**TENTATIVE RULINGS**
**LAW & MOTION CALENDAR**
**Wednesday, February 1 2023, 3:00 p.m.**
**Courtroom 16 – Hon. Patrick M. Broderick**
**3035 Cleveland Avenue, Suite 200, Santa Rosa**

**PLEASE NOTE: Per order of the Court, any party or representative of a party must appear remotely through Zoom for this calendar, unless you request in person appearance by 4:00 p.m. the day before the hearing.**

**TO JOIN "ZOOM" ONLINE,**
**Courtroom 16**
**Meeting ID: 824-7526-7360**
**Passcode: 840359**
**https://us02web.zoom.us/j/82475267360?pwd=M0o4WVRSaysydlU5VWhBZEk1MEhpdz09**

**TO JOIN "ZOOM" BY PHONE,**
**By Phone (same meeting ID and password as listed above):**
**(669) 900-6833 US (San Jose)**

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify the Court by telephone at **(707) 521-6729**, and all other opposing parties of your intent to appear by 4:00 p.m. today, Tuesday, January 31, 2023, Parties in motions for claims of exemption are exempt from this requirement.

**PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.**

## 1-2. SCV-270368, Tsai-Goodman v Hayslip

I. Demurrer

This matter is on calendar for the demurrer and motion to strike of Defendant Ella Hoy Wong ("Defendant"). Defendant demurs to the general negligence cause of action alleged in the complaint filed by Plaintiffs Hsaio Chen Tsai-Goodman and Scott Goodman ("Plaintiffs") on the grounds that it fails to state facts sufficient to constitute a cause of action and is uncertain. **The demurrer is SUSTAINED with leave to amend.**

Plaintiffs' complaint alleges that defendant John Randall Hayslip ("Hayslip") was riding his bike when he suddenly turned directly into Plaintiff's path while she was riding on her Vespa. The collision caused her to fall from the Vespa and hit her head on the ground. As a result, she sustained serious injuries including traumatic brain injuries. With respect to Defendant, the complaint alleges that she negligently entrusted the bike with Hayslip despite knowing of his prior traffic infractions.

1. Applicability of Negligent Entrustment to a Bicycle

Defendant's demurrer is based upon her argument that negligent entrustment only applies to motor vehicles. However, while the cases she cites are all based upon motorized vehicles, none state that as a matter of law liability cannot be based upon negligent entrustment of a bicycle.

*Green v. Pedigo* (1946) 75 Cal.App.2d 300 is not on point. The court in that case quickly disposed of the appellant's argument that the decedent's bicycle had to be equipped with a horn, which it was not, to warn of danger and so the decedent was contributorily negligent. The court held that the vehicle code section cited by the appellant did not apply to bicycles because it specifically stated that it only applied to "a vehicle which is self-propelled." (*Id.,* at 307-308.) Thus, the bicyclist could not be found to be contributorily negligence on the basis of that particular vehicle code section.

*Chong v. California State Automobile Assn*. (1996) 48 Cal.App.4th 285 is likewise not on point as it pertained to an insurance policy which specified that it applied to an uninsured "motor vehicle." (*Id.,* at 287.) Thus, the court held that a bicycle is not a "motor vehicle" either under the terms of the policy or within the meaning of the uninsured motorist insurance law. Neither an insurance policy nor the uninsured motorist insurance law is at issue in this case.

Defendant's citations to specific provisions of the vehicle code pertaining to motor vehicles are also irrelevant. Just because those do not apply to bicycles does not rule out liability for negligent entrustment of a bicycle.

Negligent entrustment is a common law liability doctrine, which arises in numerous factual contexts. (*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 862-863.) Conversely, the obligation of a lending owner of an automobile is one of statutory liability. (*Jones v. Ayers* (1963) 212 Cal.App.2d 646, 655.) California is one of several states which recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of specific statutes. (See Cal. Vehicle Code section 17150 et seq.) Common law negligence, including negligent entrustment, is not confined to any limited set of instrumentalities. "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others." (*Ghezavat v. Harris* (2019) 40 Cal.App.5th 555, 559 citing *Syah v. Johnson* (1966) 247 Cal.App.2d 534 [disapproved on other grounds].)

2. Previous Traffic Infractions

Defendant next argues that the allegations of Hayslip's previous traffic infractions are vague and uncertain and do not indicate any level of incompetence or lack of fitness to ride a bicycle and are factually insufficient to state a cause of action for negligent entrustment.

