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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LORE ADAMS,

Plaintiff and Respondent,

v.

WENDY LEWIS et al.,

Defendants and Appellants.

G031197

(Super. Ct. No. 01CC05561)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Reversed with directions.

Pollak, Vida & Fisher, Michael M. Pollak, Daniel P. Barer, Anna L. Birenbaum; Law Offices of William C. Cole and Ted Endres for Defendants and Appellants.

White & Roseman, Leslie Roseman; and John L. Dodd for Plaintiff and Respondent.

\* \* \*

Richard and Wendy Lewis hired animal behavior specialist Lore Adams to tame their pet dog, an overly-aggressive young Dalmatian rescued from the local animal shelter. Bitten by the canine at the third training session, Adams sued the Lewises for

personal injuries. A jury found the couple negligent and awarded Adams \$38,016 in damages.

Claiming Adams assumed the risk of being bitten during the lessons, the Lewises challenge the denial of their motions for summary judgment and nonsuit. They also contend the trial court erred in denying their proposed jury instructions. We conclude the Lewises were entitled to summary judgment and therefore reverse the judgment.

## I

### FACTS AND PROCEDURAL BACKGROUND

The facts presented at the summary judgment motion focus on a pugnacious and temperamental Dalmatian named Oreo, a dog apparently ill-bred for anything except legal controversy. Rescued from an animal shelter by the Lewises, Oreo soon displayed aggressive actions toward strangers and family members alike, and on one occasion attempted to bite an individual. To remedy the problem, the Lewises hired Adams, an “Animal Behaviorist Trainer” with 13 years experience. Informed of Oreo’s history of aggression, Adams agreed to four training sessions for \$325.

During the first two sessions, Adams directed Wendy Lewis (Wendy)<sup>1</sup> to tape-record the training lessons and to take notes for future reference. Adams arrived for Oreo’s third training session on January 2, 2001. Following previous instructions from Adams, Wendy commanded Oreo to sit still. As Adams entered the home, Wendy gave the “release” command, and Adams gave Oreo a treat. The dog ran outside and Adams followed. There, before the tape-recorded training session resumed, Oreo bit Adams.

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<sup>1</sup> We use first names, where appropriate, to avoid confusion and intend no disrespect. (*Nairne v. Jessop-Humblet* (2002) 101 Cal.App.4th 1124, 1126.)

In April 2001, Adams sued the Lewises for personal injuries resulting from the dog bite, alleging the couple was negligent in keeping a dangerous dog with known vicious propensities. The Lewises moved for summary judgment, claiming Adams had assumed the risk of a bite, based on her profession as a dog trainer. Adams contended the risk is not assumed under the so-called “veterinarian’s rule” unless the veterinarian assumes control of the animal and begins treatment. She argued there was a triable issue of fact on whether the training session had resumed when she was injured. The trial court denied the motion.

The case proceeded to trial. The Lewises moved for nonsuit, asserting Adams was injured while engaging in activities within the scope of her employment. The trial court denied the motion, and refused defense instructions based on the veterinarian’s rule and assumption of the risk. The jury awarded Adams \$38,016 in damages. This appeal followed.

## II

### DISCUSSION

#### A. *Standard of Review*

The trial court must grant summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court’s decision de novo, evaluating all the evidence offered by the parties and the uncontradicted inferences reasonably supported by the evidence. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Once the moving party shows “that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon

the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .” (*Id.* at pp. 476-477.) In sum, summary judgment should be granted if the moving party “would prevail at trial without submission of any issue of material fact to a trier of fact for determination . . . .” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.)

Defendants bear the burden to demonstrate plaintiff’s assumption of the risk by showing they owed no duty of care to protect plaintiff from the particular risk that caused her injury. (*Davis v. Gaschler* (1992) 11 Cal.App.4th 1392, 1398 (*Davis*.) “[T]he existence and scope of a defendant’s duty of care is a *legal* question which depends on the nature of the . . . activity in question and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.” (*Knight v. Jewett* (1992) 3 Cal.4th 296, 313 (*Knight*.)

#### B. *Assumption of the Risk*

Challenging the denial of their summary judgment motion, the Lewises claim any recovery was barred, as a matter of law, by the doctrine of primary assumption of the risk as embodied in the veterinarian’s rule. Before tackling the merits of this claim, we briefly review the relevant aspects of the assumption of the risk doctrine.

We begin with the general principle that everyone has a duty of care to avoid injuring others, even those undertaking hazardous work. (Civ. Code, § 1714, subd. (a); *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 536 (*Neighbarger*.) But a plaintiff’s voluntary assumption of a known risk had long been viewed as an exception to this general rule. Consistent application of the doctrine proved difficult, however, especially after our Supreme Court adopted comparative fault principles in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. (*Knight, supra*, 3 Cal.4th at pp. 306-307.)

In *Knight*, a plurality of the Supreme Court attempted to clarify the doctrine by distinguishing “between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk — the category of assumption of the risk that the legal commentators generally refer to as ‘primary assumption of risk’ — and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant’s breach of that duty — what most commentators have termed ‘secondary assumption of risk.’” (*Knight, supra*, 3 Cal.4th at p. 308.) Determining whether a defendant owes a duty of care to protect the plaintiff from a particular risk depends on the nature of the activity undertaken and the relationship of the parties to that activity — independent of whether the plaintiff acted reasonably while confronting the particular risk. (*Id.* at p. 309.)

Thus, *Knight* shifted the analytical focus from the plaintiff’s subjective decision to encounter an apparent risk and the manner in which he conducted himself to an analysis of the defendant’s duty. Cases involving the “firefighter’s rule” illustrate the difference. The rule provides that a person who negligently starts a fire is not liable for injuries sustained by firefighters summoned to subdue the blaze. As *Neighbarger* explains, “the proper basis for the firefighter’s rule after *Knight*, [citation] is a legal conclusion that the person who starts a fire owes no duty of care to the firefighter who is called to respond to the fire. [Citations.] After *Knight*, [citation] the rule cannot properly be said to rest on the plaintiff firefighter’s voluntary acceptance of a known risk of injury in the course of employment . . . .” (*Neighbarger, supra*, 8 Cal.4th at p. 541.) “In effect,” the firefighter’s rule rests on a legal determination that “it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very

condition or has the defendant has contracted with the plaintiff to remedy or confront.” (*Id.* at p. 542; accord *Knight, supra*, 3 Cal.4th at p. 310, fn. 5 [“the party who negligently started the fire has no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront”].)

The veterinarian’s rule, a variant of the firefighter’s rule, is subject to the same analysis. First announced in *Nelson v. Hall* (1985) 165 Cal.App.3d 709 (*Nelson*), the rule states that veterinarians and their assistants assume the inherent risk that any dog, regardless of its apparent docile nature, might bite in the course of treatment. (*Id.* at p. 715.) *Nelson* emphasized “[t]he veterinarian determines the method of treatment and handling of the dog. He or she is the person in possession and control of the dog and is in the best position to take necessary precautions and protective measures.” (*Ibid.*) Thus, “the risk of being attacked or bitten in the course of veterinary treatment is an occupational hazard which veterinarians accept by undertaking their employment . . . .” (*Cohen v. McIntyre* (1993) 16 Cal.App.4th 650, 655.)

Since the *Knight* decision, however, cases employing the veterinarian’s rule determine whether a defendant owed a duty of care to the plaintiff by focusing on the defendant’s relationship with the veterinarian, and “the defendant’s conduct in entrusting the animal to the professional care and control of the veterinarian,” and not on whether the veterinarian subjectively accepted dog bites as a foreseeable occupational hazard. (*Neighbarger, supra*, 8 Cal.4th at p. 545.) Following *Knight*, appellate decisions have consistently concluded “the veterinarian, like the firefighter, cannot recover for injuries arising out of the very conditions he or she was hired to confront.” (*Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477, 1480 (*Rosenbloom*) [summary judgment

affirmed where plaintiff sued for injuries sustained in moving shark into a larger aquarium].)<sup>2</sup>

With these principles in mind, we now consider whether summary judgment was warranted in this case.

