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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ZACHARY E. BLUM,

Plaintiff and Appellant,

v.

ROEM BUILDERS, INC. et al.,

Defendants and Respondents.

B270662

(Los Angeles County
Super. Ct. No. BC533725)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly J. Fujie, Judge. Reversed.

Franecke Law Group and Louis S. Franecke for Plaintiff and Appellant.

Booth LLP, Jason M. Booth and Michael N. Jones for Defendants and Respondents.

* * * * *

A motorcyclist slid in a patch of dirt and gravel as he turned into an alleyway. He sued one of the three companies with active construction sites abutting the alley. The trial court granted summary judgment to the construction company and the jobsite's owner, finding no triable issue of material fact as to whether the company was responsible for dropping the dirt at the alley's mouth. The motorcyclist now appeals two of the trial court's predicate evidentiary rulings as well as its grant of summary judgment. We conclude that the trial court erred in excluding photographs of the accident scene, and conclude that those photographs raise a triable issue of fact regarding causation. Accordingly, we reverse.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

While riding his motorcycle in Santa Monica in mid-August 2013, Zachary E. Blum (plaintiff) attempted a right turn into an alleyway at over 20 miles per hour, but lost control, fell, and was injured.

There was a patch of soil and rocks at the southern mouth (mouth) of the alley where plaintiff's motorcycle lost traction.

At that time, three lots adjacent to the alley were actively under construction. Defendant FAME Santa Monica Senior Apartments and defendant ROEM Builders, Inc. (collectively, defendants) were the owner and construction company, respectively, of the lot located nearest to the alley's mouth, some 255 feet away. Although no trail of dirt ran from the alley's mouth to *any* of the three construction sites, there was dirt "throughout the alley" and dirt spilling from defendants' jobsite into the alley.

II. Procedural History

Plaintiff sued defendants for (1) negligence (motor vehicle), (2) general negligence, and (3) premises liability.¹ Plaintiff alleged that the alley's mouth "was in a dangerous and unsafe condition for motor vehicle traffic" due to defendants' "fail[ure] to safely manage [their] work site . . . construction" and thus to "clean, warn [and] sweep" the alley it used to transport dirt to and from its jobsite.

Defendants moved for summary judgment. In support of their motion, they included the contemporaneous log entries for their construction site revealing that the only dirt or gravel that had been moved from their site during the week leading up to plaintiff's accident was from the *street* side of their site, not the *alley* side. Defendants also submitted evidence that street sweepers regularly sweep the alley's mouth, and that there was no gravel or dirt at the alley's mouth earlier in the morning on the day of plaintiff's accident.

Plaintiff opposed the motion. In support of his opposition, plaintiff submitted three categories of evidence. He submitted photographs depicting the alley's mouth and the portion of the alley adjacent to defendants' jobsite. He submitted the deposition testimony from the community services officer who responded to the accident scene and had taken the photographs. And he submitted a declaration from an expert witness. The expert opined that (1) plaintiff's motorcycle accident was caused by dirt and gravel at the alley's mouth, and (2) the dirt and gravel at the alley's mouth came from defendants' construction site.

¹ Plaintiff initially sued ROEM Builders, Inc., but later dismissed it in favor of ROEM-ICON Contracting Group, Inc.

The trial court granted summary judgment to defendants. In its 12-page order, the court ruled inadmissible (1) the photographs, for lack of authentication, and (2) plaintiff's expert's opinion that the dirt and gravel came from defendants' construction site, for being based on "speculation and conjecture."

With regard to the first evidentiary ruling, the court noted that plaintiff's attorney had attached to his declaration photographs that he said were "true and accurate copies of all of the photographs taken by" the community services officer, but had *not* also attached to the officer's deposition testimony the photographs she had authenticated during her deposition. This made it impossible, the court ruled, to know for sure whether the photographs the attorney attached were the same ones the officer had authenticated.

Without the photographs or the expert's opinion, the court reasoned, there were no triable issues of material fact as to causation.

After the trial court entered judgment for defendants, plaintiff filed a timely notice of appeal.

DISCUSSION

Plaintiff challenges the trial court's grant of summary judgment, including its subsidiary evidentiary rulings. We independently review a grant of summary judgment. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) Although the Courts of Appeal are divided over whether a trial court's evidentiary rulings subsidiary to a summary judgment motion are reviewed for an abuse of discretion (as evidentiary rulings generally are) or reviewed independently (as summary judgment motions generally are) (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535), we will sidestep this debate by applying both standards

of review. Because the evidentiary rulings affect our analysis of the summary judgment ruling, we will start with them.

