Tentative Rulings for February 11, 2025
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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 above rule also applies to cases listed in this "must appear" section.***

24CECG00179 ***Parminder Singh v. Mobile One Construction, Inc.*** **(Dept. 403)**

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 403

Begin at the next page

(20) **Tentative Ruling**

Re: ***Mullooly v. Chang et al.***
Superior Court Case No. 23CECG00123

Hearing Date: February 11, 2025 (Dept. 403)

Motion: By Defendant Sameir Alhadi for Summary Judgment / Adjudication

Tentative Ruling:

To grant summary judgment in favor of defendant Sameir Alhadi ("Dr. Alhadi"). (Code Civ. Proc., § 437c, subd. (c).) Within 10 days of service of the order, Dr. Alhadi shall submit a proposed judgment consistent with this summary judgment order.

Explanation:

Plaintiffs are family members of Dr. Adela Santana-Mullooly ("decedent"), who on 10/22/2022, while bicycling a quiet country road, was struck and killed by a vehicle driven by defendant Johnson Chang ("Johnson"). Johnson was part of a group of six individuals driving sports cars along the narrow undulating road. The group met at a Starbucks that morning and agreed to drive together to meet at Humphreys Station. The drivers in order were: (1) Johnson, driving the 2017 blue Acura NSX as the lead car; (2) Dr. Sameir Alhadi ("Dr. Alhadi"), driving a 2018 black 911 GT3 Porsche; (3) Frank Liang, driving a red 2021 Ferrari SF90; (4) Peter Chang ("Peter"), driving a 2022 White Porsche 911; (5) James Liang, driving a white Porsche Targa; and (6) Kevin Mosesian, driving a green 2003 Lamborghini Murcielago. (UMF 11.) Johnson was the only driver to hit plaintiff. Plaintiffs contend that the other drivers arrived at the accident location moments after the impact. Liability of the drivers other than Johnson is based on the allegation that they were all involved in a "motor vehicle speed contest, each racing their vehicle against the others." (Complaint ¶ 11.)

The Complaint alleges three causes of action, two of which are directed against Dr. Alhadi: (1) General Negligence; and (2) Negligence per se for alleged violations of California Vehicle Code sections 22350, 23103 and 23109.

Dr. Alhadi now moves for summary judgment, contending there is no evidence that he violated any provisions of the Vehicle Code, nor that he otherwise breached any duties he owed to the decedent.

Plaintiffs' claims against Dr. Alhadi and the other drivers hinge on allegations that he was: 1) driving in excess of the 55 mph speed limit, in violation of Vehicle Code section 22350, which prohibits driving at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property; 2) driving recklessly, in violation of Vehicle Code section 23103, which prohibits driving a vehicle upon a highway in willful or wanton disregard for the safety of persons or property,

which actions render a driver is guilty of reckless driving; and 3) aiding or abetting a motor speed contest, in violation of Vehicle Code section 23109.

Though the Complaint alleges a number of Vehicle Code violations, plaintiffs' case hinges on the alleged violation of Vehicle Code section 23109, which prohibits speed contests and exhibitions of speed. "[A] motor vehicle speed contest includes a motor vehicle race against another vehicle, a clock, or other timing device." (Veh. Code, § 23109, subd. (a).) As plaintiffs point out, section 23109 does not require evidence that drivers involved in the contest passed other vehicles. It does not require evidence that drivers explicitly planned in advance to race or to exceed the speed limit. The statute is not limited to engaging in a motor speed contest; it also prohibits aiding or abetting another driver in "any motor vehicle exhibition of speed on any highway." (*Ibid.*)

Plaintiffs point out that in *Agovino v. Kunze* (1960) 181 Cal.App.2d 591, the court found that there was sufficient evidence of a motor speed contest liability where the defendant: 1) was familiar with the neighborhood where the incident occurred; 2) knew particular streets on the route intersected at a point surrounded by residents; 3) knew the street on which he was driving intersected with a series of residential streets; and 4) that a park was located nearby. (*Id*. at pp. 596-597.) However, there must also be evidence of racing for there to be a speed contest.

The issue of proximate cause does not rise and fall on whether the defendant and the tortfeasor explicitly agreed to race, or whether the defendant's vehicle actually struck the plaintiff. (*Agovino v. Kunze* (1960) 181 Cal.App.2d 591, 597-598.) This fact is "of little importance to the issue of proximate causation." (*Id*.) Rather, liability can be based on evidence supporting an inference of a "tacit mutual understanding." (*Id*.) It is sufficient to show that the defendant and tortfeasor were not acting independently, and were jointly engaged in a series of acts which lead to harm to the plaintiff. (*Id*. at p. 597; see also *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1281.)

The concert of action theory of group liability "may be used to impose liability on a person who did not personally cause the harm to plaintiff, but whose advice or encouragement to act operates as a moral support to a tortfeasor, and if the act encouraged is known to be tortious, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act." (*Navarrete, supra,* 237 Cal.App.4th at p. 1286, citing to *Cadlo v. Owens–Illinois, Inc.* (2004) 125 Cal.App.4th 513, 521 [internal citations and quotation marks omitted].)

Plaintiffs appear to pivot away from claiming there was a speed contest and argue that defendants engaged in an exhibition of speed. "Exhibition" is defined as an "[a]ct or instance of exhibiting for inspection, or of holding forth to view; manifestation; display." (*In re Harvill* (1959) 168 Cal.App.2d 490, 492–493.) Thus, one could violate the statute by "displaying the speed of [ones] vehicle on the highway to another person… in another car." (*Id*. at pp. 492–493.) In *In re Harvill*, the court concluded that a jury could reasonably infer that a driver who was "'revving up' his engine and ... speeding at a rate of 55–60 miles per hour was exhibiting or displaying the speed of his car to the female occupants of [another car]." (*Id*. at p. 493.)

Dr. Alhadi was the first driver after Johnson's Acura NSX. (UMF 11.) Many of the facts presented in the moving papers are not particularly relevant, such as the presence of minors in the vehicles of two other drivers, and Dr. Alhadi's rendering of first aid to decedent. As for how the drive proceeded, Dr. Alhadi points out that all drivers in the group stayed in their respective positions the whole time (there was no passing). (UMF 13-14.) Dr. Alhadi was not at the scene of the accident, but arrived there after. (UMF 19.)

Primarily Dr. Alhadi relies on plaintiffs' factually devoid discovery responses to show that there is no evidence of any Vehicle Code violation on his part, or of a speed contest. When asked if any party violated any statute or regulation, plaintiffs identified Johnson only. (Alhadi's Exh. 10, Form Interrogatory 14.1.) When asked for all facts supporting their claim for damages, plaintiffs provided no facts or evidence pertaining to Dr. Alhadi. The only thing plaintiffs stated was that after Johnson, "four additional vehicles arrived at the scene of the incident within a very short period of time." (Alhadi's Exh. 9, Special Interrogatory 22.) When asked for all documents supporting the contention that Dr. Alhadi was a "substantial factor and proximate cause of … Plaintiffs' damages," plaintiffs only identified the Traffic Collision Report and decedent's death certificate, which do not mention Dr. Alhadi. (Alhadi's Exh. 9, Special Interrogatory 47.) Asked for all such supporting facts, plaintiffs provided a long narrative description of the events of that morning (decedent's group bike ride and defendants' group car ride), and stated that all defendants (including Dr. Alhadi) were driving with a "wonton disregard for the safety of people and property" and participated in a motor vehicle speed contest. These are simple legal conclusions, unsupported by any facts. The response also states that "Johnson Chang was traveling in excess of 65 miles per hour, well in excess of the speed limit of 55 miles per hour for a two-lane undivided highway in California. Sameir Ali Alhadi was traveling at approximately the same rate of speed as Johnson Chang." (Ibid., Special Interrogatory 43.) Asked for all facts supporting the contention that Dr. Alhadi engaged in a speed contest, plaintiffs offer the same legal conclusions (that defendants were driving with a "wonton disregard for the safety of people and property" and participated in a motor vehicle speed contest), plaintiffs simply add that after the impact, "Based on statements of witnesses, four additional vehicles arrived at the scene of the incident within a very short period of time." (Ibid., Special Interrogatory 34.) None of the witnesses identified by plaintiffs as supporting their claims against Dr. Alhadi provided any such evidence (UMF 25), except Heather San Julian who testified that he arrived "immediately" after the accident.

Accordingly, as asserted by Dr. Alhadi, plaintiffs' discovery responses include no facts supporting the contention that he engaged in, or aided and abetted in, a speed contest or exhibition of speed. (UMF 24.) Dr. Alhadi claimed that he was traveling within the speed limit and assumes by default that all the drivers behind were as well, as none of them passed him on Watts Valley Road. (AMF 18.) A defendant may rely on factually devoid discovery responses to shift the burden of production. (Code Civ. Proc., § 437c(p)(2).) Once the burden has shifted as a result of factually devoid discovery responses, the plaintiff must set forth the specific facts that prove the existence of a triable issue of a material fact. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.) Due to the lack of supporting facts in plaintiffs' discovery responses, the burden shifts to plaintiffs to raise a triable issue of fact.

The opposition relies on the testimony that Dr. Alhadi arrived "immediately" after the accident (AMF 5) to argue that, like Johnson, Dr. Alhadi was driving about 76 mph (in the 55 mph area) for an extended period of time. And since they were both exceeding the speed limit, they must have been engaging in a speed contest or exhibition of speed.

The fact that Johnson was driving 76 mph is not supported by any admissible evidence. This comes from what plaintiffs' counsel was told by the Fresno District Attorney – that this speed was recorded by the Acura's EDR at the time of the collision. (See Kaufman Decl., ¶ 5.) Using this as an established fact, and the testimony that Dr. Alhadi arrived "immediately" after the accident (which plaintiffs assume means not more than 10 seconds (Plaintiffs' Additional Material Facts ("AMF") 24; Oppo., 28:25-29:1), plaintiff's expert witness Colin Ferster, PhD, concludes that Dr. Alhadi must have been driving at about the same speed for an extended period of time. The chain of logic goes like this – Dr. Alhadi testified that he lost sight of Johnson's vehicle at Aardvark Drilling, which is located 4.4 miles from the crash site. Dr. Alhadi testified at his deposition that he drove the speed limit (55 mph) or below (getting down to as low as 20 mph). But with Johnson driving 76 mph, if Dr. Alhadi never exceeded the speed limit after Aardvark Drilling, he would have arrived at the accident site at least at least 1.31 minutes after Johnson struck decedent. Since San Julien testified that Dr. Alhadi arrived "immediately" after the accident, Dr. Alhadi lied in his deposition.

Dr. Alhadi aggressively attacks the Ferster Declaration, first pointing out his lack of expertise with motor vehicles. His expertise is in the field of "bicycling safety data", and "bicycling data, safety, and infrastructure". However, he is also expert in "geographic information science" with respect to "active transportation", which makes him qualified to calculate how long it would take to get from point A to point B at a given speed. He is also qualified to give testimony as to the coordinates of the accident site from data obtained from the bicyclists' watches and the 911 call. The court will overrule the objection to his declaration as a whole. Once we know the location where Dr. Alhadi says he lost sight of Johnson, it only takes basic math to work out how long it would take for one to reach the accident site from there at a given speed. Dr. Ferster is qualified to do this. But there are some fundamental flaws and unsupported assumptions in Dr. Ferster's analysis and conclusions. First, it is unknown what, exactly, San Julian meant by "immediately." It seems reasonable to assume she meant only a few seconds, but this wasn't clarified in the deposition. Second, from the fact (of which there is no admissible evidence, but of which plaintiffs' counsel was "informed") that Johnson was driving 76 mph at the moment of impact, Dr. Ferster assumes that Johnson was driving at or around 76 mph at least the entire 4.4 mile stretch from at least Aardvark Drilling. This assumption is in no way supported by the evidence. Dr. Alhadi's testimony that he lost sight of Johnson's vehicle 4.4 miles from the accident site is consistent with Johnson driving 76 mph only at the moment of impact if Johnson sped up shortly before impact. Johnson and Dr. Alhadi, and the other drivers, could have been cruising along at the speed limit until the end when Johnson unilaterally sped up shortly before the accident, with Dr. Alhadi arriving at the accident location "immediately", or within seconds, of the impact. Dr. Ferster's assumption that Johnson drove at or around 76 mph from Aardvark Drilling to the accident site renders his conclusions about Dr. Alhadi's speed speculative, and therefore inadmissible. (See *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1526.)

Plaintiffs request a continuance of the motion to obtain evidence from Johnson and his vehicle establishing his driving speed at the moment of impact, which plaintiffs believe to be 76 mph. Discovery from Johnson is prevented by the pendency of a criminal prosecution and his invocation of his Fifth Amendment privilege against self-incrimination, preventing plaintiffs from deposing and pursuing other discovery means from Johnson, and from inspecting Johnson's vehicle. The only evidence plaintiffs articulate that they will obtain from this discovery is the speed at which Johnson Chang was traveling at the time he killed decedent. The opposition argues, "The data stored with this device includes speed at which the vehicle was traveling **when it struck and killed Adela Mullooly** on October 2, 2022. Based on information provided to Plaintiffs' counsel by the Fresno County District Attorney's Office, Johnson Chang was traveling 76 miles per hour at the time he struck and killed Adela Mullooly. However, Plaintiffs have not been able to complete this inspection as the vehicle still in the custody of the criminal court. (*The People of the State of California vs. Johnson Chang*, Case No. M23911695) (AMF 26)." (Oppo. 16:17-23, emphasis added.) "The speed at which J. Chang was traveling **when he struck and killed Ms. Mullooly** is directly relevant to Plaintiffs' claims against Defendant." (Oppo. 17:1-2, emphasis added.) "Ms. San Julian's testimony, together with the EDR data showing Johnson Chang's speed **at the time he struck and killed Ms. Mullooly**, shows that Defendant was also speeding, in violation of the California Vehicle Code." (Oppo. 17:11-13, emphasis added.)

Code of Civil Procedure section 437c, subdivision h, provides that "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just."

However, plaintiffs make no showing that the evidence sought would reveal Johnson's speed at any time other than the moment of impact. The simple fact that Johnson was traveling at 76 mph at the moment of impact (if established) is not sufficient to raise a triable issue of fact as to whether defendants, and Dr. Alhadi in particular, engaged in a speed contest or exhibition of speed, or to impeach Dr. Alhadi's testimony about his speed during the group drive. The request for continuance is denied. The court intends to grant Dr. Alhadi's motion, as plaintiffs have not produced evidence raising a triable issue of fact as to whether defendant engaged in a speed contest and/or exhibition of speed.

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: JS on 2/5/2025 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Rios v. Leon, et al.***
Superior Court Case No. 23CECG00407

Hearing Date: February 11, 2025 (Dept. 403)

Motion: Petition to Compromise Minors' Claims

Tentative Ruling:

To deny the petitions for minors Isys Rios Lopez and Crystal Rios Lopez, without prejudice, unless counsel appears with additional records addressing the issues described below, which would then be considered during the hearing. Counsel will need to call and request oral argument if they intend to appear with new evidence at the hearing. Otherwise, counsel shall comply with Local Rule 2.8.4, and request a new hearing and file new petitions.

Explanation:

The two minor plaintiffs are alleged to have sustained injuries which have since resolved as a result of a collision. Both minors received treatment from American Ambulance and Tower Chiropractic. (Petn., Item 7.) The petition to approve the settlement of Isys Rios Lopez includes a record of her visit with Tower Chiropractic. Although there are intake forms from Tower Chiropractic included with the petition of Crystal Rios Lopez the record of her June 28, 2021 visit appears to have been inadvertently left out of the records. As a result, there is no medical record to demonstrate her complaints have resolved. (Petn., Item 8.)

The Medi-Cal liens provided with each petition include a description of the services billed by "Modivcare Solutions, LLC" which has not been identified as a treatment provider in the petitions. The lien for Isys Rios Lopez indicates medical transportation was provided. (Petn., Att. 12(b)(4)(c).) It appears there may be a relationship between Modivcare Solutions, LLC and American Ambulance as identified in the petitions. Both minors have been charged costs for records from American Ambulance and the court anticipates these records are available to confirm the payment by Medi-Cal and services rendered as represented in Items 6 and 7 of the petitions. The court intends to deny the petitions due to the discrepancies between the petitions at items 6 and 7 and the records provided.

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: JS on 2/6/2025.
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Dwight Nelson v. Denise Brehm***
Superior Court Case No. 23CECG05134

Hearing Date: February 11, 2025 (Dept. 403)

Motion(s)(3x): (1) Defendants Clarissa Ball and Investment Exchange Services, Inc.'s demurrer to the second amended complaint

(2) Defendants Denise Brehm and Bay Area Escrow Services' demurrer to the second amended complaint

Tentative Ruling:

To sustain the demurrer by defendants Clarissa Ball and Investment Exchange Services, Inc. and Denise Brehm and Bay Area Escrow Services. To grant leave to amend. The Third Amended Complaint shall be filed within ten (10) days from the date of this order. The new amendments shall be in **bold print**.

Explanation:

Introduction

Considering the material overlap in the contentions asserted in the demurrers, for clarity and economy this ruling is framed around each contention. As mentioned at the outset of the previous demurrer, under long settled principles governing demurrers, "*[w]e disregard legal conclusions in a complaint; they are just a lawyer's arguments*." (*Wexler v. California Fair Plan Association* (2021) 63 Cal.App.5th 55, 70, emphasis added.)

Request for Judicial Notice

Defendants Denise Brehm ("Brehm") and Bay Area Escrow Services cite subdivision (h) of Evidence Code section 452 and request this court judicially notice escrow instructions to which it is not a signatory. (These defendants also cite, without alert, the disapproved opinion in *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280.) Plaintiff opposes, indicating that the subject material ***is*** subject to dispute. Nevertheless, as discussed below, the demurrers are sustained on a variety of grounds apart from the subject escrow instructions. Accordingly, the court intends to deny the request for judicial notice, without prejudice, pending resolution of the more procedural defects currently plaguing plaintiff's pleadings.

Economic Loss Rule

"The California Supreme Court has rejected 'the transmutation of contract actions into tort actions "in favor of a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising

from principles of tort law' other than the bad faith denial of the existence of, or liability under, the breached contract."'" (*Money Store Investment Corp. v. Southern California Bank* (2002) 98 Cal.App.4th 722, 732, citations omitted; see also *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 923; but see *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 714-715 [conducting a third-party duty analysis in addition to disapproving an appellate decision which had transmuted a contract action into tort].)

As it relates to demurring defendants, the second amended complaint's alleged facts supporting of breach of duty are the same facts alleged to support breach of contract. (E.g. SAC, ¶¶ 68-70, 77, 83, 84, 93.) In other words, by overlapping the same factual predicate for both theories, plaintiff is seeking to "transmute" the contract and tort causes of action in precisely the manner prohibited by the Supreme Court. Consequently, the demurrers to the third and fifth causes of action on the basis of the economic loss rule, are sustained. Leave to amend is granted.

Personal Claim against Clarissa Ball

"It is also well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24.) Plaintiff's opposition asserts no legal authority on this point but rhetorically speculates that "if Clarissa Ball was acting as an independent contractor …." (Clarissa Ball and Investment Property Exchange Services, Inc. ("Ball and IPX") Opp. at p. 5:9-10.) Ultimately, there are no facts alleged in the second amended complaint supporting this contention. Therefore, the demurrer is sustained. With leave to amend granted.

Express Limitation Provision

"With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy … [and] they are enforceable with respect to claims for ordinary negligence unless the underlying transaction 'affects the public interest.'" (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1127-1128 [summary judgment affirmed where no evidence supported unequal bargaining power or contravention of public policy or interest].)

Plaintiff's opposition contends he was the "weaker" party to the negotiations, and, recognizing that condition, he was motivated to hire "three sets of real estate professionals." (See Ball and IPX Opp. at p. 8:15-21.) Plaintiff also contends he was not provided an opportunity to negotiate the terms. (*Id*. at p. 8:13-14.) These circumstances are not alleged in the complaint, thus the demurrer on this ground is sustained. To the extent such facts exist, plaintiff is granted another opportunity to amend.

Breach of Contract (Brehm and Bay Area Escrow Services)

Although elemental to breach of contract (Civ. Code, § 1549), plaintiff insists alleging performance is unnecessary because "[a]nyone who has ever purchased a home in California knows …." (Brehm and Bay Area Escrow Services Opp. at p. 6:23-24.)

In other words, the second amended complaint does not appear to allege performance and plaintiff's opposition cites neither a factual basis nor legal authority for excusing performance. Accordingly, Defendants Brehm and Bay Area Escrow Services demurrer to the fourth cause of action is sustained, with leave to amend.

Contradictory Terms/Integration Clause

Under long settled principles regarding demurrers, "[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context …." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Demurring defendants construe respective allegations of promised conduct as additional agreements contradicting the subject written contract(s). However, given reasonable interpretation, neither of the identified paragraphs (75 and 91) include contradictory terms. Accordingly, the demurrers on this ground are overruled.

Leave to Amend

To the extent plaintiff possess unpled facts which would address the deficiencies raised in these demurrers as discussed above, leave to amend is granted. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

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: JS on 2/7/2025.
(Judge's initials) (Date)

(41)

Tentative Ruling

Re: ***Bryan Stark v. City of Fresno***
Superior Court Case No. 22CECG03903

Hearing Date: February 11, 2025 (Dept. 403)

Motion: By Defendant County of Fresno for Summary Judgment

Tentative Ruling:

To deny the county's motion for summary judgment.

Explanation:

Plaintiff Bryan Stark ("Plaintiff") filed suit against the County of Fresno (County) and other defendants after an incident wherein Plaintiff hit a pothole shortly after midnight on the southbound lane of Clovis Avenue, which popped the tires on his motorcycle and caused him to crash and suffer injuries. Plaintiff alleges a dangerous condition on public property caused the incident. The County now moves for summary judgment, which Plaintiff opposes.

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.)

The County Fails to Satisfy Its Initial Burden

Material Facts

The County contends it is entitled to summary judgment by showing Plaintiff's complaint lacks merit because Plaintiff cannot establish the County's negligence caused his injuries. The County contends it had no actual notice and no constructive notice, even under its duty to inspect, of a dangerous condition on its public property.

To support the motion, the County presents 17 material facts, summarized below. On December 27, 2021, about 12:00 a.m. to 12:30 a.m., Plaintiff was riding his motorcycle southbound on Clovis Avenue. (Fact No. 1.) While going southbound on Clovis Avenue, Plaintiff crossed the intersection of Clovis Avenue and Ashlan Avenue. (Fact No. 2.)

Plaintiff alleges he drove over a pothole in the middle lane, about 100 feet after crossing the intersection. (Fact No. 3.) At the time of the incident, construction was going on near the intersection. (Fact No. 4.) The pothole was located on the edge of the slow lane and the middle lane. (Fact No. 5.) Plaintiff traveled along this roadway many times before the incident. (Fact No. 6.) "Plaintiff 'absolutely [did] not' see any pothole there on the day before the incident when he traveled along this roadway where the pothole was located." (Fact No. 7.)

Plaintiff filed this suit for negligence and premises liability on December 7, 2022, against three named defendants. (Fact No. 8.) The County is the sole remaining named defendant. (Fact No. 9 [Plaintiff dismissed defendant City of Fresno]; Fact Nos. 10-13 [court entered summary judgment in favor of defendant City of Clovis].)

The County has jurisdiction over the roadways where the incident occurred. (Fact No. 14.) On the day after the incident, the County received a work order for a pothole at the location of the incident, which the County repaired later on the same day. (Fact No. 15.) Before December 28, 2021, the County had received no complaints or work orders for a pothole at the incident's location. (Fact No. 16.) The construction project near the incident's location was not a County construction project. (Fact No. 17.)

