SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

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

October 22, 2024
9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

ORAL ARGUMENT

Before 4:00 PM today you must notify the:

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

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

If you fail to so notify the court or opposing side, the Court will not hear argument, and the tentative ruling will be adopted.

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

APPEARANCES

The Court strongly prefers in-person appearances.

If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

COURT REPORTERS

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https://www.scscourt.org/general_info/court_reporters.shtml

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	24CV431150	ALAN FIELD vs KAREN SIGGINS	Defendants' demurrer to the first amended complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Scroll to line 1 for complete ruling. Court to prepare formal order.
2-3	24CV434453	JANE DOE vs NAEEM HASHMI et al	The preliminary tentative ruling is below at lines 2-3. **The parties are ordered to appear for argument.** In particular, despite the initial tentative ruling that overrules certain aspects of the demurrer, the Court believes it may be possible for the alleged conduct to be sufficient to overcome demurrer even though there is only one alleged incident. In other words, can a single incident be pervasive? The Court invites counsel to appear and provide argument on this question and other aspects of the Court's tentative they may wish to address.
4	21CV392122	Jay Wayne Parker vs Paragon Custom Builders	Defendant's motion for summary judgment is DENIED. Scroll to line 4 for complete ruling. Court to prepare formal order.
5	24CV438828	EDGES ELECTRICAL GROUP LLC, a California limited liability company vs NHU PHAM et al	Notice of unconditional settlement filed October 14, 2024.
6, 13-23	24CV439209	Steleco LLC et al vs DPR Construction et al	Reset to March 18, 2025 per stipulation.
7	2008-1-CV-102730	R.W. Mayo, Inc. vs R. Parks, et al	Ruth Parks' motion to set aside default and default judgment pursuant to Code of Civil Procedure sections 473(d) and 473.5 is DENIED. First, the Court is unable to locate any evidence that this motion was served on Plaintiff (or anyone). The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Next, Code of Civil Procedure section 473.5 provides: (a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: *(i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.* (Emphasis added.) Judgment was entered in this case on March 13, 2008 and renewed on November 23, 2015 and again on March 25, 2022. Ruth Parks aka Ruth Grant was served with these renewals. Thus, this motion, even if properly served and supported by evidence, which it is not, is untimely and must be denied. Court to prepare formal order.
8	21CV381861	Blair Johnson vs James Pusateri	Parties are ordered to appear for debtor's examination.

9	21CV389745	FAIR OAKS PLACE HOMEOWNERS ASSOCIATION vs Robert Glennon	Defendant's motion to set aside default and default judgment is DENIED. Defendant's motion is simply too late and does not meet the requirements to set aside default. Code of Civil Procedure section 473 is specific in language and narrow in scope, authorizing a court only to relieve a party from a judgment taken through mistake, inadvertence, surprise or excusable neglect. (*In re Marriage of Adkins* (1982) 137 Cal. App. 3d 68.) To obtain relief under this section, the moving party must show good cause for that relief by proving the existence of a satisfactory excuse for the occurrence of that mistake. (*Dill v. Berquist Construction Co.* (1994), 24 Cal. App. 4th 1426.) Where a party delays in seeking relief, the court properly denies the application. (*Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal. App. 5th 267 (dissolved corporation not entitled to relief from a default and default judgment because motion filed more than six months after entry of default); *Stafford v. Mach* (1998) 64 Cal. App. 4th 1174 (abuse of discretion to set aside default and default judgment where party did not take steps "within a reasonable time" to set aside its default and default judgment).) In *Stafford*, an insurer filed a motion to intervene and set aside the default six months to the day after default was entered against it and four and one-half months after it became aware of the default judgment. In finding it an abuse of discretion for the trial court to set aside the default, the court of appeal noted that "[t]o hold otherwise, in light of the extreme delay and the absence of any satisfactory explanation, would empower the trial court to dispense with the 'reasonable time' requirement of the statute." (*Stafford v. Mach* (1998) 64 Cal. App. 4th 1174.) So too here. The Court understands that Defendant has certain unique difficulties navigating court processes. However, Defendant has appeared before the undersigned Court which has explained the default status on numerous occasions, and Defendant plainly has some people assisting him. Moreover, the Court is required to treat self-represented litigants the same as other litigants; to ensure that the system works for everyone and does not come to a grinding halt, self-represented litigants are required to follow the rules of civil procedure. (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303 ("[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]"; *Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209 ("A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'").) Accordingly, Defendant's motion to set aside is DENIED. Court will prepare formal order. Parties are ordered to appear for the hearing.
10	22CV400012	Pacific States Environmental Contractors, Inc. vs Steleco LLC et al	Reset to March 18, 2025 per stipulation.

