

[U] Cunningham v. Ostray, No. B157681 (Cal.App. Dist.2 02/18/2003)

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

[2] B157681

[3] 2003.CA.0001515

[4] February 18, 2003

[5] DAVID A. CUNNINGHAM, PLAINTIFF AND APPELLANT,
v.
HENRY A. OSTRAY, DEFENDANT AND RESPONDENT.

[6] APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Affirmed. (Los Angeles County Super. Ct. No. EC029355)

[7] Caskey & Holzman, Marshall A. Caskey and Daniel M. Holzman for Plaintiff and Appellant.

[8] Law Offices of Gregory Grantham, Gregory Grantham and John Saba for Defendant and Respondent.

[9] The opinion of the court was delivered by: Epstein, J., Acting P.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[10] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.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] David Cunningham appeals the judgment in his civil action against Henry Ostray. The suit was for injuries Cunningham incurred from a dog bite at Ostray's home. The trial court granted summary judgment in favor of Ostray because it concluded that no genuine issue of material

fact as to Ostray's ownership of the dog or knowledge of the animal's vicious propensities. We affirm.

[13] FACTUAL AND PROCEDURAL SUMMARY

[14] The summary judgment papers show that on January 18, 2000, David Cunningham knocked on the door of his neighbor, Henry Ostray, to inform him that the dome light in a truck operated by Ostray's son was lit. After Cunningham knocked on the screen door and was invited into the house, a dog rushed him and bit him, inflicting a painful wound that he claims caused significant injury.

[15] Cunningham sued Ostray, Ostray's estranged wife (Denise Ostray), and Ostray's two adult sons (Robert and Chris Ostray). Defendants moved for summary judgment. The trial court granted the motion in favor of Ostray and against Cunningham. *fn1 Cunningham filed a timely appeal of the judgment only as to Ostray.

[16] DISCUSSION

[17] I.

[18] Our review of the trial court's ruling on summary judgment is de novo. (Leko v. Cornerstone Bldg. Inspection Service (2001) 86 Cal.App.4th 1109, 1114.) The motion is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant meets that burden as to any cause of action by demonstrating that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) Once that burden is met, the burden shifts to the plaintiff to present evidence of specific facts demonstrating a triable issue of material fact as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (o)(2); Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 853–854.)

[19] II.

[20] Cunningham argues Ostray is liable for the dog bite related injuries because Ostray was the owner under Civil Code section 3342, or

was a keeper of the dog liable under common law negligence.

[21] Civil Code section 3342 provides that the "owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or 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." (Civ. Code, § 3342, subd. (a).) An individual is not liable under this statute unless he or she is the dog's owner. "[O]ne who treats a dog as living at his house, and undertakes to control his actions is the owner" (*Buffington v. Nicholson* (1947) 78 Cal.App.2d 37, 42, italics added.)

[22] Some 16 months before the incident, the dog was given, as a puppy, to Ostray's then 19 year-old son, Robert. Ostray was incarcerated at the time, so only Robert, his brother, and their mother, Denise, lived in the home owned by Ostray and Denise. Ostray remained incarcerated for approximately the first 13 of the 16 months the dog lived in the home. Denise licensed the dog. Robert fed, trained, groomed, and cared for the dog. He also brought the dog to the veterinarian for shots. Everyone in the family considered Robert to be the dog's owner. No evidence suggests that Ostray undertook to control the dog's action. Cunningham failed to raise a genuine issue of material fact that Ostray ever owned the dog.

[23] Someone other than the owner, a keeper, also can be liable for a dog's attack if the keeper had previous knowledge of the dog's "vicious propensities." (*Buffington v. Nicholson*, supra, 78 Cal.App.2d 37, 41- 42.) No evidence suggests that Ostray, or anyone in Ostray's family, knew the dog had vicious or dangerous propensities before the attack on Cunningham. At one point in the briefing, appellant seems to argue that the dog's vicious propensities may be imputed to Ostray because the breed is inherently dangerous. The parties dispute the dog's breed: American Pit Bull Terrier, or Sharpei and terrier mix. Whatever the ancestry, we cannot supply by judicial notice that which appellant here failed to establish by proof: the vicious propensity. (See *Lundy v. California Realty* (1985) 170 Cal.App.3d 813, 822.) So the trial court's grant of summary judgment was appropriate.

[24] DISPOSITION

[25] The judgment is affirmed. Respondent shall recover his costs

on appeal.

[26] NOT TO BE PUBLISHED

[27] We concur:

[28] HASTINGS, J.

[29] CURRY, J.

Opinion Footnotes

[30] *fn1 According to respondent, Cunningham filed a request for dismissal as to the other three defendants. The record does not contain documentation of the request or dismissal. Only Ostray is a respondent on this appeal.