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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MEHGAN HANSEN,

Plaintiff and Appellant,

v.

LAWRENCE J. T. HOLDEN et al.,

Defendants and Respondents.

F045885

(Super. Ct. No. CV 49737)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley, Judge.

Law Offices of Donald L. Jageman, Donald L. Jageman, for Plaintiff and Appellant.

Crabtree, Schmidt, Zeff & Jacobs, Walter J. Schmidt, for Defendant and Respondent.

No appearance for defendants and respondents Penny Schutt and Larry Schutt.

-ooOoo-

Plaintiff Mehgan Hansen (Mehgan) filed suit against defendants Penny Schutt (Penny), Larry Schutt (Larry), and Lawrence Holden (Holden) for negligence. She alleged that while she was visiting the home owned by Holden and rented by Penny, she was attacked by a pit bull named Spike that belonged to Larry. The trial court granted

Holden's motion for nonsuit. A jury later returned a verdict in favor of Mehgan against Penny and Larry and awarded damages in the amount of \$75,000. Mehgan appeals the court's granting of a nonsuit in favor of Holden, as well as two evidentiary rulings. We affirm.

PROCEDURAL BACKGROUND

On April 25, 2003, Mehgan filed a complaint in the Superior Court of Tuolumne County alleging the following causes of action: general negligence, premises liability, and strict liability pursuant to Civil Code section 3342, subdivision (a). An entry of default was made on August 28, 2003, against Penny and Larry. On October 14, 2003, Holden answered the complaint. A jury trial began on April 26, 2004.

FACTUAL BACKGROUND

Evidentiary rulings

Prior to jury selection, the trial court issued rulings regarding the following motions in limine by Holden: 1) to exclude evidence regarding alleged propensities of the pit bull breed; 2) to exclude expert evidence regarding alleged propensities of the pit bull breed because the expert did not examine the subject animal, Spike, to determine its viciousness; and 3) to exclude all evidence on the issue of liability other than evidence that Holden had actual knowledge of the vicious propensity of Spike prior to the attack.

The court initially granted each of these motions; however, after reviewing *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, ruled that evidence of Spike's past aggressive behavior was admissible. It excluded any evidence regarding the specific behavior of the pit bull breed. During the trial, the court ruled that an admission made by Larry that Spike had bitten him was admissible only against Larry and instructed the jury that the admission could not be considered against Holden.

The incident

On May 8, 2002, 16-year old Mehgan visited the home of Jacqueline Schutt (Jackie), which was rented by Jackie's mother, Penny, from Holden. Mehgan had visited the Schutt's home on other occasions and saw that they had dogs at the house. Two dogs, Precious and Spike, were usually tied by a chain to trees in front of the house. According to Mehgan, Spike resembled a pit bull—he had short ears and tail, and had muscular features. In fact, Spike was a pit bull/chow mix.

After talking with Jackie, Mehgan went outside of the Schutt's house and decided to walk back to her home. Mehgan saw that Larry was outside and decided to pet Precious and Spike. After she petted Precious, Mehgan began to walk toward Spike. Spike began running toward Mehgan and suddenly jumped up and attacked her, biting Mehgan's face and arms. A neighbor helped Mehgan after she got away from the dog. As a result of the attack, Mehgan has a scar on her left arm, two scars on her chin, and two of her teeth are missing. She must wear an apparatus known as a "stayplate" or "flipper," which fills in the place where her jawbone and teeth are missing.

Following the attack, Larry told Mehgan's mother that Spike had bitten him and showed her the scars on his arms from the bites.

Spike's history

Penny testified that Spike would bark and growl when a stranger would walk up to the house. In addition, Penny admitted that a neighbor once complained about Spike's barking and that Animal Control had cited her for her dogs' excessive barking, poor living conditions, and for muzzling Spike. Larry testified that Spike had bitten him in the past and once lunged at his friend, admitting that Spike would bark at people who ran past the house.

Michelle Nixon, an Animal Control officer who visited the property and encountered the dogs, testified that she felt threatened once when Spike displayed

aggression toward her; in fact, she requested that Larry hold on to Spike's leash very tightly. Nixon also stated that Penny had told her that Spike had once been aggressive with a neighbor child.

Dr. Robert Pollard, a licensed veterinarian, testified that he believed Spike had dangerous propensities prior to biting Meghan. Pollard noted that Spike displayed an aggressive reflex and was a frustrated animal due to his poor living conditions. In addition, he described Spike as an "alpha male" who was more likely to bite than a female dog.

Holden's knowledge of the dogs and their dangerous propensities

Penny testified that Holden visited the property she rented from him. According to Penny, Spike was tied up in front of the house all the time. She had dog houses on the property but did not remember ever discussing the dogs with Holden or warning him to stay away from Spike. Penny admitted that she never told Holden about the visits that Animal Control made to the property regarding the care of the dogs. Penny also testified that she did not post a warning sign about the dogs. Holden did ask Penny to get rid of Precious after the biting incident involving Meghan, and Penny moved Precious to her mother's house.

Larry testified that he did not remember Holden coming up to the house so that he could warn Holden about Spike. He did remember Holden visiting the property a couple of years ago, but did not recall having any discussion with Holden about Spike before Meghan was bitten.

Nixon stated that she did not need to make contact with the owner of the property (Holden) regarding the dogs on the property as Animal Control was only involved with the owner of the dogs.

Holden testified that the lease agreement between he and Penny allowed her to keep only one small pet and required that she obtain his written permission to do so. Holden explained, however, that he never gave Penny written permission and did not

recall whether Penny had any pets when she signed the lease. Holden admitted that he visited the property “from time to time” to check on its upkeep and to make repairs. In 1999, after seeing trash on the property, Holden hired a man to clean it up. Holden denied ever talking to the man about dogs located on the property.

Holden admitted to visiting the property in January 2001 in order to verify the property lines, but denied seeing any dogs tied up in the front. He also acknowledged that he saw two dogs tied up outside the house in 1999 but had no idea to whom they belonged and that neither resembled the description of Spike.

Holden testified that he did not remember any dogs barking while he visited the property and denied ever being obstructed from walking anywhere because of the dogs. He admitted that pit bulls have a reputation of being unstable and could be dangerous, but denied knowing that Spike was on the property. Holden never felt in danger when he visited the property and denied that any dogs ever growled at him. In response, Mehgan’s counsel introduced an interrogatory answer provided by Holden that stated he was “unaware that [the Schutts] had dogs on the premises until two months after the alleged incident occurred when ... Penny ... notified [him] of the incident.”

The nonsuit motion

On April 28, 2004, the court granted Holden’s motion for nonsuit, stating: “In approaching this, I have drawn every inference in favor of the plaintiff against Mr. Holden, and I find that there is no evidence which would support an inference by the jury that Mr. Holden must have known that Spike was vicious.” The court reasoned that there was no evidence that the Schutts had told Holden about Spike snapping at Larry or his friend. In addition, the evidence showed that Holden had visited the property only a few times and, while the dogs were likely chained in the front yard, there is no evidence the jury could use to conclude that Holden “must have known that Spike was vicious.” The court distinguished *Donchin*, observing that the landlord in *Donchin* had visited the property every month and that the dogs ran loose.

Later that day, the jury returned a verdict against the Schutts and awarded damages in the amount of \$75,000.

DISCUSSION

I. Nonsuit properly granted

Meghan first appeals the trial court's granting of Holden's motion for nonsuit. She argues that the court failed to give her evidence all legitimate inferences, and she presented substantial evidence of Holden's liability by establishing that 1) Holden made false exculpatory statements; 2) he knew about Spike's prior aggressive behavior; and 3) he had control over the property so that he could have required Spike to be removed. For the following reasons, we agree that the court correctly granted Holden's motion for nonsuit.

A. Standard of review

A motion for nonsuit must be denied “if there is ... any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint” (*Golceff v. Sugarman* (1950) 36 Cal.2d 152, 153.) However, a “defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.” (*Nally v. Grace Community Church* (1998) 47 Cal.3d 278, 291 (*Nally*)). “Since motions for nonsuit raise issues of law [citation], we review the rulings on those motions de novo” (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.) “In reviewing a grant of nonsuit, we are ‘guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.’ [Citation.] We will not sustain the judgment “‘unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.’”” (*Nally, supra*, 47 Cal.3d at p. 291.) We do not weigh the evidence or witness credibility. (*Ibid.*)

