TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, May 3, 2023, 3:00 p.m.
Courtroom 16 –Hon. René A. Chouteau covering for 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. the court day immediately before the day of the hearing.
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. SCV-269143, Sears v Roseland MHP, LLC

This matter is on calendar for the motion of Defendant Roseland MHP LLC ("Defendant") for summary judgment or, in the alternative, summary adjudication of issues specified in the motion. **The motion is DENIED.**

Plaintiff's complaint alleges that on the evening of August 29, 2019, Plaintiff Laurie D. Sears, aka Ashley Maserati ("Plaintiff") was walking outside her home with the intent of removing groceries from her car, which was parked outside her dwelling. As she walked out to her car, her foot struck a ridge of dark asphalt-like substance, causing her to fall. Plaintiff alleges that the asphalt had been installed and maintained by Defendant and that she had complained to Defendant many times about the defect, which rose between 1.5 to 2 inches above the ground, creating a dangerous condition. Despite these complaints, Plaintiff alleges Defendant did nothing to fix the dangerous condition. As a result of said breach, Plaintiff fell and sustained physical and emotional injuries. Plaintiff's complaint alleges causes of action for negligence and premises liability.

1. Duty

Defendant first argues that it had no duty to maintain the area where Plaintiff tripped because that area is located on her property, or in an area she was required to maintain. In support of its position, Defendant provides an image of where the walkway to Plaintiff's mobile home meets asphalt. (Defendant's Undisputed Material Fact ["UMF"] Number 2.) Defendant argues that the lease agreement between Plaintiff and Defendant required Plaintiff to maintain that area.

Mobile home park rules and regulations were attached to the subject lease agreement. Roseland Mobile Home Park Rules and Regulations, paragraph 13, subsection A, "Lot Maintenance," provides, in part: "residents shall maintain their homesites in a clean, well-kept and attractive fashion, including the front, sides, and back." (UMF 6.) It goes on to state that if a homesite is neglected, after reasonable written notice, management reserves the right, but is not obligated to, take over its care and bill the resident for this service, pursuant to Civil Code Section 798.36. It specifies: "All trash, debris, boxes, barrels, brooms, ladders, etc., must be kept out of sight. When a homesite is vacated, all holes must be filled and leveled. Driveways must be kept clean at all times."

Subsection B provides: "Where permits are required, they must be obtained by resident prior to commencement of work."

Subsection C provides: "Resident waives all rights to make repairs or capital improvements to homesite at Management's expense. All alterations, improvements, and changes desired by resident shall be done either by or under the direction of Management, but at the cost of the Resident, and shall at once become a part of the realty and belong to Management. Resident shall be solely responsible for maintenance and repair of such improvement. However, at Management's option, Resident shall, at his expense when surrendering the lot, remove all such alterations, additions, or improvements installed by Resident, and Resident shall repair any damage to the premises caused by the removal."

Per the Roseland Mobile Home Park Rules and Regulations, paragraph 13, subsection D, residents shall be solely responsible for the maintenance and repair of any improvements and not the park. (UMF 7.)

Defendant relies heavily on CACI 1002, which provides: "[Name of plaintiff] claims that [name of defendant] controlled the property involved in [name of plaintiff]'s harm, even though [name of defendant] did not own or lease it. A person controls property that the person does not own or lease when the person uses the property as if it were the person's own. A person is responsible for maintaining, in reasonably safe condition, all areas that person controls."

Plaintiff's lease with Defendant contains the above rules and regulations implemented pursuant to Civil Code section 798.25, which is part of the Mobilehome Residency Law. The court notes that Defendant's rules and regulations cites Civil Code section 798.37.5. The rules and

regulations state that residents are required to provide attractive landscaping at their homesite but, that section 798.37.5 makes Defendant responsible for "some trees and for driveways in certain limited circumstances." (Exhibit 3, ¶11.)

In reviewing Civil Code section 798.37.5, the court notes the following language at subsection (c): "Park management shall be solely responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of all driveways installed by park management including, but not limited to, repair of root damage to driveways and foundation systems and removal. Homeowners shall be responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of a homeowner installed driveway. A homeowner may be charged for the cost of any damage to the driveway caused by an act of the homeowner or a breach of the homeowner's responsibilities under the rules and regulations so long as those rules and regulations are not inconsistent with the provisions of this section."

While it is clear from the language of the rules and regulations that Plaintiff was required to keep her space tidy, it is not clear that she was required to re-pour asphalt that her complaint alleges Defendant installed. Defendant has not provided evidence that it did not install the asphalt in front of her unit.

Defendant has not met its burden to establish that, pursuant to her lease agreement and the park's rules and regulations, Plaintiff was required to keep the pavement around her mobile home unit in repair, including fixing uprises in asphalt installed by the Defendant.

2. Dangerous Condition; Open and Obvious; Trivial

Defendant next argues that, even if it was required to maintain the subject asphalt, the uprise in the asphalt was not a "dangerous condition." Defendant cites *Rowland v. Christian* (1968) 69 Cal.2d 108 and CACI 1004.

Rowland v. Christian established a landowner's duty of reasonable care. The *Rowland* court noted that "the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property." (*Rowland, supra,* at 118-119.) "Section 1714 of the Civil Code provides: 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. ...'" (*Id.,* at 112-113.)

Rowland involved a broken water faucet knob. The appellate court reversed summary judgment for the defendant as the evidence did not establish that the condition of the knob was not obvious or concealed.

CACI 1004 covers "obviously unsafe conditions." That instruction indicates that if a condition is obviously unsafe, the owner/occupier does not have to warn others about the dangerous condition. It also states: "However, the [owner/occupier/one who controls the property] still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition."

Defendant also cites *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, *Kasparian v. Avalon Bay Communities* (2007) 156 Cal.App.4th 11, and *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, arguing that Defendant could have avoided the defect and that it was trivial.

Ursino was an action brought by a woman who had suffered injuries after tripping and falling while walking on a sidewalk on the premises of the restaurant. The trial court found that the restaurant, a nongovernmental defendant, could assert the trivial defect defense, that injury resulting from a defect in property is actionable only if the condition of the property creates a substantial, as distinguished from minor, risk of injury, determined by the court as a matter of law. In conjunction with a defense summary judgment motion, the parties stipulated to various facts, including "the edge of the cement section in question was raised no higher than three-fourths of an inch" and "the 32 photographs presented to the trial court accurately depicted the sidewalk in question on the day of the accident." (*Ursino, supra,* at 395-396.) In granting summary judgment, the trial court concluded in view of the stipulated facts, "reasonable minds could not differ as to the triviality of the defect." (*Id.,* at 397.) The appellate court stated it had "reviewed the pictures of the sidewalk and agree[d] with the trial court that reasonable minds could not differ and that the defect was in fact trivial." (*Ibid*.)

Kasparian involved an elderly tenant who tripped over a recessed drain. The appellate court reversed the trial court's entry of summary judgment in the landlord's favor finding that triable issues of fact remained regarding whether a recessed drain was an open and obvious condition, or a trivial defect. In support of its summary judgment motion, the landlord presented expert testimony that the subject paver-drain configuration did not pose an unreasonable risk of harm to someone exercising due care in traversing the walkway. (*Kasparian, supra,* at 19.) The plaintiff provided two experts who provided contrary opinions. (*Id.,* at 20.) After review of the photographs of the recessed drain, the appellate court reversed the trial court, finding that reasonable minds *could* differ as to whether the defect was trivial or open and obvious. (*Id.,* at 25.)

In *Caloroso,* the appellate court affirmed summary judgment, also based on its review of photographs relied upon by the trial court. In that case, the plaintiff allegedly tripped over a crack in the walkway in front of defendant's home, which walkway allegedly consisted of "individual concrete slabs" that were "cracked, jagged, and depressed [.]" (*Caloroso, supra,* at 925.) "It was undisputed that the difference in elevation created by the crack in [defendant]'s walkway was less than half an inch at the highest point. [ ]" (*Id.,* at 927.) The reviewing court concluded: "Here, the trial court did not abuse its discretion in finding that, in this case, no expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous. The photographs of the crack

submitted by both sides demonstrate that the crack is minor and any irregularity in shape is minimal." (*Id.,* at 928.)

Plaintiff's complaint alleges that the uprise in the asphalt was 1.5 to 2 inches above the surrounding surface. Defendant has not provided any evidence of the height of the uprise. Therefore, the court cannot find that, like in *Ursino* or *Caloroso*, the uprise in this case was only three-quarters of an inch or less and thus trivial.

