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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SUZANNE JAKKOLA, as Executor, etc., et al., Plaintiffs and Appellants, v. TONHO INTERNATIONAL, INC., Defendant and Respondent.	B231494 (Los Angeles County Super. Ct. No. BC435252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

The Halpern Law Firm and Jesse L. Halpern for Plaintiffs and Appellants.

Goshgarian & Marshall, John A. Marshall and Merak Eskigian for Defendant and Respondent.

Plaintiffs appeal from a judgment entered in favor of defendant in this wrongful death action after defendant's motion for summary judgment was granted. The trial court found that plaintiffs lacked sufficient evidence to meet their burden of proof with respect to the element of causation on a cause of action for negligence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts:

Plaintiffs and appellants, William Loel Kramer and Janel Perea were the husband and adult daughter of decedent, Donna Kramer.[1] On May 13, 2009, Donna, William, and Janel checked into a Best Western Regency Inn owned and operated by defendant and respondent Tonho International, Inc. (Best Western). Appellants and Donna were staying at the hotel to assist Donna following breast enhancement surgery she had undergone earlier that day.

Donna's surgery was completed about 5:30 p.m. Defendant David Glick, M.D. (who is not a party to this appeal), discharged Donna with instructions that, for her own safety, she not be left alone for the remainder of the day or night. Donna was provided with pain medication and did not eat anything for the remainder of the day. William and Janel accompanied Donna back to the hotel, where Donna quickly fell asleep. Donna used the restroom unassisted at approximately 9:00 p.m. without incident, then went back to sleep.

Sometime between 10:30 p.m. and 11:00 p.m., Janel showered in the room's bathroom. Janel placed a towel on the floor before showering, and returned the towel to the tub after she finished. After showering, Janel did not notice any water anywhere.

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[1] In April 2011, while this action was pending, William Kramer passed away. On July 31, 2012 we ordered that Suzanna Jakkola, Executor of the Estate of William Loel Kramer be substituted as a party in place and in lieu of William Kramer in this appeal. (Cal. Rules of Court, rule 8.36; Code Civ. Proc., § 377.33.)

For the sake of clarity we will continue to refer to William Kramer as appellant and will refer to each appellant and decedent Donna Kramer by first name because William and Donna Kramer shared a surname.

At deposition, William testified that he watched television between 9:00 p.m. (when Donna first used the restroom) and midnight, when he went to sleep. In response to interrogatories asking him to state all facts on which he asserted that Best Western had "'[n]egligently created or knew or should have known of the existence of a Dangerous Condition'" that had allegedly caused Donna's injuries, William asserted only that the hotel room "contained a dangerous condition within the bathroom causing the floor surface area to be dangerous and slippery."

Shortly before 4:30 a.m. the next morning, Donna awoke and walked to and used the bathroom unassisted. Janel and William were woken by Donna yelling from the bathroom that she could not move. After attempting to open the bathroom door and finding it blocked, appellants summoned emergency personnel, who arrived at about 4:37 a.m. and removed the door to gain entry. A responding paramedic later testified that he did not recall seeing water on the floor while tending to Donna.

As a result of her fall, Donna sustained serious injury to her head and neck, including cord compression of her cervical vertebrae (C3 through C7); subsequently she suffered from the onset of bradycardia and hypotension. According to Janel, Donna had no independent recollection of falling in the four days following her fall. Donna died seven months after her fall.[2]

In April 2010, appellants initiated this action for wrongful death. Appellants' form complaint alleges that Best Western "owned operated controlled managed and [*sic*] hotel open to the public." Best Western, according to appellants, "created or knew or should have known of the existence of a Dangerous Condition within the bathroom floor" of the room let to appellants, and that the "dangerous condition caused the floor way to be slippery and unsafe." As a result, Donna "attempted to use the bathroom, unknowing

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[2] While the parties do not dispute the extent or nature of Donna's injuries, the record is devoid of any evidence of an autopsy, expert opinion, or other evidence that Donna died as a result of these injuries. However, neither party appears to dispute that Donna's death resulted from injuries connected to the fall.

of the dangerous nature of the floor and did slip and fall suffering catastrophic injuries resulting in quadreplegia [*sic*]." In due course, Best Western sought summary judgment contending that summary judgment was proper because appellants could not establish the pivotal element of causation to support a cause of action for negligence. Following a hearing, the trial court agreed with Best Western and granted its motion for summary judgment.

