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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID L. WILLIAMS,

Plaintiff and Appellant,

v.

RAM'S MANUFACTURING,
INC. et al.,

Defendants and
Respondents.

B270963

(Los Angeles County
Super. Ct. No. MC024508)

APPEAL from a judgment of the Superior Court for the County of Los Angeles, Brian C. Yep, Judge. Reversed and remanded.

Kuzyk Law and Mark J. Leandro for Plaintiff and Appellant.

Mark R. Weiner & Associates and Kathryn Albarian for Defendants and Respondents Ronald Brown, Ram's Manufacturing, Inc. and Hydra-Quip Corporation.

David L. Williams appeals from the judgment entered after the trial court granted summary judgment in favor of Ronald Brown and Brown's companies, Ram's Manufacturing, Inc. and Hydra-Quip Corporation, in Williams's action to recover for personal injuries he suffered when the motorcycle he was riding collided with a cow in the roadway. Because triable issues of material fact exist regarding ownership of the cow struck by Williams, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Accident

On November 21, 2013 Williams was riding his motorcycle near the unincorporated community of Lake Hughes, California when three all black cows wandered onto the road. Williams struck one of the cows and crashed his motorcycle. Another passing motorist struck and killed the downed cow. Shortly after the accident Williams called his then-girlfriend, who came to the scene and photographed the dead cow. The California Highway Patrol responded to the scene, inspected the accident site and the cow and prepared a traffic collision report. The cow carcass was later removed by unknown persons.

2. Williams's Complaint

On April 18, 2014 Williams filed a complaint and on July 7, 2014 a first amended complaint alleging a single cause of action for negligence against Brown, Ram's Manufacturing and Hydra-Quip (collectively Brown).¹ Williams alleged Brown owned the

¹ Brown is the chief executive officer of Ram's Manufacturing, doing business as Ram's Land and Livestock, and the president of Hydra-Quip. The first amended complaint named additional defendants for whom summary judgment was

cow he had hit and further alleged Brown had negligently controlled his premises and livestock, allowing the cows to wander off the property, thereby creating a dangerous and unsafe condition on the roadway. Williams alleged he suffered serious injuries as a proximate result of that negligence.

3. *Brown's Motion for Summary Judgment*

Brown moved for summary judgment on April 1, 2015. Brown asserted he did not own the cow Williams struck and, therefore, was not liable for Williams's injuries. In a declaration Ronald Brown stated the Ronald A. Brown Trust owns 980 acres of property in Lancaster, California, approximately a mile from the site of Williams's accident. Prior to June 2013 cattle owned by Ram's Manufacturing were kept on the Lancaster property. All the cattle on the property were branded with Ram's Manufacturing's brand, an uppercase letter "R." After a fire in May 2013 destroyed fencing on the property, all the cattle were accounted for and moved 11 miles away to a property owned by Hydra-Quip. At the time of Williams's accident, Ronald Brown declared, no cattle owned by Brown were kept on the Lancaster property. The motion papers also cited the traffic collision report, which stated the dead cow did not have any markings that would identify its owner.² Based on this evidence, it was argued it could not have been a Brown cow that Williams hit.

also granted. Williams has not appealed the judgment in favor of those defendants.

² During the hearing on the summary judgment motion Williams's counsel objected to the admissibility of the collision report as hearsay. The trial court did not rule on the objection. Accordingly, it is presumed the objection was overruled and preserved for appeal. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th

4. *Williams's Opposition to the Summary Judgment Motion*

In opposition to the motion Williams argued triable issues of fact existed as to whether Brown owned the cow. Williams relied in part on two photographs of the dead cow taken by his then-girlfriend shortly after the accident (labelled exhibits 1A and 1B). Williams claimed Ram's Manufacturing's brand could be seen on the carcass in the photographs. To help illustrate this point, Williams submitted two additional copies of exhibit 1B, one of which showed an enlarged section of the cow's rear belly where Williams contended the brand could be seen (exhibit 2A) and another that had the same enlarged area with an "R" drawn on it in yellow to indicate the alleged placement of the brand (exhibit 2B). Williams argued the photographs established a triable issue of fact whether Brown owned the cow.

Williams also submitted the declaration of his private investigator, Jason Rush. Rush stated he observed a large

512, 534 ["if the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal"].) Williams argues the trial court erred in overruling his hearsay objection to the report. Notwithstanding *Reid*, Brown argues Williams has not preserved the objection for appeal because no written objection was filed and the oral objection was memorialized in a settled statement rather than a reporter's transcript. (See Cal. Rules of Court, rule 3.1352 [a party objecting to evidence in summary judgment papers must submit the objections in writing or "[m]ake arrangements for a court reporter to be present at the hearing"].) Because we conclude triable issues of material fact preclude summary judgment even if the police report is considered, we need not address these issues.

pasture 3,000 feet north of the accident site and had been told by area residents the pasture was used for cattle grazing. Rush's declaration also recounted his conversation with Terry Munz, another defendant in Williams's lawsuit, who said he had at times leased portions of that pasture but not during the period when the accident occurred. According to Rush, Munz said that Brown had leased the pasture at the time of the accident and that Brown was the only one in the vicinity that owned all black cattle. (Munz claimed he had only Hereford cows, which have white faces.) Finally, Rush declared he had gone to a location 11 miles from the accident site owned by Brown and saw all black cattle grazing on the property. Williams did not submit a declaration from Munz or the other individuals to whom Rush had spoken.