11	23CV410398	Nasir Deen vs Purple Lotus et al	Presently before the Court is Plaintiff's motion for leave to file an amended complaint. "It is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Here, where trial has not yet been set, discovery remains open, and the proposed amendment is based on the same incident as alleged in the original complaint, the Court finds Defendants would not be prejudiced by the amendment beyond the fact that additional discovery may need to be taken. On this record, it would be error not to grant amendment. The Court also finds that the proposed amendments relate back to the original complaint. The comparisons between the original and proposed complaint in Defendant's briefing demonstrate that Plaintiff has always included some allegations similar to those now set forth in the proposed amended complaint. Because Plaintiff was originally unrepresented, the allegations were not made using language more familiar to legal practitioners, but they were nonetheless there. However, Plaintiff's representation that he told the emergency room medical staff that he believed the gummy he consumed on July 21, 2020 caused the injuries that prompted him to call 911 and go to the emergency room on that same night seems to belie the claim he is now making that he did not discover the source of his injury until he obtained an exam from Dr. Fabar in 2023. Plaintiff seems to remedy this conflict with the allegations made in proposed paragraph 36, wherein Plaintiff alleges other doctors repeatedly told him the single gummy could not have caused his injuries. The Court could simply grant the motion to amend and push the parties to address this issue on demurrer. However, the Court finds it would be most efficient to have the parties more fully brief the issue of whether the allegations made in the proposed amended complaint, in particular those made in proposed paragraph 36, can satisfy the discovery rule for proposed causes of action 1, 2, 4, 5, and 7, each of which would be barred by the applicable statute of limitations if the discovery rule is found to be inapplicable. Accordingly, the Court orders the parties to each submit a brief of no more than 5 pages addressing the above-described statute of limitations issue on or before November 1, 2024. The briefs shall be filed, served, and emailed to Department6@scscourt.org. The Court will issue a complete tentative ruling on November 6, 2024 and hold a further hearing on the motion on November 7, 2024 at 9 a.m. in department 6.
12	23CV423435	Mark Tracy vs Cohne Kinghorn PC et al	Ryan Creamer and Tyson Creamer, specially appearing as personal representatives of the probate estate of defendant R. Steve Creamer's ("Creamer"), motion to set aside and vacate default is GRANTED. First, even if Plaintiff were correct regarding Creamer's service of this motion, the Court has discretion to consider late papers. (*Gonzalez v. Santa Clara County Dep't of Social Servs.* (2017) 9 Cal.App.5th 162, 168.) And, where a party provides a substantive response to a late paper, the party waives all defects in service. (*Moofly Productions, LLC v. Favila* (2020) 46 Cal. App. 5th 1, 10.) Plaintiff substantively responded to the motion to set aside thereby waiving defects in service, if any existed. Next, it is undisputed that R. Steve Creamer was deceased at the time default was entered. "A judgment rendered for or against a dead person is void …" (*Estate of Parsell* (1923) 190 Cal. 454, 456 [213 P. 40])—language the Supreme Court first used in 1868, in *Judson v. Love* (1868) 35 Cal. 463." (*Grappo v. McMills* (2017) 11 Cal. App. 5th 996, 1007.) "And, of course, a void judgment is subject to attack at any time." (*Grappo v. McMills* (2017) 11 Cal. App. 5th 996, 1009.) Accordingly, Creamer's motion is GRANTED. Creamer is ordered to respond to the complaint within 20 days of service of the formal order, which the Court will prepare.

Calendar Line 1
Alan Dougals Field v. Karen Field Siggins, Case No. 24CV431150

Before the Court is Defendant Karen Field Siggins' demurrer to Plaintiff's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from a successor trustee's alleged mishandling of trust assets. According to the FAC, the parties' mother, Irene Field Capurso, passed away in 2020 from complications of Alzheimer's disease. Pursuant to her Living Trust Document amended in 2011, her assets were to be equally shared among her three children. Irene Capurso named Defendant as trustee of her estate before her passing. (FAC, pp. 1: 22-24; 2:5-12, 3:1-5)

After Ms. Capurso's passing, Plaintiff and his now deceased brother learned that Defendant had withdrawn at least $21,500.00 in cash from the estate. They asked for accounting and documentation of monies spent. However, Plaintiff refused to provide any receipts or documentation. Instead, Defendant hired accountants and attorneys in bad faith to help her hide all unauthorized withdrawals of cash from their mother's estate. (FAC, pp. 3:12-22, 4:1-4, 5:1-3, 6:20-23, 11:1-7, 12:3-14)

Plaintiff initiated this action on February 20, 2024, and was given leave to amend his complaint after the Court sustained Defendant's demurrer on July 2, 2024. Plaintiff filed his FAC on July 22, 2024, alleging causes of action for (1) recovery of unpaid inheritance money, (2) intentional infliction of emotional distress, (3) negligent infliction of emotional distress, and other injunctive relief.

II. Legal Standard

"The party against whom complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure] section 430.30, to the pleading on any one or more of the following grounds: (e) The pleading does not state facts sufficient to

constitute cause of action, (f) The pleading is uncertain." (Code Civ. Proc., 430.10, subds. (e) (f).) A demurrer may be utilized by "[t]he party against whom complaint has been filed" to object to the legal sufficiency of the pleading as whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *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 (*Committee on Children's Television*).) In ruling on demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.

III. Judicial Notice

Defendant requests judicial notice of certain court documents and orders filed in Santa Clara Superior Court case No. 22PR191873, In Re: The Trust of Irene Field of 1981, AKA Irene Capurso Living Trust dated January 6, 1982.

These documents may be judicially noticed pursuant to Evid. Code § 452(d), which permits judicial notice of the records in the pending action, or in any other action pending in the same court or any other court of record in the United States. However, "although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; see also *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.) The Court can only take judicial notice of the truth of facts asserted in documents such as orders, findings of

fact and conclusions of law, and judgment. (See, *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.)

Accordingly, the request for judicial notice is GRANTED, IN PART.

IV. Analysis

A. Recovery of Unpaid Inheritance Money

Defendant contends Plaintiff's claim is barred by the doctrine of collateral estoppel since it is a repeat of issues that were raised and decided in Probate Court in 2022 in the matter of the *Trust of Irene Field of 1981, aka Irene Capurso Living Trust* ("Trust"), Santa Clara Superior Court case number 22PR191873.

The law of preclusion helps to ensure that a dispute resolved in one case is not relitigated in a later case. (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.) "Claim and issue preclusion have different requirements and effects." (*Id*. at p. 326.) Claim preclusion prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).)

"[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings, supra*, 61 Cal.4th at p. 825.) Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. In other words, "[a] second action between same parties on a different cause of action is not precluded by a former judgment….But the first judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 225.)

Whether an issue is "identical" to a previously adjudicated issue for purposes of preclusion depends on the burden and standard of proof applicable in each proceeding or action in relation to the party who obtained a favorable finding in the prior action and who then

invokes issue preclusion in the subsequent proceeding with regard to that finding. (See, *The Grubb Co. Inc. v. Department of Real Estate* (2011) Cal.App.4th 1449, 1463.) That different burdens apply in different proceedings is not dispositive in determining whether issue preclusion applies. (*Holt v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 427, 433.) Furthermore, "… an issue might be litigated in one case, but that would not stop it from being litigated in another if the standard of proof in the first case were higher than the second case." (*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 933.)

Even if these threshold requirements are satisfied, courts may consider the public policies underlying issue preclusion in determining whether the doctrine should be applied. (*Murray v. Alaska Airlines, Inc* (2010) 50 Cal.4th 860, 879.) These policies include "conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation." (*Ibid.*)

Here, Defendant relies on the judicially noticed probate court's October 26, 2022, "Order Approving First Trust Accounting of Trustee and for Attorney's Fees". (RJN, Ex. B) First, the standard of proof applicable in the underlying probate proceeding was the same as in this civil action i.e., preponderance of evidence.

Next, the probate court reached a final decision resolving the issue of whether Defendant correctly and appropriately accounted for the Trust's funds and assets. In its Order, the probate court approved the filed accounting documents for the period of July 1, 2017, through July 31, 2021. The probate court further approved and confirmed Defendant's actions as trustee of the Trust as well as ratified the attorney's fees paid to Litherland, Kennedy & Associates APC. (RJN, Ex. B.) Plaintiff (the party against whom the doctrine is asserted) was a party in the underlying action and bound by the proceeding. Plaintiff was given a number of opportunities to appropriately file his objections, which he failed to do. (RJN, Exs. C, D, E, F.)

The appropriateness of Defendant's conduct and accounting of the trust funds during this period is now raised again in this action. The FAC alleges Defendant (1) embezzled more than $21,000.00 from the trust funds, (2) refused to give Plaintiff receipts for the embezzled sums,

and (3) wasted Plaintiff's share of funds hiring attorneys and accounts to hide her unauthorized withdrawals instead of simply turning the receipts over to Plaintiff. (FAC, pp. 3:12-22, 4:1-4, 5:1-3, 6:20-23, 11:1-7, 12:3-14.) The FAC plainly contains the same issues that were addressed in the probate action, and Plaintiff does not assert he was prevented from fully litigating the issues in that proceeding.

The public policy of maintaining consistent verdicts and promoting judicial economy also favors collateral estoppel in this matter. Accordingly, Defendant's demurrer to Plaintiff's cause of action for recovery of unpaid inheritance money is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Intentional Infliction of Emotional Distress.

To state a claim for intentional infliction of emotional distress, a plaintiff must establish: (1) extreme and outrageous conduct; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050.) Extreme and outrageous conduct is a high bar. A defendant's conduct is outrageous when it is so extreme as to exceed all bounds of what is usually tolerated in a civilized community. Moreover, "defendant's conduct must be intended to inflict injury or engaged in with the realization that injury will result." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) "Liability for intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." (*Id.,* at p. 1051.) "There is no occasion for the law to intervene in every case where someone's feelings are hurt." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.) Whether conduct is outrageous is usually a question of fact. "[However], many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.)

To sue for intentional infliction of emotional distress, a plaintiff must have suffered severe emotional distress, which "is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it." (CACI, 1604.) "It is for the court to determine whether on the evidence severe emotional distress can be found; it is

for the jury to determine whether, on the evidence, it has in fact existed." (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397.)

Plaintiff's intentional infliction of emotional distress claim is based on Defendant's alleged (1) mishandling of the Trust's funds (invalidated by the probate court), (2) verbal hostility and abuse, and (3) refusal to provide Plaintiff with his requested receipts for the Trust's expenditures. (FAC, pp. 9, 10:1-11, 17-19.) This conduct fails to state a claim for intentional infliction of emotional distress as a matter of law.

Accordingly, Defendant's demurrer to Plaintiff's cause of action for intentional infliction of emotional distress is SUSTAINED WITHOUT LEAVE TO AMEND.

C. Negligent Infliction of Emotional Distress

"A claim of negligent infliction of emotional distress is not an independent tort but the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply." (*Wong v. Jing* (2010)189 Cal.App.4th 1354, 1377.) The plaintiff must plead and prove the usual elements of negligence, namely the defendant owed a duty of care and breached it proximately causing the emotional distress damage to the plaintiff. (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 127; *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 204; *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 206.)

Plaintiff's negligent infliction of emotional distress claim is based on the same factual allegations as his claim for intentional infliction of emotional distress, i.e., distress caused by Defendant's mishandling the trust funds, verbal abuse, and refusal to provide Plaintiff his requested receipts. (FAC, pp. 16:1-6, 20,14:19.) As Plaintiff has only pled intentional conduct, and not any negligent conduct, he fails to state a cause of action for negligent infliction of emotional distress. Additionally, as mentioned above, the probate court approved, confirmed, and ratified Defendant's accounting and actions. Therefore, the doctrine of issue preclusion prevents Plaintiff from relitigating Defendant's alleged breach of duty and negates his claim for negligent infliction of emotional distress.

Accordingly, Defendants' demurrer to Plaintiff's cause of action for negligent infliction of emotional distress is SUSTAINED WITHOUT LEAVE TO AMEND.

D. Leave to Amend

A court may sustain a demurrer with or without leave to amend. (Code. Civ. Proc. §472a(c).) Leave to amend a defective complaint should be denied where no liability exists under substantive law. (*Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 321.) A demurrer must be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden of proving such reasonable possibility rests squarely on the plaintiff. (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1041.)

Here, Plaintiff seeks leave to amend his FAC because he did not have sufficient time to fully amend his complaint due to his travel arrangements. However, Plaintiff fails to show in what manner he can amend his FAC, and how that amendment will change the legal effect of the pleading.

Accordingly, the Court DENIES Plaintiff's request for leave to amend his FAC.

Calendar Lines 2-3
Jane Doe v. Naeem Ulislam Hashmi, et al. Case No. 24CV434453

Before the Court is defendants Naeem Ulislam Hashmi, M.D.'s ("Hashmi"), Naeem Hasmi Medical Corporation dba Crescent Medical Center's ("Cresent") (collectively, "Defendants") demurrer to plaintiff Jane Doe's first amended complaint ("FAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises from Hashmi's conduct during Plaintiff's medical examination. According to the FAC, on October 11, 2021, Plaintiff made an initial and last-minute appointment with Defendants to treat urinary tract infection symptoms. (FAC, ¶ 14.) When he entered the room, Hashmi informed Plaintiff that he was going to take off his mask, asked Plaintiff if he knew her, and even after she said she did not know him, he insisted he had met her somewhere before. (*Ibid*.) He proceeded to examine her by lifting her shirt and placing a stethoscope on her bare chest. (FAC, ¶ 15.) He unhooked her bra which made her uncomfortable and caused her to fidget. (*Ibid*.) He also placed his hand on her knee, squeezed it, smirked at her, and asked her if she was nervous. (*Ibid*.) He proceeded to ask her personal questions about her marriage and her husband. (*Ibid*.) Plaintiff left the appointment feeling stunned, violated, and confused. (FAC, ¶ 16.) She did not return for her follow up examination. (*Ibid*.)

On April 4, 2024, Plaintiff filed her Complaint and on April 26, 2024, she filed her FAC, asserting claims for (1) sexual battery, (2) battery, (3) gender violence, (4) sexual harassment, (5) violation of the Unruh Civil Rights Act, (6) violation of the Bane Act, and (7) intentional infliction of emotional distress. On June 28, 2024, Defendants filed the instant motions and Plaintiff opposes them.

II. Demurrer

A. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to

constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*), citing *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 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to each cause of action on the ground they fail to allege sufficient facts to state a claim.[1] (See Code Civ. Proc., § 430.10, subd. (e).)

B. Analysis

1. **<u>Vicarious Liability</u>**

"An employer will not be held vicariously liable for an employee's malicious conduct or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if the employee inflicts an injury out of personal malice, not engendered by the employment, or acts out of personal malice unconnected with the employment, or if the misconduct is not an outgrowth of the employment, the employee is not acting within the scope of employment. If an employee's tort is personal in nature, mere presence at the place of

[1] The second and third causes of action are only asserted against Hashmi and the fifth cause of action is asserted only against Crescent.

employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior. In such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 812-813 (*Delfino*) [internal citations and quotations omitted].)

Courts have applied this principle to cases involving assaults and sexual assaults. (See *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 301-302 [ultrasound technician's sexual misconduct not within the scope of employment, as "a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions"].) "To hold medical care providers strictly liable for deliberate sexual assaults by every employee whose duties include examining or touching patients' otherwise private areas would be virtually to remove scope of employment as a limitation on providers' vicarious liability." (*Id.* at p. 302; see also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 [county not vicariously liable for deputy sheriff's unwanted touching and sexual propositioning of his female coworkers during work hours, with the Court reasoning that "[i]f an employee's tort is personal in nature [as the deputy's was found to have been], mere presence at the place of employment and attendance to occupational duties prior to or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior"]; *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1432 [no vicarious liability against employer for claims of sexual battery, false imprisonment, and intentional infliction of emotional distress]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 575-577 [treatment center operator not liable for employee's sexual molestation of resident minor]; *Maria D. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125, 128-129 [employer not liable for alleged sexual assault by on-duty security guard].)