In addition, while it appears that the condition was open and obvious, as the Plaintiff herself alleges she was aware of it, Defendant has not established that it either used reasonable care to protect against the risk of harm, or that it was not required to because the condition was either trivial or Plaintiff was responsible to maintain the asphalt in front of her unit.

3. Conclusion and Order

Defendant has failed to meet its burden to establish that the alleged defect in the asphalt in front of Plaintiff's mobile home unit was open and obvious, not Defendant's responsibility, and/or it was trivial. Accordingly, the motion is DENIED.

Defendant's counsel is directed to submit a written order to the court consistent with this ruling.

2&3. SCV-267872, Norguard Insurance Company v Shephard

1. Demurrer

This matter is on calendar for the demurrer of Cross-Defendant Craft Contracting dba Craft General Construction ("Craft") to the first, second, and fourth causes of action in the First Amended Cross-Complainant ("FACC") filed by Shep Concrete Pumping and Kyle Shepherd ("Shep"). In its memorandum of points and authorities, Craft clarifies that the demurrer is also directed to Shep's fifth cause of action for declaratory relief. **The demurrer to Shep's first, second, and fourth causes of action is SUSTAINED without leave to amend. The demurrer to Shep's fifth cause of action for declaratory relief is SUSTAINED with leave to amend.**

At the original hearing on this matter on March 8, 2023, Shep argued that this motion was moot as it was directed to the original complaint. Shep also stated that they had not been given notice of the hearing. The court continued the matter to this calendar to allow Shep to provide a substantive response to the demurrer. Shep filed additional substantive opposition on April 10, 2023.

Shep's FACC contains causes of action against Craft for (1) Total Equitable Indemnity; (2) Partial Equitable Indemnity; (3) Express Indemnity; (4) Contribution and Repayment; and, (5) Declaratory Relief. The FACC incorporates the allegations in Norguard's complaint. (FACC ¶13.)

Norguard's complaint seeks recovery of payments made pursuant to a workers' compensation insurance contract with Craft. Norguard alleges that Craft's employee, Dorian Guerrero, was operating a concrete hose and that Shep caused the hose and/or concrete exiting from the hose to strike Guerrero's body, causing injuries. Norguard alleges one cause of action against Shep for negligence. Shep denies the allegations in the complaint but alleges that if they should be found liable, they are entitled to indemnity from Craft and/or entitled to some compensation from Craft.

Craft argues that Norguard's complaint clearly identifies Craft as the employer of the injured worker and states that Norguard paid workers compensation to Craft's employee because of its insurance contract with Norguard. It argues that Labor Code section 3864 clearly prohibits Shep's causes of action.

The purpose of Lab. Code, § 3864, enacted in 1959, was to eliminate what under prior law amounted to a dual insurance burden imposed on employers by the workers' compensation law and the implied indemnity doctrine. Under the statute, the employer of an employee who is injured as the result of the joint negligence of the employer and a third party is no longer required to indemnify the third party in the absence of an express indemnification agreement. (*Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 807-808.) Employers have a statutory right to be free from liability based upon theories of equitable indemnity when employees have been compensated based upon worker's compensation laws. (*Alameda Tank Co. v. Starkist Foods, Inc.* (1980) 103 Cal.App.3d 428, 431, 433.) This includes a cause of action for declaratory relief. (*Ibid*.)

In its supplemental opposition, Shep concedes that, pursuant to the provisions of Labor Code section 3864, they do not have a cause of action for equitable indemnity. They argue that these remain viable against other cross-defendants. Regardless, as to Craft, the demurrer to the first and second causes of action are SUSTAINED without leave to amend.

Shep's fourth cause of action for Contribution and Repayment is based upon CCP section 875, which provides at subsection (a): "Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided." Subsection (b) expressly states: "Such right of contribution shall be administered in accordance with the principles of equity." In other words, section 875 allows equitable contribution between tortfeasors. However, Labor Code section 3864 bars reimbursement from the employer in absence of a written agreement. This includes an equitable claim for contribution. Accordingly, the demurrer to Shep's fourth cause of action for Contribution and Repayment is SUSTAINED without leave to amend.