5. Brown's Reply and Evidentiary Objections

In reply Brown argued Williams had not submitted evidence from which a jury could reasonably conclude the cow was branded with an "R." Specifically, Brown contended the photographs submitted by Williams were "very blurry, almost indecipherable" and argued the "blob [Williams] highlighted on the photographs could be anything." Brown also argued exhibits 2A and 2B were inadmissible because they were doctored, illegible and lacked foundation and argued the Rush declaration contained inadmissible hearsay.

6. Summary Judgment for Brown

The trial court sustained Brown's hearsay objections to the Rush declaration,³ as well as his objections to the two enlarged

³ Williams does not challenge the court's evidentiary rulings excluding the Rush declaration.

photographs, and granted summary judgment in favor of Brown, finding, “[b]ased on all competent and admissible evidence, . . . the Brown Defendants have shown that Plaintiff cannot establish that said Defendants owned, possessed or had control over the cow that caused the accident with Plaintiff.” Thus, the court concluded, Williams could not establish Brown breached any duty to Williams or caused his injuries.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when “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).) When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff’s cause of action. Alternatively, the defendant may present evidence to “‘show[] that one or more elements of the cause of action . . . cannot be established’ by the plaintiff.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; see Code Civ. Proc., § 437c, subd. (p)(2).) “““The moving party bears the burden of showing the court that the plaintiff “has not established, and cannot reasonably expect to establish,” the elements of his or her cause of action.””” (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705; accord, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 [“the defendant must present evidence that would preclude a reasonable trier of fact

from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff ‘does not possess and cannot reasonably obtain, needed evidence’”].)

Once the defendant’s initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa*, *supra*, 58 Cal.4th at p. 703; *Schachter*, at p. 618.) “[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference” (*Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392.)

2. *The Trial Court Erred in Granting Brown’s Motion for Summary Judgment*

“Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.” (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573; accord, *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 662 “[t]o succeed in a negligence action, the

plaintiff must show that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach proximately or legally caused (4) the plaintiff's damages or injuries"]; see also Civ. Code, § 1714 [{"e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . ."].) Thus, a "cattle owner who *negligently* fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from a collision with his livestock" (*Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1628.)

Williams argues the photographs of the dead cow are reasonably susceptible to the interpretation that the cow bore the "R" brand and, therefore, there was a triable issue of material fact whether Brown's negligence caused Williams's injuries. Williams contends the trial court erred by examining the photographs and determining the "R" brand did not appear on the cow, an action that involved "interpreting and/or weighing the evidence."

While it is correct the trial court cannot weigh conflicting evidence, it may grant summary judgment when the undisputed facts permit only one reasonable conclusion. (*Rosas v. BASF Corp.*, *supra*, 236 Cal.App.4th at p. 1394.) Here, Williams's counsel drew the trial court's attention to a specific area of the cow and argued an "R" could be seen. The trial court disagreed, ruling no reasonable fact finder could come to that conclusion. Williams relied on no other admissible evidence Brown owned the cow.

We agree no reasonable juror could find an "R" in the enlarged area of the cow highlighted in the excluded photographs

and apparently relied upon by Williams in the trial court. However, evidence in the record supports an inference Brown owned the cow. Specifically, exhibit 1B shows a marking on the cow's rear right hip that can reasonably be interpreted as an "R," Ram's Manufacturing's brand. From that evidence the jury could find that Brown owned the cow Williams hit.⁴ As such, a triable issue of material fact exists as to Brown's liability, and summary judgment was improper.⁵

⁴ Although Williams's counsel arguably directed the court to look at the cow's stomach, rather than its rear right hip, Williams's separate statement disputed the assertion that Brown did not own the cow that Williams collided with and cited as supporting evidence "photos of subject cow depicting 'R' Brand." (See *Parkview Villas Assn. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1214 [party opposing summary judgment must "clearly indicate which of the facts contained in the moving party's separate statement it disputes," and "also must supply 'a reference to the supporting evidence' in its separate statement"].)

⁵ We need not address Williams's challenge to the trial court's exclusion of exhibits 2A and 2B because, as discussed, triable issues of material fact exist even absent consideration of those exhibits.

DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. Williams is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

BENSINGER, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.