

**LAURA KIGHTLINGER, Plaintiff and Appellant,**

**v.**

**MIKE WHITE, Defendant and Respondent.**

B210802

**Court of Appeals of California, Second Appellate District, Division One.**

November 23, 2009

Kinsella Weitzman Iser Kump & Aldisert, Dale F. Kinsella and Jennifer J. McGrath for Plaintiff and Appellant.

Leopold, Petrich & Smith, Louis P. Petrich and Daniel M. Mayeda for Defendant and Respondent.

In this idea submission case, plaintiff Laura Kightlinger claims defendant Mike White copied her ideas after reading her screenplay. The trial court granted summary judgment in favor of defendant. On appeal, plaintiff claims summary judgment was improper because triable issues of material fact remain as to (i) the existence of an implied contract between the parties with respect to plaintiff's ideas, and (ii) defendant's "use" of plaintiff's ideas. Plaintiff also claims defendant's evidence was insufficient to support the trial court's finding of "independent creation." We affirm.

## **Background**

Plaintiff and defendant both work successfully in the entertainment business. In 1998 or 1999, plaintiff and her then-boyfriend Jack Black moved next door to defendant. Plaintiff and defendant became friends. In approximately the first half of 2003, defendant and Mr. Black began discussing forming a production company together. Plaintiff was privy to these discussions and suggested the name for the company, Black & White Productions.

In late 2002 or early 2003, plaintiff gave defendant a copy of her screenplay, *We're All Animals* (WAA), which she began writing in April 2002. Defendant admits he read this draft of plaintiff's screenplay. WAA tells the story of its protagonist Anne as she struggles with depression and intense frustration in all aspects of her life. Anne turns to (among other things) rescuing stray cats as a way to find happiness. (We discuss WAA in detail below.) Plaintiff was interested in having Black & White Productions produce her screenplay and told defendant he could act in the film. Defendant signed a letter "attaching" himself to the project as an actor and posed for a photograph holding a copy of the script. Plaintiff also gave defendant a subsequent draft of her screenplay, dated either September 5, 2004 or

September 28, 2004.<sup>[1]</sup> (We refer to the draft plaintiff first gave defendant as the "2002 draft" and the later draft as the "2004 draft.")

In late 2005 (i.e., after defendant had access to plaintiff's WAA script), defendant wrote a screenplay entitled Year of the Dog (YOTD). YOTD tells the story of Peggy, a single woman utterly devoted to her dog Pencil. When Pencil dies unexpectedly, Peggy's life is turned upside down and she becomes obsessed with animal rights. (We discuss YOTD in detail below.) In early 2006, plaintiff discovered that defendant had written YOTD, sold it to Paramount Vantage and would be producing and directing the film.

Plaintiff sued defendant for breach of an implied contract and breach of confidence, claiming defendant, having read WAA, copied her ideas and used them in YOTD. Defendant filed a motion for summary judgment or summary adjudication, arguing there were no triable issues of material fact with respect to any implied agreement or confidence between the parties relating to WAA. Soon after, defendant filed a second motion for summary judgment, arguing there were no triable issues of material fact with respect to his alleged "use" of plaintiff's ideas.

The trial court granted summary adjudication in favor of defendant on plaintiff's contract claim. The trial court held plaintiff failed to raise a triable issue of material fact as to the existence of an implied contract between the parties. The trial court also held, however, that plaintiff had raised a triable issue of material fact as plaintiff's breach of confidence claim. The trial court granted defendant's second motion for summary judgment. The trial court held "there are no material similarities between Plaintiff's work and Defendant's work that could give rise to a reasonable inference that Defendant copied Plaintiff's ideas." The trial court also held that, assuming plaintiff could establish an inference of use, defendant rebutted that inference with his uncontroverted evidence of independent creation. Judgment was entered and plaintiff appealed.

## **Discussion**

### **1. Standard of Review**

Code of Civil Procedure section 437c requires the trial court to grant summary judgment if the papers submitted on the motion 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).) There is a genuine issue of material fact only if, in accordance with the applicable standard of proof, a reasonable trier of fact could find the underlying fact in favor of the party opposing the motion. (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1371.)

We review the trial court's entry of summary judgment de novo and independently review the record to determine if summary judgment is merited. (*Wiener v. Southcoast Childcare*

*Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We review the trial court's ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.)

In reviewing a summary judgment, we review the prevailing party's papers strictly and the losing party's papers liberally. (*Mammoth Mountain Ski Area v. Graham, supra*, 135 Cal.App.4th at p. 1370.) We accept as true the facts supported by the losing party's evidence and the reasonable inferences from them. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.) We resolve evidentiary ambiguities or doubts in favor of the losing party. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 768.)

## 2. Use of Ideas

Plaintiff asserted two causes of action: breach of implied contract and breach of confidence. In order to prevail on her breach of implied contract cause of action, plaintiff must demonstrate (i) she conditioned her offer to disclose her idea to defendant on his express promise to pay for the idea if he used it, (ii) knowing of that condition before the idea was disclosed to him, defendant voluntarily accepted its disclosure and (iii) believing the idea was valuable, defendant used it. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 738-739; *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 646-647 & fn. 6.)

In order to prevail on her breach of confidence cause of action, plaintiff must demonstrate (i) she offered her idea to defendant in confidence, (ii) defendant voluntarily received the idea in confidence, and (iii) understanding that he could not disclose the idea to others or use the idea for purposes beyond the limits of the confidence without plaintiff's permission, defendant did so without plaintiff's permission. (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 323; see also *Davies v. Krasna* (1975) 14 Cal.3d 502, 510.)

Thus, as the parties agree, in order to prevail on either cause of action, plaintiff must show that defendant "used" her ideas rather than his own ideas or ideas from other sources. (*Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 649, 650; *Mann v. Columbia Pictures, Inc., supra*, 128 Cal.App.3d at p. 647, fn. 6.) In cases such as this, where there is no direct evidence of defendant's use, plaintiff must raise an inference of use by showing (i) defendant had access to her ideas and (ii) copied her ideas. (*Teich v. General Mills, Inc.* (1959) 170 Cal.App.2d 791, 797.) Plaintiff can do this by demonstrating WAA and YOTD are substantially similar. (*Sutton v. Walt Disney Productions* (1953) 118 Cal.App.2d 598, 603; *A Slice of Pie Productions v. Wayans Bros. Entert.* (D. Conn. 2007) 487 F.Supp.2d 41, 52 [applying California law].) Although defendant admits he had access to the 2002 draft, and, as explained above, we assume for purposes of this appeal that he also had access to the 2004 draft, defendant disputes the screenplays are substantially similar.

There is no bright line test for determining whether two works are substantially similar. Instead, courts consider a combination of various aspects of the works at issue, including plot, themes, subject matter, sequences, characterization, motivation, milieu and dramatic gimmicks. (See, e.g., *Henried v. Four Star Television* (1968) 266 Cal.App.2d 435, 436-437

(*Henried*) [court considered "plot, motivation, subject matter, milieu, and characterization"]; *Minnier v. Tors* (1968) 266 Cal.App.2d 495, 505 [court compared "basic plot ideas, themes, sequences and dramatic 'gimmicks'"].<sup>[2]</sup> Despite there being no bright line test for "substantial similarity," however, it is clear that the similarities must be material and that the degree of similarity required is high. (See *Donahue v. United Artists Corp.* (1969) 2 Cal.App.3d 794, 807 & fn. 5; *Henried, supra*, 266 Cal.App.2d at p. 437.) Our role is to review the two works and determine whether a reasonable juror could find they are substantially similar. (*Kurlan v. Columbia Broadcasting System* (1953) 40 Cal.2d 799, 809 [the court may determine as a matter of law whether there is substantial similarity between the two works at issue].)

We have reviewed the 2002 and 2004 drafts of WAA and the January and July 2006 drafts of YOTD as well as viewed the film version of YOTD included in the record. Based on the various elements courts consider in idea submission cases—such as plot, themes, sequences, motivation, subject matter, milieu and characterization—we conclude WAA and YOTD are not substantially similar. We analyze the relevant aspects of each story below.

## **a. Subject matter and themes**

Both WAA and YOTD involve a female protagonist who loves and feels a strong connection with animals and, each in her own way, seeks to free animals from harm. Stemming from this general animal-lover idea, the stories also both involve, to differing degrees, animal rescue, animal sanctuaries, animal hoarders and veterinarian offices or animal hospitals.

In WAA, however, the overarching theme is the protagonist Anne's struggle with her "omnipresent" frustration and unhappiness. She has a bad case of writer's block, is perpetually depressed and tired, her relationship with her juvenile and inattentive boyfriend is crumbling, sexually she is extremely frustrated, and her delinquent aunt leans heavily on Anne for emotional and financial support. At the start of the 2002 draft of WAA, Anne laments that her dreams "were getting further and further away." WAA tells the story of how—given her many frustrations and impending psychological breakdown—Anne desperately looks for satisfaction and happiness in her life. As the story progresses, Anne realizes she truly enjoys and finds satisfaction in rescuing animals, predominately cats. She realizes also that she may find happiness with her new friend and cat rescuer Terry. The 2002 draft ends with Anne appearing happy to see Terry. And the 2004 draft ends with Anne deciding to leave her previous life behind and move to a farm with Terry, her aunt and her aunt's boyfriend, where they can build a sanctuary for stray cats.

Although the protagonist in YOTD encounters disappointment with two possible love interests (her neighbor Al and animal rescuer Newt), YOTD does not share WAA's theme of utter frustration. Rather, YOTD is predominately a story about love, obsession and self-realization. It tells the story of how its protagonist Peggy tries to pull her life back together following the unexpected death of her beloved dog Pencil. As Peggy struggles to deal with her loss, she turns to animal activism, realizing her greatest and most satisfying

love has always been for animals. After Newt tells Peggy he is celibate and unable to be romantically involved with anyone, Peggy is disappointed, but explains "I've always been disappointed by people. In my life, I've only really been able to count on my pets." Her friendship with Newt and his rejection of her romantic advances confirms for her what she already knew but never fully acknowledged. "[B]ecause of you [Newt] I've really been able to acknowledge that part of my life—in a deeper way—so thank you. And this . . . (indicating the space between them) . . . just, you know, confirms everything I already knew." At the end of YOTD, Peggy equates her love for animals to the love parents have for their children, the love her co-worker has for her fiancé, and the love her boss has for material things.

Thus, while Anne in WAA searches for and seems to find satisfaction (including a possible romance) by making life changes, Peggy in YOTD comes to terms with what she has always known on some level to be her true love. We conclude, therefore, that, while WAA and YOTD are similar in the abstract sense that they both involve animal-loving protagonists, they are not substantially similar in that they tell the stories of two very different women who come to find fulfillment or inner peace in different ways.

## **b. Sequence of events, plot and milieu**

The sequence of events in WAA and YOTD are not substantially similar. From the start of WAA, the protagonist Anne is intensely frustrated and depressed. The story begins with Anne either throwing an alarm clock and expressing her "omnipresent" frustration (2002 draft), or expressing her obvious and bitter frustration and sarcasm during a work meeting (2004 draft). As the story progresses, we learn more of her pervasive frustration and depression and how she tries to deal with them. In addition to becoming increasingly involved with cat rescues, Anne also turns to a "psychic-psychologist" and medication for help, as well as begins a lesbian romance with a cat rescuer named Terry. Anne has multiple sexual fantasies, repeatedly sends money to her aunt, distances herself from her boyfriend while beginning the relationship with Terry, takes revenge against a co-worker with whom she is openly hostile, loses her job, takes up painting (sometimes in the nude) and spends a bizarre night at her neighbors' cabin. Although the 2002 and 2004 drafts of WAA have different endings, they both involve Anne together with Terry, implying a romantic relationship between them has begun.

In contrast, YOTD begins with its protagonist Peggy enjoying a perfect day at the dog park with Pencil, later falling asleep with him nuzzled up beside her, and Peggy describing her love for Pencil as being "in the tenderest part of [her] heart." Soon after, Pencil dies unexpectedly and Peggy's life falls apart as she tries to cope with her loss. She goes to dinner with her neighbor only to learn he is a hunter, adopts another dog only to learn he is not safe, and develops a crush on a fellow animal lover only to learn he is asexual. While babysitting her niece and nephew, Peggy takes them on an emotional visit to an animal sanctuary, where she feels "connected" and, in a drunken state, she ruins her sister-in-law's furs. Peggy also becomes a vegan, forges her boss's signature on checks she sends to

animal rights organizations, loses her job, rescues 15 dogs from the pound, and attacks her neighbor because she believes he killed Pencil. In the end, with support from her family and friends, Peggy gets her job back. As the story concludes, Peggy is heading to an animal activist rally, having fully realized and accepted her love for animals.

In YOTD, the death of Peggy's dog Pencil is a defining moment and occurs early in the story. In WAA, on the other hand, the loss of Anne's cat does not occur until the end and, although upsetting for Anne, is not pivotal. In fact, soon after Anne's cat goes missing, WAA comes to an end, with Anne either meeting up with Terry (2002 draft) or moving to a farm with Terry, aunt Sandra and aunt Sandra's boyfriend (2004 draft).

Plaintiff argues that, in both stories, the protagonist is fired from her job because of conduct stemming in some way from her devotion to animals. We agree this constitutes a plot similarity between the two stories. But plaintiff overstates its importance and degree of similarity. In WAA, Anne's boss fires her after she glues her co-worker Deb—who used glue to trap mice at work—to a chair. In YOTD, Peggy's boss fires her after he discovers she has been forging his signature on checks sent to animal rights organizations. Plaintiff overstates the degree of similarity between these two plot points because she (i) ignores the role Anne's medication plays in her deterioration at work as well as Anne's general lack of motivation and hostility at work before she ever rescues an animal, and (ii) claims Anne's decision to glue Deb to her chair (like Peggy's decision to donate stolen money to animal rights groups) was "a misguided attempt to help animals." It is clear, however, that Anne's erratic behavior at work is due not only to her growing involvement with animal rights, but also in large part to her changing medications for depression as well as her general lack of motivation or satisfaction at work, which is apparent from the start of the story before she becomes involved with animal rescue. Peggy, on the other hand, was content at work. Her obsession to help animals drove her to steal from her boss so she could donate the money to various animal organizations which supported animal rights. Obviously, gluing a person to a chair does not help animals. We conclude this similarity is not "substantial" for purposes of this idea submission case.

Plaintiff also argues that WAA and YOTD share other similar scenes and events. While we agree, we conclude these scenes and events are not material or are *scenes a faire*, which flow naturally from the general animal-lover subject matter in both stories. Both stories include (i) a scene in a vegetarian or vegan restaurant, (ii) scenes at or driving to veterinarian offices or animal hospitals, (iii) a scene involving, or references to, animal hoarding, and (iv) a scene at, or references to, an animal sanctuary or farm. These scenes and references flow from the common animal-lover subject matter. In other words, rather than copying plaintiff's ideas on such points, defendant most likely gathered such ideas from the public domain. Accordingly, we conclude such scenes and references cannot and do not form a basis for finding substantial similarity. (See *Ware v. Columbia Broadcasting System, Inc.* (1967) 253 Cal.App.2d 489, 495 [affirming summary judgment and explaining it would have been "fatuous" for plaintiff to argue an interest in "stock" situations embodied in

plaintiff's unpublished work]; *Berkic v. Crichton*, *supra*, 761 F.2d at p. 1293; *Klekas v. EMI Films, Inc.*, *supra*, 150 Cal.App.3d at pp. 1113-1114.)

As plaintiff notes, the ending of YOTD and the ending of the 2004 WAA draft are similar. They both depict the protagonist in a bus (YOTD) or van (WAA) driving off to participate in an animal-related event or lifestyle. We conclude, however, that this similarity is not material. It is not uncommon at the end of a story for the protagonist to ride off into the sunset or drive off into the distance after the main conflict of the story has been resolved. To name just a few, the following films include such endings: *Little Miss Sunshine* (2006), *Good Will Hunting* (1997), *The Shawshank Redemption* (1994), *Indiana Jones and the Last Crusade* (1989), and *The Graduate* (1967).

## **c. Characters and motivation**

### ***(i) Anne and Peggy***

As we have alluded to above, other than their love for animals, the protagonists in both works are markedly different. From page one of WAA, Anne is stuck in a state of frustration and depression, which ultimately leads to major changes in her life. She displays a crass sense of humor and often fantasizes about sex. She is not shy about speaking her mind or creating conflict with others. She outwardly struggles in her relationship with her juvenile and unaffectionate live-in boyfriend Mike as well as with her co-worker Deb. In the 2004 draft of WAA, Anne describes work as the "unhappiest place on earth." For much of the story, she is also taking various drugs for her depression, which result in much of her aberrant behavior.

In stark contrast, Peggy is quiet and generally content. She is a single woman with a stable job, a good relationship with her brother and his family, and, of course, a strong connection with her dog Pencil. In her selfless manner, Peggy strives to make those around her (such as her boss, co-workers, niece and nephew) happy. Her life gets turned upside down not because she is deeply dissatisfied or unhappy in life, but because her closest companion, Pencil, dies unexpectedly. It is that profound loss that propels Peggy on her journey to discover what she already knew, namely that her greatest and most satisfying love is for animals.

### ***(ii) Animal rescuers***

Both stories have one or more animal rescuer or animal activist characters. WAA includes multiple cat rescuers, namely, Elsa (described as a German "cat lady" and cat hoarder) and Terry, Joanne and Meg (who work as the "Cat People"). The Cat People and Elsa are at odds with each other's cat-trapping techniques. Anne develops a romantic, though confusing, relationship with Terry who is a lesbian. In YOTD, Peggy befriends Newt, an ASPCA client services manager and animal hospital employee, after Pencil's death.

Although Peggy is attracted to Newt, she discovers her relationship with him can go no further than friendship because he is asexual and happily celibate.

Although both Anne and Peggy discuss with their animal rescuer counterparts the virtues of loving animals (such as the animal's loyalty and devotion) as opposed to loving humans (who often disappoint one another), their relationships with the rescuers are different. As her relationship with her live-in boyfriend deteriorates, Anne develops a romantic relationship with Terry. In contrast, Peggy does not develop a romantic relationship with Newt. Like Newt, Peggy realizes she is better off without any romantic relationships. In addition, it flows naturally from the stories' animal-lover subject matter that each protagonist develops a relationship (romantic or not) with another character who shares their love for animals.

### ***(iii) Co-workers***

WAA and YOTD both include the protagonist's co-workers. There is no substantial similarity amongst any of these characters. In WAA, Anne is friendly with only one of her co-workers, Karen. But Karen's character is not well-developed and we do not know much about her. Anne's relationship with her boss is strained as he tries to reignite a romance with her. Anne does not get along with her remaining co-workers, especially Deb, with whom Anne is outwardly hostile. Eventually, Anne's boss fires her, and she never mends her broken relationships with anyone at work.

In YOTD, Peggy is on good terms with everyone in her office and is seen bringing doughnuts or other treats to the office for her co-workers. Her boss relies on and confides in her. She is especially close with Layla. Layla is particularly focused on her relationship with her boyfriend, who, as the story progresses, proposes to her. Contrary to plaintiff's claims, although Peggy sees Layla kissing her boyfriend (then fiancé) in a couple scenes, Layla's character does not "talk primarily about sex." In fact, she never talks about her sex life. Thus, we are not persuaded by plaintiff's comparison of Layla to the Gretchen character in WAA.<sup>[3]</sup> Peggy's relationships at work only become strained after Pencil dies and Peggy's life collapses. By the end of the story, those relationships are mended, Peggy returns to work, and Layla asks Peggy to be a bridesmaid in her wedding.

### ***(iv) Neighbors***

WAA and YOTD both include the protagonist's neighbors. There is no substantial similarity amongst any of these characters or amongst them and any other characters. In WAA, Anne's neighbors Gretchen and Phil are one-dimensional characters who are heard throughout the screenplay having sex. Anne frequently expresses her annoyance with them. At one point, Anne and Mike spend a night at Gretchen and Phil's cabin, which event is in essence the comical climax of Gretchen's annoyance with them. We do not agree with plaintiff's description of Anne and Gretchen as "friends" or with plaintiff's equation of

Gretchen and YOTD's Layla. Anne's relationship (such that it is) with Gretchen is not similar, let alone substantially similar, to Peggy's friendship with Layla.

In YOTD, Peggy's neighbor Al is her nemesis. The day Pencil dies, Peggy finds him behind Al's garage. After Pencil dies, Al attempts to comfort Peggy and takes her to dinner, where he reveals his obsession with hunting. Peggy is disgusted. Later in the story, Peggy discovers a chewed bag of snail bait in Al's garage, which she surmises is what killed Pencil. That night, at the apex of her downward spiral triggered by Pencil's death, Peggy attacks Al with one of his hunting knives, calling him a murderer and asking, "[h]ow many dogs are you gonna kill?!" Plaintiff argues Al is similar to WAA's Deb. We agree that Deb and Al are similar characters in that they are both depicted as cruel to animals and are the target of the protagonist's revenge. We disagree, however, that it is a substantial similarity. It is certainly not unusual for a story to include a character at odds with the protagonist. Such a character not only sets up tension or conflict that can be resolved by the conclusion of the story, but also serves to highlight an important characteristic of the protagonist. Here, both protagonists love animals. Naturally, their adversaries would be portrayed as harmful or cruel to animals, thus highlighting the protagonist's animal-loving nature.<sup>[4]</sup>

### ***(v) Family***

WAA and YOTD both include members of the protagonist's family. There is no substantial similarity amongst any of these characters. In WAA, the only family member that plays a role is Anne's aunt Sandra, who consistently finds herself in trouble and relies on Anne to bail her out. At the end of the 2004 draft, aunt Sandra seems to have settled down on a farm, and offers to help Anne take care of stray cats there, which offer Anne accepts. YOTD includes Peggy's brother Pier, sister-in-law Bret, niece Lissie and nephew Benjy. Although Pier and Bret do not understand Peggy's love for animals, they love and support her. In one scene, while babysitting Lissie and Benjy, Peggy drives them to a farm animal sanctuary, where they spend the day. Peggy is emotional and deeply affected by her experience at the sanctuary. At the end of the story, after Peggy attacks Al, Pier and Bret help Peggy get back on her feet. Pier talks to her boss who agrees to welcome Peggy back to work.

### ***(vi) Anne's psychic-therapist or psychic-psychologist***

In WAA, in an effort to control her depression, Anne regularly sees a psychic-therapist (2002 draft) or psychic-psychologist (2004 draft), Ted. Ted is a comical character who either arranges for Anne to get prescription drugs (2002 draft) or prescribes them himself (2004 draft). There is no comparable character in YOTD.

## **d. Copyright standard**

Plaintiff argues the trial court improperly applied the test of substantial similarity used in copyright cases. In particular, plaintiff contends the trial court incorrectly considered whether

the two screenplays shared substantially similar expression or expressive elements. First, we review the trial court's ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.*, *supra*, 107 Cal.App.4th at p. 1196.) And, as indicated above, we have independently reviewed the record to determine whether plaintiff's WAA is substantially similar to defendant's YOTD for purposes of this idea submission case. Second, as also noted above, the elements we considered here overlap in large part with the copyright infringement test for substantial similarity. (See fn. 2 above.) Third, and in any event, plaintiff and defendant appear to agree as to which elements we should consider and compare. In her brief, plaintiff argues the relevant "material elements" are premise, basic dramatic core and theme, characters, plot ideas, scenes and settings. Similarly, defendant indicates the relevant elements are premise, plot, sequence of events, characters, scenes and settings.

## **e. Summary**

In summary, although the two works are similar in certain respects, that is not the test. In order for plaintiff to prevail on either cause of action, WAA and YOTD must be *substantially* similar. We hold that plaintiff cannot satisfy that high standard and no reasonable juror could find "that defendant used a substantial portion of plaintiff[s] material." (*Donahue v. United Artists*, *supra*, 2 Cal.App.3d at p. 807, fn. 5.) Thus, we conclude there is no triable issue of fact as to defendant's use of plaintiff's ideas, and summary judgment in favor of defendant was proper. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 [a defendant may prevail on summary judgment by showing that one or more elements of a cause of action cannot be established].)