While Defendant argues that she is not, or never was, married to Hayslip and has no ownership interest in the subject bicycle, the complaint alleges she is the bicycle's owner, which the Court assumes as true for the purposes of a demurrer. Hayslip is also alleged to own the bicycle.

The theory of negligent entrustment arises from the act of entrustment, with permission to operate the same, to one whose incompetency, inexperience, or recklessness is known or should have been known by the owner. (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1248.)

Plaintiff correctly lays out the elements of the cause of action: The bicyclist was negligent in operating the bicycle; the defendant owned the bicycle or possessed it with the owner's permission; the defendant had actual knowledge, or should have known, that the bicyclist was an incompetent rider or unfit to ride the bicycle; the defendant permitted the rider to ride the bicycle; and the rider's incompetence, inexperience, or unfitness to ride was a substantial factor in causing harm to the plaintiff. (See CACI 724.)

However, a complaint cannot just allege the elements; it must contain "a statement of the facts" constituting the cause of action. (CCP § 425.10.)

Here, the complaint alleges that Hayslip was negligent in operating the bicycle; Hayslip co-owned the bicycle; that Defendant knew Hayslip had previous traffic infractions; that Defendant permitted Hayslip to ride the bicycle; and Hayslip's carelessness was a substantial factor in the accident.

What is missing are factual allegations that Hayslip was unfit or incompetent to ride a bicycle. The complaint only alleges that Hayslip was negligent in riding the bicycle because he illegally turned his bike left from out of the shoulder northbound. While this may allege he was careless or reckless, it does not contain sufficient facts that Hayslip was unfit or incompetent and that Defendant should have known he was unfit or incompetent because of his prior unnamed traffic infractions. Moreover, minor traffic infractions generally do not cause motor vehicle drivers to become unfit to drive. Any association of traffic infractions causing Hayslip to be incompetent to ride a bicycle is even more attenuated.

3. Conclusion and order

For the reasons stated above, the demurrer is SUSTAINED. While Plaintiffs have not established how they can amend the complaint to state a cause of action against the Defendant, they have requested leave to amend. As this is the first demurrer, the Court will allow Plaintiffs leave to amend.

Defendant's counsel shall submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

II. Motion to Strike

This matter is also on calendar for the motion of Defendant Ella Hoy Wong to strike various language in the complaint. As Defendant's demurrer was sustained, **this motion is MOOT.**

**3. <u>SCV-271241, White Tornado 312 LLC v Lopez</u>**

This matter is on calendar for the motion of Juana Ramirez ("Ramirez") for leave to intervene in this action pursuant to Code of Civil Procedure section 387 on the grounds that Ramirez claims an ownership and possessory interest in the real property that is the subject of this action for partition and ejectment, and the disposition of this action without Ramirez's participation may impair or impede her ability to protect that interest. **The motion is GRANTED.**

The court shall, upon timely application, permit a nonparty to intervene in the action or proceeding if …(B) The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." (Code Civ. Proc., § 387, subd. (d)(1).)

Ramirez claims an ownership and possessory interest in the Property. Because Ramirez' claims are unique to her, disposition of this action without permitting Ramirez the opportunity to be heard in this action and defend her interest in the Property will undoubtedly impair or impede her ability to protect her interest in the Property.

In opposition, Defendant White Tornado 312 LLC argues that Ramirez does not need to be part of this action because an action is already pending against Ramirez for ejectment. Defendant argues that because Ramirez is a party to another action, she is not a "nonparty" to this action and thus cannot satisfy the nonparty element of CCP section 387.

Defendant misconstrues section 387, which applies to the action the intervenor seeks to join. Moreover, an action for ejectment does not allow Ramirez to protect her alleged property rights.

