

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Palm Springs Courthouse

Hearing re: Demurrer on 1st Amended Complaint for Other Personal Injury/Property Damage/Wrongful Death Tort (Over \$25,000) of KATHLEEN JOHNSON by CITY OF PALM SPRINGS, (A GOVERNMENTAL ENTITY)

01/19/2023  
8:30 AM  
Department PS2

**CVPS2203828**

**JOHNSON vs CITY OF PALM SPRINGS, (A GOVERNMENTAL ENTITY)**

Honorable Manuel Bustamante, Judge  
C. Martinez, Courtroom Assistant  
Court Reporter: None

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## **APPEARANCES:**

No Appearances

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Motion by CITY OF PALM SPRINGS, (A GOVERNMENTAL ENTITY) regarding Hearing re: Demurrer on 1st Amended Complaint for Other Personal Injury/Property Damage/Wrongful Death Tort (Over \$25,000) of KATHLEEN JOHNSON is called for hearing.

Pursuant to CRC 3.1308 and Local Rule 3316 and No Request for Oral Argument having been made: Court makes the following order(s):

Tentative ruling shall become the ruling of the court.

Demurrer by CITY OF PALM SPRINGS, (A GOVERNMENTAL ENTITY) on 1st Amended Complaint for Other Personal Injury/Property Damage/Wrongful Death Tort (Over \$25,000) of KATHLEEN JOHNSON overruled.

CITY OF PALM SPRINGS, (A GOVERNMENTAL ENTITY) have/has 20 days leave to file an answer on 1st Amended Complaint for Other Personal Injury/Property Damage/Wrongful Death Tort (Over \$25,000) of KATHLEEN JOHNSON.

This is a dangerous condition of public property case, in which Plaintiffs Kathleen Johnson and Gerald Johnson's First Amended Complaint (FAC) allege causes of action for 1) dangerous condition of public property, 2) negligence, 3) loss of consortium, 4) interference with rights of disabled person (Civ. §54).

Defendant City of Palm Springs demurs to the entire FAC on the grounds that the FAC and each cause of action stated in it, fails to state sufficient facts to constitute a cause of action against the City because Plaintiffs fail to allege the establish the existence of a dangerous condition as a matter of law. In addition, City specifically demurs to Plaintiffs' first cause of action for Dangerous Condition of Public Property on the grounds it fails to state a cause of action because Plaintiffs fail to establish the

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existence of a dangerous condition as a matter of law. Specifically, a dangerous condition requires that the property "is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov't Code § 830.)

In opposition, Plaintiffs assert that City's demurrer should be overruled because plaintiffs' complaint states a cognizable claim. In the alternative, plaintiff should be granted leave to amend. Plaintiffs further assert that a demurrer does not lay where, as here, moving defendant attempts to introduce extrinsic evidence. Plaintiffs state that the test of liability under this component is whether a condition is a hazard to all foreseeable users, not merely those who are intended to be users. Public entities are liable for maintaining property in a condition that creates a hazard to foreseeable users even if those persons use the property for a purpose for which it is not designed to be used or for a purpose that is illegal. Plaintiffs assert that the "foreseeable use" element is easily satisfied. As to Defendant's assertion that Plaintiffs did not plead due care, the "due care" clause of Gov't Code §830(a) is merely part of the definition of a dangerous condition. It does not require the plaintiff to plead or prove absence of his or her own negligence or that of a third person.

In reply, Defendant asserts that Plaintiffs fail to address fatal flaws in their pleading. It is not reasonably foreseeable that a person, using due care, would walk on a roadway shoulder next to a large fence with a fabric windshield surrounding a construction site when there was an unobstructed sidewalk directly across the street connected by a marked pedestrian crosswalk. Rather than addressing this glaring flaw in the pleadings, Plaintiffs argue that the City failed to warn pedestrians of a tripping hazard. However, the duty to warn exists only when the dangerous condition is not apparent. The allegations of the FAC fail to allege that such a condition was not open and obvious. Indeed, Exhibit 2 of the FAC reveals that the alleged condition was open and obvious and that there may be any number of hazards to pedestrians using the roadway shoulder as a walkway when it is next to a large fabric windscreen shielding ongoing construction. The obvious construction activity itself inherently imports some knowledge on a passing pedestrian to exercise a degree of caution. Plaintiffs took it upon themselves to walk into oncoming traffic on the wrong side of the roadway shoulder, adjacent to an active construction site – it is apparent from Plaintiffs' FAC Exhibits that the sidewalk was closed. In fact, the FAC Exhibits also show an unobstructed, proper sidewalk across the

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street. Construction sites are inherently dangerous, as is walking on the roadway shoulder – while Plaintiffs’ injuries are regrettable, they are not the result of any failure to warn or other liability on the part of the City of Palm Springs. For these reasons, the City respectfully requests that the Court sustain the City’s Demurrer.