Shep's fifth cause of action for declaratory relief states that a dispute and actual controversy has arisen and now exists between Shep and Craft concerning their respective rights, duties, and obligations to indemnify Shep totally or partially for any amounts paid by Shep as damages adjudged due and owing to Norguard. Shep requests a judicial declaration of the parties' respective rights and duties, the amount and degree of fault of Craft, and the proportional share owed by Craft.

This cause of action is based upon equitable principles of indemnity and contribution. Therefore, it is also barred by Labor Code section 3864. The demurrer to this cause of action is SUSTAINED. However, the court will allow leave to amend as Shep may be able to allege a cause of action for declaratory relief based upon its cause of action for express indemnity.

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

2. Leave to Amend

This matter is also on calendar for the motion of Shep for leave to file a Second Amended Cross-Complaint. Shep seeks to add a cause of action for Breach of Written Contract. Shep argues that the proposed cause of action is specific to Craft, who Shep argues may be jointly and severally liable for the injuries sustained by Dorian Guerrero and the damages sustained by plaintiff Norguard Insurance Company. As grounds for demurrer is premature (see *Kittredge Sports Co. v. Sup.Ct. (Marker, U.S.A.)* (1989) 213 Cal. App. 3d 1045, 1048) and based upon the liberal policy of allowing amendments, **the motion is GRANTED.**

Shep's counsel is directed to submit a written order to the court consistent with this ruling.

4. <u>SCV-272465. Transamerica Life Insurance Company v Carmona</u>

This matter is on calendar for the petition of Transamerica Life Insurance Company ("Petitioner") for approval of a transfer of structed settlement payment rights between Brian Carmona ("Carmona") and Petitioner.

The petition requests the transfer of one lump sum payment portion of $51,000.00 due on December 30, 2029. In exchange, Carmona would receive $25,000.00. The discounted present value of the transferred payments is equivalent to $39,757.00. This is equivalent to an annual interest rate of 10.58%.

Carmona is currently 22 years old and lives with his family. He has no dependents. He started a job on September 26, 2022. He makes about $38,000 per year. If the transfer is approved, Carmona intends to use the proceeds to pay off high interest credit card bills and a car loan.

The court notes that, pursuant to the annuity purchased pursuant to the settlement[1], Carmona was to receive four lump sum payments. Carmona should have received a payment of $10,000 on August 1, 2018, and $20,000 on August 1, 2021. A payment of $50,000 is due on December 30, 2024. The final payment of $115,000 is due on December 30, 2029.

[1] The court has taken judicial notice of documents filed in SCV-226399.

By this Petition, Carmona would receive $25,000.00 in exchange for $51,000.00 of the amount he will receive on December 30, 2029, when he is 30 years old. He will still receive $64,000.00 at that time.

The court notes that the annuity purchased in settlement of the personal injury dispute called for guaranteed tax-free payments. In addition, it contained a clause which did not allow for changes in the periodic payments. The agreement stated at section V. "NO CHANGES IN PERIODIC PAYMENTS:

"The Plaintiff acknowledges and agrees that all, some, or any part of the Periodic Payments cannot be, and may otherwise be prohibited or restricted under applicable law from being accelerated, commuted, transferred, deferred, increased or decreased by the Plaintiff or by any Payee or Beneficiary and that Plaintiff or any Payee or Beneficiary shall not have the power to sell, mortgage, encumber, or otherwise anticipate all, some, or any part of the Periodic Payments by assignment or otherwise.

"Any transfer of the Periodic Payments by the Plaintiff may subject the Plaintiff to serious adverse tax consequences." (Release and Settlement Agreement, section V.)

First, Petitioner has not addressed the above "No Changes" clause in the Release and Settlement Agreement. Second, it is not clear that Carmona has considered any tax consequences of receiving $25,000 outside of the tax-free annuity agreement. Last, Carmona has not disclosed the amount of credit card and car loan debt, and the accompanying interest rates, that he is currently paying off. Therefore, this court cannot determine, as it is required to do on this petition, that the proposed transfer is in Carmona's best interest.

The matter is CONTINUED to June 14, 2023, at 3:00 p.m. in Department 16, to allow Petitioner to address the issues identified above.

5&6. <u>SCV-269795, Richardson v Ray</u>

The motions for attorney Ethan Glaubiger to be relieved as counsel for defendants Mary Rachel Ray and Estela Blanch Martinez are DROPPED as moot.