The motion is GRANTED. Ramirez's counsel shall submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

**4. <u>SCV-268472, Lala v Bhadare</u>**

This matter is on calendar for the motion of Defendants Billa Management, LLC, a Delaware Limited Liability Company; Golden Eagle Delaware, LLC, a Delaware Limited Liability Company; and Ajaib S. Bhadare ("Bhadare"; altogether "Defendants") for leave to file a cross-complaint for breach of contract, and indemnity and contribution against Plaintiffs Asha Prasad and Asha Parasad dba Petaluma Shoe Repair (together "Prasad") for breach of contract and indemnification as to the claims of Plaintiffs Latchmi Lala and Kevin Lala (together "Lala Plaintiffs") per the contractual terms of the subject lease agreement entered into between Plaintiffs and Defendants. **The motion is GRANTED.**

Plaintiffs filed their complaint on May 26, 2021, alleging causes of action against Defendants for (1) Premises Liability; (2) Negligence; (3) Intentional Misrepresentation; (4) Breach of Contract; (5) Breach of Warranty of Habitability; (6) Intentional Infliction of Emotional Distress; and, (7) Fraud and Deceit. The complaint alleges that on February 26, 2016, Plaintiffs entered into a lease with Defendants for property located at 24 East Washington in Petaluma ("the Premises") to conduct their family business, Petaluma Shoe Repair. The lease was signed by Defendant Ajaib S. Bhadare, Manager, and Asha Prasad, an individual dba Petaluma Shoe Repair. Plaintiffs occupied the Premises from March 1, 2016 through December 20, 2020.

Starting on May 18, 2016, Plaintiffs began to have problems with flooding from the toilet. Plaintiffs allege that Defendants were less than responsive to Plaintiffs' requests to clean up so plaintiffs Latchmi Lala and Kevin Lala cleaned up. The toilet flooded again on February 16, 2017.

After the toilet purportedly had been fixed, Plaintiffs noticed that the toilet was leaking, causing nearby walls, floors, and rugs to be wet, and causing toxic mold to form. Plaintiffs allege that the leaking was continuous from April 2017 through November of 2018, and started up again from May 23, 2019 through July of 2019. Defendants hired a company to repair the problem. Upon tearing out the wall, they discovered black mold. They also placed a sign on Plaintiffs' office indicating that there was a danger from asbestos. Due to repair issues, Plaintiffs did not have running water and could not use the bathroom on September 13 and 14 of 2019. Additionally, a repair company used the Premises to store tools. Repair work was finished on November 8, 2019. Plaintiffs also allege that Defendants allowed the roof to leak during rainy seasons from 2016 through 2020, which contributed to the toxic mold. Despite Plaintiffs' complaints to defendant landlord, Ajaib Bhadare, throughout the time of their lease, Defendants failed to adequately repair the Premises. Plaintiffs allege that each of them has suffered adverse health consequences as a result of their exposure to toxic mold at the Premises.

Defendants filed an answer on March 15, 2022. It contains a general denial and thirty affirmative defenses.

Defendants' proposed cross-complaint alleges causes of action against Prasad for: (1) Express Indemnity; (2) Comparative Indemnity; (3) Implied Indemnity; (4) Negligence; (5) Equitable Indemnity; (6) Contribution/Apportionment of Fault; (7) Declaratory Relief Re: Express Indemnification; and (8) Breach of Contract.

Defendants argue that the terms of the contract with Prasad require them to fully and completely defend and indemnity Defendants from and against all claims of the non-signatory Lala Plaintiffs. Defendants argue that now that discovery has established that Plaintiffs do not dispute any contractual obligation, they seek to assert cross-claims against Prasad based upon the contract between Prasad and Bhadare.

Leave of court is required when a defendant seeks to file a cross-complaint against a plaintiff after having filed an answer and where the court has already set a trial date. (*Loney v. Sup. Ct. (Moneta)* (1984) 160 Cal.App.3d 719, 723.)

CCP section 426.50 provides: "A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action."

A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are insufficient grounds to deny the motion unless accompanied by bad faith. (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 99.) The finding of bad faith must be supported by substantial evidence. (*Ibid*.)

"'Bad faith' is defined as '[t]he opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to

fulfill some duty or some contractual obligation, not prompted by an honest mistake ..., but by some interested or sinister motive[,] ... not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will. [Citation.]' [Citations.]" (*Silver Organizations, Ltd., supra,* at 100.)

Here, Defendants state that they are only now seeking leave to file a cross-complaint because, since answering Plaintiffs' Complaint, Defendants have conducted initial written discovery to establish that there is no dispute as to the contractual obligations in the lease agreement. Defendants received responses on September 7, 2022—five months after serving discovery and after having to file a motion to compel responses. Once all the verified discovery responses were received, defense counsel met and conferred with Plaintiffs' counsel regarding the duties and obligations Prasad owed to Defendants and tendered the defense and indemnity for the claims of the Lala Plaintiffs. This motion was filed on November 8, 2022.

Plaintiffs oppose this motion on the grounds that Defendants' affirmative defenses provide equivalent relief and thus the cross-complaint is unnecessary.

Comparative indemnity is usually sought by cross-complaining in plaintiff's existing action against persons whose fault contributed to plaintiff's injury. Comparative indemnity cross-complaints may ordinarily proceed even though equivalent relief could be obtained by pleading an affirmative defense. (*Paragon Real Estate Group of San Francisco, Inc. v. Hansen* (2009) 178 Cal. App. 4th 177, 182-187*; Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal. App. 3d 1439, 1446.)

However, recognizing that equitable indemnification is "a matter of fairness," courts in exceptional cases may be inclined to impose "fairness" limits on "legally unnecessary" indemnity cross-complaints. Notably, if equivalent relief is available in the main action by way of affirmative defense, a comparative indemnity cross-complaint is barred when it would "jeopardize or entangle a special relationship which strong policies dictate be preserved." (*Jaffe v. Huxley Architecture* (1988) 200 CA3d 1188, 1193.)

In *Jaffe, supra,* such a "special relationship" existed between members of a homeowners' association and its board of directors, barring third parties sued by the association from cross-complaining for indemnity against the directors. In other words, the court found that the doctrine of equitable indemnity should not apply.

*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 did not involve a special relationship analysis. Rather, the court was still flushing out the comparative negligence theory and a right of partial indemnity. The court held that because the defendant might be entitled to obtain partial indemnity, they should have been allowed to file a cross-complaint containing those allegations.

The facts of *Yamaha Motor Corp. v. Paseman* (1990) 219 Cal.App.3d 958 also addressed the developing doctrine of indemnity. In *Yamaha,* Yamaha appealed the trial-court's dismissal of its cross-complaint for equitable indemnity against the parents whose adult son brought an action for injuries from riding a moped after the trial court sustained the parents' demurrer without leave to amend. The appellate court reversed the dismissal because it found that the doctrine of comparative

equitable indemnity should be available to Yamaha and that the state of the pleadings at that time did not adequately allege the parents' independent duty to safely maintain the moped.

Plaintiffs have not shown any special relationship or policy reason to disallow Defendants' cross-complaint. Nor is there any evidence of bad faith. Accordingly, the motion is GRANTED. Defendants' counsel shall submit a written order to the court consistent with this ruling.

**5. SCV-271911, TxtSmarter, LLC v Otus**

This matter is on calendar for the application of Plaintiff TxtSmarter, LLC ("Plaintiff"), for a writ of possession of certain tangible personal property from Defendant Nuri Otus ("Defendant").

On January 4, 2023, Defendant filed a motion for change of venue. Generally, the filing of a motion for change of venue operates as a supersedeas or stay of proceedings, and the court cannot rule on other substantive issues while the motion for change of venue is pending. (*Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1303–1304.) Accordingly, **the motion is STAYED pending resolution of the motion for change of venue.**

**6. SCV-267238, Verke v City of Petaluma**

This matter is on calendar for the motion of Defendant City of Petaluma ("City") for an order pursuant to Code of Civil Procedure sections 473, 474, and 576 to amend its first amended cross-complaint to add Lucila C. Soriano as Roe Cross-Defendant 1, 20, and 22; and Steven Vargas as Roe Cross-Defendant 2, 21, and 23. **The motion is GRANTED.**

Plaintiff alleges that on December 16, 2019, she "tripped and fell" on "ivy vines overgrowing onto the sidewalk" "in the vicinity of East Washington Street north of Sutter Street in Petaluma…" (Exhibit A.) She alleges that the City owned public property on which the alleged dangerous condition existed. (Exhibit A.)

The City has now identified the adjacent landowner as Lucia C. Soriano and the occupant as Steven Vargas. City argues that pursuant to Petaluma Municipal Code section 13.10.020, these individuals owe a duty to maintain the sidewalk, and may bear liability for plaintiff's accident.

"When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint…and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly…" (Civ. Proc. Code § 474.)

"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 defense, it is not only error but an abuse of discretion." (*Morgan v. Superior Court (Morgan)* (1959) 172 Cal.App.2d 527, 530.)

The motion is timely and no prejudice has been shown. Accordingly, the motion is GRANTED. City's counsel shall submit a written order to the court consistent with this ruling.

## 7. SCV-271303, Hester v Sonoma County

This matter is on calendar for the demurrer of Defendant State of California, acting by and through the California Department of Transportation ("Defendant") to the first cause of action for negligence, second cause of action for dangerous condition of public property, third cause of action for nondelegable duty, fourth cause of action for vicarious liability for employees, and fifth cause of action for liability of government employees alleged in the complaint filed by Plaintiff Daniel Hester ("Plaintiff"). **The demurrers to Plaintiff' first cause of action for negligence, fourth cause of action for vicarious liability for employees, and fifth cause of action for liability of government employees pursuant to Government Code section 840.2 are SUSTAINED without leave to amend. The demurrers to the second cause of action for dangerous condition of public property and third cause of action for nondelegable duty are OVERRULED.**

On November 21, 2022, Defendant filed a joint reply indicating that the parties have meet and conferred and have agreed to use the Demurrer Facilitator program and to postpone the hearing on this demurrer to January 25, 2023, or a date agreeable with the Court. The matter was scheduled for February 1, 2023.

On November 22, 2022, this Court ordered Andrew Fagan be appointed demurrer facilitator. As of the time the Court reviewed this matter for the February 1, 2023 hearing, no documents were filed showing that the parties met with the discovery facilitator. As it appears no resolution has been made on this motion, the Court will proceed to address it.

a. Timeliness

In opposition, Plaintiff argues that this demurrer is untimely. Based upon the Plaintiff's counsel's agreement to provide Defendant's counsel with an extension to file an "answer," as described by Plaintiff's counsel, and a "responsive pleading," as described by Defendant's counsel, Defendant's counsel reasonably relied on the one-week extension to file its demurrer. Regardless, even if the demurrer were untimely, there is no reason not to treat it as a motion for judgment on the pleadings, which may be brought at any time and has the same function as a demurrer.

b. Government Immunity; First Cause of Action – Negligence

California public entities are liable, if at all, only pursuant to a specific statute imposing liability. (See Govt. Code §815(a).) "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." (Gov. Code §815.)

Plaintiff's first cause of action does not allege statutory liability. Therefore, it has not identified a viable theory of liability against Defendant, a public entity. In addition, in opposition,

Plaintiff states that he agreed to remove Defendant from this cause of action. Accordingly, the demurrer to this cause of action is SUSTAINED without leave to amend.

c. Second Cause of Action for Dangerous Condition of Public Property

i. Bundling statutory causes of action

Defendant argues that Plaintiff improperly bundle thirteen separate and distinct causes of action under their second cause of action for dangerous condition of public property and have thus violated Cal. Rules of Court, Rule 2.112, which states that each cause of action must be separately stated.

Plaintiff' second cause of action alleges it is brought pursuant to "Government Code §815.2, §815.4, §815.6, §818.6, §820, §820.8, §821.4, §830, §830.8, §835, §835.2, §840.2 and §840.4, and/or other applicable statutes, regulations or legal basis." (Complaint, 7:17-19.) However, the cause of action is alleged to be Dangerous Condition of Public Property; the subtitle of this cause of action only cites Government Code section 835. The additional code sections are merely supportive of the cause of action.

It does not appear from the allegations that several causes of action are bundled into one. However, even if they were, Defendant has not cited authority that a violation of Cal. Rules of Court, Rule 2.112 is grounds for a demurrer. The general demurrer is OVERRULED.

ii. Uncertain

Defendant also argues that this cause of action is uncertain because it cites "inapplicable" code sections.

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc*. (1993) 14 Cal. App. 4th 612, 616 (citing text); *A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal. App. 5th 677, 695.)

Here, while it may be unclear to Defendant why Plaintiff cites certain government code sections, it is objectively clear that this cause of action alleges that Defendant owned or maintained the property at issue in this case, was responsible for warning of any dangerous condition, that the property was in a dangerous condition due to significant deterioration and debris that was likely to cause significant injury, that Defendant knew or should have known of the dangerous condition of the property, that Plaintiff used the property in a reasonably foreseeable manner, and that he was injured as a result. (See CACI 1100.) Accordingly, the special demurrer is OVERRULED.

d. Third Cause of Action – Nondelegable Duty (Gov. Code section 815.4)

To establish a cause of action for a nondelegable duty, Plaintiff must plead and prove that Defendant hired an independent contractor to perform a job involving a nondelegable duty; that the independent contractor was negligent or in some way did not comply with its obligations; that Plaintiff was harmed; and, that the independent contractor's conduct was a substantial factor in causing Plaintiff's harm. (CACI 3713.)

