SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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"Every case is important" . . . . . "No case is more important than any other."— United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

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DATE: Tuesday, 26 September 2023
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	21CV385675	Michelle Santos vs Amandeep Singh	**Order of Examination of Amandeep Singh by Petitioner Michelle Santos.** CONTINUED from 07 September 2023 NO FORMAL TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court on the status of the matter and if they wish to proceed.
LINE 2	21CV385675	Michelle Santos vs Amandeep Singh	**Order of Examination of Bohr Bhandal by Petitioner Michelle Santos.** CONTINUED from 07 September 2023 NO FORMAL TENTATIVE RULING. The parties should use the Tentative Ruling Protocol to advise this Court on the status of the matter and if they wish to proceed.
LINE 3	21CV381798	Jaime Canales v. Ashley Oliver	**Demurrer of Defendant Caltrans to Plaintiff Tina Cancilhas' Second Amended Complaint.** Defendant Caltrans' demurrer to the first cause of action in plaintiff Cacilhas's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for dangerous condition of public property and/or the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED. Defendant Caltrans' motion to strike portions of plaintiff Cacilhas's SAC is DENIED. Defendants Oliver's motion to strike portions of plaintiff Cacilhas's SAC is DENIED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	21CV381798	Jaime Canales v. Ashley Oliver	**Defendant CalTrans' Motion to Strike Portions of Plaintiff Tina Cancilhas' Second Amended Complaint.** SEE LINE #3.
LINE 5	21CV381798	Jaime Canales v. Ashley Oliver	**Defendants Ashley Oliver's and James Thomas Oliver's Motion to Strike Portions of Plaintiff Tina Cancilhas' Second Amended Complaint.** SEE LINE #3.
LINE 6	23CV413205	Brandon Reyes v. GobBrands Inc.; BevMo!, Inc	**Demurrer of Defendants to Plaintiff's Complaint.** Plaintiff did not file opposition to the demurrer. The demurrer is SUSTAINED with 10 days' leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 7	21CV381946	Carlos Castro v. Equinix, Inc.; Enviro Safetech, Inc.; Equinix (US) Enterprises, Inc.; J.T. Magen & Company, Inc.; JTM Construction Group, Inc.;Southland Industries	**Motion of Defendants J.T Magen & Co and JTM Construction Group for Summary Judgment.** Defendant JTM's motion for summary judgment of Plaintiff's complaint is DENIED. Defendant Magen's motion for summary judgment of Plaintiff's complaint is GRANTED. SEE ATTACHED TENTATIVE RULING.
LINE 8	22CV406182	American Express National Bank v. Marilyn Nguyen	**Motion of Plaintiff for Summary Judgment.** The motion is OFF CALENDAR. Pursuant to order of this Court upon stipulation, this matter is dismissed without prejudice and that this Court retains jurisdiction pursuant to California ***Code of Civil Procedure***, § 664.6 to enforce the terms of the settlement and enter judgment in the event of default. NO FORMAL TENTATIVE RULING.
LINE 9	21CV375939	Andrea Ortega v. City of San José;	**Motion of Plaintiff to Compel Attendance of a Deposition Of Defendant's Person Most Qualified By Video With Production Of Documents at Deposition and for Monetary Sanctions**. The motion plaintiff to compel attendance at a deposition of defendant's person most qualified by video with production of documents and for monetary sanctions.is DENIED. The City's request for sanctions is DENIED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 10	22CV407185	Creditors Adjustment Bureau, Inc., v. Perfectvips, Inc.	**Motion of Plaintiff Creditors Adjustment Bureau Inc Compel Defendant Perfectvips, Inc. to Provide Responses to Request For Production of Documents and Request For Monetary Sanctions.** Defendant did not file opposition. The motion is GRANTED. Defendant shall serve code-compliant responses without objection within 20 days of the filing and service of this order. The request for monetary sanctions is code-compliant and is GRANTED as follows: Defendant shall pay the sum of $673.65 to counsel for plaintiff within 20 days of the filing and service of this order.
LINE 11	22CV407185	Creditors Adjustment Bureau, Inc., v. Perfectvips, Inc.	**Motion of Plaintiff Creditors Adjustment Bureau Inc Compel Defendant Perfectvips, Inc. to Provide Responses to Special Interrogatories and Request For Monetary Sanctions.** Defendant did not file opposition. The motion is GRANTED. Defendant shall serve code-compliant responses without objection within 20 days of the filing and service of this order. The request for monetary sanctions is code-compliant and is GRANTED as follows: Defendant shall pay the sum of $673.65 to counsel for plaintiff within 20 days of the filing and service of this order. NO FORMAL TENTATIVE RULING.
LINE 12	22CV407185	Creditors Adjustment Bureau, Inc., v. Perfectvips, Inc.	**Motion Of Plaintiff Creditors Adjustment Bureau Inc Compel Defendant Perfectvips, Inc. To Provide Responses To Form Interrogatories And Request For Monetary Sanctions.** Defendant did not file opposition. The motion is GRANTED. Defendant shall serve code-compliant responses without objection within 20 days of the filing and service of this order. The request for monetary sanctions is code-compliant and is GRANTED as follows: Defendant shall pay the sum of $673.65 to counsel for plaintiff within 20 days of the filing and service of this order. NO FORMAL TENTATIVE RULING.
LINE 13	23CV416858	Petition of DRB Capital, LLC F.A., Real Party in Interest	**Motion For Approval Transfer Of Structured Settlement Payment Rights.** Further hearing required. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 14	23CV412507	Wells Fargo Bank, N.A. v. José I. Dangtayan, III	**Motion of Plaintiff Wells Fargo Bank, N.A. for Request for Admissions to be Deemed Admitted.** Defendant did not file opposition to this motion. The motion is GRANTED. NO FORMAL TENTATIVE RULING.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
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LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV381798 **Jaime Canales v. Ashley M. Oliver, et al.**
DATE: 26 September 2023 **TIME: 9:00 am** **LINE NUMBER: 03, 04, 05**
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 25 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Orders On:
(1) Defendant Caltrans' Demurrer
To Plaintiff Tina Cacilhas's Second Amended Complaint;
(2) Defendant Caltrans' Motion To Strike Portions
Of Plaintiff Tina Cacilhas's Second Amended Complaint; and
(3) Motion Of Defendants Ashley M. Oliver And James Thomas Oliver
To Strike Portions Of Plaintiff Tina Cacilhas' Second Amended Complaint.

I. Statement of Facts.

Plaintiff Canales's Operative Second Amended Complaint

On 11 May 2019, Armando Canales ("Decedent") was a passenger in a 2003 Toyota Corolla driven by defendant Billie Lighthill southbound on Highway 17. (Second Amended Complaint ("SAC"), ¶¶8 – 9.) The vehicle driven by defendant Billie Lighthill was owned by defendant Tiffany Cavanaugh, mother of defendant Collette Cavanaugh who was also a passenger in the vehicle at the time of the accident. (*Id.*)

At the same time, defendant Ashley Oliver was driving a 2001 Chrysler Voyager (owned and provided to her by defendant James Thomas Oliver) on the wrong side of the highway. (SAC, ¶10.) Defendant Ashley Oliver was driving northbound on the southbound side of Highway 17. (*Id.*)

A head-on collision occurred between the vehicles driven by defendant Billie Lighthill and defendant Ashley Oliver about 0.5 miles north of Summit Road on the southbound side of Highway 17. (SAC, ¶11.) Decedent died as a result of injuries sustained in this collision and a subsequent collision with a 2007 Audi driven by defendant Rebecca Ann Gutierrez (with the permission/ consent of its owner defendant Maria Gutierrez) behind Decedent's vehicle which collided with the vehicle occupied by Decedent due to defendant Rebecca Ann Gutierrez's unsafe speed. (SAC, ¶¶12 and 34.)

Defendant Ashley Oliver was intoxicated on the night of the accident while driving northbound on Highway 17 from Santa Cruz to her home in San Jose. (SAC, ¶13.) Defendant Ashley Oliver mistakenly crossed over from the northbound side of Highway 17 into the southbound side near the area called "restaurants" south of Summit Road. (SAC, ¶14.)