"Although the question of whether a tort was committed within the scope of employment is ordinarily a question of fact, it becomes one of law where undisputed facts would not support

an inference that the employee was acting within the scope of employment." (*Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 101-102 [county corrections officer writing racially inflammatory letter to inmates was acting outside the scope of his employment as "[a]n employee who abuses job-created authority over others for purely personal reasons is not acting within the scope of employment"].) Plaintiff's allegations regarding agency and scope of employment are conclusory and the Court does not have to accept them as true. (See *Piccinini, supra,* 226 Cal.App.4th at p. 688.) Moreover, the allegations are insufficient to support an inference that Hashmi was acting within the scope of his employment and as a result, Plaintiff fails to allege facts to support her allegations that Crescent is vicarious liable for his conduct. Thus, Plaintiff cannot state claims against Crescent based only on its vicarious liability.

2. **First Cause of Action-Sexual Battery (Civ. Code, § 1708.5)**

Civil Code section 1708.5 provides,

(a) A person commits a sexual battery who does any of the following:

(1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.

(2) Acts with the intent to cause a harmful or offensive contact with another by use of the person's intimate part, and a sexually offensive contact with that person directly or indirectly results.

(3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results.

(4) Causes contact between a sexual organ, from which a condom has been removed, and the intimate part of another who did not verbally consent to the condom being removed.

(5) Causes contact between an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent.

(Civ. Code, § 1708.5, subd. (a)(1)-(5).)

"A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225.) "Statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790 (*Covenant Care*).)

Plaintiff recites the statutory language, but her conclusory allegations are insufficient to state this statutory cause of action against Defendants. (See FAC, ¶¶ 17-28; see also *Covenant Care, supra* 32 Cal.4th at p. 790 [statutory claims must be alleged with particularity].) Moreover, as the Court explained above, Plaintiff fails to allege sufficient facts to state Crescent's vicarious liability. Thus, Defendants' demurrer to the first cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

3. **Second Cause of Action-Battery**

The elements for battery are (1) that the defendant intentionally committed an act resulting in a harmful or offensive contact with the plaintiff's body; (2) that the plaintiff did not consent to contact; and (3) that the contact caused injury, damage, loss, or harm to plaintiff. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 526.)

Plaintiff alleges Hashmi acted with the intent to make harmful and offensive contact with her person, she did not consent to any of the contact, and it caused her to suffer physical injury, severe emotional distress, and other injuries. (FAC, ¶¶ 29-33.) While Defendants contend the conduct fails to arise to the level of actionable tortious conduct, they fail to cite any authority in support and as a result, their argument is waived. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].) Plaintiff alleges sufficient facts to state this claim against Hashmi. Thus, Defendants' demurrer to the second cause of action is OVERRULED.

4. **Third Cause of Action-General Violence (Civ. Code, § 52.4)**

Civil Code section 52.4 permits "any person who has been subjected to gender violence to bring a civil action against any responsible party." (Civ. Code, § 52.4, subd. (a).) The statute defines, "gender violence" as "a form of sex discrimination and means either of the following: (1)

one or more acts that would constitute a criminal offense under state law that has an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those act have resulted in criminal complaints, charges, prosecution, or conviction[,] (2) a physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction." (Civ. Code, § 52.4, subd. (c)(1)-(2).)

Plaintiff alleges Hashmi's conduct constitutes gender violence and he was arrested and charged for sexual assault for his acts committed on patients, including Plaintiff. (FAC, ¶ 41.) However, Plaintiff merely recites the statutory language without alleging any facts. This is insufficient to state her claim against Hashmi. (See *Covenant Care, supra* 32 Cal.4th at p. 790.) Thus, Defendants' demurrer to the third cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

5. **Fourth Cause of Action-Sexual Harassment (Civ. Code, § 51.9)**

Civil Code section 51.9, provides, "(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements: (1) there is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons: (A) physician…[,] (2) the defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe[,] and (3) the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph 2." (Civ. Code, § 51.9, subd. (a)(1)-(3).)

Plaintiff alleges Hashmi made unwelcome sexual advances such a fondling her breasts and rubbing her shoulders and knees. (FAC, ¶ 53.) While Plaintiff alleges the conduct was unwelcome, she fails to allege it was pervasive or severe. (See Civ. Code, ¶ 51.9, subd. (a)(2) ["…the defendant made sexual advances… that were unwelcome *and* pervasive or severe…"]; see also *Covenant Care, supra* 32 Cal.4th at p. 790.) Moreover, Plaintiff alleges a single instance of harassing conduct. Although an isolated incidence may qualify as "severe" when it consists of "a *physical* assault or the threat thereof," Plaintiff does not allege that any threat or physical assault occurred. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049.) Furthermore, as the Court explained above, Plaintiff fails to sufficiently allege Crescent's vicarious liability. Thus, Plaintiff fails to allege sufficient facts to state this claim and Defendants demurrer to the fourth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

6. **Fifth Cause of Action-Violation of the Unruh Civil Rights Act (Civ. Code, § 51)**

Civil Code section 51, states, "all persons… are free and equal, and no matter what their sex…are entitled to full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).)

Plaintiff alleges Crescent failed to terminate Hashmi after learning about his conduct against Plaintiff, while knowing that he posed a danger to vulnerable female patients. (FAC, ¶ 66.) Plaintiff further alleges Crescent's conduct denied, aided, incited a denial of, discriminated, or made a distinction that denied full and equal advantages, privileges, and services to Plaintiff based on her sex. However, Plaintiff fails to allege any supporting facts and her conclusory allegations are insufficient to state this claim. (See *Covenant Care, supra* 32 Cal.4th at p. 790.) Thus, Defendants' demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend from the service day of the final order.

