

Christopherson v. Hamm, No. C046616 (Cal.App. Dist.3 12/21/2004)

[1] IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT (San Joaquin)

[2] No. C046616

[3] 2004.CA.0011183

[4] December 21, 2004

[5] RICHARD CHRISTOPHERSON, PLAINTIFF AND APPELLANT,
v.
JACK HAMM, DEFENDANT AND RESPONDENT.

[6] (Super. Ct. No. CV017243).

[7] The opinion of the court was delivered by: Sims, Acting P.J.

[8] NOT TO BE PUBLISHED

[9] 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 This opinion has not been certified for publication or ordered published for purposes of rule 977.

[10] In this dog bite case, plaintiff Richard Christopherson appeals from a summary judgment entered in favor of defendant Jack Hamm. We shall reverse the judgment, because Hamm's motion failed to address the complaint's allegation that the person who maintained the dog, on property owned by Hamm, was acting as Hamm's agent and employee.

[11] STANDARD FOR REVIEW OF SUMMARY JUDGMENT

[12] A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Even though the plaintiff would have the burden of proof at trial, a defendant moving for summary judgment bears the burden to present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true, or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990; Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850, 861.)

[13] We review the record and the determination of the trial court de novo. (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476.) "First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." (Waschek v. Department of Motor Vehicles (1997) 59 Cal.App.4th 640, 644.)

[14] THE COMPLAINT

[15] In May 2002, plaintiff filed a personal injury complaint against Jack Hamm and Jose Gonzales (Gonzales is not a party to this appeal).^{*fn1} The complaint alleged negligence, in that on May 11, 2001, "[d]efendants['] dog viciously attacked and repeatedly bit plaintiff[']s leg. Defendants were maintaining a vicious and dangerous dog in disregard of the risk known to them." The complaint also alleged premises liability under theories of (1) negligent ownership, maintenance, management, or operation of property, and (2) willful failure to warn of a dangerous condition. The complaint alleged Gonzales was "the agent['] and employee['] of [Hamm] and acted within the scope of the agency"

[16] THE SUMMARY JUDGMENT MOTION

[17] In December 2003, Hamm filed a motion for summary judgment, which made no mention of the agency allegation. Instead, Hamm asserted in the separate statement of undisputed facts that (1) the dog was owned, not by Hamm, but by Gonzales; (2) Hamm did not own, maintain, or control the dog; (3) Hamm had no knowledge of any dangerous or vicious propensity of the dog before it bit plaintiff; (4) plaintiff had no evidence that Hamm had knowledge the dog was dangerous; and (5) plaintiff himself was unaware the dog was dangerous before it bit him.^{*fn2}

[18] Among the evidence submitted by Hamm was plaintiff's interrogatory answer describing the incident, as follows: Plaintiff was on property (business space), which he rented from Hamm, when a Rottweiler "owned by Jack Hamm's foreman, Jose Gonzales" broke his chain, crossed the street, and attacked plaintiff's dog. Gonzales came and pulled the Rottweiler away. As plaintiff carried his own dog away, the Rottweiler broke loose from Gonzales, bit plaintiff's leg and dragged him along the ground.

[19] Hamm also submitted his own declaration, attesting as follows:

[20] "1. I am the Manager^{*fn3}] of Lima Ranch. I own a building which was being rented by Plaintiff Richard Christopherson on May 11, 2001. Lima Ranch owns a house across the street from that building which was being rented by Defendant Jose Gonzalez[s] at the time that the dog bite incident alleged in the Complaint took place on May 11, 2001.

[21] "2. I did not own, maintain or control the dog which allegedly bit plaintiff on May 11, 2001.

[22] "3. I did not receive any complaints prior to May 11, 2001 about the dog which allegedly bit plaintiff on May 11, 2001.

[23] "4. Prior to May 11, 2001 I was not aware that the dog in question had ever bitten or attacked anyone prior to the time that it allegedly bit and attacked plaintiff on May 11, 2001.