The FAC alleges in pertinent part as follows:

At the time the subject incident occurred, KATHLEEN JOHNSON was an elderly woman who had difficulty walking due to arthritic conditions. She has been married to GERALD JOHNSON since 1982. On September 23, 2021, they were visiting Palm Springs. That night, they decided to attend the Palm Springs Village Fest, a popular weekly street fair. They drove there about an hour after sunset. They finally found a place to park in the parking lot across the street from Palm Springs Art Museum at 101 North Museum Drive. Plaintiffs exited their car and walked out of the parking structure at the northeast corner of North Museum Drive near North Belardo Road. They walked southbound on the east side of North Museum Drive (the side of the street closest to defendants’ construction site) toward Museum Way. Almost immediately, they encountered a construction fence at the perimeter of the Downtown Palm Springs Revitalization Project, or City Project No.: 15-07. The fence was covered in a fabric windscreen and supported on awkward metal footings that were weighted down by sandbags. Along North Museum Drive, the perimeter fence was placed almost exclusively in the gutter abutting the curb, such that the footings and their sandbags protruded hazardously into the makeshift pedestrian walking space for northbound and southbound pedestrians. As the sun had set about an hour before and the area they were walking was not otherwise illuminated, the hazard created by the footings and sandbags was virtually invisible to pedestrian traffic. As plaintiffs walked southbound, next to the fence, they met a small passel of oncoming northbound pedestrians. Someone had to make way, so the JOHNSONS politely stepped slightly to their left, closer to the construction fence (instead into the open traffic lanes, to their right.) At that moment, KATHLEEN JOHNSON tripped over a sandbag/footing section of the construction fence that was protruding into the makeshift pedestrian walkway. This caused her to fall, thereby suffering severe personal injuries and related damages. GERALD JOHNSON watched helplessly as his wife fell. He suffered emotional distress and loss of consortium damages.

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Demurrer

To withstand a demurrer the complaint must contain “a statement of the facts constituting the cause of action, in ordinary and concise language.” (C.C.P. § 425.10.) “[T]he complaint need only allege facts sufficient to state a cause of action, each evidentiary fact that might eventually form part of the plaintiff’s proof need not be alleged. (C.A. v. William S. Hart Union High School Dist. (2012) 53 Cal.4th 861, 872.) Generally a plaintiff need only plead facts necessary “to acquaint a defendant with the nature, source and extent of his claims.” (Doe v. City of Los Angeles (2007) 42 Cal.4th 531, 549-550.) On demurrer the court must assume the truth of all facts properly pled, facts that may be implied or reasonably inferred from the facts expressly alleged, and evidentiary facts that are in exhibits attached to the complaint. (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6.) The court’s task is to treat well-pleaded allegations in the complaint as true and determine whether the complaint states facts sufficient to constitute a cause of action. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) “The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff.” (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 605; Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal.App.3d 369, 374-375.)

A general demurrer lies where the pleading does not state facts sufficient to constitute a cause of action. (CCP § 430.10(e)). A special demurrer lies where a pleading is uncertain, ambiguous and unintelligible. (CCP § 430.10(f)). Demurrers for uncertainty will only be sustained where the defendant cannot reasonably determine what issues must be admitted or denied, or what claims are directed against him. (Khoury v. Maly’s of California, Inc. (1993) 14 Cal.App.4th 612, 616.) Demurrers for uncertainty are to be overruled when addressed to inconsequential matters, the facts are within the knowledge of the defendant or ascertainable in discovery, or not dispositive of one or more causes of action. (Id.)

1st COA (Dangerous Condition of Public Property)

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Tort Claims Act, Gov. Code § 810 et seq., “a public entity is not liable for injury arising from an act or omission except as provided by statute.” (See *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 630-31.) In California, “all government tort liability must be based on statute.” (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785, n. 2.) Further, “to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity.”(Id. at 795 (internal quotation marks omitted).)

The sole statutory basis for imposing liability on public entities as property owners is Gov. Code §835. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1129. In order to state a cause of action for dangerous condition of public property, a plaintiff must allege: (1) a dangerous condition of public property; (2) a proximate causal connection between the condition and the injury sustained; (3) a reasonably foreseeable risk that the kind of injury that occurred would result from the dangerous condition; and (4) the entity either created the condition, or had actual notice or constructive notice of its existence, and there was sufficient time before the injury for it to have taken remedial action. (Gov. Code § 835; *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 146; G.C. §835.) Plaintiff may not rely on generalized allegations and must specify in what manner the condition of property constituted a dangerous condition. (See, *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.) However, less particularity is required where the defendant may be assumed to possess knowledge superior to that possessed by the plaintiff. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236.)

A court may properly sustain a demurrer to a complaint if the facts pleaded by the plaintiff in an action based upon an alleged dangerous condition of public property cannot support, as a matter of law, the finding of the existence of a dangerous condition within the meaning of the statutory scheme setting forth the conditions under which a public entity may be held liable for an injury caused by a dangerous condition of its property. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 440.) In determining whether it is proper to sustain such a cause of action the court considers what remains after the pleading is shorn of its generalized allegations and conclusions, and looks at the factors provided to support Plaintiff’s claim of the dangerous condition of the road. (*Brenner v. City of El*

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Cajon (2003) 113 Cal.App.4th 434, 440.)

“‘Dangerous condition’ means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” (Gov. Code §830(a).) A court correctly sustains a demurrer where the complaint alleging dangerous condition fails to “point to any defective aspect of the purely physical condition of the property.” (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1133–1139.)

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable (Blank vs. Kirwan (1985) 39 Cal.3d 311, 318.) In evaluating a complaint under these standards, if there is any valid cause of action stated, even if not the one intended, the complaint is sufficient. (Saunders v. Cariss (1990) 224 Cal.App.3d 905, 908.) The sufficiency of the cause of action is tested by presuming all of the material factual allegations in the complaint are true. (Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal.4th 962, 966-967.) The complaint must be construed liberally... with a view to substantial justice between the parties.” (CCP § 452; Gressley v. Williams (1961) 193 Cal.App.2d 636, 639.) If the complaint fails to state a cause of action, the court must grant the plaintiff leave to amend if there is a reasonable possibility that the defect can be cured by amendment. (Blank v. Kirwan (1985) 39 Cal. 3d 311, 318.) Applying these standards, Plaintiffs have sufficiently stated specific facts sufficient to state a cause of action. Accordingly, the demurrer is overruled.

Notice to be given by Plaintiffs pursuant to CCP 1019.5. .