7. **Sixth Cause of Action-Violation of the Bane Act (Civ. Code, § 52.1)**

"The Bane Act provides a civil cause of action against anyone who 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or

laws of the United States, or of the rights secured by the Constitution or laws of this state.' [Citations.]" (*Simmons v. Super Ct.* (2016) 7 Cal.App.5th 1113, 1125.) "The essence of a Bane Act claim is that the defendant, by the specific improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something that he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883 (*Austin B.*).)

"To state a cause of action under section 52.1, there must first be violence or intimidation by threat of violence. Second, *the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7* or a group similarly protected by the constitution or a statute from hate crimes." (*Gabrielle A. v. County of Orange* (207) 10 Cal.App.5th 1268, 1290 [emphasis added].)

Plaintiff fails to allege any facts that Hashmi threatened, intimidated, or coerced her. (See *Austin B., supra,* 149 Cal.App.4th at p. 883.) Moreover, her conclusory allegations are insufficient to state this statutory cause of action against Defendants. (See *Covenant Care, supra* 32 Cal.4th at p. 790.) As a result, Plaintiff fails to allege sufficient facts to state this claim. Moreover, as the Court explained above, Plaintiff fails to sufficiently allege Crescent's vicarious liability. Thus, Defendants' demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend from the service date of the final order.

8. **Seventh Cause of Action-Intentional Infliction of Emotional Distress**

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) For the purposes of the tort, "extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Generally, the question of whether the conduct at issue is in fact extreme and

outrageous is a question of fact to be determined beyond the pleading stage. (*Spink v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1045 (*Spink*).)

"[M]any cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law. [Citations.]" (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235.) "'[T]he trial court initially determines whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable men can differ, the jury determines whether the conduct has been extreme and outrageous to result in liability. Otherwise stated, the court determines whether severe emotional distress can be found; the jury determines whether on the evidence it has, in fact, existed. [Citation.]' [Citation.]" (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614.)

Defendants argue Hashmi's conduct of examining a patient with a stethoscope and asking questions to obtain her medical history does not constitute extreme or outrageous act. Defendants fail to cite to any authority in support. Moreover, Defendants ignore Plaintiff's allegations that Hashmi unhooked her bra and examined her without her shirt on. It appears reasonable people could differ as to whether this conduct is extreme and outrageous, thus, this is a question of fact that cannot be resolved at the pleading stage. (See *Spink, supra,* 171 Cal.App.4th at p. 1045.) Plaintiff also asserts this claim against Crescent, however, for reasons stated above, Plaintiff fails to sufficiently allege vicarious liability against it. Thus, Defendants' demurrer to the seventh cause of action is OVERRULED as to Hashmi and SUSTAINED as to Crescent with 20 days leave to amend from the service date of the final order.

III. **Motion to Strike**

A. **Legal Standard**

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437,

subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 (*Turman*), citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) 7.169.)

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

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

Defendants move to strike 25 paragraphs and a portion of paragraph 41 from the FAC.

B. **Analysis**

Defendants move to strike allegations regarding Crescent's vicarious liability (¶¶ 25-28, 35-38, 46-49, 57-60, 77-81, 89-92), a portion of paragraph 41, and Plaintiff's request for exemplary damages from the FAC (¶ 81). For reasons stated above, Plaintiff fails to state sufficient facts to support her claims against Crescent based on vicarious liability. As a result, Defendants motion to strike paragraphs 25-28, 35-38, 46-49, 57-60, 77-81, 89-92 and Plaintiff's request for exemplary damages is MOOT.[2]

Defendants also move to strike a portion of paragraph 41. Paragraph 41 is part of the third cause of action and the demurrer to that claim has been sustained, thus Defendants' motion is MOOT. However, even if the motion was not moot, the Court would still deny it. The assertion that an allegation is not true is not a basis for a motion to strike because the allegation must be accepted as true at this stage. Moreover, Defendants fail to present any basis to conclude the allegation is "irrelevant." Their assertion that it would not be admissible at trial, even if true, is not a basis for striking it from the pleading.

[2] Plaintiff's request for exemplary damages is based on her sixth cause of action and the demurrer has been sustained to that claim.

Calendar Line 4
Jay Wayne Parker v. Paragon Custom Builders, Case No. 21CV392122

Before the Court is defendant Paragon Custom Builders Inc.'s motion for summary judgment to plaintiff Jay Wayne Parker's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This action arises from alleged negligence and premises liability at a residential construction site. According to the complaint, defendant Paragon Custom Builders, Inc. ("Paragon" or "Defendant") was the general contractor for the construction of a residence located in Portola Valley ("Subject Property"). (Judicial Form Complaint ("Compl."), p. 5.)[3] Paragon retained Stannah Stairlifts/Ace Home Elevators ("Ace") to install an elevator at the Subject Property.[4] (*Ibid*.)

On October 1, 2020, Plaintiff, an Ace employee, arrived at the Subject Property to take initial measurements of the elevator shaft. (Compl., p. 5.) Plaintiff had not yet visited the Subject Property and Paragon was aware of his planned site visit. (*Ibid.*) Upon arrival, Plaintiff was directed to the first floor entrance of the elevator shaft by an individual acting on behalf of Paragon. (*Ibid*.) This individual was aware that Plaintiff intended to enter the elevator shaft and take measurements and watched him do so. (*Ibid*.)

