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: May 14, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR 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.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must 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

FOR COURT REPORTERS: 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

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

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Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	22CV405371	Krsto Mirkovski vs David White et al	Plaintiff is ordered to appear and show cause why this case should not be dismissed without prejudice for Plaintiff's failures to appear. If Plaintiff fails to appear, the case will be dismissed.
2	23CV412655	Anh Phan et al vs Kim Mai	Defendant's motion to strike is DENIED. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	21CV381190	Nayoung Lee vs Raul Arias et al	The City of San Jose's Motion for Summary Judgment is GRANTED. Scroll to line 3 for complete ruling. Court to prepare formal order.
4-7	22CV398124	Rachel Reed-Price vs Millan Chaudhary et al	Defendants' motions to compel responses to demand for production (set one) and supplemental interrogatories (set one) from Rakesh and Joceliza are GRANTED. Plaintiff does not appear to have opposed the motions to compel responses to demand for production, but Defendant appears to only seek fees for the special interrogatory motion practice, suggesting the parties resolved the production demands. Turning to fees, the Court disagrees with Plaintiff that it has no discretion to award fees as a sanction for failing to respond to discovery before a motion to compel is filed, and the responding party produces the requested discovery after the propounding party moves to compel. (See *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 408-412 (service of untimely response does not divest judge of authority to hear and grant motion to compel response; whether to proceed with motion when response was untimely is within judge's discretion).) If that were the law, parties could obtain a de facto extension of time to respond to discovery requests and force their opponents to incur unnecessary fees by simply waiting to respond to properly served discovery demands without any consequence—a result that is contrary to every other instruction from the Code of Civil Procedure. If there was no substantial justification for the failure to respond, sanctions are warranted. That is the case here, and the Court thus orders Plaintiff to pay $1020 in fees (the motions were identical and simple) to Defendant within 30 days of service of this formal order, which order the Court will prepare.
8	23CV421034	Weiting Zhan vs Sifang You	Plaintiff's motion to compel responses to special interrogatories is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on February 20, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The interrogatories were served on February 20, 2024. Plaintiff followed up in writing on March 20 and 27, 2024, and, to date, Defendant has not responded. Where, as here, a responding party fails to timely respond to interrogatories, the responding party waives all objections to the interrogatories, including objections based on privilege or on the protection for work product. (Code of Civ. Proc. §2030.290(a).) Both parties are self-represented. Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Accordingly, Defendant is ordered to serve verified, code compliant responses without objections to these interrogatories and to pay Plaintiff $300 in sanctions within 30 days of service of the formal order, which the Court will prepare.
9	18CV334988	FORD MOTOR CREDIT COMPANY LLC vs JOHN ANYOSA et al	Ford Motor Credit Company's motion to set aside dismissal and enter judgment in accordance with the parties' stipulation pursuant to Code of Civil Procedure 664.6 is GRANTED. The dismissal is SET ASIDE. Moving party to submit form of judgment within 10 days of the May 14, 2024 hearing date. This order will be reflected in the minutes.

10	22CV400295	MIN-SUN MOON et al vs HECTOR LEON et al	Plaintiff Barry Gordon's motion for sanctions against Defendant Lula Technologies, Inc. is GRANTED. A notice of motion with this hearing date and time was served on Defendant by electronic mail on April 4, 2024. Defendant failed to file an opposition. "[T]he failure to file an opposition creates an inference that the motion [] is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) On February 20, 2024, the Court ordered Defendant to produce verifications within 10 days of service of the formal order and to pay sanctions $1500 within 30 days of service of the formal order. Defendant failed to comply with the Court's February 20, 2024 order, even after Plaintiff's numerous reminders and attempts to meet and confer. On this record, it appears that Defendant has simply stopped participating in this litigation—failing to comply with the Court's order, to oppose the present motion, or even to Plaintiff's emails. The Court thus agrees that further sanctions are appropriate. Code of Civil Procedure section 2031.310(i) provides: "if a party fails to obey an order compelling further [discovery] responses, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." (See also *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) There are four types of terminating sanctions: (1) striking pleadings in whole or in part; (2) staying further proceedings by a party until it obeys a discovery order; (3) dismissing the action or part of it; and (4) rendering a default judgment. (Code of Civ. Pro. §2023.030(d).) An issue sanction either orders that designated facts be taken as established or prohibits a party from supporting or opposing designated claims or defenses. (Code of Civ. Pro. §2023.030(b); *Kuhns v. State* (1992) 8 Cal.App.4th 982, 989; *Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109-110. The trial court has broad discretion to impose discovery sanctions; a judge's sanction order will not be reversed absent "a manifest abuse of discretion that exceeds the bounds of reason." (*Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1191.) However, a sanction should not provide a windfall to the other party by putting that party in a better position than it would have been in if the party had obtained the discovery. (*Kwan Software Eng'g, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74-75.) The basic purpose of a discovery sanction is to compel disclosure of discoverable information. (*Rutledge*, 238 Cal.App.4th at 1193.) Sanctions may not be imposed solely to punish the offending party. (*Id.*; *Kwan*, 58 Cal.App.5th at 74-75.) First, the Court awards Plaintiff its attorneys' fees and costs in the amount of $435. As there was no opposition, there was no need for reply or hearing. Next, the Court agrees that further sanctions are warranted but disagrees that striking the entire answer and entering default is appropriate given the February 20, 2024 order concerned verifications and monetary sanctions. Plaintiff does not propose any issue or evidentiary sanctions. The Court concludes striking Defendant's affirmative defenses is an appropriate sanction at this juncture. Further, within ten (10) days of service of this formal order, Defendant is ordered to (1) serve verifications to its written discovery responses, (2) pay the $1500 in sanctions ordered to be paid to Plaintiff in the Court's February 20, 2024 order, and (3) pay Plaintiff an additional $435 in sanctions. Defendant's affirmative defenses are also stricken. Defendant is cautioned that further failure to comply with the Court's orders will result in Defendant's entire answer being stricken and default being entered against it. Court to prepare formal order.

