Tentative Rulings for April 7, 2022
Department 403

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.

19CECG01363 ***Urzua v. BNSF Railway Company*** **is continued to Thursday, April 28, 2022 at 3:30 p.m. in Dept. 403**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(03)

Tentative Ruling

Re: ***Orenday v. Millerton Lake Rentals, LLC***
Superior Court Case No. 21CECG00365

Hearing Date: April 7, 2022 (Dept. 403)

Motion: Defendant State of California's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the State of California's demurrer to the entire first amended complaint, without leave to amend, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10, subd. (e).)

IF ORAL ARGUMENT IS REQUESTED IT WILL BE ENTERTAINED AT 3:00 PM.

Explanation:

Plaintiff has sued the State of California for negligence, negligent supervision, and negligence per se. However, since the State is a public entity, it is immune from liability unless there is a statute that imposes a duty of care on it. (Gov. Code § 815, subd. (a).) Thus, in order to state a claim against a public entity, plaintiff must allege that the there was a statute that imposed a duty on the entity to protect her from the type of harm that she suffered. (*Eastburn v. Reg. Fire Prot. Auth*. (2003) 31 Cal.4th 1175, 1183.) Also, the general duty of care under Civil Code section 1714 is not enough to impose a duty of care on a public entity. (*Ibid*.) Otherwise, public entity immunity would cease to exist. (*Ibid*.)

"Because under the Tort Claims Act all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, 'to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.'" (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795, internal citations omitted.)

"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.) "'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6.)

"First and foremost, application of section 815.6 requires that the enactment at issue 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. It is not enough, moreover, that the public entity or officer

have been under an obligation to perform a function if the function itself involves the exercise of discretion." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498, internal citations omitted, italics in original.)

"Second, 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, internal citation omitted.)

Thus, the plaintiff must cite to not only Government Code section 815.6, but also to the specific statute or regulation that allegedly imposes the mandatory duty on the government entity. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1349.) "Duty cannot be alleged simply by stating 'defendant had a duty under the law'; that is a conclusion of law, not an allegation of fact. The facts showing the existence of the claimed duty must be alleged. Since the duty of a governmental agency can only be created by statute or 'enactment,' the statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Searcy v. Hemet Unified School Dist*. (1986) 177 Cal.App.3d 792, 802, internal citations omitted.) "Based upon the manifest intent underlying section 815.6, we think it obvious that a litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation. Only by so doing may the public entity be advised of the factual and legal basis of the claim against it." (*Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 292–293, internal citations omitted.)

Here, in the first cause of action for negligence, plaintiff alleges that the State violated mandatory duties under Government Code sections 810.6, 811.6, and 815.6, as well as under the Administrative Procedure Act and Government Code section 11340, *et seq*. and Public Contract Law section 100, *et seq.* (FAC, ¶ 10.) She claims that the State failed to monitor the concessionaire contract with Millerton Lake Rentals (MLR) and ensure that MLR complied with existing law. (*Ibid*.) She further alleges that the State did not comply with the public bidding process in awarding the concessionaire contract to MLR, and "did not provide for Millerton's insurance and bod [*sic*, bond] to be verified with an admitted carrier." (*Ibid*.)

In the second cause of action for negligent supervision, plaintiff alleges that the State owed a duty of care under Government Code section 815.2 and the California Supreme Court case *C.A. v. Wm. S. Hart School District* (2012) 53 Cal.4th 861. (*Id*. at ¶ 18.) Finally, in the third cause of action for negligence per se, she alleges that defendants violated "various laws and ordinances which was [*sic*] enacted to protect Plaintiff and others from the type of injuries sustained by Plaintiff herein", and that MLR violated Civil Code section 1714. (*Id*. at ¶ 24.)

However, none of the statutes or cases cited by plaintiff impose a mandatory duty on the State to protect plaintiff from being injured under the circumstances alleged here. As mentioned above, Government Code section 810.6 defines an "enactment" as "a constitutional provision, statute, charter provision, ordinance or regulation." It does not impose any mandatory duty on a public entity like the State. Likewise, section 811.6 defines a "regulation", but does not impose any mandatory duty on a public entity.

Section 815.6 states the general rule that "[w]here 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." Again, however, the plaintiff must allege not only that she is seeking to hold the public entity liable under section 815.6, but also the specific enactment that forms the basis for the mandatory duty. (*Searcy v. Hemet Unified School Dist.*, *supra*, 177 Cal.App.3d at p. 802.) Here, none of the other statutes cited by her impose any mandatory duty to protect her from the type of harm she suffered here.

Plaintiff also cites very broadly to the Administrative Procedure Act and the Public Contracts Act, but does not cite to any specific section of those acts that provide that the State has a mandatory duty to protect her from being injured by a boat rented from a private company on State property. Simply citing in broad and general terms to an entire statutory scheme is not sufficient to support a claim for negligence against a public entity. Plaintiff must allege the specific statute that imposes a mandatory duty to protect her from the type of harm she suffered. (*Lehto v. City of Oxnard*, *supra*, 171 Cal.App.3d at pp. 292-293.) Thus, plaintiff has failed to allege any valid statutory basis for her negligence claim, and the court intends to sustain the demurrer to the first cause of action for failure to state facts sufficient to constitute a cause of action.

In her second cause of action, plaintiff cites to Government Code section 815.2 in support of her claim for negligent supervision. Section 815.2 states, "A public entity is liable for injury proximately caused by an act or omission of *an employee of the public entity* within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2, subd. (a), italics added.) Plaintiff has not alleged any facts showing that she was injured due to the negligent act or omission of an employee of the State. In fact, plaintiff alleges that she was injured due to the negligence of a private entity, Millerton Lake Rentals, which is a limited liability company that entered into a concession agreement to run a boat rental company at Millerton Lake. (FAC, ¶¶ 2, 7-12.) There are no facts alleged in the complaint that would tend to show that MLR was an employee of the State at the time plaintiff was injured, such that its acts or omissions might be imputed to the State under section 815.2. Thus, section 815.2 does not apply here, and does not impose any mandatory duty of care on the State.

Likewise, plaintiff's citation to *C.A. v. William S. Hart Union High School District, supra*, 53 Cal.4th 861 is unavailing. The Supreme Court in *C.A.* found that there was an exception to statutory immunity for the school district under Government Code section 815.2. Plaintiff makes no effort to explain how the holding of *C.A.* would apply to the facts of the present case, which are very different from the situation in that case. Thus, Government Code section 815.2 does not apply here. Plaintiff has not shown how the holding of *C.A.* would allow her to state a claim against the State under the circumstances, and there does not appear to be any basis for her contention that it does.

In her opposition, plaintiff cites to Government Code section 815.4 and argues that the State can be liable for the acts or omissions of independent contractors that it hires if

the State retains control over their work. Government Code section 815.4 states that, "[a] public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity." (Gov. Code, § 815.4.)

However, plaintiff has not alleged that MLR was an independent contractor hired to do work on behalf of the State. Nor has plaintiff cited to Government Code section 815.4 in its first amended complaint. Instead, plaintiff only cites to section 815.2, which imputes liability to the public entity for the negligence of its own employees. Plaintiff is required to allege the specific statutory basis for the mandatory duty it seeks to impose on the public entity, as well as facts that would support application of the statutory duty. Since she has not done so here, she has failed to allege a valid cause of action for negligent supervision.

Also, the allegations of the FAC make it clear that MLR was not working as an independent contractor for the State when plaintiff suffered her injuries. "An 'independent contractor' is generally defined as a person who is employed by another to perform work; who pursues an 'independent employment or occupation' in performing it; and who follows the employer's 'desires only as to the results of the work, and not as to the means whereby it is to be accomplished.'" (*Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983–984, internal citations and quote marks omitted.) The Labor Code defines "independent contractor" to mean "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (Lab. Code, § 3353.)

Here, plaintiff alleges that the State entered into a contract with MLR to operate a boat rental concession on Millerton Lake. (FAC, ¶¶ 7-12.) However, there are no facts alleged in the complaint that would tend to show that the State paid MLR to operate the boat rental business, that it retained control over MLR, or that MLR was operating the boat rental business for the benefit of the State. In fact, plaintiff never alleges that the State received any money or other benefit from MLR's business. Thus, the FAC does not show that MLR was hired to act as an independent contractor to perform a specific task for the State.

The relationship between the State and MLR appears to be more akin to a lessor-lessee or permitor-permittee, which is not the type of relationship that would give rise to vicarious liability on the part of the public entity where the lessee or permitee is negligent, unless there is also evidence that the lessee or permittee is an employee or independent contractor of the public entity. (*Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 879-880 [City not liable for negligent acts of contractor it did not hire, and which simply received a permit from the City to perform work for a third party]; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1668-1671 [County not liable for negligence of lessee of County property in absence of evidence that lessee was also acting as employee or independent contractor of County].) In the present case, there is no indication in the FAC that MLR was working for the State as an employee or independent

contractor, or that the State hired MLR to operate the business or received any particular benefit from MLR operating the business on the lake. The allegations indicate that MLR was simply operating the business pursuant to a concession contract. (FAC, ¶¶ 10-11.) Such a relationship does not support imposing vicarious liability on the State for the concessionaire's torts.

Plaintiff's citation to *McCarty v. State of California Dept. of Transp.* (2008) 164 Cal.App.4th 955, is likewise unavailing. In that case, the Court of Appeal held that the State could be liable if it retained control over the work of an independent contractor it hired to do construction work, and the contractor's negligence caused harm to the plaintiff. (*Id*. at pp. 977-978.) Here, there are no facts alleged in the FAC that would tend to show that MLR was working as an independent contractor on behalf of the State at the time plaintiff was injured, or that the State retained control over MLR's work to the extent that it could be held liable for MLR's negligence.

The court also intends to sustain the demurrer to the third cause of action for negligence per se. Again, plaintiff cites to no statute that would impose a mandatory duty on the State to protect plaintiff from the type of harm she suffered here. Plaintiff only alleges that defendant MLR violated Civil Code section 1714, and that all defendants violated "various laws and ordinances which was [*sic*] enacted to protect Plaintiff and others from the type of injuries sustained by Plaintiff herein." (FAC, ¶ 24.) However, the reference to "various laws and ordinances" intended to protect plaintiff is far too vague to show any mandatory statutory duty imposed on the State to protect plaintiff from being injured by a rental boat. Plaintiff must allege a specific statute that imposes a mandatory duty, not simply refer vaguely to some unnamed law or ordinance.

Also, while plaintiff alleges that MLR violated Civil Code section 1714, she does not allege that the State violated section 1714. Even if she had, Civil Code section 1714 does not impose a mandatory duty on a public entity like the State of California to protect plaintiff from harm here. Section 1714 only imposes a general duty on all persons not to harm others, but courts have refused to allow this general statutory duty to also impose a mandatory duty of care on public agencies. Otherwise, section 1714 would render the general rule of public entity immunity meaningless. (*Eastburn v. Reg. Fire Prot. Auth*., *supra*, 31 Cal.4th at p. 1183.) Therefore, since plaintiff has not alleged any statutory basis for imposing a duty on the State, she has not stated a valid cause of action for negligence per se.

Plaintiff also seems to be attempting to allege a claim based on a dangerous condition of public property. In paragraph 10 of the FAC, she alleges that one basis for liability against the State is "a dangerous condition of public property." She also alleges in paragraph 11 that "the State allowed a dangerous condition to exist at Millerton" and that the State was aware of the dangerous condition, which was caused by MLR "not taking proper steps to moor or docket [*sic*] the boat rentals in a manner that due care was used in appreciation for the foreseeable risk of harm that could occur." (FAC, ¶ 11.) She alleges that she was injured when defendants negligently operated or moored the boat so as to cause the boat to strike her leg and injure her when she was disembarking. (*Id*. at ¶ 12.)

However, plaintiff's allegations fail to show that there was any dangerous condition of the public property that caused her injuries. A public entity can be held liable if a dangerous condition of public property causes injuries to the plaintiff. Government Code section 835. However, there must be some physical feature of the property that is dangerous and causes the plaintiff's injury. "[C]ourts have consistently refused to characterize harmful third party conduct as a dangerous condition - absent some concurrent contributing defect in the property itself. In support of this characterization are the sections following section 830 (§§ 830.2 through 831.8) limiting liability for dangerous conditions. All are based on some physical feature of the property." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472, internal citations and footnotes omitted.)

Here, the plaintiff fails to allege any physical defect in the property itself, and instead only alleges that she was harmed by the negligent or intentional acts of a third party that had nothing to do with the condition of the property. Therefore this court should sustain a demurrer to a dangerous condition claim for failure to state a valid cause of action. (*Rodriguez v. Inglewood Unified School Dist*. (1986) 186 Cal.App.3d 707, 715-720; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1134-1135.)

Finally, Plaintiff cannot amend her complaint to state these claims. Plaintiff cannot rely on any claims or legal theories that are not reflected in her timely government tort claim. "[B]efore a complaint may be filed against a governmental entity such entity must be presented with a claim in the form required by section 910. (§ 945.4.)" (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 888.) The tort claim must provide "A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." (Gov. Code § 910, subd. (d).)

"'The primary function of the [Government Tort Claims Act (§ 810 et seq.)] is to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims.' It is therefore necessary for the claim served on the governmental entity to describe fairly what that entity is alleged to have done. 'If a plaintiff relies on more than one theory of recovery against the State, each cause of action must have been reflected in a timely claim. In addition, the factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.'" (*Turner*, *supra*, at p. 888, internal citations omitted.)

Here, the plaintiff's tort claim does not mention or even hint that the State of California hired MLR to be its independent contractor, or that the State retained control over MLR's work such that it would be reasonable to hold it liable for MLR's negligence. Instead, it alleges that MLR was given a concession contract by the State to operate the boat rental business, and that MLR was negligent when it provided a rental boat that injured plaintiff. (FAC, Exhibit A, p. 3.) Plaintiff also alleges that the State negligently supervised the boat rental and MLR, and that it should have required higher insurance limits before issuing the concession contract to MLR. (*Ibid*.) Plaintiff further alleges that the State should have audited MLR to make sure it was operating safely and complying with the contract's requirements. (*Ibid*.) If anything, these allegations indicate that the State did not retain control over MLR's operations, and instead allowed MLR to conduct

its own operations in an unsafe manner. Since there is no indication in the claim that MLR was acting as an independent contractor of the State at the time of plaintiff's injury, or that the State is being sued because it retained control over MLR's work, the court will not allow plaintiff to amend her complaint to allege new facts to support plaintiff's independent contractor theory of liability.

Likewise, plaintiff's tort claim never mentions that the State's property was in a dangerous condition at the time of the accident, or that she was injured by the dangerous condition. She only alleges that MLR "failed to properly dock, tie up and moor a boat rental occupied by [plaintiff] causing her to fall and be seriously injured." (FAC, Exhibit A, p. 3.) She also alleges that the State negligently supervised, owned and controlled the boat rental, and its concessionaire, MLR, which caused plaintiff's injury. (*Ibid*.) She further alleges that the State should have required higher insurance limits for MLR under the contract, and that the State failed to conduct an audit of MLR to make sure it was operating safely and in compliance with contract requirements. (*Ibid*.)

None of these allegations state or even imply that the State's property was in a dangerous condition, or that the dangerous condition caused or contributed to the plaintiff's injuries. Instead, they indicate that MLR was negligent, and that the State failed to properly supervise MLR and make sure it was operating safely. Such allegations were not sufficient to place the State on notice that plaintiff might sue under a dangerous condition of public property theory. As a result, the court will not allow plaintiff to amend her complaint to allege more facts to support a dangerous condition theory now. Instead, the court intends to sustain the demurrer to the entire FAC as to the State, without leave to amend.

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: KCK on 04/04/22.
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Webb Law Group, APC v. Heinrich, et al.***
Superior Court Case No. 20CECG03060

Hearing Date: April 07, 2022 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To grant. The court intends to sign the proposed judgment. 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: KCK on 04/05/22.
(Judge's initials) (Date)

(36) **Tentative Ruling**

Re: ***Hard, et al. v. City of Selma, et al.***
Superior Court Case No. 20CECG03254

Hearing Date: April 07, 2022 (Dept. 403)

Motion: Petition to Compromise Claim of Minor

Tentative Ruling:

To grant. The Court intends to sign the proposed orders. No appearances necessary.

Explanation:

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

Tentative Ruling
Issued By: KCK **on** 04/05/22 .
(Judge's initials) (Date)