Tentative Rulings for September 28, 2022
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

(27)

Tentative Ruling

Re: ***Micheli v. City of Fresno***
Superior Court Case No. 16CECG02937/Lead

Hearing Date: September 28, 2022 (Dept. 502)

Motion: By Defendant for summary judgment, or alternatively, summary adjudication

Tentative Ruling:

To grant the motion for summary judgment. (Code of Civ. Proc., § 437c, subd. (c).) Defendant City of Fresno is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment ruling.

To overrule plaintiffs' objection number 6. All other objections are overruled pursuant to Code of Civil Procedure, section 437c, subdivision (q).

To vacate the April 17, 2023 trial date.

Explanation:

Summary Judgment/Adjudication

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) In determining a motion for summary judgment or adjudication, "'we view the evidence in the light most favorable to plaintiffs'" and "'liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor.'" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97, citations omitted.)

The court does not weigh evidence or inferences (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856), nevertheless, "'[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647, citation omitted; Code Civ. Proc., § 437c, subd. (c).)

In addition, "when discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those stern requirements applicable in a normal case are relaxed or altered in their operation." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.)

City reduces plaintiffs' claim to harm suffered by " 'aggressive, corrosive, degraded, and substandard' drinking water." (Defendant's Undisputed Material Facts (UMF) 1.) However, plaintiffs have alleged harm and injuries as a result of City's alleged failure to comply with applicable regulatory schemes including the California Safe Drinking Water Act and its implementing regulations concerning testing, treatment, notification, and reporting, and Health and Safety Code section 116550, subdivision (a) by allegedly failing to operate the NESWTF with mandated corrosion control treatment in violation of its water permit. (5AC ¶ 3.) Plaintiffs also allege exposure to excessive levels of lead and other toxic substances.

Nevertheless, plaintiffs repeatedly describe their alleged harm as "diminution of their property value, other economic harm including the cost of re-plumbing their home …." (See 5AC, ¶¶ 11, 13, 15, 17 - 25.) In addition, plaintiffs' discovery responses state that: "this is not an action for violations of numeric drinking water standards" and "…Plaintiffs' Negligence and Nuisance claims are not premised upon the City's violation of a mandatory duty to comply with a numeric drinking water standard." (City's Appx. Ex. 15, 27.)

Plaintiffs' discovery responses also identified that documentation of City's agreement to provide water service that complies with applicable regulations and statutes was premised on the federal and California Safe Drinking Water Acts and federal and California Lead and Copper Rules. (UMF 9.) Plaintiffs' response to City's contention is also addressed in discovery responses (Plaintiffs' Additional Material Facts (AMF) 897), which essentially state that the alleged contract and breach arise from the objective standards pursued by the state and federal statutory schemes:

> The City failed to provide Plaintiffs with potable, clean, safe, reliable, non-corrosive, and non-harmful drinking water that complied with applicable drinking water regulations and statutes, including the federal and California state Safe Drinking Water Acts and federal and California state Lead and Copper Rules. The City materially and irreparably breached the contracts with Plaintiffs by failing to provide non-corrosive, non-harmful, potable, clean, reliable and safe water, and instead provided substandard and degraded water that was unfit for use by Plaintiffs in Plaintiffs' homes. The approximate date of the City's first breach is the date the City's Northeast Surface Water Treatment Facility came online and the City added surface water to its existing groundwater supply, in 2004. The City's breach was ongoing each day the City failed to provide Plaintiffs with non-corrosive, non-harmful, potable, clean, reliable and safe water that destroyed their residential plumbing and caused lead and other contaminants to leach into the water supplied through the taps in Plaintiffs' homes.
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> Plaintiffs AMF 897. City's Evid. Ex 2, p. 15:1-11

In other words, plaintiffs seek recovery based on terms such as potable, clean, safe, reliable, non-corrosive, non-harmful as those terms are used to state statutory and regulatory objectives, i.e. those terms are not contractual duties. (*Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322 ["Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the

pleading or relief demanded."].) Furthermore, " 'recitations of legislative goals and policies' do not establish mandatory duties." (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 692 (*Groundwater Cases*); *Paredes v. County of Fresno* (1988) 203 Cal.App.3d 1, 12 [words such as " 'pure, wholesome, and potable' or 'pure, wholesome, healthful, and potable'" are goals to which actionable specific standards are set].)

Plaintiffs originally alleged in their pleadings that City conducted sampling at a "few residences" and detected the presence of lead. In their opposition to summary judgment, plaintiffs offer the deposition testimony of Thomas Esqueda – City's former Director of Utilities, who testified that lead was detected at a "number of residences." (AMF 938, Plts Appx. p. 45.) Although City has produced findings by the United States Environmental Protection Agency ("EPA") that the lead levels met the relevant numeric standards, plaintiffs argue - and thus clarify – that their theory of liability arises not from technical compliance with the EPA findings, which they disregard as "irrelevant," but because they "allege the City's violations of other mandatory duties imposed on it that caused Plaintiffs and Class members harm." (Opp. at p. 33:7-9.)

Accordingly, plaintiffs' alleged theories of liability all turn on whether a mandatory duty existed, plaintiffs were within the zone of protection of the mandatory duty, and City's breach of the mandatory duty caused plaintiff's harm. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499, (*Haggis*).)

Government Code section 815.6

"It is settled that public entities … are not liable in tort except as provided by statute." (*Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 990.) "Sovereign immunity is the rule in California. Governmental liability is limited to exceptions specifically set forth by statute." (*Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1454-1455; *In re Groundwater Cases, supra,* 154 Cal.App.4th at p. 688; *Sonoma AG Art v. Department of Food & Agriculture* (2004) 125 Cal.App.4th 122, 125.)

Accordingly, "[e]xcept as otherwise provided by statute … [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.)

"A plaintiff seeking to hold a public entity liable under Government Code section 815.6 must specifically identify the statute or regulation alleged to create a mandatory duty." (*In re Groundwater Cases, supra,* 154 Cal.App.4th at p. 689.) In addition, "Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*State of*

California v. Superior Court (1984) 150 Cal.App.3d 848, 854, citations omitted; *Haggis, supra,* 22 Cal.4th at pp. 498-499.)

Mandatory Duties and Administrative Discretion

For section 815.6 to apply the enactment at issue must be "*obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." (*Haggis, supra,* 22 Cal.4th at p. 498; see also *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 862-863 [statutes and regulations requiring levee projects be *designed and constructed* in accordance with a federal manual did not create a mandatory duty in levee *maintenance*].) In essence, "the imposition of a 'mandatory duty' … 'must *require* ... that a particular action be taken or not taken.'" (*Id*. at p. 863, citation omitted.)

Furthermore, general provisions do not create a mandatory duty under Government Code section 815.6. (*Groundwater Cases, supra,* 154 Cal.App.4th at p. 687.) Neither do isolated exceedances of regulatory standards (i.e. Maximum Contamination Levels ("MCL")) demonstrate violations of a mandatory duty, to the extent one exists. (*Ibid*.)

In *Haggis, supra,* 22 Cal.4th 490 the plaintiff sued to recover for compensation for property damage, loss of use and value of real property, and emotional distress, after his house was damaged by the 1994 Northridge earthquake. The plaintiff alleged his house was constructed on an unstable bluff in Pacific Palisades, and in 1966 the defendant City of Los Angeles had issued notices to the then owner to stabilize the property under a municipal ordinance. The same ordinance also required the city to record with the county recorder a "certificate of substandard condition," but the city failed to do so. (*Haggis, supra,* 22 Cal.4th at p. 496.) Accordingly, when the plaintiff purchased the property in 1991, the property's geologic instability was not apparent visually nor was it apparent from the title report because the city had never recorded the required substandard condition. The California Supreme Court held that the subject ordinance used "obligatory" language requiring the city to record a certificate of substandard condition once that determination was made. Since the city had made the predicate determination (twice, in 1966 and 1970), the ordinance "commanded" recording of the certificate – a mandatory duty was thus created. (*Id*. at p. 502.)

In *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, the plaintiffs were residents of a mobile home park who alleged the park's water had been contaminated with dangerously high levels of naturally occurring fluoride. The plaintiffs alleged the defendant county was liable under Government Code section 815.6 for breaching mandatory duties imposed by the California Safe Drinking Water Act, and its implementing regulations. Specifically, the plaintiffs identified regulations which required the defendant county to review reports submitted by the park's owner, all of which showed contamination, and report those the violations to the California Department of Health Services. (*Id*. at p. 992.) The California Supreme Court had previously rejected an implied mandatory duty by the park owner to alert his customers to the elevated fluoride and remanded the matter to the court of appeal to determine if an express mandatory duty existed. The court of appeal held that such a duty existed, given obligatory

language used in the statute requiring the defendant county to review the reports by the park operator. (*Id*. at p. 993 [noting the absence of discretion with the statute's review requirements].)

Nevertheless, for purposes of establishing liability under Government Code section 815.6, "if the predicate enactment confers the exercise of discretion on government officials, the use of 'shall' and like words will not alone support liability under the California Tort Claims Act." (*Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13, 20.)

Plaintiffs identify subdivision (a) of Health and Safety Code section 116550 as imposing the obligatory duty allegedly violated by City when it allegedly acted outside the scope of its permit when it added corrosion control treatment in 2012 and when it allegedly failed to include all customer complaints in its report to the State Board. (See Opp. at pp. 35-37.)

Health and Safety Code section 116550 provides that: "(a) No person operating a public water system shall modify, add to or change his or her source of supply or method of treatment of, or change his or her distribution system as authorized by a valid existing permit issued to him or her by the department unless the person first submits an application to the department and receives an amended permit as provided in this chapter authorizing the modification, addition, or change in his or her source of supply or method of treatment. (b) Unless otherwise directed by the department, changes in distribution systems may be made without the submission of a permit application if the changes comply in all particulars with the waterworks standards."

The Department of Health Services has been delegated by the legislature "the initial and primary authority, and the corresponding responsibility, for establishing drinking water standards." (See *Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1008.) In addition there are specific procedures for adjudicating compliance with a permit. (See Health & Saf. Code, § 116625.)

Considering that the legislature has vested "initial and primary" authority in the Department of Health, and the existence of a specific statutory mechanism for adjudicating compliance with a permit, it is not clear that, as a matter of law, section 116550 imposes an "obligatory" duty on City sufficient to constitute a "mandatory" duty for purposes of Government Code section 815.6. In other words, the availability of discretionary amendment procedures and a hearing process for alleged violations implies a level of discretion and permissiveness distinguishable from obligation.

Nevertheless, casting plaintiffs' opposition in the most favorable light, and assuming that such a duty is imposed, there is insufficient support for the other prongs to create a triable issue regarding liability under Government Code section 815.6.

Mandatory Duties and the Zone of Protected Interests

"The plaintiff must show the injury is ' "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."' " (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 861.) As the California Supreme Court held in *Haggis, supra,* 22 Cal.4th 490, "[s]econd, *but equally*

important, section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is ' "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."' " (*Id*. at p. 499, emphasis added.)

In essence, "[i]f the predicate enactment is of a type that supplies the elements of liability under section 815.6—if it places the public entity under an obligatory duty to act or refrain from acting, with the purpose of preventing the specific type of injury that occurred—then liability lies against the agency under section 815.6, regardless of whether private recovery liability would have been permitted, in the absence of section 815.6, under the predicate enactment alone." (*Haggis, supra*, 22 Cal.4th. at p. 500.)

In *Haggis, supra,* the California Supreme Court held that the plaintiff could not satisfy the second element for liability under Government Code section 815.6 because the purpose of the predicate ordinance was to encourage the landowner to conduct necessary stabilization work through the pressure of a recorded instrument. Any benefit or warning to potential purchasers would be "incidental" and thus not actionable. In other words, the subject ordinance existed to "protect the public against unsafe building and land conditions, not to regulate the marketing of real estate." (*Haggis, supra,* 22 Cal.4th at p. 503.)

Following the precedent of *Haggis,* the court in *Sutherland v. City of Fort Bragg, supra,* 86 Cal.App.4th 13, granted a city's motion for judgment on the pleadings. In *Sutherland*, the plaintiffs, who owned a commercial and residential two story building, alleged that the defendant city had failed to conduct a mandatory review of "site and architectural" provisions which resulted in the city's granting of a building permit for a neighboring building which blocked the air, light, and a fire escape of the plaintiffs' building. The blocked fire escape was a violation of the Uniform Fire Code. Tenancy plummeted and the loss of rental income caused plaintiffs to lose the building to foreclosure.

The *Sutherland* court followed *Haggis* and reasoned that the predicate enactment did not confer a mandatory duty because: 1) it governed general aesthetic aspects, 2) the zone of protected interests did not include the plaintiff's injury because the purpose of the predicate enactment was not to consider whether a proposed building conformed to fire and safety standards, and 3) given the amount of discretion afforded, it was too remote to find that the lack of site and architectural review would have secured the relief the plaintiffs sought. (*Sutherland, supra,* 86 Cal.App.4th at pp. 22-24.) Finally, the *Sutherland* court also noted that the Uniform Fire Code violation created by the blocked fire escape did not impose upon the city "any duty to shoulder the correction of code violations; that is the responsibility of the property owner." (*Id*. at p. 24.)

In *Guzman, supra,* 178 Cal.App.4th 983, the plaintiffs alleged their water operator allowed them to consume drinking water containing up to 4 times the limit of fluoride over the course of seven years, which resulted in pain and suffering and in injuries to their bodies and nervous systems, skeletal structures …." (*Id*. at p. 990.) The court held the alleged personal injuries - at least for purposes of satisfying the minimal pleading

standards in determining a demurrer - placed the plaintiffs within the zone of protected interests. (*Id*. at p. 995.)

The California Safe Drinking Water Act states: "[i]t is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that when present in drinking water may cause cancer, birth defects, and other chronic diseases." (Health & Saf. Code § 116270, subd. (d).) "The SDWA was meant to reduce to the lowest level feasible all concentrations of toxic chemicals in drinking water that may cause cancer, birth defects and other chronic diseases." (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 704.)

Unlike the bodily harm and injuries to nervous and skeletal systems alleged in *Guzman*, plaintiffs here repeatedly describe their alleged harm as "diminution of their property value, other economic harm including the cost of re-plumbing their home …." (See 5AC, ¶¶ 11, 13, 15, 17 - 25.) In addition, plaintiffs' discovery responses stated that: "this is not an action for violations of numeric drinking water standards" and "…Plaintiffs' Negligence and Nuisance claims are not premised upon the City's violation of a mandatory duty to comply with a numeric drinking water standard." (City's Appx. Ex. 15, 27.) Similarly, to the extent plaintiffs attribute their property damage to implementation of corrosion inhibitors outside the scope of permission (see Response to MF 31), recovery for property damage is not consistent with the stated legislative purpose.

The stated objective of the statutory schemes asserted as a basis for liability are premised on reducing health risks that "cause cancer, birth defects, and other chronic diseases," (Health & Saf. Code § 116270.) Potential recovery for property damage is thus incidental. (*Haggis, supra,* 22 Cal.4th at p. 503; see also *Tuthill v. City of Buenaventura* (2014) 223 Cal.App.4th 1081, 1093 ["Plaintiffs fail to demonstrate that any of the provisions they rely on … was intended to protect ineligible purchasers from economic losses."].)

Therefore, plaintiffs have not met their burden to show their injuries are within the zone of protected interests contemplated by the legislature in drafting the predicate statutes.

Mandatory Duties and Causation

The breach of the mandatory duty must be a proximate cause of the injury suffered." (*State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854, citations omitted; Haggis, supra, 22 Cal.4th at pp. 498-499.) Furthermore, *Groundwater Cases, supra,* 154 Cal.App.4th 659 held that "isolated" - as opposed to "continue[d]" - "exceedances" are insufficient to show a violation of a mandatory duty under Government Code section 815.6 because isolated exceedances do not require an immediate cessation of water delivery. (*Id*. at p. 684.) Consequently, although the defendant exceeded a maximum contaminant level ("MCL"), because the Department of Health Services ("DHS") possessed authority to allow continued water delivery despite the exceedance, the plaintiffs had not met the required showing of a violation of a mandatory duty sufficient to allege liability under the Government Tort Claims Act. (*Id*. at pp. 685-686.)

In addition, the governing statutes here provide a specific procedure, delegated to the Department of Health Services, for determining compliance with a permit. In particular, Health and Safety Code section 116625 provides that "The state board, after providing notice to the permittee and opportunity for a hearing, may suspend or revoke any permit issued pursuant to this chapter if the state board determines pursuant to the hearing that the permittee is not complying with the permit, this chapter, or any regulation, standard, or order issued or adopted thereunder, or that the permittee has made a false statement or representation on any application, record, or report maintained or submitted for purposes of compliance with this chapter." And primary authority is delegated to the Department of Health Services. (See *Western States Petroleum Ass'n v. Department of Health Services, supra,* 99 Cal.App.4th at p. 1008.)

Plaintiffs argue that the City violated its permit when it installed corrosion control treatment during annual plant shutdowns between 2006 and 2011. The basis for that position is a public presentation at a City of Fresno public meeting on August 17, 2016. (AMF 893, Ev. 36.) This was confirmed by previous assistant public utilities director Lon Martin and Chief of Operations Ken Heard. (*Ibid*.) Plaintiffs argue that City "routinely" took the surface water plant offline and supplied service area customers "sometimes [with] surface water and sometimes groundwater …." (AMF 892.) However, the cited testimony does not state a "routine" practice, or continual deviation, but rather identifies isolated instances, such as an electrical problem or other problem with the plant or maintenance by the operator of the Enterprise Canal. (See Plaintiffs' Appx. Ex. 30, pp. 46:8-12; 47:9-10 [Bud Tickel deposition].)

The City has provided evidence that between 2004 and June 2022 the State Board did not issue a written citation or compliance order, nor a violation of the City's water permit. (UMF 44.) Plaintiffs' object, asserting only that City's contention is not supported by evidence, and refer generally to their evidentiary objection number 6. Evidentiary objection number 6 challenges the foundation (among other grounds) of that part of Little's Declaration where he claims, based on personal knowledge and a diligent search of records between 2004 and the present, the State Board did not issue a written citation of compliance order. The objection is overruled.

The City references the State Board's granting of a water supply permit amendment effective June 27, 2005 to show that it met the benchmark standard for optimized corrosion control. (See Declaration of Robert Little (Little Decl.), Ex 4.) As noted in the EPA's January 2017 finding, the 2005 permit amendment required City to operate the NESWTP pursuant to its June 2004 plant operating plan, which included corrosion control treatment involving pH adjustment and the addition of corrosion inhibitors. (Little Decl., Ex. 1, at p. 6.) The City also references the January 19, 2017 letter from USEPA which states: "We assessed compliance with the LCR action level of 0.015 mg/L for lead in drinking water and conclude that lead concentrations based upon the LCR regulatory sampling were consistently low and that the City is in compliance with the LCR action level for lead." The Summary of Findings (Little Decl., Ex. 1, at p. 5) states "The City is in compliance with the AL [Action Level] for lead 1993-2015."

Although plaintiffs assert the City's installation of corrosion control treatment at seven pumps during the annual plant shutdowns from 2006 to 2011 exceeded the scope of the permit (AMF 893), there is no finding by the EPA that there were permit violations.

Similarly, although plaintiffs cite to a letter from the State Water Resources Control Board dated August 9, 2016, that mentions the City violated regulatory required monthly reporting of customer complaints because not all complaints were being tracked (AMF 895, Ex. 37), there is no evidence that the Department of Health Services found any permit violation or pursued an action under Health & Safety Code section 116625.

Assuming a mandatory duty exists, there is insufficient evidence presented to create a triable issue as to breach or causation. Plaintiffs' action is based on alleged violations of legislative enactments designed to protect public health. Plaintiffs are unable to present a triable issue of fact that the damage allegedly suffered is one of the consequences the enacting body sought to prevent in imposing the mandatory duty.

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 2/27/22.
(Judge's initials) (Date)