In front of the elevator shaft was a single temporary railing across the entrance of the shaft but there was no toe board or warning signs installed. (Compl., p. 5.) Inside the elevator shaft was a plywood board covering the entire surface of the shaft, which appeared to be safe for walking. (*Ibid*.) Plaintiff entered the elevator shaft and began taking measurements. (*Ibid*.) Thereafter the plywood floor collapsed and Plaintiff fell approximately 12 feet onto a concrete surface. (*Ibid*.) As a result, Plaintiff suffered severe injuries to his lower body requiring multiple surgeries. (*Ibid*.)

[3] Plaintiff filed a judicial form complaint that does not contain paragraphs or line numbers. The Court will therefore refer to the page number of the allegations.
[4] The instant motion and opposition refer to Ace instead as ACME Elevator Company dba Stannah Stairlifts.

On December 10, 2021, Plaintiff initiated this action against Paragon, alleging (1) premises liability and (2) negligence. On July 26, 2024, Paragon filed a motion for summary judgment as to the complaint. Plaintiff opposes the motion and Paragon filed a reply.

II. Defendant's Request for Judicial Notice

In support of its motion, Paragon requests the Court take judicial notice of *Eugene Bowen v. Burns & McDonnell Engineering Company, Inc. et al.*, Case No. A166793, certified for publication on July 15, 2024. This case is now published[5] and cited by Paragon in its motion. Therefore, the Court finds it unnecessary to take judicial notice of this case. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].) On that basis, the request is DENIED.

III. Defendant's Evidentiary Objections

Paragon asserts 41 objections to Plaintiff's materials. Objection 27 is OVERRULED. The Court declines to rule on the remaining objections. (See Code Civ Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion."].)

IV. Legal Standard

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.) If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to

[5] *Bowen v. Burns & McDonnell Engineering Co., Inc.* (2024) 103 Cal.App.5th 759.

find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*.) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id*. at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id*. at p. 843.)

V. Analysis

Paragon argues Plaintiff cannot establish that it owed him any duty of care and therefore summary judgment is appropriate. Specifically, Paragon asserts Plaintiff was an employee of its subcontractor, Ace, Plaintiff was injured while working in the course and scope of his employment with Ace, and therefore, the well-established *Privette* doctrine[6] bars Plaintiff's claims against Paragon as a matter of law. (Motion, p. 7:6-10.)

Paragon also argues Paragon did not retain control of Ace's or Plaintiff's work at the Subject Property and its conduct did not affirmatively contribute to the occurrence of the subject incident or Plaintiff's injuries and Paragon does not owe a duty to Plaintiff because falling through an open elevator shaft is an inherent risk of the elevator installation work that Plaintiff was hired to perform.

A. Premises Liability/Negligence and the *Privette* Doctrine

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. . . . The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages." (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998; see also *Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619 [explaining that premises liability is simply a form of negligence].) Recovery under these causes of action "depends on as a threshold matter on the existence of a legal duty of care." (*Brown v. USA Taekwondo* (2021) 11

[6] *Privette v. Superior Court* (1993) 5 Cal.4th 689.

Cal.5th 204, 213.) "Ordinarily, the existence of a duty . . . [is a] legal issue[] determined by courts." (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27; see also *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

The *Privette* Doctrine comes from the California Supreme Court's decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 698 (*Privette*) and related cases such as *Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253 (*Toland*) and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*). 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, supra,* 5 Cal.4th at p. 693.) 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." (*Sandoval*, *supra*, at p. 270.)

> 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.)

Thus, under the *Privette* doctrine, "when [a] contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person

who hired the contractor—a nonnegligent party—advances no societal interest that is not already served by the workers' compensation system." (*Privette*, *supra*, 5 Cal.4th at p. 692.) Therefore, "[a]n employee of an independent contractor generally may not sue the contractor's hirer for work-related injuries." (*Id*. at p. 702.) Instead, the injured employee is generally limited to worker's compensation remedies against his employer.

Paragon contends this case falls squarely within the confines of the *Privette* doctrine and that the presumption of delegation of tort duties has arisen. Paragon proffers the following relevant facts: Paragon was hired as the general contractor for the construction of a residence at the Subject Property. (Paragon's Separate Statement of Undisputed Material Facts ("UMFs") 1.) On March 24, 2019, Paragon subcontracted with Prostruction, Inc. ("Prostruction"). (UMF 2.) On or about June 26, 2019, Paragon also subcontracted with Ace to provide, construct, and install a custom hydraulic home elevator on the Subject Property. (UMFs 5-6.) At the time of the subcontract, Plaintiff was employed by Ace as a safety officer and administrator. (UMF 7.) On September 29, 2020, Plaintiff contacted Paragon's CEO, Jared Wilcox and asked if he could come to the worksite on October 1, 2020. (UMF 13.) Wilcox agreed and thereafter, on October 1, 2020, Plaintiff arrived at the Subject Property to take measurements of the elevator shaft. (UMF 15.) At the worksite, Plaintiff spoke to Roel Juarez, a foreman for another subcontractor, VNF Framing, who showed Plaintiff the elevator shaft. (UMF 17.) A wooden 2x4 plank was fastened across the shaft entrance and a piece of plywood covered the opening in the shaft. (UMFs 20-21.) Without wearing any fall arrest equipment, Plaintiff ducked under the 2x4 and stepped onto the plywood. (UMFS 22, 23, 24-26, 27.) Thereafter, Plaintiff fell approximately 13 feet through the elevator shaft. (UMF 28.)

