

**Tentative Rulings for March 3, 2022**  
**Department 503**

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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).)

19CECG02841      *Allen v. State of California* – Oral Argument (Dept. 503) – Per  
Tentative Ruling dated January 25, 2022

20CECG02029      *Montiel v. Alqadhi* (Dept. 503)

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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 503**

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(27)

### Tentative Ruling

Re: **Fankhauser v. Devlin**  
Superior Court Case No. 21CECG00362

Hearing Date: March 3, 2022 (Dept. 503)

Motion: Defendants Rebecca Devlin and Randall Rogers' demurrer to the third cause of action for premises liability

### Tentative Ruling:

To sustain without leave to amend the demurrer to the first amended complaint's third cause of action for premises liability as it relates to demurring defendants Rebecca Devlin and Randall Rogers. (Code of Civ. Proc., § 430.10, subds. (e) and (f).) Within twenty (20) days from service by the clerk of the minute order, demurring defendants Rebecca Devlin and Randall Rogers shall (1) file an order dismissing, as to them, the third cause of action for premises liability, and (2) file a responsive pleading to the remaining causes of action.

**Explanation:**

“Premises liability” “is grounded in the possession of the premises and the attendant right to control and manage the premises.”” (Kesner v. Superior Court (2016) 1 Cal.5th 1132, 1158.) Accordingly, ownership or control of the subject premises are generally required for liability. (Lewis v. Chevron U.S.A., Inc. (2004) 119 Cal.App.4th 690, 695-696; Preston v. Goldman (1986) 42 Cal.3d 108, 110.)

Plaintiff's first amended complaint alleges that the subject premises was "owned, maintained, managed and operated" by defendants other than the two demurring here. (See First Amended Complaint ¶¶ Prem. L-2.) Furthermore, plaintiff has filed a notice of non-opposition which effectively concedes this deficiency. Therefore, the demurrer is sustained. Since there is no claim the deficiency is curable, the demurrer is sustained 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: KAG on 2/17/2022  
(Judge's initials) (Date)

(20)

**Tentative Ruling**

Re: ***Romero et al. v. California Automobile Ins. Co. et al.***  
Superior Court Case No. 19CECG02939

Hearing Date: March 3, 2022 (Dept. 503)

Motion: Defendant Nutting Enterprises, Inc. dba CPR Carpet and Restoration and Suretec Indemnity Company's Motion for Judgment on the Pleadings

**Tentative Ruling:**

To grant judgment on the pleadings as to the fifth and seventh causes of action, without leave to amend. Moving parties to submit to this court, within seven (7) days of service of the minute order, an ex parte request dismissing the action as to the moving defendants.

**Explanation:**

Plaintiffs allege the following causes of action against the moving parties: fifth cause of action against defendant Nutting Enterprises, Inc. dba CPR Carpet and Restoration ("CPR") for negligence, and seventh cause of action against CPR's surety, defendant Suretec Indemnity Company ("Suretec"), against its license bond.

The fifth cause of action alleges that CPR holds itself out as having specialized experience and knowledge in testing and evaluating the quality of structural fire damage and the safety of environmental conditions inside a structure after suffering significant fire damage, and that following its December 14, 2018 inspection, defendant Matthew Nutting ("Nutting") stated that there was no smoke residue inside the house, that the house was perfectly safe for occupancy, and that once the family moved back in and started cooking and baking the house would smell brand new.

It alleges that the inspection CPR conducted was negligent, that it failed to inspect for fire damage that was concealed by defendant Lawrence Montgomery ("Montgomery") and defendant Lam Global Solutions, Inc. dba Servpro ("Servpro"), that CPR was not properly educated or licensed to test the environmental safety of the dwelling, and that it failed to identify the carcinogens left at the property due to Mercury's inadequate scope of repair.

The seventh cause of action against Suretec alleges that CPR had an active bond with the company and that, while the bond was in effect, CPR became indebted to plaintiffs in an amount exceeding the \$15,000 bond. The seventh cause of action further alleges that CPR violated, "without limitation," California Business and Professions Code sections 7108, 7108.5, 7115, 7120 and Civil Code section 3260, thus entitling plaintiffs to recover the maximum penal amount of the bond.

As in demurrers, grounds for a motion for judgment on the pleadings must appear on the face of the challenged pleading or on facts which the court may judicially notice.

(*Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.) Courts will take judicial notice of records such as admissions and answers to interrogatories when considering a demurrer, only where they contain statements of the plaintiff that are inconsistent with the allegations of the pleading before the court or which cannot reasonably be controverted. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605.) Moreover, a court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.)

The court grants the moving parties' requests for judicial notice (to which there is no opposition) of plaintiffs' admissions through discovery and the court's summary judgment order.

#### Fifth Cause of Action – Duty

“ ‘The elements of a cause of action for negligence are well established. They are “(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury.” ’ ” (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) “The first element, duty, ‘may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.’ ” (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128.) “[T]he existence of a duty is a question of law for the court.” (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819.)

When analyzing duty in the context of third-party acts, courts distinguish between “misfeasance” and “nonfeasance.” (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 529.) “Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention.” (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 717.) Defendants contend that for misfeasance plaintiffs must show that CPR “placed the plaintiff in a dangerous position and created a serious risk of harm to which [she] otherwise would not have been exposed.” (*Ibid.*, emphasis added; see *McGettigan v. BART Dist.* (1997) 57 Cal.App.4th 1011, 1017.)

