

[U] **Barrios v. Kuder, No. B170034 (Cal.App. Dist.2 09/14/2004)**

[1] IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

[2] B170034

[3] 2004.CA.0008077< <http://www.versuslaw.com>>

[4] September 14, 2004

[5] JUAN BARRIOS, PLAINTIFF AND APPELLANT,
v.
ED KUDER, DEFENDANT AND RESPONDENT.

[6] APPEAL from a judgment of the Superior Court of Los Angeles County. James L. Wright, Judge. Reversed. (Los Angeles County Super. Ct. No. NC032279

[7] Glaser & Damone and Robert P. Damone for Plaintiff and Appellant.

[8] Law Offices, Maureen C. O'Hara, and Gary S. Kranker for Defendant and Respondent.

[9] The opinion of the court was delivered by: Nott, J.

[10] **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

[11] California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

[12] Juan Barrios appeals a judgment entered following the trial court's grant of respondent Ed Kuder's motion for summary judgment. Appellant sued respondent for personal injury damages caused by a dog belonging to respondent's lessee. Under the theory of premises liability, a landlord is responsible for damages caused by a lessee's dog if the landlord has knowledge of the dog's dangerous propensities and the landlord has the ability to prevent foreseeable harm. Appellant contends that the evidence set forth in opposition to the motion for summary judgment creates triable issues of fact as to respondent's knowledge of the danger and respondent's ability to take preventive measures. We agree that appellant's contentions have merit, and we reverse the judgment.

[13] FACTS

[14] Respondent owns a single-family residence. During the time in question, Ruby Talbott was his lessee. Ms. Talbott owned three dogs which she kept at the residence. One of the dogs was named Angel, a German Shepherd-collie mix.

[15] Appellant is a mail carrier. On January 5, 2002, while delivering mail to Ms. Talbott, appellant was attacked by Angel, who broke through the front screen door. Appellant was badly bitten about the face, requiring 50 stitches.

[16] As a result of the incident, appellant sued Ms. Talbott for personal injury damages caused by the dog bites. She has defaulted, and is not a party to this appeal. Appellant also named respondent as a defendant, claiming that as the owner of the property, respondent was negligent in maintaining the premises.

[17] After the parties engaged in discovery, respondent made a motion for summary judgment, which was granted.

[18] DISCUSSION

[19] 1. Standard of Review

[20] Summary judgment is appropriately granted if the moving papers show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) *fn1

[21] A defendant seeking summary judgment meets the burden of proving that a cause of action has no merit if that party shows that one or more elements of a cause of action cannot be established, or that an affirmative defense exists to a cause of action. (§ 437c, subd. (n).) Once the defendant's burden is met, the onus shifts to the plaintiff to demonstrate that a triable question of fact exists as to that cause of action. (Ibid.) The plaintiff cannot rely simply on the allegations in the complaint, but must instead provide facts that specifically negate the evidence provided by the defendant. (§ 437c, subd. (o)(2).)

[22] On appellate review of the grant of summary judgment, we are required to examine the entire record de novo and determine whether the evidence provided by the parties gives rise to a triable issue of material fact. (ML Direct, Inc. v. TIG Specialty Ins. Co. (2000) 79 Cal.App.4th 137, 141.) In making that determination, the moving party's evidence is strictly construed while that of the opposing party is liberally construed. (Ibid.)

[23] 2. Premises liability for "dog-bite" cases

[24] We next examine three significant California dog-bite cases involving the liability of a landowner for damages caused by the dog of a lessee. The cases are Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504 (Uccello) (review den.), Donchin v.

Guerrero (1995) 34 Cal.App.4th 1832 (Donchin) (review den.), and Yuzon v. Collins (2004) 116 Cal.App.4th 149 (Yuzon).

[25] a. Uccello

[26] The dog-bite victim here was Juliana Uccello. She was a young girl who lived across the street from the Anthony Cappell family, who owned a large German Shepherd. The Cappells leased their home from Rex Laudenslayer. For a year prior to the attack on Juliana, Mr. Laudenslayer lived within three houses on the same street as the Uccellos and Cappells. In July of 1971, Juliana visited the Cappells to play with their daughter, Erna. While Juliana was in the kitchen, the German Shepherd came into the house and attacked her, causing serious injuries.

