

June 20, 2020

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V20010394**

AMYE AND ALEX NEWMAN
Animal Services Enforcement Appeal

Activity no.: A20001334

Appellants: **Amye and Alex Newman**

[REDACTED]
Ravensdale, WA 98051

Telephone: [REDACTED]

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King County: Regional Animal Services of King County
represented by **Chelsea Eykel**
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FINDINGS AND CONCLUSIONS:

Overview

1. Regional Animal Services of King County (Animal Services) asserts that Amye and Alex Newmans' dog, Kodi, was trespassing and qualifies as vicious. The Newmans timely appealed. This is a very close case. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law—mostly importantly the requirement that Animal Services prove that Kodi's attack was unprovoked—we find that, despite the Newmans' significant credibility shortcomings, Animal Services has not quite met its burden. We reverse the order.

April 26, 2019 Altercation

2. The violation notice currently under appeal involves a 2020 altercation thoroughly discussed below. However, as there was testimony and evidence submitted about a 2019 altercation between Kodiak and Joann Mattioda's dog Maxx. We start there.
3. Animal Services alleged that Kodiak was running at large and attacked Maxx, causing Maxx multiple lacerations required sutures injuries. Ex. 15. Ms. Newman appealed, acknowledging that they had mistakenly left their driveway gate open, but denying that the altercation qualified Kodiak as "vicious." Ex. 20. Animal Services withdrew the violation notice before we went to hearing.
4. At our hearing in today's case, Tim Mattioda, one of Joann's sons and a neighbor, described that 2019 incident. He testified that as his mom walked up with Maxx on a leash, Kodi started walking up behind Maxx and just latched onto him. He described Kodi as attacking Maxx "out of nowhere," asserting that Maxx had not even noticed Kodiak, because Maxx had been focused on Mr. Mattioda's dogs.
5. There is no question that Kodi injured Maxx on that day, necessitating sutures. Exs. 18-19. However, something is not adding up about how the altercation started. Mr. Mattioda's statements over a year after that incident are completely inconsistent with the texts his wife, Debbie Fuller, wrote only a few days after the incident. His depiction of Kodi sneaking up on an oblivious Maxx and blindsiding Maxx with the dog equivalent of a sucker punch bears no resemblance to Ms. Fuller assessing the incident as a "Natural Part of having animals," her not wanting Kodi "to have to pay," and her description of the 2019 incident as "the dogs [getting] worked up and Maxx [getting] in the middle it." Ex. 20 at 007-08. And Maxx was originally Ms. Fuller's dog before she gifted him to her mother-in-law to keep Joann company, making it unlikely Ms. Fuller would be biased *against* Maxx. Ex. 14 at 003 n.6.
6. It is unfortunate that, although Ms. Fuller was in the house when Mr. Mattioda provided his phone testimony at our hearing, she would not perform her civic duty and respond to requests to set the record straight about the 2019 incident. However, the record we have is the record we have. (Subpoenas are available in future cases to compel witness testimony.) Moreover, the time for Mr. Mattioda to present his testimony was during the first appeal process. Thus, the only walk away points we can glean from the 2019 altercation are the undisputed ones that the Newmans failed to control Kodi (*see also* exhibit A17), and that this resulted in Kodi injuring Maxx enough that Maxx required medical care. We make no findings or inferences about whether Kodi's bites that day were provoked.

Testimony and Documents Related to February 9, 2020

7. Connie Seth lives across the street from Ms. Mattioda. She heard two animals "screaming." It was "chilling," and she hurried to the scene. She saw Ms. Newman on the side of the road, hovering over Kodi, trying to contain him. She could see Ms. Newman was bleeding. Ms. Newman asked her to get Mr. Newman, a request Ms. Seth conveyed to her husband, Greg.

