TENTATIVE RULINGS FOR March 2, 2022
Department S24 - Judge Gilbert G. Ochoa

This court follows California Rules of Court, rule 3.1308(a)(1) for tentative rulings. (See San Bernardino Superior Court Local Emergency Rule 8.) Tentative rulings for each law & motion will be posted on the internet (https://www.sb-court.org) by 3:00 p.m. on the court day immediately before the hearing.

If you do not have internet access or if you experience difficulty with the posted tentative ruling, you may obtain the tentative ruling by calling the Administrative Assistant. You may appear in person at the hearing but personal appearance is not required and remote appearance by CourtCall is preferred during the Pandemic. (See www.sbcourt.org/general-information/remote-access)

If you wish to submit on the ruling, call the Court and your appearance is not necessary. If both sides do not appear, the tentative will simply become the ruling. If any party submits on the tentative, the Court will not alter the tentative and it will become the ruling. If one party wants to argue, Court will hear argument but will not change the tentative. If the Court does decide to modify tentative after argument, then a further hearing for oral argument will be reset for both parties to be heard at the same time by the Court.

UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.

Rebecca Smithling, a wrongful death beneficiary of Decedent Chad Smithling; Hope Smithling, a minor, by and through her guardian ad litem Rebecca Smithling, as wrongful death beneficiary of Decedent Chad Smithling; Angel Smithling, a wrongful death beneficiary of Decedent Chad Smithling

v.

State of California, acting by and through the Department of Transportation ("Caltrans"), a government entity; Town of Yucca Valley, a government entity; County of San Bernardino, a government entity; Tausif B. Billah, an individual; Crystal Smithling, nominal defendant; Does 1-50

Motion: **Motion for Summary Judgment / Motion for Summary Adjudication**

Movant: Defendant Town of Yucca Valley

Respondent: Plaintiffs

Discussion -

Town of Yucca Valley ("Town") seeks summary judgment, or in the alternative, summary adjudication on the ground Town is immune from liability for a dangerous condition of public property not owned, controlled, or maintained by it. Plaintiffs assert there is a triable issue of fact as to whether Town created the dangerous condition and had the power to prevent, remedy, or guard against the dangerous condition. Town replies that it did not own or control the subject location.

Plaintiffs cite to *Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, which involved a claim for dangerous condition of public property resulting in a drowning from a strong river current which was allegedly caused by a river dam and fish ladder. The state Department of Fish and Wildlife and Department of Water Resources moved for summary judgment, arguing the DWR did not own or control the dam and remnant, and the DFW did not own or control the dam or remnant, and did not have authority and was not obligated to remove the dam remnant or to maintain the fish ladder in the breach, as well as governmental immunity. On the issue of whether the named defendants had control over the public property sufficient to impose public entity liability, the Court explained control exists if the public entity has the power to prevent, remedy, or guard against the dangerous condition. (*Goddard*, *supra*, 243 Cal.App.4th at p. 364, citing *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 990.) The DFW took part in breaching the damn in 1974, but this was not sufficient to establish that it had the power to remedy the dangerous condition by either repairing the breach or removing the dam remnant in 2009 when the accident occurred. (*Id*. at p. 366, citing *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383.) Therefore, summary judgment in favor of DFW was

appropriate, as before governmental tort liability may be imposed for a dangerous condition only if the public entity owns or controls the public property **at the time of the injury**. (*Ibid.*)

In *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, which involved an accident in a city-owned stage by a trapdoor mechanism which the city asserted was privately owned. The Court of Appeal noted case law held a public entity can be liable for a dangerous condition on public property even though the danger would not exist but for the presence of privately owned equipment on or adjacent to the public property. (*Huffman*, *supra*, 84 Cal.App.4th at p. 989.) Further, as a city employee was loaned to the theater company by the city for a limited time and purpose, there was evidence permitting the inference that he remained the city's employee while acting as technical director for the theater company. The employee was paid by the city, his hours of work were set by the city, the city manager conducted the employee's performance reviews, and the employee was a supervisory employee for the city whose job included working as a technical director for the theater, and he had fairly broad authority or discretion in matters within his role while he was on loan to the theater company. (*Id.* at p. 991.)

Constantinescu v. Conejo Valley Unified School Dist. (1993) 16 Cal.App.4th 1466 involved children who were injured in a congested parking lot which lacked barriers between the lot and the sidewalk. The plaintiffs alleged that the school district was liable for failing to erect barriers between the lot and the sidewalk, causing a dangerous condition. The court found that the school district had known of the dangerous condition of the loading area due to a dramatic increase in traffic, and acute traffic congestion as a result of the district's discontinuance of busing and allowing the small loading zone to be used by parents to pick up their children. (*Constantinescu*, *supra*, 16 Cal.App.4th at p. 1475.) The situation was further exacerbated by the district's decision to eliminate staggered sessions the year the accident occurred, resulting in adjacent streets

becoming lined with cars and chaotic traffic. (*Ibid*.) Therefore, the jury properly found that the district had a duty to erect barriers to protect against the danger it knew existed at the site. (*Ibid*.)

Low v. City of Sacramento (1970) 7 Cal.App.3d 826 involved a pedestrian accident in a water-filled depression in a parking strip outside a hospital owned and operated by the county and brought against the city and the county. The Court of Appeal concluded that both the city and the county had a species of ownership in the parking strip – the city as the holder of the street easement and the county as the holder of the underlying fee. (*Low*, *supra*, 7 Cal.App.3d at p. 834.) Further, both had control, as the county undertook to maintain the grassy surface of the parking strip, subject to the city's control as owner of the public street easement. (*Ibid*.) The county had permitted the parking strip to deteriorate, and had the power both to prevent the deterioration and to remedy it. (*Ibid*.)

Swaner v. City of Santa Monica (1984) 150 Cal.App.3d 789 involved injuries sustained by beachgoers who were struck by a van being illegally operated on a public beach. The plaintiffs alleged that the city was liable for a dangerous condition of public property by failing to erect a barrier between the parking lot and the beach. This matter involved a demurrer, rather than a summary judgment motion, as is at issue here. The Court of Appeal concluded that it could not say as a matter of law that the city lacked the duty to erect a barrier between the highway and the beach to protect foreseeable users of the beach from the foreseeable use of the beach without due care. The Court further stated it could not conclude as a matter of law that the lack of a barrier was not a condition of the property which proximately caused the plaintiffs' injuries. (*Swaner*, *supra*, 150 Cal.App.3d at p. 808.) Therefore, the Court reversed the ruling on the demurrer. (*Id*. at p. 814.)

In *Pritchard v. Sully-Miller Contracting Co.* (1960) 178 Cal.App.2d 246, which involved an automobile accident at a traffic signal, the issue of control of the dangerous condition was established by the fact that the city voluntarily made a change to the street signal without warning to drivers, within two years prior to the date of the accident. The city deliberately created the dangerous condition, and made no attempt to correct the condition it created. (*Pritchard*, *supra*, 178 Cal.App.2d at p. 254.) Although the city asserted it did not have authority to make changes to the timing of the traffic signal system, the city had made several changes without consulting the state Division of Highways. (*Id*. at pp. 254–255.)

Shea v. San Bernardino (1936) 7 Cal.2d 688 involved an automobile accident at an intersection of a roadway with a railroad track. There was a break in the grade of the street at that point, and one of the rails was three inches higher than the other. As the automobile proceeded at the intersection, the rear part of the vehicle was thrown upward, and the passenger was thrown upward. The city asserted the railroad commission had exclusive jurisdiction to alter crossings at grade and that it was powerless to remedy the condition that existed at the railway right of way. The Supreme Court noted even if it were assumed the city was powerless to alter the premises, had no control over the right of the way as to the condition which occurred, it was not relieved from the duty to warn of the dangerous condition. (*Shea*, *supra*, 7 Cal.2d at p. 693.)

The parties do not dispute Town of Yucca Valley ("Town") is a governmental entity. (Undisputed Material Fact ("UMF") #1.) Plaintiffs allege Decedent was heading eastbound on two-lane Highway 26 (the Twentynine Palms Highway) and Defendant Billah was traveling eastbound. Billah attempted to make a left turn to the westbound lanes across double yellow lines and struck Decedent's motor vehicle, causing Decedent's death. The eastbound and westbound lanes of Highway 26 were not separated by any physical barrier that would prevent motorists from

the eastbound lanes from entering into the westbound lanes. (UMF #2; SAC at ¶2, p. 2:23-27.) Although Plaintiffs purport to dispute this fact citing to the Traffic Collision Report, the defective condition is alleged in the pleadings and the issues for summary judgment / summary adjudication are defined by the pleadings. This fact is therefore not properly disputed.

The parties agree Town answered the complaint asserting affirmative defenses including governmental immunity. (UMF #3.)

Town asserts State Route 62 has not been accepted into the Town's street system. (UMF #4; Owsley Decl. at ¶5, p. 6:2-3.) Plaintiffs assert this fact is disputed, and objects that the statement lacks foundation. However Plaitiff's objections were not made in proper form as they are to be stated separately. (Cal. Rules of Court, Rule 3.1354, subd. (b).)

Town's separate statement focuses on the present time, asserting Town asserts it **does** not design, construct, own, control, service, manage, operate, repair, or maintain the private property commercial development or land consisting of three parcels at the 58100 block of State Route 62. (DF #5; Owsley Decl. at ¶¶7, 9; Fortin Decl. at ¶18.) Plaintiffs dispute this, asserting that the Town Engineer approved the design for the commercial development at 58100 State Route 62. (Resp. to DF #5; Owsley Depo at pp. 14-15, 44-45; Revised Final Conditions of Approval of Conditional Use Permit dated 2/11/2008, Planning Commission Staff Reports dated 12/14/2010, 9/14/2010, and 7/27/2010, Exhs. 3-4 to Sanvictores Decl.) The latest of these documents were dated 12/14/2010, and the accident which is the subject of this litigation occurred on March 24, 2018, just over seven (7) years later.

Town also asserts it **does** not own, control, mange, supervise, inspect, maintain, design, construct, permit, issue conditions of approval, or have any jurisdictional level approval for State Route 62 at the location of the accident. (DF #6; Owsley Decl. at ¶¶6-8, 11, 13-22; Exhs. E, F, G,

H, I, K, L, M, N, and O to Fortin Decl. ¶¶7-17.) Plaintiffs dispute this, asserting Town had a measure of control over the location because it deliberately created the dangerous condition on State Route 62 and Town had the power to prevent and remedy the dangerous condition. (Resp. to DF #6; Owsley Depo at pp. 26, 28-29 [town has requested encroachment permits for median islands from Inca Trail to Palm Street]; Exhs. 6 [Mark Nuaimi from Town proposed to DOT personnel to have a two foot painted median rather than a raised median in 3/25/2011 11:09 a.m. email], 8, 15[1] to Sanvictores Decl.)

Town further asserts it **has** no authority to prevent, remedy, guard, or warn against any conditions on State Route 62 at the subject location. (DF #7; Owsley Decl. at ¶¶7, 20-22, Fortin Decl. at ¶¶15-17, Exhs. M, N, O.) Plaintiffs dispute this asserting Town created the dangerous condition and had the power to prevent, remedy, and guard against the condition, as the Town had entered on State Route 62 and installed raised medians at two other locations by applying for encroachment permits including maintenance agreements. (Resp. to DF #7; Owsley Depo at pp. 26-29, 31; Exhibits 3, 4, 6, 11, 13 to Sanvictores Decl.)

Town also asserts it did not contribute to, prepare, or participate in the design, construction, traffic plan, grading, signing and striping, paving or engineering of State Route 62 improvements relative to the DePierro project. (DF #9; Owsley Decl. at ¶18; Fortin Decl. Exhs E-L, O.) Plaintiffs

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[1] Exhibit 15 is a 4/23/2014 letter from Town to Caltrans which references issues with the striped median at the subject location. It states at paragraph 3:

> "SR 62 east of Balsa Avenue, Striped Median: The striped median at the driveway entrance to the AM/PM Sonic Burger site on the south side of SR 62, east of Balsa Avenue. The striping is fading, and motorist traveling westbound on SR62 can't see the striping due to the combination of change in elevations and the fading of the stripe. This has resulted in a few near head on collisions from motorists attempting to make a left turn into the establishment. Additionally motorists are also attempting to make a left hand turn out from the establishment to westbound SR.62. The speed limit at that location is 55 MPH. We respectfully request that Caltrans restripes the median and adds plastic delineators (4' tall, example attached) to prevent left hand tum movement in and out of the AM/PM Sonic Burger establishments. Please see the attached illustrations."

dispute this asserting the Town engineer approved all of the design and construction plans for the commercial development, and approved elimination of the raised median requirement and in the development's Conditional Use Permit and replacing it with a painted median and striping. (Resp. to DF #9; Owsley Depo at pp. 14-15, 44-45; Exhibits E-4 to Sanvictores Decl.)

Town finally asserts there has been no delegation of authority over State Route 62 including over maintenance from the State of California to Town. (DF #10; Owsley Decl. at ¶6.) Plaintifs dispute this, asserting again Town has entered on State Route 62 and installed raised medians at two other locations by applying for encroachment permits including maintenance agreements. (Resp. to DF #10; Owsley Depo at pp. 26-29, 31; Exhibits 3, 4, 6, 11, 13 to Sanvictores Decl.)

Based on the factual disputes, the court need not consider Plaintiffs' additional facts.

Here, the time at issue is not the present, but rather at the time the accident occurred. (*Goddard v. Dept. of Fish & Wildlife*, *supra*, 243 Cal.App.4th at p. 364 ["before governmental tort liability may be imposed for a dangerous condition, the public entity must either own or control the public property at issue at the time of the injury"].) Therefore, Town's statement of facts that it "**does**" not own or control the premises do not go to a material issue of fact – i.e., whether Town exercised control at the time of the injury. Therefore, Town has not met its burden to raise a triable issue of fact as to the lack of ownership or control, and accordingly the motion should be denied.

However, even if the court were to find Town met its initial burden, there is a triable issue of fact as to the issue of control, as Town approved the lack of a raised median and replacement with double stripes, and then made requests to the State for restriping of the area.

In the reply, Town asserts that it is entitled to summary judgment because it neither owned nor controlled the location where the accident occurred. However, Town did not establish a lack

of control **at the time of the incident** or alternatively, there is a triable issue of fact as to the existence of control.

The court finds Town has not met its initial burden, or alternatively there is a triable issue of fact, and **denies** the motion for summary judgment and the motion for summary adjudication.

Rulings

The court finds Town has not met its initial burden, or alternatively there is a triable issue of fact, and **denies** the motion for summary judgment and the motion for summary adjudication.

Evidentiary Basis: Fact Nos. 1-10 and responses thereto; Fortin Decl. and exhibits; Owsley Decl. and exhibits; Town of Yucca Valley's list and documentary evidence; Sanvictores Decl. and exhibits.

Evidentiary Objections: Overrule objection nos. 1-18.

Movant to prepare Order and provide Notice.

Dated-

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Judge