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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RICHARD EBERHART,

Plaintiff and Appellant,

v.

MENDOCINO COUNTY et al.,

Defendants and Respondents.

A134234

(Mendocino County Super. Ct.  
No. SCUK-CVPO-11-57727)

Plaintiff Robert Eberhart (appellant) appeals from orders sustaining respondents Mendocino County Sheriff’s Office, by and through the County of Mendocino (County), and California Highway Patrol’s (CHP) demurrers to his second amended complaint without leave to amend. Appellant contends he stated a valid cause of action for premises liability because respondents: (1) controlled the road on which he was injured after a vehicle he was driving collided with a cow that was on the road; and (2) had a mandatory duty to seize the cow from the road to prevent the collision from occurring. For the reasons set forth below, we shall dismiss the appeal as to CHP and affirm the order as to County.

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 20, 2009, appellant was driving on US Highway 101 in Mendocino County when his vehicle collided with a cow and he sustained serious injuries. On September 9, 2010, he filed a personal injury complaint against CHP, “by and through the State of California,” the County, and the owners of the cow—George Sequeira, Celeste Sequeira, and the estate of Joseph Sequeira (together, the Sequeiras). CHP and

County filed demurrers to appellant's first amended complaint and the trial court sustained the demurrers with leave to amend.

Appellant filed a second amended complaint, which is the operative complaint, on August 1, 2011. His first cause of action for negligence was against the Sequeiras, who he alleged "negligently owned, controlled, maintained, and/or tended to the subject bovine so as to allow said bovine to enter the aforesaid roadway," which caused a collision that resulted in appellant suffering "catastrophic injuries to his face, head and body, requiring numerous surgical procedures to date." He added the California Department of Transportation (DOT), "by and through the State of California," as a defendant and alleged in his second cause of action for premises liability against the "County and State" that they were "liable for creating, maintaining, failing to warn about, and failing to remedy a dangerous condition of their premises."

Appellant alleged County "had control over" "the site of the subject accident" because it had "the power to prevent, remedy or guard against [the] dangerous condition . . . ." He alleged that under County's "own Animal Care Ordinances," "any police officer (including, but not limited to, [County] and [CHP]) is expressly given the power to insure that the negligent management practices of large domestic animals . . . are prevented. This includes, but is not limited to, the seizing of large domestic animals that have been allowed to run astray." "Additionally, pursuant to California Penal Code § 597.1, any police officer (including, but not limited to, [County] and [CHP]) is required (as a mandatory duty) to immediately seize possession of a stray or abandoned animal in order to protect the health and safety of the animal or safety of others."

Appellant further alleged that CHP is "responsible for patrolling all state highways, including US 101 at said location, and also acts as the state police. The duties of [CHP] include, but are not limited to, investigating and disposing of obstructions or other things (including a bovine) which impede the flow of traffic and/or create a traffic hazard, and it is vested with the power to enforce all laws, including those involving livestock on or about a state highway." He alleged CHP and County "did engage in efforts to capture the subject bovine. To the extent that [CHP] and [the Sheriff's

Department] did not have possession or control over the subject premises, they were required, as agencies of [the State and County], to promptly notify the appropriate state or county agency or agencies vested with such possession or control in order to alleviate and/or warn of the dangerous condition.” “When the subject bovine avoided [their] initial attempts to capture or corral it, [CHP and County] simply gave up and left the bovine to wander on or adjacent to US 101, endangering the lives of others . . . .” He alleged the cow “wandered on the subject premises” “[f]rom . . . around September 15, 2009 to September 20, 2009 (the date of injury),” “creat[ing] a substantial risk of injury to motorists, including [appellant]. The subject bovine, which was black in color and difficult if not impossible to be seen on the highway after dark, had a propensity to and did wander directly into the path of motorists, including [appellant],” who was “operating his vehicle in a safe and reasonable manner and using due care . . . .”