8. After Mr. Seth returned with Mr. Newman, Mr. Newman picked up Kodi's leash by the mailbox. Mr. Newman took the leash to his wife and hooked Kodi back on. She told Ms. Newman that she should go to the hospital.
9. Ms. Seth's first two photos document where she was saw Ms. Newman restraining Kodi. Ex. 7 at 001-02. Her last two show where the leash (collar) was, in respect to both the mailbox and the edge of the asphalt. Ex. 7 at 003-04. She described the leash as being right below the mailbox. She thinks the right-of-way is narrow and that the fence is probably on the property line.
10. Mr. Seth was in his workshop when he heard his wife call him. He emerged to find Ms. Newman struggling to hang onto Kodi. Mr. Seth moved as fast as he could to get Mr. Newman. While he described Ms. Newman as "in trouble" holding on to Kodi, both before he went to get Mr. Newman and as they returned, he did not see Kodi get loose at any point. He saw Mr. Newman pick up the leash/collar by the Mattioda's paper box. He described Ms. Newman being on the side of the road, to the right of the driveway, but the collar further up the driveway and on the left side. During a break in our hearing, he walked across the street and measured the distance from the pavement edge to the spot he saw the collar at 15½ feet.
11. Ms. Newman stated that she was walking on the pavement on the opposite side of the street from the Mattioda property when she saw Joann by the edge of her property. At first, she did not see Maxx, but then Maxx started coming to the road, aggressively barking. As Kodi pulled towards Maxx, his collar released. The dogs advanced on each other, coming together at the edge of the pavement. For a visual of her testimony, see Ex. A-1 at 002.
12. She grabbed ahold of Kodi within a few seconds of his escape and began pulling Kodi parallel to the road, away from Maxx. She thinks she grabbed Kodi before either dog had bitten the other. Maxx had multiple opportunities to fall away, but he did not, continuing to her and biting her several times as she tried, several times, to push him away. She did not know how Maxx got his injuries. She did not see either dog bite the each other. She thinks she pulled Kodi about five to seven feet back, parallel to the asphalt/driveway convergence.
13. Mr. Newman described coming to the scene. He recalled the collar being a few feet roadside of the fence line, basically on top of where the culvert goes under the driveway. Ex. A2.

Preliminary Matters

14. We start by briefly addressing and wrapping up three issues that do not add much to the meat of this case.
15. First, Joann, who has significant memory impairment, could only recall that she remembered that Maxx was by the house and that another dog came and scared the hell out of him. While there is a dispute about where dogs were relative to the spot where the Mattiodas' long driveway meets the public right-of-way, Maxx was nowhere near the

house at the time of the altercation. And Maxx got more than the hell scared out of him by Kodi—Kodi seriously injured him.

16. Second, there was much testimony about discussions between neighbors after Kodi was finally brought under control and Maxx had run off, and then about attempts to find Maxx. Those are interesting, but not relevant. By the point the discussions and search started, Kodi had either done enough to qualify himself as vicious, or he had not.
17. Third, Ms. Newman submitted several pictures of Kodi playing nicely with others and letters extolling his virtues. Exs. A8-A14, A16. Beyond being hearsay, none of the pictures depict, nor do the writers claim to have witnessed, either the April 2019 or February 2020 altercation. While the definition of vicious seems to contemplate, in addition to performing a threshold act, having the “propensity to do” that act, we have always based our decisions on the evidence about particular altercations; we have never rested a viciousness determination on a propensity. KCC 11.04.020.BB. Having little to take from Kodi biting Maxx last April 26 (given uncertainty about specifics of that altercation), the case rises and falls on the events of February 9.

Credibility

18. We found both Seths credible. For the most part we did not find the Newmans credible.
19. Ms. Newman’s appeal statement that she “had control of Kodi for the duration of this incident,” Exhibit 10 at 002, is refuted by her own testimony that Kodi broke free of his collar as Maxx moved to towards (but had not reached) the street and well before any contact was made. Similarly, her statement that “Maxx attacked [a] restrained Kodi,” exhibit 10 at 001, embellishes things considerably—Maxx was not near Kodi when, according to her testimony, Kodi broke free of his restraint. And her assertion that Maxx “sustained one injury,” is belied by the medical evidence showing Kodi bit Maxx *eight* times. Ex. 10 at 001; Ex. 4 at 005.
20. When asked how, if Kodi never entered further in the edge of the asphalt, the collar found its way 15 feet towards the Mattioda house from the edge of the pavement, Ms. Newman did not have an answer, suggesting maybe it flew. That is inconsistent with her testimony that she pulled *back* (i.e. away from the Mattioda property) on Kodi’s collar when the collar came off, not even at the edge of the asphalt but in the middle of the road. And something is not adding up about how she was controlling an enraged 120-pound dog with one hand while pushing Maxx away with the other. Plus, she had no satisfactory answer for how Maxx received all those injuries to his hindquarters, if Maxx kept approaching.
21. Beyond those inconsistencies, she and Mr. Newman exhibited a self-righteousness and victim-blaming that was difficult to stomach, a sort of, “How dare Animal Services bring this action” approach that fell less than flat. Animal Services cited Ms. Newman because, as with the 2019 incident, she did not control Kodi, and Kodi wound up seriously injuring a 10-year-old dog only 1/8 his size. Ex. 4 at 003. If Mr. Newman was “shocked” that Animal Services thought it had “sufficient evidence” to proceed, he was either being hyperbolic or was not paying careful attention to the evidence.

