Tentative Rulings for June 9, 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.

18CECG04305 ***Erin Garcia v. Douglas Den Hartog*** **is continued to Tuesday, June 14, 2022 at 3:30 p.m. in Department 403**

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Tentative Rulings for Department 403

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Tentative Ruling

Re: ***Raymond Pulido v. Georgia-Pacific Corrugated, LLC***
Superior Court Case No. 18CECG00265

Hearing Date: June 9, 2022 (Dept. 403)

Motion: Plaintiff's Motion for Final Approval of Class Settlement

Tentative Ruling:

To deny without prejudice.

Explanation:

Final Approval of Settlement

California Rules of Court, rule 3.769(g) states: "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." The Court has vetted the fairness of the settlement through prior hearings, each with its own filings. The settlement here generally meets the standards for fairness, and the class has approved it, with no objections, opt-outs or disputes. Only one of 197 notices were undeliverable. The court finds that the method of notice followed, which this court approved at the prior hearing, comports with due process and was "reasonably calculated to reach the absent class members:

> "Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice," but "it is the court's duty to ensure that the notice ordered is reasonably calculated to reach the absent class members." *Hallman v. Pa. Life Ins. Co.,* 536 F.Supp. 745, 748–49 (N.D.Ala.1982) (quotation marks and citation omitted); *see also In re Viatron Computer Sys. Corp. Litig.,* 614 F.2d 11, 13 (1st Cir.1980); *Key v. Gillette Co.,* 90 F.R.D. 606, 612 (D.Mass.1981); *cf. Lombard,* at 155. *After such appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually receive notice. Cooper,* 467 U.S. at 874, 104 S.Ct. 2794; 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789 (2d ed.1986).

(*Reppert v. Marvin Lumber and Cedar Co., Inc.* (1st Cir. 2004) 359 F.3d 53, 56-57 emphasis added.)

However, "[a]n employee plaintiff suing, as here, under [PAGA], does so as the proxy or agent of the state's labor law enforcement agencies." *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal. App. 5th 667, 674. For that reason, Labor Code section 2699(l)(2) requires that any proposed settlement of a PAGA claim be submitted to the Labor Workforce Development Agency at the same time it was submitted to the Court. There is no proof of such submission here.

For this reason the motion is denied without prejudice.

Incentive Award

> "The propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder of his damages by means of the same mechanisms that unnamed class members must recover theirs. The members' incentives are thus aligned. But we should be most dubious of incentive payments when they make the class representatives whole, or (as here) even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief."

(In re Dry Max Pampers Litigation (6th Cir. 2013) 724 F.3d 713, 722.)

Here, the average estimated payment is $630.70 and the highest estimated payment is $1,347.63. (Kline Decl. ¶ 15.) The payments depend on the number of work weeks worked by each individual. Plaintiff asks the court to confirm that he receive a $5,000 service enhancement paid from the settlement. The court has read the plaintiff's declaration submitted with the preliminary approval motion. He has served ably as class representative, procured documents for counsel, communicated with and assisted counsel in prosecution of the case in various ways, participated in the mediation, took the risk of potentially jeopardizing future employment, among other activities. However, the amount requested is significantly higher than the highest estimated payout from this class action and the court cannot approve it without further evidence. For instance, no evidence is submitted as to what plaintiff's estimated payment would be from the settlement based on his work weeks. Without this information the court cannot determine whether or not the proposed incentive award is appropriate.

Costs

Class counsel presents evidence of the actual costs incurred in the litigation to date and requests cost reimbursement in the amount of $8,938.60. All costs are permissible and are granted.

Attorneys' Fees

The settlement provided that the parties agreed (i.e., defendant agreed not to oppose) fees calculated at 33 percent of the gross settlement amount. Counsel has provided evidence of the actual time expended by the various attorneys representing plaintiff and the class throughout this action, as a cross-check of the lodestar. The court finds that the amount requested in fees is reasonable and justified by the efforts made and results obtained with this settlement, and awards attorney fees in the amount of $74,250.

Administrator's Costs

The court finds the amount requested, which is a flat fee as agreed to in the settlement agreement, to be reasonable, and approves them as requested.