Appellant alleged as to DOT that it is “an agency of Defendant STATE” that “has possession and control over US 101. (See Streets & Highways Code § 90, § 300 and § 401.) [DOT], an agency of Defendant STATE, is also responsible for the inspection and maintenance of said highway to ensure that it is free of any obstructions or hazards to motorists . . . .” He alleged, “Based upon information and belief, [CHP] failed to adequately communicate with and seek the assistance of [DOT], or other STATE agencies, about the urgency of preventing the bovine from entering US 101. Based upon information and belief, [DOT] failed to adequately recognize and respond to the communications and requests for assistance by [CHP] in preventing the bovine from entering US 101. To the extent that [CHP] had actual or constructive notice of the subject bovine, this knowledge was imputed to [DOT], as both agencies are agents of Defendant STATE.” He alleged, “In addition to failing to corral, capture, and/or remove the bovine from the subject premises, Defendants, and each of them, failed to erect barriers, fences or otherwise prevent the bovine from entering US 101. Defendants, and each of them, also failed to warn or otherwise alert motorists, including [appellant], about the bovine’s presence on or around US 101.”

CHP, County, and DOT filed demurrers to the second amended complaint. The trial court overruled DOT's demurrer and sustained CHP's demurrer without leave to amend. The court sustained County's demurrer without leave to amend "on the ground that . . . County did not own or control the property at issue." After his motion for reconsideration was denied, appellant filed notices of appeal on January 6, 2012.

## DISCUSSION

### *1. Appealability of the order sustaining CHP's demurrer without leave to amend*

#### *a. One judgment rule*

Preliminarily, we address whether the order sustaining CHP's demurrer without leave to amend is an appealable order. The one judgment rule, effectively codified in Code of Civil Procedure section 904.1, subdivision (a), provides that only final judgments are appealable. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 803; see also *Walton v. Mueller* (2009) 180 Cal.App.4th 161, 172, fn. 9 ["Under this rule, an appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy"].) "Judgments that leave nothing to be decided between one or more parties and their adversaries . . . have the finality required by section 904.1, subdivision (a)." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.) In contrast, "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Id.* at p. 743.)

The overall objective of the one final judgment rule is to avoid the cost and oppression of "piecemeal disposition and multiple appeals." (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-967.) Interlocutory appeals "tend to clog the appellate courts with a multiplicity of appeals" and "tend[] to produce uncertainty and delay in the trial court." (*Id.* at p. 966.) Further, "[u]ntil a final judgment is rendered the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken." (*Ibid.*) In addition, "[l]ater actions by the trial court may

provide a more complete record which dispels the appearance of error or establishes that it was harmless,” and “[h]aving the benefit of a complete adjudication by the trial court will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings.” (*Id.* at pp. 966-967.) Finally, as an appellate court, we must not undermine the authority of the trial judge. (*Firestone Tire & Rubber Co. v. Risjord* (1981) 449 U.S. 368, 374 [“ ‘[p]ermitt[ing] piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.’ . . . [Citation.]”]) For the above public policy reasons, the one judgment rule is strictly applied and exceptions “should not be allowed unless clearly mandated.” (*Kinoshita v. Horio, supra*, 186 Cal.App.3d at p. 967.)

Here, CHP argues that the order sustaining its demurrer without leave to amend is not an appealable order because no final judgment has been entered as to the State of California. CHP asserts, “CHP and [DOT] are both state entities and do not have a separate legal identity for purposes of a judgment being entered in this matter. There can be only one judgment against the State of California.” Appellant responds that an appeal is appropriate because the trial court’s order “dismissed . . . CHP, as a defendant, from this case.” He asserts the CHP’s argument is “inconsistent and flawed” because CHP “[o]n the one hand, . . . wants to remain a dismissed party defendant,” and “[o]n the other hand, . . . wants this court to find that it is the same entity as an on-going party defendant, namely [DOT], by and through the State of California.”

