SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 05-28-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to 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. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV427994 Hearing: Demurrer	Gerbenn Seraphin vs Bank Of America, Corporation	Off calendar
LINE 2	20CV373466 Motion: Summary Judgment/Adjudication	James Huck vs City of Santa Clara et al	See Tentative Ruling. Court will prepare the final order.
LINE 3	21CV386240 Motion: Compel	RAO CHERUKURI vs BALAJI PARIMI et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 4	23CV423384 Motion: Admissions Deemed Admitted	Citibank, N.A. vs Ngoc Phan	Notice appearing proper and good cause appearing, the unopposed motion to have the requests for admission deemed admitted is GRANTED. Plaintiff shall submit the final order within 10 days of the hearing.
LINE 5	23CV424389 Motion: Admissions Deemed Admitted	Jpmorgan Chase Bank N.a. vs Judith Cayton	Notice appearing proper and good cause appearing, the unopposed motion to have the requests for admission deemed admitted is GRANTED. Plaintiff shall submit the final order within 10 days of the hearing.
LINE 6	21CV381965 Motion: Withdraw as attorney	Ling Wang vs Lori Greymont et al	Notice appearing proper and good cause appearing, the unopposed motion to withdraw by Attorney Look is GRANTED. Moving Counsel shall submit the final order and the order shall be final upon filing of the proof of service of the order.

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LINE 7	22CV402337 Hearing: Motion for discharge	Ana Acosta Estrada vs Bay Area Car Sales, LLC. et al	Off calendar as stip re settlement was signed.
LINE 8	23CV412729 Motion: for Leave to Intervene	RITO GARCIA vs IRBIS HVAC, INC. et al	Notice appearing proper and good cause appearing, the unopposed motion to intervene is GRANTED. Moving party shall submit the final order within 10 days of the hearing.
LINE 9	23CV415894 Motion: Withdraw as attorney	Khayti Sheth et al vs Geralyn Glowski et al	Notice appearing proper and good cause appearing, the motion to withdraw by Plaintiffs' counsel is GRANTED. Counsel shall submit the final order within 10 days and notice will be effective upon service of the final order.
LINE 10	23CV416906 Motion: Leave to File	EMILIA ARROYO vs JUAN SALAS, Jr.	Notice appearing proper and good cause appearing, the unopposed motion for leave to file amended complaint is GRANTED. Plaintiff shall submit the final order and file the amended complaint within 10 days.
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			

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LINE 17			

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Calendar Line 2
Case Name: *Huck v. City of Santa Clara, et al.*
Case No.: 20CV373466

The City of San Jose ("the City" or "Defendant") moves for summary judgment, or, in the alternative, summary adjudication, as to the operative Complaint[1] filed by James Marshall Huck, an individual. ("Plaintiff.")

I. Background

A. Factual

This premises liability action arises from a motor vehicle accident. According to allegations of the Complaint, on October 7, 2019, Plaintiff sustained a serious injury while riding his motorcycle on Airport Boulevard in San Jose, California. (Complaint, pp. 5-6.) Specifically, while attempting to avoid a vehicular collision, Plaintiff struck a shuttle bus, partially severing his finger. (Complaint, p. 5.) During the accident, the condition of the subject road was allegedly "slick and dangerous," rendering it unsafe. (Complaint, p. 6.) Plaintiff was subsequently transported to Santa Clara Valley Medical Center ("Hospital,") where it was determined Plaintiff's severed finger was unsalvageable. (Complaint, p. 7.)

B. Procedural

On June 3, 2021, Plaintiff filed the operative Complaint against the City. In his Complaint, Plaintiff indicated he complied with the applicable government claims statutes. (Complaint, p. 2.) He asserts the following causes of action:

1) Motor Vehicle Negligence – against City and the County of Santa Clara;
2) General Negligence – against Hospital and the County of Santa Clara;
3) Premises Liability – against City only; and
4) Medical Malpractice – against Hospital and Does 41 to 100.

On February 29, 2024, the City filed a motion for summary judgment ("MSJ") or, in the alternative, summary adjudication, challenging the first and third[2] causes of action. Plaintiff filed two oppositions[3] to the motion on May 13, 2024. The City did not file a reply.

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[1] Plaintiff, James Marshall Huck, filed an amendment to the operative Complaint on March 30, 2021, to replace the incorrect defendant, City of Santa Clara, with Defendant City of San Jose. (See Amendment to Complaint to Correct Misnomer of Defendant City of San Jose, p. 1.)

[2] Both the City and Plaintiff mistakenly refer to premises liability as the second cause of action in their papers. (See Defendant's Notice of Motion and MSJ, p. 2:4-9; Memorandum of Points and Authorities in Support of the City's MSJ ("MPA,") pp. 1:2-19, 7:23-28, 15:9-16; Memorandum of Points and Authorities in Opposition to the City's MSJ ("Opp.,") pp. 3:24-27, 9:12-19).) Plaintiff's second cause of action for general negligence is against both the Hospital and County of Santa Clara, *not* the City of San Jose. (See Complaint, p. 5.) Consequently, the Court will assume the City is challenging Plaintiff's third cause of action for premises liability.

II. Motion for Summary Judgment

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

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.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.)

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.)

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[3] Although Plaintiff filed two oppositions on the same date, they both appear to be substantively identical and include the same hearing date.

B. Merits of the Motion

In moving for summary judgment, the City makes the following arguments: (1) the first cause of action for motor vehicle negligence is barred as a matter of law under the Government Claims Act (Gov. Code, § 810, et seq.); and (2) Plaintiff cannot establish his third cause of action for premises liability under Government Code section 835 because: (a) the subject road leading up to the San Jose Airport Terminal does not constitute a dangerous condition; (b) Plaintiff's actions and lack of due care in the operation of his motorcycle were the sole cause of this accident; and (c) Plaintiff cannot establish that the City created the alleged dangerous condition; nor can he establish (d) that the City had actual or constructive notice of it. (MPA, p. 2:3-10.)

i. Plaintiff's First Cause of Action: Motor Vehicle Negligence

Here, the City argues it is entitled to summary judgment or summary adjudication on the first cause of action because Plaintiff's motor vehicle negligence claim is barred by the Government Claims Act. (MPA, pp. 6-7.) Specifically, it argues, Plaintiff fails to allege any statute imposing liability against the City for an accident involving a vehicle it did not own or operate. (MPA, p. 7:7-13.) Plaintiff concedes and requests this Court to dismiss the first cause of action. (Opp., pp. 3:22-24; 9:19-20.) Consequently, this Court need not address the merits of the motor vehicle negligence claim.

Accordingly, the City's motion for summary adjudication as to the first cause of action for motor vehicle negligence is GRANTED.

ii. Plaintiff's Third Cause of Action: Premises Liability-Dangerous Condition of Public Property

The Complaint asserts a third cause of action against the City for statutory liability for a dangerous condition of public property pursuant to Government Code section 835. (Complaint, p. 5.)

Government Code section 835 provides:

> 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 created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
> (a) A negligent or wrongful act or 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.

Thus, in order to succeed on this cause of action, Plaintiff must establish that the premises were in a dangerous condition that caused Plaintiff's injury and either that a City employee acting in the scope of his or her employment created the condition or that the City

had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have protected against the dangerous condition.

Here, the City contends Plaintiff cannot establish any of the essential elements of his dangerous condition of public property claim against the City. (MPA, p. 8:11-12.)

1. Existence of a Dangerous Condition

"For [the] purposes of an action brought under [Government Code] section 835, a '"dangerous condition," as defined in [Government Code] section 830, is "a condition of property that creates a substantial ... risk of injury when such property or adjacent property is used with due care" in a "reasonably foreseeable" manner. ([Gov. Code,] § 830, subd. (a).)' [Citation.]" (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 (*Sun*).)

"The term dangerous condition is statutorily 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…. As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts…. Ordinarily, the existence of a dangerous condition is a question of fact, but whether there is a dangerous condition may be resolved as a question of law if reasonable minds can come to but one conclusion." (*Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1069-1070, internal citations omitted, italics added.) To prevail on a motion for summary judgment on the ground that certain property does not constitute a dangerous condition, the moving party must present evidence that would preclude a reasonable trier of fact from finding it more likely than not that the property posed a substantial risk of injury. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346.)

The City first contends, "undisputed facts show," the City-owned, subject road, is "only dangerous" when drivers use it without due care, namely, by failing to follow applicable Vehicle Code sections. (MPA, pp. 2:8-9; 10:3-11.) Specifically, the City contends Plaintiff did not exercise "due care" while driving because he allegedly failed to detect multiple visual cues, including, a clearly marked crosswalk and a shuttle bus slowing to stop at the crosswalk. (See MPA, p. 11:11-14.) The City maintains the subject road would *only be dangerous* when drivers are "plainly inattentive," drive too fast, or ignore the presence of stopped vehicles and pedestrians. (MPA, p. 11:15-24.) The City does not point to any evidence establishing that the subject road is only dangerous when a driver acts unreasonably nor does it explain how it believes Plaintiff violated any specific provision of the Vehicle Code.

The City further contends that while Plaintiff has raised issues regarding poor road conditions, including, "raised dots and strips" added to the road, the area was "maintained on a regular basis by the City." (MSJ, pp. 10:27-28-11:5-14.) The City notes Plaintiff's accident took place at approximately 1:44 p.m., and thus, visibility should not have been at issue. (MSJ, 11: 5-14.) Finally, the City contends Plaintiff fails to corroborate that a "pothole," which allegedly caused his motorbike to "wobble," existed in front of a manhole cover. (MSJ, p. 11:6-10; Declaration of Kelsey J. Moe in Support of MSJ ("Moe Decl.,") ¶ 9; Exh. H; Deposition of James M. Huck ("Huck Depo.,") pp. 25-26; UMF No. 6.) City concludes Plaintiff has presented no evidence, and *cannot* present any evidence, that the subject road was

slick or dangerous from rain or other weather conditions. (MSJ, p. 11:5-8.) As explained below, these arguments are not well-taken.

Here, the City's argument lacks merit for three reasons: 1) the issue of due care does not, in and of itself, address whether a dangerous condition exists, 2) none of the UMFs in the City's separate statement adequately address whether a dangerous condition exists on the subject road (UMF nos. 1, 3-7, and 14), and 3) City's assertions that the road was regularly maintained and that Plaintiff's driving was unreasonable are unsupported by affirmative evidence.

"Reasonably foreseeable use with due care, as an element in defining whether property is in a dangerous condition, refers to use by the public generally, not the contributory negligence of the particular plaintiff who comes before the court; *the particular plaintiff's contributory negligence is a matter of defense*." (*Matthews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384, italics added.) "Nevertheless, the plaintiff has the burden to establish that the condition is one which creates a hazard to persons who foreseeably use the property with due care." (*Id*., p. 1384, internal citations omitted.)

Plaintiff's lack of due care does not, by itself, establish that a dangerous condition did not exist at the property. "The status of a condition as 'dangerous' for purposes of the statutory definition does *not* depend on whether the plaintiff or other persons were actually exercising due care but on whether the condition of the property posed a substantial risk of injury to persons who were exercising due care." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768.)

To illustrate, City's material fact nos. 3, 5, 7, and 14, which appear to have been included to demonstrate Plaintiff's alleged failure to exercise due care, have little bearing on the existence of a dangerous condition. For example, Plaintiff traveling the subject road "at least twenty times" or driving without a motorcycle license do not speak to the condition of the road on the date of the accident. (UMF nos. 3, 5, 7, and 14.) Next, the City claims it maintains the subject road regularly but this blanket assertion is unsupported by evidence as well. Notably, the evidence submitted by Defendant, namely, Plaintiff's deposition testimony, is arguably sufficient to support contrary inferences: 1) that the area surrounding the manhole cover was in disrepair, and 2) Plaintiff's driving was not reckless or unreasonable. The relevant portion of Plaintiff's testimony, states, as follows:

> Q. And why do you think you were in a wobble situation on the bike?
>
> A. Right before the manhole cover*, there was at least an eight inch by four inch deep piece of asphalt missing*. As my tire hit that, my tire locked up over the manhole cover, and then I got out of control, gassed it, hit the side of the bus.
>
> Q. How deep do you think the 8 by 4 asphalt divot or hole was?
>
> A. How deep? By at least two, three, four inches or more.
>
> …

Q. When you say that the bike started to wobble after you -- was it because the front tire went into the hole?

A. So what I remember is that my tire went in the hole. I was front braking hard, so when it went in the hole, it went sideways. I slid across the manhole cover, and I started getting out of control, and then I pressed the gas to try to straighten it out so I wouldn't hit anything, but I still managed to hit the bus.

...

Q. Did you know why the car in front of you slammed on their brakes?

A. To avoid hitting a pedestrian.

Q. Did you see the pedestrian when the car ahead of you slammed on its brakes?

A. I seen [sic] the lights from the pedestrian crosswalk.

Q. But you did see the lights flashing?

A. Yes.

Q. As soon as -- as soon as you saw the lights flashing, did you apply your front brake?

A. Yes.

...

Q. And I think you testified earlier, and correct me if I'm wrong, you said that the front tire locked up on the manhole cover?

A. Yes.

Q. Had the front tire been locked up on the asphalt before the manhole cover?

A. No.

Q. How far was the manhole cover from the hole in the pavement?

A. Immediately after zero -- zero percent. It was part of the manhole cover. It was against it. *So asphalt was missing from the manhole cover.*

(Huck Depo., pp. 24:16-25-25:9-25-26:1-16; 28:3-25; Exh. H, italics added.)

Additionally, Plaintiff has provided, in discovery, some evidence in support of his allegations (arguably showing a dangerous condition) including multiple photos of the subject road and accident, and police reports. (See Exh. G, pp. 2:25-29-3:13-14; see also Evidence in Opp., Exh. 2; Huck Depo; Exh. H.) Accordingly, Defendant's unsupported contention regarding Plaintiff's lack of due care is insufficient to shift the burden to Plaintiff at this step of the analysis.

i. *Plaintiff's Verified Discovery Responses*

City also contends Plaintiff's discovery responses demonstrate that "he does not have and *cannot obtain* the necessary evidence to show any liability based on a dangerous condition by the City in this accident." (MSJ, p. 11:25-27.) The City's separate statement notes Plaintiff's response to some of the form interrogatories and requests for production of documents were duplicative. (See UMF nos. 17 and 19.)

To obtain summary judgment on the basis that a plaintiff has "no evidence" to establish an essential element of a claim, a moving defendant must support such a motion with discovery admissions or other admissible evidence showing that "plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, *supra*, 25 Cal.4th at pp. 854-855 ["[t]he defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that *the plaintiff does not possess, and cannot reasonably obtain needed evidence*[.]"].) It is not enough for a moving party to show merely that a plaintiff currently has no evidence on a key element of their claim. The moving defendant must also produce evidence showing plaintiff cannot reasonably obtain evidence to support that claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891, citing *Aguilar, supra,* at p. 855.) ["the absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim."].) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 110, also citing *Aguilar*, *supra* at p. 855.) Demonstrating that a plaintiff does not have, and cannot get, essential evidence presupposes that the moving defendant has thoroughly explored the opposing party's positions through discovery aimed at uncovering all the evidence that supports those positions. (*Ibid.*)

Here, City claims Plaintiff has "no evidence" to establish an element of his claim, but the record indicates otherwise. (See Moe Decl., ¶ 9-10; see also Exhs. F, G.) Plaintiff has provided evidence of a dangerous condition, including documents discussing the accident, in the form of police reports, medical records, pictures of the subject road, and deposition testimony. Defendant has not demonstrated that Plaintiff has "never possessed" any evidence to support his allegations. Notably, Defendant presents no evidence, direct or circumstantial, that Plaintiff cannot reasonably expect to meet his burden as to the existence of the dangerous condition.

A party moving for summary judgment on the basis of an opponent's lack of evidence does not satisfy its burden of proof by producing discovery responses that do not exclude the possibility that opposing parties may possesses or may reasonably obtain evidence sufficient to

establish their claim. (See *Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 80-81; *Gulf Ins. Co. v. Berger, Kahn, Shaffton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134-136 ["[T]o grant summary judgment, the court must be able to infer from the record that the plaintiff could produce no other evidence on the disputed point."]; *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1441-1442 ["A motion for summary judgment is not a mechanism for rewarding limited discovery; it is a mechanism allowing the early disposition of cases where there is no reason to believe that a party will be able to prove its case"]; but, see *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 (*Union Bank*) ["a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2). Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth the specific facts which prove the existence of a triable issue of material fact"].) A mere restatement of the allegations contained in the complaint is so devoid of facts, that an absence of evidence can be inferred. (See *Union Bank*, *supra*, 31 Cal.App.4th at p. 590.)

The evidence submitted by the City - Plaintiff's responses to the limited discovery City propounded - fails to establish that Plaintiff has "no evidence" to support his claim. Here, as noted above, Plaintiff has proffered evidence regarding the dangerous condition. Consequently, the City fails to meet its initial burden on this basis.

2. Whether the Accident was Caused by the Alleged Dangerous Condition [4]

Here, The City claims Plaintiff's factually devoid discovery responses show he has "no evidence" to establish an element of his claim (MPA, pp. 12:23-28-13:5-11), but the record indicates otherwise. (See Moe Decl., ¶ 9-10; see also Exhs. F, G.) Plaintiff's deposition testimony quoted above supports the conclusion that the dangerous condition of the manhole cover and surrounding asphalt caused the accident. As noted above, Plaintiff has provided *some* evidence of a dangerous condition. Defendant has not demonstrated that Plaintiff "never possessed" any evidence to support his allegations.

Thus, the burden does not shift to Plaintiff to establish a triable issue of material fact as to causation. For this reason, the Court need not address Plaintiff's arguments in opposition.

3. Creation of the Dangerous Condition

If a dangerous condition does exist, to establish public entity liability, a plaintiff must prove that either: (1) "[a] negligent or wrongful act or omission of an employee of the public

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[4] City appears to argue that Plaintiff's lack of a motorcycle license caused or contributed to the accident. Plaintiff's evidentiary objection to City's undisputed material fact ("UMF") that Plaintiff did not have an "M1 motorcycle license" at the time of the accident, within his Opposition to the City's Separate Statement of UMF ("Opp. to City UMF,") p. 3:26-28,) is improper. (See Cal. Rules of Ct., rule 3.1354, subd. (b) [setting forth requirements for the format of objections to evidence, including that the evidentiary material be identified and quoted in full].) In any event, even if the evidentiary objection was in proper format, the Court declines to rule on it as it is not relying on that fact. (MPA, p. 12:26-28-13:1-11; see also Code Civ. Proc., § 437c, subd. (p)(1), (2).)

entity within the scope of his employment created the dangerous condition" or (2) "[t]he public entity had actual or constructive notice of the dangerous condition … a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835.) "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act and notice; either negligence or notice will suffice." (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 693.)

Here, the City restates its previous arguments that 1) Plaintiff has not presented any evidence that City employees created the dangerous condition; 2) Plaintiff has not presented evidence of prior complaints or similar incidents in this area; 3) Plaintiff's discovery responses show that he has never possessed any such evidence; and 4) the subject road and surrounding area is maintained on a regular basis by the City. (MPA, pp. 13:23-28-14:1-4.)

But, Plaintiff can meet his burden of establishing this element of the cause of action by showing either that the City created the dangerous condition or that the City had actual or constructive notice of the dangerous condition. Notably, Plaintiff, in opposition, does not rely on a theory that the City created the dangerous condition. Accordingly, the Court need not decide whether there is a triable issue of fact as to whether the City created the dangerous condition.

4. Actual or Constructive Notice of the Purported Dangerous Condition

"A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66, citing Gov. Code, § 835, subd. (b).) In other words, before the City can be subjected to liability, it must be shown that its employees had either actual or constructive notice of the dangerous condition in sufficient time to effectuate a remedy. (*State v. Sup. Ct. of San Mateo County* (1968) 263 Cal.App.2d 396, 399 (*San Mateo*).)

Government Code section 835.2, subdivision (a) states that "[a] public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of [Government Code] Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov. Code, § 835.2, subd. (a), emphasis added.) To establish actual notice, "[t]here must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*San Mateo, supra,* 263 Cal.App.2d at p. 399.)

Government Code section 835.2, subdivision (b) states that "[a] public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

Constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the City, in the exercise of due care, to discover and remedy the situation had they been operating under a reasonable plan of inspection. (*San Mateo, supra,* 263 Cal.App.2d at p. 400.) "The primary and indispensable

element of constructive notice is a showing that the *obvious condition existed a sufficient period of time before the accident*." (*Id.,* pp. 400-401, italics in original.) "Where there is no evidence of actual notice, the city is charged with constructive notice if the defects have *existed for such length of time* and are of such conspicuous character that a reasonable inspection would have disclosed them." (*Ibid*, emphasis added; *Lorraine v. Los Angeles* (1942) 55 Cal.App.2d 27, 30-31 ["It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition. . . ."].) In California Supreme Court opinion, *Whiting v. National City* (1937) 9 Cal.2d 163, 166, which Defendant City cites, the Court held: "…[where there is] no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry… [it is] insufficient to impose liability upon the city for injuries resulting therefrom."

Here, the City contends Plaintiff cannot establish actual or constructive notice against the City. (MPA, pp. 14:7-15:7.) In support, the City provides nearly identical arguments that the subject road and "surrounding area" is maintained on a regular basis by the City. But, again, the City provides no evidence that the road and surrounding area are well maintained. The City also contends that Plaintiff has not presented any evidence of prior complaints or similar incidents in this area. Again, the City does not cite any evidence for this proposition other than Plaintiff's responses to discovery requests.

The discovery requests the City contends show that Plaintiff has no evidence regarding creation of the condition do not do so. Instead, the limited discovery requests the City proffers speak to Plaintiff's actions or inactions and facts pertaining to the incident. Specifically, the City points to Plaintiff's responses to form interrogatories 12.1 through 12.4, which seek general information regarding witnesses to the incident, whether Plaintiff interviewed witnesses or obtained statements regarding the incident, and Plaintiff's possession of photographs or film relating to the incident and Plaintiff's injuries. (See UMF 16.) To each of these interrogatories, Plaintiff stated, "Under investigation." (See Moe Decl., Ex. E.) The responses do not indicate that Plaintiff lacks evidence that the City had actual or constructive knowledge of the condition of the road because the interrogatories do not target the City's knowledge.

Further, the UMFs do not shed light on the City's actual notice, and instead, target Plaintiff's actions or inactions, namely, his lack of a motorcycle license and failure to timely brake at a pedestrian crosswalk, and facts surrounding the incident. (See UMF nos. 3, 5, 14.)

The Court concludes that the burden does not shift to Plaintiff to present evidence because the City has not met its initial burden. Defendant City did not present any affirmative evidence showing it did not have actual or constructive notice of the purportedly dangerous condition and it has not shown that Plaintiff's discovery responses demonstrate that Plaintiff does not have evidence that it did have notice. The motion for summary judgment is DENIED as to the third cause of action.

The Court acknowledges Plaintiff's request for a continuance to complete discovery on the issue of actual or constructive notice pursuant to Code of Civil Procedure section 437c, subdivision (h) in hopes of obtaining more evidence to establish his claim. (Opp., pp. 8:18-26-9:1-9.) Code of Civil Procedure section 437c, subdivision (h) states, in pertinent part, that, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or

summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." Notably, Plaintiff did not attach an affidavit in support of his request for a continuance as required by statute. But, he did provide a notice of deposition indicating that he will be taking the deposition of the City's person most knowledgeable on May 20, 2024. (See Plaintiff's Evidence in Opp. to the City's MSJ, Exh. 7.) In any event, in light of the Court's holding above, it need not rule on Plaintiff's request for a continuance.

III. Conclusion

The City's motion for summary judgment is DENIED.

The City's motion for summary adjudication as to the first cause of action for motor vehicle negligence is GRANTED.

The City's motion for summary adjudication as to Plaintiff's third cause of action for premises liability is DENIED.

The Court will prepare the Final Order.

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Calendar Line 3
Case Name: Cherukuri v. CloudKnox et al.
Case No.: 21CV386240

Plaintiff Rao Cherukuri ("Plaintiff") seeks to compel the deposition of a PMQ to testify on behalf of Defendant CloudKnox Security, Inc. ("Defendant") related to twelve topics and seeks sanctions. Plaintiff contends that even though it already deposed Defendant's PMQ, it should be able to re-depose the witness on topics 1-4 and 10 because these topics relate to documents that Defendant did not timely provide and which Plaintiff therefore did not have at the time of the initial deposition. Plaintiff also asserts that it needs to ask Defendant's PMQ about the development of Cloudknox's technology—topics 5-9, 11 and 12. Plaintiff's argument for why it did not ask questions on topics 5-9 and 11-12 earlier is because two of the witnesses it seeks to ask about, though represented by Defendant's counsel, only produced a few documents such that Plaintiff needs to get information about their work from Defendant.

Defendant objects to the request to re-depose its PMQ alleging that the motion is untimely, as discovery has closed, Plaintiff could have asked about these topics at the initial deposition, and some of the topics are irrelevant. Defendant seeks sanctions against Plaintiff.

Timeliness

Defendant claims the motion is untimely because discovery has closed. But Plaintiff moved for this discovery three months before the discovery cut-off date. The Court was not available to hear the motion within that three-month window. The Court declined Plaintiff's motion to have the motion heard more than 15 days before the then-trial date, but indicated in its denial that it would hear Plaintiff's motion. That was within the Court's discretion. *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal. App. 4th 1568, 1587 (although a party has no *right* to have its motion to compel heard after the passage of the discovery motion cutoff date, a trial court has discretion to hear the motion); see also CCP § 2024.050. Moreover, because the trial date has been continued from June to October, 2024, there will be no prejudice to either side from hearing the motion on its merits. The Court will not deny the motion on this basis.

Plaintiff's Prior Opportunity to Depose on the Requested Topics

Defendant claims that Plaintiff should not be able to re-depose its PMQ, despite not receiving almost 700 pages of discovery until well after the deposition, because Plaintiff knew that discovery was not complete and so should have waited to depose the PMQ. This claim is unavailing. In its March 2023 response to Plaintiff's first set of RFDs, Defendant indicated that it had conducted a diligent search and had identified and produced the responsive documents. While it did include an obligatory disclaimer that its discovery may not be complete, its response at least as to requests 29-32 indicated that it believed it had no more responsive documents to provide. This was a reasonable interpretation by Plaintiff, given that its request had been made more than one-year earlier and given that Defendant did not provide the 687 pages of discovery at issue here until after it was brought to Defendant's attention that it had not provided everything. Even then Defendant took several months to provide the additional discovery.

Defendant also claims that Plaintiff does not need to depose its PMQ again about topics 1-4 and 10 because Plaintiff knew about other investors, such as Accel and Artiman, prior to the first deposition and could have asked Defendant's PMQ about them at that time. But this misses the point. While Plaintiff may have known about the investors, it did not know about the specific documents provided after the deposition. As such, Plaintiff was deprived of the ability to ask the PMQ about the information in those documents. It is evident from some of the emails provided by both parties that the emails cited by Plaintiff regarding these investors contain more detailed or different information than those provided by Defendant prior to the deposition. (Compare Exs. 17, 18, 19, 21, 22, and 23 attached to Decl. of Estrin with Exs. 19-23 attached to Decl. of Bali). Plaintiff cites several federal cases recognizing the ability to re-depose a witness based on the supplemental production of documents (Mot. p10). While those cases are not binding on this Court, their reasoning is persuasive. It should be noted, however, that these cases limit the questioning to those about the supplemental production. Accordingly, the Court will allow Plaintiff to re-depose the PMQ of Defendant, and ask questions based on the supplemental discovery that relate to topics 1-4 and 10. The questions on these topics must be limited to asking about the new documents and the information therein, however.

Topics 5-9 and 11-12

As to the other topics (5-9 and 11-12), Plaintiff does not argue that these topics are needed based on the supplemental production. Rather Plaintiff claims that 2 employees did not provide as many documents as Plaintiff's believe they should have. This is not a basis to re-depose the PMQ, regardless of the relevance of the topic. Moreover, as to the alias emails, while Plaintiff's counsel may not have known of them, Plaintiff did, and therefore, there is not a sufficient basis to allow Plaintiff to re-open the deposition on topics 5-9 or 11-12.

Sanctions

Plaintiff is entitled to sanctions, as the objection to being questioned related to the supplemental discovery is not substantially justified. Because some of Defendant's objections were justified, the request for sanctions is reduced to 4 hours at a rate of $580, for a total of $2320.

Conclusion

Defendant CloudKnox is ordered to produce a PMQ to testify to questions on the supplemental discovery produced on October 2, 2023, that are on the topics 1-4 and 10. Defendant shall pay sanctions of $2320 to Plaintiff's counsel within 20 days of the final order. Plaintiff shall submit the final order.

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