

[U] Heerlyn v. Reid, No. B174233 (Cal.App. Dist.2 01/21/2005)

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

[2] B174233

[3] 2005.CA.0000514

[4] January 21, 2005; as modified February 22, 2005

[5] CHUCK HEERLYN, PLAINTIFF AND APPELLANT,
v.
FRANCIS M. REID, DEFENDANT AND RESPONDENT.

[6] APPEAL from an order of the Superior Court of Los Angeles County, Peter Espinoza, Judge. Affirmed. (Los Angeles County Super. Ct. No. VC037531

[7] Law Offices of Deetman & Associates, Bernard Richard Deetman and Gregory E. Deetman for Plaintiff and Appellant.

[8] Bremer & Whyte, Keith G. Bremer and Clara E. Roberts for Defendant and Respondent.

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

[10] Appellant's petition for rehearing denied February 22, 2005

[11] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 977.

[13] INTRODUCTION

[14] Plaintiff appeals a summary judgment granted in favor of a landlord who rented a property to the owner of a dog which bit the plaintiff. Plaintiff has not produced evidence creating a triable issue of fact as to the landlord's actual knowledge that the dog showed dangerous or vicious propensities before the dog bite occurred, and therefore summary judgment was correctly granted. The landlord's lack of actual knowledge likewise bars plaintiff's general negligence cause of action based on the landlord's failure to properly maintain the fence and property, because without knowledge of a dog's propensities a landlord will not be able to foresee a danger posed by the animal and will not have a duty to take measures to prevent an attack. Although plaintiff claims the

summary judgment motion did not address a cause of action for negligence per se based on violation of a leash law, the complaint did not allege that theory of liability and plaintiff cannot obtain reversal of summary judgment on theories of liability not pleaded in the complaint. We affirm the grant of summary judgment for defendant.

[15] PROCEDURAL HISTORY

[16] On July 3, 2002, plaintiff Chuck Heerlyn filed a complaint for personal injury against defendant Francis M. Reid (and another defendant not a party to this appeal). The complaint alleged causes of action for negligence, premises liability, and violation of Civil Code section 3342, subdivision (a). The complaint alleged that Reid owned or controlled a dog that bit plaintiff on July 4, 2001, at premises in Whittier, California.

[17] The trial court granted Reid's summary judgment motion based on uncontradicted evidence that Reid did not own the dog, did not know of its existence until Reid was served with the complaint, and did not know the dog was vicious. Heerlyn filed a timely notice of appeal from the judgment for Reid.

[18] STANDARD OF REVIEW

[19] "A trial court properly grants 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, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has `shown 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' [Citations.]" (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476-477.) FACTS

[20] Undisputed facts: Reid owns real property at 12401 Beverly Boulevard in Whittier, California. Reid rented the property to Herlinda Rodriguez, who had no dogs when she began living at the residence. On July 4, 2001, however, Rodriguez owned a German Shepard dog that bit Heerlyn on that date.

[21] Heerlyn and Esperanza Vancini lived next to Reid's property in an apartment at 12347 Beverly Boulevard. Heerlyn and Vancini have never spoken to Reid or written Reid a letter regarding the German Shepard that bit Heerlyn. Reid never received any notification from Heerlyn or Vancini that the dog was dangerous, mean, aggressive, threatening, or vicious.

[22] Before July 4, 2001, Vancini made no complaint to police or animal control regarding the German Shepard, which had entered the apartment twice previously

when Vancini was at home. Two weeks before July 4, 2001, Vancini saw the German Shepard in her apartment, called to it, and escorted it out of her apartment. Vancini went to Rodriguez to discuss the dog's entry into Vancini and Heerlyn's apartment. Two or three days later, the dog again entered Vancini's apartment. Heerlyn was not present. On this second occasion, the dog ran through the apartment and Vancini let the dog out the front door. The German Shepard did not growl, bark, or show its teeth on either occasion.