We agree with CHP. In *Columbo v. State of California* (1991) 3 Cal.App.4th 594, 598, the plaintiff, a CHP officer, argued that because CHP and DOT are separate entities of the State of California, his workers compensation claim against CHP did not bar a separate tort action against the State for injuries he sustained due to DOT’s negligence. The Court of Appeal disagreed, stating that “[a]s part of the Business, Transportation and Housing agency of state government [citation], both departments and their employees are agents of the state. [Citation.] Hence, *lawsuits against state agencies are in effect suits against the state.* [Citations.]” (*Id.* at p. 598, fns. omitted, italics added.)

Similarly, in *Bettencourt v. California Toll Bridge Authority et al.* (1954) 123 Cal.App.2d 943, the court held that “[d]efendants Toll Bridge Authority and Department of Public Works are agencies of the State of California. [Citations.] Such agencies are really the State of California.” Thus, if “the State of California enjoy[ed] sovereign immunity as to claims for negligence in the operation of the Dumbarton Bridge” so did its agencies. (*Ibid.*) And in *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 346, the Supreme Court held that the failure to name the State as a party defendant in the complaint was not error because the complaint “named the state agencies in their capacity [and] . . . [t]he action is in effect one against the State.” Finally, in *Harland v. State of California* (1977) 75 Cal.App.3d 475, 482, 488, the Court of Appeal upheld a single, \$3 million judgment against the State that was based on the jury’s finding that two State agencies were negligent, even though the Court of Appeal concluded that only one of the State agency’s negligence actually caused the plaintiff’s injuries.

Accordingly, here, CHP and DOT are not separate party defendants, but rather, a single defendant—the State of California—and appellant’s lawsuit against CHP and DOT is legally a lawsuit against the State, which bears legal responsibility of any liability. The trial court’s order sustaining CHP’s demurrer without leave to amend did not dispose of the entire liability of the State, but rather, merely removed CHP as a responsible agency, and the State still faces exposure based on allegations relating to DOT’s acts or omissions. Because only one judgment can be rendered against the State for the torts of its agencies, and the order sustaining CHP’s demurrer without leave to amend did not completely dispose of that potential liability, the one final judgment rule bars this appeal.

#### ***b. Writ of mandate***

Appellant requests in the alternative that we treat his purported appeal as a petition for writ of mandate because “the slower process of review by appeal after a final judgment will perhaps create multiple trials.” While an appellate court has “discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate, . . . that power should be exercised only in unusual circumstances. [Citation.] ‘A petition to treat a nonappealable order as a writ should only be granted under extraordinary

circumstances, “ ‘compelling enough to indicate the propriety of a petition for writ . . . in the first instance. . . .’ [Citation.]” ’ [Citation.]” (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.)

In *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1254, for example, the court treated the appeal from an order sustaining a demurrer without leave to amend as to some causes of action as a writ “because it present[ed] a question of public importance.” No such issues are presented here. In *U.S. Financial v. Sullivan* (1974) 37 Cal.App.3d 5, 12, the court treated the improper appeal as a writ because it was “unthinkable to permit [the] complex case [before the court] to go to trial on only some of the counts because of an erroneous ruling by the trial court on defendants’ demurrers when to do so would almost certainly result in an eventual appeal and reversal of the judgment because of this error.” No such complexity or errors appear to exist in this case. Because there are no unusual or extraordinary circumstances, we deny the request to treat the purported appeal from the order sustaining CHP’s demurrer without leave to amend as a petition for writ of mandate. Next we turn to the merits of the appeal as to County, which is properly before us.<sup>1</sup>

## **2. Appeal as to the order sustaining County’s demurrer without leave to amend**

“ ‘ “On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be

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<sup>1</sup> The appeal was taken from the order sustaining County’s demurrer without leave to amend. “Orders sustaining demurrers are not appealable,” (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695), but “an appellate court may deem an order sustaining a demurrer to incorporate a judgment of dismissal” (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 920). Here, because County does not argue for dismissal of the appeal and the issues are fully briefed, we will decide the appeal as to County on its merits by treating the order as incorporating a judgment of dismissal in favor of County. (See *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1019.)

affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]” [Citation.]’ [Citation.] ‘The task of the reviewing court, therefore, “is to determine whether the pleaded facts state a cause of action on any available legal theory.” [Citation.] Where, as here, a demurrer is sustained without leave to amend, we decide whether there is a reasonable possibility the defect can be cured by amendment; if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.’ [Citations.] The burden is on appellant ‘ “to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings. [Citations.]” [Citation.]’ [Citation.]” (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121-122.)

Appellant contends the trial court erred in sustaining County’s demurrer without leave to amend because County: (1) “had control of U.S. 101 such that [appellant] can maintain a premises liability cause [of] action against [County] for creating, maintaining and failing to remedy the dangerous condition in the roadway posed by the subject cow”; and (2) “had a mandatory duty under Penal Code § 597.1 to seize the cow from U.S. 101 and thereby prevent the collision from occurring.” We reject both of these contentions.

***a. “Control of U.S. 101”***

A premises liability action against a public entity such as County must be based upon statute. (Gov. Code, § 815.) To prove an action against a public entity for an injury caused by a dangerous condition of public property, the plaintiff must establish the essential elements of liability as set forth in Government Code section 835, which provides, “a public entity is liable for injury caused by a dangerous condition of *its property* if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an

employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) the public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (Italics added.) “Liability under Government Code section 835 applies only where the public entity owns or controls the property” on which the dangerous condition exists. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 869, citing Gov. Code, § 830, subd. (c) [“ ‘Property of a public entity’ and ‘public property’ mean real or personal property owned or controlled by the public entity . . . .”].) Thus, ownership or control is a prerequisite to liability.

The Legislature has determined that DOT “shall have *full possession and control* of all state highways and all property and rights in property acquired for state highway purposes. The department is authorized and directed to lay out and construct all state highways between the termini designated by law and on the locations as determined by the commission.” (Sts. & Hy. Code, § 90, italics added.) Thus, the State of California—not County—had full ownership and control of Highway 101 on which the incident occurred. There was no allegation that County owned or constructed Highway 101, or that it designed or constructed the barriers, if any, that existed for the purpose of preventing animals from entering the road. There was no allegation that County inspected or maintained Highway 101, or that it exercised control over whether the road would remain open or had to close.

Appellant nevertheless argues that County had “control” of the property because it had “statutory authority to enter the roadway and remove the cow.” Relying on the fact that County deputy sheriffs have authority under Penal Code section 597.1 and Mendocino County Ordinance, Chapter 10.20, § 10.20.020 to seize and impound abandoned or stray animals, appellant argues, “This power equates to control which, in turn, gives rise to a premises liability cause of action against the County for failing to remove the cow from U.S. 101.” Appellant cites no relevant authority, however, to support his position that the authority to seize or impound an animal equates to control over all roads on which the animal may happen to be found. Under appellant’s argument,

County would be subject to premises liability on any property—including private property—on which an abandoned or stray animal is found, on the theory that it “controls” that property. This is not the law. (*See e.g., Aaitui v. Grande Prop.* (1994) 29 Cal.App.4th 1369, 1378 [a swimming pool in a private apartment building was not transformed into a property over which the city had “control” merely because the city had the authority to inspect the pool for safety violations and issue citations for violations].) Because County did not own or control Highway 101, it was not liable for any dangerous condition that may have existed on the property.

***b. Mandatory duty***

Appellant’s second theory of liability against County on appeal is based on Government Code, section 815.6, which provides, “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” He argues County was liable under Government Code section 815.6 because it failed to satisfy a “mandatory duty [it had] under Penal Code § 597.1 to seize the cow from U.S. 101 and thereby prevent the collision from occurring.” We disagree.

