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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF PLACER

10 COLEEN HARRINGTON,
11 Plaintiff,
12 v.
13 DAVID HOVANEK, et al.
14 Defendants.

CASE NO.: SCV 14342

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION IN LIMINE
NUMBER 1**

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16 **MOTION IN LIMINE NUMBER 1**

17 **TABLE OF AUTHORITIES**

18 **Cases**

19 Hayes v. Risk, 255 Cal.App.2d 613, 624, 64 Cal.Rptr. 36, 43 (2nd Dist.1967).....2
20 Jetty v. Craco, 123 Cal.App.2d 876, 880, 267 P.2d 1055, 1057-58 (1954).....2
21 Katsaris v. Cook, 180 Cal.App.3d 256, 225 Cal.Rptr. 531 (1986).....3
22 Reed v. Norman, 41 Cal.2d 17, 21-22, 256 P.2d 930, 932 (1953).....2

23 **Statutes**

24 Ann. Cal. Food & Agric. Code § 24957.....3
25 Ann. Cal. Food & Agric. Code § 25408.....3
26 Ann. Cal. Food & Agric. Code § 26554.....3
27 Ann. Cal. Food & Agric. Code § 31103.....3

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I. SUMMARY OF ARGUMENT

Defendant should not be allowed to raise ownership of pheasants as a defense to the killing of plaintiff’s dog because he failed to raise it as an affirmative defense in his Answer. The plaintiff would be unfairly prejudiced by the late admission of an affirmative defense that is not applicable considering the facts of this case.

II. STATEMENT OF FACTS

Plaintiff seeks recovery of damages for the death of her dog, Penny, on May 12, 2004, when defendant shot her thirteen times with two guns. As shown by the records of this Court, the complaint was filed on February 3, 2005.

III. ARGUMENT

A. A MOTION TO EXCLUDE EVIDENCE OF DEFENDANT’S OWNERSHIP OF PHEASANTS IS PROPER BECAUSE DEFENDANT FAILED TO RAISE THE ISSUE AS AN AFFIRMATIVE DEFENSE.

1. Waiver of Defense.

As a general rule, failing to present and preserve a defense relevant to a given case in the Answer results in its waiver. Reed v. Norman, 41 Cal.2d 17, 21-22, 256 P.2d 930, 932 (1953). The rule that a pleading should be liberally construed to do substantial justice between the parties cannot be interpreted to allow a defendant to surprise a plaintiff with an omitted defense that was not included either directly or by fair import. Hayes v. Risk, 255 Cal.App.2d 613, 624, 64 Cal.Rptr. 36, 43 (2nd Dist. 1967).

2. Plaintiff is Entitled to Prepare Her Case Without Undue Fear that She will be Unfairly Prejudiced by the Assertion of Affirmative Defenses Omitted from the Answer.

Affirmative defenses constitute new matter and must be alleged with the same specificity as the plaintiff’s cause of action. A plaintiff should not be expected to meet special defenses that have not been pleaded and for which he/she has not had a chance to prepare for. Jetty v. Craco 123 Cal.App.2d 876, 880, 267 P.2d 1055, 1057-58 (1954).

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1 **B. PLAINTIFF HAS A GOOD FAITH BELIEF THAT DEENDANT WILL**
2 **PRESENT EVIDENCE THAT IS IRRELEVANT AND SHOULD**
3 **THEREFORE BE EXCLUDED.**

4 **1. The Statute Permitting the Shooting of Dogs for Chasing Livestock is**
5 **Inapplicable because Pheasants Kept as Pets are not Protected as**
6 **Livestock or Poultry under California Law.**

7 "Poultry" under California Code "means domesticated fowl and domesticated rabbit which
8 is intended for use for human food." Ann. Cal. Food & Agric. Code § 25408. The defendant
9 obtained the pheasants as pets for his son David. See Deposition of David Sr. at 22-23. The
10 statements of defendant's son David also confirm that the pheasants were considered to be family
11 pets and were not being raised for food or other agricultural purposes. See Deposition of David Jr.
12 at 16:12-13. The concern of the legislature was to protect farmers from economic loss. Katsaris v.
13 Cook, 180 Cal.App.3d 256, 265 (1986). The defendant's interest in his son's pets is not the interest
14 that the Legislature sought to protect under the statute and therefore does not provide a defense for
15 the killing of plaintiff's dog Penny.

16 **2. The Defendant's Actions Fall Outside the Scope of the Privilege to**
17 **Protect Livestock.**

18 Section 31103 of the Food and Agricultural Code permits the owner of livestock or poultry
19 to kill or seize a trespassing dog in order to protect his animals. The Legislature in enacting this
20 legislation found that the public's interest in protecting "farm animals" outweighed any interest a
21 dog's owner would have in allowing their animal to roam freely. Katsaris v. Cook, 180 Cal.App.3d
22 256, 225 Cal.Rptr. 531 (1986). The statutory privilege to kill a dog provided by the Food and
23 Agricultural Code is conditional and only protects a defendant if he "acts for the purpose of
24 advancing or protecting the interest which the privilege seeks to protect." Id. at 265. The
25 Legislature made a policy choice in enacting § 31103 to protect the economic interests of those
26 involved in food production for the public good. Conduct, such as defendant's shooting Penny
27 thirteen times, which falls outside that which is necessary to protect livestock from trespassing dogs
28 is therefore not covered by the privilege.

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