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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SANDRA RICHARDSON et al., Cross-complainants and Appellants, v. WHIRLPOOL CORPORATION, Cross-defendant and Respondent.	2d Civil No. B271395 (Super. Ct. No. 1466782) (Santa Barbara County)

Who is responsible for a house fire that occurs when a dog is left alone with combustible dog food on a stove top: the dog's owners or the stove top manufacturer? Sandra Richardson and Sandra Ruiz appeal following the trial court's grant of summary judgment in favor of Whirlpool Corporation (Whirlpool), the manufacturer of a stove top that was the source of a fire in their home. Because this case presents questions of fact that cannot be decided as a matter of law, we reverse.

BACKGROUND

A fire started in appellants' rented Santa Barbara house when no one was home. When Richardson returned, her labradoodle was inside barking. She opened the door, noticed that the house was burning, and called for help. Firefighters extinguished the fire. Smoke and soot rendered the house uninhabitable.

State Farm General Insurance Company (State Farm) insured the house. State Farm paid the homeowner's claim for damages, and filed a subrogation action against Richardson and Ruiz. State Farm claims that appellants left a bag of dog food on or near the front burner of a stove top and left the dog alone in the house for a few minutes. It claims that appellants either left a burner ignited, or their dog turned one of the burner knobs to the ignition position when it tried to get the dog food. This caused the dog food to ignite. Fire then spread throughout the house.

Appellants filed a cross-complaint for indemnification and apportionment against Whirlpool. They claim that Whirlpool is responsible for the fire. Whirlpool denies the claim and asserts affirmative defenses, including superseding cause, product misuse, and failure to comply with product warnings.

Whirlpool moved for summary judgment. Whirlpool argues that appellants did not use the stove top in a reasonably foreseeable way when they placed combustible materials on it; that it properly designed and manufactured the stove top; and that it provided adequate warnings that appellants did not read. As an affirmative defense, Whirlpool argues that appellants' placement of combustibles on the stove top was an unforeseeable misuse that constitutes a superseding cause of the fire.

Whirlpool submitted the deposition testimony of the fire investigator that the fire started on or near the stove top. One of the stove top burner's knobs was in the "on" position at 63.5 degrees. The burner's grate was offset. On the stove top were layers of dog food, a bag of dog food that had been ripped open, and other combustibles. There were also burnt remnants from the cabinets above. The dog food formed the bottom layer of debris on the stove top, indicating that it was present before the fire started. There was no chance that the dog food could have fallen down from or with the cabinets. The investigator also said that appellants told him the dog food was "on or near" the stove top at the time of the fire. They said that the countertop next to the stove top was "basically used for storage."

Whirlpool's safety manager declared that the stove top had no design defect because it requires users to both push and turn the control knob to ignite a burner, exactly as a consumer who read the safety guide would expect. The amount of force needed to complete these tasks "balances the desire to prevent accidental ignition but still allow[s] older consumers or arthritic consumers to activate the surface burners." The safety manager declared that the stove top had no manufacturing defect because burners were designed to ignite when the knobs are turned between 55 and 95 degrees. Finally, he said the stove top had the requisite instructions and safety warnings on it and in the safety guide, including a warning against storing combustible materials on or near the stove top.

In opposition, appellants' expert declared that the stove top was defectively designed or manufactured. At 63.5 degrees, the stove top knob was in a position that allowed the burner's igniter to spark and gas to flow. But gas should not flow

at that position according to Whirlpool's specifications; it should only begin flowing between 80 and 92 degrees.

Richardson stated that she and Ruiz never used the stove top. They denied storing dog food or other combustibles there. Ruiz said that dog food was kept away from the stove, on the floor or on the island in the kitchen. But she did store dog treats on the counter, within a foot of the stove top, on the day of the fire. Richardson also said that there were things on the countertop within a foot of the stove top on the day of the fire, but she said that they were not dog treats. Appellants denied that their landlord gave them a copy of the stove top's safety guide, but admitted that they knew to keep combustibles away from it.

The trial court granted Whirlpool's motion for summary judgment. It ruled that appellants' actions were a superseding cause of the fire: "[A]ssuming the stove was the source of the fire, it simply was not reasonable for Whirlpool to anticipate that [Richardson and Ruiz] would store dried dog food and other combustible materials on top of their stove and then leave their dog, who is hyperactive, alone and unattended in the house and that the dog would then jump up against the stove and accidently [*sic*] turn one of the burners on while trying to get at the bag of food. Because such actions are 'highly unusual or extraordinary,' they are superseding and intervening and break the chain of causation, entitling Whirlpool to judgment as a matter of law."