Highway 17 is maintained and/or owned by defendant State of California Department of Transportation ("Caltrans") and is a mountainous road, with sharp curves, different elevations, areas of narrow lanes, and no shoulders to pull out from traffic and to stop. (SAC, ¶15.) As such, once a motorist enters the wrong side of this highway, he/she is in extreme danger of head-on collision with few, if any, opportunities to avoid a collision. (*Id.*) Therefore, throughout most of this mountainous highway, there exists a cement median barrier separating northbound and southbound traffic. (SAC, ¶16.) However, in the area of the "restaurants" there is/was no cement median barrier separating northbound and southbound traffic. (*Id.*) Further, the "restaurants" area of the highway was not properly controlled, marked, or striped, making it confusing for motorists to separate the northbound from southbound lanes of travel and increasing the risk of entering an incorrect lane of travel. (SAC, ¶¶17 – 18 and 21.)

On 23 April 2021[1], plaintiff Jaime Canales ("Plaintiff"), the biological father of Decedent (SAC, ¶1), filed a Judicial Council form complaint against defendants asserting causes of action for:

(1) Negligence—Motor Vehicle

(2) General Negligence

(3) Premises Liability [against defendant Caltrans]

(4) Negligent Entrustment [against defendants James T. Oliver, Collette Cavanaugh, Tiffany Cavanaugh, Sven Cavanaugh, and Maria Gutierrez]

On 20 October 2021, the court clerk dismissed defendant Sven Cavanaugh at Plaintiff's request.

On 26 October 2021, Plaintiff filed a motion to consolidate the instant action with an action filed by Decedent's biological mother, Tina Cacilhas ("Cacilhas"). On 25 January 2022, the court granted Plaintiff's motion to consolidate without prejudice to a motion to bifurcate at a later point, if appropriate.

On 10 January 2022, defendant Caltrans filed a demurrer to Plaintiff's complaint. [The court record is unclear with regard to the court's ruling on defendant Caltrans's demurrer. A minute order dated 7 April 2022 reflects defendant Caltrans contested the tentative ruling which was then modified and adopted. A formal order was never filed.]

On 13 April 2022, Plaintiff filed a first amended complaint ("FAC") asserting causes of action for:

(1) Dangerous Condition of Public Property [against defendant Caltrans]

(2) General Negligence [against defendants Ashley M. Oliver, James T. Oliver, Billie Lighthill, Charleen Lighthill, Collette A. Cavanaugh, Tiffany Cavanaugh, Rebecca Ann Gutierrez, Maria Gutierres, and Tina Cacilhas]

(3) Negligence—Motor Vehicle [against defendants Ashley M. Oliver, James T. Oliver, Billie Lighthill, Charleen Lighthill, Collette A. Cavanaugh, Tiffany Cavanaugh, Rebecca Ann Gutierrez, Maria Gutierres, and Tina Cacilhas]

(4) Exemplary Damages [against defendant Ashley Oliver]

On 1 July 2022, Plaintiff filed an amendment to his FAC substituting Granite Construction Company ("GCC") for Doe defendant, numbers 1 and 11.

On 12 July 2022, defendant Ashley Oliver filed a demurrer to the fourth cause of action [exemplary damages] in Plaintiff's FAC.

On 6 October 2022[2], the court sustained, with leave to amend, defendant Ashley Oliver's demurrer to the fourth cause of action in Plaintiff's FAC.

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

On 10 October 2022, Plaintiff filed the operative second amended complaint ("SAC") which now asserts the following causes of action:

(1) Dangerous Condition of Public Property [against defendant Caltrans]

(2) General Negligence [against defendants Ashley M. Oliver, James T. Oliver, Billie Lighthill, Charleen Lighthill, Collette A. Cavanaugh, Tiffany Cavanaugh, Rebecca Ann Gutierrez, Maria Gutierres, and Tina Cacilhas]

(3) Negligence—Motor Vehicle [against defendants Ashley M. Oliver, James T. Oliver, Billie Lighthill, Charleen Lighthill, Collette A. Cavanaugh, Tiffany Cavanaugh, Rebecca Ann Gutierrez, Maria Gutierres, and Tina Cacilhas]

On 20 October 2022, defendant Caltrans filed a motion to strike the allegation of vicarious liability in paragraph 27 of Plaintiff's SAC.

At an informal discovery conference held on 27 October 2022, the court set hearing dates for Plaintiff's motion for leave to file a [third] amended complaint, defendant Caltrans's motion to strike, and defendant Caltrans's demurrer for 13 December 2022.[3]

On 1 November 2022, Plaintiff filed a stipulation entered into with defendant GCC dismissing the third cause of action only as to defendant GCC. Thereafter, on 9 November 2022, defendant GCC filed its answer to Plaintiff's SAC.

On 9 November 2022, defendants Ashley M. Oliver and James T. Oliver filed a motion to strike portions of Plaintiff's SAC.[4] Hearing on this motion to strike was originally scheduled for 27 April 2023.

On 21 December 2022, the court issued an order granting defendant Caltrans's motion to strike the allegation of vicarious liability in paragraph 27 of Plaintiff's SAC without leave to amend.

On 27 April 2023, among other things, the court continued hearing on defendants Ashley M. Oliver and James T. Oliver motion to strike portions of Plaintiff's SAC to 15 June 2023. In addition, the court granted, pursuant to oral stipulation by counsel, plaintiff Cacilhas's motion for leave to file a second amended complaint. Plaintiff Cacilhas did so, filing her own SAC on 28 April 2023.

Plaintiff Cacilhas's Operative Second Amended Complaint

Plaintiff Cacilhas's SAC alleges she is the biological mother of Decedent. (Cacilhas SAC, ¶1.) On 11 May 2019, at approximately 2:12 a.m., Decedent was a back seat passenger in a Toyota Corolla owned by defendant Tiffany Cavanaugh, and operated at an unsafe speed by defendant Billie Lighthill, a minor. (Cacilhas SAC, ¶22.) A Voyager minivan, owned by defendant James Thomas Oliver and operated by defendant Ashley Oliver, drove northbound in the southbound lanes and collided with the Corolla causing a serious collision. (Cacilhas SAC, ¶23.)

On or about 11 May 2019, defendants Collette Cavanaugh and/or Tiffany Cavanaugh negligently entrusted the Toyota Corolla to defendant Billie Lighthill. (Cacilhas SAC, ¶20.) On or about 11 May 2019, defendant James Thomas Oliver negligently entrusted the Voyager minivan to defendant Ashley Oliver. (Cacilhas SAC, ¶24.)

On the date of the incident, Highway 17 where the subject collision occurred, at or near Summit Road, the roadway is comprised of two lanes of travel in both the northbound and southbound directions, which are separated by a concrete barrier. (Cacilhas SAC, ¶18.) On the date of the incident, Highway 17 at or near the area

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[2] The notice of entry of order adopting the minute order from 6 October 2022 was filed on 18 October 2022.

[3] The court record does not reflect the filing of a motion for leave to file [third] amended complaint by Plaintiff or a demurrer by defendant Caltrans in advance of 13 December 2022.

[4] On 18 November 2022, Plaintiff filed opposition to defendants Ashley M. Oliver and James T. Oliver's motion to strike portions of the SAC. On 6 December 2022, defendants Ashely M. Oliver and James T. Oliver filed a reply brief in support of their motion to strike.

commonly referred to as the "restaurants" and to the Summit Road exit constituted a dangerous condition of public property for various reasons. (Cacilhas SAC, ¶19.) Defendant Caltrans owned, controlled, maintained, designed, managed, had the power tor prevent, fix, or guard against the dangerous conditions. (Cacilhas SAC, ¶29.) Defendant [GCC] was hired by defendant Caltrans to perform work in the general area of the subject incident. (Cacilhas SAC, ¶30.)

The general area of the subject collision on Highway 17, including the area commonly known as the "restaurants" through to Summit Road, was under construction, failed to provide adequate warnings to motorists and constituted a trap for drivers such that defendant Ashley Oliver was confused by the lack of directional information and unknowingly crossed over from the northbound to the southbound lanes of travel at or around the restaurants until the time of the collision. (Cacilhas SAC, ¶25.)

Immediately following the collision between the Voyager minivan driven by defendant Ashley Oliver and the Toyota Corolla driven by Billie Lighthill, an Audi owned by defendant Maria Gutierrez and operated by Rebecca Ann Gutierrez, driving southbound on Highway 17, slammed into the Toyota Corolla causing serious injuries to Decedent. (Cacilhas SAC, ¶26.) Defendant Maria Gutierrez negligently entrusted her vehicle to defendant Rebecca Ann Gutierrez on or about 11 May 2019. (Cacilhas SAC, ¶27.) The collisions between the Toyota Corolla, Voyager minivan, and Audi caused fatal injuries to Decedent. (Cacilhas SAC, ¶28.)

Plaintiff Cacilhas's SAC asserts the following causes of action:

(1) Dangerous Condition of Public Property [against defendants Caltrans and GCC]

(2) Negligence [against defendant Granite Construction]

(3) Negligent Entrustment [against defendant James Thomas Oliver]

(4) Vehicle Negligence [against defendant Ashley Oliver]

(5) Negligent Entrustment [against defendant Maria Gutierrez]

(6) Vehicle Negligence [against defendant Rebecca Ann Gutierrez]

(7) Negligent Entrustment [against defendants Collette Cavanaugh and Tiffany Cavanaugh]

(8) Negligence [against defendant Billie Lighthill]

(9) Negligence Per Se [against defendant Tiffany Cavanaugh]

(10) Negligence [against defendants Billie Lighthill and Charleen Lighthill]

On 17 May 2023, defendant Caltrans filed the first and second motions now before the court, a demurrer to plaintiff Cacilhas's SAC and a motion to strike portions of plaintiff Cacilhas's SAC set for hearing on 15 June 2023.[5]

On 19 May 2023, defendants Ashley Oliver and James T. Oliver filed the third motion now before the court, a motion to strike portions of plaintiff Cacilhas's SAC set for hearing on 15 June 2023.

On 15 June 2023, the court denied defendants Ashley Oliver and James T. Oliver's motion to strike portions of Plaintiff's SAC. Due to a calendaring error, defendant Caltrans' demurrer and motion to strike plaintiff Cacilhas's SAC and defendants Ashley Oliver and James T. Oliver's motion to strike portions of plaintiff Cacilhas's SAC were not heard on that day.

Due to the calendaring error on 15 June 2023, defendants Ashley Oliver and James T. Oliver re-noticed hearing on their motion to strike portions of plaintiff Cacilhas's SAC for 26 September 2023.

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[5] On 2 June 2023, plaintiff Cacilhas filed opposition to defendant Caltrans's demurrer and motion to strike and also filed opposition to defendants Ashley Oliver and James T. Oliver's motion to strike. On 7 June 2023, defendants Ashley Oliver and James T. Oliver filed a reply in support of their motion to strike plaintiff Cacilhas's SAC.

II. Analysis.

A. Defendant Caltrans' demurrer to plaintiff Cacilhas's SAC is OVERRULED.

The only cause of action directed against defendant Caltrans in plaintiff Cacilhas's SAC is the first cause of action for dangerous condition of public property.

> A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute. (§ 815.) Section 835 is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [15 Cal. Rptr. 2d 679, 843 P.2d 624].) Under section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939 [67 Cal. Rptr. 2d 454].)
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> To state a cause of action against a public entity under section 835, a plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it. (§ 835; *Vedder v. County of Imperial* (1974) 36 Cal. App. 3d 654, 659 [111 Cal. Rptr. 728].) Section 830 defines a "[d]angerous 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." Property is not "dangerous" within the meaning of the statutory scheme if the property is safe when used with due care and the risk of harm is created only when foreseeable users fail to exercise due care. (*Chowdhury v. City of Los Angeles*, *supra*, 38 Cal.App.4th 1187, 1196.
>
> …
>
> Because this action was dismissed at the pleading stage, we outline the rules for pleading a claim against a governmental entity. ***The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded.*** (*Susman v. City of Los Angeles* (1969) 269 Cal. App. 2d 803, 809 [75 Cal. Rptr. 240].) ***Accordingly, a claim alleging a dangerous condition may not rely on generalized allegations*** (*Mittenhuber v. City of Redondo Beach*, *supra*, 142 Cal. App. 3d at p. 5) ***but must specify in what manner the condition constituted a dangerous condition.*** (People ex rel Dept. of Transportation v. Superior Court (1992) 5 Cal.App.4th 1480, 1485–1486 [7 Cal.Rptr.2d 498].)

(*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439; see also *Mohler v. County of Santa Clara* (2023) 92 Cal.App.5th 418, 428—also noting a "heightened pleading standard applicable to claims against government entities.")

Of particular relevance here:

> A public entity may be liable under Government Code section 835 for failing to take protective measures to safeguard the public from a dangerous condition *of the property itself*; however, when the danger at issue is third party conduct, liability attaches only if the alleged physical condition of the property "increased or intensified" the risk of misconduct. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1137 [119 Cal. Rptr. 2d 709, 45 P.3d 1171] (*Zelig*).) Thus, "courts have consistently refused to characterize harmful conduct on the part of a third party as a dangerous condition in the absence of some *concurrent contributing defect in the property itself*." (*Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118, 123 [137 Cal. Rptr. 239], italics added (*Moncur*).) In other words, "'liability can arise only when third party conduct is coupled with a defective condition of property,'" such that the risk of injury was "increased or intensified by the condition of the property." (*Zelig*, at p. 1137; see *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 813 [205 Cal. Rptr. 842, 685 P.2d 1193]

(*Peterson*) [public "can reasonably expect that the premises will be free from physical defects and that [public] school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime"]; *Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 86 [256 Cal. Rptr. 877] ["foreseeable third party conduct combined with some particular feature of the public property may create a dangerous condition of public property"].)

(*Hacala v. Bird Rides, Inc.* (2023) 90 Cal.App.5th 292, 308.)

With this framework and background in mind, the court considers defendant Caltrans's demurrer to plaintiff Cacilhas's first cause of action. In essence, defendant Caltrans contends plaintiff Cacilhas's first cause of action suffers from imprecision. More particularly, Caltrans argues, "It is uncertain, ambiguous, or unintelligible as ***where the 'public property' at issue is located***."[6] In relevant part, plaintiff Cacilhas's SAC states, "Highway 17 at or near the area commonly referred to as the 'restaurants' and to the Summit Road exit constituted a dangerous condition of public property for the following reasons." (Cacilhas SAC, ¶19.) Plaintiff Cacilhas then goes on to allege at least 17 (a – q) reasons why she contends that section of Highway 17 constitutes a dangerous condition. (See Cacilhas SAC, ¶¶19 and 36.)

> "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." (Fackrell v. City of San Diego (1945) 26 Cal.2d 196, 206 [157 P.2d 625].) ***A dangerous condition of public property*** can come in several forms and ***may be based on an "amalgam" of factors.*** (Constantinescu v. Conejo Valley Unified School Dist. (1993) 16 Cal.App.4th 1466, 1476 [20 Cal. Rptr. 2d 734].)

(*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069; emphasis added.)

As the court understands, one such factor is the lack of a center divide which allowed the vehicle driven by defendant Ashley Oliver to cross over into oncoming traffic and collide with the vehicle occupied by Decedent. "There are center divides on much of Highway 17, but not at the areas at the "Restaurants" area of Highway 17, south of Summit Road, in Santa Cruz County." (Cacilhas SAC, ¶¶19 and 36, subd. (f).) The court views this allegation to specifically identify the areas of Highway 17 which lack a center divide as the public property at issue. This public property at issue is even more specifically identified as that area lacking a center divide "at the 'Restaurants' area of Highway 17, south of Summit Road." The court views such an allegation to be sufficiently specific.

To the extent defendant Caltrans contends other allegations offer less specificity, the court cannot address each of the deficient allegations on a general demurrer because a demurrer does not lie to a portion of a cause of action. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778—"[A] defendant cannot demur generally to part of a cause of action;" see also *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682—"A demurrer does not lie to a portion of a cause of action.") Of relevance, plaintiff Cacilhas alleges that the "above conditions, either individually, in combination, or based upon a totality of the circumstances, created a dangerous condition of the subject roadway." (Cacilhas SAC, ¶37.) Thus, any one of the enumerated factors (including the lack of a center divide) may serve as the basis for plaintiff Cacilhas's claim for dangerous condition of public property.

Consequently, defendant Caltrans' demurrer to the first cause of action in plaintiff Cacilhas's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for dangerous condition of public property and/or the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

[Defendant Caltrans also takes issue with plaintiff Cacilhas asserting the first cause of action against defendant GCC who is, as Caltrans contends, not a government entity. Defendant Caltrans represents itself and does not represent GCC. In that regard, defendant Caltrans lacks standing to assert this argument. For that reason, the court will decline to address this additional argument.]

B. Defendant Caltrans' motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

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[6] See page 3, lines 18 – 19 of the Memorandum of Points and Authorities in Support of Defendant Caltrans' Demurrer, etc.

Defendant Caltrans moves to strike prayer 8 on page 30 of plaintiff Cacilhas's SAC which states, "For prejudgment interest and post judgment interest, as applicable." Defendant Caltrans contends public entities are not liable for prejudgment interest pursuant to Civil Code section 3291.[7]

In opposition, plaintiff Cacilhas does not dispute defendant Caltrans' assertion that public entities are not liable for prejudgment interest. Plaintiff Cacilhas argues simply that the language of prayer 8 expressly limits its applicability ("as applicable") and is properly asserted against the other non-public entity defendants.

Had this language of limitation not been included, the court might be inclined to strike the language as to defendant Caltrans only. However, since the language already contemplates the limited applicability of plaintiff Cacilhas's request, the court finds it unnecessary to strike prayer 8.

Accordingly, defendant Caltrans' motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

C. Defendants Ashley M. Oliver and James Thomas Oliver's motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

Defendants Ashley M. Oliver and James T. Oliver (collectively, "Oliver")[8] move to strike plaintiff Cacilhas's prayer for exemplary damages and related allegations found in plaintiff Cacilhas's SAC.[9] As this court previously explained, "'Malice' means 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 or safety of others." (Civil Code §3294, subd. (c)(1).) To plead a "willful and conscious disregard of the rights of others," a plaintiff need only allege, "that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211.)

Defendants Oliver cite to *Taylor v. Superior Court* (1979) 24 Cal.3d 890 (*Taylor*) where the California Supreme Court addressed the issue of punitive damages in the context of drunk driving. "A conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must 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." (*Taylor*, *supra*, 24 Cal.3d at pp. 895-896.)

"One who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates, in the words of Dean Prosser, 'such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.' [Citation.] Although the circumstances in a particular case may disclose similar willful or

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[7] In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of the other person, corporation, association, or partnership, and whether the injury was fatal or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in this section.

If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.

This section shall not apply to a public entity, or to a public employee for an act or omission within the scope of employment, and neither the public entity nor the public employee shall be liable, directly or indirectly, to any person for any interest imposed by this section.

(Civ. Code, § 3291.)

[8] Although the motion to strike is brought by both defendant Ashley Oliver and James T. Oliver, the prayer for exemplary damages states explicitly, "as to Defendant Ashley Oliver and Doe Defendants only."

[9] The court is not persuaded by defendants Oliver's argument that certain paragraphs of plaintiff Cacilhas's SAC can be interpreted as asserting a separate cause of action for exemplary damages.

wanton behavior in other forms, ordinarily, routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages." (*Id.* at pp. 899-900.)

In her SAC, plaintiff Cacilhas alleges, in relevant part, that "defendant ASHLEY OLIVER was under the influence of drugs and/or alcohol at the time of the subject collision, for which she was criminally convicted, and that her actions merit exemplary damages, as she, knowing the severe risk of causing injury or death associated with driving while intoxicated, willfully, and knowingly consumed excessive amounts of alcohol such that she was intoxicated. Plaintiff is informed and believes, and on that basis alleges that ASHLEY OLIVER, knowing that her level of intoxication was impairing her ability to think clearly, walk, and function, and knowing that she should not drive a vehicle as it would put the lives of others in danger of injury and/or death, consciously and willfully decided to drive and put others at risk of harm and death rather than take other readily available transportation."

It is the court's opinion that the allegations here sufficiently state defendant Ashley Oliver's awareness of the probable consequence of drunken driving. "One who wilfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others." (*Taylor*, *supra*, 24 Cal.3d at p. 897.) "Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby. This is the essential gravamen of the complaint, and while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases." (*Id.* at p. 896.) The gravamen of plaintiff Cacilhas's complaint here is sufficient to support a claim for punitive damages.

Defendants Oliver argue additionally that the alternative definition of malice also requires that the conduct be despicable. "'Despicable conduct' has been described as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. [Citation.] Such conduct has been described as '[having] the character of outrage frequently associated with crime.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1050.) "[I]n cases involving conduct performed without intent to harm, a finding of 'malice' for punitives purposes requires proof by clear and convincing evidence that defendant's tortious wrong amounted to 'despicable conduct' and that such despicable conduct was carried on with a 'willful and conscious disregard' of the rights or safety of others." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704 (*College Hospital*).)

> "Malice" is defined as conduct "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 or safety of others." [Citation.] As noted earlier, the italicized words were added by the 1987 Reform Act. We assume they are not surplusage. [Citation.]
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> By adding the word "willful" to the "conscious-disregard" prong of malice, the Legislature has arguably conformed the literal words of the statute to existing case law formulations. [Citation.] However, the statute's reference to "despicable" conduct seems to represent a new substantive limitation on punitive damage awards. Used in its ordinary sense, the adjective "despicable" is a powerful term that refers to circumstances that are "base," "vile," or "contemptible." [Citation.] As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiffs' interests. The additional component of "despicable conduct" must be found.

(*College Hospital*, *supra*, 8 Cal.4th at p. 725.)

"Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Lackner*, *supra*, 135 Cal.App.4th at p. 1210.) On the facts alleged, the court is inclined to find drunk driving to be conduct which could be described as having the character of outrage frequently associated with crime.

Accordingly, defendants Oliver's motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

III. Order.

Defendant Caltrans' demurrer to the first cause of action in plaintiff Cacilhas's SAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for dangerous condition of public property and/or the pleading is uncertain [Code Civ. Proc., §430.10, subd. (f)] is OVERRULED.

Defendant Caltrans' motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

Defendants Oliver's motion to strike portions of plaintiff Cacilhas's SAC is DENIED.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

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Calendar Line 6

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Calendar Line 7

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV381946 **Carlos Castro v. Equinix, Inc., et al.**
DATE: 26 September 2023 **TIME: 9:00 am** **LINE NUMBER: 07**
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 25 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Defendants J.T. Magen & Co., Inc and JTM Construction Group, Inc. For Summary Judgment.

I. Statement of Facts.

On or about 3 November 2020, plaintiff Carlos Castro ("Plaintiff") was an employee of Southland Industries, a subcontractor on the construction site located at or near 5 Great Oaks Boulevard in San Jose. (Complaint, ¶Prem.L-1.) Plaintiff was working as a pipefitter on the jobsite which was owned and controlled by defendant Equinix, Inc. ("Equinix") and its general contractor, defendant J.T. Magen and Company, Inc. ("Magen"). (*Id.*) Defendants were actively managing the construction site and the construction procedures when a large steel pipe struck Plaintiff causing severe and permanent injury. (*Id.*)

On 26 April 2021[1], Plaintiff filed a Judicial Council form complaint against defendants Equinix, Equinix (US) Enterprises, Inc., and Magen asserting causes of action for:

(1) Premises Liability

(2) General Negligence

On 6 July 2021, defendant Magen filed an answer to Plaintiff's complaint.

On 7 July 2021, defendant Equinix filed an answer to Plaintiff's complaint.

On 20 August 2021, defendant Magen filed a cross-complaint against cross-defendant Southland Industries ("Southland") asserting causes of action for:

(1) Breach of Contract

(2) Breach of Contract

(3) Express Indemnity

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[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

On 23 November 2021, cross-defendant Southland filed an answer to defendant/ cross-complainant Magen's cross-complaint.

On 16 March 2023, Plaintiff filed a notice of settlement with defendants Equinix and Equinix (US) Enterprises, Inc. only. On the same date, the court clerk dismissed the complaint against defendants Equinix and Equinix (US) Enterprises, Inc. upon Plaintiff's request.

On 22 March 2023, Plaintiff filed amendments to the complaint substituting Enviro Safetech, Inc. ("ESI") and JTM Construction Group, Inc. ("JTM") for Doe defendants.

On 11 April 2023, defendant JTM filed an answer to Plaintiff's complaint.