B. Landlord liability for injuries caused by tenant's dog

A landlord can be held liable for injuries caused to a third person by a tenant's dog only if the landlord has actual knowledge of the dog's vicious nature and has the ability to prevent the foreseeable harm. (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 507 (*Uccello*); *Donchin v. Guerrero, supra*, 34 Cal.App.4th at p. 1838.) “[T]he 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 propensities a landlord will not be able to foresee the animal poses a danger and thus will not have a duty to take measures to prevent the attack.” (*Ibid.*)

The first step to determining landlord liability is whether the evidence establishes that the landlord had actual knowledge of the dog’s vicious nature. (*Uccello, supra*, 44 Cal.App.3d at p. 507; *Donchin v. Guerrero, supra*, 34 Cal.App.4th at p. 1838.) Actual knowledge “can be satisfied by circumstantial evidence the landlord *must* have known about the dog’s dangerousness as well as direct evidence he *actually* knew.” (*Ibid.*) “[A]ctual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the defendant ‘must have known’ and not ‘should have known’ will an inference of actual knowledge be permitted.” (*Uccello, supra*, 44 Cal.App.3d at p. 514, fn. 4.)

The second step involves determining whether the landlord had the ability to prevent the foreseeable harm. (*Uccello, supra*, 44 Cal.App.3d at p. 507; *Donchin v. Guerrero, supra*, 34 Cal.App.4th at pp. 1838-1839.) This can be shown by establishing that the landlord had the power to take “measures on the property he controls which would have prevented plaintiff’s injuries.” (*Id.* at p. 1839.) Examples include requiring a tenant to remove a dog from the leased property or to ensure that the property is secure enough to prevent the dog from being able to escape and harm anyone. (*Ibid.*)

C. Analysis

The main issue is whether Holden had actual knowledge of Spike's dangerousness. Meghan presented no direct evidence of this fact. We realize, however, that a fact finder may infer actual knowledge based on circumstantial evidence that Holden knew about the danger that Spike posed. (*Uccello, supra*, 44 Cal.App.3d at p. 514, fn. 4.) In support of this, Meghan has two theories: 1) Holden made a false exculpatory statement, from which we could infer that he possessed actual knowledge, and 2) the testimony of the Schutts and the Animal Control officer established that Spike was dangerous. We disagree with both of these theories.

To begin with, we conclude that Holden did not make any relevant false exculpatory statements. In his interrogatory response, Holden indicated that he did not know the Schutts had dogs on the premises until two months after Meghan was bitten. Holden's deposition and trial testimony did not contradict this statement. At trial, Holden explained that he visited the property and saw two dogs in the yard, but he did not know to whom the dogs belonged. Based on this trial testimony, Holden's interrogatory answer still rings true—that he did not know the Schutts had dogs on the premises until after Penny notified him of Meghan's injury. For all Holden knew, the dogs he saw belonged to someone else. Holden denied that either of the dogs resembled the description of Spike. Further, both Penny and Larry testified that they did not discuss the dogs with Holden on any occasion. In sum, no witness was able to place Holden with the dogs at any point during the time the Schutts rented the property from him.

However, even assuming that Holden knew there were dogs on the property, there is no evidence that contradicts Holden's statement that he did not know about Spike's dangerous propensities. The prior incidents about Spike described by Penny, Larry, and the Animal Control officer do not establish Holden's knowledge. Each admitted that they had not discussed these incidents with Holden. Penny testified that she did not remember ever talking about the dogs with Holden or warning him to stay away from

Spike. Larry did not recall talking with Holden about Spike before Meghan was bitten. The Animal Control officer admitted that she did not need to make contact with Holden regarding the dogs on the property because Animal Control's only issue was with the owner of the dogs. Moreover, there was no evidence that when Holden visited the property and likely saw Spike, that Holden entered Spike's "chain distance," resulting in the dog's acting aggressively toward him.

These facts distinguish this case from that of *Donchin v. Guerrero, supra*, 34 Cal.App.4th 1832. In *Donchin*, a landlord was sued when his tenant's dogs attacked a neighbor. The landlord initially denied knowing that dogs lived on the rental property. (*Id.* at p. 1835.) Later, the landlord admitted that he knew the dogs lived there, but denied knowing they were dangerous. (*Ibid.*) *Donchin* held that when a party denies an incriminating fact (the existence of dogs) then later admits it, the fact finder properly may infer that the denial of another fact (e.g., knowledge of dangerousness) is false. (*Id.* at pp. 1841-1843.) In our case, Holden never said that he did not know the Schutts had dogs on the property. Further, he did not know that the two dogs he saw once during a visit—neither of which resembled Spike—belonged to the Schutts.