Gov. Code section 815.4 provides: "A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity."

This cause of action alleges that Defendant hired former defendant Ghilotti Bros., Inc. ("Ghilotti") to construct, maintain, service, repair, inspect, and warn drivers of the dangerous condition. (Complaint, ¶30.) It alleges that Defendant was negligent in its hiring, supervising, and retention of Ghilotti, and that Defendant and Ghilotti allowed the condition to exist and failed to warn drivers in breach of their mandatory duty. (*Id.,* ¶¶31, 32.)

Defendant cites *Hooker v. Department of Transp*. (2002) 27 Ca1.4th 198 and *Privette v. Superior Court* (1993) 5 Cal.4th 689 for its position that an owner is not liable for the acts of its contractors unless it negligently retained control over safety. Neither case supports Defendant's position as both involved the liability of a hirer of an independent contractor to ***the employees*** of that independent contractor, which is not the case here.

Defendant has not established it does not have a nondelegable duty under the circumstance of this case. Accordingly, the demurrers to this cause of action are OVERRULED.

e. Fourth Cause of Action – Vicarious Liability for Employees (Gov. Code section 815.2)

Gov. Code section 815.2 provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

The complaint alleges that employees or agents of Defendant were negligent in their hiring, supervising, and retaining of the employees or agents of Defendants. (Complaint, ¶40.) This alleged negligence caused the dangerous condition to exist and did not provide warning to drivers. (*Id.,* ¶41.)

Defendant argues that a public entity cannot be held liable under Government Code section 815.2 when a dangerous condition of public property cause of action under Government Code section 835 is pled. In other words, Defendant argues that if the injury is a dangerous condition of public property, liability arises under Gov. Code section 835—not under 815.2.

The cases cited by Defendant hold that public entity liability for property defects is not governed by the general rule of vicarious liability provided in section 815.2, but rather by the provisions in sections 830 through 835.4 of the Government Code. (*Van Kempen v. Hayward Area Park etc. Dist*. (1972) 23 Cal.App.3d 822, 825; *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 383.)

In *Longfellow*, the county was not liable on a theory of dangerous condition of public property since it was undisputed that the county did not own or control the property in question at the time of the injury. (*Id.*, at 383.)

As for the cause of action pursuant to Gov. Code section 815.2, the court noted that the statute imposes vicarious liability upon public entities for tortious acts or omissions of their employees, unless the employee is immune. (*Ibid*.) The plaintiff in that case alleged that a dangerous condition of public property existed which should have been repaired by an employee of the county working within the scope of his employment and that, therefore, the county may be vicariously liable for the employee's failure to act. (*Ibid*.) The court held that because the employee was immune under Gov. Code section 804, the public entity could not be held liable for the acts of the employee. (*Ibid*.) In addition, the court held the county could not be held liable for acts of public employees within the scope of their employment, since the employees were immune from liability pursuant to Gov. Code, § 840. That code section provides: "Except as provided in this article, a public employee is not liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The liability established by this article is subject to any immunity of the public employee provided by statute and is subject to any defenses that would be available to the public employee if he were a private person."

Here, this cause of action is styled as a negligent hiring, supervising, or retention by Defendant's employees. However, it is clear that Plaintiff is alleging that it was the condition of public property that caused his injuries—not that it was the character of an employee that caused the injury. The allegations are not, for example, that Defendant hired an independent contractor without checking whether they had a license to perform the work, which it turns out they did not have and thus were unfit to perform the work undertaken. (See CACI 426.) Or such as in *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal.4th 861, where a high school student alleged that his school administrators were negligent in hiring an employee that allegedly molested him. In those instances, it was the acts of the employee that caused the damage—not the condition of property. As stated in *Van Kempen* and *Longfellow,* the statutes applicable to the facts of this case, which are based upon a dangerous condition of public property, are Gov. Code sections 830 through 835.4. Clearly, people and employees cause dangerous conditions to exist; but, here it is the condition of the property that is alleged to have caused Plaintiff's injury. Just as in *Van Kempen,* where an employee left a work bench unattended; it was the property's condition—having an unattended work bench—which caused the injury; thus, liability arose from section 835—not 815.2. In addition, allegations of failure to take preventative measures, such as warning drivers of the condition, arise from subsection (b) of 835.

