SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.
PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling.
(See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

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- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

DATE: OCTOBER 3, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV400206	Gil v. Universal Protection L.P., et al.	See Line 1 for tentative ruling.
LINE 2	22CV400239	Bertolet, et al. v. Universal Protection L.P., et al.	
LINE 3	22CV398848	Lane, et al. v. Universal Protection Service, LP, et al. (Consolidated INTO Lead Case No. 22CV399095)	

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LINE 4	21CV380268	Calles v. Barracuda Networks, Inc. (Class Action)	On the court's own motion, this matter is continued for hearing on November 7, 2024, at 1:30 p.m. The Case Management Conference is also continued to November 7, 2024, at 2:30 p.m.
LINE 5	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	On the court's own motion, these matters are continued for hearing on October 10, 2024, at 1:30 p.m.
LINE 6	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	
LINE 7			
LINE 8			
LINE 9			

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LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1 (including Lines 2 and 3)

Case Name: *Sylvia Gil, et al. v. Universal Protection Service, LP, et al.*
Case Number: 22CV400206 (related cases: 22CV399095, 22CV399096, 22CV398848, 22CV403615, 22CV400239, 22CV399418)

Case Name: *Kirk Bertolet, et al. v. Universal Protection Service, LP, et al.*
Case Number: 22CV400239 (related cases: 22CV399095, 22CV400206, 22CV399096, 22CV398848, 22CV403615, 22CV399418)

Case Name: *Vickie Lane, et al. v. Universal Protection Service, LP, et al.*
Case Number: 22CV398848 (related cases: 22CV399095, 22CV400206, 22CV399096, 22CV403615, 22CV400239, 22CV399418)

On May 26, 2021, then-Valley Transportation Authority ("VTA") employee Samuel Cassidy shot and killed nine coworkers at a VTA facility in San Jose. Many of the decedents' heirs and estates, as well as individuals who survived the shooting, have sued VTA, Santa Clara County ("the County"), and various security companies.

Before the Court are three motions for judgment on the pleadings filed by VTA in the *Gil*, *Bertolet*, and *Lane* actions. The motions are opposed.

I. BACKGROUND

A. Factual

The following facts are applicable to each case.

VTA is a public transportation agency that operates bus and light rail services throughout Santa Clara County and employs about 2,000 workers. On May 26, 2021, VTA employee Samuel Cassidy perpetrated a mass shooting and killed a total of nine fellow employees. The shooting took place at VTA's Guadalupe Division facility, which is located in the Civic Center neighborhood of San Jose. Among the victims were the loved ones of the plaintiffs in these consolidated and related cases.

According to dispatch audio, at 6:33 a.m. on the day of the shooting, the San Jose Fire Department received a call to respond to the Guadalupe facility, though the caller did not mention anything about an active shooter. About a minute later, Santa Clara County authorities received 911 calls about shots being fired at the facility. Sheriff's deputies and police officers responded from their nearby offices. When they arrived at about 6:35 a.m., they found multiple people shot. The shooting occurred in two separate buildings at the busiest time of the day: a shift change during which employees from the overnight and morning shifts overlapped. According to the Sheriff, over 100 people were at the facility at the time of the shooting.

The shooting began in a conference room in Building B on the western side of the yard during a power crew meeting with the local Amalgamated Transit Union president. The gunman then walked over to Building A on the eastern side of the facility where he continued firing. At about 6:43 a.m., officers closed in on the gunman as he killed himself on the third floor of Building A between administrative offices and the operations control room. The

Sheriff's office established that the gunman fired a total of 39 rounds from three semiautomatic handguns equipped with 32 high-capacity magazines. This was the deadliest mass shooting in the history of the Bay Area.

The gunman had a pattern of insubordination, had verbal altercations with coworkers on at least four separate occasions that were known to VTA management, and previously made death threats to coworkers. This information was, allegedly, readily available to each of the defendants by virtue of their relationship with VTA.

In order to provide security and risk advisory services to prevent mass shootings, VTA entered into a contract with various Universal Protection entities (collectively "Universal") and the County of Santa Clara (through the Sheriff's Office) for security and protective services.

B. Procedural

Based on the foregoing allegations, multiple complaints were filed in various dockets including

1. *Vickie Lane, et al. v. Universal Protection Service, LP, et al.*, 22CV398848 (*Lane*)
2. *Firoozeh Davallou, et al. v. Universal Protection Service, LP, et al.*, 22CV399418 (*Davallou*)
3. *Heather Balleza, et al. v. Universal Protection Service, LP, et al.*, 23CV413374 (*Balleza*)
4. *Terra Fritch, et al. v. Universal Protection Service, LP, et al.*, 22CV399095 (*Fritch*)
5. *Avery Megia, et al. v. Universal Protection Service, LP, et al.*, 22CV399096 (*Megia*)
6. *Kirk Bertolet, et al. v. Universal Protection Service, LP, et al.*, 22CV400239 (*Bertolet*)
7. *Sylvia Gil, et al. v. Universal Protection Service, LP, et al.*, 22CV400206 (*Gil*)

In *Bertolet* and *Gil*, the operative third amended complaint ("TAC"), filed in each case February 7, 2024, alleges causes of action for assault, battery, and false imprisonment. The Gil TAC also includes a cause of action for negligence against Universal. In *Lane*, the operative fourth amended complaint ("4AC"), filed September 1, 2023, alleges causes of action for wrongful death; assault; battery; false imprisonment; and negligent hiring, supervision, or retention; and two separate causes of action for breach of contract.[1]

The operative complaints allege that VTA had advance knowledge that Cassidy harbored

[1] VTA settled with the *Fritch*, *Davallou*, *Megia*, and *Balleza* plaintiffs and is no longer a defendant in those cases. VTA is a defendant in the *Lane*, *Bertolet* and *Gil* cases and has filed a motion for judgment on the pleadings in each case. On August 26, 2024, the court granted Universal's motion to consolidate the *Lane, Fritch, Megia, Davallou, Balleza*, and *Gil* cases. *Fritch* was designated the lead case. The court also issued an order to show cause why *Bertolet* should not also be consolidated. It allowed *Bertolet* to file a response on or before September 13, 2024 but they did not do so.

dangerous propensities but intentionally chose not to discipline, censure, criticize, suspend, or discharge Cassidy, thereby authorizing and/or ratifying the attack that is the subject of this complaint and is thus liable for the intentional acts of Cassidy. (*Bertolet* TAC, ¶ 20; *Gil* TAC, ¶ 20; *Lane* 4AC, ¶ 12(k)-(l).) They also assert that Cassidy was acting in the scope of his employment when he committed the attack. (*Bertolet* TAC, ¶ 5; *Gil* TAC, ¶ 7; *Lane* 4AC, ¶ 11.)

On April 12, 2024, VTA filed motions for judgment on the pleadings in *Lane*, *Bertolet*, and *Gil*.[2] On June 14, 2024, the Plaintiffs in all three cases opposed the motions. On July 3, 2024, VTA filed replies in each case.

In *Lane* only, the *Lane* Plaintiffs filed a supplemental opposition and VTA filed a reply to that supplemental opposition. In *Gil* and *Bertolet*, the Plaintiffs in each case filed a notice of joinder to the Lane Plaintiffs' supplemental opposition, which VTA has opposed in each case.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. The Lane Plaintiffs' Supplemental Opposition and Request for Judicial Notice and VTA's Request for Judicial Notice

The *Lane* Plaintiffs filed a supplemental opposition, without seeking leave of court, asking the court to consider a case they believe to be on point, which was not cited in their initial opposition to VTA's motion for judgment on the pleadings. They ask the court to take judicial notice of that case, *Shin v. Nicholson* (N.D.Cal. Aug. 29, 2023, No. 23-cv-00456-VC) 2023 U.S. Dist. LEXIS 152892 (*Shin*). Gil and Bertolet filed notices of joinder as to the supplemental opposition.

