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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PETER WILKES,

Plaintiff and Appellant,

v.

FLORENTINO SANDOVAL et al.,

Defendants and Respondents.

E052868

(Super.Ct.No. CIVDS907245)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rick S. Brown, Judge. (Retired judge of the Santa Barbara Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Peter Wilkes, in pro. per., for Plaintiff and Appellant.

Early, Maslach & Van Dueck, B. Eric Nelson and Elizabeth M. Chidi for Defendants and Respondents.

On October 3, 2006, Peter Wilkes, plaintiff, was in a motor vehicle accident in

which his car was rearended by the vehicle driven by defendant, Maria Montejano.¹

Plaintiff did not seek orthodox medical treatment for more than a year. He filed a civil lawsuit on September 24, 2008, nearly two years after the accident. At a court trial, defendants made a motion for nonsuit on the ground plaintiff failed to establish causation, an element of negligence, after plaintiff failed to establish an evidentiary foundation for the admission of medical bills. The court granted the motion for nonsuit and plaintiff appealed.

On appeal, plaintiff challenges the order granting nonsuit under several theories that are not cognizable on appeal due to the lack of an adequate record. We affirm.

BACKGROUND

On October 3, 2006, an accident occurred between plaintiff, who was driving a motor home, and defendant Montejano. When a highway patrol officer responded, plaintiff informed him that his back hurt. Then he drove away from the scene. Plaintiff was unable to work at his job as a fundraiser because he was upset following the accident. Plaintiff, a vegan holistic practitioner, treated himself with herbs and supplements, rather than obtain medical treatment for the injury. Plaintiff sought treatment from a medical doctor a couple of years later.

¹ The clerk's transcript does not include a copy of the complaint for damages, so we are unable to discern the precise relationship of the defendant named as Florentino Sandoval, other than the assertion in plaintiff's mandatory settlement conference brief that Sandoval insured the vehicle that was driven by Montejano.

On September 24, 2008, plaintiff filed a civil complaint.² Court trial commenced on November 2, 2010. Plaintiff did not produce medical testimony regarding the diagnosis or prognosis of the injury. The court advised plaintiff that absent foundation, medical bills and reports could not be considered as evidence. Defendants moved for nonsuit based on lack of causation. The court granted the motion. Judgment was entered on December 6, 2010. On December 28, 2010, plaintiff appealed.

DISCUSSION

On appeal, plaintiff poses several questions, paraphrased here: (1) Is there enough evidence in the record to reverse the judgment of nonsuit? (2) Did plaintiff miss work and suffer a loss as a result of the rearend accident? (3) Were plaintiff's due process rights violated? (4) Did plaintiff suffer a loss as a result of his son's injury? The answer to all these questions is found in the trial court's rulings at trial: plaintiff failed to establish a foundation for the evidence of any losses resulting from the accident and failed to show that the accident actually caused the alleged losses.

A nonsuit is proper only if there is no substantial evidence to support a jury verdict in the plaintiff's favor. (*Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1488.) We independently review an order granting nonsuit. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124.) We view the evidence in the light most favorable to the plaintiff, resolving all presumptions, inferences and doubts in his favor. (*Barbosa v. IMPCO Technologies, Inc.* (2009) 179 Cal.App.4th 1116, 1121.) Only the

² Because the complaint is not part of the record on appeal, we cannot say with certitude what causes of action were included, or the amount of damages sought.

grounds specified by the moving party in support of its motion should be considered by the appellate court. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.)

A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.

(*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 745.)

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. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752.) In a personal injury action, causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336, citing *Jones v. Ortho Pharm. Corp.* (1985) 163 Cal.App.3d 396, 402-403.) When the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant.* (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-775 [italics in original].)

Here, the nonsuit motion was made after plaintiff had testified and rested his case without producing a foundation for the admission of hearsay documents, or presenting medical testimony as to the nature and extent of the injuries. Plaintiff delayed seeking medical attention for two years by his own testimony,³ and failed to present any medical

³ The two-year statute of limitations for personal injury (Code Civ. Proc. § 335.1) may have already expired by the time he sought treatment.

testimony which would link any injuries for which he sought recovery to the negligent acts of defendants occurring two years earlier. Absent evidence of causation, nonsuit was proper.

At oral argument, plaintiff asserted that even if the exclusion of the medical bills for the personal injury claim was proper, he should have been permitted to litigate claims relating to lost work and wages, and for emotional distress. Unfortunately, the lack of a record showing that plaintiff's complaint included claims for lost wages and emotional distress precludes us from reaching this issue. The only thing we can take judicial notice of is the fact that a complaint was filed, based on the notation in the Register of Actions. However, we cannot take judicial notice of the factual content of the complaint. (*Searles Valley Minerals Operations, Inc. v. State Board of Equalization* (2008) 160 Cal.App.4th 514, 519 [court could take judicial notice of existence of web site, but not of content]; see also *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885 [a court may not take judicial notice of hearsay allegations or statements in an appellate opinion].)

Without the complaint, we cannot assume that plaintiff included the claims he now asserts for lost wages or emotional distress. It was plaintiff's duty to provide an adequate record for review. (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 478.) In *Bains, supra*, the plaintiffs, who represented themselves, sought reversal of an order sustaining a demurrer to their second amended complaint. However, the plaintiffs omitted to include in the appellate record either the operative complaint or the demurrers thereto. The reviewing court concluded that plaintiffs' claim must be rejected on that basis alone,

citing the rule that a party challenging a judgment has the burden of showing reversible error by an adequate record. (*Ibid.*) Because nonsuit was proper on the ground of lack of causation, and because there is an inadequate record, we do not need to reach plaintiff's claim relating to wage loss as damages.

The trial court proceedings were fundamentally fair, especially in light of the assistance provided to plaintiff by the trial court in eliciting relevant information. As for the alleged injuries to plaintiff's son, plaintiff has not shown that his son was a party to the complaint, nor did plaintiff produce any competent evidence to support any claim.⁴

DISPOSITION

The judgment is affirmed. Each party will bear his or her own costs of appeal.

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RAMIREZ
P.J.

We concur:

MILLER
J.

CODRINGTON
J.

⁴ Plaintiff's request for punitive damages, presented for the first time in his reply brief, is not properly before us. (*Shimmon v. Franchise Tax Bd.* (2010) 189 Cal.App.4th 688, 694, fn. 3.)