This case can also be distinguished from *Donchin* on the basis that Dr. Pollard never concluded that it was likely Holden had seen Spike display signs of aggression when he visited the property based on the dog's prior aggressive acts toward others. In *Donchin*, the animal behaviorist testified that, based on the prior aggressive incidents observed by the two disinterested witnesses (a neighbor and a UPS carrier), the landlord would have "undoubtedly" witnessed the aggressive behavior of the dogs. (*Donchin v. Guerrero, supra*, 34 Cal.App.4th at pp. 1843-1844.) In sum, Dr. Pollard did not make the necessary connection between the prior acts and Holden's knowledge as was done by the animal behaviorist in *Donchin*.

In essence, this case involves a landlord who seldom visited the property while it was rented by the Schutts. Although Penny testified that the dogs were tied up in the

front of the house “all the time,”¹ this evidence is insufficient to support the inference that Holden, during his infrequent visits, knew that Spike was dangerous. Unlike the landlord in *Donchin*, there is no evidence placing Holden in contact with Spike at a time when Spike would undoubtedly have acted in an aggressive and dangerous manner. As a result, the motion for nonsuit properly was granted.

II. Exclusion of breed-specific testimony

Mehgan also appeals the exclusion of evidence regarding the specific behavior of the pit bull breed. In response to Holden’s motions in limine seeking to prohibit the introduction of any breed-specific evidence, Mehgan produced several scientific studies showing that pit bulls are a dangerous dog breed. The court excluded the evidence, reasoning that because the various cases it reviewed only talked about the “dog in question,” “[w]hat the rest of the pit bulls in the world do” was not relevant. Mehgan contends this ruling was error because breed-specific evidence was permitted in *Donchin*, *supra*, and there was evidence that Holden knew that Spike was a pit bull. Holden, however, argues that the court’s ruling was proper, citing *Lundy v. California Realty* (1985) 170 Cal.App.3d 813, which refused to take judicial notice regarding breed-specific evidence, noting that there was no evidence that Holden knew Spike was a pit bull.

A. Standard of review

An appellate court applies the abuse-of-discretion standard of review to any ruling by a trial court on the admissibility of evidence, including rulings concerning its relevancy. (*People v. Waidla* (2000) 22 Cal.4th 690, 724-725.) Evidence is relevant where it has a tendency in reason to prove or disprove any disputed fact of consequence,

¹Penny contradicted her own testimony when she admitted that, for a time, Spike was living at her mother’s house located next door. In addition, her testimony is undermined by Larry, who stated that he would walk Spike “every once in awhile,” “[l]ike two or three times every two or three weeks.” Larry would ride a skateboard while Spike pulled him by a leash.

including the credibility of a witness or hearsay declarant. (Evid. Code, § 210; *O’Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 501.)

B. Analysis

We conclude that the court was correct in excluding the breed-specific evidence because the evidence was not relevant. First, the record indicates that Spike was not a purebred pit bull; rather, Larry said Spike was a pit bull/chow mix. As a result, much of the information in the scientific studies proffered by Mehgan is not relevant as it mainly refers to bites by purebred dogs.

Second, there is no evidence that Holden knew Spike was part pit bull. He testified that the dogs he saw on the property did not resemble the description of Spike. Mehgan provided no direct or circumstantial evidence to contradict Holden’s lack of knowledge that Spike was a pit bull. The only evidence proffered by Mehgan was that, because Holden had visited the property and the dogs were always tied in the front, Holden “must have known” that Spike was a pit bull. While it is correct that a landlord’s actual knowledge of a dog’s dangerous propensities may be shown by circumstantial evidence, this knowledge cannot be established by relying on speculation or conjecture. (*Uccello, supra*, 44 Cal.App.3d at p. 514, fn. 4.)

We also disagree with Mehgan that breed-specific evidence should have been admissible as it was in *Donchin*. As we have already pointed out, this case is different in that we do not have a defendant-landlord who initially gave a false exculpatory statement. (*Donchin v. Guerrero, supra*, 34 Cal.App.4th at pp. 1840-1843.) The thrust of the testimony provided by an animal behaviorist in *Donchin* was not focused on breed-specific information. Rather, it emphasized his opinion that it was unlikely the owner had not seen the dogs display signs of aggression because the dogs “continually exhibited such propensities to next door neighbors and visitors.” (*Id.* at pp. 1844-1845.)

