Filed 11/28/18 Morris v. Best Friends Animal Society CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

STEPHANIE MORRIS, Plaintiff and Appellant, v. BEST FRIENDS ANIMAL SOCIETY, Defendant and Respondent.	B286621 (Los Angeles County Super. Ct. No. BC612870)

APPEAL from a judgment of the Superior Court of Los Angeles County. Melvin D. Sandvig, Judge. Affirmed.

Morris Law Firm and James A. Morris for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod, Karen Liao, and Trisha E. Newman for Defendant and Respondent.

Plaintiff and appellant Stephanie Morris (plaintiff) appeals from the summary judgment entered in favor of defendant and respondent Best Friends Animal Society (Best Friends) in this negligence action for injuries plaintiff sustained when a dog attacked her while she was volunteering at an animal shelter. We affirm the judgment.

FACTUAL BACKGROUND

The parties

Best Friends is a nonprofit corporation that operates an animal shelter in Mission Hills, California. Plaintiff worked at Best Friends' Mission Hills animal shelter as a volunteer and as a paid employee.

Plaintiff began as a volunteer at the Mission Hills animal shelter on or about November 20, 2013. She was a full time temporary employee of Best Friends from November 13, 2014 to April 17, 2015. After plaintiff was laid off from her temporary employee position, she continued to work as a volunteer at the Mission Hills shelter.

Prior to volunteering at Best Friends, plaintiff attended an orientation, which included a facility tour. Plaintiff also received materials concerning protocols at Best Friends, including Dog Behavior and Body Language, Dog Return Protocol, Dog Exit Process Protocol, Daily Responsibilities by Shift, Dog Bite Protocol, and Dog Move Protocol.

Release

When plaintiff first began working as a volunteer at Best Friends, she was required to sign a document entitled Agreement and General Release for Adult Volunteers and Non-Employee Interns (the release). Plaintiff electronically signed the release on April 2, 2014.

Section 5 of the release states:

"Assumption of Risk. I am voluntarily participating in the activities of Best Friends with full knowledge of the risks and dangers involved and hereby agree to accept any and all risks of injury, death, or damage to myself and/or my personal property. As a volunteer, I may come into contact with and interact with animals, and such work entails risk of personal injury due to proximity to animals, dangerous equipment, long-distance driving, and other considerations. These include, but are not limited to, being bitten, kicked, clawed, tripped, and possibly exposed to zoonotic diseases."

Section 7 of the release states:

"Release. As consideration for being permitted by Best Friends to participate in activities and provide Services, I hereby agree that I, my assignees, heirs, distributees, guardians, and legal representatives will not make a claim against, sue, or attach the property of Best Friends for injury or damage resulting from any act, omission, negligence or other acts, howsoever caused, by any employee, agent, contractor, or representative of Best Friends as a result of my participation in activities and performance of the Services and any A-V Recordings. I hereby release Best Friends from all actions, claims, or demands that I, my assignees, heirs, distributees, guardians, and legal representatives now have or may hereafter have for injury or damage resulting from my participation in activities and performance of the Services and any A-V Recordings."

After the signature line, the release states:

"By signing this box, I acknowledge that I have read this agreement and indicate my intent to electronically sign and be bound by the terms and

> conditions therein. I understand that the Volunteer Agreement releases any and all claims I may have against Best Friends Animal Society arising from or related to my service as a volunteer, including any claims that may be caused by the negligence of Best Friends Animal Society and acknowledge that I am knowingly waiving any and all such claims."

When plaintiff resumed volunteering after her temporary employment ended in April 2015, she was not asked to sign another release.

Plaintiff's injury

All dogs at the Best Friends Mission Hills facility were categorized by "paw colors." Dogs labeled with an orange paw were the easiest to handle; those with a brown paw required stronger handling skills; and those with a blue paw had a history of biting. Plaintiff was aware that quite a few dogs at Best Friends had a tendency to bite, and while volunteering, she saw a dog bite an employee. Plaintiff declined contact with blue paw dogs because she felt uncomfortable with them.

On April 23, 2015, plaintiff was instructed to walk a pit bull named Bubba J, a dog classified as a "brown paw." Bubba J had been at Best Friends for more than two weeks, and plaintiff had seen him before. Bubba J did not display an aggressive demeanor and plaintiff entered the kennel to leash him for a walk. When she did so, Bubba J jumped on plaintiff and bit her. Plaintiff screamed for help, but her screams went unheard for a time, and Bubba J continued to bite her, causing severe injuries. No alarm and no means of stopping the animal's behavior were within plaintiff's reach. The first Best Friends employee to arrive at the scene, Valerie Rahbany, observed what was happening and left to seek help. A volunteer coordinator then arrived, but had to go to a different part of the facility to find a

leash. Eventually, another dog caregiver arrived, used a spray to subdue Bubba J, and then extracted plaintiff from the kennel. Plaintiff was transported to the hospital. She remained there for 11 days for surgery and other treatment for her injuries.