[23] The German Shepard had also jumped over a fence into Heerlyn's back yard, but on such occasions Heerlyn escorted it out of his yard and into Rodriguez's yard. During the year before the dog bite incident, Heerlyn recalled the German Shepard entering his apartment two times. Both times Heerlyn escorted the dog out of the apartment through a patio door, and the dog did not bark, growl, or show its teeth.

[24] Vancini's neighbor, Tony, had previous encounters with the German Shepard on his patio, but the dog never growled, barked, or showed its teeth. Neither Tony nor Heerlyn's upstairs neighbor ever said that the German Shepard was dangerous or vicious.

[25] On July 4, 2001, Heerlyn saw the German Shepard in his living room. He escorted the dog out the patio door. The German Shepard did not bark, growl or show its teeth, but the dog bit Heerlyn on a patio/walkway area near his residence. Heerlyn and Vancini went to a hospital for medical treatment of Heerlyn's injury.

[26] Before the incident, Heerlyn had no information that anyone notified Reid of problems with the German Shepard, and had no information that Reid knew of any previous dog bites involving the German Shepard. As the owner of 12401 Beverly Boulevard, Reid personally collected rent, determined whether maintenance was needed, and performed routine maintenance. Before the incident, Reid never received written or verbal complaints about the German Shepard from any resident at the 12347 Beverly Boulevard apartment building or from other neighbors. No resident advised Reid that the German Shepard was mean, aggressive, threatening, dangerous, or vicious. Rodriguez never advised Reid that the German Shepard was on the rented property or had problems with anyone.

[27] Disputed facts: Heerlyn disputed some facts. Reid alleged that according to Heerlyn, before the incident the German Shepard was mild-mannered and did not cause problems. Reid alleged that during Rodriguez's tenancy until the July 4, 2001, incident, Reid did not see a German Shepard on the 12401 Beverly Boulevard property and Reid had no knowledge that a German Shepard was mean, aggressive, threatening, dangerous, or vicious. During trips to the property, Reid received no complaints regarding the German Shepard. Heerlyn and Vancini's declarations, however, stated that the German Shepard barked loudly and in a threatening manner, jumped above the fence aggressively, escaped from the backyard, and ran through the neighborhood. Their declarations also stated that for months before the incident, there had been several attempts to prevent the dog from jumping the fence by leaning boards against the

fence at 12401 Beverly to increase its height. These attempts were visible from the street. Heerlyn and Vancini stated that for months before the incident a driveway gate at 12401 Beverly Boulevard had a "Beware of Dog" sign, visible from the street.

[28] ISSUES

[29] Heerlyn claims on appeal that:

[30] 1. Circumstantial evidence of actual knowledge raised a question of fact sufficient to defeat the summary judgment motion; and

[31] 2. Besides the dog bite statute, other bases for Reid's liability existed.

[32] DISCUSSION

[33]

1. Heerlyn's Evidence Does Not Create a Triable Issue of Fact as to Reid's Lack of Prior Knowledge of the Dog's Dangerous or Vicious Propensities

[34] Heerlyn claims that circumstantial evidence of Reid's actual knowledge raised a question of fact which requires reversal of the summary judgment.

[35] One ground of Heerlyn's suit was the "dog bite statute," Civil Code section 3342. Although that statute does not require a showing of willfulness for liability, it does require ownership of the dog. *fn1 (Delfino v. Sloan (1993) 20 Cal.App.4th 1429, 1437.) It is undisputed that Reid did not own the dog. Rodriguez, Reid's tenant, owned the dog.

[36] A landlord can be liable for a tenant's dog's injuries to a third person, but only if the landlord has actual knowledge of the vicious nature of the tenant's dog. (Donchin v. Guerrero (1995) 34 Cal.App.4th 1832, 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.)

[37] In analyzing a landlord's liability for injuries to a third party caused by a tenant's dog, "[t]he first step is to determine the landlord's knowledge of the dog's vicious nature. . . . [A] landlord can only be liable if he or she had actual knowledge of the dog's vicious propensity." (Donchin v. Guerrero, supra, 34 Cal.App.4th at p. 1838.) The requirement of the landlord's 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., italics in original.) An inference based on circumstantial evidence "must reflect the landlord's actual knowledge and not merely constructive

knowledge or notice." (Id. at p. 1839.) "[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 . . . [o]nly 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 v. Laudenslayer (1975) 44 Cal.App.3d 504, 514, fn. 4.)