DISCUSSION

A. Standard of Review

"We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) "'First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact.' [Citations]." (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462–1463.) We view the evidence in the light most favorable to appellants as the losing parties. (*Id.* at p. 1463.) If there is no triable issue of material fact, we may affirm the summary judgment if it is correct on any applicable legal ground, whether or not adopted by the trial court. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

Appellants allege that Best Western is liable for the wrongful death of Donna on a "dangerous condition" theory of negligence. Innkeepers, like other commercial property owners, "are not insurers of the safety of their patrons, although they owe the patrons duties 'to exercise reasonable care in keeping the premises reasonably safe.' [Citations.]" (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 431.) However, "[t]hat an accident occurred does not give rise to a presumption that it was caused by negligence." (*Id.* at p. 432.) In addition to demonstrating the existence of a

duty and its breach,[3] to prevail on a claim of a dangerous condition theory of negligence, a plaintiff must prove that "the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm" for which no rule of law insulates the defendant from liability. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.)

B. Best Western's motion for summary judgment met its initial burden

Best Western moved for summary judgment on the basis that appellants had no evidence establishing the element of causation. In support of its motion, Best Western relied primarily on evidence produced by appellants. First, Best Western noted the lack of percipient witnesses to Donna's fall, as both William and Janel were asleep and unaware of what had occurred until Donna's cries woke them up. Second, Best Western noted the absence of any physical evidence on the bathroom floor following the fall which would have provided some inference of causation. Third, Best Western argued that an alleged utterance by Donna that she "'slipped,'" as described by William at deposition (and later in his declaration in opposition to the motion) is inadmissible hearsay.[4]

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[3] The parties focus solely on the element of causation. Best Western provided uncontroverted evidence that no guest had ever complained that its bathroom tile was slippery and that no guest had been injured by falling on this or any of the same tile installed in its bathrooms. That evidence alone is insufficient to establish an absence of breach of duty. This evidence demonstrates Best Western's lack of actual or constructive notice of the alleged dangerous condition. However, appellants also allege that Best Western *created* the dangerous condition, as opposed to knowing of—or unreasonably having failed to discover—the defect and failing to correct it. There is a difference between knowledge imputed to a property owner for failing to discover a dangerous condition not of its own making and the failure of the property owner (or its employees) to exercise reasonable care in maintaining and constructing its premises. (See *Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742.) Nevertheless, for purposes of discussion, like the parties we assume the element of breach is established.

[4] Best Western also suggested an alternate theory of causation—namely, that Donna had fallen as the result of a preexisting medical condition. The trial court

To support these contentions, Best Western, offered written interrogatory responses of William and Janel, as well as excerpts from deposition transcripts of William, Janel, and some paramedics and firefighters who responded to the scene. Best Western further provided a declaration of its expert witness, Peter Zande, who opined that the tile on the bathroom floor met industry standards under dry conditions. Best Western also provided a declaration of its general manager, Cheng Chen, who stated that no guests at the hotel had ever reported or complained about slipping on the tiled bathroom floors since the tile was installed in 50 of the hotel's 63 bathrooms in 2005. Chen also proffered an invoice for the purchase of the tile attesting to the fact that the tile met OSHA standards for slip resistance.

Best Western met its initial burden of demonstrating that appellants had no evidence establishing the element of causation and were unlikely to procure such evidence before trial: *no* percipient witness can testify to how Donna fell; expert witness evidence indicates that the tile met industry safety standards when dry; and, no admissible evidence suggests that there was water on the floor at the time of Donna's fall.

C. Appellants failed to produce admissible evidence to raise a triable issue of material fact that a fall on wet tile caused Donna's injuries

Appellants opposed the motion for summary judgment, arguing that there were triable factual issues both as to causation and as to Best Western's actual and constructive notice of the allegedly dangerous condition. In support of their opposition, appellants submitted two new pieces of evidence. The first was a declaration by William in which he stated—for the first time—that he had used the bathroom shortly before midnight and found the bathroom floor wet enough to dampen his socks. Best Western objected on the grounds that William's declaration contradicted his prior responses to interrogatories and at deposition. The second piece of evidence was a declaration by appellants' expert witness, Brad Avrit, using William's revelation as a basis to opine that the tile floor was

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sustained appellants' objections to consideration of this evidence on the basis of relevancy. This theory is not at issue on appeal.

wet and therefore dangerously slippery at the time of Donna's fall and, further, that the position of Donna's body was inconsistent with her having fainted. Best Western objected on the grounds that Avrit's testimony was incompetent. Finally, appellants also proffered a statement by Donna to William, purportedly made while she was on the bathroom floor, that she "slipped and fell."

The trial court sustained Best Western's hearsay objection to Donna's statement and declined to rule on Best Western's objections to the declarations of William and Brad Avrit. Appellants maintain that the declarations of William and Avrit are admissible over Best Western's objections and that the trial court erred in sustaining Best Western's hearsay objection to Donna's statement. The admissible evidence, according to appellants, creates a material factual issue as to whether water remained on the floor when Donna went to the bathroom and whether Donna slipped because of the wet tile floor. We take each contention in turn.

1. Standard of review for evidentiary rulings

Like most appellate courts, we apply a deferential abuse of discretion standard when reviewing a trial court's evidentiary rulings on summary judgment. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 192, fn. 15; see also *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 449.) The California Supreme Court has not definitively ruled on this issue. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

Where, however, the trial court declines to rule on properly-made objections and the parties invite review of the evidentiary objections, we apply a de novo review, "consistent with the general standard of review applicable to summary judgment rulings, that any doubts as to the propriety of granting a summary judgment should be resolved in favor of the party opposing the motion." (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 535.)

Four objections to appellants' evidence are at issue: (1) William's declaration submitted in opposition to the motion for summary judgment; (2) Donna's purported

statement in the bathroom that she "slipped and fell"; (3) the competency of Avrit's expert testimony regarding the continued presence of water on the floor at the time of Donna's fall; and (4) the competency of Avrit's expert testimony on whether the position of Donna's body was consistent with her having fainted.

a. William's Declaration

In a declaration submitted in opposition to Best Western's motion for summary judgment, William for the first time described using the bathroom shortly before going to bed, stating that "[a]fter using the bathroom, I had to remove my socks before going to bed because they were damp from the water on the bathroom floor." In his prior responses to interrogatories, when asked to state *all* facts on which he based his claim that Best Western had actual or constructive notice of the dangerous condition, William never mentioned that the floor was wet.[5] Additionally, at deposition, when asked what he did between 9:00 p.m. and when he went to sleep at approximately midnight, William responded, "I watched television."

Best Western objected to this portion of William's declaration on the basis that it contradicted his prior written discovery responses and testimony at his deposition. The trial court declined to rule on Best Western's objection.

In the absence of a credible explanation, self-serving declarations submitted in opposition to summary judgment may be disregarded by the trial court when they contradict earlier discovery responses, particularly where the earlier response was written with the assistance of counsel. (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1521–1522.)

Where a party's declarations in opposition to summary judgment contradict prior responses, "the rule of liberal construction loses its efficacy and the granting or denial of the motion for summary judgment depends upon the issues of credibility. Accordingly,

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[5] Janel's responses to Best Western's second set of interrogatories were identical to William's responses. We focus on William's responses because it is his declaration that appellants seek to employ as a means of creating an issue of material fact.

when a defendant can establish his defense with the plaintiff's admissions sufficient to pass the strict construction test imposed on the moving party [citation], the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive." (*Leasman v. Beech Aircraft Corp*. (1975) 48 Cal.App.3d 376, 382.)

Here, William's interrogatory responses, prepared with the assistance of counsel, stand in stark contrast to his subsequent declaration. William was asked to state "all facts" regarding Donna's fall. The presence of water on the bathroom floor was a significant fact—indeed, it is *the* material fact appellants now seek to identify as creating a triable issue.