Finally, it is unclear how Mehgan’s counsel intended to have these studies, or the opinion that pit bulls are a dangerous breed, properly admitted before the jury. The court

would not have been permitted to take judicial notice of these matters because whether the pit bull breed is dangerous is not “indisputably true” nor within the common knowledge of the community. (Evid. Code, § 451, subd. (f); *Mack v. State Board of Education* (1964) 224 Cal.App.2d 370, 373; see also *Lundy v. California Realty, supra*, 170 Cal.App.3d at p. 822 [judicial notice could not be taken that all German shepherds are dangerous]; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 168 [improper to take judicial notice that all adult male pit bulls are dangerous].) In addition, the studies constitute inadmissible hearsay to which an exception does not apply, and the studies were not properly authenticated. (Evid. Code, §§ 1200, 1400, 1401.)

III. Hearsay admission

During the trial, the court ruled that an admission made by Larry to Meghan’s mother that Spike had bitten him was admissible only against Larry and instructed the jury that the admission could not be considered against Holden. Meghan appeals that ruling, arguing that Larry’s admission is admissible against Holden pursuant to Evidence Code section 1224. As previously noted, we review the trial court’s ruling for an abuse of discretion. (*People v. Waidla, supra*, 22 Cal.4th at p. 725 [“an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question”].) We conclude that no abuse of discretion occurred here.

A. Applicable law

Evidence Code section 1224 provides as follows:

“When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.”

This section is intended to cover situations where there is an identity of interest between the declarant and the person against whom the statement is offered, such as where a party has assumed responsibilities for the obligations of a declarant. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 128, p. 835; *Brown v. Surety Co. of Pacific* (1981) 122 Cal.App.3d 614, 618-619 [statements made to creditor of workers and architect on construction project admissible against debtor]; see also *Labis v. Stopper* (1970) 11 Cal.App.3d 1003, 1004 [statement of employee admissible against his employer where liability is based upon respondeat superior]; *Ingram v. Bob Jaffee Co.* (1956) 139 Cal.App.2d 193, 198 [statement by automobile's driver imputed to its owner following a traffic accident].)

B. Analysis

Mehgan theorizes that a privity of interest is shared between Holden, a landlord, and Larry, his tenant, and therefore the hearsay exception provided by Evidence Code section 1224 applies. Specifically, she argues that because one element of establishing Holden's liability is that he had control over the property, and both Larry and Holden had an interest in the property (Larry's being possessory and Holden's being ownership), she has established a privity of interest. Consequently, Larry's admission that Spike had previously bitten him is admissible against Holden. This theory does not work.

First, Larry was not a party to the lease agreement between Holden and Penny and would not be considered Holden's tenant. The lease agreement is binding between Holden, the landlord, and Penny, the tenant, and it permits occupants, such as Penny's children. Larry was not a tenant under the agreement; rather he was an occupant. Thus, the only privity of interest, if any, that existed would have been between Penny and Holden, and not Larry and Holden.

Second, even if a privity of interest existed between Larry and Holden, it was limited to an interest in the control of the same property—not whether they shared the same knowledge of Spike's presence on the property and dangerousness. Larry's

admission that Spike had previously bitten him would not establish Holden’s control over the property. Rather, it would go to Holden’s knowledge of Spike’s dangerous propensity, which is not a basis for the supposed privity of interest shared by Holden and Larry.²

Third, this case is not one in which Holden assumed the liabilities of Larry, so that any admission made by Larry would be imputed to Holden. This fact alone distinguishes this case from those cited above which allowed the use of hearsay statements pursuant to Evidence Code section 1124. Imputing Larry’s knowledge to Holden in this manner would be contrary to *Uccello, supra*, 44 Cal.App.3d 504 and *Donchin v. Guerrero, supra*, 34 Cal.App.4th 1832, which require that the landlord have actual knowledge of the dog’s presence and dangerous propensities.

DISPOSITION

The trial court’s granting of Holden’s motion for nonsuit is affirmed. Costs on appeal are awarded to Holden.

Wiseman, Acting P.J.

WE CONCUR:

Cornell, J.

Dawson, J.

²We have been unable to locate—and Meghan did not cite—any case in which Evidence Code section 1224 was used to allow an admission of a tenant to be used against a landlord.