11	22CV405359	Onemain Financial Group, LLC vs Cari Love	Onemain Financial Group's motion to set aside dismissal and enter judgment in accordance with the parties' stipulation pursuant to Code of Civil Procedure 664.6 is GRANTED. The dismissal is SET ASIDE. Moving party to submit form of judgment within 10 days of the May 14, 2024 hearing date. This order will be reflected in the minutes.
12	23CV412126	MITTHAN MEENA vs SRINIVAS AKELLA et al	Plaintiff's motion to file an amended complaint to add Netskope, Inc. as a Defendant is DENIED WITHOUT PREJUDICE. The motion does not include a copy of the proposed amended complaint, a delineation of what additional allegations Plaintiff seeks leave to assert, or an affidavit under oath detailing why the proposed amendment is proper. In other words, the deficiencies outlined in the opposition are correct. And, while Plaintiff is self-represented, self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Accordingly, this motion is denied without prejudice. Court to prepare formal order.
13	22CV394761	**TWO JINN, INC. vs NOE PEREZ et al	The Court heard an identical request on May 9, 2024, and the Court ordered $165 per pay period be garnished. That order stands.
14	23CV427633	David Arken et al vs Tesla Energy Operations et al	Petitioner's motion for attorneys' fees to be added to their judgment is GRANTED. The Court served its formal ruling confirming the arbitration award on February 14, 2024. In that formal ruling, the Court states: "It does not appear, however, that Claimants ever submitted the attorney fee information to the arbitrator for the arbitrator to affix an amount of fees 'according to proof." Accordingly, there is no fixed amount of fees for this Court to confirm." On February 16, 2024, Petitioners filed a "Notice of Hearing on Petition to Confirm Arbitration Award: Proof of Filing Attorney Fee Billing." The Court reads that "Notice" as a motion for reconsideration or a motion to correct the judgment, which the Court finds timely and properly submitted, since the Court did not have the documentation showing that the attorney fee information had been timely submitted to the arbitrator and therefore the Court did have the ability to confirm that attorneys' fees the arbitrator plainly ordered in the award. The Arkens appeared at the hearing on the petition to confirm and could have provided the Court with this information then but for the numerous procedural issues that hampered their ability to prepare for and conduct the hearing, which issues were cause by problems with court processes and not the Arkens' lack of diligence. Also notable is that Tesla knows the Arkens timely submitted these materials to the arbitrator and knows the Court's sole basis for not earlier confirming these fees and including them in the judgment was its plainly mistaken belief that they had not. Tesla's position on this issue is disingenuous, at best. Accordingly, Petitioners' request to correct the Court's February 14, 2024 order confirming the arbitration award and its February 20, 2024 judgment is GRANTED. Petitioners are ordered to promptly submit an amended judgment for the Court's review and signature that includes their attorneys' fees (in full) and costs. Court will prepare a formal order with these rulings.
15	23CV427309	Jorge Lopez vs Larry Widman	This matter is set for a prove up hearing on June 3, 2024 at 1:30 in Department 7.

Calendar line 2
Case Name: *Anh Phan, et al. v. Kim Mai*
Case No.: 23CV412655

Before the Court is Defendant Kim Mai's motion to strike portions of Plaintiff Linda Phan, Anh Tuan Phan, and the Estate of Hanh Thi Ly (collectively, "Plaintiffs") first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises out of a car accident. According to the FAC, on February 10, 2023, at approximately 5:39 a.m., Mai struck Ly as she was crossing Merrill Avenue with an assistive device. (FAC, p. 6.) Instead of stopping to check on her or calling emergency services, Mai fled the scene. (*Ibid*.) Emergency services were only contacted when another driver came upon Ly's body and she was pronounced dead at 6:05 a.m. (*Ibid*.) After fleeing the scene of the incident, Mai filed a false report claiming that the damage to her vehicle was caused by a shopping cart. (*Ibid*.)

Plaintiffs initiated this action March 6, 2023, and on January 22, 2024, filed their FAC asserting (1) motor vehicle negligence; (2) general negligence; (3) general negligence (survival action); and (4) intentional tort. On March 15, 2024, Mai filed the instant motion which Plaintiffs oppose.

II. Legal Standard

Under section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence

showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

A motion to strike portions of a complaint or petition may be brought on the ground that the allegations at issue are "irrelevant" or "improper." (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See Code Civ. Proc., § 431.10, subds. (b), (c).) Generally speaking, motions to strike are disfavored and cannot be used as a vehicle to accomplish a "line item veto" of allegations in a pleading. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683 (*PH II, Inc.*).) However, where irrelevant allegations are "scandalous, abusive, disrespectful and contemptuous," they should be stricken from the pleading. (*In re Estate of Randall* (1924) 194 Cal. 725, 731.)

"While under Code of Civil Procedure section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so. [Citation.] Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike. [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1281.)