VTA filed a reply to the *Lane* supplemental opposition and oppositions to the notices of joinder in *Gil* and *Bertolet*. In *Lane* only, VTA filed a request for judicial notice in connection with its reply to the *Lane* Plaintiffs' supplemental opposition. VTA urges the court to decline to consider the *Lane* Plaintiffs' supplemental opposition because it was filed after the time to file the oppositions to the motions, it was not authorized by the court, and the *Shin* case was available at the time the *Lane* Plaintiffs' initial opposition was filed.

In an effort to fully consider the issues, the court will consider both the *Lane* Plaintiffs' supplemental opposition and VTA's reply. However, the parties are admonished to file only authorized briefing, and any requests otherwise should be done only after seeking and obtaining leave of court. The court may decide not to consider unauthorized filings made without leave of court in the future.

The court GRANTS the Lane Plaintiffs' request for judicial notice of *Shin* under Evidence Code section 451, subdivision (a). The court is cognizant of the fact that *Shin* is not binding authority. "Although [the court] recognize[s] that the 'decisions of … the lower federal courts may be instructive to the extent [it] find[s] their analysis persuasive, they are neither

[2] VTA settled with the *Fritch*, *Davallou*, *Megia*, and *Balleza* plaintiffs and is no longer a defendant in those cases. VTA is a defendant in the *Lane*, *Bertolet* and *Gil* cases.

binding nor controlling on matters of state law.' [Citation.]" (*Beverage v. Apple, Inc.* (2024) 101 Cal.App.5th 736, 756, fn. 6.)

The court also GRANTS VTA's request for judicial notice of the stipulation and order setting the briefing schedule for the motion for judgment on the pleadings and the opening and reply briefs filed in the *Shin* case. The court understands the requests as to the *Shin* briefs to be a request that the court consider the existence of the arguments raised in the briefs as VTA contends that the *Shin* court did not consider Labor Code sections 3601 and 3602 and other California authorities it relies on. The court will take judicial notice of the requested documents under Evidence Code section 452, subdivision (d).

B. Legal Standard

A motion for judgment on the pleadings brought by a defendant or respondent may be granted where the petition fails to state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).)[3] The motion may be directed to the entire complaint or any cause of action therein. (§ 438, subd. (c)(2)(A).) The grounds for the motion "shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (§ 438, subd. (d).) In ruling on a motion for judgment on the pleadings, "[t]he trial court must accept as true all material facts properly pleaded, but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts that are judicially noticed." (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1219-1220.)

"[A] motion for judgment on the pleadings may be addressed to the pleading as a whole or to separate counts. If addressed to the pleading as a whole, the motion must be denied if even one count is good. [Citation.] If addressed to separate counts, the motion may be granted as to some counts and denied as to others. [Citation.]" (*Heredia v. Farmers Ins. Exch.* (1991) 228 Cal.App.3d 1345, 1358.)

Disputed factual issues that cannot be resolved without reference to items not appearing the face of the complaint or those subject to judicial notice cannot be determined on a motion for judgment on the pleadings. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018.)

"A common law [i.e. non-statutory] motion for judgment on the pleadings 'ha[s] the purpose and effect of a general demurrer.' [Citations.]" (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145.) In ruling on such a motion, the court determines whether the challenged pleading states facts sufficient to constitute a cause of action. (*Id.* at pp. 145-146.) In so doing, the court confines itself to considering the allegation appearing on the face of the pleading, which are accepted as true, and matters subject to judicial notice. (*Id.* at p. 146.)

A motion for judgment on the pleadings may be granted with or without leave to amend. Denial of leave to amend generally constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment. (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

[3] All further undesignated statutory references are to the Code of Civil Procedure.

C. Discussion

Because the motions for judgment on the pleadings raise the same issues in each case and the oppositions are also similar, the court will discuss them together. In each case, VTA argues that the causes of action raised in the operative complaints in each case are barred by the Government Claims Act (Gov. Code, § 810 et seq.) because they are based on direct, rather than vicarious, liability and that the Worker's Compensation exclusivity provisions also bar the Plaintiffs' claims.[4]

i. Worker's Compensation Exclusivity

With respect to the *Bertolet* and *Gil* Plaintiffs, VTA contends that their injuries occurred in the scope of their employment. The *Lane* Plaintiffs are relatives of Decedent Lars Lane ("Decedent"), who passed away during the attack. VTA asserts that the *Lane* Plaintiffs' claims are derivative of Decedent's injuries, which occurred during the scope of his employment. For this reason, VTA contends that all Plaintiffs' claims are barred because the Workers' Compensation Act (Lab. Code, §§ 3200, et seq.) provides the exclusive remedy for workers who are injured during the course of their employment.

Labor Code section 3601, subdivision (a) provides,

> (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:
> (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.
> (2) When the injury or death is proximately caused by the intoxication of the other employee.

Labor Code section 3601, subdivision (b) provides, "In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a)."

Labor Code section 3602, subdivision (a) provides, "Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer."

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[4] The court will refer to the Plaintiffs in *Lane*, *Gil*, and *Bertolet* collectively as "Plaintiffs" for the remainder of this order.

Plaintiffs assert that the exception to workers' compensation exclusivity under Labor Code section 3602, subdivision (b) applies to impose liability on VTA in this case. That section provides, "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances: . . . Where the employee's injury or death is proximately caused by a willful physical assault by the employer." (Lab. Code, § 3602, subd. (b)(1).)

"[L]iability under section 3602, subdivision (b)(1), must be based on positive misconduct by the employer and not on a theory of vicarious liability such as that which forms the basis of the doctrine of respondeat superior." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1487 (*Fretland*).) "[A]n employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification." (*Id.* at pp. 1489-1490.)

Plaintiffs assert that VTA previously raised the workers' compensation exclusivity argument on demurrer, that that argument was rejected, and that VTA may not raise this argument again. They argue that, if VTA disagreed with the court's ruling on this issue in the *Gil* and *Bertolet* cases, its remedy was to move for reconsideration under Code of Civil Procedure section 1008.

To the extent VTA argues that Plaintiffs' theory of ratification is insufficiently pled such that the battery, assault, and false imprisonment causes of action raised in each operative complaint do not state a cause of action, this argument has been raised and rejected previously. In *Gil*, the court previously found, in response to VTA's demurrer, that the allegations "that VTA was aware of a threat made by Mr. Cassidy to one of the Victims that he would 'put a bullet' in his head, that employees feared that Mr. Cassidy would 'go postal', and that VTA did nothing to investigate threats by Cassidy or to discipline him or protect his fellow employees . . .coupled with the allegation that VTA engaged in a sham investigation to cover up its authorization and/or ratification of Cassidy's actions . . . are sufficient to plead ratification and defeat a demurrer based on workers' compensation exclusivity." (Order Concerning Demurrer by VTA, the County of Santa Clara, and Universal Protection to Plaintiff's Second Amended Complaint, filed January 24, 2024 in *Gil*, p. 13:18-24; Order Concerning Demurrer by to Plaintiff's Second Amended Complaint, filed January 24, 2024 in *Bertolet*, pp. 7:25-8:3.)

Recognizing that a statutory motion for judgment on the pleadings does not lie on grounds previously raised on demurrer absent a material change in circumstances, (see Code Civ. Proc., § 438 subd. (g)(1)), VTA insists that it may make a non-statutory motion for judgment on the pleadings raising ground previously raise on demurrer. Citing *Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650, VTA argues that the court has inherent authority, independent of Code of Civil Procedure section 438 to grant a non-statutory motion for judgment on the pleadings at any time at or before trial.

Even assuming that the limitations of Code of Civil Procedure section 438 do not prohibit VTA from raising previously raised arguments, the court finds that VTA has provided no reason for it to deviate from its prior rulings as to the worker's compensation exclusivity argument. Although it asserts that the court incorrectly found the above allegations sufficient to support a ratification theory, the court already considered many of the authorities VTA now cites in its motions when it assessed the sufficiency of the allegations in the *Gil* and *Bertolet* second amended complaints. Accordingly, the court declines to reconsider, or consider anew in

similar context, its ruling that the allegations supporting a ratification theory are insufficiently pled.[5]

VTA next contends that the court's order sustaining VTA's demurrers in the *Gil* and *Bertolet* actions on the ground of workers' compensation exclusivity as to the negligence claims in those cases constitutes an intervening circumstance that would allow it to raise a workers' compensation exclusivity argument in the instant motions even under Code of Civil Procedure section 438, subdivision (g)(1). VTA asserts that inconsistent results have been reached in the *Gil* and *Bertolet* cases on the one hand and the *Lane* case on the other because the negligence claim remains at issue in *Lane*. The court finds that this contention applies solely to the negligence claim in the *Lane* case, which is the only action that still contains a negligence claim against VTA, and would not allow VTA to reraise its workers' compensation exclusivity arguments as to the battery, assault, and false imprisonment claims in *Lane* or the other two cases.

Thus, the court will consider VTA's workers' compensation exclusivity argument as to the negligent hiring, supervision, or retention claim (fourth cause of action) in *Lane* in the interest of avoiding inconsistent rulings. The court notes that the *Lane* case has now been consolidated with *Gil*. The court sustained VTA's demurrers in *Gil* and *Bertolet* as to their negligent hiring claims because Labor Code section 3602, subdivision (b)(1) requires willful conduct on the part of the employer and mere negligent acts are insufficient. In *Shin*, *supra*, 2023 U.S. Dist .LEXIS 152892, at *5-6, the district court dismissed the plaintiff's negligence claim citing, inter alia, *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 252, in which the court stated, "We find no relevant case law approving a claim for direct liability based on a public entity's allegedly negligent hiring and supervision practices." Accordingly, the *Lane* motion for judgment on the pleadings is GRANTED as to the negligent hiring, supervision, or retention claim (fifth cause of action) without leave to amend.

ii. Government Claims Act

VTA contends that Government Code sections 815 and 820.2 provide immunity from common law causes of action for the discretionary acts of public employees. They argue that governmental liability must be based on statute. VTA maintains that the exceptions contained in Government Code section 815.2 cannot apply in this case because those exceptions apply in cases of vicarious liability but, here, Plaintiffs have pled that VTA's alleged actions ratifying Cassidy's conduct, which Plaintiffs assert remove this action from the purview of Worker's Compensation exclusivity, would render VTA directly liable.

Government Code section 815, subdivision (a) provides, "Except as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Government Code section 820.2 provides, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the

[5] However, VTA's argument that, because Plaintiffs are relying on a direct liability theory to "plead around" workers' compensation exclusivity, their claims are barred by the Government Claims Act because it provides for liability only in the context of vicarious liability under Government Code section 815.2 is still viable. Accordingly, the court will address that argument.

result of the exercise of the discretion vested in him, whether or not such discretion be abused." Accordingly, VTA contends that the common law causes of action for assault, battery, and false imprisonment alleged by all Plaintiffs are barred because they are not based on statute.

Citing *Fretland*, *supra*, 69 Cal.App.4th at p. 1487, VTA asserts that Government Code section 815.2 cannot provide the statutory basis for Plaintiffs' claims because it is a vicarious liability statute and the Workers' Compensation Act bars vicarious liability for the assaultive torts of an employee. That section provides, "(a) 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. (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Gov. Code, § 815.2, formatting altered.) Ratification is generally considered to be a theory of direct, rather than vicarious, liability or an alternative to respondeat superior. (*See Fischl v. Pacific Life Ins. Co*. (2023) 94 Cal.App.5th 108, 130.) VTA further maintains that the acts committed by Cassidy were outside the scope of employment such that vicarious liability under Government Code section 815.2 is unavailable.

Plaintiffs counter that Labor Code section 3602, subdivision (b)(1) is the statute allowing them to bring their claims. As mentioned above, that section states, "An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances: . . . Where the employee's injury or death is proximately caused by a willful physical assault by the employer." (Lab. Code, § 3602, subd. (b)(1).) Plaintiffs rely on Government Code section 814.2, which provides, "Nothing in this part shall be construed to impliedly repeal any provision of Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code." They assert that this provision means that the Legislature did not intend the provisions of the Government Claims Act to minimize or abrogate their rights under Labor Code section 3602, subdivision (b)(1).