A party that provides factually devoid responses in answering written interrogatories requesting "all facts" does so at risk of summary judgment in favor of its opponent. (See, e.g., *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 578 [summary judgment for defendant where plaintiff's response to a "'state all facts'" interrogatory that it held a belief the defendant committed fraud was insufficient to create issue of material fact]; but see, *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 748 [responsive party could not be faulted for deficient interrogatory responses where the party did not have access to documents allegedly held by propounding party].) In contrast with *Villa v. McFerren*, where the responsive party could not be expected to have access to information possessed only by the propounding party, William and Janel were the *sole* individuals who could have provided this key fact in response to Best Western's discovery. The statement in William's self-serving declaration is insufficient to create a material factual issue and was properly excluded.

b. Donna's Hearsay Statement

At deposition and in his declaration in opposition to the motion for summary judgment, William claimed that Donna "[i]mmediately" said "she slipped and fell." The trial court sustained Best Western's objection that the statement was inadmissible hearsay. Appellants concede that William's recounting of Donna's statement was

hearsay, but argue that the trial court abused its discretion in failing to rule the statement admissible under the "obvious exception" that it was a spontaneous declaration.

Under Evidence Code section 1240, subdivisions (a) and (b),[6] a hearsay declaration may be admissible if it "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and" "[w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." The exception requires that "'"(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 495.) The party offering the declaration bears the burden to establish these conditions. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177–178.) This discretion is amplified by the deference granted in reviewing the lower court's determination as to whether the declarant was in a state of excitement at the time of the statement. (See *People v. Poggi* (1988) 45 Cal.3d 306, 319.) "[T]he discretion of the trial court is at its broadest when it determines whether this requirement is met [citation]. Indeed, Dean Wigmore goes so far as to urge that the issue should be left 'absolutely to the determination of the trial court.'" (*Ibid.*)

We cannot agree with appellants that the trial court abused its considerable discretion in declining to extend the excited utterance exception to William's recitation of what Donna purportedly said. First, although appellants now characterize Donna's statement as having been made immediately, at deposition William testified that Donna did not tell him at the time *how* she slipped and fell, but that he "found out later" when Donna explained to him later at the hospital "that she had slipped and fallen, when she

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[6] All further statutory references are to the Evidence Code unless otherwise noted.

stood up from the toilet." Nor could William recall at deposition whether he asked Donna what had happened, which suggests her statement may not have been unprompted. The trial court properly concluded that appellants failed to prove the "crucial element" that Donna's mental state was such that her utterance was not made "'without deliberation or reflection. . . .'" (*Melkonians v. Los Angeles County Civil Service Com.* (2009) 174 Cal.App.4th 1159, 1169.) Further, at her deposition, Janel testified that Donna had suffered total memory loss as to the incident and "didn't recall anything happening until about four days" later. Further, Janel testified that Donna had no independent recollection of falling, further undercutting the indicia-of-reliability rationale for the excited utterance exception. (See *People v. Arias* (1996) 13 Cal.4th 92, 150 [noting indicia of reliability rationale].)

Appellants failed to show that the trial court abused its discretion when it found the exception did not apply.

c. Avrit's Expert Testimony Regarding Water on the Floor

Appellants and Best Western next dispute whether appellants' expert witness provided admissible evidence sufficient to create a triable factual issue that there was water on the floor when Donna fell.

In his declaration in opposition to the motion for summary judgment, Avrit opined that there was water on the floor at the time of Donna's fall. He relied on Janel's deposition testimony that she took a shower about 10:30 p.m. and on William's declaration that his socks were damp after using the restroom shortly before midnight.[7] Avrit based his slip-resistance tests of the tile surface on this information. Avrit further opined that the position of Donna's body after her fall was inconsistent with her having fainted. Best Western objected to these portions of Avrit's declaration on the basis that he was not competent to offer such testimony. The trial court declined to rule on the objection.

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[7] Avrit took William's statement that his socks got "damp" further to state that they were "significantly damp."

There is no dispute that Avrit would be competent to testify as an expert witness regarding the presence of water on the floor. He would not, however, be competent to testify that the position of Donna's body was inconsistent with fainting.

An expert's opinion testimony is admissible if it is "'[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Watson* (2008) 43 Cal.4th 652, 692; § 801, subd. (a).) Under section 720, subdivision (a), a witness is qualified to testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates," which specialty can be demonstrated by the proffered witness' own testimony. An expert's competency "'"is relative to the topic and fields of knowledge about which the person is asked to make a statement."'" (*Watson*, at p. 692.)