Mai moves to strike the following portions from the FAC:

(1) "Intentional Infliction of Emotional Distress (p.3, 10 c);

(2) "Punitive/Exemplary Damages," and "Intentional Infliction of Emotional Distress" (p.3, 11 g);

(3) "Punitive Damages" (p.3, 14 (a)(2));

(4) "Plaintiffs are also claiming punitive damages as part of the survival action" (p.5, ¶ 4.)

(5) Page 6, Ex-1 in its entirety;

(6) Page 6, Ex-2 in its entirety;

(7) Page 6, Ex-3 in its entirety; and

(8) Page 7, IT-1 in its entirety.

III. Analysis

A. Fourth Cause of Action: Intentional Infliction of Emotional Distress

Mai moves to strike the fourth cause of action for failure to state sufficient facts to support the claim. However, a motion to strike is not the appropriate procedural vehicle to strike a claim in its entirety. "[I]t is improper for a court to strike a whole cause of action of a pleading under Section 436…Where a whole cause of action is the proper subject of a pleading challenge, the court should sustain a demurrer to the cause of action rather than grant a motion to strike." (*Quiroz v. Seventh Ave Center* (2006) 140 Cal.App.4th 1256, 1281.) Mai did not file a demurrer and cannot use the motion to strike to challenge the entire claim. Thus, Mai's motion to strike the fourth cause of action is DENIED.

B. Punitive Damages

To properly plead a claim for punitive damages, a plaintiff must allege the defendant was guilty of malice, oppression, or fraud and the ultimate facts underlying such allegations. (Civ. Code, § 3294, subd. (a); *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Malice is defined as, "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." (Civ. Code, § 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Despicable conduct," in turn, has been described as conduct that is "so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.4th 306, 331.) Finally, "fraud" is defined within the statute as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).)

Allegations that a defendant exhibited a conscious disregard for the safety of others are sufficient to show malice. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895-896.) To properly allege punitive damages in a motor vehicle accident action, a plaintiff needs to "establish that the

defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Id*. at p. 896.) Moreover, conclusory allegations are not sufficient to support a claim for punitive damages. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Plaintiffs allege Mai struck Ly as she was lawfully crossing the street with an assistive device. (FAC, pp. 5-6.) Rather than checking on her or calling emergency services, Mai fled the scene. (*Ibid*.) Mai subsequently filed a false report claiming that the damage to her vehicle was caused by a shopping cart. (*Ibid*.) Plaintiffs further allege Mai knew she hit Ly, that Ly was seriously injured, and in need of emergency medical assistance. (FAC, p. 6.) Nevertheless, Mai fled the scene and left Ly to "live her last moment of life in terror." (*Ibid*.) Based on the foregoing, Plaintiffs allege Mai's conduct prior to and after the incident was despicable and done with a willful and knowing disregard of Ly's rights and safety. (*Ibid*.) They further allege Mai was aware of the probable dangerous consequences of her conduct, and she deliberately failed to avoid those consequences, which resulted in Ly's death. (*Ibid*.) Plaintiffs' allegations are sufficient to allege a conscious and deliberate disregard of the safety of others.

Mai contends Plaintiffs do not meet the clear and convincing evidence standard. However, the Court does not consider evidence for a motion to strike. In ruling on a motion to strike, the Court considers the allegations as a whole and assumes the truth of all well-pleaded allegations. (*Turman, supra,* 191 Cal.App.4th at p. 63; see also Code Civ. Proc., § 437, subd. (a).) Plaintiffs allege sufficient facts to support their request for punitive damages. Thus, the motion to strike Plaintiffs' allegations regarding punitive damages is DENIED.

Calendar line 3
Case Name: *Nayoung Lee v. Raul Arias, et al.*
Case No.: 21CV381190

Defendant City of San Jose ("City") moves for summary judgment or in the alternative, summary adjudication against Plaintiff Nayoung Lee. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is an action for negligence and premises liability. On August 10, 2020, Plaintiff was walking on the Guadalupe River Trail, which is used by bicyclists and pedestrians. (Complaint, p. 5.) While she was walking, she was struck from behind by defendants Raul Arias and Jose Mendoza who were travelling at high speeds on their bicycles. (*Ibid.*)

Plaintiff filed her complaint on March 24, 2021 asserting (1) general negligence against Arias and Mendoza and (2) premises liability against the City. On January 20, 2023, City filed the instant motion, which Plaintiff opposes.

II. Judicial Notice

City requests judicial notice of the city charter, but City cites no basis for the Court to take judicial notice. Nevertheless, judicial notice of a city charter is proper under Evidence Code section 452 (b). (See also *The Kennedy Com. v. City of Huntington Beach* (2017) 16 Cal.App.5th 841, 852 [court may take judicial notice of a city charter or municipal code].) Thus, City's request is GRANTED.

III. Evidentiary Objections

A. The City's Objections

City objects to Plaintiff's responses to The City's Separate Statement of Undisputed Material Facts ("City's UMF") and certain of Plaintiff's submitted evidence.

The objections do not need to be ruled upon because they do not comply with Rule of Court 3.1354. Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (*Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections

presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].) City's objections do not comply with Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

IV. Legal Standard for Summary Judgment

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.)

Where a plaintiff (or cross-complainant) seeks summary judgment, the burden is to produce admissible evidence on each element of a "cause of action" entitling him or her to judgment. (Code Civ. Proc. § 437c, subd. (p)(1); See *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287, disapproved on other ground in *Aguilar*; *S.B.C.C., Inc. v. St. Paul Fire & Marine, Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) This means that plaintiffs, who bear the burden of proof at trial by a preponderance of evidence, therefore "must provide evidence that would require a reasonable finder of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law but would have to present his evidence to a trier of fact." (*Aguilar, supra*, at 851; See also *LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776 [burden is on plaintiff to persuade court there is no triable issue of material fact].)

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*, 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*, 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.)

City moves for summary judgment on the grounds that Plaintiff cannot establish the existence of a dangerous condition, there is no causal relationship between the injury and the alleged dangerous condition, and City is not liable because of "trail immunity" and "design immunity." (Notice for Summary Judgment, p. 2.)

V. Analysis

A. Parties' Undisputed Material Facts

City's undisputed material facts are as follows: the Guadalupe River Trail ("GRT") is a recreational and commuter trail on land owned by the Santa Clara Valley Water District (the "District") and maintained by the City pursuant to a Collaborative Action Plan and Agreement ("CAP") and Master Plan between the two entities. (City's UMF, No. 1.) City is a California Charter City organized under the State constitution. (City's UMF, No. 2.) On August 10, 2020, at approximately 8:00 p.m., Plaintiff alleges she was struck from behind by a cyclist traveling at high speeds while she walked down the ramp of the Montague Expressway Undercrossing (the "Undercrossing"). (City's UMF, No. 3.) The Undercrossing is part of the Lower GRT Bikeway and goes underneath Montague Expressway. (City's UMF, No. 4.) The Guadalupe Trail Bikeway is a 6.4-mile paved trail, developed for recreational uses such as walking, running, and biking; it is adjacent to the Lower Guadalupe River ("LGR") that extends from Interstate 880to Gold St. in Alviso. (City's

UMF, Nos. 12-13.) It is part of the larger Guadalupe Trail System, which, when complete, will be a 25-mile paved trail through City. (*Ibid*.)

The Guadalupe Trail System supports two-way traffic and has a yellow stripe down the center as a divider. (City's UMF, No. 14.) Only pedestrians, bicyclists, and people using other forms of non-motorized transportation are permitted on it. (*Ibid*.) Entering and exiting is accomplished through trailheads located at Gold St., Tasman Dr., River Oaks Parkway, Montague Expressway, Trimble Rd., Green Island Bridge Road, Airport Parkway, Skyport Dr. and from the continuing paved trail to the south which extends through downtown San Jose. (City's UMF, No. 15.) All roads intersecting with the Guadalupe Trail Bikeway are grade-separated. (*Ibid*.)

At the time of Plaintiff's accident, she was using the trail for recreational purposes and there were signs of the trail instructing cyclists not to exceed 15 MPH and to yield to pedestrians. (City's UMF, Nos. 5, 11.) Plaintiff estimates that the cyclist that struck her was traveling between 20 and 32 miles per hours at the time of the accident. (City's UMF, No. 6.) The cyclist failed to yield to Plaintiff when he struck her from behind. (*Ibid*.) After striking Plaintiff, the cyclist fled from the scene of the accident and the San Jose Police Department is treating the incident as a hit and run. (*Ibid*.) Plaintiff has not proffered any evidence that the condition of the GRT increased or intensified the risk of injury from the cyclist's conduct. (City's UMF, No. 7.)

In her deposition, for the first time, Plaintiff claimed the design of the GRT led to her accident, specifically, the fact that the Undercrossing went below grade past Montague Expressway rather than at grade or over. (City's UMF, No. 31.) City is aware of no reasonable modifications that could be made to the Montague Undercrossing which would improve pedestrian safety as it relates to speeding cyclists without compromising the safety of the cyclists, or that would prove infeasibly expensive, or that would run afoul of State and Federal laws around accessibility or the California Highway Design Manual Standards. (City's UMF, No. 32.) There have been no other reported pedestrian and cyclist collisions at the Undercrossing or on GRT. (City's UMF, No. 33.)

According to Plaintiff, the design specifications for the Undercrossing indicate that warnings signs were *required* to be installed near the Undercrossing warning trail users of the sharp declines

that approach it. (Plaintiff's Undisputed Material Facts ("AMF"), No. 34.)[1] Signs stating, "Downhill reduce speed ahead" were required to have been installed on both sides of the Undercrossing. (Plaintiff's AMF, No. 35.) Signs stating, "Downhill, Curve Right," and "Downhill, Curve Left," were also required to be installed on either side of the Undercrossing. (Plaintiff's AMF, No. 36.) City deviated from the approved trail design when it failed to erect the warning signs proper to the trail's descent into the Undercrossing. (Plaintiff's AMF, No. 37.) The GRT descends sharply as it approaches the Undercrossing, which causes cyclists to speed up as they approach the Undercrossing. (Plaintiff's AMF, No. 1.) At these increase speeds, cyclists are then thrust into the dark corridor of the Undercrossing with limited visibility. (Plaintiff's AMF, No. 2.) The slight curve of the north of the Undercrossing also limits visibility, as does the Undercrossing itself due to shadowing. (Plaintiff's AMF, No. 3.) The dangerous condition of the Undercrossing would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care. (Plaintiff's AMF, No. 4.)

B. Second Cause of Action: Premises Liability

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach of a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "Premises liability is a form of negligence … and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition was created by a reasonably foreseeable risk of the kind of injury which occurred, and that either:

[1] It appears the number for Plaintiff's AMFs continued from the City's UMFs, before starting from 1 so the Court's citations reflect Plaintiff's Separate Statement.

(a) A negligent or wrongful omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(Gov. Code, ¶ 835.)

1. Existence of a Dangerous Condition

Government Code section 830, defines a "dangerous condition," as "a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when such 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).) As further explained in Government Code section 830.2, "[a] condition is not a dangerous condition within 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 created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

City contends Plaintiff cannot prove the Undercrossing was being used with due care at the time of the accident because the cyclist was speeding and failed to yield to her in violation of the posted trail rules and the law. (City's UMF, Nos. 3, 5-6.)

It is undisputed that the cyclist did not exercise due care. (Opp., p.4:13.) However, the remaining issue is whether the alleged dangerous condition of the Undercrossing increased or intensified the risk of Plaintiff's injury. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348 [A public entity may be liable for a dangerous condition of public property even where the immediate cause of the plaintiff's injury is a third party's negligent or illegal act if some physical characteristic of the property exposes its users to increase danger from third party negligence or criminality]; see also *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 149 [same].)

City contends Plaintiff cannot show evidence of an increased or intensified risk created by the conditions of the Undercrossing besides contentions regarding the design of the Undercrossing. (City's UMF, Nos. 7, 31; MPA, p.7:27-8:2.) Thus, it cannot establish a triable issue of material fact as to whether there was a dangerous condition. As a result, the burden shifts to Plaintiff to establish there is a triable issue of material fact as to whether there was a dangerous condition.

Plaintiff provides her own declaration in which she states, the Undercrossing is located at the bottom of a sharp, downhill pitch of the GRT and cyclists pick up speed as they approach it. (Plaintiff's response to the City's UMF, No. 7; Lee Decl., ¶ 9.) She further states cyclists are known to shoot down and pick up enough speed so that they can generate enough speed to ride up the hill on the other side. (*Ibid*; Lee Decl., ¶ 10.) In doing so, cyclists are thrust into the dark corridor of the Undercrossing with limited visibility. (*Ibid*; Lee Decl., ¶ 11.) City contends Plaintiff improperly provides expert opinion, however, it appears Plaintiff's statements and observations are based on her personal knowledge as a lay person who used the GRT "approximately 4 times per week" and was "highly familiar with the GRT and the manner in which cyclists and pedestrians [used] the trail." (Lee Decl., ¶ 5.)

Plaintiff also provides San Jose Police Department records of two fatalities which occurred under GRT undercrossings. The first occurred on May 15, 2020, on the Guadalupe Creek Bike Trail, north of Julian Street. (Plaintiff's Exh. 1 (part one), p. 2.)[2] The cyclist was moving southbound and he approached a blind left curve where the victim was traveling in the opposite direction on a bicycle and they collided with each other. (*Id.* at p. 3.) The first cyclist sustained blunt force head trauma and passed away. (*Id*. at pp. 3-4.) The reporting officer noted:

> The Guadalupe River Trail was relatively straight and level, prior to it curving and descending under the railway bridge with no obvious visibility problems. As the trail approaches the curve to the right under the railroad bridge northbound, there is a wall on the east side of the trail obstructing the view of any southbound traffic. The same applies to the southbound traffic with the east wall obstructing the view to the left for

[2] Both parties marked their exhibits using letters. To avoid confusion, the Court will refer to Plaintiff's exhibits with the corresponding numbers.

northbound traffic. In essence the east wall along the northeast curve under the railway bridge is a "blind" curve.

The trail also had a significant decrease in elevation as it passed below the overpass at the river level, in both directions. Bicycles could greatly increase speed as they traverse the downgrade. There was no posted speed limit along the trail. All posted signs, the roadway surface, and all associated roadway markings appeared to be in good condition.

(*Id*. at p. 6.)

The second occurred on June 4, 2020, near the Tasman Drive overpass. (Plaintiff's Exh. 1 (part two) p. 2.) It was a hit and run collision between two cyclists. (*Id*. at p. 2.) The first cyclist was at the bottom of the overpass, and he drifted into the northbound lane, directly into the path of another cyclists and neither of them had time to stop or take evasive action. (*Ibid*.) The second cyclist passed away due to his injuries. (*Id*. at p. 3.) The reporting officer noted:

At the date and time of the collision, the Guadalupe River Trail was a relatively north/south 11-mile-long paved bicycle and jogging pathway on an elevated levee along both sides of the Guadalupe River. It was open to the public and jointly maintained by the City of San Jose and the Santa Clara Valley Water District. Each lane was about six feet wide and included a three feet wide shoulder. The lanes of traffic were divided by a painted dashed yellow line and the shoulder was marked with a painted solid white line. Vehicles were not allowed on the trail.

The Guadalupe River Trail was relatively straight with no obvious visibility problems. As the trail approached the Tasman Drive overpass from each direction, it began a slight curve to the west which could limit visibility of approaching traffic. The trail also had a significant decrease in elevation as it passed below the overpass at river level. Bicycles could greatly increase speed as they traverse downgrade. There was no posted speed limit along the trail. All posted signs, the roadway surface, and all associated roadway markings appeared to be in good condition.

(*Id*. at p. 11.)

Neither of these incidents occurred at the Undercrossing, and Plaintiff submits no reports of any incident at the Undercrossing. However, Plaintiff provided the deposition of Liz Sewell, who works for the Parks and Recreation department. (Plaintiff's Exh. 5, Sewell Depo., 7:2-3.)[3] When asked if the Undercrossing was similar to the Tasman underpass, where an incident did occur, she stated, "I would agree." (Sewell Depo., p. 20:19- 21:12.)

Plaintiff also contends the Undercrossing was missing warning signs to reduce speed going downhill as required by the City's design specification. (Plaintiff's AMF, Nos. 34-36; Exh. 4.) At the time of the incident, there was only a sign at the entrance telling cyclists not to exceed 15 miles per hour and to yield to pedestrians, but it was placed too high and the font was too small for passersby to read it. (Lee Decl., ¶ 6.) City argues these lack of signage arguments should be disregarded because they was not specifically alleged in the Complaint.

"Pleadings play a key role in a summary judgment motion… [their] function is to delimit the scope of the issues… and to frame "the outer measure of materiality in a summary judgment proceeding." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.) Thus, "the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*." (*Ibid*.) Furthermore, "the papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." (*Ibid*.) And "a claim alleging a dangerous condition may not rely on generalized allegations but must specify in what manner the condition constituted a dangerous condition." (*Cerna, supra,* 161 Cal.App.4th at p. 1347.)

Plaintiff alleged City "negligently failed to warn [her] of the existing dangerous condition caused by speeding cyclists." (Complaint, p. 5, L-5.) Thus, the theory of liability was clearly alleged, and it does not appear that these arguments are outside the limitations of the pleading.

[3] City submits a declaration from Sewell, which states she is a Trail Manager in the Department of Parks, Recreation, and Neighborhood Services and oversees Capital improvements to the existing and planned San Jose Trail Network, including the Lower GRT Bikeway. (Sewell Decl., ¶¶ 1-2.)

Accordingly, there is a triable issue of material fact as to whether there was a dangerous condition on the trail which increased or intensified the risk of injury. As a result, summary judgment cannot be granted on this basis.

2. Design Immunity

City contends it is immune from liability under Government Code section 830.6.

Design immunity under Section 830.6 is an affirmative defense that the public entity must plead and prove. (*Cameron v. State* (1972) 7 Cal.3d 318, 325.) "The rationale for [this defense] is to prevent a jury from simply second-guessing the decision of a public entity by reviewing the identical question of risk that had previously been considered by the government officers who adopted or approved the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.App.4th 63, 69 [internal citations omitted] (*Cornette*).) "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette, supra,* 26 Cal.App.4th at p. 66.) "The first two elements, causation and discretionary approval, may only be resolved as issues of law if the facts are undisputed. The third element, substantial evidence of reasonableness, requires only evidence of solid value that reasonably inspired confidence." (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550.)

Plaintiff testified at her deposition that the design of the GRT led to her accident, specifically that the Undercrossing went below grade past the Montague Expressway rather than at grade or over. (City UMF, No. 31; Plaintiff's Depo., P. 45:2-12.) City offers Sewell's declaration, in which she states in 2003, the City and the District entered a CAP to open and improve the District's maintenance records for recreational use, which would be maintained by the City. (Sewell Decl., ¶ 11.) After they entered the CAP, City created a Master Plan for the Lower GRT, which provided for the development for a multi-use recreational commuter trail within and along the Lower Guadalupe River ("LGR"). (Sewell Decl., ¶ 12.) City hired C2HM Hill, an architectural firm, to design the bikeway trail to link to the existing trail and Undercrossing. (Sewell Decl., ¶ 13.) On June 21, 2005, the City Council of the City of San Jose approved the Master Plan. (Sewell Decl. ¶ 15; Exh. E.) The alignment of the project

followed existing and planned maintenance roads associated with the existing LGR flood projection project. (City's UMF, No. 24; Sewell Decl., ¶ 13.) The maintenance roads were surfaced with compacted base rock and typically follows the top of levees, channel banks, and undercrossings at roadway intersections. (*Ibid*.) When the District developed the flood projection project in the mid to late 1990s, it anticipated the desire for a recreational trail system that would link Norman Y. Mineta San Jose International Airport, Golden Triable businesses and residences, and the community of Alviso. (*Ibid*.) As a result, the levees have been designed with sufficient width and slopes to comply with County of Santa Clara and Americans with Disabilities Act ("ADA") guidelines respectively. (*Ibid*.)

Furthermore, the Guadalupe Bikeway Trail conforms to the California Highway Design Manual Standards, informed by American Association of State Highway and Transportation Officials ("AASHTO") standards. (City UMF, No. 25; Sewell Decl., ¶ 14; Exh. D.) As such, the Guadalupe Bikeway Trail is required to meet accessibility requirements for pedestrians as it related to the width and grade of the trail, as well as grade separation where motor vehicle cross traffic and bicycle traffic is heavy, such as the Undercrossing. (*Ibid*.) Per the Highway Manual Standards, the installation of "speed bumps," gates, obstacles, posts, fences, or other similar features intended to cause bicycles to slow down are not to be used. (*Ibid*.) These standards were considered when designing the Master Plan for the LGR. (*Ibid*.)

The Undercrossing goes underneath Montague Expressway, which is a County of Santa Clara road or highway and is part of the GRT. (City UMF, No. 30.) As the Undercrossing, the Montague Expressway is classified as a divided roadway, i.e., a road divided by means of intermittent barriers, curbs, double-parallel lines, or other markings which per United States Department of Transportation guidance would require substantial crossing improvements to precent an increase in pedestrian crash potential. (*Ibid.*) City establishes the elements of design immunity. (*Cornette, supra,* 26 Cal.App.4th at p. 66.) Thus, the burden shifts to Plaintiff to establish a triable issue of material fact exists as to the application of design immunity.

According to Plaintiff, the design specifications for the Undercrossing indicate that warnings signs were *required* to be installed near the Undercrossing to warn trail users of the sharp declines that

approach it. (Plaintiff's AMF, No. 34; Exh. 4.) Plaintiff further avers that the required signs: (1) were not on the GRT at the time of the accident; and (2) they have not been installed since Plaintiff's accident. (Plaintiff's AMF, No. 38.)

City argues Sewell's testimony regarding the design plans are speculative because she did not work for the City until May 2020 so she was not involved in the design of the trail, and Plaintiff did not tell her whether she was being shown the bid plan or the final plan.

Sewell's deposition testimony states:

> Q. Okay. All right. I think I understand. So as far as you know, this is the final drawing for the construction of the trail near and around Montague Express Underpass; is that right?
>
> A. I think so. There's a stamp on it in the bottom right corner, it looks like, from 2011. I think that's an approval stamp...
>
> A. And in that case, this *would be the final design set*.

(Sewell Depo., p. 24: 1-10 [emphasis added].)

Sewell was later asked if the designs contained mandatory construction features, and she testified:

> A. I don't know if they're technically required but I've never seen a – they must be required. Trails are as complex as streets are in many cases. So we need to make sure they're graded appropriately and that they're signed properly.

(Sewell Depo., p. 26:25-27:5.)

City contends Plaintiff could have asked Yves Zsutty, who produced the design documents in anticipation of his deposition on March 27, 2024. (Stephanie Davin Decl., ¶ 3.) Neither party provided Zsutty's testimony to the Court. Sewell's testimony as to the designs was speculative, and Plaintiff submits no other evidence regarding City's purported deviation from the designs. Therefore, she fails to raise a triable issue of material fact as to whether design immunity applies here.[4]

[4] Plaintiff presents argument regarding sign immunity in the event that City raises such an argument in the reply. City does not raise such argument and even if it did, the Court would not consider it because it was not mentioned in the moving papers. (See *Tellez v. Rich Voss Trucking Inc*. (2015) 240 Cal.App.4th 1052, 1066 [courts do not consider points raised for the first time in a reply brief].) Therefore, the Court does not need to address Plaintiff's argument as to sign immunity.

3. Trail Immunity

"Under Civil Code section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warnings of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100.) Section 846 does not apply to public entities. (*Delta Farms Reclamation District v. Superior Court* (1983) 33 Cal.3d 699.) However, Section 846 does not create an independent duty of care or theory of liability. It is merely an exception to the immunity and defense under section 846. Thus, the count is subject to Government Code section 835 and the related trail immunity under Government Code section 831.4.

The City contends it is immune from liability under Government Code section 831.4, which provides:

> A public entity, public employee… is not liable for any injury caused by a condition of:
>
> (a) Any unpaved 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.

(Gov. Code, § 831.4, subds. (a)-(b).)

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. (*Treweek v. City of Napa* (2000) 85 Cal.App.4th 221, 229 (*Treweek*); see also *Montenegro v. City of Bradbury* (2013) 215 Cal.App.4th 924, 929 (*Montenegro*).) Immunity under Section 831.4 applies if the property on which the accident occurred was an integral part of a bike path or trail. (*Treweek, supra,* 85 Cal.App.4th at pp. 232-233 [indicating that immunity applies to footbridges, wooden walkways, stairways, ramps or other constructions that are part of and essential to the ordinary use of an immunized trail]; *Prokop, v. City of Los Angeles (2007)* 150 Cal.App.4th 1332, 1338 [finding a gateway to or from a bike path to be an integral part of bike path].)

To determine the applicability of trail immunity, 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. (*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, Class I bikeways are "bike paths or shared use paths," which "provide a completely separate right-of-way designated for the exclusive use of bicycles and pedestrian with crossflows by motorists minimized. (Streets and Highways Code, § 890.4, subd. (a).) The GRT supports two-way traffic and has a yellow stripe down the center as a divider. (City's UMF, No. 14; Sewell Decl., ¶ 5.) Only pedestrians, bicyclists, and people using other forms of non-motorized transportation are permitted on the GRT. (*Ibid.*) With the exception of motorized wheelchairs, motor vehicles are not permitted. (*Ibid.*) Thus, the GRT is a Class I bikeway under Section 890.4.

Plaintiff argues the legislative history of Section 831.4 indicates that it was never intended to apply to paved trails and the Court should extend the California Supreme Court's ruling in *Tansavatdi*

v. City of Rancho Palos Verdes (2023) 14 Cal.5th 639, 647 (*Tansavatdi*) to this case. (Opp., p. 12:19-24.)

Courts have repeatedly held "the nature of the trail's surface is irrelevant to questions of immunity" under section 831.4, subdivision (b). (See *Armenion v. County of San Mateo* (1994) 28 Cal.App.4th 413, 418 (*Armenio*).) In *Armenio*, the plaintiff was injured on a paved bicycle path. (*Id*. at p. 415.) The trial court found that the defendant was immune based on Section 831.4 and granted summary judgment in its favor. (*Id*. at p. 416.) The plaintiff argued section 831.4, subdivision (b), did not apply to paved trails otherwise Section 831.4, subdivision (c), would not be needed. (*Id*. at p. 418.) The appellate court rejected the argument and explained, "subdivision (c), is not concerned with property that public entities own in fee, but with easements granted to public entities specifically to provide access to unimproved property." (*Ibid*.) The court held, "unlike [Section 831.4, subdivision (a)], which refers specifically to 'unpaved' roads, and subdivision (c), which refers specifically to 'paved' trails, paths, etc, subdivision (b), refers to 'any' trail. The logical inference of the all-encompassing 'any' in subdivision (b), particularly in relationship to the limiting adjectives in its sister subdivisions, is that the nature of the trail's surface is irrelevant to questions of immunity." (*Ibid*.)

Farham v. City of L.A. (1998) 68 Cal.App.4th 1097 (*Farham*) involved a bicyclist who was injured when he was riding on a paved bike path. (*Id*. at p. 1099.) The trial court granted the defendant's motion for judgment on the pleadings under Section 831.4. (*Ibid*.) Just as in *Armenio*, the plaintiff argued Section 831.4 did not apply to a paved trail. (*Id*. at p. 1101.) The appellate court reviewed the legislative history of Section 831.4 and rejected that argument, reasoning, "as originally enacted, subdivision (b)'s application was limited to 'any hiking, riding, fishing, or hunting trail.' The introductory paragraph to Section 831.4 was subsequently amended to include 'a grantor of a public easement' as being entitled to immunity under the statute. The stated purpose was to encourage people to grant public easements by giving liability immunity. (*Id*. at pp. 1101-1102.) The court further stated, "subdivision (b), was amended from 'any hiking, riding, fishing or hunting trail' to 'any trail used for the above [subdivision (a)] purposes.'" (*Id*. at p. 1101.) Then "in 1979, Section 831.4, subdivision (c), was added in to encourage governmental entities to accept easements for trails, etc., without fear of tort liability." (*Id*. at p. 1102.)

> It is true that part of the legislative history—depending on who is doing the analysis—shows a concern with total immunity over only unpaved roads or trails, and a more qualified immunity (as now expressed in Section 831.4, subdivision (c)) for paved trails. However, the statute went through a variety of drafts as to subdivision (b) and (c) before its final form. After considerable input from attorneys, cities, and counties, the final draft gave total immunity for *any* trail used for recreational access, and a more limited immunity to paved trails, etc., on an easement that provides access to unimproved property. The Legislature could have easily chosen to make subdivision (b)'s "any trail" subject to the same warnings requirements as subdivision (c) and opted not to do so.

(*Id*. at p. 1102.)

Thus, the law is settled that Section 831.4, subdivision (b), applies to both paved and unpaved trails, included the GRT.

Plaintiff relies on *Milligan v. City of Laguna Beach* (1983) 34 Cal.App.3d 829 (*Milligan*) in support of her argument that those cases were wrongly decided. In *Milligan*, the plaintiffs brought suit after several eucalyptus trees that were growing on the city's property fell during a storm and caused injury to their residence which was on adjacent property. (*Id*. at p. 831.) The city argued it was immune from liability under Government Code section 831.2, which provides, "neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach." (*Ibid*; Gov. Code, § 831.2.) The California Supreme Court examined the legislative history of Section 831.2 and concluded that the statute was not enacted to protect the government from this type of liability. (*Id*. at p. 833.) It held that the statute's legislative comments made it plain that the statute "has nothing to do with an injury sustained by an adjacent landowner from a tree on government land." (*Ibid*.) *Milligan* is distinguishable because it addressed a different statute and completely different circumstances.

Plaintiff further argues Government Code section 831.7, which was adopted in 1983, supports her assertion that Section 831.4 does not apply to paved trails. (Opp., p. 14:16-23.) Section 831.7

provides a public entity immunity for enumerated hazardous activity. Plaintiff argues that Section 831.7, subdivision (b)(3), excluded "riding a bicycle on paved pathways, roadways, or sidewalks", thus, paved trails are exempt from liability under Section 831.4, subdivision (b). She contends her argument is supported by Section 831.7, subdivision (c)(1)(C), which provides, "injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose." (Opp., p. 15:3-9.) Plaintiff's reliance on Section 831.7 is misplaced because Section 831.7 pertains to hazardous recreational activity and it does not impact the meaning of "all trails" under Section 831.4, subdivision (b). City is not arguing that riding a bicycle on a paved trail is a hazardous recreational activity which implicates immunity under Section 831.7.

Plaintiff argues the Court should extend the ruling in *Tansavatdi, supra,* 14 Cal.5th 639 to determine that the City is not entitled to trail immunity with respect to its failure to warn. (Opp., p. 15:20-22.) In *Tansavatdi*, the decedent was riding his bicycle in the bike lane, when the bike lane suddenly ended before an intersection for street parking before resuming after the intersection. (*Id*. at p. 648.) The decedent was travelling downhill and as he rode through the intersection, an 80-foot traction trailer was turning onto the same street. (*Id*. at p. 649.) The decedent collided with the truck and died from his injuries. (*Ibid*.) The California Supreme Court addressed whether design immunity applies to claims alleging that a public entity failed to warn of a design element that resulted in a dangerous roadway condition. (*Id*. at p. 648.) Relying on its holding in *Cameron, supra,* 7 Cal.3d 318, the high court concluded that "design immunity does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway." (*Ibid*.)

Plaintiff's reliance on *Tansavatdi* is flawed. First, the subject in *Tansavatdi*, was not a trail but a roadway, which do not have identical conditions. For example, the GRT does not allow motorized vehicles, with the exception of motorized wheelchairs. Second, the Supreme Court did not address trail immunity under Section 831.4. Therefore, the Court is not persuaded to extend the ruling of *Tansavatdi* to preclude trail immunity. City is thus immune from liability arising out of the existence

of a dangerous condition or its failure to warn of a dangerous condition pursuant to Section 831.4. Summary judgment is GRANTED.