22. However, luckily for the Newmans, sufficiency of the evidence is a more deferential review standard than the one we employ. Instead, we require Animal Services prove the violation by a preponderance of the evidence. KCC 20.22.210. And we do not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3.
23. In addition, a viciousness designation (not to mention a trespass) is about the dog, not the owner. We have upheld viciousness determinations where the owner was exercising all due care, credible, and straightforward, and yet the dog's behavior met the code criteria. And we have reversed such determinations despite the owner's conduct and presentation, where the dog's behavior did not meet the code criteria. So, the Newmans' performance does not doom Kodi to a viciousness designation, or trespass citation, unless the facts, as we find them, warrant that.

Trespass

24. The issue is whether Kodi was, on February 9 a “domesticated animal that enters upon a person's property without the permission of that person.” KCC 11.04.230.K. The matter is thumbs-up, thumbs-down; either Kodiak entered the Mattioda property or he remained on the public right-of-way.
25. Ms. Newman produced a County parcel viewer shot showing the Mattioda property starting significantly back from the edge of the road. Ex. A-4. Those lines are approximate, but they appear to be in the vicinity of the fence line. That is not surprising—fence lines often demark property boundaries. We will employ the fence line as the northern edge of the Mattioda property, which is consistent with Ms. Seth's understanding.
26. We found Mr. Greg more credible than Mr. Newman as to collar location. However, where Mr. Greg is standing appears to be, at most a foot inside the fence/property line. Ex. 7 at 003. While the collar's location there undermines Ms. Newman's testimony somewhat, it does not prove that Kodi was on the Mattioda property. While it is highly unlikely that a collar could magically fly 15 feet from the edge of the pavement—or more, given that Ms. Newman testified that the collar broke free well onto the pavement—it is not at all surprising that the collar would not have wound up directly under the altercation.
27. We accept Ms. Seth's testimony and photos as accurately depicting where Kodi was when she saw him. Ex. 7 at 001-002. We find that the most likely location of the attack. That places Kodi south of the asphalt, but north of the property/fence line.
28. In sum we agree with Animal Services that, contrary to Ms. Newman's testimony, Kodi ventured further south than the edge of the asphalt on February 9. However, we do not find that Kodi crossed over into actual Mattioda property. As such, there was no trespass.

Viciousness

29. “Vicious” is defined as:

Having performed the act of, or having the propensity to do any act, endangering the safety of any person, animal or property of another, including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

KCC 11.04.020.BB. And KCC 11.04.230.H declares as a nuisance, “Any animal that has exhibited vicious propensities and constitutes a danger to the safety of persons or property off the animal’s premises or lawfully on the animal’s premises.” That requires a far more nuanced analysis.

30. Kodi inflicted eight wounds on Maxx—three lacerations on his left lateral pelvic room, two mostly dorsal wounds, and one on his left lateral abdomen, and one to the base of his tail. Ex. 4 at 005. The photos show serious wounds. Ex. 5. However, the Newmans assert that Kodiak was provoked to inflict those. We agree with Ms. Newman that the pictures of several bites to her leg and hand appear to be from the mouth of a small dog like Maxx. Ex. A-5. There is evidence, from Ms. Newman’s mother, that Kodi had been bitten four times, including two where the skin was broken, despite Kodi’s dense double coat. Ex. A7.
31. We start with two principles from provocation jurisprudence. The first is that it is not a thumbs up thumbs down proposition. Provocation requires the dog’s reaction to be *proportional* to the victim’s act. *Bradacs v. Jacobone*, 244 Mich. App. 263, 273–75, 625 N.W.2d 108 (2001). So even if Maxx had set things in motion by coming at Kodi, Kodi biting Maxx eight times would in no sense be proportional to that initial provocation.
32. Second, and cutting the other way, the fact that Maxx sustained significantly worse injuries is not, by itself, dispositive. *People v. Shanks*, 105 A.D.3d 1103, 1104, 962 N.Y.S.2d 742 (2013), involved a dog who “picked a fight he could not win.” The appellate court lambasted the trial judge for focusing on who was “more effective in causing harm than his opponent,” instead of on who started the fight. *Id.* at 1105. The appellate court noted that the winning dog’s “protective and defensive instincts were entirely understandable, even expected.” *Id.* at 1105.
33. On first blush, the evidence—with all eight of Maxx’s wounds towards his hindquarters—seem to show Kodi was pursuing and repeatedly biting a retreating Maxx. That would be grossly out of proportion to anything Maxx might have done to start things off. But that does not fit the evidence; it is inconsistent with Maxx biting Ms. Newman several times. That not something he likely did unless he was coming at Ms. Newman. Adding to this, Ms. Seth testified that Ms. Newman was behind Kodi when she came upon the scene. The facts are far from clear cut.
34. In her 2019 appeal, Ms. Newman performed some impressive research and quoted our 2017 decision in *Wu-V17006691*. *Wu* is applicable on several fronts, not all of which Ms. Newman intended. In *Wu* we found Mr. Wu’ victim-blaming argument was “unpersuasive and borders on offensive.” We also found that Mr. Wu and his dog were “the ‘but for’ cause of the fight: Mr. Wu allowed [his dog] to approach, unrestrained,