DISCUSSION

Standard of Review

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." (Code Civ. Proc., § 437c, subd. (c).)[1] The defendant bears the initial burden of showing that the plaintiff cannot establish one or more elements of the cause of action, or that there is an affirmative defense to it. (§ 437c, subd. (*o*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The latter is a particularly heavy burden that requires the defendant to state "facts establishing every element [of the affirmative defense] necessary to sustain a judgment in [his or her] favor." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 830 (*Huynh*), internal citations and quotations omitted.) If the defendant makes one of the required showings, the burden shifts to the plaintiff to establish a triable issue of material fact. (*Aguilar*, at p. 850.)

Our review is de novo. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84.) We liberally construe the opposing party's evidence and resolve all doubts in favor of the opposing party. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) We consider all evidence in the moving and opposition papers, except that to which objections were properly sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We may affirm the judgment on any basis; we review the trial court's ruling, not its rationale. (*Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.)

Richardson and Ruiz's Claims

Appellants contend that there are triable issues of material fact on their design defect, manufacturing defect, and failure to warn claims. Under each of these causes of action, liability attaches only if the plaintiff uses the product in a

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

reasonably foreseeable manner. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560; see *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 699 [failure to warn]; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 125-126 [design defect]; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126 [manufacturing defect].) Foreseeability is generally a question of fact for the jury. (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56.) "It may be decided as a question of law only if, 'under the undisputed facts there is no room for a reasonable difference of opinion.' [Citations.]" (*Ibid.*)

Whether appellants used the stove top in a reasonably foreseeable manner must be decided by a jury because there is room for a reasonable difference of opinion. Neither party presented evidence or legal authority that leaving a dog alone at home is not reasonably foreseeable. And the only evidence on the issue of whether leaving combustibles on a stove top is reasonably foreseeable is Whirlpool's inclusion of a warning against the practice in the stove top's safety guide—something that suggests that leaving combustibles on a stove is foreseeable and should be guarded against. (Cf. *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181, fn. 6 (*Webb*) [describing duty to warn against foreseeable risks].) Because of the lack of evidence presented, we decline to decide that leaving combustibles on a stove top is unforeseeable as a matter of law.

1. Design Defect

A product has a design defect if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe." (Rest.3d Torts, Products Liability, § 2.) To

establish a design defect claim, appellants must show that (1) the stove top "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner," or (2) the benefits of the stove top's knobs did not "outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418.)

Appellants made neither showing. They argue that the stove top was defectively designed because it could be ignited if someone or something bumped its knob. But Whirlpool's expert demonstrated how the stove top's design meets the consumer expectation test by describing how the stove top's knobs require a user to both push and turn them to ignite a burner, how that performance is consistent with design specifications, and how consumers expect that performance given the specifications in the safety guide. He demonstrated how the design meets the risk-benefits test by explaining how the knobs' design balances safety and usability. Appellants' expert concluded that the stove top was defectively designed, but did not opine that it failed to perform as expected or that its risks outweighed its benefits. His unsupported conclusion that the stove top was defectively or negligently designed to allow control knobs to be moved inadvertently is mere speculation and is insufficient to create a triable issue of material fact on appellants' design defect claim. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

2. Manufacturing Defect

"A manufacturing defect exists when an item is produced in a substandard condition." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120.) To establish the elements of a manufacturing defect claim,

appellants must show that the stove top was not made as intended when it left Whirlpool's possession. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 190 (*Garrett*).) They can do so by demonstrating that the stove top failed to comply with Whirlpool's design specifications. (*Lewis v. American Hoist & Derrick Co.* (1971) 20 Cal.App.3d 570, 580.)

The parties' experts agree that, when the fire started, the stove top's knob was in a position—at 63.5 degrees—that allowed gas to flow to the burner and the igniter to spark. Whirlpool's expert declared that this was expected by the stove top's design. But appellants' expert declared that gas should not flow to the burner with the knob at 63.5 degrees based on the design specifications he reviewed. We disagree with Whirlpool's contention that the trial court should have excluded evidence from this expert[2]; the court properly admitted both his and Whirlpool's expert's dueling declarations into evidence (Evid. Code, §§ 801, 802) and decided what weight to give each (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 737-738). Their disagreement creates a triable issue of material fact on appellants' manufacturing defect claim. (*Garrett*, *supra*, 214 Cal.App.4th at pp. 190-191.)

