

The sheriff may take possession of any animal suspected of being dangerous. The sheriff may hold such animal until a formal determination can be made of the extent of the danger such animal poses. If the animal has attacked or bitten a human or an animal pet, the formal determination shall include consultation with the department of health for the purposes of rabies control. The sheriff may dispose of any animal so determined to be dangerous.

See also SDCL 40-36-1:

The department of game, fish and parks shall cooperate and enter into cooperative agreements with the United States fish and wildlife service or any other agency in the control and disposition of coyotes, feral dogs, fox, prairie dogs, and other wild animals in this state that are injurious to livestock, poultry, game, land and the public health.

[24] There are, as the dissent points out, a host of outdated nuisance decisions holding government entities liable to private individuals for failure to abate nuisances. All these cases pre-date the emergence of the public duty rule and are thus inapplicable.

[25] *See Ryan v. State, Dep't of Transp.*, 420 A.2d 841 (R.I.1980)(licensing driver who had multiple violations created no liability to individuals later injured; applying public duty rule); *but see Oleszczuk v. State*, 124 Ariz. 373, 604 P.2d 637 (1979)(imposing liability on state for negligently issuing driver's license to unsafe epileptic driver as statute was designed to protect a particular class: highway users).

[26] Copies of photographs of the animals are attached to this writing.

[27] When this court reversed and remanded this case, we stated, "The suggestion by Town that a four to five percent mix of German Shepherd would have diminished the animals' innate dangerous propensity is a claim that must be examined more fully on remand." *Tipton v. Town of Tabor*, 538 N.W.2d 783, 787 (S.D.1995) (*Tipton I*). On remand, the defendants offered no proof to support this contention. The trial court stated, in granting summary judgment to the defendants, "[W]hile it is true ... that Defendants have not produced anything in answer to the Supreme Court's query, neither have Plaintiffs furnished any argument, factual or legal, which would make this inquiry relevant." The burden is on the party requesting summary judgment to demonstrate the absence of any genuine issue of material fact and that he is entitled to judgment on the merits as a matter of law. *Walz v. Fireman's Fund Ins. Co.*, 1996 SD 135, ¶ 6, 556 N.W.2d 68, 70. For the trial court to shift the burden to the Tiptons was unfair and contrary to our well-established standards for summary judgment.

Even so, the Tiptons produced information from various publications concerning the dangers of wolf hybrids. Compounding the trial court's error is the majority's statement that there is no showing that any of the defendants were ever aware of this information. Again, the burden is on the defendants; they argued the wolves were less dangerous because of their 4-5% German Shepherd ancestry. Tiptons refuted their argument. Therefore, it is a disputed issue of material fact whether the defendants knew that hybrids

"make horrible pets" and are "schizophrenic—sometimes Lassie, sometimes Cujo. Getting too close to one is a gamble. This animal is going to make the pit bull seem like a puppy." (*Supra* note 17).

[28] In fact, photographs in the record show one wolf with its entire head outside the cage. Two sides of the cage were livestock panels, which are fences consisting of continuous rectangular openings of substantial size.

[29] The trial court misread *Tipton I;* in granting summary judgment, the court stated, "The Supreme Court obviously did not *find* issues of material facts. If they had done so, they would not have *remanded* for further review." (Emphasis in original). The plain language of our opinion indicates there were unresolved questions of fact: "[W]hether Town or County had actual knowledge of a dangerous condition created by the presence of the wolf hybrids is a subject of *sharp dispute*." *Tipton I*, 538 N.W.2d at 787 (emphasis added). We pointed out that many more facts could be considered under the *Cracraft* factors than were addressed under the *Hagen* test, including the significance, if any, of the defendants' observations of the extraordinary measures taken by Holland in caging the wolves. *See also id.* at 788 (Erickson, Circuit Judge, concurring in part and dissenting in part) ("[T]he majority argues that there is a material issue as to these public officials' actual knowledge of a dangerous condition[.]"). For the trial court to assume we would reverse and remand a grant of summary judgment where there were no genuine issues of material fact is somewhat illogical.

[30] *See, e.g., City of Aberdeen v. Wellman*, 352 N.W.2d 204, 205 (S.D.1984) (noting that one of the considerations in determining whether a nuisance must be abated is "the present use and trends of use of *surrounding property*") (emphasis added) (citation omitted); *see also Union County v. Hoffman*, 512 N.W.2d 168, 170 (S.D. 1994) (analyzing whether mobile home park was a public nuisance by examining its effect on residents of the park); *Town of Winfred v. Scholl*, 477 N.W.2d 262, 263 (S.D.1991) (affirming trial court's conclusion that junk on appellant's property constituted a nuisance and noting that the conclusion was reached by taking testimony from adjoining landowners); *Watson v. Great Lakes Pipeline Co.*, 85 S.D. 310, 314-15, 182 N.W.2d 314, 316-17 (1970) (testing of neighboring landowners' wells sufficient to establish jury question whether defendant polluted their water and thus constituted public nuisance).