Plaintiffs cite multiple cases holding that acts that fall outside of the "workers' compensation bargain" are not barred by the workers' compensation exclusivity rule. (See, e.g., *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 723 [false imprisonment may fall outside the normal employment relationship allowing an employee to sue in tort].) As VTA points out, these cases do not involve governmental employers and, therefore, the Government Claims Act could not apply in those cases. Plaintiffs also contend that, in certain cases involving governmental defendants, courts discussed workers' compensation exclusivity in cases involving governmental employers but did not mention the Government Claims Act. (See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148; *Fretland*, *supra*, 69 Cal.App.4th at p. 1481.) But it is not clear that those courts were presented with issues relating to governmental immunity under the Government Claims Act. Cases are not authority for propositions not considered. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11.) Similarly, VTA points to cases, such as *Zelig v. Cnty. of Los Angeles* (2002) 27 Cal.4th 1112 (*Zelig*) and *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507 (*Ross*), for the proposition that the liability of government entities for the conduct of employees must be limited to vicarious liability under Government Code section 815.2. VTA also relies on *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, in which the court applied the concept of workers' compensation exclusivity to the plaintiff's wrongful

termination claims under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. These cases did not discuss Labor Code section 3602, subdivision (b)(1) and did not involve situations in which that section would apply.[6] Notably, neither Plaintiffs nor VTA has pointed the court to any authority discussing the interplay between the Workers' Compensation Act and the Government Claims Act under these circumstances.[7]

In the context of a FEHA claim, the California Supreme Court explained that Government Code "[s]ection 815.2 does generally provide that a public entity is liable for an employee's act or omission within the scope of employment if the employee himself could be sued (subd. (a)), but that the entity is immune if the employee is immune (subd. (b)). We observe, however, that section 815.2 simply applies principles of vicarious entity liability. In subdivision (b), it establishes the premise that if the directly liable employee himself cannot be sued, the doctrine of respondeat superior should not apply against the entity. [Citation.] However, FEHA creates direct statutory rights, obligations, and remedies between a covered 'employer,' private or public, and those persons it considers or hires for employment. [Citations.] FEHA thus provides a basis of direct entity liability independent of the derivative liabilities addressed in section 815.2. Accordingly, any personal immunity of a public employee against a particular FEHA claim does not necessarily accrue to the benefit of the public entity itself as a covered 'employer.' [Citation.]" (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9 (*Caldwell*).) The court expressly did not decide the issue of entity immunity. (*Ibid*.)

In *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1014, fn. 12 (*Farmers*), our high court reiterated, "A public entity's civil FEHA liability for sexual harassment is not limited by section 815.2, subdivision (a). The FEHA 'creates direct statutory rights, obligations and remedies between a covered "employer," private *or public*, and those persons it considers or hires for employment.' [Citation.] Thus, the FEHA 'provides a basis of direct entity liability *independent of the derivative liabilities addressed in section 815.2*.' [Citation.] By 'otherwise provid[ing]' for direct entity liability, the FEHA's provisions provide a viable basis for tort liability against a public employer for coemployee or supervisorial harassment under section 815, subdivision (a), notwithstanding the scope of employment limitations for derivative liability under section 815.2, subdivision (a)." (Italics in original.)

In *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 545-546, the Court of Appeal explained, "FEHA expressly makes public employers, like private employers, directly

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[6] *Zelig* involved a murder that occurred in a courthouse but neither the victim nor the perpetrator was a government employee, (*Zelig, supra*, 27 Cal.4th at p. 1118), and *Ross* was an employment discrimination and wrongful termination case that did not involve assaultive conduct, (*Ross, supra*, 146 Cal.App.4th at pp. 1509-1510). Although the Court of Appeal in *Ross* stated, "when it comes to common law tort injuries, [a public entity's] liability can only be predicated on its vicarious liability, if any, for the wrongful acts of its employees, as authorized by section 815.2, subdivision (a)", (*id.* at p. 1514), it did so in the context of explaining that governmental liability must be predicated on a statute, as provided by Government Code section 815. In fact, the *Ross* court recognized that the California Supreme Court had suggested in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9 that a FEHA statutory claim "can be maintained against a public entity even though its agents or employees are immune from liability." (*Ross, supra,* 146 Cal.App.4th at p. 1514.)

liable for violations of that law, including age discrimination. [Labor Code s]ection 12926, which defines various terms used in the FEHA statutory scheme, provides that the term ' "[e]mployer" includes … *the state or any political or civil subdivision of the state*, and cities … .' ([Lab. Code,] § 12926, subd. (d), italics added.)" (Fns. omitted.) The court held, "In our view, the inclusion of 'the state or any political or civil subdivision of the state' within FEHA's definition of 'employer' constitutes an express declaration of the Legislature's intent to subject public entities to liability for violations of FEHA, and is a 'clear indication of legislative intent that immunity [under [Government Code] sections 820.2 and 815.2(b)] be withdrawn in the particular case.' [Citation.]" (*Id.* at p. 546, italics in original.)

As in the context of FEHA, the definition of "employer" in the Workers' Compensation Act includes public entities. (Lab. Code, § 3300, subd. (b) ["As used in this division, 'employer' means: Each county, city, district, and all public and quasi public corporations and public agencies therein."].) And Labor Code section 3602, subdivision (b)(1) allows for a civil suit where "the employee's injury or death is proximately caused by a willful physical assault by the employer." In other words, Labor Code section 3602, subdivision (b)(1) provides for direct employer liability under the specified circumstances.

VTA argues that Labor Code section 3601, subdivision (b) precludes employer liability in this situation. That section provides, "In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a)" and subdivision (a)(1) of Labor Code section 3601 states "[w]hen the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee." (See Lab. Code, § 3601, subds. (a)(1)&(b).) But liability pursuant to Labor Code section 3602, subdivision (b)(1) is based on the employer's direct liability, whereas Labor Code section 3601, subdivision (b) " 'insulates the employer from common law vicarious liability to an employee for the acts of another employee.' [Citation.]" (*Fretland*, *supra*, 69 Cal.App.4th at p. 1487 ["To reconcile these two statutory provisions, liability under [Labor Code] section 3602, subdivision (b)(1), must be based on positive misconduct by the employer and not on a theory of vicarious liability such as that which forms the basis of the doctrine of respondeat superior."].)

VTA's citation to *Miner v. Superior Court (Jiminez)* (1973) 30 Cal.App.3d 597 (*Miner*) does not alter the court's conclusion that Labor Code section 3602, subdivision (b)(1) provides a statutory exception to the governmental immunity provisions VTA relies on. In that case, an employee of a government entity was electrocuted when another employee, operating a crane, caused the crane to come in contact with electrical lines. (*Miner*, *supra*, 30 Cal.App.3d at p. 599.) The injured employee brought suit under former Labor Code section 3601, subdivision (a)(3). (*Id.* at p. 598.)[8] The crane operator demurred to the complaint arguing that the injured

[8] " 'Labor Code section 3601 as of the time of the accident provided in pertinent part: (a) Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependents in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in the following cases: (3) When the injury or death is proximately

employee had failed to comply with the claims presentation requirements of the California Tort Claims Act. (*Id.* at p. 599.) The trial court overruled the demurrer and the crane operator challenged that ruling via petition for writ of mandate. (*Ibid*.) In issuing a peremptory writ of mandate ordering the trial court to sustain the demurrer without leave to amend, the Court of Appeal rejected the injured employee's argument that Government Code section 814.2, which provides that "nothing in this part," can be construed to repeal any provision of the Workers' Compensation Act. The Court of Appeal explained that "the Legislative Committee's comment to Government Code section 814.2, referring to 'rights under the Workmen's Compensation Act,' must necessarily relate to rights to workmen's compensation and not to the right of one employee to sue a fellow employee for damages, the latter right not having had its origin in the act." (*Id.* at p. 600, fn. omitted.) The *Miner* court held that "[s]ince Government Code section 905, subdivision (d), (see fn. 3) establishes an exception to the claim [presentation] requirement only for workmen's compensation, and a suit for damages by statutory definition and by precedent is not a suit for such compensation, it necessarily follows that the filing of a claim as a prerequisite to the maintenance of a suit for damages is required." The *Miner* court did not discuss governmental immunity and did not hold that the injured plaintiff could not bring suit under former Labor Code section 3601, subdivision (a)(3); it merely held that, to bring suit, the plaintiff must comply with the requirements of Government Code section 905.

Here, the court's conclusion that Labor Code section 3602, subdivision (b)(1) provides a statutory basis for direct employer liability, even when the employer is a public entity, is not based on the idea that nothing in the Government Claims Act abrogates the right to sue under the Worker's Compensation Act. Nor is the court's conclusion based on the idea that Labor Code section 3602, subdivision (b)(1) *created* a new right to sue under the circumstances described therein. (See *Miner*, *supra*, 30 Cal.App.3d at p. 600 ["It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages."].) Instead, it is based on the idea that Labor Code section 3602, subdivision (b)(1) *provides* for liability and, therefore, the governmental immunity statutes, which apply "except as otherwise provided", do not apply to bar Plaintiffs' claims in these cases. In other words, it " 'provides a basis of direct entity liability *independent of the derivative liabilities addressed in section 815.2*.' [Citation.] By 'otherwise provid[ing]' for direct entity liability, [its] provisions provide a viable basis for tort liability against a public employer for [tort claims] under [Government Code] section 815, subdivision (a), notwithstanding the scope of employment limitations for derivative liability under section 815.2, subdivision (a)." (*Farmers, supra,* 11 Cal.4th at p. 1014, fn. 12.)

VTA also contends that because the individual supervisors in its employ would be immune because their actions were discretionary, it is also immune. Government Code section 820.2, on which VTA relies, provides, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Government Code section 815.2, subdivision (b) provides, "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or

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caused by an act of such other employee which evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee.' " (*Miner, supra,* 30 Cal.App.3d at p. 598, fn. 1.)

omission of an employee of the public entity where the employee is immune from liability." VTA asserts that the conduct that formed the basis of its alleged ratification of Cassidy's acts as pled in the operative complaints is comprised of discretionary acts, including disciplinary considerations for Cassidy's misconduct prior to the shooting and VTA's investigation of the shooting. (See, e.g., *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1438 (*Kemmerer*) [decision whether to discipline employee for misconduct was discretionary and fell within immunity provision of Government Code section 820.2], disapproved of on another ground in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8.)

But, in *Caldwell*, the Supreme Court explained that the public entity may be liable where a statute provides for direct liability on the part of the employer even though it held that the individual employees were immune. (*Caldwell, supra*, 10 Cal.4th at p. 989, fn. 9 ["FEHA thus provides a basis of direct entity liability independent of the derivative liabilities addressed in section 815.2. Accordingly, any personal immunity of a public employee against a particular FEHA claim does not necessarily accrue to the benefit of the public entity itself as a covered 'employer.' [Citation.]"].) Here, similarly, Labor Code section 3602, subdivision (b)(1) provides a basis for direct liability on the part of the employer. Notably, Government Code section 815.2, subdivision (b) provides that a public entity is not liable when an employee is not liable "[e]xcept as otherwise provided by statute[.]" Again, the cases VTA relies on, such as *Kemmerer* and *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, did not involve a situation in which another statute provided for direct liability on the part of the employer.

Because the court finds that there is a valid theory underlying Plaintiffs' claims, it need not address Plaintiffs' alternative argument that Government Code section 815.6 allows them to bring their claims. (See *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1231 [a complaint survives a demurrer if it adequately states a cause of action under any legal theory]; *People v. 20,000 United States Currency* (1991) 235 Cal.App.3d 682, 689 [a motion for judgment on the pleadings is similar to a demurrer].)

III. CONCLUSION

The motions for judgment on the pleadings are DENIED except as to the negligent hiring, supervision, and retention claim in *Lane*, as to which the *Lane* motion for judgment on the pleadings is GRANTED IN PART WITHOUT LEAVE TO AMEND.

The court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely.

No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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