another dog and owner on the street.” That as parallels for today’s case. Blaming Ms. Mattioda for not controlling her dog when Ms. Newman could not control Kodi and when Maxx only made it to—according to Ms. Newman—the edge of the public street was unpersuasive and borders on offensive. And Ms. Newman allowing Kodi to approach Maxx, unrestrained, at the edge of road was the “but for” cause of the altercation.

35. However, the portion she quoted is also on point. We wrote there that:

...a viciousness designation is not a proxy for holding some person responsible.... [A] viciousness designation is a serious mark on *the dog*, one that remains even if ownership is transferred. A vicious dog can be kept in King County only upon strict compliance with the requirements set forth in an [order]. If the owner fails to meet all those requirements, the dog shall be removed [from the County]. A viciousness designation is not something we take lightly. Not every dogfight means one of the dogs necessarily qualifies as “vicious,” any more than every fistfight means one party necessarily committed a felony.¹

36. The evidence is just not all adding up. The wounds to Maxx’s hindquarters are certainly evidence that Kodi went after Maxx. However, Maxx’s bite wounds on Ms. Newman’s leg are inconsistent with Maxx simply barking and posturing but then fleeing as Kodi attacked.

37. The case comes down to burden of proof. Provocation is typically an affirmative defense in a dog bite case, one the appellant must prove to escape liability. *Patterson v. New York*, 432 U.S. 197, 202-03 (1977). Were that our scenario, Animal Services would prevail; the Newmans have not proved that Kodi was provoked, as the courts interpret that doctrine.

38. However, lack of provocation is part of our definition itself, not an affirmative defense. KCC 11.04.020 (“biting a human being or attacking a human being or domesticated animal *without provocation*”). Thus, the Newmans do not bear the burden of showing that Kodi’s attack was provoked; instead, Animal Services bears the burden of showing, by a preponderance of the evidence, that Kodi’s attack was unprovoked. *See also Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 495, 337 P.3d 1097, 1101 (2014).

39. Given the inconsistencies in Ms. Newman’s testimony and the extent of Maxx’s injuries to his hindquarters, we are right at the cusp of finding that, whatever Maxx may have done to provoke things, Kodi’s reaction was so disproportionate as to make Kodi’s attack legally unprovoked. In fact, this is as close as we have come to staining a viciousness determination in the scenario where Animal Services lacked a witness who could testify about the altercation. However, as the altercation took place on public right-of-way, this was not a scenario of Maxx standing his ground on his own property. And while Maxx’s multiple bites on Kodi might be explained away as defensive, his bites on

¹ https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/animal%20enforcement/2017/2017%20june/V17006691_Wu_Report.ashx?la=en.

Ms. Newman are not consistent with a dog trying to extricate himself from a fight he wanted no part of.

40. In the final analysis, Animal Services has just not quite pushed that ball across the 50-yard line. We suspect that, had Ms. Mattioda been able to recall a few relevant details about the attack, or had Ms. Seth happened to have been, say, in her front yard at the time, the result here would be decidedly different. But we decide cases based on the evidence, not on hunches. And there is just not quite enough here to say that Animal Services has proven that Kodi's response was not sufficiently provoked.
41. In no sense is this an exoneration of the Newmans or Kodi. Their failure to control Kodi in April 2019 and February 2020 lead to serious injuries to a dog 1/8 Kodi's size. Their victim blaming and lack of responsibility-taking compounded that. They must better control Kodi, or at some point there may be either less equivocal physical proof or a witness who can remember what happened and is willing to, or is compelled to, take the stand and testify under oath.

DECISION:

1. We grant the Newman's appeal.

ORDERED June 20, 2020.



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless appealed to superior court by *July 20, 2020*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

**MINUTES OF THE MAY 6, 2020, HEARING IN THE APPEAL OF AMYE AND
ALEX NEWMAN, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO.
V20010394**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Joann Mattioda, Nick Mattioda, Tim Mattioda, Connie Seth, Greg Seth, Amye Newman, and Alex Newman. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record by the Department:

Exhibit no. 1	Regional Animal Services of King County staff report to the Hearing Examiner
Exhibit no. 2	Complaint form of February 9, 2020, incident, dated February 15, 2020
Exhibit no. 3	RASKC investigation report no. A20-001334-01
Exhibit no. 4	Medical record, dated February 10, 2020
Exhibit no. 5	Photograph of a dog
Exhibit no. 6	Letter from Constance Seth
Exhibit no. 7	Photograph of road
Exhibit no. 8	Notice of Violation no. V20010394
Exhibit no. 9	Certified mail receipt
Exhibit no. 10	Appeal of Amye Newman
Exhibit no. 11	Map of Subject Area
Exhibit no. 12	Witness list
Exhibit no. 13	Complaint form of February 26, 2019, incident, dated May 7, 2019
Exhibit no. 14	Investigation Report A19-001987-01
Exhibit no. 15	Notice of Violation no. V19009382
Exhibit no. 16	Certified mail receipt
Exhibit no. 17	Photograph of driveway
Exhibit no. 18	Photograph of a dog injury
Exhibit no. 19	Medical records dated May 6, 2019
Exhibit no. 20	Appeal of Amye and Alex Newman
Exhibit no. 21	Complaint form of July 9, 2019 incident, dated July 11, 2019
Exhibit no. 22	Investigation Report no A19-004136-01
Exhibit no. 23	Medical records dated July 9, 10, and 11 of 2019
Exhibit no. 24	Photograph of dogs
Exhibit no. 25	Photograph of injuries
Exhibit no. 26	NOV no V19009615
Exhibit no. 27	USPS tracking information
Exhibit no. 28	Appeal of Kelli Upton, Investigation no. A19-004135-01
Exhibit no. 29	Letter from Amye Newman to RASKC, dated August 1, 2019
Exhibit no. 30	Statement of Debbie Fuller regarding V19009615, received September 12, 2019

The following exhibits were offered and entered into the record by the Appellant:

Exhibit no. A1	Photograph and description of incident location
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Exhibit no. A2	Photograph of incident location
Exhibit no. A3	Photograph and description of Kodi's collar
Exhibit no. A4	Parcel map of subject area
Exhibit no. A5	Photograph of injuries
Exhibit no. A6	Medical records, dated February 9, 2020
Exhibit no. A7	Statement by Pam Newman, dated March 6, 2020
Exhibit no. A8	Various photographs of Kodi
Exhibit no. A9	List of Kodi's training, socialization and health
Exhibit no. A10	Statement of Kent Vince dated May 18, 2019
Exhibit no. A11	Statement of Deana McReynolds
Exhibit no. A12	Statement of Vince and Cheryl Ensman, dated March 1, 2020
Exhibit no. A13	Statement of Lindsey Boles and Dustin Ladd
Exhibit no. A14	Statement of Kelli Upton
Exhibit no. A15	Photograph of road, received May 1, 2020
Exhibit no. A16	Statement of Cheryl Ross, received May 1, 2020
Exhibit no. A17	Text messages between Appellant and Debbie Fuller, received May 1, 2020
Exhibit no. A18	Messages between Appellant and Kelli Upton, received May 1, 2020

DS/jf

June 20, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V20010394**

AMYE AND ALEX NEWMAN
Animal Services Enforcement Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

- EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.
- placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED June 20, 2020.



Jessica Oscoy
Legislative Secretary

Eykel, Chelsea

Regional Animal Services of King County

Fuller/Mattioda, Debbie/Tim

Hardcopy

Mattioda, Joann/Nick

Hardcopy

Newman, Amye/Alex

Hardcopy

Seth, Greg/Connie

Upton, Kelli

Hardcopy