Penal Code section 597.1 provides in relevant part: “(a)(1) Every owner, driver, or keeper of any animal who permits the animal to be in any building, enclosure, lane, street, square, or lot of any city, county, city and county, or judicial district without proper care and attention is guilty of a misdemeanor. Any peace officer, humane society officer, or animal control officer shall take possession of the stray or abandoned animal and shall provide care and treatment for the animal until the animal is deemed to be in suitable condition to be returned to the owner. When the officer has reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others, the officer shall immediately seize the animal . . . .”

Appellant argues that the use of the word “shall” throughout the statute shows that County had a mandatory duty to seize or impound the cow that was on Highway 101 at

the time of the incident. It is settled, however, that the use of the word “shall” is not dispositive on the issue of whether a duty is mandatory under Government Code section 815.6. (See, e.g., *Stout v. City of Porterville* (1983) 148 Cal.App.3d 937, 945 [provision stating that a peace officer, if reasonably able to do so, “shall” take inebriated person into protective custody did not impose mandatory duty under Government Code section 815.6]; *California Highway Patrol v. Superior Court (Walker)* 162 Cal.App.4th 1144, 1150 [language that police officer “shall” impound vehicle for 30 days did not create mandatory duty if impounding was dependent on the officer’s discretionary act].)

Moreover, the portion of the statute that appellant asserts imposed a mandatory duty on County necessarily includes discretion of the officer. As noted, the statute provides the officer “shall immediately seize the animal,” but only “[w]hen the officer has reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others.” (Pen. Code, § 597.1, italics added.) Thus, officers are permitted under this statute to exercise their discretion as to whether they need to take immediate action. “[A]pplication of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.” (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498; see also *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242 [noting that “[i]n the area of law enforcement, statutes containing ‘shall’ language are sometimes interpreted as directory or permissive because discretion is inherent in the activity concerned”].)

*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, on which appellant relies, is inapposite. There, the plaintiff challenged the police’s act of entering and searching his reptile shop without a warrant. (*Id.* at p. 1217.) The court held: “We agree with the parties that the statutory language [in Penal Code section 597.1] authorizing immediate seizure when an animal control officer ‘has reasonable grounds to believe that

very prompt action is required to protect the health or safety of others’ is the equivalent of the exigent circumstances exception familiar to search and seizure law. That exception allows entry without benefit of a warrant when a law enforcement officer confronts an emergency situation requiring swift action to save life, property, or evidence.” (*Id.* at pp. 1220-1221.) There was no issue or discussion in the case as to whether the language in Penal Code section 597.1 created a mandatory duty for purposes of liability under Government Code section 815.6.

Appellant avers that alleged efforts by CHP and County to capture or corral the cow meant that “they assumed a mandatory duty to remove the cow from harm’s way.” He asserts, “defendants obviously recognized that the cow posed an emergency to motorists . . . .” The fact that CHP and County tried to capture or corral the cow, however, does not transform Penal Code section 597.1 into a statute imposing a mandatory duty on peace officers. It is the language of the enactment, and not the actions of officers in any given instance, that determines whether the enactment creates a mandatory duty. (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898 [whether an enactment is intended to impose a mandatory duty is a question of statutory interpretation for the court].) Because Penal Code section 597.1 did not impose a mandatory duty on County to immediately seize or impound the cow, appellant’s claim that County violated a mandatory duty fails.<sup>2</sup>

#### **DISPOSITION**

The purported appeal from the trial court’s order sustaining CHP’s demurrer without leave to amend is dismissed. The trial court’s order sustaining County’s demurrer without leave to amend is affirmed. Respondent County shall recover its costs on appeal from appellant. Appellant and respondent CHP shall bear their own costs on appeal.

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<sup>2</sup> Appellant makes no attempt to demonstrate how amendment would cure the defects in his second amended complaint. We therefore need not, and will not, address whether the trial court should have granted leave to amend.

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McGuiness, P. J.

We concur:

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Pollak, J.

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Jenkins, J.