[24] "5. I was unaware of any dangerous or vicious propensity of the dog that allegedly bit plaintiff on May 11, 2001 prior to the alleged dog bite on May 11, 2001."

[25] Hamm also submitted (in support of his assertion that plaintiff had no evidence Hamm had actual knowledge the dog was dangerous) plaintiff's interrogatory answer that set forth an agency theory as follows:

[26] "Jack Hamm knew that the Rottweiler was owned by his foreman [Gonzales], that the dog was chained 24 hours a day, that he was there to guard the house of his foreman and a warehouse owned by Jack Hamm behind the foreman's house. Jack Hamm stored items in that warehouse, at one time he had a fire engine in it. Jack Hamm knew or should have known that a guard dog chained 24 hours a day could be vicious and attack people, as that was he was there for [sic]. The Rottweiler had broken loose several times before, and Jack Hamm knew or should have known that this huge guard dog could not be adequately restrained. Jack Hamm had a duty to inspect his commercial property and in the exercise of reasonable care would have known the dog was dangerous and would have removed this dangerous condition. Jack Hamm had a duty to supervise his employee and in the exercise of reasonable care would have known the dog was dangerous and would have removed this dangerous condition. As the Rottweiler was being maintained for the protection of Jack Hamm's property, he had a duty to insure that the Rottweiler was adequately restrained and not allowed to run loose."

[27] In excerpts of plaintiff's deposition testimony which were submitted with the motion, plaintiff said he believed Gonzales owned the dog and had no proof that it was a guard dog for Hamm's benefit.

[28] THE OPPOSITION

[29] Plaintiff filed an opposition, disputing the issue of ownership of the dog, asserting the dog was a guard dog kept for Hamm's benefit by the foreman of Hamm's ranch, and Hamm would have discovered the danger had he exercised reasonable care in the maintenance of his commercial property.

[30] Plaintiff submitted his deposition testimony, listing the above-stated reasons for believing the dog was a guard dog for Hamm's benefit, and plaintiff submitted his own declaration, stating in part:

[31] "2. As I testified in my deposition, the huge Rottweiler that attacked me was chained on defendant Jack Hamm's property. It was not chained within the home or fenced yard of Jack Hamm's supervisor, Jose Gonzales, but in front of a warehouse owned by defendant Jack Hamm. The Rottweiler had been chained there for four or five years, and for a time I could see a fire truck in the warehouse from the premises I rented across the street. The Rottweiler was also visible from across the street.

[32] "3. At my deposition, I testified I guessed the Rottweiler was owned by Jose Gonzales, as he was taking care of it. But the Rottweiler never did anything but bark all of the time and guard defendant Jack Hamm's warehouse. I believe defendant Jack Hamm told Jose Gonzales to get a guard dog and post it in front of his warehouse."

[33] Plaintiff also attested Hamm "visited his supervisor on a frequent basis, and must have seen the Rottweiler. Also, he supervised the remodeling of the warehouse, and must have seen and heard this huge dog 20 feet away." Plaintiff testified in deposition: "I've never seen the dog play with Jose's kids. It's not a people dog." Plaintiff submitted a letter from county animal control, which was unable to locate the dog or identify its owner.

[34] THE REPLY

[35] Hamm filed a reply, asserting plaintiff had no evidence, but only speculation that the dog was a guard dog for Hamm's property.

[36] THE RULING

[37] The trial court granted summary judgment, ruling there was "[n]o evidence that landlord Ham[m] had knowledge of [the] dog's vicious propensities."

[38] Plaintiff appeals from the ensuing judgment.

[39] DISCUSSION

[40] In summary judgment proceedings, a defendant's motion for summary judgment must defeat the allegations of the plaintiff's complaint. (Code Civ. Proc., § 437c, subd. (p)(2); Waschek v. Department of Motor Vehicles, supra, 59 Cal.App.4th 640, 644; FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 381.)

