

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

EMILY and JAMES TATE,)	No. 28731-9-III
)	
Appellants,)	
)	ORDER GRANTING
v.)	MOTION FOR
)	RECONSIDERATION
SPOKANE COUNTY REGIONAL ANIMAL)	AND AMENDING
PROTECTION SERVICES,)	OPINION
)	
Respondent.)	

The court has considered respondent’s motion for reconsideration of the court’s opinion of October 19, 2010, and the response thereto, and is of the opinion the motion should be granted.

IT IS ORDERED the motion for reconsideration of this court’s decision of October 19, 2010, is granted and the opinion shall be amended by deleting the paragraph on page 7 that begins “We reverse” and substituting the following paragraph in its place:

We reverse and remand for a new hearing. After reconsideration, we deny reasonable attorney fees and expenses to the Tates because SCRAPS is not a state agency as provided in RCW 4.84.350.

DATED:

PANEL: Judges Kulik, Sweeney, and Siddoway

FOR THE COURT:

TERESA C. KULIK
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMILY and JAMES TATE,

Appellants,

v.

**SPOKANE COUNTY REGIONAL
ANIMAL PROTECTION SERVICES,**

Respondent.

No. 28731-9-III

Division Three

UNPUBLISHED OPINION

Kulik, C.J. — Emily and James Tate appeal the determination that their mastiff-mix dogs are dangerous dogs under Spokane County Code (SCC) 5.04.020. Despite Ms.

Tate's efforts to control the dogs, the dogs attacked a moose calf, causing severe injury. The moose calf had to be euthanized. Although the Tates do not assert that their testimony or that of the County witnesses was untruthful, they assert that the hearing examiner's failure to swear in witnesses at the administrative appeal hearing deprived them of their due process rights and violated the county code requirement that witnesses be placed under oath.

The County concedes that all of the testimony of the seven witnesses was unsworn, but it argues that the additional evidence supports the hearing examiner's determination. But the record before this court does not contain the videotape, photographs, reports, or other documents referred to by the County and upon which the hearing examiner may have relied. Thus, even if we exclude the unsworn testimony, we are unable to review whether that determination was correct or whether failing to swear the witnesses was harmless error. Accordingly, we reverse and remand for a new hearing.

Hearing Examiner's Decision. On January 18, 2009, Emily Tate walked with her daughter Maggie and their three dogs "Henry," "Chaos," and "Ruby" at Eloika Lake. Clerk's Papers (CP) at 3. Chaos and Henry are large mastiff mixes. Maggie went down a hill on her sled. Henry and Chaos followed her. Ruby remained at the top of the hill with Ms. Tate. At the bottom of the hill, Maggie observed a yearling, moose calf and yelled to her mother, "'Moose, Mom, I've never been this close to a moose!'" CP at 3.

Ms. Tate told her daughter to get the dogs and come back up the hill.

At this time, Henry spotted the moose, and he and Chaos chased the moose to a plowed parking area located on Mike and Cheryl Jaeger's property. Henry and Chaos aggressively attacked the moose and brought it down in what Ms. Tate described as a "frenzy." CP at 4. The moose tried to get away from the dogs but kept slipping on the ice. During the attack, the moose was severely bitten on its right leg, resulting in torn hair, skin, and muscle, and exposing the area to the bone. The moose was also bitten on its face, leaving a gaping wound. The moose bled profusely from the wounds.

Ms. Tate tried to pull the dogs away from the moose. Ms. Tate grabbed a shovel and hit the dogs to get them to let go of the moose but without success. Maggie went to the Jaegers for help. Ms. Jaeger drove Maggie back to the parking area. Ms. Jaeger observed the injuries to the moose, blood and hair on the ground, and the moose trying to get up but unable to remain standing. Ms. Tate and Maggie were eventually able to escort the dogs from the Jaeger property to the Tate residence. Ms. Jaeger called 911 and her father-in-law, Dennis Jaeger. Mr. Jaeger observed blood, hair, and muscle on the ground. He also observed the severe injuries to the moose and the inability of the moose to stand. A deputy sheriff arrived at the scene and euthanized the moose.

Ms. Jaeger took pictures of the moose before and after it was euthanized and some video while the moose was still alive. A Washington State Department of Fish and Wildlife officer interviewed Ms. Tate and issued a citation.

