

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

SUSAN PHILLIPS, RUSSELL PHILLIPS,)
 and MARY PHILLIPS,

Petitioners and Appellants,

v.

DIRECTOR OF THE DEPARTMENT OF ANIMAL)	CASE NO. 2 CIVIL B015913
REGULATION, SAN LUIS OBISPO COUNTY)	
HEALTH AGENCY, COUNTY OF SAN LUIS)	SUPERIOR COURT NO. 60146
OBISPO, CITY OF ATASCADERO,)	
A Municipal Corporation, the CHIEF)	
OF POLICE for the CITY OF ATASCADERO,)	
and DOES I through XXV, Inclusive,)	

Respondents.

APPELLANTS REPLY BRIEF

Appeal from the Judgment of the Superior Court of California

County of San Luis Obispo

Honorable Barry Hammer

Shaunna Sullivan
 GEORGE & COLLINS, A Law Corporation
 P.O. Box 6129
 Los Osos, CA 93402
 (805) 528-3351
 Attorneys for Petitioners/Appellants

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GEORGE & COLLINS
A Law Corporation
2238 Bayview Heights Drive
P.O. Box 6129
Los Osos, CA 93402
(805) 528-3351

Attorneys for Petitioners/Appellants

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) (Hon. Barry Hammer, Judge)
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I

RESPONDENTS RELIANCE ON SIMPSON v. CITY OF LOS ANGELES
IS MISPLACED

Respondents rely on Simpson v. City of Los Angeles
(1953) 40 Cal.2d 271 [253 P.2d 464] to support their contention
that a dog owner is not entitled to a hearing prior to the

destruction of a dog which respondent Director seizes summarily determines to be uncontrollable. Simpson, however, is clearly distinguishable from the instant action on its facts. The court in Simpson had to deal with the issue of whether the City could turn over unclaimed stray dogs to medical institutions for research purposes or whether such action would constitute a taking of private property. Over a vigorous dissent, the court held that the City could turn over unclaimed dogs to medical institutions for research purposes provided that the dogs had been lawfully impounded in the first instance. With regard to unclaimed properly impounded dogs, the Simpson court held failure to conduct a hearing prior to the destruction or surrender of such dog did not constitute deprivation of property without due process of law. The instant action does not involve unclaimed strays nor does it challenge the initial impoundment of stray dogs without a hearing. Such a requirement would totally unwieldy and impracticable to administer. However, the case where the owner of the dog does step forward to timely claim her pet, the dog owner should be entitled to a hearing prior to the pet's destruction.

Appellants do not attack the right of Respondents to provide for the impounding of stray dogs or for the disposition of unclaimed impounded dogs as such impounding and disposition are within the legitimate sphere of the police power. Petitioners also do not protest the ordinance's provision which allows for destruction of any unclaimed dog which has been impounded for more than 72 hours. Under the terms of ordinance and the rationale of Simpson, private property rights

in such unclaimed dogs would be terminated following the 72 hour impoundment period.

Unlike Simpson, the instant action involves a dog owner's attempt to secure a hearing to determine if the dog is vicious and uncontrollable and to determine whether the dog must be destroyed. The subject ordinances do not provide for such a hearing. While Atascadero City Code section 4-1.207 entitled "Redemption of Impounded Dogs" provides that the owner or person entitled to the custody of the dog may, within 72 hours, request that an impartial hearing be conducted to determine "the sole issue of whether the dog was lawfully seized and impounded", said hearing is offered to determine whether impoundment fees are to be assessed or collected against the owner. Such a hearing does not address whether a dog other than a stray or a lawfully impounded dog (such as a dog quarantined for possible rabies) should be destroyed or returned to its owner. Appellants submit that the rationale of Simpson and the "impartial hearing" under Atascadero City Ordinance section 4-1.207(b) (for which no standard procedure has been implemented) apply only to stray dogs.

In any event, Appellants did request a hearing within 72 hours following the May 23, 1985 impoundment of Missy but were denied a hearing and were informed that they were not entitled to a hearing as a destruction order had already issued on May 24, 1985. Thus, assuming arguendo that a section 4-1.207 "impartial hearing" was required to review the impoundment and destruction of a dog, Appellants were denied such a hearing.

Respondents have requested Appellants "specify in more

detail how they could have received a fairer, more complete hearing, before we convert a system that works into a formal one that might not." (Respondents brief pg. 26 The only thing that "works" about the present system is that dogs are summarily destroyed and respondents are saved the "mischief" of having to prove the dog is vicious and uncontrollable. As discussed in their opening brief, Appellants seek a hearing which is mandated, rather than offered as a courtesy to one dog owner following her vocal objections to the news media and elected officials. Due process requires notice, an opportunity to be heard, an impartial decision-maker and a decision based on evidence other than hearsay allegations by Respondents. (Appellant's brief pp. 15-16)

II

PROCESS PROTECTION APPLIES TO ALL PROPERTY

While Respondents admit that a dog is personal property, they claim that a dog is not entitled to due process protection until after it is seized, and then only to determine who must pay the fees for the impoundment (Atascadero Ordinance Code, Section 4-1.207(b) [App. 226] Respondents contend that citizens have no due process protection until after their property is seized and if the property is a dog as opposed to cattle, other bovines, and inanimate personal property some type of "impartial hearing" may be conducted to determine the "sole issue of whether the dog was lawfully seized and impounded" in order to determine whether the dog owner shall be charged any fees for the impoundment.