Plaintiff's complaint already contains a cause of action pursuant to Gov. Code section 835 for dangerous condition of public property, which includes allegations of failure to take preventative measures.

The demurrer to this cause of action is SUSTAINED without leave to amend. While generally the Court will allow at least one chance to amend, based upon the facts of this case and case law, and Plaintiff's failure to identify any facts that the direct acts of an employee—as opposed to the condition of property—caused Plaintiff's injury, there does not appear to be any possibility that the cause of action could be amended to state a valid claim against Defendant.

f. Fifth Cause of Action – Liability of Government Employees pursuant to Gov. Code section 840.2.

Gov. Code section 840.2 provides: "An ***employee*** of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or [¶] (b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Plaintiff's complaint alleges that DOES 1 through 100 are employees or agents of Defendant. (Complaint, ¶48.) However, Defendant itself is not its own employee. If Plaintiff determines the identity of any employee who meets the requirements of Gov. Code section 840.2, he may substitute that person for a DOE defendant. However, this code section is not applicable to Defendant itself. Accordingly, the demurrer to this cause of action is SUSTAINED without leave to amend.

g. Conclusion and Order

The demurrers to Plaintiff' first cause of action for negligence, fourth cause of action for vicarious liability for employees, and fifth cause of action for liability of government employees pursuant to Government Code section 840.2 are SUSTAINED without leave to amend. The demurrers to the second cause of action for dangerous condition of public property and third cause of action for nondelegable duty are OVERRULED.

Defendant's counsel shall submit a written order to the court consistent with this ruling and in compliance with California Rules of Court, Rule 3.1312.

**8. <u>MCV-252690, Oldaker v Sinai</u>**

This matter is on calendar for the motion of Plaintiff Craig Oldaker ("Plaintiff") for an order and judgment enforcing the settlement agreement executed by the parties on October 12, 2020. Plaintiff requests that the costs and fees incurred of $2,137.50 be added to the judgment against Defendant Ami Sinai ("Defendant"). Subsequent fees have increased the amount requested to $2,560.00. **The motion is GRANTED.**

Plaintiff filed this action on April 16, 2020, to recover money on his loan to Defendant in the amount of $12,846 in return for specified monthly payments. On October 19, 2020, a dismissal without prejudice of the entire action was filed. This motion was filed on March 29, 2022. It was continued to this date as a result of the recusal of Judge Pardo.

Plaintiff has established that the parties entered into, and both signed, a written settlement agreement. A copy of the Settlement is attached as Exhibit A to the declaration of Nicole M. Jaffee. Among other things, it states that Defendant must pay Plaintiff $13,010.25 plus interest of 10% per annum in monthly installments of $300 each on the third day of each month from October 3, 2020 until it is paid in full. It clarifies that "[i]f Plaintiff does not receive payment by the tenth day of any month, Defendant is in breach of this agreement." It also states that Defendant agrees to pay Plaintiff for any attorneys' fees "incurred… in connection with Defendant's breach." It also states that in any action to enforce it under CCP section 664.6, "the prevailing party shall be entitled to recover… attorney's fees and costs." The agreement states that this Court would retain jurisdiction to interpret or enforce the agreement.

In his declaration, Plaintiff states that Defendant paid the $300 in agreed upon monthly payments up through August 3, 2021. (Oldaker decl., ¶¶4-14.) He has not received a payment since August 3, 2021. (*Id.,* at ¶15.) In sum, Defendant has paid $3,000 toward the amount owed per the settlement agreement. (*Id.,* ¶16.) There is still an outstanding principal balance of $10,010.25, plus interest. (*Id.,* ¶17.)

Counsel's declarations support an award of attorney fees and costs in the amount of $2,530.00. However , $30 for court reporter fees are disallowed as the Court no longer charges for those for the law and motion calendar.

The motion is GRANTED. The court will enter judgment against Defendant in the amount of $10,010.25, plus prejudgment interest in the amount of $64.93, plus post-judgment interest in the amount of 10% per annum, plus attorney fees and costs of $2,530.00.

Plaintiff's counsel shall submit a written order to the court consistent with this ruling.