[38] The second step involves whether the landlord had the ability to prevent the foreseeable harm. (Donchin v. Guerrero, supra, 34 Cal.App.4th at pp. 1838-1839.)

[39] With regard to the first step, it was undisputed that Reid never received any notification from Heerlyn or Vancini that the dog that bit Heerlyn was dangerous, mean, aggressive, threatening or vicious. Vancini, Heerlyn, and a neighbor, Tony, had prior encounters with the dog on their property, but the dog did not growl, bark, or show teeth. Neither Tony nor Heerlyn's upstairs neighbor ever mentioned that the dog was dangerous or vicious, and there is no evidence Reid received such notice from Tony or from the upstairs neighbor. Before the incident, Heerlyn had no information that anyone notified Reid about problems with the dog or that Reid knew of any prior dog bites involving the dog that bit Heerlyn. Before the July 4, 2001, dog bite, no resident of the 12347 Beverly Boulevard apartment building and no other neighbor ever advised or complained to Reid that the German Shepard was mean, aggressive, threatening, dangerous, or vicious. Heerlyn did not dispute this evidence.

[40] Reid cited Heerlyn's deposition testimony that before the incident, the German Shepard was mild-mannered and had not caused problems. Reid's declaration stated that before July 4, 2001, Reid did not note a German Shepard on the 12401 Beverly Boulevard property, had no knowledge that the German Shepard was mean, aggressive, threatening, dangerous, or vicious, and never received complaints about the dog in visiting the property. Heerlyn disputed Reid's facts, citing his and Vancini's declarations that the German Shepard dog barked in a loud and threatening manner, jumped above the fence aggressively, and escaped from the backyard, running through the neighborhood. Heerlyn's declaration also stated that for months before the incident, "[t]here were obvious attempts to add height to the fence [at Reid's 12401 Beverly Boulevard property], by stacking odd and longer boards vertically onto the existing fence." The attempts to add height to the fence were visible from the street, and could be interpreted as having the purpose of making the fence taller to keep the German Shepard dog from jumping over the fence. Heerlyn cited his declaration that for months before the July 4, 2001, incident, a driveway gate at Reid's 12401 Beverly Boulevard property gate had a "Beware of Dog" sign affixed to it, which was visible from the street.

[41] A landlord has no duty to inspect for a dog's presence. (Uccello v. Laudenslayer, supra, 44 Cal.App.3d at p. 514.) Even if fence repairs, barking, and the presence of a "beware of dog" sign is circumstantial evidence that Reid knew the dog was present, there is no evidence Reid knew of the German Shepherd's vicious propensities. It is undisputed that no prior incidents gave Reid notice that the dog had a vicious nature. (Yuzon v. Collins (2004) 116 Cal.App.4th 149, 164.) Loud barking and jumping above a fence are characteristic canine activities, and do not provide evidence

that Reid had actual notice of vicious propensities. (Ibid.) Heerlyn's evidence does not allege that the German Shepard frightened or threatened people when it ran through the neighborhood. Even if the dog escaped and ran through the neighborhood, that evidence does not show that Reid had actual notice of the dog's vicious propensities. (Ibid.)

[42] The plaintiff must show actual knowledge of the dog's "dangerous propensities." (Uccello v. Laudenslayer, supra, 44 Cal.App.3d at p. 514.) Even if Heerlyn's declaration is circumstantial evidence of Reid's knowledge that the dog existed at Reid's property, Heerlyn's evidence does not create a triable issue of fact concerning Reid's knowledge of the dog's dangerous propensities before the July 4, 2001, dog bite occurred.

[43] Heerlyn relies on Donchin v. Guerrero, supra, 34 Cal.App.4th 1832 as authority for the use of circumstantial evidence to create a triable issue of fact as to the landlord's knowledge. Donchin, however, differs from this appeal. The plaintiff in Donchin provided circumstantial evidence of two kinds, neither of which are present in Heerlyn's appeal. In Donchin, the plaintiff produced evidence creating a triable issue of fact as to the landlord's denial that he had any knowledge that his tenant's two Rottweiler dogs had vicious propensities. First, plaintiff produced evidence that the landlord initially denied he even knew the dogs existed and denied giving permission for them to be on his property. Later, however, faced with a lease mentioning the dogs and the tenant's declaration that the landlord saw the dogs regularly, the landlord changed his story, conceded he knew of the dogs, and admitted playing with them several times. The landlord's initial false exculpatory statements provided a basis to infer the landlord's guilty conscience about the dogs and his responsibility for injuries they caused. (Donchin v. Guerrero, supra, 34 Cal.App.4th at pp. 1841-1842.) It also was evidence that the landlord later falsely denied knowing the dogs had vicious propensities. (Id. at p. 1843.)

[44] By contrast, Reid did not first deny knowledge about one incriminating fact (the existence of the tenant's dog on Reid's property), then admit knowledge of that fact, and deny a second incriminating fact (prior knowledge that the German Shepard had dangerous propensities). Donchin concluded that this sequence of events permitted a trier of fact reasonably to infer that landlord falsely denied that he knew the dogs were dangerous. (Donchin v. Guerrero, supra, 34 Cal.App.4th at p. 1843.) The absence of this sequence of events in this appeal precludes a similar inference regarding Reid's lack of knowledge that the German Shepard was dangerous.

[45] Moreover, in Donchin the plaintiff provided three declarations that bolstered disbelief in the landlord's denial of actual knowledge that the dogs were dangerous. A neighbor across the street recited incidents justifying his fear of the Rottweiler dogs. A UPS courier stated that once a week he saw the Rottweilers, who growled, showed their teeth, and appeared ferocious when he tried to make deliveries. An expert witness, an animal behaviorist, stated why it was unlikely the landlord, who admitted observing the Rottweilers on numerous occasions, was unaware of the dogs' vicious propensities. The landlord failed to rebut this testimony except for his and his tenant's denial of knowledge

that the Rottweilers had dangerous propensities. (*Donchin v. Guerrero*, supra, 34 Cal.App.4th at pp. 1843-1844.) Donchin concluded that such testimony bolstered the inference that the landlord falsely denied his knowledge of the dogs' vicious propensities. (*Id.* at p. 1845.) Heerlyn produced no similar evidence bolstering disbelief in Reid's denial of actual knowledge that Reid's tenant kept a dangerous dog, and thus has not created a triable issue of fact on this issue.

[46] We therefore affirm the grant of summary judgment.

[47]

2. Defendant's Lack of Knowledge of the Dog's Propensities Precludes General Negligence Liability, and Heerlyn's Complaint Did Not Allege Negligence Per Se for Violation of Leash Laws

[48] Heerlyn claims that two other bases for finding Reid liable exist: (1) general negligence in failing to properly maintain the fence and property, which allowed the dog to escape and injure Heerlyn; and (2) negligence per se for possible violation of leash laws regarding the dog.

[49] With regard to negligent failure to properly maintain the fence and property, this raises an issue concerning the second step of the Donchin analysis, i.e., whether a landlord had the ability to prevent the foreseeable harm. (*Donchin v. Guerrero*, supra, 34 Cal.App.4th 1832, 1838.) We have concluded, however, that Reid did not have notice of the vicious nature of the dog that harmed Heerlyn. "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.*) Therefore the general negligence cause of action fails.

[50] With regard to negligence per se for possible violation of leash laws regarding the dog, the complaint did not allege this theory of liability. A party moving for summary judgment need only negate theories of liability as alleged in the complaint. Opposition to a motion for summary judgment may not create issues outside the pleadings and are not a substitute for amendment to the pleadings. (*Residential Capital v. Cal.-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 829.) Heerlyn cannot obtain reversal of summary judgment on a theory of liability not pleaded in his complaint.

[51] DISPOSITION

[52] The judgment is affirmed. Costs on appeal are awarded to defendant Reid.

[53] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS