Tentative Rulings for March 29, 2022
Department 503

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.

20CECG01971 ***Skouti v. Buttonwillow Warehouse Co., Inc.*** **is continued to Tuesday, April 19, 2022 at 3:30 p.m. in Dept. 503**

19CECG00422 ***City of Fresno v. Fresno Building Healthy Communities*** **is continued to Tuesday, April 26, 2022 at 3:30 p.m. in Dept. 503**

19CECG00432 ***Fresno Building Healthy Communities v. City of Fresno*** **is continued to Tuesday, April 26, 2022 at 3:30 p.m. in Dept. 503**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 503

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Tentative Ruling

Re: ***Proudian, et al. v. Perez, et al.***
Superior Court Case No. 20CECG00382

Hearing Date: March 29, 2022 (Dept. 503)

Motions: By Plaintiff to Deem Requests for Admission Admitted

Tentative Ruling:

To grant, but to require plaintiff to pay $60 for motion fees to the clerk (in addition to the $60 for motion fees already paid) for the correct total motion fee of $120 (two motions @ $60 each). The additional filing fees must be paid on or before April 12, 2022.

The matters specified in plaintiff Melissa Proudian's Request for Admissions, Set One, are deemed admitted by defendants Sandra Perez and Anna Alvarez, unless defendants serve, before the hearing, a proposed response to the request for admissions that is in substantial compliance with Code of Civil Procedure Section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c).)

To impose monetary sanctions in favor of plaintiff Melissa Proudian, and against defendant Sandra Perez. (Code Civ. Proc., § 2033.280, subd. (c).) Defendant Perez is ordered to pay $335.00 in sanctions to the Law Office of Amy R. Lovegren-Tipton, within 30 days of the clerk's service of the minute order.

To impose monetary sanctions in favor of plaintiff Melissa Proudian, and against defendant Anna Alvarez. (Code Civ. Proc., § 2033.280, subd. (c).) Defendant is ordered to pay $335.00 in sanctions to the Law Office of Amy R. Lovegren-Tipton, within 30 days of the clerk's service of the minute order.

Explanation:

Where a party fails to timely respond to a propounding party's request for admissions, the court must grant the propounding party's motion requesting that matters be deemed admitted, unless it finds that the party to whom the requests were directed has served, prior to the hearing on the motion, a proposed response that is substantially in compliance with Code of Civil Procedure section 2033.220. (Code Civ. Proc., § 2033.280, subd. (c); see also *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 778.) "Substantial compliance" means compliance with respect to " 'every reasonable objective of the statute.' [Citation.]" (*Id*. at p. 779.) Where the responding party serves its responses before the hearing, the court "has no discretion but to deny the motion." (*Id*. at p. 776.)

In the case at bench, there is no evidence that responses have been served since the filing of this motion by either defendant. Unless responses are served before the hearing, the motion is granted and the requests are deemed admitted.

Sanctions:

The court must impose a monetary sanction against the party or attorney, or both, whose failure to respond necessitated the motion to deem matters admitted. (Code Civ. Proc., § 2033.280, subd. (c).)

Plaintiff is seeking $1,190 in sanctions for each motion. The motions are identical save for the name of the defendant upon whom discovery was served. The sanctions requested reflect one hour of time spent drafting the discovery, two hours preparing the motion, and one hour anticipated drafting a reply at a rate of $275 per hour and $90 in "costs." (Lovegren-Tipton Decl. ¶ 12.) Plaintiff's request for sanctions is granted in a reduced amount reflecting one hour of time on each motion and $60 in filing fees for each motion. Defendant Sandra Perez is ordered to pay $335.00 to the Law Office of Amy R. Lovegren-Tipton, within 30 days of the clerk's mailing of the minute order. Defendant Anna Alvarez is ordered to pay $335.00 to the Law Office of Amy R. Lovegren-Tipton, within 30 days of the clerk's mailing of the minute 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: KAG on 3/25/2022 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Mendiola et al. v. Alpha Empire Auto Group, Inc.***
Superior Court Case No. 19CECG03931

Hearing Date: March 29, 2022 (Dept. 503)

Motion: Plaintiffs' Motion to Confirm Arbitration Award

Tentative Ruling:

To grant. Order and judgment signed. Hearing off calendar.

Explanation:

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: KAG on 3/25/2022 .
(Judge's initials) (Date)

(27)

Tentative Ruling

Re: ***Bedolla v. Environment Control Building Maintenance Company***
Superior Court Case No. 20CECG03532

Hearing Date: March 29, 2022 (Dept. 503)

Motion: By Plaintiff for Approval of PAGA Settlement

Tentative Ruling:

To grant and approve the settlement, with the exception of the requested $1,000 enhancement payment to plaintiff.

Explanation:

Plaintiff seeks the superior court's approval of the settlement of her cause of action brought under the Private Attorneys General Act ("PAGA"). (Lab. Code, § 2698 et seq.) Particularly, "PAGA settlements are subject to trial court review and approval, ensuring that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; see also Lab. Code, § 2699, subd. (l)(2). This court assesses settlement proposals under PAGA using the standards set for class actions as discussed in *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, and *Clark v. American Residential Services* (2009) 175 Cal.App.4th 785.

Plaintiff has addressed the court's concerns in the January 4, 2022 order denying approval without prejudice, by submitting declarations from defendant's CEO Kit Seals, who, through personal knowledge, attests to defendant's change to weekly payroll, and from plaintiff's counsel, who attaches an itemization of his charges and the Labor Workforce Development Agency notice. In addition, plaintiff has further explained and provided authority supporting the valuation of the maximum potential penalties, and has shown that the settlement reached is a reasonable compromise given the uncertainties of proceeding to trial. Accordingly, the settlement appears fair and reasonable upon review of the basic information submitted in plaintiff's motion.

In addition, PAGA allows recovery of attorney fees (Lab. Code, § 2699, subd. (g)), and "fee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11.) Plaintiff's settlement includes an attorney fee award of $20,000, which is one-third of the overall $60,000 total recovery and is commensurate with the total billable fees indicated in the spreadsheet attached to plaintiff's counsel's declaration. (Starr, Decl., Ex. 4.) Accordingly, the attorney fees and costs requested in this case are reasonable.

Finally, although enhancement payments (if analogized to "incentive" payments) are "fairly typical in class action cases" (*Rodriguez v. West Publishing Corp*. (2009) 563 F.3d 948, 958), it is unclear whether an incentive payment is proper under PAGA because PAGA only authorizes awards of penalties to aggrieved employees based on actual

violations of the Labor Code. (Lab. Code, § 2699, subd. (i).) Furthermore, plaintiff's declaration only states that the payment is justified because she took the time to come forward (Bedolla Decl., ¶ 9), and counsel's declaration only states that plaintiff provided documents and participated in phone calls of an unspecified duration. (Starr Decl., ¶ 23.) Consequently, neither declaration provides a specific explanation of how plaintiff's participation surpassed that of the plaintiffs in other cases, i.e. there is insufficient justification offered for the enhancement payment.

Therefore, plaintiff's motion for approval of the PAGA settlement is granted, with the exception of the $1,000 enhancement payment.

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: KAG on 3/25/2022 .
(Judge's initials) (Date)

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Tentative Ruling

Re: ***In re Camila Garcia Ortega***
Superior Court Case No. 21CECG02542

Hearing Date: March 29, 2022 (Dept. 503)

Motion: Petition for Compromise of Disputed Claim of Minor

Tentative Ruling:

To grant. Orders signed. No appearances necessary.

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: KAG on 3/25/2022 .
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Yoakum v. Heron Point Apartments***
Superior Court Case No. 19CECG02602

Hearing Date: March 29, 2022 (Dept. 503)

Motion: Defendants' Motion for Summary Judgment

Tentative Ruling:

To grant defendants' motion for summary judgment as to plaintiff's entire complaint. (Code Civ. Proc., § 437c.)

Explanation:

"The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. . . . The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted. . . . There is no liability for injuries from the dangers that are obvious, or as well known to the person injured as to the owner or occupant." (*Mautino v. Sutter Hospital Ass'n* (1931) 211 Cal. 556, 560-561, internal citations and quotations omitted.)

Likewise, in *Holcombe v. Burns* (1960) 183 Cal.App.2d 811, the Court of Appeal found that an invitee on the premises of the defendant's trailer park could not prevail on her claim for premises liability after she tripped over the wheel of a lawn mower that was leaning against the wall of a tool room. The plaintiff admitted that she had seen the lawn mower leaning against the wall when she entered the room, and thus she was aware of the potential danger it created, and defendant had no duty to protect her from the dangerous condition. (*Id*. at pp. 814-815.) "[T]he evidence clearly demonstrates that the condition as it existed was obvious to the plaintiff. There is no liability for injury from dangers that are obvious or as well known to the person injured as to the owner or occupant." (*Id.* at pp. 815–816, internal citations omitted.)

However, in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, the Court of Appeal reversed the trial court's grant of the defendant landowner's motion for nonsuit based on the open and obvious nature of the dangerous condition on the defendant's premises. The court noted that the general rule is that, "[w]here the condition or danger is obvious, there is no duty to specially guard or warn against it. Hence, an injury to the user of the premises from an obvious characteristic produces no liability against the possessor of land." (*Id*. at p. 31.) However, the court went on to note

that, "[u]nder *Rowland v. Christian* [69 Cal.2d 108] . . . , we are impelled to conclude that the obvious nature of the risk, danger or defect . . . can no longer be said *per se* to abridge the invitation given by the possessor of land, or to derogate his duty of care, so as to make his liability solely a matter of law to be determined on a nonsuit. By that decision, this matter of law for the court, is transmitted to a question of fact for the jury; namely, whether a possessor of land even in respect to the obvious risk has acted reasonably in respect to the probability of injury to an invitee; and whether or not the invitee used the property reasonably in full knowledge of any obvious risk entering into a subsequent injurious incident." (*Id*. at p. 33, internal citations omitted.)

In *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, the Court of Appeal held that the trial court erred when it gave a jury instruction that a business proprietor could not be held liable for an injury resulting from a danger which was open and obvious, or which should have been observed in the exercise of ordinary care. The plaintiff was a truck driver who tripped and fell on concrete rubble when he was walking from one part of the defendant's facility to another, injuring himself. (*Id*. at pp. 109-110.) The Court of Appeal stated, "[W]e conclude that the instruction, to the extent that it states categorically that a business proprietor cannot be held liable for an injury resulting from a danger which was obvious or which should have been observed in the exercise of ordinary care, is incorrect." (*Id*. at p. 116.) The court held that, although the obviousness of the danger may obviate the need to warn of its existence, if it is foreseeable that the danger may cause injury despite the fact that it is obvious, such as when necessity requires persons to encounter it, then there may be a duty to remedy the danger and failure to do so may result in liability. (*Id*. at pp. 119-122.)

"Thus, although the obviousness of a danger may obviate the duty to *warn* of its existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability, if the breach of duty was a proximate cause of any injury. (*Id*. at pp. 121–122, internal citation omitted, italics in original.) The court also found that the trial court's error in giving the instruction was prejudicial and required reversal of the judgment. (*Id*. at pp. 123-127.) The court noted that, although plaintiff admitted that the dangerous condition was obvious, the evidence also indicated that the plaintiff's job required him to pass across the dangerous area in order to complete his work. (*Id*. at p. 123.) Since the jury had been instructed that the defendant had no duty where the condition was open and obvious, it was reasonable to conclude that it had been misled into believing that it had no choice but to find defendant not liable. (*Id*. at pp. 126-127.)

In *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, the Court of Appeal held that a landowner could be held liable for a dangerous condition of the premises even though the condition was open and obvious, as the landowner still owed a duty to remedy the dangerous condition even if it had no duty to warn of it. In *Donohue*, the plaintiff was a firefighter who was injured when he slipped and fell during a safety inspection of the defendant's building. (*Id*. at p. 660.) The plaintiff admitted that he saw that the stairs were wet and potentially slippery, and he tried to be cautious in going up the stairs. (*Id*. at p. 661.) However, on the way back down, he slipped and fell, injuring himself. (*Ibid*.)

The appellate court concluded that the plaintiff's claim was not barred by assumption of the risk, and that the situation merely presented a question of contributory negligence which should be resolved by the jury. (*Ibid*.) The court noted, "Here, as in *Prescott*, defendant SFHA owed a general duty to tenants and visitors to maintain its premises in reasonably safe condition. Evidence was submitted showing that the concrete stairs had been heavily watered down just prior to plaintiff's visit and lacked skid-resistant treading, which might have increased traction and prevented the accident. From this evidence a jury could conclude that SFHA breached its duty of care toward plaintiff. Plaintiff's conduct in proceeding to traverse the stairs despite full appreciation of the risk created by such negligence was no more than a species of contributory negligence, to be considered by the jury in apportioning comparative fault." (*Id*. at p. 665.) The court also distinguished the older cases cited by the defendant holding that a defendant has no duty to warn of a dangerous condition of his property if it is so obvious that any reasonable person would have observed it. (*Ibid*.) "[R]ecent authority makes it clear that while a readily apparent danger may relieve the property owner of a duty to *warn*, it no longer necessarily absolves him of a duty to *remedy* that condition." (*Ibid.*, internal citations omitted, italics in original.)

Likewise, in *Martinez v. Chippewa Enterprises, Inc*. (2004) 121 Cal.App.4th 1179, the Court of Appeal reversed the trial court's grant of summary judgment in favor of the defendant landowner in a slip and fall case even though the dangerous condition created by the wet pavement was open and obvious. The plaintiff had slipped and fallen on the defendant's driveway, which was wet and slippery and which crossed over the sidewalk. (*Id*. at p. 1182.) The plaintiff admitted in her deposition that she had seen the wetness on the driveway before she slipped on it. (*Id*. at p. 1183.) The defendant moved for summary judgment on the theory that it had no duty to warn the plaintiff because the dangerous condition was open and obvious, and the trial court granted the motion despite evidence that the defendant might have been the source of the water on the driveway. (*Id*. at pp. 1183-1184.) The appellate court reversed the trial court's order.

"Although grounded in an accurate factual premise, the trial court's decision was legally incorrect. The court first ruled that the allegedly dangerous condition plaintiff encountered—the water and wetness at the area (sidewalk or driveway) where she fell—was 'open and obvious.' That much was correct: defendant's photographs prima facie established the obviousness of the wet condition (at least to sighted persons), and plaintiff—who admitted having seen the wetness before stepping on it—did not dispute this. However, that the hazard was open and obvious did not relieve defendant of all possible duty, or breach of duty, with respect to it. In the trial court and again here, defendant argued only that the obvious appearance of the wet pavement excused defendant from a duty to warn of it. That was most likely so. But the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it. The modern and controlling law on this subject is that 'although the obviousness of a danger may obviate the duty to warn of its existence, if it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it), there may be a duty to remedy the danger, and the breach of that duty may in turn form the basis for liability. . . .' (*Id*. at p. 1184, citing *Osborn v. Mission Ready Mix*, supra, 224 Cal.App.3d at p. 122 and *Beauchamp v. Los Gatos Golf Course*, *supra*, 273 Cal.App.2d at p. 33.)

"The court's analysis therefore was incomplete, and led to a premature conclusion of no duty and therefore no liability. The palpable appearance of the wetness may itself have provided a warning of the slippery condition, excusing defendant from having to do so. But it may yet have been predictable that despite that constructive warning, the wet pavement would still attract pedestrian use. For example, the pavement appears to have provided a principal if not sole access way from the street to defendant's building, which housed a government office serving the public. In these circumstances—which the evidence did not negative, but supported—defendant may have been charged with a duty of relieving the dangerous condition. Whether such a duty existed depends upon a number of as yet unresolved factors, such as the foreseeability of harm, defendant's advance knowledge *vel non* of the dangerous condition, and the burden of discharging the duty. The facts presented on the motion for summary judgment, some of them in direct conflict (e.g., the source of the water), did not permit resolution of this question of duty in defendant's favor." (*Martinez v. Chippewa Enterprises, Inc., supra*, 121 Cal.App.4th at p. 1185, internal citation omitted.)

In *Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, the plaintiff was injured when he fell into an empty pool while inspecting a vacant property that he was considering buying from the defendant bank. The plaintiff stood on the diving board of the pool to look over the fence when the diving board collapsed and caused him to fall into the pool. (*Id*. at p. 440.) The trial court granted the bank's motion for summary judgment, determining that the plaintiff had not properly pled a cause of action for a dangerous condition on the property, and, even if he had, the bank could not be liable for failing to remedy the dangerous condition caused by the empty pool because the accident was not reasonably foreseeable. (*Ibid*.) The appellate court affirmed.

The appellate court held that, even if the plaintiffs had pled that the empty pool was itself a dangerous condition, the bank was not liable because it was not reasonably foreseeable that the plaintiff would choose to encounter the danger posed by the pool. (*Id*. at pp. 446-448.) "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Id*. at p. 447, internal citations omitted.)

"An exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." (*Id*. at p. 447, citing *Osborne v. Mission Ready Mix*, *supra*, 224 Cal.App.3d at p. 123.)

The *Jacobs* court noted that the plaintiffs did not dispute that the dangers of the empty pool were obvious to any adult, and that the plaintiffs were aware of the danger

posed by the pool. (*Ibid*.) "Here, potential buyers did not have to approach the dangerous condition (i.e., the empty pool) in order to inspect the backyard. They could easily avoid the edge of the empty pool as they viewed the property. Moreover, there is nothing in the record suggesting that Jacques was under a 'necessity' to confront the dangerous condition of the empty pool. Although Jacques wished to look over the fence, he was not compelled to do so as part of his inspection. He could have abandoned that part of his inspection rather than stand on a diving board over an obviously empty pool. Alternatively, he could have found a safer means of assessing whether someone could jump over the fence into the backyard. It was not reasonably foreseeable that he or anyone else would use the diving board for that purpose." (*Id*. at p. 448.) "Because Jacques's accident was not foreseeable, the court appropriately granted summary judgment on plaintiffs' theory that Coldwell is liable for failing to protect Jacques from the dangerous condition of the empty pool." (*Id*. at pp. 448–449, footnote omitted.)

In the present case, defendants move for summary judgment on the theory that the allegedly dangerous condition created by the leaking sprinkler was open and obvious, and they therefore cannot as a matter of law be held liable for plaintiff's injuries because they had no duty to warn her of the condition or remedy it. However, defendants are only partially correct. While the evidence does indicate that the condition was open and obvious, this fact only relieved defendants of any duty to *warn* of the condition. They may still have owed a duty to plaintiff to *remedy* the condition, if the circumstances were such that it was foreseeable that plaintiff might be required to traverse the area where the dangerous condition was located.

First, there is no real dispute that plaintiff was aware of the dangerous condition caused by the leaking sprinkler, as she admitted that she knew about the wet and muddy area caused by the sprinkler for the two years prior to the accident. (Defendants' UMF Nos. 4, 5, 6.)[1] In fact, plaintiff had raised complaints with defendants in the past and asked them to fix the sprinkler. (Defendants' UMF No. 7.) However, defendants fixed the wrong sprinkler, and the area continued to be wet and muddy. (*Ibid*.) In addition, plaintiff made comments to her son, who also lived in the apartment, about the area being wet and muddy, and he was aware of the problem and considered the area to be potentially dangerous. (Defendants' UMF No. 8.)

Thus, the undisputed facts show that plaintiff was aware of the dangerous condition caused by the water leak in the grass, and that the condition was open and obvious to her and other people. While plaintiff does claim that the area was less wet and muddy than usual on the date of the accident because the sprinklers had not been running that day and it was hot, she does not deny that she was aware that the area was wet and potentially slippery.

[1] Plaintiff purports to dispute defendants' undisputed material fact numbers 4, 5, 6, 8, and 9. However, none of the evidence identified by plaintiff raises any real disputes with regard to the facts stated in defendants' separate statement. At most, plaintiff seems to be quibbling about minor details that do not affect the actual facts. Therefore, plaintiff has not shown that any disputes exist with regard to defendants' stated facts.

Because the condition was open and obvious and plaintiff was aware of it, defendants did not owe plaintiff a duty to warn her of the dangerous condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co*., *supra*, 14 Cal.App.5th at pp. 445-447.) On the other hand, defendants could still owe plaintiff a duty to remedy the dangerous condition, if plaintiff was required to traverse the dangerous area under the circumstances or if it was foreseeable that she might feel required to do so. (*Id*. at pp. 447-448; *Osborn v. Mission Ready Mix*, *supra*, 224 Cal.App.3d at p. 123.)

Here, plaintiff seems to contend that she needed to cross the dangerous area in order to reach her vehicle, which she was using to move out of the apartment and into a new house. She also notes that it was dark out, that one of the lights that would normally have lit the area was not working, that the grass was not as wet as usual because the sprinklers had not been running that day and it was a hot day, and that she thought she was already past the area where the grass was wet when she fell. (Plaintiff's AMF Nos. 20, 21, 24.)[2] Plaintiff contends that these facts raise triable issues as to whether it was foreseeable that she might choose to walk in the area where the dangerous condition existed, despite her knowledge of the danger, and thus defendants had a duty to remedy the dangerous condition. She claims that whether she acted reasonably is an issue of fact for the jury to resolve, and that it should not be decided on summary judgment.

However, it does not appear that there is any real triable issue of fact with regard to whether it was foreseeable that plaintiff would choose to traverse the area where the dangerous condition was located. As noted in *Jacobs*, "[a]n exception to this general rule [barring liability for open and obvious conditions] exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, *because of necessity or other circumstances*, a person may choose to encounter the condition." (*Jacobs v. Coldwell Banker Residential Brokerage Co., supra,* 14 Cal.App.5th at p. 447, italics added.)

In *Osborn v. Mission Ready Mix*, *supra*, 224 Cal.App.3d at p. 123, the Court of Appeal held that it was foreseeable that the driver might choose to cross the area covered with broken concrete despite the obvious danger, because it was necessary for him to do his job. Similarly, in *Martinez v. Chippewa Enterprises, Inc*., *supra*, 121 Cal.App.4th 1179, the Court of Appeal found that the property owner might still have a duty to plaintiff despite the obvious wetness of the concrete driveway, because the primary and perhaps only means of accessing the defendant's building was by crossing the driveway's apron, which intersected with the sidewalk. (*Id*. at pp. 1183-1184.) On the other hand, in *Jacobs*, the court found that it was not foreseeable that the plaintiff would use the diving board over an empty pool to look over the fence, so the bank had no duty

[2] Defendants objected to plaintiff's additional fact numbers 20 and 22 on various grounds, including lack of foundation, lack of authentication, hearsay, and misstating prior testimony. The court overrules the objections, as they are not properly brought as to plaintiff's evidence, but only as to the facts in her separate statement. In any event, even if they had been raised against the evidence itself, the objections are without merit.

to remedy the dangerous condition caused by the empty pool. (*Jacobs v. Coldwell Banker Residential Brokerage Co*., *supra*, 14 Cal.App.5th at p. 448-449.)

In the instant case, plaintiff has not identified any necessity or other circumstances that would have made it foreseeable that she would choose to cross over the wet and muddy grass, despite her knowledge that the area was wet and might be hazardous. The evidence shows that plaintiff was moving her belongings out of the apartment on defendant's property at the time of the accident. She chose to cross over the grass as she was walking back from the apartment to her vehicle, even though she knew that the grass was wet and muddy from a leaking sprinkler and thus posed an obvious danger of slipping and falling. There was a concrete walkway that came directly from the apartment door to the street, but it was curved and thus required a slightly longer walk than if one took a "short cut" over the grass. (Exhibit 6 to Defendants' Evidence.) However, there is no evidence that plaintiff was required to use the short cut through the grass rather than taking the walkway that led to almost exactly the same spot by a slightly longer path. Unlike the facts in *Osborn* or *Martinez*, plaintiff did not have to use the grass to reach her vehicle, and, in fact, she admitted in her deposition that she had sometimes used a different path to get to her vehicle on other occasions. (Defendants' UMF Nos. 12, 13.) Thus, the exception cited in *Osborn*, *Martinez*, and *Jacobs* does not apply here.

In summary, as a matter of law, it was not foreseeable that plaintiff would choose to ignore the open and obvious danger and walk through the wet and muddy grass, rather than take a slightly longer path and use the walkway to reach her vehicle. At most, plaintiff would have had to walk only a few extra feet if she had chosen to use the walkway instead of walking through the muddy grass. There is nothing to indicate that plaintiff was required to take the more dangerous path through the grass, and it appears that she simply wanted to take a short cut to reach her vehicle a bit faster. Under these circumstances, defendants could not have foreseen that plaintiff would choose to subject herself to the danger posed by the muddy grass, despite her knowledge of the risk posed by it. Therefore, the court grants defendants' motion for summary judgment as to the entire complaint.

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: KAG on 3/25/2022 .
(Judge's initials) (Date)