SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: October 24, 2023 TIME: 9:00 A.M.

TO REQUEST ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO HAVE THE HEARING REPORTED: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

TO SET YOUR NEXT hearing date: You no longer need to file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Civil Local Rule 8C is in the amendment process and will be officially changed by January 2024.

Where to call for your hearing date:	408-882-2430
When you can call:	Monday to Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	21CV382438	Huong Burrow et al vs Long Nguyen et al	The parties are ordered to appear for a case management conference.
2	23CV412210	The Board of Trustees of The Leland Stanford Junior University vs County of Santa Clara	The Board of Trustees of Leland Stanford University filed a First Amended Complaint. Accordingly, the County of Santa Clara's Demurrer is off calendar. (Code of Civ. Pro. §472.)
3	23CV415689	Jonathan Fleming vs Homefirst Services of Santa Clara County et al	Plaintiff dismissed the moving party; this motion is off calendar.
4	21CV378255	Qinglong Hu vs The City of San Jose et al	The City's Motion for Summary Judgment is GRANTED. Please scroll down to Line 4 for full tentative ruling. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Court to prepare formal order.
5	22CV402705	KINGDOM OF SWEDEN vs J. Daryaie	Kingdom of Sweden's Motion for Summary Judgment is GRANTED. An amended notice of motion with this hearing date was served by U.S. mail on July 19, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) The requests for admissions also establish the elements of breach of contract in Plaintiff's favor. Accordingly, the motion is granted. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
6	22CV404728	Santa Clara County Federal Credit Union vs Steve Aguayo	Off calendar.
7	21CV383677	AMERICAN EXPRESS NATIONAL BANK vs FREDDY WALLA et al	American Express National Bank's Motion to Vacate Conditional Dismissal and for Entry of Judgment is GRANTED. An amended notice of motion with this hearing date was served by U.S. mail on July 19, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant the motion based on the parties' stipulation pursuant to Code of Civil Procedure 664.6. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.
8	22CV404070	Haitao Wang vs Nittin Vishwanathan et al	Taylor Nicole Todd's Motion to File a Cross-Complaint is GRANTED. An amended notice of motion with this hearing date was served by electronic mail on August 24, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) The motion is also well-taken, as this is a compulsory cross-complaint that cross-complainant attempted to serve with the answer and was denied for a technical reason. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.

9	23CV415644	David Chun vs ANYTIME MERCHANT SERVICES, INC.	David Chun's Motion to Establish Admissions, Compelling Responses to Form Interrogatories and Compelling Responses and Document Requests for Production is GRANTED. An amended notice of motion with this hearing date was served by U.S. mail on August 7, 2023. No opposition was filed. Failure to oppose a motion may be deemed consent to the motion being granted. (Cal. Rule of Court, 8.54(c).) There is also good cause to grant this motion. Plaintiff served Defendant personally and by email with Requests for Admission (Set One), Form Interrogatories (Set One), and Requests for Production of Documents (Set One) on May 20, 2023. Defendant failed to serve any responses. Accordingly, all requests for admission are deemed admitted (CCP §2033.280); all objections are deemed waived (CCP §§2030.290(a), 2031.300(a), 2033.280(a)), and Defendant is ordered to serve on Plaintiff complete, code compliant, verified responses to Plaintiff's Form Interrogatories (Set One) and Requests for Production (Set One) without objections and all responsive documents within 20 days of service of the formal order. To request oral argument, call or email the other side and call the court at (408) 808-6856 by 4 p.m. today. (CRC 3.1308(a)(1) and LR 8.E.) Moving party to prepare formal order.

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Calendar Line 4
Case Name: *Qinglong Hu v. The City of San Jose, et al.*
Case No.: 21CV378255

Before the Court is defendant City of San Jose's (the "City" or "Defendant") motion for summary judgment, or in the alternative summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of plaintiff Qinglong Hu's bicycle accident. According to the Complaint, on March 5, 2020, Plaintiff was riding his bicycle to work near the intersection of Bailey Avenue and Santa Teresa Boulevard in San Jose, when the bicycle lane ended and forced him to merge into the vehicle lane. (Complaint, ¶ 11.) The lane he merged into was downhill, covered in potholes, uneven roading, and debris which caused him to crash and sustain serious bodily injuries and other damages. (*Ibid*.)

