SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: May 7, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV403357	William A. Earle v. Good Samaritan Hospital, L.P. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 2	22CV403357	William A. Earle v. Good Samaritan Hospital, L.P. et al.	Click on LINE 1 or scroll down for ruling in lines 1-2.
LINE 3	20CV366228	McManis Faulkner v. Melvin Cooper et al.	Click on LINE 3 or scroll down for ruling.
LINE 4	22CV401997	Christina Menne v. City of Morgan Hill	Click on LINE 4 or scroll down for ruling.
LINE 5	22CV398156	Central Coast Community Energy et al. v. BigBeau Solar, LLC	This case has been reassigned to Dept. 16. Please check with Dept. 16 for the hearing on this motion.
LINE 6	23CV413609	David Marquez v. General Motors LLC	Click on LINE 6 or scroll down for ruling.
LINE 7	20CV364559	Martin M. Nunez et al. v. FCA US LLC et al.	Click on LINE 7 or scroll down for ruling in lines 7-8.
LINE 8	20CV364559	Martin M. Nunez et al. v. FCA US LLC et al.	Click on LINE 7 or scroll down for ruling in lines 7-8.
LINE 9	20CV367997	Francisco Carrascal et al. v. AAA Insurance et al.	Motion for leave to amend: parties to appear. There is no indication in the file that the motion or any notice of hearing was served on any defendant. The court has received no response to the motion from any defendant. It appears that plaintiffs served a document relating to the motion on May 3, 2024, but that is only four days before the hearing. The court would like to discuss the apparent notice defect with the parties.

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LINE #	CASE #	CASE TITLE	RULING
LINE 10	22CV397481	Elizabeth Henriquez v. Mahmoud Shahram et al.	Motion for leave to file cross-complaint: notice is apparently proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. Defendant Shahram shall file and serve his cross-complaint within 10 days of this order.
LINE 11	23CV419499	Rosendo Cortes Fernandez v. Pacific Weathershield, Inc. et al.	Motion to be relieved as counsel: parties to appear.

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Calendar Lines 1-2
Case Name: *William A. Earle v. Good Samaritan Hospital, L.P. et al.*
Case No.: 22CV403357

I. BACKGROUND

This is an action by plaintiff William Alan Earle ("Earle") for medical negligence, arising out of the death of his father, Arthur Lenwood Earle ("Father"), after Father was discharged from the care of defendants Good Samaritan Hospital, L.P. and HCA, Inc., (collectively, "Defendants"). According to Earle, he is the youngest of five surviving children of his Father. (Second Amended Petition ("SAC"), p. 3.)[1] Father was a patient of Regional Medical Center ("RMC") in San Jose from March 13, 2019 to March 21, 2019. (*Id.* at p. 4.) RMC diagnosed Father with "basic influenza"; he was subsequently transferred to Defendants' rehabilitation facility; and then Defendants failed to investigate his past medical history and "overmedicated" him, which compromised his health. (*Id.* at pp. 4-5.) Defendants further neglected Father's medical needs, which led to bed sores, malnutrition, and exhaustion, among other things. (*Id.* at p. 6.) Despite his still being unwell, Defendants discharged Father on May 21, 2019. (*Id.* at p. 4.) Father died at his home two days later. (*Id.* at p. 3.)

Earle initiated this action on September 21, 2022, representing himself and filing a handwritten original complaint. The next day, Earle filed a first amended complaint, also handwritten, asserting a single cause of action for medical negligence. On December 11, 2023, more than a year later, Earle submitted an ex parte application to file a "second amended petition" (the SAC), which the court granted on the same day. In granting the application, the court noted that Earle still had not served the summons and complaint on any defendant. The court ordered Earle to serve these papers "without further delay." (December 11, 2023 Order.) The SAC, which is also handwritten, contains the same cause of action for "medical professional negligence."[2]

After Earle served the Defendants, they filed the present demurrer and motion to strike. The demurrer and motion are apparently directed to *both* the first amended complaint and the SAC, as they refer to both pleadings as "the Amended Complaint," but this is improper. "'"[A]n amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. [Citations.]" [Citation.]' [Citation.]" (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054 [quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884]; accord *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 506.) Here, the SAC supersedes the FAC, and so the court treats this demurrer and motion as being directed solely to the SAC.

For the reasons that follow, the court SUSTAINS the demurrer to the SAC with 20 days' leave to amend, and the court DENIES the motion to strike as moot.

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[1] Although Earle's SAC appears to be paginated, some pages are left unnumbered, and others contain multiple page numbers. For the sake of consistency, this court will cite the numbers listed at the bottom of each page of the SAC.

[2] In his SAC, Earle additionally requested release of Decedent's medical records and "statute of limitations credit of time waived as to notice of [Covid-19] shutdowns 2020, 2021." The court noted in its December 11, 2023 order that the request for release of medical records was premature.

II. FAILURE TO SERVE OPPOSITION PAPERS

As a preliminary matter, the court notes that Defendants have submitted reply papers indicating that Earle did not serve his opposition brief on them. (E.g., Defendants' Reply in Support of the Demurrer, p. 2.) It does appear that Earle's joint opposition to the demurrer and motion to strike is without a proof of service. Nevertheless, as it is apparent that Defendants were able to retrieve the opposition from the file and file reply briefs, the court will exercise its discretion to consider the opposition rather than deem the motion unopposed. The court does admonish Earle, however, that he *must* serve Defendants with all papers that he files with the court going forward. Although Earle is apparently not a lawyer and is representing himself in this case, self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

III. DEFENDANTS' DEMURRER

Defendants demur to the entirety of the SAC, asserting that it is barred by the statute of limitations and that it fails to join all necessary parties.

A. Legal Standard

"In reviewing the sufficiency of a complaint against a general demurrer, [the court is] guided by long settled rules. '[It] treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [The court] also consider[s] matters which may be judicially noticed.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law . . . . [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

B. Analysis

1. Statute of Limitations

Defendants contend that Earle's single cause of action for professional negligence is barred by the statute of limitations. (Memorandum, p. 3.) A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action." (*Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 806.) "A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified*

School Dist. (2006) 139 Cal.App.4th 499, 509-510 [internal citations and quotation marks omitted].)

