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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KENNETH B. GOLDSHINE,

Plaintiff and Appellant,

v.

JOHN LAFFERTY, et al.,

Defendants and Respondents.

B168000

(Los Angeles County
Super. Ct. No. SC070229)

APPEAL from a judgment of the Superior Court for Los Angeles County, Patricia L. Collins, Judge. Reversed in part and affirmed in part.

Phillip K. Fife and Ryan M. Craig for Plaintiff and Appellant.

Law Office of Priscilla Slocum, Priscilla Slocum; Early, Maslach & Rudnicki, James G. Randall and Golareh Hamid for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Kenneth B. Goldshine (Goldshine) alleges claims for strict liability and negligence against defendants and respondents Janet Ehrlich (Ehrlich) and John Lafferty (collectively, defendants) arising from injuries Goldshine suffered when he

was bitten by defendants' cat. The trial court granted summary judgment in favor of defendants. The court found no evidence that defendants knew their cat had dangerous propensities abnormal to cats as a class of animal and therefore held there could not be strict liability. The court held that Goldshine could not prevail on his negligence claim because even if defendants knew their cat was a "biter," defendants had no duty to keep the cat tethered because cats commonly run untethered; it is not abnormal for a cat to respond to provocation and bite when a stranger picks it up; and it was undisputed that the cat bit Goldshine only after Goldshine, a stranger to the cat, picked the cat up from the sidewalk in front of defendants' home. Goldshine appeals from the summary judgment.

We reverse the summary adjudication of Goldshine's strict liability claim and affirm the summary adjudication of his negligence claim. In this lead opinion, I am joined by Presiding Justice Turner in reversing the summary adjudication of the strict liability claim on the ground that the undisputed evidence presented to the trial court in support of defendants' motion is insufficient to support the trial court's conclusion that as a matter of law it is not abnormal for a cat to bite when a stranger picks it up. I dissent from the portion of Associate Justice Grignon's opinion, joined by Presiding Justice Turner, that affirms the summary adjudication of the negligence claim.

BACKGROUND

Goldshine alleged in his complaint that he was approached by a cat as he was walking on a public sidewalk in the City of Los Angeles on January 10, 2001. He picked up the cat, petted it, set it down on the sidewalk, and continued walking. The cat followed him and rubbed its head against Goldshine's leg. As Goldshine petted the cat again, the cat turned its head and bit Goldshine's hand, causing serious personal injury.

In support of his strict liability claim, Goldshine alleged that defendants "owned, controlled, and/or possessed" the cat that bit him, and that defendants knew or had reason to know that the cat had a vicious or dangerous propensity to bite people without

warning. In support of his negligence claim, Goldshine alleged that defendants knew or should have known that their cat had a propensity to bite without warning when it was petted or touched, and that they allowed the cat to roam untethered even though it was reasonably foreseeable that a person walking along the public sidewalk would encounter and pet or touch the cat.

Following discovery, defendants moved for summary judgment, and the trial court granted the motion. Goldshine filed a timely appeal from the subsequent judgment.

DISCUSSION

A. Standard of Review

“[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . A defendant [moving for summary judgment] bears the burden of persuasion that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*), italics and footnotes omitted.) If, but only if, the moving party carries that burden of persuasion by producing evidence sufficient to make a prima facie showing of the nonexistence of any triable issue of material fact, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*)

On appeal from a summary judgment, we make “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) The court strictly construes declarations of the moving party, liberally construes those of the opposing party, and it resolves all doubts as to whether a summary judgment should be granted in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find

contradictions in the evidence, or inferences reasonably deducible from the evidence, that raise a triable issue of material fact. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865-866.)

B. Strict Liability

Defendants sought summary adjudication of Goldshine's strict liability claim solely on the ground that there is no cause of action in California for strict liability for injuries arising from cat bites. As Goldshine correctly argued in opposition to the motion, a common law claim for strict liability in animal bite cases is available to plaintiffs in California. (See, e.g., *Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626; *Drake v. Dean* (1993) 15 Cal.App.4th 915, 921; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 1217, 1218, pp. 653-654.) Under common law strict liability, a person who owns or harbors a domestic animal with known vicious or dangerous propensities abnormal to its class is strictly liable to one who is injured by that animal if the injury results from that abnormally vicious or dangerous propensity. (*Hillman*, at p. 626; *Drake*, at p. 921; see also Rest.2d Torts, §509.) The trial court granted defendants' summary judgment motion as to the strict liability claim on the ground that there was no evidence that defendants knew that their cat had dangerous propensities abnormal to cats (the court also had found, in the context of Goldshine's negligence claim, that it is not abnormal or vicious for a cat to bite when picked up by a stranger).