A Spokane County Regional Animal Protection Services (SCRAPS) officer interviewed Mr. Jaeger and Ms. Tate, viewed Ms. Jaeger's photographs and video, and later served Ms. Tate with a dangerous dog declaration for all three dogs. The dogs were held at the SCRAPS animal shelter.

The SCRAPS officer noted from the photographs and video of the scene the moose's wounds to the face, nose, and legs and its labored breathing and inability to get up. Nancy Hill, the SCRAPS director, met with Ms. Tate on several occasions to discuss the incident. Ms. Hill agreed to reduce the declaration regarding Ruby to a potentially dangerous dog declaration because Ruby did not directly engage in the attack.

Ms. Hill stated in her written report that the leg wound suffered by the moose was open to the bone and would have required sutures or surgery to close the wound and the injury was severe under SCC 5.04.020. Ms. Tate agreed in her written statement that the moose would not have survived the incident. Ms. Hill found probable cause that Henry and Chaos were dangerous dogs.

None of the witnesses were sworn in before providing oral testimony at the administrative hearing. The hearing examiner recommended that both Henry and Chaos be declared a dangerous dog. The Board of County Commissioners of Spokane County (Board) accepted the hearing examiner's recommendation and adopted his findings of fact and conclusions of law.

The Tates appealed to the Spokane County Superior Court, arguing the dangerous

dog determination should be overturned because none of the testimony at the appeal hearing was presented under oath as required by the Spokane County Code. The superior court affirmed the hearing examiner's decision.

The Tates appeal.

ANALYSIS

The Tates assign error to the superior court order sustaining the Board's dangerous dog determinations. They maintain the court erred "when it disregarded the unsworn oral testimony and sustained the agency's findings solely on other unspecified evidence." Br. of Appellants at 11. They contend the hearing examiner's failure to swear in witnesses at the administrative appeal hearing violated SCC 5.04.032(b)(1) as well as their due process rights under the federal and Washington State constitutions. They argue the hearing examiner's reliance on unsworn testimony tainted the integrity of the entire hearing and impaired judicial review. The Tates, therefore, ask this court to vacate the dangerous dog determinations as violations of due process.

The County stipulates that the record contains no evidence that the witnesses were placed under oath during the administrative appeal but maintains that the error is harmless because the evidence independent of the unsworn testimony overwhelmingly supports the dangerous dog determinations. Specifically, the County argues that the county code allows the Board to consider the director's records that formed the basis of his/her decision and that this evidence supports the dangerous dog determinations.

The Tates are correct that the code requires testimony in dangerous dog appeal hearings to be taken under oath. SCC 5.04.032(b)(1). But the code allows the hearing examiner to consider evidence other than oral testimony in making a dangerous dog determination. SCC 5.04.032(a)(5) provides that “at the administrative appeal hearing, the records of the director, or his/her designee, and any supplementary material shall be admissible to prove the dog is a dangerous dog.” These supplemental materials may include written documents, photographs, or other exhibits. SCC 5.04.032(b)(3).

Here, the evidence, independent of the oral testimony, provided to this court is insufficient for our review of the hearing examiner’s decision. The hearing examiner’s decision apparently considered affidavits, reports, photographs, a map, and a videotape of the moose’s injuries before and after it died. The photographs show deep bite wounds to the moose’s face, nose, and legs. Ms. Tate described the attack as a frenzy. An exhibit to the County’s superior court brief indicates that Ms. Tate made a statement to Lenny Hahn, a Washington State Department of Fish and Wildlife officer, in which she admitted that Chaos and Henry aggressively took the moose down. Finally, the court referenced a number of documents provided by Ms. Hill, which included the Tates’ appeal form, the dangerous dog declaration and checklist, the affidavits from Mr. and Ms. Jaeger, documents from the Washington Department of Fish and Wildlife, and a written statement by Ms. Tate. None of these documents are in the record before us. We are unable to review whether the hearing examiner properly concluded that the Tates’ two

dogs are dangerous dogs under SCC 5.04.020.

We reverse and remand for a new hearing. After reconsideration, we deny reasonable attorney fees and expenses to the Tates because SCRAPS is not a state agency as provided in RCW 4.84.350.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Siddoway, J.