### C. *Summary Judgment Motion*

Adams asserts several grounds to support the trial court's denial of summary judgment. She contends the Lewises were strictly liable for her injuries under Civil Code section 3342, and she did not assume the risk of being bitten because the injury did not occur during the course of treatment. She also argues the veterinarian's rule is limited to veterinarians and their assistants and should not be extended to animal behavior specialists. We consider these arguments in turn.

#### 1. *Civil Code Section 3342*

Civil Code section 3342, subdivision (a), California's "dog bite" statute, states that a dog owner "is liable for the damages suffered by any person who is bitten by the dog while . . . lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." Although phrased in terms of strict liability, the Legislature did not intend to make liability absolute by denying dog owners the right to raise an assumption of the risk defense. (*Gomes v. Byrne* (1959) 51 Cal.2d 418, 420.)

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<sup>2</sup> An exception exists where the dog owner conceals knowledge of the animal's vicious propensities, or the dog owner's "conduct was so reckless as to fall totally outside the range of behavior ordinarily expected of those who avail themselves of veterinary services." (*Cohen v. McIntyre, supra*, 16 Cal.App.4th at p. 655; see *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 366, 371 [firefighter's rule inapplicable where defendant misled plaintiff as to the nature of the risk presented by chemicals].)

*Davis, supra*, 11 Cal.App.4th 1392 is instructive on the applicability of Civil Code section 3342 after *Knight*: “[I]f the defendant owes no duty to the plaintiff by virtue of the plaintiff’s primary assumption of the risk, liability is not imposed by Civil Code section 3342. That is, such cases are outside the reach of that section. Such an assumption of risk does not defeat liability; rather the statute does not reach that circumstance. For example, it might be determined that the statute does not reach the circumstance of a dog biting a veterinarian during treatment. In that case, primary assumption of risk would continue to operate because the statute was not designed to protect veterinarians, hence there is no duty.” (*Davis, supra*, 11 Cal.App.4th at p. 1399.)

We agree with the analysis in *Davis* and conclude Civil Code section 3342 does not preclude the Lewises from raising an assumption of the risk defense.

## 2. *Course of Treatment*

Relying on *Nelson*, Adams contends she had not assumed the risk because the training session had not yet started. She notes earlier sessions commenced when she directed Wendy to start the tape-recorder and to take notes of Adams’s training techniques as she worked with the dog. Thus, according to Adams, whether the training session had begun presented a triable issue of material fact. Under *Knight*’s duty analysis, we construe her argument to mean that, as a matter of law, she did not assume the risk until the training session had begun and therefore the Lewises owed her a duty of care to prevent their dog from biting her.

Adams relies on language in *Nelson* purportedly limiting assumption of risk “only to the danger which the injured [veterinarian] has *knowingly* assumed; i.e., the danger the dog will bite *while being treated*.” (*Nelson, supra*, 165 Cal.App.3d at p. 715, fn. 4, original italics.) Under *Nelson*’s formulation, according to Adams, assumption of

the risk applies only if the plaintiff has voluntarily accepted a known risk in the course of employment. This approach, based on implied consent, was rejected in *Knight*. *Knight* pointed out that adoption of an implied consent theory would make application of assumption of the risk dependent on variable factors that a defendant would have no way of ascertaining, and not on the nature of the activity itself. (*Knight, supra*, 3 Cal.4th at pp. 312-313; see also *Neighbarger, supra*, 8 Cal.4th at p. 541.) As *Knight* explains, “there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct, based on the often unknown, subjective expectations of the particular plaintiff who happened to be injured by the defendant’s conduct.” (*Knight, supra*, 3 Cal.4th at p. 313.)

Adams misses the crux of the *Nelson* holding. *Willenberg v. Superior Court* (1986) 185 Cal.App.3d 185 (*Willenberg*) is instructive. There, a veterinarian injured his shoulder when Pebbles, a large dog, leaped onto him. Because Pebbles was not being treated when she exuberantly greeted her veterinarian, plaintiff, relying on *Nelson*, argued assumption of the risk did not apply. But *Willenberg* concluded the defendant was entitled to summary judgment, explaining that “[t]he point of the *Nelson* case is that a visit to the veterinarian’s office can bring about unpredictable behavior in a normally docile animal, and this is an *inherent* risk which every veterinarian assumes.” (*Id.* at p. 187, italics added.) It is not that the veterinarian subjectively assumes a particular risk. Rather, the risk that “any animal may react strangely or dangerously while receiving treatment” (*id.* at p. 185) is inherent to the veterinarian’s occupation.