I. Evidentiary Rulings

A. *Exclusion of photographs*

“A photograph . . . is typically authenticated by showing it is a fair and accurate representation of the scene depicted.” (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267 (*Goldsmith*); Evid. Code, § 1413 [“A writing may be authenticated by anyone who saw the writing made or executed”]; see also Evid. Code, § 250 [a writing includes “pictures” “record[ed] upon any tangible thing”].) A photograph, like any other writing, may be authenticated by its content. (*People v. Landry* (2016) 2 Cal.5th 52, 86-87; *Goldsmith*, at p. 268; see also Evid. Code, § 1421.)

The trial court erred and abused its discretion in concluding that the photographs were not sufficiently authenticated. The threshold for authentication is low; there need only be “sufficient evidence for a trier of fact to find that the [photograph] is what it purports to be.” (*Goldsmith, supra*, 59 Cal.4th at p. 267.) In this case, the community services officer, in her deposition testimony, described the content of the photographs she had taken. The photographs attached to plaintiff’s attorney’s declaration matched the verbal descriptions provided by the community services officer during her deposition testimony. Although plaintiff’s attorney would have been well served by making the task of correlating the photographs to the officer’s testimony less onerous, there was enough evidence before the trial court to find that the photographs attached to plaintiff’s attorney’s declaration were the same ones that fairly and accurately depicted the alley at the time of the accident.

B. Exclusion of plaintiff's expert's causation opinion

Because, as discussed below, the photographs alone raise a triable issue of fact, we have no occasion to evaluate whether the trial court properly excluded the opinion of plaintiff's expert on causation. The admissibility of that opinion is for the trial court to decide at the time of trial.

II. Summary Judgment Ruling

A trial court may grant summary judgment to a defendant upon proof “that there is no triable issue as to any material fact,” including when “[o]ne or more of the elements of the cause of action cannot be separately established.” (Code Civ. Proc., § 437c, subds. (a), (c), (o)(1) & (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) A defendant moving for summary judgment bears the initial burden to “‘show[] that one or more elements of the cause of action . . . cannot be established’”; if that burden is met, the plaintiff must then come forward with “‘specific facts showing that a triable issue of material fact exists as to that cause of action’” [Citations.]” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) On appeal, we identify the issues framed by the pleadings, determine whether the defendant carried its initial burden, and if so, assess whether the plaintiff set forth any triable issues of material fact. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252-1253.)

The trial court's summary judgment ruling rests on the absence of any triable issue of material fact as to whether the dirt at the alley's mouth came from defendants' jobsite—that is, on the absence of causation. Causation is an element of all three negligence-based causes of action plaintiff asserts. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158 [premises liability];

Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP (2014) 59 Cal.4th 568, 573 [negligence, generally].)

Like the trial court, we conclude that defendants carried their initial burden of demonstrating the absence of causation through affidavits and contemporaneous records indicating that they did not use the alley to haul dirt to or from their jobsite during the week leading up to plaintiff's accident.

Unlike the trial court, we conclude that plaintiff carried his subsequent burden of establishing a triable issue of fact as to causation because the photographs we now determine are admissible create such an issue. Those photographs depict dirt spilling from defendants' jobsite into the alley. Plaintiff's claims are based on defendants' negligent failure to "clean, warn [and] sweep" the areas around their jobsite (rather than defendants' negligent transportation of dirt), so what matters is whether the dirt spilling into the alley from defendants' jobsite is the same dirt at the alley's mouth; how it got there is irrelevant. The fact that there was dirt spilling into the alley from defendants' jobsite—but not, as the community services officer saw, the other jobsites—makes it more likely that defendants' dirt is the culprit, and thus raises a reasonable inference of causation. To be sure, one can also draw a competing inference that the dirt at the alley's mouth came from some other source. But "it is improper to resolve . . . competing inferences on summary judgment" (*People ex rel. Government Employees Ins. Co. v. Cruz* (2016) 244 Cal.App.4th 1184, 1200.) The question is a close one, but the law is clear that any "tie" goes to trial and mandates the denial of summary judgment. (E.g., *Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 967 ["Because we can draw two reasonable

inferences from the[] undisputed facts, we cannot affirm the trial court's grant of summary judgment").)

DISPOSITION

The judgment is reversed. Plaintiff is entitled to his costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