## **3. Independent Creation**

In the alternative, assuming the two works are substantially similar and an inference of use exists, we nonetheless affirm summary judgment. We hold that, under the particular facts of this case, defendant demonstrated through uncontradicted evidence that he wrote and created YOTD independent of WAA.

Defendant submitted a declaration detailing his creation of YOTD and how substantial and material elements of YOTD parallel his life. He attached pages from his compositional notebooks, detailing the creative process and "gestational period" of the screenplay. Defendant also submitted declarations from third parties (Marqui Hood, Jon Shere and Jared Hess) attesting to the fact that YOTD very closely, if not exactly, parallels events in defendant's life. Finally, defendant submitted a declaration from Alicia Silverstone, in which she stated she often saw defendant at a particular vegan restaurant, where, on one occasion she told defendant about her experience of adopting 11 dogs from the Lacy Street shelter in downtown Los Angeles. Defendant asked Ms. Silverstone if he could use that scenario in a screenplay he was then working on. She agreed and that scenario became the scene in YOTD when Peggy adopts 15 dogs from the pound. Plaintiff asserts

defendant's direct evidence of independent creation is untrustworthy, but plaintiff failed to present any evidence to refute or contradict it.

As the parties agree, evidence of defendant's independent creation can rebut an inference of use as a matter of law. (*Hollywood Screentest of America, Inc v. NBC Universal, Inc.*, *supra*, 151 Cal.App.4th at pp. 646, 648-649.) Plaintiff argues, however, that defendant's evidence of independent creation is insufficient because it post-dates his access to WAA. Plaintiff claims the independent creation doctrine requires either that (i) the defendant had no access to the competing work, or (ii) if there was access (as is the case here), the independent creation must have taken place before the defendant's access to the competing work. The cases on which plaintiff relies are distinguishable because they involve claims of independent creation after access, supported only by "interested declarations." (See *Sobhani v. @Radical.Media, Inc.* (C.D. Cal. 2003) 257 F.Supp.2d 1234, 1237 (*Sobhani*); *Wrench LLC v. Taco Bell Corp.* (W.D. Mich. 1999) 51 F.Supp.2d 840, reversed on other grounds (6th Cir. 2001) 256 F.3d 446.) In contrast, here, defendant submitted not only his own declaration, but also the declarations of four uninterested third parties. Indeed, *Sobhani* leaves open the possibility that, with sufficient supporting evidence, a defendant might be able to rebut an inference of use despite creation after access. (*Sobhani, supra*, 257 F.Supp.2d at p. 1237 ["'Mere denial without substantial support would not ordinarily be thought sufficient' to rebut the strong inference raised by a combination of access and substantial similarity."].)

Defendant counters that independent creation can occur after access. But, the cases on which defendant relies do not squarely support his claim. (See *Kienzle v. Capital Cities/American Broadcasting* (E.D. Mich. 1991) 774 F.Supp. 432, 436, 437 [no one involved with the creation or production of the subject work had access to plaintiff's work]; *Gethers v. Blatty* (C.D. Cal. 1968) 283 F.Supp. 303, 305 [no substantial similarity between the two works at issue].)

Nonetheless, we conclude that, under the particular facts of this case, defendant has demonstrated independent creation. Defendant's evidence of independent creation is "clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved" and, therefore, rebuts an inference of use. (*Teich v. General Mills, Inc.*, *supra*, 170 Cal.App.2d at p. 799; see also *Donahue v. Ziv Television Programs, Inc.*, *supra*, 245 Cal.App.2d at pp. 598-599.) Plaintiff urges us not to accept defendant's claim of independent creation for fear that any defendant could then fabricate a log of notes, or something similar, to defend against claims such as those raised here. If defendant's notes were his only evidence of independent creation, we might agree with plaintiff. But that is not the case.