Relying on *Prays v. Perryman* (1989) 213 Cal.App.3d 1133 (*Prays*), Adams argues she did not assume the risk because she had no control over the canine until she began the training session. *Prays* is unavailing. There the appellate court

concluded assumption of the risk did not apply to a commercial pet groomer bitten by a dog *before* the groomer had decided whether it was safe to groom the dog. (*Id.* at p. 1137.) In contrast to the groomer in *Prays*, Adams bargained to train or tame the dog that attacked her. She had agreed to train Oreo *after* being informed of the dog’s aggressive propensities, and had completed two earlier training sessions. She established the routine for Wendy and her dog to follow. Following instruction from Adams, Wendy commanded Oreo to stay sitting as Adams arrived at the front door. After Adams entered the home, Wendy gave the “release” command and Adams rewarded Oreo with a treat. These were not social niceties. Like a veterinarian, Adams determined the method of treatment, and the orchestrated greeting at the door was part of Oreo’s training. Adams was on the job.<sup>3</sup>

Our decision in *Rosenbloom, supra*, 66 Cal.App.4th 1477, is on point. There, we concluded plaintiff assumed the risk of injuries sustained while moving a shark to a larger aquarium because he “cannot recover for injuries arising out of the very conditions he or she was hired to confront.” (*Id.* at p. 1480.) Similarly, the contractual relationship between Adams and the Lewises negates their duty of care to protect Adams from injury “arising from the very condition or hazard the defendant has contracted with the plaintiff to confront.” (*Neighbarger, supra*, 8 Cal.4th at p. 542.)

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<sup>3</sup> It is of no moment that Wendy was assisting Adams. “The doctrine of primary assumption of risk can apply even if the defendant was in some manner in control of the situation and thus in a better position than the plaintiff to prevent the plaintiff’s injury.” (*Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 531 [plaintiff injured in judo class by instructor who controlled pace of training session].)

3. *Animal Behavior Specialists and the Veterinarian's Rule*

Finally, Adams argues the veterinarian's rule applies only to veterinarians and their assistants, and does not apply to animal behavior specialists. We disagree.

Under the veterinarian's rule, the defendant retains and compensates the veterinarian to encounter the occupational risks inherent to the profession, and therefore is relieved of a duty to protect the veterinarian from those very risks. (*Rosenbloom, supra*, 66 Cal.App.4th at p. 1480.) The hazards faced by an animal behavioral specialist are equivalent to those encountered by veterinarians. Both face the risk the “animal may react strangely or dangerously while receiving treatment.” (*Willenberg, supra*, 185 Cal.App.3d at p. 185.)

The relationship of the parties to Oreo's behavioral problem compels the conclusion the defendants owed no duty of care to Adams. The “veterinarian's rule” is justified because “[b]y contracting for the services of the veterinarian, plaintiff dog owner stands in a special position with respect to the veterinarian, who receives special training and compensation for the hazardous work of treating dogs.” (*Marquez v. Mainframe* (1996) 42 Cal.App.4th 881, 886, fn. 2.) Here, Adams held herself out as competent to treat an aggressive dog based on her training and, under her contract with the Lewises, her compensation reflected the risks she faced from Oreo. It would be unfair to find a duty of care to protect Adams from injury arising from the very hazard she was retained to confront. (*Neighbarger, supra*, 8 Cal.4th at p. 542; *Knight, supra*, 3 Cal.4th at p. 310, fn. 5.) In these circumstances, applying the veterinarian's rule to an animal behavior specialist is required by the assumption of risk doctrine.

In sum, based on our review of the record, and guided by elements of the assumption of risk doctrine enunciated in *Knight* and its progeny, we conclude the trial court erred in denying summary judgment.

III

DISPOSITION

The judgment is reversed. The trial court is directed to enter summary judgment in favor of defendants. Defendants shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.