On appeal, Goldshine argues that the trial court erred by granting summary adjudication of his strict liability claim because there was evidence that defendants knew their cat bit people who petted it behind the ears, and there was no admissible evidence presented to show that cats generally bite people who pet them. Defendants contend on appeal that even if Goldshine's evidence regarding defendants' alleged knowledge were accepted as true (although defendants dispute it), that evidence "is insufficient as a matter of law to establish [the cat's] 'vicious' or 'abnormal' tendency" as required under common law strict liability.

Defendants misapprehend Goldshine’s burden as the party opposing a motion for summary judgment. It was *defendants’* burden, as the parties seeking summary judgment, to show that Goldshine could not establish an element of his strict liability claim—i.e., defendants had the burden to show that the cat’s alleged propensity to bite when petted behind the ears was not vicious or abnormal for cats as a class. (See *Aguilar, supra*, 25 Cal.4th at p. 850.) Although they presented no evidence on this issue in the trial court, defendants rely upon cat-bite cases from other jurisdictions—*Clark v. Brings* (1969) 284 Minn. 73 [169 N.W.2d 407]; *Judd v. Zupon* (1973) 297 Minn. 38 [209 N.W.2d 423]; *Goodwin v. E.B. Nelson Grocery Co.* (1921) 239 Mass. 232 [132 N.E. 51]; *Lee v. Weaver* (1976) 195 Neb. 194 [237 N.W.2d 149]; *Wignes v. Bottger* (1987) 136 Misc.2d 490 [518 N.Y.S.2d 936]; *Ray v. Young* (2002) 154 N.C.App. 492 [572 S.E.2d 216]—to argue on appeal that their cat’s alleged propensity is not abnormal for cats as a class.¹

Defendants’ reliance upon these out-of-state cases is misplaced. Even if we were inclined to rely upon factual findings made in other cases to support a factual finding made in the present case, the findings in those other cases do not support the trial court’s ruling in this case. For example, in several of the out-of-state cases, the courts found that a cat that bites *while playing* does not have a vicious or dangerous propensity abnormal

¹ Defendants also rely upon and ask us to take judicial notice of various “authorities concerning general cat behavior”—books or brochures related to the care of cats—in support of their assertion that their cat’s alleged propensity was not abnormal. We deny defendants’ request to take judicial notice of these “authorities” for two reasons. First, the “authorities” (or more properly, the assertions of fact contained therein) are not proper subjects of judicial notice under Evidence Code section 452, subdivision (h), because they are not “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Second, these “authorities” were not presented in the trial court in support of defendants’ summary judgment motion; thus, Goldshine was not given an opportunity to present evidence that might contradict the “authorities” upon which defendants rely.

for cats. (See, e.g., *Clark v. Brings*, *supra*, 169 N.W.2d at pp. 412-413; *Judd v. Zupon*, *supra*, 209 N.W.2d at p. 423; *Lee v. Weaver*, *supra*, 237 N.W.2d at p. 151; *Ray v. Young*, *supra*, 572 S.E.2d at p. 219.) In the other out-of-state cases, the courts found no dangerous or vicious propensity abnormal for cats when the subject cat had bared its teeth and pulled the fiber from the stocking of a child (*Goodwin v. E.B. Nelson Grocery Co.*, *supra*, 132 N.E. at p. 53) or the cat had bitten a person holding it by the scruff of the neck eight to ten feet above the ground (*Wignes v. Bottger*, 518 N.Y.S.2d at p. 939). None of these cases involved a cat that bit a person who was simply petting it. Thus, none of the cases supports a finding that defendants' cat's alleged propensity to bite while being petted behind the ears was not a dangerous or vicious propensity abnormal for cats.