[41] Here, Hamm's motion failed to address allegations of agency. The complaint alleged plaintiff was bitten by a dog maintained on Hamm's property, and Gonzales was an agent and employee of Hamm and acted within the scope of that agency. Hamm's assertions that Gonzales owned the dog and that Hamm did not own, maintain or con-

trol the dog, did nothing to refute the theory, as alleged in the complaint (and developed during discovery), that Gonzales maintained the dog as Hamm's agent, as a guard dog to guard Hamm's ranch property.

[42] The complaint's allegations could lead to imposition of liability against Hamm. This case presents a potential for liability under Civil Code section 1714, which currently provides: "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property" Liability extends to persons off the premises for injuries due to the landowner's lack of due care in the management of the property. (*Davert v. Larson* (1985) 163 Cal.App.3d 407, 410.)

[43] As indicated, Hamm did not refute the allegation that he owned the premises. Although Hamm declared the house was owned by Lima Ranch, which he managed, management is not inconsistent with ownership.*fn4

[44] A property owner may be liable for injury caused by a tenant's guard dog, which is used for guarding commercial property, without proof the landowner had actual knowledge the dog was dangerous, even if the tenant is not maintaining the dog as agent for the landowner. Thus, in *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, a beer delivery person was bitten by a German shepherd dog owned by and used as a guard dog by a commercial tenant operating a liquor store in a building owned by the defendant-landlord. Although the tenant displayed signs to beware of the guard dog, the landowner said he visited the store several times a year, and the dog never appeared vicious. (*Id.* at p. 1132.) The jury imposed liability on both the tenant and the landlord, finding the landlord did not have actual knowledge of the dog's dangerous propensities, but would have had such knowledge had he exercised reasonable care, and he was negligent in failing to eliminate this dangerous condition. (*Id.* at p. 1133.) Upon appeal by the landlord, the appellate court affirmed, citing Civil Code section 1714, subdivision (a), that "Every one is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person" (*Id.* at p. 1133.) *Portillo* said, "a landlord has a duty to exercise reasonable care in the inspection of his commercial property and to remove a dangerous condition, which includes a dog, from the premises, if he knew, or in the exercise of reasonable care would have known, the dog was dangerous and usually present on the premises." (*Id.* at p. 1132, italics added.) "It is reasonably foreseeable that a guard dog kept in a business open to the general public will injure someone; the purpose of such animals is to protect the premises and it is highly unlikely that they are docile by nature. . . . Moreover, as is shown in the instant case, the types of injuries inflicted by guard dogs are frequently quite serious." (*Id.* at p. 1135.)

[45] *Portillo*, supra, 27 Cal.App.4th 1128, acknowledged case law holding a landlord was liable for a tenant's dog only if the landlord had actual, rather than constructive, knowledge of the dog's propensities. (*Id.* at pp. 1136-1137, citing inter alia *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504.) However, *Portillo* distinguished *Uccello* and similar cases, on the grounds that they involved family pets in single-family residences,

not guard dogs guarding businesses open to the public. (Portillo, supra, 27 Cal.App.4th at p. 1137.)

[46] Here, imposition of liability on Hamm is even more justified than it was in Portillo, because Hamm had control over Gonzales as Gonzales's employer.

[47] Hamm maintains this case is controlled by Uccello, supra, 44 Cal.App.3d 504, not Portillo. He argues Portillo, supra, 27 Cal.App.4th 1128, does not control this case, because plaintiff was not a business invitee, as was the plaintiff in Portillo. However, the Portillo holding did not turn on the plaintiff's status as invitee; rather, the court noted the defendant's duty of care extended to the general public. (Id. at pp. 1134, 1135.) Plaintiff was a neighboring tenant of Hamm's and was one of the persons put at risk by the presence of the dog.

[48] Hamm also argues Portillo, supra, 27 Cal.App.4th 1128, does not apply, because plaintiff failed to provide sufficient evidence to establish that the premises were commercial property. However, in this summary judgment proceeding, the burden was on Hamm, as the moving party, to provide evidence that the premises were not commercial property. (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th 826, 850, 861.)