[31] See *Runkel v. City of New York*, 282 A.D. 173, 123 N.Y.S.2d 485, 489 (1953), where the City of New York was held liable for failing to abate a known nuisance when neighborhood children were injured while playing in a dangerous, abandoned building. The children were found to come within the class of persons intended to be protected by the nuisance statutes. The court relied on N.Y. Mult. Dwell. Law § 309, which defines "nuisance" in part as any public nuisance known at common law and "whatever is dangerous to human life or detrimental to health."

[32] *See, e.g., Landau v. City of New York*, 180 N.Y. 48, 72 N.E. 631, 634 (1904) (city could be held liable for consenting in advance to nuisance (fireworks); issuing permit placed it under same liability as if it created nuisance itself); *Speir v. City of Brooklyn*, 139 N.Y. 6, 34 N.E. 727, 728 (1893) (city issuing fireworks permit held liable for resulting fire); *Kolb v. Mayor of Knoxville*, 111 Tenn. 311, 76 S.W. 823, 824 (1903) (city liable for illness resulting from pollution—it did not create pollution, but it licensed individual who did); *City of Richmond v. Smith*, 101 Va. 161, 43 S.E. 345, 348 (1903) (noting that since it was city's duty to abate nuisance, "[T]he sin of commission in granting the permit cannot be less than the sin of omission in failing to discharge its duty"); *see generally* Annotation, *Liability of Municipality for Injury of Damage From Explosion or Burning of Substance Stored by Third Person Under Municipal Permit,* 17 A.L.R.2d 683 (1951).

[33] *See Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 662 (S.D.1995) ("To establish a duty on the part of the defendant, it must be foreseeable that a party would be injured by the defendant's failure to discharge that duty."); *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227, 229-30 (S.D.1994) ("Whether a duty exists depends on the foreseeability of injury."); *see also Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assocs. Co.*, 500 N.W.2d 250, 254 (S.D.1993) ("We instruct trial courts to use the legal concept of foreseeability to determine whether a duty exists."); *Champagne*, 737 P.2d at 1283 (noting that the "privity" necessary to impose liability despite the public duty doctrine refers to the relationship between the entity and the reasonably foreseeable plaintiff); *Wytupeck v. City of Camden*, 25 N.J. 450, 136 A.2d 887, 894 (1957) (holding city responsible for injuries to minor and noting that the relationship between the parties is founded upon the foreseeability of harm to the person in fact injured) (paraphrasing Judge Cardozo's writing in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)).

[34] Regardless, once they undertook to visit the wolves' cage, they may have assumed a duty to Crystal Tipton. See, for example, *Schultz v. Mills Mutual Insurance Group*, 474 N.W.2d 522, 524 & n. 1 (S.D.1991), where this court noted that a cause of action may be premised upon Restatement (Second) of Torts § 324A (1965), which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

[35] Ordinarily, the question of whether a duty exists is a question of law for the court. Here, the answer to that question rests upon substantial issues of material fact that are rightfully jury questions. *Swiden Appliance & Furniture, Inc. v. National Bank of SD*, 357 N.W.2d 271, 277 (S.D. 1984); *accord City of Gary v. Odie*, 638 N.E.2d 1326, 1329-30 (Ind.Ct.App.1994) ("Factual questions may be interwoven with the determination of the existence of a relationship, rendering the existence of a duty a mixed question of law and fact, ultimately to be resolved by the fact-finder.") (citation omitted).

EXHIBIT 10

Code of Virginia
Title 3.2. Agriculture, Animal Care, and Food
Chapter 65. Comprehensive Animal Care

§ 3.2-6509.1. Disclosure of animal bite history; penalties.

A. Any custodian of a releasing agency, animal control officer, law-enforcement officer, or humane investigator, upon taking custody of any dog or cat in the course of his official duties, shall ask and document whether, if known, the dog or cat has bitten a person or other animal and the circumstances and date of such bite. Any custodian of a releasing agency, animal control officer, law-enforcement officer, or humane investigator, upon release of a dog or cat for (i) adoption, (ii) return to a rightful owner, or (iii) transfer to another agency, shall disclose, if known, that the dog or cat has bitten a person or other animal and the circumstances and date of such bite.

B. Violation of this section is a Class 3 misdemeanor.

2018, c. 678.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

7/11/202