

Not Reported in S.W.3d, 2003 WL 1545084 (Tex.App.-Dallas)
(Cite as: **2003 WL 1545084 (Tex.App.-Dallas)**)

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SEE TX R RAP RULE 47.2 FOR DESIGNATION
AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Dallas.
Jodi PFEFFER and Kevin Pfeffer, Appellants,
v.
Lester SIMON and Sylvia Simon, Appellees.

No. 05-02-01130-CV.
March 26, 2003.

Guest, who was bitten on lip by dog while at dog owners' house, brought action against owners for strict liability, negligence, and premises liability. The County Court at Law No. 1, Dallas County, granted owners' motion for summary judgment. Guest appealed. The Court of Appeals, [Francis, J.](#), held that owners' awareness that dog had eaten owners' pet bird sometime before dog bit guest's lip did not show that owners had actual or constructive knowledge of danger presented by dog.

Affirmed.

West Headnotes

Animals 66.5(2)

[28](#) Animals

[28k66](#) Injuries to Persons

[28k66.5](#) Dogs

[28k66.5\(2\)](#) k. Vicious Propensities and

Knowledge Thereof. [Most Cited Cases](#)

(Formerly 28k70)

Dog owners' awareness that pet dog had eaten owners' pet bird sometime before dog bit guest's lip while at owners' house did not show that owners had actual or constructive knowledge of danger presented by dog, and thus guest could not prevail against owners on claims of strict liability, negligence, and prem-

ises liability; at best, evidence demonstrated that owners had knowledge that dog may have been dangerous or caused harm to birds.

On Appeal from the County Court at Law No. 1 Dallas County, Texas, Trial Court Cause No. CC-01-6807-a, [Neal M. Nagely](#) and [Elizabeth L. Phifer](#), for Jodi Pfeffer and Kevin Pfeffer.

[Dennis D. Conder](#), for Lester Simon and Sylvia Simon.

Before Justices [MORRIS](#), [WHITTINGTON](#), and [FRANCIS](#).

MEMORANDUM OPINION

Opinion by Justice [FRANCIS](#).

*1 Jodi and Kevin Pfeffer appeal the trial court's take-nothing summary judgment on their lawsuit against Lester and Sylvia Simon for injuries sustained when Jodi was bitten by the Simons' pet dog. In three issues, the Pfeffers generally contend the trial court erred in granting summary judgment against them because the summary judgment evidence raised genuine issues of material fact with respect to each of their causes of action. We affirm the trial court's judgment.

The summary judgment evidence revealed the following undisputed facts. The Simons invited the Pfeffers to their home for a cookout. Shortly after entering the Simon home, Jodi bent down in an attempt to pet the Simons' Scottish Terrier, "Duffy," and was bitten on the lip. Jodi indicated that as the dog approached her, it did not bark or growl and was wagging its tail. There is no evidence that Jodi acted aggressively or provoked the dog in any way.

The Pfeffers sued the Simons asserting claims for strict liability, negligence, and premises liability. The Simons moved for summary judgment on each of the Pfeffers' causes of action asserting both traditional and no-evidence grounds. The trial court granted summary judgment in favor of the Simons without specifying the grounds for its judgment.

We review a traditional summary judgment un-

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der rule 166a(c) to determine whether the movant has met its burden of showing no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. See *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex.1985). When reviewing a no-evidence summary judgment, we apply the legal sufficiency standard used to review a directed verdict. *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 832–33 (Tex.App.-Dallas 2000, no pet.). We will not disturb a no-evidence summary judgment unless the nonmovant produces more than a scintilla of evidence sufficient to raise a fact issue on each challenged element.

The Pfeffers acknowledge that each of their causes of action depend to some degree on proof the Simons had actual or constructive knowledge of the danger presented by Duffy. For strict liability, the Pfeffers need to show the Simons had reason to know of Duffy's dangerous or vicious propensities abnormal to its class. *Dunnings v. Castro*, 881 S.W.2d 559, 561 (Tex.App.-Houston [1st Dist.] 1994, writ denied) (Citing *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex.1974)). For their negligent handling claim, the Pfeffers had the burden of establishing that the Simons knew or should have known Duffy would cause injury to a guest in their home under the circumstances presented. See *id.* at 564. Finally, the Pfeffers were required to prove the Simons had actual knowledge that Duffy was dangerous in order to establish their premise liability claim. See *Searcy v. Brown*, 607 S.W.2d 937, 941 (Tex.Civ.App.-Houston [1st Dist.] 1980, no writ). The Pfeffers assert the trial court erred in granting summary judgment because there was summary judgment evidence that Sylvia Simon was aware Duffy had eaten the Simons' pet cockatiel bird sometime before he bit Jody. They contend this evidence raises a fact issue with respect to the Simons' actual or constructive knowledge of the requisite danger presented by Duffy with respect to each of their causes of action. We disagree this evidence precludes summary judgment.

*2 In addition to the deposition testimony of each party, the Simons' summary judgment evidence included affidavits from the Simons, Duffy's groomer, and two other individuals who were acquainted with Duffy. Nothing in the summary judgment evidence suggests that Duffy (1) had any abnormally vicious propensities, (2) would cause injury in the circumstances presented by this case, or (3)

constituted a dangerous condition. To the contrary, the Simons' evidence conclusively demonstrated that during the seven years of Duffy's life before he bit Jodi, he interacted well with both children and adults and never exhibited any behavior of a vicious, threatening, or dangerous nature.

The Pfeffers rely on Sylvia Simon's deposition testimony to show there is some evidence she knew Duffy was dangerous or could cause harm. The relevant deposition testimony is outlined in its entirety below:

Q. Okay. Did you keep the bird when y'all moved?

A. No. Actually, Duffy ate the bird.

Q. Oh dear. Duffy ate the bird?

A. Had him for Thanksgiving.

Q. Would that have been the year before the bite?

A. Yes, it was the year before the—I hear Scottish Terriers are dog birds (sic). That's what I heard, I don't know.

There is no evidence regarding the circumstances surrounding Duffy's eating of the bird. The Pfeffers' assertion that Duffy “viciously attacked” the bird are wholly unsupported by the record. Based on the evidence before us, we cannot conclude knowledge of Duffy eating a bird raises a fact issue as to whether the Simons knew or should have known the dog was abnormally vicious, would cause harm to a guest in the circumstances presented, or constituted a dangerous condition on the Simons' property. Viewing the evidence in the light most favorable to the non-movant, the evidence at best demonstrates the Simons had knowledge that Duffy may have been dangerous or caused harm to birds. Absent any evidence to raise a fact issue on whether the Simons had the knowledge required for the Pfeffers' causes of action, the trial court did not err in granting summary judgment to the Simons.

We affirm the trial court's judgment.

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