

[U] Romo v. Boynton, No. B153149 (Cal.App. Dist.2 03/12/2002)

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

[2] B153149

[3] 2002.CA.0002274

[4] March 12, 2002

[5] ANNA ROMO, CROSS-COMPLAINANT AND APPELLANT,
v.
MARY BOYNTON, CROSS-DEFENDANT AND RESPONDENT.

[6] APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph A. Rogers, Judge. Reversed. (Super. Ct. No. MC011232)

[7] Goodheart & Hartman and Michael R. Goodheart for Cross-Complainant and Appellant Anna Romo. Early, Maslach & Rudnicki and Priscilla F. Slocum for Cross-Defendant and Respondent Mary Boynton.

[8] The opinion of the court was delivered by: Turner, P.J.

[9] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 977.

[11] Cross-complainant, Anna Romo, has appealed from a summary judgment in favor of cross-defendant, Mary Boynton. The parties have entered into a stipulation for reversal of the summary judgment. We accept the stipulation. Because the stipulated reversal does not violate the provisions of Code of Civil Procedure section 128, subdivision (a)(8), the judgment is reversed.

[12] Ms. Romo's dog allegedly bit plaintiff, Sara Stowers. Ms. Romo filed a cross-complaint against Ms. Boynton for apportionment of fault, indemnification, and declaratory relief. Ms. Boynton filed a summary judgment motion against Ms. Romo. The stated grounds for the summary judgment motion were, "There is no triable issue of fact to establish that Cross-defendant MARY BOYNTON was negligent, when she was baby-sitting the minor [P]laintiff, and a dog, owned by Defendants and Cross-Complainants, ANNABELLE ROMO and ALFRED O. ROMO suddenly and without warning bit Plaintiff in the face."

[13] The trial court issued a written ruling which stated in pertinent part: "Thus, the facts show that at the time of the incident, two adults were present when the minor Plaintiff approached the dog: 1) the minor Plaintiff's baby-sitter; and 2) the owner of the dog. It is well settled that, absent a recognized defense, the owner of a dog is strictly liable for damages when his or her dog bites. See Civil Code [section] 3342. In this case, the owner of the dog wants to contend that the baby-sitter should bear some liability for the injuries inflicted by her dog because the baby-sitter allegedly did not do something that the owner herself was in an equal or better position to do: prevent the minor child from interacting with the dog. The Court finds that in view of the duty imposed upon the owner by Civil Code [section] 3342, and the fact that the owner of the dog took no action and issued no warning, the owner of the dog is estopped from making this contention." The trial court then wrote in the following notation, "The Court further finds that the Cross-Plaintiff and Cross-Defendant are not in pari materia in that Cross-Plaintiff was in violation of the applicable leash law ordinance by failing to have a dog properly leashed and restrained." As can be noted, the grounds relied upon by the trial court were not those asserted by the moving party, Ms. Boynton.

[14] Ms. Romo contends that the summary judgment was erroneous because: (1) the trial court lacked authority to sua sponte grant a summary judgment motion on a ground not raised by the parties; (2) the "estoppel" theory is in conflict with comparative fault principles which apply to strict tort liability issues; and (3) there is no evidence that would satisfy the elements of "estoppel." Ms. Boynton does not disagree with these assessments of Ms. Romo. We agree with Ms. Romo's contention that comparative fault principles apply in a strict tort liability context. (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 328; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 742.) Further, there is no body of law which would support the "estoppel" theory relied upon by the trial court. Accordingly, we are in accord with the parties' assessment that judicial error has occurred and the summary judgment would be reversed if there were full briefing on the merits.

[15] Because it appears that judicial error has occurred, we have the authority notwithstanding the provisions of Code of Civil Procedure section 128, subdivision (a)(8) *fn1 to accept the stipulation to reverse the summary judgment. (*Union Bank of California v. Braille Inst. of America, Inc.* (2001) 92 Cal.App.4th 1324, 1330 [presence of reversible error is a pertinent consideration in determining whether to accept a stipulated reversal]; *In re Rashad H.* (2000) 78 Cal.App.4th 376, 381 [stipulation accepted when juvenile court terminated parental rights without notice to a father].) In the decision of *In re Rashad H.*, supra, 78 Cal.App.4th at pages 376, 380-382, we applied Code of Civil Procedure section 128, subdivision (a)(8) and approved a stipulated reversal in a dependency matter. In *Rashad H.*, the parent was not given proper notice of a Welfare and Institutions Code section 366.26 hearing. After the opening brief was filed, the Los Angeles County Department of Children and Family Services agreed that the Welfare and Institutions Code section 366.26 parental termination rights order must be reversed. We noted that requests for approval of stipulated reversals pursuant to section 128, subdivision (a)(8) must be evaluated on a

"case-by-case basis." (Id. at pp. 381-382.) As required by Code of Civil Procedure section 128, subdivision (a)(8)(A), we first reviewed whether the stipulated reversal would adversely affect the rights of the public or nonparties. In our analysis, we noted that judicial error had been committed, parental rights had been terminated without the required notice, and reversal was mandated. We concluded that the stipulation in fact advanced the rights of the potential adoptive parents who were nonparties to the appeal by speeding up the final legal determination of the parental termination rights issue. (Id. at pp. 380-381.) As to the requirements of Code of Civil Procedure section 128, subdivision (a)(8)(B), we noted: there was no possibility of the erosion of public trust because reversal was inevitable; the public interest was advanced by a settlement premised upon judicial error; and the risk of the availability of a stipulated reversal did not reduce the incentive for pretrial settlement because the judgment would be reversed anyway because of judicial error. (Id. at p. 381.)

[16] We examine the stipulation in the present case utilizing the foregoing principles. First, there is no evidence the settlement will adversely affect the interests of nonparties or the public. (Code Civ. Proc., § 128, subd. (a)(8)(A).) Ms. Stowers's complaint remains to be tried. Acceptance of the stipulation will finally allow her to have her day in court. The public interest is advanced because the parties to this appeal will no longer be spending attorney fees in a matter which will be reversed in any event. Further, this case does not involve any allegations of corruption or conduct which would be reportable to licensing and disciplinary agencies. This is a dispute over compensation resulting from a dog bite.

[17] The second requirement in Code of Civil Procedure section 128, subdivision (a)(8)(B), "[t]he reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment," permits us to accept the stipulated reversal. As in *Rashad H.*, this is a case which will result in reversal. The parties recognize such. There will be no erosion of public trust in a case such as this where the parties have agreed, correctly so, that a reversal is at hand and have taken prudent steps to resolve a matter so a trial on the merits can occur. No erosion of public trust will occur.

[18] As to the third factor, "the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement," it does not warrant rejection of the stipulation. (Code Civ. Proc., § 128, subd. (a)(8)(B).) There is no evidence that the availability of the stipulated reversal in this case would reduce the incentive for pretrial settlement. There is no evidence that any efforts were made to settle the case prior to the resolution of the summary judgment motion. Accordingly, when we consider the three factors set forth in Code of Civil Procedure section 128, subdivision (a)(8), we conclude that we are lawfully entitled to accept the stipulation.

[19] The judgment is reversed. All parties are to bear their own costs incurred in connection with this appeal. The remittitur is to issue forthwith.

[20] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[21] We concur:

[22] GRIGNON, J.

[23] ARMSTRONG, J.

Opinion Footnotes

[24] *fn1 Code of Civil Procedure section 128, subdivision (a)(8) states: "(a) Every court shall have the power to do all of the following: [¶] . . . [¶] (8) To amend and control its process and orders so as to make them conform to law and justice. An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following: [¶] (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. [¶] (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement."