

FILED
Court of Appeals
Division III
State of Washington
3/5/2019 1:23 PM

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III

Court of Appeals No. 361128-III

In re:

JOHN AUSTIN,

Plaintiff/Appellant,

and

JIMMY'S CONTRACTOR SERVICES, INC., et al,

Defendants/Respondents.

APPELLANT'S BRIEF IN REPLY

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I. ASSIGNMENTS OF ERROR/ISSUES

Mr. Austin objects to Jimmy's Roofing's reformulation of issues. The reformulated errors/issues ask fundamentally different questions than those raised by Mr. Austin.

II. ARGUMENT

It is undisputed by Jimmy's Roofing that there are four types of potential liability implicated by the facts in this case. They are:

1. Vicarious liability for dog bite;¹
2. Premises liability for dog bite;²
3. Common law liability for dog bite,³ and
4. Statutory liability for dog bite.⁴

In this case, Mr. Austin made no appeal based on statutory liability. The arguments before this Court are based on vicarious liability, premises liability, and common law liability.

1. The trial court erred when it concluded that an employer cannot be vicariously liable for a dog bite injury as a matter of law.

Jimmy's Roofing addresses this issue in Section E ("*There is No Evidence to Support a Vicarious Liability Claim*"). *Respondent's Brief*, pgs. 17-19.

Jimmy's Roofing focuses its argument primarily on questions of fact that were never considered by the trial court and that are not properly before this

¹ Acknowledged on pgs. 17-19 of *Respondent's Brief*.

² Acknowledged on pg. 10 of *Respondent's Brief*.

³ Acknowledged on pgs. 9-10 of *Respondent's Brief*.

⁴ Acknowledged on pgs. 7-8 of *Respondent's Brief*.

Court on appeal. The trial court never considered the question of whether Erwin was an employee for the purposes of vicarious liability nor did it consider the question of whether the alleged tortious act occurred within the scope of employment. Because these questions were never considered, no findings were made with respect to either question; therefore, there is nothing for this Court to review with respect to findings of fact.

The question before this Court on appeal is therefore *not* whether there is sufficient evidence in the record to support findings (no findings were ever made), but whether the trial court erred when it declined to even consider the question of vicarious liability, which amounts to the conclusion that vicariously liability is not available *as a matter of law*.

With respect to the issue of vicarious liability, Jimmy's Roofing entirely sidesteps the legal question raised by Mr. Austin and instead discusses whether there is sufficient evidence in the record to support the findings it would have advocated before the trial court had the matter been addressed. Tellingly, however, Respondent makes no argument on appeal that a vicarious liability cannot attach to a dog bite injury *as a matter of law*; therefore, presumably Jimmy's Roofing concedes that vicarious liability is at least available because it applies a vicarious liability analysis to the facts of this case in order to argue that the facts are insufficient to support the theory.

Given that Jimmy's Roofing appears to concede that vicarious liability for tortious conduct (including tortious conduct that results in a dog bite injury) is

an available theory of liability under Washington law, it follows that the trial court erred when it dismissed Mr. Austin's claim as a matter of law without any consideration of the facts as they arise in this case.

Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the issue for proper consideration by the trial court.

2. The trial court erred when it dismissed Mr. Austin's premises liability negligence claim.

Jimmy's Roofing responds to this issue in Section C ("The Trial Court Properly Dismissed Austin's Premises Liability Claim as a Matter of Law"). *Respondent's Brief*, pgs. 10-13.

Jimmy's Roofing conflates the analysis for a premises liability claim with the analysis for a common law dog bite injury, but the theories are distinct. *Oliver v. Cook*, 194 Wn.App. 532, 545-46, 377 P.3d 265 (2016).

The obligations of the possessor of land to take reasonable care to make the property safe for invitees is a much broader duty than the very narrow obligation of a dog owner who knows his dog has a history of aggressive and violent behavior. It is not enough for Jimmy's Roofing to deny that it had actual knowledge that the dog was dangerous; a possessor of land has the *obligation to discover* whether people or animals on the property are engaging in acts that are likely to cause accidental, negligent, or intentional harm to invitees. *Passovoy v. Nordstrom, Inc.*, 52 Wn.App 166, 172-173, 758 P.2d 524 (1988). A plaintiff does not have to show notice when the defendant property

owner creates the injuring condition. *Trueax v. Ernst Home Center, Inc.*, 70 Wn.App. 381, 387-388, 853 P.2d 491 (1993), *rec'd on other grounds*, 878 P.2d 1208 (1994).

Jimmy's Roofing argues that the facts of *Oliver* prevent recovery for Mr. Austin in this case; but in *Oliver*, Division II of the Washington Court of Appeals merely applied the relevant test as articulated by the Washington Supreme Court in *Iwai v. State*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996):

A landowner is liable for an invitee's physical harm caused by a 'condition on the land' only if the landowner:

(a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) Fails to exercise reasonable care to protect them against the danger.

Division II found that there was a genuine question of material fact as to the first element because, in *that* case, there was evidence that the landowner knew that the dog barks at strangers and that he avoided going near any vehicle the dog was in; it did not require that all landowners must have knowledge that a dog barks at strangers in order to bring a premises liability claim.

The question, therefore, is whether a landowner knew or, by the exercise of reasonable care, would have discovered a condition that involves an unreasonable risk of harm to invitees. *Iwai*, 129 Wn.2d at 93-94. Not only

does this test not require actual knowledge of an animal's dangerous tendencies but, it does not specifically require that the animal be inherently dangerous. The sudden presence of an animal in circumstances where it would not be expected by invitees may be dangerous regardless of whether the animal is itself dangerous. The question in a premises liability context is whether the animal's presence on the premises created an unsafe condition. This means that the danger could arise from the animal itself or it could arise from a condition arising from the animal's presence. A bull in a china shop may create a dangerous condition as a result of falling glass and crashing furniture even in a situation where the bull was known to be the gentlest creature that ever lived. Whether the duty owed by Jimmy's Roofing to Mr. Austin included the obligation to protect him from the sudden, unexpected presence of unleashed animals appearing without warning in the reception area of a roofing company is a question of fact that turns on the foreseeability of the resulting injury. Schneider v. Strifert, 77 Wn.App. 58, 62, 888 P.2d 1244 (1995). "It is not necessary that the defendant should have foreseen the extent of the harm or the manner in which it occurred." Id. Foreseeability is a question for the jury. Id.

Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the case for consideration by a jury.

3. The trial court erred when it dismissed Mr. Austin’s common law negligence claim.

Jimmy’s Roofing responds to this issue in its Section D, (“Austin Did Not Assert a Cause of Action Against Jimmy’s Roofing for Common Law Negligence, Nor Are There Facts to Support Such a Claim”). *Respondent’s Brief*, pages 13-17.

Jimmy’s Roofing argues that Mr. Austin may not argue a common law claim for negligence against Jimmy’s Roofing on appeal because he did not amend his complaint to assert the common law claim against both defendants.⁵ Jimmy’s Roofing does not acknowledge, however, that *it* raised this issue and briefed it, thoroughly, as part of its *Motion for Summary Judgment*. (CP 49-51.) In fact, the very first paragraph of Jimmy’s Roofing’s reply brief in support of summary judgment complains that “Plaintiff’s Response fails to address governing statutory and common law governing liability for dog bites in Washington.” (CP 193.)

Jimmy’s Roofing never defended against the common law claim of negligence by asserting that Mr. Austin had failed to make a claim against it; to the contrary, it raised the issue in its opening brief and argued the matter on

⁵ Jimmy’s Roofing cites to *Sligar v. Odell*, 156 Wn.App. 720, 733 (2010), for its assertion that this Court need not address the question of common law negligence on review, but in that case, no claim was made in the pleadings *or* argued on summary judgment. Here, the issue of common law negligence was thoroughly argued on summary judgment. Jimmy’s Roofing also cites to *Beeler v. Hickman*, 50 Wn.App. 746, 753 (1988), for the same proposition and faces the same problem; that case also recognizes that the evidence and argument of counsel may be deemed to amend the pleadings.

the merits. Therefore, the defense was waived and cannot be asserted for the first time on appeal. The parties had no opportunity to argue whether the evidence in the record and the argument of counsel may be deemed to have amended the pleadings and the trial court was given no opportunity to address the issue; therefore, the record is insufficient on review for this Court to address the argument for the first time.

Jimmy's Roofing further argues that were this Court to consider the common law negligence claim, it would nevertheless fail because there is insufficient evidence to establish Jimmy's Roofing as a "harborer" of the dog. Jimmy's Roofing argues that while it had control in the form of controlling where it could go and what it could do on the premises, such control is not the same as control over the animal itself.⁶

This may be a distinction without a difference. The case law on this issue, which is not directly on point in support of either party, suggests that the relevant principle is "[i]n short, liability flows from ownership or direct control." *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994)(emphasis added). Here, while it is undisputed that Jimmy's Roofing did not have ownership of the dog, it admits that it had control. Jimmy's Roofing asserts that the question is not simply whether it had control over the

⁶ This argument exposes the difficulty that results when Jimmy's Roofing subtly shifts its position with respect to its level of control for each potential liability theory in its attempts to avoid any liability at all.

animal, but rather the *real question* is whether it exerted control based on its rights to control the dog or its rights to control the real property where the dog is located. Jimmy's Roofing argues that if its right to control the dog is derivative of its right to control the property on which the dog was being kept, then it cannot be liable under a common law negligence theory. This is, however, clearly contrary to the caselaw on the subject. See, Harris v. Turner, 1 Wn.App. 1023, 1030, 466 P.2d 202 (1970). It is clear from the case law that a "harborer" of a dog is something more than *solely* the possessor of the real estate on which the dog is kept (such as a landlord whose tenant owns a dog), but also something less than actual ownership of the dog. As indicated in the opening brief, it is established that a person "harbors" a dog by permitting someone in his household to keep the dog in the part of his land which is occupied "by his family as a group." *Id.* This outcome suggests that the question turns on whether the dog is kept in the same space used and occupied by the possessor of the real property or whether it is kept in a separate space that is not used and occupied by the possessor of the real property; therefore, by analogy, a company likely becomes a harborer of a dog if it permits someone in its employ to keep the dog in the part of its property that is used and occupied by the company as a group. In this case, Mr. Austin asserts that Mr. Erwin was an employee of Jimmy's Roofing and that he kept the dog in Jimmy's Roofing's office. Jimmy's Roofing asserts that Mr. Erwin was an independent contractor who had his own "separate" space. Therefore, there is a genuine

issue of material fact as to whether Jimmy's Roofing is a "harborer" of the dog that injured Mr. Austin, and the issue should go to a jury.

Finally, Jimmy's Roofing argues that even if it were a "harborer" of the dog for the purposes of a claim under common law negligence, Mr. Austin cannot succeed because his admission that "there is no evidence that Jimmy's Roofing had knowledge that Mr. Erwin's dog had known dangerous propensities" is "fatal" to his claim. *Respondent's Brief*, pg. 16.

Again, Jimmy's Roofing conflates two distinct theories of liability.

Two theories of liability exist at common law: (1) strict liability if the animal has known dangerous propensities, and (2) negligence liability where there are no known dangerous propensities. *Schneider*, 77 Wn.App. at 61.

Mr. Austin's admission that Jimmy's Roofing did not have knowledge that Mr. Erwin's dog had dangerous propensities merely prevents him from arguing strict liability and limits his recovery to a claim of liability based on negligence, which is in fact what he argues.

Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand the case for consideration by a jury.

III. CONCLUSION

The trial court erred when it dismissed Mr. Austin's claims against Jimmy's Roofing. Mr. Austin respectfully requests that this Court reverse the trial court's ruling and remand this matter for trial.

RESPECTFULLY SUBMITTED this 4th day of MARCH, 2019,



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on March 5, 2019, arrangements for delivery of a true and correct copy of the foregoing to the following individuals were made in the manner indicated:

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March 05, 2019 - 1:23 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36112-8
Appellate Court Case Title: John Austin v. Jimmy's Contractor Services, Inc., et al
Superior Court Case Number: 17-2-02153-3

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