Appellants submit that due process is due process and must be afforded, if not prior to a seizure due to exigent circumstances, promptly following such seizure. Respondents apparently contend that the only issue to be resolved at any hearing granted a dog owner is to determine whether the seizure was lawful or unlawful and if determined lawful, all private property rights in such dog are terminated. While it may be lawful and in furtherance of public safety, to immediately seize a possible rabid dog or even an alleged vicious dog, it does not follow that the owner of the dog lawfully seized has lost all private property rights in the dog. No one questions that a possible rabid dog can, and should be seized and quarantined without a hearing; however, following a successful quarantine period the owner is entitled to the return of the dog. The owner of a suspected rabid dog has not lost all private property rights in his dog and is entitled to the return of the dog following the quarantine.

Due process requires a hearing not only to determine if the seizure was lawful or unlawful (as clearly it would be lawful to seize a dog suspected of having rabies or of vicious biting if exigent circumstances are present) but also to determine whether the property (whether it be properly or improperly impounded) is subject to forfeiture or destruction. A hearing to determine the sole issue of whether the dog was lawfully seized or not requires no consideration of whether the dog is guilty of the accused vicious behavior justifying its destruction. Therefore, Respondent's argument that the only issue to be determined prior to the destruction of a dog accused of biting is whether the

seizure is proper or not does not comply with due process requirements.

Appellants invite the court's attention to the recent decision in Jett v. Municipal Court 1986) Cal.App.3d 223 Cal.Rptr. 111 wherein the court ordered the return of a seized alleged fighting tortoise named Rocky to its owner on grounds that the humane society had no authority to divest him of ownership of Rocky. In that case, the court held the issue was not whether the initial seizure and impoundment was proper, but rather dealt with the humane society's refusal to return the tortoise to the Petitioner. The court not only ordered the return of Rocky, but also limited the impoundment fees which could be charged to the petitioner by the society as a condition for such return to those incurred from the date of seizure to the date the court denied owner's motion for Rocky's return.

Although lack of a post-seizure hearing was not an issue in Jett v. Municipal Court supra, 223 Cal.Rptr. 111, 113, court recognized due process requires a post-seizure hearing to be held for animal impoundments as mandated by Carrera v. Bertaini (1976) 63 Cal.App.3d 721, 728-729. Petitioners submit that the due process requirements of Carrera apply equally to dogs, tortoises, cattle, and other bovines.

III

RESPONDENTS' CLAIMS ARE UNSUBSTANTIATED

A review of Respondents' version of the facts stated in their brief's introduction and statement of the case is representative of Respondents repetitive claims that Missy

viciously bitten four children without any substantiating evidence to support such claims. While Appellants are willing to concede that "a dog is a dog" as is repeatedly argued in Respondents' brief Pages 13 twice 14, and 23 twice), Appellants do not concede that Respondents' repetitive claim that Missy has viciously bitten four children has become an established fact.¹

Throughout this ordeal, Respondents claims have always been presented as established facts rather than accusations to be proved at a hearing. Respondents have made numerous claims, again repeated in their brief, as constituting established facts but which are totally unsupported and even rebutted by the record. For example, the three purported admissions stated in Respondent's brief at page 3 are distorted and taken out of context. Appellant Susan Phillips never "admitted the dog to be aggressive towards children because of 'abuse' the dog suffered at the hands of children when it was a puppy" Steve Carnes made such a statement at the courtesy hearing, but it was not confirmed or admitted to by Appellant Susan Phillips (App. 185). Furthermore, whereas Respondents claim "medical bills were generated as a result of treatment for injuries" no such alleged medical bills were submitted as evidence nor were any included in the administrative record. Moreover, while Susan Phillips may

¹It is interesting to note that Respondent's brief, replete with numerous claims of vicious acts by Missy fails to cite to any evidence in the administrative record other than the order issued June 19, 1985, which likewise consisted of "findings" unsupported by evidence presented at the courtesy hearing.

have admitted to knowing that if the alleged bite was reported to Respondent Director the dog would be destroyed as previously threatened by Respondent Director, such an admission does not constitute an admission that a fourth dog bite victim existed or agreement that the dog would have to be destroyed.

Another "fact" repeatedly asserted by Respondents which is not supported by the record is that Missy was not to be removed from Appellant Mary Phillip's cage on her Morro Bay property (Respondents' brief, page 4, App. page 51). The confinement order also issued without a hearing) did not require Appellants to keep Missy in the cage in Morro Bay at all times, nor did it require official approval prior to her removal from the cage (App. 23-24). With regard to the alleged puncture wound, which allegedly left a "residual scar about the size of a kidney bean"

Respondents' brief, page 4 no photographs, physician's statements, ripped clothing or any physical evidence of such a puncture wound has ever been presented.

Appellants submit Respondents version of the facts has not been established in any hearing and therefore, Missy, currently on death row at the County Pound, stands unjustly accused.

IV

CONCLUSION

In conclusion, Appellants request that the order denying the writ be reversed, an order issue to compel Respondents to immediately release Missy to the custody of Appellants without

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imposition of any impoundment fees (which are currently being billed at the rate of three dollars (\$3.00) per day and attorney's fees and costs be awarded in this action.

Dated: April 3, 1986

Respectfully submitted,

GEORGE & COLLINS

By: Sh A

Shaunna Sullivan

lit;reply