Plaintiff initiated this action on February 26, 2021, asserting: (1) violation of Government Code section 815.2; (2) violation of Government Code section 818.6; (3) violation of Government Code section 815.6; (4) violation of Government Code section 830, et seq.; and (5) general negligence. On June 5, 2023, the City filed the instant motion for summary judgment, which Plaintiff opposes.

II. Compliance with Rule of Court 3.1350

Plaintiff argues the City failed to comply with California Rule of Court 3.1350, which provides: "[i]f made in the alternative, a motion for summary adjudication may make reference to and depend on the same evidence submitted in support of the summary judgment motion. If summary adjudication is sought, whether separately or as an alternative to the summary judgment motion, the specific cause of action, affirmative defense, claims for damages, or issues of duty *must be stated specifically* in the notice of motion *and be repeated, verbatim, in the separate statement of undisputed material facts*." (Cal. Rules of Ct. rule 3.1350(b) [emphasis added].) Defendant's request for summary adjudication is not repeated verbatim in the City's separate statement, thus, summary adjudication in the alternative is not available.

III. Requests for Judicial Notice

The City requests judicial notice of the following nine documents and facts:

(1) Exhibit 3: Webpage of the Santa Clara Valley Open Space Authority discussing the location and characteristics of the Coyote Valley;

(2) Exhibit 4: Online Map of Coyote Valley, titled, "Coyote Valley: A Conserved Landscape";

(3) Exhibit 5: Print out of an interactive map;

(4) Exhibit 6: Photograph of Bailey Avenue, dated February 2020;

(5) Exhibit 7: Photograph of Bailey Avenue, dated November 2020;

(6) San Jose Municipal Code section 20.100.340;

(7) Alleged fact: The area on Bailey Avenue where Plaintiff fell was located adjacent to and bounded by the North Coyote Valley Conservation Area ("Conservation Area");

(8) Alleged fact: The Conservation Area forms part of Coyote Valley, which consists of a corridor of land situated between the Santa Cruz Mountains and the Diablo Range;

(9) Alleged fact: Within meters of where Plaintiff fell on Bailey Avenue, a constructed turnout with enough parking to accommodate multiple vehicles provides viewing access to the Conservation Area; and

(10) Alleged fact: Bailey Avenue directly connects the Calero County Park, through McKean Road, to the nearby Coyote Creek Parkway.

With respect to Item 1, the City's authorities do not support judicial notice. *In re N.M* (2008) 161 Cal.App.4th 253, 268, fn. 9 concerned judicial notice of names and phone numbers in the Federal Register; *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437 concerned judicial notice of the most recent version of a government website listing liens subject to a section 4651 stay, but the court did not rely on the judicially noticed documents to prove disputed facts; and *People v. Morales* (2018) 25 Cal.App.5th 502, 511, fn. 7 concerned judicial notice of official legislative acts. Here, the Open Space Authority website is not an official legislative act, and the webpage contains facts beyond the Court's ability of immediate and accurate determination. (See Evid. Code, § 452, subd. (h).) Thus, the request for judicial notice of item 1 is DENIED.

Regarding items 2 and 3, "the law [is] well settled that trial or reviewing courts may properly notice government maps and surveys." (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1021, fn. 2, citing Evid. Code, § 452, subd. (h).) Items 4 and 5 are proper items of judicial

notice as "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (See Evid. Code, § 452, subd. (h).) The Court may also take judicial notice of item 6 under Evidence Code section 452, subdivision (b), which permits judicial notice of regulations and legislative enactments issued by any public entity. Thus, the request for judicial notice is GRANTED as to items 2 through 6.

Exhibit 4 shows the (1) the intersection of Bailey Avenue and Santa Teresa Boulevard is adjacent to the Conservation Area and (2) the Conservation Area is situated between the Santa Cruz Mountains and the Diablo Range. Exhibit 5 shows that Bailey Avenue connects to the Calero County Park, through McKean Road. Exhibit 7 shows there is a construction turnout near the location of the incident, which can accommodate multiple vehicles and provides viewing access to the Conservation Area. Thus, the request for judicial notice as to facts 7 to 10 is GRANTED.

IV. Evidentiary Objections

The City objects to Exhibit 2 of the Declaration of Charles D. Caraway's ("Caraway Decl.") on the basis that it lacks foundation and has not been authenticated. The objection is SUSTAINED as to pages 7 through 12 because there is no information as to when the images were taken or who took them. However, the objection is OVERRULED as to pages 1 through 6 because they are pictures from Google Maps, which show when the images were captured and when they were accessed by Plaintiff.

The City's objection to Exhibit 3 to the Caraway Decl. is SUSTAINED because Plaintiff relies on his own discovery responses. (See *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 450 [trial court did not abuse its discretion in sustaining plaintiff's objection to defendant's use of its own interrogatory responses as evidence supporting its statement of undisputed facts].)

The City's objection to Exhibit 4 of the Caraway Decl. is SUSTAINED. Exhibit 4 is a copy of the Department of Public Works' plans for construction of 8732-FWHA-Bailey Avenue Storm Drain Inlet Repair. It appears the Director of Public Works signed the document on October 9, 2019, which signature is presumed to be genuine and authorized. (See Evid. Code, § 1453.) Above this signature, the document is dated May 24, 2021, which date appears to refer to the information regarding the As-Built drawing. Page 6 of Caraway Decl., Exhibit 4 contains a red stamp from the Department of Public

Works, dated June 1, 2021, and states "submittal was reviewed for general conformance to Contract documents only." Plaintiff did not provide any additional information as to the document or explanation of the multiple dates. Thus, the objection is to Exhibit 4 is SUSTAINED.

The City's objection to Caraway Decl. Exhibit 5 is SUSTAINED for lack of authentication.

The City's objection to Caraway Decl. paragraph 9 is SUSTAINED because it constitutes an improper legal opinion.

The City's objections to Caraway Decl. paragraphs 11-13 are OVERRULED.

V. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, the City moves for summary judgment or in the alternative, summary adjudication.

A. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra*, 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, at p. 851.)

"Another way for a defendant to obtain summary judgment is to 'show' that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff 'does not possess and cannot reasonably obtain, needed evidence' (because plaintiff must be allowed a reasonable opportunity to oppose the motion)." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855.) "Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action." (*Ibid.*)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

B. Fourth Cause of Action: Dangerous Conditions of Public Property

The Government Claims Act, codified in Government Code section 810, et seq., is a "comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts." (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104-1105(*Cordova*).) Government Code section 815, provides: "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" except as provided by statute. (Gov. Code, § 815, subd. (a).) "[D]irect tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183.)

Government Code Section 835 provides the basis for liability in an action against a public entity for an injury caused by the dangerous condition of public property. To establish liability under Section 835, the following essential elements must be proved:

(1) The public property was in a dangerous condition at the time of the injury;

(2) The injury to the plaintiff was proximately caused by the dangerous condition;

(3) The kind of injury that occurred was reasonably foreseeable as a consequence of the dangerous condition; and

(4) Either:

a. The dangerous condition was created by a public employee's negligent or wrongful act or omission within the scope of his or her employment, or

b. The entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury.

(Gov. Code, § 835; see also *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745, 753 (*Thimon*).)

A dangerous condition is defined as, "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) "In general, 'whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.'" (*Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 810.) "[A]lthough the question of whether a dangerous condition exists is often one of fact, the issue may be resolved as a question of law when reasonable minds can only draw one conclusion from the facts." (*Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1054; see also *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.)

1. Whether There was a Dangerous Condition

Government Code section 830.2, provides:

A condition is not a dangerous condition with the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition caused a substantial risk of injury when such property or adjacent property was used with due care in the manner in which it was reasonable foreseeable that it would be used.

(Gov. Code, § 830.2)

The law imposes no duty on a landowner to repair trivial defects, or to maintain its property in an absolutely perfect condition. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566

(*Stauhoulis*).) "[A] property owner is not liable for damages caused by a minor, trivial or insignificant defect in property." (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*).) "Some defects are bound to exist even in the absence of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents." (*Stathoulis, supra*, 164 Cal.App.4th at p. 566.)

"The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead or prove. The doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury." (*Stathoulis, supra,* 164 Cal.App.4th at p. 567.) "Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment. (*Caloroso, supra,* 122 Cal.App.4th at p. 929; *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704.)

"The legal analysis involves several steps. First the court reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law and grant judgment for the landowner." (*Stathoulis, supra,* 164 Cal.App.4th at pp. 567-568.)

In *Stathoulis,* the plaintiff tripped and fell into shallow holes in a residential street. (*Id*. at p. 563.) The defect constituted gouge marks on a street that the plaintiff was visiting for the first time. (*Id.* at 568.) It was a dry, clear evening and the street was lit by streetlamps. (*Ibid*.) The court reversed summary judgment and found that reasonable minds could differ as to whether the nature and quality of the defect as issue presented a substantial risk of injury. (*Id*. at p. 569-570.)

Here, Plaintiff testified he rode his bike once a week and took the same route from home to work. (Hu Decl., p. 8:1-8.) According to Plaintiff, on the date of the accident, the weather was good and the streets were not wet. (Hu Decl., p.8:17-25.) Plaintiff is unable to identify what caused his fall, and the red line Plaintiff drew on the photograph of the scene he took approximately two weeks after the accident shows that Plaintiff avoided most of the obstructions and only encountered some gravel and

uneven pavement. (Hu Decl., Exh. 1.) On this record, the City meets its initial burden to establish the defect was trivial.

In opposition, Plaintiff argues that the rock, dirt, debris, asphalt, uneven pavement, potholes, and other organic material covering the bike and car lanes were more than a trivial defect because the hazardous conditions created a substantial risk of falling when using the bike lane for its intended purpose of travel. (Opp., p. 7:20-23; Plaintiff's OMF, No. 4.) Here, the bike lane was covered in debris and other materials. (Hu Decl., Exh. 1.) [1] Plaintiff testified had to go into the vehicle lane because the bike lane ended: "I'm – I was – I was riding on the bike lane, and then when I reached to this point, because bike lane is gone and I have to move – I had to arrange my bike to go to the car lane because car lane still completely still okay. So I turn left on my bike to the – to the car lane. At that time, I fell of the bike." (Hu Decl. 15:2-6.)

The Court studied the pictures Plaintiff took approximately two weeks after his accident, and there appears to be significant debris in the form of dirt, small branches/sticks, and rocks in the bike lane. But Plaintiff did not testify that the debris or obstacles in the bike lane caused him to turn into the vehicle lane. Plaintiff turned because the bike lane ended at that point, and according to Plaintiff, it was when he turned out of the bike lane that he fell and slid in the car lane. Also, Plaintiff's pictures illustrate a surrounding rural setting, with trees and fields that makes the debris near the edge of the road where the bike lane is located unsurprising and a reasonably foreseeable part of the road.

However, under the case law it is possible that reasonable minds could come to different conclusions as to whether such obstacles would create a hazard such that there was a substantial risk of injury when the bike lane was used with due care in the manner in which it was reasonably foreseeable that it would be used. Thus, with respect to the issue of triviality, Plaintiff has met his burden to show a triable issue of material fact. As discussed below, however, the problem with Plaintiff's claim is an inability to demonstrate causation and trail immunity.

[1] At his deposition, Plaintiff testified that Exhibit 1 reflected the same conditions as the day he fell. (Hu Decl., p. 11:9-12.)

2. Causation

A plaintiff is required to demonstrate that the dangerous condition in question was a *substantial* factor in causing his or her harm. (See CACI No. 1100.) "If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [internal citation omitted].) The issue of causation, like the existence of a dangerous condition, usually presents a question of fact. (*Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354 (*Capolungo*).) However, the issue can be decided as a matter of law where the facts of a case can permit only one reasonable conclusion. (*Id*.)

The City argues Plaintiff cannot show causation. In support, the City provides Plaintiff's deposition, in which he was asked about a picture he provided of the approximate location of his fall, and appears Plaintiff does not know exactly which of the obstructions caused his fall:

> Q. Okay. And do you recall did the front of your bike, did it go into this pothole here that's at the end of that red line?
>
> A. I don't - - you know, when you - - the accident happened, it happened so fast I - - I didn't have a even chance to look around that time, right, so it's just approximate that's the area I fall off.

(City's Evidence, Exh.1, Hu's Depo, p. 13:5-13.)

The City relies on *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734 (*Buehler*). In *Buehler*, the plaintiff slipped and fell in a supermarket "on an unknown substance or an improperly waxed floor." (*Id*. at p. 732.) The plaintiff did not know what caused her to fall. (*Ibid*.) The appellate court affirmed the summary judgment and reasoned that all she could "argue is that she slipped and fell. She lost her balance for some unknown reason. She did not see anything on the floor which caused her to slip and fall and did not know what caused her to slip." (*Id*. at p. 734.) The court found the facts did not indicate negligence, either directly or indirectly through any circumstances from which it might be inferred. (*Ibid*.) Similarly, here, Plaintiff states he did not have a chance to look around when the accident occurred, and he is unable identify exactly which of the obstructions caused his fall.

Plaintiff also testified that prior to the fall, he was travelling down slope and his speed was fast:

Q. And do you recall or have an estimate for, you know, leading up to the fall, how fast you were going?

A. It's very hard for me to estimate, but as you know, this is a - - it's a big slope from the bridge - - to the point I fell. This is - - bridge cross freeway 101 and the Monterey Belt.

Q. So usually when you go down from a big slope, the speed is fast; but I don't know exactly how fast I was at that time.

(Hu Decl., p. 12:1-9.)

The City meets its burden to show there is no triable issue of material fact regarding causation.

Relying on the following portion of his deposition, Plaintiff contends his fall was caused by one of the hazards.

Q. Okay. And then did you ride your bike around the asphalt and. You know. And then you fell right where this - - the end of the red mark is?

A. Yeah. Approximately that - - that's the area I fell off.

(Hu Depo., p. 13:2-5.)

This portion of the deposition references where Plaintiff fell, not why he fell. Plaintiff testified that he did not have a chance to look around at the time of his fall to see what caused it. (Hu's Depo, p. 13:5-13.) Moreover, the red line Plaintiff drew on his own photograph shows that Plaintiff avoided the debris, the pothole, and other materials in the bike lane and only encountered some gravel and uneven pavement. (Hu Decl., Exh. 1.) On this record, Plaintiff's evidence gives rise to no more than speculation, which is insufficient to meet his burden here. (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

Accordingly, Plaintiff fails to create a triable issue of material fact as to the element of causation, the City has shown that Plaintiff cannot establish an essential element of his claim, and the City is entitled to summary judgment as to this claim. (See *Aguilar,* 25 Cal.4th at pp. 854-855.) As the Court discusses below, trail immunity also applies. Thus, the City's motion for summary judgment is GRANTED as to the fourth cause of action.

3. Trail Immunity

The City argues the remaining causes of action are barred by trail immunity.

Government Code section 831.4 provides:

A public entity, public employee… is not liable for any injury caused by a condition of:

(a) Any paved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.

(b) Any trail used for the above purposes.

(c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirements shall not be construed to be a standard of care for any unpaved pathways or roads.

(Gov. Code, § 831.4, subds. (a)-(c).)

Immunity pursuant to subdivisions (a) and (b) is absolute. (*Astenius v. State of California* (2005) 126 Cal.App.4th 472, 476.) In contrast, immunity under subdivision (c) is conditioned on the public entity reasonably attempting to provide adequate warnings of any dangerous conditions.

Section 831.4, subdivision (b), extends immunity to trails used for the recreational purposes described in subdivision (a), such as fishing, hunting, camping, hiking, riding, riding, including animals and all types of vehicular riding, and water sports and to trails providing access to those recreational activities. (See *Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 229; see also *Montenegro v. City of Bradbury* (2013) 215 Cal.App.4th 924, 929 (*Montenegro*).) A public entity is "absolutely immune from liability for injuries caused by a physical defect of a [recreational] trail." (*Montenegro, supra,* 215 Cal.App.4th at p. 929.)

To determine whether trail immunity applies, the court considers (1) whether the alleged accident occurred on a trail under the accepted definitions of a trail and (2) whether the injury was caused by conditions of the trail. (See *Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1084 (*Amberger-Warren*).) "Whether a property is considered a "trail" under Section 831.4 turns on "a number of considerations," including (1) the accepted definitions of the property, (2) the purpose for which the property is designed and used, and (3) the purpose of the immunity statute. (*Lee v. Department of Parks & Recreation* (2019) 38 Cal.App.5th 206, 211 (*Lee*).)