Appellants sought admission of Avrit's conclusions that water remained on the floor at the time of Donna's fall and that the position of her body after her fall was inconsistent with that of someone falling after fainting. For each of these conclusions, expert testimony would be helpful in assisting a trier of fact to determine (1) whether and how much water would still be present on the drain-less tile floor of a bathroom after a certain number of hours, and (2) whether the mechanical effects of fainting would cause a person's body to fall in a particular manner.

Avrit is a civil engineer licensed by the State of California. He has a bachelor's degree in civil engineering and has extensive experience investigating and analyzing more than 4,000 accident cases over the course of his 18-year career. He has been recognized as an accident reconstruction expert by California courts. Given Avrit's extensive experience investigating the circumstances surrounding the causes of accidents, Best Western has not demonstrated that Avrit is not qualified to opine as to how long water could be expected to remain on a tile floor. Whether Avrit in fact presented admissible evidence to that effect is a different question from his competency to offer that evidence at all.

Although Avrit is qualified to opinion as to the presence of water on the floor, appellants failed to submit anything beyond his conclusory assertion that water remained on the floor some five hours after Janel's shower. In order for appellants to employ Avrit's declaration as a means to establish the presence of water at the time of Donna's fall, his testimony must meet the foundational requirements of section 801.

An expert's testimony is limited to that which is derived from matter "that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (§ 801, subd. (b).) The facts forming the informational basis of the expert's opinion must be reliable. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 612.) "It is not proper for an expert to base opinions on assumptions that are not supported by the record, or on information that would not be reasonably relied upon by other experts." (*Howard v. Omni Hotels Management Corp*., *supra*, 203 Cal.App.4th at p. 427.) ""Like a house built on sand, the expert's opinion is no better than the facts on which it is based."" (*In re Alexander L*, at p. 612.) Avrit's expert opinion fell short in two significant respects.

First, Avrit's use of Janel's deposition testimony and William's declaration is of dubious reliability. Janel testified that she placed a towel on the floor during her shower, presumably to absorb any water that spilled out of the shower. She removed the towel from the floor after her shower and did not notice any water remaining on the floor at the time. William's belated declaration, proffered in opposition to the motion for summary judgment, stated for the first time that he found his socks damp after using the bathroom shortly before midnight. Whether these sources of information are reliable is questionable and a matter for the court's discretion. (See *People v. Curl* (2009) 46 Cal.4th 339, 360.)

Second, however, Avrit's assumption that water *remained* on the bathroom floor for over five hours after Janel's shower is conclusory and lacks factual basis. Avrit provided no information regarding the amount of water likely to have been left after the shower (of unknown duration) in the first place, or the rate of evaporation, nor did he conduct any test to determine whether any—or how much—water was likely to have

resisted evaporation for any reason. In short, he provided no credible basis to support his conclusion that water remained on the floor—a key assumption of the tests he performed regarding the slip resistance of the tile floor.

The record is devoid of any evidence that would qualify Avrit to opine that the position of Donna's body when she fell was inconsistent with how her body would have fallen had she fainted. The record contains no evidence that Avrit, a civil engineer, has the requisite medical and/or physiological expertise to competently opine how one would fall after fainting.

d. Appellants cannot establish causation

In opposition to the motion for summary judgment, appellants offered (1) a declaration by William concerning the presence of water on the floor around midnight; (2) Donna's purported statement on the bathroom floor that "[she] slipped and fell"; and (3) Avritt's expert opinion based on Janel's deposition and William's declaration. None of this evidence is admissible. Accordingly, appellants cannot establish that a material factual issue exists as to the element of causation. "'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. *A mere possibility of such causation is not enough*; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at pp. 1205–1206, italics added.)

Appellants' evidence suggests, at best, that Best Western may have breached a duty owed to Donna by installing tiles that might not meet industry standards for slip resistance when wet. However, in the absence of admissible evidence tending to show the tile was wet at the time of Donna's fall, there is no legitimate basis to infer that Best Western's breach caused Donna to fall. Little more than hypothetical conjecture provides a basis to draw such an inference and the trial court properly entered summary judgment for Best Western.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.