In light of the absence of undisputed evidence before the trial court to establish that defendants' cat's alleged propensity was not abnormal for cats, the trial court erred by granting summary adjudication of Goldshine's strict liability claim. In reaching this conclusion, however, we note that it is based upon the evidence before the trial court. Defendants did not in their summary judgment motion attempt to establish possible defenses that may be available to avoid (or reduce) liability under Goldshine's claim. (See, e.g., *Johnson v. McMahan* (1998) 68 Cal.App.4th 173, 176 [defenses of assumption of the risk and contributory negligence may be asserted against claim for strict liability]; see also Rest.3d Torts, Liability for Physical Harm (Tent. Draft No. 1, 2001) § 24, subd. (d), com. d. [strict liability does not apply when injured person comes in contact with the animal for the purpose of securing some benefit from that contact].) We express no opinion about the applicability of those defenses to the facts of the present case.

C. Negligence

I respectfully dissent from my colleagues' analysis with respect to Goldshine's negligence claim. Defendants moved for summary adjudication of Goldshine's negligence claim on the ground that Goldshine could not establish that defendants owed a duty to him *because there is no evidence that defendant knew that the cat had a tendency*

to bite and therefore the injury was not foreseeable. In opposition to the motion, Goldshine presented evidence that he spoke to Ehrlich immediately after he was bitten and she told him that the cat was a “biter” when petted behind the ears. Despite Goldshine’s evidence, which defendants disputed, the trial court granted defendants’ motion on the ground that defendants owed Goldshine no duty to keep their cat tethered, even assuming they knew their cat was a “biter,” because (1) cats commonly run untethered; (2) it is not abnormal for cats to bite, particularly when provoked; and (3) it was undisputed that the cat bit Goldshine only after Goldshine, a stranger to the cat, picked the cat up.

Goldshine argues on appeal that the trial court applied the wrong standard in determining whether defendants owed a duty to keep their cat tethered. In my view, he is correct. In a claim for negligence arising from an injury caused by an animal, the issue is not whether the animal’s behavior is abnormal for that class of animal. Instead, the issue is whether the kind of behavior that caused the injury, although not abnormal for the class of animal, creates a foreseeable risk of harm if the animal is allowed to roam untethered. (*Drake v. Dean, supra*, 15 Cal.App.4th at p. 929; see also *id.* at p. 925 [“In determining the keeper’s liability for negligence for injuries inflicted by a domestic animal, the criterion usually adopted is one of reasonable anticipation of the occurrence, i.e., foreseeability”].) Although defendants are correct that the determination of whether a legal duty exists is a question of law for the court, rather than an issue of fact for the jury (see, e.g., *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*)), I cannot accept defendants’ argument that they had no duty to tether their cat because it “has previously displayed nothing more than a normal tendency to bite defensively during play or while being petted.”

When, as in this case, a court is required to determine the existence or scope of a duty, “[t]he critical issue . . . is whether [the kind of injury suffered] was sufficiently foreseeable to support a requirement that defendants secure” their cat. (*Sharon P., supra*, 21 Cal.4th at p. 1188.) “[A] court’s task—in determining ‘duty’—is not to decide

whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6, italics in original; accord *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476.)²

“To support a duty, foreseeability of harm must be reasonable. [Citations.] Put another way, the degree of foreseeability must be high enough to charge the defendant with a duty to act. [Citations.] . . . [T]he harm must be sufficiently likely to arise from a given act. [Citations.] More than a mere possibility of occurrence is required since, with hindsight, everything is foreseeable. [Citations.] . . . ‘[T]he court evaluates . . . whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. [Citation.] What is “sufficiently likely” means what is “likely enough in the setting of modern life that a reasonably thoughtful [person] could take account of it in guiding practical conduct.’” [Citation.]’ [Citation.]” (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465-466.) When determining whether the kind of harm at issue is sufficiently likely to occur, the court must take into account the foreseeable conduct of other persons. (*Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 241-242; *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583, 588.)

The record in this case is insufficient to determine whether defendants owed Goldshine a duty to keep their cat tethered. The *only* issue defendants raised in their

² “Confusion has arisen over the concept of foreseeability and the variety of roles it plays in tort law. Foreseeability is a question of fact for the jury in many contexts. However, in defining the boundaries of duty, foreseeability is a question of law for the court. The question of foreseeability in a ‘duty’ context is a limited one for the court and is readily contrasted with the fact-specific foreseeability questions bearing on negligence (breach of duty) and causation posed to the jury or trier of fact.” (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1686.)

motion for summary judgment in connection with the negligence claim was whether they knew their cat had a tendency to bite under any circumstance. Defendants contended the evidence was undisputed that they did not have such knowledge. All of the facts in defendants' separate statement related to *defendants' purported lack of knowledge* of any proclivity on the part of the cat to bite. Because defendants limited their motion to a single fact related to the issue of duty—their knowledge of their cat's alleged proclivity to bite—Goldshine needed only to produce evidence sufficient to raise a disputed material fact, i.e., evidence that defendants did have knowledge of the cat's proclivity to bite. Goldshine did produce that evidence. He was required to do no more to avoid summary judgment, because defendants did not meet *their* burden on summary judgment as to other facts related to the issue of duty. (*Aguilar, supra*, 25 Cal.4th at p. 850 [defendant moving for summary judgment has initial burden to produce evidence to show that defendant is entitled to judgment as a matter of law].) That Goldshine did not produce additional evidence related to the issue of duty does not necessarily mean that none exists. In short, there is insufficient evidence *on this record* to determine the issue of duty because of the very narrow scope of the summary judgment motion

For example, if Goldshine produced evidence that defendants knew their cat had a tendency to bite anyone who touched it, regardless of how gently it was touched, a court could find it reasonably foreseeable that a stranger might encounter the cat and touch it, and thus be bitten, in which case it might be appropriate to impose a duty on defendants to keep the cat from roaming untethered. On the other hand, if the defendants knew their cat would bite only if it were trapped or handled roughly, it might not be sufficiently foreseeable that a passerby would handle the cat in that way so as to warrant the imposition of a duty to keep the cat tethered. Because there is a dispute regarding what defendants knew regarding their cat's alleged propensity to bite, the issue of duty cannot be resolved on this record. (See *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1081 [“where one invitee minor sexually assaults another in the defendant's home, the question of whether the defendant owed a duty of reasonable care to the injured minor

depends on whether the assailant minor's conduct was *reasonably foreseeable*, but that conduct will be deemed to have been reasonably foreseeable only if the defendant had *actual knowledge* of the assaultive propensities of the teenage assailant”]; see also *Silva v. Union Pacific Railroad Co.* (2000) 85 Cal.App.4th 1024, 1030 [ruling on issue of duty “can only be made with a clear factual or evidentiary basis”].) Therefore, the summary judgment as to Goldshine’s negligence claim should be reversed, and the matter remanded for further proceedings.

DISPOSITION

The judgment as to the strict liability claim is reversed, and the judgment as to the negligence claim is affirmed. The parties shall bear their own costs on appeal.

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MOSK, J.

Turner, P. J.

As to the strict tort liability analysis, I concur under the compulsion of *Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626. In terms of the negligence claim, there is no evidence the cat had ever previously left defendants' premises. Hence, there is no basis for concluding defendants acted negligently when the cat left the yard—this was something that no evidence indicates had occurred before. (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 935-944 (dis. opn. of Sparks, J.); *Hagen v. Laursen* (1953) 121 Cal.App.2d 379, 383-384; *Eigner v. Race* (1942) 54 Cal.App.2d 506, 513; see *Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, 993.) I would hold that summary adjudication should be entered on the negligence claim.

There are two justices who believe the trial court correctly ruled in plaintiff's favor on the strict tort liability theory. There are two justices who believe the trial court should have entered summary adjudication on the negligence claim. Hence, the only remaining cause of action is for strict liability.

TURNER, P.J.

J. Grignon, Dissenting.

Plaintiff and his wife were taking a walk when they saw a domestic cat on the sidewalk. The cat approached them in a friendly manner. Plaintiff picked up the cat, which was a stranger to him, and noticed the cat's tag, identifying the cat as "Tommy." Plaintiff put Tommy down. Plaintiff and his wife continued their walk, and Tommy followed in a friendly manner. Plaintiff reached down and petted Tommy behind his ear. Tommy bit plaintiff. Later, one of Tommy's owners told plaintiff that Tommy "was a biter when touched behind the ears." Plaintiff sued the owners of Tommy under theories of strict liability and negligence. The trial court granted defendant cat owners summary judgment on both theories. The opinion of Justice Mosk concludes triable issues of fact exist as to both the strict liability and negligence causes of action. The opinion of Presiding Justice Turner concludes triable issues of fact exist as to strict liability, but not negligence. In my opinion, plaintiff has no cause of action against defendants on either theory. I would affirm the summary judgment in favor of defendants in its entirety.

Allegations of the Complaint

Plaintiff Kenneth B. Goldshine filed a complaint against defendants husband and wife John Lafferty and Janet Ehrlich for personal injury inflicted by a cat bite on January 10, 2001, on theories of negligence and strict liability. As to strict liability, he alleged: "Defendant(s) owned, controlled, and/or possessed a cat. The cat had a vicious or dangerous trait or propensity for biting individuals when petted or touched. Even with such propensity, Defendant(s) allowed said cat to roam the surrounding neighborhood around 12923 Warren Avenue, Los Angeles, CA 90066. Plaintiff was walking on the sidewalk adjacent to Warren Avenue when said cat approached Plaintiff. Plaintiff reached down to pick up and pet said cat. When Plaintiff released said cat, said cat followed Plaintiff and rubbed its head against Plaintiff's leg, suggesting to Plaintiff that

said cat was seeking further attention. Plaintiff again reached down to pet said cat as he had only moments earlier with no unusual or hostile reaction by said cat. Suddenly said cat turned its head and bit Plaintiff's hand. The said cat caused serious personal injury to Plaintiff. Before Plaintiff was injured, the Defendant(s) knew, or had reason to know, of the vicious or dangerous propensity of the said cat to suddenly bite people without warning."

As to negligence, plaintiff alleged: "Defendant(s) had or should have [] known that a cat within the ownership, control, and/or possession of the Defendant(s) had a propensity to bite without warning when petted or touched, and with such known propensity Defendant(s) allowed the said cat to roam the surrounding neighborhood around 12923 Warren Avenue, Los Angeles, CA 90066, where it was reasonably foreseeable that a person walking along the public sidewalk would encounter said cat and would pet or touch said cat. Plaintiff was walking on the sidewalk adjacent to Warren Avenue when said cat approached Plaintiff, appearing to Plaintiff to be seeking to be petted. Plaintiff reached down to pick up and pet said cat. When Plaintiff released said cat, said cat followed Plaintiff. Plaintiff again reached down to pet said cat, suddenly said cat turned its head and bit Plaintiff's hand, causing serious personal injury to the Plaintiff."

Motion for Summary Judgment

Defendants moved for summary judgment on the grounds plaintiff could not establish by admissible evidence that they had been negligent, because they had owed no duty to plaintiff; they had not been the proximate cause of plaintiff's injury; and plaintiff had not stated a cause of action for strict liability. Defendants supported the motion by their and plaintiff's answers to interrogatories.

The evidence was as follows. Defendants were husband and wife. They had been the sole owners of Tommy for the previous eight to ten years. Tommy had not bitten or attempted to bite anyone prior to January 10, 2001. At the time of the incident,

defendants' yard was fenced. Tommy had been licensed, immunized, and sterilized prior to January 10, 2001. Tommy did not have a propensity to bite people. Plaintiff claimed that defendant Ehrlich had told him: "[Tommy] . . . was a biter when touched behind the ears. . . . [S]he would like to make a more appropriate fence in her yard in order to keep [Tommy] fenced in." Defendant Ehrlich denied making these statements.

Plaintiff described the incident as follows: "The subject cat approached RESPONDING PARTY and RESPONDING PARTY'S spouse as they were walking past 12923 Warren Avenue in Los Angeles on a pleasure walk through RESPONDING PARTY'S neighborhood. RESPONDING PARTY picked up the subject cat to check its tag as it was possibly lost but more specifically, the subject cat was meowing for attention. After noting that the subject cat's name was probably 'Tommy' as engraved on the tag, RESPONDING PARTY put the cat down and RESPONDING PARTY and his spouse continued with their pleasure walk. The subject cat continued to follow RESPONDING PARTY and his spouse meowing as he followed. RESPONDING PARTY reached down to again check the subject cat's tag for an address and petted the subject cat behind the ears. With that, the subject cat turned its head and bit RESPONDING PARTY. There had been no indication that the subject cat didn't like to be touched specifically behind the ears. It is common knowledge that cats 'enjoy being rubbed behind their ears.'"

Opposition to the Motion

Plaintiff's opposition to the motion was supported by much of the same evidence. No other conflicting material evidence was submitted.

Hearing and Ruling

After a hearing, the trial court took the matter under submission and then ruled as follows: "Defendants' motion for summary judgment is granted. The court finds there is

no triable issue of fact as to the First cause of action for strict liability as there is no material evidence to establish that Defendants knew or had reason to know that the cat had dangerous propensities abnormal to its class. [(*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921.)] [¶] As to the Second cause of action for negligence, there is no material evidence that the Defendants were negligent. Accepting as true the Defendants' alleged statement that the cat was a biter, in the context of a cat, this is not abnormal nor vicious behavior. It is undisputed that the cat bit Plaintiff only after he picked it up on the sidewalk. The cat's response to a stranger picking it up cannot be characterized as an attack. 'Evidence that an animal has responded to a provocation by biting or scratching is not considered as an attack, nor does it establish a vicious propensity.' [(*Clark v. Brings* (1969) 284 Minn. 73 [169 N.W.2d 407, 412-413]; *Wignes v. Bottger* (1987) 136 Misc.2d 490 [518 N.Y.S.2d 935, 938].)] Plaintiff has otherwise failed to establish that the Defendants were negligent. They were not present when Defendants picked up the cat. Consequently, Plaintiff can only claim that they were negligent in allowing the cat to run untethered. Yet, Plaintiff has cited to no evidence to show that Defendants had a duty to keep the cat tethered. Cats run untethered as a common occurrence. The allegation that the cat was a 'biter' does not place the cat in the category of abnormal. Certainly, this characteristic, relative to a cat, is not analogous to a biting dog. A bite from a cat upon being provoked when picked up by a stranger does not set the cat apart as one that should not be allowed to run untethered. [(Cf. *Wignes v. Bottger, supra*, [518 N.Y.S.2d at p. 943].)]"

The trial court entered judgment in favor of defendants. This timely appeal followed.

Strict Liability

There are no California cases concerning the liability of a cat owner to an individual bitten by a domestic cat. However, "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or

dangerous propensities abnormal to its class. (E.g., *Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626, 283 P.2d 1033, and authorities cited therein [police dog]; *Hicks v. Sullivan* (1932) 122 Cal.App. 635, 638, 10 P.2d 516, and authorities cited therein.) This rule is set forth in section 509 of the Restatement Second of Torts (Restatement Second): ‘(1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing harm. [] (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.’” (*Drake v. Dean, supra*, 15 Cal.App.4th at p. 921 [pit bull].)

“There are certain domestic animals so unlikely to do harm if left to themselves and so incapable of constant control if the purpose for which it is proper to keep them is to be satisfied, that they have traditionally been permitted to run at large. This class includes . . . cats Although it is not impossible to confine [cats] to the premises of their keepers or to keep them under leash when taken into a public place, they have been traditionally regarded as unlikely to do substantial harm if allowed to run at large, so that their keepers are not required to keep them under constant control. . . . However, although the possessor or harbinger of a . . . cat is privileged to allow it to run at large and therefore is not required to exercise care to keep it under constant control, he is liable if he sees his . . . cat about to attack a human being or animal . . . and does not exercise reasonable care to prevent it from doing so.” (Rest.2d Torts, § 518, com. (j), p. 32.) Neither the California Legislature nor the Los Angeles City Council has adopted a leash law for cats. (Cf. Civ. Code, § 3342; L.A. Muni. Code, § 53.06.) Thus, we are concerned solely with the common law.

Several out-of-state cases have discussed a cat owner’s liability for bite injuries inflicted by domestic cats. (*Goodwin v. E. B. Nelson Grocery Co.* (1921) 239 Mass. 232 [132 N.E. 51]; *Judd v. Zupon* (1973) 297 Minn. 38 [209 N.W.2d 423]; *Clark v. Brings, supra*, 284 Minn. 73 [169 N.W.2d 407]; *Ray v. Young* (2002) 154 N.C.App. 492 [572 S.E.2d 216]; *Wignes v. Bottger, supra*, 136 Misc.2d 490 [518 N.Y.S.2d 935]; *Lee v.*

Weaver (1976) 195 Neb. 194 [237 N.W.2d 149].) As the opinion of Justice Mosk notes, those cases have found no liability on the part of the cat owners. I find them persuasive.

Courts frequently take judicial notice of an animal's characteristics. (*Clark v. Brings, supra*, 284 Minn. at p. 78.) As soon as an animal is placed in the harmless class by judicial decision, judicial notice is taken of that fact in future judicial cases. (*Ibid.*) “[T]he courts have without exception explicitly held or implicitly regarded the cat as a domesticated animal, one “that is dealt with by mankind on the footing that a person may safely keep it.”” (*Ibid.*) That a cat bites or scratches when provoked or excited by play is not evidence of dangerous viciousness. (*Id.* at p. 82.) “The term ‘vicious propensity’ is usually applied to describe an unprovoked attack” (*Wignes v. Bottger, supra*, 136 Misc.2d at p. 492.) Provocation includes playing with a cat (*Ray v. Young, supra*, 154 N.C. App. at p. 493; *Judd v. Zupon, supra*, 297 Minn. 38; *Clark v. Brings, supra*, 284 Minn. at p. 80), trying to put a cat into a carrying case (*Wignes v. Bottger, supra*, 136 Misc.2d at p. 493), and holding a cat by the scruff of the neck (*ibid.*).

In this case, there is no evidence Tommy possessed a vicious or dangerous propensity abnormal to cats. The sole propensity evidence is a statement of one of Tommy's owners, which the owner denies making, that Tommy is a biter when scratched behind the ears. This is not a vicious or dangerous propensity. To the extent that this alleged statement has any evidentiary value it means that Tommy may bite when provoked by play or petting. Plaintiff has no evidence of the nature of any biting tendency or the seriousness of any previous biting injuries. Cat bites and scratches are most often superficial and slight. Plaintiff has no evidence that Tommy has ever attacked a person in an unprovoked manner. This summary judgment was brought on the ground that plaintiff could not establish by competent evidence the abnormal viciousness or dangerousness of Tommy. Plaintiff has no such evidence.¹

¹ Although I recognize this is a motion for summary judgment, a single vague disputed statement concerning a biting tendency is far outweighed by the owners' under oath answers to interrogatories that Tommy has never bitten or attempted to bite any person and by the total absence of affirmative evidence of any previous biting incidents.

Negligence

As to negligence, the issue in this case is one of duty. Duty is not a factual question to be decided by a jury, but a legal question to be decided by the judge as a matter of law. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1189.) Based on the evidence, the duty question in this case may be summarized as follows: Does the owner of a domestic cat that the owner knows has a tendency to bite when scratched behind the ears owe a duty to a stranger, who picks up the cat from the sidewalk and scratches the cat behind the ears, to absolutely confine the cat in the yard or the house? That is the only evidence supporting a duty in the case; there is simply no other evidence. Either that evidence is sufficient to create a duty or it is not. Plaintiff has no other evidence. Thus, the record is not insufficient to decide the duty issue. Defendants have established that the statement of one of the owners is the only admissible evidence that plaintiff has to prove his case. The only conflict in the evidence is whether the statement was made. Summary judgment is mandatory if plaintiff's evidence does not establish a duty on the part of defendants. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768; *Aguilar v. Atlantic Richfield Co.* (2000) 25 Cal.4th 826, 850.) In my view, it does not. In any event, either a duty exists on this evidence or it does not.

Duty is a policy decision to be arrived at by balancing various factors. (*Rowland v. Christian* (1968) 69 Cal.2d 108.) The balancing of those factors leads to the conclusion that no duty should be imposed in this case. Neither the Legislature nor the California courts have imposed a special duty on cat owners to confine their cats. Cat ownership is widespread and is of great social utility. Although cats may bite or scratch when played with, petted, or provoked, cats are unlikely to cause serious harm and are difficult to confine. Further, the imposition of liability will have a detrimental effect on cat ownership and the availability or price of liability insurance. In addition to these general considerations, the specific facts of this case point to the absence of duty: the trivial nature of any prior biting propensity; defendants' overall social responsibility

(license, sterilization, immunization, and fence); plaintiff's role in his own injuries; and the unlikelihood or unforeseeability of the injury.

I would affirm.

GRIGNON, J.