Negligence

The County contends summary judgment is proper because it had no actual or constructive notice of the alleged dangerous condition of its property. Government Code section 835 sets forth the conditions of a public entity's liability for a dangerous condition of its property, with certain inapplicable statutory exceptions, as follows:

> [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 Government Code section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(Gov. Code, § 835.) Government Code section 835.2 defines "notice," which can be either actual or constructive.

The County presents evidence to show it has jurisdiction over the roadways involved in the incident (Fact No. 14), but it had no actual notice of the pothole. (Fact Nos. 15, 16.) The County meets its initial burden to show it had no actual notice.

The County must also show it had no constructive notice of the dangerous condition in sufficient time before Plaintiff's injury to have taken preventative measures. (Gov. Code, § 835.) Because the incident's location is within the County's ownership,

control, and maintenance, its burden to negate constructive knowledge is greater than that of the City of Clovis, which had no maintenance obligations. To meet its initial burden, the County must address whether a reasonable inspection would have disclosed the dangerous condition:

> A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to: [¶] (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property. [¶] (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

(Govt. Code, § 835.2, subd. (b).)

In general, "questions of whether a dangerous condition could have been discovered by reasonable inspection and whether there was adequate time for preventive measures are properly left to the jury. [Citations.]" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 843 [trial court erred in granting city's nonsuit motion because jury could have inferred city had constructive knowledge of dangerous condition created by encroaching sign].)

The County relies on *Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508 (*Martinez*), which summarizes the constructive notice requirements as follows:

> A public entity will be charged with constructive notice of a dangerous condition only if (1) the dangerous condition existed for a sufficient period of time before the plaintiff's injury, and (2) it was sufficiently obvious that the entity acted negligently in not discovering and repairing it."

(*Id. at p.* 514.)

In *Martinez,* the plaintiff tripped on a small divot when she was walking through an alley in the City of Beverly Hills. Under the city's "pavement management program," an independent contractor inspected the streets and alleys every two years for potential hazards, such as potholes. The inspection contractor did not notice the small divot in the most recent inspection, although it repaired three large potholes near the divot. There was no evidence about whether any crew member saw the divot, but the city presented evidence that had a crew member noticed the divot, the crew "would have done nothing to fix it" because the divot's size was insignificant and the material used to patch

potholes could not be used to repair such a small divot. (*Martinez, supra,* 71 Cal.App.5th at p. 516.) The appellate court affirmed the trial court's entry of summary judgment, finding the trial court properly determined the city lacked actual and constructive notice of the divot in the alley, as a matter law. The court noted that unlike a defect in a sidewalk, the alley was designed and maintained primarily for use by heavy vehicles, therefore public entities may reasonably elect to apply less rigorous scrutiny for alleys, as compared to sidewalks. (*Id.* at pp. 524, 527.)

> As the County notes, *Martinez* summarized the duty to inspect as follows:
>
> Although constructive notice of a defect may be imputed to a public entity that fails to have a "reasonably adequate" inspection system [citation], constructive notice will not be imputed if the defect is not sufficiently obvious (*Nicholson* [*v. Los Angeles* (1936) 5 Cal.2d 361] at pp. 364-365 ["where [a public entity] is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition"]).

(*Martinez, supra,* 71 Cal.App.5th at p. 520.)

The California Supreme Court has determined there is no exact time limit to discover a defect:

> Whether a dangerous condition existed long enough for a reasonably prudent person to have discovered it is ordinarily a question of fact for the jury, and the cases do not impose exact time limitations. Each accident must be viewed in light of its own unique circumstances.

(*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1207 [affirming jury verdict that defendant's failure to inspect premises within a reasonable time was sufficient for inference that spilled milk was on floor long enough to give defendant chance to discover and remedy it].)

A plaintiff may use circumstantial evidence and inferences to prove an entity should have discovered a dangerous condition:

> [A] plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and … "evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it."

(*Ortega v. Kmart Corp, supra,* 26 Cal.4th at p. 1210, citing *Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 447.)