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 06/06/22.
(Judge's initials) (Date)

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Tentative Ruling

Re: ***David Ramirez, SR v. Kelly Cox***
Superior Court Case No. 19CCG04056

Hearing Date: June 9, 2022 (Dept. 403)

Motion: Defendant County of Fresno's motion for judgment on the pleadings

Tentative Ruling:

To grant the motion as it relates to the ninth and tenth causes of action. The motion is denied in all other respects. Because of the proximity to trial, plaintiffs are granted 20 days leave to file an amended complaint, should they choose, to cure the defects in the ninth and tenth causes of action identified below. Any amendments shall be in **bold** print.

Explanation:

Judgment on the pleadings

"A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999; see also *Templo v. State of Calif*. (2018) 24 Cal.App.5th 730, 735 [" 'motion for judgment on the pleadings is equivalent to a demurrer'"].) Leave to amend is liberally granted. (*MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 815.)

Seventh Cause of Action: Public Entity Liability

The absence of a duty may be raised on a motion for judgment on the pleadings (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1468), and the tort liability of public entities is exclusively statutory. (Gov. Code, § 815; *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868.) Furthermore, "the Government Claims Act provides that public employees are liable for their acts and omissions 'to the same extent as a private person' [citation] and public entity employers are vicariously liable for employees' negligent acts within the scope of their employment to the same extent as private employers. [Citation.]" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents*).)

Generally, for a public entity to be liable for the actions of a third party, the public entity must have engaged in conduct which created a dangerous condition which unreasonably increased the risk to the plaintiff. (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 812.) A public entity may also be liable to a plaintiff Public where a "relationship between them which gives rise to a duty to act." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.)

Accordingly, "[a] duty to control, warn, or protect may be based on the defendant's relationship with 'either the person whose conduct needs to be controlled or [with] ... the foreseeable victim of that conduct.'" (*Regents, supra,* 4 Cal.5th at p. 619.) For example, "[l]iability may be imposed if an officer voluntarily assumes a duty to provide a particular level of protection, and then fails to do so [citations] or if an officer undertakes affirmative acts that increase the risk of harm to the plaintiff. [Citation]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129.) The determination whether a particular relationship supports a duty of care rests on policy and is a question of law." (*Regents, supra,* 4 Cal.5th at p. 620.)

In essence, "[t]he corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection. "[A] typical setting for the recognition of a special relationship is where 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.' [Citations.]" (*Regents, supra,* 4 Cal.4th at p. 621.) But, "[b]ecause a special relationship is limited to specific individuals, the defendant's duty is less burdensome and more justifiable than a broad-ranging duty would be." (*Ibid*.) Accordingly, even within public facilities a public entity does not owe a duty to all entrants. (*Zelig, supra,* 27 Cal.4th at p. 1130.)

In other words, a public entity may be liable for dangerous conditions created by its poor property management (*Peterson, supra,* 36 Cal.3d at p. 812), or where its conduct increased the risk of injury to the plaintiff. (*Mann v. State of California* (1977) 70 Cal.App.3d 773, 780-781; but see *Williams v. State of California* (1983) 34 Cal.3d 18, [pleading inadequate because "officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed …."].)

In addition, "a proprietor nevertheless owes a special-relationship-based duty to undertake reasonable and minimally burdensome measures to assist customers or invitees who face danger from imminent or ongoing criminal assaultive conduct occurring upon the premises." (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 271.) Especially if the conduct is "actually occurring in plain view." (*Ibid* [noting "it requires no mastery of metaphysical philosophy or economic risk analysis to appreciate the strong possibility of serious injury" to persons against whom such imminent or ongoing criminal conduct is aimed.].)

Plaintiffs' complaint does not allege that their injuries arose from a physical defect inside the campground. Nevertheless, plaintiffs' opposition argues that their theory of public entity liability arises from a special relationship with the County of Fresno ("County"). Plaintiffs' complaint alleges they were visiting the Lost Lake campground when the subject events occurred (Comp. ¶ 8), and the campground is part of the Lost Lake Recreation Area which is owned and operated by the County. (Comp. ¶ 3.) To support the alleged special relationship with County, plaintiffs' opposition asserts their payment of the park fee and various representations made in the park's website[1]. These assertions, however, were not alleged in the complaint.