On 12 April 2023, defendants Magen and JTM filed the motion now before the court, a motion for summary judgment/ adjudication of Plaintiff's complaint.

On 2 May 2023, defendant ESI filed an answer to Plaintiff's complaint.

II. Analysis.

A. Defendant JTM's motion for summary judgment is DENIED.

1. Requests for judicial notice.

In support of the motion for summary judgment, defendants JTM and Magen request judicial notice of Plaintiff's complaint and Plaintiff's amendment to the complaint substituting defendant JTM for a Doe defendant. The request for judicial notice in support of Magen and JTM's motion for summary judgment is GRANTED insofar as the court takes judicial notice of the existence of the documents, not necessarily the truth of any matters asserted therein. (Evid. Code, §452, subd. (d); see also *People v. Woodell* (1998) 17 Cal.4th 448, 455-- Evidence Code section 452 and 453 permit the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.".)

In opposition to the motion for summary judgment, Plaintiff requests judicial notice of various OSHA regulations. The request for judicial notice pursuant to Evidence Code sections 451, 452 in support of opposition to defendants Magen and JTM's motion for summary judgment is DENIED as unnecessary. (See *Duarte v. Pacific Specialty Insurance Company* (2017) 13 Cal.App.5th 45, 51, fn. 6—denying request where judicial notice is not necessary, helpful or relevant.)

2. *Privette* doctrine.

Plaintiff's complaint asserts causes of action for premises liability and negligence. "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 was 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.)

In moving for summary judgment, defendant JTM argues it did not owe a legal duty of care to Plaintiff. "Recovery for negligence depends as a threshold matter on the existence of a legal duty of care." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213.) "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) "The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.)

It is well settled that "[w]hen a person or organization hires an independent contractor, the hirer presumptively delegates to the contractor the responsibility to do the work safely." (*Sandoval v. Qualcomm Incorporated* (2021) 12 Cal.5th 256, 269 (*Sandoval*), citing *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 597, 600, 602.)

As the California Supreme Court has explained, "[t]his presumption is grounded in two major principles: first, that independent contractors by definition ordinarily control the manner of their own work; and second, that hirers typically hire independent contractors precisely for their greater ability to perform the contracted work safely and successfully." (*Sandoval*, *supra*, at p. 269, citing *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693 (*Privette*).) "We refer to this principle that a hirer is ordinarily not liable to the contract workers as the *Privette* doctrine, for the first case in which we announced it." (*Sandoval*, *supra*, at p. 270.)

Through application of this doctrine, California courts "have endorsed a 'strong policy' of presuming that a hirer delegates all control over the contracted work, and with it all concomitant tort duties, by entrusting work to a contractor." (*Ibid.*)

> A presumptive delegation of tort duties occurs when the hirer turns over control of the worksite to the contractor so that the contractor can perform the contracted work. Our premise is ordinarily that when the hirer delegates control, the hirer simultaneously delegates all tort duties the hirer might otherwise owe the contract workers. (*Tverberg I*, *supra*, 49 Cal.4th at p. 528; *Kinsman*, *supra*, 37 Cal.4th at p. 671.) Whatever reasonable care would otherwise have demanded of the hirer, that demand lies now only with the contractor. If a contract worker becomes injured after that delegation takes place, we presume that the contractor alone—and not the hirer—was responsible for any failure to take reasonable precautions.

(*Sandoval*, supra, 12 Cal.5th at p. 271.)

Defendant JTM contends this case falls squarely within the confines of the *Privette* doctrine and that the presumption of delegation of tort duties has arisen. Defendant JTM proffers the following facts: Plaintiff's complaint alleges that on or about 3 November 2020, Plaintiff was an employee of Southland, a subcontractor, working as a pipefitter on a jobsite located at 5 Great Oaks Boulevard in San Jose, at the time he was injured.[2] Plaintiff's complaint alleges that on or about 3 November 2020, a large steel pipe struck Plaintiff causing severe and permanent injury.[3] Defendant JTM was the general contractor for the SV-11 project.[4] Defendant Equinix was the owner of the SV-11 project.[5] Plaintiff's employer, Southland, entered into a subcontract with JTM to complete mechanical and plumbing design services on the SV-11 project.[6] Southland's construction contract with JTM required Southland to: (1) "furnish all labor, materials, supervision and items required for the proper and complete performance of [its] work;" (2) furnish and install all pipe work; and (3) perform the rigging for mechanical equipment Southland provided, i.e., the pipes.[7] Southland's construction contract required Southland to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its Work.[8]

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[2] See Separate Statement of Undisputed Material Facts and Supporting Evidence in Support of Defendant J.T. Magen & Co., Inc. and JTM Construction Group, Inc.'s Motion for Summary Judgment as to Plaintiff Carlos Castro's Complaint ("Defendants' UMF"), Fact No. 4. " 'A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues.' [Citations.]" [Citation.] The admissions may not be contradicted in opposing summary judgment. [Citation.]" (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 586-587.)

[3] See Defendants' UMF, Fact No. 5.

[4] See Defendants' UMF, Fact No. 6.

[5] See Defendants' UMF, Fact No. 7.

[6] See Defendants' UMF, Fact Nos. 9 – 10.

[7] See Defendants' UMF, Fact No. 11.

[8] See Defendants' UMF, Fact No. 12.

Southland's Work included the lifting of chilled water pipes approximately 16 – 17 feet above floor level.[9] Because there were obstructions, Southland could not use a forklift to lift the cooling pipes to the second floor ceiling.[10] Southland decided to use chain falls to lift the pipes.[11] Southland foremen, John Marks ("Marks") and Nic Fabbro ("Fabbro"), did the pre-task planning and developed the plan for erecting the chilled water pipe on the second floor.[12] Marks and Fabbro decided to use tube steel wedged between the I-beams.[13] On the day of the accident, C-clamps were available to Southland and could have been used to help secure the tubular steel, but Southland did not use them.[14] Defendant JTM never told Fabbro or Marks how Southland should perform its job.[15] Plaintiff did not receive direction from defendant JTM, only from Southland General Foreman Fabbro.[16] No one from defendant JTM told Plaintiff how to rig the pipe.[17] Southland's own "Root Cause Analysis" states the cause of the accident was Southland's individual decision to deviate from [the] agreed upon plan.[18]

> But the *Privette* doctrine has its limits. Sometimes a hirer intends to delegate its responsibilities to the contractor in principle but, by withholding critical safety information, fails to effectively delegate its responsibilities in practice; or a hirer delegates its responsibilities only partially by retaining control of certain activities directly related to the contracted work. When such situations arise, the *Privette* doctrine gives way to exceptions. In *Kinsman*, we articulated the rule that a landowner-hirer owes a duty to a contract worker if the hirer fails to disclose to the contractor a concealed premises hazard. (*Kinsman*, *supra*, 37 Cal.4th at p. 664.) And in *Hooker*, we articulated the rule that a hirer owes a duty to a contract worker if the hirer retains control over any part of the work and actually exercises that control so as to affirmatively contribute to the worker's injury. (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

(*Sandoval*, *supra*, 12 Cal.5th at p. 271; see also *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717—"One allows a contractor's employee to sue the hirer of the contractor when the hirer (1) retains control over any part of the work and (2) negligently exercises that control (3) in a manner that affirmatively contributes to the employee's injury.")

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), an independent contractor's employee was killed in a crane accident while helping to construct a freeway overpass for Caltrans. Caltrans had permitted vehicles to use the overpass where the employee operated his crane. Shortly before the accident, the employee had retracted the crane's outriggers to allow traffic to pass. The employee attempted to swing the boom without first reextending the outriggers, and the crane tipped over, killing the employee. Caltrans was responsible for compliance with safety laws and regulations, and its construction safety coordinator was supposed to "'recognize and anticipate unsafe conditions'" in its construction projects. (*Ibid.*) The employee's estate contended there was a triable issue regarding whether Caltrans was liable under a "retained control theory" under the Restatement Second of Torts, section 414, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." The Supreme Court agreed that "if a hirer does retain control over safety conditions at a worksite

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[9] See Defendants' UMF, Fact No. 13.

[10] See Defendants' UMF, Fact No. 15.

[11] See Defendants' UMF, Fact No. 15.

[12] See Defendants' UMF, Fact No. 17.

[13] See Defendants' UMF, Fact No. 18.

[14] See Defendants' UMF, Fact No. 19.

[15] See Defendants' UMF, Fact No. 20.

[16] See Defendants' UMF, Fact No. 21.

[17] See Defendants' UMF, Fact No. 21.

[18] See Defendants' UMF, Fact No. 22.

and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer." (*Id.* at p. 213.) However, the court noted that liability would not attach on the hirer "merely because the hirer retained the ability to exercise control over safety at the worksite. …[T]he imposition of tort liability on a hirer should depend on whether the hirer exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (*Id.* at p. 210.) The court affirmed summary judgment in favor of Caltrans because it found that by merely permitting traffic to use the overpass, Caltrans did not affirmatively contribute to the employee's death.

a. Hirer retains control over any part of the contracted work.

> A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. This concept simply incorporates the Restatements' theory of retained control: Against a backdrop of no hirer duty respecting the manner of performance of work entrusted to a contractor, the Restatements provide that a hirer who retains control over any part of that work owes others a duty of reasonable care respecting the hirer's exercise of that retained control. (See Rest.2d Torts, § 414; *Hooker*, *supra*, 27 Cal.4th at pp. 201–202 [incorporating Rest.2d Torts, § 414]; Rest.3d Torts, Liability for Physical and Emotional Harm, § 56 [modern version of Rest.2d Torts, § 414].) So "retained control" refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the "contracted work"—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work. [Footnote.] (See Rest.3d Torts, supra, § 56, com. b, pp. 390–392.) Furthermore, ***a hirer's authority over the contracted work amounts to retained control only if the hirer's exercise of that authority would sufficiently limit the contractor's freedom to perform the contracted work in the contractor's own manner.*** (*Id.*, com. c, p. 392; see, e.g., *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1395 [68 Cal. Rptr. 2d 806] [***"the 'control' necessary to give rise to a duty of care*** under Restatement [Second of Torts] section 414" ***is "not simply general control over the premises," but control "over the methods of the work or the manner in which the contractor's employees perform the operative details of their tasks"***], disapproved on other grounds in *Hooker*, *supra*, 27 Cal.4th at p. 214 and *Camargo*, *supra*, 25 Cal.4th at p. 1245; *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902] ["the [hirer] may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without" incurring a retained control duty].)

(*Sandoval*, *supra*, 12 Cal.5th at pp. 274-275; emphasis added.)

Defendant JTM anticipated Plaintiff would argue that JTM still owed him a duty under a "retained control" theory and emphasizes the fact that Southland's construction contract required Southland to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its Work.[19] Southland had its own Safety Officer, Avnit Kang (and later Sophen Len), monitoring the SV-11 worksite.[20]

In opposition, Plaintiff presents facts to show that defendant JTM did retain control of the work (safety, in particular) purportedly contracted to Southland. Defendant JTM entered into a Construction Services Master Terms and Conditions ("Master Agreement") on 13 March 2013 for the construction of multiple projects.[21] Defendant JTM

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[19] See Defendants' UMF, Fact No. 12.

[20] See Defendants' UMF, Fact No. 14.

[21] See Plaintiff's Additional Material Facts in Support of Opposition to J.T. Magen & Co, Inc. and JTM Construction Group, Inc.'s Motion for Summary Judgment ("Plaintiff's AMF"), Fact No. 1.

has constructed at least 14 projects in conjunction with Equinix, all involving computer data centers for use in storing cloud material for public use.[22] Each project had a separate addendum providing for the specifications of that project.[23] Addendum 12 (with exhibits) is the contract addendum relating to the accident project (project SV-11).[24] Defendant JTM was responsible for all means and methods on the job, including the means and methods of the subcontractor's work; it was absolutely responsible for project safety.[25] The Master Agreement states: "Contractor [JTM] has and hereby retains the right to exercise full control and supervision over the Work and full control over employment, direction, compensation, and discharge of all persons assigning in the Work."[26]

Defendant JTM entered into a designer-builder/ design-consultant contract ("DBIA") with Southland incorporating the Master Agreement.[27] The DBIA provided, in part, "[Southland's] provision of the Construction Phase Services shall not be construed to make [Southland] responsible for … safety precautions and programs in connection with the construction of the Project."[28] Defendant JTM maintained responsibility for overseeing and monitoring the safety precautions and programs in connection with the performance of the Contract for the on-site safety of their Employees and Subcontractors performing work for the benefit of this project.[29] JTM formulated a Site Specific Safety Program ("SSSP") which stated JTM would "conduct weekly/biweekly project meetings with subcontractors to properly coordinate the work between trades and resolve matters related to safety."[30]

"If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control. [Citations omitted.] Because the hirer actively *retains* control, it cannot logically be said to have *delegated* that authority." (*Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439, 1446; italics original.) The evidence presented by Plaintiff in opposition at least presents a triable issue of material fact with regard to whether defendant JTM retained control over safety conditions at the subject construction jobsite.

b. Hirer actually exercises that retained control.

It is one thing for the hirer to retain control over some aspect of the independent contractor's work, it is an entirely different thing for the hirer to actually exercise that retained control. As Plaintiff acknowledges in opposition:

> A hirer "actually exercise[s]" its retained control over the contracted work when it involves itself in the contracted work "such that the contractor is not entirely free to do the work in the contractor's own manner." (Rest.3d Torts, supra, § 56, com. c, p. 392; see *Thompson v. Jess* (Utah 1999) 1999 UT 22 [979 P.2d 322, 327]; *Hooker*, *supra*, 27 Cal.4th at p. 209 [endorsing an approach similar to *Thompson*'s].) In other words, the hirer must exert some influence over the manner in which the contracted work is performed. Unlike "retained control," which is satisfied where the hirer retains merely the right to become so involved, "actual exercise" requires that the hirer in fact involve itself, such as through direction, participation, or induced reliance. [Footnote.] (See, e.g., *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28, 39 [103 Cal. Rptr. 2d 594] (*Kinney*) [a hirer's "mere failure to exercise a power to compel the [contractor] to adopt safer

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[22] See Plaintiff's AMF, Fact No. 2.

[23] See Plaintiff's AMF, Fact No. 7.

[24] See Plaintiff's AMF, Fact No. 8.

[25] See Plaintiff's AMF, Fact No. 11 – 12.

[26] See Plaintiff's AMF, Fact No. 14.

[27] See Plaintiff's AMF, Fact Nos. 18 – 19.

[28] See Plaintiff's AMF, Fact No. 20.

[29] See Plaintiff's AMF, Fact Nos. 22 – 27.

[30] See Plaintiff's AMF, Fact Nos. 22 and 28.

> procedures does not, without more, violate any duty owed to the [contract worker]"]; *Hooker*, *supra*, 27 Cal.4th at p. 209 [quoting and agreeing with this passage in *Kinney*].)

(*Sandoval*, *supra*, 12 Cal.5th at p. 276.)

> Although "active participation" may be one way of exerting influence over the manner of performance [citations omitted], it is not necessarily the only way. (See, e.g., *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, 1133–1134 [120 Cal. Rptr. 2d 251] (*Ray*) [finding *Hooker* test satisfied where hirer had contractually prohibited contractor from unilaterally undertaking a crucial safety measure but was not actively participating in the contracted work at the time of the injury].)

(*Sandoval*, *supra*, 12 Cal.5th at p. 276, fn. 6.)

As the court understands, Plaintiff's argument is akin to the above footnote passage from *Sandoval*. Although defendant JTM was not actively participating in the contracted work (i.e., how Southland installed/ rigged the pipe which fell on Plaintiff), defendant JTM did have control with regard to the timing of Southland's work and by advancing the schedule, defendant JTM effectively forced Southland to omit/ skip safety measures and/or precluded Southland from undertaking safety measures (in this case, submitting plans for installation of the subject pipe in advance of the work and attendance at a safety meeting where the safety of such plans could be considered). In other words, Southland was not entirely free to do the work in the manner it would have otherwise done.

To support such theory, Plaintiff proffers the following facts: Ron Bechtol ("Bechtol") was the project superintendent for JTM on the SV-11 project and the primary on-site individual to manage the Construction Sub-Contractor performance.[31] Bechtol presided over the weekly subcontractor meetings which, among other things, served to inform JTM as to how a subcontractor was going to perform a particular task.[32] Fabbro, Southland's general foreman, attended the weekly subcontractor meetings along with Mo Pournejat ("Pournejat") who worked for Enviro Safetech as the head safety person for JTM.[33]

Under the terms of the Master Agreement, JTM was responsible for all work on project SV-11 including scheduling work.[34] The SSSP called for Pre-Task Safety Analysis ["PTSA"] Meetings to be "scheduled far enough in advance of the start of the relevant phase or work to ensure that changes or revisions to JHA's [Job Hazard Analyses] and coordination efforts will not affect the scheduled execution of the relevant phase or work."[35] PTSA meetings were required to "identify and address the safety and coordination issues of the relevant phase of work."[36] The Subcontractor Safety Representative, the Site Safety Manager, the Subcontractor Foreman, and the JTM Super were required to attend.[37]

The SSSP required JTM to prepare a "Two/Three-Week Look-Ahead Schedule" to keep subcontractors apprised of future work.[38] The schedule did not call for installing the chilled water pipe in the utility corridor on the second level until 26 October 2020.[39] Bechtol told Southland that as soon as the cement pour was over, it could start installing the chilled water pipe.[40] Bechtol told Fabbro the cement pour would dry by 21 October and if Fabbro

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[31] See Plaintiff's AMF, Fact No. 35.

[32] See Plaintiff's AMF, Fact No. 36.

[33] See Plaintiff's AMF, Fact Nos. 37 – 38.

[34] See Plaintiff's AMF, Fact No. 39.

[35] See Plaintiff's AMF, Fact No. 31.

[36] See Plaintiff's AMF, Fact No. 32.

[37] *Id.*

[38] See Plaintiff's AMF, Fact Nos. 40 – 41.

[39] See Plaintiff's AMF, Fact No. 42.

[40] See Plaintiff's AMF, Fact No. 46.

had the pipe and manpower, he could begin installing the pipe.[41] Bechtol said when he asked Fabbro if "he had all of his stuff together to start," this would "include his work plan on how to install the pipe."[42]

Fabbro admitted he did not have a "task-specific installation plan" formulated for JTM to review before he started raising the pipe on the second level.[43] Fabbro was told at foremans meetings that he needed to add manpower to keep up with the schedule.[44] They would ask, "Are you going to hit your date?"[45] This was an "ongoing" thing.[46] "As far as schedule," Fabbro said, "the one thing that [JTM] did do is even if we agreed to a change in the schedule, they would still walk by daily and say, 'I don't see a lot of pipe in the air.'"[47]

Pournejat's recollection is that Southland had not, up to October 21 (the day of the first lift), submitted any plan with regard to how the pipe was going to be erected.[48] On the day Southland raised the first pipe, Pournejat watched how they were going to do it.[49] Pournejat did not observe Southland using tubular steel wedged between I-beams to anchor the chain fall that was raising the pipe.[50] If he had, Pournejat would have stopped Southland immediately.[51]

Defendant JTM anticipated Plaintiff would argue liability here is based on defendant JTM asking Southland to begin lifting pipes earlier than originally planned. Defendant JTM contends, however, that this is not a basis for applying the retained control exception because defendant JTM did not dictate how Southland was to perform the work; Southland came up with its own plan to lift the pipes.

Defendant JTM compares these circumstances to those found in *McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005 (*McCullar*). According to defendant JTM, the *McCullar* court held that a contractor who instructs a subcontractor to immediately begin working on an icy floor (a known hazardous condition created by the contractor) is not liable when the subcontractor's employee slipped on the icy floor because the subcontractor had "ample freedom to accommodate that hazard effectively in whatever manner the subcontractor sees fit." (*McCullar*, *supra*, 83 Cal.App.5th at p. 1017.)

The court here finds a distinction between *McCullar* and the facts presented here, a distinction which may be subtle, but is nonetheless significant. In *McCullar*, the hirer's conduct [telling the contractor's employee to, "go back to work"] did not affect (or did not amply affect) the contractor's freedom to perform its work in the manner it sees fit. "[The hirer] instead simply left [the contractor's employee] to his own devices in dealing with the ice, which is insufficient, as a matter of law, to establish liability." (*McCullar*, *supra*, 83 Cal.App.5th at p. 1020.)

Here, however, there is at least some evidentiary support for Plaintiff's assertion that the hirer's [JTM] conduct [providing pressure on Southland to begin installation of pipes early without a plan in place/ pressuring Southland to work faster] affected the contractor's [Southland] freedom to perform its work. In this court's opinion, this situation reflects a variation of an issue the *McCullar* court recognized remains unresolved by the courts.

> "We do not decide whether there may be situations, not presented here, in which a hirer's response to a contractor's notification that the work cannot be performed safely due to

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[41] See Plaintiff's AMF, Fact No. 47.

[42] See Plaintiff's AMF, Fact No. 48.

[43] See Plaintiff's AMF, Fact No. 49.

[44] See Plaintiff's AMF, Fact No. 55.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] See Plaintiff's AMF, Fact Nos. 56 and 80.

[49] See Plaintiff's AMF, Fact No. 81.

[50] See Plaintiff's AMF, Fact No. 82.

[51] See Plaintiff's AMF, Fact No. 82.

> hazardous conditions on the worksite might give rise to liability. For example, we do not decide whether a hirer's conduct that unduly coerces or pressures a contractor to continue the work even after being notified that the work could not be performed safely due to a premises hazard would fall under the Hooker exception to Privette." (*Gonzalez*, *supra*, 12 Cal.5th at p. 56, italics omitted.)

(*McCullar*, *supra*, 83 Cal.App.5th at pp. 1019-1020.)

It is this court's opinion that the evidence proffered by Plaintiff is sufficient to demonstrate that defendant JTM, although not actively participating in Southland's contracted work, did involve itself in the contracted work "such that [Southland was] not entirely free to do the work in [Southland's] own manner."

Moreover, it is the court's opinion that defendant JTM's conduct was not just passive [failing to enforce safety meetings, submission of work plans, review of work plans in advance] but included some more affirmative conduct [pressuring Southland to work faster] which makes these facts distinguishable from *Hooker*. ["The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff." (*Hooker*, *supra*, 27 Cal.4th at p. 209.)]

c. In a manner that affirmatively contributes to employee's injury.

Finally, " ' "[a]ffirmative contribution" means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury.' [Citation.] ***A hirer's conduct satisfies the affirmative contribution requirement when 'the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct.***' [Citation.]" (*McCullar*, *supra*, 83 Cal.App.5th at pp. 1014-1015; emphasis added.)

The same evidence offered by Plaintiff, above, is in this court's opinion sufficient to establish (or at least raise a triable issue of material fact) that defendant JTM's conduct, in some respect, induced Southland to omit/ skip safety measures and/or precluded Southland from undertaking safety measures which might have otherwise been taken.

Accordingly, defendant JTM's motion for summary judgment of Plaintiff's complaint is DENIED. [The court deems it unnecessary to consider Plaintiff's additional argument(s) in opposition.]

B. Defendant Magen's motion for summary judgment is GRANTED.

Defendant Magen moves for summary judgment by arguing, presumably, that it did not owe any duty to Plaintiff because defendant Magen is a separate business entity (from JTM) and was not involved in the SV-11 project.[52]

Plaintiff offers no argument or opposition to defendant Magen's assertion and evidence of non-liability. Accordingly, defendant Magen's motion for summary judgment of Plaintiff's complaint is GRANTED.

III. Order.

Defendant JTM's motion for summary judgment of Plaintiff's complaint is DENIED. Defendant Magen's motion for summary judgment of Plaintiff's complaint is GRANTED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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[52] See Defendants' UMF, Fact No. 6.

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 21CV375939 **Andrea Ortega v. City of San José;**
DATE: 26 September 2023 **TIME: 9:00 am** **LINE NUMBER: 09**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 25 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Motion of Plaintiff to Compel Attendance at a Deposition Of Defendant's Person Most Qualified By Video With Production Of Documents and for Monetary Sanctions.

I. Statement of Facts.

On 17 December plaintiff was riding with her boyfriend on a motor scooter near the San Fernando Light Rail Station in San Jose. They left the street and cut across a pedestrian Plaza, striking a light pole base which was missing the light pole. from what has been indicated was a light post that was either removed or broken, which caused them to be ejected from the scooter. Plaintiff experienced significant dental and facial injuries when she fell from the scooter.

Plaintiff claims that the City of San José is liable to plaintiff for dangerous condition of public property pursuant to California ***Government Code***, §§ 835 and 835.2.

City of San Jose Landscape and Traffic Maintenance Division Manager Eric Hon was produced as person most qualified regarding ownership and control of this lighting fixture. He testified that the City was contractually solely responsible for all maintenance issues within the parklet, including all lighting fixtures pursuant to an agreement executed the Santa Clara Valley Transportation Authority which was executed on 25 August 2004.

The City has filed a cross-complaint against Nicholas Bergam, the driver of the scooter.

II. Motion To Compel Deposition of Defendant's Person Most Knowledgeable.

Mr. Hon testified that the City had not inspected, maintained, or performed any repair work on any lighting fixture within the parklet since 2004.

In order to discover the City's defenses and evidence regarding Plaintiff's claim of dangerous condition of public property, plaintiff served a Notice Of Person Most Qualified Deposition covering seven relevant topics as follows:

1. Maintenance of the Subject Station for the 10 years prior to the subject incident;

2. The pole that had been attached to the lighting fixture that was absent on the day of the incident, including installation, date of detachment, cause of detachment, removal of the pole from the area, remediation etc.;

3. City of San Jose personnel that were involved with the detachment (or remediation after detachment) of the pole that had been attached to the base of the fixture;

4. Communications within the City of San Jose regarding maintenance at the subject station;

5. Communications with any entity outside of the City of San Jose regarding maintenance at the Subject Station including, but not limited to, Bayscape Landscape Management;

6. Water facilities and usage at the subject station including, but not limited to, installation, maintenance, meter readings, payments, communications, and fire hydrants; and

7. The curb ramps on the north side of West San Fernando Street at or near its intersection with Gifford Avenue in San Jose, CA, including but not limited to installation, maintenance, drawings, designs, plans, photographs, maps, invoices, personnel, communications, permits, materials, etc.

III. Analysis.

"The service of a deposition notice. . .is effective to require any deponent who is a party to the action. . .to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection and copying." (***Code of Civil Procedure***, § 2025.280(a).)

The deposition of a non-natural person (i.e., corporation) may be noticed by describing "with reasonable particularity the matters on which examination is requested" and the deponent "shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf." (***Code of Civil Procedure***, § 2025.230.)

"More specifically, the primary purpose of ***Code of Civil Procedure***, section 2025.230 is not to aid corporate entities. Rather, it is intended to simplify discovery for the party seeking information from a corporation. "As one treatise explains, the purpose of this provision is to eliminate the problem of trying to find out who in the corporate hierarchy has the information the examiner is seeking. E.g., in a product liability suit, who in the engineering department designed the defective part? (Weil & Brown, Cal. Practice Guide: ***Civil Procedure Before Trial*** (The Rutter Group 2001) ¶ 8:474, p. 8E-18.)" (***LAOSD Asbestos Cases*** (2023) 87 Cal.App.5th 939, 948.)

"A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (***Code of Civil Procedure***, § 2016.040.)

While meeting and conferring is not required for a motion to compel initial responses, the parties are always encouraged to work out their differences informally so as to avoid the necessity for a formal order. The Court has concerns when there does not appear to be any effort to resolve discovery issues without Court intervention. (See ***McElhaney v. Cessna Aircraft Co.*** (1982) 134 Cal.App.3d 285, 289.)

The purpose of this requirement is to force lawyers to reexamine their positions, and to narrow their discovery disputes to the irreducible minimum, before calling upon the court to resolve the matter. It also enables parties and counsel to avoid sanctions that are likely to be imposed if the matter comes before the court. (***Stewart v. Colonial Western Agency, Inc.*** (2001) 87 Cal.App.4th 1006, 1016-1017.)

Courts should not deny motions to compel for lack of adequate informal meet-and-confer when some efforts have been made absent a clear intent to harass or a track record of lack of good faith. (***Obregón v. Superior Court*** (1998) 67 Cal.App.4th 424, 433-434.)

In ***Nevada Power Co. v. Monsanto Co.*** (1993) 151 F.R.D. 118, 120, the court offered the following guidelines for the conduct of an informal negotiation conference: '[T]he parties must present to each other the merits of their respective positions with the same candor, specificity, and support during informal negotiations as during the briefing of discovery motions. Only after all the cards have been laid on the table, and a party has

meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a 'sincere effort' to resolve the matter.' [¶] These sensible guidelines apply, with equal force, California's Discovery Act. (***Greyhound Corp. v. Superior Court*** (1956) 56 Cal.2d 355, 371.)

The City served timely objections to the requests.

In opposition papers, the City responded that it has already responded to previous discovery that it does not have any knowledge of the detachment of the light pole and that it is responsible for the light pole. The City further states that it has produced two persons most knowledgeable on 10 different topics and responded to documents covering over 15 categories in response to the prior PMK requests and production of documents. A history of attempting to meet and confer with defense counsel with defense counsel stating that the material in question and PMKs had already been provided lead to no change in status.

As of 23 September 2023, at 9:03 PM, Odyssey does not reflect any reply papers

So, plaintiff makes a demand for production of documents and persons most knowledgeable for deposition and the City responds that it has already done so and there is no additional evidence to be provided.

Though broad, the trial court's discretion in discovery matters is not unlimited. If there is no legal justification for such exercise of discretion it must be held that an abuse occurred." (***Golf & Tennis Pro Shop, Inc. v. Superior Court*** (2022) 84 Cal.App.5th 127, 133-134) (citations omitted, internal punctuation and text modified.) In this particular matter, there is insufficient reason for this Court to exercise its discretion and its mind is in equipoise.

Since the Court believes that the burden of proof/persuasion lies with plaintiff, the motion is DENIED. The mutual requests for sanctions are DENIED.

IV. Tentative Ruling.

The tentative ruling was duly posted.

V. Case Management.

The settlement conference and trial dates will remain as set.

VI. Order.

The motion plaintiff to compel attendance at a deposition of defendant's person most qualified by video with production of documents and for monetary sanctions is DENIED. The City's request for sanctions is DENIED.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV416858 **Petition of DRB Capital, LLC**
DATE: 26 September 2023 **TIME: 9:00 am** **LINE NUMBER: 13**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on the 25 September 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Petition of DRB Capital, LLC for
Approval of Transfer of Structured Settlement Payment Rights.

Petitioner seeks approval from this Court for a transfer of payments under a structured settlement of a personal injury case wherein F.A., the individual to whom the structured settlement payments are currently being made, assigns a portion of the settlement to petitioner.

F.A. declares under penalty of perjury that he is of sound mind and not under or subject to any distress, fraud, or undue influence. He is a competent adult and he understands and accepts the consequences of his actions. He is 20 years of age.

He currently receives $725.00 per month from the annuity. He would like to use the proceeds from this transaction as a down payment on a house to provide comfort, well-being, security and to build equity over time. He received a written disclosure statement from petitioner. He states he was advised to seek independent professional advice from a financial professional and has waived his right to do so.

Under California ***Insurance Code***, § 10139.5(a), "[a] direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express written findings by the court" that considers:

(1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.

(2) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received that advice or knowingly waived, in writing, the opportunity to receive the advice.

(3) The transferee has complied with the notification requirements pursuant to paragraph (2) of subdivision (f), the transferee has provided the payee with a disclosure form that complies with Section 10136, and the transfer agreement complies with Sections 10136 and 10138.

(4) The transfer does not contravene any applicable statute or the order of any court or other government authority.

(5) The payee understands the terms of the transfer agreement, including the terms set forth in the disclosure statement required by Section 10136.

(6) The payee understands and does not wish to exercise the payee's right to cancel the transfer agreement.

The Court has no idea about the amount of money being transferred. This Court would like to see copies of the unredacted papers.

The Court would like to continue this matter to a future date so that this Court may look at the redacted papers, especially the Purchase Agreement (California ***Insurance Code***, § 10136), described in ¶ 5 of F.A.'s declaration. Additionally, the Court would like to speak to F. A. as well.

Counsel for petitioner should use the Tentative Ruling Protocol to appear at the hearing to select a future date.

DATED:

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

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