Under Streets and Highways Code section 890.4, subdivision (b), bike lanes are referred to as Class II bikeways, "which provide a restricted right-of-way designated for the exclusive or semi-exclusive use of bicycles *with through travel by motor vehicles or pedestrians prohibited*, but with vehicle and crossflows by pedestrians and motorists permitted." (Streets and Highways Code, § 890.4, subd. (b) [emphasis added].)

The City contends the area Plaintiff fell was located adjacent to and bounded by the Conservation Area, which forms part of a corridor of land situated between the Santa Cruz Mountains and the Diablo Range. (City's UMF, No. 13.) It further states, the bike lane on which Plaintiff travelled provides access to a construction turnout just meters from the location of his fall. (City's UMF, No. 14.) Thus, the City has provided sufficient evidence to establish the bike lane was a Class II bikeway. Next, the City contends the area Plaintiff fell was within a few feet of a viewing area by the side of the road with a scenic view of the expansive North Coyote Valley Conservation Area. (City's UMF, No. 13.) The area is paved and has room for multiple vehicles to park. It is undisputed that Plaintiff was using the bike lane to get to work. The City contends the purpose of the bike lane, at least in part, was to provide access to the scenic view of the Conservation Area, thus the bike lane itself is scenic as it overlooks the Conservation Area, and the bike lane constitutes a trail within the meaning of Section 831.4. (See *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, 1338; *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 418 (*Armenio*); *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606, 610; *Farham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097, 1101.)

In *Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052, 1059 (*Burgueno*), the appellate court affirmed the application of trail immunity to a path that was used by

students for commuting to and from school and by recreational bicyclists to access the mountain biking paths in the nearby redwood forests above the campus. (*Id*. at p. 1061.) Similarly, here, Bailey Avenue and its bike lane directly connects the Calero County Park, through McKean Road, to the Coyote Creek Parkway. (City's UMF, No. 15.) Bailey Avenue is also situated between the Santa Cruz Mountains and the Diablo Range. (City's UMF, No. 13.) Thus, it is a road on which recreational activities take place, and it provides access to recreational activities. (See also *Armenio, supra*¸ 28 Cal.App.4th at pp. 417-418 [the appellate court ruled that trail immunity under Section 831.4 applies to paved trails on which recreational activity takes place, as well as trails that provide access to recreational activities].)

Applying immunity here also comports with the purpose of the statute, which is to keep recreation property open to the public. (*Amberger-Warren, supra,* 143 Cal.App.4th at p. 1078-1079.)

Plaintiff contends the bike lane is part of the street and highway. (Plaintiff's OMF, No. 16.) However, a street or highway is open to the public for vehicular travel. (Veh. Code, §§ 360, 590.) A bicycle is not considered a vehicle. (Veh. Code, §§ 231, 670.) By definition, a Class II bikeway, is for the exclusive or semi-exclusive use of bicycles and through travel by vehicles or pedestrians is prohibited. Thus, as a class II bikeway, it does not qualify as a street or highway.

Plaintiff further contends the bike lane was designed and is used primarily for connecting the cities of Morgan Hill and San Jose; Bailey Avenue is one of the few roads which provides access to US-101; and the bike lane on Bailey Avenue does not provide access to fishing, hunting, camping, hiking, riding, including animals and all types of vehicular riding, water sports, recreational or scenic areas. (Plaintiff's OMF, Nos. 17-18.) However, Plaintiff relies only on the pictures of the subject area, which are not sufficient to support any of these contentions. Moreover, in response to the City's statement of undisputed facts, Plaintiff does not dispute:

(1) The area on Baily Avenue where Plaintiff fell was located adjacent to and bounded by the North Coyote Valley Conservation Area ("Conservation Area"). The Conservation Area forms part of Coyote Valley, which consists of a corridor of land situated between the Santa Cruz Mountains and the Diablo Range.

(2) The bike lane on which Plaintiff travelled provides access to a constructed turnout just meters from the location of Plaintiff's fall.

(3) Bailey Avenue directly connects the Calero County Park, through McKean road, to the Coyote Creek Parkway.

These undisputed facts demonstrate Plaintiff's position is not supported. Plaintiff fails to provide any admissible evidence in support of his arguments against trail immunity, and fails to create a triable issue of material fact as to the application of trail immunity. Therefore, the City has established that trail immunity applies and because such immunity is absolute, Plaintiff's remaining claims are barred as a matter of law. Thus, the City's motion for summary judgment is GRANTED.