Although the application of a statute of limitations is usually a factual issue, it can be subject to a demurrer if the pleading discloses on its face that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.) When evaluating whether a claim is time-barred, a court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

According to Defendants, under Code of Civil Procedure section 340.5, which sets forth a one-year limitations period "after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury," the relevant limitations period began to run on the date of Father's death on May 23, 2019. In other words, it expired on May 22, 2020. (Memorandum, p. 3.) In opposition, Earle argues that the one-year statute of limitations is "short," and he requests "leniency" in the form of "tolling credit due to the [C]ovid 19 pandemic." (Opp., pp. 3-4.) That is the full extent of Earle's response. He does not argue delayed discovery, nor does he argue that Code of Civil Procedure section 340.5 is the wrong statute of limitations.

Code of Civil Procedure section 340.5 provides, in relevant part:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person . . . .

(Code Civ. Proc., § 340.5.)

As noted above, Earle filed his initial complaint on September 21, 2022, and his allegations are based on Defendants' medical treatment of Father prior to his death on May 23, 2019. Thus, under a one-year statute of limitations, the complaint would normally need to have been filed by May 22, 2020, as Defendants contend. At the same time, Defendants also concede that this time period fell squarely within the time period of the COVID-19 pandemic and the application of California Emergency Rule 9 ("Rule 9"), which provides, in pertinent part: "Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020 to October 1, 2020." Generally, the effect of any tolling is that the limitations period stops running during the tolling period, and then it resumes when the tolling has concluded. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370 (*Lantzy*).) "As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by

the entire length of time during which the tolling event previously occurred." (*Id*. at pp. 370-371.) Thus, under Rule 9, which tolled the statute of limitations for 178 days (April 6 to October 1, 2020), Earle's statutory deadline was extended from May 22, 2020 to November 18, 2020. Despite this extension, Earle filed his original complaint on September 21, 2022, nearly two years later. (See *Lantzy, supra,* at pp. 370-371.) Therefore, Defendants' contention that the SAC is time-barred on its face appears to be meritorious. (Memorandum, p. 4:19-26.) Again, Earle does not assert delayed discovery, the application of a different limitations period, or any other exception to the statute of limitations defense in his pleadings. The court therefore concludes that the demurrer must be sustained.

As for whether leave to amend should be granted, "'[g]enerally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]' " (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. [Citation.]" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411.) Here, Earle does not explain how he could amend his SAC to cure the statute of limitations issue. Further, it is not apparent to the court that he could do so. Nevertheless, because this is the first pleading challenge, the court will grant Earle 20 days' leave to amend the cause of action for professional negligence.[3]

2. Misjoinder/Defect in Joinder

Defendants demur to the entirety of Earle's SAC for failing to include all "necessary parties" in the SAC. (Memorandum, pp. 5-6.) Specifically, Defendants argue that the SAC fails to include "four additional heirs of Decedent" identified in the SAC, in violation of Probate Code section 6402, subdivision (a). (*Id.* at p. 6:12-17.) In light of the court's conclusion that Earle's cause of action is time-barred, the court need not address this additional contention.

IV. DEFENDANTS' MOTION TO STRIKE

Defendants move to strike the punitive damages allegations in the SAC because they contend that Earle has not complied with Code of Civil Procedure section 425.13. (See Memorandum, pp. 2-3.) Given the court's ruling sustaining Defendants' demurrer to the SAC, the court declines to address this additional motion and denies it as moot.

V. CONCLUSION

The court SUSTAINS, with 20 days' leave to amend, Defendants' demurrer to the SAC on the ground that it is time-barred.

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[3] The court reminds Earle that leave is not being granted to add *new* causes of action. (See *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018, 1023 ["Following an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend [his] complaint only as authorized by the court's order. The plaintiff may not amend to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."].)

The court DENIES the motion to strike as MOOT.

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Calendar Line 3
Case Name: *McManis Faulkner, APC v. Melvin Cooper et al.*
Case No.: 20CV366228

I. BACKGROUND

This is a fee dispute between plaintiff McManis Faulkner, APC ("McManis"), a law firm, and defendant Melvin Cooper ("Melvin"), a former client. McManis filed the original and still-operative complaint on April 24, 2020. McManis represented Melvin in a family court case in Santa Cruz County Superior Court, whereby McManis agreed to provide legal services and advance costs and expenses to Melvin, and Melvin agreed to pay for these services and expenses on or before the 20th of each month. (See Complaint, First Cause of Action, ¶ BC-1, Exhibit A.) Melvin and his father, Clarke Cooper ("Clarke") (collectively, "Defendants"), signed a promissory note in which they agreed to pay principal and interest of 10 percent per annum in monthly installments of $5,000 on the 21st of each month, beginning on May 21, 2016. (Complaint, Third Cause of Action, ¶¶ BC-1-2, Exhibit C.) According to the complaint, Defendants Melvin and Clarke failed to pay McManis's billing statements under the agreement and failed to pay the principal and interest on the promissory note. (Complaint, First Cause of Action, ¶¶ BC-2-4, Exhibit C; Third Cause of Action, ¶¶ BC 2-4.) McManis's complaint states causes of action for: (1) Breach of Contract (against Melvin); (2) Common Counts (against Melvin); (3) Breach of Contract (*i.e.*, the Promissory Note, against both defendants); and (4) Common Counts (against both defendants). A copy of the Promissory Note signed by Melvin and Clarke is attached to the complaint as Exhibit B.

On September 30, 2020, Clarke filed a first amended answer ("FAA") to the complaint, asserting affirmative defenses of failure to state a cause of action, lack of consideration, fraud in the inducement, fraud, and offset. On that same date, Clarke also filed a first amended cross-complaint ("FAXC") against McManis, stating causes of action for damages and cancellation of the promissory note, fraud in the inducement, and fraud.

McManis demurred to both the FAA and the FAXC. In an order issued on March 30, 2021, this court (Judge Takaichi) overruled the demurrer to the FAA and sustained the demurrer to the second and third causes of action in the FAXC with leave to amend. As Clarke did not file a second amended cross-complaint, the second and third causes of action in the Clarke FAXC (cancellation of the promissory note and fraud in the inducement) are deemed abandoned. Melvin filed an answer to the complaint on April 29, 2021, asserting affirmative defenses of failure to state a cause of action, fraud in the inducement, fraud and offset.

Currently before the court is McManis's motion for summary adjudication of the complaint's third cause of action for breach of the promissory note, filed on December 18, 2023. Defendants filed a joint opposition on April 19, 2024. This case is set for trial on June 17, 2024.

II. MOTION FOR SUMMARY ADJUDICATION

A. General Standards

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue*

Shield of Calif. Life & Health Ins. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

This basic principle applies to the present motion in that neither of the Defendants' operative answers can be reasonably construed as asserting that McManis violated the Rules of Professional Conduct by entering into the promissory note with defendants, or as asserting that McManis breached a fiduciary duty owed to Melvin, as argued in Defendants' opposition brief. These arguments are not a proper basis for denying the present motion. "Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290 [internal citation omitted]; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].)

The moving party bears the initial burden of production—to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, affirmative defense, or an "issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136 (*Raghavan*).)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

The opposing party may be bound by admissions made in deposition testimony or in verified responses to discovery. "In a nutshell, the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D.B. Lodge Homes, Inc*. (2005) 128 Cal.App.4th 1510, 1522; See also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087 ["Where a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and 'conclude there is no substantial evidence of the existence of a triable issue of fact.'"].)

The moving party may generally not rely on additional evidence filed with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is

most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.) The court has therefore not considered the second declaration of Brandon Rose, filed with McManis's reply, or the attached exhibit.

Where a plaintiff has moved for summary judgment or adjudication, it has the burden of showing that there is no defense to a cause of action. (Code Civ. Proc., § 437c, subd. (a).) That burden can be met if the plaintiff has proved each element of the cause of action entitling it to judgment on that cause of action. If the plaintiff meets this burden, it is up to the defendant to show that a triable issue as to one or more material facts exists for that cause of action or a defense thereto. (See Code Civ. Proc., § 437c, subd. (p)(1); *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 965; *Quidel Corp. v. Super. Ct*. (2020) 57 Cal.App.5th 155, 163 ["A plaintiff moving for summary adjudication meets its burden if it proves each element of the cause of action."].)

It is not part of a moving plaintiff's initial burden to disprove affirmative defenses or cross-complaints asserted by defendants. (See *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co*. (2009) 170 Cal.App.4th 554, 564-565 [citing Code Civ. Proc., § 437c, subd. (p)(1)].)

B. The Basis for the Motion

McManis moves "for summary adjudication of Plaintiff's Third Cause of Action, for breach of contract . . . ." (Notice of Motion, p. 1:23-24.) For some reason, the notice of motion lists three separate "issues," none of which address an "issue of duty" or wholly dispose of a cause of action. They purport to address a "breach," damages for the breach, and interest on the amount of damages. As noted above, summary adjudication of general "issues" or of facts is not permitted. (*Raghavan, supra,* 133 Cal.App.4th at 1136.) The court therefore treats the motion solely as one for summary adjudication as to the third cause of action.[4]

The elements of a breach of contract cause of action are: 1) the existence of a (valid) contract; 2) a plaintiff's performance or excuse for nonperformance; 3) a defendant's breach; and 4) damages to the plaintiff resulting from that breach. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228 [citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388].) Where a contract is written, like the promissory note attached to the complaint as Exhibit B, consideration is presumed. (See Civ. Code, § 1614 ["A written instrument is presumptive evidence of a consideration."].)

McManis contends that it has proved every element of the breach of contract claim and therefore met its initial burden, as: (1) Defendants have admitted their execution of the note and its validity; (2) McManis performed its obligations under the note by continuing to represent Melvin in the child custody case in Santa Cruz County after the note was signed; (3) Defendants breached the note by ceasing to make payments after only five installment payments on September 19, 2016; and (4) McManis's damages are established by the

[4] These "issues" also resurface at the conclusion of McManis's reply brief, which again evinces a fundamental misunderstanding of the summary adjudication procedure. No stipulation was submitted to the court under Code of Civil Procedure section 437c, subdivision (t). (See Code Civ. Proc., § 437c, subd. (t).)

outstanding balance remaining on the note, plus the accumulated interest since September 2016. (See Memorandum, pp. 7:1-9:6.)

While not part of its initial burden, McManis also contends that Defendants cannot support the affirmative defenses that are asserted in their respective answers—namely, failure to state sufficient facts, fraud (including fraud in the inducement), and offset. (See Memorandum, pp. 9:9-12:11.) McManis asserts that Defendants are bound by their discovery responses, which contested the enforceability of the promissory note only on the basis of "fraud" and a purported lack of consideration. For the fraud theory, Defendants' sole support was that McManis had allegedly not done any work on an attorneys' fee motion, but McManis points out that the undisputed evidence contradicts this assertion. For the theory that consideration was lacking, McManis notes that it is hardly unusual for contracted services to be provided after a contract is signed, and the evidence submitted establishes that it continued to represent Melvin after the promissory note was signed.

McManis further contends that Melvin is judicially estopped from contesting the validity of the promissory note or the fairness of the amount of the note, given his representations to the Santa Cruz County Superior Court after McManis no longer represented him. In seeking attorneys' fees in that case, Melvin specifically requested fees in an amount that would allow him to pay off the promissory note, among other costs and expenses, which he characterized as reasonable. The family court's subsequent decision awarding him attorney's fees, based on his arguments, included amounts that were sufficient to pay the amount owed to McManis under the promissory note. (See Memorandum, pp. 12:13-13:17.)

Judicial estoppel is an equitable doctrine that "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the first position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id*. at p. 183.) "[F]or the doctrine to apply, the seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other.' [Citation]." (*Id*. at p. 182.) "The third *Jackson* factor requires that the party to be estopped was successful in asserting the first position. [Citation.] This means not just that the party prevailed in the earlier action, but that 'the tribunal adopted the position or accepted it as true[.]' [Citation.]" (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845 [internal citations omitted].)

McManis's motion is supported by a declaration from Brandon Rose, who states that he is a partner of McManis and has access to the firm's records kept in the ordinary course of business. He recounts the history of McManis's involvement in Melvin's child custody dispute in Santa Cruz County and states that Defendants will owe the firm $274,349.18 in fees and expenses (including interest) by the date of the hearing. (Rose Decl., ¶ 14.) Rose also authenticates Exhibits A-O to his declaration:

- Exhibit A is another copy of the promissory note attached to the complaint.

- Exhibits B-E are Melvin's responses to written discovery, form interrogatories, special interrogatories, and request for admission.

- Exhibits F-H are Clarke's responses to written discovery, special interrogatories, form interrogatories and requests for admission.

- Exhibit I is a memorandum filed by Melvin's successor counsel in support of his request for child support and attorneys' fees in Santa Cruz County in November 2017. Among other things, the memorandum argues that all of the fees and costs he incurred were fair and reasonable.

- Exhibit J is an October 28, 2016 email from Rose to Melvin attaching a copy of McManis's draft memorandum in support of a request for child support and attorney's fees. Rose states that he has reviewed both McManis's version and successor counsel's version "and found the versions highly similar, thus disproving the allegation that there was no work done on the motion received by successor counsel." (Rose Decl., ¶ 22.)

- Exhibit K is a copy of a declaration submitted by Melvin to the Santa Cruz County Superior Court on March 20, 2017, after McManis had ceased to represent him. In this sworn declaration, submitted in support of the request for child support and attorney's fees, Melvin confirmed that he retained McManis on February 5, 2016, less than two months before the start of the child custody trial in Santa Cruz County. (See Exhibit K, ¶¶ 14-15.) Melvin also confirmed that he "entered into a promissory note with McManis Faulkner for the sum of $119,611.52 for attorney's fees owed and $61,000 for estimated attorney's fees and cost to complete the trial and post-trial issues. As part of the Note[,] I agreed to pay monthly installments of $5,000 per month at 10 percent interest." (Exhibit K, ¶ 32.)

- Exhibit L is a copy of the May 15, 2018 statement of decision from the Santa Cruz County Superior Court. The decision specifically notes that Melvin "maintains a large debt to his former counsel McManis Faulkner with whom Petitioner signed a promissory note in order to continue to retain counsel in the middle of trial . . ." (Statement of Decision, p. 14:24-26.) It also states that "Respondent's intentional misleading of many involved in this matter directly lead to Petitioner's having to take heroic legal action—at a significant cost—to correct what had occurred. Had Respondent not lied in this matter, Petitioner would not have incurred hundreds of thousands of dollars in attorneys' fees fighting an unnecessary legal battle." (*Id.* at p. 17:18-21.) The court goes on to state that it "heard testimony from Petitioner with regard to the attorneys fees he incurred and for which he is indebted still to his father, brother, and the two law firms that represented him. The Court finds the attorneys fees reasonable and necessary under the dire circumstances with which Petitioner was faced in March 2016 when he hired his lawyer to get ready for trial in less than two months time. Petitioner's attorney's fees are reasonable particularly in light of the attorney's fees and costs expended by Respondent in this matter . . . . Respondent's actions and behavior in this case leading to the trial on custody and visitation were the sole reason Petitioner incurred these costs. Accordingly, the court grants Petitioner's request for attorneys fees and costs in the amount of $556,434 based on his need and Respondent's ability to pay them, and further as a sanction for her failure to litigate his case fairly." (*Id.* at p. 18:11-27.)

- Exhibit M is another copy of the complaint in this matter.
- Exhibit N is an excerpt from the transcript of Clarke's deposition.
- Exhibit O is an excerpt from the transcript of Melvin's deposition.

C. Analysis

The court GRANTS McManis's motion for summary adjudication of the third cause of action for breach of promissory note.

McManis's evidence—the Rose declaration and the attached exhibits—is more than sufficient to meet its initial burden as to the third cause of action for breach of the promissory note. The evidence establishes the signing of the note (which defendants do not dispute), McManis's performance of its obligations under the note, Defendants' cessation of payments on the note, and the resulting claim for damages by McManis.

The submitted evidence is also sufficient to establish that Melvin is judicially estopped from denying the validity of the promissory note, based on his sworn statement to the Santa Cruz County Superior Court and that court's subsequent award of attorneys' fees and costs ($556,434) in reliance thereon. Having represented to the Santa Cruz court that he owed money on the promissory note (implicitly conceding its validity), having argued that the respondent in the child custody should be responsible for paying his costs and fees, and having been awarded an amount sufficient to pay off the promissory note based on representations he made to the court, Melvin is estopped from now arguing that the promissory note is unenforceable or void.

When the burden shifts to Defendants, they are unable to raise any triable issue of material fact as to the third cause of action. "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at 850.) To be material for summary judgment purposes, a fact must relate to some claim or defense in issue under the pleadings. (See *Zavala v. Arce* (1997) 58 Cal App 4th 915, 926.)

Defendants' main argument in their opposition is that the promissory note is unenforceable because McManis's violated the rules of professional conduct and violated a fiduciary duty to Melvin prior to the signing of the note. Again, as noted above, the pleadings establish the outer boundary of materiality in a summary judgment motion. These arguments are not contained in Defendants' operative answers and are therefore not a basis for denying the present motion.[5] The opposition also, very briefly, argues that there are "questions of fact" regarding overcharging or work quality. Neither argument is relevant to the promissory note and these two arguments cannot raise a triable issue of material fact regarding the third cause of action for breach. Finally, the opposition offers no response to the judicial estoppel argument.