[1] The request for judicial notice of the various fees and rules contained in the websites should be denied. (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889; *Searles Valley*

Nevertheless, the park hosts who allegedly observed part or all of the subject events were employees and/or agents of the County. (Comp. ¶ 27.) In particular, Doe. No. 1 "did not at any time call either for police or medical assistance." (Comp. ¶28.) In addition, Doe. No. 1 blocked plaintiff's exit and locked the exit gate "such that emergency vehicles could not get in …." (Comp. ¶¶ 29, 33.)

Because County challenges plaintiffs' claims though a motion for judgment on the pleadings, which is treated like a demurrer, the allegations are presumed true, and whether plaintiffs' can ultimately prevail on those claims "does not concern the reviewing court …." (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496; *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190.)

Assuming the truth of their allegations, plaintiffs have sufficiently alleged public entity liability because they have alleged County's employees witnessed the alleged assault and stabbing, yet refused to summon emergency response and intentionally impeded plaintiffs' emergency egress. In essence, the alleged conduct of County's employees significantly increased the risk to plaintiffs. Although plaintiffs labeled their cause of action as one for "dangerous condition," "[i]f the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelilmane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) Finally, to the extent County seeks to controvert the alleged facts of the hosts' witnessing the subject events and their alleged inaction, controverted facts are raised in a motion for summary judgment, not a motion for judgment on the pleadings. (See *Christian v. County of Los Angeles* (1986) 176 Cal.App.3d 466, 468.)

Therefore, County's motion is denied as it relates to the seventh cause of action.

Eighth Cause of Action: Intentional Infliction of Emotional Distress

To support an intentional infliction of emotional distress claim, the plaintiff must outrageous conduct of a nature " ' "so extreme as to exceed all bounds of that usually tolerated in a civilized community."' " (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 101, citations omitted.) In other words " ' "[l]iability for intentional infliction of emotional distress ' "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." ' " (*Ibid*.)

County contends that "the facts alleged in the complaint do not, as a matter of law, reach the egregiousness required for intentional infliction of emotional distress." (Mtn. at p. 13:4-5.) However, plaintiffs have alleged that County's employee/agent witnessed the subject altercation (which plaintiffs' describe as an assault ending in a stabbing), yet obstructed plaintiffs' egress and made racially disparaging remarks toward them. (Comp. ¶¶ 28 – 30.) A reasonable jury could find such conduct beyond the bounds usually tolerated in a civilized society.

Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160 Cal.App.4th 514, 519 ["although it might be appropriate to take judicial notice of *the existence* of the websites, the same is not true of their factual content."]; Evid. Code, § 452, subd. (h) ["Judicial notice may be taken …."].)

Therefore, County's motion is denied as it relates to the eighth cause of action.

Ninth Cause of Action: False Imprisonment

The tort of false imprisonment "requires some restraint of the person and that he be deprived of his liberty or compelled to remain where he does not wish to remain, or go where he does not wish to go …." (*Collins v. Los Angeles County* (1966) 241 Cal.App.2d 451, 459-460.)

The complaint states that although Doe No. 1 positioned her gold cart to block plaintiffs' exit, plaintiffs nevertheless were able to continue unrestrained. In other words, plaintiffs have not alleged an actionable restraint of movement sufficient to support a false imprisonment cause of action. Therefore, County's motion is granted, with leave to amend, as it relates to the ninth cause of action.

Tenth Cause of Action: 42 U.S.C section 1983

Simply alleging a supervisory or employment relationship is insufficient to plead liability under section 1983. (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 692-694.) Rather, the plaintiff must allege an injury attributable to a governmental agency's custom, practice, or training program. (*Board of County Commrs. of Bryan County, Okla. v. Brown* (1997) 520 U.S. 397, 405-407.)

Here, plaintiffs' have not alleged facts showing that their injuries are attributable to a particular custom or practice of County, neither have they shown their injuries are attributable to inadequate training. Therefore, County's motion is granted, with leave to amend, as it relates to the tenth cause of action.

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 06/07/22.
(Judge's initials) (Date)