[27] While Mr. Laudenslayer was still living in the neighborhood, and prior to the biting of Juliana, the German Shepherd attacked two other neighbors (one of whom was a child), in separate incidents. Further, Mr. Laudenslayer often visited and inspected the premises. In November of 1971, four months after the attack on Juliana, the German Shepherd attacked Erna, causing severe injuries that required hospitalization. The dog was put to sleep two weeks later.

[28] The matter involving Juliana went to trial, and non-suit was granted to Mr. Laudenslayer at the close of the plaintiff's opening statement.

[29] In a case of first impression, the appellate panel reversed the judgment. The appellate court stated that when a landlord has knowledge that a dangerous animal is being kept on the landlord's leased premises, the landlord owes a third party a duty of care, so long as the landlord has the right to prevent the dangerous animal from being on the premises. (Uccello, supra, 44 Cal.App.3d at pp. 511-512.)

[30] The appellate court held that the evidence presented in the plaintiff's opening statement showed that the landlord consented to the tenant keeping the German Shepherd on the premises; that the landlord knew of the vicious propensities of the dog by virtue of the other attacks on neighbors; and that the landlord had the right to cancel the month-to-month written lease upon two weeks' notice, and thus could have removed the "dangerous condition" by requiring the tenants to move. *fn2

[31] (Uccello, supra, 44 Cal.App.3d at pp. 513-514.)

[32] b. Donchin

[33] Donchin is a case decided by Division Seven of this district. Ms. Donchin was on a public street, walking her small dog. She suffered a severe hip injury when she and her dog were attacked by two Rottweilers owned by Ubaldo Guerrero, a tenant of David Swift. The dogs had purportedly escaped from a defective portion of the fence around the rental property. The attack took place four blocks from the Swift property. There was no evidence that the dogs had ever attacked anyone before. The trial court granted

summary judgment in favor of Mr. Swift. The Court of Appeal reversed, explaining that a landlord who has actual knowledge of the vicious nature of a tenant's dog may be held liable when the dog attacks a third person. (Donchin, supra, 34 Cal.App.4th at p. 1838.) "In other words, where a third person is bitten or attacked by a tenant's dog, the landlord's duty of reasonable care to the injured third person depends on whether the dog's vicious behavior was reasonably foreseeable. Without knowledge of a dog's propensity a landlord will not be able to foresee [that] the animal poses a danger and thus will not have a duty to take measures to prevent the attack." (Ibid.)

[34] Donchin states that the analysis into a landlord's duty is a two-step process. "The first step is to determine the landlord's knowledge of the dog's vicious nature." (Donchin, supra, 34 Cal.App.4th at p. 1838.) Even though the landlord must have actual knowledge, that requirement can be met by circumstantial evidence that the landlord must have known of the animal's dangerous propensity. (Ibid.) The second step is to analyze whether the landlord had the ability to prevent the foreseeable harm. (Id. at pp. 1838-1839.)

[35] In sum, the Donchin court held that a landlord owes a third party a duty of care as to a tenant's dog if the landlord knew of the danger posed by the dog, and if the landlord had the power to take measures to prevent the harm. *fn3 (Donchin, supra, 34 Cal.App.4th at p. 1839.) Division Seven held that the opposition evidence presented by the plaintiff created a triable question as to both: (a) the landlord's knowledge of the dangerousness of the two Rottweilers, *fn4 and (b) whether the landlord could have taken measures to protect third parties, either by repair of the fence or termination of the lease.

[36] c. Yuzon

[37] Yuzon was decided by Division One of this district. A minor named Brian Yuzon was bitten by a pit bull mix owned by Tracy and Fin Blackburn, who were tenants of Gerald Collins. Brian was a guest of the Blackburns at the leased premises when the attack occurred. Suit was filed on behalf of Brian, and summary judgment was granted to Mr. Collins. Division One affirmed the judgment for the reason that the undisputed facts showed that the pit bull had not previously bitten or attacked anyone, nor had it ever exhibited any dangerous propensities, other than running, jumping and barking when a stranger would appear at the front door. Unlike Donchin, no evidence was presented that the pit bull would ram the door or gate in an effort to get at a person, nor did the dog bark viciously or bare its teeth. *fn5

[38] 3. The motion for summary judgment

[39] In support of his motion for summary judgment, respondent provided his declaration and that of Ms. Talbott. The impact of both declarations is that none of the dogs had ever bitten anyone before; that respondent had no knowledge of any dangerous propensities of any of the three dogs; and that the screen door was in good repair just prior to the biting incident. In particular, respondent averred that he had lived with Ms.

Talbott and her three dogs for over a month, and had never seen any of the animals exhibit any form of aggressive behavior. For her part, Ms. Talbott acknowledged that she had received complaints from neighbors about her dogs barking. However, she portrayed Angel as being the calming influence as to the behavior of the three dogs. *fn6

[40] 4. Opposition to the motion for summary judgment

[41] In opposition to the motion for summary judgment, appellant filed, inter alia, a declaration of Dr. Richard Polsky (who was the same expert in Donchin); declarations of Albert Escalera, Michael Coleman, and appellant; and selected portions of the depositions of Ms. Talbott and respondent.

[42] Mr. Coleman lives in a two-story home directly behind respondent's property. He stated that when Angel was in the backyard, he observed that on several occasions, she would charge the gate whenever anyone would come up to respondent's house. He said that her actions were very aggressive, as if she were trying to get out of the yard and at whoever was approaching. As a result, Mr. Coleman said he was afraid of Angel.

[43] Mr. Escalera is a mail carrier who delivers on appellant's route at least once per week. Mr. Escalera stated that each time he delivered mail to Ms. Talbott, the dogs acted viciously and aggressively toward him. He said that the dogs would "growl and bark in an angry tone. If the dogs were outside, they would also jump and push on the gate in an aggressive manner as if to try and get out. When they were in the house, in addition to barking, they would slam up against the mail delivery slot as if they were trying to get at me." Mr. Escalera concluded that based on their conduct, he was afraid of the dogs.

[44] Appellant's declaration echoed that of Mr. Escalera as to the dogs' aggressive behavior. Additionally, appellant stated that shortly after Ms. Talbott moved in, he gave her a preprinted postal service dog owner's awareness card, requesting that she as a dog owner, take preventive measures to insure that her dogs did not get loose to attack a mail carrier.

[45] Dr. Polsky reviewed the depositions of the parties, all of the pertinent declarations filed with the court, and virtually all other evidence submitted by the parties, including photographs of the injuries suffered by appellant. Dr. Polsky concluded that Angel and the other dogs exhibited strong territorial and aggressive tendencies which must have been noticed by respondent during the many times he had been around the dogs. Dr. Polsky noted Angel was extremely aggressive in charging through the screen door and biting appellant twice in the face. Dr. Polsky opined that Angel must have exhibited such aggressive behavior before, as it would be highly improbable that for the first time in her life that she would act so viciously toward appellant, a person who visited the residence on a daily basis.

[46] At his deposition, respondent admitted that in his life, he had experienced situations where the aggressive barking of dogs had caused him to be fearful for his

safety. He also admitted that he had seen Angel muzzled, and that he had lived with Ms. Talbott and the three dogs for a month. *fn7

[47] 4. Analysis

[48] Under current California law, a dog no longer gets a "free bite" in order to be determined a dangerous animal. When a stranger (or even an acquaintance) comes to a residence, it is not unusual for a dog to bark, run up to a door or fence, and jump up and down. Such behavior is characteristic of most dogs, and is not necessarily indicative of a dangerous propensity. (*Nava v. McMillan* (1981) 123 Cal.App.3d 262, 267; *Yuzon*, supra, 116 Cal.App.4th at p. 164.) However, as respondent himself acknowledged, the line is crossed when a dog charges a fence or door, and along with a fierce growl or bark, exhibits an attitude that indicates that the dog wants to get through the barrier to get at the person who has approached. In such a circumstance, anyone who observed such conduct would be put on notice that the dog was dangerous.

[49] In the present matter, we have competing evidence as to Angel's nature. According to respondent and Ms. Talbott, Angel was a good-tempered animal who had never exhibited any aggressive tendencies. However, the declarations of appellant, Mr. Escalera, and Mr. Coleman were to the opposite. Each of the men stated that all of the dogs, including Angel, were consistently aggressive, charging either the fence (when the dogs were outside) or the front door or mail slot (when the dogs were inside). The most telling point seems to be the act itself. It is uncontested that Angel ran through the screen door and viciously attacked appellant by biting him in the face. Even though she may never have bitten anyone before, common sense would seem to dictate against this being the very first time Angel had ever exhibited dangerously aggressive behavior. Accordingly, the evidence presented shows a triable issue as to whether Angel had previously exhibited such demeanor.