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[5] Even if this argument had been properly preserved, the court notes that Defendants' articulation of the argument in their opposition brief relies heavily on Rule of Professional Conduct 3-300, which is quite plainly the wrong rule, given that the promissory note is unsecured. (Opposition, pp. 6:22-8:27.) The correct rule is Rule 4-200.

The opposition is supported by two essentially identical declarations from Melvin and Clarke. Both declarations discuss Defendants' interactions with McManis attorneys and assert that Defendants were misled as to maximum amount of attorneys' fees that would be charged by McManis. They also claim that they were pressured into signing the promissory note. Neither Defendant denies signing the promissory note or denies that they have stopped making payments. Both defendants were bound by their obligation to "state all facts" in written discovery responses, in which they stated that the "fraud" allegedly committed by McManis consisted of a failure to perform legal work—specifically, drafting a motion for attorneys' fees. (See Rose Declaration, Exhibits B-H.) Nowhere in their opposition papers do Defendants actually address this allegation of fraud or rebut McManis's showing that it did in fact draft such a motion for Melvin. (See Rose Decl., Exhibit J.) Instead, Defendants now advance different, unpleaded, and never-before-articulated-in-discovery-responses theories of "fraud."

D. Evidentiary Objections

With the opposition to the motion, Defendants have submitted objections to the Rose declaration. The court will not consider these objections, as they do not comply with rule 3.1354 of the California Rules of Court. The rule requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the rule. Both documents must be filed at the same time as the objecting party's opposition or reply. (Cal. Rules of Court, rule 3.1354(a).) The court is not required to rule on objections that do not fully comply with the rule. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)[6]

With its reply papers, McManis has submitted objections to the opposing declaration of Melvin Cooper. As these objections also do not comply with Rule of Court 3.1354, the court has not considered them, either.

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[6] Even if the court were to rule on the objections, it would overrule all of them, as they simply cut and paste the same litany of grounds in response to each item of evidence—"Irrelevant," "Lack of Personal Knowledge," "Lacks Foundation," "Speculation," "Improper Legal Opinion," "Improper Opinion," "Hearsay"—in boilerplate fashion. The objections are not persuasive, and even where they address questionable evidence—*e.g.*, Rose's comparison of the memoranda by McManis and successor counsel—they go to weight rather than admissibility.

Calendar Line 4
Case Name: *Christina Menne v. City of Morgan Hill*
Case No.: 22CV401997

I. BACKGROUND

In this action, plaintiff Christina Menne seeks to recover damages for injuries she sustained when she tripped and fell on a sidewalk located in front of 15540 La Pala Court, Morgan Hill, California. Menne's original and still-operative complaint is a form complaint filed on July 25, 2022. The City of Morgan Hill (the "City") is the sole named defendant.

The complaint states two causes of action: General Negligence and Premises Liability. The Premises Liability attachment checks boxes for negligence and failure to warn but does not check the box for dangerous condition of public property, which is the only basis for a premises liability claim against a public entity. The complaint admits in paragraph five that the City is a public entity.

The narrative allegations on the General Negligence attachment state:

> On July 28, 2020 at around 7:15 pm, Plaintiff was a pedestrian on the sidewalk in front of 15540 La Pala Ct, in Morgan Hill. She was wearing appropriate footwear and paying attention to her surroundings. Plaintiff was walking in a careful and prudent manner when, suddenly and without warning, she tripped on a dangerously raised piece of sidewalk and violently fell. Plaintiff landed hard on her hands and felt a snap in her left wrist as it fractured and she immediately developed a severe pain in her wrists and hands. Defendant's failure to keep the sidewalk in a safe condition created an unreasonable risk of harm that Defendant knew of. Defendant failed to keep the property, and more specifically, the sidewalk, in a reasonably safe condition. As a direct result, Plaintiff was injured, which cause Plaintiff to incur medical expenses and suffer severe physical pain and mental anguish. The incident was the sole and proximate cause of the injuries and damages sustained by Plaintiff.

Most of this language is repeated in the Premises Liability attachment. The complaint does not allege Menne's compliance with any applicable claims statute, nor does it allege any excuse from such compliance. (See Complaint, ¶ 8.) There are no exhibits attached to the complaint.

The City answered the complaint on December 14, 2022. The answer asserts six affirmative defenses, including failure to state a cause of action against the City and failure to comply with the claim provisions of California Government Code sections 900 *et seq*.

Currently before the court is a motion for summary judgment filed by the City on February 9, 2024. Menne's opposition was filed on April 23, 2024. This case is set for trial on March 24, 2025.

II. REQUEST FOR JUDICIAL NOTICE

The City has submitted a request for judicial notice in support of its motion. "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code,

§ 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307 [citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2].) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

The City requests judicial notice of the following fact pursuant to Evidence Code section 452, subdivisions (g) and (h), and Evidence Code section 453: "The City of Morgan Hill is a California city and both a 'public entity' and 'local public entity,' as defined by the California Government Code." (Request, p. 1:21-28.)

The court grants the request, as the foregoing fact is one of basic common knowledge and not reasonably subject to dispute.

III. THE MOTION FOR SUMMARY JUDGMENT

A. General Standards

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].)[7]

The moving party bears the initial burden of production—to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, affirmative defense, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of an opponent's claim or defense. While

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[7] This basic principle applies with particular force to the present motion, as the complaint does not allege a cause of action for dangerous condition of public property against the City, nor does it allege *any* statutory claim. Accordingly, the court cannot deny the current motion on the basis of Menne's arguments in her opposition that the sidewalk where she fell was a dangerous condition of public property. "Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290, internal citation omitted; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].)

the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party].)

The moving party may generally not rely on additional evidence filed with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 [internal citations omitted].) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at 850.)

The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint. A moving party need not "refute liability on some theoretical possibility not included in the pleadings." (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 136 Cal.App.4th 292, 332-333 [quoting *Tsemetzin v. Coast Federal Savings & Loan Assn*. (1997) 57 Cal.App.4th 1334, 1342].)

B. The Basis for the City's Motion

The City seeks "summary judgment, or in the alternative, summary adjudication . . . on the grounds that (1) Plaintiff failed to allege a statutory basis supporting any alleged cause of action; (2) the City, as a public entity, cannot be liable to Plaintiff for general negligence or negligence based upon premises liability; (3) the City cannot be liable for a failure to warn of the sidewalk defect because it was not a concealed trap and the City lacked notice of the alleged sidewalk defect; and (4) although Plaintiff did not allege a dangerous condition of public property in her complaint, even if she did, she would be unable to establish the requisite elements, including actual or constructive notice." (Notice of Motion, pp. 1:24-2:4.)

California Rule of Court 3.1350(b) states: "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." As no specific causes of action are listed in the notice, the City's motion is considered one for summary judgment only.

In its supporting memorandum, the City correctly states that it cannot be liable without a statutory basis and that "Plaintiff has not identified any statutory basis supporting her negligence causes of action . . . . Plaintiff did not allege a dangerous condition of public

property. Here, the City is entitled to summary judgment because Plaintiff's complaint fails to allege a statutory basis supporting her negligence causes of action." (Memorandum, p. 1:3-7 [internal citation omitted].) The City also notes that "the Complaint includes no allegation of any negligence on the part of a City employee. As such, Plaintiff cannot now contend the City is vicariously liable for a negligence cause of action." (*Id*. at p. 5:6-8 [internal citation omitted].)

The City goes on to argue that even if a claim for dangerous condition of public property had been alleged, such a claim would fail for various reasons. (See Memorandum, pp. 5:9-8:26.) As the complaint does not allege a cause of action for dangerous condition of public property on its face, it is not necessary for the court to consider this argument in great detail.

Finally, the City argues that the one statute identified in the Complaint, Civil Code section 846, does not support a claim against it as "this statute specifically states that it 'does not create a duty or ground for liability for injury to person or property.' (Civ. Code, § 846(e).)" (Memorandum, p. 9:4-5.)

In addition to the request for judicial notice, the City's motion is supported by two declarations. The first is from counsel Christopher Yamada, who authenticates two attached exhibits (A and B). Exhibit A consists of excerpts from Menne's November 1, 2023 deposition. Exhibit B is a copy of Menne's responses to the City's requests for production of documents, including copies of photos produced by Menne.

The second declaration is from Chris Ghione, the City's Public Services Director. He states that he has been responsible for reviewing any Government Tort Claims Act claims received by the City relating to sidewalks for the last ten years. He also states that, after searching the City's records dating back to 2013, he has found no work orders for the section of sidewalk where Menne fell, nor has he found any tort claims relating to that section of sidewalk.

C. Analysis of the City's Motion

The court GRANTS the City's motion for summary judgment.

"Under the Government Claims Act (Gov. Code, § 810 et seq.), there is no common law tort liability for public entities in California; instead, such liability must be based on statute." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 [citing Gov. Code, § 815, subd. (a)' ["Except as otherwise provided by statute," "[a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."].) One such statute is Government Code section 835, governing claims for dangerous condition of public property. Again, no cause of action for dangerous condition of public property has been alleged in the complaint.

"A public entity is generally liable for injuries caused by a dangerous condition of its property if 'the property was in a dangerous condition at the time of the injury . . . the injury was proximately caused by the dangerous condition . . . the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . . either: [¶] . . . [a] negligent or wrongful act or omission of an employee created the dangerous condition; or [¶] . . . [t]he public entity had actual or constructive notice of the dangerous condition [in time to

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

"'[A] public entity is not liable for injuries except as provided by statute (§ 815) and . . . section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property.'" (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1129 [citation omitted]; see also *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 ["section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property," to the exclusion of any more general negligence claim on this subject].) As noted above, the complaint's second cause of action for premises liability fails to allege a claim for dangerous condition of public property. Common law claims for general negligence and premises liability, the only causes of action alleged in Menne's complaint, cannot be brought against a public entity.

The only statute referenced in the complaint is Civil Code section 846. This statute does not provide any basis for finding the City liable for Menne's trip and fall on the sidewalk. Civil Code section 846 generally provides private property owners with immunity where persons who enter their property for recreational purposes are injured. There is an exception to the immunity "where permission to enter for [recreational purposes] was granted for a consideration . . . ." (See Civ. Code, § 846, subd. (d)(2).) This is not at all what is alleged in the complaint, and in any event, the statute does not apply to public entities. (See *Loeb v. Count of San Diego* (2019) 43 Cal.App.5th 421, 436.) Even as to those private property owners to which section 846 does apply, the statute "does not create a duty of care or ground of liability for injury to person or property." (Civ. Code, § 846, subd. (e).)

Again, a claim under Government Code section 835 is the only means by which a public entity can be found liable for injuries caused by a claimed dangerous condition of public property. Menne's complaint does not allege such a claim, and she has never sought leave to amend to add such a cause of action in the nearly two years that this case has been pending. The only causes of action actually alleged are common law claims for General Negligence and Premises Liability. "Premises liability is a form of negligence." (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

When the burden shifts to Menne, she is unable to raise any triable issue of material fact. Menne's opposition argues from a fundamentally erroneous premise: that a cause of action for dangerous condition of public property under Government Code section 835 is actually alleged in the complaint. (See Opposition, pp. 2:28-7:13.) Nowhere does she address the City's argument that her complaint conspicuously *fails* to include such a cause of action.

The only evidence submitted with the opposition, a declaration from counsel Elan Dunaev that authenticates excerpts from Menne's deposition testimony and a short declaration from Menne herself, describing the location and circumstances of her fall, does not address the complaint's fundamental failure to state a valid cause of action against the City. This evidence does not raise any triable issue of material fact. To be material for summary judgment purposes, a fact must relate to some claim or defense in issue under the pleadings. (See

Riverside County Community Facilities Dist. v. Bainbridge 17 (1999) 77 Cal.App.4th 644, 653; *Kelly v. First Astri Corp*. (1999) 72 Cal.App.4th 462, 470; *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) No cause of action for dangerous condition of public property is alleged in Menne's complaint.

D. Objections to Evidence

The City has submitted objections to the opposing declaration from Menne with its reply brief. The court will not consider these objections, as they do not comply with Rule of Court 3.1354. The rule requires the filing of two documents, evidentiary objections and a separate proposed order on the objections, and both must be in one of the two approved formats set forth in the Rule. Both documents must be filed at the same time as the objecting party's opposition or reply papers. (Rule of Court 3.1354(a).) The court is not required to rule on objections that do not fully comply with the rule. (See *Vineyard Spring Estates v. Super. Ct*. (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

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Calendar Line 6
Case Name: *David Marquez v. General Motors LLC*
Case No.: 23CV413609

Plaintiff David Marquez moves to compel further responses to form interrogatories, special interrogatories, and requests for production of documents. The court has reviewed the requests and responses and makes the following rulings. In summary, the court GRANTS in part and DENIES in part this omnibus motion.

Special Interrogatory No. 1: GM's answer is evasive and filled with an unreasonable amount of unnecessary verbiage. GM must supplement its response with a straightforward answer to this contention interrogatory. GRANTED.

Special Interrogatory No. 2: Because the answer to this interrogatory relies entirely on the evasive and insufficient answer to Interrogatory No. 1, GM must supplement its response to this interrogatory with a straightforward answer. GRANTED.

Special Interrogatory No. 3: Because the answer to this interrogatory relies entirely on the evasive and insufficient answer to Interrogatory No. 1, GM must supplement its response to this interrogatory with a straightforward answer. GRANTED.

Special Interrogatory No. 4: GM's answer is evasive and filled with an unreasonable amount of unnecessary verbiage. GM must supplement its response with a straightforward answer to this contention interrogatory. GRANTED.

Special Interrogatory No. 5: Because the answer to this interrogatory relies entirely on the evasive and insufficient answer to Interrogatory No. 4, GM must supplement its response to this interrogatory with a straightforward answer. GRANTED.

Special Interrogatory No. 6: Because the answer to this interrogatory relies entirely on the evasive and insufficient answer to Interrogatory No. 4, GM must supplement its response to this interrogatory with a straightforward answer. GRANTED.

Requests for Production Nos. 1-3: These requests for production are overbroad. GM's statement of compliance in its responses is sufficient. DENIED.

Requests for Production Nos. 5-18: The general formulation, "All documents that relate or refer to…" is overbroad in these requests. For example, "All documents that relate or refer to the express warranties…" (Request No. 6) does not even make sense. Similarly, the definition of "customer computer file" is not sufficiently targeted (Request No. 9). Accordingly, GM's statement of compliance in its responses to these requests is sufficient. DENIED.

Requests for Production Nos. 19-25: These requests seek documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. DENIED.

Request for Production No. 28: This request for production is overbroad. GM's statement of compliance in its response is sufficient. DENIED.

Requests for Production Nos. 29-30: These requests seek documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. DENIED.

Form Interrogatory No. 12.1: The court agrees with GM that the defined term "Incident" in this form interrogatory does not properly fit the allegations of this Song-Beverly case. Marquez also fails to explain what discoverable information he actually needs in order to pursue his case. DENIED.

Form Interrogatory No. 15.1: The court agrees with Marquez that GM's answer to this interrogatory is insufficient. GM's statement that "it is not possible at this time to state all facts upon which GM bases its denials and affirmative defenses, which GM asserted to preserve them" is singularly weak and unconvincing. The obligation to answer interrogatories includes an obligation to conduct a reasonable inquiry, and GM's boilerplate answer currently reflects no inquiry whatsoever. GRANTED.

Form Interrogatory No. 17.1: Marquez's separate statement in support of the motion fails to include the text of the requests for admissions that are the subject of this form interrogatory. This would ordinarily be a basis for denying the motion as to this interrogatory. Nevertheless, it is plain from the face of GM's responses that they are insufficient and devoid of any content. Accordingly, GM must supplement its answers to this interrogatory. GRANTED.

For those interrogatories as to which the court has granted the motion, the court orders GM to serve supplemental answers within 20 days of notice of entry of this order.

The court DENIES Marquez's request for $11,562.50 in monetary sanctions.

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Calendar Lines 7-8
Case Name: *Martin M. Nunez et al. v. FCA US LLC et al.*
Case No.: 20CV364559

This is a motion for attorney's fees, costs, and expenses by plaintiffs Martin and Margarita Nunez ("Plaintiffs") and a motion to tax costs by defendant FCA US LLC ("FCA"). The court GRANTS in part and DENIES in part each motion, as follows.

1. Attorney's Fees

The parties settled this Song-Beverly Consumer Warranty Act case after over three and a half years of litigation. That is a significantly longer than average duration for a Song-Beverly case, though it is not unprecedented. The history of this case includes multiple discovery motions, multiple continuances of the trial date, and a summary adjudication motion filed by FCA as to one of the causes of action. The terms of the parties' settlement includes an award of attorney's fees, costs, and expenses to Plaintiffs as the prevailing party, but the parties are far apart in their views regarding the appropriate amount of fees. Plaintiffs request $160,289.25 in fees; FCA requests that the court award $54,256.12 in fees.

Having reviewed the parties' papers, the court makes the following findings and conclusions:

- The billing rates set forth in the declaration of counsel Roger Kirnos for the attorneys at the Knight Law Group who worked on this case are reasonable. They range from $200/hour to $645/hour, although a relatively small proportion of work was billed at these extremes, and the vast majority of billing for this case was done in the middle of this range (closer to $300-$400/hour). Under the lodestar method, the court finds no issue with these rates. The court agrees with FCA that the work in this case was not especially novel, complex, or challenging, and that fact is reflected in Plaintiffs' counsel's relatively low billing rates.[8]

- At the same time, the court agrees with FCA that 17 attorneys (and 19 total timekeepers) is extreme for any case, let alone a Song-Beverly case—even one that lasted this long. Having that many timekeepers, including several who billed only a handful of hours during the entire duration of the case, necessarily results in inefficiencies and duplication of effort. As a result, the court agrees with FCA that the fees award should be reduced for duplicative time entries that reflect the review of documents "without taking any action as a result of that review" (22.6 hours for a total of $9,687.50) and "internal communications within KLG" (6.9 hours for a total of $3,085.50). The court does not agree with FCA, however, that the inefficiency of having too many timekeepers necessitates a "25% overall reduction" in the

[8] The court overrules FCA's objections to paragraphs 36-54 of the Kirnos declaration, as the court finds that Kirnos has sufficient personal knowledge of the other attorneys at the Knight Law Group, their backgrounds, and their billing rates. The court sustains FCA's objections to paragraphs 57-76 of the Kirnos declaration on the ground of relevance. There is no such thing as "horizontal stare decisis," and so these unreported orders from other trial courts around the state have no direct application to this motion for attorney's fees. Finally, the court sustains the objections to paragraphs 77-81 of the Kirnos declaration as unduly argumentative and generally of no help to the court.

amount of fees. FCA provides no justification for this 25% figure, which appears to be arbitrary.

- The court also agrees with FCA that Plaintiffs should not recover for an ex parte application to continue the trial date that was denied for lack of good cause ($1,680.00).

- The court agrees with FCA that Plaintiffs are not entitled to six hours at $495/hour for preparing a reply brief on the motion for fees. The court's review on a motion for attorney's fees is singularly focused on the evidence submitted with the moving papers; the reply brief rarely makes any difference, and this particular motion is no exception. The court reduces the fee request by three hours at $495/hour ($1,485.00).

- The court disagrees with FCA that the time entries for SW and DF on September 13, 2022 were necessarily "for the same work." Both attorneys prepared for trial that day, and FCA's argument that this was "duplicate work" appears to be entirely speculative.

- The court disagrees with the proposed reduction of $695 for signing documents. A total of 1.8 hours over the course of three years is not unreasonable.

- The court disagrees with FCA that tasks such as drafting a complaint, preparing a CMC statement, drafting written discovery, and preparing discovery responses is "paralegal work." Only someone who is authorized to practice law should be undertaking these tasks.

- Finally, the court agrees with Plaintiffs that increasing the lodestar by 0.2x is appropriate, given that this case was taken by their counsel on a contingency basis. The court disagrees with Plaintiffs that an additional 0.3x is warranted for the "delay" in reaching a resolution in this case. That delay is already reflected in three and a half years of time entries for numerous litigation tasks that would not have been performed if the case had resolved earlier. To add 0.3x on top of all of the fees incurred in 2020, 2021, 2022, 2023, and 2024 would be another form of double counting. The court concludes that a 1.2x lodestar multiplier is appropriate here.

In summary, the court reduces the amount of requested fees by $15,938.00, awarding $90,921.50 instead of $106,859.50 in lodestar fees. Applying the 1.2x lodestar multiplier, the court awards a total of **$109,105.80** in attorney's fees.

2. Costs and Expenses

As with the fees motion, the parties disagree regarding the appropriate amount of costs and expenses, with Plaintiffs requesting $27,404.72 and FCA requesting that the court tax the majority of these costs, leaving only $10,353.02. The court finds and orders as follows:

- The court agrees with FCA that it was inappropriate for Plaintiffs to take statements of non-appearance for depositions that FCA informed Plaintiffs well in advance would not be going forward as originally scheduled. This was a needless payment

of court reporter fees. In addition, Plaintiffs' opposition brief fails to address the unexplained "copy print fee" of $85 for Stan Gozzi's deposition. Accordingly, the court agrees that $1,119.20 should be taxed or stricken from the memorandum of costs.

- The general rule is that expert fees are recoverable as costs for experts "ordered by the court"—*i.e.*, experts appointed under Evidence Code section 730. Such costs disallowed for experts "not ordered by the court." (Code Civ. Proc., § 1033.5, subds. (a)(8) & (b)(1).) The Song-Beverly Consumer Warranty Act provides a notable exception to this rule, given the language in the Act that both "costs" and "expenses" are recoverable. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th, 112, 138.) The court finds that Plaintiffs have provided sufficient justification for the expert witness fees of the three experts who performed significant tasks in this case: Thomas Lepper, Chris Morales, and Barbara Luna. FCA quibbles over the amount of time Lepper spent on the vehicle inspection, the amount of time Morales recorded for preparing for and attending his depositions, and the amount of time Luna spent preparing for her deposition. The court finds these arguments to be conclusory and unpersuasive.

- The court agrees with FCA that messenger and courier fees in the amount of $897.22 are not appropriate costs to be reimbursed.

- The court also agrees with FCA that private interpreter fees in the amount of $3,780.00 should also not be reimbursed. The court ordinarily only allows interpreter fees to be a recoverable cost for indigent parties. (See Code Civ. Proc., § 1033.5, subd. (a)(12).) For all court hearings, the court already provides certified interpreters to assist the parties. To the extent that Plaintiffs wished to use private interpreter services, they were free to do so, but they could not reasonably expect that the other side would pay for it.

- It appears that the mediation cost being sought by Plaintiffs is solely for this case ($312.50), and so the court will not strike this amount.

- In its discretion, the court will allow Plaintiffs to be reimbursed the travel cost of $360.51 for the vehicle inspection in this case. Although not expressly authorized by section 1033.5, the court finds that this "expense" is of the type that lies squarely within what was envisioned by the Song-Beverly Act.

In sum, the court will strike or tax $5,796.42 from Plaintiffs' memorandum of costs, awarding a total of **$21,608.30** in fees and expenses.

Finally, the court DENIES Plaintiffs' request to recover the attorney's fees incurred in opposing the motion to tax costs, given that the court is granting the motion in part and denying it in part.

3. Conclusion

The court awards Plaintiffs a total of $109,105.80 in attorney's fees and $21,608.30 in costs and expenses, for a total of **$130,714.10**.

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