Tentative Rulings for November 16, 2021
Department 502

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 502

Begin at the next page

(03)

Tentative Ruling

Re: ***Madrigal v. Martinez***
Superior Court Case No. 19CECG03043

Hearing Date: November 16, 2021 (Dept. 502)

Motion: Defendant/Cross-Complainant Martinez' Motions to Compel and Request for Sanctions against Plaintiffs Jose Luis Madrigal and Marisela Mendez-Hernandez

Tentative Ruling:

To grant defendant's motions to compel initial responses to form interrogatories, set one, request for production of documents, set one, establishing admissions as to request for admissions, set one, and request for monetary sanctions against plaintiffs Jose Luis Madrigal and Marisela Mendez-Hernandez. (Code Civ. Proc. §§ 2030.290; 2031.300; 2033.280.) Plaintiffs shall serve verified responses without objections within 10 days of the date of service of this order. Monetary sanctions are granted in the amount of $450 as to each plaintiff. Plaintiffs shall pay monetary sanctions within 30 days of the date of service of this order.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 11/9/2021.
(Judge's initials) (Date)

(32)

Tentative Ruling

Re: ***Board of Trustees of the IBEW Local Union No. 100 Pension Trust Fund v. Green, et al.***
Superior Court Case No. 19CECG03174

Hearing Date: November 16, 2021 (Dept. 502)

Motion: Plaintiff's Motion for Discharge, Costs and Attorneys' Fees

Tentative Ruling:

To continue the matter to December 22, 2021 at 3:30 p.m. in Dept. 502.

Explanation:

Plaintiff claims that it is, and at all relevant times was "the Plan Administrator of an employee benefit plan within the meaning of 29 U.S.C. § 1002, subd. (3) and 29 C.F.R. § 2510.3-3, subd. (a); a fiduciary within the meaning of 29 U.S.C. § 1002, subd. (14)(a); and the named fiduciary within the meaning of 29 U.S.C. § 1102, subd. (a)(2)." (Comp. ¶ 1.) Plaintiff states that it is "a multi-employer employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA)." (Motion, P&A 1:25-27; Moore Decl. ¶ 7.) Plaintiff claims that it provides, among other things, pension and related benefits to members of the International Brotherhood of Electrical Workers Local Union No. 100. (Motion, P&A 1:28-2:2; Moore Decl. ¶ 7.)

Title 29 United States Code section 1002(3) states that "[t]he term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Title 29 United States Code section 1002(14)(a) states that "[t]he term "party in interest" means, as to an employee benefit plan – [] any fiduciary (including, but not limited to, any administrator, officer, trustee or custodian), counsel, or employee of such employee benefit plan[.]"

A "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly." (29 U.S.C § 1102(a)(2).)

A civil action may be brought by a fiduciary to obtain appropriate equitable relief or to enforce the terms of the plan. (See 29 U.S.C. § 1132(a)(3)(B)(i) & (ii).) "[I]nterpleader is a form of "appropriate equitable relief" for purposes of section 1132(a)(3)(B)." (*Aetna Life Ins. Co. v. Bayona* (9th Cir. 2000) 223 F.3d 1030, 1034.)

Pursuant to Title 29 United States Code section 1132(e)(1):

> Except for actions under subsection (a)(1)(B) of this section [civil actions by participant or beneficiary], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) [civil action by a participant or beneficiary] and (7) [civil action by a State to enforce compliance with a qualified medical child support order] of subsection (a) of this section].

"The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) [persons empowered to bring a civil action] of this section in any action." (29 U.S.C. § 1132(f).)

Here, plaintiff avers that it is a fiduciary under ERISA, and that it has an obligation to ensure the proper disbursement of death benefits. Plaintiff brought this action in interpleader to fulfill that obligation. In other words, plaintiff is an ERISA fiduciary who filed an interpleader action for the purpose of enforcing the terms of the plan. Given these facts, the matter appears to fall squarely within the ambit of Title 29 United States Code Section 1132(e)(1). Hence, it appears that the federal district court has exclusive jurisdiction over this interpleader action. (See *Aetna Life Ins. Co. v. Bayona*, *supra,* 223 F.3d 1030, 1034 [interpleader action constitutes "appropriate equitable relief" within the meaning of ERISA section 1132(a)(3)(B) and the district court has jurisdiction over the complaint in interpleader].)

Therefore, the matter is continued to December 22, 2021, to allow plaintiff an opportunity to file a supplemental brief setting forth an explanation as to why this court's exercise of subject matter jurisdiction over this interpleader action is proper.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: _____RTM_____ on _____11/9/2021_____.
(Judge's Initials) (Date)

(32)

Tentative Ruling

Re: ***VRIS, Inc. v. Lopez, et al.***
Superior Court Case No. 20CECG03038

Hearing Date: November 16, 2021 (Dept. 502)

Motion: Cross-complainants' Motion for Leave to File First Amended Cross-complaint

Tentative Ruling:

To grant. (Code Civ. Proc., §§ 473, subd. (a)(1), 426.50.) Cross-complainants shall file the proposed first amended cross-complaint within ten (10) days of the clerk's service of the minute order.

Explanation:

"It is well established that leave to amend a complaint is entrusted to the sound discretion of the trial court ...." (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) "The court may ... in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading ...." (Code Civ. Proc., § 473, subd. (a)(1).) "Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading ...." (Code Civ. Proc., § 576.) "The trial court has discretion to allow amendments to the pleadings in the furtherance of justice, and this discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905; see Code. Civ. Proc., § 473, subd. (a)(1).) "[T]he policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified." (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422.)

A motion to amend a pleading must include a copy of the proposed amendment or amended pleading, serially numbered; state what allegations, if any, are to be deleted and where they are in the complaint; and state what allegations are proposed to be added, and where moving party seeks to add them. (Cal. Rules of Court, rule 3.1324(a).) The motion must be supported by a declaration specifying the effect of the proposed amendment; why the amendment is necessary and proper; when the facts giving rise to the amended allegations were discovered; and the reasons why the request for amendment was not made sooner. (Cal. Rules of Court, rule 3.1324(b).) The Court finds that the requirements of California Rules of Court, rule 3.1324 have been sufficiently met.

Here, the proposed first amended cross-complaint seeks to add causes of action for breach of oral contract between cross-complainant Ralph Lopez[1] ("Ralph") and

[1] For clarity, we refer to parties sharing a surname by their first names, intending no disrespect.

cross-defendant VRIS, Inc. ("VRIS"), conversion, intentional and negligent interference with prospective economic relations against cross-defendants VRIS and Dan W. Book ("Book"), financial elder abuse by Rebecca Lopez ("Rebecca") against VRIS and Book, and related general allegations and prayer. Cross-complainants contend that given the fact that the complaint was filed within two months of cross-complainants' ending their employment with cross-defendants, that none of the new causes of action are even remotely close to being time-barred, especially considering the tolling that was in place from April 6, 2020 through October 6 [sic] (1), 2020. (Cal. Rules of Court, emergency rule 9.) Cross-complainants also contend that limited discovery has taken place, and that the pending deposition notice for Ralph, with production of documents, includes a request for documents evidencing his book of business, which relates to several causes of action purported to be added by the proposed first amended cross-complaint, and requests documentation regarding the oral contract which forms the basis for a cause of action proposed to be added by way of the first amended cross-complaint. Cross-complainants state that the claims to be added pursuant to the proposed amendments are related to those alleged in the existing pleadings. They further contend that the new causes of action sought to be added arise from post-termination activities of cross-defendants in failing to release to cross-complainants their respective book of business; or with regard to the claim for oral breach of contract, failing to pay Ralph for his book of business as agreed. Cross-complainants state that these claims relate to plaintiff VRIS, Inc.'s claims that cross-complainants received commissions outside of their relationship with plaintiff and to which plaintiff claims it is entitled. The cause of action for financial elder abuse, sought to be asserted by Rebecca, concerns her claim for unpaid wages and benefits alleged in the cross-complaint and is based on allegations regarding her book of business. Cross-complainants claim that cross-defendants concede this relatedness as they seek discovery with regard to all these matters in pending discovery.

Additionally, cross-complainants claim that they did not unreasonably delay in seeking leave to amend the cross-complaint and that there is no bad faith on their part. Cross-complainants state that leave to amend a cross-complaint should be granted unless there is substantial evidence of bad faith. (See *Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 98-99; see Code Civ. Proc., § 426.50.) " 'Bad faith,' is defined as '[t]he opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake ..., but by some interested or sinister motive[,] ... not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will. [Citation.]' " (*Silver*, at p.100.) Cross-complainants claim that there will be no prejudice to cross-defendants from the grant of leave to file the proposed first amended cross-complaint as trial is not until February 27, 2023, and minimal discovery has taken place.

Pursuant to Code of Civil Procedure section 426.30:

> (a) Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff,

such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

(b) This section does not apply if either of the following are established:

(1) The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action.

(2) The person who failed to plead the related cause of action did not file an answer to the complaint against him.

Code of Civil Procedure section 426.50 states that:

A party who fails to plead a cause of action subject to the requirements of this article [Compulsory Cross-Complaints], whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action.

Code of Civil Procedure section 426.10, subdivision (c) defines a "related cause of action" as a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the causes of action which the plaintiff alleges in his complaint." "Because of the liberal construction given to the statute to accomplish its purpose of avoiding a multiplicity of actions, 'transaction' is construed broadly; it is 'not confined to a single, isolated act or occurrence ... but may embrace a series of acts or occurrences logically interrelated.' " (*Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 993-994.)

Here, the new causes of action appear to be related to the subject matter of the dispute alleged in plaintiff's complaint, and arise out of the same transaction, occurrence, or series of transactions or occurrences as the causes of action alleged in the original complaint, i.e., a dispute pertaining to the employment and cessation of cross-complainants' employment relationship with plaintiff. The new causes of action do not appear to be time-barred and there is no indication that cross-complainants unreasonably delayed in seeking leave to amend their cross-complaint. The complaint was filed on October 14, 2020, and cross-complainants filed their cross-complaint on December 18, 2020. Cross-complainants claim that although VRIS failed to make the first payment under the oral contract, a fact known to cross-complainants at the time they answered the complaint, cross-complainants could not have anticipated a total breach. Cross-complainants also claim that it was not fully apparent to them that they would not receive their respective book of business until they discovered that VRIS had sold the books of business to InsZone Insurance Services, LLC in or about April or May of 2021.

Thereafter, cross-complainants promptly sought leave to file their amended pleading. There is nothing to suggest that cross-complainants acted in bad faith, or that cross-defendants will be prejudiced if the amendments are allowed. Trial is not until February 27, 2023, the parties have engaged in minimal discovery, and any additional discovery necessitated by the amendment is unlikely to result in significant delay. Additionally, the Court notes that plaintiff and cross-defendants have filed a notice of non-opposition indicating that they do not intend to oppose the motion.

Allowing cross-complainants to file the proposed first amended cross-complaint will ensure that the pleading accurately reflects the issues to be tried, and will promote the strong judicial policy favoring liberal amendments so that all disputed matters between the parties may be resolved in the same action. The motion meets the requirements of California Rules of Court, rule 3.1324, and there is no indication that cross-complainants unreasonably delayed in bringing the motion, or that cross-defendants will be prejudiced if the amendments are allowed, as the motion is unopposed and trial is still over a year away. "Absent a showing of prejudice to the adverse party, [the] rule of great liberality in allowing amendment of pleadings will prevail." (*Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474.) Finally, there is no indication that cross-complainants acted in bad faith. (See *Silver Organizations Ltd. v. Frank, supra,* 217 Cal.App.3d 94, 99 [a motion to amend or file a cross-complaint under Code of Civil Procedure section 426.50 must be granted "unless bad faith of the moving party is demonstrated where forfeiture would otherwise result"]; Code Civ. Proc., § 426.50.) Accordingly, cross-complainants' motion is granted.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: RTM **on** 11/10/2021.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Ferrua v. Campos Family Almonds, LLC***
Superior Court Case No. 20CECG01044/LEAD CASE

Hearing Date: November 16, 2021 (Dept. 502)

Motion: By Defendants for Summary Judgment/Adjudication

Tentative Ruling:

To deny both motions. (Code Civ. Proc., § 437c.) Defendant's objections to the evidence submitted by Lawrence Ferrua nos. 2 and 4, and Darren Ferrua no. 3 are overruled. All other objections were not material to the determination of the motions. (Code Civ. Proc., § 437c, subd. (q).)

Explanation:

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must consider all of the evidence and all of the inferences reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.)

The moving party bears the burden of showing the court that the plaintiff " 'has not established, and cannot reasonably expect to establish, a prima facie case ... .' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Furthermore, "[t]o avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citations.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) In essence, if the party opposing summary judgment relies on inferences, those inferences must be "reasonably deducible" from the evidence. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.)

"Only when the inferences are indisputable may the court decide the issues as a matter of law.... An issue of fact becomes one of law only when 'the undisputed facts leave no room for a reasonable difference of opinion.'" (*Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 937.) A court will liberally construe the evidentiary submissions of a party opposing summary judgment, but will strictly scrutinize the moving

party's own evidence, "in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.) However, "[c]ourts liberally construe declarations submitted in opposition to summary adjudication only to the extent the declarations are admissible." (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 57.) Finally, "an issue of fact can only be created by a conflict of evidence." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) "It is not created by speculation or conjecture." (*Ibid*.)

Recreational Use Immunity (Civ. Code § 846)

"An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section." (Civ. Code, § 846, subd. (a).) In effect, "[t]he landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser under the common law as it existed prior to *Rowland v. Christian,* [(1968) 69 Cal.2d 108]; i.e., absent willful or malicious misconduct the landowner is immune from liability for ordinary negligence." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1100.)

Defendant presents evidence indicating that plaintiffs were recreating at the time of the incident, and plaintiffs do not argue to the contrary. Therefore, whether Civil Code section 846 applies turns on whether defendant possessed an applicable interest in the subject dirt road where the incident occurred.

"The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196.) Accordingly, possession of a public land grazing permit is applicable (*Ibid*), as is an "encroachment permit" permitting a private residential driveway share a portion of a public riding trail. (*Miller v. Weitzen* (2005) 133 Cal.App.4th 732, 735.) Furthermore, recreational immunity can also apply to easements. (See *Prince v. Pacific Gas & Electric Co*. (2009) 45 Cal.4th 1151, 1160.) In other words, "the statutory goal was to constrain the growing tendency of *private landowners* to bar public access to *their land* for recreational uses out of fear of incurring tort liability." (*Hubbard v. Brown, supra*, 50 Cal.3d at p. 193, emphasis added.)

Defendant contends he possesses an "interest in the property that is bounded by the dirt road," he has used the road since 2005 to access his orchards, and that the gate is partially on his property. (Points & Authorities ISO summary judgment, pg. 8:3-10.) He also asserts that the broad application of "interest" afforded under Civil Code section 846 encompasses easement owners. (*Id*. pg. 7:27-28.) Despite these contentions, however, defendant's evidence demonstrates only that a section of the gate is on moving defendants' property. (See Joe Campos Decl. pg. 2:14-16.) There is no evidence demonstrating that defendant possesses an interest - easement or otherwise - in the dirt road itself. Therefore, as a matter of law, it cannot be determined on the evidence submitted in defendant's motions that he possesses a sufficient interest in the dirt road for purposes of application of Civil Code section 846. (See *Aguilar v. Atlantic Richfield Co.,*

supra, 25 Cal.4th at p. 843 [In determining a motion for summary judgment, the court must "consider all of the *evidence*."].)

Defendants have failed to make a threshold showing that the recreational immunity applies. Even assuming defendants' evidence is sufficient to establish an applicable interest in the dirt road, the evidence submitted in opposition indicates the road was used by other entities as a short cut between Mount Whitney and Caruthers avenues. (See Notice of Lodgment, Ex. 4 of pg. 81:10-25.) In addition, although there is evidence that Joe Campos installed the gate, in the years before the subject incident there is competing evidence that he rarely, if ever, exhibited ownership or interest in the road by closing the gate. (See *Id*. Ex. 4, pg. 82:3; Ex. 5, pg. 33-34; Ex. 6, pg. 19:1-8; Ex. 7 pg. 19:14-24.) Therefore, considering the deference afforded to evidence opposing summary judgment, plaintiffs have satisfactorily established a triable issue of material fact as to defendants' interest in the dirt road.

Willful Misconduct

Recreational use immunity is not boundless and "an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, *unless*: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph, supra,* 4 Cal.4th at p. 1099, emphasis added.)

In the absence of consideration or invitation (not at issue here), recreational use immunity applies unless plaintiffs can show "[w]illful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." (Civ. Code, § 846, subd. (d)(1).) Courts describe willful misconduct as "intentional wrongful conduct" undertaken with knowledge that serious injury will result or "with a wanton and reckless disregard of the possible results …." (See *Reuther v. Viall* (1965) 62 Cal.2d 470, 475; see also *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689 ["Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results. [Citation.]"]

Accordingly, "[a] landowner's conduct becomes willful or malicious only if three elements are present: '(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril.' [Citations.]" (*Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 859.) Furthermore, a plaintiff opposing summary judgment must present more than unsupported assertions of willfulness or prior knowledge of peril. (See e.g., *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 33 (*Wang*) [unsupported assertions that runaway horses had created a dangerous condition "disregarded"].)

Unlike the unsupported assertions of willful misconduct in *Wang, supra*, 4 Cal.App.5th 1, plaintiffs here present evidence that defendant Joe Campos had taken issue with ATV riders creating dust on his property since his acquisition in 2004 (Not. of Lodgment, Ex. 2, pg. 58:10-25), particularly because the drifting dust caused disease to spread to his almond trees. (*Ibid*.) Defendant Joe Campos also knew that shadows were cast upon the gate location. (*Id*. pg. 75:1-10.) Furthermore, there is evidence that shortly after the incident defendant Joe Campos stated something along the lines that he had closed the gate "so this would happen." (Not. of Lodgment, Ex. 6, pg. 23:10.)

Defendant's reply briefs note that "[o]ral declarations of a party should be viewed with caution, and declarations which do not clearly appear to be against the interest of the party making them should be excluded." (*Sanguinetti v. Rosen* (1906) 12 Cal.App. 623, 634.) Defendant also objects contending that the deponent's testimony is vague as to his belief of whether the act was intentional. (Reply, pg. 5:6-14.) Nevertheless, defendant's objection is overruled because, considering the evidence that defendant took issue with road users and knew of shadows cast on the gate location, his comment that he closed the gate to cause "this to happen" could be inferred as a willfulness to create a dangerous condition to deter road use. (See *Aguilar v. Atlantic Richfield Co*., supra, 25 Cal.4th at p. 843 [in determining a motion for summary judgment, evidence is required to be viewed 'in the light most favorable to the opposing party."].) Accordingly, defendant's motion does not negate the willful misconduct exception. (See *Wang, supra*, 4 Cal.App.5th at p. 33 ["A defendant moving for summary judgment based on a statutory defense must also negate any statutory exceptions to the defense if the complaint alleges facts triggering potential applicability of the exception."].)

Summary judgment/adjudication is therefore denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM on 11/15/21.
(Judge's initials) (Date)