3. Failure to Warn

A manufacturer must "inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 577.) To

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[2] We review the trial court's rulings on the parties' evidentiary objections de novo. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.)

establish the elements of a failure to warn claim, appellants must show that "a warning was feasible and the absence of a warning caused [their] injury." (*Webb*, *supra*, 63 Cal.4th at p. 181.) But their claim cannot be predicated on a danger that is either generally known (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 67) or known to them specifically (*Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735). Their claim also fails in the absence of proof that the warnings Whirlpool provided with the stove top would have been made available to them. (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1596-1600.) And it fails if Whirlpool provided a warning that appellants did not attempt to read. (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 555-556.)

Appellants' warning defect claim fails because they make no showing that the absence of a warning caused their injury. While Richardson and Ruiz contend that Whirlpool should have warned that a burner could ignite if a pet or person bumps a control knob, they have shown no basis for such a warning. Whirlpool's expert stated that the burner could not ignite unless it was both pushed and turned, a statement appellants' expert did not rebut.

And to the extent that appellants base their claim on Whirlpool's alleged failure to warn against storing combustibles on the stove top, that claim fails because it is predicated on an obvious danger. (Cf. *Hanson v. Luft* (1962) 58 Cal.2d 443, 446-447 [open flames present generally known dangers].) Richardson and Ruiz both admitted that they knew not to do that. Moreover, they presented no evidence that the safety guide would have been made available to them. (Cf. *id.* at p. 445 [landlord has no duty to warn tenant of obvious danger].) Nor did they present

evidence that they requested the stove top's safety guide from their landlord. Appellants failed to show a triable issue of material fact on their failure to warn claim.

Whirlpool's Affirmative Defense

Whirlpool did not establish its affirmative defense that unforeseeable misuse of the stove top was the superseding cause of the fire for the same reasons discussed above.

In a strict product liability action, a defendant is not liable for harm caused by its product if the plaintiff misused the product after it left the defendant's possession, and the misuse was "so highly extraordinary that it was not reasonably foreseeable" to the defendant and should thus be considered the sole or superseding cause of the plaintiff's injuries. (CACI No. 1245; see *Perez v. VAS S.P.A.* (2010) 188 Cal.App.4th 658, 685.) At the summary judgment stage, it is the defendant's burden to prove that the plaintiff's own misuse caused his or her injuries. (*Huynh*, *supra*, 16 Cal.App.4th at p. 831.) The foreseeability of a product's misuse presents an issue of fact. (*Ibid.*) It may be decided as a matter of law only when the undisputed facts "'leave no room for a reasonable difference of opinion.' [Citation.]" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308 (*Chavez*).)

Whirlpool failed to carry its burden of proving that the misuse was unforeseeable as a matter of law. Whirlpool presented no evidence that leaving a dog alone at home is not reasonably foreseeable. And the only evidence on whether leaving combustibles on a stove top is so highly extraordinary as to not be reasonably foreseeable is Whirlpool's inclusion of a warning against the practice in the stove top's safety guide.

Inclusion of such a warning suggests that leaving combustibles on a stove is foreseeable and should be guarded against.

Without more evidence in support of its affirmative defense, Whirlpool cannot carry its burden of demonstrating that Richardson and Ruiz's misuse was the sole or superseding cause of the fire. (*Huynh*, *supra*, 16 Cal.App.4th at pp. 831-832 [defendant failed to establish affirmative defense of misuse when it produced no evidence that the use of wrong grinder discs was the only possible cause of plaintiff's injury].) Because there is room for a reasonable difference of opinion, the trial court erred when it decided the issue as a matter of law. (Cf. *Chavez*, *supra*, 207 Cal.App.4th at p. 1308 [question for the jury whether pistol owner's misuse, in leaving pistol on the floor of his truck while son rode in the back seat without a car seat, was a superseding cause of son shooting him].) The court should not have granted Whirlpool's motion for summary judgment on this ground.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting Whirlpool's motion for summary judgment and to enter a new order that: (1) denies the motion for summary judgment, (2) grants the motion for summary adjudication as to the negligent or defective design claim and the failure to warn claim, and (3) denies the motion for summary adjudication as to the manufacturing defect claim. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

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