[50] Next, there is also a triable question of fact as to whether respondent was aware of dangerously aggressive behavior by Angel. Respondent admitted living with Ms. Talbott for a month, and to being around the premises on a fairly regular basis. In contrast, Ms. Talbott said that respondent lived with her and the dogs for three months, in the summer prior to this biting incident. Based on the conflicting declarations of appellant on the one hand, and respondent's on the other, a trier of fact could conclude that Angel exhibited aggressive behavior on a regular basis, and that respondent was being disingenuous (as was the property owner in *Donchin*) in his denial. As mentioned, knowledge on behalf of the landowner may be proved circumstantially. *fn8 (*Donchin*, supra, 34 Cal.App.4th at p. 1838.)

[51] Finally, a question exists as to whether respondent could have take precautions to prevent the incident. The parties have not explained to us the nature of the lease between respondent and Ms. Talbott. We therefore have no idea whether it was written or oral; for a term or at will; or what agreement (if any) was made regarding the allowance of pets. Appellant has argued that respondent had the ability to either order Ms. Talbott to remove the dogs from the premises or terminate the lease. Respondent

did not argue to the contrary, and thus the issue is conceded in appellant's favor. Further, neither the record nor the briefs describe exactly how the incident occurred or the condition of the screen door at that time. Although respondent states that the door was "in good repair," we do not know if the door was self-closing; whether the screen portion was reinforced in some fashion; whether one or more of the dogs broke through the screen; or whether the door was left ajar, and one or more of the dogs simply pushed the door open. Respondent does not argue on appeal that he had done everything he could to make the property safe to prevent the dogs from getting loose from the house, so the issue is unresolved.

[52] DISPOSITION

[53] The judgment is reversed. Appellant is awarded costs on appeal.

[54] NOT FOR PUBLICATION.

[55] We concur:

[56] BOREN, P.J.

[57] DOI TODD, J.

Opinion Footnotes

[58] *fn1 All undesignated statutory references are to the Code of Civil Procedure.

[59] *fn2 Other jurisdictions have questioned the result in *Uccello*, due to the concern that the termination of a lease simply moves the problem (the dangerous dog) from one neighborhood to another. (*Feister v. Bosack* (1993) 198 Mich.App. 19; *Klitzka ex. rel. Teutonico v. Hellios* (2004) 348 Ill.App.3d 594; *Wright v. Schum* (1989) 105 Nev. 611, 781.)

[60] *fn3 Mr. Swift initially denied even knowing of the existence of the dogs. However, he later admitted the dogs were permitted by the lease, and that he saw the dogs each month when he collected the rent.

[61] *fn4 The plaintiff presented declarations from a neighbor, a UPS delivery person, and an animal behavior expert. The neighbor said that the Rottweilers often ran loose in the neighborhood, acting in a threatening manner. The neighbor said he kept a baseball bat within reach to protect himself from the dogs. The UPS delivery person said that the Rottweilers were so threatening toward him that he would not go onto the property. Instead, he would simply throw whatever he was delivering over the fence. The expert was Richard Polsky, who has a Ph.D. in animal behavior. Dr. Polsky posited that if the dogs were vicious toward the neighbor and the UPS delivery person, they were most likely vicious to others, including Mr. Swift, on visits to his property.

[62] *fn5 The lease provided that the Blackburns could have a dog on the premises. At the time the lease was executed, the Blackburns had a Springer Spaniel. After that animal passed away, the Blackburns acquired a Dalmatian. The pit bull was obtained a year and a half before the biting incident. The Blackburns denied ever telling Mr. Collins about the pit bull, and he denied knowing of its existence.

[63] *fn6 Included in respondent's moving papers were complaints made to the City of Long Beach on December 6, 2001, by three neighbors (including Michael Coleman) regarding incessant barking by Talbott's dogs. Evidently those complaints were provided by respondent on the theory that the dogs were simply "barkers" and not "biters."

[64] *fn7 In her deposition, Ms. Talbott said it was three months.

[65] *fn8 In his deposition, respondent admitted being present when the mail was delivered to the leased premises. When asked what the dogs did when the mail was being delivered, respondent said "nothing, that I recall." That testimony is directly rebutted by the declarations of Mr. Escalera, appellant, and even Ms. Talbott, who stated in her deposition that all of the dogs in the neighborhood, including hers, got excited and barked loudly when the postal carrier arrived.