As noted above, defendant submitted multiple declarations and other evidence corroborating his claim that, in significant and material respects, YOTD is based on and parallels events in his life, not plaintiff's screenplay. For example, defendant, Ms. Hood and Mr. Shere all state that defendant's cat Bootlegger died unexpectedly from toxic poisoning on Christmas Day, and that Bootlegger's death sent defendant into an emotional tailspin,

which adversely affected his work. Defendant, Ms. Hood, Mr. Shere and Mr. Hess all attest that defendant is a vegan, and defendant, Ms. Hood and Mr. Hess explain how defendant became a vegan after reading a book about the lives of animals. Defendant, Ms. Hood and Mr. Shere also explain how, after Bootlegger's death, defendant adopted four animals (two cats and two dogs, to whom he is extremely—"almost comically"—devoted) and became increasingly active in animal rights organizations. Mr. Hess also states that defendant often fed stray animals during filming in Mexico and, on one occasion, saved a neighbor's dog in Utah. Defendant also submitted receipts demonstrating he made significant monetary donations from his business account to animal rights organizations, including \$10,000 to a sanctuary for rescued farm animals. And, as noted above, Ms. Silverstone's declaration reveals she gave defendant the idea for the scene at the pound, where Peggy adopts 15 dogs and becomes a hoarder or collector. Plaintiff did not refute any of this evidence. Thus, contrary to plaintiff's claim, there are no competing facts on the issue of independent creation for a trier of fact to weigh.

Defendant's evidence demonstrates that, in significant and material respects, YOTD is based on events in his life and not on ideas in plaintiff's screenplay. Defendant demonstrated, with corroborating evidence, the source of YOTD's core premise—the pivotal and unexpected death of Pencil (i.e., Bootlegger), which causes Peggy's (i.e., defendant's) world to crumble. The uncontroverted evidence also demonstrates that his life served as the source for other material elements of YOTD, such as Peggy's (i) increasing interest and participation in animal rights organizations, including an animal sanctuary, (ii) monetary donations to such organizations using her boss's account, (iii) loss of her job as a result of the downward spiral precipitated by her dog's death, (iv) decision to become a vegan, (v) desire to help and save animals, and (vi) adoption of dogs from the pound. If plaintiff's position were taken to its logical conclusion, defendant would be barred from writing about these significant events in his own life. We conclude a reasonable juror could not find against defendant on his independent creation claim, which as a matter of law rebuts any inference of use.

In light of our conclusions above, we need not and do not reach plaintiff's remaining arguments.

## **Disposition**

The judgment is affirmed.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

[1] Defendant disputes receiving a copy of the 2004 draft and objected to plaintiff's deposition testimony on that point, arguing it lacked foundation and was improperly speculative. Noting its duty on summary judgment to construe plaintiff's evidence liberally and to resolve evidentiary doubts in plaintiff's favor (*Saelzler v. Advanced Group 400*

(2001) 25 Cal.4th 763, 768), the trial court overruled defendant's objections. We conclude the trial court did not abuse its discretion in overruling defendant's objections to this testimony. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) Thus, for purposes of this appeal from summary judgment, we assume defendant had access to the 2004 draft.

[2] Courts also apply a "substantial similarity" test in copyright infringement and plagiarism cases. (See, e.g., *Berkic v. Crichton* (9th Cir. 1985) 761 F.2d 1289, 1292; *Klekas v. EMI Films, Inc.* (1984) 150 Cal.App.3d 1102, 1111; *A Slice of Pie Productions v. Wayans Bros. Entert., supra*, 487 F.Supp.2d at pp. 46-47.) In those cases, a successful plaintiff must show substantial similarities not only between elements we consider here (such as themes, plots and characters) but also between copyright-protected elements (such as expression). Thus, copyright cases are instructive to the extent they give meaning and content to the term "substantial similarity" as to unprotected elements.

[3] The Layla character was originally called Gretchen after defendant's childhood dog. Layla is a variant on defendant's mother's name. Plaintiff finds it significant that her screenplay also has a character named Gretchen, who is (plaintiff claims) similar to the Layla character. As we have noted, we do not agree.

[4] Similarly, WAA uses the Gretchen character to emphasize Anne's extreme sexual frustration.