[49] Hamm failed to submit any evidence that the property was not commercial property or that plaintiff would be unable to establish it was. Hamm says the dog was kept behind a house where Gonzales lived, and therefore it was not commercial property. However, plaintiff's deposition testimony indicated the house where Gonzales lived, as foreman of Hamm's dairy ranch, was part of the ranch property, as was the barn/warehouse behind the house. Plaintiff testified the dairy ranch was "like a small town," with some of Hamm's two dozen employees (at peak season) living in housing provided by Hamm. Plaintiff said Hamm owned some but not all structures in the area. As indicated, Hamm's declaration said he was the "Manager" of Lima Ranch, which owned the house where Gonzales lived. This suggests the house may be considered to be part of commercial property. As indicated, Hamm's statement that he was manager did not disprove any ownership interest in the ranch, because being a manager of a business is not mutually exclusive with owning the business.

[50] Hamm says plaintiff sometimes called the structure behind Gonzales's residence a "warehouse" and sometimes called it a "barn." Hamm fails to show the significance of the distinction.

[51] The posture of this appeal does not require us to determine whether or not the property was commercial property. We merely conclude Hamm failed to meet his burden to show the property could not be considered commercial property.

[52] Hamm argues plaintiff refers to the dog as a "guard dog," whereas plaintiff said in deposition that he had no idea why Gonzales had the dog. We shall presume Hamm means to invoke the principle that a defendant may win summary judgment by

showing the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th 826, 854.)

[53] Here, plaintiff said in deposition that he had no idea why Gonzales had the dog and no proof the dog was a guard dog for Hamm. However, this lay person's use of the word "proof" does not translate into an admission of a lack of legal proof. Liability may be proved by circumstantial evidence. Here, there was circumstantial evidence, the totality of which might support an inference that the dog was a guard dog for Hamm's ranch property, as follows:

[54] Gonzales lived in a house owned by Hamm (or by Hamm's ranch) and was foreman for Hamm's ranch, which was like a "small town." Behind the house was a warehouse/barn owned by Hamm, where Hamm kept belongings. Over the course of several years, the dog (a "huge" Rottweiler) was always kept chained behind the house, in an unfenced area between the house and the warehouse/barn, where it barked incessantly. Hamm was at the property at least once a week. The dog was not kept chained in the fenced front yard of the house.*fn5 Gonzales's children never played with the dog.

[55] In reviewing summary judgment, we view the evidence in a light favorable to plaintiff as the losing party, liberally construing his evidentiary submission while strictly scrutinizing defendant's own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768.)

[56] We conclude Hamm was not entitled to summary judgment, because he failed to defeat plaintiff's theory that Hamm could be liable for a guard dog maintained by his agent to protect Hamm's ranch property, if Hamm in the exercise of reasonable care would have known the dog was dangerous. We do not express any view on the merits. We merely hold Hamm failed to meet his burden as the party moving for summary judgment, and the judgment must be reversed. We need not address the parties' arguments about assumption of the risk (which was not a basis for Hamm's motion), or whether there was evidence that Hamm had knowledge the dog was dangerous.

[57] DISPOSITION

[58] The judgment is reversed. Plaintiff shall recover his costs on appeal. (Cal. Rules of Court, rule 27.)

[59] We concur: DAVIS, J., ROBIE, J.

Opinion Footnotes

[60] *fn1 Plaintiff's appellate brief asserts, without citation to the record, that Gonzales was murdered before the complaint was filed.

[61] *fn2 For purposes of this appeal, we accept that Hamm did not "own" the dog, because plaintiff answered "No" to an interrogatory asking if he contended Hamm owned the dog. We do not address plaintiff's appellate argument that a man may own an animal and yet not be its keeper.

[62] *fn3 Being manager is not inconsistent with also being the owner. Hamm did not deny ownership of the ranch.

[63] *fn4 Plaintiff's appellate brief, in apparent inadvertent error, says the dog was chained behind a house owned by Gonzales.

[64] *fn5 The dog could not be kept unchained in the fenced front yard, because the fence would not prevent its escape.