When the court considers all the submitted moving papers, as it must under Code of Civil Procedure section 437c, subdivision (c), the County's own Fact No. 7, which it deems material, lacks factual support. As previously noted, the exact language of Fact

No. 7 is: "Plaintiff 'absolutely [did] not' see any pothole there on the day before the incident *when he traveled along this roadway* where the pothole was located." (Italics added.) As evidentiary support for its motion, the County lodged the entire Volume 1 of Plaintiff's deposition transcript. The County cites to the transcript at page 23, lines 2 through 20, to support Fact No. 7. The cited testimony includes Plaintiff's statement that his observations the day before involved different conditions and no cones directing traffic toward the pothole were present. (Plaintiff's depo., p. 23:2-13.) The submitted moving papers include the lines immediately after the County's cited testimony, which provide additional evidence that Plaintiff traveled a different route the day before the incident—he did not travel "along this roadway where the pothole was located." (Compare Plaintiff's testimony, depo., p. 23:21-24:2 ["I wasn't traveling that route the day before"] to Fact No. 7.)

In addition to its failure to provide evidentiary support for a material fact, the County fails to show Plaintiff cannot prove the defect was sufficiently obvious, as a matter of law. In *Martinez*, the court acknowledged that "constructive notice of a defect may be imputed to a public entity that fails to have a 'reasonably adequate' inspection system[.]" (*Martinez, supra,* 71 Cal.App.5th at p. 520, citing *Ortega v. Kmart Corp., supra,* 26 Cal.4th at p. 1203.) *The* County presents no evidence about its inspection system and no facts about whether the pothole could have been discovered by a reasonable inspection. On the inspection issue the County presents only one fact (Fact No. 16), which shows the County received no prior complaints or work orders for a pothole at the location of the incident. Fact No. 16 supports the conclusion that the County had no actual notice of the dangerous condition, but it proves little about the duration of the pothole, and no evidence about the type of inspection system in place.

On the issue of whether the pothole was sufficiently obvious to support a finding of constructive notice, the County asks this court to make the same finding that it made when it granted the motion for summary judgment by the City of Clovis. When this court granted that motion, it discussed the city's Fact No. 6, which states: "Plaintiff testified that on December 26, 2021, the alleged pothole was 'absolutely not' there." Fact No. 6, as framed by the City of Clovis, includes the phrase "Plaintiff testified," and does not include the phrase that the day before the incident Plaintiff "traveled along this roadway where the pothole was located." (County's Fact No. 7.) Although the facts are similar, the differences in the language and the defendants' initial burdens lead the court to different conclusions. Any factual disputes about the City of Clovis's Fact No. 6 were immaterial to the court's determination that Plaintiff could not prove the essential element that the City of Clovis owned or controlled the subject roadways.

At trial, Plaintiff has the burden to establish the obvious nature of the dangerous condition. The statement by Plaintiff that he did not observe the pothole the day before the incident raises the inference that the pothole was not obvious, but that is not the only inference. The trier of fact may also infer the pothole was there for a sufficient amount of time for the County to have discovered it under its duty to inspect, even though Plaintiff did not see it. Also, the County itself presented additional evidence that cones were present on the day of the incident directing traffic toward the pothole that were not there the day before. (Fact No. 7, Plaintiff's depo., p. 23:2-20.) And the County provided evidence that the pothole was large enough that it was repaired the day after the incident. (Fact No. 15.) The additional facts and inferences are relevant to determine

whether the County should have inspected, discovered, and repaired or marked the pothole before the incident. The County's evidence fails to establish that Plaintiff does not have, and cannot obtain, evidence to prove constructive notice, as a matter of law. (See *Aguilar*, *supra*, 25 Cal.4th at p. 855.)

Conclusion

In conclusion, the court denies the County's motion for summary judgment because the County fails to meet its burden of production and persuasion, making it unnecessary for the court to review Plaintiff's opposition. Although, at trial, Plaintiff has the burden to prove the County had constructive notice of the alleged dangerous condition, on this motion for summary judgment, constructive notice remains as an issue of fact the County has not negated as a matter of law.

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: JS on 2/10/25.
(Judge's initials) (Date)