Plaintiff concedes he cannot dispute that the *Privette* doctrine applies to these facts as a general matter. Plaintiff also argues, however, that certain exceptions bar a complete defense.

"There are exceptions to the *Privette* doctrine. 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. (*Hooker*, *supra*, 27 Cal.4th at p. 209.) Another exception permits recovery

when the hirer (1) has a nondelegable legal duty (2) which it breaches (3) in a manner that affirmatively contributes to the injury. (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 669-670, 672, (*Padilla*); *Hooker*, at pp. 210, 215; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146–147, 62 Cal.Rptr.3d 479 (*Evard*).)" (*Khosh v. Staples Construction Company* (2016) 4 Cal.App.5th 712, 717.)

1. **Concealed Hazard Exception**

A hirer "may be independently liable to a contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the [hirer] fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 674-675; see also *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1092.)

Here, Plaintiff proffers evidence that Wilcox and Angus Gavin, a Paragon employee and superintendent at the Subject Property, were aware that the plywood cover inside the framed hoist way was not capable of safely supporting the weight of a worker. (Plaintiff's Separate Statement of Material Facts ("PMFs") 1, 10, 47, 48.) Paragon does not dispute these PMFs. Next, Plaintiff proffers evidence that he did not know of the hazardous condition and could not have reasonably ascertained the condition. Specifically, Plaintiff argues the evidence shows Plaintiff had no idea the plywood floor inside the hoist way was incapable of supporting his weight. (PMF 44.) He further provides expert evidence from construction safety expert Charles Craig, that a reasonable inspection would not have revealed that the plywood platform could not support the weight of an adult. (PMF 49, citing Craig Decl., ¶ 54.) Finally, to establish the third element, Plaintiff provides evidence that neither Wilcox nor Gavin told anyone about the purpose of the plywood cover and that it was not meant to be weight bearing and there were no warnings posted in or near the elevator shaft to alert works that it was unsafe to stand on the platform. (PMF 48 and 49; see also *Gordon v. ARC Manufacturing, Inc.* (2019) 43 Cal.App.5th 705, 720 [defendant knew of unstable roof and the recommendation that nobody go up there but gave plaintiffs no such warning, "[a]s a landowner who had already been informed of the dangerous

condition of the entire roof, in the exercise of reasonable care, defendants were in the best position to protect [plaintiff] from the concealed condition that injured him."].) Paragon objects to the evidence supporting PMF 49 but this objection was overruled above. (See Paragon's Responses to Plaintiff's Separate Statement, p. 38.)

Paragon cites three cases to support its argument that Plaintiff could have reasonably inspected the premises to determine it was unsafe to walk into the elevator shaft. (Reply, pp. 9-11, citing *Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1216 (*Gravelin*); *Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863 (*Blaylock*); and *Miller v. Roseville Lodge No. 1293* (2022) 83 Cal.App.5th 825, 833 (*Miller*).) The Court finds *Gravelin* to be inapposite. There, the Court of Appeal determined that the alleged hazard was not a concealed preexisting hazard because it was fit for its intended purpose; plaintiff misused the alleged hazard; and the unsuitability of the hazard was "open and obvious" based on a photograph and plaintiff's description of the hazard. (*Gravelin*, *supra*, at p. 1217.) Further, the plaintiff would not have otherwise used the hazard had he come to the job site prepared with his own equipment. (*Ibid*.)

In *Blaylock*, there was evidence that employees were instructed to check flooring and crawl on all fours to distribute their weight when working in a crawl space. (*Blaylock*, *supra*, at p. 867.) The court there further noted that photographs in the record demonstrated that had an employee engaged in a safety inspection, the employee would have seen the "trap door" on the floor. (*Id.* at p. 873.) Similarly, in *Miller* the Court of Appeal determined the concealed hazard exception did not apply because according to the undisputed facts, the alleged hazard was not concealed and was reasonably ascertainable. (See *Miller*, *supra*, at p. 825.)

Here, there is no evidence that Plaintiff misused the elevator shaft and further, the evidence shows that a reasonable inspection would not have revealed that the plywood in the elevator shaft was not safe to walk on. (See PMF 49; see also *Sandoval*, *supra*, 12 Cal.5th at p. 272 ["'concealed' hazard means something specific: a hazard that the hirer either knows or reasonably should know exists, and that the contractor does not know exists and could not reasonably discover without the hirer's disclosure."].) Thus, for the same reasons both *Blaylock* and *Miller* are inapposite.

Plaintiff's evidence indicates that the plywood floor covered the entirety of the elevator shaft and appeared to be able to support Plaintiff's weight, and according to Plaintiff's expert, Craig, a reasonable inspection of the plywood floor would not have revealed it was unsafe. (See PMFs 44 and 49.) Thus, Plaintiff has established a triable issue of material fact of an exception to the *Privette* doctrine. As such, the Court need not address the retained control exception. Based on the foregoing, the motion for summary judgment is DENIED.