In contrast, “nonfeasance generally does not give rise to a legal duty.” (*Melton, supra*, 183 Cal.App.4th at p. 531.) The legal basis for imposing such a duty to protect others arises “in cases of misfeasance or when a special relationship exists.” (*Ibid.*) Absent misfeasance or a special relationship, “there is no duty to act to protect others from the conduct of third parties.” (*Ibid.*) “Where the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in relation to the parties [i.e., a special relationship] that creates an affirmative duty to protect the plaintiff from harm, however, [it has been] uniformly held the defendant owes no legal duty to the plaintiff.” (*Brown v. Taekwondo* (2021) 11 Cal.5th 204, 216, emphasis added.)

The moving parties correctly note that, in the fifth cause of action, plaintiffs do not explicitly allege that CPR owed a duty to plaintiffs. Plaintiffs admitted in response to

Request for Admission No. 48 that they do not have a special relationship with CPR. (See RJN Ex. C.) Accordingly, there is no duty owed by CPR absent misfeasance.

The complaint fails to allege that CPR committed any misfeasance. Here, the substance of the negligence cause of action against CPR is that it failed to identify carcinogens left at the property by Mercury's scope of repair, which had been concealed by the work of Montgomery and Servpro. The complaint does not allege a scenario in which CPR created a risk of harm for plaintiffs or made their situation worse. They simply failed to discover the negligence or fraud of other parties. The complaint does not allege any misfeasance by CPR.

In their opposition, plaintiffs do not address this theory, or argue that they have pled a viable misfeasance or nonfeasance theory against CPR. Plaintiffs instead contend that the *Biakanja* factors (*Biakanja v. Irving* (1958) 49 Cal.2d 647) favor finding that CPR owed plaintiffs a duty of care, despite not being in privity of contract with CPR. The factors set forth by the *Biakanja* court include: (a) the extent to which the transaction was intended to affect the plaintiff, (b) the foreseeability of harm to him, (c) the degree of certainty that the plaintiff suffered injury, (d) the closeness of the connection between the defendant's conduct and the injury suffered, (e) the moral blame attached to the defendant's conduct, and (f) the policy of preventing future harm. (*Id.* at p. 650.)

Plaintiffs have not alleged facts indicating that *Biakanja* applies. "In *Biakanja*, our Supreme Court established a test to determine when a defendant will be liable for negligent performance of a *contractual duty* to a party not in privity of contract with the defendant." (*Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278, 1291, emphasis in original.) The *Pacific Rim* court concluded that, because the plaintiff did not assert that the defendant breached any contract, *Biakanja* was inapplicable. (*Ibid.*; see also *Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 587 ["*Biakanja* [did] not apply because [the] plaintiffs' claims ... [were] based on negligence, not on a breach of any contractual duty."].) As the California Supreme Court later explained, the Court held in *Biakanja* that "defendant's negligent performance of a contractual obligation resulting in damage to the property or economic interests of a person not in privity could support recovery if the defendant was under a duty to protect those interests" and that the Court articulated "a case-by-case test for identifying such a duty." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 643.)

Plaintiffs here do not make a contract claim, but a negligence claim. They do not allege the existence of any contract establishing CPR's duty to competently inspect and test the property. Because *Biakanja* applies only where a defendant is under a contractual duty, the negligent performance of which could harm the plaintiff, plaintiffs have not pleaded facts to which *Biakanja* applies.

As noted, plaintiffs fail to allege any misfeasance. Plaintiffs do not allege that CPR created a condition, or made plaintiffs' situation worse. Rather, the complaint essentially alleges that CPR failed to protect plaintiffs following the alleged misfeasance of Servpro and Mercury. There must be a negligent act that is performed by the defendant that "increases the risk of injury." (*Brown v. Taekwondo, supra*, 11 Cal.5th at p. 216.) Plaintiffs cannot rely on the alleged representations by Nutting and defendant Sean Henderson

(see complaint, ¶ 53), because plaintiffs admitted that they did not make those representations. (RJN Ex. B).

The motion is therefore granted as to the fifth cause of action. To obtain leave to amend, “plaintiff[s] must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading.” (*Bergeron v. Boyd* (2014) 223 Cal.App.4th 877, 881.) The burden is on plaintiffs to demonstrate that there is a reasonable possibility that they could amend their pleadings to validly allege facts that would establish that CPR owed a duty of care to plaintiffs that was breached and that caused plaintiffs harm. (*Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal.App.4th 298; *Greif v. Sanin* (2022) 74 Cal.App.5th 412.)

Plaintiffs do include a request for leave to amend in the event the court finds the pleading lacking, and there is no indication how plaintiffs could amend the complaint to state a viable cause of action for negligence against CPR. Given the lack of showing as to how the complaint could be effectively amended, the motion is granted as to the fifth cause of action without leave to amend.

## Seventh Cause of Action – Claim on License Bond Against Suretec

The seventh cause of action is based on conclusory allegations that CPR violated, "without limitation," California Business and Professions Code section 7108, 7108.5, 7115, 7120 and Civil Code section 3260.

As noted in CPR's moving papers, the complaint alleges no facts supporting a violation of any of these statutes. Plaintiffs in their opposition do not respond or address the seventh cause of action in any way, apparently conceding the merits of the motion. Accordingly, for the reasons stated in the moving papers, and due to the lack of opposition, the motion is granted as to the seventh cause of action 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: KAG on 2/28/2022.  
(Judge's initials) (Date)