PROCEDURAL HISTORY

Plaintiff filed the instant action on March 7, 2016. In her operative first amended complaint, she alleged causes of action for negligence and gross negligence.

Best Friends moved for summary judgment on the grounds that plaintiff's negligence and gross negligence causes of action were barred by the release and by the doctrine of primary assumption of risk.

Plaintiff opposed the motion, arguing that the release was unenforceable as against public policy and in violation of Civil Code section 1668, and that the doctrine of primary assumption of risk did not apply. Plaintiff's opposition was supported by the declaration of an expert, Rolan Tripp (Tripp), in addition to other evidence.

Best Friends objected to Tripp's declaration in its entirety on the grounds that his opinions lacked foundation and stated improper legal conclusions. The trial court sustained Best Friends' evidentiary objections to the Tripp declaration and granted the motion for summary judgment. Judgment was entered in Best Friends' favor on October 13, 2017. This appeal followed.

PLAINTIFF'S CONTENTIONS

Plaintiff raises the following contentions on appeal: (1) there are triable issues of material fact as to the validity of the release, which plaintiff did not sign until after she began volunteering at Best Friends, and as to whether the release was effective during plaintiff's second term of service as a volunteer; (2) the release is unenforceable because it impairs the public

interest, because Best Friends' violation of federal and California labor laws invalidated the release under Civil Code section 1668, and because it could not exculpate Best Friends from liability for gross negligence; (3) the trial court failed to apply Utah law, which governs the release; (4) triable issues of material fact exist as to whether the defense of primary assumption of risk applies; and (5) the trial court erred by improperly excluding the Tripp declaration.

DISCUSSION

I. Summary judgment: legal principles and standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037 (*Cucuzza*).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is

to show that the plaintiff cannot establish at least one element of the cause of action. . . . [T]he defendant need not himself conclusively negate any such element." (*Id*. at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist*. (1995) 32 Cal.App.4th 218, 222.) In doing so, we "[consider] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.)

II. Enforceability of the release

The elements of a negligence cause of action are a legal duty, the defendant's breach of duty, and injury proximately caused by the breach. (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356 (*Benedek*).) "A release may negate the duty element of a negligence action." (*Ibid*.)

"A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.' [Citation.]" (*Benedek, supra,* 104 Cal.App.4th at p. 1356.) The scope of a release is determined by its express language. A release of all liability applies to any negligence of the defendant. (*Ibid*.)

A. Term of release

The express language of the release defeats plaintiff's argument that the release is unenforceable because she did not sign it contemporaneously when she began volunteering at Best Friends in November 2013, and because she did not sign a new

release when she returned as a volunteer in 2015 after working for Best Friends as a temporary employee for approximately five months.

Section 11 of the release states in relevant part: "I acknowledge that this agreement will apply to the entire term of my volunteer relationship, starting with the date I first perform volunteer duties for Best Friends, even if it pre-dates the date of this agreement, and continuing as long as I continue to be a Volunteer." By its express terms, the release did not expire or lapse.

B. Impairment of public interest

Plaintiff fails to raise any triable issue as to whether the release is unenforceable because it impairs the public interest. "An exculpatory contract releasing a party from liability for future ordinary negligence is valid unless it is prohibited by statute or impairs the public interest. [Citation.]" (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 637.)

A release impairs the public interest if it satisfies some or all of the following elements: (1) it concerns a type of business generally suitable for public regulation; (2) the party seeking to be released is performing a service of great public importance that is often a matter of practical necessity for some members of the public; (3) that party holds himself out as willing to perform this service for any member of the public who seeks it, or for any member coming within certain established standards; (4) as a result of the essential nature of the service, the party invoking exculpation possesses superior bargaining power over any member of the public seeking those services; (5) in exercising such superior bargaining power, the party seeking to be released presents a standardized contract of adhesion that makes no provision that allows a purchaser to obtain protection against negligence by paying an additional reasonable fee; and (6) as a

result of the transaction, the person or property of the purchaser is placed under the control of the seller subject to the risk of carelessness by the seller or his agents. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 98-101.) Not all of these elements must be present for an exculpatory contract to be unenforceable as against the public interest. (*Id*. at p. 98.) The relevant analysis "focuses upon the overall transaction -- with special emphasis upon the importance of the underlying service or program, and the relative bargaining relationship of the parties." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 762 (*Santa Barbara*).)

The court in *Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713 summarized the public interest analysis as follows: "Is the service merely an optional item consumers can do without if they don't want to waive their rights to recover for negligence or is it something they need enough so they have little choice if the provider attaches a liability disclaimer?" (*Id.* at p. 718.) A litigant's "'particular interest in the activity has no bearing on whether the "public interest" is involved. The issue is tested *objectively,* by the activities important to the *general public,* not by its subjective importance to the particular plaintiff. [Citation.]' [Citation.]" (*Booth v. Santa Barbara Biplanes Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179-1180.)

The service or activity in this case was the opportunity to interact with dogs by volunteering at a non-profit animal shelter. That activity is neither essential nor a matter of practical necessity for members of the general public. The release plaintiff signed as a condition to volunteering at Best Friends accordingly did not impair the public interest.

Plaintiff's evidence that Best Friends' status as a nonprofit organization and its mission statement proclamation that it is "changing the world for animals and the people that love them"

creates no triable issue of material fact as to whether Best Friends provides services that are essential or a matter of practical necessity for members of the public.

C. Civil Code section 1668

Plaintiff's argument that Best Friends' violation of federal and California labor laws invalidated the release under Civil Code section 1668[1] is not cognizable because her first amended complaint contains no allegations regarding violation of any statute, regulation, or standards. "'The complaint serves to delimit the scope of the issues before the court on a motion for summary judgment [citation], and a party cannot successfully resist summary judgment on a theory not pleaded.' [Citation.]" (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225.) The trial court did not err by disregarding this theory.

D. Utah law

Although the release states that it "will be governed by and construed in accordance with the laws of the State of Utah without regard to conflicts of laws principles," neither party cited Utah law in their respective moving and opposition papers in the trial court below. Plaintiff did not raise a choice of law issue until the hearing on the summary judgment motion, and even then did not seek to invoke Utah law. Rather, plaintiff's counsel argued that because neither party had briefed Utah law, the trial court was precluded from ruling on the motion: "There is nothing in defendant's briefing that addresses the law of the State of Utah. We are here today as respondents. That issue

---

[1] Civil Code section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

has not been briefed, has not been raised, and therefore the summary judgment should be denied as a matter of law because the applicable law has not been presented to the court and the court doesn't have a basis upon which to rule as to what the law in the State of Utah is regarding releases." That argument, which plaintiff reiterates on appeal, is incorrect.

Both parties proceeded on the basis that California law governed and therefore waived the Utah choice of law provision. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1514-1515, fn. 17; *Nagrampa v. MailCoups, Inc.* (9th Cir. 2006) 469 F.3d 1257, 1267 [applying Cal. law, parties who proceeded on assumption that Cal. law governed waived Mass. choice of law provision].)

We reject plaintiff's argument that the choice of law issue is jurisdictional and can therefore be raised for the first time on appeal. That argument is not only unsupported by any legal authority, it contradicts plaintiff's express acknowledgment in the first amended complaint that "jurisdiction is appropriate in the Superior Court for the State of California."

E. Gross negligence

California law does not recognize a distinct cause of action for gross negligence, as distinguished from ordinary negligence. (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 552, fn. 3. (*Jimenez*).) The distinction is relevant, however, to determining the enforceability of a release, to the extent it purports to release liability for future gross negligence. Such a release violates public policy and is unenforceable. (*Santa Barbara, supra,* 41 Cal.4th at p. 750.)

"'Ordinary negligence' -- an unintentional tort -- consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm. [Citation.] [¶] 'Gross negligence' has

long been defined in California and other jurisdictions as either a ""want of even scant care"" or ""an extreme departure from the ordinary standard of conduct."" [Citations.]" (*Santa Barbara, supra,* 41 Cal.4th at pp. 753-754, fn. omitted.)

"[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. [Citation.] Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. [Citation.] Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence. [Citation.]" (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 (*Anderson*).)

""'Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always.'" [Citations.] Where the evidence on summary judgment fails to demonstrate a triable issue of material fact, the existence of gross negligence can be resolved as a matter of law. [Citations.]" (*Anderson, supra,* 4 Cal.App.5th at pp. 882-883.)

The evidence in the record is insufficient to raise a triable issue of material fact as to whether Best Friends was grossly negligent. Evidence that Bubba J was miscategorized, or that Best Friends' dog handling and safety protocols were inadequate to prevent or mitigate plaintiff's injuries, raises no triable issue as to whether Best Friends actively increased the inherent risk of handling shelter dogs, or that its protocols were an extreme departure from ordinary safety standards. (See *Anderson, supra,* 4 Cal.App.5th at p. 882.)

Jimenez and *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, on which plaintiff relies, are distinguishable. The triable issue presented in *Jimenez* was based on evidence that the defendant had violated industry safety standards for treadmills. (*Jimenez, supra,* 237 Cal.App.4th at p. 557.) Plaintiff, in contrast, presented no admissible evidence of industry standards that would give rise to a triable issue of fact.

The triable issue presented in *Eriksson* concerned an equestrian coach's knowledge that a horse was unfit for competition and repeated assurances to the contrary to a student rider. (*Eriksson, supra,* 191 Cal.App.4th at pp. 846-847.) Here, there was no evidence that Best Friends knew that Bubba J would bite or that Best Friends concealed that fact from plaintiff.

Hass v. RhodyCo Productions (2018) 26 Cal.App.5th 11, a recent case decided by the First District Court of Appeal, is also distinguishable. In that case, the surviving family members of a half-marathon runner who suffered cardiac arrest at the finish line sued the organizer of the race for negligently managing and controlling emergency medical services at the event. The appellate court in *Hass* found that triable issues of material fact existed as to whether the event organizer had acted with gross negligence in providing emergency medical services at the race, thereby precluding enforcement of a written release signed by the decedent before entering the race. The court noted that there was conflicting evidence as to the location of the finish line and precisely what medical personnel and equipment were required to be stationed there. This evidence was sufficient, the court concluded, to raise a triable issue as to whether the allocation of medical resources at the finish line constituted an extreme departure from the standard of care for events of this type. (*Id.* at pp. 33-34.)

In contrast, there is no conflicting evidence in this case as to what was required under Best Friends' safety protocols, whether Best Friends complied with those protocols, or whether the protocols constituted an extreme departure from the standard of care. Plaintiff argues that Best Friends could and should have implemented other safety measures such as providing her with a whistle or additional training, requiring video monitoring of the area, or having other personnel available while dogs are unsecured; however, she presented no evidence that these measures are typically used at other animal shelters or kennels. The evidence here is insufficient to raise a triable issue of material fact as to gross negligence.

III. Primary assumption of risk

The trial court did not err by concluding that plaintiff's claims against Best Friends are barred by the primary assumption of risk doctrine. The doctrine of primary assumption of risk operates as a complete bar to a plaintiff's recovery when, "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 314-315 (*Knight*).) The existence of a legal duty does not depend on a plaintiff's subjective knowledge or appreciation of the potential risk. (*Id.* at p. 316.) The duty owed is not to eliminate or decrease the risk, but to not unreasonably increase the risks of injury beyond those inherent in the activity. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 (*Nalwa*).)

The doctrine of primary assumption of risk has been applied to kennel workers at a dog boarding facility, and to veterinarians and veterinary assistants who treat dogs and thereby assume the known risk that dogs can bite. (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1132; *Cohen v. McIntyre* (1993)

16 Cal.App.4th 650, 655 (*Cohen*); *Nelson v. Hall* (1985) 165 Cal.App.3d 709, 715.) The doctrine applies regardless of whether the veterinarian or veterinary assistant is aware of any particular vicious propensities of a particular dog. (*Nelson*, at p. 714.)

The determination of whether the doctrine of primary assumption of risk applies is a legal, not a factual issue, which depends on the nature of the activity at issue and on the parties' general relationship to the activity. (*Knight, supra,* 3 Cal.4th at p. 313; *Cohen, supra,* 16 Cal.App.4th at p. 657.)

Plaintiff, a volunteer at an animal shelter, assumed the inherent risk of being bitten by a dog. The undisputed evidence shows that plaintiff was aware that quite a few dogs at Best Friends had a tendency to bite, and while volunteering, she saw a dog bite an employee.

Plaintiff argues that she did not assume the risk of being bitten by a misclassified, aggressive dog, nor did she assume the risk of sustaining injuries as severe as those inflicted upon her by Bubba J. Neither plaintiff's subjective appreciation of the risk, nor the severity of her injuries, are relevant to the determination of whether primary assumption of risk applies. (*Nelson v. Hall, supra,* 165 Cal.App.3d at p. 714; *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 116.)

Plaintiff's argument that Best Friends could have minimized her injuries by implementing additional safety measures, such as providing her with a whistle, alarm, or spray, or having another volunteer or employee accompany her to the kennel, similarly has no relevance to application of the primary assumption of risk doctrine. Best Friends had no duty to eliminate or minimize the risks inherent in interacting with shelter dogs. Its sole duty was not to unreasonably increase that risk. (*Nalwa, supra,* 55 Cal.4th at p. 1162.) Plaintiff presented

no evidence sufficient to raise a triable issue of material fact as to primary assumption of risk.

IV. Expert declaration

A trial court's rulings on evidentiary objections are reviewed for abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) The record discloses no abuse of discretion.

Best Friends objected to Tripp's declaration on the grounds that it lacked foundation and contained improper legal conclusions. Tripp's declaration opines that Best Friends' conduct "fell below the expected standard of safety that [plaintiff] had every right to expect," but provides no foundation for that opinion, as it fails to state whether it is based on an industry standard or his own experience involving shelter animals. The trial court did not err by sustaining Best Friends' evidentiary objections to the Tripp declaration.

DISPOSITION

The judgment is affirmed. Best Friends is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT