IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brandt v. Bye,*
2024 BCSC 736

Date: 20240501
Docket: S2160236
Registry: Prince George

Between:

Alissa Brandt

Plaintiff

And

Brandon Robert Bye and John Doe/Jane Doe carrying on business under the firm name and style of "Prairie Pitbull Rescue Inc."

Defendants

And

Bryton Eagles and Kevin Bernadet

Third Parties

Before: The Honourable Madam Justice Church

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Kemp
Counsel for the Defendant, Brandon Robert Bye:	M. Boultbee
Place and Date of Hearing:	Prince George, B.C. March 6 & 7, 2024
Place and Date of Judgment:	Prince George, B.C. May 1, 2024

Introduction

[1] On August 1, 2019, the plaintiff, Alissa Brandt, moved into the lower suite of a rental property located at 676 Summit Street, Prince George, B.C. The rental property is owned by the defendant, Kevin Bye. Around the same time, the third parties, Bryton Eagles and Kevin Bernadet, moved into the upper suite on the property, together with Ms. Eagles' pit bull dog, Copper.

[2] Mr. Bye travelled to Prince George from his home in Kamloops on or about August 23, 2019 to meet with the plaintiff and the third parties to complete a conditional assessment of the property and sign the lease documents. During this visit, Mr. Bye met Copper for the first time and found him to be a friendly and energetic dog. When Mr. Bye met with Ms. Brandt, he did not see anything to indicate that she owned a dog and there was no dog present on that occasion. In fact, Ms. Brandt did own a dog, but it resided with her parents in Grand Prairie, Alberta at that time.

[3] Ms. Brandt's dog arrived at her residence in early September. Soon after, tension arose between the plaintiff and the third parties, initially because of noise from Ms. Brandt's dog, Winn, and later because the third parties had understood that their dog would have exclusive use of the back yard and they did not anticipate that there would be a dog in the lower suite. Ms. Eagles was concerned about interactions between the two dogs, as her dog acted territorially towards Ms. Brandt's dog. After some discussions, Mr. Bye arranged for a contractor to install a fence in October 2019 to ensure that each suite had its own separate yard space.

[4] On December 9, 2019, Ms. Brandt was walking alone along a walkway from her lower suite to the driveway, a path that took her through the part of the yard used by the third parties, when Copper came at her fast and bit her left ankle and left arm. Ms. Eagles heard Ms. Brandt call out Copper's name and came out to find Copper latched onto Ms. Brandt's arm. She was able to get Copper off Ms. Brandt, who suffered bite injuries to her arm and leg, as well as bruising.

[5] On December 9, 2021, Ms. Brandt filed a Notice of Civil Claim alleging that the defendants, including Mr. Bye, were negligent because they knew or ought to have known that Copper was aggressive, predisposed to attack and bite persons, and capable of causing injury. The claim further alleges that Mr. Bye was negligent in failing to take sufficient steps to make the back yard of the property safe for the plaintiff in response to the risk posed by Copper. The defendant, Mr. Bye, denies these allegations and says that he did not own Copper, had no experience or awareness of Copper displaying violent or aggressive behaviours, and the property, including the back yard, was reasonably safe at all material times. Mr. Bye says further that the actions of Copper in biting the plaintiff were not reasonably foreseeable to him.

[6] In addition to Mr. Bye, the Notice of Civil Claim names "John Doe/Jane Doe carrying on business under the firm name and style of "Prairie Pitbull Rescue Inc." as co-defendants in this proceeding and makes specific allegations of negligence against those persons. Counsel for the plaintiff advised that these defendants were never served with the Notice of Civil Claim, essentially leaving Mr. Bye as the only defendant.

[7] Mr. Bye issued a third party notice with respect to Ms. Eagles and Mr. Bernadet on January 25, 2022, claiming contribution and indemnity from them as the tenants and occupiers of the upper suite at the material time and, with respect to Ms. Eagles, as the owner of Copper. Both Ms. Eagles and Mr. Bernadet filed responses to third party notice. Mr. Bye discontinued the third party notice against Kevin Bernadet on February 21, 2023.

[8] By way of a summary trial application filed on November 1, 2023, the defendant seeks an order severing the issue of liability from damages, an order that the plaintiff's claims against him be dismissed, and costs. In an application response filed December 22, 2023, the plaintiff consents to an order severing liability from damages but opposes the dismissal of the claims against the defendant and any

order for costs. The third party, Ms. Eagles did not participate in the summary trial, which was held before me on March 6 and 7, 2024.

The Evidence

[9] The evidence on behalf of the defendant is set out in the following affidavits:

Affidavit #1 of B. Bye filed November 1, 2023;

Affidavit #1 of M. James filed November 1, 2023;

Affidavit #2 of B. Bye filed January 11, 2024; and

Affidavit #3 of B. Bye filed January 11, 2024.

[10] The evidence on behalf of the plaintiff is set out in the following affidavits:

Affidavit #1 of A. Brandt filed January 2, 2024;

Affidavit #1 of P. Brandt filed December 22, 2023;

Affidavit #1 of S. Brandt filed December 22, 2023;

Affidavit #1 of S. Plouffe filed December 22, 2023; and

Affidavit #2 of S. Brandt filed February 27, 2024.

[11] The plaintiff attended an examination for discovery on August 16, 2022. The defendant and the third party, Ms. Eagles, attended examinations for discovery on August 15, 2022.

[12] As I indicated at the outset, the basic facts in this case are not in dispute. All of these events occurred over a short time frame, between August 1 and December 9, 2019.

i. August 2019: the parties move in

[13] The evidence establishes that on August 1, 2019, the plaintiff and the third parties moved in and occupied the lower and upper suites on Mr. Bye's property. The plaintiff did not have a dog with her when she moved into the lower suite, but her evidence is that she had advised the defendant that she had a dog who would occupy the suite with her. The defendant does not recall the plaintiff telling him this, but acknowledges that she may have told him about her dog during the application process. In any event, the plaintiff's dog was not present on August 23, 2019 when the defendant attended the property to meet with the tenants and sign the lease documents.

[14] Ms. Eagles' dog Copper was present during Mr. Bye's visit on August 23, and Mr. Bye described him as friendly and energetic. During his examination, Mr. Bye commented that Copper looked to have a "little bit of pit bull" in him. He said that Copper looked to be a very healthy dog. As far as I can discern from the evidence before me, this was the one and only time the defendant attended the property and personally observed Copper. After August 23, 2019, virtually all information about Copper was conveyed to him by phone or text message by either the plaintiff or Ms. Eagles.

[15] When plaintiff's counsel urged him to agree that pit bulls are capable of inflicting serious injury on humans and that he was aware of this on the date in question, Mr. Bye agreed that dogs are capable of inflicting injury on humans and that pit bulls are dogs, but he did not believe that pit bulls are specifically more aggressive than other dogs or that they alone are known for biting humans.

[16] In Ms. Brandt's examination for discovery, she described how she occasionally encountered Copper when using the shared walkway that connected the driveway and her suite. She said that, on one occasion, Copper jumped up on her in an excited and friendly manner. She also described another occasion when she met Copper in front of her suite in September 2019. She petted Copper and

"everything was fine then." She agreed that her interactions with Copper were all friendly during this period.

ii. September 2019: the plaintiff's dog arrives

[17] The plaintiff deposed that her dog Winn, who had been in the care of her parents in Grand Prairie, arrived to live with her in early September.

[18] It was not until September 18, 2019 that the defendant became aware of any issue between the tenants with respect to dogs. On September 18, 2019, he received a text message from Ms. Eagles advising him of a "dog issue".

[19] This text message prompted the defendant to telephone the third parties, at which point he learned that the plaintiff's dog was howling loudly and disturbing the third parties. The defendant deposed that this was the first time he became aware that the plaintiff had a dog living with her or that the tenants had any issues with respect to dogs. When the third parties moved in, the defendant had told them that there would be no other dogs in the back yard.

[20] Ms. Eagles testified at her examination for discovery that the only "dog issue" at this time was the noise made by Winn and that, prior to November 15, 2019, there was no physical issue between Copper and Winn. Ms. Eagles said that she had made several attempts to talk to the plaintiff about the noise issue, but the plaintiff would not speak with her. As a result, she became frustrated and contacted the defendant directly.

[21] Ms. Eagles testified that when she and Mr. Bernadet moved into the upper suite, they did not know there was gong to be another dog on the property. When the plaintiff brought Winn to live with her, Ms. Eagles became a little upset that she could not just let Copper outside to have the run of the yard. She described the way in which the plaintiff's dog was introduced as being problematic, as Copper had already lived there for a month and was a little territorial. Ms. Eagles described Copper as "not super welcoming to [the plaintiff's] dog", and so she raised the idea of a fence with Mr. Bye to minimize any potential conflict. Ms. Eagles testified that, at

that point, no conflict had occurred, but they wanted to be proactive and prevent any issues. She said her only concern was that the dogs might not get along and she wanted to make sure that nothing happened, particularly since Winn was a smaller dog than Copper.

[22] Ms. Eagles described what she believed to be a “really good conversation” between herself, the plaintiff and the plaintiff’s mother some time in September 2019, where she expressed her concern that there might be an altercation between the dogs and her commitment to preventing that from happening. Ms. Eagles said that she asked them to communicate with her if they ever had concerns. She told them she wanted to try to be proactive with the dogs sharing the yard.

iii. October 23, 2019: The dog separation fence is constructed

[23] Mr. Bye deposed that around this time, the third parties proposed the idea of constructing a dog separation fence in the back yard to partition the upper suite from the lower suite in order to prevent conflict between Copper and Winn.

[24] Mr. Bye testified that after speaking with the third parties, he decided to have a fence constructed on the property for the sole purpose of separating the dogs.

[25] Mr. Bye had considerable difficulty finding a contractor who was available to install such a fence before winter. On October 8, 2019, he asked Ms. Eagles to confirm that she still wanted a dog separation fence. Ms. Eagles responded by text message that having a dog separation fence would be ideal “just for peace of mind”. Mr. Bye was eventually able to find a suitable contractor and the fence was constructed by October 22, 2019.

[26] Attached as Exhibit A to the Affidavit #1 of the plaintiff is a diagram of the property showing the configuration of the back yard, the access points to the upper and lower suites, and the dog separation fence and gate. Attached as Exhibit D to the Affidavit #1 of the defendant are photographs of the back yard of the property after construction of the fence. These exhibits show that the dog separation fence gave the lower suite a fully enclosed yard area. From this enclosed area, there was

a gate connecting to a shared walkway, with steps leading up to the driveway. This shared walkway was in the portion of the yard set aside for the upper suite and was not separated by a fence. The upper suite tenants could access their portion of the yard using steps leading down to the driveway and, from the driveway, taking the shared steps leading down to the yard and lower suite.

[27] Ms. Brandt testified in her examination that after the fence was constructed, she did not raise any concern with Mr. Bye that the fence did not extend far enough and should have encompassed the walkway, nor did she ask Mr. Bye to take any further safety measures after the fence was installed.

iv. November 15, 2019: Copper bites the plaintiff's dog

[28] On November 18, 2019, Mr. Bye received a text message from Ms. Eagles advising that there had been an altercation between Copper and the plaintiff's dog, Winn, after the plaintiff brought Winn into the portion of the back yard fenced for the upper suite while Copper and another dog were present.

[29] The plaintiff deposed that she was walking along the walkway towards the new gate that led to her suite when Copper was let out into the yard, following which he rushed towards Winn and bit him.

[30] Ms. Brandt was questioned thoroughly about the November 15 incident during her examination. She testified that she was coming home with Winn and noticed the light outside the upper suite but did not see any dogs in the yard. She assumed that this was because Mr. Bernadet was in the yard without the dogs and so she made her way to her lower suite while carrying Winn to get him inside. As she did so, Copper attacked Winn. Ms. Brandt agreed in her examination that Copper did not attack her or make any indication that he might attack her and he did not act aggressively towards her. However, Ms. Brandt deposed that she was dragged to the ground as she tried to grab Winn and protect him from Copper, and was left with bruises on her knees.

[31] Ms. Brandt testified that Mr. Bernadet came and separated Copper from Winn and they had a conversation about the incident. She explained that she told Mr. Bernadet that Ms. Eagles needed to take care of her dog and make sure that Copper wasn't in the yard when Ms. Brandt was taking Winn out of the fenced area. Ms. Brandt said that the third parties told her to come and talk to them if she didn't feel safe with Copper around, but that "[she] did feel safe if it was just Copper and [her]."

[32] Ms. Brandt exchanged text messages with Mr. Bye regarding this incident. Mr. Bye asked her "what's the solution to this dog issue? Are you letting me know so its on file?", to which the plaintiff replied that "[i]t would be nice to have a solution to the issue so I can feel comfortable with bringing my dog from my car to my place. It makes me scared that he could do something like this to me but definitely for the file." When Mr. Bye suggested that the plaintiff needed to discuss this with the third parties and come to some sort of resolution, Ms. Brandt responded, "[y]ou know what maybe I need to look for a new place me and my dog can't be getting abused by this." Mr. Bye responded that in the circumstances, he would be willing to waive the one month's notice period under the *Residential Tenancy Act* if she wanted to end her tenancy sooner.

[33] In text conversations with Mr. Bye following the November 15 incident, Ms. Eagles expressed some frustration at the plaintiff's lack of communication regarding their shared use of the back yard for their dogs. Mr. Bye was not directly involved in these discussions between the tenants but, at various times, he offered to mediate to find a solution.

[34] Ms. Eagles deposed that communicating with the plaintiff following the incident was "next to impossible". She and Mr. Bernadet decided that the best solution was for them to move to a new residence.

[35] On December 1, 2019, the third parties gave their notice to vacate the upper suite and Mr. Bye advised the plaintiff via text message that he would be agreeable

to having the plaintiff's dog meet the dog of any prospective tenants for the upper suite.

v. December 9, 2019: Copper attacks the plaintiff

[36] On December 9, 2019, Copper bit the left ankle and left arm of Ms. Brandt as she was walking without her dog between the gate to the lower suite and the stairs leading up to the driveway.

[37] Ms. Brandt testified that, prior to the incident on December 9, 2019, she had walked to her lower suite on the walkway "pretty much every day", sometimes while Copper was in the yard. Other than Copper jumping up on occasion in a friendly and excited manner, those interactions were unremarkable.

[38] On December 9, 2019, when Copper came towards her, Ms. Brandt said that he did not seem different than on the prior occasions when she had encountered him. By her account, from the time she first saw Copper until he bit her was approximately 10 seconds. She did not attempt to run because she thought this was going to be a friendly interaction with him. She said that it did not occur to her that he was acting aggressively and was going to bite her until she saw him go for her ankle.

[39] On December 10, 2019, Mr. Bye was advised by Ms. Eagles that Copper had been surrendered to Prince George animal control and euthanized.

vi. Phone calls following Copper's attack

[40] One of the few points of conflict in the evidence relates to interactions between the plaintiff's mother, Sandra Brandt, and the defendant after the incident on December 9, 2019. Sandra Brandt deposed in her Affidavit #1 that after the dog bite incident on December 9, 2019, she spoke with Mr. Bye on the phone several times. She said that during the first conversation after the incident, Mr. Bye said to her, "I knew that I should have extended the fence", and that he made this statement spontaneously and not in response to a specific question or statement. In his Affidavit #2, Mr. Bye denied ever making such a statement and said that it was Sandra Brandt who in fact stated that the fence should have been extended. In her

Affidavit #2 in reply, Sandra Brandt deposed that she had not attended the property after the construction of the fence and had not spoken to the plaintiff or anyone else about the configuration of the fence prior to speaking to Mr. Bye on the phone, and thus did not know that it did not create a safe path for the plaintiff and Winn when they walked to and from the driveway.

Severance and Suitability

[41] As I have noted, the defendant makes a summary trial application (under Rule 9–7) and seeks to sever the issue of liability from damages. In those circumstances, this Court must consider whether there should be severance and whether a summary trial is appropriate. The plaintiff consents to both severance and proceeding by way of summary trial.

[42] The test for severance is whether there are "extraordinary, exceptional or compelling reasons" for severance of liability from quantum, which can include the likelihood of significant savings in time and expense. In the case of *Thomas v. The Roman Catholic Archbishop of Vancouver,* 2016 BCSC 1466, the Court found that:

> [32] … the liability issue is a discrete question that can be determined separately and the parties will have the benefit of having that issue resolved before committing what are likely to be considerable resources to the damages assessment.

[43] I have no difficulty finding that there would be significant savings by severing liability and quantum, as liability is a relatively discrete issue that can properly be addressed in a summary trial, as outlined below. I therefore conclude that the issue of the defendant's liability should be severed.

[44] With respect to the issue of whether a summary trial on liability is suitable or appropriate, as the BC Court of Appeal noted in *Gichuru v. Pallai,* 2013 BCCA 60 at para. 32:

> All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the

> issues or is of the view that it would be unjust to decide the issues in this manner.

[45] In deciding whether a summary trial is suitable, a key issue is whether the court can find the facts necessary to decide the disputed issues. In this case, the issue in dispute is the defendant's liability. The basic facts in this case are not in dispute, and the minor disputes in the affidavit evidence are somewhat peripheral to the issue of liability. Further, as I discuss below, these minor conflicts can be resolved by resort to other admissible evidence without having to assess credibility or pick one party's account over the other: see e.g., *Brissette v. Cactus Club Cabaret Ltd.,* 2017 BCCA 200 at para. 21. Accordingly*,* I am able to find the facts necessary to decide the disputed issue.

[46] I also find that it would be just to decide this matter on a summary trial basis. Both parties agree that this matter is suitable for summary trial and that a summary trial could significantly reduce the length of any trial, if the plaintiff is successful, or dispose of the claim altogether if the defendant is successful.

[47] In the circumstances, I conclude that it is appropriate to proceed with a summary trial under Rule 9–7.

Evidentiary Issues

[48] Counsel on behalf of the defendant raised objections to the admissibility of portions of the affidavit material filed on behalf of the plaintiff.

[49] Counsel argued that para. 31 of Affidavit #1 of A. Brandt should be struck as hearsay. In this paragraph, the plaintiff deposes to an event that occurred when her mother, and not she, was present. The plaintiff's mother, Sandra Brandt, did not describe that event in either of her affidavits. Defence counsel further submits that the words "after the first time Copper attacked Winn" in para. 32 of that affidavit should also be struck, as that statement is tied to the hearsay in para. 31. Counsel for the defendant made a similar submission with respect to the words "after Copper had tried to bite Winn when my mother was visiting in early September" at the end of

para. 33 as this is a specific reference to the hearsay evidence in para. 31. Counsel for the plaintiff made no submissions regarding these objections.

[50] Defence counsel also submitted that the words "…which was built to protect Alissa's dog from Copper" in para. 5 of Affidavit #2 of S. Brandt should be struck as unattributed hearsay and not within her knowledge. Again, counsel for the plaintiff made no submissions regarding this objection.

[51] I agree with the submissions of counsel for the defendant that these portions of the evidence are inadmissible hearsay and should be struck.

[52] Defence counsel also sought to strike para. 36 of the Affidavit #1 of the plaintiff as speculation and argument, rather than evidence. That paragraph reads as follows:

> 36. If the fence had been extended out along the walkway and around the stairs leading up to the driveway, Winn and I would have had a secure path to go to and from my basement suite while Copper was out in the back yard.

[53] Counsel for the defendant made a similar objection with respect to para. 11 of Affidavit #1 of S. Brandt, arguing that the entire paragraph should be struck as unattributed hearsay and speculation. That para. states:

> 11. I learned later (I believe from Alissa, but I am not entirely sure of that) that the Fence did not extend along the pathway between the entrance to Alissa's basement suite and the stairs leading up to the gate to the driveway. If the Fence had been extended out to and around the stairs leading up to the driveway, it would have created a secure pathway for Alissa to go to and from her basement suite even if Copper was in his area of the backyard.

[54] Counsel for the plaintiff argued that these paragraphs are statements of the observations of the plaintiff and her mother as to the conditions that existed at the time. Counsel submits that these paragraphs are consequently inadmissible.

[55] I am not prepared to strike para. 36 of Affidavit #1 of A. Brandt. While it remains to be seen what weight I can give to that evidence of the plaintiff, I accept

that she is making an observation about the situation that existed at the time of these events and I therefore find that paragraph is admissible evidence.

[56] However, I agree with counsel that the entirety of para. 11 of the Affidavit #1 of S. Brandt is inadmissible, as it is speculation and opinion evidence based on unattributed hearsay. There is nothing to indicate that she is making a first-hand observation, as she refers to learning about the location and configuration of the fence from a third person, possibly the plaintiff, and does not ever depose to attending the property and making her own observations of the fence. There is no evidence before me that the plaintiff's mother visited the property and observed the fence after it was constructed in October 2019.

Legal Principles and Analysis

[57] The BC Court of Appeal noted in *Janota-Bzowska v. Lewis et. al,* 43 B.C.L.R. (3d) 352, 1997 CanLII 3258 at para. 9 that the owner of a dog may be held liable for an attack on two alternative bases: first, under the doctrine of *scienter*; and second, in negligence. The owner or occupier of the property on which the attack occurs may also be found liable under the *Occupiers Liability Act*, R.S.B.C. 1996. c. 337: *Evans v. Anderson*, 2023 BCSC 143 at paras. 117–129; *Parris v. Rogers*, 2019 BCSC 1828 at para. 32.

[58] The Court in *Janota-Bzowska* summarized the requisite elements of the legal test of *scienter* as follows:

> [20] The law with respect to the doctrine of *scienter* is relatively clear. The owner of a dog which bites another will not be liable simply for being the owner. Liability will only attach under the doctrine if the three conditions set forth in the *Neville* decision have been satisfied. In other words, the plaintiff (not the defendant) must establish:
>
> i) that the defendant was the owner of the dog;
>
> ii) that the dog had manifested a propensity to cause the type of harm occasioned; and
>
> iii) that the owner knew of that propensity.

[59] The plaintiff acknowledges that this proceeding is brought against the defendant in negligence only. The plaintiff does not rely on the *Occupiers Liability*

Act, and, as Mr. Bye was not the owner of Copper, the doctrine of scienter has no application.

[60] In *Mustapha v. Culligan of Canada Ltd*., [2008] SCC 27 at para. 3, the Supreme Court of Canada affirmed that a successful action in negligence requires the plaintiff to demonstrate that:

1) the defendants owed a duty of care;
2) the defendants breached the standard of care;
3) the plaintiff sustained damage; and
4) the damage was caused, in fact and in law, by the defendant's breach.

[61] The defendant does not dispute that he owed a duty of care to the plaintiff or that the plaintiff suffered an injury on December 9, 2019. The issues in dispute are whether the defendant breached his duty of care and, if so, whether the plaintiff's injury and loss were caused by the defendant's breach in fact and in law.

[62] The plaintiff bears the burden of establishing that the defendant breached the standard of care by some act or omission: *Agar v. Weber*, 2014 BCCA 297 at para. 29. In *Agar*, the Court affirmed that the standard of care requires defendants to protect others from objectively unreasonable risks of harm:

> [30] The standard of care under the *[Occupiers Liability Act]* and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[63] The standard of care is not one of perfection. In *Voje v. Teck Developments Ltd*, 2022 BCSC 503 at para. 101, the Court noted that it is not necessary for the defendant to remove every possibility of danger:

> [101] … A number of cases have explained that the standard is not perfection. An occupier is not an insurer against every eventuality that may occur on a premise, and the duty of care does not require a defendant to remove every possibility of danger. See, for example, *Fulber v. Browns Social*

> *House Ltd.*, 2013 BCSC 1760; *Lavalee v. Bristol Management*, 2005 BCSC 1666 at para. 29; *Gervais v. Do, et al*, 2000 BCSC 1271 at para. 26.

[64] I must determine whether the defendant took reasonable care in the circumstances to ensure that the property was safe for the plaintiff. As a landlord, Mr. Bye has a common law duty to maintain the premises in a reasonably safe condition for his tenants. The standard of care he must meet in these circumstances depends on factors such as the foreseeability of the danger and the steps required (and consequent burden on him) to remove the danger: *Boyes v. Wong*, 2016 BCSC 1085 at paras. 142–146.

[65] Based on the evidence before me, I am satisfied the defendant at all times acted in a manner consistent with a prudent landlord and thus met the requisite standard of care.

[66] This case falls squarely within the principles set out by the Court in *Janota-Bzowska*. The facts of that case are quite similar to the present case. In *Janota-Bzowska,* the plaintiff was attacked by a dog owned by the defendant, Holtzmann, while attending as an invited guest at the residence of the defendants, the Lewises. The dog jumped up on the plaintiff, knocking her down, and she suffered an injury to her finger. There was evidence that the dog was sometimes kept tied up because it chased deer.

[67] At trial, the plaintiff's claim for negligence was successful against all of the defendants. The trial judge found that the Lewises, as the owners of the residence, were negligent because they permitted the dog to be at large and unrestrained, and failed to warn or protect the plaintiff from an unprovoked attack.

[68] The Court of Appeal set aside the trial judgement against all of the defendants. With respect to the defendant Holtzmann, the Court found that there was insufficient evidence to establish that the dog had a propensity for jumping up and there was no evidence at trial to suggest that the accident and resulting injury to the plaintiff were reasonably foreseeable. The Court found that the fact that the dog had chased deer in the past did not establish a propensity for jumping up on people.

Consequently, the dog's actions were unexpected and out of character, failing to satisfy this element of liability in *scienter* or negligence.

[69] With respect to the Lewises, the Court of Appeal said the following:

> [25] As to the Lewises, there is no evidence to support a finding of negligence against them. Although the Lewises had a duty to take reasonable care to see that the plaintiff, who may be regarded as their guest, would be reasonably safe from injury, liability cannot attach to them in the circumstances of this case absent a finding that it was foreseeable that Holtzman's dog would cause the type of harm it did. Lewis, based on his knowledge of the dog, had no reason to believe that the dog would act in the manner in which it did. In these circumstances, it cannot be said that it was negligent for the Lewises to have the dog in their home. An occupier cannot be liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the dog in question either under the common law or the *Occupiers Liability Act*.
>
> [26] For these reasons, I would allow the appeal and dismiss the action.

[70] In the case at bar, counsel for the plaintiff argues that the evidence establishes that Copper's behaviour from first contact until the incident on December 9, 2019 was escalating. He acknowledged that the initial meeting between the plaintiff and Copper was amicable, but by mid-to-late September 2019, it was clear that a fence was needed due to Copper's conduct. He described Ms. Eagle's evidence on discovery—that Copper was "a little bit territorial" and "not super welcoming to her dog"—as a euphemism for Copper being "aggressive". While he conceded that Ms. Eagles was referring to Copper's behaviour towards the plaintiff's dog, plaintiff's counsel argued that the discussion about and decision to install the dog separation fence was an acknowledgement of the risk of harm to the plaintiff.

[71] With respect, I cannot agree. It is clear from the evidence before me that interactions between the plaintiff and Copper were friendly and the plaintiff did not feel unsafe around Copper when her dog was not present.

[72] When the plaintiff's dog came to live with her in the lower suite, the third party, Ms. Eagles was proactive in addressing possible conflict between the dogs and proposed the construction of the dog separation fence. The defendant, who I accept did not realize that the plaintiff had a dog living with her until September 18,

2019, agreed with the proposal and took immediate steps to hire a contractor who could construct the fence prior to the winter months. He confirmed with both the plaintiff and Ms. Eagles that they were happy with the dog separation fence.

[73] The incident that occurred on November 18, 2019 demonstrated that Copper was aggressive towards the plaintiff's dog. The plaintiff was clear in her testimony on discovery that Copper did not attack her or act aggressively towards her and that her concern was with respect to Copper's conduct towards her dog. She confirmed that, prior to the December 9, 2019 incident, she felt safe with Copper if her dog was not present. As was the case in *Parris v. Rogers*, 2019 BCSC 1828, the dog seemed friendly until it bit her.

[74] The defendant was not present during the November 18, 2019 incident and learned if it only through text messages from the plaintiff and Ms. Eagles. He offered to mediate the dispute between them. When the plaintiff suggested that she might have to move, he offered to waive the one-month notice period.

[75] I do not accept the submission that because of Copper's conduct towards the plaintiff's dog on November 15, 2019, it was foreseeable that the plaintiff might herself be attacked by Copper. On the contrary, in my view, a reasonable observer would foresee only a risk of harm to other dogs, rather than what plaintiff's counsel describes as an "escalation" in behaviour.

[76] Whether the defendant knew or ought to have known that a dog is likely to create a risk of injury is an objective test. It is notable that even after the incident on November 15, 2019, the plaintiff did not feel unsafe around Copper when she did not have her dog with her. Plaintiff's counsel conceded that the plaintiff's evidence on this issue is somewhat contradictory. She sent a text message to the defendant on November 18, 2019 indicating that it would be nice to have a solution so she could feel comfortable bringing her dog from the car to the lower suite. In that message, she states that the November 15 incident made her scared that "he could do something like this to me". However, at her examination for discovery, the plaintiff testified that she was not afraid of Copper when her dog was not with her. Counsel

urged me to rely on the plaintiff's text messages as a more accurate reflection of her state of mind at the time. However, I disagree. In her messages, the plaintiff explained that she was raising the incident with Mr. Bye "for the file" and, seemingly, to make him take her concerns seriously. She thereby had reason to overstate her fears. However, her discovery evidence was under affirmation and in response to a specific question from the defendant's counsel.

[77] As was the case in *Janota-Bzowska*, the behaviour of Copper on December 9, 2019 was sudden, unexpected and out of character. Based on what was known to the defendant about Copper at the time, which was the information conveyed to him by the plaintiff and Ms. Eagles, he would have had no reason to foresee that Copper would bite the plaintiff or otherwise cause her direct harm.

[78] Following the November 15 incident, it was reasonably foreseeable that the plaintiff could be indirectly injured as a result of a negative interaction between the dogs: *Garside v. Dougan*, 2022 BCSC 799 at para. 86. However, I find that the defendant had, by December 9, taken reasonable steps to lower the risk of interaction between the dogs to an acceptable level, including by arranging for the construction of the dog separation fence, offering to mediate between the plaintiff and Ms. Eagles, and encouraging the tenants to communicate with one another to coordinate, for instance, when the dogs would enter the yard (as suggested by Ms. Eagles).

[79] In taking the steps that he did, the defendant acted as a careful and prudent landlord.

[80] The plaintiff relies in part on the evidence of Sandra Brandt—who deposed that the defendant spontaneously stated to her that "[he] knew that [he] should have extended the fence"—to support her position that the defendant knew of or should have known of the risk of harm to the plaintiff in using the walkway while Copper was in the yard. Mr. Bye deposed that it was actually Sandra Brandt who stated that the fence should have been extended.

[81] This conflicting affidavit evidence can be resolved by resort to other admissible evidence. The statement about extending the fence does not make sense when viewed alongside the evidence of the configuration of the yard. Thus, I find it more probable that the statement was in fact made by Sandra Brandt, who, by her own evidence, had not seen the dog separation fence by that time.

[82] The property contains a shared walkway with steps connecting the upper suite to its portion of the yard and the lower suite to the driveway. . While I accept the plaintiff's submission that it was theoretically possible to reconfigure the fence with additional gates in order to separate the shared walkway from the portion of the yard occupied by Copper, it would not be an easy task and would involve much more than simply extending the fence. Plaintiff's counsel acknowledged that it would likely require installing at least two additional gates and possibly reconfiguring the stairs to preserve access to the back yard from the upper suite. In those circumstances, I find it implausible that the defendant would tell Sandra Brandt that he should have "extended the fence" when he would have been aware that, in reality, a much more significant restructuring would be required to enclose the walkway. Thus, I am able to find this fact despite the conflict in the affidavit evidence.

[83] In any event, it is not necessary to resolve this evidentiary conflict to decide the liability issue. I find that the defendant met the objective standard of a careful and prudent landlord, notwithstanding what he may have said or felt in hindsight about additional security measures that could have been taken in excess of the legal standard of care: see e.g., *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656 at para. 78. Considering the practical difficulty of reconfiguring the yard to provide fully separate pathways for the two suites, it would not be reasonable to expect the defendant to do so in these circumstances. It was reasonable for the defendant to propose that the tenants coordinate amongst themselves to ensure that their dogs did not access the walkway at the same time.

[84] The defendant had a duty to take reasonable care to ensure that the plaintiff would be reasonably safe from injury on the property. As the Court noted in *Janota-Bzowska*, liability cannot attach to the defendant in the circumstances of this case, absent a finding that it was foreseeable that Copper would cause the type of harm he did. Based on his knowledge of the dog, the defendant had no reason to believe that Copper would act aggressively towards the plaintiff and bite her. As was the case in *Evans v. Anderson*, 2023 BCSC 143, another decision of this court involving a dog bite, the harm caused to the plaintiff was not within the range of likely consequences. It is clear from the evidence that the defendant, in constructing the dog separation fence, took reasonable steps to prevent harm arising from reasonably foreseeable risks—namely, the risk of Copper's aggressive behaviour towards the plaintiff's dog: see e.g., *Moule v. New Brunswick Electric Power Commission*, 24 D.L.R. (2d) 305, 1960 CanLII 428 (S.C.C.) at 308–309. He cannot be liable for "a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the dog": *Janota-Bzowska* at para. 25. In all the circumstances, the defendant met the required standard of care.

[85] The plaintiff has therefore failed to establish that the defendant breached his duty of care. Given that conclusion, it is unnecessary for me to address the last branch of the test in *Mustapha*: namely, whether the damage was too remote.

[86] The defendant's application for severance and determination of liability pursuant to Rule 9–7 is granted. The plaintiff's claim against the defendant is dismissed.

[87] The defendant has been substantially successful and is entitled to his costs. In the event that the parties have exchanged settlement offers that may be relevant to the issue of costs, either party may set a further hearing date before me by filing a requisition within 30 days of the date of this judgment. In the event that no such requisition is filed or unless the parties agree otherwise, I will award the defendant his costs of this proceeding on Scale B.

"The Honourable Madam Justice Church"